

**The Saudi interpretations of capacity, public policy and awards
being set aside in the country of origin in the refusal of arbitral
awards under Article V of the New York Convention 1958, With
Reference to French and English Legal Systems**

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ABSTRACT:

This thesis will examine whether Saudi Arabia's adoption of New York Convention 1958 will improve the recognition and enforcement of international arbitral award in the country, and consequently provide a better investment environment for non-Saudi investors. The examination will be carried out against Saudi conservative approach toward the grounds of refusal of international arbitral award listed in the Convention, with examples from French and English legal systems. The thesis is intended to provide an in-depth criticism and analysis on how the role of *sharia* in Saudi legal system has affected implementation of these grounds. However, the research will only cover three out of seven grounds for the refusal of recognition and enforcement of convention awards provided by Article V of the Convention. Namely, the thesis will cover the capacity, the enforcement of award that has been set aside the country of origin and the public policy grounds. These three Grounds are unlike the rest of the grounds, they significantly affected by the Islamic rules.

The thesis concludes that the Saudi legislators should have codified the Islamic rules, whether by adopting one of the schools of thought to be the country official Islamic rules or by gathering all Islamic principles applied by Saudi courts under one Act. It also suggests a reconsideration of the judges' requirements, as only Islamic background is not enough to make the judge able to deal with international treaties. Finally, the thesis emphasizes that Saudi Arabia shall fund researches and provide scholarships to its judges to study in different countries, in order to have better understand of the legal issues in different legal systems.

1 CHAPTER ONE

Introduction to the Application of the New
York Convention 1958 Grounds for
Refusal of Arbitral Awards In Saudi
Arabia

1.1 INTRODUCTION

On the 10 June 1958, the United Nations (UN) diplomatic conference adopted The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention¹. The countries ratifying or acceding to the convention agreed to recognize and enforce foreign arbitral awards.² The rationale behind the convention is to facilitate international global business through promoting the enforcement of arbitral awards.³ The convention arose in response to an international business need for arbitration, with pressure from the International Chamber of Commerce asking the United Nations Economic and Social Council to prepare for the international arbitration mechanism.⁴ The need for arbitration to settle disputes arising from international commercial transactions has been backed by international agreement on the enforcement of court judgments.⁵ Therefore, the New York Convention came to meet the dual need of international trade and simplify the procedures for enforcing arbitration awards⁶.

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]; see International Legal Framework, 1 WORLD ARB. RS P. 1, 37 (1994) (listing accession dates for all New York Convention signatories). <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states>, 17 Dec 2013.

² Robert Mehren, 'Enforcement of Foreign Arbitral Awards in the United States' (1998) 771 PLI/COMM 147 – 156.

³ *Belship Navigation, Inc. v. Sealift, Inc.*, 95 Civ. 2748, (1995)

⁴ Richard Cole, 'The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards' (1985) 1 Ohio State Journal on Dispute Resolution 368 – 376

⁵ Andrew Guzman, 'Reconciling Arbitration and Mandatory Rules' (2000) 49 Duke Law Journal 1287 – 1295

⁶ Elisabeth m Senger-Weiss, 'Enforcing Foreign Arbitration Awards' (1998) 53 WTR dispute resolution 72 – 86

The scope of the application of the Convention was clearly laid down in Art 1 of the Convention, which provides that:

*“1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought”.*⁷

In other words, the Convention will be applied on any arbitral award if the enforcement is sought in a signatory state and the award has rendered in another signatory state, as long as the country where the enforcement is sought considers as an international award.⁸

On the 19 November 1994, with the aim to increase its role in the modern international community, Saudi Arabia backed by large numbers of consumers with high spending power, became the ninety-fourth member state to the Convention.⁹ Saudi Arabia is need to join the convention has increased due to the growing number of international investors in Saudi Arabia as a result of the discovery of vast oil and natural gas resources in the country. However, the Saudi ban of public agencies from

⁷ New York Convention 1958, Art 1 (1)

⁸ Elisabeth m Senger-Weiss, ‘Enforcing Foreign Arbitration Awards’ (1998) 53 WTR dispute resolution 72 – 86

⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330U.N.T.S. 38 [hereinafter New York Convention]; see InternationalLegalFramework,1WoRLDARB.RsP.1,37(1994)(listing accession dates for all New York Convention signatories). <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> ,17 Dec 2013.

initiating arbitration agreements,¹⁰ and the government preference of dispute resolution for its agencies have resulted in hesitation on the part of international investors to enter into contract with Saudi Arabia.¹¹ In addition, the Saudi Arabian legal system, considered as traditional and conservative toward the recognition and enforcement of international arbitral awards, which gives Saudi judges a huge power to use public policy, capacity and non binding awards as grounds to refuse international awards enforcement.¹²

The Saudi adoption of the New York Convention suggests a change in its historical resistance to the enforcement of international awards. As a result, non-Saudi Arabian investors became more confident to start their business in the country, on the belief that Saudi courts will now be more willing to enforce arbitral awards adjudicated by non-Saudi Arabian tribunals. This thesis will examine whether Saudi Arabia's adoption of the Convention will improve the application of international arbitral award recognition and enforcement in Saudi Arabia and consequently provide a better investment environment for international investors. The examination will be carried out against three grounds of refusal; which is set aside award, capacity and public policy. These three grounds in particular have highlighted the relation between Sharia rules and Saudi legal system because their application linked directly to *sharia* rules.

1.2 THE SCOPE AND IMPORTANCE OF THE STUDY:

¹⁰ Saudi arbitration act 2012, Art 10

¹¹ Nancy B Turck, 'Dispute Resolution in Saudi Arabia' (1988) 22 International Law 415 – 417

¹² David A Westbrook, 'Islamic International Law and Public International Law, Separate Expressions of World Order' (1993) 33 Virginia Journal of International Law 819 – 848.

This thesis is intended to provide an in-depth of criticism and analysis on the role of Islamic rules in Saudi legal system. Within the scope of current research, it must be confirmed that the subject of criticism is the application and understanding of the Islamic rules by Saudi judges and legislators. The Islam is both a religion and part of Saudi legal system, so applying the non-codified Islamic rules by Saudi judges; according to their understanding, is the subject of the criticism not the Islamic rules themselves.

The Convention contains seven grounds of refusal, which allows a signatory country to refuse the enforcement of an international arbitral award if the award constitutes a breach of one or more of these grounds.¹³ For instance, the winning party in order to have his arbitral award recognized as binding and enforceable, he has to submit the arbitral award and the agreement to the court of the state where recognition and enforcement are sought.¹⁴ However, the party against whom enforcement is sought can only object to the enforcement by proofing one of the grounds for refusal of enforcement related to personal matters,¹⁵ such as: (a) if the party was under incapacity; (b) was not given a proper notice; (c) the award deals with a difference not contemplated or not falling within the terms of the submission to arbitration; (d) the procedure was not in accordance with the agreement of the parties; or (e) if the award has not yet become binding or has been set aside.¹⁶ The objection might be invoked by the court itself (*ex officio* Refusal),¹⁷ as well as to the parties if (a) the subject

¹³ See appendix 1

¹⁴ New York Convention 1958, Art 4

¹⁵ New York Convention 1958, Art V(1) for more information see appendix 1

¹⁶ *Ibid.*

¹⁷ Ihab Abdel Salam Amro, *Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries* (Cambridge Scholars Publishing 2014) 143 – 148.

matter of the dispute is not capable of settlement by arbitration under the law of that state, or if (b) it considered that the award was contrary to the notion of its public policy¹⁸.

However, this thesis will not cover all the seven grounds but only three of them. The thesis will cover Art V (1)(a), V(1)(e) and V(2)(b) of the Convention which stipulates as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity

(e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

¹⁸ New York Convention 1958, Article V(2)

These grounds of refusal of arbitral awards listed in Art V of the New York Convention are considered as the exclusive source by which enforcing court might deny recognition or enforcement of a foreign arbitral award made in another signatory state. Accordingly, they should be interpreted restrictively in accordance with Vienna Convention on the law of treaties general rule of interpretation. Vienna Convention has provided that the conventions provisions shall be interpreted in good faith and in accordance with the purpose and meaning to be given to the terms of the provisions in their context.

1.3 WHY THESE THREE GROUNDS ARE PARTICULARLY IMPORTANT

Unlike the rest of grounds, these three have affected significantly by the vagueness of the relation between the sharia and the national legal system. According to Weeramantry; Sharia is the body of Islamic religious law¹⁹, which forms the legal framework in many aspects such as politics, economic, banking, family and contracts through Islamic principles of jurisprudence²⁰. However, the Islamic rules has been delivered in forms of principles and morals, but not as legal rules which means they have to be codified in order to in line with modern era.

Saudi legislators did not codify the principles of Islamic law, they left that mission to judges. In 1992 Saudi Arabia has issued its first basic law considering Quran and

¹⁹ C. G Weeramantry, *Islamic Jurisprudence* (1st edn, Palgrave Macmillan 1988) pp 1-3.

²⁰ Corinna Standke, *Sharia - The Islamic Law* (1st edn, Grin Verlag Ohg 2008) p 3.

Sunna as the country's constitution. Art 1 of The Basic Law of Saudi Arabia²¹, states that "God's Book and the Sunna²² of His Prophet, are the country's constitution". This Art shows the importance of Sharia in the legal system and that all national Acts should be in line with it. Nevertheless, legislators did not explain what might be part of sharia and what is not.

According to M. Asaddan the former judge in Board of Grievances,²³ Saudi Arabia has suffered from a lack of clarity in the relationship between Sharia and law, which has had a significant impact on the enforcement of international arbitral awards. He claimed that the number of international arbitral awards that has been enforced in Saudi Arabia, has decreased in the past two decades. M. Asaddan believes that the reason behind the decrease was because of the new Saudis judges who have only sharia science background but without legal background. He claimed that two decades ago; because of the lack in Saudi judges, the Board of Grievances used to employ judges from different parts of the world with sharia and legal background, which made the enforcement of international awards were much easier than nowadays²⁴.

²¹ The Basic Law of Saudi Arabia (Alternative name: Basic System of Governance).

²² Sunnah is the verbally transmitted record of the teachings, deeds and sayings, silent permissions (or disapprovals) of the Islamic prophet Muhammad. For more information about Quran and Sunnah see Corinna Standke, Sharia - The Islamic Law (1st edn, Grin Verlag Ohg 2008) p 3.

²³ Interview Mohammed Assadan, former judge in Board of Grievances 23:00 (Riyadh, Saudi Arabia, 7th of Dec 2013), see appendix 9

²⁴ Interview Mohammed Assadan, former judge in Board of Grievances 23:00 (Riyadh, Saudi Arabia, 7th of Dec 2013), see appendix 9

1.3.1 THE EFFECT OF ISLAMIC RULES ON THESE THREE

GROUNDS:

As explained above the vagueness of the between the roles of sharia and the positive law, has affected the legal system in many aspects. Among these aspects are the grounds of refusal listed in the Art V of the convention. The thesis will cover only three of them, which the ground of capacity, public policy and awards being set aside in the country of origin, as they have been influenced by the vagueness of the between sharia and positive law more than the rest of the grounds, as will be explained bellow.

1.3.1.1 THE EFFECT OF ISLAMIC RULES IN THE GROUND OF ENFORCEMENT OF AWARDS SET ASIDE BY THE COUNTRY OF ORIGIN

According the Saudi legislators understanding there is Islamic principle behind refusing the enforcement of arbitral award that has not yet become binding in the country where that award was rendered. It calls “Ma Bonya Ala Batil Fahwa Batil” principle, which means all actions and practices are invalid if they are based on invalid principles²⁵. So as long as the award has no power in the country of origin it it is not enforceable in Saudi Arabia. This ground might exist in other legal systems but

²⁵ Board of Grievances decision (1997) No. 11/D/F/2 of 1417 H

in Saudi Arabia it related too much to the public policy as this principle comes from Islamic rules.

1.3.1.2 THE EFFECT OF ISLAMIC RULES IN THE GROUND OF CAPACITY

In Saudi Arabia, because of the vagueness of the relation between Islamic rules, which somehow represent the public policy, and the positive law, there is no formal age of majority for the natural person, because the sharia did not provide particular age for that. Similar situation in regards to Saudi public entities as Saudi Arabia has ban public entities from initiating arbitration without permission from Saudi Council of Ministers. The ban of public entities from initiating arbitration came after *Aramco v Saudi Arabia*²⁶ case, as the application of Islamic rules in Saudi Arabia was indirectly the reason behind Saudi Arabia losing the case against Aramco as well be explained later in the thesis.

Additionally the public entities in Saudi Arabia usually are the owners of the huge projects invested by international investors who would usually demand more of the freedom of contract. For instance, Saudi Railways organization, which is

²⁶ *Aramco v Saudi Arabia*, (1963) 27 ILR 117.

governmental body, invested about \$25 billions in Riyadh metro project in 2014.²⁷ Saudi Housing Ministry in 2013 has invested about \$66 billions for huge project to build 500,000 units in different part of the country²⁸. This mixture of religious, legal, social and political factors, which are viewed absolutely different from France and England, further exacerbates the scale of the issues²⁹.

1.3.1.3 THE EFFECT OF ISLAMIC RULES IN THE GROUND OF PUBLIC POLICY

The vagueness caused between the unclear relation between Sharia and the positive law is so obvious in the Islamic scholars' definition of public police. Al-Ahdab; and many other Islamic scholars³⁰, believes that the public policy means that any legal action must be in line with the general spirit of the Sharia and its sources, and that individuals must respect their clauses in contracts³¹. By comparing the notion of public policy that has been adopted by Al-Ahdab to the one adapted by UK House of Lords, there will be a lot of differences between the two definitions. The House of Lords defined public policy as "that principle of law which holds that no subject can

²⁷ 'Saudi Railways Organization'

<http://www.saudirailways.org/portal/page/portal/PRTS/root/Home/04_Expansion_Specification/02Saudi%20Railway%20Master%20Plan> accessed 19 November 2015.

²⁸ 'Saudi Housing Ministry' (2014) <<http://housing.gov.sa/ar/Media/news/Pages/HY1hnb.aspx>> accessed 19 November 2015.

²⁹ Jean-Louis Delvolvé and others, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd edn, Sold and distributed in North, Central and South America by Aspen Publishers 2009) 46 – 51

³⁰ Ahmed M. Almutawa, Problems of Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States and the Prospect of a Uniform GCC Arbitration Law: An Empirical Study, (ssrn 2014) 10 see also Zydi Hamid, Arbitration Under the Islamic Sharia (scribd 2013) see also Audley Sheppard, Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, (International Law Association (ILA) conference 2000) 5

³¹ Jalal El-Ahdab, *General Introduction on Arbitration in Arab Countries*, (Kluwer 1998)12

lawfully do that which has a tendency to be injurious to the public, or against public good”³². Al-Ahdab definition tends to be a description of what is forbidden in Islam, rather than a definition of public policy. This definition of Islamic public policy has huge impact on the Saudi judicial practices, especially in regard to public policy as will be explain later.

1.4 RESEARCH QUESTIONS

The thesis will also try to address the relation between sharia’ and the legal system in Saudi in order to understand what is the notion of public policy and what are the sources of public policy in Saudi Arabia. It will find out how the relation between sharia’ and the legal system in Saudi affected the application of public policy as a ground of refusal in the convention and what is the more convenient way to resolve this difficulty?

The thesis will try to find out how the application of Islamic law has affected age of majority, and public entities capability to initiate arbitration, it will try to understand what is the impact of *Aramco v. Saudi Gov.* case, over the Saudi approach toward international arbitration? Since that time Saudi Arabia has ban public entities from initiating arbitration after that case.

The thesis will highlight the delocalization theory in Saudi legal system and will Saudi courts enforce the arbitral that have been set-aside at the seat of arbitration. The thesis will try to answer the question, how Shari’a rules affected the Saudi approach to reaching delocalization?

³² *Egerton v. Brownlow* (1853) 4 HLC 1

1.5 LIMITATION OF RESEARCH:

The main obstacle faced this research is the lack of judicial publication in Saudi legal system, which affects both the primary and secondary resources of the research. There are two main reasons behind the lack of sources in Saudi legal system. Firstly, the Saudi arbitration Act 2012, which is the subject of the research, is relatively new. As a result, the number of textbooks and articles have written in this regards is limited. These difficulties was further demonstrated by the ‘still waiting’ promulgation of the Implementation Document which is expected to provide guidelines how the Saudi court shall interpret the interactions between the Saudi practice and the New York Convention. However, to overcome this obstacle, the research will focus mainly on the Saudi Arbitration Act’s provisions and on other national acts and also on some case law

The second obstacle is the lack of transparency in judicial decisions in Saudi Arabia. The only way to find the case law in Saudi Arabia is through the limited information published on the Saudi ministry of justice website.³³ For those cases which are published on the website, the information is only limited to their short case number and a concise summary. Consequently, almost all cases provided in the thesis have been obtained through personal connections; such as King Nam v. Saudi Medical

³³ ‘Saudi Ministry of Justice’ <<http://www.moj.gov.sa/ar-sa/Pages/Default.aspx>> accessed 26 November 2015.

Center³⁴ case the significant case to understand what kind of public policy applied in Saudi Arabia, or through international law publications such as *Aramco v Saudi Arabia*³⁵, which was a clear example to understand how the lack of codifying Islamic rules affected Saudi arbitration law.

1.6 METHODOLOGY

The research methodology used in this thesis is the comparative research. Which is a so common methodology in the social sciences; especially in legal study that aims to make comparisons across different legal systems.

1.6.1 HISTORICAL VIEW OF METHODOLOGY OF COMPARATIVE LAW

In order to apply better justice standers, the legal researchers around the globe have been working very hard to create what is called by KOTZ the “world law”. However, political and cultural conflicts make the idea of united law impractical, which opened the door for the comparative studies across more than one legal system. The first sign of comparative law has been dedicated in 1900 in Paris, as Lambert suggested that comparative law should be an academic curriculum for law students³⁶. KOTZ believes that the best way to make the international legal business easier is by adapting unified

³⁴ *King Nam v. Saudi Medical Center* (1998) Board of Grievances, case number 159/1/Q, decision number 44/T/3

³⁵ *Aramco v Saudi Arabia*, (1963) 27 ILR 117.

³⁶ Zweigert K and Kötz H, *An introduction to comparative law* (2nd edn, Oxford University Press 1998) 3-4

law. He believes that modal law has created the platform for the unification of law because it has used the comparative law methodology and the best example is the unification of laws in the Commonwealth of Nations.³⁷

By the end of nineteen sanctuary the unification of law; with help of The Lego of Nations and the United Nations Organization, has produced its main result in different legal aspects including recognition of international judgments and arbitral awards.³⁸ In 1966 the United Nations organization resolved to set up a Commission For International and Trade Law (UNCITRAL). According to KOTZ, comparative law as a methodology is the reason behind the achievement of uniform laws and the only reasons behind unadapting of uniform laws are the national pride and the differences in the legal concepts.³⁹

1.6.2 THE RATIONALE BEHIND CHOOSING THE METHODOLOGY OF COMPARATIVE LAW IN THIS THESIS

The essential aim of comparative law methodology is not to understand the national law but to discover how to resolve the legal problems before they exist.⁴⁰ By providing different legal solutions and legal principles; these are adopted by civilized countries, comparative law can help legislators in the developing countries to renew their national laws to make them friendlier to the international practice. Especially,

³⁷ *Ibid.* 24-25

³⁸ *Ibid.* 25

³⁹ Zweigert K and Kötz H, *An introduction to comparative law* (2nd edn, Oxford University Press 1998) 26

⁴⁰ *Ibid.* 15

that comparative law study only the legal solutions these are affective in the country where they have been applied and have the platform to be affective in the countries where they should be applied.⁴¹

1.6.2.1 THE COMPARATIVE NATURE OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE EFFECT OF SHARIA

Saudi Arabia as a developing country, its legislators should not only focus on their national laws if they want to improve the recognition and enforcement of international arbitral award. If Saudi judges try to study other solutions provided by other legal systems, they will be able to interpret national laws with an international understanding. The required approach to interpret national law and international arbitration treaties is the comparative and uniformed approach, with taking into account the international nature of arbitral process. According to Berger, one of the most important obstacles of enforcing international award is the national court deal with foreign as domestic award. Berger believes that standers applied on national awards do not have to be imposed on the international awards as well.⁴² As will be explained in this thesis the current situation in Saudi Arabia allow judges to use their own understanding of Islamic rules on enforcing foreign arbitral awards, which lead to over use of these three grounds of refusal. By using the methodology of comparative law, Saudi legislators and judges will be able to explore more legal customs applied in civilized countries, which will help them to interpret national laws

⁴¹ *Ibid.* 16

⁴² Klaus Peter Berger, *Private Dispute Resolution In International Business* (Kluwer Law International 2006) 329

in line with international standers, and give them more confidence when they deal with international treaties such New York Convention.

1.6.3 TYPE OF COMPARATIVE RESEARCH METHODOLOGY IN THIS THESIS

Comparative studies aim to identify and explain different solutions provided by different legal systems, in order to resolve different legal problems. The comparison between two or more legal systems can be done on a large scale or similar scale. If the study will compare the spirit of each legal system by studying the methods and the procedural law, then it is called macrocomparison study. Nevertheless, if the study will cover only particular institution or problem in two or more legal systems, then its microcomparison study. Because this thesis will cover only the application of the three grounds of refusal provides in Art 5 of New York Convention, the methodology will be applied is the microcomparison⁴³. However, it is hard to stick only to microcomparison, because some background and historical approaches will be explained in order understand how these problems and obstacles have created by courts and legislators⁴⁴.

⁴³ Zweigert K and Kötz H, *An introduction to comparative law* (2nd edn, Oxford University Press 1998) 4

⁴⁴ Zweigert K and Kötz H, *An introduction to comparative law* (2nd edn, Oxford University Press 1998) 5

1.6.4 REASONS BEHIND CHOOSING ENGLISH AND FRENCH LEGAL SYSTEMS

In this thesis, examples from English and French legal systems will be compared with solutions provide by Saudi legal system in order to resolve problems facing the enforcement of international arbitral awards in Saudi Arabia.

The reason behind the choose of English law is that it has enriched with massive amount of case law forming the English legal concepts⁴⁵. The first English code issued by the counsel of king of Kenting wise men⁴⁶, then the codification of law has taken place and covered the majority of legal aspects. In 1189 there was no more major codification of law, and judicial precedents became binding. With this rich history and judicial practice it is important to study how such legal system created its own legal solutions and how Saudi Arabia can benefit from its solutions.

The French legal system has law has been chosen because it is one of the liberal legal systems.⁴⁷ Regarding to arbitration, it is acknowledged by commentators that France is traditionally an arbitration-friendly jurisdiction. According to Delvolvé, the French arbitration laws, are the most liberal arbitration laws in the world. Later in this thesis it will be explained how the French arbitration Act was more liberal than Saudi and

⁴⁵ Rupert Cross and Jim W Harris, *Precedent In English Law* (1st edn, Clarendon Press 1991) 168-171

⁴⁶ Frederic William Maitland, F. C Montague and James Fairbanks Colby, *A Sketch Of English Legal History* (1st edn, GP Putnam's sons 1998) 3

⁴⁷ George A Bermann, *Introduction To French Law* (Kluwer Law International 2008) 63

English legal systems, especially in regards to the notion of international public policy and delocalized arbitration⁴⁸. Will be discussed in this thesis, in order improve the national arbitration law and its interpretation as Kotz has emphasized⁴⁹.

1.7 THE CHAPTERS' AIMS:

This thesis consists of five chapters, three chapters related to the three grounds of refusal, which they are the main subject of the thesis beside two chapters of introduction and conclusion.

The first chapter is an introduction of the thesis and aim to explain the importance of the study and why the thesis covered only three grounds out of seven. It includes the methodology that will be used in this study and why this methodology in particular has been chosen. The chapter will also refer to different obstacles have faced the study and how the study has dealt with them. The chapter provides a historical view of the development of Saudi arbitration law since 1931 till the current arbitration Act 2012 and how the international treaties and Islamic rules have affected the legal codification in general and the arbitration in particular in saudi legal system. Finally the chapter provides the research questions, which the thesis has answered.

⁴⁸ Jean Louis Delvolve, Gerald H Pointon and Jean Rouche, *French Arbitration Law And Practice* (1st edn, Kluwer law international 2009) 167- 169

⁴⁹ Zweigert K and Kötz H, *An introduction to comparative law* (2nd edn, Oxford University Press 1998) 4

The second chapter aims to highlight importance of Art 2 and 7 of the convention on implementation and interpretation of Art 5. It will also focus on the development of domestic arbitration law of Saudi Arabia and why it is important to review the history of legal system in Saudi Arabia in general and arbitration in particular. It will clarify the role of sharia' in Saudi legal system and how its rules have affected each of the three grounds of refusal. Finally, the chapter will explain why the implementation of New York convention did not has a significant effect on the recent domestic arbitration Acts.

The third chapter aims to clarify how the Saudi legislators' understanding of Islamic rules was the reason behind non-existence of delocalization in international commercial arbitration. It explains the idea of refusing the enforcement of award that has been set aside in the country of origin, which is the country where the award has been rendered. The chapter elucidates that even though the Convention allows the country of enforcement to refuse the award if it has been set aside in the country of origin, but the idea of enforcing the award that has been set aside is so liberal concept and will facilitate arbitration procedures. The chapter provides that the French legal system is applying the concept of delocalized arbitration, which Saudi Arabia still far from applying it.

The fourth chapter aims to explain how Islamic rules have affected the application of capacity requirement as ground of refusal, with examples from English and French legal systems. The chapter explains how both natural and legal persons have been

affected by the Saudi legislators' understanding of Islamic rules, as because of this understanding there is no age of majority in the Saudi legal system and public entities are not free to initiate an arbitration agreement without the Council of Ministers' permission. The chapter aims to prove that the ban of Saudi authorities over its public entities has a negative impact on arbitration, and that the ban is caused by the vagueness of the relationship between Islamic rules and positive law in Saudi Arabia after *Aramco V.s Saudi Gov.*⁵⁰ case.

The fifth chapter of the thesis discusses the public policy as a ground of refusal provided by the Convention. The chapter aims to highlight the role of sharia on forming the notion of the public policy in Saudi Arabia. It first tried to compare between the definitions of public policy provided by different legal systems, such as the French and the English with the Saudi definition. Then it tries to clarify the notion of public policy in Saudi Arabia and how it is so different from English and French. The chapter also highlights how the public policy has been used as an excuse to refuse enforcement of international awards in Saudi Arabia in many cases, because of the vagueness of the notion of public policy in the Saudi legal system. Finally, the chapter links between the Saudi legislators' understanding of Islamic rules and the vagueness of the notion of public policy in Saudi Arabia.

Sixth and last chapter of this thesis is the conclusion. The chapter has explained and reviewed the arbitration situation in Saudi Arabia, particularly in regard to these three grounds of refusal and emphasized that there are different methods that might be applied

⁵⁰ Paul Michael Blyschak, 'Arbitrating Overseas Oil and Gas Disputes: Breaches of Contract Versus Breaches of Treaty' (2010) 27 *Journal of International Arbitration* 579 – 629.

in order to improve the practice of international awards enforcement in the country. The chapter also refers to few parts of the Saudi legal system, which need to be searched in order to improve Saudi arbitration law.

2 CHAPTER TWO

Road Map to Article V for Saudi Arabia

2.1 ROAD MAP TO ARTICLE V: RECOGNITION AND ENFORCEMENT

Although, this thesis will also cover three grounds of refusal, it is important to examine two articles provided by the Convention to organize the recognition of the arbitral award and agreement, and to determine the scope of the application of this recognition, which are Art II and VII. Art II of the New York Convention requires the

contracting state to allow any initiation to arbitration by the parties of the conflict by recognizing the arbitral agreement, which reads as follows:

‘(1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

(2) The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

(3) The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.’

Art II lays down the requirement for a valid arbitration agreement in terms of the formality of an arbitration agreement, reparability of arbitration agreement and party autonomy. Accordingly, Art II (2) required that the agreement must be in writing. An oral arbitration agreement will be called into doubts unless the relevant arbitration laws permits an oral agreement⁵¹ or an oral arbitration agreement evidenced by other

51 scottish arbitration act 2010, S4 and UNCITRAL Model Law on International Commercial Arbitration 1985, Art 7

evidence.⁵² Nonetheless, if the national law was more favorable toward arbitration, it shall allow a wider interpretation of the written requirement. Taking this on board, the requirements of the agreements those stipulated in Art II prescribes the maximum ones but not the minimum requirements the country of enforcement might apply. Such an interpretation on the maximum requirements under Art II also corresponds with Art VII of the Convention.

Article VII reads as follows:

‘1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.’

In other words, signatory state of the Convention are free to apply requirements less strict than those provides in the Convention, but cannot apply more requirements than

⁵² English Arbitration Act 1996, Art 5

them.⁵³ The reason why Art II requirements are the minimum is what Art VII of the convention has provided. Legally speaking, the country of enforcement by applying the national laws if they are more enforcement-friendly than the Convention, that does not mean that the national law is the applicable. Ideally, states shall try to bring its national law in line with the maximum requirements of the provisions of the Convention. While this is not strictly followed in Saudi Arabia, such practice can be seen in other arbitration friendly countries, such as France.⁵⁴

2.2 SCOPE OF ART V INTERPRETATION

These grounds of refusal of arbitral awards listed in Art V of the New York Convention are considered as the exclusive source from which enforcing court might deny recognition or enforcement of a foreign arbitral award made in another signatory state. Accordingly, they should be interpreted restrictively in accordance with the purpose of the convention. Art V provides that ‘recognition and enforcement of the award may be refused’.⁵⁵ The wording “may be refused’ indicates that the judge may use his or her discretion when ruling on the request for recognition and enforcement.⁵⁶ The court’s discretionary power in self-restricting the grounds for refusal of convention awards can be observed in *Yusuf Ahmed Alghanim & Sons v. Toys ‘R’*

⁵³ International Council and others, *ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration 2011) 47-48

⁵⁴ International Council and others, *ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration 2011) 448

⁵⁵ New York Convention 1958, Article 5

⁵⁶ See chapter three for more information.

Us,⁵⁷ the arbitrator awarded Alghanim \$46.44 million for lost profits under a commercial agreement between the two parties. Alghanim petitioned the district court to confirm the award. Toys ‘R’ Us tried to vacate or modify the award under the Federal Arbitration Act FAA⁵⁸, arguing that the award was clearly irrational and in manifest disregard of the law. The court has denied the argument put forward by Toys ‘R’ Us as the arbitrators manifestly disregard of the law not considered as ground of refusal under The Convention and court confirmed the award.

In order to ensure the effectiveness of the application of the convention, courts should interpret the grounds of refusal restrictively. In *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA)* case, it was clear how the judge tried to narrow the use of public policy ground. In 1962 The ‘RAKTA’ is an Egyptian corporation that entered into a contract for construction in Egypt with ‘Overseas’ the American corporation. The contract contained a clause for arbitration under the Rules of the International Chamber of Commerce (ICC Rules)⁵⁹. The contract also included force majeure clause, which excuse any delay in performance due to causes beyond Overseas' reasonable capacity to control. The process worked according to the plan till 1976, when the American workers in Overseas' had to leave Egypt because of political reasons then apply again for Egyptian Visa in order to remain in Egypt. Overseas' informed ‘RAKTA’ that the delay will excused under the

⁵⁷ *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us Inc.*, 126 F.3d 15, 20 (2d. Cir.1997)

⁵⁸ The Federal Arbitration Act (Pub.L. 68–401, 43 Stat. 883, enacted February 12, 1925, codified at 9 U.S.C. § 1 et seq.) is an act of Congress that provides for judicial facilitation of private dispute resolution through arbitration.

59 ICC Rules of Arbitration | Arbitration | Arbitration & ADR | Products & Services | ICC - International Chamber of Commerce’ (2016) <<http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>> accessed 14 January 2016.

force majeure clause, but 'RAKTA' disagreed. 'RAKTA' resorted the conflict to arbitration. The tribunal found that 'Overseas' workers were able to back to Egypt if they able to apply for new Egyptian Visa, as result the tribunal did not accept force majeure defense and held liable to RAKTA for \$312,507. 'Overseas' appealed against the decision and argued that (1) the enforcement of the award would violate the public policy. (2) That the subject matter is non-arbitrable as United State's Government was somehow implicated in the dispute. (3) It argued that the tribunal did not give Overseas' opportunity to present its case. (4) The merit of dispute is outside the scope of the contractual agreement for arbitration.

The Court of Appeals (Second Circuit) has denied overseas argument and confirmed the award.⁶⁰ The Court of Appeals held that the term public policy as a ground of refusal under The Convention should be interpreted narrowly, with the violation of public policy occurring only where enforcement would violate very basic notions of morality and justice. The court also held that the fact that US foreign policy was involved in the dispute did not affect the arbitrability of the claim.

The importance of this case comes from the way how judges have used discretion to facilitate enforcement of international awards. The judges in this case were able to use the ground of public policy to refuse the enforcement because of many reasons such as the safety of the American workers, as this incident occurred during the Six Days War that produced much indignation against Americans. But judges prefer not to use this ground in favour of easing enforcement of international awards.

⁶⁰ *Parsons & Whittemore Overseas Co. v. Soci6t6 General de l'Industrie du Papier* (1974) 508 F.2d

The Convention requires signatories to recognize and enforce the arbitral awards rendered by other member of the Convention.⁶¹ By providing Art V the convention gives signatories the power refuse enforcement of nondomestic arbitral awards, which is necessarily because when the Convention was initially promulgated, many countries were hesitant to part of it, believing that its provisions might be against their domestic law. Nonetheless, the ground of public policy can be used to circumvent the primary purpose of the Convention, such as Saudi Arabia which is to promote the acceptance and enforcement of non-domestic arbitral awards and to encourage international investors.⁶² Because the public policy refer values and ethics of different nations if it has not been given a narrow construction this ground will allow signatories countries to circumvent the primary purpose of the Convention. The importance of this case comes from the clear vision of the judges on understanding the convention purposes to facilitate and support enforceability of non-domestic awards, which is absolutely contrary to the current situation as judges tend to use their power to get involved in the merit of the dispute.⁶³

2.3 THE HISTORICAL APPROACH TOWARD ARBITRATION IN SAUDI ARABIA

In order to provide better understanding of any particular kind of law in any country it is really important to explain how that law has developed⁶⁴. The understanding of legal history will help to under stand why the laws are the way they are presently,

⁶¹ Art 1, New York Convention 1958

⁶² New York Convention , 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968)

⁶³ abduaziz alshbrami, *Sharh Nidam Altanfith* (1st edn, Madar Alwatan Lenashr 2014) 47

⁶⁴ Randall Lesaffer and Jan Arriëns, *European Legal History* (1st edn, Cambridge University Press 2009) 1-5

because present is just a modern understand of similar legal principles the previous laws have been built on. Especially in the country such as Saudi Arabia, as the law built in consist with sharia rules and sharia rules never have changed, but the understanding has developed to keep up with the modern era.

2.3.1 THE IMPORTANCE OF STUDYING THE HISTORY OF ARBITRATION IN SAUDI ARABIA

Just like other laws in Saudi Arabia arbitration has suffered from the not codification of Islamic rules and the vagueness of the relationship between Sharia and legal system. The reason is that the way in which the country has established nearly a century ago, has a great impact on the formation of the relation between the Islamic rules and the legal system in the country. The legal system and religion in Saudi Arabia strongly linked to each other since the country is establishment. So it is really important to understand how the relation between them has developed since the country establishment nearly a sentry ago.

In order to have better view of the impact of understanding the Islamic rules on these three grounds of refusal the research has divided the history of the relation between law and sharia in the saudi Arabia to two stages. First, the history of the social practices of arbitration as an alternative dispute resolution before arbitration was codified under the Commercial Court Act 1930. Second, the existence of arbitration provisions in Saudi Arabian positive law and these two stages share similar

characteristics, since culture and religion constitute the framework for law and government in both stages⁶⁵.

2.3.2 HISTORY OF ARBITRATION IN ARABIAN PENINSULA BEFORE THE COUNTRY ESTABLISHMENT

Due to the lack of governmental authorities and the emergence of the social objects power; such as tribes or rulers of different provinces, the peninsula in the pre-Islamic period witnessed arbitration in many circumstances. Those objects are usually considered as an alternative way to fill the power vacuum when a government has no identifiable central authority. There are many elements creating those objects, such as blood, tribe(s) or geographical relationship, which identify part of the community by special characteristics.

For example, in the Arabian Peninsula in earliest times the only way to resolve conflict between two or more parties is by recourse of referring the conflict to the head of the tribe or the ruler. However, the difficulties appear in case of one or more of the parties related to another tribe or belong to another province. In order to avoid these types of conflicts, the social objects created a number of an alternative dispute resolution (ADR). The first ADR mechanism known in Pre-Islamic Arabia was called Almonafara, a public speaking or sort of rhetoric more than litigation. The parties in such a situation claimed and supported their argument publicly in the presence of

⁶⁵ Bassam Tint, *Islam And The Cultural Accommodation Of Social Change*(Clare Krojzl trans 1990) 57 – 59

mediator who seeks for compromise.⁶⁶ Despite the differences, however, this is considered as the first embodiment of, and indication of, the principles of arbitration in the Peninsula. In the pre-Islamic period Almonafara was a noncompulsory process and arbitral awards were not legally binding.

When the Islamic era came, arbitration took a different direction. One of the important changes in the role played by arbitration in the Arabian Peninsula took place during the mid-sixth century. This was the period of the mission of Prophet Muhammad (peace be upon him) and first appearance of the government (Caliphate), and the first appearance of the Islamic legal system and judicial institutions.⁶⁷ During that period, arbitration was changed from being the only way to resolve conflict to becoming one of a number of different ADR.

Later on, under Islamic law, arbitration is considered as a contract, and all the contract characteristics and conditions in Islamic law are applicable to the arbitration agreement. The four Islamic legal schools of thought (Madh'hab)⁶⁸ have defined the arbitration agreement almost identically. They believe it occurs once parties appointed someone to be an arbitrator of such dispute.⁶⁹ However, they were not too similar regarding the obligatory recognition or enforcement of arbitral awards. Some of them clearly give arbitral awards the exact power of a court decision as indicated by the school of Hanbali, Shafee and Maliki, whereas Hanifi School only gives the

⁶⁶ Fatema Almazroi, *Almnafrat Fi A'db Kbl Alislam (almonafart in Pre-Islamic Literature)* (Dar alkitab alwatanania 2009) 33 – 38.

⁶⁷ Ahmed Omar, *Prophet Muhammed: His Life and Times* (AuthorHouse 2011) 3 – 10.

⁶⁸ The main Islamic schools of thought are four: Hanafi Maliki Shafi'I and Hanbali.

⁶⁹ Alwardi, *Almugni* (Dar alorobh 1961) 298 – 305

court the right to intervene and review the case not only for subjective but objective matters as well. The Mecelle Civil Code 1876,⁷⁰ provided that arbitration occurs once parties agreed to appoint someone as arbitrator to resolve such disputes. As a result, it is believed that these definitions of arbitration were very similar to those provided in positive law, which considered arbitration as the parties' agreement to submit their dispute to one or many persons, where the parties were able to appoint without court permission in this regard.

So, before what so-called 'modern state' and organizing territory and international borders, arbitration was the only way to resolve disputes in order to avoid conflicts. Under the current legal framework, modern state monopolizes the power and ability of law enforcement. Modern state did establish the concept of litigation as formal dispute resolution mechanism, adapted by the state itself. The state only has the right to appoint and dismiss its tribunal members, and state only have the power to enforce judicial decisions.

2.3.3 HISTORY OF SAUDI ARABIAN ARBITRATION IN THE MODERN

ERA:

Unlike many of other Arabic countries, Jordan and Syria for instance, Mecelle and other Ottoman Empire legislations did not affect the legal system in Saudi Arabia⁷¹.

⁷⁰ Mecelle civil code 1876, art (1790), the Mecelle or Mejelle, is the civil code of the Ottoman Empire and first attempt to codify Sharia law, see Ahmed Akgunduz, *Al-Dawlah Al-Othmaniyyah Al-Majhûlah* (IUR Press 2008) 650 – 654.

⁷¹ Ahmed Akgunduz, *Al-Dawlah Al-Othmaniyyah Al-Majhûlah* (IUR Press 2008) 650 – 654.

The reason is that the majority of Saudi territories were not under Ottoman Empire control, especially the capital Riyadh. This might explain why the Saudi legal system took a rather different direction from others and resorted solutions from religion when formulate its own law during the modern era.

Because the Ottoman Empire legislations do not have huge impact on Saudi legal system, the codification process in Saudi was weaker than the other country in the region. The first arbitration regulation in Saudi Arabia was found in the 1930, which is the Commercial Court Act (CCA). It provided that parties might appoint one or a group of arbitrators by submitting formal documents containing their conditions and restrictions. The agreement might be limited to a certain period or to certain kinds of disputes that might rise between parties during that period. The arbitration agreement becomes invalid after the arbitrators' final decision of that particular dispute and has to be renewed.⁷² The 1930 Act also provided that parties must the process for arbitrators to reach a decision, in the case where more than one arbitrator is appointed.⁷³

2.4 THE IMPACT OF ISLAMIC RULES ON THE THESE THREE GROUNDS OF REFUSAL IN HISTORY OF SAUDI LEGAL SYSTEM

The history of arbitration Acts shows that the vagueness of the relation between Islamic rules and positive law has affected the implementation of these three grounds

⁷² Commercial court Act 1930, Art 493

⁷³ Commercial court Act 1930, Art 493

of refusal in negative way. In this section the affection of this vagueness of the relation between Islamic rules and positive law on each time period will be examined, in order to give better understanding of the nature of the obstacles that Saudi arbitration is facing nowadays.

2.4.1 IMPACT OF ISLAMIC RULES OVER THE PARTIES' CAPACITY IN ARBITRATION CONTRACTS

2.4.1.1 NATURAL PERSON

As it has been discussed above, the first Saudi Act organizing commercial and civil contracts was the commercial Court Act 1930 which has mentioned in the Art 4, that traders have to be adult in order to go into a contract. The Art did only mentioned that parties have to reach the age of majority, and did not provide any particular age as age of majority. In regard to legal person's capacity to initiate to arbitration, the Act did not provide any ban over Saudi public entities from initiating to arbitration.

It is true that the sharia rules did not provided any particular age of majority; which might be the reason behind not providing particular age in the Act. However that does not justify why it did not provide details about the active and passive legal capacities. Different Islamic scholars in Shafi and Hanafi schools have suggested 15 to 18, as the

age of majority⁷⁴, but has been ignored by the commercial Court Act 1930. They might be ignored by Saudi legislators because these ages did not directly mentioned in Quran or Sunnah. It is clear that legislators in Saudi Arabia during that time did not realize the importance of codifying some basic Islamic rules or adapts such Islamic school to make it the main source of legislation, especially in commercial and civil matters. So the Act left the matter of capacity to courts.

In 1954 Saudi Arabia has issued its first Nationality Act, which has define people whos are under incapacity and what is the age of magority. The Act did not appoint partecular age but refer it to the age of magority in the Islamic rules⁷⁵, even though Islamic rules did not appoint partecular age as the age of majority. The only explanation can be provided in this regard, is that Saudi legislators believed that age of majority is part of Islam rules, and providing partecular age might consider as an infringement to islamic rules according to their understanding.

In 1983 Saudi Arabia has issued its first Arbitration Act, gathering all arbitration rules and procedures under one legal Act. In regards to the capacity of the natural person the Act did not provide more details than the what has provided by commercial Court Act 1930⁷⁶, as the 1983 Act provided that the parties of the arbitration agreement have to have the active capacity in order to be able to go into the contract⁷⁷. The Act has made an attempt to address the issue of arbitrability and capacity by leveling arbitration with conciliation in terms of the types of disputes allowed to be determined

⁷⁴ AlmaQdisi, Almoqni (1st edn, Dar Ehya Alturath Alarabi 2017) 297-299

⁷⁵ Act 3, Saudi Nationality Act 1954

⁷⁶ Art 4, commercial Court Act 1930

⁷⁷ Art 2, Arbitration Act 1983

by the tribunal as well as linking the validity of arbitration agreement with the issue of capacity. It stipulated: ‘Arbitration shall not be accepted in matters wherein conciliation is not permitted. Agreement to resort to arbitration shall not be deemed valid except by those who have the legal capacity to act. However, in terms of arbitrability, the Act failed to list the types of dispute, those should not be submitted to conciliation. Such gap was filled by the later regulations, which highlighted the issues of family and criminal disputes. Regulations provided that conciliation is not permitted in Hudud cases. Under Islamic law Hudud refers to the bounds of acceptable behavior and the punishments for serious crimes⁷⁸. Regulations also addressed the issue that conciliation is not permitted in some family law issues.

However, what was unclear to the users of arbitration was whether the list provided by the Regulation is an exhaustive list or merely a list of examples. It was more likely that the regulations mentioned such cases as example, because applying arbitration in relevant cases to those mentioned in regulations will be against Islamic rules, then as result it would be against public interest, represented by applying Islamic law. In another words, the reason why the 1983 Act did not be accepted arbitration in matters wherein conciliation is not permitted is because these matters are have been organized by Islamic. So if arbitrators have decided otherwise it would be a violation of Islamic rules, which mean that the legislators have mentioned cases of conciliation as an example.

⁷⁸ Mohammad Rageb, *jaraem alhodod fi atashri aleslami wa alkanon alwadi* (crimes in Islamic legislation and positive law), Cairo new library, 1961, p3.

Finally in 2009 the Shura Council⁷⁹ declared that the age of majority is 18 year old⁸⁰. This decoration came after long judicial discussion since 1996 when Saudi Arabia has signed Convention on the Rights of the Child (OHCHR). However, (OHCHR) has offered such age of majority, Saudi court remind applying different ages till 2008, even though and that the treaty has the priority to be applied in case of the conflict with the national law. According to Dr. Al-Ashakh, the President of the Shura Council, was clear about this issue. He argued that the reason behind not appointing particular age as the age of majority is the understanding of Saudi legislator, as they believe that appointing particular age as the age of majority is against islamic rules, He said that the appointing of particular age as the age of majority might be against the Hanbali school point of view, but not against other schools of Islam.

2.4.1.2 LEGAL PERSON

Before discussing how the Saudi legislators misunderstanding of Islamic rules has affected the legal person capacity in the history, it is really essential to highlight an important failure in commercial court Act 1930. It fails to provide systematic regulations on arbitration, which a detailed legislation is required for arbitration. Its superficial arrangement in few articles on such an important subject was believed to

⁷⁹ Majlis as-Shura or Consultative Assembly of Saudi Arabia, it is formal legislative body of Saudi Arabia to create and enforce law after the king approval.

⁸⁰ <http://okaz.com.sa/article/358693/> accessed 1 June 2017

be the under-estimation of arbitration, which was only considered as one of alternative dispute resolutions (ADR), and did not deserve the full attention of the Saudi government and judiciary.

The vagueness of the role of sharia in Saudi positive law had costed the Saudi Government a great deal financially. Hence, arbitration was viewed as an inappropriate mean of dispute resolution involving the Saudi government. *Aramco v. Saudi Gov.* case⁸¹ is a great example of how the vagueness of the role of sharia in Saudi positive law has changed the Saudi approach toward international arbitration in 1963. Since then Saudi Arabia has ban public entities from initiating an arbitration without permission from Saudi Council of Ministers.

Prior to the discussion on *Aramco Vs. Saudi Gov.*⁸² case, it is important to understand legal and economic circumstances in Saudi Arabia when the case has occurred. In 1938, when vast reserves of oil were discovered along the coast of the Arabian Gulf and the beginning of oil exporting from Saudi Arabia⁸³. It provided a tremendous financial support and being the main economic source of one of the poorest countries in the world during that time. With lack of oil experience; as developing country, Saudi Arabia found itself in desperate need of foreign investor oil and gas firms (O&G)⁸⁴. Like other host governments, Saudi Arabia had an agreement with

⁸¹ *Aramco v Saudi Arabia*, (1963) 27 ILR 117.

⁸² *Aramco v Saudi Arabia*, (1963) 27 ILR 117.

⁸³ Joel Mokyr, *The Oxford Encyclopedia Of Economic History. Vol. 3* (1st edn, Oxford University Press 2003) 151-153

⁸⁴ Paul Michael Blyschak, 'Arbitrating Overseas Oil and Gas Disputes: Breaches of Contract Versus Breaches of Treaty' (2010) 27 *Journal of International Arbitration* 579 – 629.

International petroleum company call *Standard Oil of California*. International petroleum agreements have almost always included an arbitration clause to refer any rising dispute to arbitration centers. Those agreements have over time held certain essential characteristics, and involve large degree of risk and complexity. It is also involves intertwined interests between the host government and the international oil and gas firms. In such circumstances when the strategic importance of interests between both parties, it is rare that parties agree to resort to the local law of each country. Thus, with international petroleum agreements, arbitration consider as the most convenient way to resolve disputes.⁸⁵

After few years Saudi Arabia signed another agreement with A.S. Onassis for oil production in the country and asked ARAMCO to conform with the requirements of the ‘Onassis Agreement’ when the agreement came into force and became legally binding. The agreement provides for the establishment of a private company with the name of Saudi Arabia Maritime Tankers Company (SATCO). The agreement also listed a number of obligations for parties, including oil transferring, establishing training institutions and employing graduates by Saudi Government. ARAMCO claimed that the agreement breached the concession, which had been granted to ARAMCO in 1933, and claimed also that it is the only company that has the right to produce and transport the oil in the county. Arbitral award was determined in Aramco’s favour and held that the Aramco Company has the rights to have its property investment be expropriated under the concession contract, moreover, Saudi government must not deny those rights enjoyed by Aramco according to the contract.

⁸⁵ Dr Zeyad Alqurashi, *International Oil and Gas Arbitration* (oil and gas observer 2005) 3 – 16.

Saudi Arabia has argued its right to withdraw from the contract under sovereignty issues so that the tribunal could not impose any obligations upon the government.

The tribunal rejected the government argument and held that it is the competent authority to judge the conflict under Art 11 of the Draft Convention on Arbitral Procedure adopted by the International Law Commission (United Nations, New York 1955), which stated that “The tribunal, which is the judge of its own competence, possesses the widest powers to interpret the compromise”⁸⁶. The tribunal held that, according to the agreement, the sharia is the applicable law over the contract because it is the center of the dispute, but they refused to fully apply sharia rules over the dispute, instead they supplemented it with general principles of oil business. The tribunal held that government has no right to award a transport concession to Aristotle Onassis and finding in favour of Aramco.

According to Berg, in this case arbitrators had the jurisdiction to determine their own jurisdiction⁸⁷, which sent a shockwave to the Saudi government, and made a new Saudi conservative approach toward international arbitration and the seriousness of the potential consequences of the tribunal’s award. Especially, that the reason behind not applying sharia rules over the contract is that the legal system of petroleum concessions is still in its very first stages in the schools of Islamic Fiqh and not sufficient to be the applicable law over the conflict⁸⁸. The Saudi legislator believed that international arbitrators in these arbitration tribunals paid no consideration to Islamic values; that they do not have basic knowledge of the Islamic rules governing

⁸⁶ Decision of 23 August 1958, 27 International Law Reports (1963) p. 117

⁸⁷ van den Berg, 'International Arbitration Of Petroleum Disputes: The Development Of A Lex Petrolea' (1998) XXIII Yearbook Commercial Arbitration. 1134-1135

⁸⁸ Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 620 – 624.

this type of conflict. Arbitrators believed that the mining law of the concession has remained embryonic in Islamic rules and it differs from school to school, and the principles of one school cannot be introduced into another⁸⁹. However, judges can directly resort to any school of Islamic thought in order to find the applicable rules to the underlying conflict. Reacting negatively, Saudi legislators adapted administrative rules to prohibit all governmental institutions from resorting to arbitration without the Council of Ministers permission. This prohibition was made formally in 1983 Act⁹⁰.

Aramco v. Saudi Gov. case proved that the limited provisions governing arbitration in the 1930 Commercial Court Act were not longer able to organize arbitration in Saudi Arabia and failed to consistent with international trade and requires legislators to legislate new Acts in proportion to international requirements. It might satisfy the needs of arbitration legal practice during that time when arbitration was primarily limited to craftspeople, who prefer to resort their dispute to someone recognized in the area rather than to courts.

In this regard it is really important to highlight that Saudi legislators were not against legal person capacity to initiate to arbitration. The Commercial Court Act 1930 did not proved any provision to ban legal person from arbitration. The ban came after the failure of the Commercial Court Act 1930 to cover and clarify the way in which Islamic rules are related to Saudi legal system.

⁸⁹ Paul Michael Blyschak, 'Arbitrating Overseas Oil and Gas Disputes: Breaches of Contract Versus Breaches of Treaty' (2010)27 Journal of International Arbitration 579 – 629.

⁹⁰ Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 620 – 624.

In 19 Apr 1994, Saudi Arabia has ratified New York Convention⁹¹, which considers parties capacity as a ground of refusing the enforcement of international arbitral award⁹². Joining the Convention has given Saudi legislators a chance to review the ban on the public entireties. However, joining the Convention had no affect on changing legislators' attitude toward the ban.

Arbitration Act 2012 was in many aspects along the lines of modern arbitration conventions, such as arbitration process, organizing the arbitral tribunal and recognition and enforcement of the awards. The new Act shows the intention of the Saudi legislators, to keep pace with the evolution of world trade and the rapid global changes with regard to capitalism by providing more opportunities to the private sector by encouraging their participation in development and international investment.

In regards to the capacity of public entities, the Act failed to provide any significant change from what Act 1983 has provided in this regard, as Art 6 and 7 of Executive Regulations of Act 2012 contained the same rules provided by the Executive Regulations of the Act 1983 both banned public entities from initiating an arbitration without permission from Saudi Council of Ministers. These provisions lead to the result that the change of saudi legislators towards this issue is not related to international effect such as signing can you treat new legal or investment treaties or updating the domestic law but it related to the legislators understanding of sharia and how its roles in the national legal system.

⁹¹ <http://www.newyorkconvention.org/countries>, Accessed 2 Feb. 2017

⁹² Art 5 of New York Convention 1958

2.4.2 THE IMPACT OF ISLAMIC RULES OVER PUBLIC POLICY AND SET ASIDE AWARDS

Because of the similarities of Islamic rules impact over these two grounds it might be important to study the historical effect of Islamic rules over them under one section, as enforcement of setting aside awards can be part of the public policy in many cases as discussed in chapters four and five.

2.4.2.1 COMMERCIAL COURT ACT 1930

2.4.2.1.1 Set aside awards in the country of origin

Commercial court Act 1930 did not provide any provisions about the enforceability of the award in the country where it has been rendered. This is understandable, as the idea of delocalized arbitration has not materialized yet⁹³, and the judicial publication during that time did not show any refers to the enforceability of set aside award in the country of origin by Saudi judges⁹⁴.

⁹³ The first approach toward delocalized arbitration was in late 1980s, for more info see chapter 4

⁹⁴ The published Judicial Code by ministry of justice does not contain any relevant cases.

2.4.2.1.1.1 Public policy

Regarding to the role of sharia in forming the public policy in Saudi domestic law, it is important to notice that the legislators did not provide that arbitral award should not be in conflict with the provisions of Sharia in commercial court Act 1930. Islamic rules has been mentioned only in Art 5 of the Act, saying that traders should act in line with Islamic provisions which is far less stricter than the way term of Islamic rules has been mentioned in 1983 and 2012 Acts, as well be discussed late in this section.

This different way of using Islamic rules as a term in the national Acts supports M.Asaddan's point of view toward the changed in Saudi Arabia during the seventies and eighties of the last century. He believes that the reason behind the tendency of the conservative approach was a result of the new Saudis judges and legislator who have only sharia science background and not legal background. He claimed that two decades ago; because of the lack in Saudi judges, the Board of Grievances used to get assisted by judges and legislators from Palestine, Egypt, Jordan, and Syria with sharia and legal background, which made the arbitration in Saudi Arabia friendlier to international treaties⁹⁵. However, that does not mean the arbitration in Saudi Arabia was friendly to international awards during that time. In fact, many international

⁹⁵ Interview Mohammed Assadan, former judge in Board of Grievances 23:00 (Riyadh, Saudi Arabia, 7th of Dec 2013), see appendix 9

arbitral awards has been rejected in Saudi Arabia during the fifties of the last century because Saudi judges find them against or disrespectful to *Sharia* rules⁹⁶.

In 1987 Sayen has criticised the Saudi strong reaction in the Saudi Arbitration Act 1983 against international arbitration that followed the famous Aramco case, he argued that Saudi Arabia should not continue the conservative approach after signing the Investment Disputes between States and Citizens of Another State (ICSID)⁹⁷. Sayen believed that the best way to improve the application of arbitration in Saudi is not by putting pressure on Saudi government to adopt new Acts which are essentially foreign, but by encouraging it to adopt new Acts that are drawn from the rich legacy of *Sharia*⁹⁸.

2.4.2.2 ACT 1983

2.4.2.2.1 Set aside awards

Similar to the Commercial Court Act 1930, 1983 Act did not provide any provision in regard to enforcement of set aside award. The reason behind is more likely because the idea of delocalization was not a new legal approach yet, and not because that Saudi legislators used to accept the delocalization of international commercial arbitration. What support this argument is the Saudi case law during that time, as

⁹⁶ Kristin T Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1994) 18 *Fordham International Law Journal* 922 – 924

⁹⁷ George Sayen, 'Arbitration, Conciliation, and The. Islamic Legal Tradition in Saudi Arabia' (1987) 9 *University of Pennsylvania Journal of international business law* 215-216

⁹⁸ George Sayen, 'Arbitration, Conciliation, and The. Islamic Legal Tradition in Saudi Arabia' (1987) 9 *University of Pennsylvania Journal of international business law* 215-216

there are no reference to the enforceability of the award in the country of origin. There are few cases where the judges tried to ensure the existence of reciprocity principle, such in case No 343/1/Q 1423; which will be discussed later in this chapter, but it can't be considered as an existence of delocalized arbitration.

2.4.2.2.2 Public policy

The ban over Government agencies from restoring to arbitration was not the only result of Aramco case, in fact it made the country more conservative towards the enforcement of international arbitral awards by using public policy as the ground of refusal. The legal system did not mention the public policy at all in the Act, but it has used that the team of Islamic rules to refer to the same notion. The Act provided that arbitrators have to act in line with Islamic rules during arbitration⁹⁹.

It might be true that the practice of arbitration law in Saudi Arabia has improved since issuing the Arbitration Act 1983, but Saudi legislators understanding of sharia as the national public policy has reduced the efficiency of the Act. For example, the executive regulations of Act 1983 have required particular religion of arbitrator¹⁰⁰. Which is pure misunderstanding of sharia rules that never required such conditions on arbitrators¹⁰¹. The practice of enforcement during that time showed that Saudi courts used to refuse awards issued by female arbitrators. The Act did not mention arbitrators gender and there are no published case law proving this issue. However, Dr. Aleassa has confirmed that the practice in Saudi courts before 2012 used to

⁹⁹ Art 39, Saudi arbitration Act 1938

¹⁰⁰ Art 3, Executive Regulations Of Act 1983

¹⁰¹ Alganim, Rawr Almahakim Fi Tandem Altahkim Alsaudi (the courts role in Saudi Arbitration (1st edn, Almanhal 2016) 82-84

consider Arbitrator gender part of Saudi public policy¹⁰². Dr.Azid, the Saudi lawyer has supported Aleassa's argument and provided that in 2015 Saudi courts have enforced the first award issued by female arbitrator in case NO 3022\Q, after a lot of discussions regarding to the gender of Arbitrator. This understanding of Islamic rules will not occurred if the Saudi judges have enough legal knowledge or if one of the schools of thought has been adapted and codified.

Another example of Saudi legislators' conservative approach toward foreign arbitral award is that they consider parties' right to restore their dispute to courts even with the existent of arbitration agreement as part of sharia, and as result part of public policy if one of the parties wanted to restore the dispute to national court . The wordings 'the authority originally competent to hear the dispute shall hear the objection and decide either to reject it or issue an order for the execution of the award' used in Art 19 of Arbitration Act 1983 is a clear example of misunderstanding of the purpose and operation of arbitration. This Art has given courts more power to get involved the merits of the dispute, which has made arbitration in Saudi Arabia just an extra stage of judicial system. It is more likely that this Art is part of the Saudi conservative approach towards international arbitral award after nationalizing Saudi legal system agencies.

Art 19 of Arbitration Act 1983 ignored the parties' intention to recourse to arbitration by allowing the conflicts being brought back to the court. By doing so, Saudi legislators have diminished the purpose of arbitration which is to swiftly settle conflicts away from the courts. This has resulted in the weakness of recognition and

¹⁰² Muhammad Alissa, '*Nidam Altahkim Alsaudi Akabat Mohtamala*' [2014] AIEqtesadia.

enforcement of awards, which was the main reason behind the need for Saudi joining the New York Convention

2.5 THE IMPACT OF SIGNING THE NEW YORK CONVENTION ON SAUDI ARBITRATION LAW

Since 1983 after issuing the Arbitration Act 1983, Saudi Arabia in order to encourage Saudi economic growth and increase international investment, it has increased the legislative policy by adapting to new Acts. The Saudi legislators attempted to incorporate few arbitration rules in investment Acts. Such as Foreigner Investment Act 2000 superseded the 1979 Act. This includes arbitration provisions to facilitate etc.”.¹⁰³ In addition, Saudi Arabia became a member of number of international conventions such as the "New York Convention". It also ratified the Riyadh Arab Agreement for Judicial Cooperation 1983¹⁰⁴. Which entered in to force on May 2000 as well as became a member of the 1965 Convention on the Settlement of Investment

¹⁰³ Foreigner investment act 2000, executive Regulation article 26 “The Board of Directors shall form, subject to Article 13, paragraph 2 of The Act, a committee composed of at least a chairman and two members to be named The Investment Disputes Settlement Committee. This committee shall consider the disputes arising between the Foreign Investor and his Saudi partners in respect of a licensed investment under The Act. The committee shall work to settle the dispute amicably. In case an amicable settlement could not be reached, the dispute shall be settled through arbitration according to the Arbitration Act and its executive rules issued by Royal Decree No. (46) Dated 12.7.1403 H. This committee is the competent body to consider the dispute as stipulated in the Arbitration Act”.

¹⁰⁴ Riyadh Arab Agreement for Judicial Cooperation’ <<http://www.unhcr.org/refworld/docid/3ae6b38d8.html>> accessed 14 November 2015, the three conventions held in 1952 regards to Letter rotatory, arbitral awards and extradition are superseded by this convention.

Disputes between States and Nationals of Other States and a part of The Unified Agreement for the Investment of Arab Capital in the Arab States in 1980¹⁰⁵.

In 1994 Saudi Arabia became part of the New York Convention, and since that legislators started using the word of public policy combined with sharia or Islamic rules to refer to the public believes, values and morals. Many legal scholars such as Roy, believed that joining the convention indicates an easing off its historical resistance to international commercial arbitration¹⁰⁶. Roy believed that with the time Saudi Arabia will create its own way to improve the application of arbitration under the Convention umbrella without utilizing public policy ground to circumvent enforcement of international arbitral awards. Roy's argument concluded that by practice Saudi Arabia will change its attitude towards international awards those Saudi Arabia has historical rejection to them¹⁰⁷.

However, joining the convention did not make a big change on the enforceability of international awards. In many cases Saudi judges considered awards as against public policy even though they are Islamically controversial issues. In 2004, case No 2496/1/Q 1424, the court ordered a partial enforcement of international arbitration

¹⁰⁵ 'The Unified Agreement for the Investment of Arab Capital in the Arab States 1980' <<http://unctad.org/Sections/dite/iaa/docs/compendium/en/36%20volume%202.pdf>> accessed 19 April 2012.

¹⁰⁶ Kristin T Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1994) 18 *Fordham International Law Journal* 929 – 930.

¹⁰⁷ Kristin T Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1994) 18 *Fordham International Law Journal* 923

award, because the award contained interest which is considered infringement for the national public policy, even though not all Islamic schools of thought following this point of view as will be explained in chapter 5. In 2003 case No 343/1/Q 1423, in order to enforce an arbitral award rendered in the United States, the Saudi appeal court has requested an improvement of the principle of reciprocity in United States courts even though in 2003 both the United States and Saudi Arabia were members to the convention. It is really not clear why the court did not enforce the award according to the Convention, but it is clear that the lack of legal knowledge and experience have an impact over this case. In this judicial decision the court did not object the subject of the enforcement; the award has been enforced but not according to the Convention provision but to the principle of reciprocity, which in any way or another is a result of the lack of legal background, the misunderstanding of Islamic rules that leads to an uncomfortable relation between judges and legal scholars as will be explained in chapter 7.

Sayen's argument suggested that the best way to improve any legal system should not come from foreign pressure but by increased use of procedures, the thing that Saudi Arabia has done till 2012 without a significant result. Sayen's argument might be a reasonable argument in case he was not talking about the Saudi legal system, simply because the problem in Saudi Arabia is not because of the unabated Arbitration Act but because of the vagueness of the relation between Sharia and positive law in Saudi Arabia.

2.5.1.1 ARBITRATION ACT 2012

Imposed by weakness of international trade in Saudi Arabia and the spread of ADR as elements to resolve international commercial conflicts, Saudi legislators abolished the Arbitration Act 1983 and its executive regulations and issued a new Arbitration Act in 2012.

The 2012 Act focuses mainly on the issue of enforcement, and along the lines of modern arbitration treaties. Arbitration 2012 Act aimed to increase the number of individuals and companies resorting to arbitration, by giving the arbitral tribunal the necessary power to deal with disputes. It is also aimed to offer more enforceability of international awards in Saudi courts. In contrast to the previous Act, Act 2012 starts by addressing the issue of definitions. It defines the arbitration agreement with more details, as form of arbitration clause in form of terms of reference. It also provides a definition of the arbitral tribunal: “arbitral tribunal is single or team of arbitrators who lead the arbitration procedure and issues awards”¹⁰⁸. The Act also defined courts of original jurisdiction as the court that originally adjudicates disputes which is the subject of the arbitration agreement¹⁰⁹. However, it still does not recognize arbitration awards in matters where conciliation is not permitted, just like the previous Arbitration Act, which might be reasonable, as conciliation is not permitted in case of crimes¹¹⁰.

¹⁰⁸ Art 1, Saudi Arbitration Act 2012

¹⁰⁹ Art 1, Saudi Arbitration Act 2012

¹¹⁰ For more information see public policy as ground of refusal, chapter three

2.5.1.1.1 Set aside award

In regard to delocalization, 2012 Act and the Executive Regulations did not provide particular provision to prohibit enforcement of set aside award in the country of origin. In 2013 Art 11 the Executive Regulations of The Enforcement Act has stipulated that international awards in order to be enforceable in Saudi Arabia, they have to be final and enforceable in the country where they have been rendered. Case law in Saudi Arabia support this approach as well, in 2016 case NO (37661023, 1437) there was a contract with a arbitration clause between Lebanese construction company and a Yemeni company to build a project in Yemen. When Lebanese company has completed the project, the Yemeni company went into insolvency. The arbitration process has been held in Tunisia according to the agreement. Because the Yemeni company has some assets in Saudi Arabia, the court of enforcement in Saudi has required an enforcement leave from the competent court in Tunisia. However; Alkodiri the president of enforcement court, which is the competent authority to enforce international awards, explained that they do not require any enforcement leaves for the enforceability of international arbitral awards. He claimed that awards do not have to be issued or approved by courts of the country of origin, and the any administrative organization or arbitration tribunal their awards will be enforceable in Saudi Arabia¹¹¹.

2.5.1.1.2 Public policy

¹¹¹ Abdullah AlKodiri, *Tanfith Alahkan Alajnabia (Enforcement Of International Awards)* (1st edn, radmak 2016) 20-22

2012 Act has paid the public policy more attention than previous arbitration Acts. 1930 and 1983 Acts have reeled to the importance of sharia rules in such way seems that Saudi legislators consider Islamic rules as the Saudi national public policy. Especially, that these Acts did not mention the term of public policy at all.

2012 Act emphasized that any arbitral award have to be inconsistent with the public policy and Islamic rules 3 times, and to be in consistent with Islamic rules about 6 times in the Act. It might be understandable that Saudi legislators wanted to give the rules of sharia more importance so they have mentioned it several times. Nonetheless, it is not understandable why they mentioned sharia individually in some Arts and followed by public policy in other Arts, particularly that Saudi case law proved that judges used to consider public policy as synonym of sharia. This was clear in case NO 62/D/F/5 1426 in 2006 as the plaintiff want to enforce and Egyptian award in Saudi Arabia that includes interest or *riba*, the plaintiff requested partial enforcement of the award, which did not include interests. Appeal court held that part of the award is enforceable which did not include interest and that sharia is the Saudi public policy. The same principle has emphasized by Art 11 of executive regulations of the enforcement Act 2013, which provided directly that Islamic rules are the notion of public policy.

However, as long as Saudi legislators believe that public policy is the Islamic rules there is no rational behind naming both of them in a way intimidates that they have different meanings in arbitration Act 2012. It seems that the notion of public policy is

not clear for Saudi legislators. What support this argument is Alkodiri; point of view in regards international awards consistency with Islamic rules. Alkodiri who is currently a judge in enforcement court; which is the competent court to enforce international awards, believes that international awards are enforceable in Saudi Arabia even if they were not consistence with sharia. He believe in some cases it is necessarily to disregard some sharia rules in case Saudi Arabia was part in an international convention with the country where the award has rendered.

It is clear that the practice of enforcing foreign arbitral award has inspired Alkodiri to come up with this understanding. His argument might be a new approach towards international public policy in Saudi Arabia. However, his argument clearly means that Islamic rules are not the public policy, because there is no country allow enforcement of award if it was not in consist with its public policy. This argument support Assadan point of view, as he believes that the lack of legal background of Saudi judges and legislators is the reason behind the conservative approach of saudi courts toward foreign arbitral awards. If they had the legal background beside their Islamic background, Saudi legal system would not have to wait from 1930 till 2012 in order to be more open to international treaties and more friendly toward international arbitral awards.

2.6 IMPORTANT DEVELOPMENT IN SAUDI 2012 ACT

2012 Act is more open to international law. Art 3 of the Act starts by addressing that the rules of the Act are applicable to any arbitration, contractual or non-contractual relation; if it is held in Saudi territory or in any other countries if parties agreed to

apply the Saudi Arbitration Act for their arbitration agreement. Different from the New York Convention and Swiss rules of international arbitration, these depend mainly on the parties' nationality. The Saudi Arbitration Act 2012 considered the internationality of arbitration in four cases, and those are almost identical to the principles adopted in the United Nations Commission on International Trade Law (UNCITRAL) Model Law toward internationality of arbitration. First if both parties have more than one business place at the time that the arbitration agreement is held. Second, if one of the parties has more than one business place, the 2012 Act will consider the place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely related. In case both parties do not have business places at the time of holding the contract or agreement the Act considers the place where parties live as the place of arbitration. Third, if the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. Fourth, if the parties have resorted their dispute to arbitration center out Saudi Arabia. Therefore, the Act applies virtually identical definition of international arbitration as that adopted in the UNCITRAL Model Law.

The Act is more effective in comparison with the previous 1983 Act. It eliminates national court interventions and parties' ability to make an objection against the arbitral award. It addresses the issue that the arbitral award issued under this Act are not subject of appeal under any circumstances, except by taking new action claiming the invalidity of the award on the grounds of refusal provided by the Act. which is a clearly expression that the arbitration award has the power of res judicata.

Different from the previous one, 2012 Act provided more details in regard all the stages of arbitration. It provides pre-arbitral procedures, procedures to organize the process of arbitration and enforcement of the arbitral award. These will be discussed in detail below.

Different from the previous Arbitration Act, the Act 2012 has allowed the application of other countries law to be applied in Saudi Arabia if the parties agreed this. The Act even allowed the application of other countries laws; even in case there was no international treaty in this regard, in cases where the arbitral tribunal considers to be most closely connected to the subject matter of the dispute. Article 38 has stated that:

“1- Without prejudice to the provisions of the Shari'a Law and the Kingdom's public policy, the arbitral tribunal shall proceed during the arbitration proceedings as follows:

- a- It shall apply the rules agreed upon by the parties to the subject matter of the dispute. If the parties agree to apply the statutes of a certain state, then the substantive rules therein shall apply without the rules pertaining to the conflict of laws, unless otherwise agreed by the parties;
- b- If the parties did not agree to the statutory rules that should apply to the subject matter of the dispute, the arbitral tribunal shall apply the substantive

rules of the statutes that it considers to be most closely connected to the subject matter of the dispute.

- c- The arbitral tribunal shall take into consideration, when settling the subject matter of the dispute, the terms of the contract in dispute, the trade usages applicable to the transaction, the customs and the common practice between the parties.

2- If the parties expressly agreed to authorize the arbitral tribunal to act as amiable compositeur, then it may decide in this respect according to the principles of justice and equity.”

As what have been said previously, the Saudi Arbitration Act has been built on the structure of the UNCITRAL Model Law on International Commercial Arbitration 1985. Article 38 of the 2012 Saudi Arbitration Act is no more than a paraphrase of Article 28 of the rules applicable to the substance of the dispute in the UNCITRAL Model Law. Article 28 of the Model Law has provided that:

“(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

The similarity between the two Articles is very obvious. However, Article 28 of the Model Law has listed the four clauses sequentially in one paragraph. In contrast, the Saudi legislators have listed the same clauses under Article 38 but in a different order under two paragraphs. The first paragraph in Article 38 of the Saudi Arbitration Act includes clause number one, two and four regarding the parties choice of law, the case of the failure of such agreement and an emphasize on the arbitral tribunal to adhere to the terms of the contract and taking into account the trade usages and the practice and the previous dealings between the parties. The second paragraph includes only the third clause of Article 28 of the Model Law, regarding the possibility to authorize the arbitral tribunal to reach a settlement “to act as *amiable compositeur*”. As the Saudi Act 2012 has listed the clauses in a different order or different construction is not of importance in legal criticism. Nonetheless, the matter may differ if the Saudi legislator has required in the first paragraph that the application of any other laws must not

constitute a prejudice to the provisions of Shari'a law, where the legislators did not require any obedience to Shari'a rules for the second paragraph. In the second paragraph, the Saudi legislators have only required that the tribunal must decide in this respect according to the principles of justice or in accordance with the rules of equity, as provided by the rules for the implementation of the Saudi Arbitration Act 2012.¹¹²

The legislative differentiation in requiring the infringement of the Shari'a law opened the door to many possibilities, as already observed in comparing the previous Arbitration Act 1983 and the new one. The provisions of the new Act became more open to the enforcement of foreign arbitral awards, as it provides more opportunity for international award to be enforced in the country. The elimination compliance with sharia rules requirement by legislators compliance that paragraph might understood as an attempt to give more flexibility to recognize and enforce international awards.

2.6.1 PRE-ARBITRAL PROCEDURES IN SAUDI ARBITRATION LAW

Almost all pre-arbitral dictions whether related to the arbitration agreement validity or arbitral tribunal, are made before the final award. The arbitrator under Act 2012 is considered as a judge in some cases, he or she could make orders during the course of the litigation to determine subsidiary issues before the final diction, for instance, the

¹¹² Arbitration Regulations of Saudi Arabia 2012, Art 38

validity of arbitration agreement or clause, any issue related to tribunal formation or to the jurisdictional limits of the arbitral tribunal¹¹³.

Under the Act 2012, an arbitration agreement means to resort all or some disputes that arose or will rise because of a contractual or non-contractual legal relationship between parties. The agreement can take the form of an independent contract or as a clause in a contract. The arbitration agreement sets both the jurisdiction of the arbitral tribunal and draws the limits of its power. Therefore, the lack of a validity arbitration agreement means that the arbitrators are powerless. This was explained in the 1958 New York Convention:

“Each Contracting State shall recognize an agreement in written under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”¹¹⁴

This prompted the Saudi legislator to enact a similar rule in Art 11 of 2012 Act, which stated that any dispute arising between arbitration agreement parties must not be accepted by court if the defendant asks to resort dispute to arbitration before taking any further action.¹¹⁵ Nevertheless, the recognition of arbitration awards and its enforceability depend on the existence and validity of the arbitration agreement,

¹¹³ Art 39, Arbitration Act 2012

¹¹⁴ Art 2, New York convention 1958

¹¹⁵ Arbitration agreement is not considered public order, so court will not take action without the defendant request.

which raises the question about whether the arbitral tribunal or courts must determine the agreement validity.

It might not be a problem to apply Art (11) in case one of the parties submit distribute to the court. However difficulties appear when parties argue about the existence or validity of the agreement, if it will be part of the competent court jurisdiction or part of the functions of the arbitration tribunal. This problem will only arise when dispute is submitted to the competent court, and that submitting might be required by a party just to impede and obstruct arbitration procedure. In that case it will be hard for the competent court to dismiss one of the parties request and hard to suspend the arbitration procedure. The same Art emphasizes that bring a claim to competent court will not affect arbitral procedures. The Act provides “bring a claim referred to in the previous article, should not stop the arbitration process or issuing arbitral award”.¹¹⁶ The Act does not give a priority to either of side in resolving the dispute; inevitably each side will come up with a decision, leading to the possibility of reaching contradictory decisions.

2.6.2 PERSONAL POINT OF VIEW

In order to determine where the responsibility lies in examining existence and validity of the agreement, we must go through two scenarios. First, if the dispute has resorted to arbitral tribunal and second if it has resorted to the competent court jurisdiction. In the first case, the first step arbitrators should start with is to examine the existence and validity of the agreement. Second, once the dispute has been restored to the competent court, then one of the parties argue the existence of the arbitration agreement. In this case, the court must verify the validity of the agreement and decide whether to restore

¹¹⁶ Saudi arbitration Act 2012, Art 11 (2)

the dispute to the arbitral tribunal or to continue the legal procedure. This is actually adopted by the Convention as well¹¹⁷, and is considered an integral part of Saudi law once Saudi Arabia became a party to the Convention in 1994¹¹⁸. It might be argued that even the parties resort the validity issue to the courts, the tribunal still has the power to rule on his own jurisdiction according to the competence principle, but the Convention gives the court of enforcement the right to refuse the award recognition. The convention obliges contracting states' courts to dismiss claims in cases if there was an arbitration agreement or clause related to the dispute, unless it turns out that the agreement was invalid. This is similar to Article 11 of the 2012 Act, which required the defendant to request to resort dispute to arbitration before taking any further action. As long as international convention rules have the priority to be applied, it is more likely that the Saudi legislator should modify Article 11 of the 2012 Act, and apply it only after the court's final decision, even if arbitration procedures have already started in order to avoid ending with incompatible decisions. As well as conforming to the provisions of the New York Convention, which obligates courts to dismiss claims in case of invalidity an arbitration agreement, regardless of the timing and the litigation stage. Especially that Saudi legislator has provided in Art 2 that provisions of the Arbitration Act 2012 must be applied without violating international conventions signed by Saudi Arabia.

¹¹⁷ New York convention 1958, Art 2

¹¹⁸ New York convention 1958 article (2) "Each Contracting State shall recognize an agreement in written under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Saudi Arabia joined the convention 1994, 'United Nations Commission on International Trade Law' <http://www.uncitral.org/pdf/07-87406_Ebook_ALL.pdf> accessed 14 November 2015.

2.6.3 SUPPORTING ROLE OF THE SAUDI COURT UNDER THE 2012

ACT:

Under the new rules of the Arbitration Act 2012 in Saudi Arabia, the courts support the procedure from the beginning till the final arbitral award. The beginning of the procedure starts when a party submits the notice of arbitration to the other party, unless the parties agree otherwise. Arbitration proceedings will end whether by the issuing of an arbitral award or dismissing the claim under one of the grounds of refusal.¹¹⁹

Besides, 2012 Act gives courts the power to supports arbitration procedure in different matters. First of all, it provides that the competent court has responsibility to deal with the preliminary issues that are necessary to be resolved in order to continue the arbitration procedures. Second, the court supports the arbitration procedures by governing the proving procedures and examining evidence. Third, the competent court responsible to take an interim measure if required, which is a legal action that must be taken by a competent court and in many cases it is out of arbitrator's jurisdiction. However, in considering the significant role that court intervention might play during the arbitral process, court intervention must not affect in any way the arbitrator's decision or point of views.

2.6.3.1 PRELIMINARY ISSUES UNDER THE 2012 ACT

¹¹⁹ Saudi arbitration act 2012, Art 26 and 41

Preliminary issues are usually concerned the matter which raised and required the tribunal's attention before moving into the substance of the disputes, such as arbitrators jurisdiction, existence or visibility of arbitration agreement and the choice of the places of arbitration¹²⁰. They are usually raised at the early stage of the process in order to speed up arbitration procedures and reduce its costs¹²¹. In this regard Act 2012 has provided in case there was arbitration agreement the court shall dismiss the case if the defendant raises such defense before any other claim¹²². Which is in line with Art II(3) of the New York Convention. Art II(3) which provides that "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it find that the said agreement is null and void, inoperative or incapable of being performed'. In this matter, 2012 Act distinguished between two situations.

First, in the case where the tribunal believed that the issue is not necessarily to be dealt with in order to resolve the original dispute. In this case, the tribunal has the right to deal with the preliminary issues by itself and continue the process. For instance, the volatility of the agreement is one of the primary issues that filing of a nullification action shall not stop the arbitration proses¹²³.

¹²⁰ Mauro Rubino-Sammartano, *International Arbitration Law And Practice* (Kluwer Law International 2001) 580-581

¹²¹ Alan Redfern, Martin Hunter and M Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) 282 – 288.

¹²² Art 11, Saudi Arbitration Act 2012

¹²³ Art 54, Saudi Arbitration Act 2012

Second, in the case where the tribunal believed there is a preliminary issue that the process cannot be continued or completed without resolving it, which is out of tribunal jurisdiction, such as obligating one of the parties to provide important documents. In this case, the tribunal must stop the process till the court issues the final decision in that matter. This is made clear in Art 37, which provides that once the tribunal comes across an issue that is out of their jurisdiction, or in the case of a challenge of authenticity, the tribunal has the right to continue the arbitration process once they believe it is not necessary to resolve preliminary issues in order to resolve the original dispute; otherwise the arbitration process must be stopped until the preliminary issue has been clarified in court. As a result, the date of issuing awards might be delayed.

This might refer to the Saudi legislators' desire to improve and speed up the process of arbitration in Saudi Arabia in order to attract more investors. The legislators tried to clear all obstacles against the arbitration process, but the practice shows the opposite. In 2012 case NO 3288/Q 1433, the plaintiff requested the appeal court to enforce the defendant to appoint its arbitrator in order to create the tribunal, which is a primary issue to start the arbitration process. Nevertheless, because both parties were Saudi citizens and have chosen International Chamber of Commerce rules as the applicable law to their dispute, the appeal court has stopped the arbitration process, considering that if two Saudi parties in an arbitration contract have agreed to resort to their conflict to place it out of Saudi Arabia, this is against the country's public policy. The court held that as long as both parties were Saudi citizens, they do not have the right to choose a foreign country to resolve their dispute in. In this case, it shows how the power has been given to

judge in order facilitate arbitration, has been used against it. The court did not respect parties' autonomy that have been given by Act 2012 in this regard. Art 25 provides that the parties has the right to resort their dispute to any organization, Agency or arbitration center and followed its interior rules. The Art does not exclude Saudi citizens from this right. This judgment will never exist if judges in saudi have the enough knowledge about the aims of law in any legal system and the relation between sharia rules and positive law was clear.

2.6.3.2 EVIDENTIAL MATTERS UNDER THE 2012 ACT

Arbitration agreement has contractual nature, with huge parties autonomy, it is fast, simple and flexible in compare to the court procedures. The only reason why court procedures still has the advantage over arbitration in some cases is the enforceability. As result it becomes a question of whether the arbitral tribunal have the power to apply proving procedures or this remains a responsibility of the court, and whether the tribunal can start procedures itself or just with parities' request.

The court role in this regard start with insuring the existent of the agreement, Act 2012 consider the agreement only if it has been in written not oral. If the agreement has been proved according to its rules, the court shall dismiss the case and refer it to the arbitration¹²⁴. Which is in the line with New York Convention that also required the Arbitration agreement to be in written¹²⁵. As in case No 4883 \2 \ Q 1434 in 2013, the plaintiff requested for determination partnership contract with the defendant. The defendant raises claimed that there is an arbitration agreement governing the dispute.

¹²⁴ Art 11, Saudi Arbitration Act 2012

¹²⁵ Art2 (2). New York Convention 1958

Appeal court held that it is out of its power to review the merits of the dispute and that its job just to enforce the award, which also consisting with the Convention¹²⁶.

The general rules under Act 2012 give the tribunal the power to apply different proving procedures, and they are similar to those provided by UNCITRAL Modal Law¹²⁷. The Act gives the tribunal the right to obligate parties to provide documents in case they believe it is necessary to do so. According to the Act the tribunal can request documents in case the document is shared between parties such if it proves their right or obligations, if it has been used by the other party during the litigation or in any case the arbitrators believe there is a rational reason behind the request¹²⁸.

However, due to the source of tribunal's mandate is based on party autonomy, its power cannot be extended to third party, who might need it in some cases, such as the appearance of witnesses or forcing third parties to provide documents. The 2012 Act also allows court intervention in cases where a third party is required to complete arbitration procedures. Art 22 (3) provides that the arbitral tribunal has the right to request from the concerned authorities with the support needed in order to complete arbitration procedures, such as the appearance of witnesses and experts or requesting documents from a third party, without prejudicing the tribunal's right to do so

¹²⁶ Art2 (1). New York Convention 1958

¹²⁷ UNCITRAL Model Law, Art 27: The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence".

¹²⁸ Art 28 of Arbitration executive regulations

independently. This is also consistent with the UNCITRAL model law provisions, which applied similar rules¹²⁹.

2.6.3.3 INTERIM MEASURES UNDER THE 2012 ACT

While many advantages of arbitration as a mean resolve dispute in terms of speed, flexibility and simplicity of procedures, some cases might require a court intervention to take interim measures, which might occur before or during arbitral procedures. The Act 2012 defined interim measure as procedures taken by the competent court based on a party request before starting arbitration procedures, or by the arbitral tribunal during proceedings, unless the parties agree otherwise¹³⁰. This definition is consistent with UNCITRAL Model Law definition of interim measure¹³¹. According to UNCITRAL interim measure occur when a party requests interim measures for the purpose of protection before or during arbitral proceedings¹³². It is important to notice that the Act did not require arbitration agreement to include the tribunal right to order interim measure, it is part of their power under the Act whether it has been mentioned or not.

There are three types of interim measures applied for different purposes. First, interim measures taken in order to facilitate arbitration procedures. Art 22 of the Act gives the tribunal and parties; the right to request interim measures; such as determining the place of arbitration if not has been agreed in the agreement or in case of appointing

¹²⁹ UNCITRAL Model Law, Art 27: The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence”.

¹³⁰ Art 22(1), Saudi arbitration Act 2012

¹³¹ Arts 9,17. UNCITRAL Model Law

¹³² UNCITRAL Model Law on International Commercial Arbitration Art 9

arbitrator¹³³, before or during the arbitration procedures. The competent court according to the Act has to issue an order of judicial delegation in case the tribunal has requested. For instance, In 2012 case NO 3288\Q 1433, The plaintiff requested the appeal court; which is the competent authority, to enforce the defendant to appoint its arbitrator in order to create the tribunal, the court in this regard has acted according to Art 15 of the Act which provided that in case the parties did not agree on appointing arbitrator it is the court role to appoint an arbitrator or tribunal.

Secondly, interim measures taken in order to avoid loss or damage, which are expected to preserve such situations until the dispute is resolved. Which is reasonable as one the arbitration aims is to reduce the cost of the procedure of resolve dispute. The court may take a decision to stop one of the parties commercial activities if the activities harm the other party till the tribunal release their final decision, or to stop arbitration procedure till court resolve some primary issues. The Act and its executive regulations did not directly named such measures in order to protect parties from loss or damages but the power it gives in Art 23 to tribunal is enough to protect them. Art 23 of the Act gives the tribunal the right to take any provisional or precautionary measures required by the nature of the dispute and the right to require the party requesting such measures to provide sufficient financial guarantee for the execution of such proceeding.

The third type of interim measure is that taken by parties' request to the court in order to stop the enforcement temporarily. As has been explained, national and international arbitral awards have been given the enforceability of judicial decision. So once the

¹³³ Mauro Rubino-Sammartano, *International Arbitration Law And Practice* (Kluwer Law International 2001) 580-581

award has been rendered whether nationally or internationally; the appeal court does not have the right to review the merits of the dispute, its role just to ensure that the award is not inconsistent with Art 50 of the Act. In 2013 case NO 505/2/S 1434; appeal court has dismissed the plaintiff request to review the award and held that it is out of its power to discuss the merits of the award and that action to nullify an arbitration award shall not be admitted except in the cases listed in Art 50 of Arbitration Act 2012. Art 50 allows the nullify an award in case (1) no arbitration agreement exists, (2) parties lack of capacity, (3) party fails to present his defense due to lack of proper notification. (4) award excludes the application of any rules which the parties to arbitration agree to apply to the subject matter of the dispute, (5) if composition of the arbitration tribunal or the appointment of the arbitrators is carried out in a manner violating this Act or the agreement of the parties. (6) If the arbitration award rules on matters not included in the arbitration agreement. (7) 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.

However, according to the executive regulations of the enforcement Act 2013, in case one of the parties has requested an interim measure, the competent court has the right to temporarily stop the enforcement of the award¹³⁴. Which is not contradictory to Art 50 in Arbitration Act, because it not about dismissing the case but delaying the enforcement for such purpose like avoids damages.

¹³⁴ Art 10(1), executive regulations of the enforcement Act 2013

2.7 THE ROLE OF ENFORCING COURT :

In December 2013, Saudi Arabia adopted several new procedural Acts that change the whole structure of litigation procedures in the Saudi legal system. It has issued the Civil Procedure Act 2013, the Criminal Procedure Act 2013, the Litigation Procedure before the Board of Grievances Act 2013 (the previous Act enacted in 2006, and used to govern the enforcement of international arbitral award, before a special court established for enforcement purposes in 2013) and the Enforcement Act 2013. The Enforcement Act 2013 is a special Act to supervise just the enforcement of judicial decisions and arbitral awards with enforcement leaves. According to the Act, approved arbitral awards from a competent court are equivalent of judicial decision¹³⁵. The Enforcement Act 2013 Implementing Regulations provide that if it is needed, a new court can be established for enforcement purposes¹³⁶. In 2013 as well Saudi Arabia has established the enforcement courts in order to deal with only the enforcement.

By legislating the enforcement Act 2013, Saudi legislators' desire to be more open to international practice is so obvious. It gives the arbitral award the power of judicial decision. However, when it comes to the practice the judges can use their own understanding to the Act to make it more conservative. This has been observed in many cases; especially in regard to public policy, the power that has been giving to

¹³⁵ Enforcement Act 2013, Art 9

¹³⁶ Enforcement Act 2013, Implementing Regulations Art 8

judges in order facilitate arbitration has been used against it¹³⁷. What might support this prospect is that the Act indulgence with the enforceability of foreign award and decisions, has not been welcomed by many judges in Saudi Arabia. Alshbrami The former judge of enforcement has disagreed with the new rules of enforcement. He argued that such rules would make the courts useless; as parties have many other (ADR) which more affective then courts. He believed that courts could regain their influence, by reviewing the every award to make sure it is not against Islamic rules¹³⁸.

2.8 CONCLUSION

By discussing the development of the relation between Islamic rules and the positive law in Saudi legal system since 1930, it is so obvious that all the developments regarding to enforcement of national and international arbitral awards were not very effective, including those applied in the resent arbitration Act 2012. The discussion has proved that there are two significant changes happened in the Saudi legal system regarding to arbitration since Commercial Court Act 1930, which is the beginning of codification of Arbitration rules in Saudi legal system.

These two changes followed the Commercial Court Act 1930 Act till the Eighties of the last century. This period of time in Saudi legal history has been described by M. Asaddan; the former judge at the Board of Grievances in Saudi Arabia, as the best

¹³⁷ NO 3288/Q 1433,

¹³⁸ abdualziz alshbrami, *Sharh Nidam Altanfith* (1st edn, Madar Alwatan Lenashr 2014) 47

time for arbitral award enforcement in the country. It might be hard to judge Act 1930 through case law; because of the lack of judicial publication during that time, but its text clearly shows that the Act; in compare to resent Acts, was more friendly toward international arbitration. It has used lees obstacles against enforcement and has better implementation of sharia rules in regard to these three grounds of refusal. M. Asaddan, believes that Saudi Arabia and due to the lack of national expert in legal field during that period, the country used to get a legal assist from non-Saudi legislators and judges who have both sharia and legal background¹³⁹.

The first change occurred in early eighties of last century, when the first arbitration Act 1983 has issued. According to Asaddan, in early eighties the country started nationalizing its courts including the Board of Grievances, which the competent court to enforce international awards and where many of non-Saudi judges used to work. The discussion has showed that since that change the Saudi Arabia, Saudi legislators start codifying more rules to organize arbitration, but those rules were more conservative than those applied in Act 1930. Case law proved that the Islamic rules have been applied against their aims and purposes, which is to facilitate people life since that change . For instance, courts started requiring particular religion and gender of arbitrators; which is not related to sharia as explained, but caused by the historical vagueness of the relation between sharia and positive law. Act 1983 has been followed by Saudi joining New York Convention; but there has been no significant change, Saudi courts remain using term of public policy as a mean to intervene, public

¹³⁹ Interview Mohammed Assadan, former judge in Board of Grievances 23:00 (Riyadh, Saudi Arabia, 7th of Dec 2013), see appendix 9

agencies are still banned and there was absolutely no sign of applying delocalized arbitration in the country.

The second change occurred in 2012 with the issue of the current arbitration Act. Even though the Act still impose restrictions on the public agencies capacity to initiate arbitration; which are usually the local party in contracts with international partners in the oil industry and giant infrastructure projects, from initiating arbitration agreements without the approval from the Council of Ministers. The Act still also does not recognize delocalized arbitration. However, as discussed, the Act was in line with international conventions, courts intervention and involvement in the merits of the dispute has been reduced and limited just to the violation of public policy. However, case law proved that the Act 2012 brought no significant change in the enforcement of international awards. The courts still use public policy as a ground of refusal to get involve in the merits. They still did not understand the notion of public policy and used it against restoring dispute between Saudi parties to international arbitration centers, even though its is not prohibited by either the Act nor sharia rules. The judges did not welcome the new approach to the enforceability of international awards, which means their practice will not get change just by enacting new rules of arbitration.

Some legal scholars have provided schemes of arbitration development in Saudi Arabia. For instance, in 1987 and after the issue of 1983 Act, Sayen explained that arbitration in saudi will get improve if the country has updated its Acts and adapt more friendly provisions toward international arbitration¹⁴⁰. Which is wrong because

¹⁴⁰ George Sayen, 'Arbitration, Conciliation, and The. Islamic Legal Tradition in Saudi Arabia' (1987) 9 University of Pennsylvania Journal of international business law 248 – 256.

Act 2012 was an updated Act but when it comes to the practice the Act did have a significant affect on the enforcement of international award, as courts still able to use their power against enforcement.

Another suggestion came from Roy (1994) just two years before Saudi signing New York Convention, he believed that the adaption of the Convention will improve Saudi Arabia's application of international arbitral award,¹⁴¹ or will create a comfortable environment for confident international investments that Saudi courts will enforce international arbitral awards. He believed that the adoption of the convention would reduce the courts use of public policy as a ground of refusal. However, an examination of the last two decades since Saudi Arabia signed the Convention has proved that joining the Convention also does not have a significant affect on the enforcement of international award.

Roy, Sayen and other foreign legal scholars have examined the practice of arbitration in Saudi Arabia by focusing on the of international treaties on the national law without paying attention to other elements affecting the practice of arbitration such as customs and religion. The real reason behind the continuance of the perplexity of enforcing international awards is the vagueness of the relation between sharia and positive law in Saudi legal system, which M.Asaddan, has supported. He described what happened in last two decades as regression in performance of Saudi judges

¹⁴¹ Kristin T Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1994) 18 Fordham International Law Journal 957 – 966.

toward international arbitration. He believes that the main reason behind this regression in their performance relates to their understanding of Islamic rules.¹⁴²

This thesis will highlight other solutions to improve the Saudi application of international arbitration after the failure of the codifying new arbitration Acts and giving more deadlines. As such, this thesis will go examine in detail the understanding of the grounds of refusal in validity of arbitration agreement, finality of awards and public policy, and how Islamic rules have affected these three grounds more than the rest provided by the Convention. It will focus on the way courts invoke these grounds in order to circumvent the enforcement and find a way to remedy this imbalance.

¹⁴² Interview Mohammed Assadan, former judge in Board of Grievances 23:00 (Riyadh, Saudi Arabia, 7th of Dec 2013), see appendix 9

3 CHAPTER THREE:

THE REQUIREMENTS OF

PARTIES CAPACITY IN

ARBITRATION AGREEMENTS

3.1 INTRODUCTION

Legal capacity is required not just in arbitration agreements but also in any contract in order to be valid. The importance of this issue in this thesis not only comes from how the Saudi law views the issue of capacity differently from other jurisdiction, but also from the ban imposed by the Saudi authorities over its public entities, leaving them without legal capacity to sign an arbitration agreement or any contract containing an arbitral clause. Saudi Arabia is a member of the NYC 1958, and the requirement of legal capacity is the second ground of refusal in the Convention.¹⁴³ Art V of the convention provides :

‘Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II¹⁴⁴ were, under the law applicable to them, under some incapacity.’

Since the elements forming legal capacity depend mainly on the subject of the capacity, it is really important to distinguish between different subjects of legal

¹⁴³ See appendix 1 for the New York Convention.

¹⁴⁴ *Ibid.*

capacity. Such study must not only cover the Saudi arbitration law, which is the main point of this chapter, but also have regard to the examples from French and English legal systems.

In order to have a better understanding of the rationale behind this requirement, the meaning of legal capacity, the types of legal capacity required in natural or legal person, it is necessary to examine in detail the main elements forming legal capacity. As such, this chapter will discuss, firstly, the reason why capacity in Saudi Arabia is important subject to be discussed and compared with other legal systems. Types of legal capacity will be addressed briefly under this section besides the elements forming the capacity of individuals, such as age of majority and bankrupt party in arbitration. Secondly, the capacity of legal persons will be discussed, including arbitration in administrative contracts and the capacity of insolvent party. For each element, there will be a comparison between the international applications of requirements of legal capacity with its application in the Saudi legal system, and how each element has affected by the ambiguity of the relation between Sharia and positive law in Saudi Arabia, under the umbrella of the 1958 New York Convention. Finally, the answer to the research question is provided at the end of this chapter.

3.2 THE IMPORTANCE OF THIS CHAPTER

The importance of capacity is so obvious in every legal contract, as duties and rights must related to a person who is able to receive them.¹⁴⁵ The issue of capacity of both natural and legal person might not be an important subject to be discussed and

¹⁴⁵ John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35 The Yale Law Journal 656.

compared with other legal systems, particularly in arbitration contracts. However, in Saudi Arabia; as mentioned in the previous chapter, Islamic rules have affected this issue in particular, as its ambiguity of the relation with positive law is the reason behind restricting public entities' capacity to sign an arbitration agreement. The Saudi 2012 Act of arbitration has prevented arbitration in governmental or administrative contracts, without permission from President of the Council of Ministers.¹⁴⁶ This is not an exception, in Italy and France public entities' capacity to arbitrate is also restricted. However the reasons behind restricting the capacity of the public entity in France and Italy are more logical than the reason behind restricting public entities' capacity in Saudi Arabia. For instance, in Italy public entities cannot arbitrate if the subject of the conflict is a real estate.¹⁴⁷ Similarly in France the capacity of public entities in arbitration is restricted to a limited amount¹⁴⁸. In Saudi Arabia the restriction of public entities came as a result of legislators' reaction toward *Aramco Vs. Saudi Gov* case.¹⁴⁹

The need of arbitration in administrative contracts in Saudi Arabia comes from the nature of these contracts. They are long term contracts and one of the parties has to be government. Some aspects of this contract are subject to public law and to private

¹⁴⁶ See Saudi Arbitration Act 2012, Article 10 (10th Article: 1- It is valid to agree on arbitration only for those who have the disposition of their rights whether a natural person - or his representative - or a legal person. 2- It is not permissible for governmental authorities to agree on arbitration only after the approval of the Prime Minister, unless there is a text of the special laws that allows it).

¹⁴⁷ Jean-François Poudret and Sébastien Besson, *Comparative Law Of International Arbitration* (1st edn, Sweet & Maxwell 2007) 183-185

¹⁴⁸ Jean-François Poudret and Sébastien Besson, *Comparative Law Of International Arbitration* (1st edn, Sweet & Maxwell 2007) 183-185

¹⁴⁹ *Aramco v Saudi Arabia*, (1963) 27 ILR 117.

international law.¹⁵⁰ The Saudi national law in many cases is not familiar with this kind of contracts, which means the international arbitration agreement is necessary.

It might be true that Saudi Arabia did not prohibit the restoring to arbitration in administrative contracts but just has restricted the capacity of public entities in this matter. However, the reality show that since Saudi Arabia has restricted its public entities capacity in 1963, there is no legal case has been recorded between international parties and Saudi government except one without permission from President Council of Ministers,¹⁵¹ which is *OGIM BV Vs. King Abdul-Aziz University* case, as will be discussed later in this chapter.¹⁵² That means that it was not just a restriction on public entities' capacity but a general rule to refuse arbitration in administrative contracts.

Saudi legal scholars have highlighted this issue and argued about the serious need of arbitration in Saudi administrative or governmental contracts. According to the legal scholar Khalid Othman, the lack of capacity of public entities has affected the national economy in Saudi Arabia, especially international parties find arbitration as an ideal way to resolve conflicts with governments. Othman argued that international investors trust tribunal impartiality more than the national litigation, specially in contracts involving the governments. He believes that international investors prefer arbitration because governments cannot use their state immunity in order to avoid the

¹⁵⁰ Fitzmaurice and Olufemi Elias, *Contemporary Issues In The Law Of Treaties* (Eleven 2005) 39

¹⁵¹ The formal judicial publication web did not recorded any cases in this regard since 1963 www.bog.gov.sa/ScientificContent/JudicialBlogs/Pages/default.aspx

¹⁵² case number 235/H2/1416/T

enforcement or withdraw from arbitration agreement, which is not the case in national litigation.¹⁵³

Similar argument has been raised by Alkather, who argued that the the restriction has affected national economy in negative way. As the industry and commerce in Saudi could have benefited more from international companies in these fields.¹⁵⁴ According to Alkather, the majority of commercial and industrial contracts are involving the government. International companies are not willing to resort their disputes with the governments to the national courts. According to Alkather, the arbitration in administrative contracts has not been studied or improved since Saudi Arabia has restricted its public entities capacity in 1963, because research centres do not find it an interesting subject to spend more funds on this area of law.¹⁵⁵ Alkather argued that if Saudi legislators still hesitate to use arbitration as method to resolve international disputes after *Aramco V Saudi Gov* case,¹⁵⁶ they can specify particular Act to govern the government arbitration agreements with international parties in order to improve this area of law in Saudi Arabia.

What might support Alkather and Othman arguments is that the public entities in Saudi Arabia usually are the owners of the huge projects that involve international investors who would usually demand more of the freedom of contract. This make Saudi Arabia as a country is in a serious need to international investors, specially on

¹⁵³ Khalid Othman, 'Arbitration In Administrative Contracts (Atahkim Fi Aluqud Aledaria)' [2009] Alektsadia.

¹⁵⁴ 'The Need To Legislate Arbitration Rules Governing The Administrative Contract(Matalib Bsn 'Anzimat Watashriat Liltahkim Fi Munazaeat Aleuqud Al'iidaria)' (2011) 15698 alryadh news paper.

¹⁵⁵ 'The Need To Legislate Arbitration Rules Governing The Administrative Contract(Matalib Bsn 'Anzimat Watashriat Liltahkim Fi Munazaeat Aleuqud Al'iidaria)' (2011) 15698 alryadh news paper.

¹⁵⁶ *Aramco v Saudi Arabia*, (1963) 27 ILR 117.

exploitation of natural resources or to a huge projects of national infrastructure. For instance, Saudi Railways organization, which is governmental entity, invested about \$25 billions in Riyadh metro project in 2014.¹⁵⁷ Saudi Housing Ministry in 2013 has invested about \$66 billions for huge project to build 500,000 units in different part of the country¹⁵⁸. As Saudi Arabia prohibits arbitration in administrative contracts, the country is not able to achieve the best deal with international investors who have good experience in these fields.

Saudi Arabia has clearly restricted its government bodies from arbitration, which means that Saudi public entities are under some incapacity. So in case a public entity go into arbitration agreement without permission Saudi courts do not need to follow Art II (3) which provides that the arbitral award is not enforceable as agreement was is null, void, inoperative, or incapable of being performed, according to Art V of the convention; the Saudi national court have a right to refuse the enforcement of international awards, in case its public entities have resorted their dispute with international company to arbitration. Although that case law in Saudi Arabia proved the opposite; as will be explained latter in this chapter, due to the lack of legal background of Saudi judges.

¹⁵⁷ 'Saudi Railways Organization'

<http://www.saudirailways.org/portal/page/portal/PRTS/root/Home/04_Expansion_Specification/02Saudi%20Railway%20Master%20Plan> accessed 19 November 2015.

¹⁵⁸ 'Saudi Housing Ministry' (2014) <<http://housing.gov.sa/ar/Media/news/Pages/HY1hnb.aspx>> accessed 19 November 2015.

3.3 THE SUBJECTS OF THE LEGAL CAPACITY

This section will first identify capacity of individuals (natural person) and the legal entity (legal person). With regard to natural person, this study will discuss the age of majority and the different types of individual legal capacities . The issue will be examined from the perspective of the civil and common legal systems, then how Sharia rules made Saudi legal system different in this respect. This study will highlight the obstacles which may cause lack of legal capacity for both legal and natural persons. Finally, this study will be concluded with a discussion on active and passive legal capacity in different legal systems.

3.3.1 NATURAL (PHYSICAL) PERSON

A natural (physical) person has been defined by Kelsen as the personification of a set of legal norms which, by constituting duties and rights containing the conduct of one and the same human being, regulate the conduct of this being.¹⁵⁹ A natural (physical) person capacity in order to enter into any civil or commercial legal action including arbitration agreement is usually restricted by legal systems for the protection of the party her or himself in case of the natural (physical) person.

¹⁵⁹ Saudi Housing Ministry' (2014) <<http://housing.gov.sa/ar/Media/news/Pages/HY1hnb.aspx>> accessed 19 November 2015.

3.3.2 NATURAL (PHYSICAL) PERSON CAPACITY TO ARBITRATE IN FRENCH LEGAL SYSTEM

Both the English and French legal systems have defined a natural person in a similar way. According to Tias, the natural person in the French legal system is any member of human kind.¹⁶⁰ He or she exists when all of the characteristics with which he is identified occur, from the time of conception to the moment of death regardless of age, health, race or gender. So, in French law, a natural person is a human being with ability to enjoy his or her legal capacity.

In regard to the natural person capacity to arbitrate in both French and English legal systems he or she is subject to age, gender and financial status. The age of a natural person affects the type of capacity that he enjoys, as there is passive and active capacity for a natural person according to his or her age and financial status. In order to arbitrate individuals have to reach the age of majority; which is usually around the ages of eighteenth to twenty one years old, and to have the active legal capacity.

In France, the age of majority was twenty-one but in 1947 the legislators reduced it to eighteen.¹⁶¹ So once individuals reach 18 they enjoy the active capacity which allow

¹⁶⁰ Christian Tias, *French Civil Law = Le Droit Civil* (Baton Rouge, La: Center of Civil Law Studies, LSU 2002) 55.

¹⁶¹ George A Bermann, *Introduction to French Law* (Sold and distributed in North, Central, and South America by Aspen Publishers 2008) 120 – 127.

them to receive rights as well as to act legally.¹⁶² The French legal system, there is a clear definition of the two kinds of capacities passive and active. This comes from the capacity to sue and to be sued in Roman law.¹⁶³ the passive capacity means the capacity to have rights and duties (a Capacity for Rights) whereas active capacity occurs once the person is able to raise right and duties by his or her actions with regard to himself and others around them (a Capacity to Act).¹⁶⁴ The distinction between these two types of capacity came after the private substantive law pre-served the Roman law foundations after the ban on slavery contained in the International Covenant on Civil and Political Rights.¹⁶⁵ However, at the procedural stage there was not much difference between the two types of capacity, because civil law countries usually define legal capacity as the ability to sue and be sued. This definition represents both types of legal capacity.

The English law applies similar rules regarding the age of majority, the age of majority in England was twenty-one until the Family Law Reform Act 1969 came into force. In England, according to Halson,¹⁶⁶ minors became adults and have legal capacity to act when they reached the age of eighteen. However, in English legal system there is no clear distinction between passive and active.¹⁶⁷ In England and other common law legal systems, and because of the adoption of legal precedents, the

¹⁶² French civil code arts. 148, 388, 488

¹⁶³ Földi András ; Gáborhamza, *római jog története és institúciói (History and Institutes of Roman Law)*, (Akadémiai Kiadó, Budapest, 2001) 228-29

¹⁶⁴ *Ibid.*

¹⁶⁵ Javaid Rehman, *International Human Rights Law* (Pearson Education 2010) 85

¹⁶⁶ Roger Halson, *Contract Law (Longman Law Series)* (Longman 2001) 242 – 249.

¹⁶⁷ Rhona KM Smith, *Textbook on International Human Rights* (6th edn, Oxford University Press 2007) 251-261

existence of rights depends on their enforceability before the court. Legal capacity in common law legal systems usually refers to the ability to take the stand before the court. It is what has traditionally been referred to in English legal speech as legal capacity.¹⁶⁸ The incorporation of both passive and active legal capacity results in the differences between the two types of capacity not too obvious. Because the English legal system did not clearly distinguish between active and passive capacity, it provided some particular stages of age where individuals are bound by their acts before the age of eighteenth; for example, by the age of sixteen education is no longer mandatory and minors can decide whether they want to continue their education or not. Nevertheless, the general rule in contract law will not be binding upon people until they reach eighteenth years old. In this regard for arbitration agreements or any contracts containing an arbitral clause, the agreement would be viewed as invalid if one of the parties were under the age eighteen.¹⁶⁹

One of the most important examples of individuals' lack of active capacity after reaching age of majority is bankruptcy. Which is a proceeding that may result in a party losing a process of protections, which they would otherwise be entitled to¹⁷⁰. Under English law, a declaration of bankruptcy or insolvency has no effect on the arbitration procedure where arbitration agreement was reached before the party being made bankrupt, which is clear in the *Vivendi v Syska* case.¹⁷¹ In this case, a Polish company went bankrupt during the arbitration procedure. The tribunal seated in London decided to apply the English law as the law of the place of arbitration in order

¹⁶⁸ John Parry and Eric Y Drogin, *Mental Disability Law, Evidence and Testimony: A Comprehensive Reference Manual for Lawyers, Judges and Mental Disability Professionals* (American Bar Association 2007) 7 – 13

¹⁶⁹ Roger Halson, *Contract Law (Longman Law Series)* (Longman 2001) 242 – 249.

¹⁷⁰ Jean-François Poudret and Sébastien Besson, *Comparative Law Of International Arbitration* (Sweet & Maxwell 2007) 505-506

¹⁷¹ *Syska (Elektrim SA) vs. Vivendi Universal SA & ors* [2009] EWCA Civ 677. 2. Decision of the Appellate Court of Warsaw of 16 November 2009, I A Cz 1883/09, not published. 3. Decision of the Swiss Supreme Court of 31 March 2009, 4_A428/2008.

to deal with the bankruptcy effect on the arbitration procedure. The tribunal decided to carry out the procedure as in English law the declaration of bankruptcy has no effect on arbitration procedures. A similar situation occurred in Argentina, where the legal system allowed arbitration proceedings to be carried out even if one of the parties is declared in bankruptcy where the arbitration tribunal has already been appointed.¹⁷² In these legal systems, legislators justify allowing arbitration proceedings to be carried out even if one or more of the parties were bankrupted by different means such as objective of arbitrability is not a concept that is part of the legal system as in England or other common law legal systems,¹⁷³ or by taking into account the benefit of both parties as in civil legal systems.

It is clear that the idea of the age of majority and the active legal capacity has been inspired from the Roman law in both legal systems. Because the idea has been inspired from a law; even though that law considered primitive, made it easier for legislators in France and England to determine the age of majority. This point is totally different from the case where capacity has been inspired from religion, that judges decide that a person has reached majority based on known physical signs of puberty in Saudi Arabia as will be explained.

¹⁷² United Nation Conference on Trade and Development, dispute resolution, 2005, p. 30. Available here: http://unctad.org/es/Docs/edmmisc232add39_en.pdf

¹⁷³ Loukas A Mistelis and Stavros L Brekoulakis, 'Arbitrability: International and Comparative Perspectives' (2009) 19 171 – 179.

3.3.3 NATURAL (PHYSICAL) PERSON CAPACITY TO ARBITRATE IN SAUDI ARABIA

Even though National acts did not provide any definition natural person, but some legal scholars such as Alrakad, defined natural person is the subject of legal capacity who is able to acquire rights and assume obligations.¹⁷⁴ Similar to the French and English legal systems, in Saudi Arabia individual have to reach the age of majority and have the active capacity in order to arbitrate. However, age of majority and active capacity are among the most influenced legal issues by the lack of clarity in the relationship between sharia rules and positive law.

The Saudi Act of Nationality 1954 refer to sharia in order to define age of majority.¹⁷⁵ However, Islamic law does not provide any definite age in this regard. According to shari'a there is no particular age of majority, it is different from person to person depending on their physical and mental growth according to the Hanbali school of thought,¹⁷⁶ which is the closest school to the Saudi legal system. Alshafi school of thought,¹⁷⁷ provided that fifteen is the age of majority according to his understanding of Prophet Mohammad's teachings. Later, in 2009, the Shura Council¹⁷⁸ decided that the age of majority is eighteen year old. This decision was objected by the Islamic and legal matters committee in the Shura Council on the basis of an infringement of

¹⁷⁴ Alrakad, Zamel. "Point Of View In Acts (Ray Fi Al Anzima)." alriyadh news paper (2007) <http://www.alriyadh.com/246918> last access 13 sep 2017

¹⁷⁵ The age of majority as stipulated in the provisions of the Sharia law <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendoepdf.pdf?reldoc=y&docid=5429543e4>

¹⁷⁶ One of the four orthodox Sunni Islamic schools of jurisprudence, its name cam from the scholar Ahmad ibn Hanbal who lived in Iraq 780–855.

¹⁷⁷ A Muslim jurist, who lived from (767 — 820) in Syria. He is well known as 'Shaykh al-Islām. His student created a school of thought call alshafie after his death adapting his view and understanding of Islamic rules.

¹⁷⁸ Majlis as-Shura or Consultative Assembly of Saudi Arabia, it is formal legislative body of Saudi Arabia to create and enforce law after the king approval.

shari'a law. They claimed that according to the Hanbali school of thought the age of majority is different from person to person, according to mental and physical growth.

Dr. Al-Ashakh, The President of the Shura Council, commented that adopting the age of eighteen as the age of majority might be against the Hanbali school point of view but other schools like Hanafi¹⁷⁹ have provided the age of eighteen as the age of majority. Other Islamic scholars such as Ibn Hazm¹⁸⁰ set the age of nineteen as the age of majority. This might support the theory that the Saudi legal system believes in the four Islamic schools of thought,¹⁸¹ and not only the Hanbali one. Saudi legislators rely on adopting the age of eighteen as the age of majority on the Convention on the Rights of the Child 1990 that Saudi Arabia joined in 1996: 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.

In order to have the legal capacity to go into arbitration agreement, the required capacity for a natural person in the Saudi legal system is the complete active capacity, which is the age of majority and the absence of any capacity obstacles¹⁸², in addition to the right of disposal over the property such as in case of bankruptcy.¹⁸³

¹⁷⁹ One of the four orthodox Sunni Islamic schools of jurisprudence its name came from the Islamic scholar Abū Ḥanīfā an-Nu'mān ibn Thābit who lived in Iraq (699 – 767).

¹⁸⁰ Abū Muḥammad 'Alī ibn Aḥmad ibn Sa'īd ibn Ḥazm, an Islamic scholar who lived in Al-Andalus (994 – 1064) during Muslim cultural domain and territory occupation of what are today Spain.

¹⁸¹ (Hanafi, Maliki, Shafi'i, Hanbali,) are the four Islamic schools of thought. They are created after about 150 after the death of prophet Mohammed. After his death there were different points of view regarding to Islamic rules, and the understanding of some Islamic scholars has an acceptance in the geographical areas more than others, which was the reason behind their existence.

¹⁸² Julian DM Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 735.

¹⁸³ Saudi arbitration act 2012, Art 10: It is valid to agree on arbitration only for those who have the disposition of their rights whether a natural person - or his representative - or a legal person.

The Saudi approach toward active and passive legal capacity spirited from sharia rules, which is different from England and France. It has distinguished between incomplete passive capacity which is given to the person before birth which out any duties, and the complete passive capacity contains both rights and duties.¹⁸⁴ The active capacity in the Saudi legal system, inspired from sharia. As Islamicly active capacity defined as the persons ability to be responsible for his or her own actions and expressions,¹⁸⁵ similar definition provides by Saudi law of nationality.¹⁸⁶ Saudi legal system has distinguished between incomplete active capacity, which is given to the child from birth until the age of discernment, and give him or her the ability to make legal action or expression, if the probability of the legal action to be in the favor of the minor is absolute,¹⁸⁷ and the complete active legal capacity.

Individuals might lose their active capacity in some case such as in case of bankruptcy. In saudi legal system bankruptcy occur when the individual assets do not cover the outstanding amount.¹⁸⁸ In this case legislators have limited the capacity of

¹⁸⁴ Mustafa Alzarka, *almadkhal alfkhi alam (the public Jurisprudential entrance)* (dar alkalam1998) 790-799

¹⁸⁵ Dr wahba alzohili, *The Roots of Islamic Jurisprudence (asol Alfgh Alislami)* 1986 (Dar alfikr 1986) 166 – 170

¹⁸⁶ Saudi nationality act, Art 3.

¹⁸⁷ *Ibid.*

the bankrupt party to sign new arbitration agreement because he or she do not have the right to dispose over the property under the dispute.¹⁸⁹

The Act remained silent about the bankrupt party's capacity in concluding arbitration agreements or any civil or commercial contracts. The Act and its executive regulations did not discuss the role of trustee or commissioners, which means that the disposition of the bankrupt assets shall take the form of a creditors' request to the court of enforcement. Requirement of having the right to dispose assets in order to arbitrate can be applied in this case. It is likely that the judge of the enforcement court might allow arbitration if requested by the creditors. In that case the judge of the enforcement court is also the trustee, which might not raise many questions as bankruptcy disputes are incomparable with those in insolvency. Another possibility comes from the conservative background of the Saudi legal system which offers the courts jurisdiction to force on the part of the insolvency¹⁹⁰ of the public policy of the State, or part of the acts of sovereignty, as is the case in the French legal system.¹⁹¹

The adoption of a particular age of majority has cleared the contradiction of majority age in different Acts in Saudi Arabia. For example, the Ministry of Commerce and the Shura Council used to require the age of eighteen years old in order for someone to enter into a contract or to do business, whereas seventeen years old was the age at

¹⁸⁹ The Saudi Judicial Enforcement Act 2012 regulated some issues related to bankruptcy. This Act is comprised of provisions related to the competent court of bankruptcy, any coming assets and fake bankruptcy claims

¹⁹⁰ There is confusion in the terms between bankruptcy and insolvency that will be addressed in the section covering Insolvency 2.1.3.1.

¹⁹¹ Article 2060 of the French Civil Code. Footnote ??

which someone could work as a public servant or governmental official. At the same time, there was no particular age for marriage.¹⁹²

However, since Saudi legislators consider sharia as a primary source of legislation and refer to it in order to adapt the age of majority in some national Acts; even though Shari'a is a religion and not a law and does not provide a particular age of majority nowadays there is more than one age of majority. such as 17 labour law, 18 addaptined by Shura Council and another one based on known physical signs of puberty which has considered 13 as the age of majority in some cases.¹⁹³ It is clear that legislators and judges in Saudi Arabia need a more legal background than what they enjoy, which supports the idea that the change in the judicial and legislative system in Saudi Arabia during the 1980s has had a significant impact on grounds of refusal provided by the convention. The impact was even more regarding to the capacity of legal person or in case of administrative contracts, as well be explained.

3.4 JURISTIC (LEGAL) PERSON

The subject of the legal capacity is the person. For the purposes of the law, the notion of “person” is that the law wants the term of person to be,¹⁹⁴ because legal scholars find a strong link between the term of person with the rights and obligations.

¹⁹² From above discussion it is clear that Scottish and Saudi law applying similar rules. Scottish law used the term of capacity and no capacity to refer to passive and active legal capacity that used in Saudi legal system.

¹⁹³ Adults Before Their Time." human rights watch 20.4 (2008) 31

¹⁹⁴ Hans Kelsen, Translated Anders Wedberg and Hans Kelsen; translated by Anders Wedberg, *General Theory of Law and State (20th Century Legal Philosophy Series)* (Russell & Russell Publishers 1961) 93.

According to Kelsen¹⁹⁵, the definition of person in traditional theory is the human being as a subject of rights and obligations. However, Kelsen emphasizes that not only human beings are subject of rights and obligations, companies, entities and states might also be subjects of rights or obligations. Thus, the holders of rights and duties are the persons, and person does not mean human being alone but any holder of rights and duties considered by the law.¹⁹⁶

The concept of legal person is now found in virtually every legal system and not just in common and civil law countries.¹⁹⁷ It is also called artificial person or legal person in different legal systems. Apart from human being, law entitles certain bodies the legal personality; even if they are not real people. Such legal bodies are independent from the natural (physical) persons that they consist of. According to Frederick, the legal person is a fictitious substance conceived as supporting legal attributes.¹⁹⁸

Juristic person might take the shape of a commercial association or collection of individuals for their mutual benefit, such as cooperatives (co-ops), different types of companies, governmental agencies or organizations, sovereign states or groups of countries under one union. These legal bodies have their own legal capacity and they are independent financially from owners in some cases, as the *Salomon v. Salomon*¹⁹⁹

¹⁹⁵ Hans Kelsen, Translated Anders Wedberg and Hans Kelsen; translated by Anders Wedberg, *General Theory of Law and State (20th Century Legal Philosophy Series)* (Russell & Russell Publishers 1961) 95.

¹⁹⁶ *Ibid.*

¹⁹⁷ Feiser George, *Law Review and American Law Register* (University of Pennsylvania Law Review 1908) Vol. 57, No. 3, 131-142.

¹⁹⁸ Pollock, Frederick Sir, *Principles of Contract* (Carswell 1982) 108.

¹⁹⁹ *Salomon v Salomon & Co Ltd* [1896] UKHL 1 (independent financial disclosure of legal person from individual)

case has proved the independent financial disclosure of legal person from individual. In this case, Mr Aron Salomon sold his business to a company that he owned with six members of his family with one share for each pound. Then, he took 20,000 paid shares for £1 each and £10,000 as debenture. The company went into insolvency and its asset value was insufficient to cover the trade creditors. The creditors argued that they were entitled to the company assets before Mr Aron the debenture holders, because Mr Aron and the company are one legal person. The House of Lord held that debenture holders must be paid first, and that the liability of the company and its forming members are separate.

3.4.1 TYPES OF (LEGAL) PERSON

With regard to a juristic (legal) person's capacity in relation to validity of arbitration agreement, one must distinguish between public entities and private juristic persons, as both enjoying legal personality and share similar characteristics.

3.4.1.1 PUBLIC ENTITIES:

Public entities might take the form of ministries or agencies; they are defined as a very general category of administrative organization that vertically comprises all national administrative bodies.²⁰⁰ They are also defined as a governmental organization to organize the provision of public services out-with the scope of ministerial regulations.²⁰¹ It has also been described as an organization that is a

²⁰⁰ Luc Verhey, Tom Zwart and undefined T Zwart, *Agencies in European and Comparative Perspective* (Intersentia Publishers 2003) 67 – 70.

²⁰¹ Hassan Tawfeeq, *Public Administartion* (Sejel Alarab 1972) 21.

financially independent and enjoining artificial personality, designed to serve economic purposes.²⁰² However, what might be the most comprehensive definition of public entities, as the governmental organizations that are reflecting the state economic, social, and political policies and has the legal person and independent financial disclosure to provide basic governmental services.

3.4.1.2 PRIVATE JURISTIC PERSONS:

Juristic person or artificial person can be an entity, such as a corporation which is recognized as having a legal personality and capable of being subject to legal rights and duties. It is different from a human being, who is referred to as a natural person. Therefore, a private legal person consists of two or more natural or legal persons, which is capable of enjoying and being subject to legal rights and duties. However, the definition can be too simplistic as private legal persons can take the form of cooperatives, business organization, unincorporated associations or any other including intergovernmental entities.²⁰³

Nonetheless, both public entities and private juristic persons have different legal capacity issues in terms of arbitration agreements, as legal systems limit the capacity of the juristic (legal) person in different ways to enter into commercial legal action including arbitration agreements. It is understood that the rationale behind these restrictions on the capacity to enter into arbitration agreements is to protect the party

²⁰² Helmi Mahmood, *Public Projects* (Alolom Aledaria Journal, first edition 1976) 177-189.

²⁰³ Private legal person can take different forms, such as cooperatives, business organization, Unincorporated associations or any other include intergovernmental

itself in the case of private juristic persons and protecting the states interests in the case of public entities.²⁰⁴

3.4.2 ARBITRATION IN ADMINISTRATIVE CONTRACTS

Administrative contracts are similar to the civil contracts in many characteristics, such as the equipment of capacity and proofing procedures. However, in Saudi legal system there is a special litigation system to govern administrative contracts, which used to be the Board of Grievances and now is the administrative courts. In administrative contracts, one of its parties is the government represented by one of its public entities. In these contracts, the public entity seeks to achieve the public interest, while the other contractor seeks an interest. In civil contracts, because both parties seek to achieve private interest, courts deal with them equally. But in case administrator contract where one the parties seeks the public interest the court have to take into account the country public interests. Therefore, arbitration in administrative contracts raises many questions about the legitimacy of habitual tribunal to deal with the country public interests.

3.4.2.1 ARBITRATION IN FRENCH ADMINISTRATIVE CONTRACTS

The French legal system gives any legal or natural person the right to initiate arbitration on the assets he or she has the right to dispose of,²⁰⁵ which means a

²⁰⁴ Julian DM Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 735.

requirement of additional conditions to have the capacity to sign an arbitration agreement. The French legislators have drawn a line between the right to dispose of such assets and the right to administrate them. According to French Civil Code, there are no obstacles for private juristic persons to initiate arbitration, in contrast to a public entity, which only has the right to administrate its assets. Therefore, the director or executive director of company has the right to initiate an arbitration agreement where ministers might not enjoy same power in their ministry.

Article 2060 of the French Civil Code²⁰⁶ prohibits the signing an arbitration agreement on a dispute involving public entities. The prohibition of French public entities might back the notion of state sovereignty and protecting the public interest of the state,²⁰⁷ as the administrative courts have exclusive jurisdiction over disputes involving public entities. However, French legislators did not totally prohibited arbitration in the administrative contracts. They excludes the administrative contracts those involve industrial and commercial interests and contracts involves international companies from the prohibition.²⁰⁸

French courts do not recognize arbitration in any administrative contracts in case of national dispute because of the public entities lack of capacity to initiate to arbitration.

²⁰⁵ French Civil Act, art. 2059 has provided “Toutes personnes peuvent compromettre sur les droits dont elles ont la libre disposition” which mean all persons may make arbitration agreements relating to rights of which they have the free disposal.

²⁰⁶ French Civil Act, art. 2060 has state that “n ne peut compromettre sur les questions d'état et de capacité des personnes, sur celles relatives au divorce et à la séparation de corps ou sur les contestations intéressant les collectivités publiques et les établissements publics et plus généralement dans toutes les matières qui intéressent l'ordre public.” Which mean that One may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or on controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned.

²⁰⁷ For further information, see chapter three

²⁰⁸ Jean-François Poudret and Sébastien Besson, *Comparative Law Of International Arbitration* (1st edn, Sweet & Maxwell 2007) 183-185

For example, in the *Tresor public v. Galakis* case 1966,²⁰⁹ where the court held that the prohibition of French law against the State agreeing to arbitration did not apply to an international contract if the contract concluded for the needs of maritime commerce.²¹⁰ Similar situation, in *INSERM v. Association Fondation Letten F. Saugstad* case, as the National Institute of Health and Medical Research (*INSERM*) and the Letten F. Saugstad Foundation the Norwegian organisation signed a contract with arbitration clause for the construction of building in France. *INSERM* as a public entity tried to sue Fondation for alleged non performance but its case has been dismissed by the court of first instance. *INSERM* try also to initiate arbitration proceedings against Fondation but it has been dismissed by the arbitral tribunal. *INSERM* then tried to have the award set aside by the French civil court which is the competent court of distribute, claiming its incapacity to sign an arbitration agreement in administrative contracts. The court has dismissed *INSERM* claim to set aside the award and held that the restriction of public bodies' capacity in France to initiate arbitration proceedings is limited to domestic agreements.

3.4.2.2 RATIONALE BEHIND RESTRICTING ARBITRATION IN ADMINISTRATIVE CONTRACTS IN FRANCE

In France there are two types of litigation, the first one is the ordinary courts. Which govern commercial, civil and criminal matters or any relation between individuals.

²⁰⁹ *Trésor Public v Galakis*, 93 JDI 648 (1966), The French court prevented other countries and public entities from using their domestic law to reject the arbitral award, considering that other countries and public entities can initiate to arbitration their disputes

²¹⁰ See *Galakis*, May 2, 1966 (French Supreme Court 1967); Goldman, case note, R.C.D.I.P. 553 (1967); Level, case note, *Clunet* 648 (1966).

The second type of litigation is administrative courts that govern administrative contracts. Which are kind of contracts that related to the public law and the conflict in these contracts usually involve public entities (public bodies).²¹¹ There is no doubt that arbitration in commercial and civil contracts is so necessarily. It provides an amazing mechanism to resolve distribute in a way that faster and more professional and impartial then regular litigation. The reasons behind adapting particular litigation in France and other countries to deal with administrative contracts is the unique nature of administrative contracts and their strong relation with the country public interest, which is not the case in commercial and civil contracts. In case of arbitration, the tribunal will not distinguish between the two parties and act impartially regardless to the public interest behind the public entities. Even if the tribunal takes into their consideration the public interest in the conflict, they are unauthorised to do so and usually they are foreign and not familiar with the country public interests.

Another point supporting the prohibition of arbitration in administrative contracts is that in many cases these types of contracts are connected to the state sovereignty. Which is a principle developed when going through lawsuit in another country used to consider an infringement of a state's sovereignty and refers to a precautionary measure that may be taken by the state in order to protect itself from being sued in civil actions in national courts. One of the most obvious examples is the existence of state sovereignty in contracts is the case of exploring the natural resources which is usually a long term contracts and the initiation to arbitration might be against the state sovereignty. However, the rule of State immunity these days is faced with substantial exceptions not just in France but also in many countries in both civil and common-law

²¹¹ Bernard Schwartz and Arthur T Vanderbilt, *French Administrative Law And The Common-Law World* (The Lawbook Exchange 2015) 45-50

legal systems, particularly with widespread international trade and multinational companies.²¹² In arbitration, state immunity can be manifested in issues of immunity from jurisdiction and immunity from the execution of arbitral awards. Nonetheless, the exist of state immunity in administrative contracts might be understandable in same cases where the national interests are so obvious such as in cases related to natural resources, especially that the applicable law to the arbitratable conflict might not be the national law.

Some legal scholars attribute the reason behind the prohibition of arbitration is because the recourse to arbitration in administrative contracts is contrary to the principle of separation of powers. This argument is based on the fact that recourse to arbitration by national public entities isolated the judicial authorities from the exercise of its essential functions. This interference by the executive authorities in the judicial authorities' job violates the principle of separation of powers.²¹³ Particularly, the principle of separation of powers is very much applied in French legal system.²¹⁴

Additionally, parties autonomy principle is uncertain in administrative contracts. The Government's autonomy to arbitrate governed but different rules applied by national law which is totally different from individuals. As a result french legislatures and in many other countries prefer the national litigation to deal with administrative conflicts.

²¹² Hazel Fox, CMG QC and Philippa Webb, *The Law of State Immunity (Oxford International Law Library)* (3rd edn, Oxford University Press 2013) 20-23.

²¹³ Samar Salih, 'The The Legislators Point Ot View In Regards To Resorting To Arbitration In Administrative Contracts' (2011) 23 arabic conference.

²¹⁴ Michel Despax, Jacques Rojot and Jean-Pierre Laborde, *Labour Law In France* (Kluwer Law International 2011) 26-29

In spite of separation of powers, state sovereignty, state autonomy and all other arguments rationalizing the prohibition of arbitration in administrative contracts, french legislators did not totally prevent the use of arbitration these contracts, but they restricted it in some cases to serve their internal and international interests. French legislators believe that it is in the interest of the state not to resort to arbitration in national conflict because this does not serve French public interests in national affairs. However, French legislators have realized that the prohibition of arbitration in administrative contracts will not serve France's industrial or commercial interests in case international parties is involved in the contract, as the French authorities could not obtain the best contracts with foreign experts in case arbitration has been prohibited.

Above discussion highlighted that French legislators when they decided to restrict public entities' capacity to arbitrate, they took into account French economic interests by identifying those interests, and then develop strategies to protect them. That is the reason why they excluded commercial and industrial contracts from the prevention. French legislators, when they restricted public entities' capacity to arbitrate, the decision was not a action to arbitral award rendered against France like the case in Saudi Arabia.

3.4.2.3 ARBITRATION IN ENGLISH ADMINISTRATIVE CONTRACTS

Slightly different from the French legal system, which has a general rule to prohibit arbitration in administrative contracts with some exceptions, the English public entities have the legal capacity to proceed with arbitration. Their capacity is restricted only in case of use or intended use of the property of a State's central bank or other monetary authority for commercial purposes and that property shall not be subject to any process for the enforcement of a judgment or arbitration award. This is also clear in the case of bankruptcy or insolvency. Bankruptcy or insolvency does not affect the ability of a party to proceed with arbitration, but it might raise issues of arbitrability as the third party must be protected.²¹⁵ The legal system in England does not impose restrictions on private legal persons' capacity except in cases where they acted out their registered objects clause; then this would be an *ultra vires* act.²¹⁶ In the *Ashbury Railway Carriage and Iron Co Ltd v Riche* case,²¹⁷ the House of Lords held that the act of the company is void because it was *ultra vires*, because the company's objects clause was to make and sell, or lend on hire. Nonetheless, the directors gave out a loan to build railways in Belgium. This obvious similarity in dealing with immunity between England and France is not a surprise, as both countries are affected by EU trade conventions even though they are applied in different legal systems.

In regard to the principle of state immunity from jurisdiction in England, it is similar to the one applied in France legal system. Art 1 of the State Immunity Act 1978 stated

²¹⁵ Frank-Bernd Weig, *Practitioner's Handbook on International Commercial Arbitration* (Frank-Bernd Weigand ed, 2nd edn, Oxford University Press 2009) 600 – 620

²¹⁶ UK Companies Act 2006 section 31, 39 and 171. (39 -1- The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution. 2- This section has effect subject to section 42 (companies that are charities). (171- Duty to act within powers: A director of a company must—(a) act in accordance with the company's constitution, and(b) only exercise powers for the purposes for which they are conferred.)

²¹⁷ *Iron Co Ltd v Riche* case (1875) LR 7 HL 653 (the objects clause of the company was only to make and sell, railway carriages. The directors tried to build railways in Belgium by giving loan. The court held that the act was *ultra vires* so it is void. The idea of *ultra vires* rules restricted the flexibility of businesses in order to protect shareholders and creditors)

that the State is immune from the jurisdiction of the English courts. However, that does not mean it includes non-enforceability of the arbitral award. As explained above the Act did not mention any obstruction on legal entities to initiate arbitration agreements and one of 10 exceptions provided by the Act is the case of arbitration²¹⁸

Article 9 of the State Immunity Act 1978 has provided that:

‘(1)Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

(2)This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.’

The Act restricts only use or intended use of any property of a State’s central bank or other monetary authority for commercial purposes.²¹⁹ Art 13(2)(b) of the Act provides that “the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.”²²⁰

English legislators in terms of arbitration in administrative contracts were more liberal than French legislators. Which is unusual, As the French legal system usually so liberal in regards to enforcing awards set aside in the country of origin and public policy grounds of refusal as will be discussed later in this thesis. However, the reason behind allowing arbitration in the administrative contracts in English law more likely

²¹⁸ Article 2 -11 State Immunity Act 1978.

²¹⁹ State Immunity Act 1978, article 14 (4) (Property of a State’s central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.)

²²⁰ State Immunity Act 1978, article 13 (2, (b) (the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale)

because the English legal system did not distinguish between administrative contracts and other civil or commercial contracts; contrasting the French legal system, which has specified special litigation just one administrator matters.²²¹

3.4.2.4 ARBITRATION IN SAUDI ADMINISTRATIVE CONTRACTS

In Saudi Arabia, the 2012 Act has prevented public entities from subjecting themselves to arbitration. It provides that an agreement to arbitrate shall not be valid unless it comes from individual or entity that is empowered to dispose of his rights, whether he is a natural person, his representative or a juristic person. Whereas, governmental agencies shall not initiate an arbitration agreement except after obtaining the consent of the President of the Council of Ministers, unless otherwise permitted by a legal enactment.²²²

In contrast to defining the capacity of an individual, which might not raise many difficulties, as all relevant rules are located in the local act, defining the capacity of public entities is a more complicated issue.²²³ The Saudi legal system considers the

²²¹ Bernard Schwartz and Arthur T Vanderbilt, *French Administrative Law And The Common-Law World* (The Lawbook Exchange 2015) 45-50

²²² See Saudi Arbitration Act 2012, Article 10 (10th Article: 1- It is valid to agree on arbitration only for those who have the disposition of their rights whether a natural person - or his representative - or a legal person.2- It is not permissible for governmental authorities to agree on arbitration only after the approval of the Prime Minister, unless there is a text of the special laws that allows it).

²²³ See *Aramco award*, 27 ILR 11(1963), For more information about the effect of that case on Saudi public policy, see chapter two.

judicial capacity of public entities; they have the capacity to sue and be sued. Saudi legal system has established the Board of Grievances, as an independent administrative judicial system to serve public entities conflicts.²²⁴ However, their capacity is restricted in some cases such as in signing an arbitration agreement. The 2012 Act reduplicates similar provisions contained in the Arbitration Act 1983,²²⁵ which provided that public entities shall not agree to arbitrate without the permission of the President of the Council of Ministers, unless otherwise permitted by a legal enactment.²²⁶ It is more likely that the reason behind this ban in subjecting to arbitration comes from the unexpected arbitral award against the Saudi government in the Saudi Arabia vs. Aramco (1963) case.²²⁷

The impact of the ambiguity on the relationship between Shari'a and the Saudi positive law in Aramco case has been discussed in the chapter two, and it has been clarified that the award will not be against Saudi Arabia if Saudi legislators had sufficient legal background. Aramco case has been followed by a decision to restrict public entities capacity to go into arbitration agreement, which is irrational and has negative effects on the national economy, as explained. However, Saudi courts could have applied this decision in a way that would serve the interests of the country if there were clear legal principles followed by Saudi judges.

²²⁴ Special court in Saudi legal system, to deal with administrative disputes between individuals and public entities.

²²⁵ See appendix 3 for the Saudi Arbitration Act 1983.

²²⁶ See Saudi Arbitration Act 2012, Article 10 (1- It is valid to agree on arbitration only for those who have the disposition of their rights whether a natural person - or his representative - or a legal person.2- It is not permissible for governmental authorities to agree on arbitration only after the approval of the Prime Minister, unless there is a text of the special laws that allows it).

²²⁷ An arbitration case law between State of Saudi Arabia and the Standard Oil Company of California, related to the Interpretation of a concession agreement made in May 29, 1933. Saudi as losing party in the arbitration believed the arbitral award was so inequitable and that lead to many consequences in the arbitration law in general in Saudi Arabia, one of those consequences is banding Saudi entities to initiate arbitration agreements

As long as Saudi government bodies do not have the legal capacity recourse to arbitration, Saudi courts have the right; under the Convention, to refuse the enforcement of international arbitral award under the ground of capacity, as long as one of the parties of the agreement according to the applicable law was under some incapacity, but the Saudi courts deal with this issue differently.

In *OGIM BV v King Abdul-Aziz University* case,²²⁸ Ogym BV the Dutch company went into a contract with King AbdulAziz University; which is public entity, to design and build some facilities that cost about \$300,3895,2. The contract included an arbitration clause, so when the dispute arises between the parties, they agreed to initiate arbitration procedures. The tribunal held that King Abdulaziz University has to pay OGIM around \$207,444,053 as a compensation, to release the bank guarantees provided by Ogim which is about \$5,874,767 and to submit to the Saudi Ministry of Finance a request to exempt Ogim from the delay fines. Ogim sought an enforcement of the award before the Board of Grievances. The University has argued that it was under incapacity when it has signed the agreement with Ogim, because it is a public body and has no permission from the Council of Ministers to go into that agreement. Board of Grievances court has dismissed the University claim and decided to enforce the arbitral award without justifying why they ignored the University argument to apply capacity ground of refusal in the convention in this case. The court held that it decides to enforce the award according to the Islamic principle “*Muslims Must Execution Their Contract*”.

²²⁸ Case number 235/H2/1416/T

There is no doubt that everyone under the Saudi jurisdiction is obligated by his or her contract regardless to his or her religion. In that case Ogim did not have a background about Saudi national law and that public bodies capacities are restricted in regard to arbitration. Nonetheless, this cannot be a logical or legitimate reason why the court did not use the Convention grounds of refusal inline with the notion of the Convention to protect countries national interest and their willing not to resolve their conflicts by arbitration in administrative contracts. The court did not raise the issue of the international public policy in order to protect the foreign party who is not familiar with Saudi law like in *King Nam v. Saudi Medical Center*²²⁹; which will be explained later in this thesis, but rather attributed its ruling to Islamic principles.

Saudi legal system in regard to capacity of public entities to arbitrate is different from the English and French legal systems in some aspects. The reason behind the differences is the ambiguity of the relationship between Sharia and the positive law. Sharia applies a variety of principles different from those applied in many legal systems in the world, especially in England and France. These principles may be logical in many cases such as “*Muslims Must Execution Their Contract*”. However, because these principles are not widely applied; and some times they have been applied against the country interest, they give the country a special nature that might in many cases deprive the county of foreign investments because of its judicial system lack of clarity. This case strongly supports Assadan theory that has been explained in chapter one. He believes that the problem of the judicial system in Saudi Arabia is the

²²⁹ *King Nam v. Saudi Medical Center* (1998) Board of Grievances, case number 159/1/Q, decision number 44/T/3

result of the lack of knowledge of the Saudi judges on basic legal and judicial principles.

3.4.3 CAPACITY OF INSOLVENT LEGAL PERSON TO ARBITRATE

Insolvency is an application that might have been applied by the directors of a company for a composition in satisfaction of its debts or a scheme of arrangement of its affairs from here on referred to, in either case, as a voluntary arrangement.²³⁰ It is a very similar legal procedure of bankruptcy; except that it deals with insolvency of another types of legal personality. As set out above, insolvency is a kind of dispute resolving system dealing with companies and proceedings for the collection and distribution of the assets of a debtor in financial difficulties for the benefit of all creditors involved in such a situation.

3.4.4 INSOLVENCY IN THE ENGLISH AND FRENCH LEGAL SYSTEMS

Under English law, the contractual freedom of insolvent party's capacity is restricted from the signing an arbitration agreement or to continue arbitration proceedings in order to protect creditors rights.²³¹ According to the English Insolvency Act 1986, an

²³⁰ UK Insolvency Act 1986, Art 1 (1): he directors of a company (other than one which is in administration or being wound up) may make a proposal under this Part to the company and to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs (from here on referred to, in either case, as a "voluntary arrangement"). See also, Royston Miles Goode and Robert Stevens, *Goode on Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) 9 – 20.

²³¹ Jean-François Poudret and Sébastien Besson, *Comparative Law Of International Arbitration* (1st edn, Sweet & Maxwell 2007) 360- 363

arbitration agreement held before bankruptcy or insolvency will not be respected without the trustees' consent.²³² However, this does not mean that there is absolutely no arbitration in disputes involving a insolvent party. The English insolvency Act 1986,²³³ gives an administrator the power to deal with the insolvent private person issues, including arbitration proceedings because they involve dispute where the rights of a third party is affected.²³⁴ Arbitration proceedings can be pursue by court consent which is a matter of discretion in order to protect the third party.

The English court desire of bring justice and more fairness to creditors in case of insolvency could be clearly seen in *Re Atlantic Computer Systems plc* case. Atlantic has rented some computers from another company. The company lending the computers tried to repossess them after declaration of insolvency, but the administrators refused the lending company claim. The Court of Appeal has tried to balance the rights of the creditors and lending company and held that the computers could not be repossessed directly to the owner. This case the court has used its discretionary power over whether to order payment of such debts as if they are expenses or not.²³⁵

English legislators in order to provide more fairness to creditors they did not just give the court discretion power distribute the potential assets. They have tried to legislate special regulation to resolve disputes arising from insolvency in case the dispute is out the jurisdiction of English courts. In 2006 England adopted the UNCITRAL Model

²³² Section 349A English Insolvency Act 1986.

²³³ Art 5 and 6 of English Insolvency Act 1986

²³⁴ Frank-Bernd Weig, *Practitioner's Handbook on International Commercial Arbitration* (Frank-Bernd Weigand ed, 2nd edn, Oxford University Press 2009) 701

²³⁵ *Atlantic Computer Systems Plc, Re* [1992] Ch. 505

Law on Cross-Border Insolvency (the Model Law) which contains more restrictions on insolvent party's capacity to arbitrate, in order to ensure more equitable distribution in case they were in more than one country. The Cross-Border Insolvency Act 2006 provides rules to govern the way how courts of cooperate in regard to insolvency; it determines the duties of the insolvency administrators, especially if the insolvency extends to more than one country.

In France, the legal rules applied in regard to the capacity of insolvent party are similar to those applied in England. The insolvent party cannot enter into any new arbitration agreement. French Civil Code provides that 'one may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or on controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned'.²³⁶ The Act did not provide an example of these matters in which public policy is concerned. However, in France, provisions including that all persons may make arbitration agreements relating to rights of which they have the free disposal,²³⁷ will not be applied in international arbitration where only international public policy can set a limit to the arbitrability.²³⁸ Whereas, in domestic arbitration the provisions on exclusive jurisdiction may limit an arbitrators' jurisdiction. Finally, it can be said that in French law agreements may be concluded with respect to pure bankruptcy issues in the context of bankruptcy proceedings, but the entering into an agreement is always subject to the authorization of the public authority.

²³⁶ Article 2060 of the French Civil Code: footnote??.

²³⁷ Article 2059 of the French Civil Code : footnote ??.

²³⁸ Ganz vs. SNCFT, 3 Rev. Arb. 478 (1991).

Unlike the English system, in France the arbitration agreement that signed before the declaration of insolvency is binding, it only restricts the capacity of the insolvent party from signing a new arbitration agreement. This point in French law consider part of both the national and international French public policy. In *Jean X vs International Co for Commercial Exchanges* case, the arbitral award has been held against the French insolvent company and it has required to pay compensation to the Egyptian company. The appeal court in France has held that even though the award is against the national public policy because it is contrary to the French bankruptcy law; but still enforceable, because it relates to international award. The Cour de cassation has refused the appeal court decision and held that the tribunal should have limited itself to validating and quantifying the damages sought, considering this as violation of French public policy.

According to Poudret, the reason behind restricting the insolvent party to arbitrate in France is that insolvency proceedings strongly related to the creditors interests. Which make of private nature of arbitration incompatible with the common nature of insolvency.²³⁹ That might be logical, as arbitration is linked to the party autonomy in appointing arbitrators, choosing the place of arbitration and the applicable law in this regard. This is difficult to achieve in insolvency cases because usually there are more than one creditors and do not agree on all these details.

Above discussion shows that both French and English legal systems pay huge efforts to protected the interests of creditors in the insolvency cases. Both have restricted the

²³⁹ Jean-François Poudret and Sébastien Besson, *Comparative Law Of International Arbitration* (1st edn, Sweet & Maxwell 2007) 233-245

insolvent party to initiate arbitration agreement after declaration of insolvency. Which looks logical, because the insolvent party does not have the right to dispose of his or her property. Arbitration is not considered to be entirely prohibited which is reasonable as well , because arbitration involves confidentiality, faster proceedings and cost less than national litigation, and creditors might find these features necessary to resolve their dispute. Nevertheless the decision to sign a new arbitration agreement is in the hands of the administrator or with the permission of the court.

It is important to highlight that the two legal systems were not identical in dealing with arbitration agreements in regard of insolvency. The English legal system considers any arbitration agreement made by the insolvent party to be null and void if it affects the property of the insolvent party even if this agreement precedes the declaration of insolvency. While French legislators recognize the arbitration agreements that signed before the declaration of insolvency. In this regard, it is clear that the English system tried to give the creditors more protection and prevented the disposal of their money even through arbitration agreements held before the declaration of insolvency. However, the French system seems more logical and maintain the stability of the legal duties , especially that the arbitration agreement has been signed during the full capacity of both parties, which might make the nullification of the agreement just because of the insolvency of one of the parties illogical

3.4.5 INSOLVENCY IN THE SAUDI LEGAL SYSTEM

In the case of a private legal person, commercial purposes are not the main concern in terms of capacity to subject itself to arbitration. Under Saudi law, corporations in many cases do not target just economic benefits as provided in some definitions. Private legal person can be defined as legal body that can be single or multinational and capable to receive and raise rights and duties to serve legal, social, economical (socio-economic) or political purposes. The most prevalent kind of private legal persons might be the company, especially in commerce. Art 1 of the Saudi Companies' Act²⁴⁰ has defined a company as a “contract under which two or more persons undertake to participate in an enterprise for profit, by contributing a share in the form of money or work, with a view to dividing any profits (realized) or losses (incurred) as a result of such enterprise.”

There are number of provisions regulate arbitration in case of insolvency, such as in Commercial Court Act 1930, the insolvency Preventive Settlement Act 1996 and arbitration Act 2012.²⁴¹ In these Acts, legislators have restricted the capacity of the insolvent party to make a legal action over all of his or her properties. The Saudi Arbitration Act 2012 has required particular capacity for the parties in order to go into

²⁴⁰ See appendix 5 for the Saudi Companies' Act.

²⁴¹ Article 489 of Saudi Commercial Court Act 1930 and Art 5 of the Saudi Insolvency Preventive Settlement Act 1996, it has been noted that some translated it as the Bankruptcy Preventive Settlement Law, they might consider insolvency and bankruptcy as synonyms

arbitration agreement, which is in addition to the complete active capacity that required in every contract. The Act provides that the parties in arbitration agreement must also have the right to dispose over the property to initiating arbitration agreement.²⁴² Unlike French and English legal systems, Saudi Arbitration 2012 Act do not refer to the possibility signing a new arbitration agreement after the declaration of insolvency. However, that does not mean that signing arbitration agreement is totally prohibited. Saudi insolvency Preventive Settlement Act 1996 provides that after the declaration of insolvency, the insolvent still able to make legal action over his or her property but with the court permission. Therefore, the prohibition of arbitration after the insolvency declaration is unexpected, but requires approval from the court.

It is so obvious that the legal rules in the Saudi legal system which regulate insolvency are not clear, and case law does not provide enough details in this regard. The reason for this is that the Saudi legal system does not obligate legal persons to resort to insolvency under any condition. In Saudi Arabia there is no bankruptcy or insolvency Acts. There is only the Insolvency Preventive Settlement Act 1996, which regulates bankruptcy proceedings in case natural or legal person decided to declare his or her insolvency. Because Saudi Arabia does not obligate legal person to go into insolvency, there is no national case law in this regards. In 2017 the Saudi Minister of Commerce has stated there is absolutely no insolvency procedures has been carried out in the country yet.²⁴³

²⁴² Art 10, Saudi Arbitration Act 2012

²⁴³ Majed Qarob, 'Challenges Facing Insolvency Act In Saudi Arabica (Tahadiyat 'Amam Nizam Alaflas Fi Alsewdy)' [2016] Alarabia network.

It is really understandable why Saudi legal system do not enforce private legal persons to go into insolvency. Many Saudi legal scholars believe it is because the country do not have enough legal practice and experience in this field.²⁴⁴ This argument does not seem to be rational, because the required practice and experience in order to legislate insolvency or bankruptcy Act is more than the experience or knowledge that is required in order to legislate any other commercial Acts. Other legal scholars question the idea of adapting international Act in this regard, arguing that it will not be helpful because the national legal system has strongly linked to the Islamic rules which is not the case in any other legal system.²⁴⁵

The main reason for the nonexistence of bankruptcy or insolvency Acts in Saudi Arabia is more likely because Islamic law has regulated insolvency and set out special rules to govern the distribution of the property of insolvent party. For instance, As sharia gives the creditor the right to take his or her estates from the bankrupt or insolvent if these estates still exist.²⁴⁶ This method is absolutely different from what is applied internationally, which is more likely to be the reason why Saudi legislators are not willing to legislate particular rules to organize the insolvency. Nevertheless, the failure to legislate an insolvency Act in Saudi Arabia because sharia has regulated it differently from international applications, does not seem to be the best solution to the problem. Saudi legislators could have legislate an Act that is fully inline with the sharia, even if it led to a difference in application with what is applied internationally, it would be more reasonable than leaving insolvency unregulated.

²⁴⁴ Majed Qarob, 'Challenges Facing Insolvency Act In Saudi Arabica (Tahadiyat 'Amam Nizam Alafla Fi Alsewdy)' [2016] Alarabia network.

²⁴⁵ Majed Qarob, 'Challenges Facing Insolvency Act In Saudi Arabica (Tahadiyat 'Amam Nizam Alafla Fi Alsewdy)' [2016] Alarabia network.

²⁴⁶ Alhafid Alaskalani, *Bulugh Al-Maram Min Adillat Al-Ahkam* (1st edn, Dar assalam 2004) 265-268

3.5 CONCLUSION:

Through the comparison between the international applications of requirements of legal capacity, with its application in the Saudi legal system under the umbrella of the 1958 New York Convention, has focused on three main issues. All of these issues have affected by the ambiguity of the relation between sharia rules and the positive law in Saudi legal system. The discussion has clearly highlighted the great impact of Saudi judges and legislators misunderstanding of sharia rules on the application of capacity as a ground of refusal.

The first issue is the age of majority the discussion has prove that the reasons behind the lack of clarity regarding to the age of majority in the Saudi legal system is that in shari'a law there is no particular age of majority. The age of majority according to sharia is different from person to person depending on their physical and mental growth according to the Hanbali school of thought,²⁴⁷ which is the closest school to the Saudi legal system.

The second issue has been raised by this chapter is the restrictions of public entities' capacity to arbitrate. The discussion, shows how Islamic rules interpretation and application in Saudi legal system, was the main reason behind the unfair award

²⁴⁷ One of the four orthodox Sunni Islamic schools of jurisprudence, its name cam from the scholar Ahmad ibn Hanbal who lived in Iraq 780–855.

against Saudi Government in *Aramco Vs. Saudi Gov.*²⁴⁸ case. In that case, the arbitral tribunal believed that the Islamic rules did not contain any applicable principles to that kind of conflict. The award in this case has followed by a change on the attitude of Saudi Arabia towards arbitration and a ban imposed by the Saudi authorities over its public entities to resort to arbitration, leaving them without legal capacity to initiate an arbitration agreement or any contract involving an arbitral clause. The ban has a great negative effect on attracting investors or use of international arbitration within the country. Especially, that the public entities in Saudi Arabia usually are the owners of the huge projects invested by international investors who would usually demand more of the freedom of contract. The Saudi legislator believed that international arbitrators in these arbitration tribunals paid no consideration to Islamic values. Arbitrators believed that the law of the mining concession has remained embryonic in Islamic rules and it differs from school to school, and the principles of one school cannot be introduced into another.

The third issue has been discussed in this chapter is the lack of bankruptcy and insolvency Act in Saudi Arabia. The chapter has highlighted the way how the misunderstanding of sharia rules have led to the of legislation in this regard and have weakened this part of the law in Saudi legal system. The chapter shows that the Saudi legal system has adopted Islamic rules without been codified, and because of this arbitrators in many international arbitration cases between the Saudi and international parties have applied their own ad hoc interpretations of Islamic Law. This has significant negative impacts on the development of arbitration in Saudi Arabia.

²⁴⁸ Paul Michael Blyschak, 'Arbitrating Overseas Oil and Gas Disputes: Breaches of Contract Versus Breaches of Treaty' (2010) 27 *Journal of International Arbitration* 579 – 629.

4 CHAPTER FOUR

The

Enforcement of Awards Set Aside By the

Country of Origin

4.1 INTRODUCTION

The 14th session of UNCITRAL held in 1981 has emphasized that the setting aside or annulment of international arbitral awards is a complicated issue to be settled not only by the 1958 New York Convention, but also for the Model Law countries.²⁴⁹ However, the situation is not much better these days. The cause of difficulties regarding the setting aside or annulment of international arbitral awards is the needed balance between the right to review the award in the country of enforcement and the overwhelming desire of arbitration achieving delocalized arbitration. Delocalized arbitration is believed to be more complicated than centralized arbitration. The reason behind its complicated nature is that it raises issues related to the authority, power of state of enforcement and is ambiguous about whether arbitration is legally related to a particular jurisdiction or has its legitimacy from more than one legal order. Regardless of its alleged independency, it is not thought to be independent of any legal order as it still needs to be recognized by the state of enforcement. The Saudi judiciary is known for placing emphasis on the binding effects of an award made in another signatory countries to the New York Convention as well as exercising its discretion under public policy ground. For the purpose of this chapter, in order to improve the unsatisfactory practice of international arbitration in Saudi Arabia, which is the aim of this thesis, we need to understand how the Saudi legal system deals with the New York Convention 1958 and Article V(1)(e), in particular.

²⁴⁹ UNCITRAL, 14th Session, report of the Secretary-General: possible features of a model law on international commercial arbitration, A/CN.9/207 (1981) 91

4.2 THE IMPORTANCE OF ARTICLE V(1)(E) FOR DELOCALIZATION

The New York convention 1958 has provided that

‘Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.’

This article has raised a few issues such as the meaning of ‘has not yet become binding’, ‘has been set aside’ and ‘has been suspended.’

4.2.1 THE AWARD “HAS NOT YET BECOME BINDING”

Instead of “had become final” used in Geneva Convention 1927, the drafters of the New York Convention provided “has not yet become binding”. “had become final” as a term in Art V(1)(e), used to be interpreted by many courts at the time as a requirement of leave for enforcement (exequatur). That interpretation led to the system considered being too cumbersome by the drafters of the New York Convention. They believed it is kind of “double-exequatur” because of the requirement of the leave for enforcement by the state where the award has been issued

in addition to the award recognition in the country of enforcement.²⁵⁰ van der Berg believes that the use of “has not yet become binding” instead of “final” in the New York Convention was the reason why no leave for enforcement in the country of origin is required by the courts interpretation of the New York Convention.²⁵¹

4.2.2 THE AWARD ‘HAS BEEN SET ASIDE’:

As provided in ground (e), the award can be refused if the party against whom the award invoked proved that ‘award has been set aside (annulled, vacated) by a court of the country where the award was made or of the country under its law where the award was made’. The Art did not obligate enforcement states to refuse enforcement of award set aside by the country of origin, it just give them the discretion to refuse. This issue has opened the question of whether a country should enforce an annulled award in the country of origin or refuse it on the ground that the award has no legal order to be based upon. According to Kronke, the idea of the New York Convention drafters is to resolve international business disputes in degree of certainty, and for the award to be recognized and enforced almost anywhere in the world.²⁵² So it is clear that for a better international practice of arbitration, the countries should enforce the international awards even though they were annulled in the seat of arbitration. It is

²⁵⁰ Van den Berg and Albert Jan, ‘The New York Convention of 1958: An Overview’ [2011] The International Congress and Convention Association (ICCA).

²⁵¹ *Ibid.*

²⁵² Herbert Kronke, Patricia Nacimiento and Dirk Otto, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, BV 2010) 3 – 5.

also the aim of the convention drafters to encourage the enforcement of international awards and the rationale behind this Art expression is not to give the state of enforcement the right to reject the award that was annulled in the seat of arbitration but to make the convention more attractive for countries to participate.

4.3 THE RELATION BETWEEN V(1)(E) AND ARTICLE VII :

Article VII clearly demonstrates the drafter's intention to limit the enforcing court's intervention over the finality of an award. It provides that

‘The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.’²⁵³

The main issue that article VII raises is whether at the heart of the tension between respect for international commercial arbitral awards and respect for annulment decisions is the vexed question of whether the New York Convention Article V(1)(e) does, or alternatively should, allow for an award to be enforced notwithstanding annulment.

²⁵³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June, 1958 (the New York Convention), 330 U.N.T.S.38 (1959), Art V(1)(e).

Some countries with civil law traditions like France have a different approach towards the enforcement of international awards. Art VII played an essential role in that conception, as in the *Norsolor v. Pabalk* case,²⁵⁴ Here, the Court held that Art VII of the New York Convention allowed contracting states to enforce international awards based on domestic law, and that article 12 of the New Code of Civil Procedure required the Court of Appeal to determine whether or not French law will refuse the enforcement of the award. According to the judge in the *Norsolor v. Pabalk* case, there is nothing in French domestic law referring to the refusal of an international award even if the county of origin has set it aside.²⁵⁵

4.4 THE DELOCALIZATION THEORY

Delocalized arbitration may be defined as a kind of international arbitration which does not derive from or is not based on a municipal legal order.²⁵⁶ It is independent from any national procedural rules or substantive law of the country of the seat. Accordingly, it means that the enforcing court has the power to decide whether an award is enforceable within its jurisdiction, regardless of the validity of the arbitral award that has been annulled by the court of the seat of arbitration.²⁵⁷ The enforcing court has this kind of power because it gets its legitimacy from the parties' submission

²⁵⁴ *Pabalk Ticaret Limited Sirketi v Norsolor* (1982) 8YB Comm Arb312

²⁵⁵ *Ibid.*

²⁵⁶ Olakunle Olatawura, 'Delocalized Arbitration under the English Arbitration Act 1996: An Evolution or a Revolution', (2003) 30 *Syracuse J. Int'l L. & Com* 49.

²⁵⁷ Renata David, 'Harmonization and Delocalization of International Commercial Arbitration' [2011] *J.Intl.Arb* 445

to its jurisdiction independent from any other legal orders. Nonetheless, the improvement of the practice of arbitration toward delocalized arbitration is different from country to country according to local specificities.

According to Gaillard, the adoption of modern legislation in a number of states that do not have a long judicial tradition favorable to arbitration has opened the door to a more geographically diverse choice of seats of arbitration.²⁵⁸

However, Gaillard attributes that the weakness application of arbitration toward delocalisation in some countries to the absence of a long judicial tradition favorable to arbitration regardless of the updated arbitration Act that they are currently applied. He also adds that it is improbable to see the international commercial players have placed in these countries, so the problem of the absence of a long judicial tradition will last long in some countries. Gaillard's argument was based on his critique over some legal scholars who believed that the decisions in the Norsolor and Hilmarton cases will discourage states who have recently embraced arbitration but were hostile to it until only recently. These legal scholars believed that the failure to obtain international recognition of decisions rendered by the courts of states that have recently embraced arbitration could have the effect of discouraging them from resorting to international arbitration in the future. Gaillard does not share the same view with them and described it as an argument that rests on a questionable premise.

Other legal scholars such as Paulsson, who has been arguing for the theory of delocalization, share a similar view with Gaillard. In 2010, Paulsson came up with a

²⁵⁸ Emmanuel Gaillard, 'The Enforcement of Awards Set aside in the Country of Origin' (1999) 14 ICSID Review 40

further emphasis on the factors of time and practice, which will be sufficient to change the practice of some legal systems towards delocalised arbitration. In order to prove his view, Paulsson relies on the English example towards the enforcement of an international award set aside in the country of origin by comparing what has been observed by Lord Justice Moore-Bick in the *Dallah Real Estate and Tourism Holding Co v Pakistan Ministry of Religious Affairs* case,²⁵⁹ with that provided by Mann.²⁶⁰ The Lord Justice Moore-Bick stated that some English cases, the court gave the judges the discretion to permit enforcement even in the presence of one of the grounds to refuse enforcement under the New York Convention. He also added that it might be necessary one day to consider and enforce international arbitral awards even if it has been set aside by the country of origin.²⁶¹ Paulsson believes that long judicial tradition has improved the arbitral practice in the UK toward delocalized arbitration. He believes that what has been provided by the Lord Justice represents an improvement in comparison with that provided by Mann, who supported the territorial approach toward arbitration, which was subsequently known as Mann's legacy. Mann believed that the only kind of law that could govern transactions involving an international element is the law of the state of enforcement. According to Mann's legacy, the enforcement of an international arbitral award that has been set-aside in the country of origin is nonsense.²⁶² Mann and the Lord Justice provided a completely different opinion regarding delocalized arbitration in different periods of time.

²⁵⁹ Lord J Moore-Bick in *Dallah Real Estate and Tourism Holding Co v Pakistan Ministry of Religious Affairs* [2009] EWCA Civ 755

²⁶⁰ FA Mann, 'Lex Facit Arbitrum' [1967] *International Arbitration Liber Amicorum* for Martin Domke 157.

²⁶¹ Jan Paulsson, 'Arbitration in Three Dimensions' (2011) 60 *ICLQ* 3 & 33-34

²⁶² Jan Paulsson, 'Arbitration in Three Dimensions' (2011) 60 *ICLQ* 3 & 33-34

The Gaillard and Paulsson approach to reaching delocalization that might work in some countries better than others, according to the specificities of every country. In some of these countries, the reality shows much improvement in the practice of international arbitration toward delocalized arbitration over time. By gaining experience of international arbitration, the legal system in these countries has been able to improve itself; and only by practice, the judges were convinced to consider the arbitral award independent from national laws.

Reality also showed that the reason behind the poor practice of international arbitration toward the enforcement of foreign arbitral awards could be the lack of updated arbitration legislation. Some countries have achieved a very significant improvement of practice of international arbitration after adopting a modern arbitration act, and friendly jurisdiction for foreign parties. For example, the use of arbitration in Singapore has improved significantly after the adoption of new Arbitration Act 2012. The number of new cases resolved in the Singapore International Arbitration Centre (SIAC) increased from around 99 cases in 2008 to around 235 cases 2012.²⁶³ It is obvious that many elements contributed in this improvement but it is clear that the main element behind this interesting improvement is the adoption of new Act. How the legal system in Singapore has achieved this improvement might not be a surprise if we have a quick look at the rules of the enforcement of international awards in the Singapore Arbitration Act 2001 and how the 2012 Act provides different rules.

²⁶³ Alvin Yeo and Lim Lee, 'International Bar Association (The Global Voice of the Legal Profession)' (2013) <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=21CE7804-1003-4E5C-965C-7BAE72749128>> accessed 16 November 2015

Article 46 of the 2001 Arbitration Act provided that

“(1) An award made by the arbitral tribunal pursuant to an arbitration agreement may, with leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect. (2) Where leave of the Court is so granted, judgment may be entered in the terms of the award.”

The requirement of enforcement resulted in the law lengthening and slowing the proceeding of arbitration. The Singapore Arbitration Act 2012 provides few grounds to refuse enforcement of international arbitral awards, without the requirement of enforcement leave from the seat of arbitration.²⁶⁴ It is quite obvious that the absence of enforcement leave was an important element behind the huge number of new cases resolved in the (SIAC). As such, the Singapore Arbitration Act 2012 represented a new step toward international arbitration. It has both facilitated and speeded-up the enforcement of international arbitration awards. In comparison with the 2001 Act, the court used to ensure the existence of enforcement leave or rules of justice as well as to the vitality of the arbitration agreement. Under the 2012 Act, in contrast, the court needed only to insure the validity of the agreement, as the parties’ autonomy is the main legal basis that the enforcement claim might rely on. However, the non-requirement of the enforcement leave does not mean that the new act of arbitration or the legal system in Singapore is applying the notion of delocalization. Delocalization does not mean to enforce an award without enforcement leave. Further, it also does not mean to enforce such a award without being reviewed by the enforcing courts. These examples might be considered as relevant concepts to delocalization and move towards a similar aim. The only situation where we can say that such a legal system is

²⁶⁴ Singapore Arbitration Act 2012, Art 6

applying the notion of delocalization is if it occurred when the country of enforcement applied an annulled award in the country of origin, which is not provided for by the Singapore Arbitration Act 2012.

The Saudi Arabian Arbitration Act came into force in 2012, roughly the same time that Singapore issued its own arbitration Act. However, in contrast to Saudi Arabia, Singapore has witnessed a stunning increasing in the number of cases that have been administered by the SIAC. At the time SIAC tripled its administered cases, the Council of Ministers of Saudi Arabia decided to set up an arbitration center in 2014. The Saudi Arbitration Act 2012 and the Enforcement Act 2013 to be discussed later in this chapter, has provided very friendly rules toward international arbitration. According to these provisions, the courts in Saudi Arabia have the right only to review the case to ensure the due process and the consistency of the award with shari'a rules. Courts do not have the right to review the merits of the dispute.

With an arbitration Act introduced in 2012 and time to development its practice of arbitration, Saudi Arabia still struggles with the concept of delocalization. Particularly on the issue of the enforcement of international arbitral awards, the likely cause has been said to be due to the lack of experience among Saudi judges. Even if the arbitration legislation is not relatively new (the first rules of arbitration in Saudi Arabia were provided by the Commercial Court Act 1930), the Saudi Arbitration Act 1983 gathered arbitration rules under one Act and finally the issue of arbitration 2012 Act. However, the practice is not showing a notable improvement; instead, according

to Assadan²⁶⁵, it has taken a step backwards. He believed that the reason behind the poor practice of international arbitration in Saudi Arabia is the education system that the Saudi judges come from. He blames the lack of legal background of Saudi judges. The legal system in Saudi was friendlier to international arbitration in the nineteenth century, more than now, because during that time, judges of the competent authorities were non-Saudi Arabian due to the lack of sufficient Saudi judges' during that time. These judges came from a legal background and might have more understanding towards international arbitration. In Saudi Arabia there is no clear distinction between the shari'a law schools and the school of law, as shari'a is considered as an Islamic law and the main source of legislation as stated by Article 1 of the Basic Law of Saudi Arabia that 'God's Book and the Sunnah of His Prophet' are the country's constitution and Arabic is the official language with the capital at Riyadh." Even though students' graduating from both schools occupy virtually the same jobs, apart from being a judge which is exclusive on graduates of shari'a schools, the curriculums in these schools is totally different.

4.5 ARTICLE V(1)(E), “UNDER THE LAW OF WHICH” THE MISLEADING PHRASE

Article V(1)(e) states that the recognition and enforcement of the award may be refused if “The award has not yet become binding, on the parties, or has been set aside

²⁶⁵ Mohammed Assadan, former judge in Board of Grievances 23:00 (Riyadh, Saudi Arabia, 7th of Dec 2013)

or suspended by a competent authority of the country in which, or under the law of which, that award was made”.²⁶⁶ It elucidates the procedure of identifying the applicable law where an arbitral award has been made in another contracting state. What might be understood from that provisions is that as long as the law governing the award is concerned the convention has provided two possible applicable laws: (1) Under the law of the country where the law has been made, which is understood from the phrase “by a competent authority of the country in which... that award was made”. This is logical, as the convention states that the law of the country where the award was made well connected to its enforcement and whether it should be suspended or not yet become binding on the parties. (2) The applicable law is the law chosen by parties, which is understood from the phrase “or under the law of which, award was made”. However, the phrase “or under the law of which” might be considered as a misleading phrase. According to van Der Berg, this phrase is concerned with the possibility that the parties have agreed on a law applicable to the award, which is different from the law of the place of rendition.²⁶⁷ The issue of that many-sided phrase in this Article exceeded the theoretical level to understand the purpose of the convention behind it to affect the translation of the New York convention 1958 of other official and working languages.

As provided by Article 51 of the Rules of Procedure of the United Nations General Assembly, Arabic is an official language and the working language of the General Assembly, its committees and its subcommittees. Article V(1)(e), in the Arabic

²⁶⁶ New york convention 1958, Art 5 (1) E ,

²⁶⁷ Albert Jan van Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law International 1994) 124 – 130

version of the New York Convention, is different from the one provided by the same Article in the English version. The Arabic version has provides in Article V(1)(e) that “The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which that award was made, or according to the law of that country”. It is really not clear why the Arabic version replaces “or under the law of which, award was made” by “according to the law of that country”. It is not clear either what the Arabic version means by saying “that country”, whether it is referring to the country of the place of rendition or the country where the enforcement has been requested. However, it more likely refers to the country of the place of rendition, because the country where the award has been made is already mentioned at the beginning of the Art. The Arabic version strongly indicated that the only meaning of “or under the law of which,” is the law of forum or the place of arbitration. However, the phrase does not necessarily lead to that meaning as it might refer to the law chosen by the parties. The situation becomes even more complicated as the Arabic version did not provide a method to select the applicable law between the two possibilities. It stated that the applicable law is the law of the country where the award has been made or according to the law of that country. The article did not mentioned phrases such as “failing of such agreement” or “if parties did not agreed otherwise”. It used “or” which means that the two possibilities are the same.

Such differences between the convention copies will lead to different courts applying different interpretations and reaching different judicial decisions regarding one provision of the New York Convention 1958. UNCITRAL is the legal body of the United Nations system in the field of international trade law. It has provided some

translations of the convention in several languages. UNCITRAL provides the copies as authentic translations of the convention,²⁶⁸ but these authentic translations contain similar misperceptions regarding Article V(1)(e).

The UNCITRAL has provided authentic translations of the convention in French, Spanish, Russian and Chinese. The French and Spanish translations were very similar to the original English text. The french translation provided that “autorité compétente du pays dans lequel, ou d'après la loi duquel, la sentence a été rendue” which means the competent authority of the country in which, or under the law of which, that award was made. It is almost identical to the phrases provided in the English version of the convention. The Spanish translation stated that “competente del país en que, o conforme a cuya ley, ha sido dictada esa sentencia”. Again, this has absolutely the same meaning as that provided by the English version. The French version used “ou d'après la loi duquel,” to refer to the English phrase “or under the law of which,” and the Spanish version used “o conforme a cuya ley,” to refer to the same phrase. The French and Spanish translations were able to express an identical meaning of this Article as that used in the English version, and this might be due to the similar background of these three languages.

The situation was different regarding the Russian version of the convention. In the Russian translation the convention provided that “исполнением компетентной

²⁶⁸ About UNCITRAL' <http://www.uncitral.org/uncitral/en/about_us.html> accessed 19 February 2014.

for more information see 'Texts the New York Convention' <<http://www.newyorkconvention.org/new+york+convention+texts>> accessed 16 November 2015.

властью страны, где оно было вынесено, или страны, закон которой применяется.” This means “By a competent authority of the country where it was made, or the country in which the law should be applied. The Russian version has provided similar meaning, because the law of the country, which the parties has agreed on, is in fact the law should be applied on them in this regard, and in case of failing such agreement, the law applicable is the law of the place where the hearing took place.

It has been observed that there are significant differences in the translations of the text of one provision of the convention. In addition to the English language version, these five languages are considered as official and working languages of the General Assembly, its committees and its subcommittees and in all formal documents for the United Nations.²⁶⁹ Some of the copies of these languages are even considered as authentic translations of the convention by Newyorkconvention.org, the official site of the convention. The debate over whether to apply the Arabic or English version of the convention is not merely academic, but goes to the very heart of the New York Convention because it impacts whether such awards can be effectively enforced under the Convention. For example, one possibility could be the scenario that in Saudi Arabia, whose judges are in option to apply the law of Saudi Arabia, according to the (Arabic version) of the convention, or to apply the law of the country where the award was made. If parties now have chosen the English on substantive merits of the dispute, Saudi judges might refuse enforcement if the business involved "Usury" transactions, which is considered as forbidden (Riba) in Islamic economic

²⁶⁹ Rules of procedure of the United Nations General Assembly, Art 51

jurisprudence (Fiqh,)²⁷⁰ in that case it is more likely for the Saudi judges to apply the law of the their country as they are in option and as result refuse the enforcement of an enforceable award according to the English version of the convention. The reason why Saudi judges have the right to apply Saudi law is that the Arabic version of the convention gives this possibility. According to Arabic version, Saudi Arabia has the right to refuse enforcement in case of it has been set aside by the court of the origin or “according to the law of that country” the country which believe to be the country of enforcement.

4.6 APPROACHES TOWARD DELOCALIZED ARBITRATION

Having the arbitration proceedings take place in a particular situs, has many consequences binding on the parties. Those who reject the delocalization process do not understand the purpose of permitting parties to unbind arbitrations from the place of arbitration law. They believe delocalization is just an escape from national jurisdictions and parties to an arbitration not to be bound by any consequences resulting from the place of arbitration particularities. In fact, without national jurisdictions to recognize and enforce awards, the international arbitral system would be useless. In France, delocalized arbitration is relatively well developed in comparison with the rest of the world. In England, there has been a constant improvement, but *Dallah* case 2010,²⁷¹ was a frustration for delocalization of international arbitration supporters in England. In Saudi Arabia, as will be discussed

270 For more information see chapter number ???

271 *Dallah Real Estate and Tourism Holding Co vs. Pakistan Ministry of Religious Affairs* [2009] EWCA Civ 755

later, the legal doctrine “ma bonya ala batil fahwa batil” which means all actions and practices are invalid if they are based on invalid principles,²⁷² is playing the main role and the future of delocalized arbitration is uncertain.

4.6.1 HOW PROBLEMATIC IS THE SAUDI APPROACH TOWARD DELOCALIZATION OF INTERNATIONAL ARBITRATION

Saudi arbitration Act 2012 does not provide any provisions regarding to the enforceability of award set aside in the seat of arbitration. This might be because legislators want to have all the enforcement provisions under one Act, which is enforcement Act 2013. According to Enforcement Act, Saudi legal system does not apply delocalized arbitration. Art (11-III) of the Act requires that the award or judgment must be final according to the law of the seat of the arbitration, which is totally different from the notion of delocalization in France where the seat court decision has no power over the enforcement in France.²⁷³ The Executive Regulations of the Act in Art 10 and 11 have emphasized the same principle related to the finality

²⁷² Board of Grievances decision (1997) No. 11/D/F/2 of 1417 H

²⁷³ French Civil Procedure Code, Art 1526 provides that a challenge to an arbitral award does not automatically result in the suspension of ongoing enforcement proceedings and the suspension of enforcement proceedings must be specifically requested by the challenging party.

of the award in the seat of arbitration and that it is unappeasable by any means in the seat.

The case law in Saudi proves that Saudi court do not recognizing delocalized arbitration. In case ?????vs ????? the seat of arbitration in this a Lebanese company signed a construction contract with a Saudi company to build projects in Saudi Arabia and other countries. The dispute arose between these parties and they initiate arbitration procedures. Tunisia was the country of the seat and the appeal court has set the award aside due to requirements of Due Process. In Saudi Arabia the court of enforcement has rejected the enforcement and required an enforcement leave from the Tunisian court.

4.6.1.1 SIGNS TOWARDS THE APPLICATION OF DELOCALIZED ARBITRATION IN SAUDI

However that does not mean there are no signs towards the application of delocalized arbitration. There are number of issues dealt with in the Enforcement Act 2013 in regard to enforcement, to avoid the mistakes occurred in the previous rules as well as a better application of enforcing arbitral award and enforcement in general, will be discussed below:

1. Under the new Enforcement Act, the enforcement claim is required to be submitted to specialized judges in the Enforcement Circuit; which facilitates

enforcement,²⁷⁴ such design provides more expedient enforcement procedures. This design it to remedy the inappropriate design of the Board of Grievances. The previous rules of Civil Procedure before the Board of Grievances 1989 and the Board of Grievances act did not detail the enforcement of international awards. The Board of Grievances act only mentioned that it is part of the Boards duties to enforce international arbitration awards.²⁷⁵ Instead, it entirely focused on the enforcement of foreign judgments, it is used to dealing with arbitral awards because the Board is an expert.²⁷⁶ However, the recognition and enforcement of foreign awards is more complicated and it caused lengthy and cumbersome procedure before the Board of Grievances. Under the Enforcement Act 2013, the procedure submitted to a specialized judge in the Enforcement Circuit, which mean more convenient producers to enforce international awards and for more expedient.²⁷⁷

2. For quicker and more accurate enforcement producers, Art 2 of the Act authorizes the enforcement Judge not only to enforce but also to monitor the enforcement of the arbitral awards in Saudi Arabia. The Enforcement Judge, by doing so, is required to ensure the consistency of arbitral award with Shari'a rules, unless the law states otherwise. Under previous rules, the legal system used to consider the enforcement of the award as not a discussion of the case merits. In 1993, the Board of Grievances considered the calling of witnesses to prove the accomplishment of his or her obligations according to the award as an independent incident came after the award's rendition but was

²⁷⁴ Enforcement Act 2013, Art 1 stated that “the Chairman and Judges of the Enforcement Circuit, the Enforcement Circuit Judge, or the Judge of the Single Court.”

²⁷⁵ Board of Grievances Act 1989, Art 13

²⁷⁶ Mohammed Assadan, former judge in Board of Grievances (Riyadh, Saudi Arabia, 7th of Dec 2013, see appendix 9

²⁷⁷ Enforcement Act 2013, Art 1 stated that “the Chairman and Judges of the Enforcement Circuit, the Enforcement Circuit Judge, or the Judge of the Single Court.”

not part of the merits of the case.²⁷⁸ By doing so the legislators under the previous rules might aim to avoid the repetition of the enforcement of that foreign arbitral award; in fact, however, it was a reason for lengthening and slowing the proceedings.

3. The Art emphasized on the application of the principles of reciprocity, Article 11 of the new Enforcement Act stipulated that the enforcement of a foreign arbitral award would be applied in accordance with the principles of reciprocity. The enforcement judge must ensure that the principle of reciprocity is applied by both the foreign and the Saudi courts. This might cause some difficulties for the parties who have to prove that the country of origin applying Saudi judicial decision or awards in case of enforcement of Saudi awards in these countries. In 1991, the Board of Grievances refused to enforce an arbitral award issued in France due to the plaintiff failure to prove the existence of reciprocity between Saudi Arabia and France in the implementation of the verdicts with the use of the same principles.²⁷⁹ In a similar case issued by the Sub-Circuit of the Board of Grievances in 2009, the Circuit refused to enforce an arbitral award issued in the United State for the same reason.²⁸⁰

Accordingly, cases such as *Jadawel Intel. v. Emaar property*, where the Board arbitrary reversed the validity of an award is unlikely to happen. In this case, *Jadawel*

²⁷⁸ Board of Grievances Case No 143 / T / 2, 1993

²⁷⁹ Board of Grievances Case No 57 / T / 3, 1991

²⁸⁰ Board of Grievances Case No 102 / T / 4, 2009

claimed US\$1.2 billion based on the breach of an agreement between the parties that included an arbitration clause. According to the claim, the Emaar has formed a partnership with another party. The tribunal dismissed the claim, with the plaintiff ordered to pay the legal cost of the case. However, once the award was submitted to the Board of Grievances for enforcement, the Board reviewed the award as one of its duties according to the 1989 Rules of Civil Procedure to ensure the consistency of awards with shari'a rules. The Board reversed the award and the legal costs awarded to Emaar have been annulled, with Emaar ordered to pay more than US\$250 million of damages. According to the new rules of enforcement, this scenario is unlikely to happen, because Enforcement Act 2013 gives arbitral award the status of a court judgment.

In addition to the important impact of the Enforcement Act on arbitration law in Saudi Arabia, the Enforcement Act 2013 has determined the Saudi approach toward delocalized arbitration. There are three important points based on reciprocity, finality, and non-appealing awards enable us to identify the legislators' view toward delocalized arbitration.

First, the Saudi legal system pays a lot of attention to the principle of reciprocity. Article 11 of the Act, and case law before the issue of this Act, proved the strong belief of Saudi judges on that principle. The President of the Saudi Grievances Board in this regard has stated that in the absence of such agreement between Saudi Arabia and the country of origin, it is the duty of the party who seeks the enforcement to prove the existence of the principle of reciprocity.²⁸¹ In spite of the appropriateness and rationality of obligating a party to do so, this point refers to the kind of approach

²⁸¹ President of the Saudi Grievances Board, Decision No 7 of 8.15, 1985

that the legal system in Saudi Arabia used to apply and that the new Act came to consolidate this approach by applying this principle.

Second, Article 9 of this act has provided that for the foreign arbitral award to be enforceable in Saudi Arabia it has to be final according to the law of the court in the country of origin. By saying according to the law of the court of the country of origin, for some it might be understood as a requirement of an enforcement leave from the country of origin. Third, the award or judgment will not be enforceable as long as the parties of the dispute still have the opportunity to appeal, which is another way for the legislators to make sure that the award is final in the country of origin.

4.6.1.2 MISGUIDED PROVISIONS OF ENFORCING INTERNATIONAL ARBITRAL AWARDS

As it has been mentioned above that provisions control the enforceability of the award that set aside in the country of origin. Art 10 of enforcement Act 2013 has required finality for the award in the country of origin in order to be enforceable in Saudi Arabia. The Act did not require the enforceability of the award in the country of origin; and the legislators' purpose regarding to requiring the finality of the award in the seat is more likely to guarantee the due process and ensure that the parties have an equal treatment and ability to present the case. This requirement applies by almost all legal systems affected by UNCITRAL Model Law.²⁸² Accordingly, if the award set aside in the country of origin and both parties had the opportunity to present the case, the award should be enforceable in Saudi Arabia regardless of the court of origin annulment of

²⁸² Model Law, Art 34(2) has summarized the grounds of refusal or setting aside of award and many legal systems almost applying a similar grounds

the award after becoming final. This argument might be correct, as been a final not necessarily mean enforceable.

However, this is not the way how Saudi courts have interpreted the Art 10, as seen in case *??v. ??* . Such an interpretation will correspond with the changes to the refusal grounds suggested by van den Berg in the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards 2008 (the Miami Draft). In the Draft, he gave a suggestion of new format in ground of refusal. In regard to ground (e) which is the subject of this chapter, he replaced the terms “not yet become binding”, “has been set aside”, “suspended by a competent authority” by using “subject to appeal on the merits”. Ground (f) of refusal in Miami dolphins draft 2008, which suggested replacing ground (e) of the New York Convention 1958, stated that “the award is subject to appeal on the merits before an arbitral appeal tribunal or a court in the country where the award was made”. Ground (f) of refusal in the Miami Draft 2008 provides more flexible terms in comparison with Ground (e) and the reason behind this suggestion is obvious. Berg intended to say that as long as the international award became final in the country of origin and both parties have the opportunity to present the case in a fair way. The Miami Draft 2008 supports its application in the country of enforcement, regardless of the opinion of the court in the country of origin.

Consequently, it may not be difficult for Saudi Arabia to adopt the approaches taken by the Miami Draft as the Enforcement Act 2013 can be interpreted similarly. However, it might be hard to say that the judges in Saudi Arabia will enforce annulled

award in the country of origin. However, Saudi courts do not rely of the Act 10 to refuse enforcement. They refuse the enforcement because of the conservative approach by such an effect of the Islamic background.

According to Alahdab; delocalized arbitration is not the best way to improve arbitration practice in Saudi Arabia²⁸³. He argued that the supervision over arbitral award should not be carried out only by the country of enforcement; but by the seat as well, because the parties in the arbitration need the supporting role of the court of the country of origin.²⁸⁴ Alahdab; who does not support the delocalized arbitration and believe that delocalization it does not neither serve the interest of the parties to arbitration nor improve the practice of arbitration in the country, supported his argument with the Belgium example of applying delocalization. Delocalized arbitration used to be applied in Belgium since 1985 but has been changed in 1998.²⁸⁵ In 1985 Belgium decided to prevent the court intervention in any arbitral award in case the parties are international and they have no business in Belgium. Since it has applied the delocalized arbitration the number of arbitrations held in Belgium has significantly decreased. As a result, Belgium has amended its law. According to Moses, the reason for the reluctance of the parties to arbitrate in Belgium was their desire for a limited court intervention to ensure the due process.²⁸⁶

²⁸³ Abduhamid Alahdab, 'New York Convention Between The Country Of The Seat And Enforcement (Aitifaqiat Niuyurk Bayn Qadii Baladay Almansha Waltanfidh)' (2001) 13916. 13

²⁸⁴ Abduhamid Alahdab, 'New York Convention Between The Country Of The Seat And Enforcement (Aitifaqiat Niuyurk Bayn Qadii Baladay Almansha Waltanfidh)' (2001) 13916. 13

²⁸⁵ Margaret L Moses, *The Principles And Practice Of International Commercial Arbitration* (Cambridge University Press 2017) 65-66

²⁸⁶ Margaret L Moses, *The Principles And Practice Of International Commercial Arbitration* (Cambridge University Press 2017) 65-66

The Belgium example provided by Alahdab indicates that adapting delocalized arbitration might not be the best remedy to increase the number of potential arbitration cases that might held in the country. This might be a good example for the countries that want to develop its arbitration center reputation, or to invest in arbitration procedures. However, increasing the number of arbitration cases is not Saudi legislators current focus of attention; the legislators current concern is to facilitate arbitral award enforcement in order to attract international investors.²⁸⁷ In this regard, Alkoderi has supported delocalization and appointed three reasons why it is important facilitate arbitral award enforcement in Saudi Arabia. First, facilitating enforcement of international arbitral awards ensure fair treatment to he parties of the conflict, which is one of the sharia main purposes. Secondly, to increase the international community trust in the Saudi judicial system. Third, is that facilitating the enforcement of international awards, will increase international investors in Saudi Arabia and support the national economy.²⁸⁸

In this regard it is important to highlight the new French approach towards finality of arbitral award in the French Arbitration Act 2011. It applies a liberal approach in regards to the finality of the award. Act 1522 of the Act provides that the parties; whether French or international and at any time, are able to wave their right to bring an action to set aside. The French legislators have added this Art, in order to speed up the process of enforcement and to give more respect to the parties' autonomy by restricted the court intervention in this regard. Art 1484 of the Act provides that "As soon as it is made, an arbitral award shall be res judicata with regard to the claims

²⁸⁷ In chapter 3 more information has been provided regarding to how arbitration in saudi has affected the national economy

²⁸⁸ Abdullah Alkoderi, *Enforcement Of International Arbitral Award In Saudi Arabia* (1st edn, SADR 2016).

adjudicated in that award”. Which means that awards are binding as soon as they are rendered. Similar approach has been taken regarding to international awards by French legislators. Art 1518 of the Act provides that “The only means of recourse against an award made in France in an international arbitration is an action to set aside”. Which means that in international arbitration, the award cannot be set aside except by annulment proceedings,²⁸⁹ which free the enforcement from suspension by neither an action to set aside an award nor an appeal against the enforcement.²⁹⁰

4.7 THE EMPLOYMENT OF THE “MA BONYA ALA BATIL FAHWA BATIL” PRINCIPLE

The legal system in Saudi Arabia is based mainly on shari’a rules. One of the main Islamic legal doctrines applied by Saudi court is “ma bonya ala batil fahwa batil” which means all actions and practices are invalid if they are based on invalid principles.²⁹¹ This Islamic legal doctrine is usually used to revoke any results of actions contrary to shari’a law, because what does not consist with shari’a law is invalid under Islamic law. Hence, that which is based on an invalid action or principle will be considered invalid as well. For example, divorce after marriage will not have effect if the marriage contract was invalid, because there can be no divorce without marriage and if the marriage is invalid then there is no divorce because the marriage basically did not exist.

²⁸⁹ Niek Peters, *The Fundamentals Of International Commercial Arbitration* (1st edn, Maklu 2017) 254-257

²⁹⁰ Art 1526, French Arbitration Act 2011

²⁹¹ Board of Grievances decision (1997) No. 11/D/F/2 of 1417 H

This legal doctrine is very logical and is expected to be applied not only in Saudi Arabia but also by many legal systems. Some legal scholars such as Schmitthoff believe that this legal doctrine is not considered by English courts and other Anglo-Saxon legal systems based on the English common law, such as Australia, India and Pakistan.²⁹² Such a rule was set with an intention to protect a third party, who gets involved or affected by the result of an invalid contract. If such a legal system allows the enforcement of such an award that has annulled in the country of origin that does not necessarily mean that this legal doctrine is not applied. Paulsson has provided what he called the pluralistic thesis in order to recognize and enforce arbitral award set aside in the country of origin.²⁹³ The legal order that enforcement can be based on is not necessarily be the leave of enforcement from the country of origin. So-called ‘delocalised awards’ are not thought to be independent of any legal order and also do not owe their life to the law of the place of arbitration. The New York convention 1958 did not require the leave of enforcement from the country of origin. So, it might be understandable that such an award needs to be based on such legal order in order to be enforced but that the legal order is not required in order to enforce the award. Because this legal doctrine strongly related to unenforceability of an arbitration award, it must be argued in the beginning of the enforcement procedure, which might be one of the legal bases for denying enforcement of international award set aside in the country of the seat. Currently, though the Saudi Arbitration Act 2012 does not required the leave of enforcement from the country of origin to enforce award in Saudi Arabia, nevertheless, if the award has been annulled in the seat of arbitration,

²⁹² Clive Schmitthoff, *Defective Arbitration Clauses, Nternational Commercial Arbitration* (OCEANA 1975) 290 – 295

²⁹³ Jan Paulsson, ‘Arbitration in Three Dimensions’ (2011) 60 ICLQ

question related to unenforceability of awards can still arise.

4.7.1 IS SAUDI ARABIA APPLYING THE “MA BONYA ALA BATIL FAHWA BATIL” PRINCIPLE

Art 21 of Saudi Arbitration Act 2012 has emphasized that the arbitral clause will remain valid even if the main contract is considered as invalid. The clause has its legitimacy from the main contract. It is obvious that the court will not recognize the clause if the reason behind the invalidity of such a contract relates to the proof issues. However, if the reason of invalidity was the subject matter, the clause will remain valid. This Art proves that Saudi legislators are committed to this principle even though it is an Islamic principle and sharia is the main source of Saudi legal system.

Moreover, there are no clear evidences to prove the existence of this principle before 2012. Arbitration Act 1983, considered unfriendly to arbitration and made arbitration in Saudi just an extra stage of litigation. So there was not reach history of arbitration case law that can be relied on in order to answer the question whether “Ma Bonya Ala Batil Fahwa Batil” principle did existence before 2012 or not. Act 1983 did not provide any provision in regard to enforcement of set aside award. The reason behind is more likely because the idea of delocalization was not a new legal approach yet, and not because that Saudi legislators used to accept the delocalization of

international commercial arbitration as has been explained in chapter two of this thesis.

4.7.1.1 PERSONAL POINT OF VIEW ON DELOCALIZATION IN SAUDI ARABIA

Before giving particular point of view on how the legal system in Saudi Arabia applied the notion of delocalized arbitration the research wishes to review a simple and very important question asked by Paulsson in 1983. Paulsson wondered: if an award has been set aside in the country of origin, will this justify the annulment of that award in the country of potential enforcement Why the country of enforcement do not consider that the annulment is properly deemed to be limited to country of origin? Why such country cannot use the argument that its own law does not consider the annulment of arbitral award in the country of origin as one of the grounds of refusal, which is supported by Article VII of the New York Convention.²⁹⁴ Paulsson asked this question in 1983 as part of legal review to the *Berardi v. Clair*²⁹⁵ case in 1982. Those who would support a state's enforcement right to refuse award if it has been set aside in the country of origin, rely on the countries right to protect parties from their own folly. Paulsson has questioned their desire to protect the potential future victims of failure of due process and suggested the possibility of their desire to protect professional prerogatives.

Countries like Saudi Arabia are considered to apply a conservative view on

²⁹⁴ JAN PAULSSON, 'Delocalisation of International Commercial Arbitration: When and Why It Matters' (1983) 32 *International and Comparative Law Quarterly* 53, 59 – 63.

²⁹⁵ *Clair v. Berardi* (1981) REV.ARB 424

arbitration. As such, it is expected that such countries will apply stricter rules on the enforcement of international arbitral awards. Accordingly, the country in this situation should not pay too much attention to procedural rules to enforce awards in other legal system, as long as it considers such international notion to fulfill the justice and legal standards to be enforced in the country. If it is really that the legal system in Saudi would pay attention to the legal status of the award in the country of origin, why the system in Saudi has applied this approach will be answered by a detailed examination of the Saudi Enforcement Act 2013.

Saudi Arabia is currently going through major legislative and regulatory reform. The new Enforcement Act appears to be a qualitative change of the enforcement of arbitration in Saudi Arabia. The New Enforcement Law of Saudi Arabia came into effect in March 2013 by virtue of Royal Decree No. M/53.²⁹⁶ Enforcement Act 2013 plays a significant role in the matters of enforcement of arbitral awards because it replaced the relevant provisions of the 1989 Rules of Civil Procedure before the Board of Grievances. The new Enforcement act is consistent with the approach of the Arbitration Act 2012 as both adopted the view that international arbitration awards do not need confirmation by local courts. Such a view is consistent with the Hanbali legal school of thought, believed to be applied in Saudi Arabia, considers that an award has the power of a court judgment.²⁹⁷

²⁹⁶ Saudi Arabia's new Enforcement Law was issued through Royal Decree No. M/53 of 13 Sha'ban 1433 Hejra corresponding to July 3, 2012 Gregorian calendar.

²⁹⁷ Samir Saleh, *Commercial Arbitration in the Arab Middle East: Shari'a, Syria, Lebanon, and Egypt* (2nd edn, Hart Publishing UK 2006) 66 – 71

The process of decolonization is relatively new and has been clearly implemented only in the 1980s in France, then in the United States.²⁹⁸ Some legal scholars who stand against digitization argued that in order to enforce the arbitration award it has to rely on legal order.²⁹⁹ According to them, if the award has been set aside in the seat of arbitration, there is no logic behind enforcing by the country of enforcement. Legal systems which are not applying digitization; including Saudi Arabia, they did not succeed in dismantling the link between the country of the seat and the legitimacy of its enforcement in country of enforcement. According to Warren, the reason behind the important role of the seat of arbitration in the countries where digitization is not applied, because it will normally determine the applicable to the arbitration as well as the involvement or intervention of the court of the seat.³⁰⁰ So in case the award has been set a side in a country that the parties have chosen to be the seat, the unenforceability of the award is justifiable in the other countries.

However, still not a logical reason for not the non enforcement of set aside award by the seat, since the seat is part of the arbitration elements just because arbitration process must have a seat in such a country. Giving the seat the power to control the enforceability of the award in the country of enforcement will increase the supervision over international awards, which they already have it by the court of enforcement. Especially that in some countries arbitral award can be set aside for an reasonable causes,³⁰¹ the previous Saudi arbitration Act 1983 was a good example in this regard. It used to set a side the award in case one of the parties was not happy with the award,

²⁹⁸ See *Chromalloy v Egypt* case in US and *Berardi v. Clair* case in France, both will be discussed later in this chapter.

²⁹⁹ Jan Paulsson, 'Arbitration in Three Dimensions' (2011) 60 ICLQ

³⁰⁰ Laura Warren, 'The Seat Of Arbitration-Why Is It So Important?' [2011] clydeco.

³⁰¹ Philippe Fouchard and Emmanuel; Savage Gaillard, *Fouchard Gaillard Goldman on International Commercial Arbitration* (E Gaillard and John Savage eds, 1st edn, Kluwer Law International 1999) 954 – 960

and used to required particular religion and gender of the arbitrators , as discussed in chapter two.

As has been mentioned above the Saudi legislators have a great desire to develop arbitration in Saudi Arabia in order to attract investments. This will not be achieved if Saudi Arabia continues to require supervision of arbitration in the seat and other requirements of the Saudi courts. This supervision might set to provide more justice and to ensure the due process but the result is against the parties' interest, as they want a simple and fast mechanism to resolve it.

4.7.2 FRENCH APPROACH TOWARD DELOCALIZED ARBITRATION

The process of the liberal practice of delocalized arbitration in France went through a significant improvement in the 1980s. Before 1983, case law shows that the French legal system used to refuse enforcement of an award if it had been set aside in the country of origin. In 1983 *Berardi v. Clair*³⁰² case, a award has rendered in Switzerland (Geneva) and France was the potential enforcement country. France refused to enforce it as it had been annulled in Geneva because the arbitrator's decision was "arbitrary". The judge in that case held that the refusal was based on the grounds of V(1)(e) of the New York Convention. For this reason, the judge believed that ground V(1)(e) obligated the enforcement country to refuse the award if it has set

³⁰² *Clair v. Berardi* (1981) REV.ARB 424

aside by competent authorities in the place where it has been rendered. Later, Paulsson has refuted the judgment providing that the refusal was discretionary in that case. According to Paulsson, Art V(1)(e) and the rest of the grounds give the court in the country of enforcement only the discretion to refuse the enforcement. Pursuant to Paulsson's arguments, the priority was to apply article VII of the New York convention, and enforce the award in France as long as there are no rules in the French legal system rejecting the enforcement of a set aside award in the country of origin.

In the late seventies and early eighties of this century, there was a change in the French approach toward enforcement regarding awards annulled in the country of origin. In *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV) 1995*³⁰³, the well-known case among international arbitration specialists, in which the dispute concerned the payment of a commission by OTV, a French corporation to an English party Hilmarton, regarding a contract in Algeria. According to Algerian law, even it is not the place of arbitration (*lex contractus*), the payments to intermediaries in such circumstances is entirely prohibited. The first award rendered in favour of OTV was recognized by the French court. At the same time, Hilmarton attempted to annul the award in Switzerland, and had the award set aside 1990. The Paris Court of Appeal in 1991 noted that in applying Article VII of the New York Convention it cannot refuse the arbitral award unless the national law authorized this. The setting aside of the award in the country of origin is not one of the grounds of refusal provided by domestic French law. In 1992, the Tribunal de Grande instance of Nanterre in France recognized the second award issued by the Swiss Federal Tribunal. The Nanterre decision has been approved by the Versailles Court of Appeal.

³⁰³ *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation OTV* (1995) XX YBCA 663

Accordingly, the French legal system faced two conflicting awards concerning the same dispute between the same parties. The two decisions were reversed by Cour de Cassation putting an end to the uncertainty. Thus, after this decision the French legal system started recognizing the first award, and granting enforcement despite that the second decision was set aside. Accordingly we can understand that the French legal system does not require the finality of the award; whether it has been set aside or proved by court, in order to be applied in France. According to Cuniberti the French court has used Art VII of New York convention; to justify enforcement of award has been set aside in the country of origin, as the French law is more favourable than the NY Convention.³⁰⁴ According to Alvik this present a clear example of the delocalization in France, as a French court did not recognize the enforcement of set aside award in in the country of origin as an infringement to its public policy.³⁰⁵

4.7.3 ENGLISH APPROACH TOWARD DELOCALIZED ARBITRATION

A number of legal scholars consider the English legal system as holding the opposite view towards delocalised arbitration. If the French legal system is open to the delocalisation, the English might be considered as conservative. However, if the comparison is extended to include the view of the Saudi legal system toward

³⁰⁴ Gilles Cuniberti, 'The French Like It Delocalized: Lex Non Facit Arbitrum' [2007] conflict of laws

³⁰⁵ Ivar Alvik, *Contracting With Sovereignty* (Hart Pub 2011) 28

delocalisation of international arbitration, ‘Not liberal enough’ toward arbitration is the most extreme description that can be attributed to the English legal system.

In England, either directly or by designating the applicable law, the law of the seat necessarily governs the arbitration agreement. The law of the seat governs the formation and composition of the arbitral tribunal as well; it also governs the procedure to form the award. The English legal system gives courts the right to oversee the proper functioning of the procedural aspects of the arbitration. In other words, English law requires such legal order for the arbitral award to be based on.³⁰⁶

According to Mann in 1976,³⁰⁷ the English legal scholar and patron of the territorial thesis towards delocalization,³⁰⁸ the enforcement of an annulled award in the seat of arbitration is nonsense. His view is that an annulled award is nothing, and nothing can come from nothing. English law followed the grounds of refusal in contrast to French law, which since 1981 has radically limited the grounds for setting aside or refusing to enforce awards rendered in international matters.

The English 1996 Arbitration Act contains many more potential grounds for refusing the enforcement award than France. According to Art 1502 of New Code of Civil Procedure (NCCP), there are only five grounds of refusing the enforcement including absence of an agreement, irregularity in the constitution of the tribunal, arbitrator’s

³⁰⁶ FA Mann, ‘Lex Facit Arbitrum’ [1967] *International Arbitration Liber Amicorum* for Martin Domke 157, see also Emmanuel Gaillard, ‘The Enforcement of Awards Set aside in the Country of Origin’ (1999) 14 *ICSID Review* 17

³⁰⁷ Martin Domke and Pieter Sanders, *International Arbitration. Liber Amicorum* (the Hague, Martinus Nijhoff 1967) 157 – 161

³⁰⁸ Jan Paulsson, ‘Arbitration in Three Dimensions’ [2010] *ICLQ* 4

decision does not conform to the terms of his reference, the principle of due process has not been complied with, or if the enforcement is contrary to international public policy. According to Fouchard, Art 1502 provided more liberal grounds than Art V in New York Convention.³⁰⁹ In the other hand the list of grounds provided by English law, appears extremely wide and imprecise in compare to the French law.

One of the clear examples of how the English law contains potential ground of refusal is what Art 68 of the Act has provided. Art 68 by giving the national courts the right to challenge the award for serious “irregularity” in the conduct of the proceedings and “ambiguity” that could affect the award, this Art opens the door to different judicial considerations. For instance English judges might use this ground to review the awards and asking why tribunal has decided the way it has, and whether the award contains errors or slips, which absolutely do not consist with the notion of delocalization which is not the case in French legal system. Another example of the potential grounds of refusal is that exist in English legal system which is not in consist with the delocalization theory is Art 68(2)d which gives the English courts to review the tribunal award to make sure that there is no failure by the tribunal to deal with all of the issues put to it. This ground indicate the keenness of the English legislator to achieve the greatest degree of justice while dealing with the enforcement of international arbitral awards; however, this ground does not consist with the spirit of international trade, where parties autonomy is really important. According to Freehills, the reason behind “Serious irregularity” in English Arbitration Act is intended to deal with cases where the tribunal goes so wrong in dealing with the

³⁰⁹ Philippe Fouchard and others, Fouchard Gaillard Goldman On International Commercial Arbitration (CITIC Pub House 2004) 373-375

conflict, so the court intervention is necessarily,³¹⁰ which is not identical to the French legislators point of view. The English Arbitration Act 1996 Section 103(2)(b) provides that “Recognition or enforcement of the award may be refused if the person against whom it is invoked proves... (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made. According to this Art, the English courts will not be able to enforce a foreign arbitral award that has been set aside by a court of the seat.

4.8 CONCLUSION:

The legislators re differentiation in requiring infringe of the Shari'a law opened the door to many possibilities. As it has been observed in comparison between the previous Arbitration Act 1983 and the new one. The provisions of the new Act became more open to the enforcement of foreign arbitral awards, as it gives more opportunity for international award the executive power to be enforced in the country. The elimination compliance with sharia rules requirement by legislators compliance that paragraph might understood as an attempt to give more flexibility to recognize and enforce international awards.

By requiring the existence of the reciprocity principle, leave of the enforcement and for the award to be final, we can see that Saudi legislators did not mention directly not to enforce a set aside award or require an enforcement leave. However, we might be

³¹⁰ Herbert Freehills, 'English Courts Set Aside Award On Grounds Of Serious Irregularity Under Section 68 Of The Arbitration Act 1996' [2015] kluwerarbitration

very close to saying that the legal system in Saudi Arabia is not applying the notion of delocalized arbitration. The legal system pays too much attention to the action of the court in the country of origin and to the procedural rules there. The reason why the legal system in Saudi Arabia has adopted this approach is really not so clear but it was something expected in such a conservative legal system.

5 CHAPTER FIVE

**PUBLIC POLICY GROUND OF REFUSAL UNDER NEW YORK
CONVENTION 1958**

5.1 INTRODUCTION

The consideration of freedom of contract in term of arbitration and other ADR methods are subject to public policy, which has been recognized by the member states of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York Convention". Article V (2) of the convention provides that

“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country”.³¹¹

However, the consideration of the notion of public policy differs from one member state to another. As such, the recognition and enforcement of arbitral awards might be asymmetrical because of reasons of public policy. In Saudi Arabia, public policy is considered as one of the basic controls for all legal actions, judicial decisions and arbitral awards. For some, the norms of public policy in the Saudi legal system became such an excuse to avoid the enforcement of an arbitration foreign award or the application of the law designated as the applicable law in the underlying contract. As a result, it contributed to the inconspicuousness of the rationale behind public policy. Therefore, it is important to know how public policy is interpreted and incorporated in Saudi Arabia, particularly for international parties who assumed to have prior

³¹¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (NYC)

knowledge of Saudi rules and regulations before dealing with its markets. This chapter will explain the definition of public policy, public policy characteristics in the context of arbitration as contract in the Saudi legal system and finally the main principles forming public policy in Saudi Arabia. Such analysis cannot be achieved without exploring the status of arbitration in Shari'a, as it forms the basis of the Saudi legal system, particularly in comparison with other legal systems. This chapter will address different types of public policies applied internationally. Then it will look at the types of public policy applied by Saudi Arabia with reference to public policies applied in France and England.

5.2 THE DEFINITIONS OF PUBLIC POLICY:

Jurists provide many definitions for public policy. In some cases it has been linked to the values and ethics. Lester describes public policy as a projected program of goals, values and practice.³¹² In other cases it is linked to government or public interests as what have been provided by Anderson who defined public policy as the purposive course of action that governments might apply in order to deal with matters of concern.³¹³ Public policy is also defined as the body of principles that underpin the process of legal systems in every country.³¹⁴ Nonetheless, none of these definitions look to be exclusive. Citing the decisions delivered by the former Chief Judge

³¹² James P Lester, Joseph Stewart and LESTER, *Public Policy: An Evolutionary Approach* (Wadsworth Publishing Co 1996) 4 – 6

³¹³ Marc Allen Eisner, Jeff Worsham and Evan J Ringquist, *Contemporary Regulatory Policy (explorations in Public Policy)* (Lynne Rienner Publishers 1999) 4.

³¹⁴ Oshisanya Oshitokunbo, *An Almanac of Contemporary and Convergent Jurisprudential Restatements (ACCJR Compl.): Jurisprudence* (Almanac Foundation 2015) 348.

Benjamin Cardozo of the US Supreme Court Justice and New York Court of Appeals, Handler described public policy as the essence of law, and part of the welfare of society, which encourages judges to decide with the community's interest in mind.³¹⁵ There is no doubt that the definition of public policy by Judge Cardozo is the most comprehensive definition of public policy. His definition is a combination between describing public policy as the protector of community values and justice.

Therefore, public policy is a sociological norm, because it is created and applied by governments according to the citizens' cultures, religions, morals, ethics and interests. It has a very fluid nature and changes from time to time and from one country to another. Public policy has a dynamic nature based on the people's beliefs and mentalities as well as different time periods or places. Such kind of fluid nature was noted in *Renusagar Power Co. v. General Electric Co*³¹⁶ case, the court held the reason underlying the difficulty of defining public policy back to the standards of morality and justice that conceived differently for from case to another in the different legal systems.³¹⁷

Courts of competent jurisdiction can be restricted by the parties' agreement to submit to arbitration, which is based on a parties' autonomy. Nonetheless, in the case of public policy, the court is authorized to invalidate an arbitration contract or refuse recognition and enforcement of an arbitral award, which considered being incompatible with public policy. The invalidity of such an award might occur without

315 Alan B Handler, 'Judging Public policy [2000] Rutgers Law Journal

316 *Renusagar Power Co. Ltd. (India) v. General Electric Co. (USA)* XXV Y.B. COM. ARB. 714 (2000) XX Y.B. COM

317 Gabriel Moens, *International Trade and Business Law Review*: Volume XI (Gabriel Moens and Roger Jones eds, 1st edn, Routledge Cavendish 2008) 40-43

either of the parties' request, and the courts of original jurisdiction have the right to refuse enforcement on the ground of public policy by itself. Courts of competent jurisdiction also has the right to use public policy in order to cover other refusing grounds not provided by the law, such as parties or arbitrator ineligibility.

5.2.1 DEFINITION OF PUBLIC POLICY IN THE FRENCH LEGAL SYSTEM

Articles 2059 and 2060 of the French Civil Code provide the general rules and principles of domestic public policy in France. Art 2059 provides that “All persons may make arbitration agreements relating to rights of which they have the free disposal.” The latter article narrows this principle by laying down a general rule that matters of public policy may not be submitted to arbitration.³¹⁸

However, lack of definition on public policy in French legal system is understandable, because in France sources of public policy come from the social values and public interest. The Court of Appeal of Paris established that social values would be protected by the law even in situations of international character.³¹⁹ What might characterise the sources of public policy in the French legal system is that they are dynamic, and will get developed with the society and public interest development. So what might be considered as part of the social value today might not protected in the future. Further to the lack of definition on public policy, the issue is exacerbated the

³¹⁸ French Civil Code, Art 2059 and 2060

³¹⁹ *Madagascar (ASECNA) v M. N'DOYE Issakha* (1997) 96/84842

blurred boundaries between arbitrability and public policy. Taking previous position taken by France back in 1950s as an example, a court decision pointed out that arbitrability of disputes is not only precluded by the mere fact of prohibition under regulations but also constitutes matters of public policy are applicable in relation to the legal relationships in issue”.³²⁰ By looking at the kind of cases these where the French legislator has prevented recourse to arbitration, Delvolvé listed three kind of cases: (i) Cases where the effect of the court decision will have an impact on the public in general, because these kind of cases required special authorities to deal with them such as the national court.³²¹; (ii) Cases is based on where the judge’s belief that that the dispute is inarbitrable, in order to protect the weaker party to a contract³²²; and (iii) Cases where the judge believes that the court decision well be an infringement of public policy.³²³

The new French Arbitration Act 2011 did not provide a definition of public policy but it has distinguished between domestic and international arbitration. Public policy referred to in Arts 1492 and 1520 of the French Code of Civil Procedure, are the domestic and international public policy. Art 1492 provides that such awards can be challenged if they are contrary to “public policy” which refers to the domestic. Whereas, Art 1520, which relates to international arbitration, specifies that international awards can be challenged if they are contrary to “international public policy”. Art 1504 states that an arbitration is international when “international trade interests are at stake”, which is any cross border economic transaction.

³²⁰ Cass. Com. 28 Nov. 1950, *Tissot*, D. 1951.120, note J. Robert; Paris

³²¹ Jean-Louis Delvolvé and others, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd edn, Sold and distributed in North, Central and South America by Aspen Publishers 2009) 46 – 51.

³²² *Ibid.*

³²³ *Ibid.*

However, the refer to international public policy is not a new phenomenon in french legal system. Since the 1980s, the French legal system has started making differentiations between domestic and international public policy, especially in regard to arbitration.³²⁴ According to van der Berg (1999), one of the main elements to distinguish between domestic and international public policy is their effect on the refusal of international awards.³²⁵ He believes that international public policy defence rarely leads to a refusal of enforcement in comparison to domestic public policy. Van der berg's observation was proven by a judgement delivered by the court of Appeal of Paris, which defined international public policy as "the body of rules and values whose violation the French legal order cannot tolerate even in situations of international character".³²⁶ According to this definition, it seems that the application of international public policy is narrower than domestic, and with regard to arbitration, international public policy usually applies to arbitral awards rendered abroad.

5.2.2 DIVINATION OF PUBLIC POLICY IN THE ENGLISH LEGAL SYSTEM

An attempt was made to define public policy by the English courts as early as 1853. In *Egerton v. Brownlow* case. The UK House of Lords held that public policy is "that

³²⁴ *Ibid.*

³²⁵ Van den Berg, *Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few* in *Arbitration in the Next Decade* (ICC Bulletin - 1999) 86

³²⁶ *Madagascar (ASECNA) v M. N'DOYE Issakha* (1997) 96/84842

principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good".³²⁷ This definition of public policy was basic and so general that it described public policy in all notions from different regards. In other words the House of Lords was inclined to believe that public policy related to the harm of public or public interest. The definition, in other words, did not address the morals, cultural value or occur infringement to national mandatory rules.

Later in this regard, a cautious approach was suggested by the Court of Appeal which emphasized that the idea of public policy must be defined comprehensively with extreme caution. However, it must not be defined exhaustively due to its fluid nature; and public policy must not be used as a ground for refusal under the New York Convention if there was no evidence showing that enforcement of the award would be clearly injurious to the public interest.³²⁸

Unlike the French legal system, the notion of international arbitration and international public policy is not too clear in English legal systems. However, it is hard to say that the international public policy does not exist at all in English law as will be discussed later in this chapter. For instance, in *Westacre Investments Inc v Jugoimport* case,³²⁹ the plaintiffs and the defendants went into consultancy contract with respect to the sale of military equipment in Kuwait, with arbitration clause to arbitrate according to the Arbitration Rules of the International Chamber of Commerce with the arbitration's

³²⁷ *Egerton v. Brownlow* (1853) 4 HLC 1

³²⁸ *Deutsche Schachtbau-und Tiefbohr-Gesellschaft M.B.H. v. Ras Al Khaimah National Oil Co.* [1987] 3 WLR 1023

³²⁹ *Westacre Investments Inc v. Jugoimport* (1999) 2 Lloyd's Rep. 65 (CA)

seat to be in Geneva, and governed by law of Switzerland. The defendants repudiated the agreement claiming that plaintiffs has used bribery and lobbying in order to get the contract directly from the third party. The tribunal made an award in favour of the plaintiffs, claiming that under Swiss law lobbying is not illegal or against the public policy. The plaintiff was granted an ex parte order permitting it to enforce the award in the United Kingdom. The english appeal court rejected the challenges of enforcement and distinguished between International awards domestic.

5.2.3 DIVINATION OF PUBLIC POLICY IN SAUDI LEGAL SYSTEM

Similar to the legal system in France and England, the Saudi legislators did not provide an exhaustive definition of public policy, they left this mission to courts. The lack of clarity on this issue is acute in the cases involving Saudi Arabia with public policy being the most upheld ground for the refusal of arbitral awards. However, due to its legal framework, in the case of the Saudi legal system, it is imperative to approach this issue from the interpretation of the islamic law,³³⁰ which forms the basis of the law f the country.

5.3 THE PRACTICAL APPLICATION OF PUBLIC POLICY AS GROUND OF REFUSAL IN SAUDI ARABIA

³³⁰ Jean Claude Goldsmith, Arnold Ingen-Housz and Gerald H Pointon, *ADR in Business: Practice and Issues across Countries and Cultures* (Sold and distributed in North, Central and South America by Aspen Publishers 2006) 278 – 280.

There are few problems facing the practical publication of public policy in Saudi Arabia. These problems in many cases related to the conservative approach of Saudi legal system. As has been discussed before and this thesis, Saudi Arabia is the kind of country that trying to bush its legal system toward more friendly environment toward enforcing international arbitral award in order to attract more international investors. Saudi legislators are fully aware of this changes and trying to be in line with these changes.³³¹

5.3.1 JUDICIAL PUBLICATION

The first problem facing the practical application of public policy in Saudi Arabia is the lack of judicial publication. Especially that the new Saudi judges have only sharia science background and without legal background as M. Asaddan has provided.³³² Judicial publication will shape the notion of public policy and will clarify the principles of public policy these are applied in Saudi Arabia, not just for parties but judges as well, as Dr. Ashabib has provided.³³³

However, the number of published cases by Saudi Ministry of Justice, still not enough to clarify the principal public policy or to clarify the relation between sharia rules and public policy. Particularly; that Saudi courts do not use term of public policy, instead they use terms such as against Islamic rules or sharia infringement in order to refer to public policy ground.

³³¹ Saudi Vision 2030 is a plan to reduce Saudi Arabia's dependence on oil, diversify its economy, <http://vision2030.gov.sa/en> 2-2-2018

³³² Interview Mohammed Assadan, former judge in Board of Grievances 23:00 (Riyadh, Saudi Arabia, 7th of Dec 2013), see appendix 9, see chapter one for more information in this regard.

³³³ <http://www.alriyadh.com/1500955> 3-3-2017

5.3.2 LACK OF CLARITY OF SHARIA AS A PUBLIC POLICY SOURCE

The second problem facing the practical application of public policy in Saudi Arabia is the lack of clarity of sharia's sources; because the public policy in Saudi Arabia is strongly linked to sharia, which is religion and not a collection legal rules. When we consider sharia as Muslims religion it is really hard to apply its rules or ethics on non-Muslim parties. In these cases courts need what so call Ijtihad,³³⁴ which make dealing with international parties so complicated for saudi judges.

There are many theories trying to explain the sources of public policy in Saudi Arabia. One of these theories is that the public policy in Saudi courts follows the Hanbali School of thought, which is widely applied by Saudi courts. The Hanbali school considered shari'a, in all its sources, including the Quran and Sunna, as the only source of Saudi public policy as long as Saudi deliberated as an Islamic country.³³⁵ Their view comes from Hadith which states the following:

“Muslims must comply with their contractual provisions unless they authorize what is forbidden or forbid what is authorized”

In the Hanbali, this statement is understood as saying that parties have the freedom of contract unless the contract contains what is forbidden by the text of the Quran or

³³⁴ Hans Wehr, *A Dictionary of Modern Written Arabic (The Hans Wehr Dictionary of Modern Written Arabic)* (3rd edn, Spoken Language Services Inc, US 1976) 143 – 150

³³⁵ ‘Abd al-Ḥamīd Aḥḍab, Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries. Third Revised and Expanded Edition* (3rd edn, Sold and distributed in North, Central and South America by Aspen Publishers 2011) 669 – 675.

Sunna.³³⁶ However, in the modern era countries cannot only be ruled by such texts with various explanations and understandings such as shari'a law without taking current Saudi legal structures into consideration. So, it can be said that the authorities are the source for public policy as they have the power to issue the royal orders, particularly that the king or the ruling authority is the highest judicial authority in the country and is the only source of public policy or public interest. Nonetheless, public policy in Saudi Arabia come from both shari'a and authorities at same time, and those sources are complementary to each other in this regard. In order to understand the notion of public policy in Saudi Arabia it is necessary to go through principles.

5.3.3 SHARIA RULES BEFORE ARBITRATION ACT 2012

The 1926 Saudi constitution gave all the power to the king and provided that the King is bound to apply Shari'a.³³⁷ The 1992 Basic Law of Saudi Arabia provided that the legal system in the country must comply with the shari'a or Islamic law as well.³³⁸ Under Shari'a provisions, authorization is the rule and prohibiting considered an

³³⁶ 'Abd al-Ḥamīd Aḥḍab, Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries. Third Revised and Expanded Edition* (3rd edn, Sold and distributed in North, Central and South America by Aspen Publishers 2011) 669 – 675.

³³⁷ 'Abd al-Ḥamīd Aḥḍab, Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries. Third Revised and Expanded Edition* (3rd edn, Sold and distributed in North, Central and South America by Aspen Publishers 2011) 594-600, see also Basic Law of Saudi Arabia, art 1

³³⁸ Basic Law of Saudi Arabia 1992, art 7

exception.³³⁹ As a general rule, every dispute or contract is allowed to be restored to arbitration whether about civil or commercial matters.

In order to determine how shari'a relates to public policy, shari'a sources must be explained. Every Islamic school has its own order to these sources; however, all of the Islamic schools agree that the Quran is the first source of shari'a rules, and Sunna is the second.³⁴⁰ The term Sunna mean the practices and rules understood from the sayings and actions of the Prophet Mohammad, Peace Be Upon Him.³⁴¹ There is another source, which became significantly important nowadays, called the (Ijtihad). It means the making of a decision in shari'a law where the meaning or rationale behind an Islamic provisions by personal effort.³⁴²

5.3.4 HOW (IJTIHAD) AFFECTED ENFORMENT OF AWARDS INCLUDES RIBA OR FEMAIL ARBITRATOR

The meaning of (Ijtihad) differs from country to country. For example, Saudi Arabia and Qatar are both considered as Islamic countries and both apply shari'a law. Nonetheless, the fee paid by a borrower of assets to the owner as a form of

³³⁹ Abd al-Hamīd Ahdab, Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries. Third Revised and Expanded Edition* (3rd edn, Sold and distributed in North, Central and South America by Aspen Publishers 2011) 633

³⁴⁰ Abd al-Wahhab Khallaf, *Islamic Law Primary Sources in the Absence of Text (Maṣadir Al-Tashri' Al-Islami Fi-Ma La Naṣṣa Fih)* (arabic studies institution, Arab League 1955) 132 – 140.

³⁴¹ Ibrahim Warde, *Islamic Finance in the Global Economy* (Edinburgh University Press 2000) 23 – 30

³⁴² Hans Wehr, *A Dictionary of Modern Written Arabic (The Hans Wehr Dictionary of Modern Written Arabic)* (3rd edn, Spoken Language Services Inc, US 1976) 143 – 150

compensation for the use of the assets considered being Riba in Saudi Arabia and ultimately against the public policy, whereas it is allowed in Qatar. Saudi legislators considered interest or Riba as a destroying factor to the economy, which means that it is against the public interest and consequently against shari'a rules. In contrast, the Qatari legislators considered interest as a key factor for the development of the economy. In Saudi Arabia itself, there is a rising argument about whether Riba should be applied to currencies or just to goods, and if prohibiting interest served the public interest or not. Particularly, it is hard to finance investment projects without interest. So the use of Ijtihad as a source of public policy, has led to different results in regard to Riba , according to understanding legislators in Qatar and Saudi Arabia; and this understanding will not remain the same forever as it is flexible, and keeps abreast of the latest developments of public interest.

Before the new approach in Saudi Arabia courts used to strictly prohibit dealing with Riba or enforcing any awards including it. Courts used to dispose the case, in case it included Riba. This was clear in case No Q/3/176 1427 (2007),³⁴³ as one of the parties in a dispute over commercial contract claimed that part of the financial claims included interest. The claimant in this case admitted that the oral contract included Riba and asked for partial enforcement of their sale contract. The court; however, decided to completely dismiss the case. In this case to distribute was over sale contract as the limited number of cases published by Board of Grievances did not involved in any case about refusing international award because of Riba. Nonetheless, it is more likely the courts have dealt with arbitral award in the similar way before Act 2012.

³⁴³ No Q/3/176 1427 in front of Board of Grievances, 2007

5.4 THE ROLE OF SAUDI ARBITRATION ACT 2012 IN REGARDS TO APPLING PUBLIC POLICY

Act 2012 emphasized that any arbitral award have to be in consistent with the public policy and Islamic rules 3 times, and to be in consistent with Islamic rules about 6 times in the Act. So theoretically, that the new law still so huge respect of Islamic rules and still consider sharia as part of the national public policy if not even synonym for public policy. However; when it comes practice, Saudi judges still applying sharia rules but they have relaxed their notion of public policy. For instance, courts started recognizing the partial enforcement of arbitral awards. In 2014, case No Q/1/2638 1436 Saline Water Conversion Corp went into a contract with construction company in order to supply especial equipment. The parties agree to restore their dispute to arbitrator in Saudi Arabia. The award came in favor SWCC and obligate the construction company to pay about 15 millions to SWCC in addition to %5 as interest. The court did not dismiss the case as it used to do before 2012, instead it obligate the company to bay 15 millions to SWCC but without interest.

5.4.1 2012 EFFECT IN REGARDS TO ARBITRATOR GENDER AND RELIGION

Arbitrators are basically the most important component of the arbitration process. Nonetheless, under the 1983 Act, public policy required extensive court interventions that restrict arbitrators' freedom and limit their independence. The 1983 Act provided that the Board must approve the appointment of arbitrators.³⁴⁴ The qualifications of an arbitrator under the 1983 Act require freedom, honesty, intelligence, capacity and extensive background and knowledge in the Shari'a sciences. While these requirements appear reasonable, other are not including the requirement of an arbitrator to be a male and Muslim. Such requirements might even be considered contrary to international public policy as will be discussed later in this chapter. According to the 1983 Act it will be a breach of public policy if the award has issued by female or non-Muslim arbitrators or if one of the tribunal is a non-Muslim or female, which is more likely to be such understanding to the Islamic rules, but has been changed in the new Act 2012. For an arbitrator to be a male Muslim limits parties autonomy if they want to appoint an arbitrator with particular knowledge in such subject, such as finance and banking regardless of gender and religion, where Islamic Science alone is no longer sufficient for the appointment of an arbitrator, as shari'a rules left certain areas of law to the arbitrator's discretion.

With regard to the appointment of arbitrators, the 2012 Act provides more flexible rules. It did not just recognize the arbitral tribunal, which consists of three or more arbitrators, their number must be odd in order to facilitate the issuance of an arbitral award unanimously, but the 2012 Act also changed some of the requirements that used to be part of the domestic public policy or used to be considered as contrary to Islamic rules or to Saudi culture, but that are no longer the case. The 2012 Act gives parties more freedom when it comes to appoint their arbitrators. In order to appoint an

³⁴⁴ Saudi Arbitration Act 1983, Art 5.

arbitrator the new Act does not require a specific gender, religion or nationality. The parties are free to appoint arbitrators from any nationality and any language. It is provided that arbitrators do not have to come from an Islamic background if he or she has a legal background or bachelor degree in law as mentioned previously.³⁴⁵ Those requirements constitute an improvement in comparison with the arbitrator requirements set out in Article 4 of the 1983 Act, which contained points of contention and uncertainty, with regard to the requirements of experience and good reputation. However, it did not provide any further detail relating to the level of experience or the kind of reputation required in order to appoint an arbitrator.

In this regard it is so obvious that the Saudi legislator has changed their interpretation of public policy between the two Acts. It is also clear that the new system has excludes some acts that were considered violation of public policy in the previous Act but not in the new Act. It seems that the understand of sharia' rules is different between 1983 and 2012 specially with the Saudi Arabia need for the foreign investor, who want to be govern by foreign Acts and international principles.

5.4.2 ARBITRATION PROCESS AND AWARD

The 1983 Act restricted the arbitration process to be held in Saudi Arabia and to be carried out in the Arabic language. According to the 2012 Act, parties are free to choose the place and language of arbitration, which gives parties more freedom and

³⁴⁵ Saudi arbitration Act 2012, Art 14.

makes the law more open to international practice.³⁴⁶ Under the new law rules, parties only have to provide an Arabic translation of their award, if required. Clearly this is an easy requirement compared with the rigidity of the 1983 rules.

The 2012 Act emphasizes the binding nature of arbitration and a degree of autonomy has been given to the process outcome. Under the 1983 rules, an arbitral award cannot be enforced without approval from the Board. Nevertheless, the arbitral award is final and binding under the new law, once issued by an arbitrator or tribunal with an enforcement order from court of competent jurisdiction. It is this which will limit the challenges after issuing the award. However, it is still not clear to which extent under the 2012 rules that the competent court will get involved in the arbitration process by requiring its approval of the award in order for it to be enforceable. Under any circumstances, it is clear that the competent court has the relative power to nullify such awards if it was contrary to domestic public policy, which is in line with the New York Convention and the UNCITRAL Model Law.

According to the Saudi Legislator under the 1983 Act it was contrary to public policy to give finality to arbitral award if one of the parties was unhappy with the decision. He or she has the right to resort the dispute to a court of competent jurisdiction for review. This method was usually applied by the losing party in arbitration because he or she has an automatic right of appeal to the Board on points of law or procedure. This made arbitration no more than an extra judicial stage, causing delays and additional cost to parties. The 2012 Act emphasizes that the arbitral award is final once issued. Article 50 of the new law has also stipulated very specific circumstances

³⁴⁶ Jeffrey Waincymer and PIERRON IVONNE, *Procedure and Evidence in International Arbitration* (Sold and distributed in North, Central, and South America by Aspen Publishers 2012) 54 – 55.

for the nullification of the arbitral award, relating to the agreement validity, violation of public policy or of Islamic rules.

It is seems that the rationale behind the Arbitration Act 2012 in Saudi legal system came due to the wide criticism of the 1983 Act in recent years. This led the Shoura Council and the Council of Ministers to speed up the necessary legal reform. The 2012 Act came concurrently with large construction investments after a significant increase in oil prices in 2004, in the country that is considered one the world largest producers of oil.³⁴⁷ It may also be motivated by the economic competition in region of Arabian Gulf where other GCC countries try to play an important economic role by attracting foreign investment. For instance, The United Arab Emirates (UAE) has established the Dubai International Financial Centre with its own domestic legislation and arbitration center (DIFC-LCIA). The UAE is also hosting the Dubai International Arbitration Centre (DIAC), a well-know arbitration center established in 1994.

Like the majority of New York Convention signatory countries, Saudi Arabia reflects a similar approach to the public policy principles provided by the Convention. Saudi arbitration law provides that the enforcement courts have the right to refuse recognition and enforcement of arbitral awards where it violates domestic public policy.³⁴⁸ Saudi Arabia provided that in order to be enforced and recognized by court of enforcement, the award must comply with shari'a law. Though viewed as a conservative measure, this provision is in line with other countries that added special

³⁴⁷ OPEC, Annual Statistical Bulletin 2010 - 2012 edition 27

³⁴⁸ Saudi Arbitration Act 2012, art 55

features to their domestic public policy such as Tunisia, which makes it clear that public policy, understood through private international law.³⁴⁹ In addition, the Supreme Court of Singapore in the *Soh Beng Tee v. Fairmont Development* case provided that awards can be considered an infringement to the natural justice of Singapore if one of the parties has not been given the opportunity to be heard on all relevant matters.³⁵⁰ A similar rule is provided by the arbitration acts in Bermuda and Malta, addition to the case of awards affected by corruption, as provided in the Bermuda³⁵¹ and Malta arbitration acts.³⁵²

From the above discussion we can see that the French and English approach to mandatory rules in public policy, although different, came to the same result. In both legal systems, the legislators welcomed the application of international rules in their territories without infringement of their cultural values or public interest, whether by applying different kinds of public policy as in France or by applying different rules to domestic and international arbitration, as in the English legal system.

In the Saudi approach, we can see that there are differences between the previous and current Arbitration Acts. The previous Act applied only one kind of public policy, and considered the mandatory rules part of the public policy. In contrast, the current Act is more open to international issues. However, the new law still sticks to the term “contrary to the provisions of Islamic Shari”, which gives the judge the power to

349 Tunisia Arbitration Act 1993, Art 81(II)

350 *Soh Beng Tee v Fairmont Development Pte Ltd* [2007] 3 SLR 86

351 Bermuda International. Conciliation and arbitration act 1993, art 27

352 Malta Arbitration Act 1996. Art. 58 (a,b).

decide what is contrary or not contrary to the provisions of the Islamic rules. The term “contrary to the provisions of the Islamic Shari” is not absolutely necessary to be mentioned in the Act, it only gives the judge more power to intervene in the merits of the dispute. This argument does not mean that Saudi Arabia should enforce an arbitral award if it was contrary to Islamic rules, but it does mean that it is not the judges’ role to decide what is contrary to Islamic rules; rather it is the legislator role. The best way to do this is by codifying the Islamic rules as legal rules in Saudi Arabia, so that the judges’ role is limited to deciding what is legal and what is illegal. The reason behind this conclusion is that Islamic rules are so complicated and differ into many schools of thought, as will be discussed later in this chapter.

5.5 IS THE PUBLIC POLICY THE SAME AS SHARIA

Al-Ahdab believed that the concept of public policy consist of two parts.³⁵³ The first is that any legal action must be in line with the general spirit of the Shari’a and its sources. Second, individuals must respect their clauses (contractual duties) unless these clauses includes somethings forbidden Islamicly. According to him, the Sharia’s sources are mainly the Koran (muslim’s holy book) and the Sunna which are the acts and sayings of the Prophet Mohamed³⁵⁴ (peace be upon him), and other different sources according to every school of thought as will be explain later in this chapter.

³⁵³ Jalal El-Ahdab, *General Introduction on Arbitration in Arab Countries*, (Kluwer 1998)12

³⁵⁴ Jalal El-Ahdab, *General Introduction on Arbitration in Arab Countries*, (Kluwer 1998)12

Many legal and islamic scholars have adapted Al-Ahdab definition as the difination of Shari's public policy.³⁵⁵ Nevertheless, this definition tends to be a description of what is forbidden in islam, rather than a definition of public policy. The Koran and Sunnah has detailed what might be infringements to islamic rules, and one infingement of islamic rules occurs when individuals do not respect their contractual duties unless these clauses forbid what is authorized and authorize what is forbidden.

The vagueness of Al-Ahdab's attempt to define the notion of public policy according to the Islamic concepts did not come as a surprise that the discussions on the relationship between mandatory rules and public policy and the French style of considerations of the societal program of goals, values or principles are left out. This is because Islam as a religion adopting many principles and social values in the religious sense but not in a legal sense. Consequently, many Islam ethics and morals principles are incorporated when the courts were given the interpretative tasks. With the courts taking the lead in the interpretation of public policy, the issue is further complicated by the fact that the Saudi legal system does not adopt all the ethics and morals of Islam but chose to base their legislation on it. So even though Art 11 of executive regulations of the enforcement Act 2013 provided directly that Islamic rules are the notion of public policy but because sharia is a religion and because of (ijthad) it is hard to say that the are the same but saudi public policy is the national understanding of Islamic rules.

³⁵⁵ Ahmed M. Almutawa, Problems of Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States and the Prospect of a Uniform GCC Arbitration Law: An Empirical Study, (ssrn 2014) 10 see also Zydi Hamid, Arbitration Under the Islamic Sharia (scribd 2013) see also Audley Sheppard, Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, (International Law Association (ILA) conference 2000) 5

5.6 PRACTICAL PROBLEMS FACING JUDGES IN APPLYING PUBLIC POLICY OR SHARIA

Courts in Saudi Arabia use the public policy as a legal term rather than a legal concept. And in regard to arbitration, public policy is used as a ground to refuse the enforcement of arbitral awards whether domestically or internationally. For example, in case No 92 / T / 2004, the court has decided that for the award in order to be enforceable in Saudi Arabia must consist with the Islamic law, public morals and public policy of Saudi Arabia as well as meet all the contractual duties.³⁵⁶ In this case we can see that the judge has mentioned public policy in addition to the morals and values of the society. However, the judge clearly did not mean that the moral and social values are part of public policy, but that these values are in harmony with public policy.

In comparing these three legal systems we can see that none of them provides a particular definition of public policy, rather having the interpretative tasks to be left with courts. The French and English judges have attempted to define it in a similar way. Both of them linked the notions of public policy to morals and social values. We can say that the French were more detailed in this with the move to differentiate the differences between domestic and international public policy.

³⁵⁶ Case No 92 / T / 2004 Saudi Arabia

However, it is clear that there was a problem in the Saudi approach to the notion of public policy and what Saudi court's meant by using public policy remains unclear. From the above discussion we can note that there are three reasons behind the lack of clarity of the definition of public policy in the Saudi legal system. First, the Saudi legal system adopted Islamic rules in a religious rather than a legal manner. This resulted in a confusion between what might be considered as contrary to Islamic rules, local customs or social values. Second, the Saudi legislators did not codify the Islamic rules in order to distinguish between what are Islamic rules and what is the law. The third is the lack of judicial publication, so even judges provide an inclusive definition of public policy, the bad judicial publication will prevent the adoption of that definition in other Saudi courts.

5.6.1 LACK OF CLARITY IN APPLYING SHARI'A RULES

There are four main Islamic schools of thought³⁵⁷ (Madh'hab) that are applied in Islamic countries. The four Islamic schools of thought consider arbitration as a contract and apply all contract characteristics to arbitration agreements. The four Islamic schools of thought acknowledge arbitration and define it almost identically.

³⁵⁷ They are the Muslim school of law or the legal schools of thought: Hanafi Maliki Shafi'I and Hanbali

They state that it must be a contract between two or more parties in order to appoint an arbitrator in such a conflict.³⁵⁸ Islamic schools of thought, however, have slightly different provisions relating to the recognition and enforcement of an arbitral award. Some of them clearly give arbitral awards the exact power of court decisions, like the Hanbali, Shafee and Maliki Schools. The Hanifi School gives the court the right to intervene and review the case not only for subjective matter but objective as well.³⁵⁹

Saudi Arabia did not officially adopt any of the four schools. In 1920, there was an attempt to codify the Hanbali school of thought, but it faced a heavy rejection by the judges under the pretext of restricting their freedom during that time. Nowadays, it is still not clear which school of thought is applied in the legal system of Saudi Arabia. According to published judicial decisions, many believe that Saudi courts apply the Hanbali Islamic school of thought, because courts decisions usually correspond with the views of the Hanbali school, which is believed to be more conservative than the other schools. However, officially judges are free to apply any of the Islamic schools as long as they can provide an Islamic or a logical argument to prove their point of view. Under these circumstances, the lack of clarity in the adoption of Islamic school of thought has a very negative effect on the definition of public policy in Saudi courts as the four schools of thought differ in their practice of public policy. Malikis and Hanbalis applied public policy more than Shafis and Hanafis do,³⁶⁰ and this lack of clarity led to significant difference in court decisions, relating to similar legal situations. It resulted in a lot of contradictions, instability of the legal situation and a lack of clarity in the Saudi judicial approach.

³⁵⁸ Dr Ahmed Aboulwafa, *Voluntary and Mandatory Arbitration* (3rd edn, 1978) 15 – 19

³⁵⁹ Dr Fatima Alawa, *Arbitration Contract between Law and Shari'a* (1st edn, almagtab aleslami 2002) 229 – 240

³⁶⁰ Adnan Omama, *Renewal in Islamic Thinking (alItajded Fi Al Fekr Aleslami)* (Dar Ibn Aljawzi 2004) 312 – 316

One of clearest examples of lack of clarity in the Saudi judicial approach in terms of public policy is with regard to what happened in the case of King Nam v. Saudi Medical Center.³⁶¹ In this case, the Saudi medical center refused to resort to arbitration after disputes arose from their contract with the Korean company called King Nam Real estate, The contract includes an arbitration clause to resolve any rising conflict at the London Court of International Arbitration (LCIA) in London. The Saudi medical center filed a lawsuit to the court of first instance arguing the invalidity of arbitration clause. The decision made by the court of First Instance was in favor of the Saudi medical center, on the grounds that in such a conflict where one or more of the parties are Muslim, it is breach public policy to have a judge or arbitrator who cannot apply Islamic rules. However, the Appeal Court reversed the decision. The Appeal Court held that the arbitration clause in this contract should not be refused for several reasons. First, that rules made to protect parties from unfair dealing, so in this case where the claimant went to the contract with full awareness of its details and intentionally signed it, should not be protected from been judged under non-Islamic rules. Secondly, not applying Islamic rules as a ground to argue for contract invalidity cannot be applied against King Nam or against the International Chamber of Commerce in London. It can be only applied against the Muslim party that entered into agreement to resort to a foreign arbitration center, because the other party was non-Muslim. The judge also said that if the King Nam Real estate company was the claimant and the Saudi medical center was asking to resort their conflict to a foreign arbitration center, the resorting to arbitration would have been refused because the court has authority over Saudi citizens but not over King Nam Real estate which

³⁶¹ *King Nam v. Saudi Medical Center* (1998) Board of Grievances, case number 159/1/Q, decision number 44/T/3

wants to resort the dispute to the International Chamber of Commerce in London. As result, the Court of Appeal held that even though the enforcement will be in Saudi territory, and one of the parties was Muslim and Saudi citizen, conflict still out of the jurisdiction because of arbitration clause in the contract. In fact the appellant court's ruling over the parties arbitration agreement opens the door to many questions. For instance, will the Saudi courts now, in the absence of the rule legal precedent, uphold the parties' arbitration agreements or any other contracts even if the underling contract contain a breach to shari'a law. Also, to which extent the application of shari'a rules will act as a restriction over the validity of the agreement, regardless what the parties agreed of. In fact the judges view in this particular case might be new understanding of Saudi domestic public policy in order to apply international arbitral awards.

The importance of this case comes from the fact that the judge has violates national mandatory rules in order to achieve more justice to the international party who has been deceived to break mandatory rule in national arbitration act. This case might not indicate the application of international public policy but it shows that there are indications in the Saudi judiciary to apply the international principles of justice, even if they violate Islamic law in way or another, they might also violate mandatory rules in this regard. This case held in 1998, if more attention has been given to this approach by Saudi legislators the saudi arbitration might be so much better than these days and the country might already has created the right legal background to attract investors

5.7 THE ROLE OF SAUDI ARBITRATION ACT 2012 TO HELP JUDGES

APPLYING PUBLIC POLICY IN NATIONAL COURTS

Public policy described as a projected program of goals, values and practice.³⁶² In many cases it is not easy for judges to distinguish these goals and values especially if the relevant Acts do not provide enough details to clarify the legislators aims when they legislated the Act. The new Saudi Arbitration Act has provided a lot of details that will help judges to understand dynamic nature of public policy in the country. The new Act allows many of what used to consider against the national morals values. For instance, it allows the application of other laws to govern arbitration in Saudi Arabia, which means to apply rules different from national mandatory rules. The new Act gives huge respect to parties' autonomy in regards to appointing the arbitrators or choosing the applicable law, which help judges to understand the new approach on dealing with international awards. Both 1983 and 2012 Acts do not provide specific rules in regards to partial enforcement or dismissing the case in case in includes Riba, but courts have dealt different since the new Act come into force, and that probably will not happen if the new law did not contain more relaxed notion toward international awards. The new Act also has opened the door to arbitrate in different languages which means that the country want to attract investors and judges should not used grounds to challenge awards if these ground has not been mentioned directly by the Act or international conventions.

³⁶² James P Lester, Joseph Stewart and LESTER, *Public Policy: An Evolutionary Approach* (Wadsworth Publishing Co 1996) 4

However, most important indication of the new Act on the more relaxed notion of the public policy is the Act gives international awards the enforceability of the national judicial decision, and take the court right to intervene is it used to happen in 1983 Act. This might one day open the door to clearly adapt international public policy or delocalized arbitration in Saudi Arabia.

5.8 THE EXISTENCE OF INTERNATIONAL AND DOMESTIC PUBLIC POLICY IN SAUDI ARABIA

Regarding national terms, domestic public policy is considered as the principles of morality and justice according to the domestic culture, as discussed previously. Rules, which make this type of public policy, are usually found in a country's domestic legislations and customary rules. Saudi legislators started with the basic legal principles that the Saudi legal system applied in the national courts. This was clear in Saudi basic law,³⁶³ which provided that Saudi Arabia is an Islamic state. Similar rules provided by the 2012 Arbitration Act stated that the rules of this Act must comply with Islamic rules and international conventions that have been ratified by the country.

This can be further explained that the Saudi parties should not sign any international agreement if it was contrary to Islamic law, unless the Saudi legislator changes

³⁶³ Basic law of Saudi Arabia, Act 1

considering Islamic rules as an ethical principle rather than a legal principle, such as the way legislators deal with the financial aspects of Islamic rules.

5.8.1.1 INTERNATIONAL PUBLIC POLICY IN SAUDI ARABIA

The other type of public policy in this division is international public policy. Saudi arbitration law considered the parties' freedom to restore their dispute to international arbitration institutions and their procedural rules or restore it to ad hoc international arbitration rules. However, there is confusion about the nature of international public policy, and whether there are differences between international and domestic public policy. In practice, there are some countries that distinguish between international and domestic public policy. Nonetheless, when countries do distinguish between them, international public policy remains an integral component of those countries' legal systems. The rationale behind the absence of international public policy is an understandable thing, because considering only one kind of public policy mean to avoid an oxymoron created by use of the term "international" under "national division" of public policy.

5.8.1.1.1 Signs of applying international public policy in Saudi legal system

The national laws in Saudi Arabia have never mentioned the term international public policy or proved any signs of dealing with Saudi citizens and foreign people in

different ways. However, there are some signs or attempts of applying international public policy in those cases where arbitration has involved international elements on non-Muslim parties. Such attempts are not new; however, because of the lack of Saudi judicial publication, it is really hard to find out how far they from achieving the goal.

One of clearest examples of such attempts to apply international public policy in Saudi Arabia is in the case, *King Nam v. Saudi Medical Center*.³⁶⁴ As discussed previously. In this case, one saw the Appeal Court held that the arbitration clause in this contract should not be refused for several reasons. First, that rules made to protect parties from unfair dealing, so in this case where the claimant went to the contract with full awareness of its details and intentionally signed it, should not be protected from been judged under non-Islamic rules. Secondly, not applying Islamic rules as a ground to argue the contract invalidity cannot be applied against King Nam or against International Chamber of Commerce in London, it can be applied only against the Muslim party how went to agreement to resort to foreign arbitration center, because the other party were non-Muslim.

The judge also said that if the King Nam Real estate company was the claimant and Saudi medical center was asking to resort their conflict to foreign arbitration center, the resorting to arbitration will be refused, because the court has authority over Saudi citizen but not over King Nam Real estate the South Korean company which want to resort the dispute to International Chamber of Commerce in London. As result court

³⁶⁴ *King Nam v. Saudi Medical Center* (1998) Board of Grievances, case number 159/1/Q, decision number 44/T/3

of appeal held that even though the enforcement will be in Saudi territory, and one of the parties was Muslim and Saudi citizen, conflict still out of our jurisdiction because of arbitration clause in the contract. In fact the appeal court understanding the arbitration agreement open the door to many questions, will the courts in Saudi Arabia apply arbitration agreements or any other contracts as long as both parties agreed to do so even if the underling contract contain a breach to shari'a law. To which extent application of shari'a rules are restricted to validity of the agreement, regardless what the parties agreed of. In fact the judges view in this particular case might be new understanding of Saudi domestic public policy in order to apply international arbitral awards.

5.8.1.2 SAUDI PRACTICE OF REGIONAL PUBLIC POLICY WITHIN GCC

There is an absent of transnational public policy in Arbitration Act 2012 and practice in Saudi Arabia. However, there may be a possibility of forming regional public policy in the region among the Gulf Co-operation Council (GCC) members.

In the Gulf region there is increasing attention to arbitration due to the economic activity in the GCC countries. Motivated by competition and the need to attract foreign investment, Gulf countries have updated their domestic Acts and established arbitration centers. For example, the UAE established a new arbitration center in 2012, the Dubai International Financial Centre (DIFC) having its own independent

jurisdiction. In 2005 there was an attempt to establish an arbitration center in Saudi Arabia according to a government announcement.

In 2012, the GCC issued a draft of the unified arbitration. By adopting unified arbitral procedures, the new law has unified the legal systems in the GCC countries. The unified arbitration law of the GCC states will replace the domestic arbitration Acts of those countries with no contradiction to their constitutional rules.³⁶⁵ The charter of (GCC) Art 4 provided that the basic objectives of the cooperation council are to formulate similar regulations in various fields including economic and financial affairs, commerce, customs, communications education and culture.³⁶⁶ Regional public policy, according to the unified act, is the shared norms of public policy within GCC countries. It provided that “arbitral award will not be enforceable if it was contrary to the public policy applied in gulf cooperation council”.³⁶⁷ Considering unified norms of public policy in GCC countries is a new phenomenon in GCC legislations, those used to appoint the public policy in each country. However, it provided no particular definition of that type of public policy.

5.9 THE DEVELOPMENT OF PUBLIC POLICY IN SAUDI LEGAL SYSTEM

Saudi Arabia became the signatory country of New York Convention in 1994. It is believed that the delay of joining the country to the international Convention was

³⁶⁵ Unified arbitration law for GCC 2012, Art 56.

³⁶⁶ The Cooperation Council for the Arab States of the Gulf <<http://www.gcc-sg.org/eng/indexfc7a.html?action=Sec-Show&ID=1>> accessed 19 October 2015.

³⁶⁷ Unified arbitration law for GCC 2012, Art 55.

caused by the conservative attitude over how the public policy should be viewed in Saudi Arabia. However, the Arbitration Act 2012 may serve a good opportunity to overturn such kind of conservative approach taken by the Saudi courts. The Saudi Arbitration Act 2012 is largely based on the UNCITRAL Model Law, which show a strong and clear commitment and recognizes the role of international arbitration rules. The Saudi 2012 Act has witnessed many changes in norms and mandatory principles of public policy. It seems that the 2012 Act provides parties more flexibility and made the system much more accessible.

By comparing different concept of public policy applied in 1983 and 2012 Saudi Arbitration Acts it is obvious that the Saudi legislators have different interpretation of public policy. For instance, imposes restrictions on arbitrator's gender and religions. The new Act required requires some such academic degree on the arbitrators regardless to their gender and religions. The New Act we more open to the parties choice of law and prevent the national courts from intervene in the merits of the dispute.

5.9.1 IMPACT OF THE COUNCIL OF MINISTERS RESOLUTION NO. 58 OF 1963 ON THE ATTITUDE OF SAUDI ARABIA TOWARDS ARBITRATION

The element of compliance of Shari'a law can also be seen in the impact the Council of Ministers Resolution No. 58 of 1963 may have on the Arbitration Act 2012. One of the main examples of royal power involved in public policy was in the case of

Aramco Vs. Saudi Gov.³⁶⁸ It started in 1938, when vast reserves of oil were discovered along the coast of the Arabian Gulf and the beginning of oil exporting from Saudi Arabia. It provided a tremendous financial support and being the main economic source of one of the poorest countries in the world during that time. With lack of oil experience; as developing country, Saudi Arabia found itself in desperate for foreign investor as international oil and gas (O&G) firms.³⁶⁹ Like other host governments, Saudi Arabia went to agreement with International petroleum company call Standard Oil of California. International petroleum agreements have almost always included an arbitration clause to refer any rising dispute to arbitration centers. Those agreements have over time held certain essential characteristics, and involve large degree of risk and complexity. It is also involves intertwined interests between the host government and the international oil and gas firms. In such circumstances when the strategic importance of interests between both parties, it is rare that parties agree to resort to the local law of each country. Thus, with international petroleum agreements, arbitration consider as the most convenient way to resolve disputes.³⁷⁰

Since 1938, arbitration has become the main method to resolve the country disputes with foreign companies in Saudi Arabia. However, the situation has changed dramatically after that arbitral award issued in Aramco Vs. Saudi Gov.³⁷¹ Arbitrators have held that the Aramco Company has the rights in the concession contract and that

³⁶⁸ Aramco v Saudi Arabia, (1963) 27 ILR 117.

³⁶⁹ Paul Michael Blyschak, 'Arbitrating Overseas Oil and Gas Disputes: Breaches of Contract Versus Breaches of Treaty' (2010) 27 Journal of International Arbitration 579 – 629.

³⁷⁰ Dr Zeyad Alqurashi, *International Oil and Gas Arbitration* (oil and gas observer 2005) 3 – 16.

³⁷¹ Paul Michael Blyschak, 'Arbitrating Overseas Oil and Gas Disputes: Breaches of Contract Versus Breaches of Treaty' (2010) 27 Journal of International Arbitration 579 – 629.

the Saudi government must not deny those rights.³⁷² The influence of the Aramco award played a major role in changing the attitude of Saudi Arabia towards arbitration. The Saudi legislator believed that international arbitrators in these arbitration tribunals paid no consideration to Islamic values; that they do not have basic knowledge of the Islamic rules governing this type of conflict. Arbitrators believed that the mining law of the concession has remained embryonic in Islamic rules and it differs from school to school, and the principles of one school cannot be introduced into another. However, judges can directly resort to any school of Islamic thought in order to find the applicable rules to the underlying conflict. The same can be said in the Qatar v International Marine Oil Company case, where the arbitral tribunal believed that the Islamic rules did not contain any applicable principles to that kind of conflict.³⁷³ International tribunals' understanding of Islamic law led to the Saudi Government's distrust of international arbitration and, as a result, to more strict principles of public policy regarding international arbitration. This can clearly be seen when Council of Ministers issued resolution No. 58 prohibiting all governmental institutions from resorting to arbitration without the Council of Ministers' permission in the 1983 and 2012 Acts.

5.9.2 SAUDI PUBLIC MORALITY

³⁷² Abdauhameed Alahdab, *Arbitration with the Arab Countries* (Kluwer Academic 2011) 620 – 634.

³⁷³ Yahya Al-Samaan, 'The Settlement of Foreign Investment Disputes By Means of Domestic Arbitration in Saudi Arabia' (1994) 9 Arab Law Quarterly 217 – 237.

A society usually adopts morality in order to preserve its principles and achievements. Saudi legislators did not provide any definition of morality, but they always made the link between morality and public policy. Morality is described as the moral expression or meaning of public policy. Jurists have defined morals as a number of ethical principles that such a society finds itself applying them according to moral control over their social relations in a particular time and place, and any infringement of those principles are considered as a deviation condemned by society.³⁷⁴ Religious country such as Saudi Arabia undoubtedly applies stricter morals principles, since religion has a major impact in forming the principles of ethics in the country.

The standard for assessing public morality cannot be based on personal convictions to decide if such behaviour is consistent or contrary to the principles of ethics. It is a social standard, and reference shall be made to what the people are accustomed to. Cultures and customs change with time, which explain the dynamic nature of public morality to consistent with the developments in the ethical principles. For instance, nearly two centuries ago, slavery was a popular market in Saudi Arabia. However, it began to change gradually, and it became something socially unacceptable, and absolutely against public morality.

Another example is polygamy, a phenomenon that used to be widespread in some countries according to life needs or historical situations such as the decrease of males in such countries because of a number of reasons, including war. Nonetheless, this phenomenon has been seen differently in each country that permits polygamy.

³⁷⁴ Bassam Abdurahman mashaqba, *Glossary of Parliamentary and Diplomatic Terms (mejam Almustalahat Albarlamaniat Walddiblumasia)*(Al Manhal 2011) 110 – 111

Polygamy in Saudi Arabia used to be a widespread phenomenon and not seen as a violation of the social customs, but it is no longer accepted by people, except in rare cases. In Tunisia, for example, polygamy became contrary to public morals and society no longer accept this at all; now, Tunisian law considers polygamy a crime. Saudi Arabia will change as well with time, and it is expected that Saudi Arabia will come to view polygamy as a crime one day, according to changes in people's cultures and needs. There are some goods like cigarettes or some types of contracts like those including interest; they used to be against public morality but society has changed gradually.

5.10 EXAMPLES OF INTERNATIONAL PUBLIC POLICY FROM ENGLISH AND FRENCH LEGAL SYSTEMS

Countries all around the world try to control the recognition and enforcement of international arbitral awards through three ways. Firstly, voluntary international arbitration may not be enforced or recognized due to the invalidity of arbitration agreement. Secondly, courts of the place of the arbitration might not allow the setting aside of international arbitral award,³⁷⁵ or , thirdly, the applications for refusal of foreign arbitral awards may be allowed by the enforcing courts.³⁷⁶

³⁷⁵ See, *Garuda Indonesia v Birgen Air* Singapore Court of Appeal: [2002] 1 SLR 393, the case distinguishes the place of arbitration, from the place where the arbitral tribunal carries on hearing witnesses , experts or parties, namely, the venue of the hearing

³⁷⁶ see chapter number 4

With multiple courts which may be involved on the issue, it is essential to highlight the types of public policy with respect to setting aside or the recognition and enforcement of international arbitral awards. Types of public policy differ according to the legal system in each country and its relation to international arbitration conventions. Types of public policy can be divided to two main sections First, domestic public policy which based on one single nation. The second section is supranational public policy which is based on transnational concepts, in some level, it overlaps with international public policy. These types of public policy, despite differing in scopes, they almost all come from similar sources. They, to be examined in details in the following sections, come from the legal practice of specific rules, that otherwise it will be an infringement to the principles of morality and justice, which require legal protection from jurists.³⁷⁷

5.10.1 NATIONAL PUBLIC POLICY

National public policy as a term refers to the principles of morality and justice of a single nation. It reflects the collective viewpoints of the society, the legal legislators and the government, without taking into consideration other countries point of view on that particular issue.

³⁷⁷ Mistelis and Julian Lew, *Pervasive Problems in International Arbitration* (International Arbitration Law Library) (International Arbitration Law Library) (Loukas Mistelis ed, Kluwer Law International, BV 2006) 60 – 63.

National public policy is also termed domestic public policy. It is the kind of public policy, which is usually applied to domestic disputes, with only domestic elements. The kind of rules that makes domestic public policy is usually found first in the country's domestic legislation, then customs and cultures. They are designed to protect the countries national interest, which in fact explains the difficulties of identifying the rules of that kind of public policy; they are well connected to a state's laws. Therefore, domestic public policy might be defined as the mandatory principles of public policy and customary rules of the country that addresses policies relevant only in an internal context.

One of the well-known cases in this area of law is the *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* case, where parties have an arbitration clause to initiate their disputes under the rules of the Japan Commercial Arbitration Association (JCAA). Mitsubishi brought an action in a US District Court, asking the court to obligate Soler to apply the arbitration clause in pursuance of the sales agreement. The court rejected the award enforcement on the ground of public interest against arbitrating antitrust.³⁷⁸

However, domestic public policy can also have impacts on the enforceability of arbitral awards when the courts are required to decide the enforceability of the convention arbitral awards under Art V(2)(b) of the Convention.

5.10.2 INTERNATIONAL PUBLIC POLICY (PUBLIC POLICY IN THE SENSE OF PRIVATE INTERNATIONAL LAW)

³⁷⁸ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* No. 83-1569. Argued March 18, 1985

International public policy is considered as the common principles of morality and justice filtered through the national jurisdictions applied to dispute where international elements get involved. This type of public policy shall only be applied if the nature of dispute was international,³⁷⁹ and occurs once the award made with a foreign jurisdiction.³⁸⁰ This type of public policy considers only what might be public interests on international sense, even though breach the domestic public policy, the awards will not be refused recognition and enforcement of that particular country.

It is hard to find a particular definition for truly international public policy, but generally it is described as the type of public policy that is virtually universal by nature.³⁸¹ Jurists have provided various definitions to this type of international public policy. According to Gotanda, truly international public policy includes only the notions of morality and justice accepted by civilized countries. This is accepted by some legal systems such as France, and is considered different from domestic public policy, which includes the principles of morality and justice of a particular state.³⁸²

Similar divination of international public policy has been adapted by ILCA rules at its 70th Conference held in New Delhi, India, 2-6 April 2002. They provided that international public policy means those fundamental rules of natural law, principles of universal justice, in public international law. They also held that the finality of the award must be respected exact in cases where the enforcement would be against

³⁷⁹ William W Park, 'Specificity of International Arbitration: The Case for FAA Reform' (2003) 36 Vand. J. Transnat'l L. 1271 – 1273.

³⁸⁰ van den Berg, 'Distinction Domestic-International Public Policy' [1996] ICCA Yearbook 502 – 505

³⁸¹ Pierre Mayer, Effect of International Public Policy in International Arbitration (Kluwer Law International 2006) 61 – 66.

³⁸² John Y Gotanda, 'Charting Developments Concerning Punitive Damages: Is the Tide Changing?' (2007) 45 Columbia Journal of Transnational Law 507 – 511.

international public policy. The conference also has emphasized that it is really important to designate the body of principles and rules recognized countries in order to apply public policy as ground of refusal.

Curtin refers to the principles of morality and justice of the United Nations and the international community merged with the rules of public policy of the enforcement state.³⁸³ Gaillard considers truly international public policy as principles of morality and justice as provided by public international law generally.³⁸⁴ Rogers believes that truly public policy is a collection of morality and justice principles, that the public would expect them to be protected.³⁸⁵ However, considering truly public policy as the principles of morality and justice of civilized nations seems to be the most recognized definition of this kind of policy. It is accepted by The International Court of Justice (ICJ) Statute. Article 38(1)(c) of the statute indicated that the court, which is according to international law, in the position to decide in such conflicts as are submitted to it, the court shall apply the general principles of law recognized by civilized nations.³⁸⁶ The idea of considering truly international public policy as universal in nature and considering that kind of public policy as general principles of law recognized by civilized nations does not seem to make any difference, even though they do not share the exact characteristics, but have common features such as the idea that rules of public policy in both definitions came from an international source that exists beyond the borders of the country.

³⁸³ Kenneth Michael Curtin, 'Redefining Public Policy in International Arbitration of Mandatory National Laws' [1997] *Defense Counsel Journal (DCJ)* 271 – 281.

³⁸⁴ Philippe Fouchard and Emmanuel; Savage Gaillard, *Fouchard Gaillard Goldman on International Commercial Arbitration* (E Gaillard and John Savage eds, 1st edn, Kluwer Law International 1999) 954 – 960

³⁸⁵ Catherine A Rogers, 'The Vocation of International Arbitrators' (2005) 20 *American University International Law Review* 957 – 996

³⁸⁶ Statute of the Court | International Court of Justice' <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II> accessed 16 October 2015.

However, using the term international might cause contradiction because international as a term usually refers to such a relation where more than one country is involved in the relation. This type of public policy is applied under international private law. So in order to avoid the contradiction of international public policy under the national section, the best terminology of that kind of public policy might be public policy in the sense of private international law.³⁸⁷

5.10.2.1 TRANSNATIONAL PUBLIC POLICY

Transnational public policy is the type of policy that relies mainly on the customary rules that are not part of any particular country. The sources of transnational public policy rules are connected to the international community. They mainly come from the spirit of international conventions, fundamental principles of natural law, the general principles of morality accepted by civilized nations, universal justice, international custom, arbitral precedent and the norms of *ius Cogens*.³⁸⁸ In other words, it is a type of public policy that allows such a countries to escape from the domestically oriented restraints imposed on the enforcement of international arbitral agreement and foreigner award, or to escape from applying the applicable law to such an agreement. This is because, under this type of public policy, the judge can enforce

³⁸⁷ William W Park, 'Specificity of International Arbitration: The Case for FAA Reform' (2003) 36 Vand. J. Transnat'l L. 1271 – 1273

³⁸⁸ Martin HUNTER and Gui CONDE, 'Transnational Public Policy and Its Application in Investment Arbitrations' (2003) 4 The Journal of World Investment & Trade, 396

what might be considered immoral in the country of enforcement, especially when it is hard to say what might be considered immoral in the international community.

5.10.2.2 REGIONAL PUBLIC POLICY

Regional public policy is not common norms in legal literature, and not easy to identify because it varies from region to region. Nonetheless, commentators refer to regional public policy norms as the rules of public policy that are shared within regions.³⁸⁹ They are neither international nor national concepts of public policy; they are the shared rules of morality and justice within a particular region. This can be seen in the *Eco Swiss China Time Ltd v. Benetton International NV* (1999) case.³⁹⁰ In this case, the European Court of Justice (ECJ) made clear in dictation that the arbitration agreement must be consistent with European competition standards,³⁹¹ and the same can be said of public policy in the Organization for the Harmonization of Business Law in Africa (OHADA) countries in Africa³⁹² and to the GCC as will be discussed later in this chapter. Thus, regional public policy is not truly international public policy.

5.10.3 PUBLIC POLICY UNDER THE NEW YORK CONVENTION

The New York Convention was not the first convention in international commercial arbitration. The 1927 Geneva Convention on the execution of foreign arbitral awards

³⁸⁹ Julian DM Lew, Loukas A Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 727 – 730

³⁹⁰ *Eco Swiss China Time Ltd. v. Benetton International NV*, (Case 126/97) ECR [1999] I-3055

³⁹¹ Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2009) 794

³⁹² Emilia Onyema, 'Enforcement of Arbitral Awards in Sub-Sahara Africa' [2008] SSRN Electronic Journal 5

was the first multinational convention dealing with international arbitration and regulated public policy exceptions to the recognition and enforcement of international arbitral awards. In terms of recognition and enforcement of arbitral awards, Art I(e) of the 1927 Geneva Convention provided two situations when an arbitral award may be rejected by enforcement states, where it was contrary to public policy or to principles of the law of the country. This Article of the 1927 Geneva Convention has formed the foundation of new international conventions, including the 1958 New York Convention. Article V of the New York Convention provides a few grounds of refusing international arbitral award. Article V(2)(b) stated that recognition and enforcement of an arbitral award may also be refused if recognition or enforcement of the award would be contrary to the public policy of that country. Nevertheless, no precise definition of public policy was provided, and lack of definition means to give the court of the place of arbitration or enforcement the discretion to decide what the public policy is, which led to asymmetrical considerations of public policy on the basis of different interpretations of morality and justice.

5.10.4 TYPES OF PUBLIC POLICY APPLIED BY DEFERENT

LEGAL SYSTEMS

The discrepancy in differences in interpreting public policy among different jurisdictions dictates the importance of the subject. To understand the scale of the problem, it is essential to understand what types of public policy are applied by the country of arbitration or enforcement. Different types of public policy applied by different countries will determine how the rules of national law will get involved in

the dispute. The rules of law must be divided into two sections. First, default rule, which is the rule of law that can be modified by contract or any legal agreement. These are the kinds of rules provided by law with no obligation in order to achieve what called complete contract, particularly for parties with no legal knowledge. The second is the mandatory rule, which is the kind of rule of law that is considered part of country public policy. So contractors must not agree on the violation of mandatory rules, whether in the form of orders to do positive action such as requiring the contract to be in written format and not orally, in order to have a lawful arbitration contract,³⁹³ or to not do negative action such as preventing contractors from violating shari'a rules in the case of Saudi Arabia.³⁹⁴

5.10.5 TYPE OF PUBLIC POLICIES APPLIED BY FRENCH LEGAL SYSTEM

The French legal system has distinguished between domestic and international public policy. Article 1502 of the Code of Civil Procedure provides that “An appeal against the decision, which grants recognition or enforcement, will be available only in the following cases... (5) if the recognition or enforcement is contrary to public international order”. From its wordings supported by a number of legal scholars type of public policy referred to in this article is international public policy.³⁹⁵ According

³⁹³ Saudi arbitration Act 2012, Art 9

³⁹⁴ Saudi arbitration Act 2012, Art 55 (2,b)

³⁹⁵ Philippe Fouchard and Emmanuel; Savage Gaillard, *Fouchard Gaillard Goldman on International Commercial Arbitration* (E Gaillard and John Savage eds, 1st edn, Kluwer Law International 1999) 954 – 959.

to Francois, the way how Art 1502 has provides the public policy can only mean the French understanding of international public policy.³⁹⁶

Because the French legal system distinguishes between domestic and international public policy, it applies different rules in cases of domestic and international commercial arbitration.³⁹⁷ In case the subject of the dispute is domestic or national arbitration, French courts considered mandatory rules as part of the public policy (domestic public policy). However, awards involved multiple national elements, the French legal system applies international public policy to determine the enforceability of such an award.

Article 1474 of the French Code of Civil Procedure has provided that “An arbitrator determines a dispute in accordance with the rules of law, save where, in the arbitration agreement, the parties assigned him as an amicable composite”. Delvolvé believes that the French legislators allowing the practice of amiable compositeur referred in this article is based on party autonomy which is related to both domestic and international public policy. Similar situation arises from the interpretation of Article 1496 which refers to international public policy, as provides that’.³⁹⁸

³⁹⁶ Jean Francois Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell 2007) 822 – 823.

³⁹⁷ Jean-Louis Delvolvé and others, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd edn, Sold and distributed in North, Central and South America by Aspen Publishers 2009) 46 – 51.

³⁹⁸ Jean-Louis Delvolvé and others, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd edn, Sold and distributed in North, Central and South America by Aspen Publishers 2009) 46 – 51.

According to Delvolvé, French national law will be applied only to national arbitration as the term (rules of law) refers to in Article 1474. In Article 1496, the term (rules of law) refers to the notion of international public policy where the mandatory rules should not be applied. The argument by Delvolvé seems to be logical, even though the French legislators has used identical terminology. This is because in Article 1496, the term (rules of law) comes associated with the parties' autonomy to choose applicable law which is a sign of international arbitration and the applicable rules are the rules of international public policy. However, in extremely limited situation, French legal system has power over international arbitration not just by using French international public policy but mandatory rules as well. The mandatory public law rules as defined by Mayer in the French legal system as the imperative provisions of law that must be applied to an international relationship irrespective of the law that governs the relationship.³⁹⁹

In *Société Hilmarton Ltd v Société Omnum de traitement et de valorisation (OTV)* 1995⁴⁰⁰, the well-known case among international arbitration specialists. Which is dispute concerned the payment of a commission by OTV, a French corporation to the to English party Hilmarton, regarding to a contract in Algeria. According to Algerian law; even it is not the place of arbitration (*lex contractus*), the payments to intermediaries in such circumstances is entirely prohibited. The fist award rendered in favor of OTV has recognized by French court. At the same time, Hilmarton attempt to annul the award in Switzerland, and has the award set aside 1990. The Paris Court of Appeal in 1991, noted that in applying Article VII of the New York Convention, it

³⁹⁹ Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 *Arbitration International*, 274 – 275.

⁴⁰⁰ *Société Hilmarton Ltd v Société Omnum de traitement et de valorisation OTV* (1995) XX YBCA 663

cannot refused the arbitral award unless the national law authorized so. The setting aside of award in the country of origin is not one of the ground of refusal provided by domestic French law. In 1992 the Tribunal de grande instance of Nanterre in France has recognized the second award issued by Swiss Federal Tribunal. Nanterre decision has approved by Versailles Court of Appeal. Accordingly, French legal system faced two conflicting awards concerning the same dispute between the same parties. The two decisions have reversed by Cour de cassation putting an end to the uncertainty. Thus, after this decision the French legal system start recognizing the first ward ordering enforcement regardless to the second decision even it set aside. Accordingly we can understand that French law decide the issue of public policy when the subject of the disputes breaches the mandatory rules of French law but not the applicable law.

5.10.6 TYPE OF PUBLIC POLICIES APPLIED BY THE ENGLISH LEGAL SYSTEM

The legal system in England does not use the term international public policy even though it has applied different rules in the case of domestic and international arbitration. This is clear in the from the wording of art 68 of the English arbitration Act 1996 where one sees ar 68 (2) (g) stating “the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy” and 81(1)(c) “the refusal of recognition or enforcement of an arbitral award on grounds of public policy”. In these examples, the legislator referred to the application of the mandatory rules on domestic arbitration; even the term domestic public policy has not mentioned.

An award which is considered to be based on immoral or illegal activities in English courts will not be enforced in cases where it does not involve international elements as stated in the *Holman v Johnson* case,⁴⁰¹ where in this case, the claimant sold tea to the defendant but when the claimant knew that the tea would be smuggled to England he brought an action for non-payment because the contract was unlawful. Because all the elements of the case were national the judge in this case has held that no court lends its aid to a man who found his cause of action upon an immoral or illegal act. Nonetheless, in the case where English courts deal with awards that have international elements. Again in *soleimany v soleimany* (1999) case,⁴⁰² as the judge held that in cases of international arbitration, English courts will address the public policy of the English legal system as well as the public policy of the country of the performance.

5.11 CONCLUSION:

Through the study of the principles of public policy in Saudi Arabia, it is clear that the way in which the country was established nearly a century ago has had the greatest impact on the formation of public policy in the country. The legal system and religion are strongly linked to each other since the country was established, and split between

⁴⁰¹ *Holman v Johnson* (1775) 1 Cowp 341

⁴⁰² *Soleimany v. Soleimany* (1999) Q.B. 785

them unexpected. Both legal system and religious rules were so blurred that it was hard to understand the real meaning of public policy. From the discussion above, it is clear that Saudi Arabia depends on domestic public policy in order to protect its interests. However, the way it applies its cultural and ethical principles is not really easy to understand, especially in the absence of judicial publications and judicial precedents. For Saudi legislators the task is a difficult. They have to consider the government ambition to attract foreign investors, without compromising the Islamic rules that form the basic law of the country. For Saudi legislators, in order to achieve this task and keep pace with the competitive atmosphere in the gulf region, they have to go through two steps. First, they have to clarify the way in which they want to apply shari'a rules, and adopt one of the Islamic schools of thought by Saudi court instead of giving the judges the freedom to issue their judicial decisions in accordance with their own convictions without any supervision, in order to improve the legal practice in Saudi courts. Especially, that the legislators in Saudi arbitration are applying shari'a rules as legal principles, not ethical principles such as in the finance and banking legal practice. According to Ballantyne, the weakness of arbitration practice in Saudi Arabia is not caused by applying the Islamic law, but because the way Saudi legislators understand of it. He points out: "The Shari'a is one of the great systems of law, but it is not appropriate in many respects to what the world has made of commerce. In this, it may well be that commerce, not the Shari'a, is at fault, but the fact remains."⁴⁰³

Second, Saudi legislators should to consider the regional public policy that is applied within the GCC countries. Studies have shown that Saudi Arabia and other

⁴⁰³ William Ballantyne, *Essays and Addresses on Arab Laws* (Taylor & Francis 1998) 45

enforcement states are not obliged to recognize or enforce international arbitration awards as long as the country did not practiced the regional public policy through economic or legal treaties such as OHADA or the EU union. Regarding Saudi legislators, there is a great opportunity to improve Saudi notion of public policy through adopting similar understanding of shari'a rules that is applied within the GCC countries, Especially since all GCC countries consider shari'a law as the main sources of public policy and the issuing of the new unified Act of arbitration might lead to a similar understand of Shari'a rules between GCC countries that implement them in various ways.

6 CHAPTER SIX

The Conclusion

6.1 INTRODUCTION

Saudi Arabia signed the Convention around two decades ago. It has a non-encouraging history of rejecting the enforcement of international arbitration awards. Saudi Arabia still bans and obstructs its public agencies, which are usually the local party in contracts with international partners in the oil industry and giant infrastructure projects, from initiating arbitration agreements without the approval from the Council of Ministers. Both Sayen and Roy believed that time will improve Saudi Arabia's application of international arbitral award,⁴⁰⁴ or the issuance of both 1983 and 2012 Arbitration Act, which contains provisions complying with international standards,⁴⁰⁵ will create a friendly environment for confident international investments in Saudi Arabia. However, an examination of the last two decades since Saudi Arabia signed the Convention has proved that there has been no progress. M. Asaddan, the former judge at the Board of Grievances appeal court in Saudi Arabia, described what happened in last two decades as regression in performance of Saudi judges toward international arbitration. He believes that the main reason behind this regression in the Board of Grievances's performance relates to their understanding of Islamic rules.⁴⁰⁶ Among the grounds for refusal of arbitral

⁴⁰⁴ Kristin T Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1994) 18 *Fordham International Law Journal* 957 – 966.

⁴⁰⁵ George Sayen, 'Arbitration, Conciliation, and The Islamic Legal Tradition in Saudi Arabia' (1987) 9 *University of Pennsylvania Journal of international business law* 248 – 256.

⁴⁰⁶ Interview Mohammed Assadan, former judge in Board of Grievances 23:00 (Riyadh, Saudi Arabia, 7th of Dec 2013), see appendix 9

awards, the issues of validity of arbitration agreement (capacity in particular), finality of awards and public policy are the most frequently upheld grounds by the Board. Hence the need of the current research.

This thesis highlighted solutions to improve the Saudi application of international arbitration after the failure of both (i)codifying new arbitration Acts and (ii)giving more deadlines, to improve the enforcement of international arbitration awards . The thesis has examined in detail the understanding of the grounds of refusal in validity of arbitration agreement, finality of awards and public policy, and how Islamic rules have affected these three grounds more than the rest provided by the Convention and how courts in Saudi Arabia invoke these grounds in order to circumvent the enforcement and find a way to remedy this imbalance.

Along the grounds on validity of arbitration agreement and finality of awards, the thesis has criticized principles of public policy in Saudi Arabia, and comes with result that the way in which the country was established nearly a century ago has had the greatest impact on the formation of public policy in the country, and that the legal system and religion are strongly linked to each other since the country was established. Both legal system and religious rules were so blurred that it was hard to understand the real meaning of public policy. The thesis made clear that Saudi Arabia depends on domestic public policy in order to protect its interests. However, the way it applies its cultural and ethical principles is not really easy to understand, especially in the absence of judicial publications and judicial precedents as examined in the chapter on public policy. Similarly, this also represents a difficult task for the Saudi

legislators who face different interpretations of the Shair'a law and have to consider the government ambition to attract foreign investors, without compromising the Islamic rules that form the basic law of the country.

From the research, the thesis has come with the result that there was a problem in the Saudi approach to the notion of public policy and the lack of clear and consistent interpretations on public policy by the Saudi courts. It has deduced the reasons behind the lack of clarity of the definition of public policy in the Saudi legal system, and how the adoption of Islamic rules without been codified has affected the understanding of public policy in the country.

The thesis has also highlighted how French and English approach to mandatory rules in public policy although different, they have arrived at the same result. In both legal systems, the legislators welcomed the application of international rules in their territories without infringement of their cultural values or public interest, whether by applying different kinds of public policy as in France or by applying different rules to domestic and international arbitration, as in the English legal system. Where in Saudi approach case was different, in Saudi Arabia there are differences between the previous and current Arbitration Acts. The 1983 Act applied only one kind of public policy, and considered the mandatory rules part of the public policy. In contrast, the current Act is more open to international issues. However, the new law still sticks the term "contrary to the provisions of Islamic Shari", which gives the judge the power to decide what is contrary or not contrary to the provisions of the Islamic rules. The researcher argues that the term "contrary to the provisions of the Islamic Shari" is not

absolutely necessary to be mentioned in the Act, it only gives the judge more power to intervene in the merits of the dispute. This argument does not mean that Saudi Arabia should enforce an arbitral award if it was contrary to Islamic rules, but it is questionable to allow judges to decide what is contrary to Islamic rules which is subject to the interpretations from various schools as discussed. The research is of the view that this task may be more suitable to be carried out by the legislators. The best way to do this is by codifying the Islamic rules as legal rules in Saudi Arabia, so that the judges' role is limited to deciding what is legal and what is illegal. The reason behind this conclusion is that Islamic rules are so complicated and differ into many schools of thought.

The Saudi Arbitration Act 2012 tries to free arbitral award from the court intervention. There are many signs of the improvement, which help to make arbitration in Saudi Arabia more consistent to international practice. Some signs of improvement can be determined as follows:

First, the Act did not required arbitration agreement approval by the court in order to be valid. Which means that arbitration in Saudi will be freed from many restrictions that used to delay the arbitration proceedings. Requiring the court approval of the arbitration agreement means more time consuming in court proceedings. Secondly, the Act embodied the principle of parties' autonomy in regard to appointing arbitrator, the place of arbitration and the applicable law⁴⁰⁷. Thirdly, the Act recognized international arbitration awards to resolve kinds of disputes, which contain

⁴⁰⁷ Saudi Arbitration Act 2012, Art 9,16,25,28,29

international elements,⁴⁰⁸ and expanded the scope of arbitrability to include any kind dispute part from the personal status or the matters that cannot be reconciled. Fourthly, according to the Act, international treaties are offered the priority to be applied in case of the conflict between international treaties and national law.⁴⁰⁹ Fifthly, arbitral awards whether Saudi or international are considered as final and not subject to any kind of appeal except in case of violating the public policy. Sixthly, in regard to the formation of the arbitral tribunal the Act allows odd number of arbitrators in order to facilitate the process of issuing the award. Seventhly, the Act ensures the parties autonomy to appointing arbitral tribunal regardless of their religions and sex.⁴¹⁰ Eighthly, the Act tried to speed up and facilitate the arbitral process by allowing only thirty days to lodge an appeal against court decision in the case of refusal of recognition and enforcement of arbitral awards.⁴¹¹

Ninthly, the Act limits the grounds of refusing the enforcement to the seven grounds which are almost identical to those provided by New York Convention 1958. Finally, the Act ensures the parties autonomy regarding to choice of law and the tribunal right to apply commercial customs, which related to the subject of dispute. These points have proved the legislator's willingness to facilitate the arbitration proceedings and to become more independent from the Saudi legal system as an attempt to move towards a truly international arbitration in Saudi Arabia.

⁴⁰⁸ Saudi Arbitration Act 2012, Art 3

⁴⁰⁹ Saudi Arbitration Act 2012, Art 1

⁴¹⁰ Saudi Arbitration Act 2012, Art 16

⁴¹¹ Saudi Arbitration Act 2012, Art 55, 51

However the term of "sharia" strongly attached with "public policy" term in Saudi Arbitration Act 2012, which means that the arbitration there still considered very far from the notion of delocalization. The traces of Islamic rules or sharia can be observed in the Act easily, as one of the ground of refusal,⁴¹² as the applicable law to the subject of the dispute in the absence of the parties' agreement⁴¹³ and as the guidelines in the appointment of the arbitrators⁴¹⁴ This strong relation between Sharia and public policy is understandable as the Islamic rules in indeed part of the Saudi social and legal culture, hence as result part of public policy. However, for both Saudi and international practitioners, the real issue with the strong emphasis on the Islamic rules or sharia as part of public police lies in its lack of clear definition or codification.

Because Islamic Law has not been codified in Saudi Arabia, arbitrators in many international arbitration cases between the Saudi and international parties have applied their own ad hoc interpretations of Islamic Law. This has significant negative impacts on the development of arbitration in Saudi Arabia.⁴¹⁵ Even now, the choice of the Sharia' as the applicable law to the agreement or procedures of arbitration still faces problems on the same ground. Taking this into consideration, the Saudi legislators proposed to amend Articles 2, 5, 25, 38, 49 and 55 of the Act as well as codify Islamic rules in particular Act or to include them in the national law. For Saudi legislators, in order to achieve this task and keep pace with the competitive atmosphere in the gulf region, they have to go through three steps:

⁴¹² Saudi Arbitration Act 2012, Art 50,2

⁴¹³ Saudi Arbitration Act 2012, Art 37

⁴¹⁴ Saudi Arbitration Act 2012, Art 25, 30, 31

⁴¹⁵ In Saudi Arabia v Aramco (1963) case, arbitrators executed Islamic law from been applied because it did not codified. The same issues happened in Qatar and United Arab Emirates.

First, they have to clarify the way in which they want to apply shari'a rules, and adopt one of the Islamic schools of thought by Saudi court instead of giving the judges the freedom to issue their judicial decisions in accordance with their own convictions without any supervision, in order to improve the legal practice in Saudi courts. Especially, that the legislators in Saudi arbitration are applying shari'a rules as legal principles, not ethical principles such as in the finance and banking legal practice. According to Ballantyne, the weakness of arbitration practice in Saudi Arabia is not caused by applying the Islamic law, but because the way Saudi legislators understand of it. He points out: 'The Shari'a is one of the great systems of law, but it is not appropriate in many respects to what the world has made of commerce. In this, it may well be that commerce, not the Shari'a, is at fault, but the fact remains.'⁴¹⁶

Second, Saudi legislators should to consider the regional public policy that is applied within the GCC countries. Studies have shown that Saudi Arabia and other enforcement states are not obliged to recognize or enforce international arbitration awards as long as the country did not practiced the regional public policy through economic or legal treaties such as OHADA or the EU union. Regarding Saudi legislators, there is a great opportunity to improve Saudi notion of public policy through adopting similar understanding of shari'a rules that is applied within the GCC countries, Especially since all GCC countries consider shari'a law as the main sources of public policy and the issuing of the new unified Act of arbitration might lead to a similar understand of Shari'a rules between GCC countries that implement them in various ways.

⁴¹⁶ William Ballantyne, *Essays and Addresses on Arab Laws* (Taylor & Francis 1998) 45

Third, is to increase providing scholarships to researchers and funding research in this field. The practice proved that the continuous pressure over the Saudi government to adapt modern Act did not really worked, and the basic example is the Saudi arbitration Act 2012, which came to make Saudi arbitration more friendly to international arbitration but it was less than the expectation, especially regarding to using the public policy or Islamic rules as ground of refusing the enforcement of international award.

6.2 THE CONTRIBUTION OF THE CURRENT RESEARCH:

The Saudi Arbitration Act 2012, which should be designed to attract international investors, has mentioned that Islamic rules should not be violated in six Arts. In each article, the legislators have given the judge the power to set the award aside, if they think that the award violates Islamic rules. This simply means that every judge has the power to apply Islamic rules according to his view. The codification of Islamic rules in the legal system in Saudi Arabia would avoid this result. Especially that every national law in Saudi must consist with the basic law of the country.⁴¹⁷

Furthermore, the 1992 Basic Law of Saudi Arabia provided that the legal system in the country must be consistent with the shari'a⁴¹⁸. If the Saudi legislators have recognized these suggestions, the application of enforcement of international award will improve significantly.

⁴¹⁷ Basic law in Saudi Arabia is synonym of the Constitution Law in other legal systems

⁴¹⁸ Basic Law of Saudi Arabia 1992, Art 7

The thesis has made clear that since the first codification of arbitration rules in Saudi Commercial Court Act 1930, the enforcement of international award has not reached the required level, in order to attract foreign investors. It also proved that codification of new Arbitration Acts with more friendly provisions to international arbitration did not prevent national courts intervention on the merits of the award and did not make the required improvement the of the enforcement of international arbitral awards. The thesis has concluded that the problem of enforcement of international arbitral award is in fact centered on the relation between Islamic rules and the legal systems in the country. The problem is not related to the Islamic rules themselves but to their understanding and application.

In order to improve enforcement of international arbitral award, the thesis suggests that the Saudi legislators should have codified Islamic rules, whether by adopting one of the schools of thought Hanbali, Shafei, Maliki or Hanafi, to be the country official Islamic rules, or by adopting Islamic principles in different legal subjects to create the country Islamic Law in form of a legal Act, like how Ottoman Empire when it adopted the Mecelle.⁴¹⁹ Saudi legislators should choose a collection of Islamic legal principles in civil, commercial, criminal and administrative law and codify them to make the Saudi national Islamic law. Because the Islamic legal system is part of the Islam as religion, and the codification will highlight the rules forming the Islamic legal system, and will facilitate the determination of the what term of ‘Against Shari’a’; which has used by Saudi legislators, does mean.

⁴¹⁹ The Mecelle is the civil code of the Ottoman Empire in the late 19th and early 20th centuries. It was the first attempt to codify a part of the Sharia-based law of an Islamic state.

Another point suggested by the thesis, is that the legal system in Saudi Arabia need to reconsider the required degree of the Saudi judges. In the current situation, the judges have two academic degrees, (i) Bachelor degree in Islamic since and (ii) master degree in Islamic politics, and both degrees are not relevant to legal science. They include teaching of Islam as religion more than legal rules. According to M. Asaddan the former judge in Board of Grievances,⁴²⁰ the enforcement of international awards were much easier before the eighties of the last century where the judges in Board of Grievances were non-Saudi and have legal and Islamic backgrounds and not only Islamic. The thesis suggests the in order to improve the enforcement of international arbitral awards, Saudi Arabia have to required at least a bachelor degree in law for its judges and to focus on providing scholarships to its judges to study in different countries in order to have better understand of the legal issues in different legal systems, and to fund research in this field. This will enable the Saudi judges to fully appreciate the legal definitions of public policy and others laid down by the Saudi legislators.

6.3 FUTURE STUDIES:

There are some studies can be built on the conclusion of this theses in order to improve the enforcement of international awards in Saudi Arabia. Further research should cover the relation between the Islamic rules and the legal system in Saudi

⁴²⁰ Interview Mohammed Assadan, former judge in Board of Grievances 23:00 (Riyadh, Saudi Arabia, 7th of Dec 2013), see appendix 9

Arabia. It should examine the impact of Islam rules on the Saudi legal system in enforcement of international arbitration awards. The study should cover both the legal and the Islamic perspectives of the problem. The study should answer the question if the Islam is a religion or law. If it is religion and law at the same time, what is the best way to make it applicable law in modern era.

Another study can emerge from this thesis, is a study to cover the sources of public policy in general. It should clarify the elements forming the public policy in the country. The main question that should be answer by the researcher is whether the terms of public policy and the shari'a are synonyms in the Saudi legal system, and should Islamic rules be applied even if the dispute involved international parties.

The thesis has discussed the impact of Islamic rules over the grounds of refusal under the convention. But it did not discuss the impact of courts system on the enforcement of international awards. Further study should discuss how the Saudi courts system affect the enforcement of international awards. Especially, that recently in Saudi Arabia there are some changes on the courts system to facilitate the enforcement of judicial decision or arbitral award.

7 BIBLIOGRAPHY

Regulations and treaties

A

- Arbitration Regulation of Saudi Arabia (Royal Decree M/46) Saudi Arabian act 1983
- Arbitration Regulations of Saudi Arabia 2012, Art 38
- Article 1030, German Civil Procedure Law (ZPO).
- Article 177 section 1 Swiss Private International Law Act (SPIL).
- Article 2059 of the French Civil Code (CC)
- Article 2060 of the French Civil Code
- Article 489 of Commercial Court Act 1930
- Article 489 of Commercial Court Act 1930: If the bankrupt defendant admitted the debt but there was not something that requires declaration of bankruptcy, the court has jurisdiction only over the debt and the declaration of bankruptcy is a separate case.
- Article 489 of Saudi Commercial Court Act 130
- Article 489 of Saudi Commercial Court Act 1930.
- Article 5 of the Saudi Bankruptcy Preventive Settlement Act 1996

- Article 5 of the Saudi Insolvency Preventive Settlement Act 1996, it has been noted that some translated it as the Bankruptcy Preventive Settlement Law, they might consider insolvency and bankruptcy as synonyms
- Article 5, Bankruptcy Preventive Settlement act 1996.
- Article 77-81 of Saudi judicial enforcement Act 2012
- Austrian Bankruptcy Code [KO] Sections 27
- Austrian Bankruptcy Code, Art (1, 3).
- Austrian Procedural Law, Section 582, para 1.

B

- Bankruptcy (Scotland) Act 1985, CHAPTER 66, Introduction.
- Bankruptcy Scotland Act 1985, Art 65
- Bankruptcy Scotland Act 1985, Art 65: APPENDIX 8
- Basic law of Saudi Arabia
- Bermuda International. Conciliation and arbitration act 1993
- Board of Grievances Act 1989, Art 13
- Board of Grievances act, art 6
- Board of Grievances court decision number 149/T/1.
- Board of Grievances decision (1997) No. 11/D/F/2 of 1417 H
- Board of Grievances, case number 159/1/Q, 1995, decision number 44/T/3, 1998.

C

- Commercial court Act 1930, Art 493

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June, 1958 (the New York Convention), 330 U.N.T.S.38 (1959), Art V(1)(e).

D

- Decree No. M/53 of 13 Sha'ban 1433 Hejra corresponding to July 3, 2012 Gregorian.

E

- Enforcement Act 2013, Art 1
- Enforcement Act 2013, Art 9
- Enforcement Act 2013, Implementing Regulations Art 8
- English Arbitration Act of 1996, Art 68
- English Mental capacity Act 2005

F

- French civil Code
- French Civil Code, Article 2059 and 2060
- French Civil Procedure Code, Art 1526
- French code of civil procedure Article 1474
- French code of civil procedure, Article 1496

I

- Insolvency Act 1986 as amended applicable under devolved Scottish Law, Art 1 (1).

- Insolvency Act 1986 as amended applicable under devolved Scottish Law, Art 1 (1)
- Insolvency Act 1986 CHAPTER 45, Introduction
- International Court of Justice (ICJ) Statute. Article 38(1)(c)

M

- Malta Arbitration Act 1996
- Model Law, Art 34(2)

N

- National Archives: Age of Legal Capacity (Scotland) Act 1991, s1
www.legislation.gov.uk/ukpga/1991/50/section/1
- National Archives: Age of Legal Capacity (Scotland) Act 1991, s2 (5)
<http://www.legislation.gov.uk/ukpga/1991/50/section/2>
- National Archives: Age of Legal Capacity (Scotland) Act 1991, s3 (5)
<http://www.legislation.gov.uk/ukpga/1991/50/section/3>
- National Archives: Age of Legal Capacity (Scotland) Act 1991, s9
<http://www.legislation.gov.uk/ukpga/1991/50/section/9>
- New York Convention 1958, Art 1 (1)
- New York convention 1958, Art 2
- New York Convention 1958, Art 4
- New york convention 1958, Art 5 (1) E
- New York Convention 1958, Art V(1)
- New York Convention 1958, Article V(2)

- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

P

- President of the Saudi Grievances Board, Decision No 7 of 8.15, 1985

R

- Royal decree No. 58 of June 25, 1963 had forbidden state agencies from restoring to arbitration without prior approval from the Council of Ministers.
- Rules of procedure of the United Nations General Assembly, Art 51

S

- Saudi Arbitration Act 1983
- Saudi arbitration Act 1983, Art 1
- Saudi Arbitration Act 2012
- Saudi arbitration act 2012, Art 10
- Saudi arbitration Act 2012, Art 11 (2)
- Saudi arbitration act 2012, Art 26 and 41
- Saudi arbitration act 2012, Article 10/1.
- Saudi commercial court 1970
- Saudi Commercial court 1970, Art 5
- Saudi Companies' Act, Art 1
- Saudi Nationality Act in Arabic: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5429543e4>

- Saudi nationality Act, Art 3
- Section 349A English Insolvency Act 1986
- Singapore Arbitration Act 2012, Art 6
- State Immunity Act 1978
- State Immunity Act 1978, article 14/13

- The convention of International Centre for Settlement of Investment Disputes 1966
- Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of 29 October 1954
- Tunisia Arbitration Act 1993

- UK Companies Act 2006 section 31, 39 and 171
- UK Insolvency Act 1986, Art 1
- UK Insolvency Act 1986, Art 1 (1)
- UNCITRAL Model Law on International Commercial Arbitration
- UNCITRAL Model Law on International Commercial Arbitration Art 9
- UNCITRAL Model Law, Art 27
- UNCITRAL, 14th Session, report of the Secretary-General: possible features of a model law on international commercial arbitration, A/CN.9/207 (1981)
- Unified arbitration law for GCC

Books

-
-

A

- Aboulwafa DA, *Voluntary and Mandatory Arbitration* (3rd edn, 1978) Ahdab ‘Abd al-Ḥamīd, El-Ahdab AH and El-Ahdab J, *Arbitration with the Arab Countries. Third Revised and Expanded Edition* (3rd edn, Sold and distributed in North, Central and South America by Aspen Publishers 2011).
- Ahdab J El, *Arbitration with the Arab Countries* (Kluwer Law International 2011)
- Akgunduz A, *Al-Dawlah Al-Othmaniyyah Al-Majhûlah* (IUR Press 2008)
- Alawa DF, *Arbitration Contract between Law and Shari’a* (1st edn, almaktab aleslami 2002)
- Aldgather Saad, *hojeat asawabik alkadaiah* (Authentic of legal precedent), (alahdal 2007).
- Alanim T, *Rawr Almahakim Fi Tandem Altahkim Alsaudi* (1st edn, Almanhal 2016)
- Alissa M, 'Nidam Altahkim Alsaudi Akabat Mohtamala' [2014] AlEqtesadia
- AlKodiri A, *Tanfith Alahkan Alajnabia (Enforcement Of International Awards)* (1st edn, radmak 2016)
- AlmaQdisi I, *Almoqni* (1st edn, Dar Ehya Alturath Alarabi 2017)
- Almawardi, *Almugni* (Dar alorobh 1961)

- Almazroi F, *Almnafrat Fi A'db Kbl Alislam* (almonafart in Pre-Islamic Literature) (Dar alkotob alwatania 2009)
- Alqurashi DZ, *International Oil and Gas Arbitration* (oil and gas observer 2005)
- Alqurashi ZA, *International Oil and Gas Arbitration* (Oil and gas observer 2005)
- Alshakh hamdan, *Alklaf Hawala Taknen Alfgh Aleslama W Atharh* (the Dispute on the Islamic Codifying and Its Impact) (Cheikh hamdoune 2015)
- alshbrami a, *Sharh Nidam Altanfith* (1st edn, Madar Alwatan Lenashr 2014)
- Alvik I, *Contracting With Sovereignty* (Hart Pub 2011)
- Alzarka mustafa, *almadkhal alfkhi alam* (the public Jurisprudential entrance) (dar alkalam1998).
- Alzohili Wahba, *The Roots of Islamic Jurisprudence* (asol Alfgh Alislami) 1986 (Dar alfikr 1986)
- Amro IAS, *Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries* (Cambridge Scholars Publishing 2014)
- *An introduction to comparative law* , Zweigert K and Kötz H, (2nd edn, Oxford University Press 1998).
- *Aramco award*, 27 ILR 11(1963)

B

- Berger K, *Private Dispute Resolution In International Business* (Kluwer Law International 2006)
- Bermann G, *Introduction To French Law* (Kluwer Law International 2008)
- Bermann GA, *Introduction to French Law* (Sold and distributed in North, Central, and South America by Aspen Publishers 2008).

- Born GB, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2009).
- Bridgit C. Dimond, *Legal Aspects of Mental Capacity* (John Wiley & Sons, 30 Apr 2008).

C

- Carper Donald, *Understanding the Law* (Cengage Learning, 18 Jan 2011) .
- Christian T, *French Civil Law = Le Droit Civil* (Baton Rouge, La: Center of Civil Law Studies, LSU 2002).
- Convention on the Rights of the Child
- Council I and others, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commerical Arbitration 2011)
- Countryman Vern, Frank R Kennedy and Jack F Williams, *Kennedy, Countryman & Williams on Partnerships, Limited Liability Entities, and S Corporations in Bankruptcy* (Aspen Law & Business 2000).
- Cross R and Harris J, *Precedent In English Law* (1st edn, Clarendon Press 1991)

D

- Delvolvé J-L and others, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd edn, Sold and distributed in North, Central and South America by Aspen Publishers 2009)
 - Delvolve J, Pointon G and Rouche J, *French Arbitration Law And Practice* (1st edn, Kluwer law international 2009)
 - Despax M, Rojot J and Laborde J, *Labour Law In France* (Kluwer Law International 2011)
 - Devolvé J, Pointon G and Rouche J, *French Arbitration Law And Practice* (Kluwer

Law International 2003)

- Dimsey M, *The Resolution of International Investment Disputes: Challenges and Practical Solutions* (Eleven International Publishing 2008).
- Domke M and Sanders P, *International Arbitration. Liber Amicorum* (The Hague, Martinus Nijhoff 1967)

E

- Eisner MA, Worsham J and Ringquist EJ, *Contemporary Regulatory Policy (explorations in Public Policy)* (Lynne Rienner Publishers 1999)
- El-Ahdab Jalal, *General Introduction on Arbitration in Arab Countries*, (Kluwer 1998).
- Elizabeth A Martin (ed), *A Dictionary of Law (Oxford Paperback Reference)* (5th edn, Oxford University Press 2003).

F

- FÖLDI ANDRÁS ; GÁBORHAMZA, *római jog története és intézményei* (History and Institutes of Roman Law), (Akadémiai Kiadó, Budapest, 2001).
- Fouchard P and Gaillard ES, *Fouchard Gaillard Goldman on International Commercial Arbitration* (E Gaillard and John Savage eds, 1st edn, Kluwer Law International 1999)
- Fouchard P and Gaillard ES, *Fouchard Gaillard Goldman on International Commercial Arbitration* (E Gaillard and John Savage eds, 1st edn, Kluwer Law International 1999).
 - Fouchard P and others, *Fouchard Gaillard Goldman On International Commercial Arbitration* (CITIC Pub House 2004)
- Fox H, QC C and Webb P, *The Law of State Immunity (Oxford International Law Library)* (3rd edn, Oxford University Press 2013).

G

- G. Wagner in Weig F-B, Practitioner's Handbook on International Commercial Arbitration (Frank-Bernd Weigand ed, 2nd edn, Oxford University Press 2009).
- Galakis, May 2, 1966 (French Supreme Court 1967).
- George F. Deiser, Law Review and American Law Register (University of Pennsylvania Law Review 1908).
- Goldman, case note, R.C.D.I.P. 553 (1967).
- Goldsmith JC, Ingen-Housz A and Pointon GH, ADR in Business: Practice and Issues across Countries and Cultures (Sold and distributed in North, Central and South America by Aspen Publishers 2006)
- Goode RM and Stevens R, Goode on Principles of Corporate Insolvency Law (4th edn, Sweet & Maxwell 2011).

H

- Halson R, Contract Law (Longman Law Series) (Longman 2001).

K

- K. Maxwell in Weig F-B, Practitioner's Handbook on International Commercial Arbitration (Frank-Bernd Weigand ed, 2nd edn, Oxford University Press 2009).
- Karsai Krisztina, Criminal Responsibility of Minors in National and International Legal Order, Criminal Responsibility of Minors in National and International Legal Order' (International Review of Penal Law 2004).

- Kelsen H, Wedberg TA and Hans Kelsen; translated by Anders Wedberg, General Theory of Law and State (20th Century Legal Philosophy Series) (Russell & Russell Publishers 1961).
- Khallaf A al-W, Islamic Law Primary Sources in the Absence of Text (Maṣadir Al-Tashri‘ Al-Islami Fi-Ma La Naṣṣa Fih) (arabic studies institution, Arab League 1955)
- Kronke H, Nacimiento P and Otto D, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Kluwer Law International, BV 2010)
- Kuwait Financial Centre 'Markaz' has provided name of that act in wrong format using bankruptcy in stead of insolvency, P. 8, 22-7-2013 available here:
<http://www.markaz.com/DesktopModules/CRD/Attachments/BankruptcyintheGCC-MarkazResearch.pdf>

L

- Legal capacity, Introduction to Law, fifth edition, p 417
- Lesaffer R and Arriëns J, *European Legal History* (1st edn, Cambridge University Press 2009)
- Lester JP, Stewart J and Hedge DM, Public Policy: An Evolutionary Approach (3rd edn, Wadsworth Thomson Learning 2007)
- Lester JP, Stewart J and LESTER, Public Policy: An Evolutionary Approach (Wadsworth Publishing Co 1996)
- Level, case note, Clunet 648 (1966).
- Lew JDM and others, Comparative International Commercial Arbitration (Kluwer Law International 2003)

- Lew JDM, Mistelis LA and Kroll S, *Comparative International Commercial Arbitration* (Kluwer Law International 2003)

M

- Mahmood H. *Public Projects* (Alolom Aledaria Journal, first edition 1976)
- Maitland F, Montague F and Colby J, *A Sketch Of English Legal History* (1st edn, GP Putnam's sons 1998)
- Mashaqba bassam A, *Glossary of Parliamentary and Diplomatic Terms* (mejam Almustalahat Albarlamaniat Walddiblumasia) (Al Manhal 2011).
- Mayer P, *Effect of International Public Policy in International Arbitration*(Kluwer Law International 2006)
- Mistelis and Lew J, *Pervasive Problems in International Arbitration* (International Arbitration Law Library) (International Arbitration Law Library) (Loukas Mistelis ed, Kluwer Law International, BV 2006)
- Mistelis LA and Brekoulakis SL, *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009)
- Moens: G and Gabriel M, *International Trade and Business Law Review: Volume XI* (Gabriel Moens and Roger Jones eds, 1st edn, Routledge Cavendish 2008)
- Mokyry J, *The Oxford Encyclopedia Of Economic History. Vol. 3* (1st edn, Oxford University Press 2003)
- New York Convention , 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968)

O

- Omama A, *Renewal in Islamic Thinking* (alittajded Fi Al Fekr Aleslami)(Dar Ibn Aljawzi 2004)
- Omar A, *Prophet Muhammed: His Life and Times* (AuthorHouse 2011)

- Onyema E, 'Enforcement of Arbitral Awards in Sub-Sahara Africa' [2008]
SSRN Electronic Journal
- Oshitokunbo O, *An Almanac of Contemporary and Convergent Jurisprudential Restatements (ACCJR Compl.): Jurisprudence (Almanac Foundation 2015)*

P

- Parry J and Drogin EY, *Mental Disability Law, Evidence and Testimony: A Comprehensive Reference Manual for Lawyers, Judges and Mental Disability Professionals (American Bar Association 2007)*
- Peters N, *The Fundamentals Of International Commercial Arbitration* (1st edn, Maklu 2017)
- Picard E. and Bermann GA, *Introduction to French Law (Sold and distributed in North, Central, and South America by Aspen Publishers 2008)*
- Poudret J and Besson S, *Comparative Law Of International Arbitration* (1st edn, Sweet & Maxwell 2007)
- Poudret JF and Besson S, *Comparative Law of International Arbitration*(2nd edn, Sweet & Maxwell 2007)
- Pryles M, *The Asian Leading Arbitrators' Guide to International Arbitration (Juris Net 2007)*

Q

- Quinn MJ and Tomita SK, *Elder Abuse and Neglect: Causes, Diagnosis, and Intervention Strategies* (2nd edn, Springer Publishing Company 1997)

R

- Reamer FG, *Tangled Relationships: Managing Boundary Issues in the Human Services (Columbia University Press 2001).*

- Redfern A, Hunter M and Hunter M, Law and Practice of International Commercial Arbitration (Sweet & Maxwell 2004)
- Rehman Javaid, International Human Rights Law (Pearson Education 2010)
- Rubino-Sammartano M, *International Arbitration Law And Practice* (Kluwer Law International 2001)

S

- Saleh S, Commercial Arbitration in the Arab Middle East: Shari'a, Syria, Lebanon, and Egypt (2nd edn, Hart Publishing UK 2006)
- Schmitthoff C, Defective Arbitration Clauses, Nternational Commercial Arbitration (OCEANA 1975)
- Schwartz B and Vanderbilt A, *French Administrative Law And The Common-Law World* (The Lawbook Exchange 2015)
- Sir P, Frederick, Principles of Contract (Carswell 1982).
- Smith RKM, Textbook on International Human Rights (6th edn, Oxford University Press 2007).
- Standke C, Sharia - The Islamic Law (1st edn, Grin Verlag Ohg 2008)
- Statsky WP, Family Law: The Essentials (Delmar Cengage Learning 2014).
- Statute of the Court | International Court of Justice' <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II> accessed 16 October 2015
- Stone Richard, The Modern Law of Contract (6th edn, Routledge Cavendish 2005).

T

- Tawfeeq H., Public Administartion (Sejel alarab 1972).

- The Commission On European Contract Law and Hugh Beale, The Commission on European Contract Law, The Principles Of European Contract Law, Parts I And Ii (Kluwer Law International 1999).
- Tint B, Islam And The Cultural Accommodation Of Social Change (Clare Krojzl trans 1990)

U

- United Nation Conference on Trade and Development, dispute resolution, 2005, p. 30. Available here: http://unctad.org/es/Docs/edmmisc232add39_en.pdf

V

- Van Berg AJ, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation (1st edn, Kluwer Law International 1994)
- Verhey L, Zwart T and Zwart undefined T, Agencies in European and Comparative Perspective (Intersentia Publishers 2003)

W

- Waincymer J and IVONNE P, Procedure and Evidence in International Arbitration (Sold and distributed in North, Central, and South America by Aspen Publishers 2012)
- Warde I, Islamic Finance in the Global Economy (Edinburgh University Press 2000).
- Weeramantry C, *Islamic Jurisprudence* (1st edn, Palgrave Macmillan 1988)
- Wehr H, A Dictionary of Modern Written Arabic (The Hans Wehr Dictionary of Modern Written Arabic) (3rd edn, Spoken Language Services Inc,US 1976).

- Weig F-B, Practitioner's Handbook on International Commercial Arbitration (Frank-Bernd Weigand ed, 2nd edn, Oxford University Press 2009).

Articles:

A

- Alahdab a, 'New York Convention Between The Country Of The Seat And Enforcement (Aitifaqiat Niuyurk Bayn Qadii Baladay Almansha Waltanfidh)' (2001) 13916
- Aljaber mariam, 'Tafawut Al'ahkam Alqadayiyat Fi Alsewdy (disproportionate Judicial Decisions)' (2010) 15285 alriyadh.
- Almutawa Ahmed, Problems of Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States and the Prospect of a Uniform GCC Arbitration Law: An Empirical Study, (ssrn 2014).
- Almutawa Ahmed, Problems of Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States and the Prospect of a Uniform GCC Arbitration Law: An Empirical Study, (ssrn 2014).
- ALrakad, Zamel. "Point Of View In Acts (Ray Fi Al'anzima)." *alriyadh news paper* (2007)

B

- Berg van den and Jan A, 'The New York Convention of 1958: An Overview' [2011] The International Congress and Convention Association (ICCA)
- Berg Van den, 'Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few' in *Arbitration in the Next Decade* (ICC Bulletin - 1999).
- Berg, van den, 'Distinction Domestic-International Public Policy' [1996] ICCA Yearbook
- Blyschak PM, 'Arbitrating Overseas Oil and Gas Disputes: Breaches of Contract Versus Breaches of Treaty' (2010) 27 *Journal of International Arbitration*.
- Blyschak PM, 'Investment Arbitration' (2010) 27 *Kluwer Law International*
- Böckstiegel K-H, 'Karl-Heinz Bockstiegel/Stefan Michael Kroll / Patricia NACIMIENTO (Eds.), *Arbitration in Germany - The Model Law in Practice*, Wolters Kluwer, Austin / Boston / Alphen A.d. Rijn, Etc., 2007 - ISBN 9789041127181 - Pp. XXXVI + 1223.' (2007) 13 *Uniform Law Review - Revue de droit uniforme* 891

C

- Cole R, 'The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards' (1985) 1 *Ohio State Journal on Dispute Resolution*
- CUNIBERTI G, 'The French Like It Delocalized: Lex Non Facit Arbitrum' [2007] *conflict of laws*
 - Curtin KM, 'Redefining Public Policy in International Arbitration of Mandatory National Laws' [1997] *Defense Counsel Journal (DCJ)*

D

- David R, 'Harmonization and Delocalization of International Commercial Arbitration' [2011] *J.Intl.Arb*

- Freehills H, 'English Courts Set Aside Award On Grounds Of Serious Irregularity Under Section 68 Of The Arbitration Act 1996' [2015] Kluwer arbitration

G

- Gaillard E, 'The Enforcement of Awards Set aside in the Country of Origin' (1999) 14 ICSID Review
- Goodman Ryan & Keohane Robert, The Transnational Spread of American Law: Legalization as Soft Power (Benjamin Brake, Cornell University 2010).
- Gotanda JY, 'Charting Developments Concerning Punitive Damages: Is the Tide Changing' (2007) 45 Columbia Journal of Transnational Law.
- Guzman A, 'Reconciling Arbitration and Mandatory Rules' (2000) 49 Duke Law Journal

H

- Hamid Zydi, Arbitration Under the Islamic Sharia (scribd 2013)
- Handler AB, 'JUDGING PUBLIC POLICY' [2000] Rutgers Law Journal.
- HUNTER M and CONDE G, 'Transnational Public Policy and Its Application in Investment Arbitrations' (2003) 4 The Journal of World Investment & Trade.

K

- Kirgis Paul, Arbitration, bankruptcy, and public policy: a contracting analysis (Harvard law school 2009) Available here: <http://pon.harvard.edu/wp-content/uploads/images/posts/kirgis-wip-article-pdf.pdf>

L

- Lando O, 'Optional or Mandatory Europeanisation of Contract Law' (2000) 8 European Review of Private Law/Revue européenne de droit privé/Europäische Zeitschrift für Privatrecht.
- Lazic V, 'Insolvency Proceedings and Commercial Arbitration' (1998) 2 T.M.C. Asser Instituut.

M

- Mann FA, 'Lex Facit Arbitrum' [1967] International Arbitration Liber Amicorum for Martin Domke 157
- Mayer P, 'Mandatory Rules of Law in International Arbitration' (1986) 2 Arbitration International
- Mehren R, 'Enforcement of Foreign Arbitral Awards in the United States' (1998) 771 PLI/COMM
- Mistelis LA and Brekoulakis SL, 'Arbitrability: International and Comparative Perspectives' (2009) 19.
- Mulvany J, 'Disability, Impairment or Illness? The Relevance of the Social Model of Disability to the Study of Mental Disorder' (2000) 22 Sociology of Health and Illness.

N

O

- Olatawura O, 'Delocalized Arbitration under the English Arbitration Act 1996: An Evolution or a Revolution', (2003) 30 Syracuse J. Int'l L. & Com
- Othman k, 'Arbitration In Administrative Contracts (Atahkim Fi Aluqud Aledaria)' [2009] Alektsadia

P

- Park WW, 'Specificity of International Arbitration: The Case for FAA Reform' (2003) 36 Vand. J. Transnat'l L.
- Paulsson J, 'Arbitration in Three Dimensions' (2011) 60 ICLQ
- Paulsson J, 'Arbitration in Three Dimensions' [2010] ICLQ
- PAULSSON J, 'Delocalisation of International Commercial Arbitration: When and Why It Matters' (1983) 32 International and Comparative Law Quarterly 53
- Qarob M, 'Challenges Facing Insolvency Act In Saudi Arabica (Tahadiyat 'Amam Nizam Alaflas Fi Alsewdy)' [2016] Alarabia network

R

- Rogers CA, 'The Vocation of International Arbitrators' (2005) 20 American University International Law Review
- Roy KT, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards ?' (1994) 18 Fordham International Law Journal

S

- Samaan Y Al-, 'The Settlement of Foreign Investment Disputes By Means of Domestic Arbitration in Saudi Arabia' (1994) 9 Arab Law Quarterly.
- Sayen G, 'Arbitration, Conciliation, and The. Islamic Legal Tradition in Saudi Arabia' (1987) 9 University of Pennsylvania Journal of international business law
- Senger-Weiss E m., 'Enforcing Foreign Arbitration Awards' (1998) 53 WTR dispute resolution

- Sheppard Audley, Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, (International Law Association (ILA) conference 2000).
- Shuja'a Aldeen A, 'Scholar's Position of Codifying Islamic Guide' [2014] organisation house of law
- Smit H, 'Comments on Public Policy in International Arbitration' (2002) 13 AM. REV. INT'L ARB.

T

- The Need To Legislate Arbitration Rules Governing The Administrative Contract(Matalib Bsn 'Anzimat Watashrieat Liltahkim Fi Munazaeat Aleuqud Al'iidaria)' (2011) 15698 alryadh news paper

U

V

- Van den Berg, 'International Arbitration Of Petroleum Disputes: The Development Of A Lex Petrolea' (1998) XXIII Yearbook Commercial Arbitration.
- Varul P and Avi A, 'Restrictions on Active Legal Capacity' (2004) 9 Juridica International.

W

- Walsh KK, 'Thoughts on Changing the Term Mental Retardation' (2002) 40 Mental Retardation 70.
- Westbrook DA, 'Islamic International Law and Public International Law, Separate Expressions of World Order' (1993) 33 Virginia Journal of International Law
- William W P, 'Specificity of International Arbitration: The Case for FAA Reform' (2003) 36 Vand. J. Transnat'l L.

Cases :

-

A

- *Aramco v. Saudi Arabia*, (1963) 27 ILR 117.
- *Archer v. Cutler* (1980) 1 NZLR 386.
- *Atlantic Computer Systems Plc, Re* [1992] Ch. 505;

B

- *Belship Navigation, Inc. v. Sealift, Inc*, 95 Civ. 2748, (1995)
- Board of Grievances Case No 102 / T / 4, 2009
- Board of Grievances Case No 143 / T / 2, 1993
- Board of Grievances Case No 57 / T / 3, 1991
- Board of Grievances, case number 159/1/Q, 1995, decision number 44/T/3, 1998.

C

- Case No 92 / T / 2004 saudi arabia
- Cass. Com. 28 Nov. 1950, *Tissot*, D. 1951.120, note J. Robert; Paris, 15 Jun. 1956, D. 1957.587, note J. Robert; Paris, 22 May 1980, and Cass. Com. 21 Oct. 1981, *Rev. Arb.* 1982.264, note J.B. Blaise; Paris, 20 Jan. 1989, *Société Phocéenne de Dépôts*, *Rev. Arb.* 1989.280, note L. Idot.
- *Chromalloy Aeroservices Inc. v. Ministry of Defence of the Republic of Egypt* [1996] 939 F. Supp. 907
- *Clair v. Berardi* (1981) REV.ARB 424

- Creighton Ltd v. Minister of Finance of Qatar and Others, 127 ILR 154

D

- Dallah Real Estate and Tourism Holding Co v Pakistan Ministry of Religious Affairs [2009] EWCA Civ 755
- Dardana Ltd v Yukos Oil Co [2002] EWCA Civ 543
- Deutsche Schachtbau-und Tiefbohr-Gesellschaft M.B.H. v. Ras Al Khaimah National Oil Co. [1987] 3 WLR 1023

E

- Eco Swiss China Time Ltd. v. Benetton International NV (1999) ECR I-3055
- Egerton -v- Brownlow (1853) 4 HLC 1

G

- Ganz vs. SNCFT, 3 Rev. Arb. 478 (1991).
- Garuda Indonesia v Birgen Air Singapore, Court of Appeal: (2002) 1 SLR 393.
- Germany v Italy: (Greece Intervening), [2012] ICJ Rep 99.

H

- Holman v Johnson (1775) 1 Cowp 341

I

- Impertail Loan Co v. Stone (1892) 1 QB 599.
- Iron Co Ltd v Riche case (1875) LR 7 HL 653.

- Islamic Republic of Iran v. Société Eurodif and Others, Cour de Cassation (1ère Chambre Civile), 14 March 1984, 77 I.L.R. 513, 515 (1988).

K

- Kanoria v Guinness [2006] APP.L.R. 02/21
- King Nam v. Saudi Medical Center (1998) Board of Grievances, case number 159/1/Q, decision number 44/T/3

M

- Madagascar (ASECNA) v M. N'DOYE Issakha (1997) 96/84842
- Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. No. 83-1569. Argued March 18, 1985.
- NO 3288\Q 1433
- No 343/1/Q 2003
- No 4883 \2 \ Q 1434
- NO 505/2/S 1434
- No Q/1/2638 1436
- No Q/3/176 1427
- *OGIM BV Vs. king Abdul-Aziz University* case number 235/H2/1416/T

P

- Pabalk Ticaret Limited Sirketi v Norsolor (1982) 8YB Comm Arb312
- Parsons & Whittemore Overseas Co. v. Société General de l'Industrie du Papier (1974) 508 F.2d

Q

R

- Renusagar Power Co. Ltd. (India) v. General Electric Co. (USA) XXV Y.B. COM. ARB. 714 (2000) XX Y.B. COM

S

- Salomon v Salomon & Co Ltd [1896] UKHL 1
- Société Hilmarton Ltd v Société Omnium de traitement et de valorisation OTV (1995) XX YBCA 663
- Soh Beng Tee v Fairmont Development Pte Ltd [2007] 3 SLR 86
- Soleimany v. Soleimany (1999) Q.B. 785
- Syska (Elektrim SA) vs. Vivendi Universal SA & ors [2009] EWCA Civ 677.
2. Decision of the Appellate Court of Warsaw of 16 November 2009, I A Cz 1883/09, not published. 3. Decision of the Swiss Supreme Court of 31 March 2009, 4_A428/2008.

T

- Trésor Public v Galakis, 93 JDI 648 (1966), the French Court prevented other countries and public entities from using their domestic law to reject the arbitral award, considering that other countries and public entities can initiate to arbitration their disputes.
- Westacre Investments Inc v. Jugoinport (1999) 2 Lloyd's Rep. 65 (CA)

Y

- Yukos Capital SARL v OJSC Rosneft Oil Co [2011] EWHC 1461
- Yusuf Ahmed Alghanim & Sons v. Toys “R” Us Inc., 126 F.3d 15, 20 (2d. Cir.1997)

Z

Websites:

- The Cooperation Council for the Arab States of the Gulf <<http://www.gcc-sg.org/eng/indexfc7a.html?action=Sec-Show&ID=1>> accessed 19 October 2015
- ‘About UNCITRAL’ <http://www.uncitral.org/uncitral/en/about_us.html> accessed 19 February 2014
- ‘Saudi Housing Ministry’ (2014) <<http://housing.gov.sa/ar/Media/news/Pages/HY1hnb.aspx>> accessed 19 November 2015
- ‘Saudi Ministry of Justice’ <<http://www.moj.gov.sa/ar-sa/Pages/Default.aspx>> accessed 26 November 2015
- ‘Saudi Railways Organization’ <http://www.saudirailways.org/portal/page/portal/PRTS/root/Home/04_Expansion_Specification/02Saudi%20Railway%20Master%20Plan> accessed 19 November 2015
- ‘Texts the New York Convention’ <<http://www.newyorkconvention.org/new+york+convention+texts>> accessed 16 November 2015

- Riyadh Arab Agreement for Judicial Cooperation’
<<http://www.unhcr.org/refworld/docid/3ae6b38d8.html>> accessed 14 November 2015
- The United Agreement for Investment of the Arab Capital in the Arab States’
<[p://unctad.org/Sections/dite/ia/docs/compendium/en/36%20volume%202.pdf](http://unctad.org/Sections/dite/ia/docs/compendium/en/36%20volume%202.pdf)>
accessed 9 August 2012
- United Nations Commission on International Trade Law’
<http://www.uncitral.org/pdf/07-87406_Ebook_ALL.pdf> accessed 14 November 2015
- Yeo A and Lee L, ‘International Bar Association (The Global Voice of the Legal Profession)’ (2013)
<<http://www.ibanet.org/Document/Default.aspx?DocumentUid=21CE7804-1003-4E5C-965C-7BAE72749128>> accessed 16 November 2015

Interviews:

- Mohammed Assadan, former judge in Board of Grievances (Riyadh, Saudi Arabia, 7th of Dec 2013, see appendix 9

Other:

- The Qur'an (Alma'eda -49)

APPENDIX 1:

NEW YORK CONVENTION

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their

- recognition and enforcement are sought.
- . 2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
 - . 3. When signing, ratifying or acceding to the Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

- . 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
- . 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
- . 3. The court of a Contracting State, when seized of an action in a manner in respect of which the parties have made an agreement within the meaning of this article at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

- . Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory when the award is relied upon, under the conditions laid down in the following articles. there shall not be imposed the substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

- . 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of application, supply:
 - . (a) The duly authenticated original award or a duly certified copy thereof.
 - . (b) The original agreement referred to in article II or a duly certified copy thereof.
- . 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

- . 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - . (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity or the said agreement is not valid

- under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- . (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - . (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - . (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - . (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
- . 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- . (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - . (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

- . If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

- . 1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.
- . 2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

- 1. This Convention shall be open 31 December 1958 for signature on behalf of any

Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialised agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

Article IX

- . 1. This Convention shall be open for accession to all States referred to in article VIII.
- . 2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

- . 1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
- . 2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
- . 3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application

of this Convention of such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

- In the case of a federal or non-unitary State, the following provisions shall apply:
 - (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
 - (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
 - (c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the

third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

- . 1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
- . 2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.
- . 3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

- . The Secretary-General of the United Nations shall notify the States contemplated in

article VIII of the following: (a) Signatures and ratifications in accordance with article VIII; (b) Accessions in accordance with article IX; (c) Declarations and notifications under articles I, X, and XI; (d) The date upon which this convention enters into force in accordance with article XII; (e) Denunciations and notifications in accordance with article XIII.

Article XVI

- . 1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.
- . 2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

APPENDIX 2:

SAUDI ARBITRATION ACT 2012

Chapter 1. General Provisions

Article 1

The terms herein used shall have the meanings that are shown opposite to them, unless the context requires otherwise:

- (1) “Arbitration Agreement”: An agreement between two or more parties to refer to arbitration all or some of the disputes that have arisen or may arise between them with respect to a particular legal relationship, whether contractual or otherwise, and whether the arbitration agreement is in the form of an arbitration clause included in the contract, or in the form of a separate arbitration agreement.
- (2) “Arbitration Tribunal”: A sole arbitrator or a team of arbitrators who shall issue an award on a dispute referred to arbitration.
- (3) “Competent Court”: It is a court which has jurisdiction to issue an award on disputes in respect of which an agreement to refer to arbitration has been made.

Article 2

Without prejudice to the rules of Islamic Shari'a and the rules of international agreements to which the Kingdom is a party, the provisions of these regulations shall apply to any arbitration, irrespective of the nature of the legal relationship forming the subject of dispute, if such arbitration is conducted in the Kingdom, or if it is an international commercial arbitration conducted abroad and the parties thereto have agreed that it shall be subject to these regulations.

The provisions hereof shall not apply to disputes related to personal status and to matters in respect of which no settlement is permitted.

Article 3

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

- (1) If the head office of each of the parties to arbitration is, at the time of signing the arbitration agreement, located in more than one country; accordingly, if one of the parties has several headquarters, effect shall be given to the headquarters which is most closely connected with the subject matter of the dispute; if one or both parties to arbitration have page "1" a non-definitive headquarter, effect shall be given to the place wherein he normally resides.
- (2) If the headquarter of each of the parties to arbitration is located in the same country at the time of signing the arbitration agreement, and if one of the places whose particulars are mentioned hereunder exists outside this country:
 - (a) The place for conducting the arbitration as has been designated in the

arbitration agreement, or if the manner for designating that place is specified in the arbitration agreement.

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

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

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

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

Article 4

In cases where these regulations permit the two parties to arbitration to choose the applicable procedure with respect to a particular issue, this will entitle them to permit third parties to choose that procedure; in this connection, third parties shall include any individual, tribunal, organization or an arbitration center within or outside the Kingdom of Saudi Arabia.

Article 5

If the two parties to arbitration agree that their mutual relationship be governed by the provisions of any instrument (a standard contract or an international agreement or otherwise), effect shall be given to the provisions of that instrument which relate to arbitration, provided that they do not contravene the rules of Shari'a.

Article 6

(1) In the absence of an agreement between the two parties to arbitration with respect to summons, any such summons shall be delivered to the addressee in person – or to his representative – or shall be sent to his postal address as specified in the disputed contract, or in the arbitration agreement or in the instrument regulating the relationship which is covered by arbitration.

(2) If the summons could not be delivered to the addressee, in accordance with para. 1, delivery of the summons is deemed to have been accomplished if such summons has been sent by registered mail to the last known headquarters, or to the place where he normally resides, or to a known postal address of the addressee.

(3) The provisions of this article shall not apply to judicial summons related to an annulment of an arbitral award before courts of law.

Article 7

If one of the parties to arbitration proceeds with the arbitration formalities – despite his knowledge of a violation of one of the provisions of these regulations (which violation may be permitted by mutual agreement), or of a violation of one of the conditions of the arbitration agreement – and has not filed an objection to any such violation within the prescribed time, or, in the absence of the said agreement, within thirty days from his knowledge of the violation, this shall be deemed to be a waiver of his right to object.

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Article 8

(1) Jurisdiction to consider the annulment of an arbitration award and the issues that are referred to the competent court pursuant to these regulations shall be enjoyed by the court of appeal which has original jurisdiction to consider the dispute.

(2) In case of an international commercial arbitration, whether conducted inside or outside the Kingdom, jurisdiction shall be enjoyed by the Court of Appeal which has original jurisdiction to consider the dispute, in the city of Riyadh, unless the two parties to arbitration agree to the jurisdiction of any other court of appeal within the Kingdom.

Chapter 2. Arbitration Agreement

Article 9

(1) The arbitration agreement could be made before a dispute has arisen, irrespective of whether such an agreement was made separately, or was provided for in a particular contract.

Similarly, the arbitration agreement could be made after the dispute has arisen, even if a claim in respect of that dispute had been filed before the competent court; in this case, the agreement shall specify the issues to be covered by arbitration, otherwise the agreement shall be deemed null and void.

(2) The arbitration agreement shall be in writing, failing which it shall be null and void.

(3) The arbitration agreement is deemed to be in writing, if it is included in an instrument that was issued by the two parties to arbitration, or if it is included in certified mutual correspondence, cables, or in any other written or an electronic communication. Reference in any particular contract to any document which incorporates an arbitration clause shall be deemed to constitute an arbitration agreement. Similarly, any reference in the contract to the provisions of a standard contract or to an international agreement, or to any other instrument that incorporates an arbitration clause is deemed to constitute a written arbitration agreement, provided

that any such reference clearly indicates that the said clause is an integral part of the contract.

Article 10

(1) An agreement to arbitrate shall not be valid unless it is made by he who is empowered to dispose of his rights, whether he be a natural person – or his representative – or a juristic person.

(2) Government agencies shall not agree to arbitrate except after obtaining the consent of the President of the Council of Ministers, unless otherwise permitted by a legal enactment.

Article 11

(1) The court with which a dispute is filed shall, in case an agreement with respect to that dispute exists, issue a decision that it is not permissible to consider the said claim if a defence to that effect is raised by the respondent before filing any application or submitting any defence in relation to that claim.

(2) The filing of the claim referred to in the preceding paragraph shall not be a bar to commencement of the arbitration proceedings or to continue with such proceedings, or to the issuance of the arbitral award.

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Article 12

Subject to the provisions of Art. 9(1) hereof, if an agreement to arbitrate is reached while the dispute is being considered by the competent court, that court shall issue a decision pursuant to which the said dispute is to be referred to arbitration.

Chapter 3. The Arbitration Tribunal

Article 13

The arbitration tribunal shall consist of one or more arbitrators, provided that the number shall be an odd number, otherwise the arbitration shall be null and void.

Article 14

The arbitrator shall satisfy the following conditions:

- (1) He shall be legally competent.
- (2) He shall be of good conduct.
- (3) He shall at least be a holder of a university degree in Shari'a or legal sciences; however, if the arbitral tribunal consists of more than one arbitrator, it would be sufficient if the chairman of such tribunal satisfies this condition.

Article 15

(1) The two parties to arbitration may agree to the appointment of arbitrators, failing which the following shall apply:

- (a) If the arbitration tribunal consists of one arbitrator, this arbitrator shall be appointed by the competent court.
- (b) If the arbitration tribunal consists of three arbitrators, each of the parties shall appoint one arbitrator, and the two appointed arbitrators shall appoint an umpire. If one of the parties fails to appoint its arbitrator within fifteen days from the date of receiving a request from the other party, or if the two appointed arbitrators fail to appoint the umpire within fifteen days from the date of appointment of the other arbitrator, the competent court shall appoint the umpire pursuant to a request by

the interested party; such appointment shall be made within fifteen days from the date of filing the application; the umpire who has been appointed by the two arbitrators, or by the competent court, shall be the chairman of the arbitration tribunal. These rules shall be applied in case the arbitration tribunal is composed of more than three arbitrators.

(2) If the two parties to arbitration fail to agree on the procedure related to the appointment of arbitrators, or if such procedure is violated by one of the parties, or if the two appointed arbitrators fail to agree on an issue in respect of which an agreement must have been reached by them, or if the third party fails to perform his assignment in this respect, the competent court shall, pursuant to a request by the interested party, take the necessary action, unless the agreement provides for another manner for performance of this task.

(3) The competent court shall ensure that the arbitrator appointed by this court satisfies the conditions provided for in the mutual agreement of the parties in addition to the conditions herein provided for, and shall issue its decision related to the appointment of the said arbitrator within thirty days from the date of filing the application.

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(4) Without prejudice to the provisions of Arts. 49 and 50 hereof, the decision issued by the competent court with respect to the appointment of the arbitrator in accordance with paras. 1 and 2 of this article shall not be appealable in any way.

Article 16

(1) An arbitrator shall not have any interest in the relevant dispute; accordingly, he shall, as of the date of his appointment and throughout the arbitral proceedings,

declare to the two parties in writing all circumstances that are likely to raise a reasonable doubt as to his impartiality, unless he had previously informed the two parties of these circumstances.

(2) The arbitrator shall not be entitled to consider any case – even though no request to this effect has been made by one of the parties to the arbitration – in the same cases with respect to which a judge is prohibited.

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

(4) None of the two parties to arbitration shall be entitled to request that the arbitrator whom he has appointed or participated in his appointment be dismissed except for reasons that have become apparent subsequent to his appointment.

Article 17

(1) If there was no agreement between the two parties to arbitration with regard to the dismissal of an arbitrator, the application for dismissal shall be filed in writing with the arbitration tribunal, explaining the reasons for such dismissal, within five days from the date on which the applicant has become aware of the formation of the tribunal, or of the circumstances justifying the dismissal; if the arbitrator whose dismissal is required does not withdraw, or if the other party does not agree to the application for dismissal within five days from the date of its filing, the arbitration tribunal shall issue a decision on such application within fifteen days from the date of receiving the application. The applicant for dismissal shall, in case his application is

refused, file such application with the competent court within thirty days; the decision of this court shall not be appealable in any manner.

(2) The application for dismissal shall not be accepted if it is filed by a person who has previously applied for dismissal of the same arbitrator, in the same arbitration, for the same reasons.

(3) The filing of the application for dismissal with the arbitration tribunal shall cause the arbitration proceedings to be suspended, but an appeal from the decision issued by the arbitration tribunal pursuant to which the application for dismissal is rejected shall not cause the arbitration proceedings to be suspended.

(4) If a decision involving dismissal of an arbitrator is passed by the arbitration tribunal or by the competent court while considering the appeal, the arbitration proceedings which might have been so far completed, including inter alia the arbitral award, shall be deemed as non-existent.

Article 18

(1) If an arbitrator has become unable to perform his duties, or he has not assumed such duties, or if he has suspended such performance and this causes an undue delay of the arbitration proceedings, and if he has not withdrawn, and if the parties to the arbitration were not in agreement with respect to his dismissal, he shall, pursuant to a request by one of the parties, be dismissed by the competent court pursuant to a decision, and such page "5"decision shall not be appealable in any way.

(2) Unless an arbitrator has been appointed by the competent court, he shall not be dismissed except with the consent of the two parties to the arbitration, without prejudice to the provisions of para. 1 of this article; the dismissed arbitrator shall be entitled to claim compensation if such dismissal was without cause.

Article 19

If the duties of an arbitrator have come to an end as a result of his death or dismissal or withdrawal or inability or for any other reason, a substitute arbitrator shall be appointed pursuant to the procedure which had been followed with respect to the appointment of the arbitrator whose duties have come to an end.

Article 20

(1) The arbitration tribunal shall issue a decision on pleas related to lack of jurisdiction of such tribunal, including inter alia pleas based on the absence of an arbitration agreement or the waiver or annulment of such agreement, or on an allegation that it does not cover the subject matter of the dispute.

(2) Pleas related to the lack of jurisdiction of the arbitration tribunal shall be submitted within the time provided for in Art. 30(2) hereof.

The appointment of one of the parties to arbitration of an arbitrator or his participation in such appointment shall not waive his right to raise any of these pleas. However, a plea that the arbitration agreement does not cover the issues raised by the other party during the hearing of the dispute must be raised without delay, failing which the right to raise any such plea is deemed to have been waived. In all cases, the arbitral tribunal shall be entitled to accept a delayed plea if it elects that such delay was for a just cause.

(3) The arbitral tribunal shall decide on the pleas referred to in para. 1 of this article before issuing a decision on the subject matter; it may elect to join these pleas to the subject matter with a view to issuing a decision on both issues. If it elects to reject the plea, no appeal shall lie from this decision except through filing an annulment claim of the arbitral award, pursuant to Art. 54 hereof.

Article 21

The arbitral clause incorporated in any contract is deemed to constitute a separate agreement, distinct from the other terms of the contract. The annulment or rescission or termination of the contract incorporating the arbitral clause shall not constitute an annulment of the arbitral clause incorporated in that contract provided that such clause is valid.

Article 22

(1) The competent court may, pursuant to a request by one of the parties to the arbitration, or pursuant to a request by the arbitral tribunal during the course of the arbitral proceedings, issue an order for taking provisional remedies before commencing the arbitral proceedings. These proceedings may be retracted in the same manner, unless otherwise agreed by the two parties to the arbitration.

(2) The competent court may, pursuant to a request by the arbitral tribunal, issue an order with respect to the judicial delegation.

(3) The arbitral tribunal may request the relevant authority to provide assistance in relation to the arbitral proceedings as this tribunal may deem appropriate for the proper conduct of the arbitration proceedings, such as the issuance of a summons to a witness or page "6" an expert, or the issuance of instructions for producing an exhibit or a copy thereof, or for perusing the same or otherwise, without prejudice to the right of the arbitral tribunal to take that action by itself.

Article 23

(1) Pursuant to a request by either party, the two parties to the arbitration may agree that the arbitral tribunal shall be entitled to instruct any of them to take any provisional remedy that it may deem appropriate or necessary. The arbitral tribunal

may obligate the party requesting the taking of the provisional remedy to provide a reasonable financial security with a view to implementing this action.

(2) If the party to whom an order has been issued has failed to implement that order, the arbitral tribunal may, pursuant to a request by the other party, permit that party to take whatever action that may be necessary for its implementation, without prejudice to the right of the tribunal or the other party to request the competent authority to instruct the person to whom such order has been issued to implement the same.

Article 24

(1) An arbitrator shall be appointed by a separate contract. This contract shall specify his fees and a copy thereof shall be deposited with the authority that may be designated by the implementing rules hereof.

(2) Should the two parties to the arbitration and the arbitrators fail to determine the arbitral fees, such fees shall be determined by the competent court which must issue a decision to that effect, and such decision shall not be appealable in any way. If the arbitrators are to be appointed by the competent court, this court shall determine the arbitral fees.

Chapter 4. Arbitral Proceedings

Article 25

(1) The two parties to arbitration may agree on the procedure to be followed by the arbitral tribunal including inter alia their right to cause these proceedings to be governed by the rules that are applicable by any organization, institution or arbitration center within or outside the Kingdom, provided that they do not contradict the rules of Islamic Shari'a.

(2) If no such agreement exists, the arbitral tribunal may, subject to the rules of Islamic Shari'a and the provisions hereof, choose the arbitral proceedings that it may deem appropriate.

Article 26

Unless otherwise agreed, the arbitral proceedings shall commence on the day on which one of the parties to the arbitration shall have received from the other party a request for arbitration.

Article 27

The two parties to arbitration shall be treated on an equal footing , and each of them shall have full opportunity to state its claim or to present his defence.

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Article 28

The two parties to the arbitration may agree to a forum for conducting arbitration within or outside the Kingdom, failing which the arbitral tribunal shall determine such forum with due regard to the circumstances of the case and the suitability of that forum to both parties; this shall not prejudice the powers of the arbitral tribunal to hold its meetings at any place it may deem appropriate for the deliberations of its members, the hearing of witnesses, experts, the parties to the dispute or for examining the subject matter of the dispute or for perusal or inspection of the documentation.

Article 29

(1) Arbitration shall be conducted in the Arabic language unless the arbitral tribunal or both parties agree on any other language or languages; such decision or agreement shall apply to the language of the data, written memoranda, verbal pleadings and to

any decision that may be adopted by the arbitral tribunal, or any message or decision it may issue, unless the agreement of the parties or the decision issued by the arbitral tribunal provide otherwise.

(2) The arbitral tribunal may decide that all or any written instrument produced in relation to this case shall be accompanied by a translation to the language or the languages used in the arbitration. In case more than one language is used, the tribunal may restrict the translation to some of these languages.

Article 30

(1) The claimant shall, within the time agreed by both parties, or the time that may be prescribed by the arbitral tribunal provide the respondent and each arbitrator, with a written statement of his claim, specifying his name and address, the name and address of the respondent, summary of the facts of the claim, the relief claimed and the substantiating documents, in addition to any other matter that must, pursuant to agreement of the parties, be mentioned in this statement.

(2) The respondent shall, within the time agreed upon by the parties, or within the time prescribed by the arbitral tribunal, provide the claimant and each arbitrator with a written reply to the statement of claim. His reply may include any request related to the subject matter of the dispute or he may invoke any other right related to set off; he may raise such defence even at a later stage of the proceedings if the arbitral tribunal elects that there are reasons for the delay.

(3) Either party may enclose to the statement of claim or to his reply thereto, as the case may be, copies of the substantiating documents, and may refer to all or any part of these documents and to the evidence that it intends to produce. This shall not prejudice the right of the arbitral tribunal to order, at any stage of the proceedings, the

submission of the originals or copies of the documentation on which the case of either party is based.

Article 31

Copies of the memoranda, instruments or any other document that may be filed by either party with the arbitral tribunal shall be sent to the other party; similarly, copies of the expert reports, the substantiating documents and of any other evidence on which the arbitral tribunal may rely in the issuance of its award shall be sent to each party.

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Article 32

Either party shall be entitled to review or compliment the relief it has claimed within the course of the arbitral proceedings, unless the arbitral tribunal decides not to accept the same so as to avoid any delay in deciding the dispute.

Article 33

(1) The arbitral tribunal shall convene hearings of the claim in order to enable either party to explain its case and produce the evidence on which it relies, and unless otherwise agreed by the parties, the submission of memoranda and other written instruments may be deemed sufficient.

(2) The parties to arbitration shall be notified, at their respective addresses of the scheduled date for a verbal hearing of any pleading and of the date for pronouncement of the award and of any meeting of the tribunal for examining the subject matter of the dispute or any other property, or for inspection of documents, in a sufficient time before convening that meeting.

(3) The arbitral tribunal shall arrange for the taking of minutes of each hearing and these minutes shall be signed by witnesses or experts as well as by the parties attending that hearing or by their duly authorized representatives as well as the members of the arbitral tribunal; a copy of these minutes shall be delivered to each party, unless otherwise agreed.

Article 34

(1) If the claimant fails – without cause – to file a written statement of claim in accordance with Art. 30(1) hereof, the arbitral tribunal shall, unless otherwise agreed by the two parties to the arbitration, terminate the arbitral proceedings.

(2) If the respondent fails to submit a written statement of his defence pursuant to Art. 30(2) hereof, the arbitral tribunal shall, unless otherwise agreed by the parties to the arbitration, continue with the arbitral proceedings.

Article 35

If either party fails, after having been duly notified, to attend one of the hearings or to submit the required documentation, the arbitral tribunal may continue with the arbitral proceedings and issue an award on the dispute on the basis of the evidence that has been produced.

Article 36

(1) The arbitral tribunal may appoint one or more experts in order to submit a written or verbal report to be entered into the file of the case on certain issues to be specified pursuant to a decision, which decision shall be communicated to each of the parties unless it is agreed otherwise.

(2) Each of the parties shall provide the expert with the information related to the dispute and shall enable the expert to examine whatever documents, goods, or any

other property related to the dispute, as may be required. The arbitral tribunal shall issue an award on any disagreement that may arise between the expert and one of the parties with respect to this matter, pursuant to a decision, which decision shall not be appealable in any manner.

(3) Promptly after the expert report has been filed with the arbitral tribunal, a copy thereof shall be sent to each of the parties for their respective comments thereon. Both parties shall be entitled to peruse and examine the documents on which the expert haspage "9" based his report. The expert shall issue his final report after he has perused the comments of the two parties.

(4) The arbitral tribunal shall, following submission of the expert report, decide either on its own initiative, or pursuant to a request by any of the parties, that a session be convened for hearing the expert; the two parties shall be afforded the opportunity to examine the expert with respect to the contents of his report.

Article 37

If, during the arbitral proceedings, an issue beyond the scope of jurisdiction of the tribunal arises, or if it is alleged that one of the documents is forged, or that criminal proceedings have been initiated with respect to the alleged forgery, or with respect to any other criminal act, the arbitral tribunal may continue the hearing of the dispute if it elects that a decision on that issue, or on the alleged forgery or on the other criminal act is not necessary for issuing the award on the subject matter of the dispute; otherwise, it may suspend the proceedings until a final decision has been issued in this respect. Hence, the running of the time which has been fixed for issuing the arbitral award shall be suspended.

Chapter 5. Procedure for Issuing an Award on the Dispute

Article 38

(1) After ensuring that the rules of Islamic Shari'a and the laws of the Kingdom are not contravened, the arbitral tribunal shall, in the course of hearing the dispute, proceed as follows:

(a) It shall apply the rules agreed upon by the parties to the subject matter of the dispute; if the parties to the dispute have agreed to the implementation of the laws of a particular country, the substantive rules of that law, excluding the rules related to conflict of laws, shall be implemented, unless agreed otherwise.

(b) If the parties fail to agree on the rules to be applied to the subject matter of the dispute, the arbitral tribunal shall apply the substantive rules of the law which the tribunal thinks that it is most closely related to the subject matter of the dispute.

(c) Upon issuing an award on the subject matter of the dispute, the arbitral tribunal shall adhere to the terms of the contract at issue, and shall take into account the trade usages, the practice and the previous dealings between the parties.

(2) If the parties to arbitration have expressly authorized the arbitral tribunal to reach a settlement, it may issue a decision on the dispute in accordance with the rules of equity.

Article 39

(1) The award of an arbitral tribunal which consists of more than one arbitrator shall be issued by majority vote of its members, following confidential deliberations.

(2) If it is not possible to achieve a majority vote, the arbitral tribunal may appoint an umpire within fifteen days from the date it has decided that it was not possible to

achieve a majority, failing which the umpire shall be appointed by the competent court.

(3) Decisions in respect of procedural matters may be issued by the chairman of the arbitral tribunal subject to a written and an express consent of the parties, or to the unanimous consent of all members of the tribunal, unless agreed otherwise.

(4) If the arbitral tribunal is authorized to reach a settlement, a decision to this effect shall be issued by unanimous vote.

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(5) The arbitral tribunal may issue provisional decisions on any of the relief claimed before issuing a final decision on the dispute, unless otherwise agreed.

Article 40

(1) The arbitral tribunal shall issue a final award on the dispute within the time that has been agreed by the two parties, failing which the award shall be issued within twelve months from the date of commencement of the arbitral proceedings.

(2) The arbitral tribunal shall, in all cases, decide to extend the time that has been set for issuing the arbitral award, provided that such extension shall not exceed six months, unless the two parties agree on a longer period.

(3) If the arbitral award is not issued within the time referred to in the preceding paragraph, any of the parties to the dispute may request the competent court to issue an order extending that period, or closing the arbitral proceedings, whereupon either party may file its claim with the competent court.

(4) If an arbitrator has been replaced by another arbitrator pursuant to the provisions hereof, the time that has been set for issuing the award shall be extended by thirty days.

Article 41

(1) The arbitral proceedings shall cease upon the issuance of the award or upon the issuance of a decision by the arbitral tribunal putting an end to these proceedings, in the following cases:

- (a) If the two parties have agreed to put an end to the arbitration.
- (b) If the claimant abandons the arbitration, unless the arbitral tribunal decides, pursuant to an assertion by the respondent, that he has a genuine interest, to continue the proceedings until an award has been issued.
- (c) If the arbitral tribunal considers, for any reason, that it would be useless to continue the arbitral proceedings or that it would be impossible to proceed.
- (d) Upon the issuance of an order putting an end to the arbitral proceedings pursuant to the provisions of Art. 34(1) hereof.

(2) The arbitral proceedings shall not be terminated by reason of the death or incapacity of one of the parties, unless an interested party agrees with the other party to putting an end to these proceedings. However, the time that has been set for issuing the award shall be extended by thirty days, unless the arbitral tribunal decides to extend that period for a similar period, or unless agreed otherwise.

(3) Subject to the provisions of Arts. 49, 50 and 51 hereof, the assignment of the arbitral tribunal shall terminate on termination of the arbitral proceedings.

Article 42

(1) The arbitral award shall be issued in writing, the reasons therefore shall be mentioned and it shall be signed by the arbitrators. If the arbitral tribunal has been set up of more than one arbitrator, it would be sufficient if the award is signed by the majority of the arbitrators, provided that the reasons for the abstention of the minority shall be stated in the minutes.

(2) The arbitral award shall state the date on which it has been issued, the place of issue, names and addresses of the parties, names, addresses, nationalities and description of arbitrators, a summary of the arbitration agreement, a summary of the statements of, and the relief claimed by, the parties, pleadings and the substantiating documents of both page "11" parties, a summary of the expert report, if any, arbitrators' fees, arbitration costs and how these costs would be apportioned between the parties, all this without prejudice to the provisions of Art. 24 hereof.

Article 43

(1) The arbitral tribunal shall deliver a copy of the arbitral award to each of the parties within fifteen days from the date on which it has been issued.

(2) The arbitral award, or any part thereof, shall not be published except with the written consent of both parties.

Article 44

The arbitral tribunal shall deposit the original or a signed copy of that original, in the language in which it has been issued, with the competent court within the time provided for in Art. 43(1) hereof, coupled with a certified Arabic translation if it was issued in a foreign language.

Article 45

Should the two parties to the arbitration agree during the course of the arbitral proceedings to settle the dispute, they may request the arbitral tribunal to enter the terms of such settlement into record. In this case, the arbitral tribunal shall issue a decision that incorporates the terms of such settlement and puts an end to the proceedings. Upon enforcement, this decision shall have the same force of an arbitral award.

Article 46

(1) Each of the parties to the arbitration may, within thirty days following receipt of the arbitral award, request the arbitral tribunal to explain any ambiguity that may be encountered. The applicant for any such explanation shall notify the other party at its address, as shown in the arbitral award, of such request before it has been submitted to the arbitral tribunal.

(2) The explanation shall be issued in writing within the thirty days following the date on which the application has been lodged with the arbitral tribunal.

(3) The decision related to any such explanation shall be deemed complimentary to the arbitral award which it explains and shall be subject to the provisions thereof.

Article 47

(1) The arbitral tribunal shall rectify any material error in the arbitral award, whether that be in the text thereof or in the accounts, pursuant to a decision issued on its own initiative or pursuant to a request by one of the parties. The arbitral tribunal shall make any such rectification without any pleading, within fifteen days following the date on which the award has been issued, or the date of filing the rectification request, as the case may be.

(2) The decision regarding the rectification shall be issued by the arbitral tribunal in writing and shall be communicated to both parties within fifteen days from the date on which it has been issued. If the arbitral tribunal has exceeded its powers with respect to such rectification, the decision is deemed to be null and void pursuant to a claim to that effect, which claim shall be subject to the provisions of Arts. 50 and 51 hereof.

Article 48

(1) Each of the parties to the arbitration may, even after expiry of the time that has been set for arbitration, request the arbitral tribunal within the thirty days which follow his page "12" receipt of the arbitral award to issue an additional arbitral award on matters that had been raised during the course of the arbitral proceedings and which have not been covered by the arbitral award. Any such request shall be notified to the other party at his address, as shown in the arbitral award, before it has been submitted to the arbitral tribunal.

(2) The arbitral tribunal shall issue its decision within sixty days following the date of filing the application and may extend this period by another thirty days if it so elects.

Chapter 6. Annulment of the Arbitral Award

Article 49

Arbitral awards that have been issued pursuant to these regulations shall not be appealable in any way, except by filing an annulment claim pursuant to the provisions hereof.

Article 50

(1) A claim for the annulment of an arbitral award shall not be accepted except in the following instances:

- (a) Where no arbitration agreement exists, or where the agreement is void or voidable or has expired by lapse of time.
- (b) If one of the parties to the arbitration agreement was, at the time of signing that agreement, incompetent or was not fully competent pursuant to the law to which he is subject.
- (c) If one of the parties to the arbitration was unable to submit his defence by reason of not being duly notified of the appointment of an arbitrator or of the arbitral proceedings, or for any other reason beyond his control.
- (d) If the arbitral award excludes the application of any of the rules that the two parties to the arbitration had agreed to apply to the subject matter of the dispute.
- (e) If the arbitral tribunal has been set up, or if the arbitrators have been appointed in a manner contrary to these regulations or to the agreement of the parties.
- (f) If the arbitral award has covered some issues that were not included in the arbitration agreement; however, if it is possible to separate those parts of the award related to the matters which are subject to arbitration from the parts related to the matters that are not subject to arbitration, the annulment shall apply only to the parts that were not subject to arbitration.
- (g) If the arbitral tribunal has failed to observe the prerequisite conditions for the award and if such failure has resulted in a negative impact on the content thereof, or if the award was based on unlawful proceedings.

(2) The competent court shall, on its own initiative, annul an arbitral award if it includes anything contrary to the rules of Islamic Shari'a and the laws of the Kingdom, or to what has been agreed upon by the two parties, or if it is found that the subject matter of the dispute is one of the matters in respect of which no arbitration is permissible pursuant to the provisions hereof.

(3) The arbitration agreement shall not be extinguished upon the issuance of a decision by the competent court annulling the arbitral award, unless the two parties had agreed otherwise, or a decision annulling the arbitration agreement had been issued.

(4) The competent court shall consider the annulment claim in cases provided for in this article without examining the facts nor the subject matter of the dispute.

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Article 51

(1) The annulment claim shall be filed by any of the parties thereto within the sixty days following the date on which that party has been notified of the arbitral award. The waiver by the claimant of its right to file this claim before the issuance of the arbitral award shall not be a bar to accepting the claim.

(2) If the competent court has upheld the arbitral award, it shall issue an order for enforcement thereof; any such order shall not be appealable in any way. However, if that court has annulled the arbitral award, its decision shall be appealable within thirty days following the day on which that decision has been communicated.

Chapter 7. Authenticity and Enforcement of Arbitral Awards

Article 52

Subject to the provisions hereof, an arbitral award that has been issued pursuant to the provisions hereof shall be deemed final and enforceable on the basis of the principle of res judicata.

Article 53

The competent court or any person authorized by this court shall issue an order for enforcement of the arbitral award. The application for enforcement of the award shall be accompanied by the following documents:

- (1) The original or a certified copy of the award.
- (2) A true copy of the arbitration agreement.
- (3) A translation of the arbitral award to the Arabic language. This translation must have been certified by accredited translators if it had been issued in a foreign language.
- (4) Evidence that the arbitral award has been filed with the competent court pursuant to Art. 44 hereof.

Article 54

The filing of an annulment claim shall not cause the enforcement of the arbitral award to be suspended. However, the competent court may issue an order for suspension of enforcement of the award if the statement of claim includes a request to that effect, and if such a request was based on genuine (lawful) grounds. The competent court shall issue a decision on the application for enforcement of the award within fifteen days from the date on which the application has been filed. If an order for suspension or enforcement of the award has been issued, the court may require the provision of a

surety or financial security. If an order to this effect has been issued, it shall issue a decision on the annulment claim within 180 days from the date of such order.

Article 55

(1) An application for enforcement of an arbitral award shall not be accepted unless the time fixed for filing the annulment claim has elapsed.

(2) No order for enforcement of an arbitral award shall be issued pursuant to the provisions hereof except after ascertainment of the following:

(a) That such order does not contradict any judgment or decision that had been issued by a court or a committee or any other tribunal in the Kingdom of Saudi Arabia, having jurisdiction to consider the subject matter of the dispute.

(b) That it does not include anything contrary to the rules of Islamic Shari'a and the page "14" laws of the Kingdom; if it is possible to split the award, the court may issue an order for enforcement of the part which is not contrary to those rules.

(c) That it has been duly communicated to the person against whom it was issued.

(3) No appeal shall lie from an order related to enforcement of an arbitral award; however, an appeal from an order dismissing the enforcement of an award may be filed with the competent authority within thirty days from the date on which it has been issued.

Chapter 8. Final Provisions

Article 56

The Council of Ministers shall issue implementing rules for these regulations.

Article 57

These regulations shall replace the Arbitration Regulations promulgated by Royal Decree No. M/46, dated 12/7/1403AH.

Article 58

These Regulations shall be implemented thirty days from the date on which they have been published in the Official Gazette.

APPENDIX 3:

SAUDI ARBITRATION ACT 1983

The implementation rules were issued by the Council of Ministers pursuant to Resolution 7/2021/M dated 8.9.1405 H (27 May 1985) and published in the Official Gazette on 10.10.1405 H (28 June 1985).

Chapter I. Arbitration, Arbitrators and Parties

Section 1

Arbitration in matters wherein conciliation is not permitted, such as hudoud⁽¹⁾ laan⁽²⁾ between spouses, and all matters relating to the public order, shall not be accepted.

Section 2

An agreement to arbitrate shall only be valid if entered into by persons of full legal capacity. A guardian of minors, appointed guardian or endowment administrator may not resort to arbitration unless being authorized to do so by the competent court.

Section 3

The arbitrator shall be a Saudi national or Muslim expatriate from the free profession section or others. The arbitrator may also be an employee of the state, provided approval of the department to which he belongs is obtained. In the case of more than one arbitrator, the umpire shall have a knowledge of sharia rules, commercial regulations, customs and traditions applicable in Saudi Arabia.

Section 4

Any person having an interest in the dispute or having being sentenced to a hud⁽³⁾ or penalty in a crime of dishonour, or being dismissed from a public position following a disciplinary order, or being adjudicated as bankrupt, unless being relieved, shall not act as arbitrator.

Section 5

Subject to the provisions of Sections 2 and 3 above, a list containing the names of arbitrators shall be prepared by agreement between the minister of justice, the minister of commerce and the chairman of the Grievance Board. The courts, page "370"judicial committees, and chambers of commerce and industry shall be informed of such lists and the respective parties may select arbitrators from these lists or from others.

Section 6

The appointment of an arbitrator or arbitrators shall be completed by agreement between the disputing parties in an arbitration instrument which shall sufficiently outline the dispute and the names of the arbitrators. Agreement to arbitration may be concluded by a condition in a contract in respect of disputes that may arise from the execution of such a contract.

Section 7

The authority originally competent to decide in the dispute shall issue a decision for approval of the arbitration instrument within 15 days and shall notify the arbitration panel of the same.

Section 8

In disputes where a government authority is a party with others, such a government authority shall prepare a memorandum with respect to arbitration in such a dispute, stating its subject matter, the reasons for arbitration and the names of the parties. Such a memorandum shall be submitted to the council of ministers for approval of arbitration. The prime minister may, by a prior resolution, authorize a government authority to settle the disputes arising from a particular contract, through arbitration. In all cases, the council of ministers shall be notified of the arbitration awards adopted.

Section 9

The clerk of the authority originally competent to decide on the dispute shall act as secretary for the arbitration panel, establish the necessary records for registration or arbitration application and shall submit the same to the concerned authority for approval of the arbitration instrument. Such clerk shall also be in charge of the summons and notices provided for in the arbitration regulations and by any other assignments as may be decided by the relevant minister. The concerned authorities shall make the necessary arrangements regarding the above.

Section 10

The arbitration panel shall fix the date of the hearing for consideration of the dispute within a period not exceeding five days from the date in which approval of the arbitration document had been notified to the arbitration panel, and shall notify the disputing parties of the same through the clerk of the authority originally competent to decide on the dispute.

Chapter II. Notification of Parties, Appearance, Default and Proxies in Arbitration

Section 11

Every summons or notice relating to the subject matter of arbitration made through the clerk of the authority originally competent to decide on the dispute, shall be made through the messenger or the official authorities, whether the said proceeding is requested by the disputing parties or initiated by the arbitrators. Police or mayors are required to assist the relevant authority in performing its duties within their prescribed jurisdiction. [page "371"](#)

Section 12

The summons or notice shall be written in the Arabic language and shall consist of two or more copies - according to the number of disputing parties - and shall contain the following:

- a) The date, day, month and year in which the summons or notice was made.
- b) The first name, surname, title, profession and domicile of the party requesting the summons or notice, and the first name, surname, title, profession and domicile of his representative, if he is working for another person.
- c) The name of the messenger who forwarded the summons or notice, his employer and his signature on the original and copy of the summons or notice.

d) The first name, surname, profession and domicile of the person to be summoned or notified, and if his domicile is not known at the time of issuance of the summons, then his latest domicile.

e) Title of the person to whom copy of the summons has been served, and his signature on the original indicating receipt, or indication of his refusal to take receipt of the summons when returned to the concerned authority.

f) Name and place of the arbitration panel, the subject matter of procedures, and the date specified therefor.

Section 13

1. The papers to be served on summons shall be delivered to the respective person, or to his place of domicile, and may be delivered to a chosen place of domicile determined by the concerned parties.

2. In case such person is not present in his place of domicile, the summons papers shall be delivered to any person who declares that he is an agent or responsible for the business of the person to be summoned, or his employee, or that he or she is living with him - such as spouse, relative or other.

Section 14

If the messenger did not find the proper person to whom the papers are to be delivered pursuant to the preceding section, or if the person mentioned therein refrained from accepting the papers, the messenger shall state that in the original copy and deliver the same that day to the police commissioner or mayor or the representative of any of them, if the residence of the person summoned falls within their authority. Also, the

messenger shall within 24 hours send the person summoned at his original or chosen domicile a registered letter, informing that the copy had been delivered to the administration and stating all such details in the original copy of the summons. The summons or notice shall be valid and effective from the time of delivery thereof as aforementioned.

Section 15

Except as provided for in special regulations, the copy of summons or notice shall be delivered in the following manner:

- a) In matters relating to the state, it shall be delivered to the ministers, district governors, directors of government departments or their representatives.
- b) In matters relating to public persons, it shall be delivered to the person acting on his behalf according to the law, or his representative.
- c) In matters relating to companies, societies and private establishments, it shall be delivered to the head offices, as indicated in the commercial registration, to the chairman, managing director or his representative from among the employees. With respect to foreign companies having branches or agents in Saudi Arabia, the papers shall be delivered to the branch or the agent. page "372"

Section 16

The official in charge shall submit the arbitration file to the authority responsible for trial of the dispute, for approval of the arbitration instrument. The clerk of such authority shall notify the parties and the arbitrators of the decision taken with respect

to approval of the arbitration instrument within one week from the date of adoption of such decision.

Section 17

On the day fixed for arbitration, the parties shall appear by themselves or through their representatives, by virtue of a notarized power of attorney, or by a proxy issued by any official authority or certified by one of the chambers of commerce and industry. A copy of the power of attorney shall be kept in the file of the claim after the original has been reviewed by the arbitrator, without prejudice to the right of the arbitrator or arbitrators to require the personal appearance of the respective party if the circumstances so require.

Section 18

1. In the event of default by one of the parties in appearing at the first hearing, and if the arbitration panel is satisfied that such defaulting party had been properly served notice, the arbitration panel may decide on the dispute as long as the respective parties have filed their statements of claim, defences and documentation. The award adopted shall, in such case, be considered a decision made in the presence of the parties. However, if the defaulting party was not properly served a summons, the hearing shall be adjourned to another hearing so that the defaulting party is properly notified. If the defendant parties are many and are only partially served a personal summons, and if they have all, or those who are not served notice, defaulted to appear, the arbitration panel in other than urgent matters shall adjourn the hearing so that the defaulting parties are properly served notice, and the award adopted in such other hearing shall be deemed as if made in the presence of all defaulting parties.

2. Also, the award of arbitration shall constructively be deemed made in the presence of the party who appears personally or by proxy in any of the hearings, or filed his statement of defence in the claim or in document relating thereto. However, if the defaulting party appeared prior to the end of the hearing, any award or decision adopted therein shall be deemed null and void.

Section 19

If the arbitration panel discovers that a summons published to a defaulting party in a newspaper is not proper, it shall adjourn arbitration of the dispute to another hearing and such defaulting party shall be properly served a summons in respect thereto.

Chapter III. Hearings, Trial and Recordings of Claim

Section 20

The claim shall be tried openly unless the arbitration panel decides by its own motion, or if one of the parties so requests, that the hearing be held in camera for reasons appreciated by the arbitration panel.

Section 21

The arbitration of the claim shall not, without an acceptable reason, be adjourned more than once for a reason attributed to one of the parties. page "373"

Section 22

The arbitration panel shall reasonably allow each party to make his remarks and defences either orally or in writing in the times specified by the arbitration panel. The

defendant party shall be the last to make submission and the panel shall complete the case and prepare the award.

Section 23

The umpire shall control and manage the hearings, direct questions to the parties or witnesses, and shall have the right to dismiss from the hearing anyone in contempt of the hearing. However, if anyone present commits a violation, the umpire shall record the incident and transfer it to the concerned authority. Each arbitrator shall have the right to direct questions and examine the parties or witnesses through the umpire.

Section 24

The parties may request the arbitration panel at any stage of the claim to record their agreement in the minutes of the hearing as related to admission, conciliation, assignment or otherwise, and the arbitration panel shall make an award of the same.

Section 25

The Arabic language shall be the official language to be used before the arbitration panel, whether in the discussions or in correspondence. The arbitration panel and the parties may not speak other than the Arabic language and any party who does not speak Arabic shall be accompanied by an accredited translator, who shall sign with him the minutes of the hearing, approving the statements made.

Section 26

Any party may request adjournment of the proceedings for a reasonable period, that period to be decided by the arbitration panel, so that such a party can submit any

documents, papers, or remarks which may be productive or have a material effect on the case. The arbitration panel may allow further adjournments if there is justification therefor.

Section 27

The arbitration panel shall record the facts and proceedings which take place in the hearing, in minutes written by the secretary of the arbitration panel under its supervision. The minutes shall contain the date and place of the hearing, names of arbitrators, the secretary and the parties. It shall also contain statements of the respective parties, the minutes shall be signed by the umpire, arbitrators and the secretary.

Section 28

1. The arbitration panel may, by its own motion, or pursuant to a request from one of the parties, require the other party to produce any document which he may possess and which may have material effect on the proceedings, in the following cases:

- a) If such document is a joint document between the parties. Such document will be deemed joint if, in particular, it is in favour of both parties or if it proves their mutual rights and obligations.
- b) If one of the parties invoked such a document in any phase of the claim.
- c) If the regulations permit demand for delivery or release of such a document.

page "374"

2. The application must state the following:

- a) description of the document requested
- b) contents of the document, with as much detail as possible
- c) the fact in issue for which such document is called
- d) the evidence and circumstances proving that the document is under the possession of the other party
- e) the reason for obligating the other party to present the said document.

Section 29

The arbitration panel may designate the effective means of inquiry in the claim whenever the facts to be proven are proximate to the dispute and are admissible.

Section 30

The arbitration panel may disregard the evidentiary procedures it has ordered, provided that reasons for such disregard shall be stated in the minutes of the hearing. The arbitration panel may not consider the result of such procedures and shall state its reasons in the award.

Section 31

The party requesting testimony of witnesses shall specify the facts to be proved in the testimony, either orally or in writing, and shall accompany his witnesses in the specified hearing. Admission of witnesses and hearing of their statements shall be

conducted before the arbitration panel pursuant to the shariatic rules, and the other party may refute such testimony in the same manner.

Section 32

The arbitration panel may cross-examine the parties at the request of either party or on its own motion.

Section 33

The arbitration panel may, if necessary, seek the assistance of one or more experts to provide a technical report regarding a technical or material matter which may have effect on the claim. The arbitration panel shall mention in its award an accurate statement of the expert's mission and the urgent arrangements which he is permitted to take. The arbitration panel shall estimate the fees of the said expert, the party who shall pay them, and the deposit to be made to the account of the expert. In case such deposit is not made by the party required to do so, or by the other parties to the arbitration, the expert will not be bound to perform his duty, and the right to adhere to the decision made for the appointment of the expert shall be void, if the arbitration panel finds that the reasons given are unacceptable. In performing his duty, the expert may hear the statements of both parties or others and shall submit a report of his opinion on the specified date. The arbitration panel may cross-examine the expert in the hearing concerning the result of his report. If there is more than one expert, the panel shall specify the manner of their performance, whether severally or collectively.

Section 34

The arbitration panel may request the expert to provide a complementary report to overcome any default or omissions in his previous report and the parties may submit advisory reports to the panel. However, in all cases the arbitration panel shall not be bound by the expert's opinions.

Section 35

The arbitration panel may, on its own motion or at the request of either party, decide to move for inspection of some facts or matters which were disputed and page "375" have a material effect on the claim and shall make a report of the inspection proceedings.

Section 36

The arbitration panel shall observe the principles of litigation, so as to include confrontation in proceedings, and to permit either party to take cognizance of the claim proceedings, to have access to its material papers and documents in reasonable periods of time, and to give him a sufficient opportunity to present his documentation, defences and contents in the hearing, either orally or in writing, and to record them in the minutes.

Section 37

If a preliminary issue of a matter falling outside the jurisdiction of the arbitration panel arose during the process of arbitration, or if a document had been claimed to have been forged, or if criminal proceedings had been instituted for the forgery or for any other criminal act, the arbitration panel shall suspend proceedings and the date

fixed for the award until a final decision is issued from the concerned authority in relation to that matter which had arisen.

Chapter IV. Awards, Objections and Execution

Section 38

When the arbitration panel is ready to render a decision, the panel shall close the case for review and deliberations. Deliberations shall be held in camera and shall only be attended collectively by the arbitration panel who attended the hearings. The panel shall fix, at the time the case is closed or in another hearing, a date for issuance of the award, subject to the provisions of articles 9, 13, 14 and 15 of the arbitration regulations.

Section 39

The arbitrators shall issue their awards without being bound by legal procedures, except as provided for in the arbitration regulations and its rules of implementation. Awards shall follow the provisions of Islamic sharia and the applicable regulations.

Section 40

When the case is closed for review and deliberation, the arbitration panel may not hear further submissions from either of the parties or their representative except in the presence of the other party, and shall not accept any memorandum or document without the document being reviewed by the other party; if such explanation, memorandum or document is deemed material, the panel may extend the date fixed for the award and reopen the proceedings by virtue of a decision stating the reasons

and justifications therefor, and shall notify the parties of the date fixed for continuation of the proceedings.

Section 41

Subject to articles 16 and 17 of the arbitration regulations, awards shall be adopted by the opinion of the majority of the arbitrators. The award shall be pronounced by the umpire in the specified hearing. The award shall contain the names of the members of the respective panel, the date, place, and subject matter of the award, first names, surnames, description, domicile, appearance and absence of the parties, a summary of the facts of the claim, requests of the parties, summary of their defences, substantial defences, and the reasons and text of the award. The arbitrators and the clerk shall, within seven days from the filing of the draft, sign page "376" the original copy of the award which comprises the above contents and which shall be kept in the file of the claim.

Section 42

Without prejudice to the provisions of articles 18 and 19 of the arbitration regulations, the arbitration panel shall rectify any material typing or arithmetical errors that may occur in its awards, by virtue of a decision to be issued on its own motion, or at the request of either party without pleading procedures. Such rectification shall be made on the original copy of the award and duly signed by the arbitrators. The decision for rectification of the award may be objected to by all possible means of objection if the arbitration panel exceeded its right of rectification as provided for in this section. The decision issued against a request for rectification may not be objected to independently.

Section 43

The parties may request the arbitration panel which has issued the award to interpret any ambiguity in the text of the award. The interpretation shall be deemed complementary in all respects to the original award and shall be subject as well to the rules relating to means of objection.

Section 44

Whenever an order is issued for execution of the arbitration award, the latter becomes an executionary instrument and the clerk of the authority originally competent to try the case shall give the winning party the execution copy of the arbitration award, containing the order for execution and ending with the following phrase:

“All concerned government authorities and departments shall cause this award to be executed with all legally applicable means even if such execution required application of force by the police.”

Fees Of Arbitrators

Section 45

If both opponents fail to agree on the fees, a decision may be issued for division of fees between them at the discretion of the authority originally competent to try the case; a decision also may be issued for payment of all such fees by one of the parties in dispute.

Section 46

Any party may object to the estimate of the arbitrators' fees to the authority which issued the decision, the objection to be made within eight days from notification of the fees; the authority's decision on the said objection shall be final.

Section 47

The concerned authorities shall execute these rules.

Section 48

These rules shall be published in the Official Gazette and shall be effective from their date of publication.

APPENDIX 6:

AGE OF LEGAL CAPACITY (SCOTLAND) ACT 1991 (SECTION 1)

1 Age of legal capacity⁴²¹.

(1) As from the commencement of this Act—

(a) a person under the age of 16 years shall, subject to section 2 below, have no legal capacity to enter into any transaction;

(b) a person of or over the age of 16 years shall have legal capacity to enter into any transaction.

(2) Subject to section 8 below, any reference in any enactment to a pupil (other than in the context of education or training) or to a person under legal disability or incapacity by reason of nonage shall, insofar as it relates to any time after the commencement of this Act, be construed as a reference to a person under the age of 16 years.

(3) Nothing in this Act shall—

(a) apply to any transaction entered into before the commencement of this Act;

(b) confer any legal capacity on any person who is under legal disability or incapacity other than by reason of nonage;

(c) affect the delictual or criminal responsibility of any person;

(d) affect any enactment which lays down an age limit expressed in years for any particular purpose;

(e) prevent any person under the age of 16 years from receiving or holding any right, title or interest;

(f) affect any existing rule of law or practice whereby—

⁴²¹ <http://www.legislation.gov.uk/ukpga/1991/50/section/1>

- (i) any civil proceedings may be brought or defended, or any step in civil proceedings may be taken, in the name of a person under the age of 16 years **u** relation to whom there is no person entitled to act as his legal representative (within the meaning of Part I of the Children (Scotland) Act 1995), or where there is such a person] is unable (whether by reason of conflict of interest or otherwise) or refuses to bring or defend such proceedings or take such step;
 - (ii) the court may, in any civil proceedings, appoint a curator ad litem to a person under the age of 16 years;
 - (iii) the court may, in relation to the approval of an arrangement under section 1 of the ^{M1}Trusts (Scotland) Act 1961, appoint a curator ad litem to a person of or over the age of 16 years but under the age of 18 years;
 - (iv) the court may appoint a curator bonis to any person;
 - (g) prevent any person under the age of 16 years from exercising parental responsibilities and parental rights (within the meaning of sections 1(3) and 2(4) respectively of the Children (Scotland) Act 1995) in relation to any child of his.]
- (4) Any existing rule of law relating to the legal capacity of minors and pupils which is inconsistent with the provisions of this Act shall cease to have effect.
- (5) Any existing rule of law relating to reduction of a transaction on the ground of minority and lesion shall cease to have effect.

APPENDIX 7:

MIAMI DRAFT

**Hypothetical Draft Convention on the International Enforcement of Arbitration
Agreements and Awards**

Article 1 – Field of Application

1. This Convention applies to the enforcement of an arbitration agreement if:
 - . (a) the parties to the arbitration agreement have, at the time of the conclusion of that agreement, their place of business or residence in different States, or
 - . (b) the subject matter of the arbitration agreement relates to more than one State.
2. This Convention applies also to the enforcement of an arbitral award based on an arbitration agreement referred to in paragraph 1.
3. Where this Convention refers to the enforcement of an arbitral award, it comprises the recognition of an arbitral award.

Article 2 – Enforcement of Arbitration Agreement

1. If a dispute is brought before a court of a Contracting State which the parties have agreed to submit to arbitration, the court shall, at the request of a party, refer the

dispute to arbitration, subject to the conditions set forth in this article.

2. The court shall not refer the dispute to arbitration if the party against whom the arbitration agreement is invoked asserts and proves that:

- . (a) the other party has requested the referral subsequent to the submission of its first statement on the substance of the dispute in the court proceedings; or
- . (b) there is prima facie no valid arbitration agreement under the law of the country where the award will be made; or
- . (c) arbitration of the dispute would violate international public policy as prevailing in the country where the agreement is invoked.

3. The court may on its own motion refuse to refer the dispute to arbitration on ground (c) mentioned in paragraph 2.

Article 3 – Enforcement of Award – General

1. An arbitral award shall be enforced exclusively on the basis of the conditions set forth in this Convention.

2. The law of the country where enforcement is sought shall govern the procedure for enforcement of the award.

3. There shall not be imposed onerous requirements on the procedure for enforcement nor substantial fees or charges.

4. Courts shall act expeditiously on a request for enforcement of an arbitral award.

Article 4 – Request for Enforcement

1. Fulfillment of the conditions set forth in this article entitles the party seeking enforcement to be granted enforcement of the arbitral award, unless the court finds that a ground for refusal is present under the conditions set forth in articles 5 and 6.

2. The party seeking enforcement shall supply to the court the original of the arbitral award.

3. Instead of an original of the arbitral award, the party seeking enforcement may submit a copy certified as conforming to the original. The certification shall be in such form as directed by the court.

4. If the arbitral award is not in an official language of the court before which enforcement is sought, the party seeking enforcement shall, at the request of the other party or the court, submit a translation. The translation shall be in such form as directed by the court.

Article 5 – Grounds for Refusal of Enforcement

1. Enforcement of an arbitral award shall not be refused on any ground other than the grounds expressly set forth in this article.

2. Enforcement shall be refused on the grounds set forth in this article in manifest

cases only.

3. Enforcement of an arbitral award shall be refused if, at the request of the party against whom the award is invoked, that party asserts and proves that:

(a) there is no valid arbitration agreement under the law of the country where the award was made; or

. (b) the party against whom the award is invoked was not treated with equality or was not given a reasonable opportunity of presenting its case; or

. (c) the relief granted in the award is more than, or different from, the relief sought in the arbitration and such relief cannot be severed from the relief sought and granted; or

. (d) the composition of the arbitral tribunal was not in accordance with the agreement of the parties, or in the absence of such an agreement, not in accordance with the law of the country where the award was made; or

. (e) the arbitral procedure was not in accordance with the agreement of the parties, or in the absence of such an agreement, not in accordance with the law of the country where the award was made; or

. (f) the award is subject to appeal on the merits before an arbitral appeal tribunal or a court in the country where the award was made; or

. (g) the award has been set aside by the court in the country where the award was made on grounds equivalent to grounds (a) to (e) of this paragraph; or

. (h) enforcement of the award would violate international public policy as

prevailing in the country where enforcement is sought.

4. The court may on its own motion refuse enforcement of an arbitral award on ground (h) of paragraph 3.
5. The party against whom the award is invoked cannot rely on grounds (a) to (e) of paragraph 3 if that party has not raised them in the arbitration without undue delay after the moment when the existence of the ground became known to that party.

Article 6 – Action for Setting Aside Pending in Country of Origin

1. If the application for setting aside the award referred to in article 5(3)(g) is pending in the country where the award was made, the court before which the enforcement of the award is sought under this Convention has the discretion to adjourn the decision on the enforcement.
2. When deciding on the adjournment, the court may, at the request of a party, require suitable security from the party seeking enforcement or the party against whom the award is invoked.

Article 7 – More-Favourable-Right

If an arbitration agreement or arbitral award can be enforced on a legal basis other than this Convention in the country where the agreement or award is invoked, a party seeking enforcement is allowed to rely on such basis.

Article 8 – General Clauses

The General Clauses to be considered and possibly included in the Draft Convention include amongst others:

- . (a) Designation of Competent Enforcement Court
- . (b) Interpretation
- . (c) Relationship with the New York Convention
- . (d) References to the New York Convention in other treaties
- . (e) Compatibility with other treaties
- . (f) [No] reservations
- . (g) General reciprocity
- . (h) Applicability of the Draft Convention to territories and in federal states
- . (i) Signature, ratification and accession, and deposit
- . (j) Entry into force
- . (k) Retroactive [in]applicability; transitional clauses
- . (l) Denunciation
- . (m) Notifications
- . (n) Language of authentic texts.

APPENDIX 8:

BANKRUPTCY (SCOTLAND) ACT 1985:

ARBITRATION AND COMPROMISE: ARTICLE 65

(1) The permanent trustee may (but if there are commissioners only with the consent of the commissioners, the creditors or the court)—

(a)refer to arbitration any claim or question of whatever nature which may arise in the course of the sequestration; or

(b)make a compromise with regard to any claim of whatever nature made against or on behalf of the sequestrated estate;and the decree arbitral or compromise shall be binding on the creditors and the debtor.

(2)Where any claim or question is referred to arbitration under this section, the Accountant in Bankruptcy may vary any time limit in respect of which any procedure under this Act has to be carried out.

(3)The permanent trustee shall insert a copy of the decree arbitral, or record the compromise, in the sederunt book.

APPENDIX 8:

REFERENCE TO ISLAMIC RULES IN SAUDI ARBITRATION ACT

2012

Article 2

Without prejudice to the rules of Islamic Shari'a and the rules of international agreements to which the Kingdom is a party, the provisions of these regulations shall apply to any arbitration, irrespective of the nature of the legal relationship forming the subject of dispute, if such arbitration is conducted in the Kingdom, or if it is an

international commercial arbitration conducted abroad and the parties thereto have agreed that it shall be subject to these regulations.

The provisions hereof shall not apply to disputes related to personal status and to matters in respect of which no settlement is permitted.

Article 5

If the two parties to arbitration agree that their mutual relationship be governed by the provisions of any instrument (a standard contract or an international agreement or otherwise), effect shall be given to the provisions of that instrument which relate to arbitration, provided that they do not contravene the rules of Shari'a.

Article 14

The arbitrator shall satisfy the following conditions:

- (1) He shall be legally competent.
- (2) He shall be of good conduct.
- (3) He shall at least be a holder of a university degree in Shari'a or legal sciences; however, if the arbitral tribunal consists of more than one arbitrator, it would be sufficient if the chairman of such tribunal satisfies this condition.

Article 25

(1) The two parties to arbitration may agree on the procedure to be followed by the arbitral tribunal including inter alia their right to cause these proceedings to be governed by the rules that are applicable by any organization, institution or arbitration center within or outside the Kingdom, provided that they do not contradict the rules of Islamic Shari'a.

(2) If no such agreement exists, the arbitral tribunal may, subject to the rules of Islamic Shari'a and the provisions hereof, choose the arbitral proceedings that it may deem appropriate.

Article 38

(1) After ensuring that the rules of Islamic Shari'a and the laws of the Kingdom are not contravened, the arbitral tribunal shall, in the course of hearing the dispute, proceed as follows:

(a) It shall apply the rules agreed upon by the parties to the subject matter of the dispute; if the parties to the dispute have agreed to the implementation of the laws of a particular country, the substantive rules of that law, excluding the rules related to conflict of laws, shall be implemented, unless agreed otherwise.

(b) If the parties fail to agree on the rules to be applied to the subject matter of the dispute, the arbitral tribunal shall apply the substantive rules of the law which the tribunal thinks that it is most closely related to the subject matter of the dispute.

(c) Upon issuing an award on the subject matter of the dispute, the arbitral tribunal shall adhere to the terms of the contract at issue, and shall take into account the trade usages, the practice and the previous dealings between the parties.

(2) If the parties to arbitration have expressly authorized the arbitral tribunal to reach a settlement, it may issue a decision on the dispute in accordance with the rules of equity.

Article 50

(1) A claim for the annulment of an arbitral award shall not be accepted except in the following instances:

(a) Where no arbitration agreement exists, or where the agreement is void or voidable or has expired by lapse of time.

(b) If one of the parties to the arbitration agreement was, at the time of signing that agreement, incompetent or was not fully competent pursuant to the law to which he is subject.

(c) If one of the parties to the arbitration was unable to submit his defence by reason of not being duly notified of the appointment of an arbitrator or of the arbitral proceedings, or for any other reason beyond his control.

(d) If the arbitral award excludes the application of any of the rules that the two parties to the arbitration had agreed to apply to the subject matter of the dispute.

(e) If the arbitral tribunal has been set up, or if the arbitrators have been appointed in a manner contrary to these regulations or to the agreement of the parties.

(f) If the arbitral award has covered some issues that were not included in the arbitration agreement; however, if it is possible to separate those parts of the award related to the matters which are subject to arbitration from the parts related to the matters that are not subject to arbitration, the annulment shall apply only to the parts that were not subject to arbitration.

(g) If the arbitral tribunal has failed to observe the prerequisite conditions for the award and if such failure has resulted in a negative impact on the content thereof,

or if the award was based on unlawful proceedings.

(2) The competent court shall, on its own initiative, annul an arbitral award if it includes anything contrary to the rules of Islamic Shari'a and the laws of the Kingdom, or to what has been agreed upon by the two parties, or if it is found that the subject matter of the dispute is one of the matters in respect of which no arbitration is permissible pursuant to the provisions hereof.

Article 55

(1) An application for enforcement of an arbitral award shall not be accepted unless the time fixed for filing the annulment claim has elapsed.

(2) No order for enforcement of an arbitral award shall be issued pursuant to the provisions hereof except after ascertainment of the following:

(a) That such order does not contradict any judgment or decision that had been issued by a court or a committee or any other tribunal in the Kingdom of Saudi Arabia, having jurisdiction to consider the subject matter of the dispute.

(b) That it does not include anything contrary to the rules of Islamic Shari'a and the page "14" laws of the Kingdom; if it is possible to split the award, the court may issue an order for enforcement of the part which is not contrary to those rules.

(c) That it has been duly communicated to the person against whom it was issued.

(3) No appeal shall lie from an order related to enforcement of an arbitral award; however, an appeal from an order dismissing the enforcement of an award may be

filed with the competent authority within thirty days from the date on which it has been issued.

No.	Name	Profile	Interview Date	Interview Venue
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APPENDIX 9:

**APPENDIX DETAILS OF SUBJECTS INTERVIEWED FOR THE
THESIS**

1	Mohammed Assadan	Mohammed bin Saad bin Abdullah Assadan, Member of the Shura Council, the former judge and Vice Chairman of the Board of Grievances. he was one of the Judiciary Committee in . King Nam v. Saudi Medical Center, case.	7th of Dec 2013	Riyadh Saudi Arabia
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