Freedom of Parties in International Commercial Arbitration: An Analytical and Comparative Study of Shariah, The Saudi Arbitration Law 2012 and The English Arbitration Act 1996

Ahmed Almuqham
School of Law
Oxford Brookes University

Thesis submitted to Oxford Brookes University for the Degree of Doctor of Philosophy

September, 2018

‘The arbitrator aims at achieving equity, the judge at applying the law’[1] Aristotle

‘By what right do you enslave people (through oppression and injustice), and they were born free’[2] Caliph Umar Bin Al-Khattab

[1] Pierre Mayer, ‘Reflections on the International Arbitrator's Duty to Apply the Law’ (2001) 7 Arbitration International 325, 325.

[2] Michael Cook and others (eds), *Law and Tradition in Classical Islamic Thought* (Palgrave Macmillan 2013) 176.

Abstract

This thesis examines the extent of the parties' freedom to establish, form and terminate an international commercial arbitration agreement under Shariah and the Saudi Arbitration Law 2012. More specifically, this thesis aims to determine the amount of the freedom that parties to international commercial arbitration experience under Shariah—an issue that, to date, has been overlooked by Sunni scholars. The research also seeks to identify the compatibility of the new Saudi arbitration system with Shariah with regard to the freedom of the arbitration parties. The thesis further seeks to explore and evaluate the degree to which Shariah and the Saudi arbitration system can benefit from the practices of the English arbitration system as established under the English Arbitration Act 1996.

Using doctrinal and comparative research strategies, the thesis analyses and compares the various opinions and evidence of Shariah scholars from the four Sunni schools over the last 1,200 years in relation to the freedom of parties in international commercial arbitration. It then compares the position of Shariah to the new Saudi arbitration system while also examining and measuring the position of these two systems against the English arbitration law and its case law.

The research demonstrates that, in light of the primary sources of Shariah and Shariah's main principles—and contrary to the common belief of most contemporary legal writers—the parties to international commercial arbitration in Shariah enjoy broad freedom in most aspects of arbitration (for example, in the establishment of an arbitration agreement with respect to both existing and future disputes, and in choosing the rules of procedure and the rules of evidence). This freedom is even broader than what is offered by most modern arbitration laws (such as the Model Law). In addition, the thesis argues that there is no legal obstacle in Shariah that prevents parties to international commercial arbitration from accessing the same freedom under the English system, as parties to arbitration in both systems must observe public policy (the right of Allah) and the mandatory rules in all systems. At the same time, the thesis posits that despite the assertion of the new Saudi arbitration law that Shariah provisions must be respected in all arbitration aspects, in many respects (and unlike its predecessor) the new law does not follow any of the approaches of the four Sunni schools on the parties' freedom.

Acknowledgements

Thanks to Allah Almighty, who guided me and provided me with the power and ability to prepare and complete this research.

I would like to express my sincere gratitude to my supervisors, Professor Ilona Cheyne and Professor Peter Edge, for their positive and productive support. They welcomed my research topic and, with their infinite support and invaluable advice, this project turned from a mere title into a complete thesis.

Sincere appreciation to Dr. Simon Cooper, Ms. Jill Organ, and Ms. Catherine Joyejob and to all those working in the Law School and Headington Campus at Oxford Brookes University who spared no effort in providing support and guidance.

I would also like to express my thanks to all members of staff at libraries that provided many of the materials and legal resources for this research, especially The Bodleian Law Library in Oxford, Headington Library at Oxford Brookes University and King Fahd National Library in Riyadh.

Special thanks to the Ministry of Commerce and Investment in the Kingdom of Saudi Arabia for sponsoring my studies here in the UK and to the Saudi Cultural Bureau in London for its remarkable commitment to supporting students.

I extend my heartfelt gratitude to Mr. Hassan Ghannam, from whose useful advice and guidance I have benefited immensely throughout the preparation of this thesis.

Finally, I thank everyone who has contributed to the completion of this research.

Dedication

To Nourah AlMuqham, my beloved mother, may Allah have mercy on her soul and grant her the highest Jannah.

To Ibrahim AlMuqham and Mohammed AlMuqham, my beloved father and brother, may Allah bless them with long life and good health.

To Nourah, my brilliant, loving and supportive wife who has been a constant source of support and encouragement during the challenges of this research journey and life generally.

To Ahmad AlZahrani, my dearest friend.

Table of Contents

Abstract II

Acknowledgements ..... **III**

Dedication ..... **IV**

Table of Contents ..... **V**

1. Table of Abbreviations XI

1.1 Statutes Abbreviations: XI

1.2 Non-Statutory Abbreviations: XII

2. Glossary ..... **XVI**

3. Table of Cases: ..... **XIX**

3.1 Islamic Shariah Cases: XIX

3.2 Saudi Arabia Cases and Decisions XIX

3.3 UK Cases: XIX

3.4 Cases of Other National Jurisdictions XXI

3.5 International Arbitral Awards XXII

4. Table of Legislation ..... **XXIII**

4.1 Islamic Shariah Legislation XXIII

4.1.1 The Two Main Sources of Shariah XXIII

4.1.2 Shariah Fatawa and Resolutions: XXIV

4.2 Saudi Arabia Legislation XXV

4.2.1 Statutes XXV

4.2.2 Statutory Instruments: XXV

4.2.3 Ministerial Decisions and Official Papers XXVI

4.2.4 Bilateral Treaties: XXVI

4.3 UK Legislation XXVI

4.3.1 Statutes XXVI

4.3.2 Statutory Instruments: XXVII

4.4 Legislations of Other National Jurisdictions XXVII

4.5 National Official Reports XXVII

4.6 International Conventions, Laws and Official Documents XXVII

4.6.1 International Conventions and Laws XXVII

4.6.2 UNCITRAL Official Documents XXVIII

4.7 Arbitration Institution Charters and Rules XXVIII

Chapter I: Introduction **1**

1. Purpose of the Thesis 5

2. Methodology 8

3. Choosing English Arbitration Law as Model 13
4. Data Collection 14
4.1 Primary Sources 15
4.2 Secondary Sources 15
4.3 Semi-Structured Interviews 16
5. Delimitation of the Thesis 20
6. Structure of the Thesis 20
Chapter II: Islamic Shariah 24
1. Overview 24
2. Definition of Shariah 25
3. *Fiqh* and Its Sources 26
3.1 *Ijma'* (Juristic Consensus) 27
3.2 *Qiyas* (Analogy) 28
4. Sunni *Madhahib* (Schools) 29
4.1 AlHanafi School 29
4.2 AlMaliki School 30
4.3 AlShafi'i School 30
4.4 AlHanbali School 31
5. Arbitration and Shariah 32
5.1 Arbitration in the Quran 32
5.2 Arbitration in Sunnah 34
5.2.1 Sunnah *AlQawliyah* 35
5.2.2 Sunnah *AlFi'liyah* 36
6. Conclusion 38
Chapter III: Nature of Arbitration and Arbitration Contract 40
1. Nature of Arbitration 40
1.1 Agency Contract Theory 41
1.1.1 Premises of Agency Theory 45
1.1.2 Critique of Agency Theory 45
1.2 Judicial Theory 47
1.3 Mixed Theory 49
2. Definition of Arbitration Agreement 52
2.1 Agreement with Arbitrator and Arbitration Agreement 53
2.1.1 Subject Matter of Contract 54
2.1.2 Applicable Law of Contract 55
2.1.3 Parties 56

3. Conclusion 58
Chapter IV: Scope of Arbitration and Types of Arbitration Agreements 60
1. Scope of Arbitration (Arbitrability *Ratione Materiae*) 60
1.1 Arbitrability of a Dispute Under Shariah 61
1.2 Arbitrability of a Dispute Under the SAL 2012 63
1.3 Arbitrability of a Dispute Under the EAA 1996 666
2. Types of Arbitration Agreements 70
2.1 Arbitration Clause 70
2.2 Submission Agreement 75
3. Conclusion 77
Chapter V: Requirements for a Valid Arbitration Agreement 79
1. Consent of the Parties 80
1.1 Writing and Consent 81
1.2 Formation of Consent 82
1.3 Requirements for Validity of Consent 83
2. Capacity 87
2.1 Natural Person 88
2.2 Legal Person 91
2.2.1 *Al-Iflas* (Bankruptcy) 94
3. Legality of Subject Matter of Contract (*Mahal Al-Aqd* or *Al-Ma'qood Alaih*) 101
4. Conclusion 103
Chapter VI: Freedom of Parties and Qualifications of Arbitrator 106
1. Qualifications of an Arbitrator as Stipulated by Law 107
1.1 Religious Qualification 109
1.2 Requirement Regarding Gender 117
1.3 Possessing the Characteristic of *Adel* 121
1.4 Legal Capacity (Age and Mental Ability) 125
1.5 Knowledge of Shariah and Law 125
1.6 Physical Abilities 128
1.7 Independence 129
1.8 Conclusions and Findings 131
2. Freedom of Parties to Determine Additional Qualifications of the Arbitrator 133
3. Conclusion 136
Chapter VII: Freedom of Arbitration Parties to Determine Substantive and Procedural Law…… 139
1. Freedom of Parties and Substantive Law 140
1.1 Freedom of Arbitration Parties to Determine Substantive Law Under Shariah 141

1.1.1 Attitude of Shariah Regarding the Use of Different Law 141
1.1.2 Necessity 143
1.1.3 *Umum Albalwa* 144
1.2 Attitude Adopted in SAL 2012 and EAA 1996 147
1.2.1 Freedom of Arbitration Parties in Choosing Substantive Law 148
1.2.2 Limits to Freedom of Arbitration Parties to Select Applicable Law 150
1.2.2.1 Connection Between the Contract and Chosen Law 150
1.2.2.2 Public Order (Public Policy) 153
1.2.2.2.1 Overview 153
1.2.2.2.2 Concept of Public Policy Under Shariah and Saudi and English Law 154
1.2.2.2.3 Effect of Public Order (Public Policy) on the Freedom of Parties to Select Law 156
1.2.2.3 Mandatory Rules 159
1.2.2.3.1 Impact of Mandatory Rules on the Freedom of Parties Before Arbitration 159
1.2.2.3.2 Impact of Mandatory Rules After the Initiation of Arbitration Process 162
1.2.2.3.3 Determination of Mandatory Rules 163
1.2.2.3.4 Conflict of Mandatory Rules 164
2. Procedural Rules 166
2.1 Overview 166
2.2 Classification as Substantive or Procedural 167
2.2.1 The Effect of the Distinction Between Procedural and Substantive Law on the Freedom of the Parties 167
2.3 Freedom of Arbitration Parties to Agree on Procedural Rules 169
2.3.1 Time Limit to Determine Procedural Rules 170
2.3.2 Legal Limits on the Freedom of Parties to Agree on Procedures 171
3. Conclusion 175
Chapter VIII: Rules of Evidence 178
1. Oral Testimony 179
1.1 Requirements of Witnesses 180
1.1.1 Being a Muslim 180
1.1.2 Being of a Particular Gender 182
1.1.3 Puberty and Sanity 184
1.2 Three Main Differences between Shariah and English System in Testimony 185
1.2.1 Cross-Examination of Witnesses 186
1.2.2 Barriers to Testimony 187
1.2.3 Written Testimony 189

2. Written Evidence 191
3. Admission (*Iqrar*) 193
3.1 Formation of Admission 194
3.2 Requirements for Valid Admission 195
3.3 Freedom of an Arbitration Party to Withdraw an Admission 196
4. Oath (Yamin/Qasam) 198
4.1 Requirements for a Valid Oath 199
4.2 Oath as Evidence 202
4.2.1 Oath as Part of Evidence 203
4.2.2 Oath as Complete Evidence (*Al-Yamin Al-Hasima*) 204
5. Conclusion 207
Chapter IX: Freedom of Parties to Terminate The Arbitration Agreement and Arbitrator's Mandate 210
1. Termination of Arbitration Contract 210
1.1 Freedom of a Party to Terminate the Agreement Without Good Cause 211
1.1.1 Approaches of Shariah 211
1.1.2 Approaches of Saudi Law and English Law 216
1.2 Exceeding Definite Time 220
1.3 Death of One Party 223
1.4 Fundamental Breach 226
1.4.1Requirements for a Party's Right to Terminate Arbitration Due to a Fundamental Breach 228
1.4.2Scope of the Parties' Right to Terminate an Arbitration Agreement After a Fundamental Breach 229
1.5 Expiration of the Agreement When the Arbitrator Exits 231
2. Freedom of Parties to End Arbitrator's Mandate Early 232
2.1 The Parties' Freedom to Terminate the Arbitrator's Mandate Early Under Shariah 233
2.2 Freedom of Parties to Terminate Arbitrator's Mandate Early Under Saudi and English Law 236
3. Conclusion 238
Chapter X: Conclusion 241
1. Pre-Agreement Stage 242
1.1 Right to Arbitrate the Dispute 242
1.2 Right to Agree on Both Types of Arbitration Agreement 243
1.3 Requirements for Valid Arbitration Agreement 244
2. Forming the Elements of the Arbitration Agreement Stage 246
2.1 Selection of Arbitrators 246
2.2 Choice of Substantive Law 248

2.3 Choice of Procedural Rules....251
2.4 Freedom and Evidence Rules....252
3. Right to Terminate Arbitration Agreement Stage....256
4. Concluding Remarks....258
5. Areas of Further Research....260
6. Recommendations....260
Bibliography....267
1. Books:....267
2. Books Chapters:....280
3. Electronic Books:....281
4. Journal Articles and Periodicals:....281
5. Electronic Sources: Journal Articles, Reports and Working Papers/Conference Papers/ Research Papers:....289
6. Other Electronic Sources:....291
7. Theses:....292
Appendices....293
Appendix I: University Research Ethics Committee Form (E2U)....294
Appendix II: Information Sheet for Members of The Senior Scholars Council....295
Appendix III: Information Sheet for Judges of Commercial Court and The Court of Appeal....297
Appendix IV: Consent Form of Members of Senior Scholars Council....299
Appendix V: Consent Form of Judges of Commercial Court and The Court of Appeal....2
AppendixVI: Certified Translation of Saudi Arbitration Law 2012....3

1. Table of Abbreviations

1.1 Statutes Abbreviations:

Arbitration (Scotland) Act 2010	SAA 2010
Saudi Basic Law of Governance 1992	SBLG 1992
Commercial Agents (Council Directive) Regulations 1993	CAR 1993
Convention on the Law Applicable to Contractual Obligations	Rome Convention
Convention on the Recognition and Enforcement of Foreign Arbitral Awards	NYC 1958
English Arbitration Act 1889	EAA 1889
English Arbitration Act 1996	EAA 1996
English Children Act 1989	ECA1989
English Civil Procedure Rules 1998	ECPR 1998
English Companies Act 1985	CA1985
English Companies Act 2006	ECA 2006
Employment Equality (Religion or Belief) Regulations 2003	EERBR 2003
English Insolvency Act 1986	EIA 1986
Equality Act 2010	EA 2010
European Convention on International Commercial Arbitration	Geneva Convention 1961
Convention on the Execution of Foreign Arbitral Awards	Geneva Convention 1927
Protocol on Arbitration Clauses 1923	Geneva 1923
Riyadh Arab League Convention for Judicial Co-operation	Riyadh Convention 1983
Saudi Commercial Court Law 1931	SCCL 1931
Saudi Companies Law 2015	SCL 2015
Saudi Law of Procedure Before Sharia Courts 2013	SLPBSC 2013
Saudia Arbitration Law 2012	SAL 2012
Saudia Arbitration Law 1983	SAL 1983
Saudia Implementing Regulations 1985 of the SAL 1983	IRSAL 1985
Saudia Implementing Regulations 2014 of the Law of Procedure Before Sharia Courts 2013	IRLPBS 2014
Saudia Law of the Relationship Between a Foreign Contractor and His Saudi Agent 1978	LRBFCSA 1978
Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations	Rome I
UNCITRAL Model Law on International Commercial Arbitration	Model Law
The United Nations Convention on Contracts for the International Sale of Goods	Vienna Convention
United States Restatement (Second) of Conflicts of Law 1971	USRSCL 1971
French Code of Civil Procedure 2011	FCCP 2011
New Zealand Arbitration Act 1996	NZAA 1996

Saudia Judiciary Law 2007	SJL 2007
Uniform Act on Arbitration of the Organization for the Harmonization of Business Law in Africa	UAOHADA 2017
Convention for the Protection of Human Rights and Fundamental Freedoms	CPHRFF
English Insolvency Rules 1986	EIR 1986

1.2 Non-Statutory Abbreviations:

European Council for Fatwa and Research	ECFR
UK Centre for Legal Education	UKCLE
Al-Imam Mohammad Ibn Saud Islamic University	IMSIU
American Bankruptcy Institute Law Review	ABI Law Review
American Journal of Comparative Law	AJCL
American Journal of Trial Advocacy	Am J Trial Advoc
American University International Law Review	Am U Int'l L Rev
Arab Law Quarterly	ALQ
Arbitration International	Arbitr Int
Australian Journal of Basic and Applied Sciences	Aust J Basic & Appl Sci
Berkeley Electronic Press SelectedWorks	BEPSW
Central European University	CEU
Civil Justice Quarterly	CJQ
Company Law Newsletter	Co LN
Company Lawyer	Comp Law
Congressional Research Service	CRS
Contemporary Asia arbitration journal	Contemp Asia Arb J
Coventry Law Journal	Cov LJ
Damascus University Journal for Social and Legal Science	DUJSLS
Ecclesiastical Law Journal	Ecc LJ
English Linguistics Research	ELR
European Parliamentary Research Service	EPRS
European University Institute	EUI
Georgia Journal of International and Comparative law	Ga J Int'l & Comp L
Global Arbitration Review	GAR
Global Journal of Comparative Law	Global J Comp L
Indian Journal of Medical Sciences	IJMS
Interdisciplinary journal of contemporary research in busines	IJCRB
International Arbitration Law Review	Int ALR
International Centre for Education in Islamic Finance	INCEIF
International Commercial Arbitration Brief	Int'l Com Arb Brief
International Institute for the Unification of Private Law	UNIDROIT

International Journal of Biomedical Research	IJBR
International Journal of Interdisciplinary and Multidisciplinary Studies	IJIMS
International Journal of Islamic Finance	IIJIF
International Journal of Law and Management	Int JLM
International Journal of Middle East Studies	Int'l JmidEStud
International Journal of Qualitative Methods	IJQM
International Lawyer	Int'l Law
International Network to Promote the Rule of Law	INPROL
International Shari'ah Research Academy for Islamic Finance Research Paper	Int'l SRAIFRP
IOSR Journal Of Humanities And Social Science	IOSR-JHSS
Islam and Civilizational Renewal	ICR
Islamic Business Researches Center	IBRC
Islamic Educational, Scientific and Cultural Organization	ISESCO
Islamic Law and Society	IL& S
Jerusalem Studies in Arabic and Islam	JSAI
Journal de Droit des Affaires Internationale	IBLJ
Journal of Arbitration and Mediation	the Journal
Journal of Business and Management	JBM
Journal of Comparative Legislation and International Law	ICLQ
Journal of Computer Information Systems	JCIS
Journal of Current Research in Science	J Curr Res Sci
Journal of Dispute Resolution	J Disp Resol
Journal of International Arbitration	J Int Arb
Journal of International Banking and Financial Law	JIBFL
Journal of International Banking Law and Regulation	JIBLR
Journal of International Business Studies	JIBS
Journal of International Trade Law and Policy	JITL&P
Journal of Islamic Law and Culture	JILC
Journal of Law and Religion	JL& Relig
Journal of Law and Society	J Law & Soc
Journal of Muslim Minority Affairs	JMMA
Journal of Personal Injury Law	JPI Law
Journal of Personal Injury Litigation	JPIL
Journal of Philosophy, Culture and Religion	JPCR
Journal of Private International Law	J Priv Int L
Journal of the Islamic Fiqh Academy	JIFA
Journal of World Investment & Trade	JWIT
Journal of Medical Ethics and History of Medicine	J Med Ethics Hist Med,
Journalism & Mass Communication Quarterly	JMCQ

Kluwer Law International	KLI
Labuan e-Journal of Muamalat and Society	LJMS
Law and Contemporary Problems	L&CP
Legal Information Management	LIM
Loyola of Los Angeles International and Comparative Law Review	Loy LA Int'l & Comp L Rev
Maastricht European Private Law Institute	M-EPLI
Masaryk University Journal of Law and Technology	MUJLT
McGill Law Journal	McGill LJ
Mediterranean Journal of Social Sciences	MJSS
Michigan State Law Revie	Mich St LRev
Middle-East Journal of Scientific Research	MEJSR
National Research University Higher School of Economics	HSE University
Nebraska Law Review	Neb L Rev
Netherlands International Law Review	NILR
Oil, Gas & Energy Law	OGEL
Organisation for Economic Co-operation and Development	OECD
Palestinian Academic Society for the Study of International Affairs	PASSIA
Political Research Quarterly	PRQ
London School of Economics and Political Science	LSE
International Shari'ah Research Academy	ISRA
Private Client Business	PCB
Qualitative Health Research	QHR
Rajaratnam School of International Studies	RSIS
Research in the Schools	RITS
Royal Danish Academy of Sciences and Letters	RDASL
Santa Clara Journal of International Law	Santa Clara J Int'l L
Singapore Academy of Law Journal	SacLJ
Tulane Journal of International and Comparative law	Tul J Intl & Comp L
Universal Law Publishing	ULP
Universitas Sahid Jakarta	USAHID Jakarta
University of Hawaii Press	UH Press
University of Pennsylvania Journal of International Law	U Pa J Int'l L
University of Pennsylvania Law Review	UPa L Rev
University of St Thomas law journal	U St Thomas LJ
Washington University Law Review	Wash UL Rev
Yale Human Rights and Development Law Journal	YHRDLJ
Yale Journal of Law & the Humanities	YJLH
Yale Law Journal	YLJ
Yalova Üniversitesi Hukuk Fakültesi Dergisi	YÜHFD

International Institute of Islamic Thought	IIIT
Virtual Foundation for Advancement of Science and Technology	VFAST
IB Tauris	IBT
The Munich Personal RePEc Archive	MPRA
United Nations Treaty Series	UNTS
Official Journal of the European Union	OJEU
Official Journal of the European Communities	OJ
Gulf Cooperation Council Commercial Arbitration Centre	GCAC
World Intellectual Property Organization	WIPO
Public Court	PC
Board of Grievances	BG
Appeal Court	AC
Shariah Court	SC
Dubai International Arbitration Centre	DIAC
European Union	EU
Football Association Premier League	FAPL
Fulham Football Club	FFC
London Court of International Arbitration	LCIA
London Maritime Arbitrators Association	LMAA
International Chamber of Commerce	ICC
International Islamic Fiqh Academy	IIFA
The Council of the International Islamic Fiqh Academy	CIIFA
Departmental Advisory Committee on Arbitration Law	DAC
International Bar Association	IBA
After Christ	AD
the Unified Form of a Commercial Proxy For a Foreign or National Project	UFCPFNP
Journal of Medical Ethics and History of Medicine	J Med Ethics Hist Med

2. Glossary

- ***Adel*** (also spelled *adil, adl* or *adalah)*: literally equity and fairness. In Shariah, *adel* is a quality of a person who follows the commands of God (Allah) and avoids what he has forbidden.
- ***Ahl al-kitab***: literally means people of the book. According to Sunni scholars, they are Jews and Christians.
- ***Al-Iflas***: bankruptcy.
- ***AlMua'hed***: a non-Muslim who enters an Islamic state for a temporary time under an agreement.
- **Sunnah**: a collection of the sayings and actions of Prophet Mohammad and his descriptions, approvals or disapprovals towards the sayings or acts of other individuals during his life. Sunnah is the second source of the main sources in Shariah as it is inspired by Allah.
- ***Al-yamin al-hasima*** *or* ***al-yamin al-wajiba***: a decisive oath or an obliged oath which is an oath requested by either of the opposing parties from the other in which the opponent swears that the claim against him is not true.
- ***Aqd jaes*** (singular of *aqud jaesah*): literally translated as permissible contract. The term has no equivalent in the common law. According to Shariah, *aqd jaes is a* contract that can be terminated at the whim of any of the parties without any justification and without bearing any liability. Under Shariah it is the opposite of a binding contract, which the parties must fulfill unless they agree otherwise.
- ***Batel***: void.
- ***Bay' al-salam*** **contract**: a contract that calls for the sale of an object which is not available at the time of the execution of the contract and will not be delivered until a fixed future date.
- ***Dhimmi*** (singular of *dhimmis*): a non-Muslim who lives continuously in an Islamic state.
- ***Istihsan*** (also spelled *estehsan*): a method of concluding provisions in Shariah and one of the sources of Shariah. As a method, *istihsan* means giving a ruling in a case contrary to similar cases for a particular reason.
- ***Fasid***: corrupt.
- ***Fatwa*** (singular of *fatawa*): Shariah opinion issued by a *mufti*.
- ***Fiqh***: literally means knowledge, understanding, and discernment. Fiqh is the knowledge of Shariah's practical rulings through the detailed texts of Shariah.
- ***Fisq***: the opposite of *adel.* In Shariah, *fisq* is a description that applies to a person who commits one of the major sins or who persists in a minor sin.
- ***Fuqaha*** (singular of *faqih*): scholars of jurisprudence in Shariah.
- ***Gharar****:* excessive uncertainty or risk.
- ***Hadith***: a report or narrative of the sayings and actions of Prophet Mohammad.
- ***Halal***: permitted.

- ***Haram***: forbidden.
- ***Hudud*** (plural of *had*): severe crimes which include seven serious crimes, according to Shariah. These are murder, apostasy from Islam, theft, adultery, defamation (false accusations of paternity), alcohol drinking and *alharaba* (an Arabic word that means the emergence of an armed group to cause chaos and bloodshed and looting money and the attack on honour).
- ***Hujjiyah***: weight or proof value.
- ***Ijma'***: the consensus of jurisprudential scholars in Shariah upon a provision regarding a particular issue in an era after the death of Prophet Mohammad.
- ***Ijtihad*** (singular of *ijtihadat*): a mechanism to derive Shariah rules by using different techniques such as *qiyas* (reasoning by analogy).
- ***Ijtihadi*** (adjective of *ijtihad)*: discretionary interpretation of a text of the main sources of Shariah to arrive at rules of Shariah regarding any new matters.
- ***Iqrar***: admission.
- ***Istishab***: presumption of continuity.
- ***Kaafir***: an infidel.
- ***Khiar Almajlis***: the right of either contracting party to withdraw from the contract after its consummation but before the end of the contractual session without bearing any liability.
- ***Khiyar AlShart***: a condition that grants one or more contracting parties the right to terminate the contract.
- ***Laan***: a procedure of Shariah by which the spouses terminate their marital relationship upon one party directing accusation of adultery to the other.
- ***Madhahib*** (plural of *madhhab*): refers to different Shariah schools.
- ***Mahal al-aqd*** (or *al-ma'qood alaih*): the subject matter of the contract.
- ***Majlis al-aqd:*** a contractual session. In Shariah, *majless al-aqd* means the situation in which the parties, or one of them, are devoting their attention to the contracting process, whether they are face to face or otherwise.
- ***Makruh***: not desirable.
- ***Mandoob***: desirable.
- ***Maqasid***: general purposes.
- ***Maslahah mursalah***: public interest.
- ***Moharram***: prohibiting commands.
- ***Mufassirin***: exegesists of Quran.
- ***Muflis***: a bankrupt.

- ***Mufti*** (singular of *mufteen*): a Muslim scholar empowered to give Shariah opinions.
- ***Mujtahid***: an expert in Shariah who is qualified to conclude Shariah opinion on new cases that were not explicitly stipulated in Quran or Sunnah.
- ***Nakel***: a parson refusing to take an oath.
- ***Nukuul***: refers to the defendant's refusal to swear that the plaintiff's claims are not valid.
- ***Qisas***: a kind of punishment in which the offender is punished equal to what he commits to the victim (retribution and retaliation), when meeting the requirements stated by Shariah.
- ***Qiyas*** (also spelled *alqiyas*): a method of concluding provisions in Shariah. It is considered the broadest source of Islamic jurisprudence. As a method, *qiyas* is an extension of a provision of Shariah (*hukm*) from an original case (*asl*) to a new case (*fara*), due to the similarity of *illah* (underlying cause) between these two cases.
- ***Riba***: usury and interest.
- ***Sahih***: valid.
- **Sunni**: refers to the largest branch of the two major branches of Islam and it comprises 87 to 90 percent of the world's Muslims. Sunni *madhhab* at the present time is also divided into four *madhahib* (AlHanafi, AlMaliki, AlShafi'i and AlHanbali) which represent the position of Sunni *madhhab* in this study.
- ***Surat*** (also spelled surah or *sura*): a term that refers to a chapter of Quran.
- ***Ta'zir***: crimes punishable at the discretion of the court.
- ***Tafaseer***: exegesis of Quran.
- ***Tarjeeh****:* under Shariah, it is weighing of one opinion of the scholars or schools of Shariah over the others.
- ***Ummah***: nation.
- ***Umum albalwa***: a disfavoured or prohibited practice that is widespread and difficult to avoid without great hardship.
- ***Urf***: customs.
- ***Wajib***: obligatory commands.
- ***Waqf***: charitable trust.
- ***Yamin alestedhar***: an oath requested by the judge or arbitrator from a claimant in order to be convinced that the evidence is true.
- ***Yastahelluh***: a characteristic of a person who believes the case at hand is permissible although he knows it is generally forbidden.
- ***Zakat***: a share of money at a particular time dictated by Allah to the beneficiaries nominated in Quran.

3. Table of Cases:

3.1 Islamic Shariah Cases:

Alnadir v Qurayzah

The Black Stone (605 AD)

3.2 Saudi Arabia Cases and Decisions

Case No 1391/5/qaf of 1429 Hijra (corresponding to 2008 AD) BG

Case No 235/2/Qhaf of 1416 Hijra (corresponding to 1996 AD) BG (Jeddah)

Case No 2496/1/qaf of 1425 Hijra (corresponding to 2004 AD) BG

Case No 250/2/kaf of 1408 Hijra (corresponding to 1987 AD) BG

Case No 269/3/gaf of 1408 Hijra (corresponding to 1987 AD) BG (Makkah)

Case No 29/T/4 of 1413 Hijra (corresponding to 1993 AD) BG

Case No 332031116 of 1434 Hijra (corresponding to 2013 AD), PC (AlDammam), AC No 34376312 (Eastern Region)

Case No 34172977 of 1434 Hijra (corresponding to 2013 AD) SC (AlQatif)

Case No 911/2/Kaf of 1429 Hijra (corresponding to 2008 AD) BG

Case No 933/3/kaf of 1429 Hijra (corresponding to 2008 AD) BG

Decision No 369/2/Q of 1421 Hijra (corresponding to 2001 AD) BG

Decision No 4/ta/155 of 1415 Hijra (corresponding to 1994 AD) BG

Decision No 4/ta/178 of 1413 Hijra (corresponding to 1992 AD) BG

Decision No 4/ta/43 of 1416 Hijra (corresponding to 1995 AD) BG

Case No 222/3/kaf of 1408 Hijra (corresponding to 1987 AD) BG

3.3 UK Cases:

Omychund v Barker (1744) 1 Atkyns 21

Robinson v Bland (1760) 1 Blackstone W 256

Accentuate Limited v ASIGRA Inc [2009] EWHC 2655 (QB)

Adams & Others v Lindsell & Others (1818) 1 Barnewall and Alderson 681, 106 ER 250

Anzen Limited and others v Hermes One Limited (British Virgin Islands) [2016] UKPC 1

BV Scheepswerf Damen Gorinchem v The Marine Institute [2015] EWHC 1810 (Comm)

Baron v Sunderland Corporation [1966] 2 QB 56

BDMS Limited v Rafael Advanced Defence Systems [2014] EWHC 451 (Comm)

BDW Trading Ltd (t/a Barratt North London) v JM Rowe (Investments) Ltd [2011] EWCA Civ 548

Bea Hotels NV v Bellway LLC [2007] 1 CLC 920

Braybrook v Basildon and Thurrock University NHS Trust [2004] EWHC 3436 (QB)

Bristol Airport Plc and Another v Powdrill and Others [1990] Ch 744

Byrne & Co v Leon Van Tienhoven & Co (1880) 5 CPD 344

Chaplin Appellant v Boys Respondent [1971] AC 356

Chaplin v Leslie Frewin (Publishers) Ltd and Others [1966] Ch 71

Compagnie d'Armement Maritime SA Appellants v Compagnie Tunisienne de Navigation SA Respondents [1970] 3 WLR 389

Compagnie Europeene de Cereals S A v Tradax Export S A [1986] 2 Lloyd's Rep 301

Continental Enterprises Limited v Shandong Zhucheng Foreign Trade Group Co [2005] EWHC (92)

David Wilson Homes Ltd v Survey Services Ltd and David Jonathan Marshall (2001) 3 TCLR 13

Delta Reclamation Limited v Premier Waste Management Limited, [2008] EWHC 2579 (QBD)

Deutsche Bank AG v Tongkah Harbour Public Co Ltd [2011] EWHC 2251 (Comm)

Deutsche Schachtbau-Und Tiefbohrgesellschaft mbH v R'as al-Khaimah National Oil Co [1987] 3 WLR 1023

Downing v Al Tameer Establishment & Anor [2002] EWCA Civ 721

Egerton v Brownlow (1853) 4 H L Cas 1

Errington v Errington and Woods [1952] 1 KB 290

Exeter City Association Football Club Ltd v Football Conference Ltd and another [2004] 1 WLR 2910

Fulham Football Club (1987) Limited v Sir David Richards, The Football Association Premier League Limited [2010] EWHC 3111 (Ch)

Fulham Football Club (1987) Ltd v Richards and another [2012] Bus LR 606

Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd [2013] EWHC 4071 (Comm)

Jivraj v Hashwani [2011] UKSC 40

Hashwani v Jivraj [2010] ICR 1435

Herschel Engineering Ltd v Breen Property Ltd (2000) 2 TCLR 473

Hyde v Wrench (1840) 3 Beavan 334

Jungheim, Hopkins & Co v Foukelmann [1909] 2 KB 948

K/s Norjarl A/s v Hyundai Heavy Industries Co Ltd, [1992] QB 863

Kuwait Airways Corpn v Iraqi Airways Co [2001] 3 WLR 1117

Lombard North Central Plc v GATX Corp [2012] EWHC 1067 (Comm)

Lord Advocate v The Scotsman Publications Ltd 1989 SC (HL) 122

Mangistaumunaigaz Oil Production Association v United World Trade Inc [1995] 1 Lloyd’s Rep 617, 621 [1995] QBD (Comm Ct)

Mercantile Union Guarantee Corporation, Limited v Ball [1937] 2 KB 498

Mohammed Ahad, Misba Uddin Ahmed v Shams Uddin [2005] EWCA Civ 883

Moriarty and Wife v The London, Chatham, and Dover Railway Company (1869-70) LR 5 QB 314

Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India [1990] 1 Lloyd’s Rep 391

Nash v Inman [1908] 2 KB 1

NB Three Shipping Ltd v Harebell Shipping Ltd [2004] EWHC 2001 (Comm)

Pan Atlantic Group v Hassneh Insurance Co of Israel Ltd [1992] 2 Lloyd’s Rep 120

Pando Compania Naviera SA v Filmo SAS [1975] QB742

Pinecraven Construction (Guernsey) Limited v Dominic Donato Taddei and Claire Susanne Taddei [2012] CSOH 18

Pittalis and Others v Sherefettin [1986] 2 WLR 1003

R v Barker [2010] EWCA Crim 4

R v Sussex Justices Ex p McCarthy [1924] 1 KB 256

R v Gough [1993] AC 646

Rahcassi Shipping Company SA v Blue Star Line Ltd [1966 R No 3574]

Ramsgate Victoria Hotel Company Limited v Montefiore (1865-66) LR 1 Ex109

Re Claim by Helbert Wagg & Co Ltd [1956] 2 WLR 183

Regina v Hayes [1977] 1 WLR 234

Regina v Kemble [1990] 1 WLR 1111

Richardson v Mellish (1824) 2 Bingham 229

Routledge v Grant (1828) 172 ER 415

Schweppe v Harper [2008] EWCA Civ 442

Slatterie v Pooley (1840) 6 M & W 664

Soleimany v Soleimany [1999] QB 785, 803

Sowerby v Charlton [2006] 1 WLR 568

Stoke on Trent City Council v Walley [2006] EWCA Civ 1137

Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others [2013] 1 WLR 102

The Dorchester Group Limited, T/a the Dorchester Collection v Kier Construction Limited [2015] EWHC 3051 (TCC)

The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain, The French State, [2013] EWHC 3188 (Comm)

Tritonia Shipping Inc v S Nelson Forest Prods Corp [1966]1 Lloyd's Rep 114

Trunk Flooring Limited v HSBC Asset Finance (UK) Limited, Costi Righi SPA [2015] NICA 68

Union Marine v Government of Comoros [2013] EWHC 5854 (Comm)

Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35

Vita Food Products, Incorporated Appellant v Unus Shipping Co, Ltd [1939] AC 277

Vynior's Case (1609) 8 Coke Reports 81b

Wiedemann v Walpole [1891] 2 QB 534

Wolf and Wolf v Forfar Potato Co 1984 SLT 100

3.4 Cases of Other National Jurisdictions

Egypt Case

Supreme Court, Case No 29/11 (1994)

India Case

Booz-Allen & Hamilton Inc vs Sbi Home Finance Ltd & Ors (2011) SC 5440 of 2002

United States Cases

Scherk v Alberto-Culver Co, 417 US 506, 94 S Ct 2449, 41 Led 2d 270 (1974)

Bothell v Hitachi Zosen Corp, 97 F Supp, 2d 1048 (W D Wash 2000)

DOE 1, DOE 2 and Kasadore Ramkissoon v AOL LLC, No 07-15323 (2009) 683

3.5 International Arbitral Awards

ICC Court of Arbitration, case No 5713/1989 (1989) Paris

ICC International Court of Arbitration, case No 8873 (1997) Paris

Saudi Arabia v Arabian American Oil Company (ARAMCO) 27 ILR 117 (1958)

4. Table of Legislation

4.1 Islamic Shariah Legislation

4.1.1 The Two Main Sources of Shariah

- Holy Quran: available at <https://quran.com/> accessed 20 June 2018
- Sunnah:[3]
    - Al-Bukhari M (died: 256 Hijra - corresponding to 870 AD), *Sahih al-Bukhari,* vol 5th (Muhsin Khan tr) < https://sunnah.com/bukhari/64/447> accessed 20 June 2018
    - Al-Bukhari M (died: 256 Hijra - corresponding to 870 AD), *Sahih al-Bukhari,* vol 4th (Muhsin Khan tr) < https://sunnah.com/bukhari/56/249> accessed 20 June 2018
    - Al-Bukhari M (died: 256 Hijra - corresponding to 870 AD), *Sahih al-Bukhari,* vol 8th (Muhsin Khan tr)7 < http://sunnah.com/bukhari/78/7> accessed 20 June 2018
    - Al-Bukhari M (died: 256 Hijra - corresponding to 870 AD), *Sahih al-Bukhari,* vol 9th (Muhsin Khan tr) < https://sunnah.com/bukhari/92/50> accessed 20 June 2018
    - At-Tirmidhi IHAEMIE, *Jami' at-Tirmidhi,* vol 3rd (Abu Khaliyl trs, Daruussalam 2007)
    - At-Tirmidhi AIM, *Jami at-Tirmidh*i, vol 1st <http://sunnah.com/tirmidhi/12/6> accessed 20 June 2018
    - At-Tirmidhi AIM, *Jami` at-Tirmidh*i, vol 3rd < http://sunnah.com/tirmidhi/15/32> accessed 20 June 2018
    - At-Tirmidhi AIM, *Jami` at-Tirmidh*i, vol 4th <https://sunnah.com/tirmidhi/33/10> accessed 20 June 2018
    - Al-Naysāburi MA (died: 261 Hijra - corresponding to 874 AD), *Sahih Muslim*, Book 1st (AH Siddiqui tr) <http://sunnah.com/muslim/1/133> accessed 20 June 2018
    - Al-Naysāburi MA (died: 261 Hijra - corresponding to 874 AD), *Sahih Muslim*, Book 17th (AH Siddiqui tr) <http://sunnah.com/muslim/29/43> accessed 20 June 2018
    - Al-Naysāburi MA (died: 261 Hijra - corresponding to 874 AD), *Sahih Muslim*, Book 18th (AH Siddiqui tr) <http://sunnah.com/muslim/30/3> accessed 20 June 2018
    - Al-Naysāburi MA (died: 261 Hijra - corresponding to 874 AD), *Sahih Muslim*, Book 20th (AH Siddiqui tr) <https://sunnah.com/muslim/33/21> accessed 20 June 2018
    - Al-Qazvini AAMBYBAA, *Sunan Ibn Majah*, vol 3rd <http://sunnah.com/urn/1321200> accessed 20 June 2018

[3] Sunnah (second source of legislation sources in Sharia) has not been collected by prophet Mohammad or during his life; rather it has been collected by Muslim scholars in various publications. According to Sunni scholars, the most rigorously authenticated among Sunnah publications are *Al-Kutub Al-Sittah* (the Six Books) (*Sahih al-Bukhari, Sahih Muslim, Jami` at-Tirmidh*i, *Muwatta of Imam Malik, Sunan Ibn Majah and Sunan Abi Dawud)* as well as *the Forty Hadith of Al-Nawawi.* See generally Ibrahim Madani, *The Preservation of Hadith* (Madania, New York 2010) <https://tinyurl.com/yaupadpq> accessed 03/07/2018.

- At-Tirmidhi AIM, *Jami` at-Tirmidhi*, vol 3rd <https://sunnah.com/tirmidhi/15/11> accessed 20 June 2018
- At-Tirmidhi AIM, *Jami` at-Tirmidhi*, vol 4th <https://sunnah.com/tirmidhi/33/10> accessed 20 June 2018
- Ibn Ash'ath IHADS, *Sunan Abi Dawud*, vol 3rd (HATZ 'All Za'l ed, N A-l Khattab tr, Maktaba Dar-us-Salam 2008)
- Ibn Ash'ath IHADS, *Sunan Abi Dawud*, vol 4th (HATZ 'All Za'l ed, N A-l Khattab tr, Maktaba Dar-us-Salam 2008)
- Ibn Ash'ath IHADS, *Sunan Abi Dawud*, vol 5th (HATZ 'All Za'l ed, N A-l Khattab tr, Maktaba Dar-us-Salam 2008)
- Zarabozo JADM, *Commentary on the Forty Hadith of Al-Nawawi,* vol 2nd (JS Idris introducer, Al-Basheer 1999) <https://muqith.files.wordpress.com/2015/12/commentary-on-the-forty-hadith-of-al-nawawi-vol-2.pdf> accessed 20 June 2018
- Ibn Anas M (died: 179 AH Hijra - corresponding to 795 AD), *The Muwatta of Imam Malik*, Book 36 (AA At-Tarjumana and Y Johnson trs, YBYBKAL Al-Andalusi narrator, Darul Ishaat 2005)

4.1.2 Shariah Fatawa and Resolutions:

- Abdul Aziz Ibn Baz, *Fatawa of Ibn Baz*, vol 18, 326, <https://tinyurl.com/ybcfwprh> accessed 29 June 2018
- Abdul Aziz Ibn Baz, *Fatawa of Ibn Baz*, vol 28, 148, <https://tinyurl.com/https-tinyurl-com-ybcfwprh> accessed 29 June 2018
- Abdul Aziz Ibn Baz, *Fatawa of Ibn Baz*, vol 23, 214 <https://tinyurl.com/y9uofuzd> accessed 29 June 2018
- The Islamic Fiqh Council, Fifth Session, First Resolution, Swearing by Torah/Bible before Jury (2-10 February 1982) <http://archive.is/KnQEw#selection-23585.4-23585.20> accessed 29 June 2018
- ECFR, Resolution No [11/4], (11th Session, Stockholm, 1-7 July 2003) <https://tinyurl.com/yy3s4mkr> accessed 29 June 2018
- The Council of International Islamic Fiqh Academy, Resolution No [91/8/9], The Principle of Arbitration in Islamic Fiqh (Ninth Session, Abu Dhabi, United Arab Emirates,1-6 April 1995) <https://tinyurl.com/y8ohftkq> accessed 29 June 2018
- The Permanent Committee for Scholarly Research and Ifta', 'When is it permissible to declare a person as a Kafir?' vol 2, Fatwa 5226 <https://tinyurl.com/ydh4uq7a> accessed 29 June 2018
- The Permanent Committee for Scholarly Research and Ifta', 'What is the Ruling on Seeking judgment at the American Judiciary System in Disputes between Muslims, whether in Divorce, Commerce or other Matters?' vol 23, Fatwa 19504 <https://tinyurl.com/y7trxnj2> accessed 29 June 2018

4.2 Saudi Arabia Legislation

4.2.1 Statutes

- Arbitration Law 2012, issued by Royal Decree No 34/m dated 24/05/1433 Hejra (corresponding to 16/04/2012)
- Arbitration Law 1983, issued by Royal Decree No M/46 dated 02/07/1403 Hejra (corresponding to 15/4/1983)
- Basic Law of Governance 1992, issued by Royal Decree No alf/90 on 27/ 8 /1412 Hijra, (corresponding to 1 March 1992)
- Commercial Agencies Law, issues by Royal Decree No M/11 dated 20/2/1382 Hijra (corresponding to 22/7/1962)
- Commercial Court Law 1931, issued by Royal Decree No 32 dated 15/01/1350 Hijra (corresponding to 02/06/1931 AD), with its amendments by the Royal Decree (M/2) dated 15/1/1390 Hijra (corresponding to 23/3/1970)
- Companies Law 1965, issued by the Royal Decree (M/6) in 22/3/1385 Hijri (Corresponding to 21/07/1965 AD), with its amendments by the Royal Decree (M/63) in 26/11/1407 Hijri (Corresponding to 23/07/1987 AD)
- Companies Law 2015, issues by Royal Decree No (M/3) dated 28/01/1437 Hijra (corresponding to 10 November 2015)
- Draft of the Implementing Regulations of the Arbitration Law 2012
- Foreign Investment Law 2000, issued by Royal Decree No M/1 dated 05/01/1421 Hejra, (corresponding to 10/4/2000)
- Judiciary Law 2007, issued by Royal Decree No M/78 dated 19/9/1428 Hejra (corresponding to 1/10/2007 AD)
- Law of Procedure Before Sharia Courts 2013, issued by the Royal Decree No M/1 dated 22/01/1435 Hijra (corresponding to 25/11/2013 AD)
- Relationship Between a Foreign Contractor and His Saudi Agent 1978, Issues by Royal Decree No M/2 of 21 Muharram 1398 Hijra (corresponding to 1st January 1978 AD)
- Settlement Against Bankruptcy Law 1996, issued by Royal Decree No M/6 dated 04/09/1416 Hijra (corresponding to 25/01/1996 AD)

4.2.2 Statutory Instruments:

- Executive Rules 2002 of Foreign Investment Law 2000, issued by decision of the Chairman of the Board of Directors of General Investment Authority No 20/1, 1423 Hejra (corresponding to 2002)
- Implementing Regulations 1985 of Arbitration Law 1983, issued by Prime Minister Resolution No 7/2021 on 8/9/1405 (corresponding to 28 May 1985)
- Implementing Regulations 2014 of Law of Procedure Before Sharia Courts 2013, issued by the decision of the Minister of Justice No 39933 Dated 19/05/1435 Hejra, (corresponding to 21 March 2014)

4.2.3 Ministerial Decisions and Official Papers

- Committee of Judicial Supervision Decision No 3 dated 07/01/1347 Hijra (corresponding to 26/06/1928 AD), approved by higher authority on 24/03/ 1347 (corresponding to 10/09/1928 AD)
- Unified Form of a Commercial Proxy for a Foreign or National Project, issued by Saudi Ministry of Commerce and Industry <https://tinyurl.com/y2e5qodl> accessed 29/06/2018
- Ministry of Commerce Circular No 31/1/331/91 of 22/02/1399 Hijra (corresponding to 21/01/1979)

4.2.4 Bilateral Treaties:

- Agreement between the Government of the Kingdom of Saudi Arabia and the Government of the Republic of Korea, signed in Seoul on 4 April 2002
- Agreement between the Government of the Kingdom of Saudi Arabia and the Government of Malaysia, signed in Kuala Lumpur on 25 Oct 2000

4.3 UK Legislation

4.3.1 Statutes

- Arbitration Act 1889, C 49
- Arbitration Act 1950, 14 GEO 6, CH 27
- Arbitration Act 1975, C 3
- Arbitration Act 1979, C 42
- Arbitration Act 1996, C 23
- Children Act 1989, C 41
- Criminal Justice Act 1967, C 80
- Disability Discrimination Act 1995, C 50
- Employment Equality (Religion or Belief) Regulations 2003 No 1660
- Companies Act 2006, C 46
- Insolvency Act 1986, C 45
- Equality Act 2010, C 15
- Evidence Further Amendment Act 1869, C 68
- Family Law Reform Act 1969, C 46
- Oath Act 1978, C 19
- Police and Criminal Evidence Act 1984, C 60
- Sex Discrimination Act 1975, C 65
- Unfair Contract Terms Act 1977, C 50
- English Human Rights Act 1998, c 42
- Contracts (Applicable Law) Act 1990, c 36

4.3.2 Statutory Instruments:

- Insolvency Rules 1986, No 1925
- Civil Procedure Rules 1998, No 3132 (L 17), with its amendments on 1 and 6 April 2016
- Commercial Agents (Council Directive) Regulations 1993, No 3053, Came into force in the UK on 1st January 1994

4.4 Legislations of Other National Jurisdictions

- Scotland: Arbitration (Scotland) Act 2010 (asp 1)
- Egyptian: Arbitration Law No 27/1994 on 21/4/1994
- French: Civil Code, Law No 72-626 in 5 July 1972
- French: Civil Code, Act No 2001- 420 in 15 May 2001, with last amendment No 2013-404 of 17 May 2013
- French: Code of Civil Procedure, Decree No 2011-48 of 13 January 2011
- German: Arbitral Proceedings Reform Act 1998, with its amendments by Civil Procedure Reform Act of 27 Jul 2001 and Law of Contracts Reform Act of 26 Nov 2001
- New Zealand: Arbitration Act 1996, No 99, with its amendments by Arbitration Amendment Act 2016 No 53
- Singapore: International Arbitration Act 1994, c 143A, 2002 Ed, with its amendments on 31st May 2016
- Spanish: Arbitration Act 60/2003, with its amendments on 6 October 2015
- Swedish: Arbitration Act 1999, SFS 1999:116
- United States of America: Restatement (Second) of Conflicts of Laws (1971)
- Pakistan: Qanun-eShahadat Order (No 10 of 1984), 28th October 1984

4.5 National Official Reports

- Departmental Advisory Committee, 1996 Report on the Arbitration Bill (February 1996) 13(3) Arbitr Int 275
- Law and Justice Commission of Pakistan, Law of Evidence (report No PKLJC 04) < http://www.commonlii.org/pk/other/PKLJC/reports/04.html > accessed 12/06/2018

4.6 International Conventions, Laws and Official Documents

4.6.1 International Conventions and Laws

- Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 September 1927) (entered into force 25 July 1929) 92 LNTS 301
- Convention on the Law Applicable to Contractual Obligations, 80/934/EEC (opened for signature 19 June 1980, entered into force on 1 April 1991) OJ L266/1 (Rome Convention)

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (entered into force on 7 June 1959) 330 UNTS 3 (NYC 1958)
- Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos 11 and 14 (opened for signature 4 November 1950, entered into force 03/09/1953) 213 UNTS 221
- European Convention on International Commercial Arbitration (Geneva, 1961) (opened for signature 21 April 1961, entered into force on **7** January 1964) 484 UNTS 349
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16
- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJEU L 177/6
- Protocol on Arbitration Clauses (Geneva, 24 September 1923) (entered into force 28 July 1924) LNTS 27/157
- Riyadh Arab League Convention for Judicial Co-operation (adopted 6 April 1983, entered into force 30 October 1985)
- UNCITRAL Model Law on International Commercial Arbitration (adopted on 21 June 1985 and amended on 7 July 2006) UN Doc A/40/17, Annex I
- Uniform Act on Arbitration, Organization for the Harmonization of Business Law in Africa, (adopted on 23 November 2017, entered into force on 15 March 2018)
- IBA Rules on the Taking of Evidence in International Arbitration, International Bar Association (adoped on 29 May 2010)
- United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (adopted 11 April 1980, entered into force 1 January 1988), 1489 UNTS 3

4.6.2 UNCITRAL Official Documents

- UNCITRAL Secretary-General 'International Commercial Arbitration: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration' UN Doc A/CN.9/264, vol 16 (1985)
- UNCITRAL, 'Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration' UN Doc A/CN.9/207 (1981) XII UNCITRAL Ybk 75, 78 <https://tinyurl.com/yxbxlk4h> accessed 29 June 2018
- UNCITRAL, 'Report of the Working Group on International Contract Practices on the work of its seventh session' (6-17 February 1984) New York, A/CN.9/246, 6 < https://tinyurl.com/yb3dwwvh l> accessed 29 June 2018

4.7 Arbitration Institution Charters and Rules

- American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures 2013
- Dubai International Arbitration Centre Rules, issued by Decree No 11 dated 2007

- Gulf Cooperation Council Commercial Arbitration Centre, Rules of Procedure 1994, with its amendments on 5 October 1999
- Gulf Cooperation Council Commercial Arbitration Centre, Charter and Arbitral Rules of Procedure 1993
- International Chamber of Commerce, Rules of Arbitration 2012, with its amendments in 2017
- London Court of International Arbitration Rules 2014
- London Maritime Arbitrators Association Terms, 2006, with its amendments on 1 May 2017
- Makkah International Center of Arbitration and Conciliation Rules
- World Intellectual Property Organization Arbitration Rules 2014
- Arbitration Rules of the European Court of Arbitration (2015 edn)

Chapter I: Introduction

International commercial arbitration has flourished remarkably since the middle of the last century,[4] as it has become a means of resolving conflicts in almost 90 percent of cross-border trade and commerce contracts.[5] That is because, *inter alia*,[6] arbitration has advantageous features that outweigh those of other dispute resolution mechanisms.[7] Foremost among these features are the freedom and flexibility enjoyed by the parties. This thesis examines in a comparative manner the freedom that parties have to create and terminate an international commercial arbitration agreement under Islamic Shariah (Shariah), the Saudi Arbitration Law 2012 (SAL 2012)[8] and the English Arbitration Act 1996 (EAA 1996).[9]

In the context of this freedom, the arbitration parties can agree to resolve their current and future disputes by the person they deem most appropriate, in accordance with the substantive law they prefer, and through the rules they specify, including procedure, evidence, language and place of arbitration. Professor Jamshed Ansari was right in observing that the freedom of parties is the 'soul and heart of all Arbitration contract[s]'.[10]

This view was confirmed in a recent survey by the International School of Arbitration, Queen Mary University,[11] which found that three of the top four reasons for preferring

---

[4] School of International Arbitration at Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (2018) International Arbitration Survey, 1 <https://tinyurl.com/y9psasep> accessed 3 July 2018.

[5] Maurice Kenton and Peter Hirst, 'Advantages of International Commercial Arbitration' in ICLG (ed), *The International Comparative Legal Guide to: International Arbitration 2015* (12th edn, Global Legal Group 2015) 20. See also Theodore Eisenberg and Geoffrey P Miller, 'The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies' (2007) 56(7) DePaul Law Review 335, 347.

[6] Another reason, for instance, is the increasing number of new arbitration centres which have contributed to the progress of institutional arbitration. Mohamed Abdel Raouf, 'Emergence of New Arbitral Centres in Asia and Africa: Competition, Cooperation and Contribution to the Rule of Law' in Stavros Brekoulakis, Julian DM Lew and Loukas Mistelis (eds), *The Evolution and Future of International Arbitration* (KLI 2016) 321.

[7] For example, see Rick Porter, 'The Not So Great Debate: Arbitration vs. Litigation' (2018) Chubb, 7-8 <https://tinyurl.com/yd7kjtor> accessed 3 July 2018; School of International Arbitration at Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (2018) International Arbitration Survey, 2 <https://tinyurl.com/y9psasep> accessed 3 July 2018; School of International Arbitration at Queen Mary University, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' 5-6 <https://tinyurl.com/y6jbzey4> accessed 24 December 2017.

[8] Issued by Royal Decree No 34/m dated 24/05/1433 Hejra (corresponding to 16/04/2012).

[9] Came into force on 31 January 1997 and is applied where the seat of arbitration is England and Wales or Northern Ireland.

[10] Jamshed Ansari, 'Party Autonomy in Arbitration: A Critical Analysis' (2014) 6(6) Researcher 47, 47.

[11] This survey comprises 763 questionnaire responses and 105 interviews with a diverse pool of respondents

international arbitration relate to the freedom and flexibility that arbitration offers: the right to choose the arbitrator, the right to select the applicable law, and the right to avoid the procedures of national courts.[12]

In academic writing, the roots of the freedom of contracting parties, particularly with respect to the freedom to choose the substantive law, go back to the sixteenth century, to the French scholar Charles Dumoulin, who asserted that, with respect to contracts, 'the will of the parties is sovereign'.[13] National and international arbitration laws did not embrace the freedom of parties broadly, however, until international trade flourished during the last century. Momentum grew especially after the United Nations Commission on International Trade Law adopted the UNCITRAL Model Law on International Commercial Arbitration (Model Law),[14] which is based on the principle of parties' freedom[15] and aims to modernise national arbitration laws. Since then, this principle has been adopted by 80 UNCITRAL member states in a total of 111 jurisdictions[16] and is recognised in most recent national commercial arbitration laws worldwide[17] including the Saudi and English arbitration systems.

In contrast, Islamic Shariah, including early scholars of the four Sunni schools, has not directly addressed the issue of the freedom of arbitration parties despite that fact that it generally encourages the use of arbitration. The situation is almost the same with regard to contemporary legal writers who have discussed arbitration under Shariah. Little is known

---

including arbitration parties, arbitrators, academics and experts in arbitration. School of International Arbitration at Queen Mary University, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' < https://tinyurl.com/y6jbzey4> accessed 24 December 2017.

[12] ibid.

[13] Laurent, 'Le Droit Civil International' (1881) 383 and 384 (as cited in EG Lorenzen, 'Selected Articles on the Conflict of Laws' (1920) 30 YLJ 261, 272); Peter Nygh, *Autonomy in International Contracts* (OUP 1999) 174.

[14] UNCITRAL Model Law on International Commercial Arbitration (adopted on 21 June 1985 and amended on 7 July 2006) UN Doc A/40/17, Annex I.

[15] During the preparation stages of the Model Law, the Secretary-General of the UNCITRAL confirmed that in relation to principles of model law on international commercial arbitration: 'Probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitration according to their expectations'. UNCITRAL, 'Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration' UN Doc A/CN.9/207 (1981) XII UNCITRAL Ybk 75, 78 <https://tinyurl.com/yxbxlk4h> accessed 24 March 2018 (UN Doc A/CN.9/207).

[16] UNCITRAL, 'Status, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' <https://tinyurl.com/l7drwdf> accessed 22 July 2018.

[17] Sunday Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality' (2015) 6 J Sustainable Dev L & Pol'y 222, 225.

about the extent of the freedom of parties in international commercial arbitration under Shariah, let alone from the perspective of the four Sunni schools. That is true despite the large body of contemporary legal literature (including theses, books and academic articles) that deals with arbitration under Shariah, whether in general or in particular aspects (such as scope of arbitration;[18] applicable law[19] and conflict of laws in arbitration;[20] finality[21] and enforcement of the arbitral award;[22] and Shariah-based arbitration in banking[23] and finance[24] disputes). This is particularly striking since Shariah 'has a rich tradition of supporting and facilitating dispute resolution … [especially] in contractual disputes when parties have already given their consent to dispute resolution outside the litigation structures of the state'.[25] Therefore, as Professor Kutty recognises in his article 'The Shari'a Factor in International Commercial Arbitration', 'There is a need to reform Islamic law from within to deal with contemporary norms, transactions and institutions, but there is an equal need to better accommodate and address the issues of concern from an Islamic perspective'.[26]

In Saudi Arabia, where Shariah is its constitution[27] and the dominant law, the Arbitration Law 2012 is the first law to explicitly recognise the freedom of parties (eg, in choosing the substantive law, the procedural rules and the site of arbitration). Before that, the issue of freedom of arbitration parties, in relation to almost all elements of arbitration, was not legally addressed. This fact, in addition to the fact that the main sources of the Saudi system are the Quran[28] and Sunnah,[29] has led most recent legal writers to doubt the existence

---

[18] Ahmad Alkhamees, 'International Arbitration and Shari'a Law: Context, Scopeand Intersection' (2011) 28 (3) J Int Arb 255, 258.

[19] Mohamed Ismail Mohamed Shariff 'Specific Issues in Islamic Dispute Resolution' (2009) 75(2) Arbitration 213; Zulkifli Hasan, 'Sharia Governance in Islamic Financial Institutions and the Effect of the Central Bank of Malaysia Act 2009' (2010) JIBLR 105.

[20] Z Akhtar 'Conflict of Laws, Sharia Rules and Dispute Resolution' (2011) Int ALR N 8.

[21] Abdulaziz Aljohar, 'Finality of Arbitral Awards: Comparing Approaches in Sharia Law and International Law' (DPhil thesis, University of Essex 2016).

[22] Abdullah Mohammed Al-abdullah, 'An Examination of the Role of Shariah in the Recognition and Enforcement of Arbitral Awards in Saudi Arabia' (DPhil Thesis, University of Exeter 2016).

[23] AH Buang, 'Shariah Banking Laws and Fatwa (Islamic Legal Resolution) in Indonesia' (2013) JIBLR 471; Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Routledge 2016).

[24] Siti Faridah Abdul Jabbar, 'Islamic Finance and Dispute Resolution' (2014) Comp Law 65.

[25] Mark Hoyle, 'Specific Issues in Islamic Dispute Resolution' (2009) 75(2) Arbitration 219.

[26] Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) Loy LA Int'l & Comp L Rev 565, 623.

[27] Basic Law of Governance, art 1. Issued by Royal Decree No alf /90 on 27/ 8 /1412 Hijra, (corresponding to 3 March 1992) (SBLG 1992).

[28] Muslims believe Quran is the word of God (Allah).

[29] SBLG 1992, art 7. Sunnah is a collection of the sayings and actions of the Prophet Mohammad (pbuh) and

of the freedom of the arbitration parties in general, including parties' freedom regarding the substantive and procedural law, under the previous Saudi arbitration law (Arbitration Law 1983[30] (SAL 1983), which was the first arbitration law in Saudi Arabia).

Although the new law is a major step for the freedom of arbitration parties, ambiguity surrounds the existence of such freedom in respect to significant arbitration elements (eg, the rules of evidence) and the extent of the parties' freedom concerning most aspects of arbitration provided for by the law. This is because the new law either does not deal with such issues at all or does so only partially or unclearly. This is especially true considering the newness of this law, the lack of published Saudi judicial decisions, and the need to comply with Shariah provisions under the new law.

In the United Kingdom, the situation is different, as the English courts are the first among all common law jurisdictions to recognise that contracting parties should be granted considerable freedom,[31] in particular, the right to choose the substantive law of contract.[32] The current EAA 1996, which combines the legal principles enshrined in the preceding Arbitration Acts[33] and the common law[34] as well as the modern approach to arbitration represented by the Model Law,[35] expressly provides a wide freedom of parties in all procedural and evidentiary matters, as well as the selection of substantive law and arbitrators. At the same time, it sets 'general principles' of effectiveness and fairness to enhance the application of such freedom.[36]

As in the Saudi law, however, the freedom of arbitration parties in the English system is

---

his descriptions, approvals or disapprovals towards the sayings or acts of other individuals during his life. Baamir, *Shari'a Law* (n 23) 51.

[30] Issued by Royal Decree No M/46 dated 02/07/1403 Hejra (corresponding to 15/4/1983).

[31] Dickson Moses and others, 'The Practicalities of Delocalisation in International Commercial Arbitration' (2017) IBLJ 461, 472.

[32] In 1760, Lord Mansfield in *Robinson v Bland* said: '[T]he general rule established ex comitate et jure gentium is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, where the parties (at the time of making the contract) had a view to a different kingdom.' (1760) 1 Blackstone W 256, 258and 259.

[33] The roots of the English arbitration acts have been in existence for centuries. The first one was in 1698 (Alan Redfern and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 4) followed by several acts that had organised and developed arbitration according to the requirements of each era. The last of these was the EAA 1996, which is applied in England and Wales and Northern Ireland. Scotland has its own separate arbitration law.

[34] Arthur L Marriott, 'The New Arbitration Bill' (1996) Arbitration 97, 98.

[35] In general, every article of the Model Law is reflected in Section of the 1996 Act. Lord Hacking, 'Arbitration Law Reform: The Impact of the UNCITRAL Model Law on the English Arbitration Act 1996' (1997) 63 Arbitration 290, 292-93. See also Marriott (n 29) 99.

[36] Rolf A Schütze (ed), *Institutional Arbitration: Article by Article Commentary* (Beck/Hart 2013) 426.

not unlimited. Both systems impose some restrictions on parties' freedom, but the limits of this freedom in the English system are much clearer than in the Saudi system. Under EAA 1996, these restrictions generally relate to illegality and the protection of public policy, both of which are largely explained by statute or case law. The Saudi system lacks such clarity, whether in legislation (for example, the SAL 2012 refers a number of legal issues relating to the freedom of parties to the provisions of Shariah, which are not codified), or in the case law, which is usually not published and does not detail the reasons for the judgment.

For these reasons, a comparative study with EAA1996 can be helpful in addressing the gaps in the Saudi law and Shariah regarding the freedom of international arbitration parties.

1. Purpose of the Thesis

This study analyses and compares the extent of the freedom of parties to international commercial contracts to agree to refer their current and future disputes to arbitration, as well as the formation and termination of the arbitration contract under Shariah and the Saudi and English systems. It aims to contribute to creating a system of rules governing the freedom of parties in international commercial arbitration under Shariah that can be attractive to arbitration parties to select Shariah as an arbitration law as well as accept applying Shariah as a choice of law. Additionally, it also aims to evaluate the compatibility of the new Saudi arbitration law with Sharia and the possibility of improving it.

To achieve its purposes, this thesis examines the extent of the parties' freedom to create and terminate an international commercial arbitration agreement under Shariah, the SAL 2012 and the EAA 1996. Three subquestions will be addressed to answer this main question. Because of the absence of legislative text directly governing the freedom of parties to international commercial arbitration under Shariah, it is necessary (before examining these three subquestions) to begin with an examination of the legal nature of arbitration under Shariah and the possibility of developing arbitration within this law. Then, the study explores how the arbitration contract and the contract with the arbitrator are viewed by Shariah, the SAL 2012 and the EAA 1996. The outcomes of this examination (in Chapters 2 and 3) will constitute the legal basis upon which most of the issues, especially those related to Shariah, will be discussed in subsequent chapters.

In these chapters, the thesis starts by addressing the extent to which the parties to an international trade contract are free to *enter into a legally protected arbitration contract* to

resolve their current or future disputes under Shariah and the Saudi and English systems. (Chapters 4 and 5)

Then, the thesis will move to addressing the extent to which international arbitration parties are free to *agree on the constituent elements* of the arbitration agreement in the systems under study; namely, the extent to which parties are free to select the arbitrator, the substantive law and procedures that govern the arbitration, and the rules of evidence. (Chapters 6-8)

Finally, this thesis will address the extent to which a party or parties, have *the right to terminate* the arbitration contract and the contract with the arbitrator, both before and after the commencement of arbitration proceedings, in the three laws in question.

By answering these questions, namely by determining the actual limits of the freedom enjoyed by international commercial parties in relation to the arbitration agreement under the umbrella of Shariah, this study will add to existing knowledge. This in turn will help create a more transparent and effective arbitration environment by shedding light on the parameters of arbitration agreements and awards that are enforceable under Shariah and countries that follow Shariah. This will benefit the arbitration parties, whether they are Muslims or not. Considering that arbitration is the preferred means of resolving disputes for international traders, it is expected that international trade will be positively influenced by this examination when the applicable law is Shariah or when the place of enforcement of the contract or the arbitral award is a country with a legal system based on Shariah

Although this research confirms that Shariah sources do not directly address the freedom of commercial arbitration parties, it argues that Shariah is rich with traditions through which the scope of that freedom can be determined. Moreover, the research argues that Shariah is sufficiently flexible to cope with contemporary developments in international commercial arbitration, to serve both the individual and society, when interpreted in accordance with the texts of the two main sources (Quran and Sunnah) and the circumstances surrounding any given issue. As Mr Elbayar, a legal advisor to the International Center for Not-for-Profit Law, observes*:* 'Sharia is not a rigid and immutable "law of God" based on unchanging texts written in the Middle Ages. Understood and applied correctly, Sharia is an imminently flexible, dynamic jurisprudence'.[37]

[37] Kareem Elbayar, 'Reclaiming Tradition: Islamic Law in a Modern World' (Spring/Summer 2008) 17(1) The

This is true even though most early Sunni scholars adopted views that limit the freedom of the parties to arbitration in general; for example, restrictions regarding the qualifications for an arbitrator. This is because such limitations resulted from the fact that Shariah scholars and their followers did not blindly adopt the practices of other Shariah scholars, but instead weighed the suitability of these practices, especially when the practices tended to vary over time.[38] This is certainly the case with arbitration, as arbitration rules in Islamic jurisprudence usually concern national arbitration, in particular family disputes, and not international commercial disputes.

This study also will add to existing scholarship by determining the limits of the freedom of parties to international commercial arbitration under the new Saudi arbitration system. It will consider whether the new law, like the previous Saudi arbitration law, can be termed a 'model' for Islamic arbitration.[39] Then, this study will discuss whether the new law can be adopted as a codification of the rules of arbitration under Shariah or whether, conversely, it is incompatible with Shariah, despite the law's obligatory stipulation that it must be interpreted in accord with Shariah.

This thesis makes a further contribution by determining whether Shariah and the new Saudi arbitration law are in harmony with the modern approach regarding the freedom of arbitration parties. The modern approach, for purposes of this study, is represented by the English system, which is widely considered to be one of the most successful national arbitration systems.[40] This approach will help to identify the actual barriers to granting more freedom to the parties to international commercial arbitration under Shariah and the Saudi system and the extent to which the circle of freedom of arbitration parties under these two systems could be widened.

International Affairs Review <http://www.iar-gwu.org/node/23> accessed 24 December 2017.

[38] For example, Imam Ahmed (the founder of AlHanbali school) counseled his followers not to simply imitate the views of senior scholars in matters of Shariah without consulting the Quran and Sunnah themselves. He said: 'Neither follow me nor Malik nor AlShafi'i nor Awza'i …. Like us, you should also read and think.' In Arabic, he said:

'لَا تقلدني وَلَا مَالِكًا وَلَا الشَّافِعِي وَلَا الْأَوْزَاعِيّ وَلَا الثَّوْرِيّ وَخذ من حَيْثُ أخذُوا'.

MAMAAS AlYamani (died: 1250 Hijra - corresponding to 1834), *AlQawl AlMufeed fi Adellat AlIjtihad wa AlTaqleed* (A Abdulkhaleq ed, Dar AlQalam 1396 Hijra - corresponding to 1976) 61. See also SW Delhi, *The Conclusive Argument from God - Hujjat Allāh Al-bāligha* (MK Hermansen tr, Brill 1995) 464.

[39] Aida Maita, 'Arbitration of Islamic Financial Disputes' (2014) 20(1) Ann Surv Int'l & Comp L 35, 55.

[40] See page 13.

2. Methodology

To answer those questions, this research involves a doctrinal methodology[41] combined with a comparative method.[42] This approach will enable the research to apply specific interpretive tools and critical strategies for the systemisation and evaluation of legal rules and the production of recommendations in respect to the legal rules that govern the issues in question[43] and to examine how these rules can be improved, particularly in Shariah and the Saudi system.[44] Such an approach is essential in respect to Shariah for three reasons: 1) as mentioned earlier, the freedom of arbitration parties in general, let alone in international commercial arbitration, is not discussed directly in Shariah; 2) Shariah scholars address only national arbitration; 3) most of the texts concerning arbitration in the main sources of Shariah deal with arbitration in family disputes. Additionally, the provisions that apply in Shariah must emanate from, or at least not conflict with, the basic principles. Therefore, doctrinal methodology and the comparative method will work effectively to address the issue in question and achieve the aim of the study.

The doctrinal methodology (which some commentators rightly call 'legal puzzle solving'[45]) aims to provide an in-depth examination of a specific legal issue or issues, and thus exhibiting gaps, ambiguities and inconsistencies in a system as well as some of doctrines and principles embodied therein.[46]

The doctrinal methodology is needed 'to confront the conundrums and uncertainties'[47] particularly at the frontiers of Shariah and the Saudi system regarding the thorny issue in this research (the freedom of the parties to international commercial arbitration) which is, directly and indirectly, related to and affected by many legal rules. This is especially true in light of

---

[41] The doctrinal research is often described as 'black-letter law'. For details about the doctrinal research methodology, see Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 9-21.

[42] Henn and others mention the essential difference between 'method' and 'methodology', where they indicate that 'method refers to the range of techniques that are available to us to collect evidence about the social world. Methodology, however, concerns the research strategy as a whole'. Matt Henn and others, *A Critical Introduction to Social Research* (2nd edn, Sage 2009) 10.

[43] Douglas W Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31(2) J Law & Soc 163, 165.

[44] Watkins and Burton (n 41) 20. See also generally Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11 OJLS 396, 398-99.

[45] Terry Hutchinson, 'Doctrinal Research; Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018)18.

[46] Khushal Vibhute and Khushal Vibhute, 'Legal Research Methods: Teaching Material' (2009) 80-82 <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> accessed 24 March 2018.

[47] Watkins and Burton (n 41) 20.

the lack of deep legal studies of international commercial arbitration and the freedom of arbitration parties under Shariah which is an essential part of the Saudi system. These factors are in addition to the generalisation of arbitration provisions of Shariah by many contemporary legal writers (which were concluded by ancient Shariah scholars concerning national arbitration, in particular family issues) to all matters related to arbitration, whether national or international, including many aspects related to the freedom of arbitration parties.

By applying its methodology, however, this thesis determines the sources of the law, then carries out a critical analysis of all related regulations and judicial precedents to reveal the state of the law concerning the issues under study.[48] This will create arguments that are derived from authentic sources (eg, existing rules, precedents, principles and scholarly publications).[49]

One of the most frequent criticisms of the doctrinal methodology is that it is confined to one legal system that affects 'how the rules might be improved or reformed'[50] in a practical and realistic manner,[51] especially when the issue under investigation is of an international nature (ie, connected to more than one jurisdiction). To avoid such problems, this thesis incorporates a comparative method which will examine the issues under study in a wider framework and foster higher levels of analysis.[52]

The comparative approach, as professors Collins and Gordley observe, can offer a better understanding and improvement of one's own national legal system through analysing how a particular issue has been addressed by foreign jurisdictions.[53]

One of the aims of using the comparative method in this study is to measure whether Shariah can grant parties to international commercial contract freedom in accordance with the modern international approach (as represented by the English approach) to enter into an arbitration contract to resolve their current and future disputes, and to agree on the elements

---

[48] NJ Duncan and T Hutchinson, 'Defining and Describing What We Do; Doctrinal Legal Research' (2012) 17(1) Deakin Law Review 83, 110; Terry Hutchinson, 'Vale Bunny Watson? Law Librarians, Law Libraries, and Legal Research in the Post-Internet Era' (2014) 106(4) Law Libr J 579, 584.

[49] Rob Van Gestel and Hans-W Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' (2011) EUI Working Papers Law 2011/05, 26 <https://tinyurl.com/y9o2jb46> accessed 24 March 2018.

[50] Hutchinson, 'Doctrinal Research' (n 45) 23.

[51] See generally ibid 21-24.

[52] Watkins and Burton (n 41) 20.

[53] Collins (n 44) 398-99; James Gordley, 'Comparative Legal Research: Its Function in the Development of Harmonized Law' (1995) 43(4) AJCL 555, 555.

of the arbitration contract (such as the arbitrator, substantive law and procedural rules). This in turn will give a clear and realistic picture of the level of freedom that parties to international commercial arbitration agreement can enjoy under Shariah in respect to the issues under study.

Moreover, this thesis uses the method of comparative law to evaluate the possibility of adopting the new Saudi arbitration law as a codification of Shariah arbitration provisions. While most existing research treats the Saudi system as a codification of Shariah, this study examines where the SAL 2012 is and is not in harmony with Shariah, and, in the instances where they diverge, the study examines why.

The comparative method, in this study, also helps 'illuminate the need for change with respect to specific'[54] issues, particularly within Shariah and the Saudi system, and offers practical solutions.[55]

As Professor Hage notes, the comparative law method can help identify the best possible law. He explains that an examination of foreign legal rules provides information about the quality, function, limits and wider applicability of these rules.[56]

It is true, as Collins argues, comparative law is not always effective as a means of transplanting a rule to another legal system. Legal rules are products of a country's social and historical development, so transplanting them elsewhere may not be entirely successful.[57] This problem is even more pronounced when it comes to a religion-based law such as Shariah. As Badr explains:

> [T]he strong link between religion and law in Islam and the need to keep all the man-made rules of *Mu amalat* in line with the guiding principles of *Qur'an* and the prophetic tradition, or more correctly to avoid all conflict between the two, would have been strong deterrents from borrowing the concepts or rules of an alien legal system.[58]

This research is not aimed at a direct transfer of rules from one jurisdiction to another, but one of its objectives is to evaluate whether the approach of the English system can actually work under Shariah and, thus, Saudi law. In other words, this research will put any

---

[54] Colin B Picker, 'Comparative Law as an Engine of Change for Civil Procedure' in Colin B Picker and Guy I Seidman (eds), *The Dynamism of Civil Procedure - Global Trends and Developments* (Springer 2016) 46.
[55] Jaap Hage, 'Comparative Law as Method and the Method of Comparative Law' (2014) M-EPLI Working Paper 2014/11< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441090> accessed 24 March 2018.
[56] ibid.
[57] Collins (n 44) 397.
[58] Gamal Moursi Badr, 'Islamic Law: Its Relation to Other Legal Systems' (1978) 26(2) AJCL 187, 193.

foreign legal trait (that has a positive impact on the freedom of the parties to arbitration) under an 'internal validity test'[59] to examine whether there is any conflict between the English legal solution and Shariah.

If such conflict exists, the study then asks, What is the rationale for each approach? The next question is whether there should be a different attitude under Shariah. That analysis must take into account that most of the arbitral provisions in Shariah are merely jurisprudential opinions that may have been influenced by the surrounding circumstances and a particular construction of the texts of the Quran and Sunnah. The analysis also must recognise that those opinions arose during the early ages of Islam (which go back more than 1,000 years) and that they address national arbitration and not international commercial arbitration. Modern international commercial arbitration should, at the very least, have special provisions that acknowledge the ways in which it is different from internal arbitration in the previous millennium. [60]

The comparative approach will be applied in two phases: The first is among the four Sunni schools that represent the major schools of Shariah thought.[61] Because of the diversity of opinions on each Islamic doctrine, the study focuses on the viewpoints of the founder of each school. If the founders' viewpoints cannot be ascertained, the dominant attitude within each school is treated as its principal opinion. It would be impractical to try to discuss the vast number of minority opinions in all of the schools.

The point of view of each school will be determined through the basic literature of the scholars in these schools. If there are recent legal sources that mention the views of these schools, they will be referred to as well. If there is a difference between the views of the scholars of Shariah in their basic books and the recent literature, the difference and its reason will be discussed to reach an accurate opinion of these schools.[62]

---

[59] Hamid Harasani, 'Islamic Law as a Comparable Model in Comparative Legal Research' (2014) 3 Global J Comp L 186, 200.

[60] For example, the freedom to choose substantive law, which is one of the fundamental rights of parties to international commercial arbitration in modern national laws including EAA1996. Shariah does not address this issue. At the same time, texts of Shariah, in general, stipulate that Shariah should be applied. Hence, this research examines whether this general provision should be extended to international commercial arbitration or whether a special provision should exist under the main principles and general rules in Shariah when it comes to international commercial arbitration.

[61] Harasani (n 59) 194.

[62] The difference between these views occurs sometimes for several reasons. For example, a Shariah scholar's viewpoint changes for a change in his understanding of the evidence on which his first viewpoint was based or because he became aware of a new evidence; ie, the existence of new and old viewpoints by a scholar

The study will compare the views of the four Sunni schools and ascertain whether there is a consensus among these views. If consensus does not exist,[63] the evidence of each school is evaluated based on two factors. The first is the strength of the evidence according to the Shariah legal pyramid — at the top of the hierarchy is Quran, then Sunnah, then consensus, and then *qiyas* ('reasoning by analogy').[64] The second factor is the question of inference;[65] ie, whether the view is explicit in the evidence or merely an *ijtihadi* view (discretionary interpretation of a text of the main sources of Shariah).

Based on the evaluation of the evidence, *tarjeeh* (the weighing of one opinion against the others) will be applied to the views of the four Sunni schools[66] in order to arrive at a reason for preferring one view or for offering a new point of view.[67] If the researcher proposes a new point of view, the evidence on which it is based and the reasons for adopting it will be discussed. All of the evidence will be derived from or depend on the sources of Shariah itself. Thus, this research will arrive at the accurate attitude of the Shariah as the research follows Shariah's approaches and means in reaching its views on the issues under discussion.[68] Therefore, the Shariah attitude that is aimed to be reached is assumed to be accepted by arbitration parties, whether Muslims or others, who desire to apply Shariah as a law governing international commercial arbitration as well as Shariah courts and arbitrators as such attitude reflects the view of Sharia itself.The second phase of analysis compares the Shariah and Saudi and English systems. The attitude of the new Saudi arbitration system and its related regulations will be analysed and compared to the position of Shariah, unless the issue in question has not been addressed by the Saudi legislature. And then the position of the English system will be analysed and compared with these two systems.

---

concerning one issue. (Abu Ameenah Bilal Philip, *The Evolution-of-Fiqh* (IIPH 1990)110). Another reason is that the phrases and style used by early Shariah scholars to express their viewpoints are not always direct and totally clear, particularly that those phrases differ than the ones used at present time.

[63] According to Shariah, if a consensus of views exists in a particular issue, such consensus must be followed and should be unchangeable. See pages 27-28.

[64] See page 28.

[65] See generally Sheikh Taqīuddīn An-Nabahānī, *The Islamic Personality:* Intellectual & Islamic Sciences, vol 1 (6th edn, Dar Al Ilm 2005) 170-175 and 183-85.

[66] Abu Ameenah Bilal Philip, *The Evolution-of-Fiqh* (IIPH 1990) 110.

[67] See generally Muhammad Nabeel Musharraf, *The Waraqat of Imam al-Haramayn al-Juwayni, a classical manual of Usul Al Fiqh* (Australian Islamic 2015); Sheikh Taqīuddīn An-Nabahānī, *The Islamic Personality: Intellectual & Islamic Sciences,* vol 1 (6th edn, Dar Al Ilm 2005).

[68] The research, if there is no *ijma'*, *yurajeeh* (verb of *tarjeeh)* among the points of view of Shariah scholars based on the strength of the evidence or presents a new opinion supported with evidence from Shariah itself.

3. Choosing English Arbitration Law as Model

Any of three reasons can justify choosing a model law in a comparative study: (1) its richness in experience and legal material (particularly the primary sources),[69] (2) its widespread nature[70] or (3) the fact that it is the most, or at least one of the most, developed laws regarding the issue in question.[71] All of these reasons are present in the English arbitration system.

The freedom of parties is one of the leading features of English commercial laws in general[72] and the EAA 1996 in particular. Under this act, as discussed before and will be seen later, parties enjoy wide freedom in nearly all aspects of arbitration — even wider than the Model Law, which is built on the principle of parties' freedom.[73]

The UK has long been the world center for international commercial arbitration. The London Court of International Arbitration (LCIA) is one of the oldest arbitral bodies in the world and *its being favoured by international parties is increasing*. For example, according to the report, 'Dispute Resolution in London and the UK 2010', disputes involving international parties increased 59 percent from 2007 to 2009, and disputes before the LCIA increased more than 100 percent during the same period.[74] The LCIA report shows that in 2016 more than 80 percent of its users are international parties.[75] The English Commercial Court saw similar increases between March 2012 and April 2013.[76]

The EAA 1996 in particular and English law in general, which greatly affect the freedom of the parties to arbitration as will be seen later, are the most used[77] systems in cross-border

---

[69] Mathias Siems, *Comparative Law; Law in Context* (2nd edn, CUP 2018) 18-19.
[70] See generally Harasani (n 59) 194.
[71] Marieke Oderkerk, 'The Importance of Context: Selecting Legal Systems in Comparative Legal Research' (2001) NILR 294, 303 & 313.
[72] For example, see World Bank Group, 'Legal Framework/Enabling Environment Assessment for PPPs' (2016) <https://tinyurl.com/y9wj6axv> accessed 24 March 2018.
[73] UN Doc A/CN.9/207 (n 15) 78.
[74] Duncan McKenzie, Dispute Resolution in London and the UK2010, TheCityUK (September 20, 2010) (as cited in Duncan McKenzie and Marko Maslakovic 'Financial Markets in the UK' (2010) TheCityUK <https://tinyurl.com/y6bcvvqk> accessed 24 March 2018).
[75] LCIA, 'Facts and Figures - 2016: A Robust Caseload' (2016) LCIA 1, 3 and 9 <http://www.lcia.org//media/download.aspx?MediaId=570> accessed 31/05/2018.
[76] Melanie Willems, 'The Rule of English Law - Why Brexit, However Blindly Foolish it is, Should Not Matter for Arbitration' (2017) Lexology <https://tinyurl.com/yc6b2wgs> accessed 24 March 2018.
[77] For example, Queen Mary University of London '2010 International Arbitration Survey: Choices in International Arbitration' (2010) 2 <https://tinyurl.com/yb9umdom> accessed 24 March 2018. See also Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (CUP 2013) 178.

disputes. This is true not only when the arbitration venue is the UK, but even when arbitration is elsewhere. To illustrate, according to a recent (2016) statistic from the Singapore Academy of Law regarding preferences for the choice of governing law and jurisdiction in international arbitration disputes in 'Singapore and the region',[78] 48 percent of the participants[79] preferred English law, while only 25 percent chose Singapore law and 7 percent mentioned New York.

It is also relevant that the English system is the parent of the common law,[80] which is 'governing 30% of the world's population and providing the basis for 27% of the 320 global legal jurisdictions'.[81] It follows that the English arbitration system is the richest in the world in terms of international commercial arbitration precedents that explain the system's rules and examine their strengths and weaknesses.

Hence, it is natural to choose the English arbitration system as a model to compare with Shariah, which has no clear attitude regarding the freedom of parties to international commercial arbitration, and with the new Saudi law, which has fresh experience in regulating international arbitration.

4. Data Collection

This thesis is qualitative research that relies primarily on desk-based research involving the analysis of primary legal sources. The research is directed at a specific legal issue: the freedom of arbitration parties to 'achieve pragmatic solutions .... based on sound legal analysis and a defensible or arguably correct view of the law'.[82] In addition, semi-structured interviews have been conducted to serve as a complementary source. Although these interviews constitute only a small fraction of the data collection, they are essential in finding a clear answer to six important questions (mentioned below) that have not been addressed by law or precedent, according to the researcher's knowledge, and that have sparked a considerable number of contradictory views by recent writers.

---

[78] Singapore Academy of Law, 'Study on Governing Law & Jurisdiction Choices In Cross-border Transaction' (10 January 2016), <https://tinyurl.com/ycyymjg4> accessed 24 March 2018. Singapore is considered one of the international dispute resolution centres in Asia Pacific.

[79] The participants are about500 commercial law practitioners and in-house counsel who are involved in cross-border transactions. ibid.

[80] K Zweigert and H Kotz, *An Introduction to Comparative Law* (2nd edn, Clarendon Press 1987) 58, (as cited in Harasani (n 59) 194).

[81] The Law Society, *Legal Services Industry; Part 1 - An Overview* (Law Society 2012) 40.

[82] Watkins and Burton (n 41) 18.

4.1 Primary Sources

The sources of primary legal materials come mainly from the three jurisdictions at issue: Shariah, Saudi and English. These include the Quran and Sunnah (for Shariah), the new SAL 2012 and the EAA 1996 and its case law. Because the freedom of arbitration parties is influenced by numerous legal issues that are outside the arbitration laws, this thesis involves extensive research in a wide range of peripheral laws that directly affect the freedom of international arbitration parties (eg, contract and bankruptcy laws).

The Saudi statutes were collected directly from the official website of the Council of Ministers and the applicable Saudi ministries. Since official translations are not usually provided for such statutes, an English translation will be provided as a footnote for the relevant provisions, employing a back-translation method for checking the accuracy of the translation.[83]

It must be noted that not all Saudi laws are codified (eg, there is no written law for contract and commercial provisions, or even evidence rules). Therefore, in such situations, Shariah provisions are deemed to be the applicable law. This is because Saudi law provides that Shariah should apply when there is no relevant legal provision in the Saudi law.[84] Despite that provision and the fact that Saudi law in general is based on the doctrine of *al siyasa al shar'iyyah,* which aims to harmonise 'man-made' law and Islamic jurisprudence,[85] this research is of the opinion that the Saudi system is not always compatible with Shariah. Therefore, as seen before, one of the aims of the thesis is to examine the compatibility of the new Saudi arbitration law with the attitude of Shariah towards the freedom of parties in international commercial arbitration.

4.2 Secondary Sources

The second type of research materials used in this study are secondary sources; in particular, the writings of classical Muslim scholars and English-language writers. These sources include a range of documents, both online and in hard copy, in Arabic and English.

---

[83] For more information on back-translation, see A Chidlow, ME Plakoyiannaki and C Welch 'Translation in cross-language international business research: Beyond equivalence' (2014), 45(5) JIBS 562 <https://tinyurl.com/yaw5dat8> accessed 29/05/2018. Anna C Korteweg and Jennifer A Selby (eds), *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration* (University of Toronto 2012) 243.

[84] See page 177.

[85] Jørgen S Nielsen and Lisbet Christoffersen (eds), *Shari'a As Discourse: Legal Traditions and the Encounter with Europe* (Taylor & Francis 2016) 157-158.

Arabic books, periodicals, official documents, reports and other sources were obtained from various institutions in Saudi Arabia and the UK, mainly the King Faisal Center for Research and Islamic Studies and Bodleian Libraries, as well as the Saudi Digital Library and *Maktabah Shamilah*, which is a digital library specialising in Islamic books.

An analysis of the position of Shariah requires an exploration of the views of the four Sunni schools, most of whose works have not been translated from Arabic. If an English translation exists, this research refers to it. If not, the study cites the Arabic reference but provides an English translation by the author.[86]

4.3 Semi-Structured Interviews

The interview is one of the sources for obtaining qualitative data. According to Lindlof and Taylor, an interview can provide data regarding issues 'that cannot be observed effectively by other means'. Such data can be used for verifying 'information obtained from other sources',[87] or even for understanding issues arising 'from the data itself'.[88]

This research uses a semi-structured interview technique as a supplementary tool to collect qualitative data to fill some of the legal gaps and clarify some ambiguities concerning a range of issues in the Saudi arbitration system and Shariah. In other words, interviews are just a complement to the huge amount of data collected by other means in this study. Although only a modest amount of data was obtained from the interviews, they were necessary since they concern a number of significant issues related to the freedom of arbitration parties and because of the absence of a clear legal text that addresses these issues in both Shariah and the Saudi system, as mentioned above.

The interviews rely on open-ended questions that balance structure with flexibility, to allow a deep engagement with the interviewee. Such engagement helps ensure the understanding of questions and the clarity of answers during the dialogue.[89] This certainty is important in light of the small number of participants and the fact that some of the questions

---

[86] Back translation method is used as a well-known technique for checking the accuracy of translation into a foreign language. Korteweg and Selby (79) 243.

[87] Lynn Silipigni Connaway and Marie L Radford, *Research Methods in Library and Information Science* (6th edn, Libraries Unlimited 2016) 239 and 240.

[88] Lana F Rakow, 'Commentary: Interviews and Focus Groups as Critical and Cultural Methods' (2011) 88(2) JMCQ 416, 423.

[89] Craig R Scott and others (eds), *The International Encyclopedia of Organizational Communication*, vol 1 (John Wiley & Sons 2017) 1367; Hamza Alshenqeeti, 'Interviewing as a Data Collection Method: A Critical Review' (2014) 3(1) JMCQ 39, 40.

concerned topics that some participants might find sensitive (eg, conflicts between the attitude of Shariah and that of the new Saudi arbitration law).

The interviews focused on six key issues: (1) the validity of a future arbitration agreement, even when the parties do not register the agreement with the court after a dispute arises; (2) the impact of a religiously neutral arbitrator when one or both parties are Muslims; (3) the limits on the freedom of parties to select the substantive law; (4) the freedom of parties to eschew the provisions of Shariah when they are non-Muslims, regardless of whether the substantive law complies with their religion; (5) the extent of parties' freedom to choose procedural rules and the effect of choosing procedures different than those of Shariah; and (6) the extent to which an arbitration party can terminate the arbitration agreement unilaterally.

Based on the university's ethics regulations and code of practice for research ethics, approval of the University Research Ethics Committee form (E2U) has been obtained.[90] An information sheet[91] with adequate information[92] and an informed consent form[93] were generated and given to each interviewee before taking part in the interview.

All interviews were audio-recorded after obtaining the interviewee's consent. Some participants asked the interviewer to pause the recording when talking about certain issues. They preferred the conversation to be written (and confirmed what has been written), then the recording was carried out after.

Due to the lack of judges and scholars of Shariah who have extensive experience and knowledge regarding Shariah arbitration and the Saudi system, snowball sampling[94] has been used in selecting the majority of interviewees. They were invited through the private secretary of the judge or via e-mail. A different information sheet for each group and a consent form were attached with the email or were handed over in person in advance of the interview date.

The quality of the interviewees and the modest aim of the interviews were behind the

---

[90] Appendix I.
[91] Appendix II and III.
[92] The information sheet contains an invitation for the individual to participate in the study, the purpose of the study, approximate time of the interview (60 minutes). It explains that participation is entirely voluntarily and participants have the right to withdraw at any time without giving reasons. Issues of anonymity and confidentiality were also highlighted.
[93] Appendix IV and V.
[94] Human Kinetics, *Applied Research and Evaluation Methods in Recreation* (Human Kinetics 2010) 88.

narrow sample size for the interviews, which constituted six participants. Although '[t]here are no rules for sample size in qualitative inquiry',[95] Malterud et al. mention some guiding elements that help in determining sample size. These elements include: (1) the aim of the study (a broad aim calls for a larger sample),[96] and (2) the power of the information, which depends on the specificity of the knowledge and experience of the participants as well as strong communication between the participants and the researcher. An interview with high information power requires fewer participants to obtain sufficient data.[97]

In this study, the participants represent, officially, the most experienced and knowledgeable individuals concerning Shariah and/or the Saudi arbitration system in Saudi Aribia. Those are: (1) the judges of the Commercial Court and the Court of Appeal, who are considered the official authority issuing the final decisions on all cases concerning international commercial arbitration, and (2) the members of the Senior Scholars Council, who represent the highest authority in terms of expressing the viewpoint of Shariah in international commercial arbitration matters.

All interviews were carried out by the researcher personally. Audio recordings of the interviews were transcribed and organised with the notes taken and then sent to respondents for verification. Approximately 20 percent of the information was removed at the participants' request, as they expressed concerns that such information might be inaccurately interpreted if published.

An interpretative analysis was applied to the interview transcripts. The principle that guides this technique is the interchange between transcribed interviews and prior theoretical knowledge.[98] The strategy is designed to identify the attitude of the participants (Shariah scholars and Saudi judges) regarding the six issues mentioned above. The analysis starts with a thorough and repeated reading of the transcribed interviews to develop analytical categories. Any similarities or differences among the interviews that help to concentrate on a single case are marked (eg, the possibility of considering religion as a measurement of

---

[95] Michael Quinn Patton, *Qualitative Evaluation and Research Methods* (2nd edn, SAGE 1990) 184. See also Bryan Marshall and others, 'Does Sample Size Matter in Qualitative Research?: A Review of Qualitative Interviews in is Research' (2013) JCIS 11, 12.

[96] Kirsti Malterud, Volkert Dirk Siersma and Ann Dorrit Guassora, 'Sample Size in Qualitative Interview Studies: Guided by Information Power' (2016) 26(13) QHR 1753, 1754-55.

[97] ibid 1755.

[98] Christiane Schmidt, 'The Analysis of Semi-structured Interviews' in Uwe Flick, Ernst von Kardoff and Ines Steinke, *A Companion to Qualitative Research* (SAGE 2004) 253.

violation of public policy under the Saudi courts).[99] Then analytical interpretations are carried out, with the aim of discovering a new attitude or testing a particular one on a single case.[100]

The researcher has followed various criteria to ensure authenticity of expression of the views of the respondents and the credibility of the interviews results. These criteria involve:

1) Ascertaining that the meaning of interviewer's questions 'is crystal clear'[101] without including any 'leading questions'[102] which might affect the opinion of the participants.[103] To that end, the supervising team and the University Research Ethics Committee have scrutinised the quality and appropriateness of the questions. Additionally, a pilot interview was conducted to evaluate the questions' clarity and understandability.
2) Giving the participants complete freedom to choose the location of the interview, to make it easier for the participants to feel they could 'speak … freely about some issues'.[104] Further, the interviewer confirmed before the date of the interview that the interviewee still favoured the chosen location.
3) The semi-structured interviews and snowball sampling improved the relationship between the researcher and participants because those techniques gave the respondents greater confidence that the resulting data concerning potentially sensitive issues would be precise and clear.[105]
4) Using a triangulation test, which aims to 'overcome the intrinsic bias that comes from single–method' studies[106] and improve the reliability and validity of the evaluation of the findings.[107] In this test, the findings from analysis results arising from other data

---

[99] ibid 254.
[100] ibid 257.
[101] Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (8th edn, Routledge 2017) 273.
[102] A leading question is a question that 'makes assumptions about interviewees or "puts words into their mouths"'. ibid 273.
[103] ibid 273.
[104] ibid 274; Sarah A Elwood and Deborah G Martin '"Placing" interviews: Location and scales of power in qualitative research' (2000) 52(4) Blackwell 649, 650-52.
[105] See generally Mahnaz Sinjari and others, 'Ethical Challenges of Researchers in Qualitative Studies: the Necessity to Develop a Specific Guideline' (2014) 7 J Med Ethics Hist Med, <https://tinyurl.com/y5f76w7y> accessed 24 March 2018.
[106] Umesh Kemparaj and Sangeeta Chavan, 'Qualitative Research: A Brief Description' (2013) 67 IJMS 89, 94.
[107] Vasco Lub, 'Validity in Qualitative Evaluation: Linking Purposes, Paradigms, and Perspectives' (2015) IJQM 1, 4.

sources are compared with the interview results. This test also has been used within findings derived from the interviews[108] where different viewpoints of participants were compared with each other.

5. Delimitation of the Thesis

The freedom of parties in international commercial arbitration is such a broad topic that it cannot be adequately examined in a PhD dissertation, let alone through a comparative approach. To conduct a deep and focused investigation, it was necessary to limit the study to the freedom of arbitration parties in the pre-award stages.

Issues related to post-award stages will not be addressed, whether these issues are related to the arbitral award itself, its challenge or recognition, or the implementation of the award. In addition, issues that are unique to third-party and multiple-party arbitrations are not within the scope of this research.

This research will not cover sub-issues such as the freedom of parties to choose the language and venue of the arbitration, or even the method of forming the arbitral tribunal. Instead, it will focus on six main elements which constitute the basic framework of the freedom of parties in general, and which embrace a number of sensitive and controversial issues under Shariah and the Saudi system. These elements include the parties' freedom to choose the arbitrator, procedural rules, substantive law and rules of evidence. Also included is the right of parties to agree to arbitrate their dispute (which includes the issue of arbitrability, the types of permissible arbitration contracts, and the formal and substantive requirements for a valid arbitration agreement) and the right of one or more parties to terminate the agreement. Those are the core and delimiting issues of this thesis.

6. Structure of the Thesis

This dissertation is divided into eight chapters, in addition to an introduction and conclusion (Chapters I and X). The first two substantive chapters (Chapters II and III) constitute the foundation of the subsequent chapters. Chapter II provides a general overview of Shariah as a body of law and analyses the attitude of the main sources of Shariah regarding arbitration and the prospect of developing arbitration in Shariah (according to the perspective

[108] John H Hitchcock and George A Johanson, 'Applying a Mixed Methods Framework to Differential Item Function Analyses' (2015) 22(1) RITS 1, 9.

of Shariah itself). Chapter III is devoted to an analysis of the legal nature of arbitration and the concept of the arbitration contract. Accordingly, this chapter comprises two sections. The first analyses the nature of arbitration in the four Sunni schools and highlights the impact of each perspective on the freedom of the parties. The second section addresses the concept of the arbitration agreement under Shariah, the SAL 2012 and the EAA 1996. This section distinguishes between the arbitration contract and the contract with the arbitrator, as well as the impact of that distinction on the freedom of parties.

The thesis then starts (through Chapters IV and V) to examine the freedom of parties of an international commercial contract at the pre-agreement stage (ie, parties' freedom to establish a legally valid arbitration agreement to resolve their current or future disputes). Chapter IV examines the attitudes of Shariah and the Saudi and English systems on the right of parties to an international commercial contract to arbitrate the subject matter of their dispute, whether this dispute already exists or might occur in the future. The chapter is divided into two sections. The first examines the arbitrability of commercial disputes (ie, whether the subject matter of a commercial dispute can be resolved by arbitration). This section also analyses the impact of commercial laws in Saudi Arabia on the issue of arbitrability, specifically the Law of the Relationship between a Foreign Contractor and His Saudi Agent 1978 and the Saudi Companies Law 2015. Then, the position of the English system is compared to the attitude of Shariah and the Saudi system.

The second section deals with types of arbitration agreements; namely, the arbitration clause and the submission agreement. Because Shariah scholars have never dealt with an arbitration clause (ie, the validity of agreeing to arbitrate future disputes), this section discusses the attitude of Shariah scholars towards the conditions associated with the contract in order to infer their position regarding future arbitration agreements. This is followed by a comparative examination of the attitudes of the Saudi and English systems.

Chapter V examines the formal and substantive requirements for a valid arbitration agreement under the four Sunni schools, as well as the attitude of the English system. Because the Saudi legislature has not enacted a contract law and because the Saudi courts generally apply Shariah when Saudi law is silent on an issue, the position of Saudi law is addressed in this chapter only when there is a provision in the Saudi law that differs from Shariah. This chapter is divided into three sections. The first examines the legal capacity requirement of natural and legal persons to enter into an international arbitration agreement. This is followed

by an examination of the requirement of valid consent to the arbitration agreement, which includes the extent of the freedom of both the offeror and offeree to withdraw consent during the negotiation period. The third section addresses the requirement of the legitimacy of the subject matter of the agreement.

At this point, the thesis completes the examination of the freedom of parties to establish the *legal container* (contract) of the arbitration, which can include the rights and obligations of the parties. The research then moves on, through the following four chapters, to a critical analysis of parties' freedom to agree on the elements of that legal container (the arbitration agreement) and the liberty of one or more parties to terminate the agreement. These stages commence with Chapter VI, which compares the attitudes of Shariah and Saudi and English systems regarding the freedom of parties to choose the arbitrator. The chapter comprises two sections. The first examines the qualifications required of an arbitrator under the three legal systems. The second section discusses the extent to which parties are free to agree on additional qualifications not provided for by those arbitration systems. In particular, the section addresses the extent to which non-discrimination laws affect the freedom of parties to choose an arbitrator on the basis of, for example, religion or gender.

Next, Chapter VII examines the extent to which the parties are free to choose the substantive and procedural law that governs their dispute. There are two main sections in this chapter. The first, which is divided into two parts, deals with the right of the parties to choose a foreign law and the limits on this right. This section examines the attitude of Shariah scholars on the parties' choice of a law other than Shariah. It also addresses the effect of the principles of necessity and *umum albalwa* on the breadth of the parties' freedom under Shariah to select a foreign law. This is followed by an examination and comparison of the attitudes of the SAL 2012 and the EAA 1996 towards party autonomy. The section ends by discussing restrictions based on public policy, mandatory rules and the nexus between the underlying contract and the chosen law.

The second main section addresses the extent to which the parties are free to choose the procedural rules. It begins by discussing the differences between the procedural and substantive rules and the effect of those differences on the freedom of arbitration parties. This is followed by an examination and comparison of the right of parties to choose the procedural rules and the legal and temporal limitations on that freedom.

Chapter VIII addresses two main issues: (1) the extent to which arbitration parties are free to adapt rules of evidence under the three legal systems, and (2) the extent to which the parties can choose foreign rules. The chapter looks at four types of evidence: oral testimony, documentary evidence, *iqrar* (admission) and oath.

Chapter IX deals with the termination of an arbitration agreement under the three legal systems. The chapter is divided into two sections, the first of which examines if and when an arbitration agreement can be terminated unilaterally or by mutual agreement. This section also addresses how the freedom of the parties to terminate the agreement is affected by: the death of a party; the failure to meet arbitration deadlines; a fundamental breach by a party; and the failure of the arbitrator to complete his mission. The second section analyses the right of one or more of the parties to bring about an early termination of the contract with the arbitrator, and whether such early termination effectively terminates the arbitration agreement itself.

Finally, Chapter X concludes the thesis. The chapter commences by reviewing and discussing the essential findings of the preceding chapters. It then presents the key issues, among those the thesis raises, that are in need of further research. The chapter ends by discussing recommendations that will contribute to increasing the freedom enjoyed by parties to international commercial arbitration, especially in Shariah and the Saudi system.

Chapter II:
Islamic Shariah

As is clear from the previous chapter, Shariah (both its primary and secondary sources) does not directly address the question of the freedom of parties in international commercial arbitration; therefore, it is necessary to address three basic issues in this chapter before undertaking an in-depth analysis in the following chapters. These three issues are: (1) the sources of law in Shariah, through which the limits of the freedom of parties in international commercial arbitration can be determined, (2) Shariah's approach to novel legal issues, with the aim of determining the extent to which Shariah can keep up with the modern attitude regarding the freedom of parties in international commercial arbitration and (3) the basic principles included in the main sources of Shariah concerning arbitration in general, which provide the key to understanding Shariah's provisions regarding arbitration.

This chapter, accordingly, will start by addressing the definition of Shariah, its main sources and then the definition and sources of *fiqh* (Islamic jurisprudence). This will be followed by an overview of the emergence of the four Sunni schools and their position on the immutability and infallibility of Shariah provisions resulting from *ijtihad*.[109] Finally, there will be a brief overview of arbitration in the Quran and Sunnah.

1. Overview

Islamic Shariah is a religion-based legal tradition that was established in the seventh century by the Prophet Mohammad peace be upon him (pbuh), who was born and lived in Hijaz, a region in the west of what is now Saudi Arabia. Today, Shariah is 'one of the major legal systems in the world'.[110]

Shariah is principally predicated on the Quran and Sunnah, but Shariah also includes the opinions of scholars who have studied and analysed the Quran and Sunnah. In general, the provisions in the sources of Shariah (Quran and Sunnah) are divided into three categories:[111]

---

[109] For *ijtihad* definition, see page 12.

[110] Mashood A Baderin (ed), *Islamic Legal Theory,* vol 1 (Routledge 2017) 77. See also Mashood Baderin, 'Understanding Islamic Law in Theory and Practice' (2009) LIM 186, 186.

[111] Acts of worship constitute a small part of Shariah. The Quran, for instance, which is considered the primary source of Shariah, includes only 110 verses relating to acts of worship, which is just 1.76 percent of its whole. The other verses include, for example, provisions relating to financial transactions (such as, *Surat Alnisaa*, verses 4, 29 and 58), the judiciary (such as, *Surat Alnisaa*, verse 58), and international relations (such as, *Surat Albaqarah*, verses 194 and 208).

provisions of faith,[112] provisions of morals,[113] and practical provisions. The last category involves three types of provisions: the provisions that regulate the relationship between humans and the Lord (such as prayer); the provisions governing the relationship between humans and between humans and their community; and the provisions governing the relationship between states. Through the last two types of practical provisions as well as moral provisions, early Shariah scholars (*fuqha)* arrived at provisions that related to arbitration in general.

2. Definition of Shariah

Shariah is an Arabic word that literally means a straight path[114] or 'a source of flowing water meant for drinking'.[115] Idiomatically, Shariah is the system issued by Allah through his messenger, Mohammad, to govern all aspects of human life, including those related to worship, and civil, commercial and political affairs. According to the Quran, Allah is the source of authority and the sole legislator.[116] Therefore, Muslims believe that provisions of the two main sources of Shariah (Quran and Sunnah) cannot be modified after the death of Prophet Mohammad (pbuh), who was the final messenger of Allah, and are applicable in all times and places since they were issued by the creator of the universe.

The immutability of the main sources of Shariah has been confirmed in practice recently by some courts in Islamic countries. For example, the Egyptian Supreme Constitutional Court in Case 29/11 stated the following:

> It is not permissible for a legislative text to contradict any peremptory provisions of [the main sources of] Shariah …, as these provisions … are not subject to *ijtihad* [jurisprudential opinions], since they represent the main principles of Shariah and [thus] it is inconceivable that they could be modified or substituted with the change of time or place.[117]

Two main facts can be inferred from the above: first, from the perspective of Shariah, there is no separation between what is religious and what is secular, as Shariah is an integrated

---

[112] For example, faith in Allah.
[113] For example, the necessity of honesty, truthfulness, and fulfilling the covenants.
[114] MB Ali, 'Shariah Law and Hudud: Understanding Its Objectives and Spirit' (2013) RSIS 1 <https://www .files.ethz.ch/isn/172845/RSIS2042013.pdf> accessed 31/05/2018.
[115] Dar Al-Ifta Al-Missriyyah, 'The History and Sources of Islamic Law' <https://tinyurl.com/yxbuccmz> accessed 25 July 2017.
[116] *Surat Yusuf*, verse 40 and *Surat Al-A`raf* verse 54.
[117] Case No 29/11 (1994) Supreme Court (Egypt).

law that covers all aspects of life; second, the main sources of Shariah consist of only divine law, namely the Quran and Sunnah.[118]

In other words, jurisprudence, which is commonly called *fiqh* in Arabic, and even *tafseer* (Quranic exegesis) are not part of the main sources of Shariah. This is because *fiqh* and *tafseer,* although they are based on the Quran and Sunnah, are just human jurisprudential opinions (*ijtihadat*), which can be fallible. Accordingly, only the two main sources of Shariah (Quran and Sunnah) are always considered valid and obligatory for Muslims. *Ijtihadat*, on the other hand, might or might not be correct, and might be appropriate for only a particular time or place. In this research, the phrase 'main sources of Shariah' will be used to refer to the Quran and Sunnah.

3. *Fiqh* and Its Sources

Fiqh is an Arabic word that literally means knowledge, understanding,[119] and discernment.[120] As used here, *fiqh* is the knowledge of Shariah's practical rulings through the detailed texts of Shariah.[121] The main aim of *fiqh* is to solve emerging issues that have no explicit or direct rule in the Quran or Sunnah through *ijtihad*, which is a mechanism to derive Shariah rules by using different techniques such as *qiyas* (reasoning by analogy).[122]

Jurists in Shariah (*fuqaha*) have agreed that Shariah scholars should use *ijtihad* to arrive at rules of Shariah regarding any new matters. They base their opinion on the *hadith* of Mu'adh Ibn Jabal, in which the Prophet Mohammad (pbuh) intended to send Mu'adh to Yemen as a judge. In this *hadith*, the Prophet (pbuh) approved that Mu'adh should resolve any disputes through *ijtihad* if he did not find a text in the Quran or Sunnah dealing with the subject matter of the dispute.[123] Early Shariah scholars agree, however, that any Shariah ruling based on *ijtihad* can be modified to suit the time or place unless there is an *ijma'* (consensus) among Shariah scholars on that ruling.

There are several methods of exercising *ijtihad* to derive the opinion of Shariah. The

---

[118] The difference between the Quran and Sunnah is that the former is literally the word of Allah, whilst Sunnah is the sayings and actions of Prophet Mohammad (pbuh) inspired by Allah. Baamir, *Shari'a Law* (n 23) 51.
[119] C Fitzpatrick and AH Walker, *Muhammad in History, Thought, and Culture: An Encyclopedia of the Prophet of God*, vol 1 (ABC-CLIO 2014) 206.
[120] NA Shah, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan* (Routledge 2011) 23.
[121] AO Altwaijri, 'Towards A Renewal of Islamic Thought' (2015) 31 ISESCO 13, 20.
[122] See generally S Shabbar, *Ijtihad and Renewal* (N Roberts tr, The International Institute of Islamic Thought 2017) 4-5.
[123] IHADS Ibn Ash'ath, *Sunan Abi Dawud*, vol 4 (HATZ 'All Za'l ed, N A-l Khattab tr, Maktaba Dar-us-Salam 2008) 179-180. Shabbar (n 122) 3-4.

five most used in *fiqh* are: *istihsan* (juristic preference), *urf* (customs), *maslahah mursalah* (public interest), *istishab* (presumption of continuity) and *qiyas*.[124]

Over time and after the collection of Shariah rulings that were reached by each method separately, these methods became accepted as sources of *fiqh* among Shariah scholars. The next section will deal with *ijma'* and *qiyas* and the conditions of their validity. They are the largest sources of *fiqh*[125] as well as the only two secondary sources of Shariah that are considered legitimate by scholarly consensus.

3.1 *Ijma'* (Juristic Consensus)

Ijma' is the consensus of *fuqaha* upon a provision regarding a particular issue in an era after the death of Prophet Mohammad (pbuh).[126] If there is an *ijma'*, scholars of the four Sunni schools believe that it must be followed[127] and should be unchangeable.[128] This is because those scholars consider the consensus of Shariah schools to be infallible.[129] They rely on the Prophet's *hadith* that Allah does not gather his nation on misguidance,[130] as well as the Prophet's saying: 'Whoever separates the distance of a hand-span from the *Jama'ah* (main body of Muslims), he has removed the yoke of Islam from his neck'.[131] Therefore, they believe any consensus among scholars of Shariah on a specific opinion is true and every Muslim must adhere to it. Early Shariah scholars require that the consensus should be among all the scholars of Islamic jurisprudence in a particular era,[132] regardless of whether they are aware of each other's opinion.

Some Shariah scholars and contemporary legal writers doubt the existence of any consensus among all Shariah scholars after the generation of the Prophet Mohammad's

---

[124] TP Daniels, *Sharia Dynamics: Islamic Law and Sociopolitical Processes* (Palgrave Macmillan 2017) 10; I Abdal-Haqq, 'An Overview of Its Origin and Elements' (1996) 1(1) JILC 1, 30-35.
[125] MO Farooq, *Toward Our Reformation: From Legalism to Value-oriented Islamic Law and Jurisprudence* (IIIT 2011) 180.
[126] K Tan Bhala and others, *International Investment Management: Theory, Ethics and Practice* (Routledge 2016) 77; ABH Ali, 'Scholarly Consensus: Ijma': Between Use and Misuse' (2010) 12(2) JILC 92, 95.
[127] Ali (n 126) 96 and 99.
[128] SA Jackson, 'Islamic Law, Muslims and American Politics' (2015) 22 IL& S 253, 290.
[129] See generally O Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge 2016) 32.
[130] AIM At-Tirmidhi, *Jami` at-Tirmidhi*, vol 4, Book 7, Hadith 2167 <https://sunnah.com/tirmidhi/33/10> accessed 14 July 2017.
[131] Ibn Ash'ath (n 123) vol 5, 245.
[132] JG Burns, *Introduction to Islamic Law: Principles of Civil, Criminal, and International Law Under the Shari'a* (Teller Books 2013-14) 28-29.

companions concerning any controversial question,[133] but in fact during the past 14 centuries, scholars of Shariah have agreed on many issues. Some contemporary writers have estimated that these issues total 9,588.[134] These include, for example, issues related to transactions (such as the conditions of validity of the contract of sale and the validity of the contract of *istisna*), and worship (such as issues related to fasting and prayer).

3.2 *Qiyas* (Analogy)

Qiyas, or *alqiyas,* is an extension of a provision of a Shariah (*hukm*) from an original case (*asl*) to a new case (*fara*), due to the similarity of underlying cause (*illah*) between these two cases.[135] *Alqiyas* is considered the broadest source of Islamic jurisprudence,[136] even broader than the main sources of Shariah itself. It has played and still plays an essential role in the development of Shariah in terms of handling new issues. When there was no divine revelation as guidance, the Prophet Mohammad (pbuh) and his companions[137] as well as Shariah scholars up to the present time have used *alqiyas* to determine a Shariah rule for the many new issues that Muslims encounter. Muslim scholars believe that the use of *qiyas* is a necessity for resolving emerging issues.[138]

Three requirements must be met for using *qiyas*: 1) the original case should have a clear provision stated in the Quran or Sunnah;[139] 2) there is no scholarly consensus regarding the new issue for which a Shariah rule is required;[140] and 3) the two issues share the same *illah*.[141]

According to the four Sunni schools, when *qiyas* meets these conditions, it is ranked second in terms of authenticity after *ijma'*[142] and a Muslim must obey the rule reached

---

[133] For example, Ali (n 126) 95-96 and 101-103. For different views, WE Shepard, *Islam - the eBook: an online introduction* (Journal Buddhist Online Books 2009) 133; IS Alharbi, *Democracy in Islamic and International Law* (Authorhouse 2011) 181.

[134] S Abu Gaeb, *Moosoah Al ijma fai Alfuqh Alaslaame*, vol 1 (3rd edn, 1996) 41.

[135] H Khan, 'Practitioners Guide: Islamic Law' (2013) INPROL 24 <https://tinyurl.com/y4b28844> accessed 31/05/2018.

[136] AW Hughes, *Muslim Identities: An Introduction to Islam* (CUP 2013) 144.

[137] J Rehman and A Ahmedov, 'Sources of Islamic Law: Teaching Manual' (2011) UKCLE 1, 31-32; A Hasan, '*The Principle of Qiyas in Islamic Law - An Historical Perspective*' (1976) Islamic Studies 201, 201-202 and 205.

[138] Hasan (n 137) 201, 202 and 207.

[139] Khan (n 135) 24.

[140] M Al Madni Busaq, *Perspectives on Modern Criminal Policy & Islamic Sharia* (Z Ahmed tr, Naif Arab University for Security Sciences 2005) 70.

[141] N Abū Zay, *Reformation of Islamic Thought: A Critical Historical Analysis* (Amsterdam University Press 2014) 16; Al Madni Busaq (n 140) 70.

[142] Hasan (n 137) 208.

through this technique. However, Shariah scholars agree that Shariah rulings based on *qiyas* can be modified or replaced in accordance with changing times or circumstances.[143]

4. Sunni *Madhahib* (Schools)

According to the *Encyclopedia of Islam,* the term *madhahib* (singular *madhhab*) is most commonly translated as 'different "schools" of Islamic law'.[144] Historically, *madhahib* emerged after the death of the Prophet Mohammad (pbuh) [145] in the seventh century.[146] Classical jurists used the term '*madhhab'* to indicate a specific approach to understanding or deducing the rules of Shariah. *Madhahib* arose to fill the legislative vacuum created by the death of the Prophet, who was the final courier of divine revelations.[147]

During the eighth and ninth centuries, many *madhahib* emerged but most disappeared due to a lack of followers.[148] Only four main Sunni schools have remained in existence until the present day and these are followed by 87 to 90 percent of the world's Muslims[149] (estimated at 1.8 billion).[150] The following is a brief overview of these four Sunni schools.

4.1 AlHanafi School

This school is attributed to Imam Abu Hanifa al-Nu'man, who was born in Iraq[151] (699-769).[152] In addition to Abu Hanifa, two of his students, Abu Yusuf (died in 798) and Mohammad Ibn al-Hasan (died in 804), further developed AlHanafi school.[153] This school was established in Kufa and expanded with the support of the Abbasih State.[154]

---

[143] Farooq (n 125) 171-172.
[144] RC Martin, *Encyclopedia of Islam and the Muslim World*, vol 1 (Macmillan Reference 2004) 417.
[145] MJ Sharif and M Ijaz, 'Madhhab in Islamic law and the dissemination of Sunni's legal text' (2014) 5(2) VFAST Transactions of Islamic Research 1, 2 <http://vfast.org/journals/index.php/VTIR/article/view/278/324> accessed 10 July 2017.
[146] CM Blanchard, 'Islam: Sunnis and Shiites' (2009) CRS 1, 3 <https://fas.org/irp/crs/RS21745.pdf> accessed 31/05/2018.
[147] S Alamad, *Financial Innovation and Engineering in Islamic Finance* (Springer 2017) 110.
[148] F Bsoul, 'The Schools of Law' (2009) 13 Majallat AlJame'a 29, 47-48. For example, the *madhhab* of al-Layth Ibn Sa'd, al-Awza'I and Sufyan al-Thawri. A Oussama, 'Early Muslim Legal Philosophy: Identity and Difference in Islamic Jurisprudence' (1999) eScholarship 18-19 < https://tinyurl.com/yyqjr2o6> accessed 11 July 2017.
[149] B Immenkamp, 'Understanding the Branches of Islam: Sunni Islam' (2016) EPRS 2 <https://tinyurl.com/yag26kqr> accessed 31/05/2018.
[150] Carl Medearis, *Muslims, Christians, and Jesus: Understanding the World of Islam and Overcoming the Fears That Divide Us* (Bethany House 2017) 195.
[151] RK Singh, *Textbook on Muslim Law* (ULP 2015) 19.
[152] Sharif and Ijaz (n 145) 2.
[153] Singh (n 151) 19.
[154] M Ruthven, *Islam: A Very Short Introduction* (2nd edn, OUP 2012) 87.

At the present time, AlHanafi school is regarded as the most widespread Sunni doctrine.[155] The reason behind this widespread popularity is its adoption by the Ottoman Empire. In addition, AlHanafi was the first Islamic *madhhab* to be codified[156] in the form of articles, which made it clearer and easier to be followed and applied than the other Sunni schools. This school is followed by Muslims in many countries such as Turkey, Iraq, Pakistan,[157] the Caucasus and the Balkans.[158]

4.2 AlMaliki School

AlMaliki school is attributed to Imam Abi Abdullah Malik Ibn Anas, who was born and raised in the holy city of Madinah (711-795).[159] The key aspect that distinguishes AlMaliki doctrine from the other three Sunni schools is its use of the practice and historical customs of the Medinan people as one of the sources of Islamic *fiqh*.[160] This school has spread widely across Sudan, Morocco, Egypt, Andalusia, and Kuwait.[161]

4.3 AlShafi'i School

AlShafi'i *madhhab* is attributed to Imam Abi Abdullah Muhammad Bin Idris AlShafi'i, who was born in Gaza in 769, raised in Hijaz,[162] and died in Cairo in 819.[163] AlShafi'i school is influenced by both AlMaliki and AlHanafi schools. This is because Imam AlShafi'i was a student of Imam Malik[164] and Abi Yusuf,[165] the main student of Imam Abu Hanifa.

Nevertheless, AlShafi'i school differs from AlMaliki and AlHanafi doctrines in many respects. The main difference is in the way it limits the sources of *fiqh* to *ijma'* and *qiyas*, as

---

[155] M Imara, 'Islamic Cultural Identity Between Originality, Modernism, and Challenges' (2015) 31 ISESCO 57, 70.
[156] L Welchman, 'The Development of Islamic Family Law in the Legal System of Jordan' (1988) ICLQ 868, 870.
[157] A Smolik, 'Effect of Shari'a on the Dispute Resolution Process Set Forth in the Washington Convention' (2010) 1 J Disp Resol 151, 156.
[158] R Pease, 'Estate Planning for Middle East Clients' (2005) PCB 143, 147.
[159] Sharif and Ijaz (n 145) 4.
[160] N Naim, 'Transatlantic Trade and Investment Partnership (TTIP) and the Spill-Over Effects on the Gulf Co-operation Council' (2017) Int JLM 35, 36.
[161] Baderin, 'Understanding Islamic Law' (n110) 189.
[162] Y Sodiq, *A History of the Application of Islamic Law in Nigeria* (Palgrave Macmillan 2017) 19.
[163] ibid 21.
[164] AlShafi'i said, 'Malik [founder of AlMaliki school] is my teacher, from him I obtained knowledge, … and there is no teacher who gives me more knowledge than Malik. Among *ulama* [senior scholars], Malik is the bright star', S Hasyim, *Understanding Women in Islam: An Indonesian Perspective* (Solstice Publishing 2005) 65. See also Singh (n 151) 21.
[165] AUF Ahmad, *Theory and Practice of Modern Islamic Finance: The Case Analysis from Australia* (Brown Walker Press 2010) 79.

well as the Quran and Sunnah.[166]

Imam AlShafi'i has two different *madhahib:* an old *madhhab* (when he was living in Iraq) and a new *madhhab* (after he settled in Egypt).[167] He justified the change in his opinions by stating: 'The time, the place and the conditions of people changed as well as AlShafi'i's knowledge and experience, which were increased'.[168] AlShafi'i doctrine has spread to many Muslim areas such as Palestine,[169] East Africa, Malaysia and Indonesia.[170]

4.4 AlHanbali School

The founding of AlHanbali school is attributed to Imam Ahmad Ibn Hanbal, who was born in Baghdad (780[171]-855[172]). Imam Ahmad was one of the most prominent students of Imam AlShafi'i.[173] He was also a student of Abi Yusuf.[174] Although Imam Ahmad was influenced by AlShafi'i and AlHanafi schools, his *madhhab* is distinct from that of the other Sunni schools.

One of the essential differences is AlHanbali school's rejection of *ijtihad* to deduce the opinion of Shariah when there is an opinion or a statement of the Prophet's companions that addresses the issue in question. In addition, AlHanbali school is the most liberal school in commercial and economic matters.[175] Currently, AlHanbali school is spread across a number of countries, especially in the Arabian Peninsula, such as Saudi Arabia, Qatar[176] and the United Arab Emirates.[177]

Two key issues are agreed upon by all four schools. First, they agree on the principles and rulings of Shariah that are stipulated by the Quran and Sunnah,[178] although they differ

---

[166] WZW Hassan and others, 'The Approach of Knowledge Transfer in Deriving Shafi'ite Hukum' (2015) 6(1) MJSS 260, 266-67; Ahmad (n 165) 79-80.
[167] Hassan and others (n 166) 268-269; Oussama (n 148) 17.
[168] A Abad, 'Alaktalafat baeen Almthahb AlEslameah' (2005) PASSIA 1, 10.
[169] Pease (n 158) 147.
[170] Baderin, 'Understanding Islamic Law' (n 110) 189.
[171] Christopher Melchert, *Makers of the Muslim World, Ahmad ibn Hanbal* (Oneworld 2013) 2.
[172] Bsoul (n 148) 30.
[173] Singh (n 151) 22.
[174] Sharif and Ijaz (n 145) 6.
[175] M Gasiorowski (ed), *The Government and Politics of the Middle East and North Africa* (7th edn, Westview Press 2013) 105. For example, under AlHanbali school and contrary to other Sunni schools, the parties to a sales contract enjoy nearly unlimited freedom to agree on the contract's terms and conditions. N Saleh, 'Freedom of Contract: What Does It Mean in the Context of Arab Laws?' (2001) 16(4) ALQ 346, 346.
[176] Baderin, 'Understanding Islamic Law' (n 110) 189.
[177] Blanchard (n 146) 3.
[178] HSF Abdul Jabbar, 'Islamic Finance: Fundamental Principles and Key Financial Institutions' (2009) Comp Law 23, 23.

on many Shariah rulings that are reached through *ijtihad* (as will be seen in various aspects of arbitration). For example, all Shariah scholars agree on the prohibition of all types of *riba* (usury and interest) while they disagree on the legality of appointing women as judges or arbitrators. This is because the first issue (*riba*) is addressed by a clear provision in the Quran [179] while the second issue (women as judges) is not addressed in the Quran or Sunnah.

The second issue upon which all the schools agree is that any viewpoints arising from *ijtihad* are neither infallible nor immutable.[180] Imam Malik, the founder of AlMaliki school, illustrated this point when he rejected the request of the Abbasi caliphs, Almansur and Harun Alrashid, to publish his book, *Almuwatta*. In hopes of standardising Shariah, the caliphs had wanted to require courts and people under the authority of the Abbasi Empire to follow the viewpoints in *Almuwatta.* Imam Malik, however, responded that scholars' opinions are not infallible, as they are merely *ijtahadat*,[181] and therefore should not be imposed on others.[182]

In fact, the early Shariah scholars themselves might modify their views during their lifetimes, as occurred with Imam AlShafi'i when he changed many of his viewpoints after moving from Iraq to Egypt.[183]

5. Arbitration and Shariah

Arbitration was the most important means of resolving disputes in the Arabian Peninsula long before the arrival of Islam. Arab tribes resolved internal and external disputes by choosing a tribal president or other honourable person to issue a final arbitral award.[184] After the emergence of Islam, Shariah recognised arbitration as a mechanism to resolve disputes, with some limitations.[185] The recognition of arbitration in the Quran and Sunnah will be briefly addressed in the following.

5.1 Arbitration in the Quran

Only two verses in the Quran address arbitration as a mechanism for resolving

---

[179] *Surat Al-Baqarah*, verses 275-279, *Surat Al- Imran*, verse 130 and *Surat Alnisaa*, verse 161.
[180] Baderin, 'Understanding Islamic Law' (n 110) 189.
[181] A Salim and A Azra, *Shari'a and Politics in Modern Indonesia* (ISEAS 2003) 126.
[182] ibid 126; Sodiq (n 162) 19.
[183] See page 31.
[184] Baamir, *Shari'a Law* (n 23) 46. For example, the Prophet Mohammad (pbuh) before becoming a messenger performed the task of arbitrator in one of the most important arbitration cases in Makkah, the *Black Stone* case (605 AD), MI Qasim, 'Prophet Muhammad's Strategies on Security and Peace Building: Lessons for the Nigerian Society' (2014) 19(11) IOSR-JHSS 18, 19.
[185] Shahadat Hossain, 'Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview' (2013) 1 JPCR 1, 1.

disputes.[186] One is in *Surat Alnisaa* verse 35 on 'voluntary arbitration' of marital disputes. This verse urges spouses to refer their dispute to arbitration if they cannot settle it themselves. The second is verse 95 of *Surat AlMā'idah,* which calls for 'compulsory arbitration' when an animal is attacked by a *muhrem* (a religious pilgrim). In this situation, the Quran requires the aggressor (*muhrem*) to appoint a third party (ie, an arbitrator) to determine the penalty for the wrong committed.

Although the Quran addresses 'voluntary arbitration' in the context of marital disputes, Sunnah scholars, except for some of AlShafi'i school, agree that verse 35 of *Surat AlNisaa* does not limit arbitration to marital issues. They believe this verse is 'general evidence that indicates the permissibility of arbitration in all [types of] … disputes and claims',[187] including those related to civil, commercial, and international political affairs.

In his article 'Legitimacy of Arbitration in Islamic Jurisprudence/Mashru'eiat Altahkim fi Alfaqih AlIslami', Professor Zaid AlZaid (dean of the Higher Institute of Jurisprudence at Imam Muhammad Ibn Saud Islamic University) discusses verse 35 and concludes that the Quran's acceptance of arbitration in a dispute between spouses is evidence that 'all other disputes [can be resolved through arbitration] if the adversaries agree on a third party to arbitrate their dispute'.[188] Accordingly, Sunni scholars, for example, rely on verse 35 to support the validity of an arbitration agreement in *Mu'awiya v Ali*[189] (one of the most famous cases of arbitration in Islamic history) regarding who would be the leader of the Muslim country after the death of Uthman, the third caliph in Islam.[190]

The verses of the Quran, including the two verses mentioned above, do not contain detailed provisions on arbitration but address only some of its basic elements. In particular, they address the freedom to accept being appointed as an arbitrator;[191] the substantive law

---

[186] The only exceptions are Quranic verses that encourage Muslims to arbitrate their dispute before the Messenger of Allah. For example, *Surat Alnisaa,* verse 65.

[187] HOA Mazzah Al-Bukhari AlHanafi (died: 536 Hijra - corresponding to 1141AD), *Kitab Shareh 'Adab Alqadi Li Alkhassaf*, vol 4 (MH Sarhan ed, Aldaar AlArabiyah Li Atteba'ah 1978) 58. Al-Qurtubi, one of the greatest scholars of Quranic exegesis, also says that verse 35 of *Surat AlNisaa* is 'evidence to prove the legitimacy of arbitration in general and not as *Khawarij* say', AAMAABFAKS AlQurtubi (died: 671 Hijra - corresponding to 1272), *AlJame' le Ahkam AlQuran, Tafseer AlQurtubi*, vol 5 (A AlBerdoni and I Atfish eds, 2nd edn, Dar AlKutub AlMesriyah 1964) 179.

[188] ZBA Al Zaid, 'Mashru'eiat Altahkim fi Alfaqih AlIslami' (2003) Albahith Aleilmie 1, 9.

[189] See page 211.

[190] See generally Z Islam, 'Provision of Alternative Dispute Resolution Process in Islam' (2012) 6(3) JBM 31, 33; W Madelung, *The Succession to Muhammad: A Study of the Early Caliphate* (CUP 2008) 238-269.

[191] *Surat Almaaida*, verse 42.

governing an arbitration dispute, which should be in line with the provisions of Quran;[192] the necessity of justice; and the impartiality of the arbitrator.[193] That has left Shariah jurists to determine most of the provisions that govern arbitration in accordance with the requirements of their age. This adds flexibility to Shariah regarding most issues related to arbitration, which in turn results in the diversity of opinions of Shariah scholars on these issues.

5.2 Arbitration in Sunnah

Since the early days of Islam in the 7th century, arbitration has been encouraged by the Sunnah.[194] The Prophet Mohammad (pbuh) urged opponents, whether Muslims or non-Muslims, to refer their disputes to arbitration when they could not resolve them amicably.[195] The Prophet (pbuh) also encouraged Muslims to accept the role of arbitrator by stating that Allah would reward them. For example, Mohammad said, 'Almuksitoon [those who are just in their judgment] will be seated [on the Day of Judgment] upon pulpits of light beside God'.[196]

At the same time, the Sunnah acknowledges the great responsibility of judging a dispute. The Prophet Mohammad (pbuh) said: 'Whoever takes the responsibility of a judge, or is appointed as a judge between people, then he has been slaughtered without a knife'.[197] Consequently, Islamic history has witnessed many Shariah scholars who declined judicial appointments. One of the most prominent was Abu Hanifa.

On the other hand, the Sunnah, unlike the Quran, includes a set of texts that govern arbitration and the arbitral process. Some of these texts are specific to arbitration while most concern dispute resolution mechanisms in general.

To avoid unnecessary repetition, as many Sunnah texts will be discussed and analysed

---

[192] *Surat Almaaida*, verses 44, 45, 47 and 50.

[193] *Surat Almaaida*, verse 8. See generally S Saleh, *Commercial Arbitration in the Arab Middle East: Shari'a, Syria, Lebanon, and Egypt* (2nd edn, Hart 2006) 12.

[194] A Al-Ramahi, 'Sulh: A Crucial Part of Islamic Arbitration' (2008) 4 LSE Law, Society and Economy Working Papers 12/2008, LSE 1, 13 and 14 <ttps://tinyurl.com/y3mr6jsw> accessed 31/05/2018.

[195] ibid 14.

[196] MA Al-Naysaburii (died: 261 Hijra - corresponding to 874 AD), *Sahih Muslim* (AH Siddiqui tr) Book 20, Hadith 4493 <https://sunnah.com/muslim/33/21> accessed 25 July 2017. Also, Allah's Messenger says, 'When a judge gives a ruling, having tried his best to decide correctly, and is right (in his decision), he will have a double reward; and when he gives a ruling having tried his best to decide correctly, and is wrong (in his decision), he will have a single reward'. ibid, Book 18, Hadith 4261 <https://sunnah.com/muslim/30/18> accessed 25 July 2017.

[197] AIM At-Tirmidhi, *Jami` at-Tirmidhi*, vol 3, Book 13, Hadith 1325 <https://sunnah.com/tirmidhi/15/5> accessed 25 July 2017

through the following chapters, it is sufficient here to mention some examples of the sayings (Sunnah *AlQawliyah)* and practices (Sunnah *AlFi'liyah*) of the Prophet Mohammad (pbuh) that provide a general view of arbitration in the Sunnah.

5.2.1 Sunnah *AlQawliyah*

In accordance with the Sunnah, the plaintiff is the party who must prove the claim (eg, by testimony). If the plaintiff cannot prove the claim, s/he has only the right to ask the defendant to take an oath that the plaintiff's claim is not true.[198] Moreover, under the Sunnah, an arbitrator must be just[199] and should grant each side full opportunity to present its case.[200] An arbitrator also should not decide a case unless he is informed of every aspect of it. The Prophet Mohammad (pbuh) said:

> Judges are of three types, one of whom will go to Paradise and two to Hell. The one who will go to Paradise is a man who knows what is right and gives judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to Hell; and a man who gives judgment for people when he is ignorant will go to Hell.[201]

Thus, even if the award or judgment is fair but only by chance, the judge or arbitrator would still have committed an act contrary to Shariah if the award was issued without full knowledge of the case.

Nevertheless, the Sunnah explains that the arbitrator's award does not necessarily reflect reality as much as it is a practical means of ending the dispute based on the understanding of the arbitrator, even if the arbitrator were the Prophet (pbuh) himself. Therefore, the Sunnah warns the winning party against insisting on the enforcement of the award when s/he is aware that it contradicts reality. The Prophet (pbuh) says:

> You refer your disputes to me and I am only human. Perhaps some of you may be more eloquent in presenting your case than others, so I rule in your

---

[198] The Prophet (pbuh) said: 'Were people to be given … [what they claimed], men would [unjustly] claim the wealth and lives of [other] people. But, the burden of proof is upon the plaintiff and the taking of an oath is upon the one who denies [the allegation]'. JADM Zarabozo, *Commentary on the Forty Hadith of Al-Nawawi*, vol 2 (JS Idris introducer, Al-Basheer 1999) 955 <https://muqith.files.wordpress.com/2015/12/commentary-on-the-forty-hadith-of-al-nawawi-vol-2.pdf> accessed 25 June 2017.

[199] For example, the Prophet Mohammad (pbuh) said: 'Whoever *hakkama* arbitrates between two disputing parties after both agree on him and he does not do justice between them, Allah will curse him'. IYI Al-Bahutr, *Kashshaf al-Qina an-Matn al-Iqna*, vol 6 (Dar al Fikr 1982) 309 (as cited in M Zahraa and NA Hak, 'Taḥkīm (Arbitration) in Islamic Law within the Context of Family Disputes' (2006) 20 ALQ 2, 6).

[200] AIM At-Tirmidhi, *Jami` at-Tirmidhi*, vol 3, Book 13, Hadith 1331 <https://sunnah.com/tirmidhi/15/11> accessed 25 July 2017.

[201] Ibn Ash'ath (n 123) vol 4, 171.

> favor because of what I hear from you. If I pass a judgment in favor of one of you that detracts from his brother's rights, then he should not take it, because it is a piece of fire that is given to him which he will bring forth on the Day of Resurrection.[202]

5.2.2 Sunnah *AlFi'liyah*

In practice, the Sunnah understands arbitration to be a flexible and effective means of dispute settlement. The Prophet (pbuh) acted as an arbitrator in many cases, both locally and farther afield.[203] He would frequently propose an amicable resolution to a dispute, but if it was rejected by one of the parties, then the Prophet (pbuh) would issue an arbitral award.[204]

The Prophet (pbuh) also participated in arbitration as a party, requesting or accepting referral to arbitration, whether the subject matter of the dispute was personal (eg, as a husband)[205] or related to the public as a leader of the Islamic State.

In fact, the Madinah Treaty, the first treaty in Islamic history (622), included an arbitration clause. The Prophet Mohammad (pbuh) represented Muslims in Madinah in negotiating the treaty with non-Muslim communities in and around the city. The treaty specified arbitration as a mechanism for resolving any dispute that could not be resolved amicably between the parties.[206] It also provided that the applicable law would be Shariah and that the Prophet (pbuh) would be the arbitrator.[207] During the period of this treaty, many cases were brought and referred to arbitration. All arbitral awards in those cases were voluntarily enforced by the Prophet (pbuh).

However, in some cases arising under the treaty, the parties agreed to change the arbitrator and the arbitrator applied a system other than Shariah. An example is the case of *Bani Qureidah,* which was considered one of the most important arbitration cases during the Prophet's life. In this case, after the Bani Qureidah clan breached the treaty by agreeing with

---

[202] AAMBYBAA Al-Qazvini, *Sunan Ibn Majah*, vol 3, Book 13, Hadith 2317 <https://sunnah.com/ibnmajah/13/10> accessed 25 July 2017.

[203] For example, during the life of the Prophet (pbuh) in Makkah, people of Madinah invited him as arbitrator in a dispute between AlKhazraj and Alaus with three clans of Jews. Zahraa and Hak (n 199) 6. Also, in the case *Alnadir v Qurayzah* where the parties agreed to appoint the Prophet Mohammad (pbuh) as arbitrator and he accepted. IHADS Ibn Ash'ath, *Sunan Abi Dawud*, vol 5 (HATZ 'All Za'l ed, N A-l Khattab tr, Maktaba Dar-us-Salam 2008) 97.

[204] For example, see page 34.

[205] GA Aldawry, *Aqd AlTahkim fi AlFiqh AlIslami wa AlQanoon AlWadi* (Dar Alfrakan, Jordan 2002) 94-95.

[206] Baamir, *Shari'a Law* (n 23) 53.

[207] MY Abu Munshar, 'The Compatibility of Islam with Pluralism: Two Historical Precedents' (2010) ICR 613, 615.

the Quraysh tribe to invade Madinah through their region, the Bani Qureidah agreed to refer the dispute to arbitration, proposing that Saad bin Mu'adh, one of their allies, would act as the arbitrator.[208] Mohammad, as the leader of Madinah, accepted the appointment of Saad bin Mu'adh and then executed the award.[209] According to some commentators, the substantive law applied by Saad bin Mu'adh was the Jewish law[210] (Torah), as Shariah did not include a provision dealing with the subject matter of the dispute (high treason).

From the above, it is possible to summarise the main principles of arbitration in the Quran and Sunnah, which are consistent with the modern approach of arbitration systems. These mainly include that:

Arbitration is a favourable means to resolve disputes.

Arbitration is a consensual agreement that can be proved by writing.

The arbitration agreement may concern an existing dispute or a dispute that may occur in the future. It also may be national or international, with one or both parties being foreign.

Parties have the right to determine the applicable law and the identity of the arbitrator in future disputes.

Parties have an equal right to due process and a fair proceeding.

The burden of proof is on the plaintiff.

Arbitration can be arbitration by conciliation, in which each party renounces some of his rights, if the arbitration parties agree to this.

The arbitrator has the right to apply a law to the merits of the dispute, that has the closest connection to the dispute, other than the law agreed upon by parties when the agreed law does not include a provision that governs the dispute.

Thus, it can be concluded that Sunnah**,** both *AlQawliyah* and *AlFi'liyah,* recognises arbitration as a method of resolving disputes in general. In addition, it contains a set of basic

---

[208] Baamir, *Shari'a Law* (n 23) 53-54.

[209] M Al-Bukhari (died: 256 Hijra - corresponding to 870 AD), *Sahih al-Bukhari*, vol 4 (M Muhsin Khan tr) Book 52, Hadith 280 <https://sunnah.com/bukhari/56/249> accessed 25 July 2017.

[210] I Kammuna*,* '*Bani Qurayza: Details of the Islamic Genocide of the Jews by Prophet Muhammad*' (Islam Watch 2014); MJ Kister, 'The Massacre of the Banu Qurayza: A Re-examination of a Tradition' (1986) 8 JSAI 61, 64.

principles that enhance the rights and freedom of arbitration parties. At the same time, it does not address international arbitration in its modern sense, let alone the freedom of the parties. However, it also does not include any explicit provisions that could unduly constrain the freedom of parties to arbitration, whether national or international.

6. Conclusion

It is clear from the above that Shariah in general is distinct from Western laws as the two main sources of Shariah (Quran and Sunnah) have been fixed and unchangeable since the death of the Prophet Mohammad (pbuh) more than 1,385 years ago. At the same time, however, when it comes to arbitration provisions, especially international commercial arbitration, it is possible to conclude from the above that international commercial arbitration in Shariah can keep up with the modern approach.

This is true for two reasons. The first is that the primary sources of Shariah (which are immutable) do not deal with arbitration except by stipulating core principles and some provisions that conform to the attitude of modern arbitration laws. These principles include, for example, the impartiality of the arbitrator, as well as procedural due process rules that guarantee each side an equal opportunity to present its case. The only exception is the freedom of arbitration parties to choose the substantive law applicable to the dispute when one of them is a Muslim, as will be seen later.

The second reason is that the detailed provisions of arbitration in Shariah are merely jurisprudential opinions by scholars during the past 1,300 years. These jurisprudential rules and most of the mechanisms that have been used to reach them are the subject of debate among early Shariah scholars, including the four Sunni schools. In addition, the scholars' jurisprudential opinions are not infallible but rather are subject to modification even by these scholars themselves. Such changes might be based on either changing circumstances or changing understanding of the evidence on which the initial opinion was based. Even today, these scholars' rulings on Shariah's arbitration provisions can change to accommodate the circumstances and the needs of the individual and society, so long as any such change does not conflict with the Quran or Sunnah.

International commercial arbitration was not directly addressed by the Quran and Sunnah, or even by the early scholars of the four Sunni schools, as far as the researcher can determine. So, from this perspective, it is possible to say that Shariah provisions on

international commercial arbitration should be drafted to be in line with the modern approach, with the parties free to choose the substantive law applicable to the dispute, provided that such law does not include a provision that contradicts the provisions of Quran and Sunnah.

In light of the absence of direct provisions in Shariah concerning the issue of parties' freedom in international commercial arbitration, the next chapter will discuss the legal basis for arbitration; specifically, the legal nature of arbitration and the legal concept of the arbitration contract.

Chapter III:
Nature of Arbitration and Arbitration Contract

As the previous chapter makes clear, although Shariah lacks detailed provisions on international commercial arbitration, it is rich in text from which the scope of the parties' freedom in arbitration can be deduced. To identify and compare such provisions in the following chapters, it is necessary, however, to first examine the legal nature of arbitration under Shariah and then compare the concept of the arbitration contract in the three systems under study. This approach is all the more necessary because of the fact that most views of early Shariah scholars on the particulars of arbitration derive from their broader viewpoints on the nature of arbitration itself.

Moreover, an arbitration agreement, which is the basis of any international commercial arbitration and the means through which the parties exercise their freedom to determine the elements of arbitration, has not been defined under the four Sunni schools. Thus, this examination will contribute to an understanding of the attitude of early Shariah scholars concerning the aspects of arbitration that will be addressed in the following chapters.

This chapter is divided into two main sections: the first addresses the nature of arbitration, aiming to analyse this nature under the four Sunni schools; the second addresses the concept of an arbitration contract. This section aims to analyse the concept of an arbitration agreement under Shariah, the SAL 2012 and the EAA 1996, and then the difference between the arbitration agreement and the agreement with the arbitrator.

1. Nature of Arbitration

The nature of arbitration is a threshold concern for national courts tasked with interpreting legal issues in international commercial arbitrations.[211] Consequently, the question of the theoretical basis of arbitration has received intense academic study since the end of the nineteenth century.[212] Under Shariah, early Sunni scholars advocated a variety of positions on the nature of arbitration which in turn have had an impact on interpretations relating to a range of issues, including the course and conduct of arbitration proceedings; the freedom of parties to arbitrate their disputes and commit to the arbitration agreement; the

[211] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) Contemp Asia Arb J 255, 257.

[212] AJ Belohlavek, 'The Legal Nature of International Commercial Arbitration and the Effects of Conflicts between Legal Cultures' (2011) 2 Law of Ukraine 18, 18.

relationship between the arbitrator and the parties; and the enforceability of the arbitral award.

Contemporary scholars continue to express a variety of opinions about the nature of arbitration in Shariah, but it appears that a dominant approach has emerged which stresses that arbitration is merely a type of conciliation contract.[213] These contemporary scholars maintain that their approach is in accord with the opinions of early Shariah scholars, but this study concludes that this is not the case.

Early Shariah scholars generally view the nature of arbitration in one of four ways: judicial, agency , mixed (hybrid) and testimonial (ie, arbitration as testimony).[214] Consistent with the objectives of this study, the first three perspectives will be addressed, as well as briefly highlighting their implications for several important issues; these are: the right of either party to commence and terminate arbitration, the qualifications required of an arbitrator and the finality of the arbitral award.

1.1 Agency Contract Theory

Most early Shariah scholars[215] believe that the arbitration agreement is an agency contract in which each party authorises one or more persons to resolve a dispute on the party's behalf. Proponents of this view stress that the parties have the legal authority to empower an agent to issue a binding decision.[216]

The proponents of this outlook frame their arguments in two ways. The first relies on verse 35 of *Surat Alnisaa* in the *tafaseer* (exegesis) of the Quran regarding arbitration in

---

[213] Hossain (n 185) 1-2; RS Elsamani, 'Factors to be Considered Before Arbitrating in the Arab Middle East: Examples of Religious and Legislative Constraints' (2011) 1 Int'l Com Arb Brief 8, 11; A El Ahdab and J El Ahdab, *Arbitration with the Arab Countries* (3rd edn, KLI 2011) 11; M M Keshavjee, *Islam, Sharia and Alternative Dispute Resolution: Mechanisms for Legal Redress in the Muslim Community* (IBT 2013) 67; Kutty (n 26) 596-98; Baamir, *Shari'a Law* (n 23) 73, 85.

[214] One explanation of this diversity of views is the difference in the interpretation of the Quranic verse 35 of *Surat Alnisaa* regarding arbitration in the dispute between spouses, which is the main text of the Quran that urges Muslims to use arbitration.

[215] Among these scholars, Abu Hanifa (the founder of AlHanafi school), AlShafi'i in an opinion (the founder of AlShafi'i school) and Ahmed (the founder of AlHanbali school) as had been quoted from him by his students.

[216] ABAABA AlJassas AlHanafi (died: 370 Hijra - corresponding to 980), *Ahkam AlQuran*, vol 2 (AMA Shahin ed, Dar AlKutub AlElmiyah, Beirut 1994) 239-40. See also generally, AIIBABY AlShirazi (died: 476 Hijra - corresponding to1083), *AlMuhathab fi Fiqh AlImam AlShafi'i*, vol 2 (Dar AlKutub AlElmiyah) 488; ABABJA AlSuyuti (died: 911 Hijra - corresponding to 1505), *AlDur AlManthor*, vol 2 (Dar AlFiker, Beirut) 524-26; AAHASMDS AlHanbali (died: 885 Hijra- corresponding to 1480), *AlEnsaf fi Ma'arefat AlRajeh mena Alkhelaf*, vol 8 (2nd edn, Dar Ehia ATurath Alarabi) 380; AZMYS AlNawawi (died: 676 Hijra- corresponding to 1277), *AlMajmo' Shareh AlMuhathab* (with thecompletion by AlSabaki and AlMuti'i), vol 16 (Dar AlFiker) 451-52 & 453-54.

conflicts between spouses.[217] This is one of the two verses that Islamic scholars cite in regard to the permissibility of arbitration in Shariah as a means of resolving disputes.[218] The second position is grounded in *fiqh.* Both the scholars of *tafaseer* of the Quran (*mufassirin*) and the jurisprudential scholars (*fuqaha*)[219] believe that the intermediaries (called 'arbiters' in the Quran) in an arbitration are merely the agents of those who have appointed them.[220] Accordingly, the arbitrator's role should not exceed that of an agent in any other agency contract.[221]

Mufassirin advance two possible explanations for why the Quran refers to the intermediary as an arbiter rather than an agent: because of the parties' agreement to accept the decision of the appointed person, or because the parties may choose who is appointed to hear their dispute and issue an award. In either case, the appointed person is empowered to act merely as an agent would act in any other type of agency relationship.[222] Hence, most proponents of either explanation do not believe that an arbitrator needs to meet the requirements for a judge.[223]

Those who support the agency theory do, however, differ on the issues of the finality of an arbitral award and the right of either party to unilaterally terminate the arbitration contract. *Fuqaha* who are proponents of agency theory assert that an arbitral award is final and binding as soon as it is issued.[224] They differ, however, over the right of either party to call off

---

[217] For example, see MMM Shafi, *Ma'ariful-Qur'an*, vol 2 (M Shamim tr, MMT Usmani reviser, Maktaba-e-Darul-Uloom, Karachi 1998) 417-43 <https://tinyurl.com/ybmbeoz7> accessed 31/05/2018; ABMB AlMaliki (died: 543 Hijra - corresponding to 1148), *Ahkam AlQuran*, vol 1 (MA Ata ed, 3rd edn, Dar AlKutub AlElmiyah 2003) 537-43.

[218] For example, see Shafi, '*Ma'ariful-Qur'an*' (n 217) 417-43.

[219] MA Alkhrashi AlMaliki (died: 1101 Hijra - corresponding to 1689), *Shareh Mukhtassar Khalil le AlKhrshi*, vol 4 (Dar AlFiker, Beirut) 9; AlShirazi (n 216) 488; AlHanbali, '*AlEnsaf*' (n 216) 380.

[220] ZBIB Mohammed, known as Ibn Najem AlMasri (died: 970 Hijra - corresponding to 1563 AD), *AlBaher AlRaeq Shareh Kanz Aldaqaeq*, vol 7 (2nd edn, Dar AlKetab AlIslami) 25; AlMaliki, '*Ahkam AlQuran*' (n 217) vol 2, 537. See also AlNawawi, *AlMajmo'* (n 216) vol 16, 454.

[221] For example, AlJassas (n 216) 239-40.

[222] Proponents of this theory stress that the role of the appointed individual, in such cases, resembles the role of an arbitrator in deciding between disputants on the one hand and that of an agent on the other hand. For example, AlJassas (n 216) 240. See also generally AAMEAOSAAMQ AlMaqqi AlShafi'i (died: 204 Hijra - corresponding to 819), *AlOm*, vol 5 (Dar AlMa'refa, Beirut 1990) 124-25.

[223] AMMDAAMQJMD AlHanbali Ibn Qudamah (died: 620 Hijra - corresponding to 1223), *AlKafi fi Fiqh AlImam Ahmed*, vol 3 (Dar AlKutub AlElmiyah 1414 Hijra - 1994 A D) 94; AWSKSAWTQB AlAndulusi (died: 474 Hijra- corresponding to 1081), *AlMuntaqa Shareh AlMuwatta*, vol 5 (AlSa'ada Printing, Egypt 1332 Hijra - corresponding to 1913) 228; A Alsusuwah, 'Athar Attahkim fi Alfiqh AlIslami' (2005) 22 Majallat AlShariah wa Alqanoon 101,122; AlHanbali, '*AlEnsaf*' (n 216) 379-80.

[224] For example, see AlAndulusi, *AlMuntaqa* (n 223) vol 5, 229; SMAAAHS AlRamli (died: 1004 Hijra - corresponding to 1595) *Nehayat AlMuhtaj Ela Shareh AlMenhaj*, vol 8 (Dar AlFiker, Beirut 1984) 243.

arbitration before the award is rendered.

Some scholars believe that the parties cannot halt an arbitration once it has commenced.[225] Asbagh justifies this opinion with the analogy that, in many situations in Islamic courts, a client cannot dismiss his attorney (agent) after litigation has begun before a judge.[226] Other scholars, such as Sahnoon, believe that either party is entitled to terminate arbitration at any point before the arbitral award is issued,[227] as the situation is the same as it was before the initiation of arbitration.[228]

Mufassirin who support agency theory believe that either party (either spouse, in the case of a marital dispute) is entitled to call off arbitration before or after the process is underway. In addition, they believe the arbitral award is binding only in two situations: when one or both parties consent to the award,[229] or when one or both parties have authorised their agents to issue a binding award.[230]

The question of the breadth of the freedom of the arbitrating parties reflects an argument about who should appoint arbitrators in a conflict between spouses.[231] While some *mufassirin* who support agency theory believe the spouses should select the arbitrator,[232] other *mufassirin* maintain that the ruler (or the official responsible for resolving the dispute) should appoint the arbitrator.[233] Those who believe the official should make the appointment also believe that the arbitrator's award can be binding without the parties' consent. They base their view on the fact that the Quran, in *Surat Alnisaa* verse 35, called the intermediary an arbiter whose duties included issuing a decision with or without the consent of the parties.[234]

---

[225] AMMDAAMQJMD AlHanbali Ibn Qudamah (died: 620 Hijra - corresponding to 1223) *AlMugni le IbnQudamah*, vol 10 (Maktabat AlQahera 1968) 95; AlAndulusi, *AlMuntaqa* (n 223) vol 5, 227; MSM AlOthaimeen (died: 1421 Hijra - corresponding to 2000), *AShareh AlMumte' ala Zad AlMustanqa*', vol 15 (Dar Ibn AlJawzi 1422 - corresponding to 2001) 286.

[226] IAM Ibn Farhoon (died: 799 Hijra – corresponding to 1396), *Tabsurat AlHukkam fi Osool AlOqdiyah wa Manahej AlAhkam*, vol 1 (Maktabat AlKulliyat AlAzhariyah 1986) 63; Ibn Qudamah, '*AlKafi*' (n 223) vol 4, 224.

[227] Ibn Qudamah, *AlMugni* (n 225) vol 10, 95; AlAndulusi, *AlMuntaqa* (n 223) vol 5, 227-28.

[228] Ibn Qudamah, '*AlKafi*' (n 223) vol 4, 224.

[229] See generally AAMEAOSAAMQ AlMaqqi AlShafi'i (died: 204 Hijra- corresponding to 819), *Tafseer AlImam AlShafi'i*, vol 5 (ABM AlFarran investigator, Dar AlTadmuriyah, Saudi Arabia 2006) 125.

[230] ibid vol 2, 320 and vol 5, 125.

[231] See generally MJYKG AlAmeli AlTabary (died: 310 Hijra - corresponding to 922), *Jame' AlBayan fi Ta'aweel AlQuran*, vol 8 (AM Shaker investigator, Mua'assasat AlRessalah 2000) 320.

[232] MJYKG AlAmeli AlTabary (died: 310 Hijra - corresponding to 922), *Tafseer AlTabary, Jame' AlBayan an Ta'aweel Ai AlQuran*, vol 6 (ABA AlTuki investigator, Dar Hajer 2001) 717 & 719.

[233] Shaker, '*Jame' AlBayan*' (n 231) vol 8, 319. See also generally AlSuyuti (n 216) 524-26; AlTuki, '*Tafseer AlTabary*' (n 232) vol 6, 719 & 720.

[234] ANA Assa'di (died: 1376 Hijra - corresponding to 1956), *Taiseer AlKareem AlRahman fi Tafseer Kalam*

Others, however, argue that the spouses must clearly consent to arbitration[235] or at least be content with the decision after it is issued, even if the decision includes divorce or an award of post-marital compensation.[236] They base their opinion on references in the Quran[237] and the Sunnah[238] which prohibit the possession of an individual's money without that person's consent and on references which permit the termination of a marriage contract only with the consent of at least one spouse.[239]

Therefore, it could be argued that the approach adopted by some Shariah scholars regarding the need for the parties' consent to an arbitral award is peculiar to marital conflicts when an arbitration agreement (or, as they express it, a mandate to hear the dispute and issue a decision) does not exist. Thus, the argument goes, this approach is not applicable to all marital disputes, much less to other types of arbitration, including international commercial arbitration.[240]

This is confirmed by the consensus among *fuqaha* and *mufassirin* proponents of agency theory that the consent of parties is not a requirement for the enforcement of the arbitral award so long as there is a mandate (arbitration agreement) by the parties to decide the dispute.[241] At the same time, however, Shariah scholars agree on the need for the parties' consent to referral to arbitration (an arbitration agreement)[242] before arbitration begins.[243] The only exception, according to some early Shariah scholars, is the arbitration of marital disputes, as has been previously pointed out.[244]

AlMannan, vol 1 (AABM Allweahk investigator, Mua'assasat AlRessalah 2000) 177; AFEOKQB AlDemashqi (died: 774 Hijra - corresponding to 1372), *Tafseer AlQuran AlAzeem*, vol 2 (SBM Salamah investigator, 2nd edn, Dar Taibah 1999) 297; Shaker, '*Jame' AlBayan*' (n 231) vol 8, 319-20.

[235] AlShafi'i, *Tafseer AlImam AlShafi'i* (n 229) vol 5, 125.

[236] AlTuki, '*Tafseer AlTabary*' (n 232) vol 6, 726-729; Ibn Qudamah, *AlMugni* (n 225) vol 10, 94.

[237] For example, *Surat al-Baqarah,* verse188 Allah says 'And do not consume one another's wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful]'. See also *Surat Alnisaa* verse 29.

[238] For example, the hadith of Prophet Mohammad (pbuh) 'You refer your disputes to me and I am only human'. AAMBYBAA Al-Qazvini, *Sunan Ibn Majah*, vol 3, Book 13, Hadith 2317 <https://sunnah.com/ibnmajah/13/10> accessed 25 July 2017. See pages 35-36.

[239] AlTuki, '*Tafseer AlTabary*' (n 232) vol 6, 726.

[240] A different point of view by some contemporary writers is that they believe the need for the consent of parties to an arbitral award is an approach taken by some early Shariah scholars in arbitration in general. Cyril Chern, *The Law of Construction Disputes* (2nd edn, Informa Law from Routledge 2014)10-11; Keshavjee (n 213) 67. See also generally Kutty (n 26) 596-597.

[241] See page 43.

[242] Chern (n 240) 10-11; ZMZAZAY AlSsaniki (died: 926 Hijra- corresponding to1519) *Asna AlMataleb fi Shareh Rawd Attaleb*, vol 4 (Dar AlKetab AlIslami) 288.

[243] AlSsaniki (n 242) vol 4, 288.

[244] See page 43.

1.1.1 Premises of Agency Theory

Proponents of agency theory base their arguments on three premises. First, the enforceability of an arbitrator's award is based primarily on the consent of the parties, who have effectively made the arbitrator their agent, and this is the meaning of agency.[245] Second, the Quranic verse 35 of *Surat Alnisaa* stipulates that arbiters shall be the parties' relatives (the spouses' relatives), and this restriction reinforces the notion that arbitrators are agents. In the ninth century, AlJassas, one of the most prominent Sunni scholars in general and of AlHanafi school in particular, wrote that this verse demonstrates that 'the person from his people is an agent for him, and that one from her people is an agent for her, it looks like as if he [Allah] says: send a man on his behalf and a man on her behalf'.[246]

For the third premise, proponents of agency theory cite an incident during the reign of Ali Ibn Abi Talib:

> A man and woman who had a dispute came to Ali with each of them having a group of people. Ali ordered them to appoint an arbiter from the man's family and an arbiter from the woman's family. Then he said to the arbiters: 'Do you know what are your duties? If you find that they should stay together, then do so. If you find that they should be separated, then do so'. The woman said, 'I am pleased with the Book of Allah [Quran] concerning what is upon me and what is for me'. The man said, 'As for separation, I will not accept that'. Ali told him, 'You are lying … until you accept the same things she has accepted'.

The proponents draw several points from this incident. One is that Ali asked the parties to appoint the arbiters and did not appoint them himself. This indicates that arbitrators are agents of the parties.[247] The second point is that Ali's request that the man accept the authority of the arbiter demonstrates that the arbitrator needs a mandate from parties. This shows that the arbitrator is an agent of the parties.[248]

1.1.2 Critique of Agency Theory

Although an arbitration contract under Shariah resembles an agency contract, the two types of agreements differ in several respects. The most important of these differences are the roles played by the arbitrator and agent[249] as well as the qualifications and responsibilities

---

[245] AlAndulusi, *AlMuntaqa* (n 223) vol 5, 227.
[246] AlJassas (n 216) 239.
[247] AlShafi'i, *AlOm* (n 222) vol 5, 125.
[248] AlJassas (n 216) 240; AlShafi'i, *AlOm* (n 222) vol 5,125.
[249] For example, the arbitrator's role is to resolve the dispute neutrally, whereas the agent should act for the

that go along with those roles.[250] For instance, Shariah, like most legal systems, calls for the arbitrator to remain neutral, which would be a breach of duty for an agent.[251] The premises relied on by the proponents of agency theory also raise a number of other arguments in the light of Shariah.

The first of these is that the Quranic verse 35 of *Surat Alnisaa*, which is relied on by proponents of the agency contract, expressly uses the term 'arbiter' but the verse does not mention the term 'agent'. If the verse meant to establish the intermediary as an 'agent', it would have used the word 'agent', not 'arbiter',[252] as the term 'agent' has an established meaning in both Shariah and custom, as does the term 'arbitrator'.[253] Thus, there is no basis for presuming that the verse uses one term to mean another.

The second is that the Quranic verse 35 of *Surat Alnisaa* states that: 'If they both [arbiters] desire to reconcile …'.[254] This is evidence that the intermediaries are not agents, because an agent does not act according to his desire 'but according to the will of his client'.[255] Based on this verse, an arbiter who acts independently of,[256] and perhaps contrary to, his client's desires is what is envisioned by Shariah.[257] That is not an agency relationship.

The third argument is that, even if it is possible to conclude that verse 35 treats the arbiter in a spousal dispute as an agent, no such conclusion can be reached based on verse 95 of

---

interest of his client. See generally Yu (n 211) 269; Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010) 37; AlAndulusi, *AlMuntaqa* (n 223) vol 5, 227.

[250] Shariah scholars have discussed several requirements that an arbitrator should possess. Among these requirements for instance being a Muslim, neutral and independent, (see page 109). However, they agree that only two requirements are required for an agent: to be mentally capable and to be aware of his agency. For more information, see AMA AlJaziri (died: 1360 Hijra- corresponding to 1941), *AlFiqh ala AlMathaheb AlAba'a*, vol 3 (2nd edn, Dar AlKutub AlElmiyah 2003) 151.

[251] See pages 123 and 129.

[252] MABASS Ibn Qayyim AlJawziyah (died: 751 Hijra - corresponding to 1350), *Zad AlMa'ad fi Hadi Khair AlEbad*, vol 5 (27th edn, Mua'assasat AlRessalah and Maktabat AlManar AlIslamiyah 1994) 172; AlMaliki, '*Ahkam AlQuran*' (n 217) vol 1, 539.

[253] AlQurtubi, *AlJame' le Ahkam AlQuran* (n 187) vol 5,176; AlJawziyah, '*Zad AlMa'ad*' (n 252) vol 5, 173.

[254] Under Shariah, one of the types of arbitration is 'arbitration by conciliation'. For example, Article 1850 of *AlMajallah: Majallat AlAhkam AlAdliyah: The Ottoman Courts Manual (Hanafi*), unofficial translation < http://www.iium.edu.my/deed/lawbase/al_majalle/index.html> accessed 31/05/2018 (*AlMajallah*). *AlMajallah* is the first codification of Islamic law according to AlHanafi school, issued in 1876.

[255] AlJawziyah, '*Zad AlMa'ad*' (n 252) vol 5, 173. See also AlJassas (n 216) 241.

[256] ABMBMBH Almawerdy (died: 450 Hijra - corresponding to 1058 AD), *Alhawy Alkabeer Fe Fiqh Mathhab AlEmam AlShafi,* vol 16 (AM Muawwadh and AA Abd AlMawjood investigators, Dar Alkotub Alelmiyah 1999) 139,140; MAM Elish, *Manh AlJalil Sharh Mukhtasar Khalil*, vol 8 (Dar AlFikr, Beirut 1989) 336; MAOAAA AlDemashqi Ibn Abdeen (died: 1252 Hijra - corresponding to 1836 AC), *Rad AlMuhtar Ala AlDur AlMukhtar*, vlo 5 (2nd edn, Dar AlFiker 1992) 442; NIZI Dawood, 'Shoroot Alqadi beyna Alhader wa Almagi' (2007) Center of Judicial Studies Specialist <https://tinyurl.com/y6hsntoa> accessed 19/08/2013.

[257] AlQurtubi, *AlJame' le Ahkam AlQuran* (n 187) vol 5, 177.

Surat Al-Mā'idah which is used by proponents of agency theory and other scholars of Islam to support the notion that arbitration is permissible under Shariah.[258] verse 95 of *Surat Al-Mā'idah* states that Muslims are forbidden from hunting animals in a particular situation (state of *ihram*[259]). In case such forbidden act has been committed, according to the Quran, arbitration is to be used as a means of rectifying this mistake by assigning an arbitrator to issue a decision regarding what needs to be done by the person who has done the wrong. In such a situation, only one human party is involved while the second party is the animal which does not exist in reality. Therefore, the theory of agency cannot be adopted here as it is inconceivable to have an agent for both parties.

Finally, the restriction in verse 35 which requires the arbiters to be relatives of the parties may suggest, not that the arbiters are agents but that they are interested parties who are in a special position to decide a familial dispute and are highly motivated to keep sensitive family matters private. This view is supported by the fact that, under Shariah in general, the arbiter should be independent of the parties, as was discussed earlier and will be expanded on later.[260] Therefore, it could be concluded that the requirement that arbiters be relatives of the parties is a special provision that applies only to the arbitration of marital conflicts. In other situations, including commercial arbitration, an arbitrator should be independent, according to Shariah.

1.2 Judicial Theory

Some early Sunni scholars, including Imam Malik, the founder of AlMaliki school, have expressed the view that arbitration is in effect a private judicial proceeding[261] and that the arbitrator acts as a judge, who hears the evidence and arguments and then issues a binding

---

[258] See generally Shaker, '*Jame' AlBayan*' (n 231) vol 10, 22-24. For more information, see IAAI Ibn Kathir, *Tafsir Ibn Kathir; Abridged*, vol 3 (SR Al Al-Mubarakpuri and others trs, 2nd edn, Maktaba Dar-us-Salam 2003) 265-68.

[259] *Ihram* is a name of the sacred state a Muslim enters into during the performance of pilgrimage.

[260] Please see page 129.

[261] AMBMAAOMB AlHanafi (died: 616 Hijra - corresponding to 1219), *AlMuheet AlBurhani fi AlFiqh AlNu'mani Fiqh AlImam Abi Hanifah*, vol 8 (AS AlJundi ed, Dar AlKutub AlElmiyah, Beirut 2004) 117; Mohammed, *AlBaher AlRaeq* (n 220) vol 7, 24; Alkhrashi AlMaliki (n 219) vol 4, 9; Alsusuwah (n 223) 122-23; AJAMSASAH AlMasri AlTahawi (died: 321 Hijra - corresponding to 933), *Mukhtassar Ektilaf AlOlama'a*, vol 4 (AN Ahmed ed, 2nd edn, Dar AlBashaer AlIslamiyah 1417 - corresponding to 1996 AC) 204; MMMAAASSSJ AlRoomi (AlBabarti, died: 786 Hijra - corresponding to 1384), *AlEnaya Shareh AlHedaya*, vol 7 (Dar AlFiker) 316-17; ATHIGDM AlHanafi (died: 1298 Hijra - corresponding to 1880), *AlLlebab fi Shareh AlKetab*, vol 4 (MMA Abdulhameed ed, AlMaktaba AlElmiyah, Beirut) 88; AlSsaniki (n 242) vol 4, 288; AlHanbali, '*AlEnsaf*' (n 216) 381; AMMAMAHGHB AlAiny (died: 855 Hijra - corresponding to 1451), *AlBenayah Shareh AlHedaya*, vol 9 (Dar AlKutub AlElmiyah, Beirut 2000) 58-59.

decision.[262] Therefore, they believe that the arbitrator should possess the qualifications of a judge and that the failure to meet any of these requirements nullifies the arbitral award.[263]

They also believe that the arbitrator's award can be challenged only on grounds that would justify a challenge of a judge's decision.[264] Moreover, when Shariah scholars are divided on a legal question that is the subject matter of an arbitrated dispute, a judge cannot nullify an arbitral award *sua sponte* merely because the outcome runs counter to the doctrine he favours, unless there is a clear injustice.[265]

In fact, some supporters of the judicial theory have exaggerated the resemblance of arbitration to a judicial proceeding, as they assert that either party is entitled to terminate the process by dismissing the arbitrator so long as the award has not yet been issued. They argue that if the authority that appoints judges is entitled to dismiss them, likewise the party who selects the arbitrators is entitled to dismiss them.[266] Supporters of this view also argue that even though arbitration is based on the agreement of all parties and therefore is not supposed to be terminated unilaterally, the arbitration contract is still not a binding contract; it's merely a permissible one.[267] Consequently, a party can walk away from an arbitration contract in the same way it can with an agency agreement. [268]

However, although the parties to arbitration enjoy a great deal of freedom in terms of terminating the arbitration contract since it is a permissible contract, the majority of early scholars of Islam agree that permissible contracts may become binding when the contract involves the rights of others. In such cases, the contract cannot be terminated without the consent of both parties.[269] Therefore, some proponents of this theory, such as Ibn al-

---

[262] AlSsaniki (n 242) vol 4, 288; OAMAFZ AlHanafi (died: 743 Hijra - corresponding to 1342), *Tabyeen AlHaqa'eq Shareh Kanz Addaqa'aeq we Hasheiat Ashelbi*, vol 4 (AlMatba'ah AlKubra AlAmeeriyah, Cairo 1313 Hijra - corresponding to 1895) 193; AlTahawi, '*Mukhtassar Ektilaf AlOlama'a*' (n 261) vol 4, 204. See also generally SAMAKS AlShafi'i (died: 977 Hijra - corresponding to 1569), *Mugni AlMuhtaj ela Ma'arefat Ma'ani Alfad AlMenhaj*, vol 4 (Dar AlKutub AlElmiyah 1994) 42; AlHanbali, '*AlEnsaf*' (n 216) 381.

[263] Mohammed, *AlBaher AlRaeq* (n 220) vol 7, 25-26; AlRoomi (n 261) vol 7, 316; AlHanafi, '*AlLlebab*' (n 261) vol 4, 88 & 89; Ibn Qudamah, *AlMugni* (n 225) vol 10, 94; AlTahawi, '*Mukhtassar Ektilaf AlOlama'a*' (n 261) vol 4, 204.

[264] Ibn Qudamah, *AlMugni* (n 225) vol 10, 95; AlSsaniki (n 242) vol 4, 288; AlTahawi, '*Mukhtassar Ektilaf AlOlama'a*' (n 261) vol 4, 204.

[265] AlAndulusi, *AlMuntaqa* (n 223) vol 5, 226; AlAiny, *AlBenayah* (n 261) vol 9, 60.

[266] AlHanafi, *Tabyeen AlHaqa'eq* (n 262) vol 4, 193.

[267] For more information about those two types of contracts in Shariah, see Muhammad Abu Sadah, 'International arbitration contract principles: analysis of Middle East perceptions' (2010) JITL&P 148, 152 and 153; MW Islam, 'Dissolution of Contract in Islamic Law' (1998) ALQ 336, 349 and 350.

[268] Mohammed, *AlBaher AlRaeq* (n 220) vol 7, 26; AlHanafi, *Tabyeen AlHaqa'eq* (n 262) vol 4, 193.

[269] Abu Sadah (n 267)152-53; Islam, 'Dissolution of Contract' (n 267) 349-50. For example, the agency

Majeshon, stress that there should be no such freedom once there is a valid arbitration agreement whether or not a dispute arises between them.[270]

1.3 Mixed Theory

Some AlHanafi scholars believe that the true nature of arbitration is a mixture of elements of the judiciary and conciliation.[271] They believe it resembles the judiciary in that the arbitrator carries out the role of a judge between the disputants. As a consequence, they believe that an arbitrator should meet the requirements of a judge.[272]

They also express the opinion, however, that arbitration is of a 'lower level' than the judiciary[273] for a number of reasons. First, an arbitral award affects only the parties.[274] Also, a judge could nullify an arbitral award *sua sponte* if it contravenes the doctrine he follows.[275] Moreover, the subject matter of disputes that can be settled through arbitration is limited,[276] while the judiciary has jurisdiction over the full range of disputes, including commercial, family and criminal matters.[277] Furthermore, commencement of arbitration generally cannot be conditional or *mudaf* (delayed until a future time), unlike in a judiciary.[278]

At the same time, the supporters of the mixed approach believe that arbitration is

---

contract, as it is classified amongst permissible contracts under Shariah. Scholars of Shariah believe that it can change from a permissible contract into a binding contract; for instance, if a mortgagor commissions an agent to sell a mortgage when the debt is due in order to fulfill that debt from the price of selling the mortgage. The client is not entitled to dismiss the agent as the right of a third party is considered and that is the mortgagee creditor. WM AlZuhaily, *AlFiqh AlIslami wa Adellatuh*, vol 4 (12th edn, Dar AlFiqr, Damascus) 3190.

[270] AlAndulusi, *AlMuntaqa* (n 223) vol 5, 227.

[271] Alsusuwah (n 223) 122. See also Ibn Abdeen (n 256) vol 5, 428 & 29; AlAiny, *AlBenayah* (n 261) vol 9, 59; KMAA Ibn AlHammam (died: 861 Hijra - corresponding to 1456), *Shareh Fateh AlQadeer ala AlHedaia Shareh Bedaiat AlMubtadi*, vol 7 (AG AlMahdi ed, Dar AlKutub AlElmiyah, Beirut) 295.

[272] Ibn Abdeen (n 256) vol 5, 429; AlRoomi (n 261) vol 7, 316; AlAiny, *AlBenayah* (n 261) vol 9, 59; Ibn AlHammam, '*Shareh Fateh AlQadeer*' (n 271) vol 7, 296.

[273] Ibn Abdeen (n 256) vol 5, 428; AlRoomi (n 261) vol 7, 316; AlAiny, *AlBenayah* (n 261) vol 9, 59.

[274] Ibn AlHammam, '*Shareh Fateh AlQadeer*' (n 271) vol 7, 295. There is an exception in one issue, when it concerns business partners. If one of the partners and their opponent assign an arbitrator who issues an award to commit the partner to pay an amount of the joint money, his award shall be binding to the partner and shall extend to the absent partners. Mohammed, *AlBaher AlRaeq* (n 220) vol7, 28.

[275] AlAiny, *AlBenayah* (n 261) vol 9, 59-60; Ibn Abdeen (n 256) vol 5, 431.

[276] This is because they believe that it is inadmissible to refer to arbitration in some disputes such as severe crimes and retaliation punishments (*qisas* and *hudud*). For definition of *qisas* and *hudud* see page 117.

[277] AlAiny, *AlBenayah* (n 261) vol 9, 59; Ibn AlHammam, '*Shareh Fateh AlQadeer*' (n 271) vol 7, 295 & 298.

[278] Ibn Abdeen (n 256) vol 5, 428 & 29; AlAiny, *AlBenayah* (n 261) vol 9, 58; AlRoomi (n 261) vol 7, 316. For example, if the arbitration agreement stipulates that the appointed arbitrator shall commence the arbitration procedures when he achieves a specific certificate or at the beginning of the next month, the arbitration agreement in accordance with this approach is null and void. This is because in the first case, the arbitration is suspended on a condition and in the second case is delayed until a particular time. Ministry of Awqaaf and Islamic Affairs, *AlMosoua AlFiqhiyah*, vol 10 (2nd edn, That Alsalaseal 1987) 243.

'conciliation on the one hand'[279] as it is 'only confirmed by consent of the disputants'[280] while 'it aims at ending the dispute'.[281] Therefore, they believe that disputes that can be resolved through arbitration are only those that can be abandoned by the parties as in conciliation.[282] Thus, they stress that arbitration is not an option in disputes that involve the rights of individuals other than the parties, just as disputes involving non-parties cannot be resolved through conciliation.[283]

It might be useful to point out that some contemporary writers state that arbitration according to the perspective of many early Shariah scholars, particularly those of AlHanafi school, is a kind of conciliation[284] or simply just conciliation.[285] This can be argued in the following way. First, most early scholars of AlHanafi school who discussed arbitration noted its resemblance to judicial proceedings.[286] But only some of those scholars took the subsequent step of finding similarities between arbitration and conciliation.[287] Therefore, those who explicitly mentioned a similarity between arbitration and conciliation are only a subset of a subset of AlHanafi scholars.

Second, those who pointed out a resemblance between arbitration and conciliation had in fact limited that observation to particular aspects, as has been previously mentioned.[288] Moreover, in the same context in which they discussed the resemblance between arbitration and conciliation, they also discussed the differences between arbitration and the judiciary. This leads to the conclusion that, from their perspective, arbitration resembles a judicial proceeding or, as some of them ventured, 'a type of judiciary',[289] apart from the limited

---

[279] See also Ibn AlHammam, '*Shareh Fateh AlQadeer*' (n 271) vol 7, 295; AlRoomi (n 261) vol 7, 316.
[280] Ibn AlHammam, '*Shareh Fateh AlQadeer*' (n 271) vol 7, 295.
[281] ibid vol 7, 295; AlRoomi (n 261) vol 7, 316. See also AlAiny, *AlBenayah* (n 261) vol 9, 59.
[282] Therefore, they exclude some crimes such as *hudud* and *qisas*.
[283] Ibn Abdeen (n 256) vol 5, 431; AlAiny, *AlBenayah* (n 261) vol 9, 60-61. The only exception is if the dispute is related to a company with a party other than partners, any partner may agree to resolve that dispute through arbitration without the need for the consent of other partners. Ibn Abdeen (n 256) vol 5, 430.
[284] Hossain (n 185) 1, 2; Elsamani (n 213) 11; Ahdab and Ahdab (n 213) 11.
[285] For example, D Brawn, 'Commercial Arbitration in Dubai' (2014) Arbitration 156, 157; Keshavjee (n 213) 67; Kutty (n 26) 596-98; Baamir, *Shari'a Law* (n 23) 85.
[286] For instance, AlHanafi, *AlMuheet AlBurhani* (n 261) vol 8, 117-18; AAJFMAH Burhan ADdeen (died: 593 Hijra - corresponding to 1196AD), *AlHidaya fi Shareh Bedayat AlMubtadi*, vol 3 (T Yusuf investigator, Dar Ehia AlTurath AlArabi, Beirut) 108; AlHanafi, *Tabyeen AlHaqa'eq* (n 262) vol 4, 193; AlHanafi, '*AlLlebab*' (n 261) vol 4, 88-89; AlAiny, *AlBenayah* (n 261) vol 9, 58-59.
[287] Alsusuwah (n 223) 122. See also generally Ibn Abdeen (n 256) vol 5, 428 – 29; AlAiny, *AlBenayah* (n 261) vol 9, 59; Ibn AlHammam, '*Shareh Fateh AlQadeer*' (n 271) vol 7, 295.
[288] Therefore, they had neither claimed a total similarity, nor even mentioned the existence of a similarity without explanation; rather they determined it in particular aspects.
[289] AlAiny, *AlBenayah* (n 261) vol 9, 58.

exceptions they mentioned. At the same time, arbitration resembles conciliation in particular aspects. It cannot be concluded, however, that they believed arbitration is identical to conciliation or that it is a type of conciliation, as they mention the similar aspects in particular, which means arbitration and conciliation are likely to differ in many other aspects. One example of the main differences is that the arbitration contract, according to early Muslim scholars, including those who advocate this approach, is among the permissible contracts,[290] unlike a conciliation contract which is regarded as a binding contract.[291] In fact, there is a consensus among the majority of Sunni schools on the resemblance between arbitration and conciliation, as they agree that the disputes that can be resolved through conciliation are the same as those that can be resolved through arbitration.[292] They also agree, in general, that the effects of arbitration cannot extend to non-parties and that mutual consent of the parties is needed to refer a dispute to arbitration.[293]

Therefore, the correspondence between some aspects of arbitration and conciliation that was pointed out by some early scholars of AlHanafi school does not mean that they are the only scholars of Shariah who believe there is a similarity between arbitration and conciliation, nor does it mean that they claim that they are identical in nature or scope. It does not even mean that they claim that arbitration is a kind of conciliation. On the contrary, they, like most early Sunni scholars, mention that there is a type of arbitration in Shariah which is arbitration by conciliation.[294] As a result, it can be concluded that some AlHanafi scholars believe that arbitration is of a mixed nature which combines elements of the judiciary and conciliation. From their perspective, arbitration is a type of judicial proceeding, though 'lower in degree' in a few respects. In some of these respects, it resembles conciliation.

Based on the above, it is clear that early Shariah scholars differ in their views on the nature of arbitration. Most of these scholars see arbitration as an agency contract and the arbitrator as an agent whose mission is no broader than that of any other agent. In line with that reasoning, all legal aspects of the arbitral process are similar to those in the agency

---

[290] Ibn Abdeen (n 256) vol 5, 430; EA Alsheikh, 'Distinction between the Concepts Mediation, Conciliation, Sulh and Arbitration in Shariah Law' (2011) 25 ALQ 367, 377.
[291] Alsheikh (n 290) 377.
[292] Alkhamees (n 18) 258.
[293] The only exception is when there is a dispute between spouses as some Shariah scholars believe that the ruler (who is responsible for resolving such conflicts) is entitled to refer the spouses to arbitration without their consent as has been previously pointed out. See pages 43-44.
[294] For example, *AlMajallah*, art 1850. See generally Al-Ramahi (191) 16-17.

contract, extending even to the arbitral award. According to the proponents of this view, the finality of an arbitral award derives from the finality of the act carried out by the agent under the agency contract, which they consider binding on the client/principal to the extent of the authority that s/he has granted the arbiter / agent.

Adopting a different approach, some early Shariah scholars, particularly those of AlMaliki school, stress that arbitration is a private judicial proceeding akin to those administered by the public judiciary. Consequently, they believe that the arbitrator should meet the requirements that a judge must meet. In addition, they maintain that an arbitral award cannot be challenged except in situations in which a court order could be challenged. Furthermore, they maintain that a judge should not nullify an arbitral award *sua sponte* for contravening his doctrine unless the award would cause a clear injustice.

Finally, there is a third perspective advanced by some AlHanafi scholars who argue that arbitration has a mixed nature. To them, arbitration is a lower level of judicial proceeding and, at the same time, it bears some resemblance to conciliation, because arbitration depends on the existence of an agreement between the parties, because of the range of those affected by an arbitral award and because of the types of disputes that can be resolved through arbitration - factors that are generally considered inarguable among early Sunni scholars.

2. Definition of Arbitration Agreement

The four Sunni schools have not directly defined an "arbitration agreement" but, under the term "arbitration", its definition can be clearly deduced. AlHanafi school, for instance, defines arbitration as the consent given by two disputants to appoint '[a] third person to settle the question at issue between them, who is called an arbitrator'.[295] A recent definition by the International Islamic Fiqh Academy (IIFA) clearly emphasised this Sunni perspective in its arbitration definition. The Resolution (91/8/9) of the Council of International Islamic Fiqh Academy (CIIFA) stipulates that 'Arbitration is an agreement between the two parties to a specific conflict, to mandate a third party to arbitrate between them and settle their differences through a binding verdict that is observant of Islamic Shari'a'.[296]

It is obvious that this definition is more relevant to the arbitration agreement than the

---

[295] *AlMajallah*, art 1790.

[296] The Council of the International Islamic Fiqh Academy (CIIFA), Resolution No [91/8/9], The Principle of Arbitration in Islamic Fiqh (Ninth Session, Abu Dhabi, United Arab Emirates,1-6 April 1995) (CIIFA Resolution No 91/8/9) <https://tinyurl.com/y8ohftkq> accessed 19 April 2017.

term arbitration itself. Although an arbitration agreement is a fundamental part of any arbitral process, it is not the arbitration itself. Arbitration is a means for resolving a dispute between two or more parties; it is commenced with the agreement on arbitration and carried out through several procedures that end with the arbitral award being issued. However, it can be clearly concluded that the agreement on arbitration under the umbrella of Shariah is the consent of two or more persons to select an individual to decide in the existing dispute between them in line with the provisions of Shariah.

Accordingly, the approach of Shariah in terms of identifying the arbitration agreement does not seem to be compatible with the modern approach. For instance, Article 7 of the Model Law, which is similar to Section 6 of the EAA 1996 and identical to Article 1 of the SAL 2012, stipulates that the arbitration agreement is an 'agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'. Two main differences can be identified between the view of Shariah and the modern approach regarding the definition of an arbitration agreement. First, the arbitration agreement follows the dispute that occurs between parties and does not precede it.[297] Second, the arbitration agreement in Shariah is not merely an agreement to refer a particular dispute to arbitration but is also a means for selecting whom shall be appointed to decide in this dispute (the arbitrator). Thus, the arbitration agreement under the umbrella of Shariah is an agreement comprising two agreements; the agreement on arbitration regarding a dispute, and the agreement on the selection of an arbitrator. Therefore, the majority of the four Sunni schools require the arbitration contract to include the determination of the arbitrator. There arises a question here regarding the difference between the arbitration contract and the contract with the arbitrator.

2.1 Agreement with Arbitrator and Arbitration Agreement

A contract with an arbitrator is a contract between parties to an arbitration agreement and an arbitrator to decide in a dispute or disputes between parties to that agreement which falls within its scope for a particular amount of money.[298] Therefore, the arbitration agreement precedes the agreement with the arbitrator[299] and the latter emanates from the

[297] There has been a jurisprudence controversy amongst Muslim scholars regarding the permissibility of agreeing to arbitration in disputes that might occur in the future. See page 71.
[298] Julian DM Lew and others, *Comparative International Commercial Arbitration* (KLI 2003) 278.
[299] M Rubino-Sammartano, *International Arbitration Law and Practice* (3rd edn, Juris 2014) 210.

former.[300]

These two contracts are separate[301] and different from each other[302] although in some cases both of them are in a single agreement formed progressively.[303] However, the approach of some authorities does not deem these two contracts as separate when the arbitrators are appointed in the arbitration agreement and they accept it.[304] Nevertheless, the difference between the two contracts is clear in their different subject matters, the parties to each contract and, in some cases, the applicable law.

2.1.1 Subject Matter of Contract

The purpose of an international arbitration agreement is always to resolve an existing dispute or one which may occur in the future as a result of a particular legal relationship via arbitration.[305] If the purpose of the contract is not to do this, then it is not an arbitration contract[306] even if this agreement (as is the case in some rare situations) includes the name of the arbitrator or the institution that carries out the role of deciding in the dispute where, in such a case, the arbitration agreement can be considered to include a friendly proposal to resolve the dispute.[307] The subject matter of the contract with the arbitrator 'regulates the provision of services by the arbitrator to the disputing parties for a fee'.[308]

Therefore, most national arbitration statutes - as in the case of Shariah - require the subject matter to be arbitrable for the arbitration agreement to be considered valid.[309] This has also been confirmed in international treaties, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC 1958),[310] which commits the Contracting

---

[300] Onyema (n 249) 49.
[301] ibid 49. See also JF Poudret and S Besson, *Comparative Law of International Arbitration* (SV Berti and A Ponti trs, 2nd edn, Sweet & Maxwell 2007) 370.
[302] Onyema (n 249) 61.
[303] Sammartano (n 299) 210.
[304] For example, *Compagnie Europeene de Cereals S A v Tradax Export S A* [1986] 2 Lloyd's Rep 301; Gary B Born, *International Commercial Arbitration, International Arbitration Agreements*, vol I (Kluwer Law International 2009) 1605-06. See also Onyema (n 249) 461.
[305] Onyema (n 249) 61.
[306] Jean-Louis Delvolvé, Jean Rouche and Gerald Pointon, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd edn, KLI 2009) 59.
[307] Sammartano (n 299) 210.
[308] Onyema (n 249) 61.
[309] See generally H Kronke and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (KLI 2010) 69. The arbitrability concept is connected to the nature of the disputed rights. R Caivano, 'Dispute Settlement, International Commercial Arbitration, 5.2 The Arbitration Agreement' (2005) United Nations, 22 <https://tinyurl.com/y4qnyleg> accessed 12 February 2014.
[310] Entered into force on 7 June 1959, New York, 1958, 330 UNTS 3.

States to recognising the arbitration agreement only if the subject matter of the dispute is according to its national law 'capable of settlement by arbitration'.[311] This is in contrast to the subject matter of the contract with the arbitrator in Shariah and national arbitration laws as it is always permissible and legitimate.

In brief, the subject matter of the arbitration contract concerns resolving a dispute between conflicting parties through arbitration;[312] and the contract with arbitrator regulates the provision of services for the fulfillment of the process of arbitration.

2.1.2 Applicable Law of Contract

International commercial arbitration often creates a range of conflict of laws issues.[313] The law that governs the arbitration agreement is not automatically the law that governs the underlying contract[314] or the contract with the arbitrator. There are two main factors to consider in order to determine the proper law that governs either the contract of international arbitration or the contract with the arbitrator.

The first factor is the agreement of parties where the parties to either contract, the arbitration contract and the contract with the arbitrator, enjoy a wide freedom in determining the applicable law of the contract they agree on. Therefore, the applicable law agreed upon in the arbitration contract might not be the same in the contract with the arbitrator due to the differences between parties and in their interests.

The second factor is the conflict of laws rules. If the contract, whether the arbitration contract or the contract with the arbitrator, does not stipulate explicitly or implicitly the determination of the applicable law, the conflict of laws rules determine the applicable law.[315] These rules usually refer to 'the law of the place which has the closest connection with the contract'.[316]

In this situation, the applicable law of the international commercial arbitration contract may not necessarily be the same law applied to the contract with the arbitrator who is to be

---

[311] NYC 1958, art II.
[312] Onyema (n 249) 61.
[313] M Parish, 'The Proper Law of an Arbitration Agreement' (2010) Arbitration 661, 661-62.
[314] *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102, 114.
[315] See generally Franco Ferrari and Stefan Krö (eds), *Conflict of Laws in International Arbitration* (Sellier European Law 2011) 30 and 32.
[316] Lew and others (n 298) 316. See also *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm) 101.

appointed to decide in that arbitration agreement although 'the legal regime applicable to the contract with the arbitrator is equally linked to that of the arbitration'.[317] This is because the state performing the international arbitration contract might not be the state where the contract with the arbitrator is concluded or the state of domicile of the arbitrator, which are both considered factors in determining the law most connected to the contract with the arbitrator.[318] This, in turn, results in the law of the place more connected to both contracts being different.

2.1.3 Parties

An international arbitration agreement is established via offer and acceptance between parties to refer an existing conflict or one that may occur in the future as a result of a contractual or non-contractual relationship to arbitration.[319] Thus, in general, the arbitrator is not considered as a party in this contract; it is a complete contract as long as both offer and acceptance are achieved between its parties in accordance with the form set by law, whilst the arbitrator's contract is an agreement between the parties to the arbitration contract on the one hand and the arbitrator on the other. This means that such a contract can only be established via the acceptance of the selected arbitrator.[320]

Therefore, it can be supposed that, in principle, the arbitration agreement is not affected by the circumstances that might occur to the selected arbitrator, such as death, disability or even a challenge to his neutrality and integrity. This is in contrast to the contract with an arbitrator which can be affected by such circumstances.[321]

In Shariah, the situation seems to be different as most early Shariah scholars require the determination of the arbitrator's name or his qualifications in order for the arbitration agreement to be valid.[322] There emerges a question here concerning whether the arbitrator is regarded as a party in the arbitration agreement, in case such an agreement includes the appointment of the arbitrator who accepts this mission.

There is no definite answer to this as the two main sources in Shariah, Quran and

---

[317] Poudret and Besson (n 301) 368.
[318] For more information, see Onyema (n 249) 160-64.
[319] AM Steingruber, *Consent in International Arbitration* (OUP 2012) 5.20-5.22.
[320] Poudret and Besson (n 301) 369. See also Onyema (n 249) 15.
[321] For instance, SAL 2012, art 19.
[322] The reason for this could be that Shariah scholars have only dealt with the arbitration agreement after the emergence of a dispute and not before that as there was no need to address such situation in their time.

Sunnah, do not address the arbitrator's relation to the arbitration agreement or even its parties as is the case in national arbitration laws,[323] and which is the situation in the SAL 2012 and the EAA 1996. Under UK jurisdiction, the case laws demonstrate that the arbitration agreement might be a trilateral contract amongst parties to arbitration and the arbitrator when it includes the appointment of an arbitrator and he accepts such an appointment. In *K/s Norjarl A/s v Hyundai Heavy Industries Co Ltd*,[324] which concerned the remuneration of arbitrators, Sir Nicolas Browne-Wilkinson V-C stated that: 'The arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract'.[325]

The researcher is not aware of any case law that handles this issue in Shariah or to any discussion by the Sunni schools, therefore it is difficult to determine the attitude of Shariah in terms of whether or not it considers the arbitrator a party to the arbitration agreement. However, it seems that arbitrator is not a party to such an agreement but his appointment under the arbitration agreement can be considered a proposal to contract by parties to the arbitration which is completed as a contract between those parties and the arbitrator by the acceptance of the latter.[326] This is because including the arbitrator as a party to the arbitration agreement means that parties to arbitration are not entitled to amend or terminate the arbitration agreement unilaterally without obtaining the consent of the assigned arbitrator, whether before or after the commencement of the arbitral process. In addition, this perspective is compatible with Article 25 of the SAL 2012 which sets out a hierarchy of rules to determine procedures of arbitration. Article 25(1) grants freedom for parties to arbitration to agree on the proceedings of the arbitral process. Then, Article 25(2) stipulates that in case of 'the absence of such an agreement, the arbitration tribunal may … [decide the] arbitration proceedings it deems fit'. Accordingly, Article 25 empowers parties to arbitration to determine the applicable procedural rule without the need for the arbitral tribunal's consent. Furthermore, during the drafting stage of the Model Law – in particular Article 19 – by which the SAL 2012 has been widely influenced, the issue of whether to limit the freedom of parties to arbitration in determining the procedures in the arbitral process to a particular time was

---

[323] Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (KLI 1999) 601.
[324] [1992] QB 863.
[325] ibid 885. See also *Compagnie Europeene* (n 304) 306.
[326] For a different point of view, see Abu Sadah (n 267) 166-67.

discussed. There was a suggestion by the Secretary to add the following to Article 19: 'Any agreement on the arbitral procedure [should] be reached before the first or sole arbitrator was appointed'.[327] The Working Group refused that suggestion confirming that 'the freedom of the parties to agree on the procedure should be a continuing one throughout the arbitral proceeding, as was provided in paragraph (1) [of Article 19], and should not be limited, for example, to the time before the first arbitrator was appointed'.[328] Hence, it appears that the arbitrators under the SAL 2012 are not parties to the arbitration agreement and their acceptance to perform the arbitration process establishes an agreement that is different from the arbitration agreement, whether or not their appointment has been stipulated by the arbitration agreement.

3 Conclusion

It is clear from the above that the early scholars of the four Sunni schools have divergent opinions on the nature of arbitration. Three main attitudes have been identified: judicial, contractual and mixed (hybrid). It is also clear that these different attitudes are the main bases from which most of the arbitration provisions in the four Sunni schools have arisen, and that they are not based on the main sources of Shariah (which do not include most arbitration provisions that were adopted by the early scholars of the four Sunni schools). Such provisions include those relating to the freedom of the arbitration parties (eg, the parties' freedom to choose the arbitrator and to commence or terminate the arbitration agreement).

At the same time, it is clear that the general approach of most contemporary legal writers is inaccurate to the extent that they attribute many of Shariah's arbitration provisions to the notion that early Shariah scholars believed that arbitration is merely a conciliation or a type of conciliation. While some scholars of AlHanafi school wrote that arbitration resembles conciliation in some respects, these same scholars also stated that arbitration is more akin to the judiciary than to conciliation. Further, these scholars also share the view of other early Shariah scholars concerning the substantial difference between arbitration and conciliation in classifying arbitration as one of the permissible contracts while conciliation is one of the binding contracts.

---

[327] HM Holtzmann and J E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (KLI 1995) 565.

[328] UNCITRAL, 'Report of the Working Group on International Contract Practices on the work of its seventh session' (6-17 February 1984) New York, A/CN.9/246, 6 <https://tinyurl.com/yb3dwwvh> accessed 24/06/2018.

Moreover, this chapter revealed that the concept of an arbitration contract is different under the four Sunni schools compared to the modern perspective, including that of the Saudi and English arbitration laws. The main difference is that under the four Sunni schools the arbitration contract is one that contains two agreements: (1) the agreement between the parties to arbitrate their dispute, and (2) the parties' agreement on the selection of an arbitrator. Such a position is at odds with the reality of international commercial arbitration because of the great difference nowadays between the contract of arbitration and the contract with the arbitrator.

A second difference between the four Sunni schools and the modern Saudi and English arbitration laws relates to the limitation of the arbitration agreement to existing disputes. This issue, in addition to the issue of the arbitrability of the subject matter of disputes in international trade contracts, are the subjects of the following chapter.

Chapter IV:
Scope of Arbitration and Types of Arbitration Agreements

As discussed in the previous chapter, arbitration is a private mechanism for resolving disputes that allows the parties to choose the arbitrator, the law and the procedures they prefer. Most national laws clearly limit the freedom of parties and allow them to refer only certain types of disputes to arbitration, as is the case in Shariah and the SAL 2012. The EAA 1996, however, contains no express limitations.

In addition, under Shariah, and in contrast to the SAL 2012 and the EAA 1996, the right of contracting parties to agree to arbitrate their future disputes is a controversial issue. Early Shariah scholars did not address this type of agreement, but more contemporary legal writers believe that an agreement to arbitrate future disputes is not permissible under Shariah, as such an agreement has prohibited attributes such as *maysir* (gambling). This research questions the accuracy of that view and demonstrates the validity of such an agreement under Shariah through an analysis of the attitude of early Shariah scholars towards the conditions associated with contracts.

This chapter aims to analyse the extent of the freedom of parties to international commercial contracts to agree to arbitrate their existing and future disputes as well as their freedom to agree to arbitrate the subject matter of the dispute itself. To achieve these aims, the chapter will be divided into two sections: first, the scope of arbitration (arbitrability) and, second, the types of arbitration agreements. These two sections will be addressed in the context of Shariah, the SAL 2012 and the EAA 1996.

1. Scope of Arbitration (Arbitrability *Ratione Materiae*)

The scope of arbitration, or arbitrability, means the eligibility of the subject matter of the dispute to be resolved by arbitration.[329] Its importance lies in determining 'the point at which the exercise of contractual freedom ends and the public mission of adjudication begins'.[330] Each state has its own rules about which matters are reserved for the courts.[331]

---

[329] AK Mittal, 'Arbitrability of Oppression and Mismanagement Claims: a Comparative Analysis' (2016) JBL 186, 186-87.

[330] TE Carbonneau and F Janson, 'Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability' (1994) 2 Tul J Intl & Comp L 193, 194.

[331] Giuditta Cordero-Moss (ed), *International Commercial Arbitration: Different Forms and their Features* (CUP 2013) 18.

These restrictions usually are based on public policy.[332]

If the subject matter of the dispute is not arbitrable under the applicable law, the arbitration agreement and the arbitral award can be unenforceable, whether in the state that is the seat of arbitration or the state where the arbitral award is sought to be enforced. This has been confirmed by many international conventions, such as the NYC 1958[333] and the European Convention on International Commercial Arbitration[334] (Geneva Convention 1961).[335]

In this section, the attitudes of Shariah and the Saudi and English systems towards the arbitrability of a dispute's subject matter are addressed consecutively.

1.1 Arbitrability of a Dispute Under Shariah

Neither the Quran nor the Sunnah addresses the issue of arbitrability. This has resulted in a diversity of viewpoints among early scholars of the Sunni schools. These viewpoints can be divided into three, based on the type of right involved in the dispute.

The first are the rights of Allah, which Ibn Taymiyah identifies as 'the *hudud* and rights that are not peculiar to a specific category of people but their benefits are for all people and needed by all'.[336] In other words, they are matters associated with the public interest and the protection of society. According to Ibn Taymiyah, these rights include fixed penalties for serious crimes, and financial rights[337] such as *zakat*.[338]

Most scholars of three Sunni schools (AlMaliki,[339] AlShafi'i[340] and AlHanafi[341]) agree that it is impermissible to agree to resolve such matters through arbitration, and that only the

---

[332] M Kurkela and S Turunen, *Due Process in International Commercial Arbitration* (2nd edn, OUP USA 2010) 84-83.

[333] Article (V)(2) of the NYC 1958 stipulates the right of the competent authority in the state party to the convention to reject the recognition and enforcement of the arbitral award if: 'The subject matter of the difference is not capable of settlement by arbitration under the law of that country'.

[334] European Convention on International Commercial Arbitration (Geneva, 1961) (opened for signature 21 April 1961, entered into force on 7 January 1964) 484 UNTS 349.

[335] Geneva Convention 1961, art VI(2).

[336] TAAAA Ibn Taimiyah (died: 728 Hijra - corresponding to 1327 AD), *AlSeyasah AlShareiyah fi Islah AlRaei' wa AlRaeiyah* (Ministry of Islamic Affairs, Endowment, Dawa and Guidance, Saudi Arabia 1418 Hijra) 51 and 52. For the definition of *hudoud*, see page 117.

[337] ibid 51.

[338] *Zakat* is a share of money at a particular time dictated by Allah to the beneficiaries nominated in the Quran. See generally TB Pepinsky and BC Welborne, 'Piety and Redistributive Preferences in the Muslim World' (2011) 64(3) PRQ 491, 493 & 494.

[339] Saleh, *Commercial Arbitration* (n 193) 38; Elish (n 256) vol 8 285.

[340] Saleh, *Commercial Arbitration* (n 193) 38; AlShafi'i, *Mugni AlMuhtaj* (n 262) vol 6, 268.

[341] Saleh, *Commercial Arbitration* (n 193) 37 & 38; AHAAKT AlHanafi (died 844 Hijra - corresponding to

judiciary has jurisdiction. The general approach of the scholars of AlHanbali school, however, conflicts with this attitude, as the most AlHanbali scholars believe all issues related to Allah's rights can be resolved through arbitration.[342]

The second type of rights are the rights of individuals. The four Sunni schools agree that any dispute associated with individual rights can be referred to arbitration[343] so long as it is permissible for the parties to act on those rights and to waive them.[344]

The third are the rights that involve both the rights of Allah and the rights of individuals, such as *qisas* (crimes punishable by personal retribution), *ta'zir* (crimes punishable at the discretion of the court); issues related to the verification of kinship; the guardianship of orphans and minors; and the issuing of an interdiction order.[345] The general approach of the Sunni schools is that disputes related to these rights cannot be resolved through arbitration.[346]

Recently, the CIIFA [347] and the European Council for Fatwa and Research (ECFR)[348] have adopted the approach of the Sunni schools, deciding that arbitrable matters are limited to disputes involving the rights of individuals.[349]

From the above, it is clear that Shariah scholars have two different opinions about the freedom of contracting parties to arbitrate their disputes: while most of those scholars, early and contemporary, believe that this freedom should not extend to any dispute that involves the rights of Allah (regardless of whether that dispute also includes the rights of individuals), AlHanbali school grants contracting parties complete freedom to refer any dispute between them to arbitration, even if it involves the rights of Allah (in other words, even if the dispute between the parties involves a crime). Under Shariah, there is no legal reason that prevents these two opinions to be extended to international commercial arbitration disputes.

1440 AD), *Mueen AlHukkam fi ma Yatarradad bayna AlKhasmain mena AlAhkam* (Dar AlFiker) 25.

[342] See generally Baamir, *Shari'a Law* (n 23) 75-76; AMAQMJ AlHanbali (died: 682 Hijra -corresponding to 1283) *AlShareh AlKabeer ala Maten AlMuqanna*, vol 11 (Dar AlKitab AlArabi) 393

[343] AlMaliki, '*Ahkam AlQuran*' (n 217) vol 2, 125. Elish (n 256) vol 8, 284. Almawerdy (n 256) vol 16, 326. See generally Saleh, *Commercial Arbitration* (n 193) 37 & 38.

[344] Almawerdy (n 256) vol 16, 326.

[345] Almawerdy (n 256) vol 16, 326. *AlMajallah*, art 941 defined Interdiction as '[P]rohibiting any particular person from dealing with his own property'.

[346] Ministry of Awqaaf and Islamic Affairs, *AlMosoua AlFiqhiyah*, vol 10 (2nd edn, That Alsalaseal 1987)239 and 40. Also, Almawerdy (n 256) vol 16, 326.

[347] CIIFA Resolution No 91/8/9.

[348] ECFR, Resolution No [11/4], (11th Session, Stockholm, 1-7 July 2003) < https://tinyurl.com/ yy3s4mkr> accessed 15/06/2018 (ECFR Resolution No [11/4]).

[349] For instance, The ECFR states that arbitration is not permissible in 'all rights that are considered for Allah such as *hudud*, and in cases where the impact of the arbitral award is extended to … [third parties] …'. ibid.

Therefore, according to the attitude of the majority of Shariah scholars, early and contemporary, parties in international commercial arbitration can agree to refer any dispute between them to arbitration so long as that dispute does not involve the rights of Allah.

1.2 Arbitrability of a Dispute Under the SAL 2012

Like the former Saudi Arbitration Law,[350] the new SAL 2012 has been influenced by the general approach of the Sunni schools. However, the SAL 2012 has increased the freedom of the parties as far as the range of disputes that are arbitrable. Under the new law, disputes that are not arbitrable are limited to 'personal status disputes [and] … matters not subject to [conciliation] …'.[351] Additionally, the SAL 2012 does not explicitly state that matters relating to public order are not arbitrable, which is contrary to the previous Saudi arbitration law[352] and most national arbitration laws.[353]

The question that arises here is the extent of the freedom of parties to international commercial contracts to arbitrate their disputes and whether this freedom extends to disputes that relate to public policy in Saudi Arabia, given the SAL 2012's silence on the issue. To address this question, situations in which conciliation is not permissible should be clarified first.

In fact, the Saudi legislature has never specified the types of disputes in which conciliation is not permissible or even provided a definition of conciliation itself. The only exception is two matters given as examples by the IRSAL 1985: '(1) *Hudoud* (2) *Laan* between spouses'.[354] Therefore, we must turn to Shariah to determine such issues, since it is the main source for clarifying any legal issue that has not been directly addressed by the Saudi legislature.[355]

Under the general rules of Shariah, conciliation is not permissible in matters that involve the rights of Allah, regardless of whether the rights of individuals are involved;[356] in other

---

[350] Article 1 of the Implementing Regulations 1985 of the SAL 1983 stated that arbitration is not permissible 'in matters wherein conciliation is not permitted … and all matters relating to the public order'. Issued by Prime Minister Resolution No 7/2021 on 08/09/1405 (corresponding to 28 May 1985) (IRSAL 1985).
[351] SAL 2012, art 2.
[352] IRSAL 1985, art 1.
[353] For example, Article 2060 of French Civil Code, Act No 2001- 420 in 15 May 2001, with last amendment No 2013-404 of 17 May 2013 (FCC 2001). Sammartano (n 299) 157.
[354] IRSAL 1985, art 1. *Laan*, is a Shariah procedure by which the spouses terminate their marital relationship upon one party directing accusation of adultery to the other. Kutty (n 26) 599.
[355] SBLG 1992, art 1.
[356] Alsheikh (n 290) 378.

words, matters relating to the public interest and the protection of society are not subject to conciliation.[357] For instance, parties cannot agree on conciliation to determine criminal responsibility in *Hudoud* (ie, to determine whether a party is guilty) whereas conciliation is permitted when assessing financial compensation for the victim, which is allowed under Shariah, as compensation is the victim's right that s/he can waive. Based on this, it can be said that, in principle, any commercial dispute is arbitrable under the SAL 2012, unless it relates to public policy.[358]

It may be appropriate to point out here that many recent legal writers assert that under the Saudi system, the freedom of contracting parties to agree on arbitration is restricted in two types of disputes: 1) disputes between a foreign contractor and his Saudi agents,[359] based on Article 11 of the Law of the Relationship Between a Foreign Contractor and His Saudi Agent 1978 (LRBFCSA 1978),[360] which gives exclusive jurisdiction to the Commission for the Settlement of Commercial Disputes to hear all disputes between a foreign contractor and his Saudi agent;[361] and 2) disputes between the partners in a company or between the partners and the company, as such disputes cannot be resolved through arbitration outside Saudi Arabia, according to Ministry of Commerce Circular No 31/1/331/91 of 22/02/1399 Hijra (corresponding to 21/01/1979 AD).[362] This circular states that a clause providing for arbitration outside Saudi Arabia regarding disputes between the partners in a company or between them and the company is void. In addition, any articles of association that include such a clause will not be registered or approved.

This, however, does not seem accurate, as the LRBFCSA 1978 has been canceled by the decision of the Council of Ministers No 142, dated 09/05/1422 Hijra (corresponding to 30/07/2001).[363] Since then, a foreign contractor's relations with his Saudi agents have been governed by the Commercial Agencies Law[364] or the Foreign Investment Law 2000,[365] which

---

[357] See page 61.
[358] See the definition of public policy at page 153.
[359] For example, Ahdab and Ahdab (n 213) 635; Kutty (n 26) 600.
[360] Issues by Royal Decree No M/2 of 21 Muharram 1398 Hijra (corresponding to 1st January 1978).
[361] LRBFCSA 1978, art 11.
[362] Baamir, *Shari'a Law* (n 23) 108. Ahdab and Ahdab (n 213) 634; Kutty (n 26) 600.
[363] MENA-OECD Investment Programme, 'Business Ethics and Anti-Bribery Policies in Selected Middle East and North African Countries' (2006) OECD, 11 <https://tinyurl.com/y9qmk69f> accessed 22/03/2017.
[364] Issues by Royal Decree No M/11 dated 20/02/1382 Hijra (corresponding to 22/7/1962).
[365] Issue by Royal Decree No M/1 dated 05/01/1421 Hijra (corresponding to 10 April 2000)

both urge parties to resolve disputes through arbitration.[366]

On a practical level, the Ministry of Commerce and Investment has recently made amendments to the unified form of commercial agencies contract for a foreign or national project (which is a requirement for the registration of any commercial agency in Saudi Arabia in practice), particularly the clause that calls for any dispute arising from the contract to be resolved by the Board of Grievances (Commercial Court).[367] According to the current form, any such disputes shall be resolved 'through arbitration before an agreed upon local or outer arbitration body'.[368]

As for intra-company disputes, Circular No 31/1/331/91 of the Ministry of Commerce is illegal as well as illogical. This is because the right to agree on arbitration is a legislative matter that the Saudi legislature has granted under the Arbitration Law without excluding intra-company disputes. Therefore, it is not within the authority of the Ministry of Commerce (as an executive body) to legislate or restrict the provisions of any legislation (including the arbitration law) without an express provision authorising it to do so, which does not exist in the current or former versions of either the Arbitration Law or the Companies Law.

In light of the current Saudi Arbitration Law, there is no rational basis for saying that arbitration is possible in Saudi Arabia but not outside the kingdom in intra-company disputes in which one of the parties is a partner who habitually resides abroad. This is because the new law treats the arbitration as international when one party resides abroad, regardless of the place of arbitration.[369] Therefore, in such a situation, all rights and obligations attendant to international arbitration (including the freedom to choose the applicable law and the arbitral tribunal, as well as the recognition and enforcement of the arbitral award) remain unchanged in the current arbitration law, regardless of whether the seat of arbitration is inside or outside Saudi Arabia.

This does not necessarily mean, however, that intra-company disputes are arbitrable. In

---

[366] Executive Rules 2002 of Foreign Investment Law 2000, art 26 states that Investment Disputes Settlement Committee 'shall consider disputes arising between the Foreign Investor and his Saudi partners concerning a licensed investment under the act. The committee shall work to settle the dispute amicably. In case such settlement could not be reached, the dispute shall be settled through arbitration …', issued by decision of the Chairman of the Board of Directors of General Investment Authority No 20/1, 1423 Hejra (corresponding to 2002). Also, Item 14 of Unified Form of a Commercial Proxy for a Foreign or National Project (UFCPFNP), issued by Ministry of Commerce and Investment <https://tinyurl.com/y2e5qodl> accessed 22/06/2018

[367] A different point of view, Kutty (n 26) 600.

[368] UFCPFNP, Item 14.

[369] SAL 2012, art 3.

fact, Saudi law is not entirely clear regarding the arbitrability of disputes that result from actions that contravene the Companies Law, whether those disputes are 1) between partners in the company, 2) between the partners and the company, 3) between the partners or the company and the board of directors in general, and 4) between the company and third parties.

This uncertainty results from several factors: the absence of an express legal provision addressing the issue; the recent enactment of the Saudi Companies Law 2015 (SCL 2015),[370] which took effect in May 2016; the lack of implementing regulations for the SCL 2015; and the loosely phrased provisions of the SCL 2015 regarding who has authority to resolve such disputes and what is the type of the right to access to the courts in such disputes.

For instance, the SCL 2015 establishes the right of the company,[371] shareholders[372] and third parties[373] to apply to the court for redress against the members of the board of directors when the company's affairs have been mismanaged or when the SCL 2015 or the company's articles of association have been breached. At the same time, Article 232 of the SCL 2015 states that 'The competent judicial authority hears all civil … cases and disputes arising from the application of the law's provisions'.[374]

These dueling clauses raise questions about whether the provisions of Article 232 are mandatory and grant exclusive jurisdiction to the courts and whether the rights granted by the SCL 2015 are statutory rights that cannot be diminished by contract. These questions are difficult to answer at the present time. If the implementing regulations of the new Companies Law (which have not yet been issued) do not clarify this issue, then the matter is subject to the discretion of the courts. Under recent English judicial decisions, any such ambiguity is construed in favour of arbitration, as will be seen later.

1.3 Arbitrability of a Dispute Under the EAA 1996

The EAA 1996, unlike Shariah and the SAL 2012, has not addressed the types of

---

[370] Issues by Royal Decree No (M/3) dated 28/01/1437 Hijra (corresponding to 10 November 2015).
[371] SCL 2015, art 79.
[372] SCL 2015, art 80.
[373] SCL 2015, art 78 states 'The members of the Board of Directors are liable ... for compensating the company, shareholders or third parties for damage resulting from their failure in managing the company's affairs or their breach of the provisions of this Law or the company's articles of association; any condition stating otherwise shall be disregarded …'.
[374] Another example, SCL 2015, art 73 (4) where it states 'every contract that is formed in violation of the provisions of this article is null and void, and the company is entitled to claim the violator for compensation before the competent judicial authority ….'.

disputes that are not arbitrable, which was also the case in previous English arbitration acts.[375] As noted by Lord Mustill and Mr Boyd QC, English law has never set out a general theory for arbitrability.[376] This does not mean that the EAA 1996 does not acknowledge the non-arbitrability of some disputes. Section 103 of the EAA 1996, for example, provided for the rejection of a New York Convention award 'if the award is in respect of a matter which is not capable of settlement by arbitration'.

This ambiguous attitude, which is contrary to the general thrust of the EAA 1996, resulted from 'the fact that the question asked in practice has been whether a specific dispute ought to be referred to arbitration or whether a court will enforce the award, and not whether a particular dispute is capable of settlement by arbitration', according to Lord Mustill and Boyd.[377]

This means that the arbitrability of a dispute under the English system is subject to the court's discretion on a case-by-case basis. It also means that the EAA 1996 left open the possibility for a party to make a challenge, either during the arbitration process[378] or after the issuance of the award, to prevent the recognition and enforcement of the arbitral award on the ground of arbitrability.[379]

However, as the Departmental Advisory Committee on Arbitration Law (DAC), which was established in 1985 to examine arbitration legislation and recommend improvements to arbitration law in England and Wales,[380] noted, 'Matters which are not arbitrable in England lie almost wholly outside the commercial field'.[381]

One of the areas considered under the former approach of the English judiciary as non-arbitrable was intra-company disputes, under Section 459 of the Companies Act 1985 (CA1985) (which is substantially the same as Section 994 of the Companies Act 2006). According to the High Court in *Exeter City*,[382] the right conferred on shareholders by Section

---

[375] Arbitration Act 1979, Arbitration Act 1975 and Arbitration Act 1950.

[376] M Mustill and S Boyd, *Law and Practice of Commercial Arbitration in England* (2nd edn, Butterworths 1989) 149 (as cited in *The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain, The French State*, [2013] EWHC 3188 (Comm) 98).

[377] Michael J Mustill and Stewart C Boyd, *Law and Practice of Commercial Arbitration in England* (2nd edn, Butterworths 1989) (as cited in *Booz-Allen & Hamilton Inc vs Sbi Home Finance Ltd & Ors* (2011) 5440 of 2002, ISC, 25).

[378] *Fulham Football Club (1987) Ltd v Richards and another* [2012] Bus LR 606.

[379] For example, EAA 1996, s 103.

[380] The DAC drafted the Bill that became the Arbitration Act 1996.

[381] Guy Pendell and David Bridge, 'Arbitration in England and Wales' in Torsten Loercher, Guy Pendell and Jeremy Wilson, *CMS Guide to Arbitration*, vol 1 (4th edn, CMS 2012) 300-301<https://tinyurl.com/y3kpo55n> accessed 31/05/2018.

[382] *Exeter City Association Football Club Ltd v Football Conference Ltd and another* [2004] 1 WLR 2910.

459 of the CA1985 to seek relief from the courts is a statutory right that is 'inalienable and cannot be diminished or removed by contract or otherwise'.[383]

A recent decision of an English court rejected this attitude, however, holding instead that disputes between the partners in the company or between them and the company arising from breaches of a shareholders' agreement or the articles of association are essentially contractual disputes.

In *Fulham Football Club (1987) Ltd v Richards and another*,[384] the Fulham Football Club (FFC) (a member of the Football Association Premier League (FAPL)) commenced court proceedings against David Richards, who was chairman of the FAPL. The FFC alleged that Richards breached the FAPL's Articles of Association by acting as an unauthorised agent in the transfer of a player, Peter Crouch. The FFC sought, *inter alia*, an injunction prohibiting such an act by Richards in the future.

The defendants sought a stay of the court proceedings pursuant to Section 9 of the EAA 1996, arguing that the matters at issue fell within the arbitration clause in the Articles of Association and Rules of the FAPL. The FFC argued, *inter alia*, that the acts of the chairman of the FAPL unfairly prejudiced its interests and, therefore, the effect of arbitration as a consensual agreement should not extend to a third party or affect the rights in rem.[385]

The main question was whether the FFC had the right to bring oppression proceedings under the ECA 2006 against Richards or whether the FFC should have abided by the arbitration clause in the FAPL's Articles of Association.

The First Instance Court granted a stay of proceedings, reasoning that unfair-prejudice disputes under Section 994 are arbitrable since there is no statutory provision to the contrary. The court also held that the decision in *Exeter City*[386] was wrong.[387] The Court of Appeal upheld the ruling of the First Instance court in favour of the arbitration clause. According to Patten LJ, there is a distinction between the subject matter of the dispute and the remedies that could be included in the arbitral award. He emphasised that although there were some forms of relief that could be granted by only a court and not by an arbitrator, such as compulsory winding

---

[383] ibid 26.
[384] *Fulham Football Club (1987) Ltd* (n 378).
[385] ibid 617.
[386] *Exeter City* (n 382).
[387] *Fulham Football Club (1987) Limited v Sir David Richards, The Football Association Premier League Limited*, [2010] EWHC 3111 (Ch), 81.

up and dissolution, this does not mean that 'the dispute between shareholders or the company which forms the grounds upon which such relief may be sought' is not arbitrable.[388]

In other words, the extent to which a dispute is arbitrable depends on the possible outcomes. This means that, at the very outset, the arbitral tribunal should determine the range of possible remedies. If the tribunal believes that resolving the dispute might require a remedy beyond its authority, the arbitration should be stayed and the dispute should be referred to the courts.

Although such an approach increases the parties' freedom to agree to arbitrate more types of disputes, it also might have some negative consequences. It could increase the duration and expense of resolving the dispute if the arbitral tribunal decides that the dispute is not arbitrable and a court then must hear the dispute again. It also might result in a conflict of views between the arbitrators and the court; for example, when the court is convinced that the dispute falls within the authority of the arbitral tribunal and the tribunal believes otherwise. As far as the researcher can determine, it is still not clear how such a divergence of opinion between the tribunal and the court would be resolved under the English system.

Therefore, it may be appropriate for the law to expressly stipulate the non-arbitrability of disputes that 'often involve complex legal issues that affect frequently the very structure, management and composition of a company',[389] such as those associated with matters of unfairly prejudicial conduct.

It is clear from the foregoing that the issue of arbitrability plays an important role in determining the extent of the freedom of arbitration parties. It is also clear that such an issue differs from one state to another. Under Shariah, it has been concluded that parties to international commercial arbitration can agree to refer any dispute between them to arbitration so long as that dispute does not involve the rights of Allah.

This is similar to the SAL 2012, in which the only limitation is when the dispute is not capable of being resolved through conciliation, which is when the dispute involves the rights of Allah. Even legal restrictions that were intended to bar arbitration in disputes between the parties to an agency contract and between a foreign contractor and his Saudi agents were abolished. With this development, however, the arbitrability of intra-company disputes and

---

[388] *Fulham Football Club (1987) Ltd* (n 378) 76.

[389] S Griffin, 'The Primacy Afforded to an Arbitration Agreement in The Context of a Petition Against Unfairly Prejudicial Conduct' (2011) Co LN 1, 4.

disputes arising from breaches of the company's articles of association or the SCL 2015 remains unclear. It is subject to a court's discretion whether the court will consider such matters to be contractual disputes, which can be resolved by arbitration (in keeping with the recent English case law), or whether the court will determine that judicial relief is a right that cannot be contractually waived (in keeping with earlier English case law).

Under the EAA 1996, the situation is somewhat different, as the freedom of arbitration parties, as a general principle, is broader, as the act does not specify any non-arbitrable disputes. At the same time, the English courts' attitude, in general, has been to rule in favour of arbitration in commercial disputes. Nevertheless, under the English system, the issue of arbitrability of disputes is less clear than under Shariah and the SAL 2012, as the EAA 1996 does not codify this issue, and the case law does not provide a helpful answer.

2. Types of Arbitration Agreements

This section will deal with the two types of arbitration agreements, which are designed for different points in the relationship between the parties: the arbitration clause and the submission agreement. These two types will be examined in the context of Shariah, and the section also will address the extent to which the SAL 2012 is compatible with the approach of Shariah, and how these two laws compare to the attitude of the EAA 1996. The term 'arbitration agreement' will be used to indicate both the arbitration clause and the submission agreement, which is how 'arbitration agreement' is used in the SAL 2012, the EAA 1996 and international conventions.

2.1 Arbitration Clause

An arbitration clause is an agreement between contracting parties to refer to arbitration any dispute that may arise between them concerning the enforcement or interpretation of their contract.[390] This agreement is usually included in the underlying contract between the parties,[391] but it can also be a separate document.

Early scholars of Shariah have not made reference to the arbitration clause, much less the scope of its validity under Shariah.[392] This might be because the business deals that were

---

[390] Steingruber (n 319) 5.45-46.

[391] S Greenberg, C Kee and JR Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (CUP 2010)146.

[392] Cyril Chern, *Chern on Dispute Boards; Construction Practice Series* (3rd edn, Informa Law from Routledge 2015) 83.

carried out by merchants in earlier times were so simple that they did not require an agreement on arbitration before a dispute arose.[393] Such clauses in commercial contracts have become more common since the 19th century, with the rise of economic development, international communications and complex business deals.

In many countries, the legitimacy of such clauses was questioned. French law, for instance, has validated the arbitration clause in commercial contracts only since 1925 and had prohibited the arbitration clause as a general principle in civil disputes[394] until 2001.[395]

The question that arises here concerns the validity of such an agreement under Shariah; in other words, the scope of the freedom of parties to international commercial contracts to agree on arbitration for future disputes. Because this type of agreement has not been discussed under Shariah, the attitude of the four Sunni schools regarding the 'conditions' associated with the contract will be addressed to infer the attitude of Shariah towards the arbitration clause.

In general, early Shariah scholars define a condition as 'a promise committed by one contractor to the other'.[396] These scholars distinguish three main types of conditions associated with contracts: valid (*sahih*), corrupt (*fasid*) and void (*batel*).[397] This study will address only valid conditions.

Early Sunni scholars, particularly those of AlHanafi school, divide valid conditions into three types. The first of these are the conditions that are merely additions to clarify the basic requirements of the contract. Their purpose is only to provide assurance.[398] An example of

---

[393] KVSK Nathan, 'Who is afraid of Sharia? - Islamic law and international commercial arbitration' (1993) Arbitration 125, 129.

[394] French Civil Code 1972, art 2061 states that 'arbitration clauses are null and void unless otherwise provided for by a statutory provision', (as cited in S Gravel and P Peterson 'French Law and Arbitration Clauses-Distinguishing Scope from Validity: Comment on ICC Case No 6519 Final Award' 37 (1992) McGill LJ 510, 511. Delvolvé (n 306) 39-40).

[395] FCC 2001, art 2061 states 'Except when there are particular legislative provisions, a compromissory clause is valid in contracts entered into on account of a professional activity'. Delvolvé (n 306) 39.

[396] MM Shalabi, *AlMadkal fi AlFiqeh AlIslami, Ta'arifuh wa Tarikuh wa Mathahebuh, Nathariyat AlMulkiyah wa AlAqdthe* (10th edn, AlDar AlJameiyah, Beirut 1985) 476. A recent definition by *AlMosoua AlFiqhiyah* (jurisprudence Encyclopedia) states that the conditions associated with the contract are 'those agreed upon between the two contracting parties, restricting the impact of the contract or suspending the contract on an additional matter that is not a requirement of the underlying contract in the future'. Ministry of Awqaaf and Islamic Affairs, *AlMosoua AlFiqhiyah*, vol 30 (Dar Alsafoah 1994) 238

[397] H Ahmed, *Product Development in Islamic Banks* (Edinburgh University Press 2011) 45 & 46.

[398] J Ercanbrack, *The Transformation of Islamic Law in Global Financial Markets* (CUP 2015) 58 & 59; O Arabi, 'Contract Stipulations (Shurut) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya' (1998) 30(1) Int'l Jmid E Stud 29, 31; AABMAK AlHanafi (died: 587 Hijra - corresponding to 1191 AD), *Badae'e AlSanae'e fi Tarteeb AlSharae'e*, vol 5 (2nd edn, Dar AlKutub AlElmiyah 1986) 171; AAMAO AlMaliki

such a condition in a sales contract is that the buyer can return any goods that are defective.[399]

Conditions of the second type add or remove basic requirements of the contract.[400] Early Sunni scholars give the example of a buyer who asks a seller to provide a guarantor or a mortgage for the proposed sale.[401] The requirement of providing a mortgage in this example is an addition to the sale contract but early Sunni scholars consider such a condition valid because it is appropriate for the contract.[402]

Scholars from the four Sunni schools agree on the validity of these conditions but disagree on the principles that justify such conditions. AlHanafi scholars, who are considered the strictest among the four schools on this issue, believe the validity of these conditions can be considered an exception to basic contract principles.[403] From their perspective, additional terms and conditions are originally invalid[404] because they impose a cost or benefit that was not required by the basic contract. This makes the condition a contract within a contract, which is not permissible.[405] Because these conditions are beneficial to the contracting parties, however, AlHanafi scholars consider them permissible by virtue of *istihsan* and not *qiyas* (analogy).[406] *Istihsan* is one of the sources of Shariah, and it means giving a ruling in a case contrary to similar cases for a particular reason.[407]

In contrast, the other three schools, AlShafi'i,[408] AlMaliki and AlHanbali,[409] agree that even if those conditions are not basic requirements, they are valid and not a matter of exception. They base their view on the clear provisions in the Quran[410] and Sunnah,[411] which

---

(died: 536 Hijra - corresponding to 1972 AD) *Shareh Attalqeen,* vol 2 (MA AlSsalami ed, Dar AlGharb AlIslami 2008) 479.

[399] Shalabi (n 396) 478. Also, AlZuhaily (n 269) vol 4, 3053.

[400] Ercanbrack (n 398) 59 & 60. BAMBBBA AlZurkashi (died: 1392 Hijra - corresponding to 1972 AD), *AlManthor fi AlQawaed*, vol 2 (2nd edn, Wazarat AlAwqaf AlKuwaitiyah 1985) 239-40; AlHanafi, *Badae'e AlSanae'e* (n 398) vol 5, 171; AlMaliki' 'Shareh Attalqeen' (n 398) vol 2, 479

[401] Arabi (n 398) 34; AlHanafi, *Badae'e AlSanae'e* (n 398) vol 5, 171.

[402] Arabi (n 398) 34; AlHanafi, *Badae'e AlSanae'e* (n 398) vol 5, 171. See generally Saleh (n 175) 354; Ercanbrack (n 398) 60.

[403] Arabi (n 398) 34.

[404] Ibid 32 & 33 & 35. Generally, AlHanafi, *Badae'e AlSanae'e* (n 398) vol 5, 171-72.

[405] Generally, Arabi (n 398) 37 & 38; AlHanafi, *Badae'e AlSanae'e* (n 398) vol 5, 171.

[406] Arabi (n 398) 34. Generally, AlHanafi, *Badae'e AlSanae'e* (n 398) vol 5, 171-72.

[407] MT Mansoori, 'Role of Ra'y and Istihsan in Hanafi Legal Theory' (2012) 27(38) Al- Azwa 19, 20.

[408] MAAMHMMFB AlShafi'i (died 516 Hijra) *Shareh AlSunnah*, vol 8 (S AlArnaout and M Z AlShawish eds, 2nd edn, Islamic office, Damascus 1983) 148.

[409] Ibn Qudamah, *AlMugni* (n 225) vol 4, 160; MN AlBejad, *AlTahkeem fi AlMamlakah AlArabiyah AlSso'awdiyah* (The Institute of Public Administration, Riyadh 1999) 89. See generally Arabi (n 398) 42-43.

[410] For example, verse 34 of *Surat Al-Isra* states: 'And fulfill [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned'.

[411] Prophet Mohammed (pbuh) said: 'The Muslims will be held to their conditions, except the conditions that

state that agreed-upon conditions must be respected.

Early scholars of the four Sunni schools agree that the subject matter of the conditions that are appropriate for the contract should be clear and known to all parties; that conditions should not contain any form of gambling, deceit or fraud; and that they should not include an additional benefit that might constitute interest (*riba*). Conditions that do not meet these standards will be considered *fasid*.[412]

The third type are those that have been so widely used that they have become customary practice.[413] An example is when a buyer requires the seller to deliver the purchased goods to the buyer's shop. To be valid, such customary conditions must not contravene a Shariah provision in the Quran or Sunnah, or a consensus of Shariah scholars.[414] Ala'a Addin AlKassi AlHanafi, one of the senior AlHanafi scholars in the 12th century, says that a condition associated with the contract is valid even if 'it is neither required by the contract nor fits it, but people use it in their deals [ie, it is a customary condition]'.[415]

From the above, and contrary to the common belief of contemporary legal writers who claim the arbitration clause is void under Shariah because it involves issues forbidden by Shariah (eg, an agreement on a future matter, *gharar* (excessive uncertainty or risk) and *riba*),[416] it is clear that such a clause is among the conditions that early scholars of Shariah schools would consider valid. This is true for three reasons.

First, the arbitration clause derives its legality mainly from the legality of arbitration under Shariah and the clear provisions in the Quran and Sunnah that state that the terms agreed upon by the parties to a contract should be followed so long as these terms do not violate Shariah.[417] The arbitration clause does not violate Shariah: its subject is known to the parties as it relates to resolving disputes that may arise from a particular contract through

---

make the lawful unlawful, or the unlawful lawful'. AIM At-Tirmidhi, *Jami` at-Tirmidhi*, vol 3, Book 13, Hadith 1352 <http://sunnah.com/tirmidhi/15/32> accessed 14/01/2017

[412] See generally Saleh (n 175) 355; K AlKadiki, 'Shart AlTahkeem fi AlSharia AlIslamiyah wa fi AlQanoon AlWadei AlArabi' (1994) 72 Majallat AlMahakem AlMagribiyah 43, 51; AlBejad (n 409) 88; generally, Shalabi (n 396) 476-77.

[413] Arabi (n 398) 31&35; Saleh (n 175) 354; AlHanafi, *Badae'e AlSanae'e* (n 398) vol 5, 172; MAASS AlSarkce (died: 483 Hijra - corresponding to 1090 AD), *AlMabsoot*, vol 16 (Dar AlMa'arefah 1993) 19.

[414] Ercanbrack (n 398) 60. AlHanafi, *Badae'e AlSanae'e* (n 398) vol 5, 171-72.

[415] AlHanafi, *Badae'e AlSanae'e* (n 398) vol 5, 172.

[416] For example, Ercanbrack (n 398) 315; D Brawn, 'Commercial Arbitration in Dubai' (2014) Arbitration 156, 157. See also Saleh, *Commercial Arbitration* (n 193) 39-40; George Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (2003) 24(4) U Pa J Int'l L 905, 915 and 930-31.

[417] Ministry of Awqaaf and Islamic Affairs, *AlMosoua AlFiqhiyah*, vol 10 (2nd edn, That Alsalaseal 1987) 235-36.

arbitration; it does not include gambling or fraud; and it does not include a benefit for one of the parties that could be considered usury. Both parties benefit equally from such a requirement.

Second, the arbitration clause is among the conditions that are appropriate for international trade contracts. An arbitration clause enables parties to select professional experts to decide the dispute rather than submitting it to national courts, which might not have sufficient experience or expertise in the subject matter of the dispute and might not consider customs and case law in international trade. In addition, the resolution of a dispute through arbitration saves time and money and maintains confidentiality, which are important factors for commercial parties.

Third, the arbitration clause is among the customary conditions from the perspective of Shariah, as international traders are used to including such a requirement in their commercial contracts. Therefore, it can be concluded that Shariah undoubtedly permits parties in international commercial contracts to agree on an arbitration clause to resolve future disputes since such a clause is one of the appropriate clauses for a commercial contract, is consistent with the Shariah provisions, and is customarily included in international trade contracts.

The validity of such a clause was also confirmed by all Shariah scholars interviewed by this researcher. For example, Shaikh Ahmad, a member of the Committee of Senior Scholars in Saudi Arabia and a lecturer in the Shariah college in Riyadh, said, 'An arbitration agreement in relation to future disputes is considered valid and binding to the parties if this is the parties' will and it does not contradict Shariah provisions, as this complies with the principles of justice'.

National arbitration laws in countries that follow Shariah clearly accept the validity of the arbitration clause. An example of such laws is the former Saudi Arbitration Law (SAL 1983), which is considered a codification of Shariah provisions relating to arbitration, particularly reflecting the views of AlHanbali school.[418] It states that an arbitration agreement entered into before a dispute occurs (ie, an arbitration clause) is valid, whether it is in the underlying contract or an independent agreement.[419]

The new Saudi Arbitration Law, like the EAA 1996, recognises the validity of the

[418] AAM Olayemi1 and BK al-Zabyani, 'Arbitration Clause in Islamic Banking Contracts: A Contractual Necessity' (2014) 1(7) IJIMS 1, 5.
[419] SAL 1983, art 1 and IRSAL 1985, art 6.

arbitration clause. According to both laws, an arbitration agreement may address 'present or future disputes'.[420]

2.2 Submission Agreement

A submission agreement is an agreement between two disputants to refer their ongoing dispute to arbitration.[421] The difference between a submission agreement and an arbitration clause is that the latter is executed before a dispute occurs while the former is executed after the dispute arises.[422]

In Shariah, early scholars of the four Sunni schools have agreed on the validity of an agreement to arbitrate an existing dispute. The scholars are relying on the Quran and the Sunnah, which both encourage disputants to use arbitration to resolve their disputes.[423]

The SAL 2012, like the SAL 1983, recognises the validity of an arbitration agreement executed after a dispute arises.[424] However, while the SAL 1983 uses the term 'arbitration agreement' to refer to both types of arbitration agreement,[425] the SAL 2012 labels a post-dispute arbitration agreement a '*Musharatat AlTahkeem*',[426] as does most of the Arab literature on arbitration. The SAL 2012 also uses '*Musharatat AlTahkeem*', but it applies the label to any arbitration agreement that is independent of the underlying contract, regardless of whether the agreement concerns an existing or future dispute.

Under the SAL 1983, when the parties wish to arbitrate a newly arisen dispute, they must file an 'arbitration instrument' with the appropriate authority for approval. According to Article 5 of the law, the 'arbitration instrument' should include the subject matter of the dispute; the names of the disputants and their signatures (or that of their representatives); and the names of the arbitrators who have agreed to hear the dispute. In addition, copies of any documents relating to the dispute should be attached.[427] A failure to include any of this information invalidates the arbitration instrument, which can be refiled after the missing

---

[420] SAL 2012, art 1. EAA 1996, s 6.
[421] H Alavt and T Khamichonak, 'International Arbitration and Its Exclusion from the Brussels Regime' (2016) 6(1) Juridical Tribune 7, 10.
[422] Sammartano (n 299) 256.
[423] For example, see Al-Ramahi (191) 14; Ahdab and Ahdab (n 213) 6-7.
[424] SAL 2012, arts 1(1) and 9(1).
[425] SAL 1983, art 1.
[426] SAL 2012, art 1(1).
[427] In some traditional laws such as Argentine and Brazilian laws parties to arbitration are required to execute a new agreement after the dispute occurrence and to include arbitrators'names and the subject matter of dispute whether there has been an arbitration clause between parties before the dispute or not. Caivano (n 309) 4.

information is supplied.[428]

Such provisions do not exist in the new Saudi Arbitration Law, which is considered one of the significant developments in the Saudi arbitration system. However, the SAL 2012, similar to the French[429] and Egyptian[430] arbitration laws, stipulates that an arbitration agreement subsequent to a dispute must spell out the issues to be covered by the arbitration; otherwise, the agreement is 'void'.[431]

That requirement can negatively affect arbitration proceedings or the enforcement of the arbitral award when an issue emerges during arbitration that was not stated in the agreement and a decision has to be made on that issue before deciding in the subject matter of the main dispute. In such a case, the arbitral tribunal has two options: 1) suspend the arbitration proceedings until the appropriate authority decides whether there is a sufficient link between the new issue and the issues that were listed in the arbitration agreement, or 2) go ahead and issue an award that includes matters not listed in the arbitration agreement.

The situation can become more complicated when the arbitration is international, as the laws of the seat of arbitration might conflict with those of the state whose court is responsible for deciding whether the issue in question is sufficiently related to the issues specified in the agreement. Therefore, some modern national arbitration laws that include such a provision (eg, the French law[432]) rightly exempt international arbitration agreements from this requirement. This is appropriate, as most international arbitration conventions do not set different requirements for the validity of an arbitration clause vis-à-vis a submission agreement.[433]

The situation under the English system is different. The EAA 1996 recognises the validity of an arbitration agreement, regardless of whether it was executed before or after the dispute arose.[434] The act uses the term 'arbitration agreement' to apply to both types of agreements and imposes the same requirements for their validity, which will be discussed in

---

[428] AlBejad (n 409) 101.
[429] French Code of Civil Procedure, art 1445. Issues by Decree No 2011-48 of 13 January 2011 (FCCP 2011).
[430] Egyptian Arbitration Law, art 10. Law No 27/1994 on 21/4/1994, <https://tinyurl.com/y2rzq24q> (accessed 20/06/2018)
[431] SAL 2012, art 9(1).
[432] FCC 2001. See also Jean de la Hosseraye, Stéphanie de Giovanni and Juliette Huard-Bourgois, 'Arbitration in France' in Torsten Lörcher, Guy Pendell and Jeremy Wilson (eds), *CMS Guide to Arbitration*, vol 1 (4th edn, CMS 2012) 336-37.
[433] For example, NYC 1958.
[434] EAA 1996, s 6.

the next chapter.

3. Conclusion

It is clear from the foregoing that the parties to international commercial contracts do not have unlimited freedom under Shariah and the SAL 2012 to resolve any dispute between them through arbitration. This is also true even under the EAA 1996, which does not clearly address the issue of arbitrability.

The only exception is AlHanbali school, which grants disputants complete freedom to arbitrate any dispute, even when the rights of Allah are involved. Most early and contemporary Shariah scholars, as well as the SAL 2012, agree that the parties' freedom is restricted by the fact that an arbitrable dispute cannot involve the rights of Allah.

The situation in the UK is different in that the English lawmakers have remained silent on the question of arbitrability, thus leaving the issue to the discretion of the courts.

English case law does not include a clear definition of or criteria for arbitrability, although the case law does identify some disputes as non-arbitrable. Even the public policy restriction imposed by Section 1(b) of the EAA 1996 does not seem to concern the question of arbitrability.[435] Consequently, the issue of arbitrability is somewhat unclear under the English system. The EAA 1996 has therefore left the door open for parties to agree to arbitrate their disputes and to challenge the arbitrability of a particular dispute (before or after the award).

The freedom of parties to international commercial contracts to agree to arbitrate their disputes, particularly existing disputes, under Shariah and Saudi law is different. Contrary to what many contemporary writers believe, parties to arbitration have absolute freedom under Shariah to agree on any of the two types of arbitration agreement (ie, an arbitration clause or a submission agreement). The SAL 2012, however, states that a submission agreement is void if it fails to specify what issues are to be covered by the arbitration.

The situation in the English system is similar to Shariah but is clearer, as the EAA 1996 includes an explicit provision that gives the parties the right to agree on an arbitration clause or submission agreement without any restrictions that are peculiar to either type of

[435] For example, see Lord Mustill and Mr Boyd QC, M Mustill and S Boyd, *Law and Practice of Commercial Arbitration in England* (2nd edn, Butterworths 1989) 27 (as cited in *The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain, The French State*, [2013] EWHC 3188 (Comm) 30).

agreement. Thus, under Shariah and the English system, the freedom of parties to agree to arbitrate an existing dispute is broader than under the SAL 2012. At the same time, the EAA 1996 is clearer than Shariah in this regard.

The issue that arises here is that if the type of dispute (whether current or future) could be resolved by arbitration, to what extent are the parties free to establish a legally binding arbitration agreement. In other words, what are the formal and substantive restrictions on the freedom of parties to establish an international commercial arbitration agreement that is protected under the three systems. This question is examined in the next chapter.

Chapter V:
Requirements for a Valid Arbitration Agreement

The agreement on international commercial arbitration, like any other agreement, is grounded in 'freedom of contract', a principle that is widely recognised by national and international laws. At the same time, however, the parties' freedom to enter into a legally binding arbitration contract is not unlimited,[436] as most national and international[437] arbitration laws impose formal and substantive requirements. Failure to meet any of these requirements might result in an arbitration agreement that is unenforceable.

Early scholars of the four Islamic schools agree on three elements that are necessary for a valid arbitration agreement: consent (offer and acceptance), capacity of the parties, and legality of *mahal al-aqd* (the subject matter of the contract).[438] The four schools differ, however, on whether all three elements are pillars of a contract or only one of them is a pillar and the others are conditions required for the validity of that pillar. This split of opinion is based on the schools' divergent definitions of a pillar.

AlHanafi school believes that a pillar of a contract is an element, constituting a part of the contract, that is necessary for the contract's formation. In AlHanafi view, consent is the necessary element, and is therefore the pillar; the other elements (capacity and legality), while necessary for the contract's validity, are not part of the contract itself.[439] The other schools (AlMaliki, AlShafi'i and AlHanbali) believe that a pillar of a contract is necessary for the contract's validity even if the pillar is not part of the contract itself. Therefore, they believe that consent, capacity and legality are all pillars.[440]

In any event, it is clear that all of the schools agree that consent, capacity and legality are essential for the validity of a contract, including an arbitration contract. Similarly, these three elements are essential for the validity of an arbitration agreement in the English system. Accordingly, this chapter will be divided into three sections: consent, capacity and legality. These sections will be addressed in the context of the classical four Sunni schools, and the

---

[436] DP Webe, 'Restricting the Freedom of Contract: A Fundamental Prohibition' (2014) 16:2 YHRDLJ 51, 53.
[437] For example, Model Law, art 7 (option 1(2)) and NYC, art II require that the arbitration agreement should be in writing.
[438] See generally Baamir, *Shari'a Law* (n 23) 67, 68; Abdul Ghafar Ismail and Achmad Tohirin, 'Finance and Growth: The Role of Islamic Contracts' (2009) MPRA Paper No 13744, 8 <https://tinyurl.com/y7govpr9> ccessed 31/05/2018.
[439] QM Mahmood, *AlTahkeem fi Daw Ahkam AlSharia AlIslamiyah* (Dar AlSumei'e, Riyadh 2009) 108.
[440] Aldawry (n 205) 119.

attitude of the English system will be compared to that of Shariah throughout these sections. Because the Saudi legislature has not enacted a contract law and because the Saudi courts generally apply Shariah when Saudi law is silent on an issue, the position of Saudi law will be addressed only where it differs from Shariah.

1. Consent of the Parties

Consent is the basic essential component of an international commercial arbitration agreement.[441] Early scholars of all four Islamic schools consider consent to be a pillar and foundation of a valid contract.[442] In general, consent is evidenced by a party's offer to engage in arbitration and the other party's acceptance of that offer. In the United Kingdom, both an offer and acceptance are necessary components of an arbitration agreement.[443]

Scholars of AlHanafi school define 'offer' as the initial overture by one of the parties (the offeror) and 'acceptance' as the affirmative reply by the other party (offeree).[444] In other words, the contract is formed when the offeree accepts the offeror's offer to submit their dispute to arbitration.

Some early Shariah scholars who support the theory that arbitration is an agency contract, however, believe that an arbitration contract may be unilateral,[445] based on the will of one of the parties without the other party's acceptance and without any exchange of consideration.[446] In such a case, the arbitration becomes optional for the party who initiates it whether before or after the commencement of the arbitration process.[447] Contrariwise, under English law, a unilateral contract arises when a party (offeror) makes a promise in exchange for a performance or forbearance by another party (offeree)[448] and the offeree then 'entered on performance [or forbearance] of the act'.[449] In such a case, the offeror is committed to his offer.

---

[441] Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcement,* vol 1 (Wolters Kluwer 2010) 640.
[442] Ministry of Awqaaf and Islamic Affairs, *AlMosoua AlFiqhiyah*, vol 30 (Dar Alsafoah 1994) 200.
[443] This is what is concluded from the provisions of the EAA 1996 where it clearly states 'exchange of communication' to create a written arbitration agreement.
[444] Ibn Abdeen (n 256) vol 4, 506.
[445] See page 43.
[446] Ismail Wisham, Aishath Muneeza and Rusni Hassan, 'Special Legal Features of the Islamic Wa'd or Pledge: Comparison with the Conventional Law on Promise within the Sphere of Islamic Finance' (2011) Int JLM 221, 223.
[447] See generally Shaker, '*Jame' AlBayan*' (n 231) vol 8, 220, 226 and 227.
[448] *Schweppe v Harper* [2008] EWCA Civ 442, 41.
[449] *Errington v Errington and Woods* [1952] 1 KB 290, 295

While the unilateral arbitration contract recognised by some early Shariah scholars does not exist under English law, there does exist under English law the so-called 'unilateral arbitration clause', also known as a 'one-sided clause' or a 'unilateral jurisdiction clause'. Such a clause grants one of the parties, usually the one in the stronger bargaining position, the power to decide whether any future dispute will be litigated or arbitrated.[450]

Such clauses are well-established in English law,[451] but there is room for debate about whether they are valid under Shariah. It seems that a unilateral arbitration clause is permissible under Shariah for several reasons: No provision of Shariah prohibits it; arbitration itself is permissible under Shariah; and the unilateral arbitration clause is one that is appropriate for an arbitration contract.[452] Moreover, the unilateral arbitration clause has been so widely used that it is trade custom, and it does not involve any kind of *gharar*.[453]

1.1 Writing and Consent

Some laws, such as the EAA 1996[454] and the SAL 2012,[455] require the offer and acceptance to be in writing. Others, such as Shariah and some modern laws like the Arbitration Acts of Scotland[456] and New Zealand,[457] recognise the validity of oral consent. It is important to keep in mind that dispensing with the requirement of written consent does not dispense with the requirement of consent. For example, there might be correspondence or communication between the parties to an international commercial relationship about resorting to arbitration that does not constitute a valid consent to resort to arbitration.[458] The

---

[450] D Draguiev, 'Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability' (2014) 31(1) J Int Arb 19, 25 (as cited in J Perenyiova, 'Unilateral option clauses in commercial arbitration' (2014) CEU, 5 <file:///C:/Users/ahmmi/Desktop/perenyiova_judita.pdf> accessed 4 June 2018); J Stacey, 'Welcome to the Club: ISDA Publishes Model Arbitration Clauses' (2013) 11 JIBFL 702, 704.

[451] In *Deutsche Bank AG v Tongkah Harbour Public Co Ltd*, the court confirmed that '[W]hilst a jurisdiction clause … that gives one party only the option to arbitrate is perfectly valid, once the option has been exercised in favour of arbitration, litigation of the same matter is subject to the statutory stay in s.9 Arbitration Act 1996'. [2011] EWHC 2251 (Comm).

[452] See page 71 and 73.

[453] NM Tabari, 'The Sharia'h Dimension of the Persian Gulf's Hydrocarbon Resources' (2012) IELR 61, 63-64. For more details about *gharar* see, N Mohammed, 'Principles of Islamic Contract Law' (1988) 6(1) JL& Relig 115, 120-21.

[454] EAE 1996, s 5.

[455] SAL 2012, art 9(2).

[456] Arbitration (Scotland) Act 2010 (asp 1) (SAA 2010), s 4(1). See also Hong-Lin Yu, 'Written Arbitration Agreements – What Written Arbitration Agreements?' (2013) 32(1) CJQ 68, 77.

[457] New Zealand Arbitration Act 1996 No 99, with its amendments by Arbitration Amendment Act 2016 No 53 (NZAA 1996), art 7(1).

[458] In *Bothell v Hitachi Zosen Corp* the court expressed the view '[I]n a series of documents, where the words used to refer to a proposed arbitration agreement are so vague as to be meaningless and no further explanation

opposite might also occur, such as when the parties to a commercial contract agree on arbitration orally without memorialising that agreement in a written document.

1.2 Formation of Consent

No particular phraseology is required for a valid offer or acceptance to submit to arbitration.[459] Rather, consent can be conveyed by any expression that demonstrates the desire of the parties to submit to arbitration.[460] Early Shariah scholars provide some examples of the breadth of the language that can convey consent, such as when the disputants agree to 'assign a person to arbitrate between them'[461] or to 'decide in their dispute'; [462] or when one of the disputants tells the other, 'Let's make this person an arbiter between us' and the other agrees.[463]

Similarly, the English judiciary has held clauses such as 'arbitration to be settled in London'[464] or 'arbitration, if any, by ICC rules in London'[465] to be sufficient for a dispute to be referred to arbitration in London. English courts do not even require that the word 'arbitration' or 'arbitrator' to be used. In *David Wilson Homes Ltd v Survey Services Ltd,*[466] the court wrote that 'The important thing is that there should be an agreement to refer disputes to a person other than the court who is to resolve the dispute in a manner binding on the parties to the agreement'.[467]

In Shariah, the assumption that the parties have the freedom to use any expression to agree on arbitration[468] is based on the jurisprudential principle that what matters in contracts are intentions and meanings, not words and phrases,[469] which in turn is derived from the

---

is provided, either by attachment, discussion or otherwise, the totality of the documents exchanged between the parties does not constitute a valid "arbitration agreement" under the Convention [on the Recognition and Enforcement of Foreign Arbitration Awards 1958]'. 97 F Supp, 2d 1048 (W D Wash 2000).

[459] Born, *International Arbitration and Forum Selection Agreements* (n 441) 655.

[460] *David Wilson Homes Ltd v Survey Services Ltd and David Jonathan Marshall* (2001) 3 TCLR 13, 10.

[461] AlHanafi, *Tabyeen AlHaqa'eq* (n 262) vol 4, 193.

[462] A M M M AlBaldahi AlHanafi (died: 683 Hijra - corresponding to 1285), *AlEkhtiar le Ta'aleel AlMukhtar,* vol 2 (M A Daqeeqa ed, AlHalabi Printing 1937) 93.

[463] Aldawry (n 205).

[464] *Tritonia Shipping Inc v S Nelson Forest Prods Corp* [1966]1 Lloyd's Rep 114, 116.

[465] *Mangistaumunaigaz Oil Production Association v United World Trade* Inc [1995] 1 Lloyd's Rep 617, 621 [1995] QBD (Comm Ct) (Case Analysis).

[466] *David Wilson* (n 460).

[467] ibid 10.

[468] M Khaddur and H J Liebesny (eds), *Law in the Middle East: Origin and Development of Islamic Law*, vol I (2nd edn, Lawbook Exchange 2009) 198.

[469] *AlMajallah*, art 3. See generally N Kamso, *Investing In Islamic Funds: A Practitioner's Perspective* (Wiley 2013) 31; Khaddur and Liebesny (n 468) 296.

Prophet's saying: 'The deeds are considered by the intentions… .'[470] Any expression can constitute consent to a valid arbitration agreement so long as it evidences the parties' intention to choose someone other than the court to decide their disputes. Because the SAL 2012 does not stipulate any restrictions on the freedom of parties in regard to expressions of consent, the presumption is that Shariah provisions apply.

1.3 Requirements for Validity of Consent

As discussed above, valid consent consists of an offer and an acceptance. Both the offer and acceptance must meet two requirements to be valid.

1.3.1 First Requirement: Correspondence Between Offer and Acceptance

According to early and contemporary Shariah scholars, the acceptance corresponds to the offer if the former conforms to the latter in all of its details, whether this correspondence is explicit or implied.[471] In this regard, the scholars rely on the following verse of Quran: 'O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent'.[472] The terms of the offer and the acceptance should be consistent in every way;[473] that is, they should be mirror images of each other.[474]

This requirement recognises that an offer might include specific provisions without which the offeror would not agree to the contract or, conversely, the offeree's acceptance might insert additional provisions without which the offeree would find the contract objectionable.[475] According to the early scholars of the four schools of Shariah, an acceptance of arbitration that includes a rejection of the named arbitrator is not a valid consent to arbitration.[476] According to most of these schools, such an acceptance actually is a new offer, which requires a new acceptance by the original offeror.[477] Under English contract law,[478] an acceptance that is not consistent with the offer is considered a rejection of the original

---

[470] Al-Bukhari (n 209) vol 8, Book 78, Hadith 680 < http://sunnah.com/bukhari/83/66> accessed 4 April 2015.
[471] Aldawry (n 205) 136 and 137.
[472] S*urat Alnisaa,* verse 29.
[473] AlBejad (n 409) 61.
[474] M Furmston and GJ Tolhurst, *Contract Formation: Law and Practice* (OUP 2010) 89.
[475] R Taylor and D Taylor, *Contract Law*: *Directions* (4th edn, OUP 2013) 31.
[476] See generally Aldawry (n 205) 136-38.
[477] M AlFadel, *AlNazariyah AlAmmah le AlEltezamat*, vol 1 (3rd edn, Maktabat Dar AlThaqafa 1995)118 (as cited in AlBejad (n 409) 61).
[478] DL Carper and JA McKinsey, *Understanding the Law* (6th edn, Cengage Learning 2012) 357.

offer[479] and is treated as a 'counter-offer which in turn requires acceptance by the original offeror before … [the contract] is complete'.[480]

1.3.2 Second Requirement: Connection of Acceptance and Offer

The four Islamic schools, AlShafi'i, AlHanbali, AlHanafi and AlMaliki, agree on the requirement of a temporal connection between the offer and acceptance in *majlis al-aqd* (a contractual session). Under Shariah, *majlis al-aqd* refers to the situation in which the parties, or any one of them, are devoting their attention to the contracting process, whether they are face to face or otherwise.[481] The significance of this requirement is that it can determine the period of time within which the offeror can withdraw an offer[482] as well as the period within which the offeror or offeree is free to withdraw from the contract without incurring any liability.[483]

Early scholars of the four Sunni schools have differing opinions about the period that applies to physically present parties at *majlis al-aqd* in binding contracts. These can be divided into two camps.

In the first group, AlShafi'i[484] and some AlHanbali scholars believe it is necessary for the acceptance, in binding contracts, to be connected to the offer without interruption; that is, without the parties being distracted by any business that does not relate to the subject matter of the contract. Otherwise, the offer expires and becomes invalid. At the same time, they state in the so-called *khiar almajlis* (option clause) that it is the right of either party to withdraw from the contract after its consummation but before the end of the *majlis al-aqd* without bearing any liability.[485] Most Sunni schools, including AlShafi'i, [486] agree that the

---

[479] *Hyde v Wrench* (1840) 3 Beavan 334, 337.
[480] *Wolf and Wolf v Forfar Potato Co* 1984 SLT 100 (as cited in *Pinecraven Construction (Guernsey) Limited v Dominic Donato Taddei and Claire Susanne Taddei* [2012] CSOH 18, 51).
[481] AH Mohammad*, AlAqd fi AlFiqh AlIslami, Derasat Muqaranah bi AlQanoon AlWade'i Takshef Tafseelan an Tafawwuq AlTashree' AlIslami,* vol 1 (IMSIU 1993) 135.
[482] See generally A Alzaagy, 'Contracting Concept of "Meeting Place" in Islamic Law: Is There a Room for its Possible Implementation in Internet Transactions?' (2011) 2 MUJLT 145, 147.
[483] Ibid 150.
[484] AlRamli, *Nehayat AlMuhtaj* (n 224) vol 3, 481.
[485] AlShafi'i, *Mugni AlMuhtaj* (n 262) vol 2, 409-16.
[486] AlHanafi, *Badae'e AlSanae'e* (n 398) vol 5, 137; Ibn Qudamah, *AlMugni* (n 225) vol 3, 484; AA AlQari, *Majallat AlAhkam AlShariah* (AIA Sulaiman and MIA Ali eds, 3rd edn, Tihama 2005) (*Majallat AlAhkam AlShariah*), Article 226. *Majallat AlAhkam AlShariah* is AlHanbali school codified opinions in the nineteenth century, included the provisions of contract.

end of *majlis al-aqd* is when both or either of the parties physically departs the venue in which the contract was consummated.

In the second group, the scholars of AlHanafi,[487] AlMaliki[488] and most AlHanbali[489] believe that the offeree should have the right to reflect on the offer for a reasonable period that expires automatically when either party departs the venue of the contracting session. The supporters of this view, apart from AlMaliki school, agree that either party is entitled to withdraw from the contract even though the parties have not agreed to *khiar almajlis*, unless one or both of them leave the venue.[490]

In the United Kingdom, the offeree enjoys the right to accept the offer within 'a reasonable time',[491] which is somewhat similar to the general approach of the Sunni schools. Under English law, 'reasonable time' is a default that does not apply when the offeror has set an express time limit for acceptance.[492] The offeror also enjoys full freedom to revoke the offer at any time before it is accepted. Once the offer is withdrawn, a contract will not be created even if the offeree eventually accepts the offer.[493]

Under English law, revocation of an offer does not take effect until the offeree is informed of the revocation. [494] This differs from the common approach under Shariah, in which the majority of early scholars believe the offeree's awareness of the revocation is not necessary. Under Shariah, the offeror's pre-acceptance withdrawal of the offer revokes it, regardless of the offeree's awareness of the revocation.[495]

Under both English law and the common approach of early Shariah scholars, the offeree's acceptance of the offer marks the completion of consent even if the offeror is not

---

[487] AlHanafi, *Badae'e AlSanae'e* (n 398) vol 5, 137.

[488] MAA Aldosooqi AlMaliki (died: 1230 Hijra - corresponding to 1815), *Hashiat AlDusooqi ala AlShareh AlKabeer*, vol 3 (Dar AlFiker) 5.

[489] AEBABMBA AlHanbali (died: 884 Hijra - corresponding to 1479), *AlMubde' fi Sharh AlMuqanna'a*, vol 4 (AlMaktab AlIslami 2000) 5-6; *Majallat AlAhkam AlShariah*, arts 226.

[490] MYSHIB AlHanbali (died: 1051 Hijra - corresponding to 1641) *Kashaf AlQina'a an Maten AlEqna'a*, vol 3 (Dar AlKutub AlElmiyah) 200. Also, Ibn Qudamah, *AlMugni* (n 225) vol 3, 484 -85.

[491] *Ramsgate Victoria Hotel Company Limited v Montefiore* (1865-66) LR 1 Ex, 109.

[492] M Charman, *Contract Law* (4th edn, Willan 2013) 16.

[493] *Routledge v Grant* (1828) 172 ER 415, 418.

[494] In *Byrne & Co v Leon Van Tienhoven & Co,* the court upheld the view that 'a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all' (1880) 5 CPD 344, 347.

[495] For example, N AlBalakhi and others, *AlFatawa AlHendiyah*, vol 3 (2nd edn, Dar AlFiker 1310 Hijra - corresponding to 1892) 9; AlHanafi, *Badae'e AlSanae'e* (n 398) vol 5, 138; Mohammed, *AlBaher AlRaeq* (n 220) vol 5, 291.

aware of the acceptance until a later time.[496] The English judiciary justifies that position on the grounds that the process could turn into an endless spiral if the offeree must be aware of the offeror's awareness of the offeree's acceptance and so on.[497]

The requirement of a temporal connection between the offer and acceptance raises the question of Shariah's attitude towards the creation of an arbitration contract *inter absentes,* as many if not most international commercial arbitration contracts are not negotiated or executed in face-to-face sessions. Early Sunni scholars who addressed the issue of the contracting *inter absentes* agree that the expiry of the *majlis al-aqd* and the completion of the contract occur at the time of acceptance by the offeree, whether the offeror is aware of the acceptance directly[498] or not,[499] and regardless of whether the acceptance is sent by letter or messenger. They also agree that the offeror's option to withdraw the offer ends with the acceptance,[500] which occurs when the offeree sends a message, whether written or oral, that discloses his acceptance.

English law conforms with this approach, as consent is considered complete once the acceptance is posted. Under English law, however, the consent is also considered complete even if the acceptance letter ultimately gets lost in the mail.[501] Although early Muslim scholars did not directly address this scenario, it is safe to conclude that a lost acceptance message would not affect the completion of the agreement as the situation under the English law. This is because early Sunni scholars believe an agreement *inter absentes* is completed when the offeree accepts the offer, with no requirement that the offeror be aware of that acceptance.[502] This is contrary to their position on contracts between face-to-face parties, where the offeror must be aware of the acceptance for the completion of the contract.

---

[496] AlShafi'i, *Mugni AlMuhtaj* (n 262) vol 2, 329; KAH Qadada, 'AlWaqt Allathi Yantuj fihi Atta'abeer an AlErada, Atharuh AlQanooni wa AlSharie, Derasat Muqaranah bayn AlSharia wa AlQanoon' (2006) 8(2) Majallat Jameat AlAzhar 25, 47.

[497] In *Adams & Others v Lindsell & Others*, the court stated that '[I]f the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum'. (1818) 1 Barnewall and Alderson 681, 106 ER 250, 251.

[498] For example, if they were in different places but they could hear each other. Early Sunni scholars give an example of this; when each party is in a separate house and these houses are close to each other.

[499] AlShafi'i, *Mugni AlMuhtaj* (n 262) vol 2, 329-30.

[500] AlHanafi, *Badae'e AlSanae'e* (n 398) vol 5, 137-38; *Majallat AlAhkam AlShariah*, art 228. See also AlShafi'i, *Mugni AlMuhtaj* (n 262) vol 2, 329-30.

[501] *Adams* (n 497) 251.

[502] Qadada (n 496) 47.

1.3.2.1 *Khiar Almajlis* 'Option Clause'

Early scholars of all four Sunni schools[503] agree that contracting parties have the freedom to suspend the offer or acceptance. This option, called *khiar almajlis*,[504] allows either party,[505] during a specified period of time, to terminate the contract in whole or in part.[506] For instance, one of the contracting parties might require the consent of a third party during the month following the creation of the contract. In this case, the arbitration agreement is not considered binding until the time period expires or the third party's consent is gained. The EAA 1996 does not prohibit such a condition so long as it is explicitly expressed. English law also recognises the validity of the so-called 'conditional contract',[507] which provides that specific conditions must be satisfied before the parties are bound by the terms of the contract, even if the time period before the satisfaction of the conditions is long.[508]

2. Capacity

Legal capacity, or the capacity of performance (*ahliyyah al-ada* in Shariah), is a person's authority to enter into and perform obligations under a contract.[509] In other words, it is the

---

[503] AlHanafi, *Tabyeen AlHaqa'eq* (n 262) vol 4, 14; AMAANSB AlMaliki (died: 222 Hijra - corresponding to 837), *AlTalqeen fi AlFiqeh AlMaliki*, vol 2 (Dar AlKutub 2004) 143; KMIAAAB AlShafi'i (died: 808 Hijra - corresponding to 1405), *AlNajem Alwahhaj fi Shareh AlMenhaj*, vol 4 (Dar AlMenhaj 2004) 116.

[504] They rely on the *hadith* narrated by Muhammad bin Yahya bin Habban: 'My grandfather was Munqidh bin 'Amr. He was a man who had suffered a head wound and lost the power of speech, but that did not stop him from engaging in trade. He was always being cheated *magboon*, so he went to the Prophet (peace be upon him) and told him about that. He said to him: "When you buy something, say: *la khalabah* [there should be no intention of cheating]. Then for every product you buy, you have the choice for three nights. If you are pleased with it, keep it, and if you are displeased then return it."', AAMBYBAA Al-Qazvini, *Sunan Ibn Majah*, vol 3, Book 13, Hadith 2355 <http://sunnah.com/ibnmajah/13/48> accessed 4 April 2015.

[505] EA Baker, *Nazariyat AlAqed fi AlFiqh AlIslami Derasah Muqarenah ma'a Al Fiqh AlQanooni wa AlQuaneen AlMu'aserah* (Dar AlKutub AlAlamiyah 2009) 184.

[506] ibid 185-86. Some Sunni scholars limit the period of *khiar almajlis* to a maximum of three days. They justify this with the fact that *khiar almajlis* contradicts the aim of the contract, which is to be final and binding on parties. Therefore, they express the opinion that the period of *khiar almajlis* should be in line with what is stipulated in the *hadith* narrated by Muhammad bin Yahya bin Habban (three days). MAMAS AlYamani (died: 1250 Hijra - corresponding to 1834), *Nayl AlAwtar*, vol 5 (E AlSabedi ed, Dar AlHadith 1993) 218.

[507] A conditional contract typically 'is the agreement that is expressed to be "subject to" the performance or occurrence of some event that is not certain to occur'. Furmston and Tolhurst (n 474) 220.

[508] In *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India,* the court stated that 'Both parties negotiated for an additional right to terminate the agreement without breach if the conditions were not satisfied by a particular date. When such clauses are drafted they regularly set an express time limit within which that right can be exercised. In so far as the Agreement purported to do so it gave a right to exercise at any time'. [1990] 1 Lloyd's Rep 391, 398, (as cited in *BDW Trading Ltd (t/a Barratt North London) v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548).

[509] In general, R Johns, *Capacity and Autonomy: Focus on Social Work Law* (Palgrave Macmillan 2014) 7-8; ANA AlSelmi, *Osoul AlFiqh Allathi la Yasa'a le Faqeeh Jahleh* (Dar AlTadmuriyah, Riyadh 2005) 79; B Walston-Dunham, *Introduction to Law* (6th edn, Delmar Cengage Learning 2012) 437.

ability of a person, whether natural or legal, to execute and become a party to an arbitration agreement.[510] Capacity, therefore, is a fundamental requirement for the validity of an arbitration agreement.

If one or both of the parties are not legally competent, the arbitration agreement and the arbitral award are voidable. Article V (1/a) of the NYC 1958, for example, allows a state party to the conventions to refuse recognition and enforcement of an arbitral award if one of the parties lacks capacity. Most national arbitration laws, including the SAL 2012 and the EAA 1996, similarly require arbitration parties to have legal capacity.

Although a dispute over the capacity of parties to commercial arbitration is rare, the issue is important in theory, as arbitration laws generally fail to specify what is meant by the capacity of parties to agree on arbitration. The issue also has implications for the question of the extent of the parties' freedom to contract. This is because a determination of the capacity of the parties, according to private international law, is not subject to the will or discretion of the parties[511] but to the domestic law that applies to the party,[512] which is the Law of Domicile (for a natural person) under the English law,[513] or (for a Muslim party) Islamic Shariah.

2.1 Natural Person

Early Shariah scholars, particularly those of AlHanafi and AlShafi'i schools, agree that arbitration parties should be sane and mature (ie, older than the age of puberty).[514] Shariah does not specify a particular age of puberty but instead mentions various physical and psychological characteristics, as the four schools believe that the age of puberty may differ from one person to another.[515] However, if such characteristics are late to appear or are not clear for some reason, an age of puberty can be presumed. Most early Sunni scholars (AlShafi'i,[516] Ahmad Ibn Hanbal[517] and some AlHanafi scholars[518]) set 15 as the presumed

---

[510] Steingruber (n 319) 3.03.
[511] GC Moss, 'Arbitration and private international law' (2008) Int ALR 153, 155.
[512] NYC1985, art V(1)(a).
[513] Poudret and Besson (n 301) 234.
[514] Aldawry (n 205) 176-178 and 181-182; Mohammed, *AlBaher AlRaeq* (n 220) vol 7, 24.
[515] Ibn Abdeen (n 256) vol 6, 153. See also Ibn Qudamah, *AlMugni* (n 225) vol 4, 346; AMAH AlHaitami, *Tuhfat AlMuhtaj fi Shareh AlMenhaj*, vol 5 (AlMaktabah AlTejariyah AlKubra 1983) 163-64; MD Bakar, 'Contracts in Islamic Commercial and Their Application in Modern Islamic Financial System' IBRC 1, 6 < https://tinyurl.com/yyqhz6fm> accessed 31/05/2018.
[516] AlHaitami (n 515) vol 5, 163.
[517] Ibn Qudamah, *AlMugni* (n 225) vol 4, 346.
[518] Ibn Abdeen (n 256) vol 6, 153.

age of puberty. It is 18 in the opinion of Imam Malik, however.[519] Abu Hanifa agrees with him on 18 for men, but for women the presumed age of puberty is 17 years.[520] In English law,[521] the age of majority is clearly set at 18 years; it was 21 before 1969.

Thus, an individual who has not reached the age of 15, according to the view of the majority in Shariah, or 18, according to English law, is a minor who has limited capacity to enter into arbitration agreements.

2.1.1 Exceptions to the Puberty Requirement

Early Shariah scholars (AlHanafi and AlShafi'i) have excluded the discerning child, who has reached the age of 7 but has not reached the age of puberty, from the requirement that one must reach the age of puberty to enter into a valid arbitration agreement.[522]

In AlHanafi school, most scholars express the opinion that the discerning child who is allowed to engage in a trade can agree to arbitration within the limits of what he/she has been authorised to do.[523] Some scholars of this school, however, require that the arbitration be in the interest of the child; otherwise it is null and void. In such situations, the guardian, either before or during arbitration, as well as the arbitrator should refer the dispute to the courts.[524] These scholars rely on the fact that arbitration for the discerning child is like conciliation, which is not permissible if it is not in the interest of the child unless he/she agrees to arbitration after reaching the age of puberty.[525]

Most AlShafi'i scholars, on the other hand, believe the guardian's consent for the discerning child is necessary for a valid arbitration, even though the child has been authorised to practise a trade. In addition, the arbitration should not harm the child in any way.[526] Other scholars of this school say that court approval for the discerning child is necessary for a valid agreement on arbitration by that child.[527]

---

[519] Alkhrashi AlMaliki (n 219) vol 5, 291.
[520] AlHanafi, *Badae'e AlSanae'e* (n 398) vol 7, 172; Ibn Qudamah, *AlMugni* (n 225) vol 4, 346.
[521] English Family Law Reform Act 1969, s 1.
[522] For example, AlSsaniki (n 242) vol 1, 219. Shariah divides the age before puberty into two categories: nondiscerning child, who is less than seven years old; and the discerning child, who is seven or older up to the puberty age. M Zahraa, 'The Legal Capacity of Women in Islamic Law' (1996) 11 ALQ 245, 248-50. See also page 125.
[523] Mahmood (n 439) 207.
[524] AlBalakhi (n 495) vol 3, 402.
[525] Mohammed, *AlBaher AlRaeq* (n 220) vol 7, 26- 27.
[526] AlHaitami (n 515) vol 10, 117-118.
[527] Mahmood (n 439) 207.

The modern attitude of Sunni scholars is to adopt a compromise approach between the two previous schools: the discerning child who has been authorised to practise a trade can enter into an agreement concerning administrative matters, but not an agreement that might affect the capital account. In such a situation, they believe that the permission of a guardian or trustee is required for the child to agree on arbitration, unless such agreement involves clear harm and no benefits to the child.[528] A question arises here about the validity of an arbitration agreement by a minor in English law, whether this agreement is independent or within a commercial contract. To answer this question, it is necessary to determine the extent of validity of a commercial contract by a minor.

Under English law, the only binding contract for a minor is a 'contract of necessity'.[529] Other contracts are generally considered either voidable in the interest of the minor or unenforceable against him, unless the minor ratifies the contract after reaching majority.[530] In *Nash v Inman,*[531] Flecher-Moulton LJ confirmed that:

> [A minor] is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant … by supplying to him necessaries, the law will imply an obligation to repay him for the services so rendered, and will enforce that obligation against the estate of the infant.[532]

This holding raises the question of the extent to which a commercial contract is necessary for a minor, particularly when it represents a means of income. In *Mercantile Union Guarantee Corporation, Limited v Ball*,[533] a minor working as a carrier entered into a contract with a company to purchase a lorry for his business. The seller sued after the minor failed to make timely payment. The Court of Appeal refused to commit the minor to the contract because, *inter alia*, the contract 'is not one of the class by which an infant can be bound'. The contract was not a contract of necessaries, apprenticeship or service.[534]

An English court may, however, bind a minor to a contract if the court considers the contract to be in the minor's favour. In *Chaplin v Leslie Frewin (Publishers) Ltd and*

---

[528] A Qura'a, *AlOsool AlQadaeiyah fi AlMurafa'at AlShareiyah* (2nd edn, Matba'at AlNahdah 1925) 48.
[529] N Monaghan and C Monaghan, *Beginning Contract Law* (Routledge 2013) 40.
[530] ibid.
[531] [1908] 2 KB 1.
[532] ibid 8.
[533] [1937] 2 KB 498.
[534] ibid 503.

Others,[535] Charlie Chaplin's minor son entered into a contract with a publisher for the right to publish the son's autobiography, *I Couldn't Smoke the Grass on My Father's Lawn*, in any language around the world. The minor's solicitor sought an injunction to restrain publication and repudiate the contract. The Court of Appeal refused and upheld the minor's commitment to the contract, as it would enable him to launch a career as an author and earn money to support himself and his wife, despite some of the negatives of the contract.[536]

This principle was also confirmed by the court in the previously mentioned *Mercantile Union Guarantee Corporation, Limited v Ball,* which involved a minor buying a truck to use in his business. The court pointed out that even if the contract could be categorised as one that a minor may commit to, the terms of the contract were not favourable to the minor, which raises the possibility that the court might have ruled that the contract was valid if it had been in the interest of the minor.

It can be concluded that, under English law, an arbitration agreement arising from a commercial contract may bind a minor if the court believes that both contracts are in favour of the minor. And it can be concluded that, under the common approach of scholars of Shariah, a commercial arbitration contract by a minor is valid when the minor is a discerning child who has been allowed to practise a trade, the arbitration is associated with such trade, and the contract is in the minor's favour.

2.2 Legal Person

Scholars of Islam have not defined the legal person or discussed any particular theory in this regard,[537] but they 'recognise the concept of juristic personality'.[538] Early Islamic jurists considered the permissibility of a non-human financial entity.[539] Some entities, such as *waqf* (charitable trust), *bayt almal* (public treasury), schools and mosques, have been recognised by those jurists as having independent personality and capacity to receive rights and assume responsibilities of a natural person independent of their owners,[540] including

---

[535] [1966] Ch 71.
[536] ibid 95.
[537] AlBejad (n 409) 71.
[538] M Zahraa, 'Legal Personality in Islamic Law' (1995) 10(3) ALQ 193, 202.
[539] For example, Wisham, Muneeza and Hassan (n 446) 221-22. See also generally, KMA Aal Haamid, 'Jurists' Differences Regarding the Juristic Categorisation of Shares in Joint-Stock Companies and the Effect of Such Differences' 59 Al-Adl Journal <https://adlm.moj.gov.sa/ENG/attach/311.pdf> accessed 4 June 2018.
[540] For example, AlMawerdy, when discussing the duties and rights of *bayt almal* and whether it can own movable and immovable assets, said '… *bayt almal* is entity [body] and not a place'. In Arabic, he said:

the right to litigate.[541] However, such an independent personality was not granted by the early Shariah jurists to any of the types of *sharikat*[542] (partnership) that they discussed (eg, *Shirkt AlMufawadah* and *Shirkat AlAnan*).

Nevertheless, this does not mean that recent forms of commercial legal entities including commercial companies cannot be granted an independent legal personality under Islamic law. Ali Alkhafif (member of Islamic Research Academy and Supreme Council of Al-Azhar in the last century) explains that:

> The difference between positive law and [early] Islamic jurisprudence in recognising independent personality for the companies is due to the difference in trade dealings and customs, as well as the response to economic development in recent times …, and is not a fundamental disagreement due to differences in the main basis of the two jurisprudences.[543]

The current attitude of Shariah scholars is that companies should be granted an independent legal personality separate from their owners as they believe that such an attitude corresponds to the requirements of the modern era and does not contradict the main

---

'لأنَّ بيت المال عبارة عن الجهة لا عن المكان'. ABMBMBH AlMawerdy (died: 450 Hijra - corresponding to 1058 AD), *AlAhkam AlSultaniyah* (Dar AlHadith, Cairo) 315. Also, AlHaitami in has book *Tuhfat AlMuhtaj fi Shareh AlMenhaj* explains the permissibility of the commandment for the mosque with that "it is free [a free person] it can possess". In Arabic, he said: 'انه حر يملك'. AMAH AlHaitami, *Tuhfat AlMuhtaj fi Shareh AlMenhaj*, vol 7 (AlMaktabah AlTejariyah AlKubra 1983) 13. Moreover, Ibn Farhoon says "when a lawsuit is brought against … [a mosque or *waqf*], the governor must appoint an agent to defend it. If there is a right for the plaintiff, a judgment must be rendered containing this right …'. In Arabic, he said:
'إذَا وَقَعَتْ الدَّعْوَى عَلَى حَبْسٍ أَوْ مَسْجِدٍ أَوْ مَحَجَّةٍ وَجَبَ عَلَى الْحَاكِمِ أَنْ يُقِيمَ وَكِيلًا يَدْفَعُ عَنْهُ، فَإِنْ وَجَبَ عَلَيْهِ حَقٌّ قَضَى بِهِ وَإِلَّا فَلَا'. IAM Ibn Farhoon (died: 799 Hijra – corresponding to 1396 AD), *Tabsurat AlHukkam fi Osool AlOqdiyah wa Manahej AlAhkam*, vol 1 (Maktabat AlKulliyat AlAzhariyah 1986) 185. See also Baamir, *Shari'a Law* (n 23) 63; AlBejad (n 409) 71-72. See also generally, Wisham, Muneeza and Hassan (n 446) 221-22.

[541] KAI AlJerayied, 'AlShakhsiyah AlE'etebariyah' (1427 Hijra - corresponding to 2006 AD) 29 Al-Adl Journal 61, 78-79. A different point of view, Saleh, *Commercial Arbitration* (n 193) 25-26.

[542] In Shariah, *sharika* (singular of *sharikat*) is a generic term that means any participation of any type including commercial partnership. For more information, see Ya'akov Firestone, 'Production and Trade in an Islamic Context: Sharika Contracts in the Transitional Economy of Northern Samaria' (1975) 6:2 International Journal of Middle East Studies 185, 186. Nicholas HD Foster, 'Islamic perspectives on the law of business organisations: Part 1: an overview of the classical Sharia and a brief comparison of the Sharia regimes with Western-style law' (2020) EBOR 3, 14-27. The word company, in its current legal sense, is not equivalent to the word *sharika*, at the very least in the concept of early Shariah scholars, although many contemporary legal writers used these two words interchangeably. The term 'company' in general, and in the English system in particular, has a specific legal concept that differs from the concept of *sharika* in Shariah. In the English system, all companies, for instance, have separate legal entities and a company can be owned by an individual who is the sole shareholder and controls all its activities/forms of business. See generally Andrew Hicks and SH Goo, Cases and Materials on Company Law (OUP Oxford 2008) 95 and 96.

[543] A Alkhafif, *Alsharikat fi Alfiqh Alislami, Buhooth Muqarenah* (Dar AlFikr Alarabi 2009) 35.

sources of Shariah.[544]

Professor Abdul Aziz AlKhayyat (Dean of the Faculty of Sharia at the University of Jordan and member of the International Islamic Fiqh Academy in Jeddah) emphasises in his book *AlSharikat fi AlShriah AlIslamiyah* (*Companies in Islamic Law*) that:

> It is necessary, in accordance with the requirements of the public interest, to grant the company, depending on its type, an independent legal personality, … and thus it has a name, place of residence and nationality …. There is nothing in Shariah (whether Quran or Sunnah) that prevents granting such rights. Additionally, custom, interest and necessity require the recognition of independent legal personality for the company …. .[545]

Such an attitude has recently been explicitly reflected in the Shariah courts of many Islamic countries (such as, Palestine, Jordan,[546] Lebanon[547] and Saudi Arabia) as they recognise the independent personality of the company from its owners. For instance, the Saudi Law of Procedure Before Sharia Courts 2013 (SLPBSC 2013) provides the right of a company in litigation against partners or third parties as well as the right to sue a company as a legal person independent from the partners.[548]

Based on the above, it can be said that, according to the recent attitude of Shariah jurists and Shariah courts, under Islamic law as is the case in English law a legal entity including companies, through their directors or board of directors, can enter into contracts just like a natural person who has full capacity.[549] This capacity to enter into contracts is determined in accordance with the constitution of the corporation which in turn, under English law, is subject to the law of the place of incorporation,[550] while under Shariah the corporate constitution is supposed to be subject to Shariah if the owner is a Muslim.

---

[544] A Alkhafif, *Alsharikat fi Alfiqh Alislami, Buhooth Muqarenah* (Dar AlFikr Alarabi 2009) 34-35; MA AlZarqa, *Alfiqh Alislami fi Thawbeh Aljadid, Almadkhal ela Nazariyat Aliltizam Alammah fi Alfiqh Alislami* (Dar Alqalam 1999) 269-71, 275, 279-81 and 296; A AlKhayyat, *AlSharikat fi AlShriah AlIslamiyah* (4th edn, Dar AlBasheer 1994) 219-221; AMA Daghi, 'Althimmah Almaliyah li Alwaqf wa A'atharuha, Dirasah Fiqhiyah Muqarinah' (Muntada Qadaya Alwaqf Alfiqhiyah VII, Qadaya Mustajiddah wa Ta'asil Share'i, Sarajevo - Bosnia and Herzegovina 27-29 May 2015, Al'amanah Ala'ammah li Alawqf, Kuwait 2015) 55-56. See also generally, KAI AlJerayied, 'AlShakhsiyah AlE'etebariyah' (1427 Hijra - corresponding to 2006 AD) 29 Al-Adl Journal 61.

[545] A AlKhayyat, *AlSharikat fi AlShriah AlIslamiyah* (4th edn, Dar AlBasheer 1994) 221.

[546] Article (15) of The Law of Sharia Trials Procedure, No 31 on 1959. Also, Article (15) of Amending Law of Sharia Trials Procedure (1959), No 11 in 2016.

[547] For example, Articles (25 and 140) of The Law of Organising Sunni and Ja'fari Sharia Judiciary, issued on 16 July 1962, with its amendments by The Law No 769 on 11 November 2006.

[548] For example, Article (38) of SLPBSC 2013.

[549] J Beatson and others, *Anson's Law of Contract* (29th edn, OUP 2010) 228, 231.

[550] *Continental Enterprises Limited v Shandong Zhucheng Foreign Trade Group Co*, [2005] EWHC (92) 40.

In general, if a company lacks capacity to enter into international commercial contracts, then such contracts, including arbitration agreements, are null and void.[551] In *Continental Enterprises Limited v Shandong Zhucheng Foreign Trade Group Co,*[552] which related to a challenge of an arbitral award based on an international sales contract, the English court held that the agreement was invalid because of the lack of capacity of the defendant, a Chinese company, to engage in foreign trade according to its own constitution and Chinese law.

If a company is registered under the English Companies Act 2006 (ECA 2006), its director must act within the limits of the company's goals and not exceed the limits stipulated by the company's constitution.[553] Nevertheless, the ECA 2006 protects those who are dealing with the company in good faith regardless of the limitations prescribed by the company's constitution.[554] In addition, the ECA 2006 stipulates that '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'.[555]

In Saudi Arabia, the new Companies Law,[556] unlike the former law, [557] restricts the capacity of the company's director to agree on arbitration, unless the articles of incorporation expressly grant the director the right to resort to arbitration. If the director violates such a restriction, he is personally liable for the damages[558] resulting from the nullity of the arbitration agreement, so long as the articles of incorporation have been published according to the law.

2.2.1 *Al-Iflas* (Bankruptcy)

Al-iflas **(**bankruptcy) of one of the parties to international commercial arbitration is a matter that occurs regularly.[559] In light of the increasing number of international commercial contracts, the existence of a *muflis* (bankrupt) party to an arbitration agreement also has

---

[551] ibid 71.
[552] ibid.
[553] ECA 2006, s 171.
[554] ECA 2006, s 40(1).
[555] ECA 2006, s 39.
[556] SCL 2015, art 30.
[557] Issued by the Royal Decree (M/6) in 22/3/1385 Hijri (Corresponding to 21/07/1965 AD), with its amendments by the Royal Decree (M/63) in 26/11/1407 Hijri (Corresponding to 23/07/1987 AD) (SCL 1965). Article 29 of SCL 1965 grants the director of a company the capacity to agree on arbitration, unless the articles of incorporation restrict his ability to do so.
[558] SCL 2015, art 32.
[559] James Hargrove and Vanessa Liborio, 'Arbitration and Insolvency: English and Swiss perspectives' (2009) Arbitration 47, 47.

increased.[560] Under Shariah, a bankrupt is one whose current debts are equal to[561] or in excess of his assets.[562] This affects the capacity of the bankrupt to conclude a commercial arbitration agreement, and it may also affect the validity of an arbitration agreement that was executed before bankruptcy.

The impact of bankruptcy on the capacity (or freedom) of a party to agree on commercial arbitration will be discussed in the following subsections, as well as the validity of such an agreement in the eyes of early scholars of the four Sunni schools, and the extent of the consistency of the approach of Saudi law with the approaches of Shariah, followed by a comparison of these two approaches to English law.

2.2.1.1 Shariah Approach to Arbitration Agreements by Bankrupts

Early scholars of the four Sunni schools have dealt extensively with bankruptcy and its effects, whether before or after an interdiction order is issued.[563] As far as the researcher can determine, however, the scholars have not discussed the impact of bankruptcy on the capacity of arbitration parties and the arbitration agreement. To figure out their approach, it is necessary to know their point of view on the contractual actions of a bankrupt party, either before or during the interdiction.

2.2.1.1.1 Arbitration Agreements by a Bankrupt Before Interdiction

Most Sunni scholars of AlHanafi,[564] AlShafi'i[565] and AlHanbali schools[566] believe that all of the actions of a bankrupt before interdiction are valid, as the bankrupt enjoys full capacity until interdiction is decreed. AlMaliki school[567] and Ibn Qayyim[568] limit the capacity of a bankrupt before interdiction, however. They believe that such a bankrupt lacks

---

[560] PF Klrgis, 'Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis' (2009) 17 ABI Law Review 503.
[561] *AlMajallah*, art 999.
[562] AlShafi'i, *Mugni AlMuhtaj* (n 262) vol 3, 97. See also generally, A Awad and RE Michael, 'Iflas and Chapter 11: Classical Islamic Law and Modern Bankruptcy' (2010) 44 Int'l Law 975, 980.
[563] A person, in accordance with Shariah, may be declared bankrupt by a court without issuing an interdiction sentence, which can be issued at the request of debtors. For instance, in his book, *AlMugni*, Ibn Qudamah mentioned that AlShafi'i, Malik and Abu Hanifa believe that '[I]t is not permissible [for a judge] to issue a distrain order against a bankrupt without a request from his creditors … [or] some of them', Ibn Qudamah, *AlMugni* (n 225) vol 4, 329.
[564] KMAA Ibn Alhammam (died: 861 Hijra - corresponding to 1456), *Fateh AlQade*er, vol 9 (Dar AlFikr) 276.
[565] AlShafi'i, *AlOm* (n 222) vol 3, 214.
[566] Ibn Qudamah, *AlMugni* (n 225) vol 4, 328-29.
[567] Alkhrashi AlMaliki (n 219) vol 5, 263-64.
[568] MABASS Ibn Qayyim AlJawziyah (died: 751 Hijra- corresponding to 1350 AD) *E'elam AlMuwaqqe'een an Rab AlAlameen*, vol 4 (Dar AlKutub AlElmiyah 1991 AD) 7-8.

capacity to make charitable donations or to take any other unnecessary action that might reduce his assets during the bankruptcy period, such as repaying a debt that is not yet due.[569]

Accordingly, it follows that the majority of early Shariah Sunni scholars grant full capacity to the bankrupt to enter into commercial arbitration contracts, while AlMaliki scholars and Ibn Qayyim seem to believe that bankruptcy has a negative impact on a person's capacity to agree to commercial arbitration, since an arbitration agreement might not be a necessity and even if it was, there is no doubt that it could reduce his assets.

2.2.1.1.2 Arbitration Agreement by Bankrupt During Interdiction

After a bankrupt is subject to an interdiction order, early scholars of the four Sunni schools, AlMaliki,[570] AlShafi'i,[571] AlHanbali[572] and AlHanafi,[573] agree that the bankrupt lacks capacity in regard to acts that might harm his distrainable assets.[574] Even financial obligations to non-creditors that are obligatory under Shariah, such as *zakat*,[575] must be supervised by the court.[576]

For actions that do not imperil distrainable assets, whether commercial or civilian, such as borrowing and *bay' al-salam*,[577] the interdicted bankrupt enjoys full capacity, as the interdiction relates to his assets and not his personal competence. In the view of these scholars, those who become creditors after the interdiction takes place do not share in the division of distrained assets with the earlier creditors.[578] This is justified on the ground that if the new creditors were aware of the interdiction, they accepted the fact that they had no claim on the assets. And if they were not aware of the interdiction, they were negligent,[579] as an interdiction has to be announced in public.[580]

---

[569] Aldosooqi (n 488) vol 3, 266; Alkhrashi AlMaliki (n 219) vol 5, 263-64.
[570] Alkhrashi AlMaliki (n 219) vol 5, 266-67; SAAMMAT AlMagrebi (died: 954 Hijra - corresponding to 1547) *Mawaheb AlJalil fi Shareh Mukhtassar Khalil*, vlo 5 (3rd edn, Dar AlFiker 1992) 5-6.
[571] AlRamli, *Nehayat AlMuhtaj* (n 224) vol 4, 315-17; AlShafi'i, *Mugni AlMuhtaj* (n 262) vol 3, 100-102.
[572] Ibn Qudamah, *AlMugni* (n 225) vol 4, 330.
[573] Ibn Abdeen (n 256) vol 5, 147-52.
[574] Distrainable assets are assets owned by the debtor that can be seized to pay his debts.
[575] For definition of *zakat*, see page 61. See also Said Bouheraoua, 'Zakah Obligations on Islamic Financial Institutions' (2012) ISRA Research Paper 34/2012, 14 <https://tinyurl.com/ybhcr29t> ccessed 28/06/ 2018.
[576] See for example, AlSsaniki (n 242) vol 1, 575.
[577] *Bay' al-salam* is a type of sales contracts. See page 112.
[578] AlRamli, *Nehayat AlMuhtaj* (n 224) vol 4, 316; AlShafi'i, *Mugni AlMuhtaj* (n 262) vol 3, 101.
[579] AlShirazi (n 216)114; AlRamli, *Nehayat AlMuhtaj* (n 224) vol 4, 319; AlShafi'i, *Mugni AlMuhtaj* (n 262) vol 3, 103.
[580] Ibn Qudamah, *AlMugni* (n 225) vol 4, 330; AlShafi'i, *Mugni AlMuhtaj* (n 262) vol 3, 100.

2.2.1.1.3 Enforceability of Arbitration During Interdiction

As discussed above, the majority of early Sunni scholars agree that all contracts by a bankrupt are valid prior to interdiction.[581] These contracts encompass the arbitration agreement,[582] regardless of whether it is associated with them or arises from them. That does not mean, however, that arbitration agreements are always enforceable against the bankrupt's distrained assets. This is because jurists of the Sunni schools differ over the enforceability of the commitments that an interdicted made before the interdiction.

Most AlHanafi scholars[583] believe that such commitments made before interdiction are enforceable if they are proved by witness testimony or other external evidence. In such a case, the beneficiary of the commitments shares the distrained assets with the other creditors. If the commitments cannot be proved, however, they remain in the bankrupt's *themma* (trust) and can be accessed after the interdiction has been discharged.

On the other hand, AlHanbali,[584] some AlShafi'i[585] and some AlMaliki scholars believe that, in the absence of a judicial order to the contrary, the pre-interdiction commitments of a distrainee are generally unenforceable during the interdiction if they would diminish the distrainable assets. This position puts a priority on the rights of the creditors for whom the distraint order was issued.[586]

Some scholars of AlHanafi school[587] and AlMaliki School[588] advocate a middle course, positing that the bankrupt's pre-interdiction commitments that are proved by evidence cannot be levied against distrained assets but they can be levied against any funds the distrainee

---

[581] Ibn Qudamah says 'What a bankrupt has done [has agreed on] before he has been sentenced to bankruptcy, either selling or granting ... etc, is permissible as well as enforceable. This is the view expressed by Abu Hanifa, Malik and AlShafi'i and it has not come to our knowledge that there is someone who disagreed with their view' among the Sunni scholars. In Arabic, he said:
'ما فَعَلَهُ الْمُفْلِسُ قَبْلَ حَجْرِ الْحَاكِمِ عَلَيْهِ، مِنْ بَيْعٍ، أَوْ هِبَةٍ، أَوْ إقْرَارٍ، أَوْ قَضَاءِ بَعْضِ الْغُرَمَاءِ، أَوْ غَيْرِ ذَلِكَ، فَهُوَ جَائِزٌ نَافِذ وَبِهَذَا قَالَ أَبُو حَنِيفَةَ، وَمَالِكٌ، وَالشَّافِعِيُّ وَلَا نَعْلَمُ أَحَدًا خَالَفَهُمْ'.
Ibn Qudamah, *AlMugni* (n 225) vol 4, 329.

[582] This is because those Sunni scholars gave a general provision in this regard and did not exclude the arbitration agreement.

[583] AHKA Afandi (died 1353 Hijra - corresponding to 1934), *Durar AlHukkam fi Shareh Majallat AlAhkam*, vol 2 (F AlHusaini tr, Dar AlJabal 1991) 724 -25.

[584] Ibn Qudamah, *AlMugni* (n 225) vol 4, 330.

[585] AlNawawi, *AlMajmo'* (n 216) vol 13, 285-86. Some AlShafi'i scholars have an opposite opinion as they believe that the acknowledgements by the distrainee in relation to the distrained assets are enforceable. ibid 286.

[586] AlNawawi, *AlMajmo'* (n 216) vol 13, 285-86.

[587] Ibn Abdeen (n 256) vol 6, 148.

[588] Aldosooqi (n 488) vol 3, 267.

receives during the interdiction period. Unpaid creditors have a shared claim on this 'new money' that the bankrupt receives during interdiction.

From the above, it can be concluded that, under Shariah, an arbitration agreement executed by a bankrupt prior to interdiction is valid. This follows from the fact that most early Sunni scholars agree that all contracts entered into by a bankrupt before interdiction are valid, without exception. With regard to the enforceability of arbitration agreements during the interdiction period, three approaches of the Sunni scholars can be deduced, based on their views on the enforceability of the commitments of a distrainee.

The approach of most AlHanafi scholars is to consider these agreements enforceable if they are based on external evidence. Some AlHanafi and AlMaliki scholars, however, consider such agreements enforceable only in relation to funds that the bankrupt receives after the interdiction. Contrariwise, the view of AlHanbali, some AlShafi'i and some AlMaliki scholars seems to be that these agreements are unenforceable in the absence of a judicial order, although these agreements can be enforced after the interdiction is discharged.

2.2.1.2 Saudi Approach to Arbitration Agreements by a Bankrupt

Saudi law takes a different approach from that of most Shariah scholars, in that Saudi law treats bankruptcy[589] as a reason for a lack of capacity for contracts, including arbitration agreements. Article 110 of SCCL 1931[590] provides that all acts, verbal or physical, of a bankrupt, whether a natural or a legal person, are unenforceable from the date of the declaration of bankruptcy.

Moreover, Article 10 of the SAL 2012 states that an arbitration agreement may be executed only by 'those who have the disposition of their rights whether a natural person — or his representative — or a legal person'. The bankrupt, therefore, lacks capacity to enter into an arbitration agreement after the date of the declaration of bankruptcy. According to Article 5 of the Settlement Against Bankruptcy Law 1996, [591] however, the ineffectiveness

[589] Article 103 of Commercial Court Law 1931 (SCCL 1931) provides a definition for a 'bankrupt' that is similar to the definition of Shariah. It states that *muflis* is 'a person whose debts are more than all his funds …'. Issued by Royal Decree No 32 dated 15/01/1350 Hijra (corresponding to 02/06/1931 AD), with its amendments by the Royal Decree (M/2) dated 15/1/1390 Hijra (corresponding to 23/3/1970).

[590] ibid.

[591] Issued by Royal Decree No M/16 dated 04/09/1416 Hijra (corresponding to 25/01/1996).

of such an agreement is a recognised right for creditors; thus, they may waive such right if they have an interest in it.

This raises the question of the validity and enforceability of an arbitration agreement that is concluded before a declaration of bankruptcy. While Saudi law is silent on that specific question, one can reasonably presume that an arbitration agreement concluded before a declaration of bankruptcy is valid and enforceable since the bankrupt, under Saudi law, has full capacity at the time of executing the agreement. After declaring bankruptcy, the bankrupt lacks capacity, and any decision to commence or continue arbitration procedures would be made by the Secretary of the Board, who is appointed by the court to investigate and determine the financial rights and obligations of the bankrupt.[592]

Accordingly, the approach of Saudi law resembles that of AlMaliki school, in that Saudi law considers bankruptcy, and not just interdiction, as a cause for the lack of capacity of a bankrupt to agree on arbitration, as well as limiting the enforceability of any arbitration agreements the bankrupt entered into after declaring bankruptcy.

2.2.1.3 English Approach to Arbitration Agreements by a Bankrupt

Under English law, bankruptcy has a negative impact on the capacity of individual arbitration parties. This lack of capacity, however, does not automatically invalidate an otherwise valid commercial arbitration agreement that a bankrupt executed prior to the commencement of the bankruptcy.

This is because under the English Insolvency Act 1986 (EIA 1986), the bankruptcy trustee can adopt a bankrupt's pre-bankruptcy contract that includes an arbitration agreement. In such a situation, an arbitration agreement relating to any dispute emerging from the contract becomes enforceable. The trustee, however, also has the authority to reject such contracts and, if the trustee does so, a court order would be required to commence the arbitration process.[593]

A trustee, moreover, may disclaim any new contracts by a bankrupt, if such contracts are unprofitable[594] and might have a negative impact on his assets. This in turn might affect the enforceability of any arbitration agreement associated with these contracts, whether

[592] SCCL 1931, art 112.
[593] EIA 1986, s 349A which is inserted by s 107 of EAA 1996.
[594] EIA 1986, s 315.

within the commercial contract or in a separate agreement. Such an agreement, however, might personally bind the bankrupt and thus be enforceable after his eventual return to solvency.[595]

As in Shariah and Saudi law, bankruptcy proceedings under English law are intended to preserve the bankrupt's assets, under the trustee's management, for the benefit of the creditors.[596] So, an arbitration agreement entered into by a bankrupt is considered valid if it does not diminish his assets during the period of bankruptcy. If the agreement would affect the assets, it would apply only to the bankrupt personally, and not his assets, during the bankruptcy period.

Under English law, bankruptcy is restricted to individuals. If a corporation or other business entity cannot meet its debts, it goes into administration procedures or liquidation. In either case, however, the entity that is under administration or liquidation lacks the capacity to agree to commercial arbitration. Additionally, arbitration agreements to which such an entity is a party, even if valid, might not be enforced.

This is because the law grants a liquidator, if the winding-up is voluntary, the right to bring and defend any legal proceeding,[597] including arbitration procedures,[598] on behalf of the company. If the winding-up is compulsory, court permission is required before a liquidator can use such authority.[599] The EIA 1986 grants similar powers to an administrator or administrative receiver,[600] as well as providing for the referral of any question affecting the company to arbitration if an arbitration agreement exists.[601]

Furthermore, according to Section B1 para 43(6) of the EIA 1986, when a company is under administration, the consent of the administrator or the court is needed to commence or continue any arbitral procedure against the company. The situation is the same when the company is under a compulsory winding-up.[602] If the winding-up is voluntary, however, there is no need for leave of court.[603]

---

[595] G Burn and E Grubb, 'Insolvency and Arbitration in English Law' (2005) Int ALR 124, 127.
[596] See generally Hargrove and Liborio (n 559) 47 & 49.
[597] EIA 1986, s 165(3) and sch 4 Pt II(4).
[598] *Bristol Airport Plc and Another v Powdrill and Others* [1990] Ch 744, 765.
[599] EIA 1986, s 167(1)(a) and sch 4 Pt II(4).
[600] EIA 1986, s 1(5).
[601] EIA 1986, s 1(6).
[602] EIA 1986, s 130.
[603] J Sutcliffe and J Rogers, 'Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times' (2010) Arbitration 277, 280.

Thus, it is clear that the approach of English law is consistent with that of Saudi law in terms of the validity of arbitration agreements concluded by a bankrupt and the bankrupt's lack of capacity to agree to new arbitration if it affects his assets during the bankruptcy period. English and Saudi law differ, however, regarding the enforceability of arbitration agreements executed prior to a declaration of bankruptcy. Whilst under Saudi law such agreements are enforced, the English Act considers it a matter that is subject to the discretion of either the trustee or the court.

The situation in Shariah is distinctive, as Shariah differentiates between the two stages: During the interdiction period, the Shariah provisions regarding the bankrupt's lack of capacity resemble those in Saudi and English laws. Prior to interdiction, the majority of early Sunni scholars grant a bankrupt full capacity to agree on arbitration. Thus, it is clear that a bankrupt under Shariah enjoys more freedom than under Saudi or English law.

3. Legality of Subject Matter of Contract (*Mahal Al-Aqd* or *Al-Ma'qood Alaih*)

Early scholars of the four Sunni schools agree that the subject matter of a contract must be lawful. While AlHanafi school considers legality of subject matter to be a condition for a valid consent,[604] the other three Sunni schools (the majority) consider it a pillar that is necessary to establish a valid contract.[605]

The subject matter of an arbitration contract is always to resolve a dispute by a person or persons other than the court.[606] The subject matter of an arbitration contract is permissible under Shariah[607], as it is under Saudi[608] and English law, because arbitration itself is legitimate under these laws. The subject matter of the arbitration can be restricted, however, as some national laws exclude specified categories of disputes from arbitration.[609] Under Shariah, as concluded earlier,[610] all commercial disputes arising from an international commercial contract are arbitrable.

It should be noted that although the subject matter of the dispute arising from a contract

---

[604] Mahmood (n 439) 108.
[605] Aldawry (n 205) 119.
[606] Onyema (n 249) 61.
[607] Aldawry (n 205) 169.
[608] AlBejad (n 409) 63-64.
[609] N Blackaby and others, *Redfern and Hunter on International Arbitration* (5th edn, NY 2009) 95.
[610] See page 61 - 63.

and the subject matter of the arbitration agreement associated with that contract are related and are referenced interchangeably by some authors,[611] they are actually distinct. The distinction is highlighted by the fact that the subject matter of the dispute might be illegal while the subject matter of arbitration contract that governs the dispute is legal.[612]

To illustrate, the dispute's subject matter might concern delivering alcohol, selling alcohol or engaging in usury (*riba*), all of which are illegal under Shariah when one party is Muslim. Arbitration agreements associated with the underlying contracts from which these disputes arose, however, are considered valid and binding under Shariah even though the disputed transaction is illegal.[613] This is because the severance doctrine exists under Shariah.[614] According to the view of the majority of early Shariah scholars, the invalidity of the underlying contract or a *contractual clause* does not necessarily affect the validity of the remainder of the contract so long as it is enforceable and can be established independently.[615] The subject matter of the underlying contract and the subject matter of the arbitration contract

---

[611] For example, GS Dursun, 'A Critical Examination of The Role of Party Autonomy in International Commercial Arbitration and An Assessment of its Role and Extent' (2012) 1 YÜHFD 161, 166; Mohammed AH Al Jarba, 'Commercial Arbitration Islamic Jurisprudence: A Study of its Role in The Saudi Arabia Context' (DPhil thesis, University of Wales, Aberystwyth 2001)109, 110.

[612] If the subject matter of a dispute is not arbitrable, the arbitration agreement may be unenforceable or unlawful due to the non-arbitrability of the subject matter of the dispute and not because of the illegality of the subject matter of the arbitration contract.

[613] Different viewpoint, Dursun (n 611) 166; Al Jarba (n 611)109, 110.

[614] NJ Coulson, *A History of Islamic Law* (Aldine Transaction 2011) 100; MA Alqudah, 'The Impact of Sharia on The Acceptance of International Commercial Arbitration in The Countries of The Gulf Cooperation Council' 20:1 (2017) Journal of Legal, Ethical and Regulatory Issues 1, 8; Baamir, *Shari'a Law* (n 23) 159.

[615] In different contexts, classical Islamic scholars discussed *the concept* of the severance principle without any of them mentioning this principle explicitly. For instance, they discussed the validity of a contract that involves an invalid condition as well as discussing *dividing the transaction (*contract) that includes more than one agreement (eg, a loan contract that includes an interest clause, a contract that includes an unproven sale and a valid and enforceable guarantee, and a sale contract that involves wine and vinegar). AlSuyuti says that Shariah scholars have two different opinions on the validity of a contract 'when it combines permissible and prohibited agreements, … the most accurate attitude is the validity and enforceability of the permissible part'. (AABJ AlSuyuti (died: 911 Hijra - corresponding to 1505 AD), *AlAshbah wa AlNnazaer* (Dar AlKutub AlElmiyah 1990) 108, see also AMAWI Al-Ruwani (died: 502 Hijra - corresponding to 1108 AD), *Bahr Almathhab; fy furue almathhab AlShafi'i*, (TF AlSayed ed, Dar al-Kuttab Al-Alami 2009) 237). According to AlZuhaily, the reason is that 'the illegality is prevailing only in the illegal part, but does not extend to the legal part as it is considered valid'. (MM AlZuhaily, *AlQawaed AlFiqhiyah wa Tatbiqatuha fi AlMadhahib AlArbea'h*, vol 2 (2nd edn, Dar AlFiqr 2006) 698). Additionally, the Islamic legal maxim *that* 'Failure to establish the principle claim does not imply failure to establish a claim subsidiary thereto' (Article 81 of *AlMajallah*), indicates that part of a contract (eg, *contractual clause)* may remain valid and enforceable notwithstanding that the underlying contract is invalid or cannot be proven. Al Zarkashi (one of the most prominent scholars of AlShafi'i school in the fourteenth century) commented that this *exception* maxim can be applied when a part of the contract can be established independently. In Arabic, he said:
'وَقد يثبت الفرع وإن لم يثبت الأصل ... والضَّابِطُ: أَنَّا نَنْظُرُ فِي الْفَرْعِ فَإِنْ كَانَ يَسْتَقِلُّ بِإِنْشَائِهِ بِطَرِيقِ الْأَصَالَةِ " ثَبَتَ " قَطْعًا وَإِنْ لَمْ يَثْبُتْ الْأَصْلُ'.
A ABMAB Al Zarkashi (died: 794 Hijra - corresponding to 1391 AD), *Almanthoor Fi Alqawaed Alfiqhiyah*, vol 3 (Kuwaiti Ministry of Awqaf, 1405 H-1985) 23.

are distinct. The subject matter of an arbitration agreement under Shariah is the resolution of a dispute according to the provisions of Shariah.[616]

4. Conclusion

It is clear from the foregoing that the restrictions imposed on the freedom of parties to a commercial contract relate to three elements: the parties' capacity to agree on arbitration; the mutual expression of a desire to arbitrate (and the form of that expression of consent); and the legality of the subject matter of arbitration.

It is also clear that both Shariah and English law grant the parties broad freedom in this regard, but the extent of this freedom varies under the two systems. The outcomes under Saudi law and Shariah are virtually the same because Saudi contracts are governed by Shariah contract law, with the exception that the SAL 2012 requires the agreement to be in writing.

Under Shariah (and thus under Saudi law) and in the English system, a natural person who is a party to a commercial contract has complete freedom to enter into an arbitration agreement so long as s/he has reached adulthood. Under Shariah, even a minor can enter into an enforceable arbitration agreement if s/he is a discerning minor authorised in trade and the arbitration benefits him/her. Similarly, under English law, an arbitration agreement involving a commercial contract can be enforceable if both agreements are in the minor's interest. Moreover, under all three systems a legal person is granted full capacity to enter into an arbitration agreement.

However, the capacity of a party may negatively be affected under these systems if this party becomes a bankrupt, which is not uncommon in international trade. In this situation, the English and Saudi systems are more restrictive than the general approach of early Shariah scholars. Under Shariah, the general approach is that a bankrupt enjoys full capacity until an interdiction order is issued against him. Under the Saudi system, as with AlMaliki doctrine and the English system, bankruptcy limits the bankrupt's ability to enter into an arbitration agreement if it might affect his assets. A difference between the Saudi and English laws is

[616] It is assumed that the arbitral tribunal would invalidate the contract in the first two examples, selling alcohol or delivering it, (RA Abdel Karim and S Archer, *Islamic Finance: The New Regulatory Challenge (Wiley Finance)* (2nd edn, John Wiley & Sons 2013) 249-50) and rule with the illegality of the interests (*riba*) for both parties in the third example (MA Anwar, 'Emerging Markets: The Importance of Islamic Finance to The UK Economy' (2014) JIBLR 360; AK Aldohni, 'The Quest for A Better Legal and Regulatory Framework for Islamic Banking' (2015) Ecc LJ 15, 20 - 21) when both or either is Muslim.

that arbitration agreements concluded before a party becomes a bankrupt are enforced under Saudi law, while such agreements are subject to the discretion of the trustee or the court under the English system.

Under Shariah (and thus under Saudi law) and English law, there are also no restrictions on the phraseology of the offer and acceptance that establish the arbitration agreement. Once an offer is timely connected to an acceptance, the agreement is created. Both systems also grant the offeror the right to withdraw his offer at any time before the acceptance. At the same time, they do not require the offeror's awareness of the acceptance for the establishment of the arbitration agreement.

However, unlike Shariah, the English system requires the offeree's awareness of the withdrawal of the offer; otherwise, the withdrawal has no legal effect. Moreover, under the English system, the arbitration agreement must be in writing, or evidenced by a writing, to be enforceable under the EAA 1996. In contrast, under Shariah the offeree's awareness of the withdrawal of the offer is not necessary, and an arbitration agreement need not be in writing.

The common approach of early Shariah scholars requires the acceptance to be connected to the offer during *majlis al-aqd;* otherwise, the offer expires and becomes invalid. The English system, on the other hand, grants the parties 'a reasonable time' to complete the establishment of the contract, depending on the surrounding circumstances. To limit the effects of this restriction under Shariah, early scholars of the four Sunni schools grant contracting parties the right to agree on the so-called 'option clause', which allows either party to terminate the contract in whole or in part within an agreed period of time. Such a right has no equivalent in the English system, but at the same time there is nothing in the English system that prevents the parties from agreeing on such an option.

If parties to an international commercial contract abide by the aforementioned requirements, they enjoy complete freedom to establish an enforceable arbitration agreement under Shariah, Saudi law and English law, regardless of the legality of the subject matter of the underlying contract. That is true because the subject matter of an arbitration agreement under these three systems is always legitimate and because all three systems recognise the principle of severability.

Consequently, it can be said that the parties to arbitration have wide freedom to establish an enforceable arbitration agreement under Shariah, the SAL 2012 and the EAA 1996, but

under Shariah, parties have more freedom compared to the Saudi and English systems.

However, the conclusion is not the same when it comes to the freedom of parties to agree on the main elements of the arbitration contract itself (namely, agreeing on arbitrators, substantive and procedural law, and rules of evidence). These elements are the core issues investigated in the following three chapters.

Chapter VI:
Freedom of Parties and Qualifications of Arbitrator

The two previous chapters established the extent of the freedom of parties to agree to arbitrate their disputes, whether current or future, in the three systems under study. This and the next two chapters will, in turn, examine the freedom of parties regarding four fundamental issues of arbitration which also constitute the essential elements of arbitration contract itself.[617] This chapter examines the parties' right to determine the qualifications of the decision maker for their dispute.

Such a right is a distinctive feature of arbitration.[618] It enables them to select an appropriate arbitrator based on the nature of their dispute and the applicable law, which will help save time, money and effort. Therefore, it has been rightly said by practitioners that 'an arbitration is only as good as the arbitrators'.[619]

The extent of this freedom varies from one jurisdiction to another depending on two factors. First is the set of qualifications imposed by the applicable arbitration law. While some arbitration laws impose specific qualifications that must be met in an arbitrator (eg, must be a rabbi thoroughly versed in the Mosaic dietary laws[620] or should be Muslim[621]), others are either satisfied with simple qualifications (eg, legal capacity and impartiality[622]), or are even silent on the question of qualifications (eg, the Singapore International Arbitration Act 1994).[623]

The second factor is the extent of the parties' right to agree on additional qualifications that are not stipulated by the applicable arbitration law (eg, an arbitrator must be of a certain

---

[617] These fundamental issues are the right of parties to agree on: the arbitrator or his qualifications, the law governing the subject matter of the dispute, the procedural rules followed in the arbitral process and finally the evidence rules that can be followed to establish the rights and obligations.

[618] ML Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, CUP 2012) 123; Lord Hacking 'Arbitration Is Only as Good as Its Arbitrators' in S Kroll and author (eds), *International Arbitration and International Commercial Law: Synergy Convergence and Evolution* (KLI 2011); American Arbitration Association, *AAA Handbook on International Arbitration Practice* (Juris 2010) 134.

[619] M Petsche, 'Mediation As the Preferred Method to Solve International Business Disputes? A Look Into the Future' (2013) IBLJ 251, 257; Ugo Draetta, 'The Role of In-house Counsel in International Arbitration' (2010) IBLJ 385, 388.

[620] AB Wood, 'The Qualifications of an Arbitrator' (1953) Arbitration 44, 45.

[621] See page 109.

[622] For example, Article 1450 of FCCP 2011 and Section 7 of Swedish Arbitration Act 1999, SFS 1999:116 (SAA 1999). SAA 1999, S 7 states 'Any person who possesses full legal capacity in regard to his actions and his property may act as an arbitrator'.

[623] Chapter 143A, 2002 Ed, as amended on 31st May 2016.

age, sex, race or nationality). In other words, the parties' right to determine the qualifications of the arbitrator that might clash with anti-discrimination laws in the state that is the seat of arbitration or the seat of enforcement of the award.

The aim of this chapter is to analyse the extent to which parties to international commercial arbitration are free to determine the qualifications of an arbitrator under Shariah and the Saudi and English systems. To achieve this aim, the chapter will be divided into two sections. The first section will deal with qualifications provided by Shariah, the SAL 2012 and the EAA 1996. The second section will deal with the parties' right to agree on additional qualifications that are not mentioned by the arbitration laws of these three systems.

1. Qualifications of an Arbitrator as Stipulated by Law

Like many western arbitration laws,[624] EAA 1996 provides a high degree of freedom for arbitration parties.[625] This is the case so long as the impartiality of the arbitrator is established. Under EAA 1996, the only restriction is that the Lord Chief Justice's approval is required if the chosen arbitrator is a judge of the Commercial Court or Technology and Construction Court of England and Wales.[626] Thus, the rules are simple and straightforward, which is markedly different from the situation under Shariah and SAL 2012.

The main sources of Shariah do not contain clear provisions prescribing the qualifications of an arbitrator. This results in a system that is bound to spawn differing interpretations.

At this point, we must distinguish two arbitration scenarios: (1) when both parties are non-Muslims and (2) when one or both parties are Muslims. In the first situation, when both parties are non-Muslims, the Shariah jurists agree that the parties are not bound by Shariah in connection with their own deals and disputes. This is true whether the non-Muslims are *dhimmi* (an Arabic word for a non-Muslim who lives continuously in an Islamic state)[627] or an *almua'hed* (a non-Muslim who enters an Islamic state for a temporary time under an

---

[624] For example, Section 1035- 36 of German Arbitral Proceedings Reform Act 1998, with its amendments by Civil Procedure Reform Act of 27 Jul 2001 and Law of Contracts Reform Act of 26 Nov 2001. Also, FCCP 2011, art 1450 and SAA 1999, s 7.

[625] Saleh, *Commercial Arbitration* (n 193) 28.

[626] EAA 1996, s 93(2 and 3).

[627] AM Emon, *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law* (OUP 2012) 34.

agreement).[628] This is because non-Muslims are not obligated to apply and follow the rules of Shariah; only Muslims are committed to them.[629] (This will be dealt with in more detail below).[630] As Adam Metz, a German historian, writes: 'Since the Islamic Law was applied to Muslims, the Islamic state allowed the people of other religions to have their own courts. What we know about these courts is that they were church courts and prominent spiritual leaders were the chief justices'.[631]

Thus, arbitration parties who are non-Muslims are completely free to determine the qualifications of their arbitrator, unless they have agreed to apply Shariah.

In the second situation — when one or both parties are Muslims — early scholars have differing opinions about the required qualifications of an arbitrator. Most scholars of the four schools (AlMaliki, AlShafi'i, AlHanafi and AlHanbali) believe the qualifications for an arbitrator are the same as those for a judge.[632] This view is dominant because of the fact that an arbitrator carries out many of the same functions as a judge, which includes hearing the dispute and issuing a judgment. [633] On the other hand, some scholars, such as Ibn Taimiyah[634] and Ibn Hazm Aldhaheri,[635] express the view that an arbitrator does not need to have the same qualifications as a judge. They believe any Muslim can be an arbitrator.

---

[628] Alkhrashi AlMaliki (n 219) vol 5, 80. Under Shariah, *dhimmi* and *almua'hed* have rights and duties, and the most important of their duties is the payment of *jeziyah* (tribute), which was imposed on the working men without women, the disabled, boys and men of religion, in addition to respecting religious rites of Muslims. The most important of their rights is to enjoy complete safety for themselves and their assets, in addition to their right to practice their beliefs and customs, even if they contradict Shariah. See generally Burns (128) 146-50; AH AlKharbutaly, *AlIslam wa Ahel Althemmah* (AlMajles AlA'la le AlShoon AlIslamiyah, Cairo 1969) 68-75; MTMMTA AlTonisi (died 1393 Hijra - corresponding to 1973 AD) *AlTahrir wa AlTanweer, Tahrir AlMa'na AlSadid wa Tanweer AlAqel AlJadid men Tafseer AlKetab AlMajeed*, vol 6 (AlDar AlTunesyia, Tunisia 1984) 205-06.

[629] See generally, SH Al-Aayed, *The Rights of Non-Muslims in the Islamic World*, (Dar Eshbelia 2002) 40-28.

[630] See page 160.

[631] A Metz, *Islamic Civilization in the Fourth Century of the Hegira*, vol 1 (M Abu Redah tr, Qairo 1975) 85 (as cited in Al-Aayed (n 629) 30). For example, with the increasing number of non-Muslims living in the Islamic state in the era of the Ottoman Empire in the fifties of the fourteenth century, a system has been created and called the *millet* system, which is particular to non-Muslim minorities. It gives non-Muslims in the Islamic state the right to govern their own affairs in education and judiciary among the individuals of the same minority under the supervision of heads who embrace the same belief. These heads are elected independently by the members of this minority. A Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (UH Press 2008) 36-38.

[632] Z AlQurashi, 'Arbitration under the Islamic Sharia' (2003) 2 OGEL <www.ogel.org/article.asp?key=149> accessed 10/01/2017. Baamir, *Shari'a Law* (n 23) 78.

[633] AlQurashi (n 632).

[634] Baamir, *Shari'a Law* (n 23) 78; MBY AlBahoti, *Kashaf AlQena' A'n Maten AlEqna*, vol 6 (HMM Helal investigator, Dar AlFikr 1982) 309-10.

[635]Aldawry (n 205) 228.

In Saudi Arabia, where Shariah dominates the Saudi laws and constitution,[636] many writers believe that the arbitrator, in addition to meeting the qualifications stated in SAL 2012,[637] must also meet the qualifications of a judge under Shariah.[638] The differences become particularly problematic in the event of a challenge to an arbitration decision or its implementation.

In this section, seven qualifications of arbitrators under Shariah will be addressed which are that the arbitrator must be: a Muslim; a male; *adel* (which will be defined and discussed at length below); of full mental capacity and at or over the age of puberty; knowledgeable of Shariah; physically able (ie, can see, talk and hear) and independent. The attitude of SAL 2012, EAA 1996 and the case laws in the UK will be addressed during the discussion of these qualifications.

1.1 Religious Qualification

Early scholars of the four Sunni schools — AlHanbali,[639] AlShafi'i,[640] AlMaliki[641] and AlHanafi[642] — agree that a judge (and therefore, in their view, an arbitrator) must be a Muslim when either party is a Muslim and the arbitration occurs in an Islamic state. These scholars also require that the judge (or arbitrator) remain a Muslim throughout the arbitral process, which ends with the rendering of the arbitral award.[643] If this requirement is not satisfied, the award is not valid for the Muslim party or parties.[644]

The opinion of the four schools is based on two main principles: first, the verse in the Quran that prohibits granting non-Muslims authority over Muslims[645] and, second, the requirement that only a Muslim can provide testimony in a dispute involving a Muslim. These scholars reason, by inference, that a judge or arbitrator in a dispute that involves a Muslim must be a Muslim.

---

[636] SBLG 1992, art 1.
[637] SAL 2012, art 14.
[638] S Al-Ammari and AT Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30(2) Arbitr Int 387, 392.
[639] MBY Al Bahaote (died: 1051 Hijra - corresponding to 1641 AD), *Sharh Montaha AlEradat, Dagaeg Awle Alnahi Lesharh Almontaha,* vol 3 (Alem AlKutub1993) 482.
[640] Almawerdy (n 256) vol 16, 158.
[641] Aldosooqi (n 488) vol 4, 129.
[642] ZBI Ibn Najim, *Albahr AlRraeq Sharh Kanz Aldagaeg*, vol 6 (2nd edn Dar AlKitab AlIslami, Cairo) 283.
[643] Aldawry (n 205) 211.
[644] Ibn Alhammam, *Fateh AlQadeer* (n 564) vol 7, 315.
[645] *Surat Alnisaa*, verse 141.

However, this *ijtihad* by the four Sunni schools was more appropriate in the past than in our present era of international commercial arbitration and increased communication and commerce between Muslims and non-Muslims. The argument against the previous position of the early scholars of four Sunni schools is based on four factors:

First, there is no provision in the Quran or Sunnah that explicitly states that a judge or arbitrator must be a Muslim. The Quranic foundation of the four Sunni schools' view states that 'never will Allah give the disbelievers over the believers a way [to overcome them]'.[646] This verse, many scholars now believe, does not actually relate to arbitration matters. Rather, it concerns military and political matters, [647] or the day of judgment[648] according to senior scholars.

Further, Islamic jurists acknowledge that the role of leaders in an Islamic state is to establish, uphold and live in accordance with the law of Allah.[649] It is not reasonable to expect non-Muslims to share those principles, nor does it make sense to apply those principles to arbitration, which is the resolution of a dispute according to the law agreed upon by the disputants. This is supported by the case of Bani Amber and the Prophet, in which the arbitrator was Sabrah Ibn Amro, a non-Muslim who was proposed by the Prophet and whose decision was accepted by the Prophet.[650]

Second, the argument against the four Sunni schools' previous position is supported by the following Quranic verse, which the four schools consider the basis for the permissibility of arbitration under Shariah: 'And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things]'.[651]

---

[646] *Sarat Alnisaa*, verse 141.

[647] IAAI Ibn Kathir, *Tafsir Ibn Kathir; Abridged,* vol 2 (SR Al Al-Mubarakpuri and others trs, 2nd edn, Maktaba Dar-us-Salam 2003) 615-16. AAMBA Alansari Alkurtobi*, AlGami' Li Ahkam AlQuran,* vol 7 (ABA Alturki investigator, Moassasat AlResalah 2006) 187-190.

[648] Ibn Atiyya, one of the most prominent scholars of Quran in Andalusia in the 12th century, said: 'Quran interpreters say this verse refers to the Day of Judgment'. AlQurtubi, *AlJame' le Ahkam AlQuran* (n 187) vol 5, 419.

[649] AlMawerdy says: 'Imamate is placed for the succeeding in the prophecy in guarding religion and conducting life'. ABMBMBH AlMawerdy (died: 450 Hijra - corresponding to 1058 AD), *AlAhkam AlSultaniyah* (Dar AlHadith, Cairo)15.

[650] AMHM AlBagawi (died: 510 Hijra- corresponding to 1116 AD), *Ma'alem AlTanzeel fi Tafseer AlQuran, Tafseer AlBagawi*, vol 7 (MA AlNamer and others investigators, 4th edn, Dar Taiba 1997) 337.

[651] *Surat Alnisaa*, verse 35. See also A Engineer, *The Qu'ran, Women and Modern Society* (2nd edn, New Dawn Press Group 2005) 213.

Since Shariah allows Muslim men to marry non-Muslim (*ahl al-kitab)* women, the Quranic verse would allow one of arbitrators to be a non-Muslim (*ahl al-kitab*) in the arbitration of a family dispute that involves a Muslim man and a non-Muslim woman. Because the discourse in the verse was general and does not specify what restricts or constrains it,[652] the verse is not necessarily limited to arbitration in family matters but extends to other types of arbitration. This is confirmed by the fact that this verse was used by Ali Ibn Abi Talib as an evidence of the validity of arbitration between him and Mu'awiya Ibn Abu Sufyan, whose dispute was not a family matter.[653]

The third argument against the four Sunni schools' previous position addresses their reliance on the Shariah provision that says that only a Muslim can give testimony in a case involving a Muslim. They reason by inference that the provision requires an arbitrator or a judge to be a Muslim in disputes involving a Muslim, but the Quran clearly states that a non-Muslim witness is permissible when necessary.[654] As Dr. Nasser Ibn Zaid, the judge and head of courts in the Haiel region, explained:

> [A]lthough scholars have agreed on requiring it [being a Muslim] for the judge, this does not mean it has not included exceptions. Should we go back to what has been mentioned by scholars concerning the equalization of a judge to a witness in terms of requirements, and what has been said by them: of the admissibility of the testimony of the non-Muslim in case of necessity, due to what is stated in the verse of [witnessing in] the will while travelling, it could be said that: appointing a non-Muslim on judiciary in case of necessity is admissible.[655]

Thus it follows that if it is not obligatory for a judge to be a Muslim in a case of necessity, neither is it obligatory for an arbitrator. This is underscored by the fact that arbitral awards remain under the supervision of Shariah-based national courts regardless of whether they are issued by Muslims or non-Muslims.[656] The question that arises here is whether there is a case of necessity that permits a Muslim to resort to international commercial arbitration and be

---

[652] Ahdab and Ahdab (n 213) 37.

[653] AAf Ibn Al Jawzi (died: 597 Hijra- corresponding to 1200 AD), *The Devil's Deceptions; Talbis Iblis* (Dar as Sunnah) 168 <https://tinyurl.com/ycuzurh5> accessed 20/06/2018. KA AlKhudair 'Hukum Shart AlIslam fi AlMuhakkem fi AlMunaza't AlTahkeemiyah' (1433 Hijra- corresponding to 2011 AD) 4 AlQada'eiyah 122, 144.

[654] *Surat Al Maaida*, verse 106. See also Ahdab and Ahdab (n 213) 38-39.

[655] Dawood (n 256).

[656] This is the case, for example, in Saudi Arabia, where SAL 2012 expresses the right of national courts to reject the recognition and enforcement of arbitral awards whenever they contain a violation of Sharia. SAA 2012, art 50(2).

subjected to its decisions when one or more of the arbitrators are religiously neutral. To answer this, two matters should be clarified.

The first is the difference between a public need (or, as it called by some Muslim jurists, 'public necessity') and a private necessity. A private necessity arises when a person has a reasonable fear of probable harm or death if that person does not act contrary to Shariah.[657] A public necessity is the need to act in contravention of Shariah in order to ease a public hardship.[658]

The notion that 'The public need can be considered a private necessity of an individual' is one of the main principles of Shariah.[659] This principle means that the exceptions to Shariah are not limited to situations of urgent necessity. Shariah can be breached in cases of a public hardship even if the situation does not rise to the level of necessity.[660]

Public need and private necessity are similar in that they both have the effect of easing the requirements and provisions in Shariah. They differ, however, in that a private necessity is limited and temporary.[661] For instance, the necessity to use a forbidden drug disappears when the patient recovers or an alternative medicine becomes available. Public need, on the other hand, tends to be broad and continuous. For example, Shariah would forbid a *bay' al-salam* contract; that is, a contract that calls for the sale of an object that is not available at the time of the execution of the contract but will not be delivered until a fixed future date.[662] A public need, however, does not justify acts that are as extreme as those that can be justified by private necessity.[663]

---

[657] Generally, MI Dien, *Islamic Law: From Historical Foundations to Contemporary Practice*, (Edinburgh University Press 2004) 82-86.

[658] FMM Opwis, *Maṣlaḥah and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* (BRILL 2010).

[659] A Kafie, *AlHajah AlShareiyah Hudodoha wa Qawaedoha*, (Dar Al-Kotob Al-ilmiyah, Beirut 2004)175.

[660] This does not mean that the public need constantly requires the rules of necessity; the intended meaning is that the need in some of its types is similar to private necessity in that it is a reason for the legitimacy of exceptional provisions and rules. WS Alzer, 'Duabt Alhagah Altea Tanzal Manzalh Altrorah Wa Tdbagatah Ala Alagthadat Almosarah' (2010) 26 DUJSLS 675, 677.

[661] DA Desierto, *Necessity and National Emergency Clauses, Sovereignty in Modern Treaty Interpretation, International Litigation in Practice* (Martinus Nijhoff 2012) 67.

[662] Mohd Zulkifli Muhammad, 'The Contract of Bay' Al- Salam and Istisna' in Islamic Commercial Law, A Comparative Analysis' (2007) 1, LJMS 21, 22, < https://kantakji.com/media/8685/s195.pdf > accessed 31/05/2018. Despite that *Salam* contract is forbidden originally in Shariah because it is selling something that is non-existent, it has been made permissible for the public need.

[663] For example, the need does not permit a person to take someone else's money (MU Chapra, *Islam and the Economic Challenge* (Islamic Foundation 1992) 306), but such matters may be permissible due to necessity. Alzer (n 660) 681-82.

Therefore, it is not private necessity that allows arbitrations that might be in violation of Shariah; it is the public necessity of Muslims' needing to accept international arbitration in international trade contracts. This is because the reality of modern commerce requires Muslim countries and their citizens to participate in international trade and enter into contracts with non-Muslims. The non-Muslim parties often require that contracts include an arbitration clause, which is likely to lead to the appointment of a non-Muslim arbitrator in the event of a dispute.

This exception to Shariah becomes imperative when the place of enforcement of the contract is a state where Shariah is the dominant law. It is also necessary because non-Muslim contracting parties and their non-Muslim lawyers are unlikely to draft contracts that take the provisions of Shariah into account.[664] If Muslims could not accept such arbitration clauses in international commercial contracts, Muslim countries would suffer in terms of economic, scientific and technological development.

Saudi Arabia, for example, needs to enter into a number of bilateral and multilateral investment treaties for the development of the Kingdom's economy. Most of these treaties include a provision that any dispute between the parties will be resolved through arbitration, without stipulating any particular qualifications for the arbitrators. It is highly likely that an arbitrator appointed by the foreign party from a non-Muslim country would be a non-Muslim.

For those reasons, it should be clear that arbitration in international commercial contracts is a public need — it is necessary to advance the public interest. That position is confirmed by the Resolution of the CIIFA regarding arbitration in Islamic jurisprudence. The CIIFA decided it is permissible for Islamic countries to refer disputes to non-Islamic international tribunals when Islamic international tribunals do not exist.[665] Similarly, the ECFR issued Decision No 4/11, which declared that it is permissible for Muslims to resort to non-Islamic arbitration bodies when there is a need for such arbitration.[666]

---

[664] Many non-Islamic countries and their citizens are uncertain about justice and fairness under Islamic Shariah. Whitney Hampton, 'Foreigners Beware: Exploring the Tension Between Saudi Arabian and Western International Commercial Arbitration Practices: In re Aramco Services Co.' (2011) J Disp Resol 431, 440-41.

[665] CIIFA Resolution No 91/8/9. If resorting to a non-Islamic tribunal when it is needed in general cases concerning the interests of an Islamic state along with its nation is a permissible matter, then a fortiori arbitration is permissible through an arbitral tribunal that consists of non-Muslim arbitrators in matters that are less significant, as is the situation in most international commercial arbitration cases.

[666] ECFR Resolution No [11/4].

In Saudi Arabia, the new arbitration law (SAL 2012) and its Implementing Regulations do not include a requirement that the arbitrator must be a Muslim. The previous arbitration law (SAL 1983) did not include such a requirement either, but its Implementing Regulations did.[667] The regulations were not considered legally binding, however, for a technical reason: The regulations were issued by the Council of Ministers, while the law was issued by a royal decree. A royal decree has greater authority, in the Saudi legal hierarchy, than a decision by the Council of Ministers.[668] Therefore, the Implementing Regulations could not amend the provisions of SAL 1983 or add conditions that were not included in the law. The situation will be the same if the regulations that eventually[669] will be promulgated to implement SAL 2012 turn out to contradict the act itself.[670]

Because of the lack of published Saudi arbitral awards and judicial decisions, scholars are left to speculate on how the Kingdom's courts generally deal with the issue of non-Muslim arbitrators in international arbitration cases. Some scholars believe that 'The truth is that Saudi courts do not set aside foreign arbitral awards on the grounds of … having been issued by [a] non-Muslim …, as it may be claimed'.[671] Others believe the contrary.[672]

The only case that the researcher is aware of that involves a non-Muslim arbitrator and was reviewed by the Saudi courts is 235/2/Qhaf.[673] It arose from a dispute between a Dutch company and a university in Saudi Arabia. One of those grounds was that the formation of the arbitral tribunal was void because it included a non-Muslim arbitrator in contravention of Shariah and the IRSAL 1985,[674] which state that the qualifications required of an arbitrator are the same as those of a judge, and thus an arbitrator must be a Muslim.[675] The First Instance

---

[667] Article 3 of the IRSAL 1985 stated, 'The arbitrator shall be a Saudi National or Muslim expatriate from the private Sector or others …'. From such Article it is understood that this requirement is necessary because all Saudi citizens are Muslims.

[668] See generally AF Ansary, 'A Brief Overview of the Saudi Arabian Legal System' (2008) GlobaLex, < http://www.nyulawglobal.org/globalex/saudi_arabia.htm#_ednref1> accessed 25/06/2018.

[669] The Implementing Regulations of the new SAL do not indicate any religious requirement in the arbitrator as yet.

[670] The SAL 2012 was issued by a Royal Decree signed with the name of the King. It provides, under Article 56, that the Implementing Regulations of the law will be issued by the Council of Ministers.

[671] AY Baamir, 'The New Saudi Arbitration Act: Evaluation of The Theory and Practice' (2012) Int ALR 219, 220.

[672] FMA Al-Fadhel, 'Party Autonomy and the Role of Saudi Courts, with Reference to the Arbitration Laws in the UK, Egypt and Bahrain and the UNCITRAL Model Law' (DPhil thesis, Queen Mary College, University of London 2010) 171-72

[673] Case No 235/2/Qhaf of 1416 Hijra (corresponding to 1996 AD) BG (Jeddah).

[674] ibid.

[675] ibid 8.

Court, Administrative Circle, at the Board of Grievances (BG) rejected that position, stating:

> [C]onsidering this case in order to achieve justice requires considering the arbitral tribunal as an expert in the case where its decisions are subjected by the [administrative] circle on the merits of the dispute to Shariah and legal provisions as it is the top expert in the case … . This [decision that has been reached by the court regarding committing the defendant to the arbitral award] cannot be altered or affected by the fact that one of the members of the arbitral tribunal is a non-Muslim as none of the tribunal's decisions has been issued based on his own independent opinion, but rather all the tribunal's decisions have been unanimously rendered.[676]

Accordingly, the court issued a decision that the Saudi defendant must comply with the arbitral award. Despite the court's ruling, however, it must be noted that the court's approach in this case is still ambiguous in relation to the requirement that an arbitrator must be a Muslim. This is due to two factors: first, it appears that the court considered the arbitral tribunal merely as an expert in the case rather than as an arbitral tribunal that reached a decision to be reviewed by the court.[677] There is no disagreement in Saudi Arabia and Shariah regarding the permissibility of appointing a non-Muslim expert.

The second factor creating ambiguity is that the court stated that the presence of a non-Muslim on the arbitral tribunal does not invalidate the decision it reached so long as the arbitral tribunal's decision was unanimous. When the decision is unanimous, the outcome of the arbitration would not have been affected by the presence of a non-Muslim on the arbitration panel. This shows that the court took into consideration the requirement that the arbitrator be a Muslim, and it leads to questions about whether the Saudi courts would enforce an arbitral award when a majority of the members of the arbitral tribunal were non-Muslims.

Although the approach of the court was not clear in the previous case, the requirement that an arbitrator be a Muslim is not supposed to have any relevance for Saudi courts so long as the arbitration agreement does not expressly set such a requirement. This is true for two reasons: First, there is no provision in SAL 2012, or any other law in Saudi, concerning such a requirement. Second, Saudi Arabia is already committed to many bilateral conventions with other nations, and many of those conventions specify that any disputes are to be resolved by an arbitral tribunal.[678] These conventions contain no requirement that the arbitrator be a

---

[676] ibid 11.

[677] The court's judgment explicitly stated, '… the arbitral tribunal as an expert in the case'. ibid.

[678] For example, Article 11 of the Agreement between the Government of the Kingdom of Saudi Arabia and the Government of the Republic of Korea concerning the promotion and reciprocal protection of investment,

Muslim. Thus, if Saudi courts required the arbitrator to be a Muslim in order to recognise and enforce an international arbitration award, the Saudi government or its nationals would be forced into the position of flouting their obligations under those agreements, which would be unacceptable to the international community and international law.[679]

In addition, the main sources of Shariah (Quran and Sunnah) command that Muslims respect the conditions of the agreements they enter into. In Sunnah, for instance, the Prophet (pbuh) states that 'the Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful'.[680] This means that Muslims must commit to their agreements so long as they do not violate Shariah provisions.

That an arbitrator be a Muslim is not among the requirements of the Quran or Sunnah. Instead, the Quran is very clear about the duty to fulfill contracts and agreements.[681] Muslims must abide by the arbitration clauses in the treaties and agreements they enter into or else they are betraying the other party, which is strictly prohibited by Shariah.

This is also confirmed by the interviews with Saudi judges. Although some of the judges were not satisfied with the approach of the SAL 2012 regarding the arbitrator's belief because it does not comply with the attitude of most Shariah scholars, all of the judges agreed that this issue is now decisively resolved by the clear attitude of the law. According to the judges, the issue of the arbitrator's belief should not have any effect on either the validity of an arbitration agreement or the enforcement of the international arbitral award so long as the arbitration agreement does not state otherwise. They cite two reasons: the first is the absence of any provision in the SAL 2012 that concerns the arbitrator's belief, and the second is that the SAL 2012 stipulates certain grounds for challenging an arbitral award and those grounds do not include the issue of the arbitrator's belief.

In the United Kingdom, the Arbitration Act 1996 does not include any provisions about

---

signed in Seoul on 4 April 2002. Also, Article 11 of the Agreement between the Government of the Kingdom of Saudi Arabia and the Government of Malaysia concerning the promotion and reciprocal protection of investment, signed in Kuala Lumpur on 25 Oct 2000.

[679] See generally Born, *International Commercial Arbitration* (n 304) 1381, 1443-46.

[680] AIM At-Tirmidhi, *Jami` at-Tirmidhi*, vol 3, Book 13, Hadith 1352 <http://sunnah.com/tirmidhi/15/32> accessed 14/01/2017.

[681] For example, *Surat Almaaida,* verse 1 says, 'O you who have believed, fulfill [all] contracts'. Also, *Surat AlIsraa,* verse 34 says, '[F]ulfil (every) covenant. Verily, the covenant, will be questioned about'. The interpretation of Al Tabary of this verse is that 'he who does not fulfill his promise will be asked by Allah Almighty. Therefore, you should fulfill contracts amongst you, and amongst you and others'. MBGBYBKBG AlTabari (died 310 Hijra - corresponding to 922 AD), *Tfasier Altabari: Jame Albian An Tiwial Ai Alquran*, vol 7 (MM Shaker ed, Dar Almaarar, Egypt) 444.

an arbitrator's religion or faith. However, under the English anti-discrimination regulations, particularly the Equality Act 2010 (EA 2010),[682] the issue that arises is whether the parties can agree to restrict the selection of an arbitrator on the basis of religion (eg, the arbitrator must be a Muslim) when such an agreement might constitute the sort of religious discrimination that the EA 2010 prohibits. This will be discussed in detail in the section 'Freedom of Parties to Determine Additional Qualifications of the Arbitrator'.[683]

From the foregoing, it is concluded that in Saudi Arabia, SAL 2012 does not require an arbitrator to be of a particular religion, nor does the Quran or Sunnah. This is also the situation under EAA1996, where disputants are free to choose arbitrators of any faith.

1.2 Requirement Regarding Gender

Early Shariah scholars hold three views about whether it is permissible to appoint a woman as a judge or arbitrator. Most Sunni scholars (AlMaliki,[684] AlShafi'i[685] and AlHanbali[686]) are of the opinion that a judge or arbitrator should be a male. They base their view on two main premises: the Quranic verse that makes men in charge of women as 'maintainers',[687] and the saying of the Prophet (pbuh): 'Never will succeed such a nation that makes a woman their ruler'.[688]

AlHanafi scholars, however, believe women can be appointed to the judiciary to handle all cases except certain criminal matters known as *qisas* and *hudud*.[689] They base their opinion on the notion that if a person's testimony is admissible, then appointing that person to be a judge is acceptable. According to AlHanafi view, a woman's testimony is valid in all cases except *qisas* and *hudud*. Hence, a woman can be appointed a judge or arbitrator except

---

[682] Came into force on 1 October 2010.
[683] See page 133.
[684] Elish (n 256) vol 8, 256-58.
[685] Almawerdy (n 256) vol 6, 158.
[686] AlHanbali, *AlMubde'* (n 489) vol 10, 19; Aldawry (n 205) 216.
[687] *Surat Alnisaa,* verse 34.
[688] Al-Bukhari (n 209) vol 9, Book 88, Hadith 219 <https://sunnah.com/bukhari/92/50> accessed 25 January 2016.
[689] Two Arabic words, the first one *hudud* includes seven serious crimes, according to Shariah, which are murder, apostasy from Islam, theft, adultery, defamation (false accusations of paternity), alcohol drinking and *alharaba* (an Arabic word that means the emergence of an armed group to cause chaos and bloodshed and looting money and the attack on honour). *Qisas* is a kind of punishment in which the offender is punished equal to what he commits to the victim (retribution and retaliation), when meeting the requirements stated by Shariah. Mohammed Salam Madkoar 'Human Rights from an Islamic Worldview; An Outline of Hudud, Ta'zir and Qisas', Al-Muhajabah website <http://www.muhajabah.com/docstorage/hudud.htm> accessed 11/01/2017.

in those two types of cases.[690] Therefore, according to that view, women can be appointed in all international commercial arbitration matters.

The third view is that of Al Tabari,[691] Ibn Hazm[692] and Al Hasan Al Basri,[693] who believe that women can be judges in all cases, just as those scholars agree that a woman can be appointed as *mufti* (a Muslim scholar empowered to give Shariah opinions, called *fatawa*, covering the civil, political, commercial and religious spheres, among others).[694]

It seems that the third opinion is the most appropriate view at the present time, when education is accessible to both genders. Recently, Muslim women have become physicians, scientists, university professors and lawyers, to name just a few. Shariah does not object to women working in these professions. In fact, Shariah scholars encourage women to enter those fields. Hence, if a woman is allowed to treat a patient or issue decisions affecting the social order and human lives, there is nothing to prevent her from serving as an arbitrator, either individually or as a part of an arbitral tribunal.

Furthermore, as previously mentioned, women can be appointed *mufti,* according to early Sunni scholars, and the role of *mufti* is more important than that of arbitrator. The *fatwa* issued by *mufti* can be about important political and social issues that affect all members of the Islamic society. Commercial arbitration, on the other hand, affects mainly the commercial interests of the parties. Therefore, one can easily argue that from the perspective of Shariah, if a person is competent to dispense *fatwa*, then he or she can undoubtedly handle the less significant role of arbitrator. A question is raised regarding the evidence underlying the first two opinions of Shariah schools. Due to the aim of the study, the evidence of AlHanafi school will not be discussed, as it does not oppose the appointment of women as arbitrators in international commercial arbitration. The evidence of the majority of early Sunni scholars (AlMaliki, AlShafi'i and AlHanbali) will be discussed in respect to two points:

The first is the evidence based on the Quranic verse that men are in charge of women.[695] This verse does not concern taking jobs such as judge or arbitrator. Rather, it deals with

---

[690] Qazi Fazl Ullah, *Sharia And Politics* (Hund 2015) 210; Ibn Alhammam, *Fateh AlQadeer* (n 564) vol 7, 315-16.
[691] Ullah, *Sharia And Politics* (n 690) 211; AlHanbali, *AlMubde'* (n 489) vol 10, 19.
[692] Aldawry (n 205) 218.
[693] AlMagrebi (n 570) vol 6, 87-88.
[694] See generally DB Parkinson (ed), *Perspectives on Arabic Linguistics XXI* (John Benjamins Pub Co 2008) 115-119.
[695] *Surat Alnisaa,* verse 34.

family matters, according to Shariah as explained by the senior interpreters of Quran such as Ibn Kathir and AlTabari.[696] This is confirmed by the consensus among Sunni scholars regarding the permissibility of appointing women to most civil jobs such as physicians, engineers, teachers and legal advisors. Furthermore, as Judge Zaidan says, the preference expressed in the Quranic verse is not general; it does not set all men above all women. It means some men are better than some women, and some women are better than some men.[697] Therefore, women who meet the qualifications are eligible to be appointed to such positions.

The second point deals with the Prophet's saying (*hadith*) 'Never will succeed such a nation as makes a woman their ruler'. This saying applies to the leadership of the state rather than to the judiciary or arbitration.[698] It is not appropriate to generalise this saying, since it is limited to the specific matter of the leadership of the state. Moreover, even assuming that this saying is applicable at all times and without exceptions,[699] there remains a big difference between the job of an arbitrator and the responsibilities of civic leadership such as the state presidency. The president, according to Shariah, is the people's representative and is responsible for looking out for their interests,[700] while the arbitrator is constrained by the law and the terms of the parties' agreement.

It has been established that there are different views among early Shariah scholars concerning the appointment of women as judges and arbitrators. However, it is merely an *ijtihad* matter, which can accommodate more than one opinion, since it is based on presumptive and not definitive evidence. Neither the Quran nor Sunnah contains a clear provision regarding this issue. Thus some views express an absolute prohibition, while others require that the subject matter of the dispute not relate to *qisas* and *hudud*. A third view supports the absolute permissibility of such appointments.

Accordingly, the issue of allowing women to become judges or arbitrators is a matter that is based on the circumstances of each time and place, to be determined based on

---

[696] For example, H Ibn Kathir, *Tafsir Ibn Kathir* (A Al Arna'ut tr, Dar-us-Salam) <https://tinyurl.com/yceowrxu > accessed 31/05/2018; MBGBYBKBG AlTabari (died 310 Hijra - corresponding to 922 AD), *Tfasier Altabari: Jame Albian An Tiwial Ai Alquran*, vol 6 (ABA AlTurky ed, Hajr) 690-91.

[697] Dawood (n 256).

[698] Al-Bukhari (n 209) vol 5, Book 59, Hadith 709 <https://sunnah.com/bukhari/64/447> accessed 25 January 2016.MM Shalash, 'The Position of Islamic Jurisprudence from Women Acting as Judges' (2007) Journal of Studies Jordan University 1, 7-8.

[699] One of the Shariah's principles is that Shariah is valid and can be applied for all times.

[700] SAA Razwy, *A Restatement of the History of Islam and Muslims* (World Federation of KSI Muslim Communities Islamic Centre 1997) 267-69.

contemporary demands. Under the current circumstances, women are undoubtedly capable of occupying the position of an arbitrator in international commercial disputes.[701]

Not the former Saudi Arbitration Law nor its Implementing Regulations [702] nor the new Saudi Arbitration Law included a requirement that the arbitrator be a man. This is also the situation with EAA 1996.

It seems, however, that the current approach in Saudi Arabia still excludes women from occupying the position of arbitrator. Dr. Mohammad AlBejad said that 'Not mentioning the conditions of being a male in the Arbitration Law [1983] and its Implementing Regulations does not mean that the Law approves the possibility of appointing women as arbitrators'.[703] This position was based on the Quranic verse that men are in charge of women, as well as the Prophet's saying regarding female leadership of the state.[704] Dr. AlBejad added that the appointment of a female judge did not occur during the life of the Prophet and his companions, or at any other time in the course of Islamic history. These inferences are not valid in the context of legal or Shariah logic. It is not a principle of Shariah to use negative actions of the past as an argument. It is contrary to Shariah unless there exists an explicit provision in either the Quran or Sunnah that sanctions this kind of attitude.[705] Such a provision is nonexistent in this case.

In the United Kingdom, employment discrimination on the basis of gender is unlawful and contradicts public policy.[706] The principle also appears in Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF): 'The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex'.[707] The only exception is when a real material factor justifies differential treatment.[708] The question raised in the British context is whether the parties are free to agree to discriminate and consider only men for appointment as arbitrators. This will be clarified in the next section.

---

[701] Al Jarba (n 611) 82.
[702] For a different point of view, see for example, Ahdab and Ahdab (n 213) 39.
[703] AlBejad (n 409) 136 - 137.
[704] See page 117.
[705] For example, in verse 22 of *Surat AlAhzab*, the Quran criticizes Quraish for referring to the validity of what they were doing to the parents and grandparents without considering the evidence provided to them.
[706] Born, *International Commercial Arbitration* (n 304) 1381 & 1457.
[707] CPHRFF as amended by Protocols Nos 11 and 14 (opened for signature 4 November 1950, entered into force 03/09/1953) 213 UNTS 221. It was ratified by the UK on 8 March 1951.
[708] EA 2010, s 69.

In terms of actual practice in Saudi Arabia, there has not been any formal participation of Saudi women in the arbitration field. The list of names of arbitrators issued by the Saudi Ministry of Justice, based on Article 5 of the Implementing Regulations of the previous SAL 1983, did not include any female arbitrators.[709] This is so even though a Saudi woman is among the arbitrators on the list of Gulf Cooperation Council Commercial Arbitration Centre (GCAC),[710] which includes arbitrators recommended by the Commercial Industrial Chamber in Saudi Arabia in accordance with Article 11 of the GCAC's Charter and Arbitral Rules of Procedure 1993.[711] The issue should be resolved in Saudi Arabia via a clear legal provision that establishes that banning women from serving as arbitrators is unjustifiable sex discrimination, whether based on Shariah or the SAL 2012, and also is incompatible with the modern approach. A clear statement of law is needed because questions remain concerning the recognition and enforcement of an arbitral award when the arbitral tribunal includes a woman.

1.3 Possessing the Characteristic of *Adel*

The Arabic word *adel* (sometimes transliterated as *adil* or *adl*) has various meanings. The most common of these is 'equity' and fairness.[712] (Another noun form is *adalah*, acting equitably.) Moreover, Shariah jurists provide differing definitions of *adel*. These definitions address the person's relationship with Allah, and the following of his commands and avoidance of what he has forbidden. These are reflected in the arbitrator's behaviour and fairness, as Shariah scholars believe.[713]

Fisq (immorality) is the opposite of *adel,* and a person who is *fasiq* (the adjective form of *fisq*) is defined by Sunni jurists as a person who commits one of the major sins or who persists in a minor sin.[714] It is clear that the term *adel,* in *fiqh* terminology, is not a synonym

---

[709] Ministry of Justice, 'List of Arbitrators' <https://tinyurl.com/yd2b7bq5> accessed 31/05/2018.
[710] The GCAC, 'List of Arbitrators' <https://tinyurl.com/ydh3ofjg> accessed 31/05/2018.
[711] Charter and Arbitral Rules of Procedure 1993 of the GCAC, art 11.
[712] Maszlee Malik, *Foundations of Islamic Governance: A Southeast Asian Perspective;(Routledge Studies on Islam and Muslims in Southeast Asia* (Routledge 2016).
[713] For example, Al Baghdadi defines a person who is *adel* as one 'who is known for fulfilling his obligations, committing to what has been commanded and avoiding that which is forbidden by both religion and good manners'. NBA AAlshak, 'Aqidat Ahl AlSunnah Wa AlJama Fi AlSahaba AlKiram Radia Allah Ta'ala Anhom' (DPhil thesis, Islamic University in Madinah 2009) 949. Also, Ibn Najim defines *adalah* as 'avoiding both major sins and insisting on minor sins as well as avoiding what prejudices magnanimity'. Ibn Najim (n 642) vol 6, 284.
[714] Ibn Najim (n 642) vol 6, 284; ABSM AlQari, *Murqat AlMafatih Sharh Mashkat AlMasabih*, vol 6 (Dar AlFikr 2002) 2450.

for the terms 'justice,' 'honesty' or 'integrity', as some writers seem to think.[715] The term, rather, is characterized by certain Islamic qualities.

For example, drinking alcohol is considered a major sin among Muslim scholars and, hence, it is *fisq*, whereas it is not so in many other religions and societies. Thus a person who is considered non-*adel,* or *fasiq*, under Shariah is not necessarily regarded as such under other laws and religions. The term 'justice', as a legal concept, addresses whether arbitration or judiciary proceedings are conducted with fairness.[716] The question that arises here is Shariah's approach to the requirement of *adel* in the arbitrator.

The majority of AlHanbali scholars[717] and some of those of AlShafi'i[718] and AlMaliki[719] schools express the opinion that *adel* is required of both judges and arbitrators. They rely on the Quranic verse 6 of *Surat Al- Hujurat,* which does not approve the testimony or news of *fasiq* unless it is verified. They concluded that if a person's testimony is not acceptable, then his judgment should also not be acceptable. Therefore, according to these scholars, an arbitration award by *fasiq* would be void. A number of early Sunni scholars, including most of AlHanafi scholars,[720] argue that a person who is *fasiq* is not preferred as a judge or arbitrator, but if he is selected by both parties, then his decision should be enforced.[721]

Ahmed Ibn Hanbal (one of the senior scholars in Shariah in the 9th century and the founder of AlHanbali school) believes that the appointment of *fasiq* as a judge (a fortiori as an arbitrator) is permissible based on the principle of necessity.[722] This approach seems to be in touch with reality at the present time due to the difficulty of meeting the requirement of *adel* under Shariah. This is true whether in terms of enforcing international judicial decisions or international arbitral awards when the seat of arbitration is a state — whether non-Islamic or Islamic — that does not apply Shariah.

Adopting a different approach might aggravate conflicts between parties, as it would lead to disapproval of the final award issued by arbitrators who are considered competent

---

[715] Ahdab and Ahdab (n 213) 38.
[716] RKL Chung, 'The Rules of Natural Justice in Arbitration' (2011) Arbitration 167.
[717] AlHanbali, *AlMubde'* (n 489) vol 10, 19.
[718] Almawerdy (n 256) vol 16, 158-59.
[719] Elish (n 256) vol 8, 258-59.
[720] Ullah, *Sharia And Politics* (n 690) 210; ABMBM AlMawselli AlHanafi*, AlEkhtiar Lita'lil AlMukhtar*, vol 2 (Dar AlKhair 1998) 344.
[721] This is because they do not require a witness to be adel. Ullah, *Sharia And Politics* (n 690) 210; AlMawselli AlHanafi (n 720) vol 2, 344.
[722] AlBahoti (n 634) vol 6, 278-79.

based on the law of the seat of arbitration. Furthermore, the disputants do not benefit from the apparent righteousness of the arbitrator as much as they do from his knowledge, honesty and impartiality. Such qualities are assumed to exist in arbitrators, even in the absence of *adel*, according to the definitions of the Shariah jurists.

Therefore, meeting the requirement of *adel* in its linguistic meaning (equity) might be sufficient for an arbitrator, whether the person is Muslim or religiously neutral, particularly in light of the fact that the aim of Shariah is to end up with a fair decision. That *adel* is not limited to a particular party or religion was confirmed by the Prophet Mohammed when he suggested that his companions migrate to *Habesha* (Abyssinia) because of the hardships and oppression they faced during the first stages of his missionary work (*da'wa*). Prophet Mohammed (pbuh) said to them: 'Set out to the land of Abyssinia. There is a king [and he was Christian] where no one suffers injustice in his country'.[723]

Consequently, some Shariah scholars of AlHanbali school,[724] who believe the requirement of *adel/adalah* to be a major condition for both judge and arbitrator, now interpret the requirement to mean neutrality and honesty.

SAL 2012 does not expressly require *adalah* of the arbitrator. Instead, the law requires good conduct and reputation,[725] which constitute elements of *adalah* in Shariah. In this respect, a question arises about the meaning of good conduct and reputation in Saudi law, as this requirement is broad and could vary from one place to another.[726] There also is the issue of whether it is even necessary to clear up whether good conduct and reputation should be seen as synonymous with the concept of *adel/adalah* in Shariah.

Neither SAL 2012 nor its Implementing Regulations clarify the issue. Therefore, one can turn to the Implementing Regulations of the previous Saudi Arbitration Law, which included the same requirement.[727] Under those Regulations, a person can be considered of good conduct if he has not been 'sentenced to *Had* or *Ta'zir*, to penalty for a crime of

---

[723] AMMAMAHGHB AlAiny (died: 855 Hijra - corresponding to 1451), *Omdat Alqari Shareh Sahih AlBuqari*, vol 7 (Dar Ehia' AlTurath AlArabi, Beirut) 268. See also PA Bhat, 'The Makkan Phase of Sīrah: A Study from the Standpoint of Pluralism' (2013) 6(2) Islam and Muslim Societies, A Social Science Journal 69, 78 <https://tinyurl.com/y7flafw7> accessed 31/05/2018.
[724] Dawood (n 256).
[725] SAL 2012, art 14.
[726] For example, drinking alcohol is contrary to the good conduct and reputation in Saudi Arabia, while it is not so in Britain and most other countries.
[727] SAL 1983, art 4.

dishonor, or been dismissed from a public position following a disciplinary order'.[728] From this, it is clear that the requirement of good conduct is close to the requirement of *adalah* in Shariah but is not its equal. This is because committing minor sins and persisting in them, which are considered acts contrary to *adalah* under Shariah, do not always constitute offenses in the eyes of the law. Most of these do not call for the issuance of a judicial decision with *ta'zir* or dismissal from public position in Saudi Arabia.[729] Therefore, what contradicts *adalah* under Shariah does not necessarily contradict good conduct in Saudi Arabia.

One could also examine the motivations of the legislators. By refraining from mentioning *adalah* in the law, the Saudi legislature expressed its intent. If *adalah* were meant to be the same as good conduct and reputation under Shariah, then the lawmakers would clearly say so, as they did in the Judiciary Law 2007 (SJL 2007).[730] That law clearly states that a judge must fully meet the requirements of Shariah.[731]

In practice, good conduct is presumed in the arbitrator, unless the contrary is proved by the party who claims otherwise.[732] Should the contrary be proved, the appointment of the arbitrator is to be nullified in keeping with the Saudi Arbitration Law, which in turn exposes the arbitral award to a challenge. There arises a question here concerning whether the arbitrator in international arbitration must be of good conduct and reputation, applying the criteria of the Saudi Arbitration Law.

This issue should be addressed by adhering to the criteria of good conduct under whatever nation's law governs the arbitrator. If the arbitrator is a Saudi national, then the criteria of Saudi law are to be applied, and if the arbitrator is from another state, then that state's criteria are to be applied. This is in keeping with the aim of the Saudi legislature, which is that the process results in a fair and correct award. Therefore, it makes sense to apply the law of the state of the arbitrator since it would be a less contentious, more impartial and more appropriate barometer of the good conduct of its citizens.

---

[728] IRSAL 1985, art 4.

[729] For example, smoking tobacco, which is considered one of the minor sins according to most contemporary Shariah scholars (eg, Ali Gomaa (the eighteenth Grand Mufti of Egypt), Shawki Ibrahim Allam (the nineteenth Grand Mufti of Egypt), Ibn Baz and Ibn Uthaymeen (members of the Council of Senior Scholars in Saudi Arabia)), is not considered a crime that requires a judicial decision in Saudi Arabia.

[730] Issued by Royal Decree No M/78 dated 19/09/1428 Hejra (corresponding to 1/10/2007) <http://adl.moj.gov.sa/ENG/attach/39.pdf> accessed 22/08/2013.

[731] SJL 2007, art 31(c).

[732] Mhaidib I Al-Mhaidib 'Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kingdom of Saudi Arabia' (DPhil thesis, University of Edinburgh 1997) 153.

1.4 Legal Capacity (Age and Mental Ability)

Early Shariah scholars agree that a judge or arbitrator should at least have reached puberty and should be mentally sound.[733] This is based on the principle that the legal actions of immature and mentally ill people are not valid without the authorisation of their guardians, [734] and thus are a fortiori not valid when they affect other people. Some AlMaliki scholars argue against the legal age constraint, however, favouring the recognition of a judgment or award made by a discerning child.[735]

In Saudi Arabia, the new arbitration law, [736] like the previous one,[737] states that full legal capacity is a requirement for an arbitrator. Capacity in this context means having reached the age of maturity, possessing full mental ability and not having been interdicted for bankruptcy.[738] Thus, minors, people with mental deficiencies as well as bankrupts, are barred from being appointed arbitrators.

1.5 Knowledge of Shariah and Law

Most of the early Sharia scholars of the four Sunni schools agree that knowledge of Shariah is a requirement for both the judge and the arbitrator.[739] They differ, however, about the degree of knowledge required. AlMaliki, [740] AlHanbali[741] AlShafi'i[742] and some AlHanafi scholars[743] believe a judge and arbitrator should be *mujtahid* (an expert in Shariah 'who uses his reasoning to discover the legal assessment of a case for which there is no explicit stipulation in Quran and Sunnah')[744] in order to be able to issue a fair and correct judgment based on the sources of Shariah (Quran, Sunnah, *ijma'* and *qiyas*). This position is based on

---

[733] Mohammed, *AlBaher AlRaeq* (n 220) vol 7, 24; Baamir, *Shari'a Law* (n 23) 79.

[734] This is based on the *hadith* of Aishah, in which the Prophet Mohammad (pbuh) said: 'The pen has been lifted [ie, there is no legal responsibility] from three: … from the minor until he grows up, and from the insane person until he comes to his senses'. AAMBYBAA Al-Qazvini, *Sunan Ibn Majah*, vol 3, Book 10, Hadith 2041 <https://tinyurl.com/yy9bfspg> accessed 8 February 2016. Almawerdy (n 256) vol 16, 154-56.

[735] Aldawry (n 205) 222-23. See also page 89.

[736] SAL 2012, art 14.

[737] SAL 1983, art 4.

[738] IRSAL 1985, art 4.

[739] Prophet's *hadith* 'judges are of three types', IHAEMIE At-Tirmidhi, *Jami' at-Tirmidhi,* vol 3 (Abu Khaliyl trs, Daruussalam 2007) 121. See page 35. AlHanbali, *AlMubde'* (n 489) vol 10, 19; Ullah, *Sharia And Politics* (n 690) 211; Ibn Najim (n 642) vol 6, 289-90; Elish (n 256) vol 8, 259.

[740] Ullah, *Sharia And Politics* (n 690) 211; Elish (n 256) vol 8, 259.

[741] Ahdab and Ahdab (n 213) 38; AlHanbali, *AlMubde'* (n 489) vol 10, 19.

[742] Baamir, *Shari'a Law* (n 23) 79.

[743]Ahdab and Ahdab (n 213) 38; Ibn Najim (n 642) vol 6, 289-90.

[744] O Arabi and others (eds), *Islamic Legal Thought: A Compendium of Muslim Jurists* (Brill 2013) 160.

the narration of Mu'adh Ibn Jabal when he was sent to Yemen by the Prophet Mohammed.[745] On the other hand, there are those who maintain that it is sufficient for a judge to have knowledge of the provisions of Shariah, even if this knowledge is not sufficient to make him a *mujtahid*. Adherents of this view believe that it is permissible for a judge or arbitrator to make decisions on the basis of *fatwa*.[746]

The two positions discussed above demonstrate the prevailing belief that knowledge of Shariah is an indispensable requirement. Scholars who support these two positions also adhere to the tenet that the most knowledgeable candidate should be appointed, as 'obligations are conditional with the ability to do them'.[747]

The difference between the two schools of thought is that those who subscribe to the first position believe that a judgment is a nullity if a non-*mujtahid* was selected as the judge or arbitrator when a *mujtahid* was available for the job. This is contrary to the second school of thought, which holds that anyone who has knowledge of Shariah can be appointed as judge or arbitrator and that the resulting decision is valid and enforceable.

That latter school of thought seems to be more appropriate because commercial arbitration cases — particularly international ones — have become more complicated, requiring expert arbitrators who have specialised knowledge in areas other than Shariah. This does not mean that it is not important to consider the provisions of Shariah, but rather that for the arbitral tribunal to reach a decision compatible with Shariah, the tribunal or the parties may seek the opinion of outside experts in Shariah or appoint one to the panel at any stage of the arbitration process.

SAL 2012 explicitly states that the arbitrator must have at least a university degree in Shariah or legal studies whenever the arbitration is being conducted by a sole arbitrator. When the tribunal consists of more than one arbitrator, the tribunal's chairman must meet that educational requirement.[748]

---

[745] The Prophet Mohammed (pbuh) sent Mu'adh to Yemen, so he (pbuh) said: "'How will you judge?' He said: 'I will judge according to what is in Allah's Book.' He said: 'If it is not in Allah's Book?' He said: 'Then with the Sunnah of the Messenger of Allah (peace be upon him).' He said: 'If it is not in the Sunnah of Messenger of Allah (peace be upon him)?' He said: 'I will give in my view'. He said: 'All praise is due to Allah, the One Who made the messenger of the Messenger of Allah suitable'". IHAEMIE At-Tirmidhi, *Jami' at-Tirmidhi,* vol 3 (Abu Khaliyl trs, Daruussalam 2007) 124.

[746] Ibn Najim (n 642) vol 6, 289-90.

[747] Elish (n 256) vol 8, 263-64.

[748] SAL 2012, art 14.

It is clear that the Saudi legislature does not adopt the majority approach of early Shariah scholars, which demands that the arbitrator be knowledgeable in Shariah, whether that knowledge is at the *ijtihad* level or not. Article 14 of SAL 2012 treats equally a degree in Shariah and a degree in legal studies, without specifying the type of legal studies or the source of the degree. This means that the law would include individuals who do not know Shariah. Contrary to the situation under the former Arbitration Law, which was more correspondent to the approach of Shariah. Article 3 of the Implementing Regulations of the old law stated, 'In the case of more than one arbitrator, the Chairman of the arbitration panel shall have knowledge of Shariah rules, commercial regulations, customs and traditions applicable in Saudi Arabia.'

While this approach is in line with the growing push in many countries to require arbitrators to be lawyers,[749] it seems to be an inappropriate requirement. This is because a degree — or even experience — in law or in Shariah is not the main determinant of the success of the arbitral process. As Redfern and Hunter write: 'There is no sense in appointing an experienced lawyer ... if that experience does not include practical experience of arbitration'.[750] International commercial arbitration requires experience in international arbitration and in the subject matter that is at the heart of the dispute. Those types of expertise do not necessarily attach themselves to a university degree in Shariah or law. Specialists in science and technology, for example, are often the best-qualified arbitrators for a highly technical dispute, even though they do not have degrees in Shariah or law.[751]

The United Kingdom is one of the most successful countries in the field of arbitration, and it has many arbitrators who are not lawyers, but instead are specialists in such areas as shipping, engineering or construction.[752]

Thus it can be concluded that arbitral proceedings do not suffer where the laws do not require the arbitrator to be a lawyer (such as EAA 1996) or where such requirements are not strictly construed or enforced (such as the Spanish Arbitration Act 2003).[753]

---

[749] Blackaby (n 609) 259.
[750] ibid 263.
[751] Al-Mhaidib (n 732) 143.
[752] DJ Sutton and others, *Russell on Arbitration* (23rd edn, Sweet & Maxwell 2007) 119.
[753] Spanish Arbitration Act 2003, art 15(1) states 'Unless otherwise agreed by the parties, in arbitration proceedings which are not to be decided according the principles of equity, and the award is to be made by a sole arbitrator, the person fulfilling that role must have a law degree. When the arbitration proceedings are to be decided by three or more arbitrators, at least one of them must have a law degree', Act No 60/2003,

1.6 Physical Abilities

Early Shariah scholars disagree on whether a judge or arbitrator must be able to see, hear and talk, while they agree that it is permissible to appoint a judge or arbitrator who has other physical disabilities. Most AlHanbali,[754] AlShafi'i[755] and AlMaliki[756] scholars believe that a judge or arbitrator should be able to hear, see and talk. They rely on the premise that someone who does not have the ability to see, hear or talk cannot arrive at an accurate judgment.

They find partial hearing and partial sight acceptable so long as the partial disability does not prevent the judge or arbitrator from performing his job. Such a judge or arbitrator is presumed to be capable if he can see and hear well enough to determine who is talking and what is being said. Some AlShafi'i scholars[757] are of the opinion that it is permissible for a person who cannot talk to be appointed if he could be understood through sign language.

Some AlMaliki[758] scholars believe that it is preferred, but not necessary, for the judge or arbitrator to have all of his senses intact. Some AlShafi'i[759] and AlHanbali[760] scholars as well as Ibn Hazm[761] share that view regarding the sight disability. Their view is based on two bits of evidence: First, the Prophet (pbuh) appointed Ibn Oumm Maktum, who was blind, as the president of Madinah while the Prophet was absent, and resolving disputes between litigants was among the duties of the president at that time.[762] Second, it is permissible for a blind person to give testimony; accordingly, it is permissible for him to be a judge or arbitrator.[763]

This approach was adopted in both SAL 1983 and SAL 2012, which have no restrictions on the appointment of an arbitrator with physical disabilities. That position is echoed in the SJL 2007. In practice, Saudi Arabia throughout its history has had effective judges who were blind. [764]

---

with its amendments on 6 October 2015.
[754] AlHanbali, *AlMubde'* (n 489) vol 10, 19.
[755] Almawerdy (n 256) vol 16, 155-56.
[756] AlMagrebi (n 570) vol 6, 100-101.
[757] Almawerdy (n 256) vol 16, 156.
[758] AlMagrebi (n 570) vol 6, 100-101.
[759] Almawerdy (n 256) vol 16, 156.
[760] Baamir, *Shari'a Law* (n 23) 81.
[761] ibid 318-19.
[762] IHADS Ibn Ash'ath, *Sunan Abi Dawud*, vol 3 (HATZ 'All Za'l ed, N A-l Khattab (tr), Maktaba Dar-us-Salam 2008) 454.
[763] See page 191.
[764] For example, Abdul Aziz Ibn Baz.

In Britain, it was long unclear whether an arbitrator could have such disabilities, because there was no definitive statutory or case law on the issue. The question was answered by the Arbitration Act 1996, which states that a disabled person can be appointed, but can be removed under Section 24 of EAA 1996 if the disability prevents the arbitrator from performing the job.[765]

1.7 Independence

Most arbitration laws, on both the national and international levels, pay great attention to the issue of arbitrator independence,[766] which refers to the absence of a social or financial relationship between the arbitrator and any of the parties or their representatives.[767]

Under Shariah, most early scholars of Sunni schools — specifically AlShafi'i,[768] AlMaliki[769] and AlHanafi[770] — believe it is not permissible for one of the litigants to be the judge or arbitrator except when the award is in favour of the other party, in which case they see the decision as a form of admission.[771]

In addition, it is not permissible to choose a judge or arbitrator who is a relative or agent of one of the parties. Proponents of this view rely on the general rule that 'It is not permissible for a judge to rule for those whose testimony is not accepted' as it raises doubts about his impartiality.[772] For example, a parent's testimony for his or her child is not admissible, thus it also is inappropriate for a judge or arbitrator to be a parent of one of the parties. Some AlShafi'i scholars also believe that there should be no pre-existing enmity or dispute between the arbitrator and any of the parties.[773]

In Saudi Arabia, SAL 2012 states that an arbitrator should have no vested interest in the dispute.[774] In addition, the law states that an arbitrator is prohibited from considering a case

---

[765] R Merkin and L Flannery, *Arbitration Act 1996* (5th edn, Informa 2014) 89.
[766] This is because without independence, the issued decision would lack impartiality. LJE Timmer, 'The Quality, Independence and Impartiality of the Arbitrator in International Commercial Arbitration' (2012) Arbitration 348, 354-55.
[767] L Trakman, 'The Impartiality and Independence of Arbitrators Reconsidered' (2007) Int ALR 124, 227.
[768] Almawerdy (n 256) vol 16, 139-140.
[769] Elish (n 256) vol 8, 336.
[770] Ibn Abdeen (n 256) vol 5, 442.
[771] Baamir, *Shari'a Law* (n 23) 82.
[772] AlShafi'i school limits the family relationship to parenthood, childhood and the spouse, whereas it is admissible for relatives other than those; for example, brothers, sisters or their children. Almawerdy (n 256) vol 16, 140.
[773] Baamir, *Shari'a Law* (n 23) 82.
[774] SAL 2012, art 16(1).

for the same reasons a judge would be prohibited.[775] Based on Article 94 of the Law of Procedure Before Sharia Courts 2013 (SLPBSC 2013),[776] there are several situations in which a judge is prohibited from hearing a dispute. The first is when there is a family or in-law relationship between the judge and one of the litigants. The second is when there is a standing dispute between the judge or his wife and one of the litigants. The third is when an interest in the outcome of the dispute vests in the judge, his relatives, his in-laws, or those for whom he or one of his relatives is trustee or guardian. Finally, the judge is disqualified if he has made a *fatwa*, has 'litigated for one of the litigants in the case, or written about it, even if it were before he joined the judiciary', has participated in the case as an expert or witness, or has investigated in it.

Thus, under SAL 2012, these same situations affect the arbitrator's ability to handle a particular dispute. The question arises whether the arbitrator must be disqualified when all parties know about his potential conflict of interest but consent to his appointment anyway. Under Article 95 of the SLPBSC 2013, an action or decision of a judge is null and void whenever one of the situations enumerated in Article 94 exists, even when the litigants do not object. This is true even if the Court of Appeal has approved the judgment.[777] Therefore, it could be said that the parties being aware of the lack of independence of arbitrator or even accepting it due to one of these situations mentioned in Article 94 does not mean that the parties lose or waive their right to challenge the arbitrator's competence.

This is opposite to EAA 1996, which does not mandate that the arbitrator be independent. The issue was considered by the DAC,[778] but the committee decided not to address it because it could lead to 'endless argument'[779] and 'there may well be situations in which parties desire their arbitrators to have familiarity with a specific field, rather than being entirely independent'.[780] Nevertheless, it is possible to challenge the independence of an arbitrator under EAA 1996, but only if there are justifiable doubts about the arbitrator's impartiality.[781]

---

[775] SAL 2012, art 16(2).
[776] Issued by the Royal Decree No M/1 dated 22/01/1435 Hijra (corresponding to 25/11/2013 AD).
[777] SLPBSC 2013, art 95.
[778] G Carey, 'Impartiality of Arbitrators: English and Irish Law Contrasted' (2006) Int ALR 156, 157.
[779] Departmental Advisory Committee, *1996 Report on the Arbitration Bill* (February 1996) 13(3) Arbitr Int 275, para 102.
[780] ibid para 103.
[781] ibid para 104.

Impartiality is the absence of a bias for or against any of the disputants.[782] The importance of impartiality is reflected in the principle that 'Justice should not only be done but should manifestly and undoubtedly be seen to be done'.[783] Under English law, there are two tests of impartiality; the first is the 'real danger' test, and the second is the 'reasonable observer' test.[784] The former refers to when a person might not have a fair proceeding, and the latter refers to when there is a reasonable suspicion that a fair proceeding is not possible.[785]

The difference between the concepts of 'impartiality' and 'independence' is also relevant. The former is more subjective than the latter. Therefore, parties are in a better position to ascertain the independence of an arbitrator at the beginning of the process, whereas impartiality, or the lack of same, is likely to become manifest only after the process is under way.[786]

The Saudi law provides a broad interpretation of independence to the point of exaggeration. For example, the in-law relationship is considered to have an impact on the independence of an arbitrator even after the marriage has ended.[787] Whereas under EAA1996, there is no restriction on the selection of an arbitrator or any legal basis to challenge the arbitrator merely on the ground of lack of independence, so long as this lack of independence does not raise justifiable doubts about his impartiality. Between these extremes, Shariah has adopted the middle ground, embracing the criterion of 'accepting testimonial', which means that the only relationships presumed to affect independence are those that affect the approval of testimony. This reduces disputes about the removal of an arbitrator because Shariah, unlike EAA 1996, clearly states what constitutes a lack of independence, which reduces the risk of nullification of an award.

1.8 Conclusions and Findings

Based on the foregoing, it is clear that the English act does not include any general requirement that must be met in the appointment of an arbitrator. Even independence is not

---

[782] See generally Oxford Dictionary, 'impartial' <https://tinyurl.com/yckwlc28> accessed 22/08/2013.
[783] *R v Sussex Justices Ex p McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ).
[784] *R v Gough* [1993] AC 646.
[785] ibid 653.
[786] D Hascher, 'Independence and Impartiality of Arbitrators: 3 Issues' (2012) 27 Am U Int'l L Rev 789, 792.
[787] Article 94 (2) of the Implementing Regulations 2014 of Law of Procedure Before Sharia Courts 2013 (IRLPBS 2014), issued by the decision of the Minister of Justice No 39933 Dated on 19/05/1435 Hejra, (corresponding to 21 March 2014).

necessarily required unless the lack of independence raises justifiable doubts about the arbitrator's impartiality. On the other hand, SAL 2012 specifies four strict qualifications that the arbitrator must meet: full legal capacity, good conduct, a university degree in Shariah or law,[788] and independence.[789]

Under Shariah, there is a divergence of early scholars' opinion about the qualifications that a judge must meet and whether an arbitrator must possess the qualifications required of a judge. These opinions are based merely on *ijtihad*, not on a clear provision in the main sources of Shariah. Therefore, some scholars believe that the arbitrator need only be Muslim, while others call for stricter requirements.

And then there is the reality of the demands of international commercial arbitration. In the context of the two main sources of Shariah, there is an alignment of the requirements for an arbitrator in international commercial arbitration today: independence, *adalah* (neutrality and honesty) and mental ability. These are the core qualifications based on Shariah, and they are acceptable to international arbitration. Other requirements proffered by the four schools can be argued as follows:

The requirement that the arbitrator be a Muslim when either party is a Muslim is not obligatory because of the doctrine of public need. As for gender, according to AlHanafi, Ibn Hazm,[790] and Al Tabari,[791] there is no discrimination between the two genders in occupying the position of an arbitrator. If this was true when women were less educated, it is even truer now, as many contemporary Shariah scholars concur.[792] The knowledge of Shariah – *ijtihad* – that is a consideration when the arbitral award needs to be compatible with Shariah can be accomplished through the assistance of a Shariah expert, and not necessarily by the arbitrator.[793] In regard to physical ability, the actual experience in Islamic countries such as Saudi Arabia proves that full physical capability is not required for an arbitrator or even a judge. Therefore, Shariah can be seen as embracing the modern approach, like EAA 1996, without prejudice to any provision of the main sources of Shariah.

---

[788] SAL 2012, art 14.
[789] SAL 2012, art 16.
[790] Aldawry (n 205) 218.
[791] AlHanbali, *AlMubde'* (n 489) vol 10, 19.
[792] For example, Alkhamees (n 18) 260.
[793] This is based on the Shariah approach that it is permissible for a judge to rule based on *fatwa*. This means that an arbitrator can issue the award based on *fatwa* as well as on the opinion of an expert in Shariah. See page 126.

2. Freedom of Parties to Determine Additional Qualifications of the Arbitrator

Based on contract principles, most common law and civil law jurisdictions allow the parties to select their arbitrator so long as the qualifications, if any, stipulated by the applicable arbitration law are respected.[794] The arbitration agreement, therefore, can specify qualifications for the arbitrator, either explicitly or via reference to the rules of an institution that sets standards for arbitrators.[795] Such requirements might take a positive form (eg, the arbitrator must have a particular linguistic capability, must be experienced in a particular field, or must practice a particular religion). Or it could take a negative form (eg, the arbitrator must not be of the same nationality as the parties, or the arbitrator must not be a lawyer).

The question that arises here is whether the parties have unlimited freedom to set the qualifications for the arbitrator. In principle, this freedom is not unlimited, as the parties should not set standards that contravene anti-discrimination laws of the state that is the seat of arbitration or seat of enforcement. Otherwise, the arbitration agreement could be considered void as it violates the public policy.

Shariah has no provisions that prohibit discrimination based on any ground in private agreements. Therefore, the freedom of arbitration parties to agree on any qualification of an arbitrator is unlimited so long as the requirements do not contradict those stipulated by early Shariah scholars. This is true because of the general principle of freedom of contract in Shariah, as well as the Islamic legal maxim that 'The norm in regard to things is that of permissibility',[796] which means that anything is permissible unless a legal text forbids it.

In the Saudi system, there is also no law or regulation that forbids discrimination in the private sector; therefore, Shariah governs the issue.

The English situation is different but quite unclear. In the English system, the Equality Act 2010[797] replaced several anti-discrimination statutes, including the Sex Discrimination Act 1975, Disability Discrimination Act 1995 and Employment Equality (Religion or Belief) Regulations 2003 (EERBR 2003).[798] The EA 2010 bans discrimination in employment and the workplace on the basis of 'protected characteristics': religion or belief,

---

[794] Born, *International Commercial Arbitration* (n 304) 1378-79.
[795] Sutton and others (n 752) 121.
[796] MH Kamali, *Shari'ah Law: An Introduction* (Oneworld Publications 2008) 146.
[797] Came into force on 1 October 2010.
[798] Came into force on 2 December 2003.

age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race, colour, ethnicity or nationality, and sex and sexual orientation.[799] Under the act, it is unlawful for employers to discriminate against employees or potential employees based on any of the protected characteristics. The act applies to 'employment under [a contract of service] … or a contract personally to do work'.[800] However, discrimination on the basis of a protected characteristic can be lawful if the employer demonstrates that the discriminatory requirement is a 'proportionate means of achieving a legitimate aim'.[801]

The question that arises here is whether the contract between arbitration parties and the arbitrator is an employment contract under English law. In other words, is the relationship between the arbitrator and the parties an employment relationship governed by the EA 2010.

This question was the core issue in *Jivraj v Hashwani*[802] before the English courts. In this case, the parties agreed to refer any dispute concerning their joint venture, which was governed by English law, to arbitration. The arbitration agreement provided that the arbitral tribunal should be composed of three arbitrators, all of whom should be from the Ismaili, the second largest Shia community.[803] The defendant, however, appointed a retired non-Ismaili judge as an arbitrator, arguing that the religious restriction contravened regulation 6(1) of the EERBR 2003 and was therefore unlawful. The defendant's position prevailed in the Court of Appeal, but not in the Supreme Court.

The Court of Appeal unanimously held that the contract with the arbitrator, as person who provides services, falls under the definition of 'a contract personally to do any work',[804] and thus 'is a contract of employment within the meaning of …the Regulations'.[805] The court, therefore, unanimously ruled that the arbitration agreement was void, as it constituted unlawful discrimination based on religion.

The Supreme Court, however, reversed the Court of Appeal's decision, and upheld the decision of the First Instance Court that the arbitration agreement was valid. The Supreme Court held that the relationship between an arbitrator and the arbitration parties is not an

---

[799] EA 2010, pt 2 ch 1.
[800] EA 2010, s 83(2). See also EERBR 2003, reg 2 (3). See also *Jivraj v Hashwani* [2011] UKSC 40, 1885.
[801] EA 2010, sch 9(pt 1).
[802] *Jivraj* (n 800).
[803] ibid 2.
[804] *Hashwani v Jivraj* [2010] ICR 1435, 1443.
[805] ibid 1444.

employment relationship.[806] The court rightly noted that 'Although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties'[807] and therefore the regulations concerning employment discrimination do not apply to 'the selection, engagement or appointment of arbitrators'.[808]

The majority of the justices further asserted that even if the arbitrator is considered an employee and the parties are employers, as held by the Court of Appeal,[809] the parties' requirement to resolve their dispute through a person of a particular religion or belief (a member of the Ismaili community) could be regarded as a 'legitimate and justified' requirement.[810]

The decision of the Supreme Court has been criticised by many legal writers, who complain that it was so imprecise that its impact could extend to solicitors, doctors, plumbers and the like.[811] This fear, however, seems exaggerated, as an arbitrator is not like other self-employed workers for several reasons. These include the fact that the arbitrator is not supposed to receive any instructions from the parties (as the court pointed out),[812] that an arbitrator's duty is to reach a fair decision without fear or favour, and that none of the parties could unilaterally terminate the arbitrator.

An issue arises here is how the courts would treat an arbitration agreement that includes a restriction based on a protected characteristic other than religion or belief. Considering Article 4 of the European Council Directive 2000/78/EC,[813] Schedule 9 (part 1) of EA 2010 and the holding in *Jivraj v Hashwani*, [814] one can conclude that such a restriction would pass muster if the restriction has a genuine nexus with the matter in dispute.

In any event, many UK court decisions confirm the freedom of the parties to place

---

[806] *Jivraj* (n 800) 23.
[807] ibid 1889.
[808] ibid 1891.
[809] *Hashwani* (n 804) 1443-44.
[810] *Jivraj* (n 800) 1897.
[811] R Davies, 'A Line Drawn in the Right Place' (2013) LQR 1,1-2. See also R Buxton, 'Discrimination in Employment: the Supreme Court Draws a Line' (2012) LQR 1, 1-2; R Mina and P Charles, 'UK: The Overshadowed Issues Arising from Jivraj v Hashwani' (2012) GAR <https://tinyurl.com/ybcyk9ou> accessed 13/08/2013.
[812] *Jivraj* (n 800) 45.
[813] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
[814] *Jivraj* (n 800) 1897.

restrictions on the selection of an arbitrator (eg, the arbitrator must be a 'commercial man',[815] a UK resident,[816] or a 'disinterested executive official of insurance or reinsurance companies'[817]).

3. Conclusion

It is clear from the foregoing that the extent of the parties' freedom to select an arbitrator under Shariah, the SAL 2012 and the EAA 1996 is widely different. Under Shariah, two situations must be distinguished: first, when one party is a Muslim and, second, when both parties are non-Muslims. If parties to arbitration are non-Muslims (ie, religiously neutral), Shariah grants them absolute freedom to choose an arbitrator as they deem appropriate. If one party is a Muslim, there are two main attitudes, according to the early scholars of the four Sunni schools.

Most early Sunni scholars believe that certain requirements must be met by an arbitrator: the arbitrator should be a Muslim male with legal capacity (except for scholars of AlMaliki school, as they believe it is permissible for the discerning child to be an arbitrator), who is independent, knowledgeable about Shariah, *adel,* and physically able (able to see, hear and talk). On the other hand, however, some early Shariah scholars believe an arbitrator should meet only three requirements: Muslim, independence and legal capacity.

It is also clear from the foregoing, however, that all of these requirements adopted by early Shariah scholars are based merely on *ijtihad* that does not rely on explicit provisions of the main sources of Shariah (Quran and Sunnah). This *ijtihad*, like other *ijtihadat*, is supposed to adapt to the changing circumstances of each era, including people's changing needs. Accordingly, this chapter has demonstrated that the only qualifications that can limit the freedom of arbitration parties in accordance with the Quran and Sunnah are independence, *adalah* (neutrality and honesty) and mental ability. As for other qualifications mentioned by early Shariah scholars, there is no justification for imposing these on the parties to international commercial arbitration in modern times, nor does the Quran or Sunnah include a provision that imposes any of these qualifications.

---

[815] *Rahcassi Shipping Company SA v Blue Star Line Ltd* [1966 R No 3574]; *Pando Compania Naviera SA v Filmo SAS* [1975] QB742.
[816] *Jungheim, Hopkins & Co v Foukelmann* [1909] 2 KB 948.
[817] *Pan Atlantic Group v Hassneh Insurance Co of Israel Ltd* [1992] 2 Lloyd's Rep 120.

The position of the new Saudi arbitration law is not consistent with the attitude of Shariah scholars. On one hand, the SAL 2012 stipulates only two of the qualifications expressed by most early Shariah scholars (independence and legal capacity). On the other hand, the law stipulates two additional qualifications that are not mentioned by Shariah scholars (a university degree in Shariah or law for a sole arbitrator or chairman of the tribunal, and good conduct and reputation). Therefore, contrary to the assertion of some contemporary writers that the Saudi courts may consider the qualifications stipulated by most early Shariah scholars, it is clear that the intention of the Saudi legislature is not to adopt the attitude of Shariah. Otherwise the legislature would not adopt only two of the qualifications agreed upon by most Shariah scholars, and at the same time add qualifications not mentioned by those scholars.

In stark contrast to Shariah and the SAL 2012, the EAA 1996 is silent about the qualifications of an arbitrator. The only limitation that can be inferred from the EAA 1996 is the need to obtain approval from the Lord Chief Justice when the chosen arbitrator is a judge of the Commercial Court or Technology and Construction Court of England and Wales. Even the restrictions that prohibit discrimination under English anti-discrimination laws, in accordance with the attitude of the Supreme Court in the *Jivraj* case, do not extend to the freedom of parties to select their preferred arbitrators.

Consequently, it can be said that the freedom of arbitration parties to select an arbitrator under the approach of most early Shariah scholars is narrower than under Saudi law, whereas that freedom under the English system is not merely wider, but there seem to be no restrictions on the parties' freedom in this regard. It is no accident that it is under the English system that arbitration has proved most successful. This is largrly because the selection of the arbitrator is 'strategically a key for a successful [process and] outcome of the arbitration'.[818] Elimination of the statutory obstacles that prevent the selection of a suitable arbitrator (whether these obstacles relate to religion, gender or certain qualifications and experiences) clears the way for the appointment of the appropriate decision maker (arbitrator) for, *inter alia*, the subject matter of the dispute and the selected substantive and procedural law. Practitioners know that '[i]nadequate arbitrators may turn the arbitration into a

[818] Draetta, 'The Role of In-house' (n 619) 388.

gamble'.[819] The next chapter will address the extent of the parties' freedom in the three systems under study to choose the substantive law and procedural rules that the arbitrator and the parties must follow during the arbitration process.

[819] ibid 388. See also Ugo Draetta, *Behind the Scenes in International Arbitration* (Juris 2011) 42.

Chapter VII:
Freedom of Arbitration Parties to Determine Substantive and Procedural Law

As indicated in the previous chapter, substantive and procedural law are essential elements of the arbitration contract. This chapter is devoted to exploring the extent to which parties in international commercial arbitration are free to agree on which body of substantive and procedural rules will apply. Such freedom (which some writers call 'party autonomy') is a basic feature of international commercial arbitration[820] and is a fundamental freedom for the parties.[821] Through this freedom, the parties can enhance certainty and predictability concerning their legal rights and obligations. In the absence of such autonomy, 'uncertainty will almost inevitably exist with respect to any' international arbitration contract because each implicated country has its own, often conflicting, substantive laws and procedural rules.[822] Therefore, modern national legislative bodies have been keen to recognise this choice-of-law right in their arbitration laws.[823] The EAA 1996[824] and the SAL 2012[825] are examples.

Under Shariah, the situation is somewhat different, since Islamic scholars consider Shariah to be the law of Allah (the creator), which cannot be altered by humans (the creations).[826] These scholars also believe that, since Shariah is the law a Muslim should obey,[827] following some other law is tantamount to accepting a new religion.[828]

The research argues that, based on the principles of Shariah, Muslim parties to international commercial arbitration have the right to choose a law (whether substantive or procedural) other than Shariah in light of the principles of *umum albalwa* and necessity.

---

[820] Frank-Bernd Weigand (ed), *Practitioner's Handbook on International Commercial Arbitration* (2nd edn, OUP 2009) 64.

[821] D Jones, 'Choosing The Law or Rules of Law to Govern The Substantive Rights of The Parties – A Discussion of Voie Directe and Voie Indirecte' (2014) 26 SAcLJ 911, 911; E Omeroglu, 'Taking Evidence in International Arbitration' (2015) Cov LJ 4, 4.

[822] *Scherk v Alberto-Culver Co*, 417 US 506, 94 S Ct 2449, 41 Led 2d 270 (1974).

[823] See generally M Kay and others (eds), *Blackstone's Civil Practice 2013: The Commentary* (2nd edn, OUP 2012) 64; TO Main, 'The Procedural Foundation of Substantive Law' (2010) 87 Wash UL Rev 801, 804.

[824] EAA 1996, ss 46 & 34.

[825] F Nesheiwat and A A1-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13(2) Santa Clara J Int'l L 443, 447.

[826] See generally AT Uddin, 'Religious Freedom Implications of Sharia Implementation in Aceh, Indonesia' (2010) 7(3) U St Thomas LJ 603, 628.

[827] See generally Saleh, *Commercial Arbitration* (n 193) 43; Sammartano (n 299) 799.

[828] See page 142.

The chapter aims to analyse and comparatively discuss the freedom of arbitration parties to choose the rules governing the substance and process of their dispute, as well as the restrictions on that freedom under Shariah, the SAL 2012 and the EAA 1996. To achieve this aim, the chapter will be divided into two sections: (1) freedom of parties to choose substantive law, and (2) parties' freedom to determine procedural rules.

1. Freedom of Parties and Substantive Law

The substantive law is the body of law that governs the contractual relationship of the parties and determines their rights and duties when a breach of the contract is alleged.[829] Unless the parties agree to apply another body of law, they might be saddled with the substantive law of the nation that is the forum of their arbitration or of the nation that is most closely linked to the subject matter of their transaction or dispute.[830]

While international laws and conventions have emphasised the right of arbitration parties to choose the 'law or rules of law' that will govern their disputes,[831] these laws and conventions contain exceptions and restrictions that limit the parties' freedom.[832] National arbitration laws also include constraints on the parties' rights.

This section is divided into three parts: First, the section addresses the freedom of arbitration parties under Shariah to determine the substantive law that will govern their disputes. This part includes discussions of the views of early Shariah scholars on the scope of the obligation to apply Shariah and of two principles — necessity and *umum albalwa* — that affect that scope. Second, the section presents a comparative discussion of the attitudes of the SAL 2012 and the EAA 1996 towards party autonomy.

Third, the section analyses the limitations on arbitration parties' freedom under Saudi and English law, including limitations based on public policy, mandatory rules, and the nexus between the underlying contract and the chosen law.

---

[829] Jones (n 821) 912.

[830] ME Hoyle, 'Recent Development: Contract Law - Trends, Cases, and Explanations Determining Which Choice-of-Law Provision Applies' (2015) 39 Am J Trial Advoc 219, 219, 220.

[831] For example, Geneva Convention 1961, art VII(1). Also, Model Law, art 28(1).

[832] A Schwartze, 'New Trends in Parties' Options to Select The Applicable Law? The Hague Principles on Choice of Law in International Contracts in A Comparative Perspective' (2015) 12 U St Thomas LJ 87, 88 and 89.

1.1 Freedom of Arbitration Parties to Determine Substantive Law Under Shariah

In contrast to the situation in Western legal systems, early scholars of the four Sunni schools agree that Shariah generally should be applied in all disputes. To support this notion, they rely on express provisions of the Quran and Sunnah that command Muslims to apply Shariah — the law of Allah — and avoid applying other laws.[833] Some of these scholars believe the application of Shariah is a form of worship and that the choice of a law other than Shariah is apostasy, but most scholars believe that the preference for Shariah is an order from Allah. Violating it is a sin or an act of disobedience unless the person is *yastahelluh* (one who believes it is permissible in the case at hand although he knows it is generally forbidden).

Most early and contemporary Shariah scholars, however, believe the selection and application of laws other than Shariah are permissible in cases of necessity; for instance, when the dispute is in an Islamic country that does not apply Shariah or in a country that does not allow Shariah to be applied.[834] This section will briefly deal with early Shariah scholars' viewpoints on the application of Shariah, before addressing whether the doctrine of necessity allows the parties in international commercial arbitration to choose a law other than Shariah. Finally, the section will determine whether the arbitration parties are free to choose a law other than Shariah only in cases of necessity.

1.1.1 Attitude of Shariah Regarding the Use of Different Law

As previously pointed out, early Shariah scholars offer two viewpoints regarding the selection and application of a law other than Shariah, whether it is a national law, international law or the principles and customs related to such laws.

The first view is that application of a law other than Shariah by a Muslim is an act of apostasy. Scholars who hold this view base their opinion on several sources, the most important of which is the Quranic verse 44 in *Surat Al-Ma'idah*: 'And whoever does not judge by what Allah has revealed, then it is those who are the disbelievers'. Ibn Katheer interprets this verse as follows:

> Allah condemns those who get out from his judgement [Islamic law] ... to other opinions ... established by humans without basing them on Allah's Shariah … . They became a set of rules they prefer more than to judge by the book of Allah and the Sunnah of his Messenger, peace be upon him.

---

[833] Baamir, *Shari'a Law* (n 23) 77.
[834] Alkhamees (n 18) 258-259.

If a Muslim does that, he becomes an infidel (a non-Muslim).[835] Proponents of this view argue that the use of a law other than Shariah is the adoption of a non-Islamic religion, which replaces the religion of Allah because it imposes rules that differ from and may contradict those that Muslims must follow.[836] By acquiescing to such laws, a Muslim is agreeing to comply with rules that might conflict with Shariah.[837]

The second view agrees with the first on the impropriety of selecting a law other than Shariah. Proponents of this view, however, do not believe that the selection or acceptance of a law other than Shariah to achieve a particular purpose makes a Muslim *kaafir* (an infidel). Rather, they see it as the commission of a sin.[838] Ibn Abbas, who is a senior interpreter of the Quran, said that the disbelief (*kufer*) mentioned in the Quranic verse 44 is not of the kind that expels a Muslim from Islam,[839] but it is a sin.[840] This is because the Arabic word *kufer* encompasses two types of disbelief:[841] (1) *kufer* of belief, which expels a Muslim from the religion of Islam and (2) *kufer* of practice, which is considered a sin. [842] It is the *kufer* of practice that is meant in verse 44, so those who choose a law other than Shariah have merely sinned — so long as they believe in the general obligation to rely on Shariah but did not do so in this instance in order to achieve a specific purpose or because they were simply unaware of the obligation to apply Shariah in the case at hand.[843]

It seems that the proponderant opinion is the second one. A number of points confirm this. First, according to the interpreters of the Quran[844] and the books of Hadeeth,[845] the

---

[835] AlDemashqi, *Tafseer AlQuran AlAzeem* (n 234) vol 3, 131.

[836] AJ AlNashmi, 'Eshterat AlTahkeem aw Altahakum ela Qanoon Wade'ei fi Oqood AlMoassasat AlMaliyah AlIslamiyah' (2010) IFA 1, 51.

[837] A Shaker, *Umdat AlTafseer an AlHafiz Ibn Katheer, Mukhtasar Tafseer AlQuran AlAzeem*, vol 4 (2nd edn, Dar AlWafa 2005) 535.

[838] For example, The Permanent Committee for Scholarly Research and Ifta', 'When is it permissible to declare a person as a Kafir?' vol 2, Fatwa 5226 <https://tinyurl.com/ydh4uq7a> accessed 19 September 2015.

[839] AMI AlTha'alabi, (died: 427 Hijra - corresponding to 1035), *AlKashef wa AlBayan an Tafseer AlQuran*, vol 4 (IAM Ashoor and N AlSa'aedi eds, Dar Ihya'a AlTurath AlArabi 2002) 70; MN AlAlbani, *Fitnat AlTakfeer* (A Baz and M AlOthaimeen eds, 2nd edn, Dar Ibn Khozaimah 1997) 6.

[840] Abdul Aziz Ibn Baz, *Fatawa of Ibn Baz*, vol 18, 326 <https://tinyurl.com/ybcfwprh> accessed 19 September 2015; AlQurtubi, *AlJame' le Ahkam AlQuran* (n 187) vol 6, 190-91; AlAlbani, *Fitnat AlTakfeer* (n 839) 6.

[841] AlAlbani, *Fitnat AlTakfeer* (n 839) 21.

[842] AJAMSASAH AlMesri (known as AlTahawi) (died: 321 Hijra - corresponding to 933), *Shareh AlAqeeda AlTahawiya* (MN AlAlbani and others eds, 8th edn, AlMaktaba AlIslamiyah 1984) 323.

[843] ibid 323-24.

[844] For example, AlDemashqi, *Tafseer AlQuran AlAzeem* (n 234) vol 3, 120. See also AlQurtubi, *AlJame' le Ahkam AlQuran* (n 187) vol 6, 190.

[845] For example, MA Al-Naysāburi (died: 261 Hijra - corresponding to 874 AD), *Sahih Muslim* (AH Siddiqui tr) Book 17, Hadith 4214 <http://sunnah.com/muslim/29/43> accessed 19 September 2015.

revelation of the Quranic verse 44 did not concern Muslims but was revealed in connection with special events that took place between non-Muslims and the Prophet (pbuh) concerning the application of criminal penalties.[846] Therefore, some interpreters, such as AlSha'abi, said that this verse applies only to those because of whom the verse was revealed.[847]

Second, it is the approach that has been accepted by *fuqaha* (jurists), the founders of the four Sunni schools[848] and contemporary *mufteen* (plural of *mufti*)[849] and senior scholars such as Sheikh Muhammad AlAlbani, who states that some people 'superficially understand the Quranic verse 44 without deeper understanding of what it really means', as the *kufer* stipulated by the verse is the type that does not expel a Muslim from the religion of Islam.[850]

A third reason is that this view is consistent with the Prophet's sayings that use the word *kufer*[851] and disbelief[852] to describe Muslims who commit sins. All Shariah Sunni scholars agree that such sinners are not excluded from Islam.[853]

1.1.2 Necessity

Most scholars who are proponents of the first and second views agree that when a case of necessity arises, it is permissible for a Muslim to refer to positive law (a law other than Shariah) based on the rule that 'Necessity permits what is forbidden'. The Permanent Committee for Scholarly Research and Ifta' in Saudi Arabia determined that 'It is impermissible for a Muslim to seek judgment at … [a court that does not apply Shariah]

---

[846] AAAAMAAA AlShafi'i (died: 468 Hijra - corresponding to 1076 AD) *AlTafseer AlBaseet*, vol 7 (IMSIU 1430 Hijra - corresponding to 2009 AD) 392-396.

[847] MAMMAJ AlShanqeeti (died: 1393 Hijra - corresponding to 1973 AD) *Adwa AlBayan fi Eidah AlQuran bi AlQuran*, vol 1 (Dar AlFikr 1995) 406.

[848] SMAAMAE AlHanafi (died 792 Hijra - corresponding to 1389 AD), *Shareh AlAqeeda AlTahaweiya* (A Shaker investigator, Ministry of Islamic Affairs, Endowments, Da`wah, and Guidance 1418 Hijra - corresponding to 1997 AD) 304; AlTahawi, *Shareh AlAqeeda* (n 842) 323-24.

[849] Such as Sheikh Ibn Baz, the grand *mufti* of Saudi Arabia, Abdul Aziz Ibn Baz, *Fatawa of Ibn Baz*, vol 28, 148 <https://tinyurl.com/https-tinyurl-com-ybcfwprh> accessed 19 September 2015. For the definition of *mufti*, see page 118.

[850] AlAlbani, *Fitnat AlTakfeer* (n 839) 23.

[851] Among these sayings is the Prophet's (pbuh) saying 'Two (things) are found among men which are tantamount to unbelief *kafer*: slandering one's lineage and lamentation on the dead'. Al-Naysāburi (n 845) Book 1, Hadith 128 <http://sunnah.com/muslim/1/133> accessed 19 September 2015.

[852] The Prophet (pbuh) disapproves the faith of that whose neighbor is not secure or does not feel safe from his wrongful conduct. The Prophet said, '"By Allah, he does not believe! By Allah, he does not believe! By Allah, he does not believe!" It was said, "Who is that, O Allah's Messenger (Peace be upon him) ?" He said, "That person whose neighbor does not feel safe from his evil"'. Al-Bukhari (n 209) vol 8, Book 73, Hadith 4 < http://sunnah.com/bukhari/78/47> accessed 25 January 2016.

[853] For example, MN AlAlbani (died: 1420 Hijra - corresponding to 1999 AD), *Selselat AlAhadith AlSahiha wa Shai men Fiqheha wa Fawaeduha,* vol 7 (Maktabat AlMa'aref 2002) 135.

except in case of necessity when there are no Shari`ah courts. If the court's decision includes what is not his right [eg, if the decision includes *riba*], it is impermissible for him to take it'.[854]

This raises the question of what constitutes the sort of 'necessity' that allows a Muslim to choose or accept a law other than Shariah. Scholars who have addressed this issue have not settled on a precise definition or criterion for such necessity. However, they believe such necessity arises when a Muslim needs to obtain his rights and can do so only by choosing (or resorting to) a law other than Shariah. [855]

This brings us to the question of whether, under Shariah, Muslims in an international commercial arbitration are free to choose a secular law only in cases of necessity. This research argues that necessity is not the sole justification, for the simple reason that choosing a law other than Shariah in international commercial arbitration has become an integral part of the practice of international commerce itself. This will be elaborated further in the next section 'umum albalwa'.

1.1.3 *Umum Albalwa*

Umum albalwa is an Arabic phrase composed of two words: *umum,* which means universality or generalisation, and *albalwa,* which is a test that involves great hardship.[856] Earlier Muslim scholars did not enunciate a precise definition of *umum albalwa*. However, it can be concluded from their discussion of its causes and its resulting provisions that *umum albalwa* means a disfavoured or prohibited practice that is widespread and difficult to avoid without great hardship.[857]

---

[854] The Permanent Committee for Scholarly Research and Ifta', 'What is the Ruling on Seeking judgment at the American Judiciary System in Disputes between Muslims, whether in Divorce, Commerce or other Matters?' vol 23, Fatwa 19504 <https://tinyurl.com/y7trxnj2> accessed 19 January 2017.

[855] Abdul Aziz Ibn Baz, *Fatawa of Ibn Baz*, vol 23, 214 <https://tinyurl.com/y9uofuzd> accessed 24 March 2018.

[856] MMM AlDawssari, 'Qa'edat Umoom AlBalwa wa Atharuha fi Derasat AlQadaya AlFeqhiyah AlMu'asera' (2010) Markaz AlTamaiyuz AlBahthi fi Fiqh AlQadaya AlMu'asera 1637, 1639-1640. See also generally AI Padela and others, 'Dire Necessity and Transformation: Entry-points for Modern Science in Islamic Bioethical Assessment of Porcine Products in Vaccines' (2013) Bioethics 1, 7.

[857] See generally AABJ AlSuyuti (died: 911 Hijra - corresponding to 1505 AD), *AlAshbah wa AlNnazaer* (Dar AlKutub AlElmiyah 1990) 78 and 79; Ministry of Awqaaf and Islamic Affairs, *AlMosoua AlFiqhiyah*, vol 31 (Dar Alsafoah 1994) 6-9; M Mahlknecht and K Hassan, *Islamic Capital Markets: Products and Strategies* (John Wiley & Sons 2011) 60; MN Omar and others, 'When Halal and Haram Meet the Haram Prevails?: An Analysis of the Maxim and Its Application in Contemporary Issues' (2012) 6(11) Aust J Basic & Appl Sci 199, 204. For example, usury which includes loans to buy a house in most countries is prohibited in Shariah, it is widespread and hard to avoid without great hardship for those who do not have enough money.

Saleh Ibn Humaidan, the head of the Supreme Judicial Council of Saudi Arabia and a member of the Council of Senior Scholars, says that:

> Umum albalwa can be seen in two situations: (1) the general need for something that is difficult to be dispensable, except with extreme hardship, and this is what some scholars call public need; (2) the prevalence of committing a matter that it makes it difficult for a person who is competent to perform religious duties to avoid or disengage from committing such a matter except by a great hardship.[858]

Both of these meanings of *umum albalwa* are at play in an international commercial contract, including the law that governs it, regardless of whether there is an agreement that any disputes will be referred to arbitration or court. On the one hand, it is undoubtedly difficult for the citizens of any state, particularly developing ones, to function without engaging in international commercial contracts that touch on many aspects of life (eg, air transportation, banking, health services, technology, etc), and these matters are dispensable only with great hardship.[859] At the same time, it is true that it is the common practice among members of international society to apply positive laws (law other than Shariah) to commercial contracts, which makes it hard for a Muslim party to insist on an agreement to apply Shariah. And even if the parties were to agree to apply Shariah, the arbitral tribunals and national courts in non-Muslim countries may not apply it.[860]

A question arises here regarding the attitude of Shariah in cases of *umum albalwa*. Saleh Ibn Humaidan says that:

> In a case where there is *umum albalwa*, the legislator [Allah] has a different viewpoint regarding original provisions that is based on the degree of the need for this case or difficulty in avoiding it. Accordingly … [in Shariah] the more balwa prevails, the more the matter becomes less stressful, and in hardships there is always ease.[861]

Early scholars of Shariah, particularly those of AlHanafi school, express the need to ease the provisions of Shariah in cases of *umum albalwa*, basing their view on accepted principles

---

Therefore, based on *umum albalwa*, some contemporary Shariah scholars (eg, Sheikh Abdul Aziz Ibn Baz) believe it is permissible to buy a house on mortgage if a person does not have enough money and if it is the only solution to buy a house for living.

[858] SA Humaid, *Rafe' AlHaraj fi AlSharia AlIslamiyah Zawabetuhu wa Tatbiqatuh* (Maktabat AlObeikan 2004) 289.

[859] This is what some scholars call 'public need'. For more details regarding public need, see page 112.

[860] See generally Z Hasan and M Asutay, 'An Analysis of the Courts Decisions on Islamic Finance Disputes' (2011) 3(2) IIJIF 41, 62-63.

[861] Humaid (n 858) 307.

of Shariah,[862] such as the principle of 'difficulty necessitates facilitation',[863] which is derived from the Quranic verse 'Allah intends for you ease and does not intend for you hardship; He does not want to put you in difficulties'[864] and the verse 'He [Allah] has chosen you [Muslims] and has not placed upon you in the religion any difficulty'.[865] A further principle is 'When a prohibited matter (*haram*) prevails, it is permissible to use what is needed'.[866]

It should be emphasised that the invocation of the forbidden (*haram*) does not mean that only necessity can trigger the doctrine. Early scholars of Shariah — both those (1) who require the spread of *haram* and the nonexistence of the permitted (*halal*) for *umum albalwa*[867] and (2) those who are content with a lack of *halal* and the spread of *haram*[868] — agree that the freedom to resort to the forbidden 'is not limited to necessity'. AlEz Ibn AbdAssalam, the most prominent Shariah scholar of the 13th century, states that requiring necessity when *umum albalwa* exists could lead to 'weakening ... people … [and] the Islamic state. It may also lead to stopping people from doing crafts, industries and the activities that serve the interests of society'.[869]

Based on the above, it can be concluded that even though Shariah is clear about not allowing Muslims to generally choose or apply a law other than Shariah in all aspects of their lives, this ban cannot be applied at the present time to the parties to international commercial arbitration. This is because the parties selecting and accepting secular laws in international trade contracts are included in *umum albalwa*. As mentioned earlier, the fruits of international commercial contracts are things that people need in their lives. Moreover, the rules of positive

---

[862] See generally Padela and others (n 856) 7; Omar and others, 'When Halal and Haram Meet' (n 857) 204.

[863] It was first expressed by Imam AlShafi'i. TAT AlSsabki (died: 771 Hijra - corresponding to 1369), *AlAshbah wa AlNazaer*, vol 1 (Dar AlKutub AlElmiyah 1991) 49. See generally AB As-Safi, *Islamic Jurisprudential Maxims: 114 Maxims Expounded* (Amwaj 2012) 123.

[864] *Surat Albaqra*, verse 185.

[865] *Surat Alhajj*, verse 78.

[866] AMEAAQHS AlDemashqi (died: 660 Hijra - corresponding to 1262 AD), *Qawaed AlAhkam fi Masaleh AlAnaam*, vol 2 (TA Sa'ad ed, Maktabat AlKuliyat AlAzhariyah 1991) 45.

[867] For example, AlEz Ibn AbdAssalam said: '[W]hen the forbidden *haram* prevails that the permissible *halal* cannot be found, people are not obliged to wait until there is a necessity as this may lead to general harm'. In Arabic, he said:

'إذَا عَمَّ الْحَرَامُ بِحَيْثُ لَا يُوجَدُ حَلَالٌ فَلَا يَجِبُ عَلَى النَّاسِ الصَّبْرُ إلَى تَحَقُّقِ الضَّرُورَةِ، لِمَا يُؤَدِّي إلَيْهِ مِنْ الضَّرَرِ الْعَامِّ ...'.

ibid 45.

[868] AABJ AlSuyuti (died: 911 Hijra - corresponding to 1505 AD), *AlAshbah wa AlNnazaer* (Dar AlKutub AlElmiyah 1990) 84. Al-Suyuti said 'If the *haram* (forbidden) is spread that the permissible becomes rare, it is admissible to use what is needed and this is not limited to only necessity'. In Arabic, he said:

'وَلَوْ عَمَّ الْحَرَامُ قُطْرًا، بِحَيْثُ لَا يُوجَدُ فِيهِ حَلَالٌ إلَّا نَادِرًا فَإِنَّهُ يَجُوزُ اسْتِعْمَالُ مَا يَحْتَاجُ إلَيْهِ، وَلَا يَقْتَصِرُ عَلَى الضَّرُورَةِ'.

ibid.

[869] AlDemashqi, *Qawaed AlAhkam* (n 866)188.

laws are so widespread that it is difficult for Muslims to avoid them. The ability to resort to the laws of non-Islamic states is a prerequisite for engaging in trade with such countries which is indisputably permissible in Islam.

In addition, the biographies of the companions of the Prophet are full of evidence of their travels and trade in countries where Shariah is not applied. The act of engaging in trade in such countries implies that they consented to the laws and trade customs of those countries. No Shariah scholars, then or now, have ever said that those actions were illegitimate or even undesirable.

Further, the inability to choose or accept a law other than Shariah would obstruct international trade, thus denying Muslims the benefits of such trade for both the individual and the community. Shariah does not support such hardship. The final reason relates to the explicitly forbidden action mentioned in Quranic verse 44.[870] It can be argued that it concerns those who are not satisfied with or do not desire the judgment of Allah. Mustafa AlZarqa, one of the most prominent contemporary scholars of Islamic jurisprudence, argues that 'Those who do not want to judge by what Allah has revealed, and are not pleased with the judgement of the Messenger of Allah are those meant in … [verse 44]; those who cannot judge by what Allah has revealed and cannot refer to the Messenger of Allah are not included under the rule of [this verse]'.[871] In short, the scholar is saying that verse 44 does not apply to those who are not in a position to apply it.

1.2 Attitude Adopted in SAL 2012 and EAA 1996

To clarify the extent to which the SAL 2012 complies with Shariah in terms of the freedom of arbitration parties to choose the applicable law and then compare this to the situation in English law, an analytical discussion and comparison will be carried out concerning the position of both SAL 2012 and EAA 1996 in two parts: (1) the freedom of arbitration parties in choosing the substantive law and (2) limits to freedom of arbitration parties to select applicable law. This will provide a clear illustration of their scope.

---

[870] *Surat Al-Ma'idah,* verse 44.

[871] M AlZarqa, 'AlEttifaq AlA'am ala Usus AlOqood allati Tajri bayn: Sharekat AlRajhi AlMasrefiyah le AlEstithmar, wa AlSharikat AlAjnabiyah AlKubra' (as cited in SBA Allehidan, 'Annas ala AlTahakum le AlQawaneen AlWadeiyah fi Oqood AlMuassasat AlMaliyah AlIslamiyah' (1430 Hijra - corresponding to 2008) 14 <https://kantakji.com/media/5683/3031.pdf> accessed 31/05/2018).

1.2.1 Freedom of Arbitration Parties in Choosing Substantive Law

The SAL 2012 clearly grants arbitration parties — for the first time ever in Saudi Arabia — the right to select a foreign substantive law.[872] Before the enactment of the SAL 2012, the question was unclear because the former arbitration law, SAL 1983, was silent on the issue.[873] Some scholars believed that the absence of such a provision in the earlier law meant that the arbitration parties did not have the right to choose a law other than Saudi law,[874] while others believed the earlier law's silence on the issue opened the door to choosing a foreign law.[875]

The attitude of Saudi courts seemed to depend on the presence of a foreign element in the dispute. If the arbitration parties were Saudi nationals, for instance, the Saudi courts tended to hold that the applicable law should be Saudi in order to avoid a violation of Saudi public order.[876] If, however, the subject matter of the underlying contract or one of the parties to the dispute was foreign, the Saudi courts tended not to nullify the arbitration contract merely because it called for the application of a foreign law. This will be discussed further below, in the section (1.2.2) on the limits of the freedom of arbitration parties to choose the applicable law.

The SAL 2012 resolves this controversy as it adopts the modern approach of national and international arbitration laws. Similar to Section 46 (1/a) of the EAA 1996 as well as Article 28(1) of the Model Law, Article 38 of the SAL 2012 states that an arbitral tribunal shall apply 'the rules agreed upon by the arbitration parties'. The scope of freedom of arbitration parties to select the applicable rule under these laws is not the same, however, despite the similarity in the provisions that grant such freedom. This is because of the stipulation in Article 38 (1/c) of the SAL 2012, just as it is stipulated by the Model Law,[877] that an arbitral tribunal shall take into account 'the usages of the trade applicable to the

---

[872] SAL 2012, art 38.

[873] The only exception is Article 39 of SAL 1983 which stipulates that '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 Shariah and the applicable regulations.'

[874] Y Al-Samaan, 'The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia' (1994) 9 ALQ 217, 233-34. See generally J Basedow, *The Law of Open Societies, Private Ordering and Public Regulation in the Conflict of Laws* (Brill 2015) 120; A Baamir and I Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009) 25 Arbitr Int 239, 251.

[875] Mohammed Al Sewilem, 'The Legal Framework for Foreign Direct Investment in the Kingdom of Saudi Arabia: Theory and Practice' (PhD Thesis, University of London 2012) 223.

[876] Decision No 369/2/Q of 1421 Hijra (corresponding to 2001 AD) BG.

[877] Model Law, art 28(4).

transaction'.

The centrality of that provision in the SAL 2012 is greater than in the Model Law because the Saudi law does not distinguish between national and international arbitration and thus provides little guidance as to whether it encompasses the trade customs of the Western world as well as those of Islamic countries. This provision has potentially added an additional source of rules (trade usages) to be considered by the arbitral tribunal, regardless of whether the applicable law is directly determined by parties or the tribunal. The importance of this provision is highlighted in two aspects.

The first is the ambiguity that surrounds the phrase 'trade usages'. Trade usages generally include 'codified and uncodified commercial practices in various trades and industries'.[878] Therefore, trade usages may include the International Institute for the Unification of Private Law (UNIDROIT) Principles, as some arbitral tribunals consider these to be expressions of trade usages[879] or *lex mercatoria*.[880] Even the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention)[881] may be considered to reflect trade usages.[882] An example is International Chamber of Commerce (ICC) Case No 5713/1989[883] regarding a sale contract between a Turkish party and a Swiss party that was entered into in 1979 (a year before the adoption of Vienna Convention). In this case, the arbitral tribunal considered that 'There is no better source to determine the prevailing trade usages than the terms of the Vienna Convention'.[884]

The other aspect, which results from the previous one, is the effect of this provision on the freedom of arbitration parties in terms of selecting the applicable law and its effect on the enforcement of that law. Although the SAL 2012 does not expressly set specific mandatory provisions as does the EAA 1996,[885] it can be concluded from the phrasing of Article 38 of SAL 2012 that the provision regarding trade usages is mandatory. The drafters used the word

---

[878] RC Drahozal and RW Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical Research* (KLI 2004) 238.

[879] MJ Bonell, 'Model Clauses for Use of the UNIDROIT Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice' (2013) UNIDROIT 11 <https://tinyurl.com/yyvap5v2> accessed 31/06/2018. See also ICC International Court of Arbitration, case No 8873 (1997) Paris.

[880] Drahozal (n 878) 238-239.

[881] The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (adopted 11 April 1980, entered into force 1 January 1988), 1489 UNTS 3.

[882] Indira Carr and Peter Stone, *International Trade Law* (5th edn, Routledge 2013) 66.

[883] ICC Court of Arbitration, case No 5713/1989 (1989) Paris.

[884] ibid.

[885] EAA 1996, s 4.

'shall' without any exceptions or limitations. Therefore, under Article 38 the arbitration parties should not choose legal rules that contradict trade usages and the arbitral tribunal should not ignore trade usages, regardless of whether the parties agreed on them.

The question that arises here is what happens under the SAL 2012 when the provisions of the selected law contradict trade usages or when the parties' trade usages conflict. One such instance involves *riba*. It is an accepted usage in international trade, particularly in Western countries, that a merchant is responsible for paying interest under certain circumstances, such as a delay in payment.[886] That practice, however, contradicts the trade usages in countries that are ruled by Shariah, including Saudi Arabia.

This question can be addressed only by looking beyond the words of Article 38 itself and turning to the general interpretive principles of Saudi law. Unless the trade usages contradict a provision of the Quran or Sunnah, the Shariah provision is supposed to be applied. This is because the constitution of Saudi Arabia (the SBLG 1992) places Shariah as the ultimate legal authority in Saudi Arabia.[887] Consequently, any usage or legal provision that conflicts with Shariah automatically violates the constitution and thus should not be applied.

1.2.2 Limits to Freedom of Arbitration Parties to Select Applicable Law

Despite a general recognition of the principle that parties to international arbitration are free to select the law that will apply to their disputes, there are restrictions on that principle in both developed and developing countries. These restrictions fall into three categories: (1) There should be a connection between the underlying contract and the chosen law. (2) The chosen law should not conflict with public policy. (3) The chosen law should not override mandatory rules. These three issues will be discussed below.

1.2.2.1 Connection Between the Contract and Chosen Law

One of the limits on the parties' freedom to choose the applicable substantive law is the requirement that there be some relationship between the parties (or the transactions) and the substantive law selected to govern any disputes that might arise.[888] This limitation is intended

---

[886] N Dawud, *Interest Under CISG and Al Shari'a: Problems with the Enforceability of Article 78 of the CISG in Arab* (Epubli 2014) 12-13.
[887] SBLG 1992, arts 1 and 7.
[888] For example, see K Roosevelt, *Conflict of Laws, Concepts and Insights Series* (2nd edn, Foundation Press 2014) 87.

to prevent parties from avoiding mandatory rules in the law that has the most direct connection with the contract.[889] In the United States, for example, the Restatement (Second) of Conflicts of Law 1971 (USRSCL 1971) states that the law selected by the parties to govern their contract shall be applied unless, *inter alia*, this law 'has no substantial relationship to the parties or transaction and there is no other reasonable basis for the parties' choice'.[890]

Neither the SAL 2012 nor the EAA 1996 includes such a requirement.[891] English case law is less clear.[892] In *Re Claim by Helbert Wagg & Co Ltd*,[893] Upjohn J wrote that a court will not necessarily enforce a selected law if it 'has no real or substantial connexion' with the transaction .[894] In *Vita Food Products, Incorporated Appellant v Unus Shipping Co, Ltd,*[895] however, Lord Wright wrote that a '[c]onnection with English law is not as a matter of principle essential'.[896] Further, there appears to be no reported English case in which the law selected by parties was rejected merely because of its lack of a connection with the underlying contract.[897]

The Saudi situation appears to be different. Saudi courts have distinguished between two situations regarding the parties' freedom to select a foreign law. The first situation relates to nullifying an arbitration agreement that includes the selection of a foreign law when the parties and the transaction are national. In case No 4/ta/143[898] between Saudi disputants regarding a contract, all of its elements were national. The defendant asked for the case to be dismissed due to the existence of an arbitration agreement that specified Zurich as the seat of

---

[889] D Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law?* (Martinus Nijhoff 2008) 105.

[890] The USRSCL 1971, s 187(2)(a). See also *DOE 1, DOE 2 and Kasadore Ramkissoon v AOL LLC*, No 07-15323 (2009) 683, 701.

[891] Although the UK is one of the signatories on the Regulation No 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), which does not require that there should be a relationship between the parties (or the transactions) and the substantive law, Article 1(2) of this Regulation excludes arbitration agreements from its scope. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJEU L 177/6.

[892] See for instance, CB Bourne (ed), *Canadian Yearbook of International Law*, vol 18 (UBC Press 2007) 165, 166.

[893] [1956] 2 WLR 183.

[894] ibid 342.

[895] [1939] AC 277.

[896] ibid 291.

[897] This is also supported by some legal scholars such as Professor Duncan (WD Duncan, *Joint Ventures Law in Australia* (3rd rev edn, Federation Press 2013) 344), Professor Merkin (Robert Merkin (ed), *A Guide to Reinsurance Law, Practical Insurance Guides* (Informa Law 2007) 386) and Professor Born (Gary B Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, KLI 2001) 551).

[898] Decision No 369/2/Q of 1421 Hijra (corresponding to 2001 AD) BG.

arbitration and the rules of ICC as the applicable law. The defendant also noted that the arbitral process had already been initiated. The court rejected the defendant's request, stating that the arbitration agreement 'deprived the jurisdiction of the Saudi judiciary and prevented it from hearing disputes within its jurisdiction and this violated public order in the Kingdom'. Therefore, the court considered the arbitration agreement to be a nullity and ruled that the BG should hear the dispute.

The second situation concerns the enforcement of an arbitration agreement that includes a foreign law when the subject matter of the contract or one of the parties is foreign. The case law in Saudi Arabia confirms the right of the parties to an arbitration agreement to select a foreign law so long as there is a connection between the foreign jurisdiction and either the parties or the underlying contract.[899] In case No 4/ta/43[900] between an American company and a Saudi party, the plaintiff (the American company) challenged the Saudi court's right to hear the case because of the arbitration agreement that said any disputes should be resolved in Cedar Rapids, Iowa, in the United States. The court wrote:

> [Although] the Saudi judiciary is the authority originally competent to view the case as Saudi Arabia is the seat of enforcement of the contract, … the defendant company being an American and the enforcement of the contract is not limited to the claimant as the defendant enforces a part of the contract [selling and exporting] … there is nothing that prevents agreeing to the American jurisdiction. In addition, the presence of an arbitration agreement between the parties that stipulated that any dispute or claim between them should be resolved through arbitration in Cedar Rapids, Iowa, in the United States, explicitly means the agreement of the parties to appoint only judiciary there [the United States] to rule in the emerging dispute. This leads to the conclusion that the Saudi party waived his right ... to resort to the Saudi judiciary.

Accordingly, the Saudi court accepted the defendant's challenge and refused to hear the case.

It seems, however, that this distinction disappeared when the new law came into force. This is because Article 38 of the new law explicitly grants the arbitration parties the freedom to choose the law they believe is appropriate for them. There is no mention of the need for a connection between the contract and the chosen law, nor does Article 38 differentiate on the basis of whether the arbitration is domestic or international.

---

[899] For example, Decision No 4/ta/155 of 1415 Hijra (corresponding to 1994 AD) BG; Decision No 4/ta/178 of 1413 Hijra (corresponding to 1992 AD) BG.

[900] Decision No 4/ta/43 of 1416 Hijra (corresponding to 1995 AD) BG.

The practice in the Saudi courts seems to be in accord with this new approach. This is clear from the views of the judges who were interviewed — both those judges who favour the new law and those who do not. For instance, in response to a question about the limits of the freedom of the arbitration parties to select the law, the Appeal Judge Obeid AlAmri states that the only limit is not to violate Shariah. The boundaries of Shariah in such a matter are very narrow, particularly in commercial transactions, as they can be limited only by *riba*, *garar*, trading in alcohol, and prostitution.

1.2.2.2 Public Order (Public Policy)

The terms 'public policy' and 'public order' (*ordre public* in French)[901] are different but are often used interchangeably in this context.[902] While the EAA 1996 adopted the term 'public policy',[903] the SAL 2012 uses the term 'public order', which many legal writers mistranslate as 'public policy'.[904] Therefore, as suggested by some writers, the somewhat unwieldy phrase 'public order (public policy)' will be used here to avoid confusion.

Public order (public policy) is the main source of limitation on the freedom of parties to choose a foreign law in international commercial arbitration. Almost all national and international laws and conventions concerned with arbitration and the enforcement of arbitration awards provide for a state's right to protect its public order (public policy).

The scope of this limitation varies based on each state's interpretation of the concept of public order (public policy). Due to the importance of this issue and the widely varying approaches to it, it will be tackled in three sections: an overview of public order (public policy); the concept of public order (public policy) under Shariah and Saudi and English law; and finally the effect of public order (public policy) on the freedom of parties to select law.

1.2.2.2.1 Overview

Despite the ubiquity of the public order (public policy) principle in laws and conventions concerned with arbitration at both the international and national levels, it seems that no

---

[901] AJ Belohlávek and N Rozehnalová (eds), *Czech Yearbook of International Law, Public Policy and Ordre Public*, vol 3 (Juris Publishing 2012) 80.

[902] M Kent, '*The Traditional View of Public Policy and Ordre Public in Private International Law*' (1981) 11(3) Ga J Int'l & Comp L 591, 599. The nature of both terms is the same and both of them are found in different legal systems (order). Belohlávek (n 901) vol 3, 81 and 82.

[903] For example, EAA 1996, ss 68 and 103.

[904] For example, Nesheiwat and Khasawneh (n 825) 446,464.

comprehensive or widely accepted definition of the phrase has arisen. The situation has been compared to an 'unruly horse',[905] perhaps because of the wide variance of what is considered a violation of public order (public policy) in each locale and in each era. As Sir Donaldson stated: 'Considerations of defined public policy can never be exhaustively defined ...'.[906]

Dr Lew agrees that it is difficult to arrive at a comprehensive definition, but he suggests that public policy 'reflects the fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community'.[907]

1.2.2.2.2 Concept of Public Policy Under Shariah and Saudi and English Law

In Shariah, neither the two main sources (Quran and Sunnah) nor the early *fiqh* publications (as far as the researcher is aware of) refer to the concept of public policy or public order as such. Instead, they include the terms 'public welfare', 'public benefit', 'public interest' and 'public right' — in addition to 'the right of Allah', which is considered by most Shariah scholars to be the equivalent of the concept of public order. Professor Abdul Razzak AlSanhoori, a senior scholar of Egyptian civil law, stated that 'In the Islamic jurisprudence we can find an equivalent to the Western jurisprudence's idea of public order and ethics presented in what is usually called the right of Allah'.[908]

According to AlTaher bin Ashoor, the right of Allah is:

> The rights of the *Ummah* (nation) where public or common benefit or the right of those who are incapable of protecting their rights is achieved. Allah the Almighty ordered people to protect such rights, and he does not empower anybody to relinquish them. These rights protect the *maqasid* [general purposes] of the Islamic Shariah, and prevent the actions of individuals and groups from causing a breach of such *maqasid* when pursuing their own private interests, and protect the right of those who are thought of to be powerless.[909]

---

[905] In *Richardson v Mellish*, Burrough J states that public policy 'is a very unruly horse, and when once you get astride it you never know where it will carry you'. (1824) 2 Bingham 229, 252. See also PH Winfield, 'Public policy in the English Common Law' (1928) 42(1) Harv L Rev 76, 92.

[906] *Deutsche Schachtbau-Und Tiefbohrgesellschaft mbH v R'as al-Khaimah National Oil Co* [1987] 3 WLR 1023, 1035.

[907] Julian DM Lew, *Applicable Law in International Commercial Arbitration* (Oceana 1978) 532.

[908] Abd AlRazzaq AlSanhori, *AlWaseet fi Shareh AlQanoon AlMadani AlJadeed*, vol 3 (Dar AlNnasher le AlJamea'at AlMesriyah 1944) 99 (as cited in MMA AlTawalbah, 'Haq Allah wa Haq AlAbd wa Atharuhuma fi AlHudood' (2013) 9(1) AlMajallah AlUrduniyah fi AlDerasaat AlIslamiyah 115, 118). In Arabic, he said: 'يمكن أن نجد نظيرا في الفقه الإسلامي لفكرة النظام العام والآداب في الفقه الغربي فيما يدعى عادة بحق الله'.

[909] MTMMT Ibn A'ashoor, *Maqasid AlSharia AlIslamiyah*, vol 2 (MHI AlKhojah ed, Ministry of Endowments and Islamic Affairs 2004) 123.

The question here is what are the elements of the right of Allah that constitute the public order (public policy). In other words, what are the elements of the right of Allah that should be considered when the arbitration parties choose the law applicable to their dispute?

It can be said that the right of Allah (public order) includes four types of Shariah provisions. The first two are obligatory commands (*wajib*) and prohibiting commands (*moharram*). Additionally, it is a violation of the right of Allah (public order) to agree on changing Shariah's permissible provisions, whether those that are desirable (which are called *mandoob* in Shariah) or those that are not desirable (*makruh* in Shariah).[910] This is because such an agreement is considered contradictory to the *maqasid* of Shariah.[911]

The Saudi legislature usually uses the term 'public order', as evidenced in the SAL 2012 (Arabic version),[912] even though the law adopts the Model Law. The situation is the same in the Saudi judiciary, which uses 'public order' in its decisions. The researcher has found no published Saudi case that mentions 'public policy'. According to the researcher's knowledge, neither Saudi laws nor Saudi courts have defined 'public order'. In many cases, however, Saudi courts have stated that 'Shariah is the public order in Saudi Arabia'.[913]

In Britain, public policy lacks a clear legal definition even though English courts have invoked the concept since at least 1414.[914] Lord Brougham in *Egerton v Brownlow* broadly described public policy as 'that principle of law that holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good'.[915]

From the discussion above, it is clear that the concept of public order (public policy), which is used as an equivalent to 'the right of Allah' in Shariah, includes the provisions of the Quran and Sunnah in addition to those provisions agreed upon by Shariah scholars.[916] In

---

[910] Such as if an ordinary person agrees with another not to get married or engage in trade, these agreements are not considered binding in Shariah courts as they contradict public order in the eyes of Shariah.

[911] AlShatebi states that: 'As for the prohibition of what is permissible and permitting what is prohibited and so, they are part of the right of Allah. Because it is part of Shariah [law] of Allah people are committed to and thus they do not have control over these matters ...'. AlShatebi supports his viewpoint with Quranic verses such as 'O you who have believed, do not prohibit the good things which Allah has made lawful to you and do not transgress. Indeed, Allah does not like transgressors'. IMMLG AlShatebi (died: 790 Hijri - corresponding to 1388 AD), *AlMuwafaqat*, vol 3 (AOMH AlSalman ed, Dar Ibn Affan 1997)103.

[912] SAL 2012, arts 38, 50 and 55.

[913] Case No 2496/1/qaf of 1425 Hijra (corresponding to 2004 AD) BG 2080, 2086.

[914] See generally F Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2016) 94(3) Neb L Rev 685, 691-92.

[915] (1853) 4 H L Cas 1. See also *Lord Advocate v The Scotsman Publications Ltd* 1989 SC (HL) 122, 150.

[916] This is confirmed by a recent definition of public order in Shariah by Dr Abdullah AlOtaibi in his book Public Order of Islamic State (*AlNetham AlA'am le AlDawlah AlIslamiyah*) where he says that it is 'a set of

contrast, public policy, according to English law, includes abstract principles that are not necessarily codified. Therefore, it can be concluded that public order under Shariah is clearer than the public policy under English law. It also appears that public order in Shariah is broader.

1.2.2.2.3 Effect of Public Order (Public Policy) on the Freedom of Parties to Select Law

Although public order (public policy) still plays a substantial role in determining the parties' freedom to select the law, this role has decreased over time in favour of the arbitration parties.[917] One of the main reasons for this lessened role is the differentiation between national and international public policy. Thus, before discussing the attitude of Saudi and English laws, the difference between national and international public policy will be clarified.

National and international public policy are in fact 'two aspects of the same public policy'.[918] This means that they both emerge inside a particular country and are applied by the national courts of that country.[919] The difference between the two is that the first one is applied only in cases that are wholly national[920] whereas the other type is applied when an international element exists. According to the International Law Association, the concept of international public policy is 'that part of the public policy of a state which, if violated, would prevent a party from invoking a foreign law or foreign judgement or foreign award'.[921]

International public policy is not mentioned in most conventions or laws concerned with arbitration, such as the NYC 1958, Riyadh Arab League Convention for Judicial Co-operation[922] (Riyadh Convention 1983) and the Convention on the Execution of Foreign Arbitral Awards (Geneva Convention 1927).[923] The only exception is a fairly recent treaty, the Uniform Act on Arbitration of the Organization for the Harmonization of Business Law

---

provisions and procedures designed to protect the community and achieve the public good in this world and the hereafter and that no one may modify or agree on what contradicts them'. A AlOtaibi, *AlNetham AlA'am le AlDawlah AlIslamiyah* (Dar Kunooz Ashbilia 2009) 55.

[917] This is clear in many modern national arbitration laws such as the SAL 2012.

[918] Sammartano (n 299) 732.

[919] D Bray and HL Bray (eds), *International Arbitration and Public Policy* (Juris 2014) 24.

[920] A Chong, 'Transnational Public Policy in Civil and Commercial Matters' (2012) LQR 88, 89.

[921] International Law Association, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (New Delhi Conference 2002) 1, 11 <https://tinyurl.com/ycct5s9c> accessed 31/05/2018.

[922] Adopted 6 April 1983, entered into force 30 October 1985.

[923] Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 September 1927) (entered into force 25 July 1929) 92 LNTS 301.

in Africa 2017[924] (UAOHADA 2017), which sets out the right to challenge an arbitral award 'if the arbitral award is contrary to international public policy'.[925]

This gap is reflected in national arbitration laws, including the SAL 2012 and EAA 1996. The EAA 1996 does not discuss any role for English public policy in connection with the arbitration parties' selection of a foreign substantive law.[926] If, however, the English conflict of laws rules are applied, there is an exception. According to the Rome I: 'The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.'[927]

The situation in Saudi Arabia to some extent resembles this, as the SAL 2012 stipulates that the application of the chosen law shall not conflict with the Saudi public order.[928] Additionally, the court of enforcement is required by Article 55 (2/b) of the SAL 2012 to verify that the arbitral award does not violate the public order in Saudi Arabia.

Therefore, under both the English and Saudi systems, a violation of public order (public policy) can be a successful ground for restricting enforcement of a choice of law clause. For instance, in *Kuwait Airways Corpn v Iraqi Airways Co,*[929] the English Court of Appeal held that 'If English public policy can be shown to differ from … [clearly established principles of international law], then no doubt the courts of this country will be required to follow the dictates or limits of that public policy'.[930] In practice, however, there is no reported case law in which an English court rejected the clearly chosen law by the arbitration parties because of public policy.[931]

In Saudi Arabia, the situation is different, as the Saudi courts have been strict when the matter concerns a violation of Saudi public order, even under the previous law, which was silent on the freedom of arbitration parties to choose the controlling law. For instance, *riba*

---

[924] Uniform Act on Arbitration, Organization for the Harmonization of Business Law in Africa (adopted on 23 November 2017, entered into force on 15 March 2018).
[925] UAOHADA 2017, art 26 <https://tinyurl.com/yxgaf89f > accessed 18 August 2018.
[926] EAA 1996, s 64(2)(g) makes clear that the violation of public policy can be a ground for challenging the arbitral award.
[927] Rome I, arts 3 and 21. See also Articles 3 and 6 of Convention on the Law Applicable to Contractual Obligations, 80/934/EEC (opened for signature 19 June 1980, entered into force on 1 April 1991) OJ L266/1 (Rome Convention).
[928] SAL 2012, art 38(1)(a).
[929] [2001] 3 WLR 1117.
[930] ibid 1203.
[931] Weigand (n 820) 392.

included in an arbitral decision is not enforced, even when the percentage is stipulated in the law applicable to the dispute. Case No 2496/1/qaf[932] concerned the enforcement of a decision issued under Egyptian law, which included 4 percent annual interest on the delayed repayment of a debt. The BG refused to enforce the *riba* as it 'contravened the Islamic Shariah, which is the public order'[933] in Saudi Arabia.

It seems, however, that the Saudi courts view Saudi public order narrowly when the arbitration is international; ie, they distinguish between international public policy and national public policy — so long as there is no violation of a mandatory provision of Shariah. In cases No 4/ta/143[934] and No 4/ta/43[935], the arbitration parties agreed on the application of a foreign law. In the first case, where all elements of the arbitration were Saudi, the court nullified the arbitration agreement based on that the public order was violated because such agreement restricted the jurisdiction of the Saudi judiciary. In the second case, as the arbitration was international, the court approved the arbitration agreement and refused to hear the subject matter of the dispute.

Similarly, under English law there is also a distinction between national and international public policy.[936] The Court of Appeal has held, however, that when it comes to the issue of violating English public policy because the contract contravenes UK law, an English court:

> … will not enforce a contract governed by English law, or to be performed in England, which is illegal by English domestic law. Nor will it enforce a contract governed by the law of a foreign and friendly state, or which requires performance in such a country, if performance is illegal by the law of that country.[937]

From the above, it can be concluded that, as a general principle, public order (public policy) in both the Saudi and English jurisdictions can restrict the freedom of arbitration parties in the selection of law. The validity of a contract under the chosen foreign rules does not prevent its nullification if there is a violation of Saudi or English public order (public

---

[932] Case No 2496/1/qaf of 1425 Hijra (corresponding to 2004 AD) BG, 2080.
[933] ibid 2086.
[934] Decision No 369/2/Q of 1421 Hijra (corresponding to 2001 AD) BG.
[935] Decision No 4/ta/43 of 1416 Hijra (corresponding to 1995 AD) BG.
[936] For instance, the lack of reasons in the international arbitration award is not a violation of public policy under Article V(2)(b) of NYC 1958 while such matter in the national arbitration award is considered a violation of public policy. Lord Justice Bingham, 'Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award' (1988) 4(2) Arb Int'l 141, 154.
[937] *Soleimany v Soleimany* [1999] QB 785, 803.

policy). However, there is a difference in the scope and interpretation of public order (public policy) itself. Whereas the Saudi judiciary will not tolerate a violation of Shariah provisions as part of public order, the English courts will look askance at a challenge based on a violation of public policy unless the violation is found to 'be clearly injurious to public good' or 'wholly offensive to the ordinary reasonable and fully informed member of the public' or involve 'some element of illegality'.[938]

1.2.2.3 Mandatory Rules

Mandatory rules are domestic[939] provisions 'purporting to apply objectively to any disputes, including international disputes'.[940] As manifestations of public policy, these rules aim to protect the economic and social interests of a state.[941] Although mandatory rules can be considered part of the public policy, they actually differ in terms of their method of application. The role of public policy is remedial, whereas mandatory rules' role is preventive. This means that mandatory rules are applied directly without the need to determine the applicable law, and public policy is used subsequently to determine the applicable law.[942]

Failure to observe mandatory rules by the arbitration parties or the arbitral tribunal can lead to the nullification of the arbitration agreement or to the court's refusal to enforce the arbitral award. This subsection will be divided into four parts. The first addresses the impact of mandatory rules on parties' freedom to choose the governing law before the arbitration process. The second addresses the impact of these rules after the initiation of the arbitration process. The last two parts address the determination and conflict of mandatory rules.

1.2.2.3.1 Impact of Mandatory Rules on the Freedom of Parties Before Arbitration

Although there is a wide recognition of arbitration parties' freedom to choose the law that will govern their dispute, the parties might be bound by mandatory rules, including those of the state that is the site of the arbitration or those of the state that has the closest connection to the contract. Therefore, some writers believe that any improvement of the international

---

[938] *Deutsche Schachtbau* (n 906) 1035.
[939] John O'Brien, *Conflict of Laws* (2nd edn, Cavendish 1999) 351.
[940] S Bonnard and S Touchard, 'Mandatory Rules in International Arbitration: the Example of Recent Awards' (2015) IBLJ 453, 454.
[941] Rome I, art 9(1); AJ Belohlávek, *Rome Convention - Rome I Regulation*, vol 1 (Juris 2010) 604.
[942] Ferrari and Krö (n 315) 355.

commercial arbitration system hinges on states' flexibility in imposing mandatory rules.

In Shariah, particularly in AlHanafi school, the necessity of complying with Shariah's mandatory rules depends on the religion of the arbitration parties. When the parties are religiously neutral (non-Muslims), they need not comply with Shariah mandatory rules in commercial matters among themselves, so long as such noncompliance does not violate the public order (the right of Allah).[943] Scholars of Shariah support that stance with a saying of Ali: 'We were commanded to leave them [non-Muslims] and what they believe'.[944] This means that non-Muslim parties to commercial arbitration enjoy complete freedom to select the law of their choice.

Ibn Abdeen, one of the senior scholars of AlHanafi school, states:

> The prohibition … [of certain foods] by a clear provision of Shariah does not lead to the invalidity of selling them between *dhimmis* [non-Muslims who have an agreement with Muslims in order to live in the Islamic state] ... . Because of their belief that these foods are permissible, we [Muslims] did not invalidate selling such foods among them.[945]

Therefore, according to Abu Hanifa, the founder of AlHanafi school, 'If a *dhimmi* sold wine to other *dhimmis*, the sale would be legal as he is not legally forbidden from possessing and transferring its ownership to others, unlike a Muslim'.[946] According to the scholars of the four Sunni schools, however, if the arbitration parties are Muslims, then any agreement, including the arbitration agreement, that contradicts mandatory rules in Shariah is null and void,[947] unless one of the exceptional cases previously mentioned exists.[948]

In the UK, Section 46 of the Arbitration Act 1996 does not mention any mandatory rules and grants the arbitration parties the freedom to choose any law, but this does not mean that arbitration parties are not bound by the mandatory rules in English law. Regardless of whether the chosen substantive law is English or foreign, the English rules apply when the

---

[943] Ibn Abdeen (n 256) vol 5, 54.
[944] AlAiny, *AlBenayah* (n 261) vol 13, 495.
[945] Ibn Abdeen (n 256) vol 5, 54.
[946] OIAHA AlHanafi (died: 773 Hijra - corresponding to 1371 AD), *AlGurrah AlMuneefa fi Tahqeeq Ba'ad Masael AlImamAbi Hanifa* (Moassasat AlKutub AlThaqafuyah 1986) 113. If such goods were damaged, Shariah commits the responsible person, whether a Muslim or non-Muslim, to pay a compensation to the non-Muslim owner. ibid 113; AlZuhaily (n 269) 2879; Ministry of Awqaaf and Islamic Affairs, *AlMosoua AlFiqhiyah*, vol 12 (2nd edn, That Alsalaseal 1988) 89.
[947] Please see pages 141-142.
[948] Please see pages 143-147.

seat of arbitration[949] or the enforcement of the arbitral award is in the UK. In *Accentuate Limited v ASIGRA Inc*,[950] the court held that European Union (EU) mandatory provisions must be given effect regardless of any contrary agreement between the parties. Moreover, the court agreed with the argument of a claimant that: 'Where an arbitration clause purports to apply a foreign law which does not give effect to a mandatory provision of EU law, then the agreement to arbitrate is void and the parties are not "party to an arbitration agreement" within the meaning of the Arbitration Act 1996 s.9(4) and (1) respectively.'[951]

Like the EAA 1996, the SAL 2012 does not address the need to consider mandatory rules. A difference between these two laws, however, is that the Saudi law restricts the freedom of arbitration parties by stating that their choice of law cannot contradict Shariah.[952] Hence, there is no doubt that the freedom of arbitration parties is restricted by the mandatory rules in Shariah. This raises the question of whether the restriction applies only when one or more of the arbitration parties is a Muslim (as is the case in Shariah) or whether it applies regardless of the parties' religious beliefs.

The researcher is not aware of any applicable published Saudi case in which both parties are non-Muslims. The interviews with Saudi judges, however, found that the majority viewpoint is that any arbitration agreement that contravenes Shariah will not be approved by a court, regardless of the religion of the parties, so long as the dispute does not relate to family matters. Dr AlKhunain, a member of the Committee of Senior Scholars and a judge in a Shariah Court, was asked whether a Saudi court would enforce an arbitral award that contradicts Shariah but complies with the faith of the non-Muslim parties, such as a dispute involving *riba,* which is prohibited by Shariah but permitted by Western law. Dr AlKhunain replied:

> The violation of Shariah by the arbitral award prevents the enforcement of the award in the Saudi territory regardless of the parties' faith — even if all parties are non-Muslims, as long as the subject matter contradicts Shariah or the Saudi public order. The subject matter is a red line [that should not be crossed] … .

Appeal Judge AlOmar expressed a different point of view, however, stating that the

---

[949] Rome Convention, art 7(2). Rome Convention enacted into UK law by the Contracts (Applicable Law) Act 1990.
[950] [2009] EWHC 2655 (QB).
[951] ibid 72.
[952] SAL 2012, art 38.

Saudi courts are supposed to apply Shariah, which 'grants those of other religions the freedom to follow their belief and apply its teachings and provisions among themselves. If a certain religion allows alcohol and pork, for instance, then such are considered respectable … for them in the eyes of Islamic Sharia'.

Consequently, it seems that Shariah grants religiously neutral parties complete freedom. When the parties are Muslims, however, Shariah is strict in terms of not allowing contraventions of its mandatory rules, unless there is an exceptional situation such as necessity. The approach of English law is somewhat similar to that of Shariah, as mandatory rules should be considered, particularly when they are part of the EU law adopted by the UK. The situation in Saudi Arabia seems less clear, particularly regarding whether Saudi courts will follow the Shariah approach, in which the religion of the parties is a factor.

1.2.2.3.2 Impact of Mandatory Rules After the Initiation of Arbitration Process

An international arbitral tribunal derives its power from the arbitration agreement. Therefore, if the agreement includes a choice of law clause, the arbitral tribunal must apply such law[953] unless it contravenes the requirements of international public policy in general.[954] If the chosen law is the law of a particular country, the arbitral tribunal's role is not limited to applying the mandatory rules of the country's law, but it should also consider the mandatory general rules that are in effect in that jurisdiction.[955] For instance, if the chosen substantive law is that of England, the arbitral tribunal should consider the European Convention on Human Rights, which is incorporated by the English Human Rights Act 1998, regardless of whether the arbitration agreement stipulates such laws. Therefore, the scope of freedom of the arbitration parties, even in an *arbitration-friendly* jurisdiction, might be negatively affected by the mandatory rules of the chosen law, and arbitration parties are not entitled to deviate from them.

The crucial question here is whether the arbitral tribunal should consider only the mandatory rules in the law chosen by the parties? This is one of the most difficult issues the arbitral tribunal faces,[956] and it arises in more than 50 percent of international arbitration

---

[953] T Begic, *Applicable Law in International Investment Disputes* (Eleven International Publishing 2005) 98.
[954] Gaillard and Savage (n 323) 848.
[955] M Harding, *Conflict of Laws* (5th edn, Routledge 2014) 142.
[956] See generally Ferrari and Krö (n 315) 376.

cases.[957] Many legal scholars express the view that in general an arbitrator should consider only the mandatory rules of the chosen law and the law of the seat of arbitration without considering other laws, including the mandatory rules of the law of the seat of enforcement.[958] They believe it is not necessary for the arbitral tribunal to even be aware of the state of enforcement.[959] This, however, seems inaccurate, as an arbitrator is supposed to reach an award that can be enforced. A failure to consider the mandatory rules of the state of enforcement can lead to the non-recognition and non-enforcement of the arbitral award.

Therefore, the mandatory rules of the state of enforcement should be considered, despite their negative effect on the freedom of arbitration parties. It is true that there could be more than one possible place for enforcement, but at the very least the arbitration parties will specify a place where the arbitral award is to be executed. Therefore, some legal writers see that the approach adopting the view that only the mandatory rules of the chosen law should be considered has changed when mandatory rules of the place of enforcement constituted a contravention of public policy.[960]

1.2.2.3.3 Determination of Mandatory Rules

Most national laws do not enumerate the mandatory rules[961] from which parties cannot agree to deviate. No Saudi law defines the concept of a mandatory rule nor specifies which Articles are mandatory. Therefore, the issue is subject to discretion, which can result in varying viewpoints. In Shariah, the situation is different, as the scholars of Shariah identify, with supporting evidence, which provisions should be considered mandatory. The result is that there is no room for argument on what contravenes Shariah's mandatory rules.

In this respect, the English law seems clearer than the Saudi law. Many, but not all, English national laws either specify the sections that are mandatory, as is the case with the Arbitration Act 1996,[962] or give 'an express indication of whether, and to what extent, its provisions' should be considered.[963]

---

[957] ibid 376.
[958] Moses (n 618) 84; Weigand (n 820) 1389.
[959] Weigand (n 820) 1389.
[960] See generally Moses (n 618) 84.
[961] Ferrari and Krö (n 315) 363.
[962] For example, EAA 1996, s 4.
[963] H Beale (ed), *Chitty on Contracts, Volume I General Principles* (31st edn, Sweet and Maxwell 2012) 2206. For example, the Unfair Contract Terms Act 1977, s 27(2).

1.2.2.3.4 Conflict of Mandatory Rules

In some cases, the arbitral tribunal is obliged to deal with more than one body of law, which might have conflicting or contradictory mandatory rules. Divergent sets of mandatory rules might be found in the law chosen by the arbitration parties, the law of the arbitration forum, the forum of enforcement of the arbitral award, or even of a third state whose law has the closest connection with the underlying transaction or dispute. In such a situation, the Shariah approach is clear: When one or more of the parties is a Muslim, the provisions of Shariah should be applied regardless of any other law.[964]

In some cases, however, the Shariah rules themselves might be subject to conflicting interpretations by early scholars of the four Sunni schools. As far as the researcher is aware, these scholars have not addressed this issue. They have, however, discussed to what degree it is permissible to require a particular doctrine to be used as the applicable law, which sheds light on how they would approach the issue of conflicting interpretations of mandatory rules. Both AlHanbali[965] and AlShafi'i[966] schools believe that a judge should rule based on what he deems just when there is more than one viewpoint, and that he should not be restricted to a particular school or doctrine. AlMaliki[967] and AlHanafi[968] schools express an opposing conclusion. Ali Afandi, Hanafi scholar, stated that:

> When disputants deem resolving their disputes according to the provisions of their school suitable, they can appoint an arbiter to decide on their claims. This arbiter shall rule according to the provisions of that school. Such an arbitral award would be enforced by AlHanafi judge.[969]

Based on this approach, it can be concluded that, according to AlMaliki and AlHanafi schools, an arbitrator should commit to the mandatory rules of the chosen school. In AlHanbali and AlShafi'i schools, however, the determination of the applicable mandatory rules is subject to the arbitrator's discretion.

In the UK, although there is no clear provision that governs the issue, it appears that when there is a conflict between English mandatory rules and the mandatory rules of a foreign

---

[964] See page 141 and 160.
[965] MAMSESHMSS Abu AlNaja (died: 968 Hijra - corresponding to 1560 AD), *AlIqna'a fi Fiqeh AlImam Ahmad ibn Hanbal*, vol 4 (AMM AlSabaki ed, Dar AlMa'arefah) 367.
[966] Ibn Qudamah, *AlMugni* (n 225) vol 10, 93.
[967] AlMagrebi (n 570) vol 6, 98.
[968] Afandi (n 583) vol 4, 602.
[969] ibid 602.

law, the English rules will prevail in the English courts. Therefore, if the arbitral tribunal fails to apply English mandatory rules, the English courts will assert or maintain jurisdiction to apply these rules.[970]

This can clearly be concluded from the case *Accentuate Limited v ASIGRA Inc.*[971] between an English distributor (plaintiff) and a Canadian software licensor (defendant). The parties had agreed that any dispute would be resolved by arbitration in Canada. The agreement also specified that Canadian law would be the governing law. Because of the termination of the agreement by the licensor, the plaintiff requested compensation before the arbitral tribunal in Canada under the Commercial Agents (Council Directive) Regulations 1993[972] (CAR 1993).[973]

Regulation 17 of CAR 1993 states that after termination of the agency contract, the agent is 'entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal'. According to Regulation 19 of the CAR 1993, 'The parties may not derogate from regulations 17 and 18 to the detriment of the commercial agent before the agency contract expires'. However, the arbitral tribunal refused to apply CAR 1993, stating: 'It is the Arbitral Tribunal's decision therefore that the English Regulations do not apply in determining the rights and liabilities of the parties to this arbitration. Those rights and liabilities will be determined in accordance with the "Governing Law" selected by the parties'.[974]

The plaintiff brought a claim before the English courts to obtain permission to serve the defendant outside the jurisdiction rather than challenge the arbitral award. The plaintiff argued that the arbitral tribunal did not consider the CAR 1993, which includes mandatory provisions that cannot be derogated from by the parties' agreement.[975] Although the defendant applied to stay the proceedings in accordance with Section 9 of the EAA 1996, the English Court of Appeal granted the plaintiff permission.[976] After addressing the question regarding which law governs the compensation claim under CAR 1993, the court also held

---

[970] S Dutson and T Berger, 'The Application of Mandatory Laws in England and Wales: Accentuate Limited v Asigra Inc' (2011) Int ALR 73, 79.
[971] *Accentuate* (n 950).
[972] *Accentuate* (n 950) 4.
[973] Came into force in the UK on 1st January 1994.
[974] The arbitral award on 3 March 2008, 20 (as cited in *Accentuate* (n 950) 86).
[975] *Accentuate* (n 950) 72.
[976] ibid 103.

that because CAR 1993 cannot be applied with the chosen law (Ontario law), the law of England and Wales should be applied.[977]

2. Procedural Rules

2.1 Overview

The procedural law (also called 'adjective law' or 'curial law') of arbitration is the body of rules regulating the internal processes of arbitration and its relationship with the court.[978]

The first acknowledgement of the right of parties to choose the procedural rules for their arbitration was the Protocol on Arbitration Clauses 1923[979] (Geneva 1923), which stated: 'The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place'.[980] The Geneva approach was adopted by many international laws and conventions concerned with arbitration, such as the Geneva Convention 1927,[981] NYC 1958[982] and the Model Law.[983]

The Geneva approach supplanted the traditional approach that favoured the procedural law of the seat of arbitration.[984] Now, it is generally accepted that arbitration parties can choose a procedural law that is foreign to the state where the arbitration takes place.

This section discusses and compares the extent of the freedom of parties to choose the procedural rules of arbitration under English, Shariah and Saudi law. The analysis begins with a clarification of the distinction between substantive and procedural rules, along with a look at the influence of this distinction on the freedom of arbitration parties. The section then

---

[977] *Accentuate* (n 950) 92.
[978] A Henderson, 'Lex Arbitri, Procedural Law and the Seat of Arbitration' (2014) 26 SAcLJ 886, 886.
[979] Protocol on Arbitration Clauses, Geneva, 24 September 1923, entered into force 28 July 1924, LNTS 27/157. O Chukwumerije, *Choice of Law in International Commercial Arbitration* (Greenwood Press 1994) 79.
[980] Geneva 1923, art 2.
[981] Article 1(c) of Geneva Convention 1927 has mentioned the right of arbitration parties to choose the procedural rules indirectly as it requires for the recognition and enforcement of the arbitral award, *inter alia*, that '[T]he Arbitral Tribunal ...[is] constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure'.
[982] Article V(1)(d) of NYC 1958 has also mentioned that indirectly as it stipulates the possibility of refusal of recognition and enforcement, *inter alia*, when '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'.
[983] Model Law, art 19.
[984] H Seriki, 'Substantive or Procedural: an Arbitration Perspective' (2006) Int ALR 24.

examines the freedom of arbitration parties to agree on procedural rules, and the legal and time limitations on that freedom.

2.2 Classification as Substantive or Procedural

There is no comprehensive legal or academic standard to distinguish which issues are procedural and which are substantive. As Lord Pearson observed, 'I do not think there is any exact and authoritative definition of the boundary between substantive law and procedural (or adjectival or non-substantive) law, and the boundary remains to be settled by further decisions in particular cases'.[985]

The difficulty in determining this boundary — especially in international arbitration — is twofold. First, what is considered a procedural issue can vary from country to country,[986] and, second, the definition of procedural law has evolved so that what was once considered purely procedural is now seen as only partly procedural.[987] Therefore, the procedural vs. substantive determination can be made only on a rule by rule basis.[988]

Nevertheless, it can be generally said that the substantive law is the law that governs the dispute's subject matter and regulates the rights, duties[989] and powers[990] of the contracting parties, while the procedural rules govern the conduct and mode of the proceedings.[991] In other words, the procedural rules provide the mechanism for applying the substantive rules in a dispute.[992]

2.2.1 The Effect of the Distinction Between Procedural and Substantive Law on the Freedom of the Parties

The distinction between procedural and substantive law gives the arbitration parties the freedom to mix and match different laws, one governing the dispute's subject matter and the other governing the procedures. While the parties might believe, for example, that it is in

---

[985] *Chaplin v Boys* [1971] AC 356, 395.
[986] Henderson (n 978) 894.
[987] Seriki (n 984) 24.
[988] *Chaplin* (n 985) 395.
[989] Jones (n 821).
[990] KB Gerdy, 'Teachable Moments: What is the Difference Between Substantive and Procedural Law? And How do I Research Procedure?' (2000) 9(1) Perspectives: Teaching Legal Research and Writing 5 <https://tinyurl.com/y2vbnzyj> accessed 10 March 2016.
[991] Seriki (n 984) 25.
[992] TK Saha and M Saharay, *Textbook on Legal Methods, Legal Systems and Research* (ULP 2010) 198.

their interest to choose English law to regulate the arbitration procedures, they might prefer Shariah to govern the substance of the dispute.

This distinction is recognised by many jurisdictions. In Great Britain, the principle was acknowledged in *Compagnie d'Armement Maritime SA Appellants* v *Compagnie Tunisienne de Navigation SA Respondents*,[993] which concerned the transport of crude oil. The parties had agreed to resolve any disputes by arbitration in London, with French law governing the underlying contract. Accordingly, the arbitral tribunal applied French substantive law and English procedural law. The House of Lords upheld the arbitral award, stating:

> [I]t is possible for parties to a contract to choose one system of law as the proper law of their contract and a different system of law as the curial law. Although they may want their mutual rights and obligations under the contract to be ascertained by reference to the system of law of a country with which the transaction has some close and real connection, they may nonetheless consider that the arbitral procedure adopted in some other country … .[994]

Shariah addresses substantive and procedural rules,[995] but the ancient scholars of Shariah did not discuss the distinction at length.[996] This may be a result of the principle that Shariah should be applied in all matters associated with any dispute. In modern times, however, the distinction — both in arbitration and in judicial proceedings — is recognised in the laws of countries that apply Shariah. An example can be found in the law applied in Shariah courts in Saudi Arabia, which are considered by legal scholars as a true model of applying Shariah.[997] The First Article of the SLPBSC 2013 expressly distinguishes between substantive rules, which should be derived from the Quran and Sunnah, and procedural provisions, which are determined by the statute.[998]

The Shariah scholars and judges of Shariah courts who were interviewed for this research affirmed the freedom of parties to choose the procedures they deem suitable. For

---

[993] [1970] 3 WLR 389.
[994] ibid 604.
[995] C Toll and J Skovgaard-Petersen (eds), *Law and the Islamic World Past and Present* (RDASL 1995) 10. For a different viewpoint see Chern (n 240) 13.
[996] Saleh, *Commercial Arbitration* (n 193) 43.
[997] Leonid R Sykiainen, 'Sharia Courts: Modern Practices and Prospectives in Russia' HSE University, BRP Working Papers 60/LAW/2015, 5 <https://www.hse.ru/data/2015/12/29/1136288132/60LAW2015.pdf> accessed 25/06/2018.
[998] SLPBSC 2013, art 1 states that 'Courts shall apply the provisions of Sharia to cases brought before them, as derived from the Quran and Sunnah, and State laws not conflicting therewith. Proceedings before such courts shall comply with the provisions of this Law'.

instance, Sheik AlKhunein, who is a member of the Committee of Senior Scholars and a judge in Shariah court in Saudi Arabia, was asked about the scope of arbitration parties' freedom to choose a law under Shariah. He responded: 'We should differentiate between procedures and the law that governs the subject matter. Procedures can be derived from any law, while the subject matter should be derived from Shariah and based on Shariah'.

2.3 Freedom of Arbitration Parties to Agree on Procedural Rules

The English judiciary, as previously pointed out, recognises the separation between procedural and substantive rules. This recognition is reflected in the EAA 1996, which grants arbitration parties the freedom to agree on the procedural rules[999] and the substantive law.[1000]

The SAL 2012, unlike the old law, expressly states that the parties are free to agree on any procedural rules, including the rules of an arbitration institution outside Saudi Arabia,[1001] such as the Dubai International Arbitration Centre (DIAC), the LCIA, and the ICC.

When such an agreement exists, it automatically supplants non-mandatory procedural rules included in the Saudi Arbitration Law, as is the situation in the English law.[1002] The Model Law, on the other hand, makes the freedom of arbitration parties to agree on procedural rules subject to its provisions.[1003]

Saudi case law shows that the courts support the freedom of parties to choose foreign procedural rules when the arbitration is international. Further, the BG in Saudi Arabia commits to an arbitration agreement upon the request of either party, even if that agreement involves the application of a foreign law.

In Case No 4/ta/43,[1004] the BG refused to decide the case after the defendant (an American) pointed to an agreement between the parties that any disputes would be arbitrated in the USA under US law. The BG also ruled that the parties' agreement to arbitrate outside Saudi Arabia constituted a waiver of the Saudi party's right to resort to the Saudi judiciary.

If the arbitration agreement is silent on procedure, the arbitral tribunal has the authority to determine appropriate procedures.[1005] The approaches of the SAL 2012 and the EAA 1996

---

[999] EAA 1996, s 34(1).
[1000] See page 148.
[1001] SAL 2012, art 25(1).
[1002] Nesheiwat and Khasawneh (n 825) 447.
[1003] Model Law, art 19.
[1004] Decision No 4/ta/43 of 1416 Hijra (corresponding to 1995 AD) BG.
[1005] SAL 2012, art 25(2) and EAA 1996, s 34(1).

diverge, however, on how the tribunal should make that determination. The English act grants the arbitral tribunal the same freedom that is granted to the parties.[1006] The Saudi law, on the other hand, requires the tribunal to apply the procedural provisions of the SAL 2012 if the arbitration agreement is silent on the issue.[1007] That position seems to reflect Saudi lawmakers' negative reaction to international arbitral tribunals' unwillingness to apply Saudi law and Shariah, as evidenced in the ARAMCO case.[1008] Although this limits the arbitral tribunal's freedom, it provides a guarantee to the arbitration parties that, at the very least, the procedural rules will not contravene those set out in the SAL 2012.

The parties can avoid this situation by empowering the arbitral tribunal, whether it is inside or outside Saudi Arabia, to determine the procedures. Article 4 of the SAL 2012 states that 'In cases where this Law allows the parties to arbitration to choose the procedure to be followed in a certain issue, this shall include the right of the two parties to authorise a third party to choose that procedure'. According to the same Article, the third party 'includes any… tribunal, organization, or arbitration center within the Kingdom or abroad'.

The question arises here concerns whether the freedom of arbitration parties to determine procedural rules is constrained. To clarify this point, two matters will be addressed; the time and legal limits of this freedom

2.3.1 Time Limit to Determine Procedural Rules

An important distinction exists between the period before the appointment of an arbitrator and the period after the appointment and acceptance of an arbitrator. During the first period, there is no doubt that arbitration parties under both the SAL 2012 and the EAA 1996 enjoy the right to choose, devise or modify procedural rules. But after the appointment of the arbitrator, their freedom may be limited, depending on whether the arbitrator is considered a party to the arbitration agreement.

[1006] EAA1996, s 34(1).
[1007] SAL 2012, art 25(2).
[1008] *Saudi Arabia v Arabian American Oil Company* (ARAMCO) 27 ILR 117 (1958). *Saudi Arabia v Arabian American Oil Company* (ARAMCO) 27 ILR 117 (1958). In this case the two parties agreed to apply Saudi law, which the agreement specified as 'the Moslem law (a) as taught by the school of Imam Ahmed Ibn Hanbal, (b) as applied in Saudi Arabia'. The arbitral tribunal, however, refused to apply Shariah, stating that 'Hanbali law contains no precise rule about mining concessions and is silent a fortiori about oil concessions'. The tribunal so ruled even though Shariah is rich with principles and methods that could govern such a dispute. Al-Samaan (n 874) 219.

As previously mentioned, the arbitrator in the English system[1009] is considered a party to the arbitration agreement after accepting the appointment. In *Compagnie Europeene de Cereals SA v Tradax Export SA*,[1010] Hobhouse J wrote, 'It is the arbitration contract that the arbitrators become parties to by accepting appointments under it. All parties to the arbitration are as a matter of contract (subject always to the various statutory provisions) bound by the terms of the arbitration contract'.[1011] Accordingly, under English law, adding or amending any arbitral procedure requires arbitrator's consent once he becomes a party to the contract.

The approach of Saudi law, which is similar to that of Shariah, is different from the English method, as the Saudi arbitrator is not considered a party to the arbitration agreement.[1012] Consequently, the arbitration parties continue to enjoy the right to establish or modify procedures even after the arbitral process has begun. If an arbitrator does not agree to such modification and withdraws from the arbitration, the validity of the arbitration agreement is not affected under Saudi law.

2.3.2 Legal Limits on the Freedom of Parties to Agree on Procedures

While the SAL 2012 and the EAA1996 grant considerable procedural freedom to arbitration parties, that freedom does have limits. International commercial arbitration procedures arise from at least two sources: (1) the agreement of parties and (2) the procedural rules of the law of the seat of arbitration, even if it is not the chosen law.[1013] In the interest of public policy, most modern national arbitration laws[1014] as well as the Model Law include restrictions on the freedom to choose procedures.[1015]

Under the English system, mandatory provisions in various laws are the main source of restrictions on the freedom of parties to choose procedures.[1016] Foremost among these is Schedule 1 of the EAA 1996, which includes 21 sections. According to Section 4 of the EAA

[1009] See page 57.
[1010] *Compagnie Europeene* (n 304).
[1011] ibid 306.
[1012] See pages 57-58.
[1013] See generally J Jenkins and S Stebbing, *International Construction Arbitration Law* (KLI 2006) 238-239.
[1014] For example, EAA 1996, s 1(b) states that 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest'.
[1015] UNCITRAL Secretary-General 'International Commercial Arbitration: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration' UN Doc A/CN.9/264, vol 16 (1985) 45. The Analytical Commentary provides that 'The freedom of the parties [to agree on the procedural rules under the Model Law] is subject …. [to its provisions], that is, to its mandatory provisions'.
[1016] See pages 160 and 164.

1996, the provisions listed in Schedule 1 'have effect notwithstanding any agreement to the contrary'. These include, *inter alia*, a court's power to stay legal proceedings,[1017] to extend agreed-upon time limits[1018] and to remove an arbitrator.[1019] Also legislated are the general duties of the parties and the arbitral tribunal[1020] and the loss of party's right to object.[1021]

These provisions should be taken into account when the chosen law is the EAA 1996 or when the seat of arbitration is England, Wales or Northern Ireland (EWNI). Furthermore, these mandatory rules include provisions that should be considered any time a party or the subject matter of an arbitration has legal links to EWNI — even if the arbitration takes place outside the United Kingdom and even if the chosen law is foreign. These mandatory rules involve staying legal proceedings,[1022] compelling attendance of witnesses,[1023] and a court's power to support an arbitral proceeding.[1024]

Unlike English law, Saudi law (like the Model Law) does not specify what is considered a mandatory provision. This raises the question of whether the SAL 2012 includes any mandatory procedural provisions that cannot be derogated by arbitration parties.

Because of the law's silence, some legal writers argue that arbitration parties can agree to forgo the procedures contained in the SAL 2012,[1025] but in fact there seem to be procedural provisions that cannot be contravened by the parties' agreement.

Two provisions support that position. The first is the stipulation in Article 4 regarding the right of arbitration parties to authorise a third party to choose arbitration procedures only 'where this Law allows the parties to arbitration to choose the procedure to be followed in a certain issue'. This can only mean that there are instances where the law does not allow the parties to choose procedures other than those stated by the law.

The second provision supporting the position that some procedural provisions cannot be contravened by the parties' agreement is the stipulation in some procedural Articles that the Articles apply 'unless otherwise agreed by the parties to arbitration'[1026] or 'unless they

---

[1017] EAA 1996, s 9-11.
[1018] EAA 1996, s 12.
[1019] EAA 1996, s 24.
[1020] EAA 1996, ss 33 and 40.
[1021] EAA 1996, s 73.
[1022] EAA 1996, ss 9-11.
[1023] EAA 1996, s 43.
[1024] EAA 1996, s 44.
[1025] For example, Nesheiwat and Khasawneh (n 825) 447.
[1026] SAL 2012, art 22(1).

[parties] agree otherwise'.[1027] The fact that some other procedural Articles do not include such a proviso indicates that the lawmakers intended those Articles to be compulsory notwithstanding any contrary agreement between the parties. This conclusion is further reinforced by the fact that some of those procedural provisions that do not include opt-out provisos are phrased as imperative commands (eg, 'shall be',[1028] and 'shall not'[1029]).

Consequently, it can be concluded that despite the fact that the SAL 2012 does not expressly state that certain procedural provisions are mandatory, it is almost certain that there are procedures that cannot be contravened by agreement of the parties. These include provisions dictating that the number of arbitrators must be odd,[1030] that an arbitrator is barred from hearing a case under certain circumstances,[1031] that each party must have equal opportunity to present his claim and defence,[1032] that the parties must receive adequate notice of any arbitral meetings,[1033] that certain procedures are invoked when a criminal action (eg, forgery) is discovered,[1034] that the arbitral award must be rendered in a certain format,[1035] that the parties have the right to challenge the arbitral award,[1036] that certain procedures must be followed in the enforcement[1037] or challenge[1038] of the award, and that the procedural rules of Shariah must be considered.

Parties should take into account the mandatory rules of the SAL 2012 when the arbitration will take place in Saudi Arabia or when the parties have chosen Saudi law to govern their arbitration.[1039]

While Shariah is strict about sticking to its substantive rules, Shariah is very flexible about procedural rules and grants arbitration parties wide latitude.[1040] This is contrary to the belief of some legal scholars who assert that not 'much room tends to be left for foreign

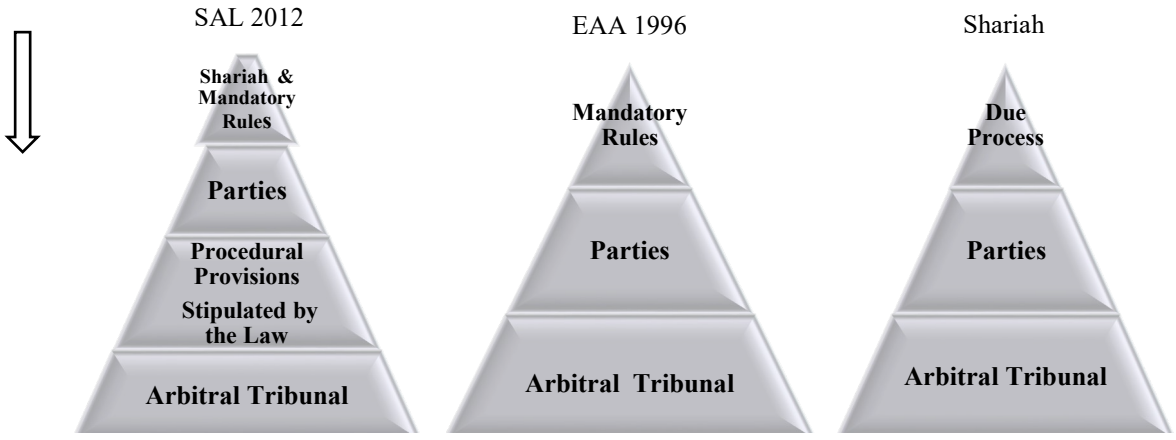
---

[1027] SAL 2012, art 36(1).
[1028] SAL 2012, arts 9(2) and 13.
[1029] SAL 2012, arts 16 and 55(2 and 3).
[1030] SAL 2012, art 12.
[1031] SAL 2012, art 16(2).
[1032] SAL 2012, art 27.
[1033] SAL 2012, art 33(2).
[1034] SAL 2012, art 37.
[1035] SAL 2012, art 42(2).
[1036] SAL 2012, art 51.
[1037] SAL 2012, arts 53-55.
[1038] SAL 2012, art 50.
[1039] SAL 2012, art 2.
[1040] J Jemielniak, *Legal Interpretation in International Commercial Arbitration* (Ashgate 2014) 119-20.

procedural' rules in the Shariah tradition.[1041] In fact, under Shariah parties to arbitration can choose any international or national procedures, as Shariah has no restrictions in this regard except for matters relating to due process[1042] and evidence.

As Samir Saleh, a legal consultant in Islamic and Middle Eastern law, has correctly observed, the only restriction on the parties' freedom under Shariah is 'the mandatory rules of evidence and the principle of fair trial'.[1043] Other than that, the arbitration parties have complete freedom to '[s]et out the powers of the arbitrators, the time and place of the hearings' and any other procedural matters.[1044]

Based on the above, it can be concluded that the legal hierarchies relating to the selection of procedural rules in Shariah and Saudi and English law are as follows:



Hence it can be said that while the SAL 2012 grants the arbitration parties freedom that is wider than that granted to the arbitral tribunal in terms of the selection of arbitration procedures, English law grants greater freedom to the arbitral tribunal. Furthermore, English law is clearer, since the mandatory rules are set by statute, whereas determining such matters

[1041] Sammartano (n 299)799.
[1042] See generally Ahdab and Ahdab (n 213) 40.
[1043] Saleh, *Commercial Arbitration* (n 193) 46.
[1044] ibid 46.

under Saudi law is within the discretion of the court.

On the other hand, Shariah is clearer than the SAL 2012, as the restriction on the freedom of parties under Shariah is limited to due process concerns. Shariah also grants arbitration parties broader freedom than that granted by English and Saudi law in choosing the arbitration procedures, except as to some issues related to evidence, which will be addressed later.[1045]

3. Conclusion

It is clear from the foregoing that the attitude of early scholars of the four Sunni schools differs significantly from the position of the Saudi and English systems in respect to the freedom of parties to international commercial arbitration to choose the substantive law that governs their dispute.

According to the attitude of early scholars of the four Sunni schools, if the parties are religiously neutral, they have complete freedom to choose the substantive law, even if the chosen law contradicts Shariah mandatory rules, so long as that contradiction does not violate public policy (right of Allah). If one of the parties is a Muslim, there is no freedom to choose a foreign substantive law; the applicable law must be Shariah. It is widely thought that the only exception is in cases of necessity. This chapter proved, however, that under the main sources and general principles of Shariah, the freedom of parties to international commercial arbitration in selecting the substantive law should not be limited to cases of necessity. By virtue of the principle of *umum albalwa*, the parties should now have the right to choose a law other than Shariah when the seat of arbitration or the enforcement of the arbitral award is a country that does not apply Shariah. This is because the parties' acceptance of secular laws in international trade contracts is within the ambit of *umum albalwa* in the current era.

In contrast to the attitude of Shariah scholars, the new Saudi Arbitration Law, similarly to the EAA 1996, explicitly stipulates the right of arbitration parties to choose the substantive law. Unlike the EAA 1996, however, the SAL 2012 considerably limits this right in many respects.

[1045] Chapter eight which is devoted to examining the effects of evidentiary rules on the freedom of international commercial arbitration parties in Shariah and the Saudi and English systems.

The public policy and mandatory rules have more negative impact on the parties' freedom to choose the substantive law under the Saudi system compared to the English system. Under the Saudi system, the scope and interpretation of public policy are broader than in the English system. This is true even in light of the Saudi judicial precedents' distinction between national and international public policy. This is because Saudi courts will not tolerate any violation of Shariah (which is broader than English public policy) as Shariah is a part of Saudi public policy even if the dispute is international.

In addition, while the mandatory rules must be taken into consideration when choosing the substantive law in both the Saudi and English jurisdictions, they are not specified or even defined under Saudi law. Instead, the issue is subject to the discretion of the Saudi courts, which has led to varying outcomes. In contrast, under the English system the situation is close to Shariah, as English law usually is more explicit about which rules are mandatory.

Furthermore, the SAL 2012, in contrast to the EAA 1996, includes a mandatory requirement that the arbitral tribunal take into account 'the usages of the trade applicable to the transaction', which are very broad and unspecified.

These differences regarding the selection of the substantive law under the three jurisdictions, however, are starker than the differences relating to procedural rules. Under all three systems, arbitration parties have a wide freedom to choose the procedural rules they prefer. This freedom is not absolute, however, nor is it equal across all three systems.

In Shariah, parties to arbitration enjoy greater freedom compared to the Saudi and English systems in respect to procedural rules. Under the English system, such freedom is restricted after the acceptance of an arbitrator, as s/he is considered a party to the arbitration contract after that acceptance. A similar restriction does not appear to exist under Shariah or the Saudi system, as the arbitrator does not become a party to the arbitration contract even after the commencement of the arbitration proceedings. Furthermore, the freedom of the arbitration parties under both the Saudi and English systems is limited considerably by the mandatory procedural rules, which are broader under the English and Saudi systems compared to Shariah.

Under Shariah, observing such rules is required only when an arbitration party is a Muslim. Moreover, the mandatory rules under Shariah are limited to matters relating to due process, which is part of the procedural mandatory rules under both the English and Saudi systems, and to some issues related to evidence. The following chapter will therefore examine

the freedom of arbitration parties in respect to the rules of evidence under Shariah and the Saudi and English systems.

Chapter VIII:
Rules of Evidence

In the previous chapter, this study examined the extent to which the parties are free to choose the law governing their substantive dispute and the procedures governing the arbitral process. This chapter examines the final issue in regard to parties' freedom to determine the rules of their arbitral process — namely, their rights regarding the rules of evidence that they and the arbitrator must follow.

The freedom to choose evidentiary rules is important because these rules can alter the course and the outcome of an international commercial arbitration. This is especially true when it comes to Shariah and the Saudi law, which contain rules that could block a party from presenting his evidence and challenging an opponent's evidence, as in the case of the decisive oath.

Generally, in international arbitration, the gathering and presentation of evidence are often complicated and different under the fact that the parties have different legal traditions from each other or from the tribunal.[1046] Evidentiary rules are among the issues where the civil law, the common law and Shariah diverge most widely in international arbitration.

To address this problem, uniform rules of evidence have been established at the international level (eg, IBA Rules on the Taking of Evidence in International Arbitration).[1047] At the same time, however, most modern national arbitration laws allow the parties to agree on the evidentiary rules that will apply to their disputes.

English law clearly grants the parties the right to agree on all evidentiary matters, while both the old and new Saudi arbitration laws are silent on the issue. According to Decision No 3 dated 1347 Hijra (corresponding to1928 AD), when there is no relevant legal provision in the Saudi law, 'All Saudi courts should follow the opinion of Imam Ahmad Ibn Hanbal unless the judge … finds that doing so would violate the public interest', in which case the conduct practiced by any of the other schools should be followed.[1048] Therefore, under Saudi law, the arbitration parties and the arbitral tribunal are limited to rules of evidence that have been

---

[1046] Born, 'International Commercial Arbitration: Commentary and Materials' (n 897) 469.
[1047] IBA Rules on the Taking of Evidence in International Arbitration, International Bar Association (adoped on 29 May 2010).
[1048] Committee of Judicial Supervision Decision No 3 dated 07/01/1347 Hijra (corresponding to 26/06/1928 AD), approved by higher authority on 24/03/ 1347 (corresponding to 10/09/1928 AD).

sanctioned by the schools of Islamic jurisprudence or that at least do not conflict with the schools' mandatory rules, unless there is a Saudi legal provision governing the evidentiary issue, which is very rare (as will be seen later).

This chapter aims to determine the extent to which parties to international commercial arbitration are free to choose or modify the applicable rules of evidence under Shariah and the Saudi and English systems. To achieve this aim, four types of evidence will be addressed: oral testimony, written evidence, admission (*iqrar*) and oath. Accordingly, the chapter will be divided into four sections. Moreover, two main issues will be analysed under each section: the extent to which the arbitration parties are free when applying the rules in the three systems under study (eg, restrictions imposed on presenting an evidence and the right to challenge the evidence provided by the other party), and the extent to which arbitration parties under these three systems have the right to agree on different rules.

1. Oral Testimony

Despite the growing use of documentary evidence in recent years,[1049] oral testimony still plays an essential role in dispute resolution under both Shariah[1050] and English law.[1051]

Under the EAA 1996, the arbitration parties have unbridled freedom to decide whether they will allow oral testimony and, if so, how it will be presented.[1052] The situation is the same under the SAL 2012 and Shariah, as there is no provision mandating testimony as a means of proof, although it is recommended by Shariah in financial transactions.[1053]

English law has shed most restrictions on a witness's competence.[1054] In 1744, Lord Willes CJ wrote in *Omychund v Barker*:[1055]

> I am of [the] opinion that infidels [ie, non-Christians] who believe [in] a God, and future rewards and punishment in the other world may be witnesses; yet I am as clearly of [the] opinion, that if they do not believe [in] a God, or future rewards and punishments, they ought not to be admitted as witnesses.[1056]

[1049] Lawrence W Newman, Ben H Sheppard (eds), *Take the Witness: Cross-Examination in International Arbitration* (JURIS 2010) 253.
[1050] Ahdab and Ahdab (n 213) 40 and 41.
[1051] See generally Omeroglu (n 821) 13.
[1052] EAA 1996, s 34(2) (f and h).
[1053] For example, *Surat Al-Baqarah,* verse 282.
[1054] Kay and others (n 823) 771.
[1055] (1744) 1 Atkyns 21.
[1056] ibid 45. See also SM Phillipps and A Amos, *A Treatise on the Law of Evidence* (Saunders and Benning

In 1896, however, the English courts completely discarded any religious qualifications for a witness and held that an atheist could testify.[1057] Shariah, on the other hand, still demands that a witness meet certain religion-based requirements.

Under Shariah, the witness should be a Muslim when the defendant is a Muslim. Also, in some situations, the witness must be a man, must have reached the age of puberty, and must be mentally competent. There remains a controversy among early Shariah scholars over requiring that the witness not be mute or blind[1058] and be free.[1059]

The first four requirements — relating to religion, gender, age and mental competence — will be addressed in a detailed manner because these can restrict the freedom of arbitration parties and because they have sparked controversy among contemporary legal writers.

1.1 Requirements of Witnesses

1.1.1 Being a Muslim

Early scholars of the four Sunni schools (AlHanbali,[1060] AlMaliki,[1061] AlShafi'i[1062] and AlHanafi[1063]) agree that a witness who testifies among Muslims should be a Muslim. They base their opinion on several Quranic verses, such as 'And bring to witness two witnesses from among your men'[1064] and 'take for witness two persons from among you, endued with justice'.[1065] They believe that the pronoun 'you' refers to the Muslim community being addressed by the Quran. Therefore, only a Muslim can be a witness.[1066]

At the same time, these scholars agree that it is permissible for a non-Muslim to be a witness concerning the will of a Muslim who is travelling abroad. Their opinion is based on a Quranic verse that says, 'O you who have believed, testimony [should be taken] among you

---

1838) 12.

[1057] The Evidence Further Amendment Act, 1869. See also Paul W Kaufman, 'Disbelieving Nonbelievers: Atheism, Competence, and Credibility in the Turn of the Century American Courtroom' (2003) 15 YJLH 395, 405.

[1058] M Abualfaraj, 'Evidence in Islamic Law: Reforming the Islamic Evidence Law Based on the Federal Rules of Evidence' (2011)13(2-3) JILC 140, 151.

[1059] P Bearman and R Peters, *The Ashgate Research Companion to Islamic Law* (Routledge 2014) 131.

[1060] TAAAAT Al Harany (died: 728 Hijra - corresponding to 1327 AD), *Majmo' AlFatawa,* vol 15 (AM Qasim ed, King Fahad Quran Printing Complex 1995) 297.

[1061] Aldosooqi (n 488) vol 4, 172.

[1062] AAMAMAR AlQurtubi (died: 595 Hijra - corresponding to 1198 AD), *Bedayat AlMujtahid wa Nehayat AlMuqtased*, vol 4 (Dar AlHadith 2004) 246.

[1063] AlSarkce (n 413) vol 16, 114.

[1064] *Surat Al-Baqarah,* verse 282.

[1065] *Surat At-Talaq,* verse 2.

[1066] J Al-Mahalli and J Al-Suyuti, *Tafsīr al- Jalālayn* (F Hamza tr, GM Talal ed, Royal Aal Al-Bayt 2007) 52.

when death approaches one of you at the time of bequest — [that of] two just men from among you or two others from outside if you are travelling through the land and the disaster of death should strike you'.[1067]

A group of scholars from these schools, such as Ahmad Ibn Hanbal (founder of AlHanbali school) and Ibn Qayyim,[1068] and some contemporary scholars such as Jamal Qutub (the head of the Committee of Fatwa in Al-Azhar)[1069] express the opinion that when necessary, the testimony of non-Muslims under oath among Muslims is valid in all situations,[1070] whether these are People of the Book (ie, Jews and Christians) or other non-Muslims.[1071] They argue that the reason a non-Muslim's testimony is permissible in the travelling scenario is necessity. Necessity is not limited to travel or will matters. Therefore, it can be said that according to verse 106 of *Surat Al Maadia*, such testimony should be accepted when it is necessary.

In the modern times, a non-Muslim's testimony among Muslims should be considered valid in all international financial cases for several reasons:

First, it is essential to achieve equity in the rights and duties of the parties and to promote trust between the citizens of different states, most of which contain people of various religions. Quran calls on Muslims to exhibit righteousness and fairness in the treatment of non-Muslims, so long as they do not fight against Muslims. The Quran, in verse 8 of *Surat Al-Mumtahana*, states: 'Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes — from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly'.[1072] It is not righteous to reject the testimony of a person based on his religion.

Second, Sheikh Abdulkareem Zaidan, a contemporary Iraqi senior scholar of Shariah, points out that there has been unanimous agreement among Shariah scholars since the beginning of Islam that it is permissible for a Muslim to deal with non-Muslims in commercial transactions; therefore, by implication, non-Muslims' testimony should be

---

[1067] *Surat Al Maidah,* verse 106.
[1068] MABASS Ibn Qayyim AlJawziyah (died: 751 Hijra - corresponding to 1350 AD), *AlTuruq AlHukmiyah* (Maktabat Dar AlBayan) 160.
[1069] AA Arif (ed), *Masail Mu'asirah Fi Al-fiqh Al-Islami*, vol 1 (Fajar Ulung 2014) 59.
[1070] Ibn Qayyim, *AlTuruq AlHukmiyah* (n 1068) 160.
[1071] FAFHMA AlNajdi (died: 1376 Hijra - corresponding to 1956 AD), *Bustan AlAkhbar Mukhtasar Nayl AlAotar*, vol 2 (Dar Ashbelia 1998) 627.
[1072] *Surat Al-Mumtahana,* verse 8.

permissible. To do otherwise would be to disfavour non-Muslims and to deny them equal rights.[1073] Shariah is keen to preserve people's rights, regardless of their beliefs.

Third, the acceptability of testimony is mainly based (whether in Shariah or other laws) on its reliability to reveal the truth, and this depends on the witness's credibility, not his religion. Therefore, a witness's testimony should be accepted when his credibility is established, regardless of whether he is a Muslim. Ibn Al-Qayyim says:

> Shariah does not deny a right, reject evidence or invalidate presumptive evidence. Allah Almighty orders us to verify the news of a *fasiq* [unreliable person] but does not order us to spurn the news in general. There may be signs of the accuracy of the news of a person who is an infidel and *fasiq*, and then it should be accepted.[1074]

1.1.2 Being of a Particular Gender

Early Shariah scholars have discussed the issue of women's testimony in various situations, such as in connection with severe crimes (*hudud*), financial matters and matters about which women generally are more knowledgeable than men.[1075]

Here, the gender requirement will be addressed only in relation to the freedom of the parties to offer a woman's testimony in commercial arbitration. The majority of the four Sunni schools agree that a woman's testimony is acceptable in this situation.[1076] AlKasaani, one of the leading scholars of Shariah in the 12th century, says: 'As for the testimony on the financial matters, it is unanimously agreed [by Shariah scholars] that a man's testimony is not a requirement and a woman's testimony is not prohibited'.[1077]

Just as in other legal systems, testimony in the Islamic Shariah is evaluated on the basis of honesty and reliability,[1078] and Shariah does not distinguish between men and women in

---

[1073] A Zaidan, *Ahkam AlThemmiyeen wa AlMustamenin fi Dar AlIslam* (Muassasat AlResalah 1982) 579. Regarding the permissibility of commercial transactions between Muslims and non-Muslims, see for example, S Al-Bahnasawy, *Non-Muslims in the Shariah of Islam* (Bayan Translation Services (tr), Dr An-Nashr Liljami'at 2004) 55.

[1074] Ibn Qayyim, *AlTuruq AlHukmiyah* (n 1068) 23. In Arabic, he said:
'أَنَّ الشَّرِيعَةَ لَا تَرُدُّ حَقًّا، وَلَا تُكَذِّبُ دَلِيلًا، وَلَا تُبْطِلُ أَمَارَةً صَحِيحَةً. وَقَدْ أَمَرَ اللَّهُ سُبْحَانَهُ بِالتَّثَبُّتِ وَالتَّبَيُّنِ فِي خَبَرِ الْفَاسِقِ، وَلَمْ يَأْمُرْ بِرَدِّهِ' جُمْلَةً. فَإِنَّ الْكَافِرَ الْفَاسِقَ قَدْ يَقُومُ عَلَى خَبَرِهِ شَوَاهِدُ الصِّدْقِ. فَيَجِبُ قَبُولُهُ وَالْعَمَلُ بِهِ.'

[1075] For example, childbirth.

[1076] AlHanafi, *AlMuheet AlBurhani* (n 261) vol 8, 75; AlShafi'i, *AlOm* (n 222) vol 7, 50; Ibn Qudamah, *AlMugni* (n 225) vol 10, 133; AWMAR AlQurtubi (died: 520 Hijra - corresponding to 1126 AD), *AlBayan wa AlTahseel wa AlShareh wa AlTawjeeh wa AlTahleel le AlMasael AlMustakhrajah*, vol 18 (M Hejji and others eds, Dar AlGarb AlIslami 1988) 165.

[1077] AlHanafi, *Badae'e AlSanae'e* (n 398) vol 6, 279. In Arabic, he said:
'وأما الشهادة على الأموال فالذكورية ليست فيها شرط, والأنوثه ليست بمانعة بالأجماع'.

[1078] MSR Buti, *Women Between Western System and Islamic Law* (N Roberts tr, A Al Rifai revised, Dar Al Fikr

regard to those traits.[1079] There is a question in Shariah, however, whether the testimony of men and women is equivalent in financial matters. Most early Shariah scholars believe that the sufficient number of witnesses is either two men or one man and two women.[1080] They base their view on the following Quranic verse: 'O you who have believed, when you contract a debt for a specified term, write it down .... And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses …'.[1081]

On the other hand, some scholars, particularly from AlMaliki school, believe the testimony of two women is sufficient. For instance, Mohammad AlQurtubi says, 'The testimony of two women concerning debt is permissible accompanied by the oath of the right holder'.[1082]

This raises the question of whether arbitration parties are free to decide for themselves if they will accept the testimony of one woman or two. In other words, is the the Quranic provision mandatory?

The rationale for the provision, according to the same verse, is 'so that if one of the women errs, then the other can remind her'.[1083] It is not about the supremacy of men,[1084] since Shariah considers the testimony of one woman as equivalent to that of one man in some cases.[1085] Furthermore, according to the Quran, the testimony of a woman can overcome that of a man — and not the contrary — in certain situations. For example, the Quran states that

---

2008) 213.

[1079] STJ Al-Alwani, *Issues in Contemporary Islamic Thought* (IIIT 2005) 180-81; Buti (n 1078) 214.

[1080] SA Spectorsky, *Women in Classical Islamic Law: A Survey of the Sources* (Brill Academic 2009) 192; Saleh, *Commercial Arbitration* (n 193) 48.

[1081] *Surat Al-Baqarah,* verse 282.

[1082] AlQurtubi, *AlBayan wa AlTahseel* (n 1076) vol 18, 165.

[1083] *Surat Al-Baqarah,* verse 282. The reason for that is not as some believe due to *adalah*. Those who are familiar with the provisions of Shariah scholars concerning the testimony of a woman consider *adalah* to be in women actually more than men. For instance, in the case of testimony of two men, it is assumed to keep the two apart when they testify as well as interrogate them as a way to ensure credibility. While if women are within the witnesses, they are not to be separated or questioned when testifying.

[1084] Al-Alwani (n 1079) 170. A number of legal writers perceive that in the light of Shariah, a woman's testimony is equal to half of a man's testimony which is inaccurate. B Warner, *Sharia Law for Non-Muslims* (CSPI 2010) 12-13; K Anderson, *A Biblical Point of View on Islam* (Harvest House Publishers 2007) 83, 87.

[1085] For instance, the majority of scholars, including the four schools consider the legality of one woman to be a witness in some issues, such as suckling and childbirth. S Ahmad, *Islam in Perspective* (Author House 2011) 254; Spectorsky (n 1080) 192, 194 and 195; Ibn Qudamah, *AlMugni* (n 225) vol 8, 190; AlQurtubi, *Bedayat AlMujtahid* (n 1062) vol 3, 63; AlRamli, *Nehayat AlMuhtaj* (n 224) vol 7,185. See also the *hadith* of 'Uqbah bin Al-Harith'. AIM at-Tirmidhi, *Jami` at-Tirmidh*i, vol 1, Book 7, Hadith 1151 <http://sunnah.com/tirmidhi/12/6> accessed 10 March 2016.

a woman's testimony can invalidate a man's testimony as in the verses 6-11 in *Surat Al-Noor* on spousal accusation of treason.[1086]

Another possible reason for the provision is to spare women the burden of testifying unless their testimony is necessary. The responsibility of giving testimony is weighty under Shariah compared to other laws. Generally, to appear as a witness is compulsory when requested,[1087] and payment other than travel expenses is forbidden. Therefore, using the testimony of one man instead of two women eases the burden on women.[1088]

The researcher has not found any discussion by Shariah scholars concerning whether the provision is mandatory. Dr. Jassim Ajil AlNashmi (head of the Faculty of Shariah in Kuwait), however, wrote in his book *Turuq Estenbat AlAhkam men Quran AlKareem* (*Method of Deriving Provisions from the Holy Quran*) that the Quranic verse 'And bring to witness two witnesses from among your men' is intended as guidance.[1089] Since the provision is a recommendation rather than a mandate, adherence can depend on the circumstances.[1090]

Therefore, it can be concluded that the arbitration parties have complete freedom to agree on any number of witnesses, whether men or women.

1.1.3 Puberty and Sanity

Under Shariah, a witness should not be mentally ill or a minor.[1091] Early Shariah scholars are divided over whether the age of majority is 15 or 18 for these purposes.[1092]

The Quranic verse 'And bring to witness two witnesses from among your men … [or]

[1086] The husband in this case must swear by Allah five times to prove the truth of what he says. If the wife denies and swears by Allah five times, she is not considered guilty. In both cases, the marriage terminates. See in general, Spectorsky (n 1080) 38; K Bauer, *Gender Hierarchy in the Qur'ān: Medieval Interpretations, Modern Responses* (CUP 2015) 35.

[1087] Saleh, *Commercial Arbitration* (n 193) 49 and 52. For example, *Surat Al-Baqarah*, verse 283 states 'And do not conceal testimony, for whoever conceals it - his heart is indeed sinful, and Allah is Knowing of what you do'. See also the *hadith* of Prophet (pbuh) 'Shall I inform you of the biggest of the great sins?'. Al-Bukhari (n 209) vol 8, Book 73, Hadith 7 < http://sunnah.com/bukhari/78/7> accessed 25 January 2016.

[1088] See generally E Tosun, *Guide to Understanding Islam* (Ender Tosun2012) 202.

[1089] OJ AlNashmi, *Turuq Estenbat AlAhkam men AlQuran AlKareem* (2nd edn, Moassassat AlKuwait le AlTaqaddum AlElmi 1997) 70-71.

[1090] Ibn Uthaymeen (a member of the Counsel of Senior Scholars in Saudi Arabia) says that 'The testimony in the verse is not an obligation, but rather it is desirable. This is because - among other things - saying it is obligatory can cause embarrassment and hardship, particularly with, the large increase of trade practicing.' MS AlUthaymeen, *Tafseer AlQuran AlKareem*, vol 3 (Dar Ibn AlJawzi 1423) 419–420.

[1091] *Surat Al-Baqarah,* verse 282; AAMBYBAA Al-Qazvini, *Sunan Ibn Majah*, vol 3, Book 10, Hadith 2041 <http://sunnah.com/urn/1321200 > accessed 8 February 2016. Abualfaraj (n 1058) 151; JJ Nasir, *The Islamic Law of Personal Status* (2nd edn, KLI 1990) 54.

[1092] See page 89.

women'[1093] supports the proposition that testimony should come from witnesses who have reached the age of manhood or womanhood; ie, puberty. Moreover, the Prophet said, 'The pen has been lifted from three: …, from the minor until he grows up, and from the insane person until he comes to his senses'.[1094] According to this saying, the actions and words of a mentally ill person or a minor do not have legal effect in their affairs in general, including their financial affairs. A fortiori, their testimony regarding the financial affairs of others should not be considered. There is only one exception: under certain circumstances, a minor can be a witness in disputes between other minors.[1095]

From the above, it can be concluded that in international commercial arbitration, the testimony of a minor who has not reached the age of puberty is invalid.

Under English Law, a child who is younger than 18 years old,[1096] without a specific minimum age,[1097] can be a witness when two conditions are met: The child 'understands that it is his duty to speak the truth', and 'he has sufficient understanding to justify his evidence being heard'.[1098] To determine whether such an exception should apply in a particular case, the presiding judge asks the child a series of questions.[1099] The child does not need to appreciate the special importance of speaking the truth in court; he or she merely needs to understand how to answer questions truthfully.[1100]

1.2 Three Main Differences between Shariah and English System in Testimony

In addition to the requirements for serving as a witness under Shariah, three other elements can affect the freedom of arbitration parties concerning testimony. These are cross-examination of witnesses, barriers to testimony, and written testimony. These issues will be addressed in turn.

[1093] *Surat Al-Baqarah,* verse 282.
[1094] Al-Qazvini, *Sunan Ibn Majah* (n 1091) vol 3, Book 10, Hadith 2041.
[1095] According to Shariah scholars, two requirements should be met for this exception (a minor's testimony); his being aware of and realising the meaning of testimony, and there should not be an interval that separates the act which the minor has witnessed and the time of his testimony so as to prevent him from oblivion and to prevent any possibility of his family's influence upon him. AMJANSNJS AlMaliki (died: 616 Hijra - corresponding to 1219 AD), *Aqd AlJawaher AlThameena fi Mathhab Alam AlMadeena*, vol 3 (HM Lahmar investigator, Dar AlGharb AlIslami 2003) 1031; Ibn Qayyim, *AlTuruq AlHukmiyah* (n 1068) 145.
[1096] Section 105 of the Children Act 1989 (ECA1989).
[1097] A child less than five years old can be a witness in criminal matter. *R v Barker* [2010] EWCA Crim 4.
[1098] ECA1989, s 96.
[1099] C Osborne, *Civil Litigation 2007-2008, Legal Practice Guides* (OUP 2007) 50-51.
[1100] R Glover and P Murphy, *Murphy on Evidence* (13th edn, OUP 2013) 575.

1.2.1 Cross-Examination of Witnesses

A wide divide separates the method of cross-examination of witnesses in the common law and civil law traditions.[1101] In civil law systems, the judge generally takes the lead in cross-examining witnesses, while that task falls to the parties' counsel in common law proceedings. Shariah adopts a middle ground.

This section will examine the attitude of the EAA and the SAL 2012 towards the freedom of arbitration parties to agree on cross-examination matters, and then will look at the Shariah approach.

The EAA 1996 does not specify the scope of the freedom of the parties in cross-examining witnesses. According to Section 34, however, the arbitral tribunal has discretionary power concerning all procedures and evidence, in the absence of an agreement between the parties. Therefore, it can be concluded that arbitration parties have the right to agree on such matters and the method of doing it. Article 17(2) of the rules of the European Court of Arbitration clearly states: 'The parties may examine witnesses and the parties directly before the Arbitral Tribunal'.[1102]

The SAL 2012, like the EAA 1996, does not include a specific provision on cross-examining witnesses. It does, however, grant the parties the right to 'agree on the procedures followed by the arbitral tribunal', including adopting the procedural rules of any institution or arbitral centre inside or outside Saudi Arabia.[1103] If the parties do not agree on the procedural rules, the arbitral tribunal determines the procedures it considers appropriate.[1104] The law requires, however, that the procedures — whether agreed upon by the parties or determined by the tribunal — do not violate Shariah.[1105] That leads to the question of how Shariah addresses the freedom of parties regarding the cross-examination of witnesses.

In Shariah, a witness is cross-examined by the judge or arbitrator, who can ask any questions he believes will illuminate the truth.[1106] The judge or arbitrator, in fact, drives the

---

[1101] American Arbitration Association, *AAA Handbook on International Arbitration and ADR* (2nd edn, Juris 2010) 4.
[1102] The European Court of Arbitration (2015 edn).
[1103] SAL 2012, art 25(1).
[1104] SAL 2012, art 25(2).
[1105] SAL 2012, art 25(1 and 2).
[1106] GM Baroody, 'Shari'ah, Law of Islam' (1966) 17(6) Aramco World, Arab & Islamic Cultures and Connections 26 <https://tinyurl.com/y2rc463j> accessed 12 March 2016. For a different viewpoint, see GL Roberts, *Sharia Law and the Arab Oil Bust: PetroCurse Or Cost of Being Muslim?* (Dissertation Com 2007) 82.

cross-examination process. In Case No 1391/5/qaf,[1107] for example, the Saudi court stated:

> After considering the witnesses' testimony by the circle, the court decides that more elaboration is needed from the witness …, and it requests that the claimant bring… [the witness] to the next session so that the circle can investigate further and direct some questions to the witness regarding his testimony ... .[1108]

A party (or his counsel) can ask the judge to direct specific questions to the witness that may support the party's case.[1109] It is within the judge's discretion to accept or reject such a request.[1110] Article 121 of the SLPBSC 2013 expressly states that a judge has the discretionary power to direct the opponent's question to the witness when the judge believes it will be beneficial in reaching the truth.

At the same time, Shariah always gives the opponent the right to challenge the witness's credibility and *adalah*.[1111] If the challenge is successful, the judge or arbitrator must nullify the witness's testimony. If the opponent cannot immediately prove the grounds of his challenge, the judge (or usually his assistants) will investigate the witness's credibility.[1112]

One of the greatest difficulties an arbitrator faces under Shariah or the SAL 2012 arises when the opponent challenges the witness without providing sufficient evidence to support his challenge, as both laws do not tackle this issue. In such a situation, it seems that the arbitrator shall ask for assistance from the court in order to determine the credibility of the witness, unless there is an agreement between the parties that calls for some alternative procedure.

1.2.2 Barriers to Testimony

One of the most significant differences between English law and Shariah regarding the freedom of arbitration parties to offer witnesses is the issue of barriers to testimony.

Under English law, most barriers to testimony — such as a criminal conviction, financial interest in the outcome of the case, or marriage to a party — have been removed over time by statute.[1113] In general, the English system allows any person to be a witness, including the

---

[1107] Case No 1391/5/qaf of 1429 Hijra (corresponding to 2008 AD) BG 1665.
[1108] ibid 1668.
[1109] See generally Law and Justice Commission of Pakistan, *Law of Evidence* (Report No PKLJC 04) Section 134 <http://www.commonlii.org/pk/other/PKLJC/reports/04.html> accessed 12/06/2018.
[1110] Baroody (n 1106).
[1111] *Adalah* refers not only to the sincerity of witness in his testimony. For definition of *Adalah*, see page 121.
[1112] A Zaidan, *Nezam AlQada fi AlSharia AlIslamiyah* (2nd edn, Muassasat AlResalah 1989) 176-177.
[1113] Kay and others (n 823) 771.

parties themselves.[1114] Article 20(1) of the LCIA Arbitration Rules 2014 (LCIA 2014) states that any person who provides testimony during the arbitration process shall be treated as a witness, even if the person has a personal or financial interest in the dispute.

In Shariah, the situation is much different, as the early scholars point to many factors that can affect the validity of testimony, including:

- A paternal, filial,[1115] or marital [1116]relationship with a party.
- Animosity between the witness and the party whom the testimony is against.[1117]
- Being a party to the dispute.[1118]
- Standing to gain from the testimony.[1119]
- Being a partner in a company that is a party.[1120]

Those factors nullify testimony that is favorable to the witness's interests, but they do not nullify the testimony if it harms his interests.[1121] All testimony, however, is rejected from certain other types of witnesses, including:

- A person who has been sentenced for *had.*[1122]
- A homosexual.[1123]

The SAL 2012 does not include any restrictions regarding witnesses. Moreover, there is no provision in Saudi law that includes the qualifications of a witness or the barriers to a witness's testimony. The only law that addresses issues related to testimony is the SLPBSC 2013 (Articles 121-127), which does not discuss any of the previously mentioned issues. The

---

[1114] R Ziade and CH De Taffin, 'Fact Witnesses in International Arbitration' (2010) IBLJ 115, 119; Weigand (n 820) 377.

[1115] AlZuhaily (n 269) vol 8, 6041; AlSsaniki (n 242) vol 4, 351; Mohammed, *AlBaher AlRaeq* (n 220) vol 7, 93; For instance, the son or daughter testifying for their parents, their grandparents or vice versa.

[1116] AlSsaniki (n 242) vol 4, 352; Mohammed, *AlBaher AlRaeq* (n 220) vol 7, 81; MYSHEB AlHanbali (died: 1051 Hijra - corresponding to 1641 AD), *Daqaeq Uli AlNahi le Shareh AlMuntahi AlMa'aroof bi Shareh Muntahi AlIeadat*, vol 3 (Alam AlKutub 1993) 596.

[1117] There is an exception according to some AlHanafi scholars as they do not consider such animosity a barrier to testimony. Mohammed, *AlBaher AlRaeq* (n 220) vol 7, 86; AlHanbali, *Daqaeq Uli AlNahi* (n 1116) vol 3, 502, 596 and 597.

[1118] AlZuhaily (n 269) vol 8, 6041.

[1119] AlSsaniki (n 242) vol 4, 349; AlHanbali, *Daqaeq Uli AlNahi* (n 1116) vol 3, 596 and 597.

[1120] Except for AlMaliki as they express the permissibility of the partner's testimony. AlZuhaily (n 269) vol 8, 6041. For example, if a debtor testifies against his bankrupt creditor. AlHanbali, *Daqaeq Uli AlNahi* (n 1116) vol 3, 596, 598.

[1121] AlSsaniki (n 242) vol 4, 349; AlHanbali, *Daqaeq Uli AlNahi* (n 1116) vol 3, 598.

[1122] *Mohammed*, *AlBaher AlRaeq* (n 220) vol 7, 85. *Had* singular of *hudud*. For the definition of hudud, see page 117.

[1123] ibid.

SAL 2012, however, mandates that arbitration procedures do not violate Shariah, regardless of whether these procedures are set by the parties[1124] or the arbitral tribunal.[1125] Therefore, it can be concluded that, under the SAL 2012, a witness should not manifest any of the barriers to testimony specified by Shariah.

1.2.3 Written Testimony

To reduce the time and cost of arbitration,[1126] it is generally preferred that testimony in international commercial arbitration be in document form.[1127] Moreover, situations arise when it is impractical or impossible for a witness to attend the arbitration.[1128]

The EAA 1996 contains no specific provision that directly addresses this issue. Under the common law, however, written testimony is often exchanged between disputants early in the case. Written testimony can be sufficient when there is no need or desire to cross-examine the witness.[1129]

Based on the breadth of Section 34 of the EAA 1996, arbitration parties are free to agree on the form of testimony (written, oral or both). If the parties do not agree, the arbitral tribunal can decide this matter. Moreover, Article 20.2 of the LCIA 2014 states: 'Subject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or like document'.

In Shariah, the founders of the four Sunni schools discussed oral testimony but not written testimony. This is likely due to the fact that few people were literate in those days.[1130] It does not indicate, as claimed by some writers, that Shariah frowns on written testimony.[1131] This issue will be discussed later.[1132] It is sufficient here to note that Shariah does not exclude written documents as evidence. On the contrary, early Shariah scholars have debated whether

---

[1124] SAL 2012, art 25(1).
[1125] SAL 2012, art 25(2).
[1126] ICC, *Techniques for Controlling Time and Costs in Arbitration* (ICC 2018) 12 & 14 <https://tinyurl.com/y7molghx> accessed 31/05/2018.
[1127] Omeroglu (n 821) 12-13; M Kocur, 'Witness Statements in International Commercial Arbitration' in BGK vel Kalisz (ed), *The Challenges and the Future of Commercial and Investment Arbitration: Liber Amicorum Profesor Jerzy Rajski* (Lewiatan Court of Arbitration 2015) 167; JA Wolf and KM Preteroti, 'Written Witness Statements - A Practical Bridge of the Cultural Divide' in American Arbitration Association, *AAA Handbook on International Arbitration Practice* (Juris 2010).
[1128] See generally P Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice* (KLI 1999) 259.
[1129] A Dahlberg and A Welsh, 'Arbitration Country Guides, England and Wales' (2018) IBA Arbitration Committee 1, 13 <https://tinyurl.com/y9s9rtmf> accessed 31/05/2018.
[1130] See generally Saleh, *Commercial Arbitration* (n 193) 52.
[1131] Roberts (n 1106) 82; J Neuman, *It Is All About Islam* (Lulu com 2015) 152.
[1132] See pages 190-192.

to consider a writing for commercial transactions as obligatory.[1133] AlBagawi, one of the senior scholars of Quran interpretation, says: 'They [Shariah scholars] differ in this writing [regarding commercial transactions]. Some say it is mandatory and the majority see it as recommended ...'.[1134]

In addition, in addressing the means of proof, the Quran calls for a writing as a means of proof:

> O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties; let not the scribe refuse to write. As Allah has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord Allah, and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully, and get two witnesses, out of your own men.[1135]

Based on the Shariah principle that everything is allowed (*halal*) that is not forbidden by the Quran or Sunnah,[1136] it can be concluded that arbitration parties in Shariah have the right to agree on the form of testimony (written or oral). Further, there may be circumstances when the testimony can only be in writing, as when a witness is too ill or too old to appear at arbitration. In that case, a failure to honor written testimony could result in an injustice and a loss of rights, which contradict the principles of Shariah.

The SAL 2012 does not address this issue. The SLPBSC 2013, however, states that testimony should be oral.[1137] In general, Saudi law does not recognise written testimony except in exceptional cases. The SLPBSC 2013, in fact, emphasises that testimony should be spoken spontaneously, without notes. Article 224 of the SLPBSC 2013 states: 'Testimony shall be given orally. The use of written notes during testimony is permitted only with the judge's consent provided that the nature of the case justifies it'.

In practice, however, Saudi courts allow written testimony when it is necessary and when the writing is made under the supervision of the court. In Case No 1391/5/ka,[1138] which

---

[1133] Baamir, *Shari'a Law* (n 23) 88.

[1134] AlBagawi, *Ma'alem AlTanzeel* (n 650) vol 1, 349. In Arabic, he said:
'اختلفوا في هذه الكتابة: فقال بعضهم: هي واجبة والأكثرون على أنه أمر استحباب فإن ترك فلا بأس'.

[1135] *Surat Al-Baqarah,* verse 282.

[1136] NM Tabari, 'Islamic Finance and The Modern World: The Legal Principles Governing Islamic Finance in International Trade' (2010) Comp Law 249, 250.

[1137] SLPBSC 2013, art 124.

[1138] Case No 1391/5/qaf of 1429 Hijra (corresponding to 2008 AD) BG.

concerned the claimant's request of the refund of a payment he had made to the defendant, the only evidence offered by the claimant was the testimony of two witnesses. When the court requested the attendance of the witnesses, the claimant explained that they were in a distant city, where one of them was imprisoned. Therefore, the claimant asked the court to consider the written testimony of the witnesses, which would be taken under court supervision.[1139] The First Instance court ultimately ruled in the case based on the written testimony.

2. Written Evidence

Written contracts and other such documents, as opposed to written testimony, are among the means of proof recommended by Shariah in commercial transactions. This is clear from the Quranic verse 'O ye who believe! When ye deal with each other in transactions involving future obligations in a fixed period of time, reduce them to writing ...'.[1140] Further, it is known that the Prophet himself used documents to memorialise commercial transactions.[1141]

What is the scope of the freedom of arbitration parties to agree on documents as a means of proof? Before answering this question, it should be noted that when discussing writings in commercial transactions, early Shariah scholars addressed the topic as two issues: (1) the need for a writing in commercial transactions and (2) the evidentiary weight or proof value (*hujjiyah*) of a writing.

Regarding the first issue, most Shariah scholars of the four Sunni schools as well as most contemporary legal writers agree that verse 282 should be read to recommend rather than mandate a writing in commercial transactions.[1142] That position is based on the verse 'And if you are on a journey and cannot find a scribe, then a security deposit [should be] taken. And if one of you entrusts another, then let him who is entrusted discharge his trust [faithfully] and let him fear Allah, his Lord. …'. [1143]

Regarding the second issue, concerning the proof value of a written document, there is considerable controversy. Many contemporary legal writers believe that evidence in Shariah

---

[1139] ibid 1667.
[1140] *Surat Al-Baqarah,* verse 282.
[1141] For example, the *hadith* of 'Adda' bin Khalid bin Hawdhah'. AAMBYBAA Al-Qazvini, *Sunan Ibn Majah*, vol 3, Book 12, Hadith 2251 <http://sunnah.com/urn/1323370> accessed 12 March 2016.
[1142] See page 188. Also, H Ibn Kathir, *Tafsir Ibn Kathir* (A Al Arna'ut tr, Dar-us-Salam) <https://tinyurl.com /yceowrxu> accessed 31/05/2018.
[1143] *Surat Al-Baqarah,* verse 283.

should be based on oral testimony[1144] because a written document can be forged.[1145] Shariah scholars in the early centuries of Islam expressed concerns about 'the similarity of the hand writings and the possibility of falsifying them'. [1146]

This does not mean, however, that Shariah considers a written document to have no proof value or evidentiary weight. Early Shariah scholars, particularly those of AlHanafi and AlHanbali schools, consider a written document to be an acknowledgement of the recorded event or phenomenon,[1147] and they require the existence of one of two conditions for the document to have proof value: (1) the document is supported by witness testimony[1148] or (2) the handwriting of the writer of the document can be verified.[1149]

Ibn Al-Qayyim, a prominent Shariah scholar of the 14th century, says that the evaluation of a document as evidence depends on:

> [A]chieving knowledge to relate the handwriting to the writer. If this was clearly known, it would be similar to relating an oral expression to him. The difficulty that may occur is the confusion between handwritings, and this is similar to the confusion between voices and images. Allah Almighty makes every handwriting distinguishable from the others, like voices and images are distinguishable from each other. Persons can undoubtedly confirm that this is the handwriting of a particular person. Even if there is a possibility to imitate it, there must be a difference. This is a peculiarity to Arabic handwriting.[1150]

Ibn Al-Qayyim emphasises that the possibility that a document can be forged is not an insurmountable barrier under Shariah. He points out that any document that ever leaves the hands of its author is exposed to some risk of falsification. He also notes that Shariah permits a blind person to testify relying on what he hears, even though the 'similarity in voices — if not more than the similarity in handwriting — is not less'.[1151]

[1144] RM Savory, *Introduction to Islamic Civilization* (CUP 1976) 58; B Messick, 'Just Writing: Paradox and Political Economy in Yemeni Legal Documents' (1989) 4(1) Cultural Anthropology 26, 27.

[1145] Ahdab and Ahdab (n 213) 40.

[1146] Ahdab and Ahdab (n 213) 40.

[1147] For example, *AlMajallah*, art 1606.

[1148] *Surat Al-Baqarah,* verse 282.

[1149] Ishaq Ibraheem (one of the most prominent Shariah scholars in the 8th century) says: 'I have discussed with Ahmed [the founder of AlHanbali school]: when a man is deceased and he leaves a written will without including witnesses or informing anybody with the existence of his will, is it lawful to enforce his will?" Ahmed Ibn Hanbal says: "if his handwriting is recognisable and if he is known for his handwriting, the will shall be enforced"'. Ibn Qayyim, *AlTuruq AlHukmiyah* (n 1068) 174.

[1150] Ibn Qayyim, *AlTuruq AlHukmiyah* (n 1068)174.

[1151] Ibn Al-Qayyim says that 'If the presence of similarity and confusion was a reason for prohibition in Shariah, the witness would be prohibited from testifying to a written document that he does not keep with him due to

Finally, it can be concluded that documents undoubtedly have great proof value in financial transactions under Shariah since Shariah expressly recommends a writing in such transactions. Saying otherwise would mean that the provision by Allah in verse 282 *Surat Al-Baqarah* is not beneficial. That is a position that no Shariah scholar would take.

Consequently, it can be concluded that Shariah recognises and recommends written documents as a means of proof. At the same time, Shariah does not restrict the freedom of the parties in terms of the form or the value of proof.

The same situation applies to the SAL 2012, as it places no restriction on the freedom of parties relating to the means of proof, and Saudi law follows Shariah in the absence of a Saudi regulatory provision. The arbitration parties also have complete freedom in that regard under the EAA 1996.[1152] The only exception under both the EAA 1996[1153] and SAL 2012[1154] is that the arbitration agreement itself must be in writing.

3. Admission (*Iqrar*)

Admission, or *iqrar* in Arabic, is a party's acknowledgement of a duty or a right that conflicts with his self-interest.[1155] In general, early Shariah scholars (unanimously across all four schools),[1156] Saudi law and English law consider an admission to be conclusive proof, once the various requirements are met. In Shariah, however, the terms 'admission' and 'confession' are used alternatively in both civil and criminal matters by most contemporary scholars,[1157] whilst in English law, 'admission' is generally used in civil matters and 'confession' is used in criminal matters.[1158] In this research, the term 'admission' will be used in all instances to avoid ambiguity. Three elements will be addressed: the freedom of arbitration parties in respect to the formation of an admission, the requirements of a valid

---

the possibility of it being falsified. Shariah provisions prove the acceptance of the testimony of a blind person regarding what he hears when the sound is recognised to him although the similarity in voices … '. Ibn Qayyim, *AlTuruq AlHukmiyah* (n 1068) 174.

[1152] EAA 1996, s 34(1).

[1153] EAA 1996, s 5.

[1154] SAL 2012, art 9(2).

[1155] See generally NBM Mohamad, 'Islamic Law of Evidence in Confession (Iqrar): Definitions and Conditions' (1994) 15 Islamiyyat 71, 72-73; Rule 14.1 of English Civil Procedure Rules 1998 (ECPR 1998) with its amendments on 1 and 6 April 2016.

[1156] For example, see Baamir, *Shari'a Law* (n 23) 110; Mohamad, 'Islamic Law' (n 1155) 78.

[1157] Different viewpoint, R Ahmad and others, 'Admission/Confession: A Comparative Study of Islamic And Pakistani Laws of Evidence' (2012) 4(1) IJCRB 817, 818. Mohamad, 'Islamic Law' (n 1155) 75.

[1158] For example, Section 76 of English Police and Criminal Evidence Act 1984 uses the word 'confession', while part 14 of ECPR 1998 uses the word 'admission'. At the same time, Section 10 of the English Criminal Justice Act 1967 uses the word 'admission' as one of the evidence types in criminal cases.

admission, and the freedom of an arbitration party to withdraw an admission.

3.1 Formation of Admission

Under Shariah and the English law, an admission can be oral or written.[1159] Silence can also be considered an admission in both legal systems. The Saudi law is silent regarding this matter. Therefore, Shariah is supposed to be applied as mentioned above.[1160] In Shariah, although in principle silence has no legal effect and does not express a person's will, it can be considered an admission when it occurs in circumstances in which a response is deemed necessary.[1161] Article 67 of *AlMajallah* states that 'No statement is imputed to a man who keeps silence, but silence is tantamount to a statement where there is … [a] necessity for speech'. The situation is similar under English law. Bowen LJ in *Wiedemann v Walpole*[1162] stated that in some circumstances the act of not responding to a business letter that includes a charge can be considered an admission to the contents of that letter.[1163]

Moreover, under English law conduct also can be an admission. For example, in *Moriarty and Wife v The London, Chatham, and Dover Railway Company*,[1164] the English court held that the conduct of the plaintiff in suborning false testimony from witnesses served 'as evidence of an admission by the party against whom it is given that the case he was putting forward was not a true one'.[1165] In Shariah, the only conduct recognised as an admission, according to AlHanafi doctrine, is *nukuul,* which refers to the defendant's refusal to swear that the plaintiff's claims are not valid.[1166] In this regard Saudi law does not consider the defendant's refusal to take an oath as an admission which will be clarified later.[1167]

Thus it can be concluded that silence of either party to arbitration can be considered an admission by the arbitral tribunal under all the three systems even when there is no explicit

---

[1159] C Mallat, *Introduction to Middle Eastern Law* (OUP 2007) 270. See also S*latterie v Pooley* (1840) 6 M & W 664.
[1160] See page 177.
[1161] See generally SAA Abu-Sahlieh, *Introduction to Islamic Law; Foundation, sources and principles* (FJ Phiri tr, CreateSpace 2012) 244-245.
[1162] [1891] 2 QB, 534.
[1163] ibid 540.
[1164] (1869-70) LR 5 QB, 314.
[1165] ibid, 323.
[1166] The Jurisprudential Encyclopedia, *AlMosoua AlFiqhiyah,* stipulates that: 'Abu Yusef and Ibn AlHasan of AlHanafi scholl believe that *nukul* where admission is admissible under Shariah is considered an admission. They justify their view with the fact that refraining from doing the oath means that he is a liar in his previous denial. Otherwise, he would do the oath since it is obligation and to avoid being harmed. Thus his *nukul* is considered admission'. Ministry of Awqaaf and Islamic Affairs, *AlMosoua AlFiqhiyah*, vol 41 (2002) 360.
[1167] See page 204.

expression of the parties' will. Similarly, the conduct of either party under Shariah and the English law can be considered an admission. The difference between Shariah and English law in this regard is that Shariah limits the actions that can be considered an admission to *nukuul* while in English law the matter is subject to the discretion of the authority that hears the case.

3.2 Requirements for Valid Admission

According to Shariah[1168] and the SLPBSC 2013,[1169] a person who makes an admission (admitter) should be an adult of sound mind and not interdicted because of bankruptcy. The only exception under Shariah, according to AlHanbali and AlHanafi schools, is that a discerning child who is allowed to practise a trade can make a valid admission in regard to that trade.[1170] The Saudi courts are supposed to adopt this exception since Saudi law compels them, in the absence of any special regulatory provision, to apply the opinions of the scholars of Shariah.[1171]

Under English law, there is no clear rule in this regard. It seems that the admitter in financial disputes — where the only remedy sought is the payment of money — should be an adult and not a protected party. Rule 14.1 of the ECPR 1998 explicitly recognises an exception to the claimant's right to enter a judgement based on an admission if the admitter is a child or a protected party and the only remedy sought is a payment of money. Moreover, under English law any evidence (including an admission) of commitments by a bankrupt or insolvent legal entity that might affect its assets has no legal effect on these assets if not admitted by a trustee in bankruptcy,[1172] a liquidator[1173] or an administrator[1174] in the insolvent legal entity, or admitted by the court when the decision to reject such evidence is challenged by the bankrupt, any contributor or creditor.[1175]

Under Shariah, a bankrupt may not be interdicted on the basis of the bankruptcy.[1176] In such a case, the bankrupt's actions, including his admission, have a legal effect on his assets

---

[1168] *AlMajallah*, arts 994 and 1573. Ahmad and others 'Admission/Confession' (n 1157) 818.
[1169] SLPBSC 2013, art 109 states 'For an admission to be valid it must be made by an adult, who is sane, not under interdiction, and must make the admission freely'.
[1170] *AlMajallah*, art 1573; Mohamad, 'Islamic Law' (n 1155) 80. Ibn Qudamah, *AlMugni* (n 225) vol 5, 109.
[1171] See page 177.
[1172] Insolvency Rules 1986, No 1925 (EIR 1986), r 6.98, 6.96 and 6.104.
[1173] EIR 1986, r 4.73, 4.75 and 4.82.
[1174] EIR 1986, r 2.72, 2.88 and 2.77.
[1175] EIR 1986, r 4.83, r 2.78 and r 6.105.
[1176] See page 96.

even though a court has classified him a bankrupt. Under the English and Saudi laws, however, a bankruptcy decision can limit a person's competence in actions that might harm his assets.

In addition to the above restrictions, Shariah, Saudi law and English law require that an admission should be voluntary,[1177] unequivocal and clear.[1178]

3.3 Freedom of an Arbitration Party to Withdraw an Admission

In practice, it is not uncommon for an admitter to try to retract his admission.[1179] In this regard, the early Shariah scholars distinguish three types of admission. The first type is an admission that is associated with the right of Allah (eg, *hudud*).[1180] This does not relate to the research topic, as such rights do not relate to disputes arising from international commercial contracts. The second type is an admission of a matter that involves the right of Allah and the right of people (eg, *zakat*). The third type is an admission that is associated with only the right of people.

For the last two types, early Shariah scholars agree that the admission cannot be withdrawn without the consent of those who stand to benefit from the admission.[1181] In other words, the admitter cannot disavow an admission merely by later saying something different.[1182] For instance, if A admits he owes a certain amount of money to B, then B becomes the creditor of that amount. A's commitment to pay that amount to B cannot be terminated by A's merely withdrawing the admission, nor can A say that such an amount has been paid unless it is done with the consent of B. This is true even when A's admission is the only proof of the debt. This is also true, according to the majority of AlHanafi scholars[1183]

[1177] MHZ Dee, *Shari'ah: A Case for Legal Pluralism* (Author House 2015) 91; Ahmad and others 'Admission/Confession' (n 1157) 818. SLPBSC 2013, art 109. G Slapper and D Kelly, *Q&A English Legal System 2013-2014* (10th edn, Routledge 2013) 141.

[1178] Dee (n 1177) 91; Mohamad, 'Islamic Law' (n 1155) 83 and 84. The IRLPBS 2014, art 108. *The Dorchester Group Limited, T/a the Dorchester Collection v Kier Construction Limited*, [2015] EWHC 3051 (TCC) 15.

[1179] J McQuater, 'Case Comment; Cavell v Transport for London (QBD, William Davis J, 30 July 2015, [2015] EWHC 2283 (QB))' (2016) JPIL C45, C47.

[1180] Scholars of Shariah agree on the admissibility to withdraw admission associated with the right of Allah upon the admitter's request at any time even after the award is issued and before the enforcement. MA Baderin, 'Effective Legal Representation in 'Shari'ah' Courts as a Means of Addressing Human Rights Concerns in the Islamic Criminal Justice System of Muslim States' (2006) BEPSW 135, 153.

[1181] Ahmad and others 'Admission/Confession' (n 1157) 819 and 820; L Zakariyah, 'Confession and Retraction: The Application of Islamic Legal Maxims in Safiyyatu and Amina's Cases in Northern Nigeria' (2010) JMMA 251, 257 and 259.

[1182] *AlMajallah*, art 1588.

[1183] Ibn Abdeen (n 256) vol 4, 57.

and some AlMaliki scholars,[1184] even when the admitter presents evidence that contradicts his admission. These scholars believe that there's 'no need to hear evidence when there is admission'[1185] because 'the admission is a refutation of the previous evidence'.[1186]

Under English law, an admission can be withdrawn if it was made either before the proceedings commenced and after 5 April 2007[1187] or after the proceedings commenced. When the admission was made before the proceedings commenced, it can be withdrawn with the consent of the party referenced in the admission if the proceedings have not commenced yet[1188] and with the consent of all parties to the proceedings after commencing the proceedings.[1189]

If the admitter is unable to obtain the consent of the necessary party or parties,[1190] or if the admission is made after the proceedings are commenced,[1191] the admission can be withdrawn only with the court's permission. According to ECPR 1998, as amended on 1 and 6 April 2016, in deciding whether to grant such permission, a court should consider all the relevant circumstances, including: the emergence of new evidence after the admission, any prejudice that might be caused by the approval or rejection of withdrawing the admission, the timing of the request[1192] and the good faith of the person who submits the request.[1193]

This raises the question of whether arbitration parties under Shariah can ask a court or arbitral tribunal for permission to withdraw an admission. Only a few AlHanafi scholars and AlMaliki school have addressed this issue. As mentioned earlier, the majority approach of early Shariah scholars is that an admission cannot be withdrawn, but there are exceptions according to some AlHanafi scholars and the majority of AlMaliki scholars. According to

---

[1184] ASAAA AlTtasooli (died: 1258 Hijra - corresponding to 1842 AD), *AlBahja fi Shareh AlTuhfa, Shareh Tuhfat AlAhkam,* vol 2 (MQ Shaheen ed, Dar AlKutub AlElmiyah 1998) 525.

[1185] Ibn Abdeen (n 256) vol 4, 57.

[1186] AlTtasooli (n 1184) vol 2, 525. In Arabic, he said:

'أَنَّ إقْرَارَهُ الْأَوَّلَ مُكَذِّبٌ لِلْبَيِّنَةِ فَلَا يُنْتَفَعُ بِهَا'.

[1187] On 6 April 2007, Practice Direction14 has become in effect which was incorporated into Civil Procedural Rules 1998. Before this date, the Court of Appeal stated in *Stoke on Trent City Council v Walley* that part 14 of the Civil Procedural Rules 1998 only concerned the admission that is made after commencing the proceedings. [2006] EWCA Civ 1137.

[1188] ECPR 1998, r 14.1A (3)(a).

[1189] ECPR 1998, r 14.1A (3)(b).

[1190] ECPR 1998, rr 14.1A (3)(b) and (4); K Young, 'Case Comment; When is an Admission not an Admission?' (2012) JPI Law 134, 135.

[1191] ECPR 1998, r 14.1 (5).

[1192] ECPR 1998, pt 14 (7.2).

[1193] *Braybrook v Basildon and Thurrock University NHS Trust* [2004] EWHC 3436 (QB), 45 (as cited in *Sowerby v Charlton* [2006] 1 WLR 568, 576-77).

some AlHanafi scholars[1194] and contrary to the opinion of Abu Hanifa[1195] (the founder of AlHanafi school), the admitter can ask to withdraw an admission on the ground that the admission was false. In this case, the person in whose favour the admission was made must swear that the admission was true. If he takes the oath, the admitter is committed to his admission. If he refuses, the admitter is granted permission to withdraw his admission.

AlMaliki scholars[1196] also allow an admission to be withdrawn in two rare situations. The first is when the admission was conditional. (Eg, A's admission that he owes B a sum of money was contingent on B's swearing that A has not already paid the debt.) Proponents of this exception argue that one who makes a conditional admission does so because he believes that the conditions have not or cannot be met.

The second situation in which AlMaliki scholars believe an admission can be withdrawn is when the admitter discovers relevant evidence that he was not aware of at the time of the admission.[1197] This exception seems to be compatible with the rules of AlHanbali and AlShafi'i schools. In their discussion of the requirements of a valid claim, AlShafi'i[1198] and AlHanbali[1199] scholars agree that an admitter can raise a claim to withdraw his admission if new evidence (an expert's report, for example) significantly changes the pool of facts upon which he based his admission.

4. Oath (Yamin/Qasam)

Neither Shariah nor Saudi law includes provisions that are specific to the application of an oath in arbitration disputes, but both bodies of law recognise an oath as a type of evidence in litigation in general. Therefore, provisions relating to an oath should be applied in all types of dispute resolution, including arbitration, so long as no provision in Shariah or the SAL

[1194] Afandi (n 583) vol 4, 125.

[1195] Ibn Abdeen (n 256) vol 5, 612. *AlMajallah*, art 1589.

[1196] AAAES AlQrafi (died: 684 Hijra - corresponding to1285 AD), *AlFurooq wa Anwar AlBurooq fi Anwaa AlFurooq,* vol 4 (K AlMansour ed, Dar AlKutub AlElmiyah 1998) 92-94.

[1197] For instance, if A admits that his testator owes B a sum of money, and after that witnesses come to A testifying that his testator has paid the debt to B. AlQrafi (n 1196) vol 4, 92-94.

[1198] AlNawawi (one of the most prominent scholars of AlShafi'i school in the seventh century) said 'Whoever admits an object for a man, then he reclaims it for himself, his claim shall not be heard unless the admitter remembers he has already given it to that party and he presents evidence that supports that'. In Arabic, he said:

'مَنْ أَقَرَّ بِعَيْنٍ لِرَجُلٍ، ثُمَّ ادَّعَاهَا، لَا تُسْمَعُ دَعْوَاهُ إِلَّا أَنْ تَذْكُرَ تَلَقِّيَ الْمِلْكِ مِنْهُ، وَلَوْ أُخِذَتْ مِنْهُ بِبَيِّنَةٍ ثُمَّ ادَّعَاهَا هَلْ يَحْتَاجُ إِلَى ذِكْرِ التَّلَقِّي؟ وَجْهَانِ أَحَدُهُمَا: نَعَمْ؛ لِأَنَّهُ صَارَ مُؤَاخَذًا بِالْبَيِّنَةِ، كَمَا لَوْ أَقَرَّ، وَأَصَحُّهُمَا: لَا، كَالْأَجْنَبِيِّ، وَلَا خِلَافَ أَنَّهُ لَوِ ادَّعَى عَلَيْهِ أَجْنَبِيٌّ وَأَطْلَقَ، سُمِعَتْ.'

AZMYS AlNawawi (died: 676 Hijra - corresponding to 1277 AD), *Rawdat AlTalebeen wa Omdat AlMufteen*, vol 12 (Z AlShaweesh ed, 3rd edn, AlMaktab AlIslami 1991) 61.

[1199] For example, Abu AlNaja (n 965) vol 4, 397; AlHanbali, *Kashaf AlQina'a* (n 490) vol 6, 344.

2012 specifically prevents it.

Unlike the situation in Shariah and Saudi law, the EAA 1996 clearly grants the arbitral tribunal the power to direct that parties and witnesses be examined under oath. English law, however, has a different conception of the role of an oath than the view that prevails in Shariah and Saudi law.

The next section will discuss the requirements and validity of an oath under Shariah, Saudi law and English law. This will be followed by a discussion of the attitude of Shariah and Saudi law toward oath as evidence, along with a comparison to the situation in English law. The effect of oath on the freedom of arbitration parties will be addressed.

4.1 Requirements for a Valid Oath

Under Shariah, the requirements for a valid oath in financial disputes are straightforward: The person making an oath must be an adult,[1200] and the oath should be made with the consent of and in front of the authority that is hearing the case.[1201]

Moreover, if the oath is offered as complete evidence, the party for whom the oath is performed should give his consent before the other party takes the oath. This is because such an oath is a right of the plaintiff. This notion is supported by the case of *AlHadrami,* in which the plaintiff demanded that the defendant relinquish a plot of land that the plaintiff claimed belonged to the plaintiff's father. After the plaintiff failed to present evidence supporting his case, the arbitrator (Prophet Mohammad) proposed that the plaintiff ask the defendant to take an oath. The plaintiff said, 'O Messenger of Allah, … he does not care about an oath and he would not stop at anything'. The Prophet said, 'You have no other choice [than to accept his oath]'.[1202] Thus, it can be said that even if the oath is taken after the arbitrator's request but without the plaintiff's consent, the plaintiff has the right to challenge the decision or request the oath to be taken again, since asking the defendant to take an oath is the plaintiff's right.

In addition to the two straightforward requirements for a valid oath discussed above, there are three requirements that are more controversial. The first is that some AlHanafi scholars require that the person making the oath be a Muslim.[1203] Advocates of this position

---

[1200] Saleh, *Commercial Arbitration* (n 193) 51.
[1201] R Omar, H Bahrom and G de Mello (eds), *Islamic Perspectives Relating to Business, Arts, Culture and Communication* (Springer 2015) 473.
[1202] Ibn Ash'ath (n 123) vol 4, 19.
[1203] Burhan ADdeen, *AlHidaya* (n 286) vol 2, 320.

point out that the potential penance that backs up some types of oath is the performance of particular kinds of worship, which are unenforceable, if not meaningless, in the case of non-Muslims.[1204] Therefore, they argue, only Muslims have an incentive to make a truthful oath.

Most early Shariah scholars, however, do not support this requirement.[1205] It can be argued that the requirement contradicts verse 106 of *Surat Al Maaida*, which recognises the possibility of requesting an oath from a non-Muslim. In this verse, Allah says:

> O you who have believed, testimony [should be taken] among you when death approaches one of you at the time of bequest [that of] two just men from among you or two others from outside [non-Muslims] if you are travelling through the land and the disaster of death should strike you. Detain them after the prayer and let them both swear by Allah if you doubt [regarding their testimony] … .

Based on this verse, it can be said that under Shariah the oath of a non-Muslim is permissible and carries the same weight as that of a Muslim. Moreover, the oath-related sayings of the Prophet Mohammad do not specify any requirements regarding the parties' religion.[1206] In addition, the Prophet Mohammad, acting as an arbitrator, oversaw more than one case involving Muslim plaintiffs who were asked to accept the non-Muslim defendants' oaths.[1207] If an oath by a non-Muslim was not permissible under Shariah, the Prophet would not have suggested it.

The second controversial requirement is that the oath should be in — or at least begin in — the Arabic language. Some contemporary scholars believe that an oath under Shariah should start with particular Arabic words (eg, *Wallahi* and *Watallah*, 'by the name of God').[1208] The researcher is not aware, however, of any of the senior scholars of the four Sunni schools who have expressed this view. Rather, they believe — like Ibn Hazem, one of the senior Shariah scholars in the 11th century — that an oath can be performed in any language that is understood by the one who performs the oath. For example, the oath could

---

[1204] For instance, Alaa ADdeen AlHanadi says that a non-Muslim 'is not qualified to take an oath, even if he is qualified to be a witness in a dispute between non-Muslims. This is because he is not considered of those who have to do … penance'. AlHanafi, *Badae'e AlSanae'e* (n 398) vol 3, 242. See also Burhan ADdeen, *AlHidaya* (n 286) vol2, 320.

[1205] See generally G Bechor, *God in the Courtroom: The Transformation of Courtroom Oath and Perjury Between Islamic and Franco-Egyptian Law, Studies in Islamic Law and Society* (Brill 2011) 122.

[1206] For example, Zarabozo (n 198) 955.

[1207] For example, the *hadith* of 'Al-Ash'ath bin Qais'. Al-Bukhari (n 209) vol 3, Book 41, Hadith 599 <http://sunnah.com/bukhari/44/7%20> accessed 25 June 2016. For other examples see, Ibn Ash'ath (n 123) vol 4, 18 and 196.

[1208] J Hussain, *Islam: Its Law and Society* (Federation Press 2011) 195.

begin with *Eloha or Adonai* in Hebrew, or *Deus* in Latin.[1209] Otherwise, the oath would be meaningless for the person who makes it.

The third controversial requirement is that the oath should be upon the Quran when the person taking the oath is a Muslim, which is a view held by some contemporary authors[1210] and adopted by the English courts.[1211] This may mirror the approach of the English judiciary toward the Bible, but it seems that the proposition is not accurate under Shariah. The early Shariah scholars, as far as the researcher can determine, have not included this condition as a requirement for a valid oath. Instead, Shariah scholars differed over whether it is permissible to use the Quran when taking an oath (eg, putting a hand on the Quran or holding it). This is because they believe, as does Ibn Qudama, that an oath upon the Quran is an additional requirement to what is stated by the primary sources of Shariah (Quran and Sunnah) without any evidence.[1212]

A recent approach, however, adopted by the Islamic Fiqh Council, which is constituted of senior scholars of Islamic countries, is the permissibility of taking an oath upon the Quran when there is a particular need. The Council stated: 'Putting hand on Qur'an, … is not necessary for the validity of swearing; however, … [to avoid a] lie, … [the arbiter] can enforce it to emphasize the oath'.[1213]

Saudi law does not set out requirements for the validity of an oath. The requirements provided by Shariah are assumed to apply, however, since Saudi law stipulates that Shariah applies whenever the national law does not provide a particular rule for a particular

---

[1209] Ibn Hazem in his book *Al-Muhalla* mentions examples of oath for those who do not speak Arabic (eg, Yaksh for Berbers, Uzmuz in Persian) then he confirms that 'If these people swear by these names this is a proper oath, and if they fail to observe it they may make penance', AMABABS Ibn Hazm, *Al-Muhalla,* vol 8 *(*Dar al-Jil 1996) 44 (as cited in Bechor (n 1205) 123).

[1210] Baamir, *Shari'a Law* (n 23) 112.

[1211] For example, see *Regina v Kemble* [1990] 1 WLR 1111.

[1212] Ibn Qudama says: 'Ibn AlMunther [who is described by Shariah scholars as a scholar with the most writings over the controversies amongst Shariah scholars, died in 922] said, we have not come to know any scholar who express that oath should be taken upon the Quran. …. . AlShafi'i says: … I have seen Ibn Mazen, who is a judge in Sana'a, confirming the oath by bringing the Quran. … . [Ibn Qudama said] And this is an addition; to what the Prophet (pbuh) required for an oath, and to what was applied by the four caliphs and their judges, without any supporting evidence or proof for this addition. Therefore, the action of the Prophet and his companions should not be ignored because of the action of Ibn Mazen or other'. In Arabic, he said:
'قَالَ ابْنُ الْمُنْذِرِ: لَمْ نَجِدْ أَحَدًا يُوجِبُ الْيَمِينَ بِالْمُصْحَفِ. وَقَالَ الشَّافِعِيّ...رَأَيْت ابْنَ مَازِنٍ، وَهُوَ قَاضٍ بِصَنْعَاءَ، يُغَلِّظُ الْيَمِينَ بِالْمُصْحَفِ. ... وَهَذَا زِيَادَةٌ عَلَى مَا أَمَرَ بِهِ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فِي الْيَمِينِ، وَفَعَلَهُ الْخُلَفَاءُ الرَّاشِدُونَ وَقُضَاتُهُمْ، مِنْ غَيْرِ دَلِيلٍ وَلَا حُجَّةٍ يُسْتَنَدُ إلَيْهَا، وَلَا يُتْرَكُ فِعْلُ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - وَأَصْحَابِهِ لِفِعْلِ ابْنِ مَازِنٍ وَلَا غَيْرِهِ.'
Ibn Qudamah, *AlMugni* (n 225) vol 10, 207.

[1213] The Islamic Fiqh Council, Fifth Session, First Resolution, Swearing by Torah/Bible before Jury (2-10 February 1982) <http://archive.is/KnQEw#selection-23585.4-23585.20> accessed 15/06/2018.

circumstance.[1214]

Under English law, there are two requirements. First, it must be established that the oath maker understands the nature of the oath if he is younger than 18 years old.[1215] English law does not set a minimum age for making an oath, but the case law appears to indicate that those who are younger than 8 are presumed to be too young to understand the nature of an oath. [1216]

Second requirement involves the perceptions of the court and the oath maker.[1217] According to the English case law, an oath is valid when it 'appears to the court to be binding on the conscience of [he who takes it] …. [and when that person] himself considers [the oath] to be binding upon his conscience'.[1218] Therefore, under English law, a Muslim's or a Jew's oath on the New Testament, for example, could theoretically be valid.

In the case of *Regina v Kemble*,[1219] the Court of Appeal refused a challenge that was based on the ground that a Muslim witness took an oath upon the New Testament instead of the Quran. The court stated that it was satisfied that the witness believed that his oath was binding on his conscience. The court further stated that the issue of whether 'the administration of an oath is lawful does not depend upon what may be the considerable intricacies of the particular religion which is adhered to by the witness'.[1220]

On the other hand, Liverpool Crown Court,[1221] in a recent case that has not been officially reported yet, ordered a retrial because a Muslim witness took an oath upon the New Testament instead of his holy book, the Quran. Although the witness, Kerim Kurt, stated that he respected the New Testament and considered it a holy book, Judge Thompson ruled that the witness, as a Muslim, should swear on the Quran.

4.2 Oath as Evidence

Unlike in English law, an oath under Shariah and Saudi law can be treated as either (1)

[1214] See please page 177.
[1215] ECA1989, s 96 and 105.
[1216] In *Regina v Hayes*, it was stated that '[T]he watershed dividing children who are normally considered old enough to take the oath and children normally considered too young to take the oath, probably falls between the ages of 8 and 10'. [1977] 1 WLR 234.
[1217] English Oath Act 1978, s 1(3).
[1218] *Regina v Kemble* [1990] 1 WLR 1111, 1114.
[1219] ibid.
[1220] ibid 1114.
[1221] According to a report by the BBC, 'Judge 'Wrong' to Stop Case after Muslim Swears on Bible' (Liverpool, 27 February 2015) <http://www.bbc.co.uk/news/uk-england-merseyside-31655854> accessed 31/05/2018.

a supplementary part of the evidence or (2) complete evidence that is sufficient for a decision. These two types and their effect on the freedom of arbitration of parties are addressed below. This discussion is followed by an examination of the approach of English law toward oath in arbitration disputes and a comparison of English law and the approaches of Shariah and Saudi law.

4.2.1 Oath as Part of Evidence

According to the attitude of early Shariah scholars of the Sunni schools except for AlHanafi school, an oath may be used as evidence in financial dispute resolution as a complement to testimony.[1222] If the number of witnesses presented by the claimant is less than the number needed to consider testimony as complete evidence (eg, if only one male witness is presented rather than two), the judge or arbitrator is supposed to direct a request to the claimant to take an oath that his claims are true.[1223] This is based on the *hadith* narrated by Ibn Abbas that the Prophet Mohammad (pbuh) delivered a decision based on a witness and an oath taken by the plaintiff that his claim was true.[1224]

When the plaintiff takes an oath, the case is supposed to be decided in his favour and the other party has no right to challenge the oath after it has been taken. If the plaintiff refuses to take the oath, an oath is requested from the defendant. If he takes an oath, the decision shall be in his favour. If he refuses, the decision shall be in favour of the plaintiff.[1225]

Under Saudi law, no particular provision directly addresses this type of oath. The Saudi judiciary, however, adopts the approach of Shariah in this regard. In case No 34172977,[1226] the defendant denied the plaintiff's claim that they had agreed orally to terminate a sale contract.[1227] The plaintiff produced one witness to support his claims.[1228] He also consented

---

[1222] Ibn Rushd, *The Distinguished Jurist's Primer, Bidayat al-Mujtahid Wa Nihayat Al-Muqtasid*, vol 2 (IAK Nyazee tr, MA Rauf reviewer, Garnet 2000) 562; Ahdab and Ahdab (n 213) 41.

[1223] Saleh, *Commercial Arbitration* (n 193) 51.

[1224] Al-Naysāburi (n 845) Book 18, Hadith 4246 <http://sunnah.com/muslim/30/3> accessed 28 June 2016; Ibn Rushd (n 1222) vol 2, 562-63.

[1225] Imam Malik Ibn Anas (the originator of AlMaliki school) said: 'The precedent of the Sunnah in judging by an oath with one witness is that if the plaintiff takes an oath with his witness, he is confirmed in his right. If he draws back and refuses to take an oath, the defendant is made to take an oath. If he takes an oath, the claim against him is dropped. If he refuses to take an oath, the claim is confirmed against him'. Malik Ibn Anas (died: 179 AH Hijra - corresponding to 795 AD), *The Muwatta of Imam Malik*, Book 36, Hadith 4.7 (AA At-Tarjumana and Y Johnson trs, YBYBKAL Al-Andalusi narrator, Darul Ishaat 2005) 298.

[1226] Case No 34172977 of 1434 Hijra (corresponding to 2013 AD) SC (AlQatif).

[1227] ibid 462.

[1228] ibid 462-63.

to take an oath that his claims were true when the court asked him to do so.[1229] After the plaintiff took an oath, the court ruled to terminate the contract and to compel the defendant to return the sums already paid. The court based its ruling on, *inter alia*, the consensus 'by most [Shariah] scholars that rights in [financial] disputes are proved by a witness and the claimant's oath, and this is also the view of the four caliphs … as well as AlHanbali, AlMaliki and AlShafi'i scholars'.[1230]

4.2.2 Oath as Complete Evidence (*Al-Yamin Al-Hasima*)

According to Shariah[1231] and Saudi law,[1232] either of the opposing parties has the right to request from the other a decisive oath (*al-yamin al-hasima*), in which the opponent swears that the claim against him is not true. Two conditions should be met for this right: the party requesting the oath fails to present evidence[1233] (eg, due to loss) and the opponent denies the requesting party's claims.[1234] Consequently, some early Shariah scholars refer to this type of oath as the oath of denial (*yamin al-inkar*). The question that arises here concerns the extent of an arbitration party's freedom to decline to take this type of oath.

Under Shariah, when either party requests that the other one take this type of oath and both conditions are met, the opponent does not have a right to refuse.[1235] (One who refuses to take an oath is considered *nakel.*)[1236] The situation is the same under Saudi law except that the party from whom an oath is requested has the right to make a counter-request that the other party make an oath that his claim is true.[1237]

In all situations, regardless of whether the oath is performed or refused, this is supposed to be the last stage before the award is issued.[1238] If the party who was requested to take an oath does in fact take the oath, the decision should be in his favour.[1239] If he refuses to take

---

[1229] ibid 467-68.
[1230] ibid 468-69.
[1231] Ahdab and Ahdab (n 213) 41. See also Baamir and Bantekas (n 874) 259.
[1232] SLPBSC 2013, arts 111 and 113.
[1233] M Chiba (ed), *Asian Indigenous Law* (Routledge 2013) 91.
[1234] Prophet Mohammad (pbuh) said: 'The proof (Bayyinah) lies with the claimant and the oath must be taken by him who denies the claim'. BH Al-Asqalani, *Bulugh Al-Maram: Attainment of the Objective According to Evidence of the Ordinances* (N Eweiss tr, S Cook ed, Dar Al-Manarah 2003) 524, 525.
[1235] See generally Omar, Bahrom and Mello, *Islamic Perspectives* (n 1201) 470 and 472.
[1236] *AlMajallah*, art 1820.
[1237] SLPBSC 2013, art 113(2).
[1238] For example, *AlMajallah*, arts 1818-1820.
[1239] Chiba (n 1233) 91; Ahdab and Ahdab (n 213) 41. Baamir and Bantekas (n 874) 259.

the oath, which sometimes occurs in courts that apply Shariah[1240] (eg, Saudi courts),[1241] there are two different approaches under Shariah. AlHanafi school[1242] and Imam Ahmed,[1243] in one of his views, believe that the decision should be issued in favour of the party who requests the oath. They consider the other party's refusal to take the oath to be an admission that the claims against him are true.[1244]

The second approach is that of AlMaliki school, AlShafi'i school and a second view of Imam Ahmed, which is that the court or arbitrator should redirect the oath request to the party who requested it before deciding the case. If that party takes the oath that his case is true, the decision is issued in his favour. If he refuses, his case will be dismissed.[1245]

In Saudi Arabia, the legislature seems to adopt a middle view, as the opponent who is requested to take an oath is given the right to redirect the oath to the other party before the opponent is considered *nakel*. If the opponent redirects the oath to the party who initially requested it, he is not considered *nakel*. In such a situation, the party who initially requested the oath should make an oath. If he does not, the case should be decided in his opponent's favour. But if that opponent does not agree to redirect the oath or to take it, he shall be considered *nakel* and the decision shall not be in his favour.[1246]

The English Arbitration Act 1996 grants the arbitral tribunal discretionary powers, unless the parties agree otherwise, to direct witnesses or parties to be examined under oath or affirmation. The tribunal has the power to 'administer any necessary oath or take any

---

[1240] H Janin and A Kahlmeyer, *Islamic Law: The Sharia from Muhammad's Time to the Present* (McFarland 2007) 33.

[1241] For example, case No 332031116 concerns the plaintiff's request to terminate the contract for the reason of non-payment of the amount agreed upon in the contract, the due amount. In this case, the defendant claimed there was an oral agreement between him and the plaintiff to pay the amount in installments. After the plaintiff denied the claim, the defendant requested an oath to be taken by the plaintiff that the defendant's claims were not true. The plaintiff refused. The court stated that '[B]ecause the defendant claimed the payment was late due to the existence of an agreement between his agent and the plaintiff. And because the defendant did not present an evidence to prove that, and he [the defendant] requested the plaintiff to take an oath. In addition, because the plaintiff is *nakel* [refusing to take an oath] and based on the Prophet's saying "the proof lies on the one who is making the claim, and the oath is taken by the one who rejects the claim", the court hence dismissed the plaintiff's claim'. Case No 332031116 of 1434 Hijra (corresponding to 2013 AD), PC (AlDammam), AC No 34376312 (Eastern Region).

[1242] Omar, Bahrom and Mello, *Islamic Perspectives* (n 1201) 472.

[1243] S Nahmassni, *Falsafat Al-Tashri fi Al-Islam: The Philosophy of Jurisprudence in Islam* (FJ Ziadeh (tr), Leiden EJ Brill 1961) 192.

[1244] ibid 192. See also pages 203-204.

[1245] ibid 192-193.

[1246] SLPBSC 2013, art 113(2) states 'If the party who is requested to take an oath is present in person … he must take the oath immediately or retort it to his adversary, otherwise he shall be considered *nakel*'.

necessary affirmation'.[1247] English law, however, does not consider an oath to be evidence or a supplement to evidence. Instead, the oath is merely one of the requirements for the validity of the presented evidence. Hence the term 'sworn evidence' in English law.

As far as the researcher is aware, this type of oath does not exist under either Shariah or Saudi law except in two situations: (1) under AlHanafi school, when the party against whom the testimony is delivered requests that the witness take an oath that his testimony is true and the court or arbitrator is convinced that the testimony needs to be reinforced;[1248] and (2) under Shariah[1249] and Saudi law[1250], when the court or arbitrator seeks *yamin alestedhar* (an oath from the claimant) in order to be convinced that the evidence is true. This type of oath can be requested only in certain situations, such as when the defendant has died, is missing, is a minor or is mentally incompetent.

Based on the above, it appears that English law is more flexible concerning oaths than Shariah or Saudi law. English law does not set a particular age for a party's or witness's oath to be valid. Rather, it merely requires that the party or witness understand the nature of an oath. Furthermore, the religion of the oath taker is of little consequence under English law. Under Shariah and Saudi law, however, a person taking an oath should have reached the age of puberty and, according to some early scholars, the oath taker must be Muslim. These differences reflect the different role the oath plays in the English and Shariah/Saudi systems.

Under Shariah and Saudi law, the request for an oath restricts the freedom of the disputing parties regardless of whether the oath is complete evidence or supplementary evidence. When the oath is a supplement to evidence, the defendant has no right to refute or challenge the plaintiff's oath. Once the claimant takes an oath, the court or arbitrator is supposed to issue a decision.

When the oath is complete evidence (a decisive oath, *al-yamin al-hasima;* or an obliged oath, *al-yamin al-wajiba*), the defendant has no right to refuse to take an oath that the plaintiff's claims are not true. If he refuses, the decision is issued against him — even if the plaintiff did not provide any evidence against the defendant.

These types of oath do not exist under English law. An English arbitral tribunal cannot

---

[1247] EAA 1996, s 27(5).
[1248] *AlMajallah*, art 1727.
[1249] See generally Hussain (n 1208) 195.
[1250] IRLPBS 2014, art 111(5).

order or accept an oath as proof of anything other than the veracity of a witness's testimony.

Consequently, the issue of an oath is far less of a restriction on the freedom of arbitration parties under English law than under Shariah or Saudi law.

5. Conclusion

As discussed in this chapter, the rules of evidence may restrict the freedom of arbitration parties, depending on the limitations imposed by the applicable law regarding: the validity of the evidence presented; modification or withdrawal of that evidence; and a party's right to challenge the other party's evidence. The approaches of Shariah and English law diverge widely on these issues.

The outcomes under the SAL 2012 and Shariah are similar because the Saudi law, which is silent on most evidentiary questions, stipulates that Saudi courts should follow Shariah when no relevant provision is found in the Saudi law. In addition, the SAL 2012 states that the provisions of Shariah should not be violated.

It is also clear that under Shariah (and thus under Saudi law), the freedom of parties regarding the rules of evidence is narrow, while under English law that freedom is vast. This is demonstrated in many ways, including the qualifications of the witnesses, the right to withdraw or modify admissions, the right to take or not take an oath, and the right to challenge another party's oath.

English law expressly grants arbitration parties the right to agree on evidentiary rules, while no such provision exists under Shariah or Saudi law. Shariah does not, however, bar arbitration parties from agreeing on such rules.

Under Shariah (and thus under Saudi law), witnesses must be Muslims when any party is a Muslim. The only exception, according to some early Sunni scholars, is when necessity dictates otherwise. The existence of enmity or kinship between the witness and either party also can affect the testimony's validity. This is also true when the witness has a stake in the outcome of the case. Moreover, a witness's age and criminal record are factors under Shariah and Saudi law.

Under English law, on the other hand, arbitration parties enjoy complete freedom in presenting witnesses, regardless of their faith, relationship to the parties, or conflict of interest. Even a minor can testify, so long as he recognises the importance of telling the truth.

Although Shariah, Saudi law, and English law agree on the requirements for a valid admission, each of these legal systems has a different approach in respect to the right of the admitting party to withdraw or modify his admission.

Except for some AlHanafi scholars and AlMaliki school, early Shariah scholars agree that it is impermissible for a party to withdraw his admission without the other party's consent. According to some AlHanafi scholars, an admission can be withdrawn when it was based on false grounds. AlMaliki scholars also believe that an admitter is entitled to withdraw his admission when the admission is conditional or when the admitter discovers evidence that he was not aware of at the time of his admission.

English law does not specify the conditions under which a party can modify or withdraw an admission, but instead leaves the matter to the discretion of the reviewing authority.

Furthermore, Shariah limits the freedom of arbitration parties in respect to an oath - whether this oath is a complete evidence or an evidence supplement. Under Shariah (and thus under Saudi law), the plaintiff can ask the defendant to take an oath only when the plaintiff fails to produce evidence supporting his claim. In such a situation, the defendant cannot refuse the oath, even though no evidence has been presented against him. If the defendant refuses, a decision is issued against him. The only twist to this situation is that, according to Saudi law and some early Shariah scholars, it is possible for the defendant to redirect the oath to the plaintiff.

Moreover, if the plaintiff fails to present sufficient evidence and he requests an oath, the defendant does not have the right to refuse the plaintiff's oath, upon which a decision is supposed to be made against the defendant.

Under both types of oath, an opponent does not have the right to challenge an oath after it is performed. Some early Shariah scholars believe that it is not permissible to review a case in which a decision has been made based on an oath as complete evidence, even if new evidence arises.

These restrictions do not exist under English law. In fact, English courts might not even enforce an arbitral award that was based on these rules. That is because the English courts might consider these provisions to be violations of the right to a fair trial, which includes the parties' right to present their case as well as the right to challenge any evidence an opponent presents. Although the parties' freedom is narrow when Shariah or Saudi rules of evidence apply, this chapter proves that there is nothing in Shariah (specifically the Quran, Sunnah or

even *ijma'*) or Saudi law that bars parties in international commercial arbitration from agreeing on the evidence rules that they prefer, regardless of whether they relate to testimony, written evidence, admission or oath.

In contrast with the rather strict approach that early Shariah scholars take on the freedom of parties under the rules of evidence, these scholars (unlike the Saudis and English) grant arbitration parties very broad freedom to terminate the arbitration agreement and the agreement with the arbitrator — even after the start of the arbitration process. The parties' freedom in respect to these two issues is the subject of the next chapter.

Chapter IX:
Freedom of Parties to Terminate The Arbitration Agreement and Arbitrator's Mandate

The previous five chapters examined the extent of parties' freedom to establish and form the elements of the arbitration contract. This penultimate chapter of this thesis focuses on the extent to which an arbitration party has the right to terminate the arbitration contract and the contract with the arbitrator. This examination is essential to determine the scope of the freedom of the parties to international commercial arbitration (the core issue of this research). The termination issue also is a key concern because of the importance of the arbitration contract itself as legal proof of the arbitration agreement, and because of the critical impact an early termination can have on the resolution of the dispute.

There is a significant difference in the freedom granted to arbitration parties concerning the termination of the arbitration contract and the contract with the arbitrator in the systems under study. And there is considerable confusion owing to the fact that most contemporary legal writers wrongly generalise the attitude of early Sunnah scholars regarding the parties' nearly unlimited freedom to terminate these two contracts to be the position of Shariah in all types of arbitration, including international commercial arbitration.

The aim of this chapter is to analyse and compare two issues: first, the freedom of parties to terminate an arbitration agreement and, second, the freedom of parties to effect an early termination of the arbitrator's mandate. To achieve those aims, this chapter will be divided into two sections. The first section deals with the freedom of either party to terminate an arbitration contract and with termination because of the death of a party, because the arbitration exceeded its set time, or because of a fundamental breach by a party or a failure by the arbitrator to complete his mission. The second section deals with the freedom of the arbitration parties to end an arbitrator's mandate early. These issues are addressed in relation to Shariah, SAL 2012, and EAA 1996.

1. Termination of Arbitration Contract

Shariah, Saudi law, and English law all agree that an arbitration agreement, like most contracts, ends when its aim is achieved through the resolution of all disputes that fall within its ambit or when external forces frustrate achievement of the purpose of the agreement. The

arbitration contract also can be terminated by the parties' mutual agreement or unilaterally when a party commits a fundamental breach of the agreement.

Shariah goes further than Saudi or English law by granting each party the freedom to terminate the arbitration contract unilaterally, even without good cause, which is similar to the situation under English law in the Middle Ages. Under Shariah, either party also can terminate the arbitration agreement indirectly by ending the arbitrator's mandate before the arbitral award is issued. Furthermore, according to most AlHanafi scholars, the expiration of the time limit for issuing the award can give any party the right to terminate the arbitration contract — even after the award is issued and even if no objection is raised during the arbitration procedures. Most early Shariah scholars also believe the death of any party justifies termination of the arbitration agreement.

1.1 Freedom of a Party to Terminate the Agreement Without Good Cause

1.1.1 Approaches of Shariah

Although early Shariah scholars classify an arbitration contract as one of the consensual contracts, in which the parties' consent is required for the formation of the contract, most of those scholars agree that such a contract can be unilaterally terminated. The reason is that early Shariah scholars categorise arbitration contracts as *aqud jaesah,*[1251] literally translated as 'permissible contracts'. English law has no equivalent to such contracts, which can be terminated at the whim of any of the parties.[1252] Under Shariah, a permissible contract contrasts with a binding contract, which the parties must fulfill unless they agree otherwise.

At the same time, however, early Shariah scholars differ over how long the parties have the right to unilaterally terminate the contract. In other words, when does an arbitration contract become a binding contract?

This controversy emerges from their differing viewpoints on whether the nature of an arbitration contract is agency, judicial, or mixed, as previously discussed.[1253] Four different viewpoints have arisen. These views, as well as an additional view advanced by many contemporary writers, are addressed in the following.

[1251] Ercanbrack (n 398) 315.
[1252] Baamir, *Shari'a Law* (n 23) 72.
[1253] See page 40.

First View: Both Parties Can Terminate Arbitration Until Proceedings Commence

Most AlMaliki scholars[1254] and some AlShafi'i scholars,[1255] as well as the CIIFA,[1256] express the view that each party has the right to withdraw from an arbitration agreement so long as the proceedings have not yet started. After the proceedings begin, the contract becomes binding, and neither party can unilaterally terminate the arbitration. Mutref, a senior AlMaliki scholar in the eighth century, states: 'Either of the parties … can withdraw his consent to solve their dispute by an arbitrator before that arbitrator views the dispute between them. After commencing their dispute before an arbitrator …, none of them can withdraw and they are committed to continue arbitration'.[1257]

Some proponents of this view cite the incident of Ali and Mu'awiya involving arbitration over who should be the leader of the caliphate. Some followers of Ali (*Khawarij*) asked him to withdraw from arbitration before the arbitrators decided. Ali answered them: 'Woe unto you, should we withdraw after consent and agreement? Does not Allah Almighty say: "And fulfil the Covenant of Allah, when you have made a covenant, and break not your oaths …" and he says: "O you who have believed, fulfil [all] contracts"'.[1258]

Second View: The Parties Are Free to Terminate Arbitration Until Pleadings Close

Most AlHanbali scholars[1259] express the view that any party can terminate the arbitration agreement until the arbitrator has started the procedures to issue the award. Once the process is underway, the right to unilaterally terminate the arbitration agreement expires. This means, in practical terms, that the freedom to terminate the agreement ends when the pleadings close.

[1254] MYAQYAGAAM AlMaliki (died: 897 Hijra - corresponding to 1491 AD), *AlTtaj wa AlIkleel le Mukhtasar Khaleel*, vol 8 (Dar AlKutub AlIlmiyah 1994) 116. Mohammed AlMaliki says: 'Concerning the issue of consent in arbitration, AlBaghawi [reporting from Ibn AlQassem, *mufti* of Egypt in the eighth century] says: if they appoint an arbiter between them and they present their case in front of him, then one of them withdraws before the arbiter decides. I believe he decides between them and his decision is enforceable'.

[1255] SAIIAHH Ibn Abi AlDam AlShafi'i (died: 642 Hijra - corresponding to 1244), *Adab AlQada'a*, vol 1 (MH AlSarhan investigator, Matba'at AlIrshad 1984) 430. Ibn Abi AlDam says some AlShafi'i scholars like Abi Saeed AlAstakhri believe that 'If parties to a dispute agree on arbitration. Then one of them withdraws when the arbitrator commences viewing the dispute, such withdrawal does not have effect and the arbitral award is valid and shall be enforce'. ibid.

[1256] Para 2 of the CIIFA Resolution No 91/8/9 stipulates that 'Arbitration is [a contract] not mandatory for the two conflicting parties nor is it for the arbitrator. Either of the parties may decline it as long as the arbitration has not started ….'.

[1257] ESAAJQG Abu AlAsbagh (died: 486 Hijra - corresponding to 1093), *Diwan AlAhkam AlKubra aw AlE'alam bi Nawazel AlAhkam wa Qatr men Sayr AlHukkam* (Y Murad (ed), Dar AlHadith 2007) 407-408.

[1258] M AlJehani, *AlTahkeem fi AlSharia AlIslamiyah* (Maktabat Dar AlIman 1994) 142; MHY Gharawi, *Mawso'at AlTarikh AlIslami*, vol 5 (Majma' Andisha Islami 1386) 201.

[1259] SAFAMAQ AlMaqdesi (died: 682 Hijra - corresponding to 1283), *AlShareh AlKabeer ala AlMuqne'e*, vlo 28 (AA AlTurki and AM AlHulu investigators, Hajra 1995) 32; Ibn Qudamah, *AlMugni* (n 225) vol 10, 95.

Proponents of this view compare an arbitration contract to an agency agreement. They point out that the consent of all parties is the key element on which arbitration and agency contracts are based. When this element is missing because the principal of an agency contract withdraws before the agent commences the work he is commissioned to do, then the agency expires. Similarly, if one of the arbitration parties withdraws before the arbitrator begins the process of issuing the award, the arbitration contract expires.[1260]

Third View: The Parties Are Free to Terminate Arbitration Until the Award Is Issued

Most AlShafi'i[1261] and AlHanafi[1262] scholars, as well as some AlMaliki[1263] and AlHanbali[1264] scholars, express the view that each party has the right to unilaterally terminate the arbitration agreement until the arbitral award is issued. Ibn Abi AlDam AlShafi'i writes:

> No matter how content they [parties] are to arbitrate their dispute, once one of them withdraws before the arbitrator issues the award, the arbitrator should not issue the award. If he does so [even though one of the parties withdraws], his award is not enforceable, and this is the view consensually agreed by scholars [AlShafi'i scholars].[1265]

Proponents of this view believe that an arbitration contract is one of the permissible contracts that grant each party the right to unilaterally terminate the contract.[1266]

These proponents also argue that arbitration is akin to a judicial proceeding, and that just as a ruler who appoints a judge can terminate a proceeding by dismissing the judge before a decision is made, likewise a party can terminate arbitration by dismissing the arbitrator before the award is issued, because it was the parties who appointed the arbitrator.[1267]

[1260] Ibn Qudama says: 'Each party can withdraw from arbitration before commencement of award issuance, because it is only confirmed via his consent, similarly to when a party withdraws from agency before the agent starts to act on his behalf'. Ibn Qudamah, *AlMugni* (n 225) vol 10, 95.

[1261] Ibn Abi AlDam (n 1255) vol 1, 429; Almawerdy (n 256) vol 16, 325.

[1262] Ibn Alhammam, *Fateh AlQadeer* (n 564) vol 7, 316 and 317. Ibn AlHammam says: 'Each of the arbitration parties has the right to withdraw [from arbitration] unless arbitrator decides between them, if so his decision is binding for both of them'. ibid.

[1263] For instance, Sahnon says: 'Each party has the right to withdraw as long as the award has not been issued just as agency'. In Arabic, he said 'وَعَنْ سَحْنُونٍ لِكُلِّ وَاحِدٍ مِنْهُمَا الرُّجُوعُ مَا لَمْ يَمْضِ الْحُكْمُ كَالْوَكَالَةِ'. AASAIA AlMaliki (died: 684 Hijra - corresponding to 1285 AD), *AlThakheera*, vol 10 (Dar AlGharb AlIslami 1994) 37.

[1264] AlMaqdesi, *AlShareh AlKabeer* (n 1259) vol 28, 32. Ibn Qudamah, *AlMugni* (n 225) vol 10, 95.

[1265] Ibn Abi AlDam (n 1255) vol 1, 429.

[1266] Othman AlHanafi, when discussing the permissibility of an arbitrator's dismissal by one party and without the consent of the other, says: 'Each of the parties to an arbitration contract has the right to withdraw before the deciding in the case …. because we consider arbitration as one of the permissible contracts, not binding. Therefore, either of them [parties] enjoys the right of terminating the agreement unilaterally'. AlHanafi, *Tabyeen AlHaqa'eq* (n 262) vol 4, 193.

[1267] Ibn AlHammam says: 'Each of the arbitration parties may withdraw (from the arbitration agreement) unless the arbitrator issues the decision because the arbitrator is appointed by them, therefore, they can dismiss him

Fourth View: The Parties Are Free to Terminate Arbitration After the Award

Many contemporary writers assert that the view of Imam AlShafi'i is that each party should be satisfied with the arbitral award after it is issued.[1268] In other words, each party can decide whether to commit to an arbitration agreement even after the arbitrator renders his decision.

This view appears to be incorrect, however, and associating it with Imam AlShafi'i is inaccurate as well, based on his main books[1269] and the reports of AlShafi'i scholars who were his students. When Imam AlShafi'i discussed the issue of arbitration — between spouses in particular — he distinguished between two situations when a dispute is presented to a decision-maker.

The first situation is when two individuals (whom AlShafi'i calls 'arbiters') are appointed to decide a dispute even though one or both spouses do not consent to arbitration. If resolution is not reached amicably, the arbiters' decision, if any, can be enforced only with the parties' consent.[1270] If the parties are not content with the arbiters' decision, the ruler hears their case as a judge and issues a decision.[1271]

The second situation referenced by AlShafi'i occurs when arbiters are not appointed unless the spouses consent to arbitration. In this situation, AlShafi'i believes that the arbiters' decision is enforceable against both parties even if one party does not consent to it.[1272]

It can be concluded that Imam AlShafi'i envisioned arbitral awards that were enforceable even in the absence of an arbitration agreement, if the parties consented to the decision after

---

before he issues an award just as a governor can dismiss a judge before the latter issues a decision. If the judge issues a decision before his dismissal, the decision is enforceable. His dismissal after the decision issuance does not nullify the decision. This is similar to the situation in arbitration.' Ibn Alhammam, *Fateh AlQadeer* (n 564) vol 7, 317. See also AlHanafi, *Tabyeen AlHaqa'eq* (n 262) vol 4, 193.

[1268] A Black and other, *Modern Perspectives on Islamic Law* (Edward Elgar 2014) 163; Ahdab and Ahdab (n 213) 48. See also Chern (n 240) 10-11; Keshavjee (n 213) 67; Kutty (n 26) 596-597.

[1269] For example, *Tafseer AlImam AlShafi'i* (AM Alfarran (ed), Dar AlTadmuriyah 2006) and *AlOm*, (AlShafi'i, *AlOm* (n 222)) which includes a group of books by Imam AlShafi'i with the last of his jurisprudential views.

[1270] AlShafi'i says: 'If spouses refer to the ruler, he can send one arbiter from each of the spouses' families in order to investigate and resolve the matter between them if possible. A ruler shall not order them [the spouses] to get a divorce or pay a certain amount of money if the arbiters decide that unless after obtaining the husband's consent for the divorce, and the wife's permission for the payment'. AlShafi'i, *AlOm* (n 222) vol 5, 124. See also C Jones-Pauly and S Elbern (eds), *Access to Justice: The Role of Court Administrators and Lay Adjudicators In the African and Islamic Contexts* (KLI 2002) 153.

[1271] See generally Jones-Pauly and Elbern (n 1270) 153.

[1272] AlShafi'i says 'It is preferable that he [a ruler] asks the spouses to consent to and authorise the arbiters … [without exception in order to resolve the dispute between them]. If the spouses consent to that, the ruler shall advise the two arbiters to endeavor in their duty … . And what they decide then shall be enforced upon both parties…'. AlShafi'i, *AlOm* (n 222) vol 5, 124.

it was issued. If the parties have executed a valid arbitration agreement, however, the award is enforceable even if one party does not consent to it, according to Imam AlShafi'i. This means, in other words, that Imam AlShafi'i did not believe that a party has the right to unilaterally terminate a valid arbitration agreement after the award is issued.

In fact, the notion that parties can withdraw their consent after the award has been issued defies both logic and Shariah. The enforcement of the arbitral award is an inevitable consequence of consenting to arbitration, otherwise an arbitration would be useless and meaningless. The arbitration process would be a waste of time and money if the eventual award did not bind the parties.

Moreover, the view that a party can terminate an arbitration *post facto* contradicts the Shariah rule that 'The decision of a person who is authorized to decide in a dispute is binding'.[1273] Further, Prophet Mohammad (pbuh) said: 'Whoever decides unjustly between two disputants after they agree on appointing him, the curse of Allah be upon him'.[1274] The Prophet would have no reason to make such a warning about Allah's wrath if parties were free to simply disregard arbitral awards they considered unjust. This demonstrates that an arbitral award is mandatory and that the freedom of a party to abandon the arbitration agreement ends when the award is issued.

Fifth View: Freedom to Terminate Arbitration Ends When the Contract Is Formed

Some AlMaliki scholars advance the position that an arbitration agreement becomes binding on all parties as soon as the contract is formed. Consequently, neither party can unilaterally terminate the contract. Ibn AlMajeshon (one of the most prominent of AlMaliki scholars in the ninth century and *mufti* of the city of Madinah) states: 'Neither of them [arbitration parties] can withdraw [from arbitration] either before or after getting together [in front of an arbitrator] …, because an arbitration agreement grants an arbitration party the right by virtue of which that party is relieved from being present before the judiciary'.[1275] In other words, an arbitration agreement is a binding contract that creates rights for each party that cannot be withdrawn or terminated without that party's consent.

This view is most compatible with current commercial realities as well as with the two

---

[1273] AlNawawi, *AlMajmo'* (n 216) vol 20, 127.
[1274] Ibn Qudamah, *AlMugni* (n 225) vol 10, 94.
[1275] MAMY AlRahoni and others, *Hasheiyat AlImam AlRahoni ala Shareh AlZarqani le Mukhtasar Khalil*, vol 7 (AlMatba'ah AlAmeeriyah, 1306 Hijra - corresponding to 1888) 301.

main sources of Shariah (Quran and Sunnah), because the above-mentioned early scholars' views are *ijtihadat* (jurisprudential opinions) originally based on an *ijtihad* (singular of *ijtihadat*) that an arbitration contract is a permissible one. These *ijtihadat* were drafted to serve the interests of individuals and society 1,200 years ago. Like all *ijtihadat*, they are supposed to adapt to the circumstances of each succeeding era. This variability helps explain why Shariah scholars have divergent opinions on the issue of when an arbitration agreement can be terminated, as demonstrated above.

In the modern world, the interests of individuals and society conflict with the views of early Shariah scholars who support the freedom of a party to terminate an arbitration contract after its completion. Indeed, these scholars' views conflict with the principles underpinning modern national and international arbitration laws.

Moreover, the evidence (Ali's incident including the Quranic verses) advanced by the proponents of the first view actually supports the position that an arbitration contract cannot be terminated unilaterally. This is because the evidence reinforces the concept that the duties under a contract start from the date of formation, not the date of enforcement. Accordingly, this position is the one that complies with the provisions of the Quran.

1.1.2 Approaches of Saudi Law and English Law

Saudi law does not embrace Shariah's general approach concerning the freedom of a party to unilaterally terminate an arbitration contract. SAL 2012, for example, considers an arbitration agreement to be binding on both parties[1276] and requires a court to rule on the dismissal of any dispute that is subject to a valid arbitration agreement 'if the defendant raises such defense before any other claim or defense'.[1277]

This stance was also confirmed by the judges who were interviewed for this research. According to the judges, an arbitration contract becomes binding the moment it is formed, and a party cannot terminate it without the consent of the other. The president of one of the commercial departments at the BG stated: 'I believe an arbitration contract is considered one of the permissible contracts before agreement. But after agreement, it becomes binding, and this view complies with the principles of Shariah because it achieves justice, which is the ultimate goal of Shariah'. Accordingly, the approach of the SAL 2012 appears to resemble

[1276] SAL 2012, art 41(1)(a).
[1277] SAL 2012, art 11.

that of AlMaliki scholars who believe that no party has the right to unilaterally terminate an arbitration agreement.[1278]

The approach under English law, and common law in general,[1279] has been similar to that of most early Shariah scholars, who argue that any party can revoke an arbitration contract[1280] before an award is issued.[1281] In contrast to the situation in Shariah, however, the reason for English law's adoption of this approach is not clear. Some legal writers link the English position to the quirks of judges who were protecting their interests, while others tie it to the principles of agency contracts,[1282] which can be terminated by any party.[1283]

The approach under English law gradually started to change with the passage of the first arbitration law in 1698.[1284] By 1889, a new Arbitration Act (EAA 1889)[1285] expressly stated: 'A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court'.[1286]

The current English Arbitration Act contains no such provision, but it is clear that an arbitration agreement is a contract that creates mutual rights and duties,[1287] and, thus, the consent of all parties is required to terminate it.[1288] In the modern English system, any party to arbitration can ask a court to enjoin a violation of the arbitration agreement,[1289] even if the violation takes place overseas, so long as the legal seat of arbitration is the United Kingdom.[1290] For example, if a party files suit in a dispute that is covered by an arbitration

---

[1278] See page 214.
[1279] ES Wolaver, 'The Historical Background of Commercial Arbitration' (1934) UPa L Rev 132, 138.
[1280] In the *Vynior*'s Case, Lord Coke wrote '[I]f I submit myself to an arbitrament ... yet I may revoke it, for my act or my words cannot alter the judgment of the law to make *that* irrevocable, which is of its own nature revocable.' (1609) 8 Coke Reports 81b, 82a.
[1281] PD Carrington and PY Castle, 'The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties' (2004) 67 L&CP 207, 213-214; *Vynior*'s Case (n 1280).
[1282] G I Zekos, *International Commercial and Marine Arbitration* (Routledge-Cavendish 2008) 17.
[1283] See generally PL Sayre, 'Development of Commercial Arbitration Law' (1928) 37 YLJ 595, 598-600.
[1284] This law aimed to making an arbitration agreement unilaterally irrevocable. Sayre (n 1283) 605.
[1285] For more information, see Carrington and Castle (n 1281) 213-14; Sayre (n 1283) 605-607.
[1286] EAA 1889, s 3. EAA 1889, s 27 states '"Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not'.
[1287] For example, see EAA 1996, s 6.
[1288] This can also be concluded implicitly from EAA 1996, s 23(4).
[1289] EAA 1996, s 9.
[1290] For example, see *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, 60-61. See also N Andrews, *Arbitration and Contract Law: Common Law Perspectives* (Springer 2016) 46; DD Celik, 'Interpretation and Enforcement of Arbitration Agreements under English and U.S. Law' (2014) 4(1) the Journal 21, 35-38.

agreement, the other party can ask the court to stay the suit. In such a situation, the court 'shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed'.[1291]

The question arises whether, under the SAL 2012 and EAA 1996, the parties can agree that each or one party has the right to unilaterally terminate the arbitration contract.

The Saudi law does not include an express provision on this question. Therefore, Shariah's general rules on binding contracts are supposed to be applied, since an arbitration agreement is recognised as a binding contract by the SAL 2012[1292] and Saudi courts adopt Shariah concerning contracts.[1293] Under the law of contract in Shariah, it is permissible to agree on what is called *Khiyar AlShart* (optional condition),[1294] which grants one or more parties the right to terminate a contract[1295] so long as it includes a specific time (and it can be a long time) during which the right can be exercised.[1296] Saudi courts clearly adopt this approach. In case No 911/2/ Kaf,[1297] which concerned the plaintiff's request to enforce a sales contract, the defendant adhered to his right to terminate the contract based on an *optional condition* in the contract. The court said 'the contract in question is a conditional contract … and Shariah jurists unanimously agree that it is permissible for contracting parties to agree on an *optional condition* for one or both of them in relation to either terminating or continuing' the contract.[1298] Accordingly, the court ruled for the defendant.

Hence, it can be concluded that under the Saudi system, an arbitration agreement can confer the right of a party to unilaterally terminate the agreement. Such a provision, however, must include a specific time limit.[1299]

The EAA 1996, like the SAL 2012, does not include an express provision on this issue. Even though such a contract condition (when it favours only one party) could appear to

---

[1291] EAA 1996, s 9.
[1292] See page 215.
[1293] See generally F Ismail, 'A Commentary on Islamic Finance Case Law in the US' (2015) Comp Law 123, 123-124; IBP Inc, *Saudi Arabia Criminal Laws, Regulations and Procedures Handbook: Strategic Information, Regulations, Procedures* (IBP 2016) 98.
[1294] For example, *Majallat AlAhkam AlShariah*, art 393 states 'The condition by the contracting parties that both or one of the parties has the right to either terminate or continue the sale contract is permissible'.
[1295] ML Benmaran and others, 'Option in Islam' (2014) 2 J Curr Res Sci 708, 710.
[1296] SM Salehi, 'A Study of Willful Options in Religious and Civil Laws' (2016) 3 IJBR 298, 300-301. *Majallat AlAhkam AlShariah*, art 392 states 'A certain time for the optional condition shall be determined regardless of how long it is'.
[1297] Case No 911/2/Kaf of 1429 Hijra (corresponding to 2008 AD) BG.
[1298] ibid 1218.
[1299] For example, ten years after the termination of the underlying contract.

violate the arbitral principle of equality under the English system,[1300] such a condition seems to be valid under the broad doctrine of freedom to contract under English law in general and the EAA 1996 in particular.[1301] In addition, English case law clearly establishes[1302] the enforceability of a unilateral (hybrid, optional) arbitration clause, which confers the right to only one party to resolve any disputes via arbitration.[1303] In other words, English law accepts a scenario in which one party can decide whether to arbitrate, regardless of the will of the other party.

In *NB Three Shipping Ltd v Harebell Shipping Ltd*,[1304] the agreement between the parties stipulated: 'The courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty'.[1305] At the same time, however, the agreement granted one of the parties (the owner of the vessel) 'the option of bringing any dispute hereunder to arbitration'.[1306] The court upheld the validity of the agreement, confirming that it 'gives owners a right to stop or stay a court action brought against them, at their option'.[1307] Thus, a unilateral arbitration clause, even if it does not explicitly include the right to unilaterally terminate the contract, contains that right implicitly. Therefore, it can be concluded that an arbitration party has the right to unilaterally terminate an arbitration agreement in light of the English judiciary's approval of the unilateral arbitration clause.

It should be noted that, unlike a unilateral arbitration clause, an optional arbitration clause that grants the right to all parties to choose arbitration (multilateral optional arbitration clause) does not constitute, under English law, a grant of absolute freedom to each party to choose whether or not to submit to arbitration. As Leggatt J in *Union Marine v Government of Comoros*[1308] states, an optional arbitration agreement becomes binding for both parties 'when that option is exercised' by either party.[1309]

[1300] In *Baron v Sunderland Corporation*, the Court of Appeal stipulated that 'It is an essential ingredient of an arbitration clause that either party may, in the event of a dispute arising, refer it, in the provided manner, to arbitration. In other words, the clause must give bilateral rights of reference'. [1966] 2 QB 56, 64.
[1301] EAA 1996, s 1(b).
[1302] For example, *NB Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC (Comm); *Pittalis and Others v Sherefettin* [1986] 2 WLR 1003.
[1303] See generally AGR Auda, 'The Future of Arbitration under the Brussels Recast Regulation' (2016) Arbitration 122, 123.
[1304] [2004] EWHC (Comm).
[1305] Clause 47.02 of the Charterparty (as cited in *Three Shipping* (n 1302) 7).
[1306] ibid.
[1307] *Three Shipping* (n 1302) 11.
[1308] [2013] EWHC 5854 (Comm).
[1309] ibid 17.

Such an agreement was at issue in a recent case, *Anzen Limited and others v Hermes One Limited (British Virgin Islands)*.[1310] According to the Privy Council (Lord Mance and Lord Clarke), the agreement that 'Any Party *may* submit the dispute to binding arbitration'[1311] binds parties to submit to arbitration. Hence the Council reversed the decision of Bannister J, which had been upheld by the Court of Appeal, and considered staying litigation because of the existence of a binding arbitration agreement.[1312] At an earlier stage of the case, both Judge Bannister QC and the Court of Appeal considered the agreement to be *optional*.[1313] The Court of Appeal had agreed with Judge Bannister QC's dismissal of the stay, holding that the defendant, under this optional arbitration agreement, could have exercised the option if he had referred the same dispute to arbitration.[1314]

From the above, it is clear that the approach of the SAL 2012 resembles that of AlMaliki scholars, who believe that none of the arbitration parties has the right to unilaterally terminate an arbitration agreement. The situation under the EAA 1996 is the same. Under Saudi law, however, an agreement under which only one party enjoys the right to unilaterally terminate the contract is enforceable so long as it includes a specific time during which such a right is valid. Under English law, such agreement seems to be valid with no need to specify a time.

1.2 Exceeding Definite Time

An arbitration agreement may directly or indirectly (eg, by referring to arbitration rules or a national law) include a period of time during which the arbitral process should be completed or during which the arbitral award should be issued (eg, 30 days from the close of hearings).[1315] Most national laws eschew such provisions, while the rules of arbitration institutions usually contain such provisions.[1316]

Shariah, like English law, sets no definite time for the arbitral process or the arbitral award. Under both legal systems, however, parties are free to agree on time limits.[1317] The situation under the SAL 2012 is different, as it requires that the arbitral award be delivered

---

[1310] [2016] UKPC 1.
[1311] Clause 19.5 of the shareholders' agreement, July 2012 (as cited in *Anzen* (n 1310) 3).
[1312] *Anzen* (n 1310) 35.
[1313] ibid 6.
[1314] ibid.
[1315] Commercial Arbitration Rules and Mediation Procedures of American Arbitration Association 2013, r 45.
[1316] For instance, Articles 31(1) and 5(6) of International Chamber of Commerce Rules of Arbitration 2012, with its amendments in 2017 (ICC Rules of Arbitration 2017). See also Term 20 of LMAA.
[1317] For example, see generally *AlMajallah*, art 1846. EAA 1996, ss 1, 50 and 79.

within 12 months unless the arbitration agreement states otherwise.[1318] This raises the question of whether a party can terminate an arbitration agreement under Shariah, SAL 2012, and EAA 1996 when a time limit is exceeded.

As far as the researcher can determine, only AlHanafi early scholars have discussed this issue. Under AlHanafi school, there are two contradictory approaches. Some scholars, such as Abi Yusuf (one of the most prominent AlHanafi scholars in the eighth century and the first judge in Islamic history to be made chief justice), express the view that an arbitration agreement is not valid if it includes a time limit to issue the arbitral award because it becomes a conditional agreement, which is not permissible.[1319] On the other hand, most scholars of AlHanafi school (eg, in *AlFatawa Al Hindiya* [*Indian Fatawa*][1320] and *AlMajallah*[1321]) believe that if the arbitration agreement specifies a period of time, the time limit should be respected, otherwise the agreement terminates. They argue that just as a judicial system can specify a time within which to issue a judgment, so too can an arbitration agreement.[1322] According to these scholars, if an arbitration award is issued after the time limit has expired, the award 'will not be executable'.[1323]

Thus it can be said that under the majority approach of AlHanafi school, an arbitration agreement terminates automatically when the time expires, without the need for the issue to be raised by any of the parties. This means that, when the time limit is exceeded, either party can treat the arbitration agreement as having terminated — even after the award has been issued. At the same time, however, the enforcement of an arbitration agreement and an arbitral award remains subject to the parties' will. This is because, in accordance with the approach of these scholars, the effect of the award being issued after the time limit is non-enforcement,[1324] not nullity.

The situation is different under Saudi law, which allows the arbitral tribunal to extend

---

[1318] SAL 2012, art 40.
[1319] AlHanafi, *AlMuheet AlBurhani* (n 261) vol 8, 117-18.
[1320] NA AlBalkhi and others, *AlFatawa Al Hindiya*, vol 3 (2nd edn, Dar AlFiker, 1310 Hijra - corresponding to 1892) 398.
[1321] *AlMajallah*, art 1846.
[1322] Abu AlMa'ali AlHanafi says: 'If parties agree on appointing an arbitrator between them on a particular day or within a particular period of time, it is permissible. Don't you see that it is permissible to appoint a judge temporary, and so is an arbitrator'. AlHanafi, *AlMuheet AlBurhani* (n 261) vol 8, 119.
[1323] *AlMajallah*, art 1846.
[1324] *AlMajallah*, art 1846.

the time limit by six months.[1325] (The arbitral body has no such power under Shariah.) In addition, Article 40 of the SAL 2012 states that the expiration of the original period specified for the issuance of the award or the additional period (if any) set by the arbitral tribunal does not result in the automatic termination of an arbitration agreement but rather merely grants each party the right to ask a court to terminate the arbitration or to extend the time limit. Furthermore, if the parties do not object to the period being exceeded (whether the deadline is set by the law or in the arbitration agreement) for 30 days, then their silence can be treated as a waiver of their right to terminate the arbitration. [1326]

The situation is less clear under the EAA 1996, which does not address the effect of exceeding time limits, though the law does grant the arbitral tribunal and parties the right to ask a court to extend any deadlines.[1327] Section 24 of the EAA, however, allows a party to ask a court to remove an arbitral tribunal if the tribunal fails to issue an award within a reasonable time.

In a recent case, *BV Scheepswerf Damen Gorinchem v The Marine Institute*,[1328] the defendant sought to set aside an arbitral award under Section 68 of the EAA 1996 on the ground of delay in issuing the award, which was delivered more than 12 months after the hearings, contrary to the rules of the London Maritime Arbitrators Association (LMAA), which the parties had agreed to follow.[1329] The defendant argued that the arbitrator failed to comply with a general duty to avoid unnecessary delay, which is a ground for setting aside an award under Section 68 of the EAA1996.[1330] The court rejected the challenge, holding that the delay, 'without more', was not a sufficient basis for setting aside an arbitral award,[1331] 'although the delay in producing the award in this case was extremely regrettable'.[1332] According to the court, a delay will not justify the rejection of an award unless that delay is compounded by other errors, such as the arbitrator's failure to deal with all issues presented by the parties.[1333]

[1325] SAL 2012, art 40(2).
[1326] SAL 2012, art 7.
[1327] EAA 1996, s 50.
[1328] [2015] EWHC 1810 (Comm).
[1329] Term 20 of the LMAA states: 'The award should normally be available within not more than six weeks from the close of the proceeding'.
[1330] *Scheepswerf* (n 1328) 1.
[1331] ibid 8.
[1332] ibid 46.
[1333] ibid 8.

From the above, it is clear that the effects of exceeding a time limit in an arbitration are different in the three legal systems. Under the approach of most AlHanafi scholars, as soon as the specified period is exceeded, an arbitration agreement expires and an arbitral award is not binding. Saudi law, on the other hand, leaves it up to a party to ask a court to consider terminating the arbitration. Under English law, arbitration parties can seek the removal of arbitrators who fail to conclude the arbitral process or issue the award within a reasonable time. If an award is issued, the mere fact that deadlines were exceeded will not affect the validity of the arbitration under the EAA1996, even if the delays were *long and unjustifiable*.

1.3 Death of One Party

One of the parties might die during the span of an underlying contract that includes an arbitration clause or a party might die after agreeing to submit a particular dispute to arbitration but before an award is issued. In such situations, if there is no specific provision under applicable laws, such as the Model Law, that deals with the effect of death on the arbitration agreement, the situation will be governed by the principle of universal succession, which is recognised by most national laws.[1334]

In accordance with this principle, the rights and duties under an arbitration agreement are transferred to the successor, except for rights and duties that would have been performed only by the decedent.[1335] Such personal rights and duties are not usually present in an international commercial arbitration.

As far as the researcher can determine, early scholars of the four Sunni schools have not addressed the issue of the effect of either party's death on an arbitration agreement[1336] nor have they expressly discussed the principle of universal succession.[1337] Despite this legal gap, however, the approach of Shariah can be deduced from the views of early Shariah scholars regarding the effect of death on contractual commitments. Early Shariah scholars

---

[1334] See generally Ferrari and Krö (n 315) 168-69.

[1335] See generally S Kalss, *Company Law and the Law of Succession Editors* (Springer 2015) 10 and 278.

[1336] For a contrasting opinion, see Ahdab and Ahdab (n 213) 48. The authors point out that under AlHanafi school and *AlMajallah*, an arbitration agreement expires upon the death of one of the parties. This seems to be inaccurate due to *AlMajallah* as well as its explanatory book *Durar AlHukkam* (Afandi (n 583)) have not addressed this matter.

[1337] Werner End and Udo Steinbach (eds), *Islam in the World Today: A Handbook of Politics, Religion, Culture, and Society* (Cornell University Press 2010) 216.

categorise three types of contracts: permissible contracts, binding contracts,[1338] and unilateral binding contracts.[1339] Only the first two types will be addressed here since an arbitration contract falls within one of those categories.[1340]

Early Shariah scholars assert that binding contracts do not end upon the death of a party but rather that all rights and duties are transferred to the party's heir or testamentary successor. Ibn Qudamah stated: 'If the two contractors become deceased, their inheritors will be in their places … [in all disputes arising from the contract], because they inherit their money and their rights, hence they should also receive their commitments and duties …'.[1341] On the other hand, most early Shariah scholars agree that permissible contracts (eg, an agency[1342] or partnership contract[1343]) expire upon the death of a party.

Accordingly, it can be said that, under the four Islamic schools, whether an arbitration agreement terminates upon the death of a party depends on the schools' differing views on when an arbitration contract becomes a binding one.[1344]

Based on that, the following can be concluded:

1) The approach of some AlMaliki scholars is that after an arbitration contract is concluded, it does not expire upon the death of one of its parties, as these scholars believe an arbitration contract becomes binding as soon as it is created.[1345]
2) The approach of most AlMaliki scholars and some AlShafi'i scholars as well as the CIIFA is that an arbitration contract expires when any party dies, except in respect to arbitration disputes already commenced, as these scholars believe an arbitration agreement becomes binding at the commencement of procedures.[1346]
3) The approach of most AlHanbali scholars is that upon the death of any party, an arbitration agreement expires except for arbitration disputes in which pleading is

---

[1338] Baamir, *Shari'a Law* (n 23) 72.
[1339] Z Shamsuddin and AG Ismail, 'Agency Theory in Explaining Islamic Financial Contracts' (2013) 15(4) MEJSR 530, 537.
[1340] Ercanbrack (n 398) 315; see also pages 48-49.
[1341] Ibn Qudamah, *AlMugni* (n 225) vol 4, 149.
[1342] A Ridwan, 'Contemplation Of Islamic Law Toward Wakalah Contract In Islamic Banking Practice' 4(2) USAHID Jakarta <https://tinyurl.com/y9ao6ps5> accessed 20/06/2018; International Centre for Education in Islamic Finance, *Applied Shariah in Financial Transactions: CIFP. Part 1: Study Material* (INCEIF 2006) 419.
[1343] B Kettell, *Islamic Finance in a Nutshell: A Guide for Non-Specialists* (Wiley 2010) 49.
[1344] See page 210.
[1345] See page 214.
[1346] See page 211.

closed. This is because these scholars believe that an agreement to arbitrate does not become a binding contract until arbitration procedures actually are underway and pleading is closed.[1347]

4) The approach adopted by most early Shariah scholars of the four Sunni schools is that an arbitration agreement, including arbitrable disputes arising from such an agreement, expires upon the death of any party, so long as an arbitral award has not yet been issued. This is because these scholars consider an arbitration agreement to be a non-binding contract until an award is issued.[1348]

Consequently, it can be said that under Shariah, except for the approach of some AlMaliki scholars, an arbitration agreement or arbitration clause expires upon the death of any party. The only exception is when an arbitration agreement concerns a dispute that is already in the hands of an arbitrator. In this case, the approach of most AlMaliki scholars and some AlShafi'i scholars as well as the CIIFA is that a party's death has no effect on such disputes, while the approach of most AlHanbali scholars is to close the door on all arbitration disputes except those in which pleading has closed.

In Saudi Arabia, the Arbitration Law 2012 (in contrast to the EAA 1996) does not address this issue except in respect to an arbitration agreement that concerns a dispute in which procedures have commenced. According to Article 41(2), the death of any party does not terminate the arbitration procedures unless the arbitration agreement states otherwise. It is clear that the Saudi law does not adopt the approach of Shariah scholars that an arbitration agreement expires upon the death of any party so long as arbitration procedures have not yet started. This is because, under the SAL 2012, an arbitration agreement is considered a binding contract from the moment of its creation.[1349] Moreover, the approach of the Saudi judiciary is that the arbitration contract remains valid even after the death of a party.

Case No 269/3/gaf[1350] concerns the plaintiff's request to force the deceased's heirs to fulfil a contract signed by the deceased. The heirs defended themselves by citing the arbitration clause included in the contract in question. The plaintiff had consented to the matter being referred to arbitration. The court decided to enforce the arbitration clause in the

[1347] See page 211.
[1348] See page 212.
[1349] For example, SAL 2012, arts 11-12.
[1350] Case No 269/3/gaf of 1408 Hijra (corresponding to 1987 AD) BG (Makkah).

underlying contract, and the Review Committee affirmed.[1351]

From this decision, it can be concluded that the court believed the arbitration clause in the underlying contract did not expire because of a party's death; otherwise the court would not have ruled with the enforcement of arbitration clause in this case.

The English law is similar in that it states that an arbitration agreement is not terminated due to the death of a party unless the arbitration agreement expressly says otherwise.[1352] According to Section 8 of the EAA 1996, if a party dies, an arbitration agreement 'may be enforced by or against the person or representatives of that party'.

It is clear that Saudi law differs from the common approach of Shariah scholars in this regard. While most Shariah scholars argue that the death of any party terminates an arbitration agreement except for arbitral disputes that have already started (according to most AlMaliki scholars and some AlShafi'i scholars as well as the CIIFA), and arbitral disputes in which pleading has closed (according to most AlHanbali scholars), the attitude of the Saudi law is that a party's death has no effect upon the expiration of an arbitration contract, following the approach of some AlMaliki scholars, as is the case in the English system. Under the EAA 1996, however, the situation is clearer than that of both the Saudi law and Shariah, as English lawmakers addressed this issue with an explicit provision under which an arbitration agreement is automatically transferred to the representative of the deceased party unless the parties agree otherwise.

1.4 Fundamental Breach

A valid arbitration agreement, whether in the form of an arbitration clause or a submission agreement, may be breached explicitly or implicitly by actions that contravene the provisions of the agreement. When a party commits a fundamental breach (also called a 'repudiatory breach')[1353] of an arbitration agreement, it is considered a waiver of his right to benefit from the agreement and, thus, the agreement (in its entirety or in a particular dispute) cannot be relied on without the other party's consent. At the same time, such a breach grants the other party the right to terminate the arbitration agreement.

Early Shariah scholars did not address this issue, because they categorise an arbitration

[1351] ibid 5.
[1352] EAA 1996, s 8(1).
[1353] Saha and Saharay (n 992) 169.

agreement as one of the permissible contracts that can be terminated unilaterally without any justification.[1354] This raises the question of how Shariah treats an arbitration contract that has become a binding one, for example by the parties' mutual agreement or after arbitration procedures are underway.[1355] In such cases, the general provisions of Shariah concerning binding contracts should apply. According to these provisions, a fundamental breach of contract by one of the parties entitles the other party to terminate the contract.[1356] This can be seen in the approach of the Saudi courts, which adopt the views of Shariah jurists on this issue, as will be discussed later.

The SAL 2012 and the Saudi case law do not directly address a fundamental breach of an arbitration agreement. The same is true of the EAA 1996 and even the Model Law. The English judiciary, however, has consistently and explicitly applied 'the traditional principles of the law of contract' when there is fundamental breach of an arbitration agreement.[1357]

Despite the gap in Saudi statutory law, Saudi case law shows that the Saudi courts respond to a fundamental breach of an arbitration agreement by allowing the aggrieved party to terminate the agreement in whole or in respect to a particular dispute. The principle is the same under English law.

For instance, both Saudi and English case law establish that when one party breaches the arbitration agreement by filing suit over a dispute rather than pursuing arbitration, the innocent party gains the right to block the breaching party from referring the same dispute to arbitration.[1358] Moreover, the denial of a valid arbitration agreement or the denial of the validity of the underlying contract that includes an arbitration clause[1359] may be treated by Saudi and English courts as a breach that entitles the other party to terminate the arbitration agreement.

[1354] See page 210.
[1355] See page 211.
[1356] Islam, 'Dissolution of Contract' (n 267) 358-59.
[1357] *Downing v Al Tameer Establishment & Anor* [2002] EWCA Civ 721; *Bea Hotels NV v Bellway LLC* [2007] 1 CLC 920, 925. Andrews (n 1290) 46.
[1358] Case No 29/T/4 of 1413 Hijra (corresponding to 1993 AD) BG (as cited in Baamir, *Shari'a Law* (n 23) 121). In *Herschel Engineering Ltd v Breen Property Ltd*, the English High Court stated that 'The issue of [filing] proceedings in court [by one of arbitration parties] will usually amount to a waiver of his right to have the dispute that is the subject of the court proceedings determined by arbitration'. (2000) 2 TCLR 473, 480; *Delta Reclamation Limited v Premier Waste Management Limited* [2008] EWHC 2579 (QBD) 35. *Lombard North Central Plc v GATX Corp* [2012] EWHC 1067 (Comm).
[1359] Case No 250/2/kaf of 1408 Hijra (corresponding to 1987 AD) BG, 56. *Downing* (n 1357).

1.4.1 Requirements for a Party's Right to Terminate Arbitration Due to a Fundamental Breach

Under both Saudi and English case law, two requirements must be met for a party to gain the right to terminate an arbitration agreement when it is breached by the other party.

The first requirement is that the breaching party manifests an intent not to commit to the arbitration agreement. In case No 933/3/kaf,[1360] the Saudi courts held that the consent of one party to the other party's filing suit to resolve a dispute that was subject to an arbitration agreement did not represent a waiver of the arbitration agreement (or a consent to the violation) by the consenting party unless the party who filed suit can prove that the consenting party's intention was to terminate the arbitration agreement. Rather, the consent was viewed merely as a consent to resort to a court that had the authority to interpret and enforce the arbitration clause. Similarly but more clearly, the English Commercial Court in *Bea Hotels NV v Bellway LLC*[1361] held that a party's filing suit in a foreign court over a dispute that was subject to an arbitration agreement did not amount to a repudiatory breach unless it could be shown that the suing party intended to no longer be bound by the arbitration agreement.[1362]

The second requirement turns on the aggrieved party's timely and unequivocal consent response to the other party's fundamental breach.[1363] If the aggrieved party rejects the breach, by word or deed, his right to claim that the breach terminated the arbitration agreement evaporates.[1364]

In case No 250/2/kaf,[1365] the claimant sought to compel the defendant to make payments under a commercial contract between them. The defendant asked to have the dispute referred

---

[1360] Case No 933/3/kaf of 1429 Hijra (corresponding to 2008 AD) BG.

[1361] *Bea Hotels* (n 1357).

[1362] ibid 925. *BDMS Limited v Rafael Advanced Defence Systems* [2014] EWHC 451 (Comm) 45. See also *Trunk Flooring Limited v HSBC Asset Finance (UK) Limited, Costi Righi SPA*, [2015] NICA 68, 35-36.

[1363] For instance, if one party denies the arbitration agreement after a dispute occurs between them, the other party has the right to accept this breach by filing a case before the competent court. *Downing* (n 1357).

[1364] As an example, if one of the parties files a dispute that is subject to an arbitration agreement before the competent court, the other party has the right to reject this breach and apply for a stay of litigation proceedings. If the innocent party does not object before filing any defense on the merits of the dispute, he loses his right to adhere to this breach. For example, in Case No 222/3/kaf (1987), the First Instance Court stayed the litigation proceedings upon the defendant's request that was based on the existence of a valid arbitration clause. The decision was reversed by a Review Committee based on the fact that the defendant did not adhere to the arbitration agreement until after a number of sessions during which there was a pleading on the merits of the dispute between parties. Thus '[T]he defendant … has waived his right to adhere to the existence of an arbitration clause between him and the plaintiff …'. Case No 222/3/kaf of 1408 Hijra (corresponding to 1987 AD) BG 70.

[1365] Case No 250/2/kaf (n 1359).

to arbitration based on an arbitration clause in the underlying contract. The plaintiff claimed the arbitration agreement was no longer in effect because of the defendant's violation of the agreement in previous disputes arising from the same contract. He based his claim on the defendant's memorandum in those earlier cases, which stated his 'non-commitment to the arbitration clause due to "the expiration of the effect of underlying contract … including arbitration clause"'. The court rejected the plaintiff's claim and wrote, 'At the time when the defendant's attorney claimed the termination of the contract including the arbitration clause, the plaintiff's attorney was adhering to his right to enforce the arbitration clause'. This led the court to conclude that the parties had not agreed on the termination of the arbitration clause in an explicit or implicit manner.[1366]

The situation is similar in the United Kingdom. According to the English Court of Appeal, an arbitration agreement remains in force even if breached by one party 'unless and until' the other party communicates in an unequivocal manner to the breaching party that 'he accepted such repudiation as bringing to an end the obligation of both parties to perform the arbitration agreement'.[1367]

Hence, it can be concluded that under both the Saudi and English systems a fundamental breach does not end an arbitration contract automatically but instead is treated as an implicit offer to terminate the agreement. To take effect, that offer should be accepted clearly and timely. If the offer is rejected, any subsequent fundamental breach by the offending party is considered a new offer to terminate the arbitration agreement.

1.4.2 Scope of the Parties' Right to Terminate an Arbitration Agreement After a Fundamental Breach

It is clear from the discussion above that a fundamental breach can be the basis of a party's right to terminate an arbitration agreement. The question here is whether any fundamental breach that meets the previously mentioned requirements creates a right to completely terminate the arbitration agreement or whether the agreement is terminated merely in respect to the dispute in which the breach occurred.

The Saudi judiciary has not directly answered that question, but the case law indicates that the courts have distinguished two situations:

[1366] ibid 59-60.
[1367] *Downing* (n 1357) 21. See also generally, *Bea Hotels* (n 1357) 925-26.

1) When a breach occurs in a particular dispute (eg, a party files suit in a standing dispute that is subject to an arbitration agreement). In this situation, the effect of the breach of the arbitration agreement is limited to that dispute. In case 250/2/kaf,[1368] the Saudi court dismissed the suit and referred the dispute to arbitration because of the existence of a valid arbitration clause. The court so ruled even though the parties had violated the arbitration agreement in previous disputes that were subject to the agreement. The court rejected the plaintiff's argument that the defendant had claimed in those earlier disputes that the underlying contract that included the arbitration agreement was terminated. In the earlier cases, the plaintiff rejected the claim that the underlying contract had been terminated, yet he litigated the suit to conclusion without ever demanding referral to arbitration. It seems that the court in 250/2/kaf treated his continuous litigation of the earlier cases as an implicit consent to the breach of the arbitration agreement even though he did not consent to the other party's claim of termination of the underlying contract. Consequently, it can be inferred that the Saudi courts do not consider a breach in a particular dispute to affect the entire arbitration agreement.

The attitude of the English judiciary is similar but more nuanced. In *Mohammed Ahad, Misba Uddin Ahmed v Shams Uddin*,[1369] the plaintiffs filed suit in a dispute that was subject to an arbitration agreement. The defendant did not ask for a stay, but instead commenced pleading on the merits. When the claimant later requested that other issues be added, the defendant asked for a stay only as to those issues. The Court of Appeal rejected the defendant's request because the additional issues were 'part and parcel of the dispute' that was already before the court.[1370] Accordingly, it can be said that the effect of a breach of an arbitration agreement regarding a particular dispute is limited to that dispute and the issues that are integral 'part and parcel' to it.

2) When there is a complete breach of an arbitration agreement (eg, by denying the existence of the agreement or by claiming it was terminated). In such a situation, the effect of the breach extends to the whole arbitration agreement, giving the other party the right to abandon the arbitration agreement completely.

This can be inferred from case No 250/2/kaf, which was mentioned above. In that case,

---

[1368] Case No 250/2/kaf (n 1359).
[1369] [2005] EWCA Civ 883.
[1370] ibid 19.

the Review Committee rejected the plaintiff's claim that the arbitration agreement was not operative. The plaintiff's position was based on the defendant's claim in previous cases that he was not committed to the underlying contract and its arbitration clause because they had expired. [1371] The court reasoned that the plaintiff's adherence to the arbitration agreement at the same time as the defendant was claiming it had expired meant that 'both parties to the contract were not agreed on the termination of the arbitration clause'. [1372]

The state of English law on this issue is illuminated by *Downing v Al Tameer Establishment,* [1373] in which the defendant sought to stay litigation because an arbitration agreement covered the subject matter of the dispute. The plaintiff countered that the arbitration agreement had been breached by the defendant, who had repeatedly denied the existence of the underlying contract that included the arbitration clause. The Court of Appeal held that when one party, through word or deed, indicates that he is no longer committed to the arbitration agreement, the other party has the right to terminate it.

Based on the above, it can be concluded that under Saudi law (Saudi courts apply Shariah contract law), and English law, a party can terminate an arbitration contract that has been breached when the breach and its acceptance are clear, connected and timely. The right to terminate may, however, be limited to the dispute that is connected to the breach if the breach does not involve the entire arbitration contract.

1.5 Expiration of the Agreement When the Arbitrator Exits

Early Shariah scholars, particularly those of AlHanafi school, express the view that an arbitration contract expires when the arbitrator fails to fulfil his mission, regardless of the cause of that failure (eg, he dies, is dismissed or becomes disqualified). [1374] In contrast, Saudi [1375] and English law [1376] do not require an arbitration contract to end in such a situation, regardless of why the arbitrator failed to complete his mission.

[1371] Case No 250/2/kaf (n 1359) 59.
[1372] ibid 60.
[1373] *Downing* (n 1357).
[1374] For example, in *AlFatawa Al Hindiya* it is stated that 'Arbitration is permissible and the condition for its permissibility is that an arbiter should meet the witness requirements at the time of arbitration and the time of the award … if an arbitrator becomes an infidel … then becomes a Muslim, … [or vice versa] his decision is not permissible [and] the arbitration is null'. AlBalkhi and others (n 1320) vol 3, 398. See also generally, Ahdab and Ahdab (n 213) 44; AlHanafi, *Tabyeen AlHaqa'eq* (n 262) vol 4, 194; Mohammed, *AlBaher AlRaeq* (n 220) vol 7, 28.
[1375] SAL 2012, art 19.
[1376] EAA 1996, ss 26 and 27.

Under the SAL 2012, when the arbitrator is removed or drops out, he must be replaced, applying the same procedures that led to his original appointment.[1377] Similarly under the EAA 1996, if the parties cannot agree on how to fill the vacancy, they must follow the same steps through which the original arbitrator was appointed.[1378] In other words, under English and Saudi laws the arbitration contract and the agreement with the arbitrator operate independently, and the failure of the latter does not terminate the former.

The following section addresses the scope of the parties' freedom to put an early end to the arbitrator's mandate under Shariah, the SAL 2012, and the EAA 1996.

2. Freedom of Parties to End Arbitrator's Mandate Early

The arbitrator's mandate typically ends when s/he issues the arbitral award. It, however, can be terminated early, by force (eg, through a court order requested by a party) or voluntarily (eg, when the arbitrator falls ill). Most national and international arbitration laws (including the EAA 1996 and Model law[1379]) as well as arbitration rules[1380] grant the parties total freedom to agree to terminate an arbitrator's mandate before an award is issued.

Even when there is no express provision, the parties' right to remove the arbitrator is in accord with the contractual nature of arbitration. The parties are the masters of the arbitration and are not obligated to go through the process with an arbitrator they do not want.[1381] At the same time, because of the consensual nature of arbitration, one party cannot terminate the arbitrator without the other's consent or without good cause.

Under Shariah and Saudi law, however, the situation is not so simple. According to most early Shariah scholars, a party can unilaterally terminate an arbitrator's mandate without cause. If the arbitrator was appointed by a court, however, the parties cannot remove the arbitrator even if they both agree to do so, according to AlHanafi doctrine and the SAL 2012.

The freedom of the parties to terminate an arbitrator's mandate without a legitimate reason under Shariah and Saudi and English laws will be addressed in turn. It should be noted

---

[1377] SAL 2012, art 19.
[1378] EAA 1996, s 27.
[1379] Model law, art 14.
[1380] For example, Article 10(5) of LCIA 2014 and Article 28 of the World Intellectual Property Organization 2014 (WIPO). On the contrary, for example, is Article 15 of the ICC Rules of Arbitration 2017 by which the right of parties to revoke an arbitrator is subject to the Court's acceptance.
[1381] Lew and others (n 298) 316.

here that the three legal systems use different terms to describe the termination of an arbitrator's mandate at the will of the parties. English law uses the term 'revocation', Shariah scholars speak of 'dismissal of the arbitrator' or 'withdrawal of arbitrator's appointment', while Saudi law simply uses 'dismissal'.[1382]

2.1 The Parties' Freedom to Terminate the Arbitrator's Mandate Early Under Shariah

Early Shariah scholars endorse the right of the parties to agree to terminate an arbitrator's mandate by dismissal. According to AlHanafi school, however, the parties cannot dismiss an arbitrator who was appointed by a court.[1383] Based on their differing views on the nature of the arbitrator's role, early Shariah scholars diverge on the issue of whether a party can unilaterally terminate an arbitrator's mandate. The scholars' opinions fall into three categories:

First View

Most AlMaliki scholars[1384] believe that either party can terminate an arbitrator's mandate by dismissing him before the arbitration gets underway. After an arbitrator begins hearing a dispute, however, an agreement between the parties or a legitimate reason for termination is required. The proponents of this view argue that an arbitrator is like an agent, and a client, in Islamic courts, is entitled to dismiss his agent (attorney) before litigation has begun in front of a judge but not after the litigation has commenced.[1385]

This view is not persuasive, however. Although there are similarities between an agent and an arbitrator, each has a different role and aim. An agent should follow his client's instructions, and the agent's job is to promote the interests of the client. An arbitrator, on the other hand, does not follow the instructions of the parties nor does the arbitrator represent the

---

[1382] Contrary to Shariah and Saudi law, dismissal of an arbitrator is usually carried out by the request of one party from either the competent court or the arbitration institution that appointed that arbitrator. Onyema (n 249) 177.

[1383] *AlMajallah*, art 1847.

[1384] AlAndulusi, *AlMuntaqa* (n 223) vol 5, 227; AlMaliki, *Aqd AlJawaher* (n 1095) vol 3, 1006.

[1385] For example, Abu Mohmmed AlMaliki says: 'Ibn AlQassem [one of AlMaliki senior scholars and *mufti* of Egypt in the eighth century] says: if they[disputants] appoint an arbitrator to decide between them and present their evidence in front of him, then one of them changes his mind [towards the arbitrator] before he rules between them, I [Ibn AlQassem] believe he should continue to decide between them and his decision is permissible and enforceable. … Asbagh says: this is similar to when two disputants present their dispute before the judge, neither of them can appoint or dismiss an agent'. AMAAZANQ AlMaliki (died: 386 Hijra - corresponding to 996 AD), A*lNnawader wa AlZeyadat ala ma fi AlMudawwenah men Gayreha men AlOmmahat*, vol 8 (MA Boa Khabazah investigator, Dar AlGharb AlIslami 1999) 83-84.

interests of either party. Rather, the arbitrator's task is to abide by the arbitration agreement and the applicable law without fear or favour.

Moreover, according to the early scholars of the four Sunni schools, an arbitrator's qualifications are different from those of an agent. Under Shariah, an agent is required only to be of sound mind[1386] and not to be a minor.[1387] On the other hand, early Shariah scholars cite a long list of qualifications that an arbitrator should possess (eg, religious criteria and Shariah knowledge).[1388]

Consequently, arguments based on an analogy between agents and arbitrators are not convincing. The differences between their roles, aim, and qualifications should be reflected in how, when, and whether they can be dismissed from their duties.

Second View

The view of AlShafi[1389] and some AlHanafi,[1390] AlMaliki[1391] and AlHanbali[1392] scholars is that each party is entitled to terminate arbitrator's mandate before an award is issued. This is true even if arbitration proceedings have already commenced. AlMawerdy said:

> For an arbitration award to be enforced …, consent of disputing parties to resolve their dispute by an arbitrator should be continued until the time of issuing the award. If one party is content with him [the arbitrator] but not the other or if both parties consent to appointing him, then they or one of them withdraws the consent, the arbitration is void, and his decision is unenforceable whether it is in favour of the consenting or withdrawing party.[1393]

[1386] Ministry of Awqaaf and Islamic Affairs, *AlMosoua AlFiqhiyah*, vol 45 (2006) 23-24.

[1387] Shamsuddin and Ismail (n 1339) 536.

[1388] See pages 108-130.

[1389] AlShafi'i, *Mugni AlMuhtaj* (n 262) vol 6, 268; Almawerdy (n 256) vol 16, 325.

[1390] AlHanafi, *Tabyeen AlHaqa'eq* (n 262) vol 4, 193.

[1391] According to *AlMosoua AlFiqhiyah,* some 'AlHanafi scholars and AlMaliki scholar Sahnoon express the view that each disputing party is entitled to withdraw from arbitration before an award is issued … [this withdrawal] is considered a dismissal of arbitrator. After an award is issued, neither party has the right to withdraw from arbitration nor to dismiss the arbitrator.' Ministry of Awqaaf and Islamic Affairs, *AlMosoua AlFiqhiyah*, vol 10 (2nd edn, That Alsalaseal 1987) 243-244.

[1392] Mansoor AlHanbali says: 'Each disputant can terminate the mandate of an arbitrator before he commences the award issuance because his decision does not become binding unless with the disputants'. consent. This is similar to a client who withdraws from an agency before an agent commences acting on the client's behalf. After an arbitrator commences the award issuance and before it is completed, they cannot withdraw from his arbitration just as a client cannot withdraw after his agent acts on his behalf' In Arabic, he said:
'(وَلِكُلِّ وَاحِدٍ مِنْ الْخَصْمَيْنِ الرُّجُوعُ عَنْ تَحْكِيمِهِ قَبْلَ شُرُوعِهِ فِي الْحُكْمِ) لِأَنَّهُ لَا يَلْزَمُ حُكْمُهُ إلَّا بِرِضَا الْخَصْمَيْنِ أَشْبَهَ رُجُوعَ الْمُوَكِّلِ عَنْ التَّوْكِيلِ قَبْلَ التَّصَرُّفِ فِيمَا وُكِّلَ فِيهِ وَ (لَا) يَصِحُّ رُجُوعُ أَحَدِهِمَا (بَعْدَهُ) أَيْ بَعْدَ شُرُوعِهِ فِي الْحُكْمِ (وَقَبْلَ تَمَامِهِ) كَرُجُوعِ الْمُوَكِّلِ بَعْدَ صُدُورِ مَا وُكِّلَ فِيهِ مِنْ وَكِيلِهِ'.
AlHanbali, *Kashaf AlQina'a* (n 490) vol 6, 309.

[1393] In Arabic, he said:

AlHanafi scholars argue that arbitration is judicial in nature and that an arbitrator is like a judge. Thus, the arbitrator can be dismissed and his mandate terminated by any of the parties before he issues the award since they appointed him, just as a ruler who appoints a judge can dismiss and terminate the mandate of that judge.[1394] The only exception, according to AlHanafi school, is when the arbitrator was appointed under the supervision of a court. AlHanafi scholars justify this exception by stating that when an arbitrator is appointed under court's supervision, the arbitrator is a representative of the court and therefore cannot be dismissed without the court's permission.[1395]

This argument is flawed in that the appointment of an arbitrator is based on an offer from both arbitration parties, which contrasts with the appointment of a judge, which is based, according to Shariah, on an offer from the ruler alone. Therefore, the judge's tenure is based solely on the will of one person (the ruler), while the arbitrator performs at the pleasure of all parties. Even if an arbitrator is proposed by only one party, the arbitrator's selection is not final unless the other party consents to it. It follows that since the appointment of the arbitrator is made with the consent of all of the contract parties, the arbitrator cannot be dismissed without the consent of all of those parties.

Third View

The view of some AlMaliki scholars is that neither party is entitled to unilaterally terminate an arbitrator's mandate by withdrawing the party's consent. Ibn AlMajeshon says:

> Neither of them – disputants – has the right individually to change his mind and withdraw from appointing an arbitrator, whether before or after they present their dispute before him, and his award is binding for both of them just as the decision of the governor [acting as a judge] is binding whether one of them is content or discontent … .[1396]

Proponents of this view argue that, through the arbitration agreement, the parties grant power to an individual to decide a dispute. This power, once granted, should not be affected

---

'يجب ان يَتَّفِقَ الْخَصْمَانِ عَلَى التَّرَاضِي بِهِ، إلَى حِينِ الْحُكْمِ فَإِنْ رَضِيَ بِهِ أَحَدُهُمَا دُونَ الْآخَرِ أَوْ رَضِيَا بِهِ ثُمَّ رَجَعَا أَوْ رَضِيَ أَحَدُهُمَا بَطَلَ تَحْكِيمُهُ وَلَمْ يَنْفُذْ حُكْمُهُ سَوَاءٌ حَكَمَ لِلرَّاضِي أَوْ لِلرَّاجِعِ.'

Almawerdy (n 256) vol 16, 325.

[1394] For example, Othman AlHanafi said: 'Each party to arbitration can withdraw before his decision, because he is appointed by them and so they are entitled to dismiss him before deciding between them just as that [a judge] who is appointed by Imam [president] can be dismissed by such Imam before he decides between people'. AlHanafi, *Tabyeen AlHaqa'eq* (n 262) vol 4, 193.

[1395] *AlMajallah*, art 1847.

[1396] AlMaliki, *AlNnawader* (n 1385) vol 8, 83.

by the will of one of the parties without the other party's consent.[1397] In other words, an arbitration agreement, including the appointment of an arbitrator, is a consensual contract that neither party can terminate or modify unilaterally.

This view seems to be most compatible with the provisions of the primary Islamic resources (Quran[1398] and Sunnah[1399]), which state that each party should commit to the contract. A party is not demonstrating such commitment if he seeks to unilaterally erode the terms of the contract.

The selection and appointment of an arbitrator are carried out by the parties' agreement, whether directly or implicitly (eg, when one party chooses and the other does not object), to resolve their dispute according to the terms of the arbitration contract. So the termination of the arbitrator's mandate by one of the parties (which, according to Shariah, also leads to the termination of the arbitration contract) is a violation of both the agreement with the arbitrator and the arbitration agreement itself.

From the above, it is clear that most early Sunni scholars support the freedom of either arbitration party to terminate an arbitrator's mandate by dismissing the arbitrator or withdrawing the party's consent from the appointment of the arbitrator, even after the arbitration agreement is in place. These scholars diverge, however, on when this freedom expires. While some believe this right expires as soon as the arbitral process is commenced, most believe the right continues until the arbitral award has been issued. In addition to these two views, some AlMaliki scholars follow an approach, adopted by most national arbitration laws including those of most Islamic countries, in which it is not permissible to terminate an arbitrator's mandate without good cause or the consent of all parties.

2.2 Freedom of Parties to Terminate Arbitrator's Mandate Early Under Saudi and English Law

As with Shariah, the SAL 2012 grants arbitration parties the right to agree to dismiss an arbitrator and terminate his mandate before an award is issued. Arbitration Law 2012 also settles a controversy among early Shariah scholars regarding the freedom of one party to terminate an arbitrator's mandate early by (1) limiting the method of terminating the

---

[1397] AlAndulusi, *AlMuntaqa* (n 223) vol 5, 227.
[1398] For example, *Surat Almaaida,* verse 1. See page 116.
[1399] For example, Prophet Mohammad (pbuh) said: 'The Muslims are bound by their conditions.' Ibn Ash'ath (n 123) vol4, 181.

arbitrator's mandate to his dismissal, and (2) stipulating in Article 18 that an arbitrator can be dismissed only by mutual agreement of the parties or by a court.[1400]

The EAA 1996 also allows an arbitrator's mandate to be terminated early.[1401] Section 23(1) states that '[t]he parties are free to agree' on the revocation of an arbitrator's authority. That agreement 'must be in writing unless the parties also agree (whether or not in writing) to terminate the arbitration agreement'.[1402] In contrast to English law, Saudi law bars the parties from exercising such a right when the arbitrator was appointed through the courts, which is similar to the position of AlHanafi school.[1403] Article 18(2) of the SAL 2012 states: 'Unless the arbitrator is appointed by the competent court, he may be dismissed only with the agreement of the parties of the arbitration …'.

This seems to be a violation of the freedom of the parties, in relation not only to the dismissal of an arbitrator but also to the termination of the arbitration agreement. If it is not permissible for arbitration parties to dismiss an arbitrator appointed by the court, then in such case it is not permissible for them to agree to terminate an arbitration agreement or arbitration procedures, which would necessarily result in the dismissal of the arbitrator. Such an approach means that arbitration can be *compulsory,* which violates the principle of the freedom of arbitration parties and contradicts the general attitude of the SAL 2012.

The question that arises here is whether an arbitration agreement is valid if it gives one party the right to terminate the arbitrator's mandate early without the consent of the other party. Under the Saudi law, it seems that such an agreement would not be valid since the law is clear that the dismissal of an arbitrator requires the consent of both parties or a court order. The law does not state any exceptions. The situation is similar under the previous English Arbitration Act 1950, which limited the paths to the revocation of the arbitrator's authority to the parties' agreement or leave of the High Court.

Under the more recent EAA 1996, however, the situation has changed. Section 23 grants arbitration parties the freedom to agree on 'in what circumstances the authority of an arbitrator may be revoked'. Such freedom seems to extend to the right to agree that one party can carry out the early termination of the arbitrator's authority. This is supported by (1) Section 23 of the

---

[1400] SAL 2012, art 18(2).
[1401] Merkin and Flannery (n 765) 82.
[1402] EAA 1996, s 23(4).
[1403] See page 234.

EAA 1996, which says, '[i]f or to the extent that there is no such agreement' the revocation of the authority of an arbitrator can be done by, among other things, 'the parties acting jointly', which implies that such authority can be unilateral if the parties so agree; (2) recent cases in which the English courts have validated a unilateral arbitration clause;[1404] (3) Section 23 again, which acknowledges that the authority of the arbitrator can be revoked by a 'person vested by the parties with powers in that regard';[1405] and (4) the broad interpretation of the doctrine of freedom of contract under English law.

Even if a unilateral dismissal clause is valid under the English law, that does not mean that the other party is powerless to remove the arbitrator. According to Section 24, which is a mandatory provision[1406] that cannot be violated by the parties' agreement,[1407] any party to arbitration can apply to the court to remove the arbitrator. The same section also gives the parties the right to appeal the court's decision on the issue. This is contrary to the SAL 2012, which says that the decision of the court regarding the dismissal of an arbitrator 'is not subject to appealing in any way of appeal'.[1408]

3. Conclusion

It is clear from the discussion above that there are considerable differences among Shariah, Saudi law, and English law regarding the scope of the freedom of arbitration parties to terminate an arbitration agreement and an arbitrator's mandate.

Except for some AlMaliki scholars, early Shariah scholars agree that each party enjoys complete freedom to unilaterally terminate arbitration, even without cause, so long as arbitration procedures have not yet commenced. After arbitration is underway, most Shariah scholars believe, the parties' freedom becomes restricted. While most AlMaliki scholars and some AlShafi'i scholars, as well as the CIIFA, believe a mutual agreement between parties is required, most AlHanbali scholars believe such a restriction is appropriate only after pleading closes. A third approach, favoured by most AlShafi'i and AlHanafi scholars as well as some AlMaliki and AlHanbali scholars, promotes the view that the freedom of the parties should be unrestricted until arbitration naturally ends by resolving the dispute.

[1404] See page 218.
[1405] EAA 1996, s 23(3)(b).
[1406] EAA 1996, sch 1.
[1407] EAA 1996, s 4(1).
[1408] SAL 2012, art 18(1).

Further, most early Shariah scholars agree that three grounds can confer the right to any party to terminate arbitration: (1) expiration of the arbitrator's mandate for any reason before an award is issued, (2) death of a party, and (3) a fundamental breach by either party. Most AlHanafi scholars offer an additional reason: expiration of the time limit for issuing an award. Such a delay gives either party the right to terminate the arbitration contract, even after the award is issued.

Under Saudi and English law, none of those reasons, except for a fundamental breach, is alone sufficient to allow a party to terminate an arbitration agreement. At the same time, Saudi and English laws do not include any provisions that prevent parties from agreeing in advance that either of them can terminate the arbitration agreement at will. An exception to this freedom, under Saudi law, is when the arbitrator was appointed by a court.

On the other hand, most early scholars of the Sunni schools (AlShafi'i, AlHanbali and AlHanafi) grant complete freedom to each party to unilaterally terminate an arbitrator's mandate before an award is issued, so long as the arbitrator is not court-appointed according to AlHanafi scholars. Only AlMaliki scholars demur; most of them believe both parties' consent is required to terminate an arbitrator's mandate if dispute resolution procedures have commenced. Other scholars believe that such mutual consent is necessary once the contract is formed.

Saudi law did not completely adopt any of the Shariah positions. It, however, concurs with the attitude of some AlMaliki scholars that mutual consent is required for an early end of the arbitrator's mandate. At the same time, Saudi law adopts AlHanafi position that the parties cannot agree to dismiss an arbitrator who was appointed by the court, which could prevent parties from agreeing to terminate arbitration.

English law has adopted a middle approach, which gives parties the right to agree to revoke an arbitrator's authority, to authorise others to do so, and to agree in advance on the circumstances that will trigger a revocation of the arbitrator's authority.

The attitude of most early Shariah scholars towards the freedom of parties in terminating the arbitration agreement (where the parties are given nearly unlimited freedom) is not supposed to be extended to international commercial arbitration in the modern era. This is not only because this attitude is incompatible with the modern approach, but also because it contradicts the main sources of Shariah, considering that one of the main characteristics of international commercial arbitration is that

it is a binding contract on both parties from its inception to its conclusion.[1409] AlMaliki scholars, therefore, were early to recognise this issue and limited the freedom to terminate any arbitration contract to the parties' mutual agreement or the existence of a legitimate reason.

The situation under the new Saudi arbitration system also is not intended to extend to international commercial arbitration, particulary when the arbitrator is appointed by the court. Extending the Saudi domestic law in that way would contradict the general attitude of the new law on the development of international commercial arbitration, and it has no legal basis in the main sources of Shariah.

Consequently, it can be said that the attitude of AlMaliki school is more compatible with the two main sources of Shariah than the attitude of most Shariah scholars and the SAL 2012 regarding the freedom of parties to terminate an international commercial arbitration contract at the present time.

[1409] See pages 116 and 235.

Chapter X: Conclusion

Freedom of the parties is one of the most valued characteristics of international commercial arbitration, according to a recent survey by the School of International Arbitration at Queen Mary University of London.[1410] However, few if any academic studies of Shariah and Saudi arbitration law examine the level of freedom and flexibility that the parties to an international trade contract are granted to agree on arbitrating their disputes.

As discussed in earlier chapters, the reason for this void is that the freedom of arbitration parties in general, let alone in international arbitration, is never discussed directly in the main sources of Shariah (the Quran and Sunnah) nor in the existing literature of early Shariah scholars, which comprises the secondary sources of Shariah. This issue is compounded by a widespread misunderstanding of the Islamic principle that Shariah is a comprehensive law for all aspects of life and is valid for all times. The result is that contemporary legal writers usually deal with Shariah provisions regarding arbitration in general without addressing the issue of the parties' freedom.

This thesis has presented a deep analysis in a comparative manner of the extent to which the parties to international commercial contracts are free to agree on arbitration:

1) under Shariah, by examining the various opinions and evidence of scholars from the four Sunni schools, along with evaluating those opinions and evidence in the context of the main principles in Shariah and current circumstances and requirements arising from international conventions, given that most of those opinions are merely *ijtihadat* that go back 1,200 years;

2) under the new Saudi arbitration law (SAL 2012), by examining how compatible this law is with Shariah; and

3) under the EAA 1996, by comparing it and its case law with Shariah and Saudi law.

To achieve this aim, three stages, imposed by the nature of the systems under study, were examined, all of which are connected through a single spine: freedom of parties. In addition, an introduction stage was presented to provide necessary background information.

The introduction stage was a foundational one, which addressed the concept of Shariah and its sources (Chapter II) as well as the nature of arbitration and the definition of an

[1410] See page 1.

arbitration agreement (Chapter III). This was followed by an examination of the pre-agreement stage, which analysed the extent of the parties' freedom in resolving their dispute by arbitration (ie, the nature of arbitrable disputes); in agreeing on both types of the arbitration agreement; and establishing a legally valid arbitration agreement in the eyes of the laws in question. The next stage was about forming the arbitration agreement. This section examined the freedom of the parties in terms of the main elements of the arbitration contract. Finally came a discussion of the termination stage, which provided an examination of the freedom of the parties, or one of them, to terminate the arbitration agreement, and to terminate the arbitrator's mission. A number of conclusions were reached. These are explained below.

1. Pre-Agreement Stage

This stage was designed to examine and determine the extent of the parties' freedom to enter into a legally valid arbitral agreement under Shariah, the SAL 2012 and EAA 1996 (the laws under study). Accordingly, it was divided into three parts in Chapters IV and V.

Chapter IV considered the nature of arbitrable disputes and the types of arbitration agreements that can be entered into under the three systems. Chapter V looked at the legal conditions that must be met by the contracting parties to establish a valid arbitration agreement in each of the three systems.

1.1 Right to Arbitrate the Dispute

To study the freedom enjoyed by arbitration parties, it is necessary to examine the subject matter of the dispute that the parties have the right to resolve by arbitration under the laws in question. This is because such a right is not absolute and is not equally protected under national arbitration laws, as is the case in the three laws under study (excepting AlHanbali view that the right is absolute).

This examination concluded that the attitude of the majority of both early and contemporary Shariah scholars is similar to that of SAL 2012 in limiting the freedom of the parties to arbitrate their commercial disputes only when such arbitration would violate public policy, although the criterion used to determine the arbitrability of disputes is different under Shariah (which is the right of Allah and the people's right) than under the SAL 2012 (which is capability of being resolved through conciliation). This is due to the fact that disputes that

involve the rights of Allah under Shariah, whether the rights of individuals are involved or not, are the same disputes that cannot be arbitrated under the Saudi law, as 'the rights of Allah' is functionally equivalent to the modern term 'public policy' in this context.

A somewhat similar conclusion was reached under the English system, as the parties do not enjoy absolute freedom to arbitrate, even though the EAA 1996 does not specify what types of disputes are not arbitrable. Instead, the EAA 1996 leaves open the possibility that a party can make a challenge, either during the arbitration process or after the issuance of the award, on the ground of arbitrability. In other words, the arbitrability of a dispute under the English system is left to the court's discretion on a case-by-case basis. In English case law, it was also concluded that the main criterion in this regard seems to be whether 'the possible outcome' of the dispute is within an arbitrator's authority.

1.2 Right to Agree on Both Types of Arbitration Agreement

The types of arbitration agreement that can be entered into under the three systems have also been examined in Chapter IV. This important issue involves the extent of the parties' right to agree on both existing disputes and future disputes that may occur. Early Shariah scholars of the four Sunni schools have dealt only with the right of parties to agree on arbitrating existing disputes (submission agreement), as agreements regarding future disputes (the arbitration clause) did not arise until after the time of those scholars.

To determine the attitude of Shariah on arbitration clauses, this study has analysed the position of early Shariah scholars on conditions associated with contracts. The analysis demonstrated that, contrary to the opinion of most recent legal writers that such a clause is void under Shariah (claiming that it includes illegal issues such as *gharar* and *riba*), an arbitration clause actually is among the conditions that Shariah schools would consider valid, similar to the case in the Saudi and English systems. This conclusion is supported by the fact that such a clause can be viewed by the four Sunni schools as an appropriate clause for a contract of international trade and as a customary condition that is usually included in international trade contracts. According to the early Shariah scholars, each of these considerations justifies the validity of any condition so long as the condition does not contain any prohibited action under Shariah. The analysis showed that an arbitration clause does not involve any such action.

On the contrary, this stage revealed that the freedom enjoyed by parties to agree on

arbitrating their existing disputes is not equal under the three systems. The Saudi system, unlike Shariah and the EAA 1996, requires the parties to spell out the issues to be covered by arbitration; otherwise, the agreement is null and void. Such a harsh result is avoided by Shariah and the EAA 1996, which leave the issue to the will of parties.

1.3 Requirements for Valid Arbitration Agreement

To complete this stage (the pre-agreement stage), Chapter V examined the requirements for a valid arbitration agreement. Three issues were analysed in this chapter: the legal capacity of a natural and legal person to enter into an arbitration agreement; the requirement of valid consent for the arbitration agreement, which includes the extent of freedom of both the offeror and offeree to withdraw during the negotiation period (which usually is extended in international commercial arbitration contracts before reaching a final agreement); and the requirement of legitimacy of the subject matter of the agreement.

This analysis concluded that the negative impact of restrictions on the validity of arbitration agreements upon the freedom of the parties is less under Shariah compared to the Saudi and English systems. Under Shariah, a natural person has full capacity to enter into a commercial arbitration contract at an earlier age (age 10, when one of the physical or psychological characteristics of puberty is attained, or age 15 in all cases) than in the English system (age 18). Also, Shariah (particularly under AlHanafi school) grants the discerning child who is allowed to engage in trade absolute freedom to agree on arbitration regarding such trade.

This issue is significant because under English case law, any commercial arbitration contract made by a minor binds the minor only if the court believes that both contracts (the arbitration contract and the underlying commercial contract) are in the interests of the minor — even if the commercial contract that related to the arbitration agreement was clearly valid (eg, ‘contract of necessity’).

This chapter also demonstrated that although the laws in question converge on the issue of granting the juridical person full capacity to enter into a commercial arbitration agreement, they diverge on the extent to which this capacity continues when the person falls into bankruptcy, which often occurs in international trade contracts.

By analysing the opinions of early scholars of the four Sunni schools towards the contractual actions of a bankrupt party, either before or during interdiction, it was concluded

that, according to most early Shariah scholars, the bankrupt party in an international commercial contract enjoys full capacity to enter into an arbitration agreement so long as no interdiction has been decreed. This conclusion follows from the fact that most early Sunni scholars agree that all contracts entered into by a bankrupt before interdiction are valid and enforceable, without mentioning any exceptions. In contrast, under Saudi and English laws, the bankrupt lacks the ability to enter into an arbitration agreement from the date of bankruptcy if the agreement would affect the bankrupt's assets during the period of bankruptcy.

Moreover, based on the viewpoints of early Shariah scholars, and particularly those of AlHanafi school, regarding the enforceability of a contract made by a bankrupt before interdiction, it was found that all arbitration agreements entered into by a bankrupt are enforceable during the interdiction period if they are proved by witness testimony or other external evidence. In contrast, under the English act, the enforceability of arbitration agreements during the bankruptcy period, even if created before the bankruptcy, is subject to the discretion of either the trustee or the court.

The research also determined that the three laws under study do not require the use of particular phrases for a valid offer or acceptance of an agreement to submit to arbitration. Instead, an arbitration agreement can be created by the acceptance of any offer that evidences a desire to resolve the dispute by a final award issued by a third person who is not a court. However, the SAL 2012 and EAA 1996, in contrast to Shariah, require the arbitration agreement to be in writing.

Furthermore, through an analysis of the views of early Shariah scholars on the formation of a contract *inter praesentes* versus *inter absentes*, it was concluded that there is a difference in the freedom enjoyed by the offeror to withdraw his offer as well as the freedom of the offeror or offeree to withdraw from the contract without incurring any liability. Under the common approach in Shariah, the offeror has the right to withdraw a pre-acceptance offer, which will revoke this offer, whilst under English law, revocation of an offer does not take effect until the offeree is informed of the revocation. Moreover, according to the majority approach of early Shariah scholars, either party can withdraw from an *inter praesentes* contract at any time until one or both of them leave the venue.

In addition, the research established, contrary to the opinion of the majority of recent legal writers, that the subject matter of an arbitration agreement under Shariah does not

interfere with the right of the parties to resort to arbitration. This is true because the subject matter of the dispute itself, which might be illegal or non-arbitrable, is distinct from the subject matter of the commercial arbitration agreement. The latter is legal under Shariah and the Saudi and English systems because it is merely an agreement to resolve a dispute by a person or persons other than the court.

2. Forming the Elements of the Arbitration Agreement Stage

The extent to which parties to international commercial arbitration are free to tailor the arbitration agreement was considered in Chapters VI to VIII by analysing four key elements that constitute the arbitration agreement. These are the freedom of the parties to select the arbitrators, substantive law, procedural rules, and rules of evidence.

2.1 Selection of Arbitrators

The parties' ability to choose the decision-maker in their dispute is a key determinant of the freedom of parties under an arbitration law. This is especially true in the legal systems in question (Shariah, Saudi and English), whose laws manifest divergent attitudes regarding the qualifications of an arbitrator.

To examine the extent of the parties' freedom to select their arbitrator, Chapter VI considered the qualifications required for an arbitrator under Shariah, the SAL 2012 and the EAA 1996. The chapter then analysed the extent of the parties' right to agree on additional qualifications that were not specified by these three laws.

Early scholars of the four Sunni Shariah schools specify a set of qualifications (related, *inter alia*, to religion, gender and integrity) that must be met by the arbitrator when one or more of the parties is a Muslim. The EAA 1996 does not impose any requirements on arbitrators except when the arbitrator is a judge of the Commercial Court or Technology and Construction Court of England and Wales. At the same time, English law — namely, the EA 2010 — prohibits discrimination in private employment agreements on many grounds, including religion and gender.

Accordingly, the first part of Chapter VI focused on the qualifications required by Shariah and Saudi law, whilst the second part focused on the effect of English anti-discrimination law on the freedom of parties to agree on qualifications for the arbitrator.

This chapter revealed that early scholars of the four Sunni schools agree that parties have

absolute freedom to choose their arbitrator when the parties are religiously neutral (ie, not Muslims). The scholars' opinions diverge, however, when one or more of the parties is a Muslim. In that situation, the research demonstrated, most early Sunni scholars agree that the arbitrator should be a physically able, Muslim male who has *adel* (a sense of equity), knowledge of Shariah, independence, and legal capacity (except for AlMaliki scholars who believe a discerning child can be an arbitrator).

The chapter also established, however, that all of the qualifications advanced by early Sunni scholars are based merely on *ijtihadat* without any explicit evidence in any of the main sources of Shariah. In the light of this fact and the contemporary reality of the demands of international commercial arbitration, this study demonstrated that in accordance with the Quran and Sunnah only three qualifications can limit the freedom of arbitration parties under Shariah: independence, *adalah* (neutrality and honesty) and mental ability.

This section also noted that the Saudi legislature did not adopt any of the opinions of early Sunni scholars regarding arbitrators' qualifications. This finding highlights the inaccuracy of the assertion by some contemporary writers that the Saudi courts can take into consideration the qualifications advanced by the scholars, especially those of AlHanbali school. In fact, only two of the qualifications stipulated by early Shariah scholars (independence and legal capacity) overlap with the criteria adopted by the Saudi legislature. Furthermore, the lawmakers added qualifications that are not mentioned by any of the scholars (university degree in Shariah or law for a sole arbitrator or chairman of the tribunal, and good conduct and reputation).

In stark contrast to the attitude of Shariah and the SAL 2012, this section showed that the English Act does not include any general requirements that limit the freedom of parties in international commercial arbitration to select their preferred arbitrators. Even independence is not necessarily required of an arbitrator unless the lack of independence raises justifiable doubts about the arbitrator's impartiality.

On the other hand, the second part of Chapter VI concluded that under Shariah the freedom of the parties to agree on additional qualifications of the arbitrator is not limited since (1) Shariah does not contain any provision that prohibits discrimination on any basis in private agreements, (2) freedom of contract is a general principle in Shariah, and (3) Shariah favours the notion that everything that is not prohibited is allowed (cf, the Islamic legal maxim 'the norm in regard to things is that of permissibility'). It was also concluded

that the same result should occur under the Saudi system because it does not have any prohibition against discrimination in the private sector, and because Saudi courts apply Shariah in regard to freedom of contract.

A similar conclusion was reached in respect to the English system even though it does prohibit discrimination in employment and the workplace on the basis of 'protected characteristics' such as gender, religion and disability. Such provisions should not limit the freedom of parties to select their preferred arbitrators, particularly when the agreed-upon qualification has a genuine nexus with the matter in dispute. This true because, under English case law, the relationship between the arbitrator and arbitration parties is not an employment relationship, and thus the employment discrimination prohibitions do not apply to the selection or engagement of arbitrators.

2.2 Choice of Substantive Law

One of the most important elements through which parties to arbitration exercise their freedom to form a contract is the choice of the applicable substantive law; that is, the body of law that will govern the rights and obligations of the parties. It is also one of the most complex issues, especially under Shariah, as one of the most fundamental principles of Shariah is that the Islamic law must be applied in all aspects of Muslim life.

Because of the importance and complexity of the issue, this thesis dedicated the first two parts of Chapter VII to it. The first part dealt with the position of Shariah and Saudi and English law in relation to the possibility of choosing a foreign law; in other words, whether parties have the right to choose a substantive law. The second part considered the limits on this right when it exists.

To determine the position of Shariah, one must examine the attitude of Shariah scholars towards the obligation to apply Shariah and then must analyse their evidence in light of the texts of the Quran and Sunnah. This approach is necessary since early Shariah scholars do not directly address the question of freedom to choose a foreign law. This examination revealed that under all of the views of early scholars of the four Sunni schools, a Muslim party has no right to choose a law other than Shariah. The only difference between these scholars is that most of them believe choosing a law other than Shariah is a sin, while the others believe that such an act takes a Muslim out of Islam. The latter position has been proven to be contrary to the context of the Sunnah and opinions of senior interpreters of the

Quran. The only exception, according to the majority of these scholars, is in a case of necessity — when a Muslim needs to assert or protect his rights and no means are available to do so except through a law other than Shariah.

This study argued, however, that, based on the main sources and principles of Shariah, the freedom of international commercial arbitration parties to choose a law other than Shariah is not limited to cases of necessity. By virtue of the principle of *umum albalwa,* the parties have the right to choose a law other than Shariah in all cases of international commercial arbitration when one of the parties is not Muslim or the place of arbitration or the place of enforcement of the arbitral award is a state that does not apply Shariah.

The study also noted that, contrary to the attitude of early Shariah scholars and the former Saudi arbitration law, the SAL 2012 explicitly states that parties are free to choose a foreign substantive law. At the same time, however, the SAL 2012 compromised this freedom by linking it with an obligation by the arbitrator to take into consideration 'the usages of the trade applicable to the transaction'— a provision that is similar to the Model Law and contrary to the EAA 1996. This provision of the SAL 2012 is problematic because, on the one hand, international trade usages are not clear and specific (they may, for example, include principles from UNIDROIT, *lex mercatoria* or the Vienna Convention), and, on the other hand, they may conflict with the provisions of the chosen law. For instance, it is an accepted usage in international trade that a merchant is responsible for paying interest in certain circumstances, whilst in Shariah such interest (*riba*) is strictly prohibited. In such a case, the arbitrator could be facing three contradictory provisions under the SAL 2012: (1) the chosen substantive law, (2) trade usages, and (3) Shariah, as the SAL 2012 states that Shariah provisions should not be violated.

In addition, two main factors limiting the freedom of arbitration parties have been revealed under these laws. The first factor is public policy, which is the widest limit on the freedom of parties to select the substantive law. At the same time, it is the least clear, particularly under the Saudi law, which according to the researcher's knowledge has not been clarified before.

The effect of public policy on the freedom of arbitration parties is not only substantial, but it also is amorphous, as it depends on the interpretation of the concept of public policy itself, which usually differs from state to state (including the systems under study). It was in this context that this study examined the concept of public policy under the three legal

systems at issue and then assessed the impact of public policy on the freedom of arbitration parties in selecting substantive law.

This examination revealed that the concept of public policy has a broader reach in Saudi law than in Shariah, and is even narrower in the English system. Public policy under Saudi law includes, but is not limited to, Shariah. Under Shariah, public policy includes the applicable provisions of the Quran and Sunnah as well as those that emerge from consensus among Shariah scholars. In contrast, under the English system, public policy is an abstract principle that has not necessarily been codified.

The concept of public policy has had a negative impact on the freedom of arbitration parties to select the substantive law of their choosing. This is true of Saudi law, even though the Saudi judiciary, like the English, distinguishes between national and international public policy on international arbitration. In determining public policy, Saudi courts will not tolerate a violation of Shariah provisions, such as *riba.* This section revealed that, in contrast, the English judiciary will look askance at a challenge based on a purported violation of public policy unless such a violation is found to 'be clearly injurious to public good' or 'wholly offensive to the ordinary reasonable and fully informed member of the public' or involves 'some element of illegality'.

Mandatory rules are the second factor limiting the freedom of commercial arbitration parties in selecting the substantive law. Mandatory rules that affect arbitration exist in nearly every national law, including the laws under study. Their impact on the freedom of arbitration parties, however, depends primarily on the breadth of the rules and the flexibility of the state that is charged with enforcing them. Accordingly, this research concluded that the domain of mandatory rules in the Saudi system (which does not define mandatory rules) is broader compared to Shariah (which defines all mandatory rules) and the English system (which usually clarifies the mandatory rules). This is because the determination of mandatory norms in the SAL 2012 is subject to discretion. The variety of viewpoints in this regard may lead to a broad interpretation of what constitutes a mandatory rule. Moreover, according to the SAL 2012, Shariah mandatory rules must be considered, and, contrary to the attitude of early Shariah scholars, the Saudi courts may apply Shariah mandatory rules regardless of the parties' religion.

It was also revealed that Shariah, and in particular AlHanafi school, grants non-Muslim arbitration parties full freedom to ignore the rules of Shariah in commercial contracts unless

doing so violates public policy. If, on the other hand, the parties are Muslims, all Shariah scholars in the four Sunni schools agree that, regardless of any other law, Shariah mandatory rules must be applied and any contrary agreement is null and void (unless it can be salvaged by the necessity doctrine).

Similarly, this study showed that under the Saudi and English systems, mandatory rules have a negative impact on the freedom of arbitration parties. This is true not only when the chosen law is Saudi or English, but even if it is a foreign law, so long as the place of arbitration or enforcement is within Saudi or English jurisdiction. In such a case, the religion of the parties does not matter. The situation is the same even when there is a conflict of mandatory rules, as the Saudi and English case law holds that their mandatory rules will prevail in their courts regardless of the chosen law.

2.3 Choice of Procedural Rules

Procedural law is another significant element through which the parties can exercise their freedom to create an arbitration agreement. Two main issues were examined in relation to this issue in Chapter VII: the right of arbitration parties to agree on procedural rules, and limitations on that right. Also discussed was the difference between substantive and procedural legal rules, which is a distinction that can enable arbitration parties to mix and match different laws. This distinction is even more important when the systems in question differ on the extent of freedom granted to parties regarding the substantive law than regarding procedural rules, as is the situation with Shariah.

It was found that this issue must be considered case by case, since what is considered procedural in one country may be substantive in another. This issue is further complicated by the fact that which rules are deemed substantive and which are procedural changes over time. Still, a general conclusion can be formulated: substantive rules are those that govern the dispute's subject matter and regulate the rights, duties and powers of the contracting parties, while procedural rules are those that provide the mechanism for applying the substantive rules. Many contemporary writers assert that there is no room for parties to select procedural rules under Shariah, but this study demonstrated that parties enjoy broad freedom under Shariah to choose procedural rules, broader even than in the Saudi and English systems.

The study identified two types of constraints on the parties' freedom to choose procedural rules in the three systems: time limits and legal limits. As for time limits, the English system, unlike Shariah and Saudi law, restricts the freedom of the parties after the appointment and acceptance of an arbitrator, because after that point, the parties must win the arbitrator's consent to add or modify any procedural rules. This is because English case law treats the arbitrator as a party to the arbitration agreement. Under Shariah principles and the Saudi law, it was concluded that the arbitrator is not considered a party to the arbitration agreement even if s/he is appointed in the agreement and even if the arbitration proceedings have commenced.

Regarding legal limits, the study found that Shariah restricts parties' freedom to choose procedural rules the least, since Shariah is confined to due process rules. In contrast, the EAA 1996 provides a list of procedural rules that are mandatory. The outcome in the Saudi system is similar to that in the English system, despite the assertion by many recent writers that the parties' freedom is unlimited under the SAL 2012 because the statute lists no mandatory procedural rules. An analysis of SAL 2012, however, shows that the law implicitly includes many procedural rules that are mandatory regardless of any contrary provisions in the arbitration agreement. Such rules relate, for example, to the format of the arbitral award and the procedures that must be followed to enforce or challenge the award.

2.4 Freedom and Evidence Rules

This thesis devoted all of Chapter VIII to an examination of the effects of evidentiary rules on the freedom of international commercial arbitration parties in the three systems and to the question of whether the parties can agree to exclude any of these rules. Four main types of evidence were examined: testimony, written evidence, admission and oath.

This study demonstrated that, under Shariah, arbitration parties enjoy full freedom to agree on whether to use oral testimony. This position aligns with the English and Saudi systems, but it contradicts many recent writers who argue that evidence in Shariah should be based exclusively on oral testimony.

Most early Sunni scholars agree that under Shariah, a specific number of witnesses is required to support a ruling in a commercial dispute. The scholars also agree that a witness must satisfy three requirements: (1) must be a Muslim when the defendant is a Muslim; (2) must have reached the age of puberty; and (3) must be mentally competent. Those scholars

also point to many factors that can affect the validity of testimony, including: standing to gain from the testimony, being a party to the dispute, or animosity between the witness and the party whom the testimony is against. The SAL 2012 does not address these issues, so Shariah applies, which is the case whenever Saudi law is silent on an issue. In contrast, the English system allows any person to be a witness, including the parties themselves. Even a child can be a witness so long as he has personal knowledge of the relevant facts and he understands that he has a duty to tell the truth.

This study concluded that under Shariah (and thus in Saudi Arabia) parties to international commercial arbitration have full freedom to agree on the qualifications and number of witnesses. That conclusion is based on the argument that all of the opinions of Shariah scholars are *ijtihadat,* and all evidence for those views are either interpretations of Quranic texts, whose acceptance may result in a conflict with express provisions of the Quran (for example, the requirement that a witness be a Muslim), or are only for guidance and are not mandatory (as is the case with the number of witnesses when they include women).

This research also demonstrated that, contrary to the belief of many recent writers, Shariah does not reject written testimony. This is true because, although the early Shariah scholars did not deal with this matter, the main sources of Shariah do not include any prohibition against written testimony. Therefore, based on the Shariah principle that everything that is not prohibited is allowed, it can be concluded that this issue is subject to the will of parties. If there is no agreement among the parties, the question is subject to the discretion of the arbitrator. This is contrary to the situation in the Saudi system, where the testimony must be oral without the use of notes. The only exception under Saudi case law is when the witness is unable to attend a proceeding and his testimony is written under the supervision of the court. The English system, like Shariah, freely accepts written testimony.

This study next undertook an examination of the issue of written documents as evidence. Many contemporary legal writers believe evidence must be based on oral testimony under Shariah, because documents can be falsified. Through an analysis of the work of early Sunni scholars and the texts of the Quran and Sunnah, however, this study established that Shariah recognises the value of written evidence, especially in commercial disputes. To conclude otherwise would mean that verse 282 of *Surat Al-Baqarah*, which encourages recording business transactions in writing, is meaningless, and that is a position no Shariah scholar would take.

Accordingly, this study concluded that parties to international commercial arbitration have complete freedom under Shariah to agree to accept written evidence as proof. If the parties cannot agree, the decision is subject to the discretion of the arbitrator. The situation should be the same under the Saudi system, as Saudi law is silent on the issue, so Shariah governs. Under the English system, parties have absolute freedom to agree on the rules of evidence, including documentary evidence. The only mandatory rule in this regard under the Saudi and English systems is that the arbitration agreement itself must be in writing.

Another type of evidence that was examined in Chapter VIII is admission. The examination revealed that although there is agreement among the three legal systems on the criteria for a valid admission, Shariah and the English system have different approaches regarding the right of the admitting party to withdraw or modify his admission, which is not uncommon in arbitration.

Most early Shariah scholars believe that such a withdrawal is impermissible unless the other party agrees. Under the English system, the admitting party can ask the court to exercise its discretion to allow the party to withdraw or modify his/her admission. Under Shariah, there is nothing to prevent the request of such a withdrawal from the court. In fact, some early Shariah scholars recognise the possibility of withdrawing an admission when it is based on false grounds or when new evidence has arisen.

The fourth type of evidence, the oath, is treated very differently by the three legal systems. These differences, as discussed in Chapter VIII, result from the various roles the oath plays in those systems. Under the English system, the oath is merely one of the requirements for the validity of the presented evidence. In Shariah and the Saudi system, an oath can be considered evidence in favour of the oath-taker; conversely, it can be evidence against a party who refuses to take an oath.

Despite the important role of the oath in Shariah, this research found that most early Shariah scholars have very few requirements for the validity of an oath: the oath-taker must be an adult, he must consent to the oath, and he must take the oath in front of the arbitrator. The opinion of those Shariah scholars (particularly AlHanafi school) who assert that the oath-taker must be Muslim appears to be incorrect. Such a requirement would violate express provisions of the Sunnah and Quran, such as verse 106 of *Surat Al-Ma'eida*, which not only recognises the validity of an oath by a neutrally religious individual but also gives the non-Muslim's oath the same weight as a Muslim's.

The assertion by many contemporary legal writers that, under Shariah, an oath must be in Arabic also appears to be inaccurate. Besides the fact that the research has not identified any early scholar of the four Sunni schools who mentions an Arabic language requirement, many of those scholars refer to examples of a valid oath in a language other than Arabic. Furthermore, limiting the oath to a language that might not be understood by the oath-taker would make the oath meaningless.

This study also demonstrated that the attitude in English case law about the requirements for an oath's validity is more flexible than that of most early Shariah scholars. This is because English case law is satisfied with an oath's validity when it appears to the court that the oath-taker sincerely believes the oath is binding on his conscience. English law does not even specify a minimum age for the oath-taker, so long as he understands the nature of the oath.

In spite of the flexibility that is accorded oaths under Shariah, Chapter VIII concluded that under Shariah and Saudi law there is almost no freedom for an arbitration party when he is asked to take an oath — regardless of whether the request is from one of the parties or from the arbitrator, or whether the oath is supplementary evidence or decisive evidence. In the case of a decisive oath, if a claimant requests a defendant's oath, the defendant cannot refuse or a decision will be issued against him, even if the claimant does not submit any evidence. If the arbitrator requests a decisive oath from one party, the other party cannot object to the request or he will lose the case.

The only exception, the research concluded, is that under AlShafi'i and AlMaliki schools as well as Saudi law, the arbitrator or the party who has been asked to take an oath can redirect the oath to the other party. Also, an arbitrator can ask the plaintiff to take an oath that his claim is true when he does not present sufficient evidence to support his claim. If the plaintiff takes the oath, the arbitrator is supposed to issue the award in the plaintiff's favour, and the defendant has no right to challenge the oath.

This research found that such rules have no equivalent in the English system and in fact would be considered by an English court to be a violation of the right to a fair trial, which includes the parties' rights to present their evidence and to challenge any evidence offered by their opponent. Therefore, parties to arbitration must take into account the impact and validity of the oath both in the state of arbitration and the state of enforcement, or agree to eschew oaths altogether.

3. Right to Terminate Arbitration Agreement Stage

While the three legal systems under study agree that an arbitration contract is always a consensual one, this research found that the parties' freedom to terminate arbitration varies greatly between Shariah on one hand and the Saudi and English laws on the other. The reason is that early Shariah scholars classify an arbitration contract as a permissible contract, which is a non-binding agreement that has no equivalent in the common law. The reason is *not*, as most recent legal writers believe, that arbitration is conciliation or a type of conciliation under Shariah.

It is in this context that the research found that there are four distinct viewpoints held by early scholars of the four Sunni schools concerning the right of parties to terminate an arbitration agreement. All of them (except some AlMaliki scholars) agree that each party has the right to terminate arbitration unilaterally, so long as the arbitral process has not commenced.

At the same time, this research argued that many recent jurists are incorrect in asserting that Imam AlShafi'i (the founder of AlShafi'i school) believed that either of the arbitration parties has the right to withdraw their consent even after the award has been issued and thus not be bound by the arbitration. First, this is incorrect because such a point of view is contrary to the position Imam AlShafi'i advanced in his main books and the reports of AlShafi'i scholars who were his students, which is that an arbitral award should be implemented regardless of the consent of one of the parties so long as there is a valid arbitration agreement. Second, this view is irrational because it turns arbitration into a grand waste of time and money, and it runs counter to the Shariah principle that a decision is binding if issued by the person who is authorised to decide the dispute.

This research also argued that Shariah scholars who support a party's right to terminate an arbitration contract after its completion are voicing opinions that were meant to serve the interests of society more than a millennium ago and are neither compatible with current commercial realities nor with the two main sources of Shariah that reinforce the concept that duties under a contract start from the date of formation, not the date of enforcement. Accordingly, this study concluded that the attitude of some AlMaliki scholars who advance the position that an arbitration agreement becomes binding on all parties as soon as the contract is formed is the most compatible with modern times and the tenets of Shariah.

The research found three justifications under Shariah for terminating an arbitration agreement after it becomes binding: (1) the arbitral process exceeded the deadline for its completion or for the issuance of the arbitral award, which are usually included in the arbitration rules and some national arbitration laws such as the Saudi law; (2) a party committed a fundamental or repudiatory breach of the arbitration agreement; and (3) the arbitrator's mandate was terminated early, whether by force (eg, through a court order requested by a party) or even unilaterally by one of the parties when arbitration proceedings have not yet commenced, as early scholars of the four Sunni schools (except for some AlMaliki) agree on the right of either party to terminate an arbitrator's mandate unilaterally before s/he commences arbitration procedures.

Contrary to the belief of most early Shariah scholars, this research found that, under the Saudi and English systems, none of those reasons alone supports the parties' right to terminate the arbitration agreement. Moreover, no party has the right, without the other party's consent, to terminate the arbitrator's mandate after agreeing to appoint him. The only exception is when there is a fundamental breach of the arbitration agreement by one of the parties, as such a breach under Saudi and English case law constitutes an implicit offer to end the arbitration agreement. For that 'offer' to take effect, however, it should be accepted clearly and timely. If it is rejected, a subsequent fundamental breach may be considered a new offer to terminate the arbitration agreement.

Under both Saudi and English case law, the right of termination is limited based on whether the breach of the arbitration contract is complete (such as denying the whole underlying contract including the arbitration agreement) or occurs in a particular dispute. In the first case, both Saudi and English case law grant the oppressed party the right to abandon the arbitration agreement completely, while in the second case the effect of the breach is limited to that particular dispute and the issues that are 'part and parcel' of it.

At the same time, this thesis concluded that nothing in Saudi and English law prevents the parties from agreeing to terminate arbitration, whether unilaterally or automatically, when any of the justifications for terminating arbitration under Shariah occurs. The only exception under the SAL 2012 is when the arbitrator was appointed by the court, in which case only the court can end the arbitrator's mandate.

Under Saudi and English case law, the parties' agreement to grant either of them the right to terminate the arbitration unilaterally is valid, even though such a right might appear

to violate the arbitral principle of equality. Such a provision is permissible under Saudi law because the Saudi judiciary has validated an 'optional condition' through which one or more parties may be granted the right to terminate the arbitration agreement. The provision is permissible under English law because the English courts have approved the unilateral arbitration clause — which allows one party to decide whether to arbitrate, regardless of the will of the other party — as well as the broad freedom of contract found in English law in general and the EAA 1996 in particular.

4. Concluding Remarks

Although this thesis revealed similarities among Shariah, Saudi law and English law in respect to the freedom of arbitration parties, particularly in the pre-agreement stage, it also highlighted the great differences in the extent of such freedom under the three legal systems.

Shariah — or, more precisely, early Shariah scholars, who are still followed by around 1.8 billion people — rigidly restricts the freedom of arbitration parties in regard to the selection of the arbitrator and the substantive law and to the rules of evidence. At the same time, these scholars grant each party full freedom to end the arbitration contract unilaterally, whether through termination of the agreement without good cause or through the early termination of an arbitrator's mandate without justification, as was permissible in the medieval English system.

This research found, however, that under Shariah nearly all provisions addressing the freedom of arbitration parties are *ijtihadat* that do not rely on an express text from the main sources of Shariah. This is true whether the provisions relate to the elements of the arbitration agreement (such as the qualifications of the arbitrator or the selection of substantive law) or relate to the termination of the arbitration contract. These provisions are based mainly on ancient decisions that classified the arbitration contract as a permissible contract. Like all *ijtihadat* opinions, they are affected by the scholars' circumstances and experiences as well as the needs of society at the time they are written, which can be as far back as 1,200 years.

Given those facts as well as the fact that all early scholars of the four Sunni schools concede that their *ijtihadat* can be changeable and fallible, this analytical and comparative study has offered new findings that are in harmony with modern international commercial arbitration and that serve the relevant societies internally and internationally. These findings

are based mainly on the texts of the main sources of Shariah (Quran and Sunnah) and the main principles of Shariah.

The findings demonstrate that, under Shariah, arbitration parties enjoy full freedom to agree on arbitration for their future and existing disputes, and to select the substantive law, the rules of procedure and the rules of evidence, similar to the situation under the English arbitration system. The study also stressed that the freedom of parties to unilaterally terminate the arbitration agreement and the agreement with arbitrators should not be unrestricted, as these agreements were created by the will of all parties. According to the Quran, parties are not supposed to end these contracts except by mutual agreement or with legal justification.

This research also demonstrated that the SAL 2012 (unlike the previous Saudi arbitration law) neither follows the approach of the four Sunni schools nor adopts the modern approach regarding the freedom of parties, even though it is influenced by the Model Law. The level of freedom granted by the SAL 2012 and its clarity are insufficient in light of the modern approach to international commercial arbitration. At the same time, it is true that this law is a big improvement over the previous arbitration law in terms of the freedom granted to the parties. It, for example, removed many of the restrictions on choosing an arbitrator and expressly granted the parties the freedom to select the substantive law and arbitration procedures.

The SAL 2012 includes requirements that restrict the freedom of parties in selecting an arbitrator, that deny parties the right to agree to remove a court-appointed arbitrator, and that muddy the parties' control over the rules of evidence. But those negatives pale in comparison with the fact that the law restricts the freedom of parties in *all* aspects by insisting on strict compliance with Shariah. Such a restriction has no clear limits in light of the diverse opinions of Shariah scholars and the absence of explicit text in the Quran or Sunnah that governs these questions.

The English system, in contrast, gives parties broad freedom in all aspects of arbitration, as English law is content with imposing restrictions only in cases of a clear violation of public policy that harms the public interest or involves illegality.

No provision in the main sources of Shariah or Islamic jurisprudential consensus prevents Shariah and the Saudi system from keeping pace with the modern approach to international commercial arbitration.

5. Areas of Further Research

This thesis is confined to an examination of the parties' freedom to form and terminate an arbitration agreement; however, issues arising out of this thesis warrant further research.

To flesh out the limited existing knowledge about parties' freedom to agree on the duties, powers and jurisdiction of the arbitral tribunal as well as parties' freedom in the post-award stages under Shariah and the new Saudi arbitration law, additional research needs to focus on a comparative analysis of these two systems.

On a practical level, there is a need for future research on how parties actually have applied their freedom in international commercial arbitration, to help determine how international traders can create arbitration agreements that promote efficiency and positive outcomes under Shariah and the Saudi and English arbitration systems.

In the end, this research is but a first step towards delineating the boundaries of the freedom of parties in international commercial arbitration under Shariah in a realistic manner by comparing it to a modern national arbitration system, namely the English system. To establish under Shariah an international commercial arbitration system that will thrive in our contemporary world, further studies are needed on the role of national courts throughout the arbitral process, as the court alone has the power to safeguard the freedom of arbitration parties from national and international forces that seek to impinge on that freedom.

6. Recommendations

After the deep examination and extensive analysis involved in this study, the researcher believes that the courses of action recommended below would increase the freedom of parties to international commercial arbitration in the three systems under study. These recommendations would help foster efficient and effective international commercial arbitration in a practical and theoretical manner, especially under Shariah and the Saudi system. The improvements would serve parties to the international trade contract, both before the agreement on arbitration and during its enforcement. The suggestions also would be beneficial when one, some or none of the parties are Muslims and when the arbitral award is enforced in a country that adopts Shariah, such as Saudi Arabia. The researcher also believes that despite the development of the English arbitration system, there are some issues that

deserve reconsideration by the English Parliament. The suggested recommendations are as follows:

1. There can be no doubt that most Shariah provisions on domestic arbitration (especially those concerning family disputes) were derived from *ijtihad* and adopted about thousand years ago and consequently are not appropriate for international commercial arbitration in the modern era. Therefore, this study concludes that Shariah courts, arbitral tribunals as well as lawyers should not generalise such provisions to all types of arbitration, including international commercial arbitration.
2. Although the researcher acknowledges that Shariah (both its primary and secondary sources) preceded most national and international laws in the establishment of many indispensable arbitration provisions, he also believes that many of the legal issues related to freedom of parties in international commercial arbitration were not dealt with under Shariah. Therefore, current Islamic governments and Shariah scholars, under their duty to clarify the position of Shariah concerning contemporary issues,[1411] should formulate and/or codify the provisions governing international commercial arbitration (including those provisions that define the limits of parties' freedom). It is advisable that such efforts incorporate the fruits of the great efforts of the early Shariah scholars on arbitration but the features and needs of modern international commercial arbitration must also be taken into account. According to the 'internal validity test'[1412] carried out by this research, nearly all the provisions of the English arbitration system that were studied do not contain any conflicts with the main sources of Shariah. Thus, nothing in Shariah bars adopting those provisions on freedom of arbitration parties in the EAA 1996, which is based on accumulated experience over the past decades and which clearly delineates the limits of the freedom of parties to international commercial arbitration (in most aspects of arbitration) even better than the Model Law, which was created to foster the freedom of arbitration parties.
3. The statement in the SAL 2012 that Shariah must be observed should also encompass what was intended by Shariah. This requires the codification of the applicable provisions of Shariah. Without such codification, the Saudi arbitration system will remain unclear,

[1411] See page 26.
[1412] See pages 10-11.

in light of the divergent views of Shariah scholars on many issues related to arbitration. This is especially true when it comes to international commercial arbitration, which usually requires an arbitrator with special expertise in the subject matter of the dispute and international arbitration. At the same time, the parties to international commercial arbitration are often of different religious backgrounds, which means that the arbitral tribunal or most of its members are religiously neutral and thus not specialists in Islamic jurisprudence.

4. Because of the lack of a provision in the EAA 1996 that clarifies the issue of arbitrability, the English system should squarely address this issue, especially since the English judiciary accepts challenges based on non-arbitrability of the subject matter of the dispute (whether before or after issuance of the arbitral award) without a clear criterion for arbitrability. This is true even though this research found that the attitude of English case law on arbitrability depends on whether the 'possible outcomes' of the dispute fall within the authority of the arbitral tribunal or the court. This does not increase the clarity on this issue since the determination of arbitrability remains a matter of discretion. The current approach also can increase the duration and expense of resolving the dispute when the arbitral tribunal decides that the possible outcomes of a dispute fall within the authority of the court and the court believes otherwise. It is not clear, as far as the researcher can determine, how such a divergence of opinion would be resolved under the English system.
5. Saudi regulators should grant more freedom to arbitral parties regarding the form of the arbitration agreement by modifying the harsh provision in Article 9(2) of the SAL 2012 which considers any unwritten arbitration agreement void. That provision is contrary to the position of all scholars of the four Sunni schools, past and present. It is also contrary to the modern attitude of national arbitration systems, including those that do not require any specific legal form of arbitration agreement (eg, the SAA 2010) as well as those that simply consider an unwritten arbitration to be outside the arbitration act (eg, the EAA1996).
6. The Saudi legislature should mitigate the harsh effects of Article 9(1) of the SAL 2012, which stipulates that an arbitration agreement subsequent to a dispute is void if it does not spell out the issues to be covered by arbitration.[1413] This provision not only limits

[1413] SAL 2012, art (9)(1).

the freedom of arbitration parties, but it also disrupts arbitration proceedings when an issue emerges that was not stated in the agreement but is integral to the dispute. The provision could create chaos when the law of the seat of arbitration conflicts with that of the state whose court is responsible for deciding whether the issue in question is sufficiently related to the issues specified in the agreement. Therefore, it is highly recommended that the Saudi legislature abrogate this provision, or at least exempt international arbitration agreements from this restriction.

7. When a national arbitration system requires that an arbitrator should be independent, it usually does not inhibit the freedom of arbitration parties in the selection of an arbitrator. But the situation is much different when it comes to the SAL 2012, which prohibits the arbitrator from hearing any case for the same reasons a judge would be prohibited, even if neither party so requests and even after the award is issued.[1414] This strict rule comes on top of the already-broad notion of judge independence under Article 94 of SLPBSC 2013.[1415] The SAL 2012 should be amended to exclude cases where the parties are aware of and do not object to the arbitrator's lack of independence. Parties usually are more concerned with whether the arbitrator is familiar with the subject matter than whether he is uncontestably independent.[1416]
8. The SAL 2012's requirement that the arbitrator be of good conduct and reputation should be abrogated or at least should exempt international arbitration. This requirement not only restricts the freedom of arbitration parties, which in turn harms the quality of the arbitration process and arbitral award,[1417] but also creates unnecessary complexity because of the fact that good conduct and reputation vary from one place to another (eg, drinking alcohol is contrary to the good conduct and reputation in Saudi Arabia but not in Britain and most other countries). Further, if the Saudi courts enforce this requirement, it could result in Saudi Arabia violating many of its multilateral and bilateral obligations related to the implementation of foreign arbitral awards.
9. The SAL 2012 should drop the requirement that the arbitral tribunal consider 'the usages of the trade applicable to the transaction' — a provision that is similar to the Model Law

[1414] SAL 2012, art 16(2) and SLPBSC 2013, art 91.
[1415] See page 130.
[1416] For example, see page 130.
[1417] See page 106.

and contrary to the EAA 1996. This provision restricts the freedom of arbitration parties concerning the choice of substantive law, and it also causes confusion because international trade usages are very broad and unspecified. Additionally, such usages may conflict with the provisions of the SAL 2012 itself, as it obligates the arbitral tribunal to consider the provisions of Shariah. Some accepted usages in international trade such as interest (*riba*) are strictly prohibited under Shariah.

10. Because the SAL 2012 is silent on the rules of evidence, the Saudi legislature should stipulate that arbitration parties are free to agree on the rules of evidence, as is the case with substantive and procedural law. The lack of a written law on this issue in Saudi Arabia means that the applicable evidence rules are those of Shariah, which include uncodified opinions.
11. It is highly recommended that the Saudi legislature amend the provision of Article 18(2) of the Arbitration Law 2012 which disallows arbitration parties from agreeing on early termination of an arbitrator's mandate when the arbitrator is appointed by the court. This provision not only has the obvious effect of limiting the freedom of arbitration parties to terminate the arbitrator's mandate, but it also could prevent them from agreeing to terminate the arbitration agreement or arbitration process, since such terminations would necessarily result in the dismissal of arbitrator.
12. There is a need for a legislative clarification of the position in the Saudi and English systems regarding the limits of parties' freedom to agree on granting one of them the right to terminate the arbitration contract. This issue is especially salient in light of the silence of the SAL 2012 on the issue, which raises the question of whether the provisions of Shariah are applicable and, if so, which of the opinions of Shariah scholars should apply. And in the English system, such an agreement could constitute a violation of the arbitral principle of equality.
13. The limits of parties' freedom under the SAL 2012 must be clarified in light of the wide effect of the mandatory rules on the rights and freedoms of arbitration parties, and the failure of the Saudi law to determine these rules or specify the standard for such a determination. In the current vacuum, the determination of such rules is subject to the discretion of the court or arbitrator. This issue is critical because there is no clarity on whether Shariah mandatory rules are considered part of Saudi mandatory rules, and if so, which of the four Sunni schools' rules are controlling. This is especially nettlesome

when parties are non-Muslims, as most Saudi judges who were interviewed disagree with the attitude of early Shariah scholars who grant wider freedom to non-Muslims.

14. English lawmakers need to clarify the extent of the legal impact of anti-discrimination regulations, namely the EA 2010, on the parties' freedom in international commercial arbitration to determine the qualifications of the arbitrator. The number of international arbitration cases in the UK is substantial (eg, in 2016 more than 80 percent of the disputes before the LCIA were international) and international cases usually include parties from a variety of religious and cultural background who may prefer, for instance, an arbitrator from their religious background, such as when a case involves Muslim or Jewish parties. This raises the question of whether such preferences violate the anti-discrimination rules.
15. The Saudi legislature should remove the ambiguity surrounding the new Companies Law concerning the arbitrability of disputes: 1) between the partners in the company, 2) between the partners and the company, 3) between the partners or the company and the board of directors in general, and 4) between the company and third parties. The situation is unclear under the loosely phrased provisions of the SCL 2015 regarding who has authority to resolve such disputes and what right of access to the courts exists in such disputes.
16. The Saudi Ministry of Commerce and Investment should cancel the Circular No 31/1/331/91 issued on 21/01/1979 which states that a clause providing for arbitration outside Saudi Arabia regarding disputes between the partners in a company or between them and the company is void. This is because the Circular is illegal in that, without any valid legal basis, it usurps the freedom of the partners and the company which is granted to them by the SAL 2012. It is outside the authority of the Ministry of Commerce (as an executive body) to restrict the provisions of the Arbitration Law (a legislative act) without an express provision authorising it to do so, which does not exist.

The implementation of these recommendations is undoubtedly necessary for the success of international commercial arbitration in Shariah and the Saudi system. This is not only because it will contribute to granting the supposed freedom of the parties to international commercial arbitration and the delimitation of that freedom, but also because this freedom and the clarity of its limits are among the main factors for the selection and success of any international commercial arbitration system that is to have a positive impact in many areas,

especially at the national level (eg, the flourishing of international commercial arbitration and international trade within the country). Without such freedom and clarity, the law of international commercial arbitration (including in Shariah and Saudi Arabia), which is the main and preferable means of resolving any dispute among international traders today, would be difficult to implement. If it were applied, moreover, its consequences for the rights and obligations of the parties would be nearly impossible to predict. Therefore, as previously seen, the principle of the freedom of parties and its clarity are the basis for drafting modern international commercial arbitration laws (as in the case of the Model Law).

Although the English system is a realistic model of an international commercial arbitration system—and one that has proven its success in our modern world—it still has room for improvement. The recommendations made here, should English legislators consider them, would produce greater clarity and increase the perception that the English arbitration system is an arbitration-friendly legal system. Nonetheless, such recommendations do not change the fact that the English arbitration system is one of the world's leading arbitration systems in the freedom it grants to arbitration parties and is compatible with the basic principles of Shariah. This research thus firmly maintains that it is a model system for drafting the provisions of international commercial arbitration in Shariah and for redrafting the Saudi Arbitration Law 2012 to make it friendly to arbitration.

Bibliography

1. Books:

- Abdel Karim RA and Archer S, *Islamic Finance: The New Regulatory Challenge (Wiley Finance)* (2nd edn, John Wiley & Sons 2013)
- Abu AlAsbagh ESAAJQG (died: 486 Hijra - corresponding to 1093 AD), *Diwan AlAhkam AlKubra aw AlE'alam bi Nawazel AlAhkam wa Qatr men Sayr AlHukkam* (Y Murad investigator, Dar AlHadith 2007)
- Abu AlNaja MAMSESHMSS (died: 968 Hijra - corresponding to 1560 AD), *AlIqna'a fi Fiqeh AlImam Ahmad Ibn Hanbal*, vol 4 (AMM AlSabaki ed, Dar AlMa'arefah)
- Abu Gaeb S, *Moosoah Al ijma fai Alfuqh Alaslaame*, vol 1 (3rd edn, 1996)
- Abū Zay N, *Reformation of Islamic Thought: A Critical Historical Analysis* (Amsterdam University Press 2014)
- Abu-Sahlieh SAA, *Introduction to Islamic Law; Foundation, sources and principles* (FJ Phiri tr, CreateSpace 2012)
- Afandi AHKA (died 1353 Hijra - corresponding to 1934), *Durar AlHukkam fi Shareh Majallat AlAhkam*, vol 2 (F AlHusaini tr, Dar AlJabal 1991)
- Ahmad AUF, *Theory and Practice of Modern Islamic Finance: The Case Analysis from Australia* (Brown Walker Press 2010)
- Ahmad S, *Islam in Perspective* (Author House 2011)
- Ahmed H, *Product Development in Islamic Banks* (Edinburgh University Press 2011)
- Al Bahaote MBY (died: 1051 Hijra - corresponding to 1641 AD), *Sharh Montaha AlEradat, Dagaeg Awle Alnahi Lesharh Almontaha,* vol 3 (Alem AlKutub 1993)
- Al Harany TAAAAT (died: 728 Hijra - corresponding to 1327 AD), *Majmo' AlFatawa,* vol 15 (AM Qasim ed, King Fahad Quran Printing Complex 1995)
- Al Madni Busaq M, *Perspectives on Modern Criminal Policy & Islamic Sharia* (Z Ahmed tr, Naif Arab University for Security Sciences 2005)
- Al Maliki ABMB (died: 543 Hijra - corresponding to 1148 AD), *Ahkam AlQuran*, vol 1 (MA Ata ed, 3rd edn, Dar AlKutub AlElmiyah 2003)
- Al-Aayed SH, *The Rights of Non-Muslims in the Islamic World*, (Dar Eshbelia 2002)
- AlAiny AMMAMAHGHB (died: 855 Hijra - corresponding to 1451 AD), *AlBenayah Shareh AlHedaya*, vol 9 (Dar AlKutub AlElmiyah, Beirut 2000)
- _____, *Omdat Alqari Shareh Sahih AlBuqari*, vol 7 (Dar Ehia' AlTurath AlArabi, Beirut)
- _____, *AlBenayah Shareh AlHedaya*, vol 13 (Dar AlKutub AlAlamiyah 2000)
- AlAlbani MN (died: 1420 Hijra - corresponding to 1999 AD), *Selselat AlAhadith AlSahiha wa Shai men Fiqheha wa Fawaeduha,* vol 7 (Maktabat AlMa'aref 2002)

- _____, *Fitnat AlTakfeer* (A Baz and M AlOthaimeen eds, 2nd edn, Dar Ibn Khozaimah 1997)
- Al-Alwani STJ, *Issues in Contemporary Islamic Thought* (IIIT 2005)
- Alamad S, *Financial Innovation and Engineering in Islamic Finance* (Springer 2017)
- AlAmeli AlTabary MJYKG (died: 310 Hijra - corresponding to 922 AD), *Jame' AlBayan fi Ta'aweel AlQuran*, vol 8 (AM Shaker investigator, Mua'assasat AlRessalah 2000)
- AlAmeli AlTabary MJYKG (died: 310 Hijra - corresponding to 922), *Tafseer AlTabary, Jame' AlBayan an Ta'aweel Ai AlQuran*, vol 6 (ABA AlTuki investigator, Dar Hajer 2001)
- AlAndulusi AWSKSAWTQB (died: 474 Hijra- corresponding to 1081 AD), *AlMuntaqa Shareh AlMuwatta*, vol 5 (AlSa'ada Printing, Egypt 1332 Hijra - corresponding to 1913 AD)
- Alansari Alkurtobi AAMBA*, AlGami' Li Ahkam AlQuran,* vol 7 (ABA Alturki investigator, Moassasat AlResalah 2006)
- Al-Asqalani BH, *Bulugh Al-Maram: Attainment of the Objective According to Evidence of the Ordinances* (N Eweiss tr, S Cook ed, Dar Al-Manarah 2003)
- AlBagawi AMHM (died: 510 Hijra- corresponding to 1116 AD), *Ma'alem AlTanzeel fi Tafseer AlQuran, Tafseer AlBagawi*, vol 7 (MA AlNamer and others investigators, 4th edn, Dar Taiba 1997)
- Al-Bahnasawy S, *Non-Muslims in the Shariah of Islam* (Bayan Translation Services tr, Dr An-Nashr Liljami'at 2004)
- AlBahoti MBY, *Kashaf AlQena' A'n Maten AlEqna*, vol 6 (HMM Helal investigator, Dar AlFikr 1982)
- AlBalakhi N and others, *AlFatawa AlHendiyah*, vol 3 (2nd edn, Dar AlFiker 1310 Hijra - corresponding to 1892)
- AlBaldahi AlHanafi AMMM (died: 683 Hijra - corresponding to 1285), *AlEkhtiar le Ta'aleel AlMukhtar,* vol 2 (M A Daqeeqa ed, AlHalabi Printing 1937)
- AlBalkhi NA and others, *AlFatawa Al Hindiya*, vol 3 (2nd edn, Dar AlFiker, 1310 Hijra - corresponding to 1892)
- AlBejad MN, *AlTahkeem fi AlMamlakah AlArabiyah AlSso'awdiyah* (The Institute of Public Administration, Riyadh 1999)
- Aldawry GA, *Aqd AlTahkim fi AlFiqh AlIslami wa AlQanoon AlWadi* (Dar Alfrakan, Jordan 2002)
- AlDemashqi AFEOKQB (died: 774 Hijra - corresponding to 1372), *Tafseer AlQuran AlAzeem*, vol 2 (SBM Salamah investigator, 2nd edn, Dar Taibah 1999)
- AlDemashqi AMEAAQHS (died: 660 Hijra - corresponding to 1262 AD), *Qawaed AlAhkam fi Masaleh AlAnaam*, vol 2 (TA Sa'ad ed, Maktabat AlKuliyat AlAzhariyah 1991)
- AlDemashqi Ibn Abdeen MAOAAA (died: 1252 Hijra - corresponding to 1836 AD), *Rad AlMuhtar Ala AlDur AlMukhtar*, vlo 5 (2nd edn, Dar AlFiker 1992)
- Aldosooqi AlMaliki MAA (died: 1230 Hijra - corresponding to 1815 AD), *Hashiat AlDusooqi ala AlShareh AlKabeer*, vol 3 (Dar AlFiker)
- AlHaitami AMAH, *Tuhfat AlMuhtaj fi Shareh AlMenhaj*, vol 5 (AlMaktabah AlTejariyah AlKubra 1983)

- AlHanafi AABMAK (died: 587 Hijra - corresponding to 1191 AD), *Badae'e AlSanae'e fi Tarteeb AlSharae'e*, vol 5 (2nd edn, Dar AlKutub AlElmiyah 1986)
- AlHanafi AHAAKT (died 844 Hijra - corresponding to 1440 AD), *Mueen AlHukkam fi ma Yatarradad bayna AlKhasmain mena AlAhkam* (Dar AlFiker)
- AlHanafi AMBMAAOMB (died: 616 Hijra - corresponding to 1219 AD), *AlMuheet AlBurhani fi AlFiqh AlNu'mani Fiqh AlImam Abi Hanifah*, vol 8 (AS AlJundi ed, Dar AlKutub AlElmiyah, Beirut 2004)
- AlHanafi ATHIGDM (died: 1298 Hijra - corresponding to 1880 AD), *AlLlebab fi Shareh AlKetab*, vol 4 (MMA Abdulhameed ed, AlMaktaba AlElmiyah, Beirut)
- AlHanafi OAMAFZ (died: 743 Hijra - corresponding to 1342 AD), *Tabyeen AlHaqa'eq Shareh Kanz Addaqa'aeq we Hasheiat Ashelbi*, vol 4 (AlMatba'ah AlKubra AlAmeeriyah, Cairo 1313 Hijra - corresponding to 1895 AD)
- AlHanafi OIAHA (died: 773 Hijra - corresponding to 1371 AD), *AlGurrah AlMuneefa fi Tahqeeq Ba'ad Masael AlImamAbi Hanifa* (Moassasat AlKutub AlThaqafuyah 1986)
- AlHanafi SMAAMAE (died 792 Hijra - corresponding to 1389 AD), *Shareh AlAqeeda AlTahaweiya*, (A Shaker investigator, Ministry of Islamic Affairs, Endowments, Da`wah, and Guidance 1418 Hijra - corresponding to 1997 AD)
- AlHanbali AAHASMDS (died: 885 Hijra- corresponding to 1480), *AlEnsaf fi Ma'arefat AlRajeh mena Alkhelaf*, vol 8 (2nd edn, Dar Ehia ATurath Alarabi)
- AlHanbali AEBABMBA (died: 884 Hijra - corresponding to 1479 AD), *AlMubde' fi Sharh AlMuqanna'a*, vol 4 (AlMaktab AlIslami 2000)
- AlHanbali AMAQMJ (died: 682 Hijra -corresponding to 1283 AD) *AlShareh AlKabeer ala Maten AlMuqanna*, vol 11 (Dar AlKitab AlArabi)
- AlHanbali Ibn Qudamah AMMDAAMQJMD (died: 620 Hijra - corresponding to 1223 AD), *AlKafi fi Fiqh AlImam Ahmed*, vol 3 (Dar AlKutub AlElmiyah 1414 Hijra - 1994 AD)
- _____, *AlMugni le IbnQudamah*, vol 10 (Maktabat AlQahera 1968)
- AlHanbali MYSHEB (died: 1051 Hijra - corresponding to 1641 AD), *Daqaeq Uli AlNahi le Shareh AlMuntahi AlMa'aroof bi Shareh Muntahi AlIeadat*, vol 3 (Alam AlKutub 1993)
- _____, *Kashaf AlQina'a an Maten AlEqna'a*, vol 3 (Dar AlKutub AlElmiyah)
- Alharbi IS, *Democracy in Islamic and International Law* (Authorhouse 2011)
- AlJassas AlHanafi ABAABA (died: 370 Hijra - corresponding to 980 AD), *Ahkam AlQuran*, vol 2 (AMA Shahin ed, Dar AlKutub AlElmiyah, Beirut 1994)
- AlJaziri AMA (died: 1360 Hijra- corresponding to 1941 AD), *AlFiqh ala AlMathaheb AlAba'a*, vol 3 (2nd edn, Dar AlKutub AlElmiyah 2003)
- AlJehani M, *AlTahkeem fi AlSharia AlIslamiyah* (Maktabat Dar AlIman 1994)
- AlKharbutaly AH, *AlIslam wa Ahel Althemmah* (AlMajles AlA'la le AlShoon AlIslamiyah, Cairo 1969)

- Alkhrashi AlMaliki MA (died: 1101 Hijra - corresponding to 1689 AD), *Shareh Mukhtassar Khalil le AlKhrshi*, vol 4 (Dar AlFiker, Beirut)
- AlMagrebi SAAMMAT (died: 954 Hijra - corresponding to 1547 AD) *Mawaheb AlJalil fi Shareh Mukhtassar Khalil*, vlo 5th (3rd edn, Dar AlFiker 1992)
- Al-Mahalli J and Al-Suyuti J, *Tafsīr al- Jalālayn* (F Hamza tr, GM Talal ed, Royal Aal Al-Bayt 2007)
- AlMaliki AAMAO (died: 536 Hijra - corresponding to 1972 AD) *Shareh Attalqeen,* vol 2 (MA AlSsalami ed, Dar AlGharb AlIslami 2008)
- AlMaliki AASAIA (died: 684 Hijra - corresponding to 1285 AD), *AlThakheera*, vol 10 (Dar AlGharb AlIslami 1994)
- AlMaliki AMAANSB (died: 222 Hijra - corresponding to 837 AD), *AlTalqeen fi AlFiqeh AlMaliki*, vol 2 (Dar AlKutub AlAlamiyah 2004)
- AlMaliki AMAAZANQ (died: 386 Hijra - corresponding to 996 AD), A*lNnawader wa AlZeyadat ala ma fi AlMudawwenah men Gayreha men AlOmmahat*, vol 8 (MA Boa Khabazah investigator, Dar AlGharb AlIslami 1999)
- AlMaliki AMJANSNJS (died: 616 Hijra - corresponding to 1219 AD), *Aqd AlJawaher AlThameena fi Mathhab Alam AlMadeena*, vol 3 (HM Lahmar investigator, Dar AlGharb AlIslami 2003)
- AlMaliki MYAQYAGAAM (died: 897 Hijra - corresponding to 1491 AD), *AlTtaj wa AlIkleel le Mukhtasar Khaleel*, vol 8 (Dar AlKutub AlIlmiyah 1994)
- AlMaqdesi SAFAMAQ (died: 682 Hijra - corresponding to 1283 AD), *AlShareh AlKabeer ala AlMuqne'e*, vlo 28th (AA AlTurki and AM AlHulu investigators, Hajra 1995)
- AlMaqqi AlShafi'i AAMEAOSAAMQ (died: 204 Hijra - corresponding to 819 AD), *AlOm*, vol 5 (Dar AlMa'refa, Beirut 1990)
- _____, *Tafseer AlImam AlShafi'i*, vol 5 (ABM AlFarran investigator, Dar AlTadmuriyah, Saudi Arabia 2006)
- AlMasri AlTahawi AJAMSASAH (died: 321 Hijra - corresponding to 933 AD), *Mukhtassar Ektilaf AlOlama'a*, vol 4 (AN Ahmed ed, 2nd edn, Dar AlBashaer AlIslamiyah 1417 - corresponding to 1996 AD)
- AlMawerdy ABMBMBH (died: 450 Hijra - corresponding to 1058 AD), *AlAhkam AlSultaniyah* (Dar AlHadith, Cairo)
- _____, *Alhawy Alkabeer Fe Fiqh Mathhab AlEmam AlShafi'i,* vol 16 (AM Muawwadh and AA Abd AlMawjood investigators, Dar Alkotub Alelmiyah 1999)
- AlMawselli AlHanafi ABMBM*, AlEkhtiar Lita'lil AlMukhtar*, vol 2 (Dar AlKhair 1998)
- AlMesri AJAMSASAH (known as AlTahawi) (died: 321 Hijra - corresponding to 933 AD), *Shareh AlAqeeda AlTahawiya* (MN AlAlbani and others ed, 8th edn, AlMaktaba AlIslamiyah 1984)
- AlNajdi FAFHMA (died: 1376 Hijra - corresponding to 1956 AD), *Bustan AlAkhbar Mukhtasar Nayl AlAotar*, vol 2 (Dar Ashbelia 1998)

- AlNashmi OJ, *Turuq Estenbat AlAhkam men AlQuran AlKareem* (2nd edn, Moassassat AlKuwait le AlTaqaddum AlElmi 1997)
- AlNawawi AZMYS (died: 676 Hijra- corresponding to 1277 AD), *AlMajmo' Shareh AlMuhathab*: with the Completion by AlSabaki and AlMuti'i, vol 16 (Dar AlFiker)
- _____, *Rawdat AlTalebeen wa Omdat AlMufteen*, vol 12 (Z AlShaweesh ed, 3rd edn, AlMaktab AlIslami 1991)
- AlOtaibi A, *AlNetham AlA'am le AlDawlah AlIslamiyah* (Dar Kunooz Ashbilia 2009)
- AlOthaimeen MSM (died: 1421 Hijra - corresponding to 2000 AD), *AShareh AlMumte' ala Zad AlMustanqa*', vol 15 (Dar Ibn AlJawzi 1422 - corresponding to 2001 AD)
- AlQari AA, *Majallat AlAhkam AlShariah* (AIA Sulaiman and MIA Ali eds, 3rd edn, Tihama 2005)
- AlQari ABSM, *Murqat AlMafatih Sharh Mashkat AlMasabih*, vol 6 (Dar AlFikr 2002)
- AlQrafi AAAES (died: 684 Hijra - corresponding to1285 AD), *AlFurooq wa Anwar AlBurooq fi Anwaa AlFurooq,* vol 4 (K AlMansour ed, Dar AlKutub AlElmiyah 1998)
- AlQurtubi AAMAABFAKS (died: 671 Hijra - corresponding to 1272 AD), *AlJame' le Ahkam AlQuran, Tafseer AlQurtubi*, vol 5 (A AlBerdoni and I Atfish eds, 2nd edn, Dar AlKutub AlMesriyah 1964)
- AlQurtubi AAMAMAR (died: 595 Hijra - corresponding to 1198 AD), *Bedayat AlMujtahid wa Nehayat AlMuqtased*, vol 4 (Dar AlHadith 2004)
- AlQurtubi AWMAR (died: 520 Hijra - corresponding to 1126 AD), *AlBayan wa AlTahseel wa AlShareh wa AlTawjeeh wa AlTahleel le AlMasael AlMustakhrajah*, vol 18 (M Hejji and others eds, Dar AlGarb AlIslami 1988)
- AlRahoni MAMY and others, *Hasheiyat AlImam AlRahoni ala Shareh AlZarqani le Mukhtasar Khalil*, vol 7 (AlMatba'ah AlAmeeriyah, 1306 Hijra - corresponding to 1888 AD)
- AlRamli SMAAAHS (died: 1004 Hijra - corresponding to 1595 AD) *Nehayat AlMuhtaj Ela Shareh AlMenhaj*, vol 8 (Dar AlFiker, Beirut 1984)
- AlRoomi MMMAAASSSJ (AlBabarti, died: 786 Hijra - corresponding to 1384 AD), *AlEnaya Shareh AlHedaya*, vol 7 (Dar AlFiker)
- AlSarkce MAASS (died: 483 Hijra - corresponding to 1090 AD), *AlMabsoot*, vol 16 (Dar AlMa'arefah 1993)
- AlSelmi ANA, *Osoul AlFiqh Allathi la Yasa'a le Faqeeh Jahleh* (Dar AlTadmuriyah, Riyadh 2005)
- AlShafi'i AAAAMAAA (died: 468 Hijra - corresponding to 1076 AD) *AlTafseer AlBaseet*, vol 7 (IMSIU 1430 Hijra - corresponding to 2009 AD)
- AlShafi'i KMIAAAB (died: 808 Hijra - corresponding to 1405), *AlNajem Alwahhaj fi Shareh AlMenhaj*, vol 4 (Dar AlMenhaj 2004)
- AlShafi'i MAAMHMMFB (died 516 Hijra- corresponding to 1122 AD), *Shareh AlSunnah*, vol 8 (S AlArnaout and M Z AlShawish eds, 2nd edn, Islamic office 1983)

- AlShafi'i SAMAKS (died: 977 Hijra - corresponding to 1569 AD), *Mugni AlMuhtaj ela Ma'arefat Ma'ani Alfad AlMenhaj*, vol 4 (Dar AlKutub AlElmiyah 1994)
- AlShanqeeti MAMMAJ (died: 1393 Hijra - corresponding to 1973 AD), *Adwa AlBayan fi Eidah AlQuran bi AlQuran*, vol 1 (Dar AlFikr 1995)
- AlShatebi IMMLG (died: 790 Hijri - corresponding to 1388 AD), *AlMuwafaqat*, vol 3 (AOMH AlSalman ed, Dar Ibn Affan 1997)
- AlShirazi AIIBABY (died: 476 Hijra - corresponding to1083 AD), *AlMuhathab fi Fiqh AlImam AlShafi'i*, vol 2 (Dar AlKutub AlElmiyah)
- AlSsabki TAT (died: 771 Hijra - corresponding to 1369 AD), *AlAshbah wa AlNazaer*, vol 1 (Dar AlKutub AlElmiyah 1991)
- AlSsaniki ZMZAZAY (died: 926 Hijra- corresponding to1519 AD) *Asna AlMataleb fi Shareh Rawd Attaleb*, vol 4 (Dar AlKetab AlIslami)
- AlSuyuti ABABJA (died: 911 Hijra - corresponding to 1505 AD), *AlAshbah wa AlNnazaer* (Dar AlKutub AlElmiyah 1990)
- _____, *AlDur AlManthor*, vol 2 (Dar AlFiker, Beirut)
- AlTabari MBGBYBKBG (died 310 Hijra - corresponding to 922 AD), *Tfasier Altabari: Jame Albian An Tiwial Ai Alquran*, vol 7 (MM Shaker ed, Dar Almaarar, Egypt)
- _____, *Tfasier Altabari: Jame Albian An Tiwial Ai Alquran*, vol 6 (ABA AlTurky ed, Hajr)
- AlTha'alabi AMI (died: 427 Hijra - corresponding to 1035 AD), *AlKashef wa AlBayan an Tafseer AlQuran*, vol 4 (IAM Ashoor and N AlSa'aedi eds, Dar Ihya'a AlTurath AlArabi 2002)
- AlTonisi MTMMTA (died 1393 Hijra - corresponding to 1973 AD) *AlTahrir wa AlTanweer, Tahrir AlMa'na AlSadid wa Tanweer AlAqel AlJadid men Tafseer AlKetab AlMajeed*, vol 6 (AlDar AlTunesyia, Tunisia 1984)
- AlTtasooli ASAAA (died: 1258 Hijra - corresponding to 1842 AD), *AlBahja fi Shareh AlTuhfa, Shareh Tuhfat AlAhkam,* vol 2 (MQ Shaheen ed, Dar AlKutub AlElmiyah 1998)
- AlUthaymeen MS, *Tafseer AlQuran AlKareem*, vol 3 (Dar Ibn AlJawzi 1423)
- AlYamani MAMAAS (died: 1250 Hijra - corresponding to 1834), *AlQawl AlMufeed fi Adellat AlIjtihad wa AlTaqleed* (A Abdulkhaleq ed, Dar AlQalam 1396 Hijra - corresponding to 1976)
- AlYamani MAMAS (died: 1250 Hijra - corresponding to 1834 AD), *Nayl AlAwtar*, vol 5 (E AlSabedi ed, Dar AlHadith 1993)
- AlZuhaily WM, *AlFiqh AlIslami wa Adellatuh*, vol 4 (12th edn, Dar AlFiqr, Damascus)
- AlZurkashi BAMBBBA (died: 1392 Hijra - corresponding to 1972 AD), *AlManthor fi AlQawaed*, vol 2 (2nd edn, Wazarat AlAwqaf AlKuwaitiyah 1985)
- American Arbitration Association, *AAA Handbook on International Arbitration Practice* (Juris 2010)
- _____, *AAA Handbook on International Arbitration and ADR* (2nd edn, Juris 2010)

- Anderson K, *A Biblical Point of View on Islam* (Harvest House Publishers 2007)
- Andrews N, *Arbitration and Contract Law: Common Law Perspectives* (Springer 2016)
- An-Nabahānī ST, *The Islamic Personality: Intellectual & Islamic Sciences*, vol 1 (6th edn, Dar Al Ilm 2005)
- Arabi O and others (eds), *Islamic Legal Thought: A Compendium of Muslim Jurists* (Brill 2013)
- Arif AA (ed), *Masail Mu'asirah Fi Al-fiqh Al-Islami*, vol 1 (Fajar Ulung 2014)
- Assa'di ANA (died: 1376 Hijra - corresponding to 1956 AD), *Taiseer AlKareem AlRahman fi Tafseer Kalam AlMannan*, vol 1 (AABM Allweahk investigator, Mua'assasat AlRessalah 2000)
- As-Safi AB, *Islamic Jurisprudential Maxims: 114 Maxims Expounded and Rendered Into English* (Amwaj 2012)
- Baamir AY, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Routledge 2016)
- Baderin M A (ed), *Islamic Legal Theory,* vol 1 (Routledge 2017)
- Baker EA, *Nazariyat AlAqed fi AlFiqh AlIslami Derasah Muqarenah ma'a Al Fiqh AlQanooni wa AlQuaneen AlMu'aserah* (Dar AlKutub AlAlamiyah 2009)
- Bakircioglu O, *Islam and Warfare: Context and Compatibility with International Law* (Routledge 2016)
- Basedow J, *The Law of Open Societies, Private Ordering and Public Regulation in the Conflict of Laws* (Brill Nijhoff 2015)
- Bauer K, *Gender Hierarchy in the Qur'ān: Medieval Interpretations, Modern Responses* (CUP 2015)
- Beale H (ed), *Chitty on Contracts, Volume I General Principles* (31st edn, Sweet and Maxwell 2012)
- Bearman P and Peters R, *The Ashgate Research Companion to Islamic Law* (Routledge 2014)
- Beatson J and others, *Anson's Law of Contract* (29th edn, OUP 2010)
- Bechor G, *God in the Courtroom: The Transformation of Courtroom Oath and Perjury Between Islamic and Franco-Egyptian Law, Studies in Islamic Law and Society* (Brill 2011)
- Begic T, *Applicable Law in International Investment Disputes* (Eleven International Publishing 2005)
- Belohlávek AJ, *Rome Convention - Rome I Regulation*, vol 1 (Juris 2010)
- _____ _____ and N Rozehnalová (eds), *Czech Yearbook of International Law, Public Policy and Ordre Public*, vol 3 (Juris Publishing 2012)
- Black A and other, *Modern Perspectives on Islamic Law* (Edward Elgar 2014)
- Blankenship Diane C, *Applied Research and Evaluation Methods in Recreation* (Human Kinetics 2010)
- Born GB, *International Arbitration and Forum Selection Agreements: Drafting and Enforcement,* vol 1 (Wolters Kluwer 2010)
- _____, *International Commercial Arbitration: Commentary and Materials* (2nd edn, KLI 2001)
- Bourne CB (ed), *Canadian Yearbook of International Law*, vol 18 (UBC Press 2007)

- Bray D and Bray HL (eds), *International Arbitration and Public Policy* (Juris 2014)
- Burhan ADdeen AAJFMAH (died: 593 Hijra - corresponding to 1196 AD), *AlHidaya fi Shareh Bedayat AlMubtadi*, vol 3 (T Yusuf investigator, Dar Ehia AlTurath AlArabi, Beirut)
- Burns JG, *Introduction to Islamic Law: Principles of Civil, Criminal, and International Law Under the Shari'a* (Teller Books 2013-14)
- Buti MSR, *Women Between Western System and Islamic Law* (N Roberts tr, A Al Rifai revised, Dar Al Fikr 2008)
- Carper DL and McKinsey JA, *Understanding the Law* (6th edn, Cengage Learning 2012)
- Carr I and Stone P, *International Trade Law* (5th edn, Routledge 2013)
- Chapra MU, *Islam and the Economic Challenge* (Islamic Foundation 1992)
- Charman M, *Contract Law* (4th edn, Willan 2013)
- Chern C, *Chern on Dispute Boards; Practice and Procedure* (3rd edn, Informa Law from Routledge 2015)
- _____, *The Law of Construction Disputes* (2nd edn, Informa Law from Routledge 2014)
- Chiba M (ed), *Asian Indigenous Law* (Routledge 2013)
- Chukwumerije O, *Choice of Law in International Commercial Arbitration* (Greenwood Press 1994)
- Cohen Louis, Manion Lawrence and Morrison Keith, *Research Methods in Education* (8th edn, Routledge 2017)
- Connaway Lynn Silipigni and Radford Marie L, *Research Methods in Library and Information Science* (6th edn, Libraries Unlimited 2016)
- Cook Michael and others (eds), *Law and Tradition in Classical Islamic Thought* (Palgrave Macmillan 2013)
- Cordero-Moss G (ed), *International Commercial Arbitration: Different Forms and their Features* (CUP 2013)
- Daniels TP, *Sharia Dynamics: Islamic Law and Sociopolitical Processes* (Palgrave Macmillan 2017)
- Dawud N, *Interest Under CISG and Al Shari'a: Problems with the Enforceability of Article 78 of the CISG in Arab* (Epubli 2014)
- Dee MHZ, *Shari'ah: A Case for Legal Pluralism* (Author House 2015)
- Delhi SW, *The Conclusive Argument from God - Hujjat Allāh Al-bāligha* (MK Hermansen tr, Brill 1995)
- Delvolvé JL, J Rouche and GH Pointon, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd edn, KLI 2009)
- Desierto DA, *Necessity and National Emergency Clauses, Sovereignty in Modern Treaty Interpretation, International Litigation in Practice* (Martinus Nijhoff 2012)
- Dien MI, *Islamic Law: From Historical Foundations to Contemporary Practice*, (Edinburgh University Press 2004)

- Draetta U, Behind the Scenes in International Arbitration (Juris 2011)
- Drahozal RC and Naimark RW (eds), *Towards a Science of International Arbitration: Collected Empirical Research* (KLI 2004)
- Duncan WD, *Joint Ventures Law in Australia* (3rd rev edn, Federation Press 2013)
- El Ahdab AH and El Ahdab J, *Arbitration with the Arab Countries* (3rd edn, KLI 2011)
- Elish MAM, *Manh AlJalil Sharh Mukhtasar Khalil*, vol 8 (Dar AlFikr, Beirut 1989)
- Emon AM, *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law* (OUP 2012)
- End W and Steinbach U (eds), *Islam in the World Today: A Handbook of Politics, Religion, Culture, and Society* (Cornell University Press 2010)
- Engineer A, *The Qu'ran, Women and Modern Society* (2nd edn, New Dawn Press Group 2005)
- Ercanbrack J, *The Transformation of Islamic Law in Global Financial Markets*, (CUP 2015)
- Farooq MO, *Toward Our Reformation: From Legalism to Value-oriented Islamic Law and Jurisprudence* (IIIT 2011)
- Ferrari F and Krö S (eds), *Conflict of Laws in International Arbitration* (Sellier European Law 2011)
- Fitzpatrick C and Walker AH, *Muhammad in History, Thought, and Culture: An Encyclopedia of the Prophet of God*, vol 1 (ABC-CLIO 2014)
- Furmston M and Tolhurst GJ, *Contract Formation: Law and Practice* (OUP 2010)
- Gaillard E and Savage J (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (KLI 1999)
- Gasiorowski M (ed), *The Government and Politics of the Middle East and North Africa* (7th edn, Westview Press 2013)
- Glover R and Murphy P, *Murphy on Evidence* (13th edn, OUP 2013)
- Greenberg S, Kee C and Weeramantry JR, *International Commercial Arbitration: An Asia-Pacific Perspective* (CUP 2010)
- Harding M, *Conflict of Laws* (5th edn, Routledge 2014)
- Hasyim S, *Understanding Women in Islam: An Indonesian Perspective* (Solstice Publishing 2005)
- Henn Matt and others, *A Critical Introduction to Social Research* (2nd edn, Sage 2009)
- Holtzmann HM and Neuhaus JE, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (KLI 1995)
- Hughes AW, *Muslim Identities: An Introduction to Islam* (CUP 2013)
- Humaid SA, *Rafe' AlHaraj fi AlSharia AlIslamiyah Zawabetuhu wa Tatbiqatuh* (Maktabat AlObeikan 2004)
- Hussain J, *Islam: Its Law and Society* (Federation Press 2011)
- Ibn A'ashoor MTMMT, *Maqasid AlSharia AlIslamiyah*, vol 2 (MHI AlKhojah ed, Ministry of Endowments and Islamic Affairs 2004)

- Ibn Abi AlDam AlShafi'i SAIIAHH (died: 642 Hijra - corresponding to 1244 AD), *Adab AlQada'a*, vol 1 (MH AlSarhan investigator, Matba'at AlIrshad 1984)
- Ibn Alhammam KMAA (died in 861 Hijra - corresponding to 1456 AD), *Fateh AlQade*er, vol 9 (Dar AlFikr)
- _____, *Shareh Fateh AlQadeer ala AlHedaia Shareh Bedaiat AlMubtadi*, vol 7 (AG AlMahdi ed, Dar AlKutub AlElmiyah, Beirut)
- Ibn Farhoon IAM (died: 799 Hijra – corresponding to 1396 AD), *Tabsurat AlHukkam fi Osool AlOqdiyah wa Manahej AlAhkam*, vol 1 (Maktabat AlKulliyat AlAzhariyah 1986)
- Ibn Kathir IAAI, *Tafsir Ibn Kathir; Abridged,* vol 2 (SR Al Al-Mubarakpuri and others trs, 2nd edn, Maktaba Dar-us-Salam 2003)
- _____, *Tafsir Ibn Kathir; Abridged*, vol 3 (SR Al Al-Mubarakpuri and others trs, 2nd edn, Maktaba Dar-us-Salam 2003)
- Ibn Najim ZBI, *Albahr AlRraeq Sharh Kanz Aldagaeg*, vol 6 (2nd edn, Dar AlKitab AlIslami, Cairo)
- Ibn Qayyim AlJawziyah MABASS (died: 751 Hijra - corresponding to 1350 AD), *Zad AlMa'ad fi Hadi Khair AlEbad*, vol 5 (27th edn, Mua'assasat AlRessalah and Maktabat AlManar AlIslamiyah 1994)
- _____, *AlTuruq AlHukmiyah* (Maktabat Dar AlBayan)
- _____, *E'elam AlMuwaqqe'een an Rab AlAlameen*, vol 4 (Dar AlKutub AlElmiyah 1991)
- Ibn Rushd, *The Distinguished Jurist's Primer, Bidayat al-Mujtahid Wa Nihayat Al-Muqtasid*, vol 2 (IAK Nyazee tr, MA Rauf reviewer, Garnet 2000)
- Ibn Taimiyah TAAAA (died: 728 Hijra - corresponding to 1327 AD), *AlSeyasah AlShareiyah fi Islah AlRaei' wa AlRaeiyah* (Ministry of Islamic Affairs, Endowment, Dawa and Guidance, Saudi Arabia 1418 Hijra)
- IBP Inc, *Saudi Arabia Criminal Laws, Regulations and Procedures Handbook, Strategic Information, Regulations, Procedures* (IBP 2016)
- International Centre for Education in Islamic Finance, *Applied Shariah in Financial Transactions* (INCEIF 2006)
- Janin H and Kahlmeyer A, *Islamic Law: The Sharia from Muhammad's Time to the Present* (McFarland 2007)
- Jemielniak J, *Legal Interpretation in International Commercial Arbitration* (Ashgate 2014)
- Jenkins J and Stebbing S, *International Construction Arbitration Law* (KLI 2006)
- Johns R, *Capacity and Autonomy: Focus on Social Work Law* (Palgrave Macmillan 2014)
- Jones-Pauly C and Elbern S (eds), *Access to Justice: The Role of Court Administrators and Lay Adjudicators In the African and Islamic Contexts* (KLI 2002)
- Kafie A, *AlHajah AlShareiyah Hudodoha wa Qawaedoha*, (Dar Al-Kotob Al-ilmiyah , Beirut 2004)
- Kalss S, *Company Law and the Law of Succession Editors* (Springer 2015)

- Kamali MH, *Shari'ah Law: An Introduction* (Oneworld Publications 2008)
- Kammuna I*, 'Bani Qurayza: Details of the Islamic Genocide of the Jews by Prophet Muhammad*' (Islam Watch, 2014)
- Kamso N, *Investing In Islamic Funds: A Practitioner's Perspective* (Wiley 2013)
- Kay M and others (eds), *Blackstone's Civil Practice 2013: The Commentary* (2nd edn, OUP 2012)
- Keshavjee MM, *Islam, Sharia and Alternative Dispute Resolution: Mechanisms for Legal Redress in the Muslim Community* (IBT 2013)
- Kettell B, *Islamic Finance in a Nutshell: A Guide for Non-Specialists* (Wiley 2010)
- Khaddur M and Liebesny HJ (eds), *Law in the Middle East: Origin and Development of Islamic Law*, vol 1 (2nd edn, Lawbook Exchange 2009)
- Korteweg Anna C and Selby Jennifer A (eds), *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration* (University of Toronto 2012)
- Kronke H and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (KLI 2010)
- Kurkela M and Turunen S, *Due Process in International Commercial Arbitration* (2nd edn, OUP USA 2010)
- Lew JDM, *Applicable Law in International Commercial Arbitration* (Oceana 1978)
- ____ ____ and others, *Comparative International Commercial Arbitration* (KLI 2003)
- Madelung W, *The Succession to Muhammad: A Study of the Early Caliphate* (CUP 2008)
- Mahlknecht M and Hassan K, *Islamic Capital Markets: Products and Strategies* (John Wiley & Sons 2011)
- Mahmood QM, *AlTahkeem fi Daw Ahkam AlSharia AlIslamiyah* (Dar AlSumei'e, Riyadh 2009)
- Malik M, *Foundations of Islamic Governance: A Southeast Asian Perspective;(Routledge Studies on Islam and Muslims in Southeast Asia* (Routledge 2016)
- Mallat C, *Introduction to Middle Eastern Law* (OUP 2007)
- Martin RC, *Encyclopedia of Islam and the Muslim World*, vol 1 (Macmillan Reference 2004)
- Mazzah Al-Bukhari Hanafi HOA (died: 536 Hijra - corresponding to 1141AD), *Kitab Shareh 'Adab Alqadi Li Alkhassaf*, vol 4 (MH Sarhan ed, Aldaar AlArabiyah Li Atteba'ah 1978)
- Medearis C, *Muslims, Christians, and Jesus: Understanding the World of Islam and Overcoming the Fears That Divide Us* (Bethany House 2017)
- Melchert C, *Makers of the Muslim World, Ahmad Ibn Hanbal* (Oneworld 2013)
- Merkin R (ed), *A Guide to Reinsurance Law, Practical Insurance Guides* (Informa Law 2007)
- Merkin R and Flannery L, *Arbitration Act 1996* (5th edn, Informa 2014)
- Metz A, *Islamic Civilization in the Fourth Century of the Hegira*, vol 1 (M Abu Redah tr, Qairo 1975)
- MHY Gharawi, *Mawso'at AlTarikh AlIslami*, vol 5 (Majma' Andisha Islami 1386)
- Ministry of Awqaaf and Islamic Affairs, *AlMosoua AlFiqhiyah*, vol 10 (2nd edn, That Alsalaseal 1987)

- _____, *AlMosoua AlFiqhiyah*, vol 12 (2nd edn, That Alsalaseal 1988)
- _____, *AlMosoua AlFiqhiyah*, vol 30 (Dar Alsafoah 1994)
- _____, *AlMosoua AlFiqhiyah*, vol 45 (2006)
- _____, *AlMosoua AlFiqhiyah*, vol 41 (2002)
- Mohammad AH*, AlAqd fi AlFiqh AlIslami, Derasat Muqaranah bi AlQanoon AlWade'i Takshef Tafseelan an Tafawwuq AlTashree' AlIslami,* vol 1 (IMSIU 1993)
- Mohammed ZBIB, known as Ibn Najem AlMasri (died: 970 Hijra - corresponding to 1563 AD), *AlBaher AlRaeq Shareh Kanz Aldaqaeq*, vol 7 (2nd edn, Dar AlKetab AlIslami)
- Monaghan N and Monaghan C, *Beginning Contract Law* (Routledge 2013)
- Morgan Jonathan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (CUP 2013)
- Moses ML, *The Principles and Practice of International Commercial Arbitration* (2nd edn, CUP 2012)
- Nabeel Musharraf Muhammad, *The Waraqat of Imam al-Haramayn al-Juwayni, a classical manual of Usul Al Fiqh* (Australian Islamic 2015)
- Nahmassni S, *Falsafat Al-Tashri fi Al-Islam: The Philosophy of Jurisprudence in Islam* (FJ Ziadeh tr, Leiden EJ Brill 1961)
- Nasir JJ, *The Islamic Law of Personal Status* (2nd edn, KLI 1990)
- Neuman J, *It Is All About Islam* (Lulu com 2015)
- Newman LW and Sheppard BH (eds), *Take the Witness: Cross-Examination in International Arbitration* (JURIS 2010)
- Nielsen Jørgen S and Christoffersen Lisbet (eds), *Shari'a As Discourse: Legal Traditions and the Encounter with Europe* (Taylor & Francis 2016)
- Nygh Peter, *Autonomy in International Contracts* (OUP 1999)
- O'Brien J, *Conflict of Laws* (2nd edn, Cavendish 1999)
- Omar R, Bahrom H and Mello G de (eds), *Islamic Perspectives Relating to Business, Arts, Culture and Communication* (Springer 2015)
- Onyema E, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010)
- Opwis FMM, *Maṣlaḥah and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* (BRILL 2010)
- Osborne C, *Civil Litigation 2007-2008, Legal Practice Guides* (OUP 2007)
- Oser D, *The Unidroit Principles of International Commercial Contracts: A Governing Law?* (Martinus Nijhoff 2008)
- Parkinson DB (ed), *Perspectives on Arabic Linguistics XXI* (John Benjamins Pub Co 2008)
- Patton Michael Quinn, *Qualitative Evaluation and Research Methods* (2nd edn, SAGE 1990)
- Pely D, *Muslim/Arab Mediation and Conflict Resolution: Understanding Sulha* (Routledge 2016)
- Philip Abu Ameenah Bilal, *The Evolution-of-Fiqh* (IIPH 1990)

- Phillipps SM and Amos A, *A Treatise on the Law of Evidence* (Saunders and Benning 1838)
- Poudret JF and Besson S, *Comparative Law of International Arbitration* (SV Berti and A Ponti trs, 2nd edn, Sweet & Maxwell 2007)
- Qura'a A, *AlOsool AlQadaeiyah fi AlMurafa'at AlShareiyah* (2nd edn, Matba'at AlNahdah 1925)
- Razwy SAA, *A Restatement of the History of Islam and Muslims* (World Federation of KSI Muslim Communities Islamic Centre 1997)
- Redfern A and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004)
- Roberts GL, *Sharia Law and the Arab Oil Bust: PetroCurse Or Cost of Being Muslim?* (Dissertation Com 2007)
- Roosevelt K, *Conflict of Laws, Concepts and Insights Series* (2nd edn, Foundation Press 2014)
- Rubino-Sammartano M, *International Arbitration Law and Practice* (3rd edn, Juris 2014)
- Ruthven M, *Islam: A Very Short Introduction* (2nd edn, OUP 2012)
- Saha TK and Saharay M, *Textbook on Legal Methods, Legal Systems and Research* (ULP 2010)
- Saleh S, *Commercial Arbitration in the Arab Middle East: Shari'a, Syria, Lebanon, and Egypt* (2nd edn, Hart 2006)
- Salim A, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (UH Press 2008)
- ___ ___and Azra A, *Shari'a and Politics in Modern Indonesia* (ISEAS 2003)
- Sanders P, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice* (KLI 1999)
- Savory RM, *Introduction to Islamic Civilization* (CUP 1976)
- Schütze RA (ed), *Institutional Arbitration: Article by Article Commentary* (Beck/Hart 2013)
- Scott Craig R and others (eds), *The International Encyclopedia of Organizational Communication*, vol 1 (John Wiley & Sons 2017)
- Shabbar S, *Ijtihad and Renewal* (N Roberts tr, The International Institute of Islamic Thought 2017)
- Shah NA, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan* (Routledge 2011)
- Shaker A, *Umdat AlTafseer an AlHafiz Ibn Katheer, Mukhtasar Tafseer AlQuran AlAzeem*, vol 4 (2nd edn, Dar AlWafa 2005)
- Shalabi MM, *AlMadkal fi AlFiqeh AlIslami, Ta'arifuh wa Tarikuh wa Mathahebuh, Nathariyat AlMulkiyah wa AlAqdthe* (10th edn, AlDar AlJameiyah, Beirut 1985)
- Siems Mathias, *Comparative Law; Law in Context* (2nd edn, CUP 2018)
- Singh RK, *Textbook on Muslim Law* (ULP 2015)
- Slapper G and Kelly D, *Q&A English Legal System 2013-2014* (10th edn, Routledge 2013)
- Sodiq Y, *A History of the Application of Islamic Law in Nigeria* (Palgrave Macmillan 2017)
- Spectorsky SA, *Women in Classical Islamic Law: A Survey of the Sources* (Brill Academic 2009)
- Steingruber AM, *Consent in International Arbitration* (OUP 2012)

- Sutton DJ and others, *Russell on Arbitration* (23rd edn, Sweet & Maxwell 2007)
- Tan Bhala K and others, *International Investment Management: Theory, Ethics and Practice* (Routledge 2016)
- Taylor R and Taylor D, *Contract Law*: *Directions* (4th edn, OUP 2013)
- The Law Society, *Legal Services Industry; Part 1 - An Overview* (Law Society 2012)
- Toll C and Skovgaard-Petersen J (eds)*, Law and the Islamic World Past and Present* (RDASL 1995)
- Tosun E, *Guide to Understanding Islam* (Ender Tosun2012)
- Ullah QF, *Sharia And Politics* (Hund 2015)
- Walston-Dunham B, *Introduction to Law* (6th edn, Delmar Cengage Learning 2012)
- Warner B, *Sharia Law for Non-Muslims* (CSPI 2010)
- Watkins Dawn and Burton Mandy (eds), *Research Methods in Law* (2nd edn, Routledge 2018)
- Weigand FB (ed), *Practitioner's Handbook on International Commercial Arbitration* (2nd edn, OUP 2009)
- Zaidan A, *Ahkam AlThemmiyeen wa AlMustamenin fi Dar AlIslam* (Muassasat AlResalah 1982)
- _____, *Nezam AlQada fi AlSharia AlIslamiyah* (2nd edn, Muassasat AlResalah 1989)
- Zekos GI, *International Commercial and Marine Arbitration* (Routledge-Cavendish 2008)

2. Books Chapters:

- Hacking L, 'Arbitration Is Only as Good as Its Arbitrators' in Kroll S and author (eds), *International Arbitration and International Commercial Law: Synergy Convergence and Evolution* (KLI 2011)
- Hosseraye J, Giovanni S and Huard-Bourgois J, 'Arbitration in France' in Lörcher T, Pendell G and Wilson J (eds), *CMS Guide to Arbitration*, vol 1 (4th edn, CMS 2012)
- Hutchinson T, 'Doctrinal Research; Researching the Jury' in Watkins D, Burton M (eds), *Research Methods in Law* (2nd edn, Routledge 2018)
- Kenton M and Hirst P, 'Advantages of International Commercial Arbitration' in ICLG (ed), *The International Comparative Legal Guide to: International Arbitration 2015* (12th edn, Global Legal Group 2015)
- Kocur M, 'Witness Statements in International Commercial Arbitration' in Kalisz BGK (ed), *The Challenges and the Future of Commercial and Investment Arbitration: Liber Amicorum Profesor Jerzy Rajski* (Lewiatan Court of Arbitration 2015)
- Picker CB, 'Comparative Law as an Engine of Change for Civil Procedure' in Picker CB and Seidman GI (eds), *The Dynamism of Civil Procedure - Global Trends and Developments* (Springer 2016)
- Raouf MA, 'Emergence of New Arbitral Centres in Asia and Africa: Competition, Cooperation and Contribution to the Rule of Law' in Stavros Brekoulakis, Julian DM Lew and Loukas Mistelis (eds), *The Evolution and Future of International Arbitration* (KLI 2016)

- Schmidt C, 'The Analysis of Semi-structured Interviews' in Flick U, Kardoff E and Steinke I, *A Companion to Qualitative Research* (SAGE 2004)
- Wolf JA and Preteroti KM, 'Written Witness Statements - A Practical Bridge of the Cultural Divide' in American Arbitration Association, *AAA Handbook on International Arbitration Practice* (Juris 2010)

3. Electronic Books:

- *AlMajallah: Majallat AlAhkam AlAdliyah: The Ottoman Courts Manual (Hanafi*), unofficial translation < http://www.iium.edu.my/deed/lawbase/al_majalle/index.html> accessed 31 May 2018
- Ibn Al Jawzi AAf (died: 597 Hijra- corresponding to 1200 AD), *The Devil's Deceptions; Talbis Iblis* (Dar as Sunnah) <https://tinyurl.com/ycuzurh5> accessed 31 May 2018
- Ibn Kathir H, *Tafsir Ibn Kathir* (A Al Arna'ut tr, Dar-us-Salam) <https://tinyurl.com/yceowrxu> accessed 31 May 2018
- ICC, *Techniques for Controlling Time and Costs in Arbitration* (ICC 2018) 12 & 14 <https://tinyurl.com/y7molghx> accessed 31 May 2018
- Madani Ibrahim, *The Preservation of Hadith* (Madania, New York 2010) <https://tinyurl.com/yaupadpq> accessed 31 May 2018
- Pendell G and Bridge D, 'Arbitration in England and Wales' in Torsten Loercher, Guy Pendell and Jeremy Wilson, *CMS Guide to Arbitration*, vol 1 (4th edn, CMS 2012) <https://tinyurl.com/y3kpo55n> accessed 31 May 2018
- Shafi MMM, *Ma'ariful-Qur'an*, vol 2 (M Shamim tr, MMT Usmani reviser, Maktaba-e- Darul-Uloom, Karachi 1998) <https://tinyurl.com/ybmbeoz7> accessed 31 May 2018
- Shepard WE, *Islam - the eBook*: *An Online Introduction* (Journal Buddhist Online Books 2009)

4. Journal Articles and Periodicals:

- Abad A, 'Alaktalafat baeen Almthahb AlEslameah' (2005) PASSIA 1
- Abdal-Haqq I, 'An Overview of Its Origin and Elements' (1996) 1(1) JILC 1
- Abdul Jabbar HSF, 'Islamic Finance: Fundamental Principles and Key Financial Institutions' (2009) Comp Law 23
- Abdul Jabbar SF, 'Islamic Finance and Dispute Resolution' (2014) Comp Law 65
- Abu Munshar MY, 'The Compatibility of Islam with Pluralism: Two Historical Precedents' (2010) ICR 613
- Abu Sadah M, 'International arbitration contract principles: analysis of Middle East perceptions' (2010) JITL&P 148
- Abualfaraj M, 'Evidence in Islamic Law: Reforming the Islamic Evidence Law Based on the Federal Rules of Evidence' (2011) 13(2-3) JILC 140

- Ahmad R and others, 'Admission/Confession: A Comparative Study of Islamic And Pakistani Laws of Evidence' (2012) 4(1) IJCRB 817
- Akhtar Z 'Conflict of Laws, Sharia Rules and Dispute Resolution' (2011) Int ALR N 8
- Al Zaid ZBA, 'Mashru'eiat Altahkim fi Alfaqih AlIslami' (2003) Albahith Aleilmie 1
- Al-Ammari S and Martin AT, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30(2) Arbitr Int 387
- Alavt H and Khamichonak T, 'International Arbitration and Its Exclusion from the Brussels Regime' (2016) 6(1) Juridical Tribune 7
- AlDawssari MMM, 'Qa'edat Umoom AlBalwa wa Atharuha fi Derasat AlQadaya AlFeqhiyah AlMu'asera' (2010) Markaz AlTamaiyuz AlBahthi fi Fiqh AlQadaya AlMu'asera 1637
- Aldohni AK, 'The Quest for A Better Legal and Regulatory Framework for Islamic Banking' (2015) Ecc LJ 15
- Ali ABH, 'Scholarly Consensus: Ijma': Between Use and Misuse' (2010) 12(2) JILC 92
- AlJerayied KAI, 'AlShakhsiyah AlE'etebariyah' (1427 Hijra - corresponding to 2006 AD) 29 Al-Adl Journal 61
- AlKadiki K, 'Shart AlTahkeem fi AlSharia AlIslamiyah wa fi AlQanoon AlWadei AlArabi' (1994) 72 Majallat AlMahakem AlMagribiyah 43
- Alkhamees A, 'International Arbitration and Shari'a Law: Context, Scope, and Intersection' (2011) 28(3) J Int Arb 255
- AlKhudair KA, 'Hukum Shart AlIslam fi AlMuhakkem fi AlMunaza't AlTahkeemiyah' (1433 Hijra-corresponding to 2011 AD) 4 AlQada'eiyah 122
- AlNashmi AJ, 'Eshterat AlTahkeem aw Altahakum ela Qanoon Wade'ei fi Oqood AlMoassasat AlMaliyah AlIslamiyah' (2010) IFA 1
- Al-Samaan Y, 'The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia' (1994) 9(3) ALQ 217
- Alsheikh EA, 'Distinction between the Concepts Mediation, Conciliation, Sulh and Arbitration in Shariah Law' (2011) 25 ALQ 367
- Alshenqeeti Hamza, 'Interviewing as a Data Collection Method: A Critical Review' (2014) 3(1) ELR 39
- Alsusuwah A, 'Athar Attahkim fi Alfiqh AlIslami' (2005) 22 Majallat Asharia wa Alqanoon 101
- AlTawalbah MMA, 'Haq Allah wa Haq AlAbd wa Atharuhuma fi AlHudood' (2013) 9(1) AlMajallah AlUrduniyah fi AlDerasaat AlIslamiyah 115
- Altwaijri AO, 'Towards A Renewal of Islamic Thought' (2015) 31 ISESCO 13
- Alzaagy A, 'Contracting Concept of "Meeting Place" in Islamic Law: Is There a Room for its Possible Implementation in Internet Transactions?' (2011) 2 MUJLT 145

- Alzer WS, 'Duabt Alhagah Altea Tanzal Manzalh Altrorah Wa Tdbagatah Ala Alagthadat Almosarah' (2010) 26 DUJSLS 675
- Ansari Jamshed, 'Party Autonomy in Arbitration: A Critical Analysis' (2014) 6(6) Researcher 47
- Anwar MA, 'Emerging Markets: The Importance of Islamic Finance to The UK Economy' (2014) JIBLR 360
- Arabi O, 'Contract Stipulations (Shurut) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya' (1998) 30(1) Int'l Jmid E Stud 29
- Auda AGR, 'The Future of Arbitration under the Brussels Recast Regulation' (2016) Arbitration 122
- Awad A and Michael RE, 'Iflas and Chapter 11: Classical Islamic Law and Modern Bankruptcy' (2010) 44 Int'l Law 975
- Baamir AY, 'New Saudi Arbitration Act: Evaluation of the Theory and Practice' (2012) Int ALR 219
- _____ ____ and Bantekas I, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009) 25(2) Arbitr Int 239
- Baderin M, 'Understanding Islamic Law in Theory and Practice' (2009) LIM 186
- Baderin MA, 'Effective Legal Representation in 'Shari'ah' Courts as a Means of Addressing Human Rights Concerns in the Islamic Criminal Justice System of Muslim States' (2006) BEPSW 135
- Badr Gamal Moursi, 'Islamic Law: Its Relation to Other Legal Systems' (1978) 26(2) Am J Comp L 187
- Belohlavek AJ, 'The Legal Nature of International Commercial Arbitration and the Effects of Conflicts between Legal Cultures' (2011) 2 Law of Ukraine 18
- Benmaran ML and others, 'Option in Islam' (2014) 2 Journal of Current Research in Science 708
- Bonnard S and Touchard S, 'Mandatory Rules in International Arbitration: the Example of Recent Awards' (2015) IBLJ 453
- Bingham LJ, 'Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award' (1988) 4(2) Arb Int'l 141
- Brawn D, 'Commercial Arbitration in Dubai' (2014) Arbitration 156
- Bsoul F, 'The Schools of Law' (2009) 13 Majallat AlJame'a 29
- Buang AH, 'Shariah Banking Laws and Fatwa (Islamic Legal Resolution) in Indonesia' (2013) JIBLR 471
- Burn G and Grubb E, 'Insolvency and Arbitration in English Law' (2005) Int ALR 124
- Buxton R, 'Discrimination in Employment: the Supreme Court Draws a Line' (2012) LQR 1
- Carbonneau TE and F Janson, 'Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability' (1994) 2 Tul J Intl & Comp L 193
- Carey G, 'Impartiality of Arbitrators: English and Irish Law Contrasted' (2006) Int ALR 156
- Carrington PD and Castle PY, 'The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties' (2004) 67 L&CP 207

- Celik DD, 'Interpretation and Enforcement of Arbitration Agreements under English and U.S. Law' (2014) 4(1) the Journal 21
- Chong A, 'Transnational Public Policy in Civil and Commercial Matters' (2012) LQR 88
- Chung RKL, 'The Rules of Natural Justice in Arbitration' (2011) Arbitration 167
- Collins Hugh, 'Methods and Aims of Comparative Contract Law' (1991) 11 OJLS 396
- Davies R, 'A Line Drawn in the Right Place' (2013) LQR 1
- Draetta U, 'The Role of In-house Counsel in International Arbitration' (2010) IBLJ 385
- Duncan NJ and Hutchinson T, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 (1) Deakin Law Review 83
- Dursun GS, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and An Assessment of its Role and Extent' (2012) 1 YÜHFD 161
- Dutson S and Berger T, 'The Application of Mandatory Laws in England and Wales: Accentuate Limited v Asigra Inc' (2011) Int ALR 73
- Eisenberg Theodore and Miller Geoffrey P, 'The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies' (2007) 56(7) DePaul Law Review 335
- Elsamani RS, 'Factors to be Considered Before Arbitrating in the Arab Middle East: Examples of Religious and Legislative Constraints' (2011) 1 Int'l Com Arb Brief 8
- Elwood Sarah A and Martin Deborah G '"Placing" Interviews: Location and Scales of Power in Qualitative Research' (2000) 52(4) Blackwell 649
- Fagbemi Sunday, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality' (2015) 6 J Sustainable Dev L & Pol'y 222
- Ghodoosi F, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2016) 94(3) Neb L Rev 685
- Gordley James, 'Comparative Legal Research: Its Function in the Development of Harmonized Law' (1995) 43(4) AJCL 555
- Gravel S and Peterson P 'French Law and Arbitration Clauses-Distinguishing Scope from Validity: Comment on ICC Case No. 6519 Final Award' 37 (1992) McGill LJ 510
- Griffin S, 'The Primacy Afforded to an Arbitration Agreement in the Context of a Petition Against Unfairly Prejudicial Conduct' (2011) Co LN 1
- Hampton W, 'Foreigners Beware: Exploring the Tension Between Saudi Arabian and Western International Commercial Arbitration Practices: In re Aramco Services Co.' (2011) J Disp Resol 431
- Harasani Hamid, 'Islamic Law as a Comparable Model in Comparative Legal Research' (2014) 3 Global J Comp L 186
- Hargrove J and Liborio V, 'Arbitration and insolvency: English and Swiss perspectives' (2009) Arbitration 47

- Hasan A, 'The Principle of Qiyas in Islamic Law - An Historical Perspective' (1976) Islamic Studies 201
- Hasan Z and Asutay M, 'An Analysis of the Courts Decisions on Islamic Finance Disputes (2011) 3(2) IIJIF 41
- Hasan Zulkifli, 'Sharia Governance in Islamic Financial Institutions and the Effect of the Central Bank of Malaysia Act 2009' (2010) JIBLR 105
- Hascher D, 'Independence and Impartiality of Arbitrators: 3 Issues' (2012) 27 Am U Int'l L Rev 789
- Hassan WZW and others, 'The Approach of Knowledge Transfer in Deriving Shafi'ite Hukum' (2015) 6(1) MJSS 260
- Henderson A, 'Lex Arbitri, Procedural Law and the Seat of Arbitration' (2014) 26 SAcLJ 886
- Hitchcock John H and Johanson George A, 'Applying a Mixed Methods Framework to Differential Item Function Analyses' 22(1) (2015) RITS 1
- Hossain S, 'Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview' (2013) 1 JPCR 1
- Hoyle M, 'Specific Issues in Islamic Dispute Resolution' (2009) 75(2) Arbitration 219
- Hoyle ME, 'Recent Development: Contract Law - Trends, Cases, and Explanations Determining Which Choice-of-Law Provision Applies' (2015) 39 Am J Trial Advoc 219
- Hutchinson Terry, 'Vale Bunny Watson? Law Librarians, Law Libraries, and Legal Research in the Post-Internet Era' (2014) 106(4) Law Libr J 579
- Imara M, 'Islamic Cultural Identity Between Originality, Modernism, and Challenges' (2015) 31 ISESCO 57
- Islam MW, 'Dissolution of Contract in Islamic Law' (1998) ALQ 336
- Islam Z, 'Provision of Alternative Dispute Resolution Process in Islam' (2012) 6(3) JBM 31
- Ismail F, 'A Commentary on Islamic Finance Case Law in the US' (2015) Comp Law 123
- Jackson SA, 'Islamic Law, Muslims and American Politics' (2015) 22 IL& S 253
- Jones D, 'Choosing The Law or Rules of Law to Govern The Substantive Rights of The Parties – A Discussion of Voie Directe and Voie Indirecte' (2014) 26 SAcLJ 911
- Kaufman PW, 'Disbelieving Nonbelievers: Atheism, Competence**,** and Credibility in the Turn of the Century American Courtroom' (2003) 15 YJLH 395
- Kemparaj Umesh and Chavan Sangeeta, 'Qualitative Research: A Brief Description' 67 (2013) IJMS 89
- Kent M, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11(3) Ga J Int'l & Comp L 591
- Kister MJ, 'The Massacre of the Banu Qurayza: A Re-examination of a Tradition' (1986) 8 JSAI 61
- Klrgis PF, 'Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis' (2009) 17 ABI Law Review 503

- Kutty F, ‘The Shari'a Factor in International Commercial Arbitration’ (2006) Loy L A Int'l & Comp L Rev 565
- Lorenzen EG, ‘Selected Articles on the Conflict of Laws’ (1920) 30 YLJ 261
- Lord Hacking, ‘Arbitration Law Reform: The Impact of the UNCITRAL Model Law on the English Arbitration Act 1996’ (1997) 63 Arbitration 290
- Lub Vasco, ‘Validity in Qualitative Evaluation: Linking Purposes, Paradigms, and Perspectives’ (2015) IJQM 1
- Main TO, ‘The Procedural Foundation of Substantive Law’ (2010) 87 Wash UL Rev 801
- Maita Aida, ‘Arbitration of Islamic Financial Disputes’ (2014) 20(1) Ann Surv Int'l & Comp L 35
- Malterud Kirsti, Siersma Volkert Dirk and Guassora Ann Dorrit, ‘Sample Size in Qualitative Interview Studies: Guided by Information Power’ (2016) 26(13) QHR 1753
- Mansoori MT, 'Role of Ra'y and Istihsan in Hanafi Legal Theory, (2012) 27**(**38**)** Al- Azwa 19
- Marriott AL, ‘The New Arbitration Bill’ (1996) Arbitration 97
- Marshall Bryan and others, ‘Does Sample Size Matter in Qualitative Research?: A Review of Qualitative Interviews in is Research’ (2013) JCIS 11
- Mayer Pierre, ‘Reflections on the International Arbitrator's Duty to Apply the Law’ (2001) 7 Arbitration International 325
- McQuater J, ‘Case Comment; Cavell v Transport for London (QBD, William Davis J, 30 July 2015, [2015] EWHC 2283 (QB))’ (2016) JPIL C45
- Messick B, ‘Just Writing: Paradox and Political Economy in Yemeni Legal Documents’ (1989) 4(1) Cultural Anthropology 26
- Mittal AK, ‘Arbitrability of Oppression and Mismanagement Claims: A Comparative Analysis’ (2016) JBL 186
- Mohamad NBM, ‘Islamic Law of Evidence in Confession (Iqrar): Definitions and Conditions’ (1994) 15 Islamiyyat 71
- Mohammed N, ‘Principles of Islamic Contract Law’ (1988) 6(1) JL& Relig 115
- Moses Dickson and others, ‘The Practicalities of Delocalisation in International Commercial Arbitration’ (2017) IBLJ 461
- Moss GC, ‘Arbitration and private international law’ (2008) Int ALR 153
- Naim N, ‘Transatlantic Trade and Investment Partnership (TTIP) and the Spill-Over Effects on the Gulf Co-operation Council’ (2017) Int JLM 35
- Nathan KVSK, ‘Who is Afraid of Sharia? - Islamic Law and International Commercial Arbitration’ (1993) Arbitration 125
- Nesheiwat F and A1-Khasawneh A, ‘The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia’ (2015) 13(2) Santa Clara J Int'l L 443

- Oderkerk Marieke, 'The Importance of Context: Selecting Legal Systems in Comparative Legal Research' (2001) NILR 294
- Olayemi AAM and al-Zabyani BK, 'Arbitration Clause in Islamic Banking Contracts: A Contractual Necessity' (2014) 1(7) IJIMS 1
- Omar MN and others, 'When Halal and Haram Meet the Haram Prevails?: An Analysis of the Maxim and Its Application in Contemporary Issues' (2012) 6(11) Aust J Basic & Appl Sci 199
- Omeroglu E, 'Taking Evidence in International Arbitration' (2015) Cov LJ 4
- Padela AI and others, 'Dire Necessity and Transformation: Entry-points for Modern Science in Islamic Bioethical Assessment of Porcine Products in Vaccines' (2013) Bioethics 1
- Parish M, 'The Proper Law of an Arbitration Agreement' (2010) Arbitration 661
- Pease R, 'Estate Planning for Middle East Clients' (2005) PCB 143
- Pepinsky TB and Welborne BC, 'Piety and Redistributive Preferences in the Muslim World' (2011) 64(3) PRQ 491
- Petsche M, 'Mediation As the Preferred Method to Solve International Business Disputes? A Look Into the Future' (2013) IBLJ 251
- Qadada KAH, 'AlWaqt Allathi Yantuj fihi Atta'abeer an AlErada, Atharuh AlQanooni wa AlSharie, Derasat Muqaranah bayn AlSharia wa AlQanoon' (2006) 8(2) Majallat Jameat AlAzhar 25
- Qasim MI, 'Prophet Muhammad's Strategies on Security and Peace Building: Lessons for the Nigerian Society' (2014) 19(11) IOSR-JHSS 18
- Rakow Lana F, 'Commentary: Interviews and Focus Groups as Critical and Cultural Methods' (2011) 88(2) JMCQ 416
- Rehman J and Ahmedov A, 'Sources of Islamic Law: Teaching Manual' (2011) UKCLE 1
- Saleh N, 'Freedom of Contract: What Does It Mean in the Context of Arab Laws?' (2001) 16(4) ALQ 346
- Salehi SM, 'A Study of Willful Options in Religious and Civil Laws' (2016) 3 IJBR 298
- Sayen G, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (2003) 24(4) U Pa J Int'l L 905
- Sayre PL, 'Development of Commercial Arbitration Law' (1928) 37 YLJ 595
- Schwartze A, 'New Trends in Parties' Options to Select The Applicable Law? The Hague Principles on Choice of Law in International Contracts in A Comparative Perspective' (2015) 12 U St Thomas LJ 87
- Seriki H, 'Substantive or Procedural: an Arbitration Perspective' (2006) Int ALR 24
- Shalash MM, 'The Position of Islamic Jurisprudence from Women Acting as Judges' (2007) Journal of Studies Jordan University
- Shamsuddin Z and Ismail AG, 'Agency Theory in Explaining Islamic Financial Contracts' (2013) 15(4) MEJSR 530

- Shariff MIM, 'Specific Issues in Islamic Dispute Resolution' (2009) 75(2) Arbitration 213
- Smolik A, 'Effect of Shari'a on the Dispute Resolution Process Set Forth in the Washington Convention' (2010) 1 J Disp Resol 151
- Stacey J, 'Welcome to the Club: ISDA Publishes Model Arbitration Clauses' (2013) 11 JIBFL 702
- Sutcliffe J and Rogers J, 'Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times' (2010) Arbitration 277
- Tabari NM, 'Islamic Finance and The Modern World: The Legal Principles Governing Islamic Finance in International Trade' (2010) Comp Law 249
- Tabari NM, 'The Sharia'h dimension of the Persian Gulf's hydrocarbon resources' (2012) IELR 61
- Timmer LJE, 'The Quality, Independence and Impartiality of the Arbitrator in International Commercial Arbitration' (2012) Arbitration 348
- Trakman L, 'The Impartiality and Independence of Arbitrators Reconsidered' (2007) Int ALR 124
- Uddin AT, **'**Religious Freedom Implications of Sharia Implementation in Aceh, Indonesia' (2010) 7(3) U St Thomas LJ 603
- Vick Douglas W, 'Interdisciplinarity and the Discipline of Law' (2004) 31(2) J Law & Soc 163
- Webe DP, 'Restricting the Freedom of Contract: A Fundamental Prohibition' (2014) 16(2) YHRDLJ 51
- Welchman L, 'The Development of Islamic Family Law in the Legal System of Jordan' (1988) ICLQ 868
- Winfield PH, 'Public policy in the English Common Law' 42(1) (1928) Harv L Rev 76
- Wisham I, Muneeza A and Hassan R, 'Special Legal Features of the Islamic Wa'd or Pledge: Comparison with the Conventional Law on Promise within the Sphere of Islamic Finance' (2011) Int JLM 221
- Wolaver ES, 'The Historical Background of Commercial Arbitration' (1934) UPa L Rev 132
- Wood AB, 'The Qualifications of an Arbitrator' (1953) Arbitration 44
- Young K, 'Case Comment; When is an Admission not an Admission?' (2012) JPI Law 134
- Yu H, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) Contemp Asia Arb J 255
- Yu Hong-Lin, 'Written Arbitration Agreements – What Written Arbitration Agreements?' (2013) 32 (1) CJQ 68
- Zahraa M and Hak NA, 'Taḥkīm (Arbitration) in Islamic Law within the Context of Family Disputes' (2006) 20 ALQ 2
- Zahraa M, 'The Legal Capacity of Women in Islamic Law' (1996) 11 ALQ 245
- Zakariyah L, 'Confession and Retraction: The Application of Islamic Legal Maxims in Safiyyatu and Amina's Cases in Northern Nigeria' (2010) JMMA 251
- Ziade R and De Taffin CH, 'Fact Witnesses in International Arbitration' (2010) IBLJ 115

5. Electronic Sources: Journal Articles, Reports and Working Papers/Conference Papers/ Research Papers[1418]

- Aal Haamid KMA, 'Jurists' Differences Regarding the Juristic Categorisation of Shares in Joint-Stock Companies and the Effect of Such Differences' 59 Al-Adl Journal <https://adlm.moj.gov.sa/ENG/attach/311.pdf>
- Abdul Ghafar Ismail and Achmad Tohirin, 'Finance and Growth: The Role of Islamic Contracts' (2009) MPRA Paper No 13744 <https://tinyurl.com/y7govpr9>
- Ali MB, 'Shariah Law and Hudud: Understanding Its Objectives and Spirit' (2013) RSIS <https://www.files.ethz.ch/isn/172845/RSIS2042013.pdf>
- Allehidan SBA, 'Annas ala AlTahakum le AlQawaneen AlWadeiyah fi Oqood AlMuassasat AlMaliyah AlIslamiyah' (1430 Hijra - corresponding to 2008) 1 <https://kantakji.com/media/5683/3031.pdf>
- AlQurashi Z, 'Arbitration under the Islamic Sharia' (2003) 2 OGEL <www.ogel.org/article.asp?key=149>
- Al-Ramahi A, 'Sulh: A Crucial Part of Islamic Arbitration' (2008) 4 LSE Law, Society and Economy Working Papers 12/2008, LSE <https://tinyurl.com/y3mr6jsw>
- Ansary AF, 'A Brief Overview of the Saudi Arabian Legal System' (2008) GlobaLex <http://www.nyulawglobal.org/globalex/saudi_arabia.htm#_ednref1>
- Bakar MD, 'Contracts in Islamic Commercial and Their Application in Modern Islamic Financial System' IBRC <https://tinyurl.com/yyqhz6fm>
- Baroody GM, 'Shari'ah, Law of Islam' (1966) 17(6) Aramco World, Arab & Islamic Cultures and Connections 26 <https://tinyurl.com/y2rc463j>
- Bhat PA, 'The Makkan Phase of Sīrah: A Study from the Standpoint of Pluralism' (2013) 6(2) Islam and Muslim Societies, A Social Science Journal 69 <https://tinyurl.com/y7flafw7>
- Blanchard CM, 'Islam: Sunnis and Shiites' (2009) CRS <https://fas.org/irp/crs/RS21745.pdf>
- Bonell MJ, 'Model Clauses for Use of the UNIDROIT Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice' (2013) UNIDROIT <https://tinyurl.com/yyvap5v2>
- Caivano R, 'Dispute Settlement, International Commercial Arbitration, 5.2 The Arbitration Agreement' (2005) UN <https://tinyurl.com/y4qnyleg>
- Chidlow A, Plakoyiannaki ME and Welch C 'Translation in cross-language international business research: Beyond equivalence' (2014), 45(5) JIBS 562 <https://tinyurl.com/yaw5dat8>
- Dahlberg A and Welsh A, 'Arbitration Country Guides, England and Wales' (2018) IBA Arbitration Committee <https://tinyurl.com/y9s9rtmf>

[1418] All websites were last accessed on 7 July 2018.

- Dar Al-Ifta Al-Missriyyah, 'The History and Sources of Islamic Law' <https://tinyurl.com/yxbuccmz>
- Dawood NIZI, 'Shoroot Alqadi beyna Alhader wa Almagi' (2007) Center of Judicial Studies Specialist <https://tinyurl.com/y6hsntoa>
- Elbayar Kareem, 'Reclaiming Tradition: Islamic Law in a Modern World' (Spring/Summer 2008) XVII:1 The International Affairs Review <http://www.iar-gwu.org/node/23>
- Gerdy KB, 'Teachable Moments: What is the Difference Between Substantive and Procedural Law? And How do I Research Procedure?' (2000) 9(1) Perspectives: Teaching Legal Research and Writing <https://tinyurl.com/y2vbnzyj>
- Gestel Rob Van and Micklitz Hans W, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' (2011) EUI Working Papers Law 2011/05 <https://tinyurl.com/y9o2jb46>
- Hage Jaap, 'Comparative Law as Method and the Method of Comparative Law' (2014) M-EPLI Working Paper 2014/11< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441090>
- Immenkamp B, 'Understanding the branches of Islam: Sunni Islam' (2016) EPRS <https://tinyurl.com/yag26kqr>
- International Law Association, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (New Delhi Conference 2002) 1 <https://tinyurl.com/ycct5s9c>
- Khan H, 'Practitioners Guide: Islamic Law' (2013) INPROL <https://tinyurl.com/y4b28844>
- LCIA, 'Facts and Figures - 2016: A Robust Caseload' (2016) LCIA <http://www.lcia.org//media/download.aspx?MediaId=570>
- Madkoar MS, 'Human Rights from an Islamic Worldview; An Outline of Hudud, Ta'zir and Qisas', Al-Muhajabah website <http://www.muhajabah.com/docstorage/hudud.htm>
- McKenzie Duncan and Maslakovic Marko 'Financial Markets in the UK' (2010) TheCityUK < https://tinyurl.com/y6bcvvqk >
- MENA-OECD Investment Programme, 'Business Ethics and Anti-Bribery Policies in Selected Middle East and North African Countries' (2006) OECD <https://tinyurl.com/y9qmk69f>
- Mina R and Charles P, 'UK: The Overshadowed Issues Arising from Jivraj v Hashwani' (2012) GAR <https://tinyurl.com/ybcyk9ou>
- Muhammad MZ, 'The Contract of Bay' Al- Salam and Istisna' in Islamic Commercial Law, A Comparative Analysis' (2007) 1, LJMS 21 < https://kantakji.com/media/8685/s195.pdf >
- Oussama A, 'Early Muslim Legal Philosophy: Identity and Difference in Islamic Jurisprudence' (1999) eScholarship < https://tinyurl.com/yyqjr2o6>
- Perenyiova J, 'Unilateral option clauses in commercial arbitration' (2014) CEU <file:///C:/Users/ahmmi/Desktop/perenyiova_judita.pdf>
- Porter R, 'The Not So Great Debate: Arbitration vs. Litigation' (2018) Chubb <https://tinyurl.com/yd7kjtor>

- Queen Mary University of London '2010 International Arbitration Survey: Choices in International Arbitration' (2010) <https://tinyurl.com/yb9umdom>
- Ridwan A, 'Contemplation Of Islamic Law Toward Wakalah Contract In Islamic Banking Practice' 4(2) USAHID Jakarta <https://tinyurl.com/y9ao6ps5>
- Said Bouheraoua, 'Zakah Obligations on Islamic Financial Institutions' (2012) ISRA Research Paper 34/2012, 14 <https://tinyurl.com/ybhcr29t >
- School of International Arbitration at Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (2018) International Arbitration Survey 1 <https://tinyurl.com/y9psasep>
- School of International Arbitration at Queen Mary University of London, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <https://tinyurl.com/y6jbzey4>
- Sharif MJ and Ijaz M, 'Madhhab in Islamic law and the dissemination of Sunni's legal text' (2014) 5(2) VFAST Transactions of Islamic Research <http://vfast.org/journals/index.php/VTIR/article/view/278/324>
- Singapore Academy of Law, 'Study on Governing Law & Jurisdiction Choices In Cross-border Transaction' **(**10 January 2016) <https://tinyurl.com/ycyymjg4>
- Sinjari Mahnaz and others, 'Ethical Challenges of Researchers in Qualitative Studies: the Necessity to Develop a Specific Guideline' (2014) 7(14) J Med Ethics Hist Med <https://tinyurl.com/y5f76w7y>
- Sykiainen LR, 'Sharia Courts: Modern Practices and Prospectives in Russia' HSE University, BRP Working Papers 60/LAW/2015 <https://www.hse.ru/data/2015/12/29/1136288132/60LAW2015.pdf>
- Vibhute Khushal and Vibhute Khushal, 'Legal Research Methods: Teaching Material' (2009) <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf>
- Willems Melanie, 'The Rule of English Law - Why Brexit, However Blindly Foolish it is, Should Not Matter for Arbitration' (2017) Lexology <https://tinyurl.com/yc6b2wgs>

6. Other Electronic Sources:[1419]

- BBC, 'Judge 'Wrong' to Stop Case after Muslim Swears on Bible' (Liverpool, 27 February 2015) <http://www.bbc.co.uk/news/uk-england-merseyside-31655854>
- Ministry of Justice, 'List of Arbitrators' <https://tinyurl.com/yd2b7bq5>
- Oxford Dictionary, 'impartial' <https://tinyurl.com/yckwlc28>
- The GCC Commercial Arbitration Centre, 'List of Arbitrators' <https://tinyurl.com/ydh3ofjg>
- UNCITRAL, 'Status, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' <https://tinyurl.com/l7drwdf>

[1419] All websites were last accessed on 10 July 2018.

- World Bank Group, 'Legal Framework / Enabling Environment Assessment for PPPs' (2016) <https://tinyurl.com/y9wj6axv>

7. Theses:

- AAlshak NBA, ‘Aqidat Ahl AlSunnah Wa AlJama Fi AlSahaba AlKiram Radia Allah Ta’ala Anhom’ (DPhil thesis, Islamic University in Madinah 2009)
- Al Jarba MAH, 'Commercial Arbitration Islamic Jurisprudence: A Study of its Role in the Saudi Arabia Context' (DPhil thesis, University of Wales, Aberystwyth 2001)
- Al Sewilem M, ‘The Legal Framework for Foreign Direct Investment in the Kingdom of Saudi Arabia: Theory and Practice’ (PhD Thesis, University of London 2012)
- Al-abdullah AM, ‘An Examination of the Role of Shariah in the Recognition and Enforcement of Arbitral Awards in Saudi Arabia’ (DPhil Thesis, University of Exeter 2016)
- Al-Fadhel FMA, ‘Party Autonomy and the Role of Saudi Courts, with Reference to the Arbitration Laws in the UK, Egypt and Bahrain and the UNCITRAL Model Law’ (DPhil thesis, Queen Mary College, University of London 2010)
- Aljohar A, ‘Finality of Arbitral Awards: Comparing Approaches in Sharia Law and International Law’ (DPhil thesis, University of Essex 2016)
- Al-Mhaidb MI, ‘Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kingdom of Saudi Arabia’ (DPhil thesis, University of Edinburgh 1997)

Appendices

Appendix I: University Research Ethics Committee Form (E2U)

Appendix II: Information Sheet for Members of The Senior Scholars Council

Appendix III: Information Sheet for Judges of Commercial Court and The Court of Appeal

Appendix IV: Consent Form of Members of Senior Scholars Council

Appendix V: Consent Form of Judges of Commercial Court and The Court of Appeal

AppendixVI: Certified Translation of Saudi Arbitration Law 2012

APPENDIX: I

OXFORD BROOKES UNIVERSITY

Appendix I: University Research Ethics Committee Form (E2U)

Professor Ilona Cheyne
Department of Law
Faculty of Humanities and Social Sciences
Oxford Brookes University
Headington Hill Hall

4 November 2014

Dear Professor Cheyne

UREC Registration No: 140860

Thank you for the email of 29 October 2014 outlining the response to the points raised in my previous letter about the PhD study of your research student Ahmed Almuqham and attaching the revised documents. I am pleased to inform you that, on this basis, I have given Chair's Approval for the study to begin.

The UREC approval period for this study is two years from the date of this letter, so 4 November 2016. If you need the approval to be extended please do contact me nearer the time of expiry.

Should the recruitment, methodology or data storage change from your original plans, or should any study participants experience adverse physical, psychological, social, legal or economic effects from the research, please inform me with full details as soon as possible.

Yours sincerely

Hazel Abbott
Chair of the University Research Ethics Committee

cc Peter Edge, Second Supervisor
Ahmed Almuqham, Research Student
Maggie Wilson, Research Ethics Officer
Jill Organ, Research Degrees Team
Louise Wood, UREC Administrator

UNIVERSITY RESEARCH ETHICS COMMITTEE, FACULTY OF HEALTH AND LIFE SCIENCES
Headington Campus Gipsy Lane
Oxford OX3 0BP UK

Tel: 01865 482639
heabbott@brookes.ac.uk

Appendix: II

OXFORD BROOKES UNIVERSITY
School of Law

Appendix II: Information Sheet for Members of The Senior Scholars Council

International Commercial Arbitration: A Comparative Study between Sharia, Saudi Arbitration Law 2012 and English Arbitration Act 1996

Ahmed Almuham, 12109240@brookes.ac.uk, mobile: 07442-261115.

You are being invited to take part in a research study. Before you decide whether or not to take part, it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully.

What is the purpose of the study?
This project seeks to explore a number of issues: the limits of the freedom of parties in international commercial arbitration; the role of national courts for the success of the process of international commercial arbitration in the light of Islamic Sharia and the SAL 2012; and the extent to which the scope of these two issues can be expanded in order to increase the efficiency of international commercial arbitration in Saudi Arabia through the study of previous UK case law in that field.

Why have I been invited to participate?
The Council of Senior Scholars is the official body in Saudi Arabia and it provides the view of Sharia in all issues, including international commercial arbitration. The SAL 2012 has not addressed or only partially addressed some significant issues: the freedom of arbitration parties concerning the arbitration agreement or the arbitral process; and the role that should be carried out by national courts in the arbitral process. Moreover, the perspectives of Sharia scholars towards these issues are different. You are invited to participate as you are considered to be someone who is qualified both officially and in Sharia at the present time to provide the perspective of Islamic Sharia in Saudi Arabia. Your knowledge of Sharia and experience will provide an extremely valuable perspective.

Do I have to take part?
Taking part in the research is entirely voluntary. It is up to you to decide whether or not to take part. If you do decide to take part, you will be given this information sheet to keep and be asked to sign a consent form. If you decide to participate, you are still free to withdraw at any time and without giving a reason.

What will happen to me if I take part?
You will be invited to take part in a semi-structured interview lasting approximately sixty minutes. The date will be set for your convenience. The most likely way of carrying out this interview will be at your office or an agreed public venue in Riyadh. An outline of the interview will be available on request prior to the interview date. The interview will be audio recorded after obtaining your consent in conjunction with taking notes. Alternatively, only written notes will be taken if you would prefer that. A transcript of the interview will be sent to you for accuracy checking.

What are the possible benefits of taking part?
There are no direct benefits to participants. However, in Sharia and the SAL 2012, the freedom of the parties to international commercial arbitration and the role of commercial courts towards the arbitral process are two of the most significant issues that have created and continue to create a lot of discussion amongst academics, in particular, outside Saudi Arabia. This is due to a number of reasons: the SAL 2012 does not address these or only does so partially; the perspectives of Sharia scholars towards these

issues are different; and there is a lack of published court decisions regarding arbitration in Saudi Arabia. Your participation in your official capacity as someone concerned with the application of Sharia will provide for a more precise discussion of those issues.

Will what I say in this study be kept confidential?
All information collected from you will be kept strictly confidential (subject to legal limitations). If you would prefer your identity not to be mentioned, privacy and anonymity will be ensured in the collection, storage and publication of research material. Any reference to your comments in the interview will be to job title only. However, as the sample size of the potential group of participants is small, others might be able to guess your identity as a consequence.

Data generated by the study will be retained in accordance with the University's policy on Academic Integrity and kept securely in paper or/and electronic form for a period of ten years after the completion of the research project. Data will be stored on lap-top and will be security-code encrypted and stored in a safe place.

What should I do if I want to take part?
You should 'opt in' to the study by signing the consent form at the end of this document, and returning it to me at 12109240@brookes.ac.uk

What will happen to the results of the research study?
The results of the research will be used in my dissertation for the MPhil/PhD. Hard copies of the final dissertation will be deposited at the library of Oxford Brookes University and King Fahad National Library in Saudi Arabia. The library of the Saudi Cultural Bureau in London will also be provided with hard and electronic copies of the research. I also intend to publish it and translate it into Arabic. A summary of the findings will be sent to you in electronic form.

Who is organising and funding the research?
I am an MPhil\PhD student at School of Law, Oxford Brookes University, I am being sponsored by the Ministry of Commerce and Industry in Riyadh. My supervisors are Professor Ilona Cheyne, School of Law, Oxford Brookes University, Headington Hill, Oxford, OX3 0BP, email: <icheyne@brookes.ac.uk> and Professor Peter Edge, School of Law, Oxford Brookes University, Headington Hill, Oxford, OX3 0BP, email: <P0072528@brookes.ac.uk>.

Who has reviewed the study?
The research has been approved by the University Research Ethics Committee, Oxford Brookes University.

Contact for Further Information
Ahmed Almuqham, School of Law, Faculty of Humanities and Social Sciences, Oxford Brookes University, Oxford, OX3 0BP, 12109240@brookes.ac.uk.
If you have any concerns about the way in which the study has been conducted, please contact the Chair of the University Research Ethics Committee on ethics@brookes.ac.uk.

Thank you for taking the time to read the information sheet.
Oxford, /9/2014.

OXFORD BROOKES UNIVERSITY
School of Law

Appendix III: Information Sheet for Judges of Commercial Court and The Court of Appeal

International Commercial Arbitration: A Comparative Study between Sharia, Saudi Arbitration Law 2012 and English Arbitration Act 1996

Ahmed Almuqham, 12109240@brookes.ac.uk, mobile: 07442-261115.

You are being invited to take part in a research study. Before you decide whether or not to take part, it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully.

What is the purpose of the study?

This project seeks to explore a number of issues: the limits of the freedom of parties in international commercial arbitration; the role of national courts for the success of the process of international commercial arbitration in the light of Islamic Sharia and the SAL 2012; and the extent to which the scope of these two issues can be expanded in order to increase the efficiency of international commercial arbitration in Saudi Arabia through the study of previous UK case law in that field.

Why have I been invited to participate?

The judges of commercial courts and judges of the Court of Appeal are the official authority competent to hear all commercial disputes that involve an arbitration agreement according to the SAL 2012 and the Judiciary Law 2007. The SAL 2012 has not addressed or has only partially addressed some significant issues: the freedom of the arbitration parties concerning the arbitration agreement or the arbitral process; and the role that should be carried out by national courts in the arbitral process. Moreover, the perspectives of Sharia scholars towards these issues are different. You are invited because you are considered to be someone who has the final or semi-final decision in applying and interpreting the Arbitration Law 2012 in line with the provisions of Sharia. Your experience in this regard will provide an extremely valuable perspective.

Do I have to take part?

Taking part in the research is entirely voluntary. It is up to you to decide whether or not to take part. If you do decide to take part, you will be given this information sheet to keep and be asked to sign a consent form. If you decide to participate, you are still free to withdraw at any time and without giving a reason.

What will happen to me if I take part?

You will be invited to take part in a semi-structured interview lasting approximately sixty minutes. The date will be set for your convenience. The most likely way of carrying out this interview will be at your office or an agreed public venue in Riyadh. An outline of the interview will be available on request prior to the interview date. The interview will be audio recorded after obtaining your consent in conjunction with taking notes. Alternatively, only written notes will be taken if you would prefer that. A transcript of the interview will be sent to you for accuracy checking.

What are the possible benefits of taking part?

There are no direct benefits to participants. However, in Sharia and the SAL 2012, the freedom of the parties in international commercial arbitration and the role of commercial courts towards the arbitral process are two of the most significant issues that have created and still create a lot of discussion amongst academics, in particular, outside Saudi Arabia. This is due to a number of reasons: the SAL 2012 does not address these or only does so partially; the perspectives of Sharia scholars towards these issues are different; and there is a lack of published court decisions regarding arbitration in Saudi Arabia. Your participation in your official capacity as someone concerned with the application of the SAL 2012, without prejudice to the provisions of Sharia, will provide for a more precise discussion of those issues.

OXFORD BROOKES UNIVERSITY
School of Law

Will what I say in this study be kept confidential?
All information collected from you will be kept strictly confidential (subject to legal limitations). If you would prefer your name not to be mentioned, privacy and anonymity will be ensured in the collection, storage and publication of research material. Any reference to your comments in the interview will be only to job title (judge) along with the name of the court where you work. However, as the sample size of the potential group of participants is small, others might be able to guess your identity as a consequence. Data generated by the study will be retained in accordance with the University's policy on Academic Integrity and kept securely in paper or/and electronic form for a period of ten years after the completion of the research project. Data will be stored on lap-top and will be security-code encrypted and stored in a safe place.

What should I do if I want to take part?
You should 'opt in' to the study by signing the consent form at the end of this document, and returning it to me at 12109240@brookes.ac.uk

What will happen to the results of the research study?
The results of the research will be used in my dissertation for the MPhil/PhD. Hard copies of the final dissertation will be deposited at the library of Oxford Brookes University and King Fahad National Library in Saudi Arabia. The library of the Saudi Cultural Bureau in London will also be provided with hard and electronic copies of the research. I also intend to publish it and translate it into Arabic. A summary of the findings will be sent to you in electronic form.

Who is organising and funding the research?
I am an MPhil\PhD student at School of Law, Oxford Brookes University, I am being sponsored by the Ministry of Commerce and Industry in Riyadh. My supervisors are Professor Ilona Cheyne, School of Law, Oxford Brookes University, Headington Hill, Oxford, OX3 0BP, email: <icheyne@brookes.ac.uk> and Professor Peter Edge, School of Law, Oxford Brookes University, Headington Hill, Oxford, OX3 0BP, email: <P0072528@brookes.ac.uk>.

Who has reviewed the study?
The research has been approved by the University Research Ethics Committee, Oxford Brookes University.

Contact for Further Information
Ahmed Almuqham, School of Law, Faculty of Humanities and Social Sciences, Oxford Brookes University, Oxford, OX3 0BP, 12109240@brookes.ac.uk.
If you have any concerns about the way in which the study has been conducted, please contact the Chair of the University Research Ethics Committee on ethics@brookes.ac.uk.

Thank you for taking the time to read the information sheet.
Oxford, /9/2014.

OXFORD BROOKES UNIVERSITY
School of Law

Appendix IV: Consent Form of Members of Senior Scholars Council

Full title of Project: International Commercial Arbitration: A Comparative Study between Sharia, Saudi Arbitration Law 2012 and English Arbitration Act 1996.

Name, position and contact address of Principal Investigator: Ahmed Almuqham,

MPhil/PhD student at Oxford Brookes University, Faculty of Humanities and Social Sciences, School of Law, Oxford, Mobile: + 44 7442261115, E-mail: 12109240@brookes.ac.uk

		Please initial box
1.	I confirm that I have read and understood the information sheet for the above study and have had the opportunity to ask questions.	☐
2.	I understand that my participation is voluntary and that I am free to withdraw at any time, without giving reason.	☐
3.	I agree to take part in the above study.	☐

		Please tick box Yes	No
4.	I agree to the interview being audio recorded	☐	☐
6.	I agree to the use of anonymised quotes in publications	☐	☐
7.	I agree to reference to my identity in the interview and the use of quotes in publications with or without reference to my name.	☐	☐
8.	I agree that my data gathered in this study may be stored (after it has been anonymised) in a specialist data centre and may be used for future research.	☐	☐

Name of Participant	Date	Signature
Name of Researcher	Date	Signature

OXFORD BROOKES UNIVERSITY
School of Law

Appendix V: Consent Form of Judges of Commercial Court and The Court of Appeal

Full title of Project: International Commercial Arbitration: A Comparative Study between Sharia, Saudi Arbitration Law 2012 and English Arbitration Act 1996.

Name, position and contact address of Principal Investigator: Ahmed Almuqham, MPhil/PhD student at Oxford Brookes University, Faculty of Humanities and Social Sciences, School of Law, Oxford, Mobile: + 44 7442261115, E-mail: 12109240@brookes.ac.uk

Please initial box

1. I confirm that I have read and understand the information sheet for the above study and have had the opportunity to ask questions. ☐
2. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving reason. ☐
3. I agree to take part in the above study. ☐
4. I understand that the sample size of the potential group of participants is small and others might be able to guess my identity as a consequence. ☐

	Please tick box Yes	No
5. I agree to the interview being audio recorded	☐	☐
6. I agree to the use of anonymised quotes in publications	☐	☐
7. I agree to reference to my identity in the interview and the use of quotes in publications with or without reference to my name.	☐	☐
8. I agree that my data gathered in this study may be stored (after it has been anonymised) in a specialist data centre and may be used for future research.	☐	☐

Name of Participant	Date	Signature
Name of Researcher	Date	Signature

AppendixVI: Certified Translation of Saudi Arbitration Law 2012

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

الرقم: م/ ٣٤
التاريخ: ٢٤ / ٥ / ١٤٣٣هـ
المرفقات:

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
R.M.NO. 450

نشهد بأن النص المترجم هو ترجمة صادقة
صحيحة لنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

نظـــام التحكيـــم

الباب الأول

أحكام عامة

المادة الأولى:

تدل العبارات الآتية الواردة في هذا النظام على المعاني الموضحة أمامها، ما لم يقتض السياق خلاف ذلك:

١- **اتفاق التحكيم:** هو اتفاق بين طرفين أو أكثر على أن يحيلا إلى التحكيم جميع أو بعض المنازعات المحددة التي نشأت أو قد تنشأ بينهما في شأن علاقة نظامية محددة، تعاقدية كانت أم غير تعاقدية، سواءً أكان اتفاق التحكيم في صورة شرط تحكيم وارد في عقد، أم في صورة مشارطة تحكيم مستقلة.

٢- **هيئة التحكيم:** هي المحكم الفرد أو الفريق من المحكمين، الذي يفصل في النزاع المحال إلى التحكيم.

٣- **المحكمة المختصة:** هي المحكمة صاحبة الولاية نظاماً بالفصل في المنازعات التي اتفق على التحكيم فيها.

المادة الثانية:

مع عدم الإخلال بأحكام الشريعة الإسلامية وأحكام الاتفاقيات الدولية التي تكون المملكة طرفاً فيها؛ تسري أحكام هذا النظام على كل تحكيم، أياً كانت طبيعة العلاقة النظامية التي يدور حولها النزاع، إذا جرى هذا التحكيم في المملكة، أو كان تحكيماً تجارياً دولياً يجرى في الخارج، واتفق طرفاه على إخضاعه لأحكام هذا النظام.

Appendix: VI

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

الرقم: _____
التاريخ: / / ١٤هـ
المرفقات: _____

ولا تسري أحكام هذا النظام على المنازعات المتعلقة بالأحوال الشخصية، والمسائل التي لا يجوز فيها الصلح.

المادة الثالثة:

يكون التحكيم دولياً في حكم هذا النظام إذا كان موضوعه نزاعاً يتعلق بالتجارة الدولية، وذلك في الأحوال الآتية:

١- إذا كان المركز الرئيس لأعمال كل من طرفي التحكيم يقع في أكثر من دولة وقت إبرام اتفاق التحكيم، فإذا كان لأحد الطرفين عدة مراكز للأعمال فالعبرة بالمركز الأكثر ارتباطاً بموضوع النزاع، وإذا لم يكن لأحد طرفي التحكيم أو كليهما مركز أعمال محدد فالعبرة بمحل إقامته المعتاد.

٢- إذا كان المركز الرئيس لأعمال كل من طرفي التحكيم يقع في الدولة نفسها وقت إبرام اتفاق التحكيم، وكان أحد الأماكن الآتي بيانها واقعاً خارج هذه الدولة:

أ- مكان إجراء التحكيم كما عيّنه اتفاق التحكيم، أو أشار إلى كيفية تعيينه.

ب- مكان تنفيذ جانب جوهري من الالتزامات الناشئة من العلاقة التجارية بين الطرفين.

ج- المكان الأكثر ارتباطاً بموضوع النزاع.

٣- إذا اتفق طرفا التحكيم على اللجوء إلى منظمة، أو هيئة تحكيم دائمة، أو مركز للتحكيم يوجد مقره خارج المملكة.

٤- إذا كان موضوع النزاع الذي يشمله اتفاق التحكيم يرتبط بأكثر من دولة.

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيد
ترخيص رقم ١٣٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R NO. 450

نشهد بأن النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

الرقم: _____
التاريخ: / / ١٤هـ
المرفقات: _____

المادة الرابعة:

في الأحوال التي يجيز فيها هذا النظام لطرفي التحكيم اختيار الإجراء الواجب الاتباع في مسألة معينة، فإن ذلك يضمن حقهما في الترخيص للغير في اختيار هذا الإجراء، ويعد من الغير في هذا الشأن كل فرد، أو هيئة، أو منظمة، أو مركز للتحكيم في المملكة العربية السعودية، أو في خارجها.

المادة الخامسة:

إذا اتفق طرفا التحكيم على إخضاع العلاقة بينهما لأحكام أي وثيقة (عقد نموذجي، أو اتفاقية دولية أو غيرهما)، وجب العمل بأحكام هذه الوثيقة بما تشمله من أحكام خاصة بالتحكيم، وذلك بما لا يخالف أحكام الشريعة الإسلامية.

المادة السادسة:

١- إذا لم يكن هناك اتفاق خاص بين طرفي التحكيم في شأن الإبلاغات فيتم تسليم الإبلاغ إلى المرسل إليه شخصيًا - أو من ينوب عنه - أو إرساله إلى عنوانه البريدي المحدد في العقد محل المنازعة، أو المحدد في مشارطة التحكيم، أو في الوثيقة المنظمة للعلاقة التي يتناولها التحكيم.

٢- إذا تعذر تسليم الإبلاغ إلى المرسل إليه وفقاً للفقرة (١)؛ يعد التسليم قد تم إذا كان الإبلاغ بكتاب مسجل إلى آخر مقر عمل، أو محل إقامة معتاد، أو عنوان بريدي معروف للمرسل إليه.

٣- لا تسري أحكام هذه المادة على الإبلاغات القضائية الخاصة ببطلان حكم التحكيم أمام المحاكم.

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

نشهد بان النص المترجم هو ترجمة صادقة صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED TEXT IS A FAIR AND ACCURATE TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

المادة السابعة:

إذا استمر أحد طرفي التحكيم في إجراءات التحكيم - مع علمه بوقوع مخالفة لحكم من أحكام هذا النظام مما يجوز الاتفاق على مخالفته أو لشرط في اتفاق التحكيم - ولم يقدم اعتراضاً على هذه المخالفة في الميعاد المتفق عليه، أو خلال ثلاثين يوماً من علمه بوقوع المخالفة عند عدم الاتفاق، عد ذلك تنازلاً منه عن حقه في الاعتراض.

المادة الثامنة:

١- يكون الاختصاص بنظر دعوى بطلان حكم التحكيم والمسائل التي يحيلها هذا النظام للمحكمة المختصة معقوداً لمحكمة الاستئناف المختصة أصلاً بنظر النزاع.

٢- إذا كان التحكيم تجارياً دولياً سواء جرى بالمملكة أم خارجها، فيكون الاختصاص لمحكمة الاستئناف المختصة أصلاً بنظر النزاع في مدينة الرياض ما لم يتفق طرفا التحكيم على محكمة استئناف أخرى في المملكة.

الباب الثاني

اتفاق التحكيم

المادة التاسعة:

١- يجوز أن يكون اتفاق التحكيم سابقاً على قيام النزاع سواء أكان مستقلاً بذاته، أم ورد في عقد معين.

كما يجوز أن يكون اتفاق التحكيم لاحقاً لقيام النزاع، وإن كانت قد أقيمت في شأنه دعوى أمام المحكمة المختصة، وفي هذه الحالة يجب أن يحدد الاتفاق المسائل التي يشملها التحكيم، وإلا كان الاتفاق باطلاً.

٢- يجب أن يكون اتفاق التحكيم مكتوباً، وإلا كان باطلاً.

نشهد بان النص المترجم هو ترجمة صادقة صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED TEXT IS A FAIR AND ACCURATE TRANSLATION FOR THE TEXT ATTACHED w

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

بسم الله الرحمن الرحيم

الرقم :
التاريخ : / / ١٤هـ
المرفقات :

٣- يكون اتفاق التحكيم مكتوباً إذا تضمنه محرر صادر من طرفي التحكيم، أو إذا تضمنه ما تبادلاه من مراسلات موثقة، أو برقيات، أو غيرها من وسائل الاتصال الإلكترونية، أو المكتوبة. وتعد الإشارة في عقد ما، أو الإحالة فيه إلى مستند يشتمل على شرط للتحكيم، بمثابة اتفاق تحكيم. كما يُعدّ في حكم اتفاق التحكيم المكتوب كل إحالة في العقد إلى أحكام عقد نموذجي، أو اتفاقية دولية، أو أي وثيقة أخرى تتضمن شرط تحكيم إذا كانت الإحالة واضحة في اعتبار هذا الشرط جزءاً من العقد.

المادة العاشرة:

١- لا يصح الاتفاق على التحكيم إلا ممن يملك التصرف في حقوقه سواء أكان شخصاً طبيعيًا - أو من يمثله - أم شخصاً اعتباريًا.

٢- لا يجوز للجهات الحكومية الاتفاق على التحكيم إلا بعد موافقة رئيس مجلس الوزراء، ما لم يرد نص نظامي خاص يجيز ذلك.

المادة الحادية عشرة:

١- يجب على المحكمة التي يرفع إليها نزاع يوجد في شأنه اتفاق تحكيم أن تحكم بعدم جواز نظر الدعوى إذا دفع المدعى عليه بذلك قبل أي طلب أو دفاع في الدعوى.

٢- لا يحول رفع الدعوى المشار إليها في الفقرة السابقة دون البدء في إجراءات التحكيم، أو الاستمرار فيها، أو إصدار حكم التحكيم.

المادة الثانية عشرة:

مع مراعاة ما ورد في الفقرة (١) من المادة (التاسعة) من هذا النظام؛ إذا تم الاتفاق على التحكيم أثناء نظر النزاع أمام المحكمة المختصة، وجب عليها أن تقرر إحالة النزاع إلى التحكيم.

نشهد بأن النص المرفق هو ترجمة دقيقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

الرقم :
التاريخ : / / ١٤هـ
المرفقات :

الباب الثالث

هيئة التحكيم

المادة الثالثة عشرة:

تشكل هيئة التحكيم من محكم واحد أو أكثر، على أن يكون العدد فردياً وإلا كان التحكيم باطلاً.

المادة الرابعة عشرة:

يشترط في المحكم ما يأتي:

١- أن يكون كامل الأهلية.

٢- أن يكون حسن السيرة والسلوك.

٣- أن يكون حاصلاً على الأقل على شهادة جامعية في العلوم الشرعية أو النظامية، وإذا كانت هيئة التحكيم مكونة من أكثر من محكم فيكتفى توافر هذا الشرط في رئيسها.

المادة الخامسة عشرة:

١- لطرفي التحكيم الاتفاق على اختيار المحكمين، فإذا لم يتفقا اتبع ما يأتي:

أ- إذا كانت هيئة التحكيم مشكلة من محكم واحد تولت المحكمة المختصة اختياره.

ب- إذا كانت هيئة التحكيم مشكلة من ثلاثة محكمين اختار كل طرف محكماً عنه، ثم يتفق المحكمان على اختيار المحكم الثالث، فإذا لم يعين أحد الطرفين محكمه خلال خمسة عشر يوماً التالية لتسلمه طلباً بذلك من الطرف الآخر، أو إذا لم يتفق المحكمان المعينان على اختيار المحكم الثالث خلال خمسة عشر يوماً التالية لتاريخ تعيين آخرهما ؛ تولت المحكمة المختصة اختياره بناءً على طلب من يهمه التعجيل، وذلك خلال خمسة عشر يوماً من تاريخ تقديم الطلب، ويكون

نشهد بأن النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

الرقم :
التاريخ : / / ١٤هـ
المرفقات :

للمحكم الذي اختاره المحكمان المعينان، أو الذي اختارته المحكمة المختصة رئاسة هيئة التحكيم، وتسري هذه الأحكام في حالة تشكيل هيئة التحكيم من أكثر من ثلاثة محكمين.

٢- إذا لم يتفق طرفا التحكيم على إجراءات اختيار المحكمين، أو خالفها أحد الطرفين، أو لم يتفق المحكمان المعينان على أمر مما يلزم اتفاقهما عليه، أو إذا تخلف الغير عن أداء ما عُهد به إليه في هذا الشأن، تولت المحكمة المختصة - بناءً على طلب من يهمه التعجيل - القيام بالإجراء، أو بالعمل المطلوب، ما لم ينص في الاتفاق على كيفية أخرى لإتمام هذا الإجراء أو العمل.

٣- تراعي المحكمة المختصة في المحكم الذي تختاره الشروط التي نص عليها اتفاق الطرفين، وتلك الشروط التي يتطلبها هذا النظام، وتُصدر قرارها باختيار المحكم خلال ثلاثين يوماً من تاريخ تقديم الطلب.

٤- مع عدم الإخلال بأحكام المادتين (التاسعة والاربعين) و(الخمسين) من هذا النظام، يكون قرار المحكمة المختصة بتعيين المحكم وفقاً للفقرتين (١ و ٢) من هذه المادة غير قابل للطعن فيه استقلالاً بأي طريق من طرق الطعن.

المادة السادسة عشرة:

١- يجب ألا يكون للمحكم مصلحة في النزاع، وعليه - منذ تعيينه وطوال إجراءات التحكيم - أن يصرح - كتابةً - لطرفي التحكيم بكل الظروف التي من شأنها أن تُثير شكوكا لها ما يسوغها حول حياده واستقلاله، إلا إذا كان قد سبق له أن أحاطهما علماً بها.

نشهد بان النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED H

Appendix: VI

مكتب يار
لصاحبه د/ا-
ICE
ANSLATION
-50

الرقم :
التاريخ : / / ١٤هـ
المرفقات :

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

٢- يكون المحكم ممنوعاً من النظر في الدعوى وسماعها - ولو لم يطلب ذلك أحد طرفي التحكيم - في الحالات نفسها التي يُمنع فيها القاضي.

٣- لا يجوز ردّ المحكم إلا إذا قامت ظروف تثير شكوكاً جدية حول حياده أو استقلاله، أو إذا لم يكن حائزاً لمؤهلات اتفق عليها طرفا التحكيم، وذلك بما لا يخل بما ورد في المادة (الرابعة عشرة) من هذا النظام.

٤- لا يجوز لأي من طرفي التحكيم طلب ردّ المحكم الذي عينه أو اشترك في تعيينه إلا لأسباب اتضحت بعد أن تم تعيين هذا المحكم.

المادة السابعة عشرة:

١- إذا لم يكن هناك اتفاق بين طرفي التحكيم حول إجراءات ردّ المحكم، يقدم طلب الرد - كتابةً - إلى هيئة التحكيم مبيناً فيه أسباب الردّ خلال خمسة أيام من تاريخ علم طالب الردّ بتشكيل الهيئة، أو بالظروف المسوغة للرد، فإذا لم يتنح المحكم المطلوب ردّه، أو لم يوافق الطرف الآخر على طلب الردّ خلال خمسة أيام من تاريخ تقديمه ؛ فعلى هيئة التحكيم أن تبت فيه خلال (خمسة عشر) يوماً من تاريخ تسلمه، ولطالب الرد في حالة رفض طلبه التقدم به إلى المحكمة المختصة خلال (ثلاثين) يوماً، ويكون حكمها في ذلك غير قابل للطعن بأي طريق من طرق الطعن.

٢- لا يُقبل طلب الردّ ممن سبق له تقديم طلب بردّ المحكم نفسه في التحكيم نفسه، للأسباب ذاتها.

٣- يترتب على تقديم طلب الردّ أمام هيئة التحكيم وقف إجراءات التحكيم، ولا يترتب على الطعن في حكم هيئة التحكيم الصادر برفض طلب الرد وقف إجراءات التحكيم.

نشهد بأن النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

الرقم :
التاريخ : / / ١٤هـ
المرفقات :

٤- إذا حُكم بردّ المحكم - سواء من هيئة التحكيم، أم من المحكمة المختصة عند نظر الطعن - ترتب على ذلك اعتبار ما يكون قد تم من إجراءات التحكيم - بما في ذلك حكم التحكيم - كأن لم يكن.

المادة الثامنة عشرة:

١- إذا تعذر على المحكم أداء مهمته، أو لم يباشرها، أو انقطع عن أدائها بما يؤدي إلى تأخير لا مسوغ له في إجراءات التحكيم، ولم يتنحّ، ولم يتفق طرفا التحكيم على عزله، جاز للمحكمة المختصة عزله بناءً على طلب أي من الطرفين، بقرار غير قابل للطعن بأي طريق من طرق الطعن.

٢- ما لم يكن المحكم معيناً من المحكمة المختصة، فإنه لا يُعزل إلا باتفاق طرفي التحكيم، دون إخلال بما ورد في الفقرة (١) من هذه المادة، وللمعزول المطالبة بالتعويض إن لم يكن العزل قد حصل بسبب منه.

المادة التاسعة عشرة:

إذا انتهت مهمة المحكم بوفاته، أو بردّه، أو عزله، أو تنحّيه، أو عجزه، أو لأي سبب آخر، وجب تعيين بديل له طبقا للإجراءات التي اتبعت في اختيار المحكم الذي انتهت مهمته.

المادة العشرون:

١- تفصل هيئة التحكيم في الدفوع المتعلقة بعدم اختصاصها بما في ذلك الدفوع المبنيّة على عدم وجود اتفاق تحكيم، أو سقوطه، أو بطلانه، أو عدم شموله لموضوع النزاع.

٢- يجب إبداء الدفوع بعدم اختصاص هيئة التحكيم وفقاً للمواعيد المشار إليها في الفقرة (٢) من المادة (الثلاثين) من هذا النظام.

نشهد بان النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

ولا يترتب على قيام أحد طرفي التحكيم بتعيين محكم أو الاشتراك في تعيينه سقوط حقه في تقديم أي من هذه الدفوع. أما الدفع بعدم شمول اتفاق التحكيم لما يثيره الطرف الآخر من مسائل أثناء نظر النزاع فيجب إبداؤه فوراً وإلا سقط الحق فيه. ويجوز في جميع الأحوال أن تقبل هيئة التحكيم الدفع المتأخر إذا رأت أن التأخير كان لسبب مقبول.

٣- تفصل هيئة التحكيم في الدفوع المشار إليها في الفقرة (١) من هذه المادة قبل الفصل في الموضوع، ولها أن تضمها إلى الموضوع لتفصل فيهما معاً، فإذا قضت برفض الدفع فلا يجوز الطعن به إلا بطريق رفع دعوى بطلان حكم التحكيم المنهي للخصومة كلها وفقا للمادة (الرابعة والخمسين) من هذا النظام.

المادة الحادية والعشرون:

يعد شرط التحكيم الوارد في أحد العقود اتفاقاً مستقلاً عن شروط العقد الأخرى. ولا يترتب على بطلان العقد - الذي يتضمن شرط التحكيم - أو فسخه أو إنهائه بطلان شرط التحكيم الذي يتضمنه إذا كان هذا الشرط صحيحاً في ذاته.

المادة الثانية والعشرون:

١- للمحكمة المختصة أن تأمر باتخاذ تدابير مؤقتة أو تحفظية بناءً على طلب أحد طرفي التحكيم قبل البدء في إجراءات التحكيم أو بناءً على طلب هيئة التحكيم أثناء سير إجراءات التحكيم، ويجوز الرجوع عن تلك الإجراءات بالطريقة نفسها، ما لم يتفق طرفا التحكيم على خلاف ذلك.

٢- يجوز للمحكمة المختصة بناءً على طلب هيئة التحكيم الأمر بالإنابة القضائية.

نشهد بأن النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED w

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

الرقم :
التاريخ : / / ١٤هـ
المرفقات :

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

٣- يجوز لهيئة التحكيم أن تطلب من الجهة المعنية مساعدتها على إجراءات التحكيم وفق ما تراه هذه الهيئة مناسبا لحسن سير التحكيم مثل: دعوة شاهد، أو خبير، أو الأمر بإحضار مستند، أو صورة منه، أو الاطلاع عليه، أو غير ذلك، مع عدم الإخلال بحق هيئة التحكيم بإجراء ذلك استقلالاً.

المادة الثالثة والعشرون:

١- يجوز لطرفي التحكيم الاتفاق على أن يكون لهيئة التحكيم - بناءً على طلب أحدهما - أن تأمر أيًا منهما باتخاذ ما تراه من تدابير مؤقتة أو تحفظية تقتضيها طبيعة النزاع. ولهيئة التحكيم أن تلزم الطرف الذي يطلب اتخاذ تلك التدابير تقديم ضمان مالي مناسب لتنفيذ هذا الإجراء.

٢- إذا تخلف من صدر عليه الأمر عن تنفيذه جاز لهيئة التحكيم بناءً على طلب الطرف الآخر أن تأذن لهذا الطرف في اتخاذ الإجراءات اللازمة لتنفيذه، وذلك دون إخلال بحق الهيئة أو الطرف الآخر في أن يطلب من الجهة المختصة تكليف من صدر عليه الأمر بتنفيذه.

المادة الرابعة والعشرون:

١- يجب عند اختيار المحكم إبرام عقد مستقل معه توضح فيه أتعابه، وتودع نسخة من العقد لدى الجهة التي تحددها اللائحة التنفيذية لهذا النظام.

٢- إذا لم يتم الاتفاق بين طرفي التحكيم والمحكمين على تحديد أتعاب المحكمين، فتحددها المحكمة المختصة التي يجب عليها أن تفصل فيه بقرار غير قابل للطعن بأي طريق من طرق الطعن. وإذا كان تعيين المحكمين من قبل المحكمة المختصة وجب معه تحديد أتعاب المحكمين.

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

نشهد بأن النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

الرقم: ــــــــــــ
التاريخ: / / ١٤هـ
المرفقات: ــــــــــــ

الباب الرابع
إجراءات التحكيم

المادة الخامسة والعشرون:

١- لطرفي التحكيم الاتفاق على الإجراءات التي تتبعها هيئة التحكيم، بما في ذلك حقهما في إخضاع هذه الإجراءات للقواعد النافذة في أي منظمة، أو هيئة، أو مركز تحكيم في المملكة أو خارجها، بشرط عدم مخالفتها لأحكام الشريعة الإسلامية.

٢- إذا لم يوجد مثل هذا الاتفاق كان لهيئة التحكيم - مع مراعاة أحكام الشريعة الإسلامية، وأحكام هذا النظام - أن تختار إجراءات التحكيم التي تراها مناسبة.

المادة السادسة والعشرون:

تبدأ إجراءات التحكيم من اليوم الذي يتسلم فيه أحد طرفي التحكيم طلب التحكيم من الطرف الآخر، ما لم يتفق طرفا التحكيم على غير ذلك.

المادة السابعة والعشرون:

يعامل طرفا التحكيم على قدم المساواة، وتهيأ لكل منهما الفرصة الكاملة والمتكافئة لعرض دعواه أو دفاعه.

المادة الثامنة والعشرون:

لطرفي التحكيم الاتفاق على مكان التحكيم في المملكة أو خارجها، فإذا لم يوجد اتفاق عينت هيئة التحكيم مكان التحكيم مع مراعاة ظروف الدعوى، وملاءمة المكان لطرفيها، ولا يخل ذلك بسلطة هيئة التحكيم في أن تجتمع في أي مكان تراه مناسبا للمداولة بين أعضائها، ولسماع أقوال الشهود، أو الخبراء، أو طرفي النزاع، أو لمعاينة محل النزاع أو لفحص المستندات، أو الاطلاع عليها.

نشهد بان النص المترجم هو ترجمة للمادة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED w

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

المرفقات: ــــــــــــــــ

المرفقات: ــــــــــــــــ

التاريخ: / / ١٤هـ

المادة التاسعة والعشرون:

١- يجرى التحكيم باللغة العربية ما لم تقرر هيئة التحكيم أو يتفق طرفا التحكيم على لغة أو لغات أخرى، ويسري حكم الاتفاق أو القرار على لغة البيانات والمذكرات المكتوبة، والمرافعات الشفهية، وكذلك على كل قرار تتخذه هيئة التحكيم، أو رسالة توجهها، أو حكم تصدره، ما لم ينص اتفاق الطرفين أو قرار هيئة التحكيم على غير ذلك.

٢- لهيئة التحكيم أن تقرر أن يرافق كل الوثائق المكتوبة أو بعضها التي تقدم في الدعوى ترجمة إلى اللغة أو اللغات المستعملة في التحكيم، وفي حالة تعدد هذه اللغات يجوز للهيئة قصر الترجمة على بعضها.

المادة الثلاثون:

١- يرسل المدعي خلال الميعاد المتفق عليه بين الطرفين، أو الذي تعينه هيئة التحكيم إلى المدعى عليه وإلى كل واحد من المحكمين ؛ بياناً مكتوباً بدعواه، يشتمل على اسمه، وعنوانه، واسم المدعى عليه، وعنوانه، وشرح لوقائع الدعوى، وطلباته، وأسانيده، وكل أمر آخر يوجب اتفاق الطرفين ذكره في هذا البيان.

٢- يرسل المدعى عليه خلال الميعاد المتفق عليه بين الطرفين، أو الذي تعينه هيئة التحكيم إلى المدعي وإلى كل واحد من المحكمين ؛ جواباً مكتوباً بدفاعه رداً على ما جاء في بيان الدعوى، وله أن يضمن جوابه أي طلب متصل بموضوع النزاع، أو أن يتمسك بحق ناشئ منه بقصد الدفع بالمقاصة، وله ذلك ولو في مرحلة لاحقة من الإجراءات إذا رأت هيئة التحكيم أن الظروف تسوغ التأخير.

نشهد بان النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED w

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

٣- يجوز لكل واحد من الطرفين أن يرفق ببيان الدعوى أو بجوابه عليها - على حسب الأحوال - صوراً من الوثائق التي يستند إليها، وأن يشير إلى كل الوثائق أو بعضها، وأدلة الإثبات التي يعتزم تقديمها. ولا يُخل هذا بحق هيئة التحكيم في أي مرحلة كانت عليها الدعوى في طلب تقديم أصول المستندات أو الوثائق التي يستند إليها أي من طرفي الدعوى، أو صور منها.

المادة الحادية والثلاثون:

ترسل صورة مما يقدمه أحد الطرفين إلى هيئة التحكيم من مذكرات أو مستندات أو أوراق أخرى إلى الطرف الآخر، وكذلك ترسل إلى كل من الطرفين صورة من كل ما يقدم إلى الهيئة المذكورة من تقارير الخبراء والمستندات وغيرها من الأدلة التي يمكن أن تعتمد عليها هيئة التحكيم في إصدار حكمها.

المادة الثانية والثلاثون:

لكل من طرفي التحكيم تعديل طلباته - أو أوجه دفاعه - أو استكمالها خلال إجراءات التحكيم، ما لم تقرر هيئة التحكيم عدم قبول ذلك منعاً لتعطيل الفصل في النزاع.

المادة الثالثة والثلاثون:

١- تعقد هيئة التحكيم جلسات مرافعة لتمكين كل من الطرفين من شرح موضوع الدعوى وعرض حججه وأدلته ولها الاكتفاء بتقديم المذكرات والوثائق المكتوبة، ما لم يتفق طرفا التحكيم على غير ذلك.

٢- يجب إبلاغ طرفي التحكيم على عناوينهم الثابتة لدى هيئة التحكيم بموعد أي جلسة مرافعة شفهية، وموعد النطق بالحكم، وأي اجتماع لهيئة التحكيم لأغراض معاينة محل النزاع، أو ممتلكات أخرى، أو لفحص مستندات، وذلك قبل الانعقاد بوقت كاف.

نشهد بأن النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

٣- تدون هيئة التحكيم خلاصة ما يدور في الجلسة في محضر يوقعه الشهود أو الخبراء والحاضرون من الطرفين، أو وكلائهم؛ وأعضاء هيئة التحكيم ؛ وتسلم صورة منه إلى كل من الطرفين، ما لم يتفق طرفا التحكيم على غير ذلك.

المادة الرابعة والثلاثون:

١- إذا لم يقدم المدعي - دون عذر مقبول - بياناً مكتوباً بدعواه وفقا للفقرة (١) من المادة (الثلاثين) من هذا النظام، وجب على هيئة التحكيم إنهاء إجراءات التحكيم، ما لم يتفق طرفا التحكيم على غير ذلك.

٢- إذا لم يقدم المدعى عليه جواباً مكتوباً بدفاعه وفقاً للفقرة (٢) من المادة (الثلاثين) من هذا النظام، وجب على هيئة التحكيم الاستمرار في إجراءات التحكيم ما لم يتفق طرفا التحكيم على غير ذلك.

المادة الخامسة والثلاثون:

إذا تخلف أحد الطرفين عن حضور إحدى الجلسات - بعد تبليغه - أو عن تقديم ما طلب منه من مستندات جاز لهيئة التحكيم الاستمرار في إجراءات التحكيم، وإصدار حكم في النزاع استناداً إلى عناصر الإثبات الموجودة أمامها.

المادة السادسة والثلاثون:

١- لهيئة التحكيم تعيين خبير أو أكثر، لتقديم تقرير مكتوب أو شفهي يثبت في محضر الجلسة في شأن مسائل معينة تحددها بقرار منها، وتبلغ به كلاً من الطرفين ما لم يتفقا على غير ذلك.

٢- على كل من الطرفين أن يقدم إلى الخبير المعلومات المتعلقة بالنزاع، وأن يمكنه من معاينة وفحص ما يطلبه من وثائق أو سلع أو أموال أخرى متعلقة بالنزاع. وتفصل هيئة

نشهد بان النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

الرقم :
التاريخ : / / ١٤هـ
المرفقات :

التحكيم في كل نزاع يقوم بين الخبير وأحد الطرفين في هذا الشأن بقرار غير قابل للطعن بأي طريق من طرق الطعن.

٣- ترسل هيئة التحكيم صورة من تقرير الخبير بمجرد إيداعه لديها إلى كل من الطرفين، مع إتاحة الفرصة له لإبداء رأيه فيه. ولكليهما الحق في الاطلاع على الوثائق التي استند إليها الخبير في تقريره وفحصها. ويصدر الخبير تقريره النهائي بعد الاطلاع على ما أبداه طرفا التحكيم حوله.

٤- لهيئة التحكيم بعد تقديم تقرير الخبير أن تقرر من تلقاء نفسها، أو بناءً على طلب أحد طرفي التحكيم، عقد جلسة لسماع أقوال الخبير، مع إتاحة الفرصة للطرفين لسماعه ومناقشته في شأن ما ورد في تقريره.

المادة السابعة والثلاثون:

إذا عرضت خلال إجراءات التحكيم مسألة تخرج عن ولاية هيئة التحكيم، أو طعن بالتزوير في مستند قدم لها، أو اتخذت إجراءات جنائية عن تزويره، أو عن فعل جنائي آخر؛ كان لهيئة التحكيم الاستمرار في نظر موضوع النزاع إذا رأت أن الفصل في هذه المسألة، أو في تزوير المستند أو في الفعل الجنائي الآخر، ليس لازماً للفصل في موضوع النزاع، وإلا أوقفت الإجراءات حتى يصدر حكم نهائي في هذا الشأن، ويترتب على ذلك وقف سريان الميعاد المحدد لإصدار حكم التحكيم.

نشهد بان النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C R.NO. 450

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

الموضوع :
التاريخ : / / ١٤هـ
المرفقات :

الباب الخامس

إجراءات الفصل في الدعوى التحكيمية

المادة الثامنة والثلاثون:

١- مع مراعاة عدم مخالفة أحكام الشريعة الإسلامية والنظام العام بالمملكة، على هيئة التحكيم أثناء نظر النزاع الآتي:

أ- تطبيق القواعد التي يتفق عليها طرفا التحكيم على موضوع النزاع، وإذا اتفقا على تطبيق نظام دولة معينة اتبعت القواعد الموضوعية فيه دون القواعد الخاصة بتنازع القوانين، ما لم يتفق على غير ذلك.

ب- إذا لم يتفق طرفا التحكيم على القواعد النظامية واجبة التطبيق على موضوع النزاع طبقت هيئة التحكيم القواعد الموضوعية في النظام الذي ترى أنه الأكثر اتصالاً بموضوع النزاع.

ج- يجب أن تراعي هيئة التحكيم عند الفصل في موضوع النزاع شروط العقد محل النزاع، وتأخذ في الاعتبار الأعراف الجارية في نوع المعاملة، والعادات المتبعة، وما جرى عليه التعامل بين الطرفين.

٢- إذا اتفق طرفا التحكيم صراحة على تفويض هيئة التحكيم بالصلح جاز لها أن تحكم به وفق مقتضى قواعد العدالة والإنصاف.

المادة التاسعة والثلاثون:

١- يصدر حكم هيئة التحكيم المشكلة من أكثر من محكم واحد بأغلبية أعضائها بعد مداولة سرية.

نشهد بأن النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

٢- إذا تشعبت آراء هيئة التحكيم ولم يكن ممكناً حصول الأغلبية فلهيئة التحكيم اختيار محكم مرجح خلال (١٥) يوماً من قرارها بعدم إمكان حصول الأغلبية وإلا عينت المحكمة المختصة محكماً مرجحاً.

٣- يجوز أن تصدر القرارات في المسائل الإجرائية من المحكم الذي يرأس الهيئة إذا صرح طرفا التحكيم بذلك كتابة، أو أذن له جميع أعضاء هيئة التحكيم ما لم يتفق طرفا التحكيم على غير ذلك.

٤- إن كانت هيئة التحكيم مفوضة بالصلح وجب أن يصدر الحكم به بالإجماع.

٥- لهيئة التحكيم أن تصدر أحكاماً وقتية أو في جزء من الطلبات، وذلك قبل إصدار الحكم المنهي للخصومة كلها، ما لم يتفق طرفا التحكيم على غير ذلك.

المادة الأربعون:

١- على هيئة التحكيم إصدار الحكم المنهي للخصومة كلها خلال الميعاد الذي اتفق عليه طرفا التحكيم، فإن لم يكن هناك اتفاق وجب أن يصدر الحكم خلال اثني عشر شهراً من تاريخ بدء إجراءات التحكيم.

٢- يجوز لهيئة التحكيم - في جميع الأحوال - أن تقرر زيادة مدة التحكيم على ألا تتجاوز هذه الزيادة ستة أشهر، ما لم يتفق طرفا التحكيم على مدة تزيد على ذلك.

٣- إذا لم يصدر حكم التحكيم خلال الميعاد المشار إليه في الفقرة السابقة، جاز لأي من طرفي التحكيم أن يطلب من المحكمة المختصة أن تصدر أمراً بتحديد مدة إضافية، أو بإنهاء إجراءات التحكيم، ولأي من الطرفين عندئذ رفع دعواه إلى المحكمة المختصة.

نشهد بان النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

٤- إذا عين محكم بدلاً من محكم وفقاً لأحكام هذا النظام، امتد الميعاد المحدد للحكم ثلاثين يوماً.

المادة الحادية والأربعون:

١- تنتهي إجراءات التحكيم بصدور الحكم المنهي للخصومة، أو بصدور قرار من هيئة التحكيم بإنهاء الإجراءات في الأحوال الآتية:

أ- إذا اتفق طرفا التحكيم على إنهاء التحكيم.

ب- إذا ترك المدعي خصومة التحكيم، ما لم تقرر هيئة التحكيم بناءً على طلب المدعى عليه أن له مصلحة جدية في استمرار الإجراءات حتى يحسم النزاع.

ج- إذا رأت هيئة التحكيم لأي سبب آخر عدم جدوى استمرار إجراءات التحكيم أو استحالته.

د- صدور أمر بإنهاء إجراءات التحكيم وفقاً لحكم الفقرة (١) من المادة (الرابعة والثلاثين) من هذا النظام.

٢- لا تنتهي إجراءات التحكيم بموت أحد طرفي التحكيم، أو فقد أهليته - ما لم يتفق من له صفة في النزاع مع الطرف الآخر على انتهائه - ولكن يمتد الميعاد المحدد للتحكيم ثلاثين يوماً، ما لم تقرر هيئة التحكيم تمديد المدة مدة مماثلة، أو يتفق طرفا التحكيم على غير ذلك.

٣- مع مراعاة أحكام المواد (التاسعة والأربعين) (والخمسين) (والحادية والخمسين) من هذا النظام، تنتهي مهمة هيئة التحكيم بانتهاء إجراءات التحكيم.

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

نشهد بأن النص المترجم هو ترجمة مماثلة صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED TEXT IS A FAIR AND ACCURATE TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

الرقم: _____
التاريخ: / / ١٤هـ
المرفقات: _____

المادة الثانية والأربعون:

١- يصدر حكم التحكيم كتابة ويكون مسبباً، ويوقعه المحكمون، وفي حالة تشكيل هيئة التحكيم من أكثر من محكم واحد يُكتفى بتوقيعات أغلبية المحكمين بشرط أن يثبت في محضر القضية أسباب عدم توقيع الأقلية.

٢- يجب أن يشتمل حكم التحكيم على تاريخ النطق به ومكان إصداره، وأسماء الخصوم، وعناوينهم، وأسماء المحكمين، وعناوينهم، وجنسياتهم، وصفاتهم، وملخص اتفاق التحكيم، وملخص لأقوال وطلبات طرفي التحكيم، ومرافعتهم، ومستنداتهم، وملخص تقرير الخبرة - إن وجد - ومنطوق الحكم، وتحديد أتعاب المحكمين، ونفقات التحكيم، وكيفية توزيعها بين الطرفين. دون إخلال بما قضت به المادة (الرابعة والعشرون) من هذا النظام.

المادة الثالثة والأربعون:

١- تُسلَّم هيئة التحكيم إلى كل من طرفي التحكيم صورة طبق الأصل من حكم التحكيم خلال خمسة عشر يوماً من تاريخ صدوره.

٢- لا يجوز نشر حكم التحكيم أو جزء منه إلا بموافقة طرفي التحكيم كتابة.

المادة الرابعة والأربعون:

تودع هيئة التحكيم أصل الحكم، أو صورة موقعة منه باللغة التي صدر بها لدى المحكمة المختصة وذلك خلال المدة المنصوص عليها في الفقرة (١) من المادة (الثالثة والأربعين) من هذا النظام، مع ترجمة باللغة العربية مصدق عليها من جهة معتمدة إذا كان صادراً بلغة أجنبية.

نشهد بأن النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمد
لصاحبه د/ أحمد عبدالرزاق الصيدار
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

الرقم: _____
التاريخ: / / ١٤هـ
المرفقات: _____

المادة الخامسة والاربعون:

إذا اتفق طرفا التحكيم خلال إجراءات التحكيم على تسوية تنهي النزاع، كان لهما أن يطلبا إثبات شروط التسوية أمام هيئة التحكيم؛ التي يجب عليها في هذه الحالة أن تصدر حكماً يتضمن شروط التسوية وينهي الإجراءات، ويكون لهذا الحكم ما لأحكام المُحكمين من قوة عند التنفيذ.

المادة السادسة والاربعون:

١- يجوز لكل واحد من طرفي التحكيم أن يطلب من هيئة التحكيم خلال الثلاثين يوماً التالية لتسلمه حكم التحكيم تفسير ما وقع في منطوقه من غموض. ويجب على طالب التفسير إبلاغ الطرف الآخر على عنوانه الموضح في حكم التحكيم بهذا الطلب قبل تقديمه لهيئة التحكيم.

٢- يصدر التفسير كتابةً خلال الثلاثين يوماً التالية لتاريخ تقديم طلب التفسير لهيئة التحكيم.

٣- يعد الحكم الصادر بالتفسير متمماً لحكم التحكيم الذي يفسره وتسري عليه أحكامه.

المادة السابعة والاربعون:

١- تتولى هيئة التحكيم تصحيح ما يقع في حكمها من أخطاء مادية بحتة كتابيةً أو حسابيةً، وذلك بقرار تصدره من تلقاء نفسها، أو بناءً على طلب أحد الخصوم. وتجري هيئة التحكيم التصحيح من غير مرافعة خلال خمسة عشر يوماً التالية لتاريخ صدور الحكم، أو لإيداع طلب التصحيح بحسب الأحوال.

٢- يصدر قرار التصحيح كتابةً من هيئة التحكيم، ويبلغ إلى طرفي التحكيم خلال خمسة عشر يوماً من تاريخ صدوره. وإذا تجاوزت هيئة التحكيم سلطتها في التصحيح جاز

نشهد بأن النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

بسم الله الرحمن الرحيم

الرقم :
التاريخ : ١٤هـ / /
المرفقات :

التمسك ببطلان هذا القرار بدعوى بطلان تسري عليها أحكام المادتين (الخمسين) ، (والحادية والخمسين) من هذا النظام.

المادة الثامنة والأربعون:

١- يجوز لكل من طرفي التحكيم ولو بعد انتهاء ميعاد التحكيم ، أن يطلب من هيئة التحكيم خلال الثلاثين يوماً التالية لتسلمه حكم التحكيم ؛ إصدار حكم تحكيم إضافي في طلبات قدمت خلال الإجراءات وأغفلها حكم التحكيم. ويجب إبلاغ الطرف الآخر على عنوانه الموضح في حكم التحكيم بهذا الطلب قبل تقديمه لهيئة التحكيم.

٢- تصدر هيئة التحكيم حكمها خلال ستين يوماً من تاريخ تقديم الطلب ، ويجوز لها مد هذا الميعاد ثلاثين يوماً أخرى إذا رأت ضرورة لذلك.

الباب السادس

بطلان حكم التحكيم

المادة التاسعة والأربعون:

لا تقبل أحكام التحكيم التي تصدر طبقا لأحكام هذا النظام الطعن فيها بأي طريق من طرق الطعن ، عدا رفع دعوى بطلان حكم التحكيم وفقا للأحكام المبينة في هذا النظام.

المادة الخمسون:

١- لا تقبل دعوى بطلان حكم التحكيم إلا في الأحوال الآتية:

أ- إذا لم يوجد اتفاق تحكيم أو كان هذا الاتفاق باطلاً، أو قابلاً للإبطال، أو سقط بانتهاء مدته.

ب- إذا كان أحد طرفي اتفاق التحكيم وقت إبرامه فاقد الأهلية، أو ناقصها، وفقاً للنظام الذي يحكم أهليته.

نشهد بان اللغة المترجم هو اللغة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

الرقم :
التاريخ : / / ١٤هـ
المرفقات :

ج- إذا تعذر على أحد طرفي التحكيم تقديم دفاعه بسبب عدم إبلاغه إبلاغاً صحيحاً بتعيين محكم أو بإجراءات التحكيم، أو لأي سبب آخر خارج عن إرادته.

د- إذا استبعد حكم التحكيم تطبيق أي من القواعد النظامية التي اتفق طرفا التحكيم على تطبيقها على موضوع النزاع.

هـ- إذا شكلت هيئة التحكيم أو عين المحكمون على وجه مخالف لهذا النظام، أو لاتفاق الطرفين.

و- إذا فصل حكم التحكيم في مسائل لا يشملها اتفاق التحكيم، ومع ذلك إذا أمكن فصل أجزاء الحكم الخاصة بالمسائل الخاضعة للتحكيم عن أجزائه الخاصة بالمسائل غير الخاضعة له، فلا يقع البطلان إلا على الأجزاء غير الخاضعة للتحكيم وحدها.

ز- إذا لم تراع هيئة التحكيم الشروط الواجب توافرها في الحكم على نحو أثر في مضمونه، أو استند الحكم على إجراءات تحكيم باطلة أثرت فيه.

٢- تقضي المحكمة المختصة التي تنظر دعوى البطلان من تلقاء نفسها ببطلان حكم التحكيم إذا تضمن ما يخالف أحكام الشريعة الإسلامية والنظام العام في المملكة، أو ما اتفق عليه طرفا التحكيم، أو إذا وجدت أن موضوع النزاع من المسائل التي لا يجوز التحكيم فيها بموجب هذا النظام.

٣- لا ينقضي اتفاق التحكيم بصدور حكم المحكمة المختصة ببطلان حكم التحكيم، ما لم يكن طرفا التحكيم قد اتفقا على ذلك، أو صدر حكم نص على إبطال اتفاق التحكيم.

٤- تنظر المحكمة المختصة في دعوى البطلان في الحالات المشار إليها في هذه المادة، دون أن يكون لها فحص وقائع وموضوع النزاع.

نشهد بأن النص المترجم هو ترجمة صادقة صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED TEXT IS A FAIR AND ACCURATE TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

الرقم :
التاريخ : / / ١٤هـ
المرفقات :

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

المادة الحادية والخمسون:

١- ترفع دعوى بطلان حكم التحكيم من أي من طرفيه خلال الستين يوماً التالية لتاريخ إبلاغ ذلك الطرف بالحكم. ولا يحول تنازل مدعي البطلان عن حقه في رفعها قبل صدور حكم التحكيم دون قبول الدعوى.

٢- إذا حكمت المحكمة المختصة بتأييد حكم التحكيم وجب عليها أن تأمر بتنفيذه، ويكون حكمها في ذلك غير قابل للطعن بأي طريق من طرق الطعن. أما إذا حكمت ببطلان حكم التحكيم، فيكون حكمها قابلاً للطعن خلال ثلاثين يوماً من اليوم التالي للتبليغ.

الباب السابع

حجية أحكام المحكمين وتنفيذها

المادة الثانية والخمسون:

مع مراعاة الأحكام المنصوص عليها في هذا النظام، يحوز حكم التحكيم الصادر طبقاً لهذا النظام حجية الأمر المقضي به، ويكون واجب النفاذ.

المادة الثالثة والخمسون:

تصدر المحكمة المختصة أو من تندبه، أمراً بتنفيذ حكم المحكمين. ويقدم طلب تنفيذ الحكم مرافقاً له الآتي:

١- أصل الحكم أو صورة مصدقة منه.

٢- صورة طبق الأصل من اتفاق التحكيم.

٣- ترجمة لحكم التحكيم إلى اللغة العربية مصدق عليها من جهة معتمدة، إذا كان صادراً بلغة أخرى.

نشهد بأن النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

الرقم :
التاريخ : ١٤٢٨/ / /
المرفقات : _____

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

٤- ما يدل على إيداع الحكم لدى المحكمة المختصة وفقاً للمادة (الرابعة والأربعين) من هذا النظام.

المادة الرابعة والخمسون:

لا يترتب على رفع دعوى البطلان وقف تنفيذ حكم التحكيم. ومع ذلك يجوز للمحكمة المختصة أن تأمر بوقف التنفيذ إذا طلب مدعي البطلان ذلك في صحيفة الدعوى، وكان الطلب مبنياً على أسباب جدية. وعلى المحكمة المختصة الفصل في طلب وقف التنفيذ خلال خمسة عشر يوماً من تاريخ تقديم الطلب. وإذا أمرت بوقف التنفيذ جاز لها أن تأمر بتقديم كفالة أو ضمان مالي، وعليها إذا أمرت بوقف التنفيذ الفصل في دعوى البطلان خلال مائة وثمانين يوماً من تاريخ صدور هذا الأمر.

المادة الخامسة والخمسون:

١- لا يقبل طلب تنفيذ حكم التحكيم إلا إذا انقضى ميعاد رفع دعوى بطلان الحكم.

٢- لا يجوز الأمر بتنفيذ حكم التحكيم وفقاً لهذا النظام إلا بعد التحقق من الآتي:

أ- أنه لا يتعارض مع حكم أو قرار صادر من محكمة أو لجنة أو هيئة لها ولاية الفصل في موضوع النزاع في المملكة العربية السعودية.

ب- أنه لا يتضمن ما يخالف أحكام الشريعة الإسلامية والنظام العام بالمملكة، وإذا أمكن تجزئة الحكم فيما يتضمنه من مخالفة، جاز الأمر بتنفيذ الجزء الباقي غير المخالف.

ج- أنه قد أبلغ للمحكوم عليه إبلاغاً صحيحاً.

٣- لا يجوز التظلم من الأمر الصادر بتنفيذ حكم التحكيم، أما الأمر الصادر برفض التنفيذ فيجوز التظلم منه إلى الجهة المختصة خلال ثلاثين يوماً من تاريخ صدوره.

نشهد بان النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED

Appendix: VI

مكتب يارا للترجمة المعتمدة
لصاحبه د/ أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

الرقم : _____
التاريخ : / / ١٤هـ
المرفقات : _____

بسم الله الرحمن الرحيم

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

الباب الثامن
أحكام ختامية

المادة السادسة والخمسون:

يصدر مجلس الوزراء اللائحة التنفيذية لهذا النظام.

المادة السابعة والخمسون:

يحل هذا النظام محل نظام التحكيم، الصادر بالمرسوم الملكي رقم (م/٤٦) وتاريخ ١٤٠٣/٧/١٢هـ.

المادة الثامنة والخمسون:

يعمل بهذا النظام بعد ثلاثين يوماً من تاريخ نشره في الجريدة الرسمية.

المملكة العربية السعودية
هيئة الخبراء بمجلس الوزراء

نشهد بان النص المترجم هو ترجمة صادقة
صحيحة للنص المرفق
WE CERTIFY THAT THE TRANSLATED
TEXT IS A FAIR AND ACCURATE
TRANSLATION FOR THE TEXT ATTACHED W

Kingdom of Saudi Arabia **Number:** **34/m**

Bureau of Experts at the Council of Ministers **Date:** **24/05/1433 H**

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 1010

Saudi Arbitration Law issued by the Royal Decree No. (34/m) dated 24/05/1433 H. (corresponding to 16/04/2012)

Part I - General Provisions

Article (1)

The following terms included in this law shall indicate the meanings shown below, unless the context requires otherwise:

1. Arbitration agreement: Is an agreement between two or more parties to submit to arbitration all or certain disputes which have arisen or which may arise between them regarding certain legal relationship, contractual or non-contractual, whether arbitration agreement is in the form of an arbitration clause in the contract, or in the form of an independent arbitral agreement.

2. Arbitral tribunal: Is the individual arbitrator or group of arbitrators, who rules/rule on the dispute referred to arbitration.

3. Arbitral Tribunal: Is the court having jurisdiction legally to adjudicate in disputes that have been agreed to be referred to arbitration.

Article (2)

Without prejudice to the provisions of Sharia and the provisions of international conventions in which the Kingdom is a party, the provisions of the present Law shall apply to every arbitration, whatever the nature of the legal relationship around which the dispute revolves, when such arbitration is conducted in the Kingdom, or when it is an international commercial arbitration conducted abroad, and its parties agree to subject it to the provisions of this Law. The provisions of this law shall not apply to disputes relating to personal status, and matters where compromise is not allowed.

Article (3)

Arbitration is international within the scope of this Law if the matter thereof relates to international trade as in the following cases:

1. If the respective head offices of the parties to the arbitration are situated in more than one country at the time the arbitral agreement is concluded. If either of the two parties has several business centres, the one most closely linked to the subject matter of the dispute shall count. Should either of the two parties or both of them not have specific business centre, then his usual place of abode shall count.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION

Kingdom of Saudi Arabia **Number:** **34/m**

Bureau of Experts at the Council of Ministers **Date:** **24/05/1433 H**

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبد الرزاق المهياني
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R. 460

2. If the respective head offices of the parties to arbitration are located in the same state at the time the arbitral agreement is concluded, and one of the following places is located outside such state:

a) The place designated as the seat of arbitration in the arbitral agreement, or whose manner of designation is referred to therein.

b) The place in which an essential part of the obligations arising from the commercial relationship between the parties are to be performed.

c) The place closely linked to the subject matter of the dispute.

3. If the parties to the arbitration agree to resort to an institution, permanent Arbitral Tribunal, or to an arbitration centre having its headquarters outside the Kingdom.

4. If the subject matter of the dispute falling within the scope of the arbitral agreement is linked to more than one state.

Article (4)

In those cases where this Law permits the parties to arbitration t select the procedures which must be followed in a given matter, this also includes their right to allow a third party to make such selection. In this regard, third parties are deemed to be any individual, tribunal, institution, or arbitral centre in the Kingdom or abroad.

Article (5)

If the parties to arbitration agree to subject the legal relationship between them to the provisions of any document (a model contract, an international convention or other), then the provisions of such document, including those related to arbitration, must be enforced, provided that such provisions do not violate the provisions of Islamic Sharia.

Article (6)

1. If no special agreement exists between the parties to arbitration, regarding notifications, the notice shall be delivered to the addressee personally - or on whose behalf - or sent to his mailing address, designated in the contract subject to dispute, in the arbitral agreement or in the document organizing the relationship subject of arbitration.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبد الرزاق المهياني
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

2. If the notice cannot be delivered to the addressee according to paragraph (1), delivery shall be deemed to have been effected if the notice is in the form of a registered letter addressed to the addressee's last known place of work, usual place of adobe or known mailing address.

3. The provisions of this article do not apply to judicial writs concerning the invalidity of the arbitration award before the courts.

Article (7)

If one of the parties to a dispute pursues arbitral proceedings - while knowing that one of the mandatory provisions of the present law or a condition in the arbitral agreement has been violated - and does not raise an objection to such violation by the agreed deadline, or within thirty days from his knowledge of the violation in the absence of agreements, this shall be deemed a waiver by him of his right to object.

Article (8)

Jurisdiction to review the case for the annulment of the arbitral award and the matters referred by this law to the judiciary lies with the court having original jurisdiction over the dispute. However, in the case of international commercial arbitration, whether conducted in the Kingdom or abroad, jurisdiction lies with the Court of Appeal having original jurisdiction over the dispute in Riyadh, unless the parties agree on another court of appeal in the Kingdom.

Part II -Arbitral Agreement

Article (9)

1. The arbitral agreement may precede the occurrence of the dispute, whether such agreement exists independently or as a clause on a given contract. The arbitral agreement may also be concluded after the occurrence of a dispute, even when such dispute is the subject of the competent court, in such case, the agreement must determine the matters included in the arbitration, otherwise it shall be null and void.

2. The arbitral agreement must, be concluded in writing, otherwise it shall be null and void.

3. The arbitral agreement shall be in writing if included in a document issued by both parties to arbitration, or if included in documented letters, cables or other means of electronic or written communication exchanged between them. Any Reference: in the contract to a document containing an arbitral clause is deemed to be an arbitral agreement. Any reference in the contract to the provisions of a model contract, an international convention or another document containing an arbitral clause is deemed to be a written arbitral agreement, if the reference expressly provides that such clause is an integral part of the contract.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number: 34/m**

Bureau of Experts at the Council of Ministers **Date: 24/05/1433 H**

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Article (10)

1. Arbitral agreements may only be concluded by those having capacity to dispose of their rights, whether natural -or his representative-or juridical persons.

2. The government authorities may only agree to arbitration after the approval of the president of the Council of Ministers, unless there is a special legal provision authorizing it.

Article (11)

1. A court seized with a dispute in respect of which an arbitral agreement exists must rule the case non admissible if the respondent invokes a plea of non admissibility before raising any request or defense in the case.

2. Bringing the action referred to in the preceding paragraph shall not preclude commencing arbitral proceedings, pursuing same or issuing an arbitral award.

Article (12)

Without prejudice to paragraph (1) of Article (9) of the present law, if it is agreed to arbitration during reviewing the dispute before the competent court, the court shall decide to refer the dispute to arbitration.

Part III -The Arbitral Tribunal

Article (13)

The arbitral tribunal is composed of one arbitrator or more. If there is more than one arbitrator, the tribunal must, on pain of nullity, be composed of an odd number.

Article (14)

The requirements of the arbitrator are as follows:

1. The arbitrator must be fully competent.

2. The arbitrator must be of good biography and conduct.

3. The arbitrator must have at least a university degree in Sharia or legal sciences, and if the Arbitral Tribunal is composed of more than one arbitrator, the availability of this condition in its head is sufficient.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number: 34/m**

Bureau of Experts at the Council of Ministers **Date: 24/05/1433 H**

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Article (15)

1. The parties to arbitration may agree on the selection of arbitrators. In default of such agreement, the following steps shall be followed:

a) If the Arbitral Tribunal is composed of a sole arbitrator, the competent court shall select him.

b) If the Arbitral Tribunal is composed of three arbitrators, each of the parties shall select one arbitrator and the two arbitrators shall then select a third. If either party fails to appoint his arbitrator within fifteen days from being requested to do so by the other party, or if the two arbitrators fail to select a third arbitrator within the fifteen days following the appointment of the more recently appointed one among them, the competent court shall under take to make such selection on the basis of a request by one of the parties, within fifteen days from the date of the submission of the application. The arbitrator selected by the two arbitrators appointed as aforesaid or by the court shall preside over the Arbitral Tribunal. These provisions shall apply to cases where the Arbitral Tribunal is composed of more than three arbitrators.

2. If the parties to arbitration do not agree on the procedures for the selection of arbitrators, or if one of the parties violates these procedures, or if the two appointed arbitrators fail to agree on a matter entailing their agreement, or if a third party defaults on the performance of a matter entrusted to him in this regard, then the competent court shall, on the basis of a request by one of the parties, carry out the required procedure or matter unless the agreement provides for another method of completing the said procedure or matter.

3. In selecting the arbitrators, the competent court shall observe the conditions agreed upon by the parties, and those required by the present Law, and shall issue its decision in this regard within thirty days from the date of the submission of the application.

4. Without prejudice to the provisions of Article (49) and (50) hereof. The decision of the competent court of appointing the arbitrator according to paragraphs (1 and 2) of this Article shall not be independently amenable to any form of challenge.

Article (16)

1. The arbitrator should not have interest in the conflict, and he should - since his being appointed and throughout the arbitration proceedings - to declare - in writing – to the parties to arbitration of all circumstances that would raise doubts with justifications on his impartiality and independence, unless he has already informed them.

2. The arbitrator is prevented from considering and hearing the case - even if this is not requested by one of the parties to arbitration - in the same situations in which the judge is prevented.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number: 34/m**

Bureau of Experts at the Council of Ministers **Date: 24/05/1433 H**

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

3. An arbitrator may not be recused unless circumstances arise to cast serious doubts on his neutrality or independence, or if he does not have the qualifications agreed upon by the parties to arbitration, without prejudice to the provisions of Article (14) of this Law.

4. Neither party may request to recuse the arbitrator he appointed or in whose appointment he participated except for reasons he discovers after making such appointment.

Article (17)

1. If there is no agreement between the parties to arbitration on the procedures of recusing the arbitrator, the recusance application shall be submitted - in writing - to the arbitral tribunal, indicating therein the reasons for the recusance, within five days from the dated of the recusance applicant's awareness of the constitution of such tribunal, or of the conditions justifying the recusance. If the arbitrator, whose reply is required, does not step aside, or the other party does not agree on the recusance application within five days from the date of the submission of the application, the Arbitral Tribunal shall consider it within fifteen days from the date of receiving it. If the application is denied, the recusance applicant may apply his application to the competent court within thirty days, and its decision in this regard shall not be amenable to any form of challenge.

2. The recusance application shall not be accepted from part of whoever has previously submitted a recusance application related to the recusance of the same arbitrator in relation to the same arbitration, for the same reasons.

3. The submission of the recusance application shall result in the suspension of the arbitration procedures, but If recusance of the arbitrator is accepted and sentenced, the arbitration procedures which have been undertaken, including the arbitrator's ruling, shall be consequently considered as null and void.

Article (18)

1. If an arbitrator who is unable to perform his mission or who fails to perform it or interrupts performance in a manner which leads to unjustifiable delay in the arbitral proceedings does not withdraw or is not removed by agreement between the parties, then the competent court may terminate his mission on the basis of the request of either parties, and its decision in this regard shall not be amenable to any form of challenge.

2. Unless the arbitrator is appointed by the competent court, he may not be dismissed except by an agreement by the parties to the arbitration, without prejudice to the provisions of paragraph (1) of this Article, and the dismissed arbitrator may demand a compensation if the dismissing is not because of him.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number: 34/m**

Bureau of Experts at the Council of Ministers **Date: 24/05/1433 H**

Attachments:

مكتب العتيبة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Article (19)

If an arbitrator's mission is terminated by his death, a decision for his recusal, discharge, abstention or inability or for any other reason, a substitute shall be appointed in his place in accordance with the procedures followed for the selection of the arbitrator whose mission has been terminated.

Article (20)

1. The arbitral tribunal is empowered to rule on motions related to it's non-competence, including motions based on the absence of an arbitral clause, it's expiry or nullity, or its failure to include the subject of the dispute.

2. These motions must be invoked according to the dates referred to in paragraph (2) of Article (30) hereof. The appointment or participation in the appointment of an arbitrator by one of the parties to the arbitration shall not disentitle him invoking any of these motions. As to the motion that the arbitral clause does not include matters raised by the other party in the course of the review of the dispute, it must be invoked immediately or the right to invoke it shall lapse. In all cases, the Arbitral Tribunal may accept motions invoked after the prescribed time limit if it deems the delay to have been for an acceptable reason.

3. The Arbitral Tribunal may rule on the motions referred to in paragraph (1) of this Article before ruling on the merits or join them to the merits in order to adjudicate both together. If it rules to dismiss a motion, such motion may not be invoked except through the institution of a case for the annulment of the arbitral award adjudicating the dispute pursuant to Article (54) of this law.

Article (21)

The arbitral clause in a contract is deemed to be an agreement that is independent of the other conditions of the contract. The nullity, repudiation or termination of the contract shall not result in the nullity of the arbitral clause therein, provided such clause is valid per se.

Article (22)

1. The competent court may order that provisional or conservatory measures be taken on the basis of an application from one of the parties to the arbitration before the commencement of arbitral proceedings, or upon request from the Arbitral Tribunal during the arbitration procedures, these procedures may be reversible in the same way, unless the parties otherwise agree.

2. The competent court, upon a request from the Arbitral Tribunal, may order a judicial delegation commission rogatoire.

3. The Arbitral Tribunal may request from the concerned authority to assist in the arbitral proceedings in accordance with the Tribunal deems suitable for the proper progress of the arbitration such as: requesting

مكتب العتيبة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

the attendance of a witness, or an expert, ordering to present a document, a copy of it, or reviewing it, or any other, without prejudice to the right of the Arbitral Tribunal to conduct this procedure independently.

Article (23)

1. The parties to arbitration may agree that the Arbitral Tribunal shall be entitled - pursuant to a request by one of them - to order either party to take whatever provisional or conservatory measures it deems the nature of the dispute requires. The Arbitral Tribunal may commit the party requesting these measures to present an proper financial guarantee in order to fulfil this procedure.

2. If the party to whom the order is issued defaults on executing it, the Arbitral Tribunal may, at the request of the other party, allow the latter to take the procedures necessary for execution, without prejudice to the right of the Tribunal or the right of the other party in applying to the competent authority to commit the party to whom the order is issued to enforcement.

Article (24)

1. An independent contract must be concluded with the selected arbitrator with his fees illustrated in it, and a copy of the contract shall be deposited to the authority prescribed by the Executive Regulations of this law.

2. If the parties to arbitration and the arbitrators do not agree on the fees of arbitrators, the court competent to hear the dispute shall determine the fees. Its decision shall not be amenable to any form of challenge. If appointing arbitrators is by the competent court, it shall be accompanied by determining their fees.

Part IV -The Arbitral Proceedings

Article (25)

1. The parties to the arbitration have the right to agree on the procedures to be followed by the Arbitral Tribunal, including the right to subject such procedures to the provisions in force in any arbitral organization, tribunal or centre in the Kingdom or aboard, as long as they do not contradict the provisions of the Islamic Sharia.

2. In the absence of such agreement, the Arbitral Tribunal may - without prejudice to the provisions of the Islamic Sharia, and the provisions of the present law - adopt the arbitration procedures it deems suitable.

Article (26)

The arbitral proceedings shall commence from the date one of the parties to arbitration receives the notice for arbitration from the other party, unless the parties agree otherwise.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number:** **34/m**

Bureau of Experts at the Council of Ministers **Date:** **24/05/1433 H**

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السند
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Article (27)

The parties to arbitration shall be on an equal footing, and each shall be accorded a full and equal opportunity to present his case or defense.

Article (28)

The parties to arbitration may agree on a place of arbitration in the Kingdom or abroad. In the absence of such agreement, the Arbitral Tribunal shall determine where the arbitration shall be held, with due consideration to the circumstance of the dispute and the convenience of the place to the parties, this shall be without prejudice to the power of the Arbitral Tribunal to convene in any place it deems suitable for holding deliberations between its members, hearing the testimonies of witnesses, experts, the parties to the dispute, previewing the dispute place, examining documents, or reviewing them.

Article (29)

1. Arbitration shall be conducted in Arabic, unless another language or languages is agreed upon by the parties or decided by the Arbitral Tribunal. The agreement or decision as aforesaid shall apply to the language of written statements and memos, oral pleadings as well as of all decisions taken, all communications transmitted and all awards issued by the Arbitral Tribunal, unless the agreement between the parties or the decision of the Arbitral Tribunal provides otherwise.

2. The Arbitral Tribunal may require that all or some of the written documents submitted in the case be accompanied by a translation into the language or languages used in the arbitration. In case of a plurality of such languages, the Tribunal may limit translations to some of them.

Article (30)

1. The claimant shall, by the date agreed between the parties or prescribed by the Arbitral Tribunal, send to the respondent and to each of the arbitrators a written statement of his claims, containing his name and address, the respondent's name and address, an explanation of the facts of the case, his claims, his grounds, and all other matters required to be cited in such statement by the agreement between the parties.

2. The respondent shall, by the date agreed between the parties or prescribed by the arbitral tribunal, send to the applicant and to each of the arbitrators a written statement of defence in reply to the statement of claim. He may include in such statement any claims related to the subject matter or the dispute or invoke a right arising therefrom in the aim of raising a claim for set-off. This right is available to the respondent even at a subsequent stage of the proceedings, if the Arbitral Tribunal deems that there are circumstances justifying such delay.

3. Either party may annex to his statement of claim or his statement of defence - as the case may be - copies of the documents on which he predicates his claims, and may refer to all or some of the documents and

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السند
ترخيص رقم ٤٥٠
YARA OFFICE
ATTESTED TRANSLATION
C.R.NO. 450

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

evidence that he intends to present. This shall be without prejudice to the right of the arbitral tribunal, at any stage of the proceedings, to request submission of the originals of the documents or instruments on which either of the parties relies, or copies of them.

Article (31)

Copies of the memos, documents and papers submitted to the Arbitral Tribunal by either party shall be sent to the other. Similarly, copies of experts' reports, documents and other means of evidence submitted to the Tribunal, on which the Arbitral Tribunal can rely in issuing its award, shall be sent to each of the parties.

Article (32)

Either party may modify his claims - or defences - or expand thereon during the arbitral proceeding, unless the Arbitral Tribunal decides not to accept such modification or expansion to avoid delaying adjudication of the dispute.

Article (33)

1. The Arbitral Tribunal shall hold pleading hearings to enable each party to explain the subject matter of his claim and to present his arguments and evidence. However, it may limit proceedings to the submission of written memos and documents, unless the parties otherwise agree.

2. The parties to arbitration must be notified on their fixed addresses included in the Arbitral Tribunal of the dates of any session of oral pleading, the date of the verdict, and any meetings that the Arbitral Tribunal decides for purposes of previewing the dispute place, or other properties, or to examine documents, and any other meeting that the Arbitral Tribunal decides to convene sufficiently in advance of the scheduled date.

3. A summary of the facts of each hearing convened by the Arbitral Tribunal shall be transcribed in minutes signed by witnesses, experts, attendees of both parties, or their clients, and the members of the Arbitral Tribunal, a copy of which shall be delivered to each of the parties unless they decide otherwise.

Article (34)

1. If the claimant fails - without an acceptable excuse - to submit the written statement of his claim pursuant to paragraph (1) of Article (30) of this law, the Arbitral Tribunal shall terminate the arbitral proceedings, unless the parties agree otherwise.

2. If the respondent fails to submit a statement of defence pursuant to paragraph (2) of Article (30), the Arbitral Tribunal shall continue the arbitral proceedings, unless the parties agree otherwise.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number: 34/m**

Bureau of Experts at the Council of Ministers **Date: 24/05/1433 H**

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION

Article (35)

If either party fails to attend one of the hearings - after being notified - or fails to present any of the documents requested from him, the Arbitral Tribunal may continue with the arbitral proceedings, and issue an award on the dispute based on the elements of proof present before it.

Article (36)

1. The Arbitral Tribunal may appoint one expert or more, to present a written or oral report in connection with certain matters it designates via a decision. Such report shall be evidenced in the minutes of the hearing. The Tribunal shall furnish each of the parties with a copy of its decision designating the mission entrusted to the expert, unless the parties agree otherwise.

2. The parties shall submit to the expert with any information he may request in connection with the dispute, and enable him to examine any documents, goods or other assets related thereto. The Tribunal shall adjudicate any dispute arising between the expert and one of the parties in this connection, and its decision in this regard shall not be amenable to any form of challenge.

3. The Arbitral Tribunal shall send a copy of the expert's report to each party promptly upon its deposition, while allowing each of them to express his opinion thereon. The parties are entitled to review and examine the documents on which the expert based his report. The expert shall issue his final report after reviewing the opinions of parties in this regard.

4. The Tribunal may, following submission of the expert's report, decide, either sua sponte or on the basis of a request by either party, to convene a hearing to hear the expert's testimony, while allowing the parties to listen to the expert and to discuss with him the contents of his report.

Article (37)

If, in the course of the arbitral proceedings, a matter lying outside the mandate of the Arbitral Tribunal arises. Or if a document submitted to it is challenged for forgery ,or if criminal proceedings are instituted for forgery or for any other criminal act, the Arbitral Tribunal may continue to review the merits of the dispute if it deems a decision on such matter, on forgery of the document or on the other criminal act to be unnecessary for the determination of the merits of the dispute. Otherwise, it shall suspend proceedings until a final judgment is issued in this respect. Such suspension shall entail suspension of the time limit prescribed for rendering the arbitral award.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number: 34/m**

Bureau of Experts at the Council of Ministers **Date: 24/05/1433 H**

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Part V -The Proceedings of Ruling on The Arbitral Case

Article (38)

1. Without violating the provisions of the Islamic Sharia and the public policy in the Kingdom, the Arbitral Tribunal, while adjudicating the merits of the dispute, shall consider the following:

a) The Arbitral Tribunal shall apply the rules agreed by the parties to the subject matter of the dispute. If they agree to apply the law of a specific state, then the substantive rules of that law, not those governing conflict of laws, shall be followed, unless the parties otherwise agree.

b) If the parties fail to agree on the legal rules to be applied to the subject matter of the dispute, the Arbitral Tribunal shall apply the substantive rules of the law it deems most closely connected to the dispute.

c) The Arbitral Tribunal must, when adjudicating the merits of the dispute, take into account the conditions of the contract, subject of the dispute and the usages of commerce in similar transactions and according to the dealings between the parties.

2. If it has been expressly empowered to act as an "amiable compositeur" by agreement between the parties to arbitration, The Arbitral Tribunal may adjudicate the merits of the dispute according to the rules of justice and equity.

Article (39)

1. The award of an Arbitral Tribunal composed of more than one arbitrator shall be issued by a majority of opinions after deliberations conducted in a confidential manner.

2. If the opinions of the Arbitral Tribunal differ and getting the majority is difficult, the Arbitral Tribunal may select a casting arbitrator within fifteen days of its decision of the non possibility for the majority. Otherwise, the competent court shall appoint the casting arbitrator.

3. Decisions on procedural matters may be issued by the arbitrator who heads the Tribunal if the parties to arbitration state on that in writing, or if all members of the Arbitral Tribunal allow him to do that unless the parties to arbitration agree otherwise.

4. If the Arbitral Tribunal has been empowered to act as an "amiable compositeur", the decision shall be issued unanimously/consensually.

5. The Arbitral Tribunal may issue interlocutory awards or awards that address part of the claim before issuing its final arbitral award ending the entire dispute, unless the parties agree otherwise.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number: 34/m**

Bureau of Experts at the Council of Ministers **Date: 24/05/1433 H**

Attachments:

مكتب يارا للترجمة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Article (40)

1. The Arbitral Tribunal shall issue the award finally ending the entire dispute within the time frame agreed by the parties, in the absence of such agreement, the award must be rendered within twelve months from the date of commencement of the arbitral proceedings.

2. The Arbitral Tribunal may, in all cases, extend the deadline of the arbitration period provided the period of extension shall not exceed six months, unless the parties agree to a longer period.

3. If the arbitral award is not rendered within the period referred to in the preceding paragraph, either of the two parties to arbitration may request the competent court to issue an order setting a new deadline or terminating the arbitral proceeding. In such case either party may raise his claims to the court of original jurisdiction.

4. If an arbitrator is appointed as an alternative to another arbitrator in accordance with the provisions of this law, the time limit prescribed for rendering the arbitral award shall be extended for thirty days.

Article (41)

1. The arbitral proceedings shall terminate with the issuance or the award ending the dispute, or with the issuance of an order by the Arbitral Tribunal ending the arbitral proceedings in the following cases:

a) If the parties agree to end the arbitration.

b) If the applicant abandons the dispute subject of arbitration, unless the Arbitral Tribunal decides, on the basis of an objection raised by the respondent, that the latter has a significant interest in the continuance of the arbitral proceeding until the dispute is adjudicated.

c) If for any other reason the Arbitral Tribunal deems it useless or impossible to continue the arbitral proceedings.

d) The issuance of an order ending the arbitral proceedings in accordance with the provision in paragraph (1) of Article (34) of this law.

2. The arbitral proceedings do not end with the death of one of the parties to arbitration, or loss of eligibility - unless who has legal status to the dispute agrees with the other party on ending it - but the period prescribed for arbitration shall extend for thirty days, unless the Arbitral Tribunal decides to extend the period for a similar period, or otherwise agreed by the parties to arbitration.

3. Without prejudice to the provisions of Articles (49), (50) and (51) of the present Law, the mission of the Arbitral Tribunal ends with the termination of the arbitral proceedings.

مكتب يارا للترجمة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number:** **34/m**

Bureau of Experts at the Council of Ministers **Date:** **24/05/1433 H**

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Article (42)

1. The arbitral award shall be issued in writing, it shall be motivated and signed by the arbitrators. If the Arbitral Tribunal is composed of more than one arbitrator, the signatures of the majority of the arbitrators shall be sufficient, provided the reasons why a minority desisted are mentioned in the case record.

2. The arbitral award must include the date and place it was issued, the names and addresses of the parties, the names, addresses, nationalities and capacities of the arbitrators, a summary of the arbitral agreement, a summary of the parties' statements, claims, defences and documents, a summary of the experience report - if any - the text of the ruling, determining the arbitrators' fees, the expenses of arbitration, and how they are distributed between the parties. Without prejudice to Article (24) of this law.

Article (43)

1. The arbitral tribunal shall deliver to each of the parties a true copy of the arbitral Award within fifteen days from the date of its issuance.

2. The arbitral award may not be published in whole or in part except with a written approval of the parties to arbitration.

Article (44)

The Arbitral Tribunal must deposit the original award or a signed copy thereof in the language in which it was issued for the competent court, within the period of time stated in paragraph (1) of Article (43) of this law, with an Arabic translation thereof authenticated by the competent authority if it was issued in a foreign language.

Article (45)

If the parties agree, during the arbitral proceeding, on a settlement ending the dispute, they may request that the conditions of the settlement be evidenced before the Arbitral Tribunal, which must in such case issue a decision containing the conditions of the settlement and terminating proceedings. Such decision shall have the force of an arbitral award as far as execution is concerned.

Article (46)

1. Either party to arbitration may, within thirty days from receiving the arbitral award, request the arbitral award to interpret any ambiguity appearing in the award. The party requesting interpretation must notify the other party, at his described address in the arbitral award, of the request before presenting it to the arbitral tribunal.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number:** **34/m**

Bureau of Experts at the Council of Ministers **Date:** **24/05/1433 H**

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

2. The interpretation shall be issued in writing within the thirty days following the date the request for interpretation is submitted to the arbitral tribunal.

3. The award rendered to interpret is deemed to be a complementary part of the arbitral award and is subject to its provisions.

Article (47)

1. The arbitral tribunal shall correct any material errors in its award, whether involving words or figures, by means of a decision it issues either sua sponte or upon request by one of the parties. The arbitral tribunal shall make the correction without pleadings within fifteen days following the issuance of the award or the deposition of the request for correction, as the case may be.

2.The correction shall be issued in writing by the arbitral tribunal and notified to the parties within fifteen days from the date it was issued. if the decision may be invoked by means of an action for nullity, which shall be subject to the provisions of Articles (50) and (51) of this law.

Article (48)

1. Either of the parties to arbitration may, even after the expiry of the time limit for arbitration, request the arbitral tribunal within thirty days from receiving the arbitral award, to issue an additional award on a claim submitted by such party in the course of the proceedings and overlooked by the arbitral award. Such request must be notified to the other party at the address shown in the arbitration award before it is presented to the tribunal.

2. The Arbitral Tribunal shall render its award within sixty days from the submission of the request, and may extend such period for a further thirty days if it deems this to be necessary.

Part VI -Nullity of Arbitral Award

Article (49)

Arbitral awards issued in accordance with the provisions of this law may not be challenged by any of the means of challenge, except instituting an action for the nullity of the arbitration award in accordance with the provisions set forth in this law.

Article (50)

1. An action to procure the nullity of the arbitral award is admissible only in the following cases:

a) If no arbitral agreement exists, or if it is void, voidable or expired.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number: 34/m**

Bureau of Experts at the Council of Ministers **Date: 24/05/1433 H**

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

b) If at the time of entering into the arbitral agreement one of the parties thereto was minor or incapacitated pursuant to the law governing his capacity.

c) If one of the parties to the arbitration was unable to present his defence because he was not properly 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 fails to apply any of the legal provisions agreed to by the parties to the subject matter of the dispute.

e) If the Arbitral Tribunal was constituted or the arbitrators were appointed in a manner contrary to law or to the agreement between the parties.

f) If the arbitral award rules on matters not included in the arbitral agreement or exceeds the limits of such agreement. Nevertheless, if the parts of the award relating to matters which are amenable to arbitration can be separated from the parts relating to matters which are not, then nullity shall apply only to parts which are not amenable to arbitration.

g) If the Arbitral Tribunal does not take into consideration the conditions that should be provided in the arbitral award in a manner that affects its content, or if the arbitral proceedings are tainted by nullity affecting the award.

2. The competent court seized with the action for nullity shall rule sua sponte for the annulment of the arbitral award if its contents violate the provisions of Islamic Sharia, the public policy in the Kingdom, the agreement between the parties, or if the subject matter of the dispute is one of the issues that are not included in the arbitration in accordance with this law.

3. The arbitration agreement does not end with issuing the decision of the invalidity of the arbitration award by the competent court, unless the parties to arbitration agree on that, or with the issuance of a ruling that stipulates invalidating the arbitration agreement.

4. The competent court shall consider the action for nullity in the cases referred to in this Article, without examining the facts and merits of the dispute.

Article (51)

1. Actions to procure the nullity of the arbitral award must be brought within the sixty days following the date the arbitral award is notified to the party against whom it was rendered. An action for nullity is admissible even if the party invoking nullity waived his right to do so before the arbitral award was issued.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number: 34/m**

Bureau of Experts at the Council of Ministers **Date: 24/05/1433 H**

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

2. If the competent court rules to uphold the arbitration award, it shall order its enforcement, its decision in this regard shall not be amenable to any form of challenge. If it rules with the invalidity of the arbitration award, its ruling may be challenged within thirty days from the day following the notification.

Part VII -Recognition and Enforcement of Arbitral Awards

Article (52)

Without prejudice to the provisions of the present Law, arbitral awards rendered in accordance with the provisions of this law have the authority of res judicata and shall be forcibly executed.

Article (53)

The competent court, or who it delegates, issues an order of enforcement of arbitral awards. The application for executing the arbitral award shall be accompanied by:

1. The original award or a certified copy thereof.

2. A true copy of the arbitral agreement.

3. An Arabic translation of the award, authenticated by the competent authority, if the award was issued in another language.

4. An evident of the deposition of the award to the competent court pursuant to Article (44) hereof.

Article (54)

The institution of an action for nullity shall not stay execution of the arbitral award. Nevertheless, the competent court may order a stay of execution if the plaintiff of nullity requests same in his request and such request is based on valid reasons. The competent court shall rule on the request for a stay of execution within fifteen days from the date of the submission of the request. If it orders a stay of execution, it may order the presentation of a surety or money guarantee. Should the court order a stay of execution, it must rule on the motion for nullity within one hundred and eighty days from the date such order was issued.

Article (55)

1. The application for the enforcement of an arbitral award shall not be accepted unless the date prescribed for raising an action for its nullity has lapsed.

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number: 34/m**

Bureau of Experts at the Council of Ministers **Date: 24/05/1433 H**

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / احمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

2. Enforcement of the arbitral award pursuant to this law may not be ordered except after verifying that:

a) It is not contrary to a judgment or a decision previously issued by a court, a committee, or a tribunal that has jurisdiction over the subject matter of the dispute in the Kingdom of Saudi Arabia.

b) It does not include anything that contradicts the provisions of Islamic Sharia and the public policy in the Kingdom, and if a separating the arbitral award - including the violating part - is possible, the execution of the remaining non violating part may be ordered.

c) It is properly notified to the party against whom it is rendered.

3. Orders issued for the enforcement of arbitral awards may not be petitioned against. However, orders refusing execution may be petitioned against before the competent authority within thirty days from the date of its issuance.

Part VIII - Final Provisions

Article (56)

The Council of Ministers shall issue the Executive regulations of this law.

Article (57)

This law shall replace the arbitration law issued by the Royal Decree No. (M/46) dated 12/07/1403 H. (corresponding to 25/4/1983)

Article (58)

This Law shall enter into force thirty days from the day following the date of its publication in the Official Gazette.

مكتب يارا للترجمة المعتمدة
لصاحبه د / احمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

Kingdom of Saudi Arabia **Number:** 34/m

Bureau of Experts at the Council of Ministers **Date:** 24/05/1433 H

Attachments:

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450

2. Enforcement of the arbitral award pursuant to this law may not be ordered except after verifying that:

a) It is not contrary to a judgment or a decision previously issued by a court, a committee, or a tribunal that has jurisdiction over the subject matter of the dispute in the Kingdom of Saudi Arabia.

b) It does not include anything that contradicts the provisions of Islamic Sharia and the public policy in the Kingdom, and if a separating the arbitral award - including the violating part - is possible, the execution of the remaining non violating part may be ordered.

c) It is properly notified to the party against whom it is rendered.

3. Orders issued for the enforcement of arbitral awards may not be petitioned against. However, orders refusing execution may be petitioned against before the competent authority within thirty days from the date of its issuance.

Part VIII - Final Provisions

Article (56)

The Council of Ministers shall issue the Executive regulations of this law.

Article (57)

This law shall replace the arbitration law issued by the Royal Decree No. (M/46) dated 12/07/1403 H. (corresponding to 25/4/1983)

Article (58)

This Law shall enter into force thirty days from the day following the date of its publication in the Official Gazette.

Translated by:

Legal consultant, Ahmed AlMugham

مكتب يارا للترجمة المعتمدة
لصاحبه د / أحمد عبدالرزاق السعيدان
ترخيص رقم ٤٥٠
YARA OFFICE
FOR ATTESTED TRANSLATION
C.R.NO. 450