

Saudi Law and Judicial Practice in Commercial and Banking Arbitration

A thesis submitted for the degree of Doctor of Philosophy

By

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18/1409	1988
66/1409	1989
60/D/4	1989

135/1410	1990
12/1411	1991
28/1411	1991
194/1411	1991
185/1411	1991
54/1411	1992
115/1412	1992
1622/1412	1992
63/1413	1993
87/1413	1993
107/1413	1993
46/1413	1993
38/1415	1994
231/1415	1995
39/1416	1995
44/T/3	1996
61/T/4	1996
99/T/4	1996
53/T/3	1996
150/T/3	1996
125/1417	1997
11/D/F/2	1997
104/T/4	1998
73/T/4	1998
44/1419	1998
16/1420	1999
59/1419	1999
369/2/Q	2001
992/2/Q	2001
34/1422	2001
102/1422	2001
90/1422	2001

34/1422	2002
95/1422	2002
91/1423	2002
91/1423	2002
103/1423	2002
116/1423	2002
651/1/Q	2003
54/5/Q	2003
369/1424	2004
102/T/5	2004
87/1424	2004
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Abbreviations

ADR	Alternative Dispute Resolution
Aramco	Arabian American Oil Company
BIT	Bilateral Investment Treaty
GCC	The Gulf Cooperation Council
ICC	International Chamber of Commerce
ICSID	The International Centre for Settlement of Investment Disputes
KSA	Kingdom of Saudi Arabia
OPEC	The Organization of the Petroleum Exporting Countries
SAMA	The Saudi Arabian Monetary Agency
SAGIA	The Saudi Arabian General Investment Authority
UAE	The United Arab Emirates
UNICTRAL	The United Nations Commission on International Trade Law

Abstract

This thesis examines various issues of arbitration law and practice in relation to the Islamic Shari'a law and the law of Saudi Arabia in general, and for arbitration in conventional banking disputes in particular. The thesis found that the Shari'a regulates arbitration tightly compared to other contemporary developments as no fundamental differences were found to exist between the classical Shari'a arbitration rules and the Saudi arbitration regulations, which represent the codification of the Hanbali law of arbitration. Unlike other arbitration laws, almost all kinds of disputes can be settled by arbitration in Saudi Arabia, and these include family and some criminal disputes such as murder and personal injuries. Moreover, this thesis demonstrates the difference between Islamic law and Saudi law. The latter is more comprehensive as it includes Islamic law and the borrowed Codes and Acts of the laws of other nations. The legal status of banking interest under the Saudi law is not clearly defined and it is not clear whether *riba* contradicts with the public policy of Saudi Arabia or not. This uncertainty has an impact on arbitration related to banking disputes and has led me to conclude that arbitration is not the best method for settling disputes involving domestic conventional banking business. Although resorting to the Committee for the Settlement of Banking Disputes of SAMA might provide a better solution, the decisions of the Committee are not "strong" enough to be fully enforced and the payment of interest continues to be an avoidable obligation in Saudi Arabia; therefore, the thesis examined the alternative remedies for both domestic and international banking arbitration. The thesis also found that if the enforcement of an international arbitration award is sought in Saudi Arabia, the award will be subject to the mandatory application of Shari'a law, which in addition to the imposition of interest, prohibits also certain kinds of commercial contracts.

Introduction

Human beings knew and practised arbitration prior to litigation and to the creation of civilised legal systems. Due to the absence of judicial systems and state power at some points in history, the use of force was the primary means of settling any disputes.¹ Nonetheless, the peaceful nature of human beings did intervene in finding pacific solutions for conflicts. Through the passage of time, these practices developed to form a body of customs and traditions, or what is known in Arabic as Urf. In the light of these customs, people started to refer their disputes to the third parties that had been chosen by them. The custom of the ancient Arabs did set some general criteria for the choice of arbitrators, where they should be known for their impartiality, fairness and wisdom in addition to the social power. For instance, Monks can be appointed for their religious influence which can benefit the enforcement of the judgment. The same rule applies to the chief of the tribe where his social power can help in determining the dispute and enforcing the judgment.² As a result, arbitration became the tool of individuals to reach a pacific and fair dispute settlement by a third party. After the creation and the development of judicial bodies, arbitration existed as an auxiliary dispute settlement mechanism, working under the supervision of the judicial authorities.³

The Islamic law, or what we know as Shari'a, introduced a comprehensive set of arbitration rules giving arbitration a strength similar to that of official litigation. The Shari'a regulated all the steps of the arbitral practice, from the arbitration agreement till the enforcement of the final award. In Saudi Arabia, the first attempt to codify the Shari'a arbitration rules came with the provisions of the Code of Commercial Courts of 1931; however, the code was not the perfect arbitration law as Shari'a courts failed, at that time, to recognise arbitration clauses and because the enforcement of the arbitration awards was voluntary.⁴ The wrong interpretation of the law by the Shari'a

¹ W. Ragib, 'Is Arbitration a type of Litigation?' *University of Kuwait Law Journal*, 17/1 (1993), pp. 131-172.

² See in general, N. Albejad, *Arbitration in Saudi Arabia* (1st edn, Institute of Public Administration, 1999).

³ See the Code of Commercial Court ratified by Royal Decree No. 32 dated 15/01/1350 H. (1931) published in *Umm Alqura Gazette*, issue nos. 374-376 dated 22/03/1350 H. (1931).

⁴ See the Code of Commercial Court ratified by Royal Decree No. 32 dated 15/01/1350 H. (1931) published in *Umm Alqura Gazette*, issue nos. 374-376 dated 22/03/1350 H. (1931).

courts with regard to the recognition of the arbitration clauses and the voluntary execution of arbitral awards affected arbitration in Saudi Arabia negatively and led arbitration to exist in theory only for many decades. The second attempt came in 1983 when Saudi Arabia enacted the Arbitration Code of 1983 which overcame many of the problems of the first code, but it did not produce clear solutions to the crucial issue of arbitration in banking arbitration.

In Saudi Arabia, a major problem with conventional banking disputes occurred as the principles of conventional banking contradict with the principles of the Shari'a, especially when it comes to some very sensitive issues such as interest. As a general rule, Saudi courts are not competent to settle disputes that arise out of banking activities as defined by the Banking Control Act of 1966. The competence is spread between two semi-judicial committees in addition to arbitration. Resorting to one of these Committees does not guarantee the full enforcement of interest provisions in any agreement for the reasons that the Committee for the Settlement of Negotiable Instruments Disputes applies the Shari'a law and does not award interest in its judgments. On the other hand, the Committee for the Settlement of Banking Disputes does not have the full power to enforce its judgments if it provides for the payment of interest. Even though arbitration is a possible remedy for a banking dispute, it is faced with many obstacles that make disputes related to conventional banking amenable to arbitration in theory only. The Saudi law did not even give a clear answer to the question of arbitrability of disputes in general and of banking disputes in particular and referred the whole issue to the law on conciliation. The law on conciliation itself carries a great deal of ambiguity and conflict among the Fiqh Schools and that is added to the fact that there are no rules on conciliation in Saudi Arabia. In accordance with the Shari'a teachings on conciliation, banking interest disputes are arbitrable; however, does this apply in real life?

This thesis examines various issues of arbitration law and practice in relation to the Islamic Shari'a law and the law of Saudi Arabia in general, and for arbitration in conventional banking disputes in particular. The study also aims at comparing the available remedies for the settlement of banking disputes in Saudi Arabia in order to suggest the most suitable one for such kinds of disputes in Saudi Arabia. This thesis will be divided into five chapters in addition to this brief introduction and the

conclusion. Chapter 1 will give a historical background about arbitration in this very specific geographical area where Saudi Arabia is located. The chapter will start with the law and practice of arbitration in the pre-Islamic period that ended by the time of Prophet Muhammad (570-632 AD). The chapter also shows how Islam upheld some pre-Islamic practices with regard to arbitration as well as how Muslim Scholars introduced the methodologies of Usul Alfiqh to allow Muslims to keep their laws updated through regulating the reasoning process and putting restrictions on law transplantation within the Muslim state through the use of the concept of Urf or local custom as the source of legislation to protect the special identity of the society. The evolution of Usul Alfiqh or the legal theories as an independent science led to the creation of four main schools of thought where each school adopted a different set of rules for reasoning, application and even different subordinate sources of law. The chapter also distinguishes between the three confusing concepts of Islamic law, Shari'a and Islamic jurisprudence on the one hand, and the Saudi law on the other hand.

Chapter 2 discuss the next stage of the development of arbitration law of Saudi Arabia and examines the law of arbitration under the fully developed Islamic jurisprudence or what is known as fiqh. The arbitration laws discussed in this chapter are the basis of the Arbitration Act of 1983 in Saudi Arabia. The chapter starts with the difference between arbitration and litigation under Shari'a and is followed by comparing the definitions of arbitration. This chapter covers the arbitration rules of Shari'a, from the arbitration agreement till the enforcement of the final arbitral award, in a comparative way between the four Islamic schools, paying more attention to the Hanbali School as the official school in Saudi Arabia.

Chapter 3 examines the regulatory attitude toward international arbitration in Saudi Arabia as well as other relevant issues of the Saudi law in general. The chapter starts by giving a brief overview of the Saudi legal system and its institutions. The chapter then examines other related issues of the Saudi law in general such as Wahhabism, the role of the official Mufti and his influence on the legal system in addition to the foreign influence on the Saudi law. After that, the regulatory attitude toward international arbitration will be analysed in chronological order. This section will be divided into two main parts. The first part will discuss the regulatory attitude toward

arbitration from the creation of the Saudi state in the 1920s till the first oil boom in the 1970s. This part will examine the arbitration cases that the Saudi Government was party to, such as the Wahat Alburaimi Case of 1955 and the well-known case of Arabian American Oil Company v. Saudi Arabia “Aramco Award of 1958” and its impacts on the Saudi legal system. The second part will cover the period between the 1970s and now; this period experienced a shift in the attitude in order to attract foreign investment and many important steps toward the reactivation of arbitration as an effective dispute settlement mechanism, such as the enactment of the Arbitration Act of 1983 and its Implementing Rules in 1985 and the ratification of the New York Convention of 1958.

Chapter 4 is an evaluation of Saudi arbitration law and judicial practice. The chapter also links the arbitration act with the common practice, other relevant regulations and the Shari’a sources. For the reason that the arbitration act was too brief to cover all the related issues, the study relied on the Implementing Rules which explain the ambiguous aspects of the act in some detail. The chapter also discusses the issues of enforcement of arbitral awards, both domestic and international, and the public policy of Saudi Arabia, its sources and applications

Chapter 5 will decide whether a dispute related to conventional banking business can be settled through arbitration or not. The chapter decides first on the issue of arbitrability of banking disputes which needs a reference to the Shari’a law on conciliation first. The chapter will also explore the Shari’a law on banking interest as the main motive in the banking sector and the main contradiction of the public policy of Saudi Arabia. After that, the chapter will compare the judicial treatment of banking interest in Saudi Arabia with some neighbouring countries such as Egypt and the UAE. The chapter will suggest the most suitable alternative remedy in the case of disputes involving elements contradicting Shari’a.

This study addresses the following main questions:

What is Shari'a, its sources and application in arbitration?

What is the difference between Shari'a and the Saudi law in general and the arbitration rules in particular, and to what extent does Saudi Arabia apply Islamic law?

How has politics affected the regulatory attitude toward state arbitration in Saudi Arabia?

What is the scope of public policy in Saudi Arabia, its sources and application in arbitration?

What do banking disputes mean under the Saudi law and how can arbitration settle banking disputes when the subject matter contradicts with the public policy?

What are the alternative remedies in the case when arbitration fails to serve its objectives in banking disputes?

Methodology

This thesis is mainly based on library research, involving an analysis and comparative study of a range of documents, publications, hard copy and online material, and legal materials from different jurisdictions both in Arabic and in English. Arabic books, periodicals, official documents and reports and other sources related to Saudi Arabia, Islamic law and Arabic countries had been collected from various libraries in Saudi Arabia, mainly the central library of King Abdul-Aziz University in Jeddah, the central library of King Saud University in Riyadh and the library of Umm-Alqura University in Mecca. The Saudi Statutes were collected directly from Umm Alqura Magazine, which is the official press in Saudi Arabia; however, it should be noted that Saudi legislations are drafted in Arabic and there is no official English translation.

In addition to some legal databases such as LexisNexis, HeinOnline, Westlaw, etc., materials relating to International and English law and practice had been collected from different libraries in the UK, mainly the libraries of Brunel University, University College London, Institute of Advanced Legal Studies, SOAS and The British Library.

The collection of the Saudi case law was made by personal visits to Diwan Almazalim, the Jeddah Chamber of Commerce and Industry, the Ministry of Commerce and Industry, and the Supreme Shari'a Court of Jeddah. Unfortunately, it was not possible to get enough material regarding banking disputes from the official authorities, which led the author to seek assistance from the banking sector directly. I was given access to the legal archive of one of the leading commercial banks where I was given great assistance. In any event, the main requirement of the official judicial authorities and the legal staff of the bank was to delete all of the relevant information that may give indication of the personality of the parties to the dispute, which was their primary requisite for providing assistance. Although some PhD theses have referred to this topic that they are in fact shallow and I found no use for them.

1 The Law and Practice of Arbitration in Arabia from the Pre-Islamic Era till the Emergence of the Four Schools of Jurisprudence

Traditionally, there has been a cultural preference in the Arabic mentality to resolve disputes privately through negotiation, mediation and conciliation rather than public litigation. In addition to the structure of the society, this trend has historical roots that go back to the pre-Islamic era or, what it is called in Arabic, *al-jaheliyah*. During that era, different types of tribal ruling systems controlled Arabia with the total absence of regulations and regulatory bodies. Even the chief of a tribe did not have absolute power to regulate and settle disputes between individuals. As a result, revenge and wars were the main means of settling any dispute; however, it has been reported that individuals and tribes referred to arbitration and other forms of dispute resolution mechanisms, but mostly after being exhausted by wars.⁵ According to Al-Ya'qoubi, a well-known Arab historian who lived in the 10th century: *“As a result of not having religions or laws to govern their lives, pagan Arabs used to have arbitrators to settle their disputes. So when they have a conflict regarding blood, water, grazing or inheritance they used to appoint an arbitrator who carries the characters of honour, honesty, older age and wisdom”*. Furthermore, many people were known for being arbitrators at that time such as Aktham bin Saifi, Hajjeb bin Zurarah, Al-akra'a bin Habis and Abdulmuttalib bin Hashim, the grandfather of Prophet Muhammad; even Prophet Muhammad himself acted as an arbitrator in many incidents. Despite the great deal of discrimination practiced against women in that era, the appointment of female arbitrators was a notable feature of arbitration in that era, and historians did not ignore the important roles played by women arbitrators at that time and quoted the names of many women arbitrators such as Hind bint Alkhas, Jam'a bint Habis and Sahar bint Loukman.⁶

Prior to Islam, the recourse to arbitration was voluntary as well as the enforcement of the final judgment. The attendance of the parties in the dispute to the hearings was an important condition for the validity of the arbitral award. With regard to the procedural rules, arbitrators were not bound by any certain rules apart from a number

⁵ J. Ali, *History of Arab before Islam* (3rd edn., Dar Al Elm Lelmalayeen,1970), vol. 5, p. 65.

⁶ Ibid.

of certain customs like the obligation to hear the disputing parties on an equal basis and to bear in mind the customary rules of the tribe when examining proofs presented by the parties.⁷ The procedural rules of arbitration under the Islamic law were inspired by some of the pre-Islamic procedural practices that went on to be the base of the laws of procedure in all Muslim countries today, such as the rule providing that the plaintiff bear the burden of proof; and if the defendant denies, the only thing that can be taken from him is the oath.⁸ At that time, the oath used to be taken in front of one of the sacred idols of the tribe or the village, or in some cases in front of one of the main idols of the Arabs at that time. If the defendant did not admit or defend himself and refused to take the oath, the arbitrator issued his decision in favour of the plaintiff.⁹ Such rules were the results of the accumulated experiences and practices of the ancient Arabs which were based on the common sense of some Elders which continued to be followed by the later generations and were partly adopted by Islam. The question that may arise now would be about the reasons that made Islam uphold such pre-Islamic practices. It will be seen below that Islamic law adopts the concept of local custom (*Urf*) as a source of regulation as long as it does not contradict with the main principles of Shari'a. It is not necessary for these customs to be of a Muslim society if it is not concerned with rituals and belief. This issue will be dealt with in detail when discussing the sources of the Islamic law.

Lack of enforceability was one of the features of arbitration before Islam; however, in many cases the losing parties voluntarily execute the arbitral award either for moral reasons or because of the social influence, especially when refusing the enforcement of the judgment is considered a violation or a disrespect of the tribal rules which might lead the society to abandon them. In the worst case scenario, the voluntary execution of the judgment can prevent the spark of wars and revenge, as wars at that time used to spark from silly reasons and lasted for years or even decades.¹⁰

⁷ See in general, Z. Alqurashi, 'Arbitration under the Islamic Shari'a', *Oil, Gas and Energy Intelligence*, 1, Mar. 2003, pp. 30-44.

⁸ This principle was developed and adopted by Shari'a, as will be discussed later on.

⁹ A. Alahdab, *Altahkeem Ahkamouh wa Masaderouh* (1st edn., Naoufal Publications, 1990), vol. 1, p. 37.

¹⁰ P. Hitti, *History of the Arabs* (10th edn., Macmillan, 2002), p. 87-90. It was reported that a war between two tribes lasted for more than 40 years because of a dispute over the result of a camel race.

Most of the disputes before Islam were usually related to issues of honour, leadership, blood and aversion. One of the well-known disputes of that era is the dispute between Amir ibn Altufail and his brother Alqam'a bin Altufail after the death of their father, who was the Chief of the tribe of *Bani Amir*. The two brothers had a dispute over the leadership of the tribe and they agreed to refer the dispute to the Chief of another tribe to arbitrate between them, who proposed that they should have a duel with swords in front of him and other people. The Chief of the other tribe suggested that the one who beats the other would be the leader of the tribe; however, an entire year passed without an end to this fight. As a final award, the Chief of the other tribe decided that both should share the leadership of the tribe, which they did.¹¹

The story of the reconstruction of the *Ka'bah* in Makkah, around the year 605 AD, is an example of a typical arbitration procedure of that time. The story has been narrated by many historians and *Hadeeth's*¹² narrators:

Once the walls of the *Ka'bah* were rebuilt, it was time to place the Black Stone (*Alhajar al Aswad*) on its south-eastern corner. Arguments went off about who would have the honour of putting the Black Stone in its place. A fight was about to break out over this issue, then Abu Umayyah, Mecca's oldest man, proposed that the first man to enter the gate of the mosque the following morning would decide the matter. That man was Muhammad. The people were delighted "This is Muhammad". "We accepted him as arbitrator", Muhammad came to them and they asked him to decide on the matter. He agreed. Prophet Muhammad proposed a solution that all agreed to place the Black Stone on a cloak; the elders of each of the parties to the dispute held on to one edge of the cloak and carried the stone to its place. The Prophet then picked up the stone and placed it on the wall of the *Ka'bah*.¹³

The above incident shows the main features of arbitration in that era, which are:

- Arbitration agreements were simple and spontaneous;
- The agreement was not in writing;

¹¹ E. Aljuhani, 'The New Saudi Arbitration Act', *Riyadh Chamber of Commerce and Industry Magazine*, issue 1 (1985), pp. 22.

¹² This term will be defined when talking about the sources of Shari'a.

¹³ I. Hisham, *Seerat Ibn Hisham* (Ministry of Islamic Affairs, Saudi Arabia) <<http://www.al-islam.com>>, accessed 21 May 2007.

- Arbitration was similar to conciliation because the purpose behind the whole process was to reach an agreement and settle the dispute by any amiable solution, not to give a binding judgment.

In principle, arbitration agreements of the old Arabs do not differ from any modern arbitration agreement in the sense that they include all the essential elements of modern arbitration agreements. As seen above, the parties to the dispute stipulate to submit the dispute to arbitration; also the parties to the dispute identify the issue at the time of the dispute, agree on the time and the seat of the arbitration and nominate the arbitrators.¹⁴ Islam in its early stages adopted the concept of arbitration and emphasised on its validity on the basis of local customs and practices which were considered to be a source of law under Shari'a, as will be seen below.

1.1 Arbitration in the Early Stages of the Development of Islamic Law

1.1.1 Arbitration in the Quran

The Quran is the sacred book of Islam, believed by Muslims to be the infallible words of God dictated to Prophet Muhammad. It should be noted that the essential nature of the Quran is that it is not a code of law; nonetheless, it gives general guidance and sets up broad concepts.¹⁵ The following Quranic verse supports this view and indicates that Muslims should follow the guidance of the Quran to regulate their lives even if there is no Quranic ruling on the very specific issue: "*Now there has come to you a clear sign from your Lord, guidance and mercy*".¹⁶ There are only less than 500 verses referring to legal issues in the Quran.¹⁷ It can be said that even in these verses there are both gaps as well as doubts as to whether the legal injunctions included in these verses are mandatory or permissive and as to whether it is subject to public or

¹⁴ Supra 2, Albejad, p. 23.

¹⁵ D. Pearl, *A Text Book on Muslim Law* (1st edn., Croom Helm, 1979), p. 1.

¹⁶ The Quran 6: 175. please note that the Quran cannot be translated literally. All references to the Quran hereinafter are references to the translation of the meanings of the Quran as understood by the translator. The English translations have been taken from the website of King Fahd Complex for the Printing of the Holy Quran, <www.qurancomplex.org>, accessed 12 July 2008.

¹⁷ The exact number is disputed; however, the number ranges between 80 and 500. For a partial list of the verses and the related topics, see in general: I. Abd-Alhaqq, 'Legal Injunctions of the Quran', *The Journal of Islamic Law*, 2 Spring/Summer 1997.

private sanctions.¹⁸ The existence of these gaps can be regarded as an advantage that made the Quranic injunctions flexible and suitable for every time and every situation, as demonstrated in the conflicts between Scholars which are a result of the differences in the understanding of the Shari'a texts.

Many of the usual pre-Islamic practices were abolished by Islam such as revenge, female infanticide, robbery, etc. However, the pre-Islamic methods of dispute settlement were recognised, confirmed and regulated. The validity of arbitration has been confirmed by the main sources of Shari'a at that time as the other sources developed some decades or even centuries later.¹⁹ The Quranic view regarding arbitration has two main lines; according to some verses of the Quran, arbitration is a form of conciliation, similar to "amiable composition", which is not binding on the parties. According to these texts, the arbitrator's decision is neither binding nor final, unless it is accepted by the parties. Thus, arbitration does not have any judicial nature;²⁰ it is no more than conciliation.²¹ The second group of texts recognises arbitration as a binding dispute settlement mechanism that is similar to the modern arbitration.²² The Quranic verses regarding arbitration use the word *Hokm*, which means judgment or arbitral award, and the word *Hakam*, which means arbitrator.

*"Surely, we have revealed to you the Book with the truth, so that you may judge between people according to what Allah has shown you".*²³

The applicable law under the Quranic provisions is the Quran itself and the *Sunnah* of Prophet Muhammad; and then the other sources of Shari'a as they have developed from the understanding of these two sources.²⁴

*"If you fear a breach between them (the man and his wife), appoint (two) arbitrators, one from his family and the other from her family; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is ever all-knowing, well acquainted with all things."*²⁵ With reference to the latter Quranic verse, commentators emphasised on

¹⁸ Supra 10, Hitti, p. 95.

¹⁹ The recognised sources of Shari'a law at that time were the Quran, *Sunnah* and *ijtihad* only as the other sources were developed at a later period.

²⁰ Supra 7, Zeyad.

²¹ The Quran 4: 35.

²² The Quran 4: 58.

²³ The Quran 4: 105.

²⁴ This point will be elaborated when talking about Islamic jurisprudence.

²⁵ The Quran 4: 35.

the appointment of the arbitrators in family disputes as one of the judge's duties and as being a part of the usual procedure that should be resorted to after exhausting the primary remedies.²⁶ In this verse, the Quran used the word *eb a'tho* which is an order to send rather than appoint, adding more strength to the arbitral award issued by the arbitrators. Ibn Qodamah, in his comprehensive work *Almoghni*, which is the main text book in comparative *fiqh* under the *Hanbali* School, cited two main arguments regarding the nature of the mission of the arbitrators in the light of the previous Quranic verse:

1. Arbitrators are agents of the disputed parties

According to this view, the acceptance of the arbitration and the appointment of the arbitrators are compulsory for the parties to the dispute because the appointment is established by a judicial order. However, the acceptance of the award requires the parties' consent. The exception of the requirement of the parties' consent is the case of having disqualified parties.²⁷ In this case, the acceptance of the decision will be subject to the consideration of their guardian or to the judge.²⁸

2. Arbitrators are judges

According to this view, the reference to arbitration is compulsory as well as the acceptance of the award which is considered final and binding, similar to court judgments. The supporters of this view quoted the following Quranic verse: "*appoint (two) arbitrators, one from his family and the other from her family; if they both wish for peace*".²⁹ They added that the Quran calls them arbitrators not conciliators and arbitrators are judges. Thus, arbitrators have freedom in their judgment with no need for the disputed parties' authority or consent. Ibn Qodamah added that the last sentence in the Quranic verse "*if they both wish for peace*" is directed to the arbitrators not to the couple.³⁰

²⁶ See generally A. Al-Kenain, *Altaheem fe Alshari'a Alislamiyah: Altaheem Al'am, wa Altaheem fe Alshiqaq Alzaouji* (1st edn., Dar Alasimah, 2000).

²⁷ The general rules of disqualification will be discussed later on.

²⁸ M. Ibn Qodamah, *Almoghni* (1st edn., Hajar Publications, 1992), vol. 10, p. 263.

²⁹ The Quran 4: 35.

³⁰ See in general, supra 28, Ibn Qodamah, vol. 14.

*“Surely, Allah commands you to deliver trusts to those entitled to them, and that, when you judge between people, judge with justice. Surely, excellent is the exhortation Allah gives you. Surely, Allah is All-Hearing, All-Seeing”.*³¹ *“If they come to you, judge between them or turn away from them. If you turn away from them, they can do you no harm. But if you judge, judge between them with justice. Surely, Allah loves those who do justice”.*³²

Although the above-quoted verses use the verb ‘to judge’, it distinguishes between arbitration and litigation by giving arbitration the voluntary nature in the sense that arbitrators are given a choice between accepting the position and rejecting it, which is exactly the same concept applied by modern arbitration. Unlike judges, who do not have the choice to decline jurisdiction over a case, if an arbitrator declines, there is no way to force him to accept the arbitration as a court judge cannot decline jurisdiction over a case without a valid reason.³³ If the arbitrator accepts office, he has the duty to arbitrate with due observance of the rules of fairness and justice and he also has the right to resign at any time.³⁴

*“And when you pronounce judgment, pronounce it with justice even if a near relation is concerned, and fulfil the covenant of Allah”.*³⁵ The Quran established the principle of impartiality of the arbitrators in this verse and the issue as a whole received a great deal of attention from Muslim scholars, as will be seen below.

*“O you who believe, do not kill game when you are in Ihram (state of consecration for Hajj or ‘Umrah’). If someone from among you kills it deliberately, then compensation (will be required) from cattle equal to what one has killed, according to the judgement of two just men from among you”.*³⁶

³¹ The Quran 4: 58.

³² The Quran 5: 42.

³³ I. Alastal, *Altaheem fe Alshari’a Alislamiyah* (1st edn., Maktabat Alnahdah Al Arabiyah, 1986), p. 36. Such reasons vary from a fear of bias to being subject to actual duress.

³⁴ S. Saleh, *Commercial Arbitration in the Arab Middle East A Study in Shari’a and Statute Law* (2nd edn., Graham & Trotman, 2006), p. 16.

³⁵ The Quran 6: 152.

³⁶ The Quran 5: 95.

This verse of the Quran gave individuals the right to appoint someone to judge in estimating the amount of compensation without the supervision of a judge or the authority. In the light of this verse, the mistaken party should appoint two qualified arbitrators and execute their decision without resorting to the authority, which is evidence of the legality of ad-hoc arbitration in the Quran.³⁷ The guidance provided by this Quranic verse is similar to the principles established by the UNICTRAL model law on International Commercial Arbitration in the sense that the parties to the arbitration administer the proceedings themselves without the supervision of a judicial body.³⁸

1.1.2 Arbitration in the Sunnah

1.1.2.1 Definition of Sunnah

As mentioned above, the Quran contains general guidance and broader concepts regarding all legal aspects. These principles have been illustrated in the *Sunnah*, which is the second source of Islamic law after the Quran. The Quran mentions: “*And whatever the Messenger gives you, take it, and whatever he forbids you, leave it.*”³⁹ The *Sunnah* can be defined as a collection of the sayings of Prophet Muhammad, examples of his behaviour, things he approved and things he condemned during his lifetime.⁴⁰ The *Sunnah* can be divided into three types: *Alsunnah al qawliyah*, which is the sayings and statements of the Prophet; *Alsunnah al fi’liyah*, which is the deeds of the Prophet; and *Alsunnah al taqririah* or the Prophet’s silence or tacit approval regarding deeds which occur with his knowledge. There was a dispute between Scholars on whether the *Sunnah* is a direct revelation of Allah or is just a reasoning of the Prophet. Some scholars argued that the *Sunnah* is not a direct revelation of Allah as is the Quran and it is just a reasoning of Prophet Muhammad. However, this opinion contradicts with the following verse of the Quran: “*He, Prophet Muhammad, does not speak out of his own desire. It is but revelation revealed to him*”.⁴¹ It is

³⁷ The Quran 5: 95.

³⁸ See the UNICTRAL Model Law on International Commercial Arbitration, especially article 5.

³⁹ The Quran 7: 59.

⁴⁰ Supra 13, Ibn Hisham, ‘The Life of Prophet Muhammad in Medina’.

⁴¹ The Quran 53: 3-4.

believed among the majority of Muslims that the Quran is the word of Allah literally, whereas the *Sunnah* was inspired by Allah but the wording and actions are of the Prophet's.⁴²

The *Sunnah* also contains the *Hadeeth*, which is a more specific term. *Hadeeth* refers to the direct report of the sayings and teachings of Prophet Muhammad. In the *Sunnah*, the reference was made to arbitration, and the administration of justice is mainly subjective, descriptive of judges' (arbitrators') ideal behaviour and generally in the form of broad thoughts and prescriptions. Saleh (1984) summarised the most cited references to arbitration in the *Sunnah* as follows:

- The Prophet disliked endless litigation, especially litigation of an oral nature.
- The Prophet's continuous effort to conciliate between litigants and the swift procedure of conciliation reported to have been established by him between creditors and debtors. It has been reported that he discounted the claim of a creditor in order to reach a rapid payment.

*"Reduce your debt to one half," gesturing with his hand. Kab said, "I have done so, O Allah's Apostle!" On that the Prophet said to Ibn Abi Hadrad, "Get up and repay the debt, to him."*⁴³

- The stringent sanctions which would befall a litigant who did not abide by the ruling of the Prophet acting as a conciliator.
- The determination of disputes according to the rules of the Quran with no room for innovation.
- The repeated requirement that resources should be given to the Prophet as a judge (arbitrator) is authorised as a sign of faith.
- The remuneration of the judge (arbitrator) is authorised as long as it is not excessive.
- The important aspect of the Prophet's realistic and transcendental view on litigation (also valid for arbitration) is worth quoting:

⁴² A. Hourani, *A History of the Arab People* (1st edn., Warner Books, 1991), pp. 59-71.

⁴³ A. Albukhari, *Aljame' Alsaheeh (Saheeh Albukhari)* (1st edn., Dar Aljeel, 2005), vol. 3, Chapter 40, No. 600.

Allah's Prophet said, "I am only a human being, and you people (opponents) come to me with your cases; and it may be that one of you can present his case eloquently in a more convincing way than the other, and I give my verdict according to what I hear. So if ever I judge (by error) and give the right of a brother to his other (brother) then he (the latter) should not take it, for I am giving him only a piece of Fire".⁴⁴

It is true that this statement stresses the weakness of judges (arbitrators), but it also throws light on the transcendental ethics of the Islamic sense of justice beyond the judicial mechanism.⁴⁵

1.1.3 The Practice of Arbitration at the Time of Prophet Muhammad and his Companions

Unlike the legal scholars of Rome and medieval Europe, Prophet Muhammad was not interested in developing a dispute settlement mechanism that was isolated from political control. On the other hand, Prophet Muhammad needed to control the legal system and, through that, control the development of the law itself.⁴⁶ Arbitration was not isolated from the general improvement of the law. Practiced by Prophet Muhammad and his companions, arbitration was a successful and flexible dispute settlement mechanism. Arbitration at that time can be divided into two main sections, general arbitration and arbitration in political disputes.⁴⁷ The general arbitration did not lose the voluntary character that it used to have during the pre-Islamic age; even Prophet Muhammad preferred to resolve disputes by proposing an amicable settlement (*sulh*) rather than imposing a judgment on unwilling parties; however, a decision can be imposed if the parties do not accept the proposed settlement.⁴⁸ The latter type of dispute settlement has been reported in the following *Hadeeth*:

"An Ansari man quarrelled with Azzubair in the presence of the Prophet about the Harrah Canals which were used for irrigating the date-palms. The Ansari man said to Azzubair, "Let the water pass" but Azzubair refused to do so. So, the case was brought before the Prophet who said to Azzubair, "O' Zubair! Irrigate (your land)

⁴⁴ Ibid. vol. 9, Chapter 89, No. 281.

⁴⁵ Supra 34, Saleh, p. 16.

⁴⁶ G. Sayen, 'Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia', *University of Pennsylvania Journal of International Business Law*, 9/2 (1987), pp. 211-227.

⁴⁷ Supra 34, Saleh, p. 17.

⁴⁸ Ibid.

and then let the water pass to your neighbour." On that the Ansari got angry and said to the Prophet, "Is it because he (i.e. Zubair) is your cousin?" On that the colour of the face of Prophet changed (because of anger) and he said, "O' Zubair! Irrigate (your land) and then withhold the water till it reaches the walls between the pits round the trees." Zubair said, "By Allah, I think that the following verse was revealed on this incident: But no, by your Lord they can have No faith until they make you judge in all disputes between them"⁴⁹.

Arbitration in war had a different character and circumstances from modern arbitration of a similar nature. This kind of arbitration refers to the settlement of political and military disputes inside and outside the territory of the state, between the state and other states or between the state and individuals who have military power.⁵⁰ Shortly after the foundation of Islam, the treaty of Medina of 662 AD, which was a security pact among the city's Muslims, non-Muslim Arabs and Jews, included an arbitration clause. The clause provided that in the case of a dispute between the inhabitants of the city with regard to a political matter, the dispute should be settled through arbitration by Prophet Muhammad personally or, subject to the approval of the parties, by an arbitrator appointed by Prophet Muhammad.⁵¹ In accordance with the treaty of Medina, Prophet Muhammad resorted to arbitration in his dispute with the Jewish tribe Banu Qurayza.⁵² At that incident, the Jews agreed to name Muhammad as a sole arbitrator on the condition that he refer the decision of the case to another Muslim named Sa'ad ibn Moazz, who had once been an ally of the Jews. Even after Sa'ad rendered his decision, Muhammad formally ratified it, saying that it was in accordance with his own opinion.⁵³ The procedure of the latter case was described by Sayen (1987) as follows:

This is evidence that if the parties submit to the judgment of a certain man and he refers judgment to a third person with their acceptance, then that is lawful. He should not refer judgment to third persons without their acceptance because Sa'd, between the arms of the Prophet, took from them the oath that they would accept his

⁴⁹ Supra 43, Albukhari, Chapter 40, No. 548.

⁵⁰ Ibid.

⁵¹ Supra 13, Ibn Hisham, 'The Treaty of Medina'.

⁵² C. Brower and J. Sharpe, 'International Commercial Arbitration and the Islamic World: The Third Phase', *The American Journal of International Law*, 97 (2003), pp. 643-656.

⁵³ Supra 46, Sayen.

*judgement, and the prophet did not object to that. This is because people have different opinion regarding the law and this is a judgment that requires an opinion. So their acceptance for the judgement of one person is not acceptance of the judgment of another, and if he refers judgment to some one else without their consent and he judges in a certain way, then that judgment should not be enforced unless the first hakam approves it after he learns of it. Then it should be enforced because his approval gives it the same status as if he made it himself and because the judgment was in accordance with his opinion and they had accepted that.*⁵⁴

As mentioned above in the case of family dispute arbitration, the two appointed arbitrators have to agree on the judgment. This method has been used in the famous incident of *Tahkeem* between Ali the fourth Caliphate and Mu'awiyah the governor of Syria in the year 659 AD. This arbitration was an effort to stop the civil war that erupted as an impact of the assassination of the third Islamic Caliphate Othman and lasted for more than two years. The dispute was submitted to arbitration by a written agreement; the two parties agreed to appoint two arbitrators in a written deed which stated the names of the arbitrators, the time limit for making the award, the applicable law and the place of issuing the award.⁵⁵ The arbitrators had been given the full power to determine the dispute; however, the provision of the applicable law provided that the decision should be based on the Quran and the *Sunnah*. The two arbitrators agreed in private that both claimants be deposed and a new Caliphate be chosen by a general election. Ali's arbitrator announced the decision first; however, when Mu'awiyah's arbitrator followed, he said that he agreed that Ali should be deposed but affirmed Mu'awiyah's claim to the Caliphate.⁵⁶ The award was easily set aside on the grounds of violating the Quran and the *Sunnah*.⁵⁷

The above incident shows the main features of a political arbitration during the first few decades of the life of Islam. When looking at the story as narrated by different historians in comparison with modern arbitration agreements, it can be said that both agreements share many characteristics as both:

⁵⁴ Ibid.

⁵⁵ Supra 7, Zeyad.

⁵⁶ Supra 46, Sayen, p. 229.

⁵⁷ Ibid.

- Define the disputing parties precisely by name, place of residence and occupation;
- Identify the precise issue of the dispute;
- Include the choice of the arbitrator(s);
- Take the form of a written contract;
- Determine a deadline for issuing the final award;
- Determine the applicable law in the arbitration proceedings;
- Determine the seat of the arbitration;
- Define the supervisory authority;
- Determine the authority responsible for the execution of the final award;
- Determine the terms of reference of the arbitral tribunal.

A few decades after this incident, Islamic jurisprudence started to develop as the understanding of the Shari'a texts to cover the development in various areas of law. Arbitration received a good deal of attention as a supplementary mechanism to the official litigation, as will be seen later on. The questions of what is Islamic jurisprudence and how it evolved and developed as well as the question of whether it can accommodate the modern commercial practices will be answered in the following part of the chapter before proceeding to examine arbitration rules under the different Schools of jurisprudence.

1.2 Arbitration in the Islamic Jurisprudence (Fiqh)

1.2.1 The Distinction between Islamic Law, Shari'a and Islamic Jurisprudence (Fiqh) and the Saudi Law

Before examining the arbitration practices under Islamic law and Saudi law, we should distinguish between three important concepts. These concepts are used interchangeably especially by Western scholars and practitioners; the terms are: Islamic law, Shari'a, Islamic jurisprudence. On the other hand, we have the term "Saudi law" which we can describe as Islamic law for the reason that Saudi Arabia applies it; however, the distinction should receive more attention as Saudi Arabia apply Shari'a in addition to some transplanted Acts and Codes. These borrowed Acts

and Codes are Islamic in concept as they do not contradict with the Islamic law, but a few codes contradict with some of the Shari'a principles in some of its provisions and that is the point at which the distinction becomes important. Many Muslim scholars distinguished between Shari'a and Islamic jurisprudence or, what it is called in Arabic, *fiqh* as follows: The concept of Shari'a is broader than jurisprudence and the jurisprudence itself comes, as well as other concepts of Islam such as the Islamic creed, under the umbrella of Shari'a.⁵⁸

Generally speaking, Shari'a or *Ash-Shari'a* literally means the pathway or a way to be followed and a way that a Muslim has to tread. In its original usage, the term Shari'a meant the road to the watering place or the path leading to the water, i.e., the way to the source of life.⁵⁹ From the latter point, Shari'a in the acceptance of the Arab Lexicographers has developed to mean "the law of water" and, by the passage of time, it was extended to cover all issues of life.⁶⁰ In the Quranic context, the word Shari'a describes any religion or a principle that is followed by someone; "*Then we put you on a Shari'a (a way of Religion); so follow that (way), and follow not the desires of those who know not*".⁶¹ "*To each among you have we prescribed a law and an open way*".⁶² When the Quran mentioned the word Shari'a, it meant Shari'a in its broader context as applied to any human being. When describing Shari'a in relation to Muslims, Scholars usually use the narrow definition of the word Shari'a and refer to it as the religion of Islam. The scope of Shari'a can be expanded to encompass the way of life that Muslims should follow, which is wider than the mere formal rites and legal provisions.⁶³ The broader definition of Shari'a suits the nature of the rulings of Shari'a as it is not restricted to laws, regulations or beliefs and rituals only; it covers all aspects of the private and public life of Muslims as individuals and as groups and it includes the totality of Allah's commandment.⁶⁴ Islamic jurisprudence, or *fiqh*,

⁵⁸ I. Abd-Alhaqq, 'Islamic Law; an Overview of its Origin and Elements', *The Journal of Islamic Law*, 1/1 (1996), pp. 26-31.

⁵⁹ Ibid.

⁶⁰ C. Mallat, 'From Islamic to Middle Eastern Law: A Restatement of the Field (Part 1)', *The American Journal of Comparative Law*, 51 (2003), pp. 699-719.

⁶¹ The Quran 45: 18. It should be noted that the reference to the Quran hereinafter is made to the translation of the meaning of the Quran from Arabic to English. The translation was taken from the website of the Ministry of Islamic Affairs of Saudi Arabia and it is available at <<http://www.al-islam.com>>, accessed 11 March 2008.

⁶² The Quran 5: 48.

⁶³ S. Ramadan, *Islamic Law, Its scope and Equity* (1st edn., Macmillan, 1960), p. 62.

⁶⁴ Ibid.

developed at a later stage as reasoning became necessary to allow the Islamic system to regulate new circumstances. The word *fiqh* literally means understanding and Islamic jurisprudence is an understanding of the Shari'a texts consisting merely of the applied knowledge of the Quran and *Sunnah*.⁶⁵

The concept of Islamic law was not in use at the time of the Classical Muslim scholars as it started to develop as a reaction to the western influence on Muslim Scholars and philosophers, especially after the French occupation of Egypt. The French occupation influenced Egypt in various ways but the creation of modern statutes represented in the import of the Napoleonic Code and the formation of the Constitution of Egypt were the most notable benefits in the areas of law development and codification of Islamic law.⁶⁶ It can be said that after the French occupation of Egypt, many Muslim Scholars started to take initiatives to modernise the Shari'a by taking the Napoleonic Code as a model for the Shari'a reform.

At the present time, Islamic law is recognised as the entire system of law and jurisprudence associated with the religion of Islam, including:

- The primary sources of law (Shari'a) which are the Quran and the *Sunnah*;
- The subordinate sources of law and the methodology used to deduce and apply the law (Islamic jurisprudence or *fiqh*).

It has been noticed that Western scholars mainly use the terms Shari'a and Islamic jurisprudence interchangeably and in many cases, do not distinguish between them which might lead to some confusion, as the Shari'a never changes and what changes is the *fiqh* or the jurisprudence. The distinction between Shari'a and jurisprudence should receive more attention as Shari'a is the foundation of all doctrines formulated and developed under *fiqh*, and *fiqh* is the understanding of the sources of Shari'a.

The Kingdom of Saudi Arabia was united officially in 1931 but the term Saudi law started to appear in the mid-1960s, as the law in Saudi Arabia experienced comprehensive reforms represented by issuing a number of basic laws. Despite very

⁶⁵ H. Motki, *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools* (1st edn., Brill Publications, 2002), p. 4.

⁶⁶ J. Harold, *Bonaparte in Egypt* (1st edn., Hamish Hamilton Publications, 1963), p. 374.

few Codes issued before the 1960s, the law was totally dependent on the individual reasoning of judges as well as Ministerial Circulars and Royal Decrees concerning very specific issues.⁶⁷ For outsiders, Saudi Arabia might be seen as a place in which Shari'a is the law of the country, which is partly true. Nonetheless, the missing fact is that the term Saudi law is more comprehensive than Islamic law or Shari'a in the sense that the Saudi law encompasses the Islamic law and the Codes and Regulations adapted from other laws within the sphere of the Shari'a principles. Saudi regulators bear the duty of not violating the Shari'a and the duty of keeping up with the economic, social and political interests. The main dilemma faced by the Saudi regulators is the regulation of some prohibited activities under Shari'a, especially when such activities are so important to promote the economic growth such as some banking activities. For instance, the Banking Control Law of 1966 is an example showing the way in which the Saudi regulators deal with prohibited activities under Shari'a. The Law is totally silent about banking interest as legalising it clearly in the Act is a violation of the Constitution of the Country; however, the law left room for the practice to regulate such activities, as will be seen in the last chapter.

1.2.2 The Evolution of Islamic Jurisprudence (Fiqh)

Islamic jurisprudence (hereinafter *fiqh*) has been described by Schacht (1959) as the Canon Law of Islam and the “common law” of the whole Islamic world. Under Shari'a, the Monarch is bound by the same duty of respect and obedience as are his subjects. The interpretation of the rules of the *fiqh*, their extension or limitation when confronted by new cases and the judgment on how they can be adapted to new social needs are matters to be decided by *Ulama*.⁶⁸

Fiqh literally means deep understanding; terminologically, the term *fiqh* means the process of deducing and applying Shari'a principles and injunctions in real or hypothetical cases or situations. The same term is used to refer to the collective body of laws deducing from Shari'a through the use of *fiqh* methodologies. The only

⁶⁷ Examples of laws issued in that period and still in effect: The Banking Control Law of 1966, The Companies Law of 1965, and The Law of Commercial Agency of 1962.

⁶⁸ J. Schacht, 'Islamic Law in Contemporary States', *The American Journal of Comparative Law*, 8 (1959), pp. 133-136. *Ulama* are scholars in theology and law.

fundamental difference between *fiqh* based injunctions and Shari'a based injunctions is that Shari'a injunctions are not amendable or even negotiable, whereas injunctions established under *fiqh* should be flexible and amendable in accordance with the different circumstances and customs and plays an important role in the application of such injunctions provided that such customs do not contradict with the Shari'a. This difference can be observed when following the root of a controversial issue in contemporary life that used to have a different legal status in the past, such as some kinds of banking interest. Due to the economic necessities, the legal status of banking interest has been modified and the prohibition was relaxed in some Muslim countries. Even in Saudi Arabia, which is known for a degree of strict adherence to Shari'a rulings, banking interest became more acceptable in the recent years.⁶⁹ The objective of *fiqh* is to demonstrate the practical application of Shari'a. The scope of the application of *fiqh* is very wide; it applies to all areas of law and life, including religious, political, civil, criminal, constitutional and procedural law; the administration of justice; and the conduct of war.⁷⁰ One of the main conditions that should be provided in a fatwa is conformity with the real life of the recipients of that specific ruling which means that in many cases the spirit of the law should prevail over the strict wordings.⁷¹ Classical Scholars during the 8th and the 9th centuries AD divided the *fiqh* as a science into two broad divisions; the first is called *Usul Alfiqh* (the roots of *fiqh*), which refers to the systemised methodology and principles of interpretation used in ascertaining the law. The second is called *foru' alfiqh*, the branches of *fiqh*, which is similar to the actual practice of law and deals with rendering decisions that derive from the application of *usul alfiqh*.

1.2.2.1 Usul Alfiqh

There is an independent field under the study of Islamic law that is called *usul alfiqh* or the science of source methodology in Islamic jurisprudence. Although Alshafi'e, the founder of the *Shafi'e* school, was the first scholar to introduce *Usul Alfiqh* as an

⁶⁹ See generally Chapter 5 below.

⁷⁰ Supra 63, Ramadan, p. 64.

⁷¹ Fatwa is an Arabic term to describe a legal opinion of a Muslim Scholar concerning issues of religion, law or legal interpretation.

independent science, *Usul Alfiqh* needed a few decades to develop.⁷² There are many definitions for this term; Alghazali, a classical scholar, defined it as the fundamental sources or roots from which Islamic law (*fiqh*) can be derived.⁷³ Another scholar, Alrazi, defined it as the aggregate, considered per se, of legal proofs and evidence that, when studied properly, will lead either to certain knowledge of a Shari'a ruling or to at least a reasonable assumption concerning the same; the manner by which such proofs are adduced, and the status of the adducer.⁷⁴

There is a debate between Muslim scholars regarding the number of these sources; however, there is an agreement among all of them on five sources, which are:

- The Quran, which is the ultimate source
- The *Sunnah*, which has been defined above along with the Quran
- *Alijtihad*
- *Alijma'*
- Al Qiyas⁷⁵

1.2.2.1.1 Al Ijtihad

Ijtihad can be translated from Arabic as a "human activity", and refers in legal usage to the endeavour of a scholar to derive law on the basis of evidence found in the Shari'a texts. The result of *Ijtihad* or the discovery or the formulation of a new legal rule is to be reached through the interpretation of the Shari'a texts and the application of the *Qiyas*. By the interpretation of the Shari'a texts, a Muslim scholar can discover the reason for an expressed legal rule, and by analogical deduction, he extends a given rule to cases of a similar nature.⁷⁶ There is a general impression that the use of *Ijtihad* was blocked around the 11th century when some scholars declared the gate of *Ijtihad*

⁷² See generally M. Alshafi'e, *Alrisalah* (1st edn., Dar Alkotoub Al Ilmiyah, 2001).

⁷³ F. Mitha, *Alghazali and the Ismailis: A Debate on Reasoning and Authority in Medieval Islam* (1st edn., Institute of Ismaili Studies, 2001), p. 10.

⁷⁴ F. Al Razi, *Al Mahsul Fi 'Ilm Usul al Fiqh*, ed. Dr. Taha Jabir al 'Alwani (1st edn., Imam Muhammad ibn Saud Islamic University, 1979), vol. 1, p. 94.

⁷⁵ H. Khan, 'Nothing is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law', *Michigan Journal of International Law*, 24 (2002/2003), p. 273.

⁷⁶ B. Al-Muhairi, 'Islamisation and Modernisation within the UAE Penal Law: Shari'a in the pre-modern period', *Arab Law Quarterly*, 10 (1995), pp. 287-309.

closed, but it can be said that Muslim scholars have been using it in various legal and religious issues.⁷⁷

1.2.2.1.2 Al Ijma'

Alijma' refers to the consensus of qualified Islamic scholars of a given generation on particular points of Islamic law. On points where the Quran and the *Sunnah* do not give particular guidance on an issue, the scholars' community should reach an agreement to determine on that disputed matter.⁷⁸ This methodology has its reference in the Quran in the following verse: "O ye who believe! Obey God, and obey the Apostle, and those charged with authority among you. If ye differ in anything among yourselves, refer it to God and His Prophet, if ye do believe in God and the Last Day: That is best and most suitable for final determination".⁷⁹ The qualification of those scholars who are able to participate in *ijma'* are set in the *fiqh's* text books; however, each one of the participants should resort to individual reasoning in his or her right. Some groups of scholars require judges to have the ability to participate in such a process, as will be seen when talking about the qualification of the arbitrators. Theoretically, some scholars describe *ijma'* as the most important legal notion in Islam; through it, they believe, Islamic societies should be able to establish permanent legislative institutions.⁸⁰ In practice, there has not been any successful *ijma'* since the time of the companions of Prophet Muhammad due to the political divisions and cultural differences.⁸¹ Despite the fact that absolute *Ijma'* cannot be practically reached, a sort of limited *Ijma'* can be attained by scholars in a certain geographic area or within a certain *Mathhab*.

1.2.2.1.3 Al Qiyas

Al Qiyas can be considered as the source of continuity of the *fiqh*. *Al-Qiyas* or *Qiyas* was defined as the process of analogical reasoning from a known injunction to a new

⁷⁷ W. Hallaq, 'On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad', *Studia Islamica*, 63 (1986), pp. 129-144.

⁷⁸ Supra 76, Butti.

⁷⁹ The Quran 4: 59.

⁸⁰ I. Abd-Alhaqq, 'Islamic Law An Overview of its Origin and Elements', *The Journal of Islamic Law and Culture*, 7/1 (2002), pp. 27-54.

⁸¹ Ibid.

injunction. *Qiyas* involved analogical reasoning based on the primary sources of Shari'a, the Quran and the *Hadeeth*. According to this method, the ruling of the Quran and *Sunnah* may be extended to new problems provided that the precedent (*asl*) and the new problems (*far'*) share the same operative or effective cause (*illah*).⁸² An example of this would be when the established prohibition of alcohol (from the Quran) is used to prohibit the use of drugs which causes effects similar to the intoxication of alcohol, even though there is no mention of drugs in the Shari'a texts.⁸³ As mentioned above, the Quran is not a collection of laws and codes; however, when reading the Quran, the first impression is that everything is lawful unless prohibitive injunctions exist either in the Quran or in the *Sunnah*.

Ijma' is ranked higher than *Qiyas* in the order of *fiqh* methodology. To participate in *ijma'* involving a matter, the scholars or *fuqaha'* must have a deep knowledge of the Quran and the *Sunnah* and their related sciences, most notably the Arabic language. The requirement of the Arabic language knowledge is very important as Arabic as a language differs from other languages and a scholar needs a deep understanding of the Arabic language in order to grasp the intention of the Shari'a texts.⁸⁴ *Qiyas* was originally a fluid concept of reasoning from prior sources through argument by analogy, argument *a fortiori*, argument *a majore ad minus*, argument *a minore ad majus* or argument *a contrario*. Reasoning through *Qiyas* was broad enough to provide for flexible development in the law; it permitted limitations and extensions of pre-existing rules by all its techniques. Through the passage of time, *Qiyas* was restricted through a misunderstanding of its real sense, to a strict or literal interpretation of the law, which led to the development of the *istihsan* to remedy this later restriction by promoting the spirit and essential social end of the law which was to assure the satisfaction of human interests.⁸⁵ The above five sources are the agreed-upon sources of *fiqh* among all the Schools of *fiqh*; the disputed sources will be discussed below.

⁸² J. Makdisi, 'Legal Logic and Equity in Islamic Law', *The American Journal of Comparative Law*, 33 (1985), pp. 63-78.

⁸³ *Ibid.*

⁸⁴ N. Aghndies, *Islamic Theories of Finance: With an Introduction to Islamic Law and Bibliography* (1st edn., Gorgias Press, 2005), p. 71.

⁸⁵ *Supra* 82, Makdisi.

1.2.2.1.4 Istihsan

The term *Istihsan* can be translated as juristic preference,⁸⁶ another author translated *Istihsan* as the public's interest. *Istihsan* can be defined as the process of selecting one acceptable alternative solution over another because the former appears more suitable for the situation at hand, even though the selected solution may be technically weaker than the rejected one. *Istihsan* has also been defined as a process of selecting the best solution for the general public's interest in the form of *Ijtihad*.⁸⁷ *Istihsan* allows judges and scholars some flexibility in interpreting the law to allow for something that is useful. In other words, *Istihsan* is the permission to allow the spirit of the law to prevail over the wording of the law.⁸⁸ Scholars of different Schools gave this concept a different name; the *Hanbali* scholars call it *istislah*, which can be translated as equity or public interest; meanwhile, the *Maliki* scholars call it *Almasaleh Almursalah*, which is more like a departure from strict adherence to the texts for the public's welfare.⁸⁹ *Istihsan* can be called the hidden *Qiyas*, as opposed to the apparent *Qiyas* which requires a strict application of the law.⁹⁰

1.2.2.1.5 Istihab or Istis'hab

Istihab or *istis'hab* is best defined as the presumption of continuity. This concept is well-known in western laws which provide that things or situations continue to exist until the contrary is proven. This principle has been introduced by Alshafi'e, the founder of the *Shafi'e Mathhab*, and it is considered to be a limited principle. It only applies to cases where there is no evidence available, and at best, establishes the continuance of a fact in existence, which has already proven to have existed.⁹¹ Examples for the use of the *istis'hab* are:

- The presumption that a missing person is still alive until his or her death is confirmed;

⁸⁶ H. Fadel, 'The Islamic Viewpoint on New Assisted Reproductive Technology', *Fordham Urban Law Journal*, 30 (2002), pp. 148-150.

⁸⁷ *Supra* 82, Makdisi, p. 92.

⁸⁸ *Supra* 86, Fadel, p. 150.

⁸⁹ *Supra* 82, Makdisi, p. 73.

⁹⁰ *Ibid.*

⁹¹ *Supra* 84, Aghndies, p. 104.

- The marriage continues unless dissolution is proved;
- The fundamental Islamic Law principle that a person is innocent until proven guilty.

1.2.2.1.6 Urf “Local Custom”

Islamic jurisprudence recognises a local custom as an important source of law only when such practices do not breach the Islamic principles, even if it relates to a non-Muslim society. Custom can be defined as that which is practiced by the people more often than in a particular geographic area.⁹² Islam considers custom unwritten laws formed by the practice of people throughout generations. Custom is incorporated into the law through the procedure of judges, court judgments and *Ijma*’. When a judge is unable to find an applicable text from the Quran or Sunnah, or cannot find an *Ijma*’ or an accurate *Qiyas* on a case, he will turn to the custom of the community to determine on the issue.⁹³ As a simple example, if an agreement does not determine the commission in a sale contract, the judge will turn to the practice of the place of the conclusion of the contract and issue his judgment on that basis. Custom can serve as persuasive evidence or as the basis for legal presumption; however, even when the case requires reference to the local custom, judges rely on experts and notaries to indicate the acceptable form of the local customary practice.⁹⁴

As a final remark about *Usul Al fiqh*, it is appropriate to add this quote from Professor Hallaq concluding that “*usul alfiqh as a mixed product of human reasoning was articulated in a double edged manner as it was both descriptive and prescriptive. It expounded not only the method of modus operandi of juristic construction of the law as the later Scholars carried them out, but also the proper and sound ways of dealing with the law. Moreover, usul al fiqh provided the jurists with a methodology that allowed them not only to find solutions for a new case, but also to articulate and*

⁹² Ibid.

⁹³ S. Heynman, *Islam and Social Policy* (1st edn., Vanderbilt University Press, 2004), p. 102.

⁹⁴ L. Rosen, *The Justice of Islam: Comparative perspectives on Islamic law and society* (1st edn., Oxford University Press, 2000), p. 16.

*maintain the existing law. Even old solutions to old problems were constantly rehabilitated and reasoned anew”.*⁹⁵

1.2.3 The Branches of Fiqh “Foru’ Al Fiqh”

The result of applying the methodologies of *Usul Alfiqh* on the Shari’a texts is what is known in Arabic as *foru’ Al fiqh*, which translates literally as branches of *fiqh*. *Foru’ Al fiqh* are the actual laws or the legal interpretation of the Shari’a texts that can be found in the *fiqh* textbooks which we refer to as *fiqh*. Scholars categorised *foru’ Al fiqh* into different categories in accordance with the subject matter; however, there is a disagreement over the classification and each group of scholars classified it in a different way in accordance with their own discretion. First of all, Classical Scholars divided *Al fiqh* into two broad divisions, which are *Ibadat* and *Muamalat*. *Ibadat* is the part of the teachings regarding the relationship between a human being and Allah, whereas *Muamalat* regulates the relationships among people. The most common classifications for *fiqh Al-Muamalat* are:

- Family
- Food
- Wills, Trusts, Estates and Inheritance
- Contracts, Trade and Commerce
- Property
- Criminal
- Evidence
- Administrative procedure
- Administration of justice (*Al-Qada*)
- Zakat⁹⁶
- Domestic Relations
- Relations with Non-Muslims
- War

⁹⁵ W. Hallaq, *The Origins and Evolution of Islamic Law* (4th edn., Cambridge University Press, 2007), p. 148.

⁹⁶ *Zakat* is one of the five Pillars of the religion of Islam. *Zakat* is similar to the Christian tithing.

- Ethics

1.3 The Emergence of the Islamic Schools of Thought (Mathahib)

The differences in the backgrounds, circumstances and personal understanding of the Shari'a texts and the application of *Usul Alfiqh* have a great influence on the legal interpretation in practical life. Some Muslim Scholars stopped at the clear wording of the Quran and the *Sunnah* when some others went further, attempting to achieve a deeper understanding using analogies, reasoning or even their personal opinion. When talking about the Sunni Islam, there are four main developed schools of thought or, what it is called in Arabic, *Mathahib*.⁹⁷ The differences between these Schools are noticed in very minor practical differences which are due to the differences in the interpretation of the Shari'a texts; otherwise, the four Schools are basically one for the reason that Sunni Muslims do not identify themselves according to their *Mathhabs*.

The four main schools in existence nowadays are:

- *Hanafi* School;
- *Maliki* School;
- *Shafi'e* School;
- and *Hanbali* School.

The above schools existed because they had their teachings maintained and developed by their followers, which gave them the potential to spread around the Muslim world and allowed them to keep up with the changes in daily life. In the pre-Islamic times, Arabs used to rely on their memories to remember their events, stories and poetry. The same concept was applied to the Quran, the *Sunnah* and the teachings of the religious Scholars, especially in the early stages of the development of Islam. During the first two centuries of the life of Islam, the Quran and the *Sunnah* were transferred between generations by narration, following the same methodology applied by the Arabs before Islam. By the 9th Century, a few attempts were made to collect the *Sunnah* and the teachings of the Scholars and other intellectual works. The results of

⁹⁷ For a deeper understanding of the emergence of *Mathhabs*, please see generally P. Bearman, R. Peters and F. Vogel, *The Islamic School of Law: Evolution, Development and Progress* (1st edn., Harvard University Press, 2005).

that movement were represented in the spread of the works of some Scholars more than the others. These ways of thought established by some Scholars were followed by some other Scholars and as a result, people started to refer to the followers of a particular School of thought by the name of the founder.

1.3.1 Hanafi School

The *Hanafi* School is the oldest of the four schools of Islamic law; it has been named after its founder, Abo Hanifa, Annu'man Bin Thabit (699-767), also known as *Alimam Ala'azam* "the greatest imam" in Kofa "Iraq". Although, this school is the oldest among the Islamic schools of thought, it can be considered as the most open to modern ideas and more liberal in certain matters. The *Hanafi* School is characterised by the use of subjective opinions (*ra'i*) and that gave it the name of the school, *ahl ar ra'i*. Under the teachings of this School, the priority is always given to the Quran, then to the *Sunnah* and then to Abo Hanifa's opinion. New problems are examined and often anticipated by the use of *Qiyas*. *Urf* or local custom is not a source of law but it can be a dependable reference in the case of a lack of other sources.⁹⁸ The *Hanafi* school is also known for giving legal opinions or fatwa in proposed, or sometimes imaginative, cases that did not exist at the time of discussing the matter. The *Hanafi* School was the official school of the Ottoman Empire and a selected part of the *Hanafi* teachings was embodied in the *Majalla* as an attempt to codify the financial provisions of the *Hanafi* teachings.⁹⁹ The followers of this school spread to Iraq, the region of the Caucasus and the South Asian countries such as Pakistan, India and Bangladesh.

1.3.2 Maliki School

The *Maliki* School was founded in Medina, Saudi Arabia, by Malik Bin Anas (713-795). His major work, *Almuwatt'a*, was the first comprehensive work in Islamic history and includes a collection of the *Sunnah* in addition to a selection of the *Ijma'* of the Scholars of Medina in his time. This *Ijma'* is mainly based on the Quran, *Sunnah* and *Qiyas*. In addition to the main sources of Shari'a, Malik added the

⁹⁸ A. Aljaziri, *Ketab Al Fiqh Ala Almathahib Al Arba'a* (1st edn., Dar Alkutob Alilmiah, 2003), p. 28.

⁹⁹ See generally M. Alatasi, *Sharh Almjallah* (1st edn., Maktabah Haqqaniyah, 1949).

practices of the people of Medina at the time of the Prophet Muhammad's companions as a source of legislation.¹⁰⁰ A draft code in French, based on *Maliki* teachings, was prepared by M. Morand in Algeria in 1916 but this work remained in draft form.¹⁰¹ The *Maliki* School is widely spread in North and West Africa.

1.3.3 Shafi'e School

The *Shafi'e* school was founded by Muhammad bin Idri's Alshafi'e (769-819). Alshafi'e was a student of Malik bin Anas, the founder of the *Maliki* School, and also influenced by the *Hanafi* scholar Muhammad ibn Alhasan Alshaibani, but he soon founded his own school. The *Shafi'e* teachings are mainly eclectic, borrowing from both the *Maliki* and *Hanafi* schools, because Alshafi'e himself had been inspired by both schools. Alshafi'e was the first scholar to address the concept of *usul alfiqh* (legal theories) in his book *Alresalah*. The *Shafi'es* do not recognise the concept of *istihsan* but they emphasise on the concept of *istislah*.¹⁰² The *Shafi'e* school is the official school in Indonesia, Malaysia and Brunei Darussalam, and it is widely spread among the Kurds (Turkey, Syria, Iran and Iraq), Egypt, Yemen and the entire East Asia.

1.3.4 Hanbali School

The *Hanbali* School is the official school in Saudi Arabia which makes it the most relevant School for this study. The *Hanbali* school was founded by Ahmad bin Muhammad bin Hanbal (780-855), who was a narrator of *Sunnah* and a *Shafi'e* student. The teachings of ibn Hanbal are quite conservative because they are strongly based on the Quran and the *Sunnah* with a little room for *Qiyas* and other methods of reasoning. Although the *Hanbalies* are relatively strict in religious ritual, they are the most tolerant and flexible in commercial and financial transactions.¹⁰³ As mentioned above, the *Hanbali* is the official school in Saudi Arabia; it is also widely spread in some parts of Syria and in some of the Gulf States. In 1927 King Abdul-Aziz Al Saud declared his intention to draft a code embodying the teachings of *Hanbali* scholar Ibn

¹⁰⁰ M. bin Anas, *Almuwatt'a*, ed. Muhammad Fouad Abdulbaqi (1st edn., Dar Alkotoub Alilmiyah, 2000), p. 3.

¹⁰¹ Supra 34, Saleh, p. 5.

¹⁰² Supra 72, Alshafi'e.

¹⁰³ See generally S. bin Hanbal, *Sirat Alimam Ahmad bin Hanbal*, ed. Muhammad Alzali (1st edn., Almaktab Alislami Lel Tiba'a wa Annashr, 1997).

Taymiyyah.¹⁰⁴ Although this plan was opposed by traditional religious scholars and the proposal was eventually given up, Ibn Taymiyyah's teachings are still one of the main pillars of the Saudi legal system. Non-Saudis in general use the term Wahhabism or *Wahhabiya* when describing the Saudi legal system or the official religious school in Saudi Arabia, which is a misunderstanding of the political history of that country as will be seen below.

¹⁰⁴ Supra 34, Saleh, p. 6.

2 Arbitration in the Fully Developed Islamic Law

By the end of the third century of the life of Islam, *fiqh* and *Sunnah* books started to take the form that we have nowadays. Scholars realised the importance of arbitration as an alternative for litigation and an essential step in the procedure of solving family disputes. This chapter analyses the arbitration rules under Shari'a as the base for the current arbitration rules in Saudi Arabia and many other Muslim countries. The chapter will start by showing the difference between arbitration and litigation. After that, arbitration will be defined and then the chapter will compare between the arbitration rules under the four schools of *fiqh*. The comparison will cover all the aspects of arbitration under Shari'a from the arbitration agreement till the enforcement of the final arbitral award.

2.1 The Difference between Arbitration and Litigation

The Islamic law of arbitration regulated the arbitration proceedings from the arbitration agreement till the enforcement of the final award. Some scholars did not distinguish between arbitration and litigation at all to the extent that they described arbitration as litigation and some others gave arbitration many features of litigation, as will be seen below. Before examining the arbitration regulation under the classical Islamic law, the difference between arbitration and litigation should be clarified. According to different *fiqh* sources, there are five main differences between arbitration and litigation that can be stated as follows:

- Unlike litigation, the submission of a case to arbitration needs the disputants' acceptance.¹⁰⁵
- The arbitrator's jurisdiction does not exceed to any issue other than the stipulated case in the arbitration agreement. Meanwhile, the judge has the authority to adjudicate in any case brought before him without the requirement of a prior agreement.¹⁰⁶

¹⁰⁵ Z. Ibn Nujaim, *Albahr Alraeq Sharh Kanz Aldaqaek* (2nd edn., Dar Alma'rafah, 1993), vol. 7, p. 27.

¹⁰⁶ *Supra* 99, Alatasi, Article 1842.

- An arbitrator has no authority to make an injunction on any party other than the parties to the dispute.¹⁰⁷
- An arbitral award against a guardian of an incapacitated person is not valid if it provides for any damage against his interest unless approved by a judge.¹⁰⁸
- Unlike a judge, an arbitrator has the authority to deal with disputes even if one of the parties domiciles in another country. Unlike court judgments, arbitral awards can be enforced extraterritorially.¹⁰⁹

2.2 The Differences between the Judge and the Arbitrator

There are some differences between a judge and an arbitrator even in the opinions of the scholars who consider arbitration as a form of litigation, give arbitrators the same authority as court judges and give the arbitral award the same power as a court decision. First of all, an arbitrator does not have immunity and if it is proved that he is corrupted, he will be punished like any ordinary man. A witness summons of an arbitrator is not compulsory and witnesses are not obliged to attend, or as some classical jurists explained by the following statement, “An arbitrator cannot force someone to attend the hearing either as a witness, expert or as a party to the dispute”. An arbitrator does not have the authority to imprison anyone because it encroaches on the competence of the court. An arbitrator cannot refer the dispute to another arbitrator without the approval of all the parties to the dispute. An arbitrator does not have the power to enforce an award and his duty ends by issuing the final arbitral award. Finally, an arbitrator cannot change his decision after issuing the award and if he does, the latter award is void.¹¹⁰

2.2.1 Definition of Arbitration

Although arbitration is recognised by all sources of Shari’a, it does not receive exclusive attention in the treatises and doctrinal literature of the four schools of *fiqh* for the reason that many scholars dealt with arbitration as a branch of litigation.

¹⁰⁷ Supra 26, Al Kenain, p. 37.

¹⁰⁸ Ibid.

¹⁰⁹ Supra 99, Alatasi, p. 28.

¹¹⁰ See in general supra 28, Ibn Qodamah, vol. 14 and see supra 26, Al Kenain, pp. 123-129.

Reference to arbitration is often made in chapters dealing with administration of justice “*Al-Qada*”. This might also be due to the fact that the Islamic judiciary was sufficient and flexible enough to provide suitable solutions to all types of problems which arose from social life during that time.¹¹¹ There are many different definitions for arbitration under the Islamic *fiqh*; each definition gives arbitration a different scope and even a different nature from the others. It is difficult to find a comprehensive definition for arbitration in the classical Shari’a texts as each school defines it in accordance with the scope that it gives to arbitration. The *Hanafi* School defined arbitration as the process of choosing a person to settle a dispute. On the other hand, the *Maliki* School referred to arbitration in a fairly specified manner and defined it as the process of choosing a person to settle a dispute between two or more other parties. Arbitration requires both parties to agree on the arbitrator and the decision taken by the arbitrator.¹¹² The *Shafi’i* School defined it differently and did not put restrictions on the choice of the arbitrator, and their definition reads as follows: arbitration is the process of choosing a person among the community to judge between disputants and settle their differences.¹¹³ The *Hanbali* School defined arbitration as choosing an individual for the purpose of settling a dispute between two other parties and enforcing the judgment on them.¹¹⁴

When looking at the above-quoted definitions, we can see that the four Schools defined arbitration in a very similar way. It can also be seen that arbitration under Shari’a is not restricted to commercial disputes only as Scholars left room for arbitration to encompass almost all kinds of disputes. At a later stage, arbitration was described as a spontaneous, and more or less ad hoc, move by two or more parties to a dispute to submit their case to a third party called *Hakam* or *Muhakkem* (arbitrator). The most comprehensive definition formulated by a modern author is: “Arbitration is the submission by two or more parties to a third party of a dispute to be adjudicated according to Shari’a”¹¹⁵

¹¹¹ Y. Al-Samaan, *The Legal Protection of Foreign Investment in The Kingdom of Saudi Arabia* (1st edn., Dar Alandalus for Publication and Distribution, 2000), p. 248.

¹¹² B. Ibn Farhoun, *Tabsirat Alhokkam Fe Usul Alaqdiyah Wa Manahej Alahkam*, ed. Taha Abdulaouf Sa’ad (1st edn., Maktabat Alkollyyat Alazhariyah, 1986), vol. 1, p. 43.

¹¹³ A. Al-mawardi, *Adab Alqadi* (4th edn., Dar Alani Liltiba’a Publishers, 1972), vol. 2, p. 379.

¹¹⁴ *Supra* 28, Ibn Qodamah, vol. 11, p. 843.

¹¹⁵ *Supra* 34, Saleh, p. 20.

2.2.2 The Legal Status of Arbitration under Shari'a

As a general rule, the arbitrator is an ordinary man; however, the conflict here is about whether the arbitrator is required to possess all the qualifications of a judge “*Qadi*” or not. The disagreement regarding the latter point led to arbitration having a different scope and characteristics. Moreover, scholars from different schools disputed over arbitration, whether it is litigation, agency, a combination of both, or a conciliation of the four main opinions;

- Arbitration is litigation; this opinion was reported by the *Malikies*, some *Shafi'es* and the *Hanbalies*. They justified that the arbitrator adjudicates on the dispute, and that is litigation. The *Hanbalies* added that the arbitral award is a binding judgment on all the parties.¹¹⁶
- Arbitration is an agency contract; this opinion has been reported by some *Malikies*; they added that the arbitrator is a private judge in a specified dispute so needs the disputants' approval and acceptance in order to render a valid judgment.¹¹⁷
- Arbitration is conciliation; according to the *Hanafies*, arbitrators are appointed with the disputants' acceptance and each party can decline and deny the arbitration before the issuance of the award, exactly like conciliation.¹¹⁸
- Arbitration is a combination of litigation and agency; this is one of the *Hanafies'* opinions. They justified that arbitrators act on behalf of the parties so they are agents; on the other hand, the award is binding, so it is litigation.¹¹⁹ This opinion can be seen as contrary to the doctrine of impartiality of the arbitrators for the reason that arbitrators are appointed to give a just judgment, not to act on behalf of the parties.

Following the above opinions, some *Hanafies* emphasise on the contractual nature of arbitration and compare it with contracts of agency (*wakalah*).¹²⁰ In other words, they

¹¹⁶ Supra 28, Ibn Qodamah, vol. 11, p. 484.

¹¹⁷ Ibid.

¹¹⁸ Supra 35, pp. 19-20.

¹¹⁹ Supra 99, Alatasi article 1850.

¹²⁰ Supra 113, Alkawardi, pp. 247-259.

assume an arbitrator to act as an agent on behalf of the disputants who appoint him. They also stressed on the close connection between arbitration and conciliation (*sulh*). Accordingly, an arbitral award, which is closer to conciliation than a court judgment, is of a lesser force than a court judgment but the losing party is obligated to abide by the award because the arbitration agreement binds the parties like any other contract.¹²¹ The interesting part of the arbitration under the *Hanafi* teachings is in rendering the arbitral award. The award must be rendered unanimously, otherwise every arbitrator would be considered to have made his award separately, and this would be inconsistent with the will of the disputing parties to have an award decided by the arbitrators together.¹²² This constitutes a major obstacle to arbitration as an effective method of dispute settlement. Under article 1847 of the *Majalla*, a disputant may revoke the appointment of the arbitrator at any time before the issuance of the final arbitral award unless the appointment of the arbitrator is confirmed by a judge, because in this case the arbitrator will be regarded as the judge's representative and therefore cannot be revoked during the arbitration proceedings.¹²³

Under the *Maliki* School, a disputing party can be chosen to arbitrate by the other disputing party in the same dispute that he is a party to. The *Malikies* have a different opinion regarding the revocation of the appointment of the arbitrator as according to them, the appointment of the arbitrator cannot be revoked after the commencement of the arbitration proceedings.¹²⁴

The *Shafi'es* consider arbitration an inferior system compared to the judiciary. This is because the appointment of the arbitrator can be revoked at any point up to the time of the issuance of the final award, which shows that an arbitrator is at a lower grade than a court judge. The *Hanbalies* consider arbitration as litigation; therefore, an arbitrator must possess the same qualifications as a court judge and arbitral awards should carry the same strength as a court judgment.¹²⁵

The above examples of the conflict between the Schools can be regarded as advantages for arbitration under the Shari'a as parties can apply any opinion that

¹²¹ Ibid.

¹²² Ibid.

¹²³ Supra 99, Alatasi article 1847.

¹²⁴ Supra 3, Saiyed, pp. 46-47.

¹²⁵ Ibid.

belongs to any of the four Schools on an equal basis without violating the law, for the reason that all the opinions are correct and the difference is merely in the interpretation of the legal texts.

From the above-quoted definitions, we can see that there are five main elements in any arbitration agreement under Shari'a, which are:

- The disputants, whether they are legal or natural persons with clear intentions and the full capacity to enter into the arbitration agreement.
- The arbitration agreement.
- A dispute.
- Arbitrator(s).
- Applicable law.

The arbitration regulations under the different Schools of Islamic law, as are found in the classical treatises, are the basis of the current arbitration acts in many Muslim countries in general and in Saudi Arabia in particular. This following section examines the legal rulings on arbitration under Islamic Shari'a from the arbitration agreement till the enforcement of the final arbitral award.

2.2.3 The Capacity of Parties to Enter into an Arbitration Agreement

2.2.3.1 Types of Legal Capacities

Similar to other types of contracts, parties to the arbitration agreement should possess all the qualities of a capable personality. Such a person should also be competent enough to enter into the arbitration agreement as well as being able to execute and accept the arbitral award. Under Shari'a, the legal capacity or, what it is called in Arabic, *alahliyah* to enter into an arbitration agreement does not differ from the legal capacity to enter into any other agreement. In order to be able to enter into a contractual relationship, the parties to the contract should each be

- A person that is defined as an entity who is able to bear the legal aspects of Shari'a;

- Able to acquire rights;
- Able to bear obligations; and
- Able to conduct legally effective actions and transactions.¹²⁶

A Legal personality can be either a natural personality or legal personality. A Natural personality corresponds to the living status of a human being as it starts at birth and ends at death. Nonetheless, a natural personality can be a presumed legal personality which might be present before birth or after real death.¹²⁷ A Legal personality is a presumed personality in entities that have a separate existence from the individuals who establish them but do not have human qualities.¹²⁸

Alahliyah can appear in several forms depending on the age and the mental ability. Muslim scholars identified two main sub-concepts of the legal capacity divided into five different levels, and each level represents a different form of *alahliyah*.¹²⁹ The first sub-concept of *alahliyah* is *ahliyat aluojouj* or the eligibility for the capacity which concerns the minimum requirements of an entity in order to be qualified as a natural or legal person. *Ahliyat aluojouj* can be defined as the ability of a person to acquire rights and bear obligations. *Ahliyat aluojouj* has been divided into full *kamilah* and restricted *naqisah*. Restricted capacity imposes limitations on the person's ability to acquire some rights and bear certain obligations. The latter level of capacity is restricted to the foetus and embryo during pregnancy as an unborn human being has the full right to inherit.¹³⁰ Full capacity is attributed to every living human being from the moment of birth till death.¹³¹

The second sub-concept of the legal capacity in Islamic law is *ahliyat al adaa'*; the possession of *ahliyat al adaa'* qualifies the person to conduct and execute his own affairs on his own. It has also been defined as the "ability of a person to initiate

¹²⁶ See in general, M. Zahraa, 'The Legal Capacity of Women in Islamic Law', *Arab Law Quarterly*, 11 (1996), pp. 245-263.

¹²⁷ See in general, M. Zahraa, 'Negotiating Contracts in Islamic and Middle Eastern Law', *Arab Law Quarterly*, 13 (1998), pp. 265-277.

¹²⁸ Supra 126, Zahraa, p. 253.

¹²⁹ A. Alsamnani, *Rawdat Alqodat wa Tarwwq Alnajat*, ed. Salahaddin Alnahi (2nd edn., Moassasat Alrisalah, 1984), vol. 1, p. 52.

¹³⁰ Ibid. p. 56.

¹³¹ Supra 127, Zahraa, p. 251.

actions, the considerations of which depend on a sound mind”.¹³² *Ahliyat al adaa’* can be obsolete, restricted or full. Obsolete *ahliyat al adaa’* was referred to by Muslim scholars as the state of non-existence of the capacity or *In'idam*. *Alahliyah* is associated with people who have not yet reached the age of discernment or reached it but for some reason can not satisfy its requirements, such as children under the age of seven and insane people. Restricted *ahliyat al adaa’* applies to persons who satisfy some of the discernment requirements but have not yet attained a sufficient level of mental and physical maturity; discerning children can be a good example.¹³³ *Ahliyat al adaa’*, mainly, concerns the presence of a sound mind, intellectual capacity and discernment. Any person who lacks one of these qualities is presumed to have a restricted *ahliyat al adaa’* provided that such a person reaches the age of discernment. Any human being will be presumed to have full *ahliyat al adaa’* upon reaching the age of maturity and satisfying its requirements.

It has been alleged that Islamic law does not recognise the concept of legal personality. Such a view can be generally rejected as incorrect. Although classical Muslim scholars did not apply this concept to partnerships, this fact has been explained by the social and economic conditions of their time, when partnerships generally comprised a limited number of individuals. In contrast, the concept of the legal personality is well established under Shari’a with respect to such institutions as the public treasury, the *waqf* “charitable trust”, schools, hospitals and mosques, all of which are recognised as having the capacity to hold and exercise rights and liable for obligations independent of their administrators. Parties to the arbitration should have a full capacity in order to be able to exercise their rights.¹³⁴ *Alahliyah* as represented above is only the theory as when it comes to the actual application, the law summarises *Alahliyah* in two main issues only: majority and prudence. In the next few paragraphs, the requirements of majority and prudence under Shari’a as applied in Saudi Arabia will be examined.

¹³² Ibid.

¹³³ Shari’a scholars distinguish between the age of maturity and the age of discernment. Scholars disputed about the age of maturity as some fixed the age at 15-18 and the majority of scholars recognised maturity to be attained by physical puberty. All scholars in all schools agreed on the age of 7 to be the age of discernment.

¹³⁴ A. Lerrick and Q. Mian, *Saudi Business and Labor Law* (2nd edn., Graham & Trotman, 1987), pp. 106-107.

2.2.4 The Legal Capacity Requirements for Natural Persons

In addition to satisfying the requirement of the Shari'a contract law, a valid arbitration agreement requires the parties to the agreement to satisfy the requirements of legal capacity, i.e. to have reached a certain age and have a certain level of mental ability at the time of concluding the contract. Classical Islamic scholars tend to treat every case on its own merit, identifying the criteria according to age, sign of puberty and also on the attainment of a defect-free physical and mental maturity with which the person can reach a reliable standard in transactional matters.¹³⁵ A general legal competence to engage in legal transactions requires two basic qualifications: majority and prudence.

2.2.4.1 Majority

*“Make trial of orphans until they reach the age of marriage; if then ye find sound judgment in them, release their property to them.”*¹³⁶

The majority age is not exactly fixed under Shari'a law, neither by classical Scholars nor today; however, the above-quoted verse indicates that it is around the age of puberty. Unlike most western legal systems, the Shari'a did not fix an exact age of majority. Some early Muslim scholars such as Abo Hanifa fixed the age of majority at 18 for males and 17 for females.¹³⁷ The most general support was given to the age of 15 for both males and females by the reason of the act of Prophet Muhammad. The Prophet did not allow anyone under the age of 15 to join the army during his lifetime. The Islamic *fiqh* rejected the fixing of any definite age for legal majority and adopted the principle that legal majority is attained with physical puberty. In Saudi Arabia nowadays, the majority age is a matter of dispute between different public authorities. The Ministry of Justice follows the teachings of the Shari'a and follows the age of physical puberty, which varies from one to the other.

A Saudi national can apply for a national identity card at the age of 15. Before the age of 15, a person needs to obtain permission from his guardian in order to perform a

¹³⁵ Ibid.

¹³⁶ The Quran 4: 6.

¹³⁷ Y. Haddad and B. Stowasser, *Islamic Law and the Challenges of Modernity* (1st edn., Altamira Press, 2004), pp. 222-224.

valid action. In this case, the father of a minor is his guardian by default, following the *Hadeeth* of the Prophet when he said: “you and your property belong to your father”. If the father is not present, the testamentary guardian appointed by him should have priority over anyone else. In the absence of the father and testamentary guardian, the paternal grandfather and the guardian appointed by court will follow respectively.¹³⁸ On the other hand, a person will have some restrictions on his actions till the age of 18, like the ability to work in the public sector. The restriction might also extend to the age of 21 for travelling outside the country.

2.2.4.2 Prudence

The Arabic legal term for prudence is *rushd* and a prudent person is called *rashid*. Ibn Qodamah described a prudent person as the person who shows protective safeguarding of his property and soundness in the ordering of his income.¹³⁹ The general trend restricts the scope of prudence to it being required in financial matters only, whereas some scholars argued that prudence means sound judgment with regard to religion as well as property so that a sinful or religious hypocrite may not be qualified as *rashid*, just as he may not qualify as the witness. The latter argument has been generally rejected in favour of the view that an impious Muslim might lack prudence in matters of religion, but if he has prudence in property dealings, then he has the full competence to transact.¹⁴⁰

¹³⁸ J. Nasir, *The Islamic Law of Personal Status* (2nd edn., Graham & Trotman Ltd, 1990), p. 215.

¹³⁹ *Supra* 28, Ibn Qodamah, vol. 6, p. 610.

¹⁴⁰ N. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (1st edn., Graham & Trotman, 1984), pp. 32-36.

2.2.5 Incapacitated Persons

Muslim scholars identified several mental and physical defects that constitute impediments to legal capacity; and consequently, those who suffer such defects have a restricted legal capacity. These defects can be either natural or incidental defects.

2.2.5.1 Natural Defects

2.2.5.1.1 Minority and Insanity

Infants and insane people are not allowed to conclude any kind of contract and they must be represented by their guardians. The actions of infants and insane people are null and void and not capable of ratification. The incompetence of the insane does not require the prior issue of a judgment to the effect that the party is insane, except in the *Maliki* teachings.¹⁴¹

Mental derangement is a weakness of mental faculties causing a person to have a limited ability in understanding, mixed reasoning and a defective ability of execution. Mental derangement could be severe, similar to insanity, and in this case such mentally deranged persons will have the legal status of insane persons, causing their *ahliyat al adaa'* to be obsolete; or it could be slight mental derangement, and in this case mentally deranged persons can have a restricted capacity similar to discerning children.¹⁴²

2.2.5.1.2 Mortal Illness

Mortal illness “*maradh almout*” has been defined in article 1595 of the *Majalla* as “a sickness where in the majority of cases, death is very likely to happen, and, in the case of a male, such a person become unable to deal with his affairs outside his home, and in the case of a female, she is unable to deal with her domestic duties, death having occurred before the expiration of one year by reason of such illness whether the sick

¹⁴¹ Supra 34, Saleh, p. 27.

¹⁴² Supra 127, Zahraa, p. 253.

person has been confined to bed or not”¹⁴³ Mortal illness might deprive the individual from the capacity to contract; the concept of mortal illness is an original concept of Shari’a. From the above-quoted definition, for a person to be declared incapacitated, four requirements should be fulfilled:

- A hopeless illness such as cancer or AIDS;
- The patient’s awareness of his illness;
- The death of the patient as a result of his illness is expected within one year;
- A detrimental act to the patient’s heirs or creditors.

An arbitration agreement can be annulled by the patient’s heirs or creditors if it contains a present or a harmful action against their interests.¹⁴⁴ The annulment of the arbitration agreement requires a court order.

2.2.5.2 Incidental Defects

2.2.5.2.1 Intoxication

As a general rule, a person under the influence of alcohol or drug loses his legal capacity as long as he is under its influence. The incapacitated person under this category, as it has been defined by Abo Hanifa, is a person who is not able to distinguish the earth from the sky.¹⁴⁵ The *Hanafi* School holds a radical position regarding intoxicated people. According to the *Hanafies*, the legal competence of a man is not affected when intoxication results from a voluntary act. It is affected only when alcohol is taken by accident or for medical reasons. At a lesser degree, the *Malikies* give an intoxicated person the option to ratify his action after regaining his consciousness. The *Shafi’es* and the *Hanbalies* deny the legal competence of an intoxicated person and disregard his acts.¹⁴⁶

¹⁴³ A. Arrawi, ‘Principles of the Islamic Law on Contracts’, *The George Washington Law Review*, 36 (1953), pp. 32-36.

¹⁴⁴ Ibid.

¹⁴⁵ Supra 34, Saleh, p. 28.

¹⁴⁶ Supra 138, Nasir, p. 47.

2.2.5.2.2 Insolvency

An insolvent “*Moflis*” is a person whose debt exceeds his assets and who is thereby unable to discharge his liability for such debts. It has been argued that a person may be regarded insolvent if he attempts to place his assets beyond the reach of his creditors, or even in some cases when he delays payment, a judge may, upon the petition of the creditors or heirs, issue an injunction forbidding the insolvent person from disposing of his assets.¹⁴⁷ This anticipatory restriction in the legal capacity is called *hajr*; scholars have based it on the practice of Prophet Muhammad and his companions. All forms of commercial conduct of the insolvent are not valid unless approved by a judge or by the creditors.¹⁴⁸

2.3 Shari’a Contract Law in Relation to Arbitration Agreements and Arbitration Clauses

Parties to the dispute should agree to arbitrate as a prerequisite for the commencement of the arbitration proceedings. Such an agreement takes the form of either an independent agreement or a contractual clause incorporated within the main contract. Unlike arbitration under the Code of the Commercial Court of 1931, the Arbitration Act of 1983 regards arbitration agreements and clauses as binding and enforceable. As a general rule, we can say that all contracts and transactions are lawful and binding unless someone finds a clear evidence to the contrary. The prohibition of the contract should be established by a clear Shari’a text or through accurate reasoning.¹⁴⁹ The Shari’a maintains the freedom of the parties to contract and in relation to the *Hanbali* School, Ibn Taymiyyah concluded that a contract cannot be revoked without the mutual consent and satisfaction of all the parties, except if it provides for an obvious violation of the Shari’a law i.e. it prohibits a lawful issue or legalises a prohibited one.¹⁵⁰ The important aspects of Shari’a contract law in relation to arbitration agreements and arbitration clauses will be examined with reference to the *fiqh* treatises and the common practice in Saudi Arabia for the reason that there is no code

¹⁴⁷ Supra 84, Aghndies, pp. 215-216.

¹⁴⁸ See Diwan Almazalim, Decision No. 60/D/4 of 1989.

¹⁴⁹ S. Mahmoud, *Arbitration Codes: Comparative study between the arbitration codes of Saudi Arabia, Kuwait and Egypt* (2nd edn., Dar Alkotob Alqanonyah, 2007), p. 56.

¹⁵⁰ Ibid.

or act to regulate commercial contracts, as the practice is totally based on the tradition of the Shari'a.

2.3.1 Contract under Shari'a

2.3.1.1 The Meaning of "Contract"

Shari'a recognises a contract as a legally valid activity and encourages the parties to any agreement to perform their obligations in accordance with the terms of the contract, as the Quran states: "*You who believe, fulfil any contracts you may make*".¹⁵¹ The Arabic term *Aqd* is translated into English as a contract; however, it carries, literally, a more deeper meaning than a normal contractual relationship. When looking at the literal meaning of the word *Aqd*, we can see that it means "tie" or "bond"; therefore, there is no precise equivalent of the technical term contract in Western jurisprudence, as a contract under common law involves, in addition to the intention to create a legal relation, the basic requirements of the offer, acceptance and consideration. On the other hand, under Shari'a contract law, a contract does not necessarily require the agreement of all the parties because the term *Aqd* may describe a unilateral action which is binding and effective without the consent of the other parties in some events. For instance, a gift contract and the dissolution of a marriage by the husband are valid actions with no need for the acceptance of other parties.¹⁵² The juristic use of the word *Aqd* might lead to a presumption that scholars have been using the word in its etymological sense i.e. following the root of the word rather than its technical use.¹⁵³

Unlike other legal systems, a contract under Shari'a covers all kinds of obligations in all aspects of life such as religious obligations to Allah, the political obligations expressed in treaties, the obligation of *Bay'ah* to the political leader and commercial obligations.¹⁵⁴ The following Quranic verse supports the view that a contract involves

¹⁵¹ The Quran 5: 1.

¹⁵² Supra 140, Coulson, p. 18.

¹⁵³ M. Hamid, 'Islamic Law of Contract or Contracts', *Journal of Islamic and Comparative Law*, 3 (1969), pp. 1-11.

¹⁵⁴ N. Mohammed, 'Principles of Islamic Contract Law', *Journal of Law and Religion*, 6 (1988), pp. 115-116. *Bay'ah* is an Arabic term that describes the oath of allegiance to the political leader. *Bay'ah* has been in practice since the time of Prophet Muhammad.

all aspects of life including faith and personal religious affairs: “*Fulfil the covenant of God when you have entered into it, and break not your oaths after you have confirmed them*”.¹⁵⁵ There is no precise definition for contracts in the Shari’a treatises but most of the classical scholars defined it as “offer and acceptance”. Some scholars require the intention to enter into the contract except in issues related to personal status i.e. marriage and divorce where the contract will form even if there is no intention.¹⁵⁶ Some Western scholars assume that a contract in Islamic law is merely a legal undertaking with there being a dispute among the different schools of *fiqh* over the essentials, which are different from the Western definition of a “binding promise”.¹⁵⁷

2.3.1.2 The Formation of a Contract

To form a contract under Shari’a, a number of conditions have to be fulfilled. First of all, for a contract to be valid, it should not contradict with the Shari’a principles. This means that the contract should not involve any prohibited subject matter and it should be procedurally valid in the sense that there should be no uncertainty or, what it is called in Arabic, “*Gharar*”. Moreover, a commercial contract is of no value without satisfying the essential conditions of the offer and acceptance.¹⁵⁸ The Shari’a contract law is far easier than modern Western laws; however, this simplicity may turn into complexity in modern commercial contracts, especially when the contract is to be concluded by a means other than the traditional way of having the parties to the contract physically gathered and conclude the contract with the witness of other qualified persons. In addition to the requirements of the legal capacity of the parties to join the contract, the Shari’a requires that the parties should sustain mutual agreement during the session of the transaction, or what is known as *Khiar Almajlis*.

2.3.1.3 Mutual Consent

The most important condition for the validity of any contract is the mutual consent of the parties of the contract. The legal basis of this rule is the following Quranic verse: “*O you who believe! Transfer not unjustly the property of one another among*

¹⁵⁵ The Quran 16: 91.

¹⁵⁶ A. bin Gasim, *Hashiyat Alraoud Almourbi’ Sharh Zad Almostaqna* (1st edn., Almatba’a Alahliyah Liloffset, 1976), vol. 4, p. 327. See also, supra 28, Ibn Qodamah, vol. 4, p. 271.

¹⁵⁷ Supra 140, Coulson, p. 18.

¹⁵⁸ A. Alkhenain, ‘Contracts Involving Uncertainty’, *Ministry of Justice Journal, Saudi Arabia*, 13 (2002), pp. 170-173.

yourselves except by your mutual consent".¹⁵⁹ In accordance with the teachings of the latter Quranic verse, a contract concluded under duress is null and void. Consent should be voluntary and the parties should freely choose to make the promise. In addition to the mutual consent, the Shari'a requires mutual satisfaction as contracts concluded against the will of one of the parties can be revoked if one of the parties challenges it. Classical Shari'a scholars distinguished between consent and satisfaction as the consent might be obtained without satisfaction like in the case of hard bargaining, which is considered to be a sort of duress. The only exception to this requirement is contracts made by the authority against insolvents to pay off the creditors which do not require consent or satisfaction.¹⁶⁰

Mutual agreement is the foundation of most kinds of contracts under Shari'a. Mutual consent happens when one party gives an explicit offer or, what it is called in Arabic, *Ijab*. The party who receives the offer should give an unequivocal acceptance or *qoboul*. If these two steps are taken correctly, the contract will be legally binding as long as the parties do not change their minds before leaving the place at the conclusion of the contract. In normal circumstances, if a contract has been concluded in conformity with all relevant provisions of the Shari'a, this means not only that the contract is valid and binding on the parties, but that its conclusion is permissible and certain performances have become obligatory for them.¹⁶¹

2.3.1.4 Khiar Almajlis

Khiar Almajlis is another important doctrine under the Shari'a contract law. *Khiar Almajlis* is the option of cancelling the contract after its conclusion without bearing any liability. This cancellation method is available in the period between the moment of concluding the contract and the time of leaving the place at the conclusion of the contract. *Khiar Almajlis* is an option available to all the parties to the contract and when one of them decides to use it, the contract will be annulled without bearing any liability. The concept of *Khiar Almajlis* is similar, to some extent, to the cooling-off

¹⁵⁹ The Quran 4: 29.

¹⁶⁰ Supra 156, bin Gasim, vol. 5, p. 332. See also, I. Algari. 'The Formation of the Contract in Islamic Shari'a', *Ministry of Justice Journal, Saudi Arabia*, 11 (2001), pp. 1-13.

¹⁶¹ J. Schacht, 'Problems of Modern Islamic Legislation', *Studia Islamica*, 12 (1960), pp. 99-129.

period in Western laws and the basis for this doctrine came from the following *Ahadeeth* of Prophet Muhammad, where he said: “*The buyer and the seller have the option to cancel or to confirm the contract before they separate from each other*”.¹⁶²

With regard to a conditional sale, the Prophet said: “*No deal is settled and finalized unless the buyer and the seller separate, except if the deal is conditional*”. In this case, the validity of the contract will depend on the conditions stipulated in the contract.¹⁶³ Furthermore, *Khiar Almajlis* is not the only cancellation method under Shari’a contract law as there are some other forms of *Khiar* which apply to some cases such as conditional sales, fraud, defects, mistakes and misrepresentations.¹⁶⁴

In circumstances where one of the parties to the agreement wishes to cancel or amend the contract on one of the cancelling grounds, the damaged party will have the option of cancelling the contract without bearing any liability toward the other parties.¹⁶⁵ After the end of the cooling-off period i.e. leaving the venue after concluding the contract, the contract is final and ready for execution.

2.3.2 Nominate and Innominate Contracts

Unlike other laws, the Shari’a law pays very little attention to the distinction between nominate and innominate contracts. The Shari’a established the rule that in matters of civil and commercial dealings, any agreement not specifically prohibited by the Shari’a is valid and binding on the parties and could be enforced by the court. In the *Aramco Award* of 1958, the arbitration tribunal stated “*Aramco’s Concession must be considered as an innominated contract sui generis*”. Moreover, the law gives full

¹⁶² Supra 43, Saheeh Albukhari, vol. 3, Chapter 34, Hadeeth No. 320.

¹⁶³ Ibid., Albukhari, vol. 3, Book 34, Hadeeth No. 326.

¹⁶⁴ In addition to *Khiar Almajlis*, there are a few types of options mentioned in the Shari’a treatises, which are: *Khiar Alshart*: conditional sale; *Khiar Ala’ib*: where the buyer has the option of cancelling the contract for a defect in the subject matter; *Khiar Alro’yah*: the validity of the contract is subject to the inspection of the goods; *Khiar Ghalat* or Mistake: the parties reserve the right of cancelling the contract if it is concluded by mistake i.e. one of the parties bought the wrong goods; *Khiar Altadles*: the parties have the right to cancel the contract in case of fraud.

¹⁶⁵ See generally, supra 140, Coulson, pp. 56-74.

recognition to the rule *Pacta Sunt Servanda* with a few moral and religious exceptions in cases where the execution of the contract leads to a violation of the Shari'a.¹⁶⁶

The nominated commercial contracts under Shari'a law are:

- *Bai'*: a sale, which is the transfer of the subject matter of the contract for consideration.
- *Hibah*: a gift, which is the transfer of the subject matter without consideration.
- *Ijara*: a lease, which is the transfer of the right of using the subject matter for consideration.
- *Ariyyah*: a loan, which is the transfer of the right of using the subject matter without consideration.
- *Salam*: *Salam* contracts can be equivalent to futures contracts.

Contracts other than these five are innominated and they are permissible as long as they do not violate the principles of the Shari'a and the public order.

2.3.2.1 Special Conditions "Shorout"

Fiqh treatises defined special conditions as conditions that are irrelevant to the fundamental nature of the contract. Some scholars do not accept special conditions if they are irrelevant in the essence of the contract. Such an attitude shows that Shari'a law tries to keep commercial contracts as simple as possible; however, such simplicity works as an impediment in some modern transactions.¹⁶⁷ In this sense, a loan agreement should not involve a sale or a lease agreement as, if the parties wish to stipulate something else other than the main subject matter of the contract, they should do it in a separate agreement. For instance, hire-purchase contracts were a subject of long debate in the last decade because the condition of an obligatory sale of the subject matter after the termination of the lease period was not relevant to the lease contract. Scholars who opposed such contracts argued that having two different kinds of obligations, i.e., sale and lease, under the same contract may create a degree of uncertainty. Hire-purchase contracts were eventually legalised under the condition that the provisions related to the sale of the subject matter after the termination of the

¹⁶⁶ See generally, S. Habachy, 'Property, Right, and Contract in Muslim Law', *Columbia Law Review*, 62 (1962), pp. 450-473.

¹⁶⁷ *Supra* 28, Ibn Qodamah, vol. 4, p. 224.

lease period change to be a non-binding promise; otherwise, such contracts are null and void.¹⁶⁸

With regard to banking transactions, the known practice of *Altawarrouq* has been the subject of continuous debate among scholars nowadays as some of them have prohibited it and some have allowed it with restrictions. An *Altawarrouq* transaction is a contract whereby a customer requests a bank to acquire a specific commodity, usually one with a stable price such as metals, on his behalf. The customer will repay the bank the cost of the commodity plus an agreed margin in instalments. The customer then requests the bank to sell the commodity right away in the commodity spot market.¹⁶⁹ An *Altawarrouq* contract involves three main irrelevant obligations as the bank will be a seller, broker and an agent at the same time. First, the bank will act as a broker and seller in the credit sale of a commodity from the bank to the client. Second, the bank will act as an agent for the client in the second sale of the commodity. When looking at the nature of an *Altawarrouq* transaction, the reasoning of the scholars who prohibited it is obvious as the purpose behind this transaction is not an interest in the commodity at issue but to acquire immediate financing without getting a loan with interest. Although such transactions do not involve interest, it involves a great deal of prohibited *Gharar* or uncertainty as a result of having two or more different irrelevant obligations in one contract.¹⁷⁰

It was noticed that prior to the enactment of the Arbitration Act of 1983, Shari'a courts used to fail in recognising arbitration clauses as valid dispute settlement clauses for the reason that judges regarded them as conditions that were irrelevant to the nature of the contract.¹⁷¹ However, there is no doubt that arbitration agreements and arbitration clauses are valid agreements as long as the dispute is solvable through conciliation.

¹⁶⁸ See the Council of Senior Ulama of Saudi Arabia, Decision No. 52 dated 29/10/1420 H. (2000) Riyadh, Saudi Arabia.

¹⁶⁹ J. Sole, *Introducing Islamic Banking into Conventional Banking System* (IMF working paper No. WP/07/175, International Monetary Fund, 2007).

¹⁷⁰ "*Majma' Alfiqh Alislami*" the Islamic Fiqh Council of the Muslim World League, Decision No. 19 dated 22/10/1428 H. 3/11/2007. Makkah, Saudi Arabia.

¹⁷¹ *Supra* 2, Alebejad, p. 30.

2.3.3 Termination of the Contract

Shari'a contract law shares many of the common grounds for the dissolution of a contract with Western laws. Similar to English law, a contract will be discharged when both parties have satisfactorily performed their contractual obligations. Furthermore, in accordance with the principle of freedom of contract, parties to the contract can terminate it by mutual agreement in the same way as establishing it.¹⁷² Under the Saudi law, the mutual agreement to terminate the contract will be treated, to some extent, in a way similar to a conciliation award for the reason that the law does not provide any teachings with regard to remedies and liabilities in such instances. However, the Shari'a introduced the principle of *Aloqoud Aljai'za*. There is no exact equivalent to this term in Western laws as the direct translation of this group of contracts can be "permissible contracts", which is meaningless for the reason that entering into most kinds of contracts is permissible; however, the term may be used to describe non-binding contracts. The most popular forms of non-binding commercial contracts are *wakalah* "Agency" and *Mudarabah Company*.¹⁷³ The most important feature of these kinds of contracts is the unilateral termination, except in *Mudarabah* where the only condition is to give notice to the other party unless the terms of the contract provide for certain obligations. Shari'a scholars restrict the principle of freedom of contract by the doctrine established by the *Hadeeth* of Prophet Muhammad that reads as follows: "*La Dharar wa La Dhirar*". The *Hadeeth* can be translated as "there shall be neither unfair loss nor the causing of such loss"; it could also mean that a person should not harm others and should not be harmed by others in return. This doctrine is important not just in the field of contracts, it can be considered as one of the main bases of *fiqh* teachings in all aspects of life. Accordingly, the principle of *La Dharar wa La Dhirar* allows any party to annul the contract if they have experienced serious prejudice as a result of the execution of the contract.¹⁷⁴

In relation to arbitration, some *fiqh* schools consider appointing arbitrators for non-binding contracts as the parties can revoke them at any time during the arbitration

¹⁷² See generally G. Samuel, *Contract Law: Cases and Materials* (1st edn., Sweet and Maxwell, 2007), pp. 475-505.

¹⁷³ A *Mudarabah Company* is a form of commercial partnership where one partner gives money to another for investing it in a commercial activity.

¹⁷⁴ See generally S. Alsadlan, *Alqawaid Alfiqhiyah Alkubra wa Matafarra' Minha* (1st edn., Dar Balancia, 1997), especially Chapter 5.

proceedings. On the other hand, the arbitration agreement is a binding agreement as will be seen when discussing the arbitration law of Saudi Arabia.

2.4 The Arbitration Agreement and Arbitration Clause in the Islamic Law

2.4.1 Arbitration Agreement

There is no mention of a model arbitration clause or agreement in the classical Shari'a treatises; however, the general rules of Shari'a contract law are applied to arbitration agreements. An arbitration agreement can be formed by an offer and an acceptance or any word or action that indicates the intention of the parties to refer the dispute to arbitration.¹⁷⁵ The *Majalla* set a few conditions for the validity of the arbitration agreement, which are:

- The dispute must already have arisen and be clearly defined;
- The parties must have agreed to arbitration by a reciprocal offer and acceptance and they must say the following to the arbitrator “arbitrate between us because we have appointed you as an arbitrator”;
- The arbitrator must be appointed by name;
- The arbitrator must have the capacity to be a witness.¹⁷⁶

With the exception of the *Maliki* School, which considers the appointment of the arbitrator as irrevocable, the appointment of the arbitrator is revocable up to the point of the issuance of the award, except if the appointment has been confirmed by a court or if the arbitration agreement contains a provision for the non-revocation of the arbitrator. The *Maliki* School stresses on the irrevocability of the appointment of arbitrators and the arbitration agreement in the light of the following Quranic verse: “*O you, who believe, fulfil the contracts*”.¹⁷⁷ This verse calls for a fulfilment of all contractual obligations, and the arbitration agreement is a binding contract. In

¹⁷⁵ M. Ibn Taymiyyah, *Majmou' Alfatawa* (2nd edn., The Ministry of Islamic Affairs of Saudi Arabia, 1995), vol. 29, p. 20.

¹⁷⁶ *Supra* 9, Alahdab, p. 26.

¹⁷⁷ The Quran 5: 1.

addition, assuming that the arbitration agreement is not a binding obligation, it will undermine the strength of arbitration as an effective dispute settlement mechanism.

The Arbitration agreement should be documented in writing as a recommendation to prevent any future disputes regarding the arbitration.¹⁷⁸ Islamic law encourages the writing to record all debts and contracts, as the Quran stated: “*When you 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*”.¹⁷⁹

2.4.2 Arbitration Clause

One of the conditions of the validity of an arbitration agreement is to have an existing dispute; therefore, the legality of the arbitration clause is controversial. Under Shari’a, there are two grounds on which to challenge the legality of the arbitration clause. First, the submission of a non-existing dispute to arbitration might involve uncertainty (*gharar*) which is prohibited in the Shari’a contract law. Under Shari’a, a contract whose subject matter did not exist at the time of the conclusion of the contract is not acknowledged and it is similar to the prohibited contracts of selling unborn animals.¹⁸⁰ Second, the enforcement of the arbitration clause is suspended on the occurrence of disputes between the contracting parties and this is contrary to the fact that contractual obligations under the arbitration clause are among the obligations which cannot be conditional, according to the four schools.¹⁸¹

On the other hand, the previous view counters the basic principles of Shari’a contract law; according to the principle of freedom of contract, parties to the contract are free to include any term or condition as long as these terms and conditions are not contrary to the mandatory principles of the Islamic law, such as those providing for the payment of interest, resulting in a risk or any practice involving any kind of speculation where the parties become unable to predict the result of the contract.¹⁸²

¹⁷⁸ See generally A. Al-Kenain, ‘Tadween Almorafa’a Alqadaiyah’, *Al-Adl Journal*, 2 (1999), pp. 76-115.

¹⁷⁹ The Quran 1: 282.

¹⁸⁰ See in general, M. Wohidul Islam, ‘Dissolution of Contract in Islamic Law’, *Arab Law Quarterly*, 13 (1998).

¹⁸¹ *Supra* 111, Alsamaan, pp. 253-254.

¹⁸² *Supra* 9, Alahdab, pp. 28-30.

When looking at the sources of Islamic jurisprudence, especially the doctrine of *istihsan* and *Urf*, it is found difficult not to allow the use of arbitration clauses for the following reasons:

- They are necessary in commercial contracts in general and in international commercial contracts in particular as they enable justice to be achieved more quickly.
- They are commonly used in commercial transactions.
- They do not really involve uncertainty or risk because arbitration clauses provide that the contracting parties should choose an authority other than the court to resolve their disputes.

Although the teachings of the *Hanbali* school are very strict in matters that relate to rituals and beliefs, it is very flexible in commercial and financial transactions. According to the *Hanbali* teachings, contractual clauses are valid as long as they are not contrary to the purpose of the contract. Ibn Taymiyyah added that a contractual clause is valid even if it is not necessary, appropriate or even relevant to the contract. Al-Sanhury made the following comment:

*“With the renewal brought about by Ibn Taymiyyah, the Hanbali doctrine made a great step forward on the way of evolution. It has shed the prohibition of double contracts and restricted the number of defect clauses as it is held that a clause is only defected if it is contrary to the object of the contract or the provisions of Shari’a, i.e. the law public order or good morals. In this, the Hanbali doctrine has come quite close to the western doctrines: any clause which accompanies the contract is valid unless it is impossible or contrary to public order or good morals. Said clause is then set aside but the contract remains valid unless this clause condition is the determining motive of the contract: in this case, the contract is also set aside”.*¹⁸³

To sum up, arbitration clauses are recognised as valid by all the schools as long as they are not contrary to public order and do not permit a prohibited action under

¹⁸³ A.Al-Sanhury, *The Sources of Truth in the Muslim Fiqh* (1st edn., Maktabat Alhalabi Alhoqouqiyah, 1998), vol. 2, p. 102. Cited by Alsamaan, *supra* 111, p. 254.

Shari'a. Risk and uncertainty make a transaction void and it is obvious that an arbitration clause does not involve any risk.¹⁸⁴

2.5 Scope of Arbitration

Unlike western laws, Shari'a does not restrict arbitration to commercial matters only. It gives arbitration the full competence to work as a real alternative to the judiciary. The scope of arbitration in Islamic law is a matter of disagreement between the four schools; the differences in the scope of arbitration given by each school are a result of the different natures given by each one of them; nonetheless, arbitration in its narrowest scope under Shari'a is wider and more comprehensive than arbitration in Western legal systems. The scope of arbitration under each School of *fiqh* will be examined in the following few paragraphs.

2.5.1 The Hanafi School

The *Hanafies* have two opinions regarding the scope of arbitration. The first opinion permits arbitration in all subject matters except *Hodoud* and *Qissas*; some scholars permit arbitration in the case of murder by error.¹⁸⁵ They justified that *Hodoud* are crimes against God and they have fixed punishments that have been set by him and are found in the Quran and the *Sunnah*. The second opinion does not allow arbitration to cover *Hodoud* but allows it in *Qissas*. The supporters of this division argued that *Hodoud* are crimes against God so there is no way to arbitrate in them. On the other hand, *Qissas* are crimes committed against other human beings and those victims or their heirs have the right to decide on the punishment, on whether to execute it or not. It has been added by them that if the family of a murdered person took revenge on the murderer prior to taking the case before the court, their action would be acceptable and they would have no criminal liability.¹⁸⁶

¹⁸⁴ Ibid.

¹⁸⁵ The term *Hodoud* describes crimes which are punishable by a pre-established punishment found in the Quran, and the execution of the punishment is definite; examples are rape, theft and terrorism. *Qissas* is a term to describe revenge crimes; in *Qissas* crimes, the victim or his family has a right to seek retribution and retaliation. In *Qissas* crimes, the victim or his family has the right not to execute the judgment, like in the case of murder and injury.

¹⁸⁶ Supra 142.

2.5.2 The Maliki School

The *Malikies* restrict the application of arbitration to commercial matters only; they said that cases involving any issue other than money must be decided by a judge. In their view, the arbitrator has a limited jurisdiction on the given case and the disputed parties only and subjects other than money are of the competence of the judicial authority. The *Malikies* did not put limitations on the terms of reference of the arbitral panel, like if an arbitrator rendered a correct judgment on a case that is outside his jurisdiction, the judgment would be valid subject to the ratification of a court judge; nonetheless, he would be warned not to do it again.¹⁸⁷

2.5.3 The Shafi'e School

The *Shafi'es* have three main opinions regarding the scope of arbitration; some of their scholars deny the validity of arbitration if there is a court in the town as that might weaken the power of the court. Another group of scholars give arbitration the same scope and power as litigation; they argue that the appointed arbitrator has the same power as the appointed judge as both have been appointed; and the validity of arbitration is not restricted to commercial disputes. The third group of scholars allow arbitration to proceed in all subject matters except in criminal disputes.¹⁸⁸

2.5.4 The Hanbali School

The *Hanbalies* mainly give arbitrators the same jurisdiction as court judges. Some scholars do not allow arbitration in criminal matters because it has a different nature than commercial disputes. Ibn Taymiyyah does not restrict the scope of arbitration and he gives it the same scope as litigation; however, according to him, an arbitral award has no value without judicial review, which is the same concept followed by the Saudi legal system nowadays.¹⁸⁹

¹⁸⁷ Supra 112, Ibn Farhoun, p. 145.

¹⁸⁸ Supra 26, Al Kenain, p. 49.

¹⁸⁹ Ibid.

2.6 Applicable Law

The concept of conflict of laws under Shari'a has different dimensions in contrast to modern Western laws. All four schools of *fiqh* insist on the mandatory application of procedural and substantive Shari'a rules; the application of any law other than Shari'a or any custom or practices that are not in compliance with the Shari'a on a dispute between Muslim parties within the Muslim state is totally prohibited. The ban has been brought about by the following Quranic verses: "*Those who do not judge according to what Allah has sent down, they are the unjust*".¹⁹⁰ "*Those who do not judge according to what Allah has sent down, they are the sinners*".¹⁹¹

Islamic law pays no attention to states, borders and other concepts such as nationality and domicile; it only recognises two main categories of legal subjects, which are Muslims and non-Muslims. With regard to Muslims, Shari'a is a personal law by being applicable regardless of whether the Muslim travels or resides in or outside Islamic territory. In other words, Shari'a applies extraterritorially to Muslims. Regarding non-Muslims, Shari'a is a territorial law by being applicable to anyone travelling or residing in Islamic territory, with the exception of family law and religious affairs.¹⁹² In the latter cases, Islamic conflicts law adheres to the personality of laws by allowing non-Muslims a relative legislative and judicial autonomy. If a Muslim party is involved in any dispute, Shari'a will be the applicable law; however, there are some cases where the dispute involves non-Muslims only, which will be given more attention when discussing the qualifications of arbitrators.

The conflict of laws under Shari'a arises to some extent between the rules of the different Shari'a Schools, but it should be noted that the problem of conflict of laws is not so material in arbitration as each party will nominate its arbitrator, which can be considered as an implied choice of school. Article 1803 of the *Majalla* provides that the defendant in judicial proceedings is allowed to choose a judge from his own school if he has been brought before a judge from another school of law. The choice

¹⁹⁰ The Quran 5: 45.

¹⁹¹ The Quran 5: 47.

¹⁹² M. Berger, 'Conflicts of Law and Public Policy in Egyptian Family Law: Islamic Law Through the Backdoor', *The American Journal of Comparative Law*, 50 (2002), pp. 555-556.

can be made if the application of the other school's teachings will result in a substantial change in the award or the judgment.¹⁹³ To overcome this problem, there were four judges or judges belonging to the four schools of *fiqh* in major Muslim cities. Similar to that, judges in Saudi Arabia have the right to apply the teachings of the four schools on an equal basis. As a final remark, the application of the different Schools results in a very minor difference and in many cases, the four schools incorporate the opinions of each other within their teachings as different ways of interpreting the same legal text.

2.7 Arbitrators

2.7.1 Qualifications of Arbitrators

An important condition for the validity of arbitral awards is that they be awarded by a qualified arbitrator. Also, having an arbitrator that lacks one of the qualifications can be solid ground for challenging an arbitral award not just under Shari'a, but as a recognised concept in all civilised arbitration rules. There has been a dispute between the four Schools of *fiqh* with regard to the required qualifications of arbitrators. There are two main views on whether the arbitrator should possess the qualifications of a judge or not. The difference in the requirements is based on the nature of the arbitration and whether it is similar to conciliation, agency or litigation. The first view does not require the arbitrator to possess all the qualifications of a judge. According to this view, the arbitrator should be a Muslim man only. This opinion has been reported by some *Malikies* and by Ibn Taymiyyah from the *Hanbali* School; they justified that arbitration is a kind of agency. For this reason, Ibn Taymiyyah held that an arbitral award is of no affect without judicial review.¹⁹⁴ The second opinion represents the view of the majority of Muslim scholars which requires the arbitrator to possess all the qualifications of a judge.¹⁹⁵ There are nine qualifications of a judge under the four schools' law, which will be elaborated in turn.

¹⁹³ Supra 99, Alatasi, Article 1803.

¹⁹⁴ Supra 175, Ibn Taymiyyah, vol. 35, p. 355.

¹⁹⁵ Supra 26, Al Kenain, p. 58.

2.7.1.1 The Arbitrator should be Muslim

There is no doubt between all the scholars that a non-Muslim is not allowed to adjudicate in any dispute involving a Muslim element if the dispute concerns an action done within Muslim territory. According to the *Malikies*, the *Shafi'es* and the *Hanbalies*, arbitration proceedings in Muslim territory must be adjudicated by a Muslim arbitrator and non-Muslims should not serve as judges or as arbitrators, even to arbitrate between non-Muslims.¹⁹⁶ However, the ban of non-Muslim arbitrators to arbitrate in a totally non-Muslim dispute might contradict the following Quranic verse: “So let the People of the Gospel judge according to what God has sent down therein”.¹⁹⁷ On the other hand, the *Hanafies* have no restrictions on this issue and permit non-Muslims to arbitrate between non-Muslims in all subject matters in accordance with the above-quoted Quranic verse.¹⁹⁸

There are a lot of opinions regarding this point, each Scholar or group of scholars within the *Hanbali* School evidenced for their view; though the issue can be summed up as follows:

Apart from settling their personal status disputes, non-Muslims are not allowed to serve as arbitrators inside Islamic territory. If the arbitration agreement provides for the settlement of the dispute by conciliation, then the arbitrators/conciliators can be non-Muslims because the agreement is considered to be an agency agreement which can be executed by them. Moreover, oral testimony and expert opinion from non-Muslims are assumed to be valid.¹⁹⁹

2.7.1.2 The Arbitrator should be Mature

Muslim Scholars did not doubt that maturity is one of the important qualifications of judges and arbitrators if it is not the most important one. Shari'a law assumes underage people to be under the authority and guardianship of others so they cannot

¹⁹⁶ Supra 26, Al Kenain, p. 58.

¹⁹⁷ The Quran 5: 47.

¹⁹⁸ Supra 26, Al Kenain, p. 59.

¹⁹⁹ Supra 28, Ibn Qodamah, vol. 14, p. 170.

have authority over other people.²⁰⁰ The *Hanafies*, *Malikies* and the *Hanbalies* expressed the prohibition of child arbitration because his testimony is not accepted and because he lacks the technical qualifications and experience. Some *Malikies* approve the arbitration of a child if he renders a correct judgment.²⁰¹

2.7.1.3 The Arbitrator should be Prudent

As an essential condition for the acceptance of a testimony and oath, prudence is also a required quality that should be found in arbitrators.²⁰² The four schools require the arbitrator/judge to be prudent. It is not sufficient for a judge/arbitrator to use his five senses like any ordinary man. He must have the ability to understand, analyse and solve complicated problems. Some *Maliki* Scholars do not prefer too much cleverness.²⁰³ Prudence and *Adalah* share many common aspects but *Adalah* seems to be more comprehensive as it includes prudence in addition to some other issues with regard to religion and behaviour.

2.7.1.4 The Arbitrator should be Knowledgeable of the Shari'a Law

An arbitrator must have enough understanding of the Shari'a law, especially the four agreed-upon sources of Shari'a, "the Quran, the *Sunnah*, the *ijma'* and the *Qiyas*", and a judgment without reference to one of these sources will be null, void and it will not be approved by the judge for enforcement. The *Shafi'es*, *Hanbalies*, and some *Malikies* and *Hanafies* require a judge/arbitrator to be a *mujtahid* i.e., have the ability to exercise the above-mentioned method of *ijtihad*.²⁰⁴ The majority of the *Hanafies*, some *Malikies* and some *Hanbalies* do not require him to be so. Ibn Taymiyyah from the *Hanbali* School argues that arbitrators should be specialists, and they are supposed to have enough knowledge in their areas of specialisation only. He added that a general knowledge of Islamic law should be obtained by the arbitrator in order to enable him to render a valid judgment that does not contradict with the main

²⁰⁰ Supra 129, Alsamnani, vol. 1, p. 52.

²⁰¹ Supra 26, Al Kenain, p. 61.

²⁰² Supra 28, Ibn Qodamah, vol. 10, p. 45.

²⁰³ Ibid.

²⁰⁴ Supra 113, Almawardi, vol. 2, p. 380.

principles of the Islamic Shari'a. The *Malikies* allow non-specialists to arbitrate provided that they seek specialists' consultation and the award is totally based on the expert's testimony, otherwise the award will be void.²⁰⁵

2.7.1.5 The Arbitrator should Possess the Characteristics of AlAdalah

The word *adalah* is a comprehensive term to describe a person's character. Honesty, a stable mind, decent behaviour, good moral values, avoidance of forbidden things and major sins can constitute the character of an *adl* person.²⁰⁶ In contrast, the term *fasiq* is used to describe the opposite qualities and it is usually reserved to describe someone whose moral character is corrupt. According to the *Malikies*, the *Shafi'es* and the *Hanbalies*, if the authority appoints a judge who is not *adl*, he will have no valid authority and judgments.²⁰⁷ The *Hanafies* and some *Malikies* do not require a judge to be *adl*; they added that a non-*adl* person can have a valid authority and judgment if he has been appointed by the authority. In addition, some *Malikies*, *Shafi'es* and the *Hanbalies* have the concept of "necessity judge" which describes either an appointed judge who does not possess all the required qualifications or a powerful person with no legal authority to help run peoples' daily lives.²⁰⁸

Having decided on the issue of *adalah* as a requirement for a court judge, the question of whether an arbitrator has to be *adl* is a matter of dispute. Some *Hanafies*, the majority of the *Malikies* and the *Hanbalies* do not recognise the appointment and the judgment of a *fasiq* arbitrator because arbitration is equivalent to litigation. The other view recognises the appointment and the judgment of a non-*adl* or a *fasiq* if he is professionally qualified.²⁰⁹ It can be said that if a person's testimony is accepted, his arbitration should be recognised.

²⁰⁵ Supra 28, Ibn Qodamah, vol. 14, pp. 5-37.

²⁰⁶ Supra 34, Saleh, p. 36.

²⁰⁷ Supra 26, Al Kenain, p. 73.

²⁰⁸ S. Alramly, *Nihayat Almohtaj Ila Sharh Alminhaj* (3rd edn., Dar Ihya' Altorath, 1993), vol. 8, p. 240.

²⁰⁹ H. bin Maza, *Sharh Adab Alqadi*, ed. Abilwafa Alafgani and Abibakur Alhashimi (1st edn., Dar Alkotoub Al Ilmiyah, 1994), vol. 4, p. 66.

2.7.1.6 The Arbitrator should be Male

The Shari'a requires the arbitrator to be a man; according to Shari'a, the appointment of a woman as a judge/arbitrator is null and void even if she gives a correct judgment.²¹⁰ Scholars have evidenced this opinion with the following *Hadeeth*: When the Prophet heard the news that the people of Persia had made the daughter of Khosrau their Queen, he said, "*Never will succeed such a nation as makes a woman their ruler.*"²¹¹ They also applied the general principles of the following Quranic verse: "*Two men shall serve as witnesses; if not two men, then a man and two women whose testimony is acceptable to all. Thus, if one woman becomes biased, the other will remind her.*"²¹² According to this verse, a male's testimony is equal to two women; therefore, it can be understood that women are not as competent as men to be in some positions, and the judiciary and arbitration are examples. The *Hanafies* do not require a judge/arbitrator to be a man and they permit woman's arbitration except in crimes. The *Hanafies'* practice contradicts with their opinion as the *Hanafies* ruled the Islamic countries for centuries during the Ottoman Empire and a woman had never been appointed as a judge. The vast majority of Muslim Scholars do not recognise the appointment of women arbitrators because women are not qualified to be judges.²¹³

2.7.1.7 The Arbitrator should not be Blind, Deaf or Mute

A judge should not be blind, deaf or mute as such disabilities can impede him from rendering accurate judgments. Partial hardness in sight and hearing can be tolerated as long as it does not affect the arbitration.²¹⁴ With regard to hearing and sight, scholars have three opinions; the *Hanafies*, the *Shafi'es* and some *Hanbalies* require the arbitrator not to be deaf or blind as one of these disabilities nullifies his appointment and it can be grounds for challenging the judgment.²¹⁵ The second opinion was reported by the *Maliki* School; they said that sight and hearing are very important conditions that should be met in an arbitrator; however, if deafness or blindness

²¹⁰ Supra 28, Ibn Qodamah, vol. 11, p. 380.

²¹¹ Supra 43, Albukhari, vol. 9, Chapter 88, Hadeeth No. 219.

²¹² The Quran 1: 282.

²¹³ Supra 26, Al Kenain, pp. 77-79.

²¹⁴ Supra 28, Ibn Qodamah, vol. 11, p. 381.

²¹⁵ Supra 209, Ibn Maza, vol. 4, p. 61.

occurs during the course of his appointment, the arbitrator should be replaced as soon as possible, but if he renders a judgment, it will be valid; they also apply the same conditions for talking disability. The third view has been reported by some *Hanbalies* who do not see blindness and deafness as obstacles to the appointment of the arbitrator. A Mute person cannot be appointed at all except in the view of some *Shafi'es* that requires him to be able to communicate by understandable sign language.²¹⁶

2.7.1.8 The Arbitrator should be Impartial

Muslim Scholars paid a great deal of attention to the principle of impartiality of judges and arbitrators. The reasons behind such regulations are to promote justice and to give confidence in the legal system. There are a few issues that might harm the impartiality of the arbitrator and might prevent his appointment or serve as grounds for challenging the arbitral award. The first impediment is hostility; the *Shafi'es* see no problem if the award is in favour of the arbitrator's opponent, but if it is not in his favour, they have two opinions; some of them do not allow the appointment on the ground of hostility because enemies are not allowed to be witnesses against each other. On the other hand, some other *Shafi'e* Scholars said that the ratification is subject to the disputant's permission. The second impediment is dispute, which means any normal dispute even if it does not reach the level of hostility.²¹⁷ There is a great deal of conflict regarding this issue but it can be summarised as follows: If the arbitrator is in dispute with both parties, some scholars reject his appointment and do not recognise his awards, and some allow him to arbitrate without conditions. If the arbitrator is in dispute with one of the disputants, there is unanimity on banning his arbitration.

If the arbitrator is one of the parties to the same dispute, there are four views regarding the validity of his appointment. The first view allows one of the parties to the dispute to act as an arbitrator as long as he is adjudicating in equity. The second one does not allow a party to the dispute to serve as an arbitrator; the *Hanafies* justified this opinion by saying that a party to the dispute is not allowed to be a

²¹⁶ Supra 3, Saiyed, p. 47.

²¹⁷ Ibid.

witness against the other party so he is not allowed to arbitrate. The third opinion does not encourage one of the parties to be an arbitrator in the dispute, but if this happens the award is valid. The fourth one does not allow one of the parties to serve as an arbitrator in the same dispute unless he is willing to issue an award in favour of his opponent, as it will be considered as a form of admission (*iqrar*).²¹⁸ The main view encourages the parties to avoid any suspicion with regard to the impartiality of the arbitrators; if they both agree on an arbitrator, his award will be valid.

The third impediment to the impartiality of the arbitrator is kinship. The kinds of relationship that annul the appointment are fatherhood, motherhood including grandfathers, grandmothers, great-grandfathers and great-grandmothers or, what it is called in Arabic, “*aloul*”. This category also includes children, grandchildren, and their children as well as the wife and husband in the *Hanafi* teachings. Scholars have two opinions regarding kinship; some *Shafi’es* and *Hanafies* allow kin to judge against his family members only; the others allow family members to be chosen as arbitrators.²¹⁹

2.7.2 The Appointment of the Arbitrators

The appointment of an arbitrator is a contractual act entered into by two or more parties involved in a judicial or extra-judicial dispute.²²⁰ All parties should consent to the appointment of the arbitrator; there are some differences of opinion among the four schools as to whether the consent of the parties is required at the time of the appointment only or whether it should continue until the arbitrator makes his award. The appointment should be made in the arbitration agreement subject to the acceptance of the arbitrator as mentioned above.²²¹ The *Hanafies* require an arbitrator to be known to the parties to avoid uncertainty; however, if a person arbitrates between two parties, without an appointment, and they accept his award, his appointment will apply retroactively.²²² Some modern texts deny the institutional

²¹⁸ Ibid.

²¹⁹ Supra 105, Ibn Nujaim, vol. 7, pp. 26-27.

²²⁰ Supra 34, Saleh, p. 39.

²²¹ Supra 3, Saiyed, pp. 38-40.

²²² Supra 26, Al Kenain, p. 100.

appointment under Shari'a and argue that arbitration is an independent mechanism for settling disputes and it should not fall under the influence of any official institution.²²³ This argument contradicts the Quran where the appointment of the arbitrators in family disputes should be done through the court judge as seen above.

2.7.3 Number of Arbitrators

Due to the circumstances of the pre-Islamic time, multiple arbitrators' proceedings were unknown. Traditionally, arbitrators had to settle disputes alone, acting as single judges.²²⁴ All four schools permit the parties to have more than one arbitrator; the *Shafi'es* expressed their permission for having two arbitrators; the *Hanafies*, the *Hanbalies* and the *Malikies* allow parties to have more than two arbitrators.²²⁵ Some *Hanbalies* do not recommend the appointment of an even number of arbitrators for the sake of reaching unanimity when issuing the award, as it cannot be reached if the number of arbitrators is even. This approach was adopted by the Arbitration Act of 1983 in Saudi Arabia, which will be seen below.

2.7.4 Remuneration of the Arbitrators and Administration Fees

The remuneration of judges has been recognised by all four schools which have recommended that a suitable remuneration be drawn from the public treasury to ensure their impartiality. The case is different with arbitration as it is a private dispute settlement method. Under all the Schools, the parties to the arbitration agreement should bear the fees of the arbitrators. The *Hanbali* scholar Ibn Qayem Aljaoziyah set two conditions for the arbitrator's remuneration:

First, an arbitrator should not receive any money from the public treasury for arbitration. The second, the money should be deposited with an impartial party before the commencement of the arbitral proceeding in order to guarantee the payment of the fees.²²⁶ Classical Shari'a treatises did not mention anything regarding administration

²²³ Supra 34, Saleh, p. 39.

²²⁴ This effect can be seen in article 4 of the Arbitration Regulation of Saudi Arabia.

²²⁵ Supra 26, Al Kenain, pp. 105-106.

²²⁶ Ibn Qayem Aljaoziyah, *Bada' I Alfawaid*, ed. Hisham Ata, Adil Adawi and Ashraf Ahmad (1st edn., Nizar Mustafa Albaz Publishers, 1996), vol. 3, p. 146.

fees and experts' remuneration. It seems that if the arbitration agreement does not state that the parties are going to bear the administration fees, such fees should be paid by the parties.

2.7.5 Termination of the Office of the Arbitrator

Under Shari'a, the arbitrator's appointment may end before or after the settlement of the dispute. The appointment of an arbitrator may end by issuing the arbitral award; scholars mention that the issuance of the final award puts an end to the dispute or, what it is called in Arabic, "*raf' alneza*", as the parties to the dispute are no longer in need of the services of the arbitrators.²²⁷ The second reason for the termination of the appointment is reaching a settlement outside the arbitral tribunal or what can be described as compulsory termination; reaching an amiable settlement outside the tribunal, exemption or rescheduling of a debt can be examples for the latter circumstance.²²⁸

The appointment of an arbitrator can be terminated before reaching a settlement. The termination in this case can take the following forms:

- Disqualification of an arbitrator: losing one or more of the required qualifications of an arbitrator disqualifies him from continuing in office and annuls the arbitration and the award. The concept of the continuity of the qualifications requires an arbitrator to be qualified throughout the arbitral procedure, from the date of the arbitration agreement until the issue of the award.²²⁹
- The Absence of the Arbitrator: if the arbitrator's absence affects the parties to the dispute, they have the choice to annul his appointment.²³⁰
- The expiration of the arbitrator's appointment: the parties to the dispute have the choice of appointing an arbitrator for a limited period of time. The

²²⁷ Supra 99, Alatasi, article 1842.

²²⁸ Supra 28, Ibn Qodamah, vol. 5, p. 2.

²²⁹ Supra 3, Saiyed, pp. 41-42.

²³⁰ Supra 105, Ibn Nujaim, vol. 7, p. 28.

arbitrator has no jurisdiction over the dispute after the designated date unless the parties to the arbitration extend it, which will be considered as a new appointment.²³¹

- Termination by the arbitrator's death or insanity: it is obvious that an arbitrator's appointment terminates at the moment of his death or insanity.²³²
- Revocation of the arbitrator's authority: the arbitrator is not authorised to exercise his function without the continuing consent of either of the parties to the arbitration. The consent must continue until the issue of the arbitral award; the *Malikies* do not recognise the concept of revocability of the appointment made by the parties as they consider the appointment irrevocable.²³³

The issue of revocability of the appointment of the arbitrator can be summarised as follows: The parties to the dispute can terminate the appointment of the arbitrator at any time and if the arbitrator issues an award after the revocation, the award will be considered void. On the other hand, if the appointment has been made through a judge (or in an institutional arbitration of nowadays), the revocation must be done through a judge again.²³⁴ If one party revokes the appointment of the arbitrator and the other denies, there are three views; each party to the dispute has the right to revoke the appointment of the arbitrator unilaterally at any time without any limitations because the arbitrator is an agent. The revocation is permissible before the commencement of the arbitration only. Parties to the dispute cannot revoke the appointment of the arbitrator after they accept it. A party to the arbitration cannot revoke the appointment unilaterally because that might be used fraudulently by the party that see the proceeding going not in their favour.²³⁵

Resignation of the arbitrator: *Malikies* do not accept the arbitrator's resignation after the commencement of the arbitration without the parties' approval. Other schools have various opinions; some scholars allow the arbitrator to resign at any time. If the

²³¹ Ibid.

²³² Supra 34, Saleh, p. 45.

²³³ Ibid.

²³⁴ Supra 99, Alatasi, Article 1847.

²³⁵ Supra 26, Al Kenain, pp. 159-160.

arbitrator refuses to perform his duty, either party can revoke the appointment without any remuneration.²³⁶

2.8 Rules of Evidence

The law on evidence in the Islamic Shari'a did not experience much change in the last 10 centuries, which has left it out of date to some extent nowadays. Evidence can be defined as anything that tends to prove or disprove a fact at issue in a legal action.²³⁷ There is a link between the concept of evidence and the definition of plaintiff in Islamic law. A plaintiff is not just the litigant who commences the judicial or arbitral proceedings. The plaintiff is the litigant who, by issuing the claim before the judge or the arbitrator, disrupts an apparently normal state of affairs by alleging that this state of affairs does not conform to his rights. The defendant is the party who admits or denies the plaintiff's claim. Shari'a places the burden of proof on the plaintiff which can be justified on two grounds:

- The existing situation is presumed to be the original and the normal state of affairs, and it is up to the plaintiff to establish the contrary.
- A person summoned before the judge or the arbitrator is presumed to be free of liability.²³⁸

There are six types of evidence under Shari'a; these rules have been set out firmly, leaving no room for the judge/arbitrator to choose the most convincing one as all of them have the same power. Apart from family disputes, the typical procedure before any Shari'a court consists of three stages. First the plaintiff lodges the claim which should be precise in all its details. The claim can be in writing or verbal at the time of the trial. At the second stage, the judge invites the defendant to answer the plaintiff's claim. At this stage, the defendant will either admit the claim "*iqrar*" or denies it "*nokoul*". If the defendant denies the claim, the judge will ask the plaintiff to adduce the evidence "*baiyannah*". The final stage starts if the plaintiff fails to provide the court with the testimonial evidence; he may administer the oath "*yameen* or *qasam*". If the defendant swears that the claim is groundless, the claim will be dismissed; however, if

²³⁶ Ibid.

²³⁷ T. Buckles, *Laws of Evidence* (1st edn., Thomson Delmar Learning, 2003), p. 15.

²³⁸ *Supra* 34, Saleh, p. 60.

the defendant refuses to take the oath, the case will be decided in favour of the plaintiff.²³⁹ This is the normal procedure applied since the time of Prophet Muhammad till today in all Shari'a courts anywhere in the world.

2.8.1 Admission "Iqrar"

The *iqrar* or admission was ranked at the top by the Shari'a Scholars as there is a rule saying that "*admission is the master of all types of evidence*". *Iqrar* has been defined as an admission on the part of a person that he owes an obligation to another person. There has been a dispute on whether the scope of the term would include a confession, either judicial or extra-judicial, or not. A recognisable admission is one that has been made by an *adl* defendant provided that he is not under duress; a valid admission should be precise with regard to the very specific facts and the circumstances in order to enable the arbitrator to issue a correct award.²⁴⁰

2.8.2 Oral Testimony "Shahadah/Baiyannah"

In Shari'a, oral testimony or "*shahadah*" is the primary means of evidence, prevailing over all other forms of evidence. The classical juridical reading of the Quranic verses privileges the oral testimony "*shahadah*" of two male witnesses over the written deed, as the primary form of legal proof in general.²⁴¹

*"The witnesses should not refuse when they are called on (to give their testimony)."*²⁴²

The Quran gives oral testimony a sacred character and obliges witnesses to perform it as a religious duty. Moreover, Shari'a sets a strict punishment for giving a false statement with intention. The punishment for giving a false statement ranges between seven and 75 lashes in a public place. In addition to the physical punishment, the false witness would be slandered and he would lose his credibility before courts forever; in other words, his testimony would not be accepted before any court or arbitration

²³⁹ See generally supra 28, Ibn Qodamah, vol. 14.

²⁴⁰ R. Peters, *Crimes and Punishment in Islamic Law* (1st edn., Cambridge University Press, 2005), p. 82.

²⁴¹ O. Arabi, 'Orienting the Gaze: Marcel Morand and the Codification of Le Droit Musulman Algerien', *Journal of Islamic Studies*, 11/1, pp. 43-72.

²⁴² The Quran 1: 282.

tribunal for the rest of his life.²⁴³ The punishment for a false witness was determined in principle in the following Quranic verse: “*And those who launch a charge against chaste women, and produce not four witnesses “to support their allegations” lash them with eighty stripes; and reject their evidence ever after*”.²⁴⁴ The interpretation of this principle in cases other than the accusation of adultery depends on the discretion of the court. The qualifications of a witness vary from one school to another; however, a witness should be a trustworthy Muslim person who has reached the age of puberty and he should not be subject to any incapacity. The testimony of non-Muslims is accepted in all subject matters except in *Hodoud*. The four schools of *fiqh* require a thorough investigation of the witness’ trustworthiness because if there is any doubt about it, the witness will not be heard. The oral testimony is to be administered on the spot by the arbitrator and according to the *Hanafies*, at the request of the witness. Disqualified witnesses are the same people who are not allowed to participate as arbitrators in a dispute.²⁴⁵ According to the Quran, a male’s testimony is equal to two women’s; the Quran justified that one woman may forget the incident so the other one reminds her.²⁴⁶

2.8.3 Oath “Qasam/Yameen”

According to the reported practice of Prophet Muhammad, the oath is the final step in any court proceeding. Arbitrators resort to giving an oath by a special request from the plaintiff in case he became unable to adduce evidence of his rights or he did but his evidence was incomplete, like if he has one male and one female witness or two females only. The qualifications of a party to be able to give a credible oath are the same as those of the witness. If the defendant takes the oath, the arbitrator may decide on the case in his favour; however, some *Hanafies* consider the oath as a second-class form of evidence and allow the plaintiff to challenge the oath.²⁴⁷ On the other hand, scholars of other schools require an additional oath to be taken by the plaintiff, subject to a request from the defendant, in case the arbitrator decides the case in favour of the plaintiff.²⁴⁸ The Quran gives the oath a sacred nature and warns parties about lying

²⁴³ Supra 28, Ibn Qodamah, vol. 14, p. 262.

²⁴⁴ The Quran 24: 4.

²⁴⁵ Look at the impartiality of the arbitrator.

²⁴⁶ The Quran 1: 282.

²⁴⁷ Supra 34, Saleh, p. 64 and supra 28, Ibn Qodamah, p. 145.

²⁴⁸ Ibid.

under oath as in the following Quranic verse: “surely, those who take a small price by (breaking) the covenant of Allah and their oaths, for them there is no share in the Hereafter, and Allah will neither speak to them, nor will He look towards them on the Day of Judgment, nor will He purify them. For them there is a painful punishment”.²⁴⁹

A Muslim party taking the oath has to swear on the Quran; in the case of a non-Muslim party, he should swear on something sacred for him such as the Bible for Christians and the Torah for Jews.²⁵⁰

2.8.4 Written Evidence

The Quran encourages parties to any contract to write it down. This principle was disputed between classical Scholars over whether it is a binding condition for the validity of a contract or it is just a recommendation. The division in the opinion is due to the understanding of the following verse, which is the longest verse in the Quran:

“O you who believe, when you contract a debt for a fixed time, write it down. And let a scribe write it down between you with fairness; nor should the scribe refuse to write as Allah has taught him, so let him write. And let him who owes the debt dictate and he should observe his duty to Allah, his Lord, and not diminish anything from it. But if he who owes the debt is unsound in understanding or weak, or (if) he is not able to dictate himself, let his guardian dictate with fairness. And call to witness from among your men two witnesses; but if there are not two men, then one man and two women from among those whom you choose to be witnesses, so that if one of the two errs, the one may remind the other. And the witnesses must not refuse when they are summoned. And be not averse to writing it whether it is small or large along with the time of its falling due. This is more equitable in the sight of Allah and makes testimony surer and the best way to keep away from doubts. But when it is ready merchandise which you give and take among yourselves from hand to hand, there is no blame on you in not writing it down. And have witnesses when you sell one to another. And let no harm be done to the scribe or to the witnesses. And if you do (it),

²⁴⁹ The Quran 2: 77.

²⁵⁰ Supra 28, Ibn Qodamah, p. 145.

then surely it is a transgression on your part. And keep your duty to Allah. And Allah teaches you. And Allah is Knower of all things.”²⁵¹

2.8.5 Presumptions (Qara’en)

It has been reported that Prophet Muhammad and his companions had decided on some cases on the basis of presumptions or the legal method of *istis’hab*. The use of presumptions in giving judgments has been given a wider scope by *Hanbali* Scholars; according to them, the refusal of the defendant to take an oath is a presumption in favour of the plaintiff and the presumption of ownership if a property is in possession of one of the parties for a long time with no proof to the contrary.²⁵²

2.8.6 Personal Knowledge of the Judge or the Arbitrator

Giving a judgment on the basis of the judge/arbitrator’s personal knowledge is prohibited in all the schools except the *Hanafi* School. Basing a judgment on the judge’s/arbitrator’s own knowledge raises suspicion of bias and can be the grounds to challenge the award. The *Hanbalies* left no room for the arbitrator’s own knowledge of the fact of the dispute as he is totally not allowed to rely on it in rendering the award without evidence.²⁵³

2.9 Rules of Fair Trial

Islamic law established its own rules of fair trial to guarantee justice and equality. Some of these rules were derived from the practices of Arabs before Islam and upheld by the Shari’a. In the Shari’a view, the choice of a qualified and impartial judge is the first step to achieve justice. Thus, the Shari’a concentrated first on the impartiality of judges and arbitrators; therefore, Shari’a governs their social lives. A judge as well as any official is not allowed to accept gifts, while he is at office, from someone he did

²⁵¹ The Quran 1: 282.

²⁵² See in general supra 28, Ibn Qodamah, vol. 14, p. 156.

²⁵³ Ibid.

not exchange gifts with before his appointment as such an act might raise the suspicion of bias.²⁵⁴ The *Hanafi* scholars discouraged judges from receiving gifts while some other scholars considered a mere gift to a judge as a bribe.²⁵⁵ Prophet Muhammad gave the prohibition of accepting gifts a religious character as in the following *Hadeeth*: “*What is wrong with the employee whom we appoint that he returns to say, 'this is for you and that is for me?' Why didn't he stay at his father's and mother's house to see whether he will be given gifts or not? By Him in Whose Hand my life is, whoever takes anything illegally will bring it on the Day of Resurrection by carrying it over his neck*”.²⁵⁶ Moreover, *Hanbali* Scholars do not allow judges to conduct business. Bribery is totally prohibited by the Quran and the *Sunnah*; the punishment expands to cover the corrupter and the corrupted and all persons in connection with it.

The principle of equal treatment of the parties to the dispute has various forms under Shari'a. All litigants, without exception, must be granted reasonable access to the place of hearing. The procedure must be carried out with equal speed; no priority should be given except in some cases where a delay might harm the litigants like in the case of travellers and ill people. In the course of the hearing, the judge/arbitrator should address each litigant in an equally composed tone; the equality should also be reflected in the way that the litigants are seated. The judge/arbitrator should not greet one litigant with undue warmth and have a personal conversation as it might create a feeling of unjust with the other litigant.²⁵⁷ If one of the parties to the dispute does not speak Arabic and the judge/arbitrator does not know his language, two translators, only one is required by the *Hanafies* and some *Hanbalies*, must attend the hearing to translate between the litigants and the judge/arbitrator. The translators should possess the characters of *adalah* as he will be considered as a witness to the statement of that party.²⁵⁸

Under Shari'a, the arbitrator is not allowed to decide on a dispute without hearing all the parties and giving them the chance to present all their evidence. There are strict

²⁵⁴ Supra 28, Ibn Qodamah, vol. 14, p. 58.

²⁵⁵ Ibid. p. 59.

²⁵⁶ Supra 43, Albukhari, Chapter 8, Hadeeth No. 162.

²⁵⁷ See generally The Ministry of Justice of Saudi Arabia, *Litigation in Saudi Arabia, History, Institutions and Principles* (1st edn., The Ministry of Justice of Saudi Arabia, 1999).

²⁵⁸ Supra 28, Ibn Qodamah, vol. 14, p. 84.

conditions for issuing a judgment *in absentia* as such a judgment requires judicial review before its execution because the defendant might have a defence against the claim; however, according to the *Malikies* and some *Hanbalies*, a judge/arbitrator is not allowed to issue a judgment *in absentia* at all.²⁵⁹

The Shari'a understood that parties have different abilities in representing their cases; therefore, Shari'a assumes that substantive truth should prevail over procedural technicalities as embodied in the following *Hadeeth*: “*You people present your cases to me and some of you may be more eloquent and persuasive in presenting their argument. So, if I give some one's right to another (wrongly) because of the latter's “tricky” presentation of the case, I am really giving him a piece of fire; so he should not take it*”.²⁶⁰ This *Hadeeth* affects the *res judicata* aspects of a judgment/award but only to a limited extent and no more than the western concept of retrial would affect the award.²⁶¹

2.10 Enforcement of Arbitral Awards under Shari'a

2.10.1 The Nature of the Arbitral Award

The objective of an arbitral award is to settle the dispute and to put an end to the conflict between the parties or, what it is called in Arabic, *raf' alneza'*. Arbitration loses its objective of settling disputes if arbitral awards lack enforceability.²⁶² Despite some Scholars who require the disputants' approval, an award is enforceable and binding on the parties from the moment it becomes final and it has the same effects and power as a court judgment. The arbitrator has no right to decline his award, and even if he declines and issues another award in favour of the other party, the latter award will be void. No third party would be affected by the arbitral award because the arbitrator has no jurisdiction over anyone but the parties to the dispute who agreed to obey the arbitrator's decision and execute it on themselves. The *Hanbali* Scholars require ratification from a judge before enforcing any arbitral award.²⁶³

²⁵⁹ Supra 28, Ibn Qodamah, vol. 14, p. 96.

²⁶⁰ Supra 43, Albukhari, Chapter 3, Hadeeth No. 845.

²⁶¹ Supra 34, Saleh, pp. 70-71.

²⁶² Supra 26, Al Kenain, pp. 141-145.

²⁶³ Ibid.

2.10.2 The Content of the Arbitral Award

The content of an arbitral award does not differ from any ordinary court judgment. The award should include a sufficient description of the merits of the dispute at issue, then the findings of fact substantiated by the Shari'a rules of evidence, the reasoning under *usul alfiqh* with references to the Shari'a sources and finally the decision. An award that lacks the findings of fact under Shari'a rules of evidence or a valid reasoning according to Shari'a substantive rules will not be accepted. The arbitrators have the right to correct material errors in the award from the time of issuing the award until referring to the court for an enforcement order.²⁶⁴

2.10.3 Challenge of the Arbitral Award

Parties to the dispute may accept the arbitral award and execute it, and they may ask for further judicial review. Each school has its own view regarding the ability of parties to challenge the arbitral award, which can be summarised as follows: The *Maliki* scholars consider arbitral awards as unchallengeable, and the judge cannot revoke it as long as it does not contradict with the main sources of Shari'a except if it entails serious prejudice. According to the *Hanbali* Scholars, an arbitral award carries the same influence as a court decision and it can be revoked under the same conditions that revoke a court judgment. The *Hanafies* see the possibility of revoking an arbitral award in the case when the award is not in compliance with the appellant's *Mathhab* or school; however, the revocation is not mandatory, it is up to the judge who should pay attention to the relevant circumstances when reviewing the award. The *Shafi'es* have two opinions with regard to the strength of the arbitral award; one of them gives the arbitral award the same strength as a court judgment where the judge has to treat the arbitral award in the same way that they treat other judges' judgments. The other view requires the parties' consent to accept the award or reject it. In such a case, there is no challenge of the arbitral award because the award is not binding; therefore, there is no need to challenge it.²⁶⁵

²⁶⁴ See generally A. Al Kenain, *Tasbeeb Alahkam Alqadaiyyah fe Alshari'a Alislamiyah* (1st edn., Al Kenain, 1999).

²⁶⁵ *Supra* 105, Ibn Nujaim, vol. 7, p. 26; see also *supra* 28, Ibn Qodamah, vol. 11, p. 484.

2.10.4 Judicial Remedies

After the issuance of the arbitral award, the parties to the arbitration have two options available in case they are not satisfied with the outcomes of the arbitral award.

2.10.4.1 Revocation

Parties to the dispute may ask for the revocation of the arbitral award. This issue takes us back to the nature of arbitration under the teachings of each school; if arbitration is similar to conciliation or to agency contract, the award can be revoked on the same grounds of revoking any normal contract. If the arbitration has a judicial nature, the revocation cannot be done without an obvious error in the award or at any stage of the arbitral procedure. If the judge revokes the arbitral award, he is not obliged to decide on the case again unless he has been asked to do so by one of the parties to the dispute. On the other hand, if the judge upholds the arbitral award, his judgment will be treated as an enforcement order.²⁶⁶

2.10.4.2 Appeal

The parties to the arbitration may appeal to the arbitration panel or to the court. In this situation, the judge will revoke the arbitral award and issue a new award if he accepts the appeal.²⁶⁷

2.11 Miscellaneous Issues

2.11.1 The Seat of the Arbitration

The seat theory did not receive any attention from the classical Muslim Scholars because it has no affect on the arbitration. None of the classical treatises mention anything with regard to the seat of the arbitration; however, the seat of the arbitration is to be decided according to the parties as a clause in the arbitration agreement.

²⁶⁶ Supra 3, Saiyed, p. 74.

²⁶⁷ Ibid.

2.11.2 The Rights of Third Parties

Generally speaking, the effect of the arbitral award must not extend to anyone other than the parties to the dispute. If a third party has got an interest in the enforcement of the arbitral award, they can send their request to the court.²⁶⁸

2.11.3 The Unanimity of the Award

If the arbitration proceeds by a sole arbitrator, the problem of conflict of opinions with regard to the final decision between the arbitrators will not exist as the task of making the award is an individual process; however, scholars agreed that if each arbitrator has got a different opinion, the award will be void. The award should comply with the opinion of the majority of the arbitrators in order to be fair and just. The *Hanbali* treatises suggested that there are four methods of issuing the arbitral award if the arbitrators do not reach an agreement:

First, when drafting the arbitration agreement, the number of arbitrators should be odd. Second, the assistance of an external arbitrator should be sought and the case should be decided according to his opinion. The external arbitrator is not allowed to come up with a new opinion; his job is to choose one of the available decisions only. Third, if the arbitrators fail to issue the award, the dispute can be decided by another tribunal or by a sole arbitrator.²⁶⁹ This option may lengthen the dispute, which contradicts with one of the main objectives of choosing arbitration as a swift dispute settlement mechanism. Fourth, if unanimity cannot be reached, and the parties to the dispute have exhausted the above-mentioned methods, they can refer the dispute to litigation as a last resort.²⁷⁰

²⁶⁸ Ibid.

²⁶⁹ Supra 28, Ibn Qodamah, vol. 10, p. 546.

²⁷⁰ Ibid.

2.12 Conclusion

This chapter represented the way in which the Islamic Shari'a regulated arbitration proceedings in a comprehensive way that covered all its important aspects from the formation of the arbitration agreement to the enforcement of the final arbitral award. The chapter also showed a great deal of attention and support for arbitration to be a real alternative to litigation in all subject matters. When comparing the Shari'a arbitration rules with any current rule, no substantial difference can be found. The above rules are the basis for most arbitration regulations in most Muslim countries nowadays. Before continuing to the arbitration regulations in Saudi Arabia, which are codifications of the *Hanbali* teachings as introduced by Ibn Taymiyyah and Ibn Qodamah, the next chapter will examine the regulatory attitude toward arbitration in Saudi Arabia.

3 Arbitration in the Saudi Legal System from 1920s till Now

Commercial arbitration has existed in the Saudi legal system since the enactment of the Code of Commercial Courts in 1931. Nonetheless, International arbitration was not always welcomed by the Saudi government. At first, the Saudi Government did not oppose resorting to International Arbitration; however, due to some unexpected circumstances at that time, the Government restricted resorting to International arbitration. This restriction started to relax in the mid-1970s; yet, the openness to international arbitration took its steps in a very slow mode. The main purpose of this chapter is to examine the regulatory attitude toward International arbitration in Saudi Arabia. This chapter starts by giving a brief overview of the Saudi legal system and the structure of the judicial bodies in Saudi Arabia in accordance with the recent amendments to the law of the judiciary and the law of *Diwan Almazalim*. It will then move to talk about a few other related issues such as the issues of Wahhabism and the Saudi legal system, the roles of women in the Saudi legal system, the role of the official Mufti in protecting the Shari'a tradition as well as the foreign influence on the Saudi law. After that, the regulatory attitude toward international arbitration will be examined. This section will be divided into two main parts. The first part will discuss the regulatory attitude toward arbitration from the creation of the Saudi state in the 1930s to the first oil boom in the 1970s. This part will examine the arbitration cases that the Saudi Government was a party to such as *Wahat Alburaimi* and the well-known case of *Arabian American Oil Company v. Saudi Arabia* "Aramco Case" and its impacts on the Saudi legal system. The second part will cover the period from the mid-1970s till now; this period experienced a shift in the attitude to attract foreign investment.

3.1 The Establishment of the Legal System in Saudi Arabia

3.1.1 The Foundation (1920s-1960s)

The modern state of Al Saud was established in 1932, when The King of Hejaz and the Sultan of Najd, Abdul-Aziz ibn Saud, established the Kingdom of Saudi Arabia with himself as absolute monarch. Since his first days as the King of Hejaz, King Abdul-Aziz was concerned with establishing a modern independent legal system based on the principles of the Islamic Shari'a. In issue No. 64 of *Umm Alqura*, the official gazette, dated 5/9/1344 H (18/03/1926), King Abdul-Aziz issued the first provisional regulation for the judiciary; according to that royal decree, the act had the title of Provisional Act to Reform the Shari'a Courts. The act consists of 15 articles, in its very simple wording; the act gave general guidance and established the framework of the Shari'a courts. In his speech at *Majlis Alshura*,²⁷¹ King Abdul-Aziz held the Shari'a principles as the main source of legislation in the kingdom. He also added that all legislations should be approved by the *Shura Council* before they become effective in order to enhance transparency and public participation in the process of decision making.²⁷² In the next year, another royal decree called for the establishment of two summary courts in Mecca in addition to the Shari'a Supreme Court "*Almahkamah Alshar'iyah Alkobra*". The decree also called for establishing summary courts and Shari'a courts in Jeddah and Medina.²⁷³ The same royal decree established a committee to be in charge of appeals and judicial supervision under the name of "*Hay' at Almuragaba Alqada'iyah*"; the name of the committee changed later on to be "*Hay'at Altadqiqat Alshar'iyah*". The committee used to serve as a court of appeal as well as a regulator and supervisor for all the judicial bodies in the Kingdom at that time.²⁷⁴ A few weeks later, the King gave his order to establish *ketabat alad'l* "the notary public".²⁷⁵ The provisional law of 1926 was replaced in

²⁷¹ It is a consultative body equivalent to parliament; it was founded in 1924 under the name of *Almajlis Alahli* (The National Council).

²⁷² The speech dated 9/03/1349 H. (1930).

²⁷³ *Umm Alqura Gazette*, issue No. 140 dated 21/02/1346 H. (1927).

²⁷⁴ Ibid.

²⁷⁵ *Umm Alqura Gazette*, issue No. 143 dated 13/03/1346 (1927) and issue No. 144 dated 20/03/1346 (1927).

1931 by *nizam sair almuhakamat alshar'iyah*, which was more comprehensive than the previous one and it was more concerned with the procedural issues of judicial proceedings. The new act came with 36 articles only; the act was amended in 1936 to 142 articles under the title of *nizam almurafa'at*. In 1938, another act established the competence of judges and their responsibilities. The latter two acts were redrafted in 1952 under the titles of "*nizam tarkeez almasoliyat alshar'iyah* and *nizam tanzeem al a'amal al idariyah fee aldawa'er alshar'iyah*". By a royal decree dated 23/10/1381 (1962), the old committee for judicial supervision or *Hay'at Altadqiqat Alshar'iyah* was replaced by *Mahkamat Altamyeez* or the court of appeal which opened in Mecca in the same year. The court of appeal worked under a provisional regulation till the approval of its law by Royal Decree No. 24836 dated 29/10/1386 H (1967); the new regulation gave *Mahkamat Altamyeez* an exclusive duty to serve as a superior court instead of the load of duties of the old committee which included the revision of the regulations, legal consultation, a commercial court in some situations in addition to its duty as a court of appeal.²⁷⁶ The above regulations established the foundation of the Saudi judicial system which was followed by many Royal Decrees and Ministerial decisions, and administrative circulations in many fields of activity such as commerce, banking, labour, social security, arbitration, etc. Such legislations intend to complement the Shari'a, not to replace it, and they can also be considered as updates to the existing Shari'a principles.

3.2 The Judicial Bodies in Saudi Arabia

In Saudi Arabia, the competence for the settlement of disputes was generally divided between different judicial and semi-judicial bodies. These bodies are supervised by different Ministries in accordance with the subject matter of the dispute. The Judicial bodies in Saudi Arabia are:

- The Judicial bodies under the Ministry of Justice, Shari'a Courts, Court of Appeal, etc
- The Independent judicial authorities: the Board of Grievances "*Diwan Almazalim*"

²⁷⁶ See supra 257, Ministry of Justice of Saudi Arabia, p. 89.

- The Semi-judicial committees such as The Committee for the Settlement of Negotiable Instruments Disputes of the Ministry of Commerce, The Committee for the Settlement of Banking Disputes of SAMA, The Committee for the Settlement of Labour Disputes of the Ministry of Labour and Social Affairs, etc.

3.2.1 The Ministry of Justice

In 1962, King Faisal gave his order for establishing the Ministry of Justice; however, it was another eight years before the ministry started its activities. The first judiciary law was issued by Royal Decree No. (M/64) of 1395 H (1975); this law experienced a major amendment in 2007. The recent amendments will change the face of the Saudi judicial system considerably, as for the first time there will be specialised courts for each branch of legal practice in Saudi Arabia. Prior to these amendments, the judge who decided on criminal matters now might settle an inheritance dispute 30 minutes later. The Ministry of Justice was allowed a transition period of two years before the new law became effective. Similar to the previous law, the new law contains several sections covering various issues related to the judicial system, such as provisions securing the independence and impartiality of the courts, the types of courts and their jurisdictions, judges, their appointments and promotions, the role of the Ministry of Justice, etc. Interestingly, the Law comprises 85 articles on eight A4 pages only.

In the foreseeable future, there will be three main divisions for the Shari'a courts in Saudi Arabia. According to article 9 of the judiciary law of 2007, the Shari'a courts shall consist of:

- The High Court, *Almahkama Al'olia*
- The Court of Appeal, *Mahkamat Alisti'naaf*
- The Courts of First Instance, *Mahakim Aldaraja Al'oula*. This class of courts was subdivided into:
 - General Courts
 - Courts of Personal Status
 - Commercial Courts

- Labour Courts.²⁷⁷

3.2.1.1 The High Court, Almahkama Al'olia

The High Court will be constituted to replace the Supreme Judicial Council or *Majlis Alqada' Al A'ala*, which in its current structure is a result of many decades of development from the committee of judicial supervision in the 1920s till the enactment of the previous Law of Judiciary of 1975. The new High Courts will have legislative, administrative and judicial powers. The High Court as a successor to the Supreme Judicial Council will be the highest judicial authority in the Kingdom which makes it the final court of appeal. The duties of the High Court in accordance with article 11 of the Law of Judiciary of 2007 are:

- Giving legal opinions with regard to issues related to the judiciary upon request of the Minister of Justice;
- Examining questions referred to it by the King to issue Shari'a guidance with regard to it;
- Reviewing death, amputation or stoning sentences;
- Reviewing cases in which one of the parties is not satisfied with the decision of the court of appeal in case the decision of the Court contradicts with the Shari'a or the decision is issued by a court that lacks the competence to decide on the issue at dispute;
- Examining Shari'a questions that, in the opinion of the Minister of Justice, require a statement of general Shari'a principles.

Similar to the Supreme Judicial Council, the High Court's decisions on cases referred to it from the court of appeal are binding upon all other courts including the court of appeal. As a result, the High Courts have a powerful influence on the development of the Law in the country.

With regard to the publication of judicial decisions and court decisions, *Diwan*

²⁷⁷ The Law of the Judiciary of Saudi Arabia, Royal Decree No. (M/78) dated 19/09/1428 H. *Umm Alqura Gazette*, issue No. 4170 dated 30/09/1428 H. (12/10/2007).

Almazalim's decisions are not yet available to the public which contradicts with the basic rules of transparency and justice. The previous Law of Judiciary of 1975 provided for the publication of a selection of judicial decisions regularly; however, the first volume of the judicial decisions report of the Saudi courts was issued 32 years later in 2007 under the title of *Modawanat Alahkam Alqada'iyah* with a small selection consisting of 39 court decisions and nine of the Supreme Judicial Council's resolutions.²⁷⁸

3.2.1.2 The Court of Appeal

The court of appeal was established in 1927, under the name of *Hay'at Altadqiqat Alshar'iyah*. After the enactment of the Law of Judiciary of 1975, the same Committee functioned under the name of *Mahkamat Altameez*. The new law added a new division to this court and divided it into five departments: the Civil Division, Criminal Division, Personal Status Division, Commercial Division and Labour Division.²⁷⁹

3.2.1.3 Courts of First Instance

The general courts were established by the same Royal Order that established the court of appeal in 1927. The judge in these courts sits alone except in cases of executions, stoning, amputation, kidnapping, armed robbery and other serious criminal offences specified in the Judiciary Act that must be decided by three judges.²⁸⁰ These courts have civil and criminal jurisdiction as they deal with more cases than other judicial bodies in the Kingdom. Saudi Courts in general assume jurisdiction over all cases brought before them except in cases *in rem* involving real estate located outside the Kingdom.²⁸¹ The general courts have the authority to deal with all civil and criminal cases regardless of their nature and financial value, unless the case falls under the competence of other judicial bodies that have been given exclusive jurisdiction, such as the Saudi Arabian Monetary Agency, Ministry of

²⁷⁸ See generally The Ministry of Justice of Saudi Arabia, *Modawanat Alahkam Alqada'iyah* (1st and 2nd edn., Ministry of Justice of Saudi Arabia, 2007).

²⁷⁹ See the Law of Judiciary of 2007, article 16.

²⁸⁰ Article 10.4, the Judiciary Act of 2007.

²⁸¹ See the law of procedure before Shari'a Courts, Royal Decree No. (M/21) dated 20/05/1421 (19/08/200). *Umm Alqura Gazette*, issue No. 3811 dated 17/06/1421 (15/09/200).

Commerce, Ministry of Information, etc.²⁸² The new Law of Judiciary provides that such courts should be divided into five different departments, which are: the Civil Division, Criminal Division, Personal Status Division, Commercial Division and Labour Division.²⁸³ The law joined some of the semi-judicial committees in the new courts. With the exception of the Committee for the Settlement of Banking Disputes, all the semi-judicial committees will be incorporated in the new courts in two years' time.

3.2.2 Independent Judicial Bodies

The Shari'a courts have general jurisdiction over civil disputes; however, the judicial regulation takes into account the constitution of specialised courts. The word independent means that there is a dichotomy between these bodies and the authority of the Ministry of Justice. The jurisdiction of these bodies is defined both in terms of the subject matter and of the parties to the dispute.²⁸⁴ The rule is that these commissions do not usually have the jurisdiction to adjudicate cases that the Saudi government or any of its entities is a party to because such disputes should fall under the competence of the Board of Grievances, hereinafter *Diwan Almazalim*. The next few paragraphs will give a brief overview of the authority most connected with arbitration in Saudi Arabia in general and to banking disputes in particular. It should be noted that some of these Committees will either disappear or be incorporated in the courts of first instance in the next two years.

3.2.2.1 Committee for the Settlement of Negotiable Instruments Disputes

The Committee for the Settlement of Negotiable Instruments Disputes is also known as The Negotiable Instruments Office. The Committee falls under the jurisdiction of the Ministry of Commerce and Industry. Established by the Law of Negotiable Instruments, the Commercial Paper Committee, also known as the Office for the Settlement of Commercial Papers Disputes, has the jurisdiction to hear claims

²⁸² Ibid.

²⁸³ Article 20 of the Judiciary Act of 2007.

²⁸⁴ Supra 134, Lerrick and Mian, p. 222.

concerning bills of exchange, promissory notes and cheques. The Negotiable Instruments Law provides the substantive legal provisions applied by the Commercial Paper Committee.²⁸⁵ The law largely reproduces the provisions of the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes of June 7, 1930 and for Cheques of March 9, 1931, even though Saudi Arabia has not become a party to the conventions themselves. As Shari'a forbids the payment and charging of interest, provisions in the Conventions relating to interest were omitted from the Negotiable Instruments Law. In practice, this position has been applied by offsetting interest payments voluntarily made by the debtor, against the principle of the debt. The procedure before the Committee is subject to the provisions of the Code of Commercial Courts of 1931. Decisions may be appealed to the Minister of Commerce.²⁸⁶ The competence of settling negotiable instruments disputes will move to the Commercial Courts by 2009 and as a result, this Committee will disappear.

3.2.2.2 The Committee for Settlement of Banking Disputes of the Saudi Arabian Monetary Agency "SAMA"

The Committee for Settlement of Banking Disputes was established under the Saudi Arabian Monetary Authority (SAMA) for the purpose of settling disputes between banks and their clients arising from contracts and transactions which do not concern commercial papers such as bills of exchange which should be settled through a different Committee. In exercising its powers, the Committee may decide to freeze a party's assets or restrict parties from travelling outside of Saudi Arabia.

The Committee consists of three members who are appointed by the Ministry of Finance upon the recommendation of the Saudi Arabian Monetary Agency governor. There is only one Committee for the Settlement of Banking Disputes in the Kingdom, which is located in Riyadh. The Committee is under the umbrella of SAMA and all its members are SAMA employees. All members are equal. The working mechanisms of the Committee will be examined in detail in the last chapter.

²⁸⁵ The Law of Commercial Papers, *Nizam Alawraq Altejariyah*. Issued by Royal Decree No. 37 dated 11/10/1383 H. (1963). *Umm Alqura Gazette* issue No. 2010 dated 15/10/1383 H. (1963).

²⁸⁶ Ibid.

3.2.2.3 The Board of Grievances Diwan Almazalim

The Board of Grievances, hereinafter *Diwan Almazalim*, was created in 1955 as a department of the Council of Ministers *Majlis Al wuzara*.²⁸⁷ The Board was later reconstituted as an independent entity.²⁸⁸ At first the Board served as a general clearing house for complaints in the public domain; it has since evolved into the most important administrative and judicial body outside the Shari'a courts.²⁸⁹ Some authors argued that *Diwan Almazalim* is a sort of *Conseil d'Etat* that has been borrowed by the Egyptians from the Code of Napoleon; however, the principle of *Qadi Almazalim* was well known in the Shari'a treatises many centuries prior to the foundation of the Napoleonic Laws.²⁹⁰

Upon its establishment, *Diwan Almazalim*'s competence was limited to receiving and investigating complaints that the government or a governmental entity was a party to.²⁹¹ Due to the rapid economic growth following the oil boom in the 1970s and the trend to reduce the load of cases on the Shari'a courts as well as founding a specialised legal body for settling commercial matters where the application of strict Shari'a rules may be seen as an impediment to the flow of foreign investment, the settlement of commercial and investment disputes has been added to the competence of the *Diwan*.²⁹² Another important step in that direction came when the *Diwan* was given the power to entertain applications for the execution of foreign judgments when questions of public policy usually arise.²⁹³ The *Diwan* remained as a commercial and administrative court until the issuance of the new Law of *Diwan Almazalim*, which changed the structure of the *Diwan* considerably.²⁹⁴ The Competence of the *Diwan* was restricted by the new law which transferred the competence of settling

²⁸⁷ See the Royal Decree No. 02/13/8759 of 1374 H. (1955).

²⁸⁸ See the Royal Decree No. (M/51) of 1402 H. (1982).

²⁸⁹ G. Sfeir, 'The Saudi Approach to Law Reform', *The American Journal of Comparative Law*, 36 (1988), pp. 729-744.

²⁹⁰ See generally M. Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia', *Arab Law Quarterly*, 2 (1987), p. 272.

²⁹¹ *Ibid.*

²⁹² *Ibid.* See also the Royal Decree No. (M/51) of 1402 H. (1982). This opinion proved to be not accurate for the reason that the Board of Grievances functions in the same way as Shari'a courts, as will be seen in chapter 5 of this study.

²⁹³ K. Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non-Domestic Arbitral Awards?', *Fordham International Law Journal*, 18 (1994-1995), p. 922.

²⁹⁴ The Law of Diwan Almazalim of Saudi Arabia, Royal Decree No. (M/78) dated 19/09/1428 H. *Umm Alqura Gazette*, issue No. 4170 dated 30/09/1428 H. (12/10/2007).

commercial disputes from the *Diwan* to the new courts of first instance. With regard to arbitration, the *Diwan* is still the competent authority for the supervision of the arbitration proceedings in Saudi Arabia. The *Diwan* is also competent for the enforcement of arbitral awards, both foreign and domestic, in addition to the enforcement of foreign judgments subject to the Riyadh Convention of 1983.²⁹⁵

3.3 Wahhabism and the Saudi Law

3.3.1 Foundation and Origin

After September 2001, the Western world started to talk about something called Wahhabism when describing the Saudi state, law and the religious institution in Saudi Arabia. The term Wahhabism or *Wahhabiya* has been used to describe the Islamic revival and reform movement in the 18th century in the centre of Arabia. The movement mainly concentrated on restoring the correct Islamic rituals and belief as polytheism spread widely as a result of ignorance of Shari'a, especially among Bedouins and people of remote villages and oases. Unlike some other reform movements of that era, the movement of Muhammad bin Abdulwahhab (1702-1791) did not start as a response to an external factor such as European imperialism, hostility against the Turkish or the desire for political independence. The Wahhabi movement arose in response to internal conditions, notably the perceived deterioration in Muslim beliefs and practices.²⁹⁶ What is called Wahhabism is no more than a socio-religious reform movement without any major contribution to the Islamic *fiqh* because Muhammad bin Abdulwahhab was following the teachings of the late *Hanbali* scholars, especially Ibn Taymiyyah and Ibn Alqayem.²⁹⁷ The name *Wahhabiya* has been given to the movement of Sheikh Muhammad bin Abdulwahhab by its opponents as the followers of ibn Abdulwahhab used to call themselves *Almuahhideen* (the Unitarians).²⁹⁸

²⁹⁵ The Arab League Convention for Judicial Co-operation (Riyadh Convention). Signed in Riyadh, Saudi Arabia on 4/04/1983.

²⁹⁶ See generally M. Kurdi, *Altareekh Alqaweem Le Mecca Wa Bait Allah Alkareem* (1st edn., Albaz Publications, 1962), vol. 5.

²⁹⁷ Ibid.

²⁹⁸ N. Delong-Bas, *Wahhabi Islam from Revival and Reform to Global Jihad* (1st edn., Oxford University Press), p. 8.

The movement of Muhammad bin Abdulwahhab, or the Sheikh as his followers call him, has been described outside Najd as “Islamic Orthodoxy”. The opponents of the movement inside Najd and within the Islamic world tried to stop it by attacking the Sheikh himself and his movement by, for instance, alleging that the Wahhabi school displays an extreme hostility to intellectualism, spirituality, and any sectarian divisions within Islam. The previous alleges were the main topics of a long debate between the *Ulamas* of Najd and Hejaz during the 18th and 19th centuries. The Wahhabi movement also faced military attacks from outside the Arabian Peninsula. The military attacks started in 1811 and led to the collapse of the first Saudi state in the year 1818. The war between the Egyptian force of Muhammad Ali by the command of his son Ibrahim Pasha succeeded in stopping the “political” Wahhabism but it failed in defeating the faith of its followers. Some Scholars of that time adopted an extreme position against the Sheikh to the extent that they described him and his students as apostates.²⁹⁹ Meanwhile, the western understanding of Wahhabism came to the conclusion that Wahhabism is a “new Islamic sect” that encourages intolerance and extremism.³⁰⁰ Nowadays, Wahhabism in the western context refers to the form of Sunni Islam practiced in Saudi Arabia that carries the characteristics of extremism, intolerance and supporting terrorism.³⁰¹

The main objectives of the Wahhabi movement was summarised in the following quotations: “*Muhammad bin Abdulwahhab perceived the religious, social and political problems of his society and the critical conditions through which the Najdi people were passing. Thus he dedicated his life and enthusiastic energy to bringing about a comprehensive solution to the various problems of the Najdi society through the establishment of a strong central government that would enforce the Shari’a and impose peace and order in the land. Ibn Abdulwahhab was prepared for the great task by his own education and training, and was assisted by the particular religious and political conditions of Najd in his time*”.³⁰²

²⁹⁹ Ibid.

³⁰⁰ See generally supra 298, Natana J. Delong-Bas and supra 289, Sfeir, p. 731.

³⁰¹ C. Blanchard, *The Islamic Tradition of Wahhabism and Salafiyya* (Congressional Research Service Report for Congress, submitted on 17/01/2007).

³⁰² U. Aljuhany. *Najd before the Salafi Reform Movement: Social, Political and Religious Conditions during the Three Centuries Preceding the Rise of the Saudi State* (1st edn., Ithaca Press in association with the King Abdul-Aziz Foundation for Research and Archives, 2002), p. 156.

*“Ibn Abdulwahhab aimed at renewing and reforming the faith and the practice of his people and both concepts are fundamental components of Islam’s worldview, embedded in the Quran and the Sunna of the Prophet and both concepts, renewal and reform involve a call for the return to the fundamentals of Islam, the Quran and the Sunna”.*³⁰³

3.3.2 Wahhabism and Politics

Sheikh Muhammad bin Abdulwahhab was initially persecuted by some local religious scholars and political leaders who viewed his teachings as a threat to their power and influence. The Sheikh, who had been expelled from his hometown *Al O’yainah*, looked for protection in many neighbouring towns but he couldn’t get it, either because the governors opposed him and his movement or because they feared his opponents. Eventually the Sheikh got a warm welcome in the town of Diriyah, which was ruled by Muhammad bin Saud.

Muhammad bin Abdulwahhab and Muhammad bin Saud formed an agreement to dedicate their lives to restore the pure teachings of Islam to the Muslim community. The agreement was the Constitution of the first Saudi state; Muhammad bin Saud “the Imam” was required under this agreement to give the political and military protection to “the Sheikh”. Muhammad bin Abdulwahhab, in his turn,³⁰⁴ gave spiritual guidance to the newly formed state under the political rule of Muhammad bin Saud. By 1788, the Saudi State ruled over the entire central province of Saudi Arabia, or what is now known as the central province of Saudi Arabia. Since that time, the term *Wahhabiya* was used outside Najd to describe the Saudi State. The fame and success of the Sheikh’s movement and the newly formed state stimulated the hostility as well as the panic of the Ottoman Empire, the dominant power in the Middle East and North Africa at the time. The Ottoman Empire and its allies in the region tried, as mentioned above, to break the Sheikh and the Saudi state in various ways. From then on, the term *Wahhabiya* started to be used for the people of the specific geographic area i.e.

³⁰³ J. Esposito, *Islam: The Straight Path* (1st edn., Oxford University Press, 1988), pp. 114–118.

³⁰⁴ The agreement has had its effect on the Saudi religious institution until now as the Sheikh’s descendants are still in its top positions such as the Minister of Justice, Minister of Islamic Affairs and the Grand Mufti.

the central region of Saudi Arabia, and after that for the people who followed the teachings of Muhammad bin Abdulwahhab anywhere else, especially the Saudis.³⁰⁵

3.3.3 Wahhabism and the Saudi Law

The Saudi legal system is totally based on the Shari'a "the Quran and the Sunna". There is no reference to the word *Wahhabiya* in any of the Codes, Royal Decrees and court decisions, or even in the curriculum of the Shari'a Colleges in Saudi Arabia. The term *Wahhabiya* has been given to the country, its Law and its people by outsiders and it is in use outside the country only. Article 1 of the Basic Law of Saudi Arabia states that the Kingdom of Saudi Arabia is a sovereign Arab Islamic state; its Constitution is the Quran and the *Sunnah*.³⁰⁶ Article 1 of the Law of the Judiciary states clearly that the "Shari'a" rules are the only source of legislation in Saudi Arabia with no mention of *Wahhabiya* or Sheikh Muhammad bin Abdulwahhab. It can be said that *Wahhabiya* exists only in the minds of the opponents of Saudi Arabia who transferred their inaccurate understanding to the world in a way that represents the movement of Muhammad bin Abdulwahhab as a new Islamic School or *Mathhab*.

3.4 The Roles of Women in the Saudi Legal System

Due to some cultural controversies, the participation of women in the Saudi legal system is very limited. In accordance with the Shari'a ruling, women cannot be appointed as judges or arbitrators. This issue is not a matter of discussion in Saudi Arabia as the Shari'a requires the arbitrator to be a man; according to Shari'a, the appointment of a woman as a judge/arbitrator is null and void even if she gives a correct judgment.³⁰⁷ Scholars have evidenced this opinion with the following *Hadeeth*: When the Prophet heard the news that the people of Persia had made the daughter of Khosrau their Queen, he said, "*Never will succeed such a nation as makes a woman their ruler.*"³⁰⁸ The vast majority of Muslim scholars do not recognise the

³⁰⁵ See generally A. Sa'ied, *The History of the Saudi State* (1st edn., Darat Almalik Abdul-Aziz, 1973).

³⁰⁶ The Basic Law of Saudi Arabia, *Alnezam Alasasi Lelhokm*, Royal Decree No. (90/A) dated 28/06/1412 H. (1992).

³⁰⁷ *Supra* 28, Ibn Qodamah, vol. 11, p. 380.

³⁰⁸ *Supra* 43, Albukhari, vol. 9, Chapter 88, Hadeeth No. 219.

appointment of women arbitrators because women are not qualified to be judges.³⁰⁹ Scholars supported their argument with the fact that a male witness is equal to two women. The legal basis for this practice is the following Quranic verse: “*Two men shall serve as witnesses; if not two men, then a man and two women whose testimony is acceptable to all. Thus, if one woman becomes biased, the other will remind her*”.³¹⁰

However, there have been some speculations on whether women will be allowed to practice law as licensed lawyers and this issue is still under consideration by the Ministry of Justice. At the moment, women are only allowed to work as in-house legal advisors.

3.5 The Influence of the Mufti on the Application of Shari’a in the Saudi Judiciary

The role played by the official Mufti in the Islamic state is very important for the reason that the Mufti is the highest religious authority in the state and because the Mufti occupies an intermediate position between the law, religion and real life. The main duty of the official Mufti is to give opinions concerning matters of Shari’a law and social affairs; in other words, the Mufti is the authority who gives guidance on the practical ways of applying the Shari’a rules in legal and social matters.³¹¹ It cannot be denied that the Saudi judiciary falls under the influence of the General Mufti or *Almufti Al’am* who works side by side with the Monarch as a final resort after the Committee of the Senior Scholars or what is known as *Hay’at Kibar Al Ulama’*. For the reason that the Grand Mufti belongs to the *Hanbali* School, the influence of the *Hanbali* School on the reasoning of judges and the application of Shari’a in the Shari’a courts is very clear. The late General Mufti Sheikh Abdul-Aziz bin Baz (1910-1999), who served as a judge for many years, rejected the idea of basing legal opinions solely on the teachings of one school. Sheikh bin Baz instructed judges and scholars to liberalise their thinking from the strict adherence to one school and to develop a mechanism to allow judges to decide on the case not on the basis of the

³⁰⁹ Supra 26, Al Kenain, pp. 77-79.

³¹⁰ The Quran 1: 282.

³¹¹ J. Skovgaard-Petersen, *Defining Islam for the Egyptian State: Mufti and Fatwas of the Dar al-Ifta* (1st edn., Brill Publishers, 1997), pp. 5-9.

School of thought, but on the basis of equity and mercy. It has been noted from his fatwa that Sheikh bin Baz tried to find the easier solution for any problem; in other words, he attempted to make life easier and his judgments in the areas of family and criminal law are clear evidence of his approach.³¹² Nowadays, it can be argued that the fatwa of Sheikh Abdul-Aziz bin Baz is one of the strongest legal sources before any Saudi court.³¹³ Despite Sheikh bin Baz, General Muftis of Saudi Arabia are known for their strict observance of the *Hanbali* teachings in accordance with the teachings of the Scholar Ibn Taymiyyah.

The reasons behind the strict adherence of the General Muftis of Saudi Arabia to the *Hanbali* School under the teachings of Ibn Taymiyyah are obvious and they can be summarised as follows:

- The *Hanbali* School is the School followed by the Royal Family of Saudi Arabia since the time of the agreement between Muhammad Ibn Saud and Muhammad Ibn Abdulwahhab around the 18th century AD;
- The vast majority of judges and the senior Scholars follow the *Hanbali* School either because of education or due to the family background, especially the Mufti and the Minister of Justice who are the direct descendents of Sheikh Muhammad bin Abdulwahhab. The descendents of Sheikh Muhammad bin Abdulwahhab are known nowadays as “Al-Ash-Sheikh” and they have been occupying almost all of the highest religious and legal positions in the Government of Saudi Arabia.³¹⁴

The importance of the role of the General Mufti with regard to the judiciary is represented when the Ministry of Justice refers a question to him, asking for legal or religious guidance on a very specific issue. The answer of the Mufti will be

³¹² For more details, see Sheik Abdul-Aziz bin Baz’s fatwa concerning divorce No. 2157 dated 09/11/1391 H. (1971); see also the Council of Senior Ulama decision concerning murder No. 38 dated 11/08/1395 H. (1975); see decision No. 167 of the Shari’a Supreme Court of Riyadh concerning divorce dated 14/06/1392 H. (1972).

³¹³ The supremacy of the fatwa over some Codes and Regulations can be found when looking at the decisions of the Shari’a court in matters concerning some disputed matters such as the sale of tobacco and other disputed subject matters under Shari’a.

³¹⁴ The General Mufti of Saudi Arabia is Sheik Abdul-Aziz bin Abdullah Al-Ash-Sheikh; the Minister of Justice is Dr. Abdullah bin Muhammad Al-Ash-Sheikh since 1993, and another member of the same family was the Minister of Justice between 1975 and 1990; the Minister of Islamic Affairs is Sheik Saleh bin Abdul-Aziz Al-Ash-Sheikh since 1996 and another member of the same family was appointed as the first official Mufti in 1954.

considered a sort of binding precedent before any court in Saudi Arabia. With regard to arbitration, the guidance of the General Mufti is very important in determining the rules of public policy and the application of Shari'a in Saudi Arabia.

3.6 The Influence of Foreign Laws on the Saudi Law

Due to the lack of legal experience at the time of the creation of Saudi Arabia, King Abdul-Aziz had to rely on the existing Ottoman Codes as a base for the legal system and as a supplement to the Shari'a rules. The newly formed state had to work further to develop a suitable body of legislation depending on the available bodies of law and on foreign expertise. That trend was established by his order to the attorney general of Hejaz to adhere to the Ottoman regulations until further notice.³¹⁵ The Code of Commercial Courts of 1931 was extensively inspired by the Ottoman Code of 1850. With many amendments since that time, the code is still in existence today; it includes a lot of Turkish terms and it can be considered as a direct translation from the Turkish Code.³¹⁶ Moreover, King Abdul-Aziz attempted to codify the teachings of the four Islamic Schools in a way that was similar to the way that the *Majalla* codified the *Hanafi fiqh*; however, this step had been strongly opposed by some radical scholars and did not see the light. In conjunction with that attempt, the King ordered the Shari'a judges not to be bound by the rules of one school of *fiqh* in a way that would result in one school's ruling abrogating another.³¹⁷ On the other hand, some *Ulamas* had their own agenda; they opposed the King's reform plans and tried to put pressure on the judges in all the courts in the Kingdom to apply the *Hanbali fiqh* under the teachings of the late Scholar Ibn Taymiyyah. The main reason for their opposition was the fear that the expansion of civil jurisdiction may come at the expense of the Shari'a and lead, at the end, to the application of unrelated laws to the Shari'a.³¹⁸

Later on, the Saudi law was inspired by the French system indirectly. The French law was of deep influence on the Saudi law because of the foreign experts from other Arab countries, especially Egypt which was under French occupation during the 18th

³¹⁵ See the Royal Decree No. 1166 dated 27/12/1345 H. (1927).

³¹⁶ See in general supra 290, The Code of Commercial Courts of Saudi Arabia.

³¹⁷ Supra 289, Sfeir, p. 732.

³¹⁸ Ibid. p. 733.

and 19th centuries, as well as the young Saudi legal scholars who graduated from the law schools in Egypt, Lebanon and France.³¹⁹ Moreover, many of the consultants of the Saudi kings were Egyptians or Syrians either by birth, origin or education which are countries highly influenced by the French legal system.³²⁰ Those Consultants imported the Egyptian laws, which are direct translations of the French laws. However, in order to be adopted in Saudi Arabia, all these regulations must be in compliance with the Shari'a principles. For instance, in 1966, Saudi Arabia enacted the Royal Decree No. (M/6) dated 24/02/1386 H. entitled Regulation Governing Bids for Government Procurement, Sales and Leases.³²¹ This was a copy of the Egyptian Bid Regulation of 1957, which was a textual translation of the French regulation of 1953. Another example of the French influence is the Saudi Companies Law enacted by Royal Decree No. (M/6) dated 22/03/1385 H. (1965). The law was copied from the Egyptian code which was directly patterned after the French company law.³²² The French influence can even be seen in the case when the Government representatives in the Aramco arbitration cited some French administrative laws to support their arguments. The list of such borrowed regulations is long and regulates most of the aspects of the Saudi law such as the Banking Control Law of 1966, Labour and Workers Regulation of 1969 and the Law of Procedure before Shari'a Courts of 2000. Although these laws have been borrowed from French law, they are still Islamic in the sense that they do not contradict with any of the Shari'a principles.

3.7 The Regulatory Attitude toward Arbitration in Saudi Arabia

The regulatory attitude toward arbitration in Saudi Arabia has gone through three phases; at first, International arbitration was welcomed by the government and governmental entities. The first attempt to use arbitration by the Saudi government was in the settlement of the "*Wahat Alburaimi*" Buraimi Oasis Case in 1955. The arbitration took place in Jeddah, Saudi Arabia, and the British government acted on

³¹⁹ Supra 290, Hanson, p. 288.

³²⁰ See generally D. Holden and R. Johns, *The House of Saud* (1st edn., Sedgwick and Jackson, 1981).

³²¹ Supra 290, Hanson, p. 289.

³²² Ibid.

behalf of the Ruler of Abu Dhabi and the Sultan of Oman. The arbitration agreement established a tribunal consisting of five members for the settlement of the dispute as to the location of the common border between Saudi Arabia and Abu Dhabi, and as to the sovereignty of the Buraimi Oasis. According to the arbitration agreement, the tribunal had to give due regard to all relevant considerations of law, fact and equity, and in particular to the historical rights of the rulers in the area; the traditional loyalties, tribal organisation and the way of life of the inhabitants of the area; and the exercise of jurisdiction and other activities in the area.³²³ The *Buraimi* arbitration did not have a significant impact on the arbitration or the legal system of Saudi Arabia, like the well-known arbitration between the government of Saudi Arabia and Aramco in 1958 which changed the Government's attitude toward international arbitration for a few decades, or what can be called as the second phase.³²⁴ During this phase, Saudi Arabia looked at international arbitration as a threat to its national sovereignty. The Aramco Award of 1958 had a significant impact on accepting arbitration agreements and clauses providing for International arbitration by governmental bodies. The award will be discussed later in this section. The third phase started with the first oil boom in the 1970s and continued up to now.³²⁵ Due to the economic expansion and the building of the infrastructure, Saudi Arabia had to relax its attitude toward International arbitration. The notable steps taken by the Saudi government in this area are represented in it joining the ICSID convention, reforming the arbitration regulations and offering more protection to foreign investments. This part of the chapter will be divided into two main sections; the first will deal with arbitration from the creation of the Saudi legal system and the enactment of the Code of Commercial Courts in 1931 till the first Oil boom in the mid-1970s. The second part will deal with the current approach that started as a result of the oil boom.

³²³ The Arbitration agreement between the Government of the United Kingdom (acting on behalf of the ruler of Abu Dhabi and His Highness the Sultan Said bin Taimur) and the Government of Saudi Arabia, Jeddah, 30 July 1954 (H.M.S.O. Cmd. 9272, 1954) cited in J. B. Kelly, 'The Buraimi Oasis Dispute', *International Affairs*, 32/3, Jul. 1956, pp. 318-324.

³²⁴ This case is also known as Aramco Case and Onassis Case.

³²⁵ F. Sami, *International Commercial Arbitration in Arab Countries* (1st edn., Dar Althaqafa Li Nashr wa Altaouze', 2006), p. 423.

3.8 Arbitration in the Saudi Legal System Prior to the Oil Boom

3.8.1 Arbitration under the Code of Commercial Courts 1931

The related provisions of the Code of Commercial Courts are concerned with commercial arbitration between private parties only. The Code includes nine brief articles to regulate arbitration proceedings. Article 493 allows disputants to stipulate to arbitrate in a written notarised deed. The parties to the arbitration are free to decide on the number of arbitrators, the timescale and the way of rendering the arbitral award, whether it is by unanimity or by majority. Arbitration under this Code is institutional³²⁶ and the proceedings are held under the supervision of the Commercial Court.³²⁷

Article 494 deals with the procedural law of the arbitration; the arbitrators are required by this article to apply the provisions of the Code of Commercial Courts under the light of the Shari'a procedural rules with the support of the arbitration agreement.³²⁸ Similar to the relevant provisions in the Arbitration Act of 1983, an arbitral award is not enforceable unless reviewed by the Commercial Court, which will either approve it for enforcement or repudiate it.³²⁹ With regard to the revocability of the appointment of the arbitrators, the Code prohibits the revocation of the appointment of the arbitrators by the parties after the Court's approval; nonetheless, the disputants have been given the right to challenge the award before the Court.³³⁰ The Code also includes provisions to determine the administrative fees.³³¹

However, the above-quoted provisions did not exist in real life for the following reasons; the courts at that time did not recognise the arbitration agreement or arbitration clause in the case when the parties insisted on their right to arbitrate in accordance with the arbitration agreement. Even if the court approved the arbitration agreement or the arbitration clause, the enforcement of the arbitral award would have

³²⁶ However, article 613 set the administrative fees for enforcing arbitral awards that have not been supervised by the Court.

³²⁷ *Supra* 290, The Code of Commercial Courts of Saudi Arabia, Article 493.

³²⁸ *Ibid.*, article 494.

³²⁹ *Ibid.*, articles 495 and 497.

³³⁰ *Ibid.*, article 496.

³³¹ *Ibid.*, articles 610, 611, 612 and 613.

been voluntary.³³² Accordingly, the reference to arbitration was very limited; the conflict between the Commercial Court and the Shari'a courts led arbitration to become ineffective, time consuming and in many cases harmful to some parties. The Arbitration Act of 1983 superseded the arbitration provisions of this Code; however, ad hoc arbitration in cases of a non-commercial nature is still governed by the provisions of this Code till now.³³³

3.8.2 Arbitration Clauses in the Oil Concessions in Saudi Arabia

On 29/05/1933, the founder of the Kingdom of Saudi Arabia, King Abdul-Aziz, concluded a contract on oil exploitation with the Standard Oil Company of California (Socal), the parent company of Chevron. Under that contract, the Company was granted an exclusive Concession for 60 years in the eastern province of Saudi Arabia.³³⁴ In accordance with the Concession Agreement, Socal established a corporation, the California-Arabian Standard Oil Company (Casoc), and assigned to it all its rights and obligations under the Agreement. In 1936, due to the failure in locating oil and the high cost of the operations, the Texas Oil Company acquired a 50% stake of the Concession which had been ratified by the government of Saudi Arabia. The company name was changed in 1944 from California-Arabian Standard Oil Company to Arabian American Oil Company (or Aramco).³³⁵ At the time of drafting the Concession agreement, Saudi Arabia did not foresee the possibility of a dispute with Aramco which resulted in it not including a well-drafted arbitration clause; however, article 31 of the Concession Agreement stated that in case of dispute, the dispute would be settled through an arbitration panel consisting of three arbitrators and the Islamic law as taught by the *Hanbali* School would be made applicable. The issue of the applicability of the Islamic law was even clearly expressed in the arbitration agreement between the government of Saudi Arabia and

³³² Supra 2, Alebejad, p. 30.

³³³ Ibid.

³³⁴ In 1939, by a supplementary agreement, the Concession area was extended to cover about 116,000 square miles and the period was extended as well to 65 years.

³³⁵ See in general, Saudi Aramco, <<http://www.saudiaramco.com>>, accessed 8 April 2007.

Aramco in 1955; nonetheless, the arbitration tribunal failed to apply it in the dispute, as will be seen below.³³⁶

Due to the outcomes of the Aramco arbitration and following the Council of Ministers Resolution No. 58 of 1963, Saudi Arabia avoided the possibility of not applying its law in disputes raised in the future, which was demonstrated in the great attention that was paid to the Concession agreement between the government of Saudi Arabia and Auxirap (French Red Sea). The Auxirap Agreement of 1965 was outstandingly more favourable to Saudi Arabia than the Aramco one. Article 63 of the Concession agreement between Saudi Arabia and Auxirap of 1965 provides that in the case of any dispute raised as a result of the interpretation or the execution of the agreement, the dispute should be referred first to a committee of experts. The committee would consist of two experts; one of them would be chosen by the government of Saudi Arabia and the other would be chosen by the concessionaire. If the Committee fails to reach an acceptable settlement, the dispute would be referred to the Committee of Settlement of Mining Disputes in accordance with the Mining Act of 1963.³³⁷ The agreement had altered later on in the same year after the participation of Petromin Oil Company³³⁸ in the same concession. The distinction had been made between the dispute between Auxirap and the Saudi government and the dispute between Auxirap and Petromin. There would have been no change in the dispute settlement procedure if the dispute had occurred between Auxirap and the Saudi government; however, if a dispute happens between the participants i.e. Petromin and Auxirap, the dispute would be settled by means of international arbitration like any normal commercial dispute.³³⁹ As an added security, Saudi Arabia obliged Auxirap to incorporate a joint venture company in Saudi Arabia to be the operating company for the Concession and set the maximum foreign ownership limit at 60%.³⁴⁰ It can be seen from the arbitration clauses included in other Oil Concessions (especially after the Aramco award) that Saudi Arabia tried not to refer to arbitration outside the country, which was clearly

³³⁶ A. Ashoush, *The Law of the Oil Concessions in the Arab Countries* (1st edn., Alsharikah Almuttahidah Lelnashr Wa altawze', 1975), p. 415.

³³⁷ The Committee is to be established by article 50 of the Mining law of 1963.

³³⁸ The Saudi Arabian Lubricating Oil Company was formed in 1968 by a Royal Decree as one of the joint ventures of the General Organisation of Petroleum and Minerals (Petromin). The company was renamed as the Saudi Arabian Lubricating Oil Company in 1997 after Petromin's shares in the company were transferred to Saudi Aramco.

³³⁹ See supra 332, Ashoush, p. 415.

³⁴⁰ Ibid. p. 613.

demonstrated in the Agreements with Japan Petroleum Trading Co. of 1957 when article 55 of that Agreement stated that disputes are to be resolved finally by a five-arbitrator panel sitting in Saudi Arabia; article 23 of the Agreement between Saudi Arabia and Trans-Arabian Pipe Co. also provides for a three-arbitrator panel sitting in Jeddah. It can be said that the Saudi government tried to secure its position in any possible conflicts to ensure the application of the Saudi law in any future disputes, especially after the disappointment of the Aramco award.³⁴¹

3.9 Aramco v. Saudi Arabia

3.9.1 Background

In January 1954, an agreement was concluded between the government of Saudi Arabia and Aristotle Onassis, the Greek-born shipping tycoon of that time, hereinafter, the Onassis Agreement. The original deal was amended in April of the same year. It has been argued that the provisions of that agreement were only beneficial to Onassis and the middlemen who facilitated the deal. It was also argued that Onassis's main concern was to guarantee the employment of 10 oil tankers that he was chartered on in a long-term contract in a time when the global tankers market experienced overcapacity in addition to a global depression in the demand for oil.³⁴² On the other hand, some may argue that the agreement was an attempt to break Aramco's monopoly over the Saudi oil, which was absolutely monopolised by Aramco.³⁴³ Nevertheless, and away from politics, Saudi Arabia sought its own interests which were clearly demonstrated in the provision of the agreement.

The agreement granted Onassis the right to establish a private company in Saudi Arabia under the commercial name of the *Saudi Arabian Maritime Tankers Company*, hereinafter Satco. The newly formed company was to be bound to maintain a minimum of 500,000 tons of tankers under the Saudi Arabian flag and to register this tonnage in Saudi Arabia.³⁴⁴ The Agreement obliged Satco to establish a marine school

³⁴¹ Supra 134, Lerrick and Mian, footnote,15, p. 153.

³⁴² Supra 316, Holden and Johns, pp. 181-182.

³⁴³ Ibid.

³⁴⁴ Article 14 of Onassis Agreement as quoted in the Aramco Award 27 I.L.R. (1963), pp. 116-127.

in Jeddah and to employ its graduates on board Satco tankers. Satco further undertook to give Saudi Arabian employees and workmen preference in working on its tankers.³⁴⁵ Moreover, Satco was obliged to carry on her tankers, free of charge, 50,000 tons of oil and oil products from Saudi Arabian ports in the Persian Gulf to any Saudi port in the Red Sea.³⁴⁶ The government of Saudi Arabia was entitled to receive a royalty of 1 shilling and 6 pence for every ton shipped abroad in Satco tankers, as well as the payment of all port and harbour duties in Saudi Arabian ports.³⁴⁷ The agreement foresaw a possible increase in Satco's fleet which had to always represent a minimum of 500,000 deadweight tons of tankships during the life of the agreement.³⁴⁸

On the other hand, Satco's tankers had to bear Saudi Arabian names and Satco had the right to enjoy the Government's protection, which is the right of any Saudi Arabian Company.³⁴⁹ The Agreement obligated Saudi Arabia to enact a Maritime Law.³⁵⁰ The controversial provisions of the Agreement that raised the dispute were articles 4 and 15. According to these provisions, the Saudi Arabian Maritime Tankers Company Ltd. had the right of priority for the transport of oil for a period of 30 years from the date of signing the agreement, renewable for a further period by mutual agreement.³⁵¹

The dispute at issue started when the government of Saudi Arabia ordered Aramco to apply Royal Decree No. 5737 of 09/04/1954 that ratified the Onassis Agreement concluded in 20/01/1954. The Royal Decree gave the Onassis Agreement a legal status similar to that of the Aramco Concession Agreement of 1933. On 23 January 1954, the Saudi Minister of Finance advised Aramco of the signing of the Agreement and informed it of the content of article 4. The letter in this part reads as follows:

“it is taken for granted that the Saudi tankers have priority over other tankers for loading Saudi petroleum (in second place) after the tankers owned by your company

³⁴⁵ Ibid., articles 6 and 9.

³⁴⁶ Ibid., article 10; however, it did not state the frequency of this shipment, whether it will be for one time only or in a frequent manner.

³⁴⁷ Ibid., articles 11 and 12.

³⁴⁸ Ibid., article 14.

³⁴⁹ Ibid., articles 2 and 3.

³⁵⁰ Ibid., article 5.

³⁵¹ Aramco Award, 27 I.L.R. 117 (1963), p. 128.

or by companies which founded you and which have been actually transporting Saudi petroleum before December 31, 1953”.³⁵²

3.9.2 Aramco’s Response

Aramco rejected the Onassis Agreement and responded to the Minister of Finance’s letter, saying that the implementation of the Onassis Agreement would be:

- contrary to and in violation of both the letter and the spirit of the existing Agreement between the government of Saudi Arabia and Aramco;
- contrary to long-established business arrangements and procedures developed with reliance on these Agreements;
- contrary to established world-wide custom and practice in the international oil industry;
- of a disastrous effect upon the presently established sales outlets for Saudi oil and the possible future development thereof;
- wholly impractical.³⁵³

Aramco based its rejection on the above-mentioned grounds without any real justification which carried on throughout the proceedings, as Aramco failed to prove that the Onassis Agreement would cause any injury to its interests.

3.9.3 The Saudi Government’s Position

After months of negotiations to reach an amicable settlement, the parties agreed to submit the dispute to an ad hoc Arbitration tribunal in Switzerland. The Arbitration proceedings started in 1954 but the Award was issued in 1958. Although it was merely an arbitration relating to the interpretation of a Concession Agreement, many circumstances lengthened the proceedings to four years. Throughout the proceedings, the government of Saudi Arabia tried to reach an amicable settlement outside the tribunal. The arbitrator appointed by Saudi Arabia, Dr. Badawi, died during the proceedings and was replaced by Mr. Mahmoud Hassan, and both, in addition to the arbitrator appointed by Aramco, were Egyptian nationals. Dr. Badawi and Mr.

³⁵² Ibid. p. 130.

³⁵³ Ibid.

Habachy, the arbitrator chosen by Aramco, appointed the Swiss Georges Sauser-Hall as a referee. The Saudi Government recognised that the Concession Agreement of 1933 gave Aramco very extensive rights, exclusive in character, in respect of the operations pertaining to its enterprise, but it contended that this right did not include transportation of petroleum and petroleum products by sea. The Government contended that Aramco was granted an exclusive right to transport its oil and oil products only to the seashore including the exclusive area in Saudi Arabia and to the limit of the territorial waters of the State, but this grant did not include the right to cross Saudi Arabia's maritime frontier and reach the high seas.³⁵⁴

The Government based its argument on the text of the Concession Agreement, which did not expressly provide for granting Aramco the exclusive right of transportation by sea to foreign countries.³⁵⁵ The Government also relied upon the principle of restrictive interpretation of the obligations assumed by a sovereign state in agreements with private individuals or companies, inasmuch as a Government must always bear in mind and safeguard the interests of the community.³⁵⁶ The Government took the position that it could withdraw from arbitration any act done by it to exercise its sovereign power. The Saudi Government concluded that with regard to the transportation of oil and oil products to foreign countries, Aramco was in the same legal position as other inhabitants of Saudi Arabia and it had to therefore, comply with any restriction adopted by the Government in connection with external transport of oil and oil products. The Company had no ownership in these products or any other property interest which would immunise it, or its buyers, from governmental action regulating such transport.³⁵⁷

Saudi Arabia insisted that in addition to the principles of Islamic law and the principles of International law, the general principles of law recognised by civilised nations do not support the contention that the Concession Agreement of 1933 exempts Aramco from the regulatory power of the Saudi government. The Government added

³⁵⁴ Supra 347, Aramco Award, p. 140.

³⁵⁵ Supra 347, Aramco Award, p. 132. Aramco alleged that it has the exclusive right of transportation of Saudi oil; however, it has never exercised it either by engaging in such transport or by exerting control over such transport.

³⁵⁶ Ibid.

³⁵⁷ Ibid., in support of the Government's point of view, some Muslim Scholars exclude minerals from the scope of private ownership. See supra 134, Lerrick and Mian, n. 88, pp. 170-171.

that since the Onassis Agreement had been ratified by Royal Decree No. 5737, it had become the law of the land that everyone had to respect.³⁵⁸ The Saudi Government contended, therefore, that Aramco could be lawfully bound to ship oil and oil products to foreign markets on Satco tankers, in conformity with the Onassis Agreement ratified by the Royal Decree. To exercise its sovereignty, the Government insisted that Aramco be forced to submit to any regulatory restriction that provides for a preferential right in the transportation of its products from Saudi Arabia in favour of tankers flying the Saudi Arab flag. Despite the fact that Saudi Arabia ratified the Onassis Agreement for the interests of its community, it guaranteed the minimum standard of protection to the rights of Aramco.³⁵⁹ Royal Decree No. 5737 gave Satco's tankers a right of priority after Aramco's tankers and tankers owned by the owning companies of Aramco, which is a right that Aramco has never exercised since its creation which has resulted in making the application of the Royal Decree of no injury to Aramco. Moreover, under the Islamic law, the "generic terms of a contract must be interpreted extensively" and if Aramco had been granted the right of transport, it should have exercised it; Aramco did not do so for more than 17 years. For the sake of the manifestation of the general principles of law recognised by civilised nations, the Government cited the French administrative law, as developed by the French "*Conseil d'Etat*", to support its contention that a state has the right to exercise its regulatory powers in order to control, and if necessary to adapt, the methods used by a company operating a public service. In the Government's opinion, the 1933 Concession is included in the concept of public service.³⁶⁰

3.9.4 The Applicable Law

According to article 4 of the Arbitration Agreement between Aramco and the Government of Saudi Arabia dated 15/02/1955, the arbitral tribunal would have to decide on the dispute in accordance with the Saudi Arabian law in so far as matters

³⁵⁸ Supra 347, Aramco Award, p. 141.

³⁵⁹ Ibid. p. 140, the letter of the Saudi Minister of Finance quoted above.

³⁶⁰ Ibid.

within the jurisdiction of Saudi Arabia; otherwise, the tribunal would be free to decide on the applicable law if the matter is outside the jurisdiction of Saudi Arabia.³⁶¹

With regard to the procedural law, despite the fact that the parties agreed for the arbitration to take place outside Saudi Arabia, the law of the place of the seat could not be applied to the arbitration. The tribunal stated: “considering the jurisdictional immunity of foreign states, recognised by international law in a spirit of respect for the essential dignity of sovereign power, the tribunal is unable to hold that arbitral proceedings to which a sovereign state is a Party could be subject to the law of another state”.³⁶²

As mentioned above, the parties to the arbitration agreement agreed to apply the principles of Islamic law, as taught by the *Hanbali* School, whereas the tribunal supported Aramco’s argument and stood against the application of the Saudi law; however, it explained its opinion in a “more polite way” compared to Aramco.³⁶³ The tribunal stated the following: “the regime of mining concessions, and, consequently, also of oil concessions, has remained embryonic in Moslem law and is not the same in the different schools. The principles of one school cannot be introduced into another, unless this is done by the act of authority. *Hanbali* law contains no precise rule about mining concessions and *a fortiori* about oil concessions”.³⁶⁴ The above quotation cannot show anything but a lack of knowledge of the Islamic law which has rules to govern all kinds of contracts, and if, for instance, the *Hanbali* School has no rules to govern a concession agreement, resorting to other schools, by the method of Qiyas, can solve the dispute. As it has been mentioned in one of the previous chapters, the use of the method of Qiyas does not need any act of authority. The use of Qiyas needs adequate knowledge of the nature of both situations and an accurate reasoning without any resort to the official authority because it is the law of God, not of the state of Saudi Arabia. The original case or, what it is called in the Islamic law, “*al asl*” can be the rules governing hidden wealth, like gold and silver, where oil can be one of its applications or “*far’a*”. The law applicable to this case under all conflict of laws

³⁶¹ Article 4 (b) of the arbitration agreement defined the Saudi law as the Muslim law under the teaching of the School of Imam Ahmad bin Hanbal, as applied in Saudi Arabia.

³⁶² Supra 347, Aramco Award, p. 154.

³⁶³ Ibid. pp. 162-163.

³⁶⁴ Ibid.

theories cannot be any law but the Saudi law. The tribunal denied the application of the Saudi law in the dispute and claimed that the Saudi law had no rules to govern oil concessions.

The Concession Agreement of 1933 was an agreement between a state and a private American party which cannot be subject to public international law. The tribunal quoted: “Any contract which is not a contract between states in their capacity as subjects of international law, is based on the municipal law of some country”.³⁶⁵ Consequently, if the international law cannot be applied because of the nature of the dispute and other municipal laws cannot be applied because a state cannot fall under a jurisdiction of another state, what is the applicable law, then? Even the general principles of law recognised by civilised nations cannot be applied in this case because in the end, the tribunal will apply a municipal law of a state on a sovereign state. Moreover, when the tribunal denied the application of the Saudi law and applied British and Swiss practices, it implied that Saudi Arabia is not a civilised nation, which was a discrimination against not just Saudi Arabia alone, but an unfair judgment of the Islamic law as a whole.³⁶⁶

The tribunal contradicted itself when denying the application of the Saudi law because no other law can be imagined to have a real connection other than the Saudi law for the following reasons:

- The Contract was concluded in Jeddah “Saudi Arabia”.
- The Contract came into force after its ratification and publication in the Saudi official gazette.
- The place of the characteristic performance of the contract was Saudi Arabia.
- The Concession of 1933 is a contract concerning immovable property situated in Saudi Arabia.

The tribunal’s competence was to specify the rights and the obligations of both parties under the Concession Agreement and to determine whether the Onassis contract infringed Aramco's rights under the agreement or not.³⁶⁷ The tribunal determined that

³⁶⁵ See in general supra 347, Aramco Award.

³⁶⁶ Ibid.

³⁶⁷ Ibid. p. 202.

it could only decide on disputes, such as the five questions submitted by the parties, and could find that the two contracts were compatible or in conflict. The tribunal was not authorised as an amiable compositeur, however, it was competent to find a method to reconcile or harmonise the two agreements. Consequently, the Tribunal rejected the suggestion that it had wider powers than those bestowed upon it by the parties' agreement. Despite the disagreement of one of the arbitrators, the tribunal concluded the case in Aramco's favour and stated in the award that the Onassis Agreement was neither a Law of the State of Saudi Arabia nor a Governmental regulation.³⁶⁸ The general principles of law that the tribunal relied on were neither clear nor coherent and were not, logically, suitable for the situation. Although the arbitral award was not binding on Saudi Arabia, the Saudi government abided by it, voluntarily announcing the death of the Onassis Agreement and of Satco.

3.9.5 Comments on the Case

The relationship between the government of Saudi Arabia and Aramco was based on mutual understanding of each other's needs. The Saudi government understood the American thirst for oil and facilitated Aramco's operations in the Saudi deserts; on the other hand, Aramco understood the Government's need for cash and arranged for loans, constructions and the employment and training of the Saudi nationals. If Aramco gave preferential treatment to Satco, it would have at least reduced the amount of loans that it used to give to the Government, bearing in mind the financial difficulties that Saudi Arabia faced during the early 1950s.³⁶⁹ However, Onassis had a long history of legal troubles with the U.S. government which may seem to be the reason behind Aramco's rejection and gives the impression that if someone else other than Onassis made the agreement with the government of Saudi Arabia, Aramco would not have opposed applying Royal Decree No. 5737. The FBI had investigated Onassis several times since 1943 for charges ranging from fraud to the possession of fascist ideas. Moreover, in 1953 Onassis had been charged, along with some other individuals and companies, of conspiracy to defraud the United States Government in multi-million-dollar deals to buy surplus U.S. ships after the war. The U.S.

³⁶⁸ Ibid. p. 220.

³⁶⁹ See generally supra 316, Holden and Johns. The situation was even worse before the 50/50 profit-sharing agreement.

Government found it in violation of the law which forbids the sale of U.S. ships to aliens.³⁷⁰ In the next year, Onassis was charged for another related fraud against the U.S. Government. He was charged with violating the citizenship provision of the shipping laws which requires that all ships displaying the American flag be owned by United States citizens. Onassis pled guilty and agreed to pay seven million dollars to the Government of the United States.³⁷¹

The Arbitrators chose the Swiss Sauser-Hall as a referee. Georges Sauser-Hall was a Professor of International Law at Geneva and Neuchatel Universities; also, he was a Member of the Permanent Court of Arbitration and of the Institute of International Law. He engaged in many cases of international arbitration such as the dispute between Albania and Italy in 1951 and many other cases, but the question here is what was his knowledge of the Islamic law and of the Arabic language which was the official language of the contracts and one of the languages of the hearings? One of the main controversial points in this case was the interpretation of article 1 of the Concession Agreement of 1933; whether the Arabic word “*Moutlaq*” is a synonym of the English word “exclusive” and whether the word “*Moua’malat*” has the same meaning as “treat”, which need a good grasp of both languages in order to reach the correct interpretation of the texts which the tribunal failed to achieve.

Saudi Arabia claimed that the wording of the Concession Agreement of 1933 does not give Aramco an exclusive right for transport. This opinion was supported by one of the arbitrators, Mr. Hassan, who quoted:

“Signing the Award, I state that I am in disagreement particularly with the interpretation contained therein of Article 1 of the Aramco Concession Agreement of 1933. That article is the key to the solution of the present dispute and to the answers to be given to the questions submitted to the tribunal. In my opinion, article 1, when read in its proper context, covers an Oil Concession with its various technical ramifications. The word “transport” which occurs in the nomenclature of Aramco’s

³⁷⁰ ‘Time Clock’, *Time Magazine*, 15 Feb. 1954.

³⁷¹ Federal Bureau of Investigation United States, *Published materials under the Freedom of Information Act 2000* <<http://foia.fbi.gov/foiaindex/aonassis.htm>>, accessed 9 April 2007.

exclusive rights can only cover transport which pertains to operations to be performed in the exclusive are of the Concession”.³⁷²

Mr. Hassan added: “Maritime transport is a vast world-wide operation which is independent from the industrial enterprise of the concessionary company and cannot therefore be mentioned casually. The right granted to Aramco in article 1 are recited in technological order. They correspond to the logical sequences of the successive operations of the enterprise which move with clockwork regularity from one stage to another. Had the parties intended the “transport” to mean transportation by sea, that word should have been the last in the enumeration of the exclusive right granted to Aramco. This is because transport by sea is the final act in the process covered by the enterprise. Moreover, had the Parties envisaged transport by sea in the 1933 Concession Agreement, they would have mentioned this *expressis verbis*, as such a right cannot be granted to Aramco by implication”.³⁷³

The tribunal cited the award of *Petroleum Development Ltd. v. Sheikh of Abu Dhabi* as a precedent to support the rejection of the application of the principle of restrictive interpretation of the contractual obligation of a Government toward a private individual.³⁷⁴ The latter case cannot be treated as such because it has a different nature. Unlike Saudi Arabia, Abu Dhabi was not a sovereign state at that time as it was under the British protection to the extent that the British government acted on its behalf in the Buraimi arbitration with Saudi Arabia.³⁷⁵

The lack of experience played an important role in Saudi Arabia losing this case, from the submission of the case to arbitration outside Saudi Arabia till the obedience of the award. The case was between a sovereign state and a private party; if the dispute had occurred nowadays, it would have been governed by ICSID arbitration rules and Saudi Arabia would have got a better deal. Saudi Arabia should not have involved Onassis in the dispute because Satco was, in theory, a Saudi company and it should have granted complete protection as a Saudi company. Saudi Arabia was in the stage

³⁷² Supra 347, Aramco Award, pp. 228-229.

³⁷³ Ibid.

³⁷⁴ Ibid. p. 194.

³⁷⁵ See in general supra 319, Kelly.

of creating or modernising its legal system and such mistakes were normal. Despite the fact that the Award was not in favour of Saudi Arabia, it was a good lesson that Saudi Arabia benefited from in building its legal regime. The Award encouraged Saudi Arabia to be more cautious when dealing with foreign parties in any contract, especially when the oil industry is involved, and not to put its national sovereignty at dispute again like what happened in the Aramco dispute. This trend was demonstrated in the Saudi reservation on the ICSID Convention.

3.10 The Legal Impacts of the Aramco Award 1958 on Arbitration in Saudi Arabia

3.10.1 The Council of Ministers Resolution No. 58 of 1963

There were many impacts of the Aramco award in different areas of law and legal practice, mainly on International arbitration and economic policy. The direct regulatory response to the Award was the Council of Ministers Resolution No. 58 of 1963, which was supplemented by the Ministry of Commerce Circular of 1979 that imposed some restrictions on the acceptance of arbitration clauses and agreements.

The Council of Ministers Resolution No. 58 of 1963 concerns arbitration when the Government of Saudi Arabia or a governmental entity is a party to the dispute. Prior to 1963, the Government frequently provided for arbitration as a means of settlement of disputes between itself and private parties; however, due to the disappointing outcomes of the Aramco Award of 1958, Resolution No. 58 prohibited resorting to arbitration to settle disputes between the Saudi Government or its Ministries, departments or agencies on the one hand, and individuals, companies or private organisations on the other.³⁷⁶ The regulation did not distinguish between foreign and local entities. The Resolution provides:

³⁷⁶ The Resolution is incorporated in article 3 of the Arbitration Act of 1983.

- No government agency shall conclude a contract with any individual, company or private organisation which includes a clause subjecting the government agency to any foreign court of law or any judicial body.
- Except in Concessions granted by the Government,³⁷⁷ no government agency shall accept arbitration as a means of settling disputes which may arise between it and any individual, company or private organisation.
- The most important principle of private international law is the principle of application of the law of the place of performance; Government agencies may not choose any foreign law to govern their relationship with any individual, company or private organisation.
- The above provisions shall not apply to contracts concluded after the issuance of this resolution.³⁷⁸

3.10.2 Ministry of Commerce Circular No. 31/1/331/91 of 1979

The Ministry of Commerce Circular No. 31/1/331/91 of 1979 confirmed the Council of Ministers' Resolution No. 58 of 1963 in prohibiting or restricting the recourse to International arbitration. The Circular stated that a clause providing for arbitration (outside the Kingdom) included in the articles of association of Saudi companies would be considered absolutely void. Articles of association that contain such clauses would not be approved or registered.³⁷⁹ As a result, reference can be made to domestic arbitration in the article of association of a joint company which is formed by foreign and local businessmen for the purpose of carrying out investment operations in Saudi Arabia. This restriction should include all forms of joint companies, whether they are formed by foreign investors and a private party or by a foreign investor and the government of Saudi Arabia.³⁸⁰

³⁷⁷ The exceptions here are technical disputes and disputes arising out of Concession agreements which have been exempted for its important interest to the country.

³⁷⁸ See the Ministerial Resolution No. 58 dated 17/01/1383 (1963).

³⁷⁹ Ministry of Commerce, Companies Department Circular No. 31/1/331/91 dated 22/02/1399 H. (1979).

³⁸⁰ Y. Al-Samman, 'The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia', *Arab Law Quarterly*, 9 (1994), pp. 217-220.

3.10.3 Other Impacts: the Establishment of OPEC

Following some arbitral awards involving concession agreements concerning natural resources such as the *Aramco Award*, and *Petroleum Development Arbitration*,³⁸¹ the oil producing states found themselves in need of a protecting cartel against the foreign control over their national wealth and against the unfair concession agreement. It should be noted that until the mid-1950s, the sums paid as taxes to the American government was far more than the share of Saudi Arabia in its oil.³⁸² The Saudi Minister of Oil and Mineral Affairs of that time, Abdullah Al Tirigi, sometimes spelled “Al-Tariki”, was deeply inspired by the revolutionary ideas of Juan Pablo Pérez Alfonso, the Venezuelan Oil Minister at that time, and of Frank Hendryx, who was a former Aramco employee and at the time employed by the Minister.³⁸³ The Venezuelan Minister came up with the ideas of forming the OPEC to enhance national sovereignty over natural resources and profit sharing with the foreign Concessionaires. Hendryx put forward the proposition that all petroleum agreements should be periodically re-negotiated when they no longer suit one of the parties or when conditions change to such a degree that the agreement is out of date.³⁸⁴ According to Hendryx, “*An oil producing nation by the law of civilised nations may clearly, in a proper case, modify or eliminate provisions of an existing petroleum concession which have become substantially contrary to the best interests of its citizens. Financial interest must certainly be included in the classification of matters of vital interest to a nation’s citizens*”.³⁸⁵

³⁸¹ *Petroleum Development (Trucial Coast) Ltd. v. The Sheikh of Abu Dhabi* “Petroleum Development Arbitration” II.C.Q.247 (1952). See also R. El Mallakh, Challenge of Affluence: Abu Dhabi, *The Middle East Journal*, 24/2 (1970) pp. 135-138.

³⁸² See generally supra 320, Holden and Johns.

³⁸³ Hendryx was the legal advisor to the Saudi Arabian Directorate General of Petroleum and Mineral Affairs; the Directorate General had been substituted by the Ministry of Petroleum and Mineral Wealth in 1960.

³⁸⁴ See generally S. Duguid, ‘A Biographical Approach to the Study of Social Change in the Middle East: Abdullah Tariki as a New Man’, *International Journal of Middle East Studies*, 1/3 (1970), p. 195.

³⁸⁵ L. Kissam and E. Leach, ‘Sovereign Expropriation of Property and Abrogation of Concession Contracts’, *Fordham Law Review*, 28 (1959-1960), pp. 177-200.

In September 1960, the Organisation of Petroleum Exporting Countries was established as an instrument for collective bargaining and self-defence.³⁸⁶ OPEC changed the role of the game and made the playing field more even by giving the oil producers some power in a market dominated by consumers. Nowadays, due to speculation, political instability and the huge oil production coming from non-OPEC sources, the power of OPEC in controlling global oil prices has been slightly decreased; however, the psychological influence of OPEC's announcements can be more effective than some real market factors.

During the 1950s and 1960s, the Middle East experienced a wave of nationalisation of foreign properties started in Egypt by nationalising the Suez Canal, which led to what is known as the *Tripartite Aggression* of 1956 when Britain, France and Israel attacked Egypt. The Saudi response to this attack was represented in an oil embargo against Britain and France.³⁸⁷ The Saudi government used oil as a tool to impose some pressure to support Arab countries in political conflicts for a second and last time in 1973, which changed the economic facts and the power balance in the region. Such incidents urged Saudi Arabia and other oil producers to get rid of foreign concessionaires, especially when the concession holder belongs to one of the world's superpowers. Unlike other Arab countries such as Libya and Algeria, Gulf countries preferred the gradual participation in the ownership of the companies holding the concessions, which proved to be more technically beneficial and politically safe. Saudi Arabia did acquire 100 percent participation interest in Aramco by 1980 through purchasing almost all the assets of the American owners.³⁸⁸ It can be assumed that Aramco arbitration encouraged Saudi Arabia to replace the foreign monopoly over its natural resources by a national concessionaire that is totally owned and controlled by the government and as a matter of public policy, no foreign investments are allowed in the oil sector.

³⁸⁶ Leonardo Maugeri, *The Age of Oil: The Methodology, History, and Future of the World's Most Controversial Resource*, (1st edn., Greenwood Publishing Group, 2006), p. 85.

³⁸⁷ See generally, L. Kennett, *Suez: The Twice-Fought War*, (1st edn., McGraw Hill, 1969).

³⁸⁸ See generally, Saudi Aramco, www.aramco.com, (accessed in 18/04/2008).

3.11 The Change in the Governmental Attitude toward Arbitration: 1970s till Now

3.11.1 Reasons for the Change

In the aftermath of the first oil boom, Saudi Arabia accumulated enormous financial surpluses which made it the strongest of the OPEC group.³⁸⁹ The financial ability characterised Saudi Arabia as a major capital-exporting country exporting to the world, especially to the United States and Europe.³⁹⁰ The main objective behind the statutory reform was to attract foreign investment. Saudi Arabia at that time did not lack financial capital; it was in need of capital, in terms of technology and expertise. In the late 1970s, Saudi Arabia started to transform its economy from overwhelming dependence on oil to a diversified industrial economy with an ultimate target of setting up a hydrocarbon-based petrochemical industry.³⁹¹ The flow of foreign investment would not have met the economic needs without a regulatory flexibility and sufficient protection of foreign investment. One of the fundamental needs of any foreign investor is to have a fair and impartial dispute settlement mechanism where the investor is not the weak party in the dispute.

The shift started when Saudi Arabia agreed to settle certain differences and claims relating to the Agreement on Guaranteed Private Investment and guarantees of Saudi public sector contracts and investments with the United States in 1975.³⁹² Saudi Arabia started a comprehensive reform, as a legal incentive to foreign investment, by joining the ICSID Convention in 1979-80, issuing the Arbitration Act of 1983 and it implementing a regulation in 1985, ratifying the New York Convention on the enforcement and recognition of foreign arbitral awards of 1958, contributing to the

³⁸⁹ That also led to what is called Petrodollar recycling as a result of having quite a small population and/or underdeveloped infrastructure, and the availability of extra financial resources even with intensive development plans.

³⁹⁰ F. El Sheikh, *The Legal Regime of Foreign Private Investment in the Sudan and Saudi Arabia, A Case Study of Developing Countries* (1st edn., Cambridge University Press, 1984), p. 11.

³⁹¹ Ibid.

³⁹² The Overseas Private Investment Corporation (OPIC) no longer provides coverage in Saudi Arabia. In 1995, OPIC removed Saudi Arabia from its list of countries approved for OPIC coverage because of Saudi Arabia's failure to take steps to comply with "internationally recognized labour standards". See the US Department of State website <<http://www.state.gov/e/eeb/afd/2005/43038.htm>>, accessed 1 May 2007.

establishment of the GCC Commercial Arbitration Centre, giving effect to some regional arbitration-related conventions and adopting some bilateral Investment Agreements.³⁹³

3.11.2 Saudi Arabia join ICSID Convention

The International Centre for Settlement of Investment Disputes is an autonomous International organisation with close links with the World Bank. All of the members of the ICSID Convention are also members of the World Bank. According to the ICSID Convention, which came into force on October 14, 1966, the Centre provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID services is entirely voluntary. However, a party to the dispute cannot withdraw its consent unilaterally and member states are required to enforce ICSID arbitral awards.³⁹⁴ The acceptance of ICSID jurisdiction was seen as an important instrument to give investors confidence to continue with their existing investments as well as a tool for attracting further investments.³⁹⁵ Saudi Arabia signed the Convention in September 1979 and it entered into force in June 1980.³⁹⁶

Pursuant to Article 25(4) of the Convention, any contracting state may notify ICSID of the class or classes of disputes that it may or may not be willing to submit to ICSID arbitration. Accordingly, the Kingdom, in its ratification instrument, reserved the right of not submitting all questions pertaining to oil and to acts of sovereignty to ICSID, whether by way of conciliation or arbitration.³⁹⁷ Investment arbitration in Saudi Arabia is to be governed by the ICSID rules in contrast to Commercial Arbitration, which is governed by the Arbitration Act of 1983 or other rules provided that the rules are recognised by the Saudi authorities. *Ed. Züblin AG v. Kingdom of Saudi Arabia* is the first case where the Saudi government was a party to ICSID arbitration. The

³⁹³ Saudi Arabia has ratified eight investment promotion and protection agreements other than the Agreements under the GCC and the Arab League.

³⁹⁴ See in general, International Centre for Settlement of Investment Disputes (ICSID) <<http://www.worldbank.org/icsid>>, accessed 26 April 2007.

³⁹⁵ J. Lew; L. Mistelis and S. Kroll, *Comparative International Commercial Arbitration* (1st edn, Kluwer Law International, 2003) pp. 22.

³⁹⁶ See the Council of Ministers Resolution No. 372 of 15/03/1394 H. (1974). See also Royal Decree No. M/8 of 22/02/1394 H. (1974).

³⁹⁷ G. Delaume, 'ICSID Arbitration and the Courts', *The American Journal of International Law*, 77/4 (1983), pp. 784-796.

construction of university facilities was the subject matter of the dispute. On January 28, 2003, the Secretary General registered a request for the constitution of the arbitration panel. However, a Settlement was reached by the parties and the proceeding discontinued at the request of the Claimant in accordance with article 44 of the Arbitration Rules.³⁹⁸ This case is an example of the dispute settlement approach of the government of Saudi Arabia that performs its obligation under any contract adequately and in good faith, and in the case of a dispute, the Government prefers to settle it amicably and in private, which was one of the reasons behind the length of the proceedings in the Aramco Case.³⁹⁹

3.11.3 The Arbitration Act of 1983

Regardless of the impractical provisions in the Code of Commercial Courts of 1931, article 183 of the Labour Law of 1969 and article 3 of the Chamber of Commerce and Industry Regulation of 1980,⁴⁰⁰ Saudi Arabia lacked a comprehensive arbitration regulation. The Arbitration Act of 1983 repealed the related provisions in the Code of Commercial Courts of 1931. The Implementing Regulation of 1985 came to answer all the related questions that had not been answered in the Act and to describe various aspects of the arbitration proceedings. It can be said that the Act is a codification of the *Hanbali* law of arbitration. Regardless of the religious restrictions, the Act and the Implementing Rules were described as clarification and simplification of the traditional Islamic system.⁴⁰¹ The Act provides a framework for commercial arbitration in a flexible way that makes arbitration a real alternative dispute resolution mechanism, as will be seen in the next chapter.

³⁹⁸ See the list of the concluded cases of ICSID, Case No. (ARB/03/1) <<http://www.worldbank.org/icsid/cases/conclude.htm>>, accessed 25 April 2007.

³⁹⁹ See supra 347, Aramco Award. It is also the reason for the very small number of disputes against the Saudi government, bearing in mind the intensive constructions and governmental contracts during the 1970s and 1980s.

⁴⁰⁰ See Royal Decree No. (M/21) of 06/09/1389 H. (1969). Article 183 provides for arbitration as an alternative for the Committee for the Settlement of Labour Disputes. See also Royal Decree No. (M/6) dated 60/04/1400 H. (1980). According to article 5 of the Chamber of Commerce and Industry Regulation, the Chambers of Commerce and Industry are competent to resolve business disputes by arbitration if the parties agree to it.

⁴⁰¹ P. Fouchard; E. Gaillard; B. Goldsman and J. Savage, Fouchard, Gaillard, Goldsman on International Commercial Arbitration (2nd edn., Kluwer Law International, 1999), p.92.

3.12 Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

3.12.1 The New York Convention 1958

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, or what is known as the New York Convention, requires signatories to enforce arbitral awards issued by other member nations. Saudi Arabia ratified the Convention on July 18, 1994 to become the 94th party to the Convention.⁴⁰² The main purpose of the Convention is to facilitate the enforcement and recognition of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.⁴⁰³ The main feature of this Convention is article 5.2, which gives the member states two grounds to refuse the enforcement of any foreign arbitral award. Article 5.2 (a) stated that a member state can refuse the enforcement of a foreign arbitral award if the subject matter of the dispute is not capable of settlement by arbitration under its municipal law. Article 5.2 (b) gives the member state the right not to enforce foreign arbitral awards that are contrary to public policy.⁴⁰⁴ The defence of the public policy can be used intensively and there are many aspects of public policy in Saudi Arabia that can set aside any foreign arbitral award. Accordingly, it has been argued that Saudi Arabia joined the New York Convention without being obliged to enforce foreign arbitral awards and the scope of article 5 (b) of the Convention should be restricted.⁴⁰⁵

3.12.2 The Convention of the Arab League of Nations on the Enforcement of Judgments of 1952

Although this Convention was replaced by the Riyadh Convention for Judicial Cooperation of 1983, it might be useful to give a brief outline about the Convention. The Convention of the Arab League of Nations on the Enforcement of Judgments of

⁴⁰² See the United Nation Commission on International Trade Law (UNCITRAL) <<http://www.uncitral.org>>, accessed 30 April 2007.

⁴⁰³ Article 1 of the United Nation Convention on the Enforcement and Recognition of Foreign Arbitral Awards (New York Convention) (10 June 1958).

⁴⁰⁴ *Ibid.*, article 5.2.

⁴⁰⁵ See in general *supra* 322, Kristin T. Roy.

September 14, 1952 had been ratified by Saudi Arabia on July 18, 1954. Saudi Arabia was the first country to ratify the Convention. The Council of Ministers Resolution No. 50 dated June 25/12/1379 H. (1960) gives *Diwan Almazalim* the competence to examine the petitions for the enforcement of Arab League judgments. Prior to the enactment of the previous resolution, Arab League arbitral awards were not to be tried *de novo* except in the circumstances stated below. The Council of Ministers Resolution was complemented by Royal Decree No. (M/51), which expanded the jurisdiction of *Diwan Almazalim* to cover the enforcement of all foreign arbitral awards and judgments. The Royal Decree abolished the discrimination between arbitral awards issued in a member state to the Arab League and non-Arab arbitral awards.⁴⁰⁶ The Convention provides for the direct enforcement of any court decision issued in any court in any member state of the Convention. The Convention left the competent authority with a limited scope for judicial review for the reason that most Arab countries have their laws based on the same principles.⁴⁰⁷ With regard to arbitration, the competent authority in Saudi Arabia is *Diwan Almazalim*. According to article 3 of the Convention, the competent authority does not have to review the arbitral award; however, it has the right to refuse the enforcement in the following cases:

- If the subject matter of the dispute is not arbitrable under the law of the state where the enforcement is sought;
- If the arbitral tribunal exceeds its jurisdiction;
- If the award is issued under a non-valid arbitration clause or agreement;
- If the award is issued *in absentia*;
- If the award is not final in the country where it is rendered and
- If the award is contrary to public policy or the law of the country where the enforcement is sought.⁴⁰⁸

⁴⁰⁶ See generally A. Alfahal, *Qada' Almazalim Fe Almamlakah Al Arabiya Al Saudiya* (1st edn., Dar Alnawabig, 1994).

⁴⁰⁷ See article 1 of the Basic Law of Saudi Arabia, which states that the "Shari'a" rules are the only source of legislation in Saudi Arabia; see also article 2 of the Egyptian Constitution, as amended in 1980, which states that the Islamic Jurisprudence is the principal source of legislation; article 2 of the Constitution of Kuwait of 1962, which states that the Shari'a shall be a main source of legislation; article 3 of the Constitution of Yemen of 1994, which provides that Islamic Shari'a is the source of all legislation.

⁴⁰⁸ The Convention of Arab League of Nations on the Enforcement of Judgements of September 14, 1952.

3.12.3 The Gulf Cooperation Council (GCC) Commercial Arbitration Centre

The GCC Commercial Arbitration Centre was established as an independent, non-profitable organisation by the Leaders of the GCC States in December 1993 during the 14th GCC Summit in Riyadh, Kingdom of Saudi Arabia, with its headquarters situated in the Kingdom of Bahrain.⁴⁰⁹ The arbitration rules of the Centre were issued in November 1994 and the Centre was fully functional by March 1995. The Centre can be considered as the most active arbitration Centre in the GCC area due to its understanding of the legal systems of the member States. Moreover, arbitration through the Centre can be considered as the most advantageous foreign solution for the parties with regard to enforcement in Saudi Arabia.⁴¹⁰ In relation with the enforcement of the Centre's awards, article 36 of the rules of procedure of the Centre provides: "an award passed by the Tribunal pursuant to these Rules shall be binding and final. It shall be enforceable in the GCC member States once an order is issued for the enforcement thereof by the relevant judicial authority"; the rules set the grounds of setting aside an arbitral award in article 36, which are:

- If it is passed in the absence of an Arbitration Agreement or in pursuance of a null Agreement, or if it is prescribed by the passage of time or if the arbitrator goes beyond the scope of the Agreement;
- If the award is passed by arbitrators who have not been appointed in accordance with the law, or if it is passed by some of them without being authorised to hand down a ruling in the absence of others, or if it is passed pursuant to an Arbitration Agreement in which the issue of the dispute is not specified, or if it is passed by a person who is not legally qualified to issue such an award.⁴¹¹

⁴⁰⁹ GCC stands for Gulf Cooperation Council, which is an agreement among the six Arab countries of the Persian Gulf region, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates in 1981, with the aim of coordinating and integrating their economic policies.

⁴¹⁰ See in general GCC Commercial Arbitration Centre <<http://www.gcac.biz/en>>, accessed 30 April 2007.

⁴¹¹ Arbitral rules of procedure adopted by the GCC Commercial Co-operation Committee in November 1994 in Riyadh, Saudi Arabia.

3.12.4 Bilateral Investment Treaties

Apart from the regional Agreements concluded under the Arab League and the GCC, Saudi Arabia concluded the investment promotion and protection agreement with the following eight countries: Italy, Germany, Belgium, Taiwan, China, France, Malaysia and Austria. These agreements aim to promote and protect the investments of the nationals and enterprises of one contracting party in the territory of the other contracting party by providing an appropriate legislative environment to stimulate and increase investment, trade and industrial activity. With the recession in Western economies and the ambitious development plans, Saudi Arabia assumes the role of capital exporting country that many Western countries such as the US and the UK are trying to share part of its wealth by any means. In relation to the dispute settlement method, all the treaties provide for arbitration as a method of settlement of any dispute arising out of the interpretation of the Agreements.⁴¹² The Agreements also provide for arbitration under ICSID for the settlement of disputes between the host state and the private parties of the other state as well as ad hoc arbitration under the UNCITRAL arbitration rules to settle disputes between private parties.⁴¹³

3.12.5 The Saudi Arbitration Team

As a sign of unprofessional conduct, a Royal Decree was issued under number 7/5/23165 dated 24/08/2002 calling for the establishment of the Saudi Arbitration Team. After a long series of discussions with one of the members of that team, the mission of that team was unclear as it can be summarised as follows: advertising for arbitration in Saudi Arabia as an auxiliary mechanism to litigation; attending conferences by the members of the team and holding closed discussions to discuss issues with regard to arbitration. They claim that the team aims at encouraging the

⁴¹² See article 9 of the agreement between the Kingdom of Saudi Arabia and the Belo Luxembourg economic union (b.l.e.u.) concerning the reciprocal promotion and protection of investments signed in Jeddah on April 22, 2001; article 10 of the Agreement between the Kingdom of Saudi Arabia and the Republic of Austria concerning the Encouragement and Reciprocal Protection of Investment signed in Riyadh on June 30, 200?missing number?; article 10 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 October 10, 2000.

⁴¹³ Ibid., moreover, article 11.2.b of the Agreement between Saudi Arabia and Austria provides for an ad hoc arbitration tribunal to be established under the rules of UNCITRAL for the purpose of settling disputes between host states and private parties.

business community to pay more attention to arbitration as a fast, cheap and effective dispute settlement mechanism. In reality, problems related to the Saudi law in general and arbitration in particular cannot be solved by forming such teams as Saudi Arabia is in need of developed arbitration centres instead of the time-consuming proceedings before *Diwan Almazalim*. The problems related to the legal system in Saudi Arabia need at least another generation before they can be solved. Personally, I believe that this team as well as some other committees benefit its members only for the reason that after six years of its creation i.e. in 2008, many of the members of the Saudi Arbitration team have been studying in the UK for the last five years.

3.13 Conclusion

In conclusion, the attitude of the Saudi Government toward international arbitration was strongly influenced by the outcome of the Aramco award of 1958. At first, the Government welcomed international arbitration as seen in the Buraimi Arbitration in 1955. After the Aramco award, international arbitration was viewed by the Saudis as a breach of their national sovereignty represented in disrespecting their laws and regulations and applying foreign laws to their national wealth. International arbitration was also seen as a useful tool to be used in favour of western parties in order to escape the application of the Saudi law. This argument might be supported by the arguably unfair tactical use of arbitration by some western companies.⁴¹⁴ The disappointing outcomes of the Aramco arbitration were expected due to the lack of legal experience and the naïve or the “too honest” conduct with Aramco, which was also a normal result for being the weaker party in the dispute. Some of the members of the arbitration tribunal in the Aramco case lacked the basic knowledge of Islamic Shari’a and its principles. The arbitration tribunal was unfair in judging the Shari’a and they refused to apply its principles when the application was due. The Aramco award changed the Government’s attitude toward arbitration as the Aramco award was followed by the Council of Ministers Resolution No. 85 of 1963, which prohibited the government and its agencies from accepting arbitration clauses and agreements. Later on, the Ministry of Commerce Circulation complemented the

⁴¹⁴ Supra 379, Alsamman, p. 219.

Council of Ministers Resolution and prohibited foreign arbitration clauses in the articles of association of joint ventures registered within the Kingdom. This approach did not last for long because the oil boom started to relax it. The relaxation started when Saudi Arabia agreed to settle certain differences and claims relating to the Agreement on Guaranteed Private Investment and guarantees of Saudi public sector contracts and investments with the United States in 1975. The previous step was with an individual country; the comprehensive reform, as a legal incentive to foreign investment, began when Saudi Arabia joined the ICSID Convention in 1979-80. The impacts of the Aramco award were obvious in the reservation made by the Government regarding oil and acts of sovereignty. This step was followed by expanding the jurisdiction of *Diwan Almazalim* to include the enforcement of foreign judgments and arbitral awards in 1982. The Arbitration Act of 1983 and its implementing regulation in 1985 were the first comprehensive arbitration regulations in the Kingdom that are still in force today. The real interaction with the world in the field of international commercial arbitration came after the ratification of the New York Convention on the enforcement and recognition of foreign arbitral awards of 1958 regardless of its limited application in Saudi Arabia and the intensive use of the public policy defence; the New York Convention is still the main international instrument for the enforcement of foreign arbitral awards. Saudi Arabia also contributed to the establishment of the GCC Commercial Arbitration Centre, which works as a fully functioning arbitration centre for the GCC countries with easier and more direct enforcement of its awards in Saudi Arabia. The last few years experienced the adoption of some bilateral Investment Agreements for the protection of foreign investment that include arbitration as the main method of dispute settlement. The quality of the regulatory relaxation differs between the 1970s and the current phase, which is due to the economic circumstances. In the 1970s, Saudi Arabia needed to attract foreign expertise and technology to contribute to the building of the infrastructure; however, after the collapse of the global oil prices in the 1990s, the objective of attracting foreign capital was added to the Saudi agenda. Despite the fact that Saudi Arabia relaxed its regulation toward foreign elements and showed more tolerance toward foreign arbitral awards, the impact of the Aramco award was still on the scene as it was represented in the limitations on arbitration in Governmental contracts, as demonstrated in article 3 of the Arbitration Act of 1983 and in the reservation made when ratifying the ICSID Convention; nonetheless, the arbitration

clauses in the Gas Concessions of 2004 show another openness toward the outside world in this area.

4 Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice

The Arbitration Act of Saudi Arabia was adopted by Royal Decree No. M/46, issued on 12/07/1403 H (1983), repealing in the process the relevant provisions of the Commercial Court Code of 1931.⁴¹⁵ The Implementing Rules of the Act were subsequently adopted by the Royal Decree in 1985.⁴¹⁶ The purpose of the Implementing Rules was to supplement lacunae in the Act and provide guidance on particular aspects of Saudi arbitral proceedings. More specifically, the Act is silent regarding numerous procedural issues, such as the rules pertaining to the delivery of arbitral awards, notifications as to the process and communication between the parties and the arbitral tribunal and between the arbitral tribunal and third parties, the seat of the arbitral tribunal, and others. It will be demonstrated that the Act constitutes a codification of the *Hanbali* law of arbitration⁴¹⁷ as elaborated by Ibn Taymiyyah (1263-1328), in his collection of *Fatwas*⁴¹⁸, and Ibn Qudamah (1146-1223), in his comprehensive work *Almoghni*, which has been considered as the most authoritative source of *Hanbali* teachings until the present day.⁴¹⁹ The Act provides a framework for flexible commercial arbitration with a view to establishing it as a real and effective alternative dispute resolution mechanism. Prior to the adoption of the 1983 Act, arbitration existed only as a theoretical possibility on account of several factors. Firstly, the courts at the time did not recognise arbitration agreements or clauses, even where the parties claimed a contractual entitlement to arbitrate as a result. Even where the court approved the arbitration agreement or clause, the subsequent enforcement of the arbitral award was wholly voluntary.⁴²⁰ Accordingly, reference to arbitration was very limited. Secondly, the jurisdictional conflict between the Saudi Commercial

⁴¹⁵ Reprinted in *Umm Alqura Gazette*, issue No. 2969 of 22/08/1403 H. (1983).

⁴¹⁶ Royal Decree No. M/7/2021, of 08/09/1405 H. (1985), reprinted in *Umm Alqura Gazette*, issue No. 3069 of 10/10/1405 H. (1985).

⁴¹⁷ See generally, S. Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Shari'a and Statute Law* (2nd edn., Graham & Trotman, 2006), especially Chapter 20, pp. 290-325.

⁴¹⁸ *Supra* 175, Ibn Taymiyyah, vol. 29.

⁴¹⁹ *Supra* 28, Ibn Qodamah, vol. 10.

⁴²⁰ *Supra* 2, Albejad, p. 30.

Court⁴²¹ and Shari'a courts culminated in rendering arbitration ineffective and time consuming. Although the Arbitration Act of 1983 supersedes the arbitration provisions of the Commercial Court Code of 1931, ad hoc arbitrations lacking a commercial character are still governed by the provisions of the Commercial Court Code.⁴²² While one generally speaks of either ad hoc or institutional arbitration, in Saudi Arabia there is yet another classification on the basis of the nature of the dispute as either compulsory or voluntary arbitration. As a general rule, resort to arbitration is voluntary⁴²³ except where the regulator recommends the compulsory route in a particular case. The rationale behind this classification is to restrict the jurisdiction of the Shari'a courts with respect to some controversial matters under the Shari'a and also to avoid the conflict between Shari'a and Saudi law on the one hand and Saudi law and some customs and traditions on the other.⁴²⁴

The Arbitration Act of 1983 is relatively brief and ambiguous in parts and, as already stated, lacks detail with respect to some key issues of the arbitration proceedings. Most of the ambiguous issues were ironed out in the Implementing Rules of 1985. The Implementing Rules are elaborate and highly influential for both arbitral tribunals and the judicial bodies overseeing the arbitral process in Saudi Arabia. However, even the Implementing Rules did not give a clear answer to some essential aspects such as the question of arbitrability which will be examined in details in the next chapter.

The following sections provide an analysis of the Rules with reference to *Hanbali* arbitration law and the relevant laws in Saudi Arabia, especially the Law of Procedure before Shari'a Courts.⁴²⁵

⁴²¹ Upon its establishment, there was only one commercial court seated in Jeddah, which was later substituted by the Commission for the Settlement of Commercial Disputes under the supervision of the Ministry of Commerce and Industry.

⁴²² *Supra* 2, Albejad, p. 30.

⁴²³ Article 1, 1983 Arbitration Act.

⁴²⁴ *Supra* 2, Albejad, p. 51. Disputes related to tobacco products, insurance, musical instruments and recordings are compulsorily referred to arbitration.

⁴²⁵ As we have already noted, under *Hanbali* teachings arbitration is equivalent to litigation and the arbitrator is thus analogous to a private judge having specific jurisdiction over the issue at hand only. Article 36 of the Implementing Rules provides that the arbitral tribunal should comply with the litigation principles of the Shari'a. The Implementing Rules were issued in 1985 prior to the enactment of the 2000 Law of Procedure before Shari'a Courts. Prior to the enactment of the 2000 Law, arbitrators relied on Shari'a principles in order to find governing rules for arbitral proceedings.

4.1 Arbitration, Arbitrators and Parties

Article one of the Implementing Rules concerns with the scope of arbitration. According the article, arbitration is not permitted in matters in which conciliation is not permitted such as *hodoud*,⁴²⁶ accusation of adultery between spouses and all matters relating to public order.⁴²⁷ The Hanbalies mainly give arbitrator the same jurisdiction as court judge. Ibn Taymiyyah does not restrict the scope of arbitration and gives it the same scope as litigation; however, according to him, an arbitral award is with no value without judicial review.⁴²⁸ The Act followed the restriction made by some Hanbali scholars and did not allow arbitration in criminal matters because it have a different nature from commercial disputes and got a relation with state power.⁴²⁹

Article 2 deals with the capacity of parties to arbitrate. Like any normal contract, arbitration agreement should not be valid unless made by a person having full legal capacity to conclude a valid contract. In order to conclude a valid agreement under Shari'a, the parties to the dispute must satisfy the requirements of legal capacity, i.e. to have reached a certain age and have a certain level of mental ability at the time of concluding the contract.⁴³⁰ The guardian of a minor, appointed guardian or trustee of charitable trust, or what is so-called in Arabic *waqf*, cannot be conclude arbitration agreement arbitration unless authorised by the court.⁴³¹ Even after being authorised to resort to arbitration, an arbitral award against a guardian of an incapacitated person is not valid if it provides for any damage against their interest unless approved by a judge.⁴³² In accordance with article 5 of the Arbitration Act, the arbitration agreement should be sent, in order to be approved, to the competent authority which is the authority having jurisdiction on the dispute originally.⁴³³ When reviewing arbitration agreements, the competent authority decide whether it entails any contradiction with the substantive and the procedural law of arbitration as well as the public policy.

⁴²⁶ Hodoud are crimes for which the Quran provides punishments such as theft, adultery and accusation of adultery.

⁴²⁷ Article 1 of the Implementing Rules of the Arbitration Act.

⁴²⁸ A. bin Mofleh, *Al-forou'*. (4th edn., A'alam Alkotoub, 1985) vol. 6 p. 440

⁴²⁹ Supra 28, Ibn Qodamah. Vol. 11, p. 484.

⁴³⁰ See in general, M. Zahraa, The Legal Capacity of Women in Islamic Law. Arab Law Quarterly vol. 11 1996. p.245-249

⁴³¹ Article 2 of the implementing rules

⁴³² See in general supra 26, Al-Kenain.

⁴³³ See article 5 of the Arbitration Act and *Diwan Almazalim* decision No. 59/T/4 of 1412 H. (1992)

After approving the arbitration agreement by the authority which is mainly *Diwan Alamzalim* “the Board of Grievances” or the Ministry of Commerce and Industry, the authority should inform the arbitral tribunal of the approval and advice it to proceed in looking at the dispute at issue or the refusing party may be forced by the *Diwan* to prepare it in accordance with the Arbitration Act.⁴³⁴ If one of the parties refused to arbitrate after concluding a binding arbitration clause, the other party will prepare the arbitration agreement unilaterally but under the supervision of the authority and if the agreement meets the legal requirements and the denying party rejected it, the authority will approve it, inform the arbitral tribunal and ask it to proceed normally following the related provisions of the Arbitration Act and the Implementing Regulations.⁴³⁵

Under the Saudi law, the existence of the arbitration clause does not affect the right of the parties to resort to litigation. It can be understood from the case law that referring the dispute to litigation with the existence of arbitration clause is an implied waiver of the parties’ right to arbitrate. In decision number 29/T/4 of 1413 H. (1993), the *Diwan* emphasised on the parties’ right to insist on arbitration as mean of settlement to their disputes as a valid agreement⁴³⁶; however, the action of referring the dispute to litigation is a waiver of the parties’ right to arbitrate and the arbitration clause will be of no affect.⁴³⁷ This view was further supported by decision number 72/T/4 of 1411 H. (1991) the *Diwan* denied jurisdiction over the dispute because of the existence of the arbitration clause but when the case was referred to the Review Committee of the *Diwan*, it found that one of the defendant insist on his right to arbitrate after referring the case to litigation which annul his right to arbitrate; therefore, the committee uphold the nullification of the arbitration clause because the defendant raised his claim after referring the dispute to litigation.⁴³⁸ The moment when the right to arbitrate is waived by the action of referring the dispute to litigation is not clearly determined but it might be subject to the time of filing the dispute to litigation before the Shari’a court or *Diwan Almazalim*.

⁴³⁴ *Diwan Almazalim* decision No. 184/T/4 of 1412 H. (1992)

⁴³⁵ See *Diwan Alamzalim* decision No. 150/T/4 of 1413 H. (1993).

⁴³⁶ *Diwan Almazalim* decisions No. 113/T/4 of 1416 H. (1996) and 38/T/4 of 1409 H. (1989)

⁴³⁷ *Diwan Almazalim* decision No. 29/T/4 of 1413 H. (1993)

⁴³⁸ *Diwan Almazalim* decision No. 72/T/4 of 1411 H. (1991)

It is not a matter of public policy in Saudi Arabia that the arbitration clause waives the parties' right to refer to litigation. In the Saudi law, if one of the parties want to insist on his right to arbitrate, his claim should be done before referring the dispute to litigation as seen in decisions number 95/T/4 of 1413 H. (1993) and 142/T/4 of 1409 H. (1989).⁴³⁹ In the latter decision the Review Committee of the *Diwan* added: the parties to the arbitration have the right to refer the case to litigation even if they have a valid arbitration clause. Litigation is the original method for settling disputes and arbitration is an exception only which have nothing to do with the public policy.⁴⁴⁰ On the other hand, referring the dispute to litigation does not affect the right of the parties to resort to arbitration. In case number 27/T/4 of 1411 H. (1991), the defendant argued that the plaintiff sued him before a court in the United State which is a waiver of his right to arbitrate. The Committee decided that referring the dispute to litigation has no affect on the parties' right to arbitrate.⁴⁴¹ As it has been seen above, the case law carries some contradiction in the point whether referring the dispute to arbitration could annul the arbitration clause or whether the arbitration clause remains valid. Such a conflict may be due to the fact that precedent cases have a little affect on the legal practice and the dependence was placed heavily on the reasoning and understanding of judges and arbitrators.

Article three came to determine the nationality of the arbitrators as well as other matter of public policy regarding the characters of the arbitrators. The arbitrator should be a Muslim Male of a Saudi nationality or a Muslim Male of any other nationality of a liberal profession or otherwise he may be a public official upon approval of the department to which such official belongs. If there is more than one arbitrator, the chairman should be knowledgeable in Shari'a rules and the commercial regulations, custom and tradition in effect in the kingdom.⁴⁴² Article four of the Act added that in case of multiple arbitrators the number should be odd.⁴⁴³ The appointment of sole arbitrator as well as the validity of arbitral awards rendered by a

⁴³⁹ *Diwan Almazalim* decisions No. 95/T/4 of 1413 H. (1993) and 142/T/4 of 1409 H. (1989).

⁴⁴⁰ *Ibid*

⁴⁴¹ *Diwan Almazalim* decision No. 27/T/4 of 1411 H. (1991)

⁴⁴² Article 3 of the implementing rules

⁴⁴³ Article 4 of the arbitration act

sole arbitrator was upheld by the common practice and the decisions of the *Diwan*.⁴⁴⁴ The requirement of the odd number of arbitrators facilitates the issuing of the arbitral award in case of conflict in judgments between the arbitrators.⁴⁴⁵ The Islamic law clearly elaborated the issue of non-Muslims acting as arbitrators and there is no doubt between all the scholars that non-Muslims are not allowed to adjudicate in any dispute involving a Muslim element within the Muslim territory. This opinion was based on the assumption that arbitration is another form of litigation.⁴⁴⁶

If the arbitration agreement provides for the settlement of the dispute by conciliation, then the arbitrators/conciliators can be non-Muslims because the agreement is considered to be an agency agreement which can be executed by them.⁴⁴⁷ In relation to the Saudi law, arbitrators working in the settlement of any dispute within the Kingdom must be Muslims in accordance with article three of the Implementing Rules of Arbitration.⁴⁴⁸ Residing in Saudi Arabia is not a condition for the validity of the appointment of the arbitrators. The Arbitration Act is silent on the issue of the place of residence of the arbitrator and it requires them to be Muslim Males only. In case number 22/T/4 of 1413 H. (1993), *Diwan Almazalim* rejected the decision of the Committee for the Settlement of Commercial Dispute that annulled the appointment of an arbitrator on the ground that he is not residing in Saudi Arabia although, he is a Muslim. The Review Committee added: the rejection imposes an unnecessary restriction.⁴⁴⁹

Article four provides for some restrictions on the appointment of the arbitrators. According to the article, a person having an interest in the dispute, having been convicted of a *hadd* (single of *hodoud*) or penalty of a crime of dishonour, having been dismissed from public office by punitive decision or adjudicated bankrupt, unless relived from, may not be an arbitrator.⁴⁵⁰ These characters concern with the

⁴⁴⁴ *Diwan Almazalim* decision No. 7/T/4 of 1419 H. (1999)

⁴⁴⁵ *Supra* 26 Al-Kenain. p. 111

⁴⁴⁶ A. Alfara', *Al-Ahkam Al-Sultaniyah*. Edited by Muhammad Hamid Al-fagy (1st edn, Dar Alkotoub Alilmiah, 1983), p. 61

⁴⁴⁷ *Supra* 28, Ibn Qodamah vol.14 p. 170

⁴⁴⁸ See article 3 of the Implementing Rules.

⁴⁴⁹ *Diwan Almazalim* decision No. 22/T/4 of 1412 H. (1992)

⁴⁵⁰ Article 4 of the implementing rules

issues of impartiality and credibility. Moreover, most of the latter issues can be used as grounds for the challenging of witnesses. The appointment of an arbitrator possessing one of these characters violates the principle that the arbitrator must be an *adl*.⁴⁵¹ The appointment of the *fasiq*⁴⁵² is void because arbitration under the Hanbali teachings is litigation and the arbitrator should possess all the characters of a court judge.⁴⁵³

Article five obliges the Authorities to issue an official updated list of the licensed arbitrators; the list should be prepared by agreement among the Minister of Justice, the Minister of Commerce and Industry and the Chairman of the Board of Grievances. The courts, judicial commissions, and Chambers of Commerce and Industry shall be notified of the list and disputants have liberty to choose arbitrators from such lists. The Ministry of Justice states its criterion for prospective arbitrators who have to pass an exam before they qualify as arbitrators. The exam covers various topics such as the mandatory rules of Shari'a and the arbitration procedure under the Arbitration Act and its Implementing Rules in addition to the valid laws and customs that relate to the area that the arbitrator want to practice.⁴⁵⁴ The test that should be taken by the arbitrator is no more than a multiple choice based questionnaire of 20 questions. The candidate should download it from the website of the Ministry of Justice and send it by fax or post after answering it. It might be said that this procedure is not the appropriate way of qualifying arbitrators for the following reasons: the questionnaire does not cover many important issues with regard to arbitration such as public policy, the issuance of the award or even the rules of procedure. For instance, some questions deal with issues like the number of articles in the Arbitration Act and the Implementing Rules, the date of ratifying the New York Convention of 1958, what does UNICTRAL stands for etc.

Second, the credibility of such a procedure is disputed because anyone can answer it on behalf of the candidate. According to the website of the Ministry of Justice, if the

⁴⁵¹ Supra 34, Saleh, p.36. In general, the term *adl* refers to the person who does not violate Shari'a law and have a decent mental abilities.

⁴⁵² Fasiq is a term that describes someone guilty of openly and flagrantly violating Islamic law and/or someone whose moral character is corrupt

⁴⁵³ Supra 26, Al-Kenain p. 77-79

⁴⁵⁴ See article 5 of the implementing rules. The list of the arbitrators is available in the website of the Ministry of Justice. www.moj.gov.sa 22/05/2007

candidate failed in answering one of the questions, he will have to attend an interview which might be a mere repetition of the questionnaire that he has already sent to the Ministry.⁴⁵⁵ Although, non-Saudis are allowed to arbitrate if they are chosen by the parties to the dispute, the Ministry of Justice required all the applicants to be of Saudi nationality.⁴⁵⁶

4.2 Arbitration Clause

Article six overcomes one of the main impediments to arbitration in Saudi Arabia which is the recognition of arbitration clause. The article also sets the minimum amount of information that should be included in the arbitration agreement According to the article; the arbitrators shall be appointed by agreement of the parties in the arbitration agreement which should adequately define the subject of the dispute and the names of the arbitrators. An agreement to arbitrate may also be made by a contractual clause “arbitration clause” relating to disputes arising out of the execution of the contract.⁴⁵⁷

The failure of the court in recognising arbitration clauses characterised arbitration under the Code of Commercial Court of 1931 as an impractical and time consuming dispute settlement mechanism.⁴⁵⁸ Courts did not use to recognise arbitration clauses because it doubted its validity under Shari’a and it use to reject arbitration it mainly on the ground of uncertainty. One of the conditions of the validity of arbitration agreement is to have an existed dispute; therefore, the legality of the arbitration clause is controversial. Under Shari’a, a contract whose object did not exist at the time of the conclusion of the contract is not acknowledged and is similar to the prohibited contracts of the selling of fish in the sea or bird in the sky. The Hanbali teaching, as being the most flexible School in commercial transactions, considers arbitration clause a contractual clause which is valid as long as it does not contradict with the purpose of the contract, and it is not prohibited under Shari’a.⁴⁵⁹ The rejection may

⁴⁵⁵ The Ministry of Justice of Saudi Arabia, www.moj.gov.sa [17/10/2007]

⁴⁵⁶ Ibid

⁴⁵⁷ Article 6 of the implementing rules

⁴⁵⁸ See in general, supra 2 Albejad, p. 30

⁴⁵⁹ See in general supra 28 , vol. 14 Ibn Qudamah

was a result of the judges misunderstanding of the contractual nature of arbitration clauses.

Traditionally, arbitration agreement should include the names of the arbitrators, the subject of the dispute, the applicable law and the time of rendering the arbitral award as well as the seat of the arbitration.⁴⁶⁰ It can be seen in the famous incident of *Tahkeem* between Ali the fourth Caliphate and Mu'awiyah the governor of Syria in the year (659 AD). This arbitration was an effort to stop the civil war that erupted as an impact of the assassination of the third Islamic Caliphate Othman and lasted for more than two years. The dispute was submitted to arbitration by a written agreement, the two parties agreed to appoint two arbitrators in a written deed which stated the names of the arbitrators, the time limit for making the award, the applicable law and the place of issuing the award.⁴⁶¹ The arbitration agreements between the Government of Saudi Arabia and Aramco and the Government of Saudi Arabia and Ruler of Abo Dhabi and the Sultan of Oman in the 1950s followed the same model.⁴⁶² Under the Saudi law of arbitration there is no need to determine the applicable law to the dispute in the arbitration agreement or the arbitration clause because it will be, by default, the Shari'a or the Saudi law. Moreover, the Hanbali teachings gives a total freedom to the parties to the agreement to include any condition in their agreement even if the conditions are irrelevant to the dispute at issue as long as it is not contrary to the Shari'a principles.⁴⁶³

Article seven of the implementing rules deals with the role of the supervisory authority to the arbitral proceedings. The supervisory authority over the arbitration proceedings is the authority originally having jurisdiction over the dispute. The authority originally having jurisdiction over the dispute should issue a decision approving the arbitration agreement within fifteen days and shall notify the arbitral tribunal of its decision.⁴⁶⁴ This article codifies the opinion of Ibn Taymiyyah which

⁴⁶⁰ Supra 46, Sayen.

⁴⁶¹ Supra 7, Alqurashi.

⁴⁶² See Aramco Award, 27 I.L.R. 117, (1963) p. 128, see also, The Arbitration agreement between the Government of the United Kingdom acting on behalf of the ruler of Abu Dhabi and His Highness the Sultan Said bin Taimur the Sultan of Oman and the Government of Saudi Arabia signed in Jeddah on 30 July 1954 (H.M.S.O. Cmd. 9272, 1954) cited in J.B. Kelly, The Buraimi Oasis Dispute. *International affairs*, vol.32, No. 3. (July., 1956) p. 318-324

⁴⁶³ Supra 46 Sayen, p. 220

⁴⁶⁴ Article 7 of the implementing rules

considers the arbitral award to be with no value without judicial review.⁴⁶⁵ *Diwan Almazalim* and the Ministry of Commerce are the competent authorities to deal with commercial arbitration in the Kingdom. Having 2 authorities competent for the settlement of commercial disputes might seem problematic; however, *Diwan Almazalim* has supremacy over the Committee for the Settlement of Commercial Disputes of the Ministry of Commerce and Industry. Regardless of the very recent change in the charter of *Diwan Almazalim* that moved the competence of settling commercial disputes to the Ministry of Justice, the supervision of arbitration still one of the *Diwan's* competences till now.⁴⁶⁶ As a general rule, all the parties to the arbitration and the arbitral tribunal are bound by the Arbitration act and the Implementing Rules which mean that any clause, agreement or action found to be in violation of the law is null and void. The *Diwan* in its decision number 53/T/4 of 1414 H. (1994) nullified an arbitral award made without the supervision and approval of the competent authority. In this case, the parties to the arbitration agreed to arbitrate under the supervision of some entities other than the competent authority originally having jurisdiction over the dispute. The review committee of the *Diwan* set-aside the award and stated: terms or conditions in the arbitration agreement contradict the Arbitration Act and the related laws and policies are null and void. As a result, it is prohibited to have a person, legal or natural, as a supervisor for the arbitration in the Kingdom other than the competent authority originally having jurisdiction over the dispute.⁴⁶⁷ In another case, the *Diwan* nullified the arbitral award rendered without an approved arbitration agreement. In this case, the *Diwan* directed the arbitration tribunal to proceed in deciding the case even though there was no arbitration agreement approved by the *Diwan*. The arbitral tribunal proceeded relying on the communication of the *Diwan* that included all the information that should be included in the arbitration agreement; however, this action was in violation of the law and a mistake from the *Diwan* that should have informed the tribunal of the importance of having a valid arbitration agreement. As a result the award considered void and what the *Diwan* and the tribunal did was in violation to the Arbitration Act and its Implementing Rules.⁴⁶⁸

⁴⁶⁵ Supra 18 Al Kenain p.49

⁴⁶⁶ Umm Alqura Gazette, Issue No. 4170 dated 30/09/1428 H. 12/10/2007.

⁴⁶⁷ *Diwan Almazalim* decision No.61/T/4 of 1415 H. (1995)

⁴⁶⁸ *Diwan Almazalim* decision No. 99/T/4 of 1414 H. (1994)

There is a dispute whether the competent authority has supremacy over the arbitration tribunal irrespective of the place of arbitration or not. When looking at the arbitration regulation especially article 18 of the Arbitration act⁴⁶⁹, it can be understood that the supervisory authority may act as an appellate body; however, the case law regards the supervisory authority as lower court and the arbitral tribunal is the supreme. Consequently, the *Diwan* will either uphold or reject the arbitral award without the competence to decide on the case anew. In case number 53/T/4 of 1415 H. (1995), the Committee stated: because the word competent authority in the Arbitration Act and its Implementing Rules does not specify the degree of the court, the supervisory authority should apply its own rules of procedure. With regard to the *Diwan*, we consider it a second degree court after the arbitration tribunal; therefore, the *Diwan* should apply its own rules of procedure and the *Diwan*'s duty is to uphold or reject the decision of the arbitration tribunal only.⁴⁷⁰

Article eight demonstrates one of the impacts of Aramco Award of 1958; this article as well as article 3 of the Arbitration Act has incorporated in the Council of Ministers Resolution Number 58 of 1963 and the Deputy Minister of Commerce Circulation No.3/9/sh/331/9/2903 of 13/03/1399 H. (1979).⁴⁷¹ In disputes to which a government authority is a party with third parties and desires to resort to arbitration, such authority shall prepare a memorandum concerning arbitration in such dispute stating in it the subject of the dispute, the justification for arbitration and the names of the parties for submission to the President of the Council of Ministers to consider approval of the arbitration. The article allowed some governmental entities to include arbitration clauses in their contract and in all cases, the council of ministers should be notified of the award rendered in relation to all the disputes involving a governmental element.⁴⁷² In practice, if a governmental entity wanted to resort to arbitration for the settlement of any dispute with another party, it should obtain approval from the President of the

⁴⁶⁹ Article 18 of the Arbitration Act reads as follow: All awards passed by the arbitrators, even though issued under an investigation procedure, shall be filed within five days with the authority originally competent to hear the dispute and the parties notified with copies thereof. Parties may submit their objections against what is issued by arbitrators to the authority with which the award is filed, within fifteen days from the date they are notified of the arbitrators' awards; otherwise such awards shall be final.

⁴⁷⁰ *Diwan Almazalim* decision No. 53/T/4 of 1415 H. (1995)

⁴⁷¹ See the Council of Ministers Resolution No. 58 dated 03/02/1383 H. (25/06/1963) and the Deputy Minister of Commerce Circulation No.3/9/sh/331/9/2903 of 13/03/1399 H. (1979).

⁴⁷² Article 8 of the implementing rules

Council of Ministers; however, a governmental body may include arbitration clause in its contracts.⁴⁷³

4.3 Proceeding

Article nine specifies some of the responsibilities of the competent authority toward the arbitration proceedings. The arbitration proceedings shall be supervised by the authority originally having jurisdiction over the dispute; the authority shall appoint a clerk to act as a secretary for the arbitral tribunal. The article sets the duties of the secretary which include; establishing the records necessary for the registration of request for arbitration and submits them to the competent authority for approval of arbitration document; the clerk shall be responsible for the notifications and communications provided in the Arbitration Act and any other responsibilities determined by the competent minister.⁴⁷⁴ Article eight of the Arbitration Act state that the clerk of the authority originally competent to hear the dispute shall be in charge of all notifications and notices related to the arbitration proceedings.⁴⁷⁵ Such notifications include the notification of the time and the place of the hearings and all the communications between the tribunal and the competent authority, witnesses, experts and all other individuals and entities.

Article ten sets the time for the commencement of the arbitral proceedings and illustrate some of the responsibilities of the secretary of the arbitral tribunal, the article requires the arbitral tribunal to fix the date for hearing the dispute within a period not exceeding five days from the date of its notification of the decision approving the arbitration agreement and shall notify the parties of that through the clerk of the authority originally having jurisdiction over the dispute.⁴⁷⁶ The responsibilities of the supervisory authority and the secretary of the arbitral tribunal will be illustrated in more details below.

⁴⁷³ For further details see of Appendix (Z) of the gas concession agreement between the Kingdom of Saudi Arabia and Lukoil overseas and the gas concession agreement between the Kingdom of Saudi Arabia and Sinopec International Petroleum and Production Corporation Umm Alqura Gazette, issue No. 3990 dated 15/03/1425 H. 4/05/2004. See.

⁴⁷⁴ Article 9 of the implementing rules

⁴⁷⁵ Article 8 of the arbitration act

⁴⁷⁶ Article 10 of the implementing rules

4.4 Notification of Parties, Appearance and Default, and Representation in the Arbitration

This part of the implementing rules can be divided into three parts; the first part illustrates the related issues to the notifications of and the communications with the Parties to the arbitration⁴⁷⁷; the second part specifies the competent persons to appear before the tribunal.⁴⁷⁸ The third part deals with the appearance before the tribunal and the default in the appearance.⁴⁷⁹

Article 11 insists on the importance of the role of the secretary appointed by the supervisory authority. All the communication and notification relating to the dispute should be made by the clerk of the authority originally having jurisdiction over the dispute. These communications whether carried out at the request of the parties or initiated by the arbitrators should be assisted by the police and the local authority within the scope of their area of competence.⁴⁸⁰

Article 12 determines the official language for the content of all communications done by the tribunal. A notification or communication shall be drawn in Arabic in a number of copies according to the number of parties and should include all the required information such as the timing of making the notification, the names, addresses of the parties and the server, the names of the arbitrators, the seat of the arbitral tribunal and the timing of the hearing.⁴⁸¹

If the arbitration agreement provides for the settlement of the dispute by means of arbitration outside Saudi Arabia, the agreement is valid if the conflict of laws rules allow and one of the parties of the arbitration is of a non-Saudi nationality. In decision number 155/T/4/ of 1415 H. (1995), the defendant, a foreign company, requested that arbitration should be held outside Saudi Arabia, the Committee decided that the defendant is bound by the Saudi law of arbitration; the arbitration tribunal should be

⁴⁷⁷ Articles 11-16 of the implementing rules

⁴⁷⁸ Article 17 of the implementing rules

⁴⁷⁹ Articles 18 and 19 of the implementing rules

⁴⁸⁰ Article 11 of the implementing rules and see also article 15 of the law of procedure before the Shari'a courts which determined the persons competent to assist in delivering notifications and communications as follow: the *Umdah* or the chief of the quarter, the police station, to the head of the "centre", or the chief of the tribe.

⁴⁸¹ See article 12 of the implementing rules

seated in Saudi Arabia, apply the Saudi substantive law on the merit and it is to be supervised by *Diwan Almazalim*.⁴⁸² However, if another law got applicability on the merit of the dispute, the *Diwan* does not oppose the reference to arbitration outside the Saudi Arabia like in decision number 43/T/4 of 1416 H. (1996). In the latter case, the parties to the dispute, a Saudi company against an American company, entered into a distribution agreement and agreed in the arbitration clause to refer their disputes to arbitration in the State of Iowa in the United State. The *Diwan* rejected the claim that the dispute should be settled restrictedly in Saudi Arabia on the ground of the applicability of other foreign laws on the dispute and when the American party insisted on its rights under the arbitration clause, the *Diwan* asked the parties to refer dispute to the chosen forum.⁴⁸³

If all the parties to the arbitration are Saudis and the dispute is subject to the Saudi law, they have no right to arbitrate outside Saudi Arabia and under any other laws as it is against the public policy. In case number 143/T/4 of 1412 H.(1992), the Saudi disputants agreed to refer their dispute to arbitration in Zurich under the ICC rules. The dispute was a Saudi dispute in all its elements which made the arbitration clause for arbitration outside Saudi Arabia null and void for contradicting the public policy. The Committee stated: this dispute is subject to the Saudi law and the arbitration clause providing for the settlement of the dispute by means of arbitration in Zurich under the rules of the ICC is null and void. Regardless of its contradiction with the Saudi law of arbitration and its implementing rules, it is an attempt to eliminate the jurisdiction of the Saudi judiciary over the dispute which is against the public policy of Saudi Arabia. The Committee decided that the arbitration clause is null and void and obliged the parties to refer the dispute to *Diwan Almazalim* to decide on the dispute.⁴⁸⁴ To sum up in the issue of the applicable law, if there is a foreign element in the dispute, the Saudi courts will look at the place of characteristic performance but it will not apply the foreign law in case a foreign law is applicable, it will give the parties the choice of settling the dispute before the court or through arbitration in the given jurisdiction. However, if both parties to the dispute are of Saudi nationality, the Saudi law must be applied on them.

⁴⁸² *Diwan Almazalim* decision No. 155/T/4 of 1415 H. (1995)

⁴⁸³ *Diwan Almazalim* decision No. 43/T/4 of 1416 H. (1996)

⁴⁸⁴ *Diwan Almazalim* decision No. 143/T/4 of 1412 H. (1992)

4.5 Notification

Articles 13 and 14 deal with the ways of notifying individual parties, the articles also determine the place and the means of delivery of the notifications.⁴⁸⁵ Article 15 deals with the same issue but in the case of having legal persons as one of the parties to the arbitration, the article determines the related issues to the notification of the state, public persons and companies, organisations and private establishments. In relation with the latter article, the notification to the state should be delivered to the competent minister, regional governor, and the head of the government authorities concern with the dispute or to their deputies. In matters relating to public persons, notifications and communications should be delivered to the representative authorised by regulations or his substitute. Finally, in matters relating to companies, associations and private establishments, the notifications and communications shall be delivered to the main office as set fourth in the commercial register to the chairman of the board of directors or to general manager or to employee substituting for such person; and with respect to foreign companies having a branch or agent in the Kingdom, to such branch or agent.⁴⁸⁶ The Law of Procedure before the Shari'a Courts explains the issue of the notification of the parties to the dispute in greater details. Article 18 of the Law reads as follow: With respect to government agencies, to their heads or those acting for them; With respect to public corporate persons, to their managers or those acting for them or representing them; With respect to companies, societies, and private establishments, to their managers or those acting for them or representing them; With respect to foreign companies and establishments which have a branch or an agent in the Kingdom, to the branch manager or the one acting for him or to the agent; or the one acting for him; With respect to armed forces personnel and those of similar status, to the immediate superior of the person to be served; With respect to sailors and ship personnel, to the captain; With respect to interdicted persons, to their trustees or guardians as the case may be; With respect to prisoners or detainees, to the warden of the prison or detention centre; With respect to persons who have no known place of

⁴⁸⁵ See articles 13 and 14 of the implementing rules

⁴⁸⁶ See article 15 of the implementing rules and Article 18 of the Law of Procedure before the Shari'a Courts

residence or designated place of residence in the Kingdom, to the Ministry of Interior in the regular administrative ways for notification by appropriate means.

4.6 Procedure

Under article 16, the secretary of the arbitral tribunal have to bear the duty of submitting the arbitration file to the supervisory authority and notifying the parties and the arbitrators of the decision issued approving the arbitration agreement within one week from the date of the approval.⁴⁸⁷

Article 17 determines the capable persons for representing the Parties before the arbitral tribunal. On the day fixed for hearing the arbitration, the parties should appear either in person or through a representative pursuant to a power-of-attorney, or what it is so-called in Arabic *Wakalah*, issued by a notary public⁴⁸⁸ or any official authority or certified by a Chamber of Commerce and Industry. The option of appearance through a representative should not prejudice the right of the tribunal to require the personal appearance of a party if the circumstance so require.⁴⁸⁹ *Wakalah* can be translated as proxy but under Shari'a *Wakalah* is more than an agreement between 2 people to act on behalf of one another; it involves, in case of unconditional *Wakalah*, the right to act absolutely like the principal party. In Islamic law, *Wakalah* is a non-binding contract on both parties; *wakalah* is dissolved by the death of the agent or the principal regardless of the knowledge of the other party about it. It can be dissolved by resignation, recession or any other ground of dissolving any contract. In the case of restricted *Wakalah*, the contract terminates by the time of executing the contract. In the case of a dispute, the power of attorney terminates on the time of rendering the final award.⁴⁹⁰ One of the main conditions that should be available in the agent of the

⁴⁸⁷ See article 16 of the implementing rules

⁴⁸⁸ This body responsible for issuing the powers of attorney in Saudi Arabia is known as *ketabat alad'l*

⁴⁸⁹ Article 17 of the implementing rules

⁴⁹⁰ *Supra* 99, Alatasi. vol. 5 articles 1521-1530

parties to the arbitration is to be qualified to accept a power of attorney according to law of Saudi Arabia.⁴⁹¹

Article 18 deals with the default in appearance before the arbitral tribunal. If one of the parties failed to appear before the arbitral tribunal and the tribunal is satisfied that he was notified personally, it may decide the dispute if the parties have deposited in the arbitration file a memorial of their claim, defence, answers and documents. The award in such cases shall be deemed made as if all parties were presented. If the party was not duly summoned, the tribunal will be postponed to a subsequent hearing to be notified to the defaulting party. If there is more than one defendant party, some of whom were duly summoned and the other was not duly summoned and they all fail to appear or the party who was not duly summoned failed to appear, the tribunal shall, except in urgent cases, adjourn hearing the matter to a subsequent hearing to be notified to the non-appearing parties who were not duly summoned. The award in the matter shall be deemed made as if all parties failing to appear at the subsequent hearing were present. In addition, an award shall be deemed made as if a party were present if the party or his representative makes an appearance at any hearing or submit a defence memorial in the case or document related thereof. If a defaulting party makes an appearance before the end of the hearing, any award made therein shall be deemed null and void. There are strict conditions for issuing a judgment *in absentia* under the Hanbali teachings. The above article codified the exceptional cases where the tribunal can render an award without the physical presence of the parties to the dispute. Under the Hanbali teachings, an award issued in absentia requires a judicial review before its execution because the defendant might have a defence against the claim; nonetheless, as a general rule, the tribunal is not allowed to issue a judgment *in absentia* except in the cases mentioned above.⁴⁹²

Article 19 provides for the re-notification of the party that have not been notified in the proper manner. According to the article, if a party failed to appear and it appears to the tribunal that his summons by publication was invalid, it shall suspend hearing the claim to a later hearing to be validly re-notified to such party.⁴⁹³

⁴⁹¹ There are a few persons who are unable to act as agents or accept the power of attorney before the judicial bodies in Saudi Arabia such as minors, women and non-Saudis. See the code of Law Practice of Saudi Arabia, Royal Decree No. M/38 dated 28/06/1422 H. (2001) Umm Alqura Gazette, Issue No. 3867 dated 17/08/1422 H. (2001)

⁴⁹² See in general supra 28, Ibn Qodamah, vol. 14 p. 96.

⁴⁹³ Article 19 of the implementing rules

4.7 Hearings, Procedure and Recording of the Case

4.7.1 Confidentiality of Proceedings

Under article 20, the case shall be publicly heard before the arbitral tribunal unless the tribunal decided on its own initiative or under the request of one of the parties for reasons evaluated by the tribunal.⁴⁹⁴ Accordingly, any member of the public is allowed to attend the hearings without restrictions.⁴⁹⁵ Under the latter article, the option of having private hearing cannot be extended to the issuance of the final award which must be in public.⁴⁹⁶ This article seems to contradict with one of the main purposes of arbitration as confidentiality is deemed to be one of the advantages of arbitration. Some commentators claim that the objective behind the publicity of the arbitral proceedings is to enhance the transparency and the impartiality. The latter view does not match the reality in Saudi Arabia nowadays. As a general rule, the court proceedings are to be held in public; however, in Saudi Arabia, individuals who are not involved in the dispute cannot even enter the court room. In addition to the negative attitude of some judges, the infrastructure of most of the courts in Saudi Arabia do not enable members of public to attend the court proceeding and the law should have not imposed the publicity on the arbitral tribunal when the State courts do not apply it on its proceedings. Article 20 was supported also by article 61 of the law of procedure before the Shari'a courts which state that the judge on his own or at the request of one of the litigants can close the hearing in order to maintain order, observe public morality, or for the privacy of the family.⁴⁹⁷ Although, this article does not contradict with the Hanbali law of arbitration, it contradicts with the one of the objectives of the resort to arbitration as a private dispute settlement mechanism.

Traditionally, disputes use to be settled in a public place. The judge or the governor of the region set either in the mosque or in his *Diwan* to hear and settle disputes between

⁴⁹⁴ Article 20 of the implementing rules

⁴⁹⁵ A. Aldar'an, *Alqawa'ed Al ijrae'iyah fe Al morafa'at Alshar'iyah* (1st edn, Altawbah Publications, 1993) p. 67

⁴⁹⁶ *Ibid*

⁴⁹⁷ Article 61 of the Law of Procedure before the Shari'a Courts of Saudi Arabia. Royal Decree No. M/21 dated 20/05/1421 H. (2000). Umm Alqura Gazette, Issue No. 3811 dated 17/06/1421 H. (2000)

the members of the public. With reference to the Islamic law of arbitration, this article is in compliance with the traditional rules; however, under the light of modern custom and trade practices, the application of this article can be of a harmful affects on the parties especially for their business reputation and credibility.

Article 21 requires a satisfactory excuse to suspend the hearing of a case.⁴⁹⁸ Article 22 upholds some of the rights of the parties to have a fair trial. The arbitral tribunal shall enable each party to represent his comments, defences, and answers orally or in writing to an appropriate extent on the date of the hearing.⁴⁹⁹ As a general rule, the tribunal is not allowed to decide the dispute without hearing all the parties and giving them an equal chance to represent all their evidence.⁵⁰⁰ Moreover, giving a judgment on the basis of the arbitrator's personal knowledge is prohibited because it may rise a suspicion of biasness and can be a ground to challenge the award, even if the arbitrator knows the fact, he is not allowed to rely on it in rendering the award without clear evidence.⁵⁰¹ The article added that the defendant shall be the final speaker which is the normal end of any typical dispute before a Shari'a court.

The typical procedure before any court consists of three stages; first the plaintiff raises the claim which should be precise in all its details. The claim can be in writing or verbal at the time of the trial. At the second stage, the judge invites the defendant to answer the plaintiff's claim. At this stage, the defendant will either admit the claim (*iqrar*) or denies it (*nokoul*). If the defendant denies the claim, the judge will ask the plaintiff to adduce evidence (*baiyannah*) which will be an oral testimony in such a case. The final stage starts if the plaintiff fails to provide the court with the testimonial evidence, he may administer the oath (*yameen* or *qasam*). If the defendant swears that the claim is groundless, the claim will be dismissed; however, if the defendant refused to take the oath, the case will be decided in favour of the plaintiff.⁵⁰²

Article 23 specifies some of the chairman's responsibilities toward managing the proceedings. The responsibilities stated in this article are similar to that of a court

⁴⁹⁸ See article 21 of the implementing rules

⁴⁹⁹ Article 22 of the implementing rules

⁵⁰⁰ Supra 5 Ibn Qodamah vol.14 p. 96

⁵⁰¹ Ibid

⁵⁰² See in general, supra 112, Ibn Farhoun.

judge; however, he has no right to imprison anyone for any misbehaviour before the tribunal. In the case of misbehaviour before the arbitral tribunal, the chairman can only expel the person from the place of the hearing and report him to the competent authority. Each arbitrator has the right to direct questions and interrogate parties or witnesses through the chairman of the tribunal.⁵⁰³ The responsibilities of the court judges toward managing the proceedings were stated in article 69 and 70 of the Law of Procedure before the Shari'a Courts. The only difference is that the judge can imprison anyone disturbs order for up to 24 hours.⁵⁰⁴ In accordance with the Law of Procedure before the Shari'a Courts, the expelled persons might be referred to the authority after the 24 hours sentence in case of committing an offence against the judge or anyone at the trial; however, the case of misbehaviour cannot be decided by the same judge because, in this case, he will be a party to the case.⁵⁰⁵

Article 24 provides for what the tribunal might do in case the parties reached an extrajudicial settlement. The parties can request the tribunal at any stage of the case to record their agreement as to an admission, settlement, and waiver or otherwise in the record of the hearing and the tribunal shall make an award based on the parties' agreement.⁵⁰⁶ Article 67 of the Law of Procedure before the Shari'a Courts supports this article and provides for the same steps to be taken by the court in case of reaching a settlement for the dispute outside the court to give it a binding nature instead of being a mere statement from the parties without enforceability.⁵⁰⁷

Article 25 provides for the official language for the arbitration proceedings. Arabic is the official language before the arbitral tribunal whether in oral discussions or in writing. The tribunal, the parties and other persons should, exclusively, speak Arabic. A foreigner who does not speak Arabic should be accompanied by an accredited translator who should sign with him the record of the hearing as to the oral statement which he translated.

⁵⁰³ Article 23 of the implementing rules

⁵⁰⁴ See articles 69 and 70 of the Law of Procedure before the Shari'a Courts.

⁵⁰⁵ This information was given by an official in the Ministry of Justice who preferred his name to be confidential.

⁵⁰⁶ Article 24 of the implementing rules

⁵⁰⁷ See article 67 of the Law of Procedure before the Shari'a Courts.

Arabic language is the official language in Saudi Arabia, all the communications, contract before any governmental entity must be in Arabic language. Moreover, contracts with the Saudi government can be signed in an additional language but in case of a dispute relating to the execution of the contract, the disputants should refer to the Arabic version of the contract.⁵⁰⁸ This principle was established by article 1 of the Basic Law.⁵⁰⁹ It was also supported by article 1 of the Law of Procedure before the Shari'a Courts which stated that Arabic is the official language for all hearing and communications and if the circumstance requires the use of other language, the document or the statement must be translated into Arabic.⁵¹⁰ In the Hanbali law, if one of the parties to the dispute does not speak Arabic and the arbitrator does not know his language, an accredited translator must attend the hearing to translate between him and the arbitrator and between him and the other parties to the dispute. The translators should possess the characters of *adalah* or full legal capacity.⁵¹¹

Article 26 gives the arbitral tribunal a discretionary power to postpone the hearing of a case if the parties requested so in order to represent their documents, papers or comments material.⁵¹² Article 27 provides for the writing of the facts and the proceedings of the hearing in a record prepared by the secretary of the tribunal under its supervision.⁵¹³ The principle of the writing of contracts and other similar documents such arbitration agreements and arbitration clauses was established by the Quran in the following verse: “*When you 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*”.⁵¹⁴ The Sunnah also supported the writing of commercial agreements as well as Islamic teachings, current laws and practices that emphasised on its importance.⁵¹⁵

⁵⁰⁸ See for example article 9-31 of the gas concession agreement between the Kingdom of Saudi Arabia and Lukoil overseas. Umm Alqura Gazette, issue No. 3990 dated 15/03/1425 H. 4/05/2004.

⁵⁰⁹ The Basic Law of Saudi Arabia. Alnezam Alasasi Lelhokm. Royal Decree No. (90/A) dated 28/06/1412 H. (1992)

⁵¹⁰ See article 1 of the Law of Procedure before the Shari'a Courts

⁵¹¹ Supra 28 Ibn Qodamah, vol. 14 p. 84.

⁵¹² Article 26 of the implementing rules. See also article 65 of the Law of Procedure before the Shari'a Courts

⁵¹³ Article 27 of the implementing rules

⁵¹⁴ The Quran: 1/282. please note that quoted verses of the Quran hereinafter are translation to the meaning of the Quran as it understood by the translator not a direct translation

⁵¹⁵ See article 69 of the Law of Procedure before the Shari'a Courts.

Article 28 sets the conditions in which the arbitral tribunal can ask one of the parties to present any document material to the case.⁵¹⁶ The *Diwan* allow the use to foreign arbitral awards as precedent provided that it does not violate the Shari'a rules and the public policy in Saudi Arabia. The parties should use the foreign arbitral award as precedent to support their argument not to claim enforcement of the foreign award because the enforcement is not under the competence of the arbitration tribunal.⁵¹⁷

Articles 29 deals with the conditions in which the arbitral tribunal can order for the establishment of investigation measures having a material effect on the case if the facts sought to be established are relevant, admissible and material to the dispute. Article 30 deals with the departing from the evidentiary procedure providing that the tribunal state the reasons for the departure in the record of the hearing and in the final award.⁵¹⁸ The issue of investigations and evidence have been dealt with in greater details in other regulations especially the law of procedure before the Shari'a courts of 2000.⁵¹⁹

Article 31 state some rules for the oral statements of witnesses which should be proved in writing or orally at the hearing and shall accompany the witnesses, the hearing of such statement of witnesses should be in accordance with the Shari'a principles. In addition, article gives the other party the right to disprove the facts in a similar manner.⁵²⁰ The article sets that the statement of witnesses should be in accordance with the Shari'a rules which require certain qualities to be possessed by the person who gives the statement. As a general rule, a witness should be a Muslim who reached the age of puberty, not subject to any incapacity and he should be a trustworthy person. Non-Muslims' witness is accepted in all subjects except in *Hodoud*. Shari'a requires a through investigation of witness trustworthiness because if there is any doubt about him, the witness will not be heard. The oral testimony is to be made in spot by the arbitrator through the Chairman of the arbitral tribunal and at

⁵¹⁶ See article 28 of the implementing rules

⁵¹⁷ *Diwan Almazalim* decision No. 29/T/4 of 1413 H. (1993)

⁵¹⁸ See articles 29 and 30 of the implementing rules

⁵¹⁹ See articles 154,155,211 and 261 of the Law of Procedure before the Shari'a Courts.

⁵²⁰ See article 31 of the implementing rules

the request of one of the parties. Some witnesses can be disqualified which are the same people that are not allowed to participate as arbitrators in a dispute.⁵²¹

Article 32 set the rules of interrogating at the hearings; and article 33 deals with the rules of experts' assistance. Experts are considered witnesses under this article and they can be challenged on the same grounds of challenging witnesses and arbitrators.⁵²²

Articles 34 regulate some of the related aspects to the experts' witness such as requiring a supplementary report; however, the tribunal is not bound to take it into consideration when rendering the arbitral award.⁵²³ Under the Hanbali teachings, such a report cannot be classified as evidence.⁵²⁴

Article 35 gives the arbitral tribunal the option to relocate the seat of the hearing. The arbitral tribunal may relocate the seat of the arbitration in order to inspect disputed facts or any matter affecting the case; the tribunal should also prepare a record of the inspection procedure which complies with article 112 of the law of procedure before the Shari'a courts of 2000.⁵²⁵

The implementing rules provide that the arbitral tribunal should comply with litigation principles of the Shari'a.⁵²⁶ The implementing rules were issued in 1985 prior to the enactment of the Law of Procedure before the Shari'a Courts. Prior to the enactment of the Law, arbitrators use to rely on the Shari'a principles in order to find governing rules for the arbitral proceedings but after the enactment of the Law in the year 2000, it become applicable for all litigations and arbitration proceedings within the Kingdom.⁵²⁷

One of the main differences between arbitration and litigation is that the arbitrators do not have the judicial and enforcement power like that of the court judge. Therefore, if

⁵²¹ Supra 28, Ibn Qodamah. vol.14 p. 262

⁵²² See article 33 of the implementing rules

⁵²³ See article 34 of the implementing rules

⁵²⁴ Supra 28, Ibn Qodamah. vol.14 p. 262

⁵²⁵ See article 35 of the implementing rules and article 112 of the Law of Procedure before the Shari'a Courts of 2000

⁵²⁶ See article 36 of the implementing rules

⁵²⁷ See in general the Law of Procedure before the Shari'a Courts

the arbitral tribunal faced an issue that are not under its competent such as forgery or other criminal matter, the issue should be referred to the competent authority having jurisdiction over the dispute. The tribunal should wait till the case investigated and the tribunal should suspend issuing the award till a final judgment is rendered by the competent authority.⁵²⁸

4.8 Making of Awards, Challenging the Awards and Enforcement of the Arbitral Awards

When the case is ready for decision, the arbitral tribunal should declare the proceedings closed, fix a date for making the award and bring the case under review and discussion. Such a review should be held in private and the attendance is restricted to the members of the arbitral tribunal only. When the arbitral tribunal fix the date of making the award, it should take into consideration the relevant provisions of the Arbitration Act and the relevant laws or in other words the law of procedure before the Shari'a courts of 2000.⁵²⁹ With regard to the Arbitration Act the relevant articles are: article 9 which provides for an extension in the time before the issuance of the arbitral award subject to the mutual agreement of the parties or under the discretion of the arbitral tribunal; article 13 which state that in case of death of one of the arbitrators, the time for the award shall be extended by thirty days unless the other arbitrators decide on a longer period; article 14 which state that where an arbitrator is appointed in place of a dismissed or a withdrawing arbitrator, the date fixed for the award shall be extended by thirty days; and article 15 which gives the arbitral tribunal a discretionary power to extend the deadline of rendering the award.⁵³⁰

Article 39 exempts the arbitrators from being bound by regulatory procedures except as provided in the Arbitration Act and the Implementing Rules. The article also added that the award should be made in accordance with the Shari'a principles and regulations in effect.⁵³¹ Prior to the issuance of the Law of Procedure before the Shari'a Courts, arbitrators use to rely on the Shari'a principles to govern the arbitral procedure. The application of the Shari'a principles relies to a great degree on the

⁵²⁸ See article 37 of the implementing rules

⁵²⁹ See article 38 of the implementing rules; see also article 162 of the Law of Procedure before the Shari'a Courts

⁵³⁰ See articles 9,13,14 and15 of the Arbitration Act of 1983

⁵³¹ See article 39 of the implementing rules

individual understanding of the Shari'a text by the arbitrator which resulted in variation in the practice from arbitrator to another. The Law of Procedure before the Shari'a Courts of 2000 came to codify the Shari'a principles under the light of the common practices; it produced a set of rules to be followed by arbitral tribunal in case of silence of the arbitration regulations. As a general principle, in case of silence of the "Man-Made" law, the tribunal should go back to the Shari'a principles which serve as a safety measure to ensure the compliance with the Islamic law in all cases.

Article 40 regulates some aspects of equality between the parties to the arbitration and the procedure of reopening the arbitral proceedings. The arbitral tribunal may not, during the review of the case and deliberation, hear explanations of one of the parties without the presence of the other party nor may receive memorials or documents unless the other party examines the same; however, if the arbitral tribunal considers them to be material, it may extend the date for pronouncing the award and reopen the proceedings by an award in which shall be recorded, the reasons and justifications and shall notify the parties of the date fixed for hearing the case.⁵³² The same content was provided by article 66,159 and 160 of the Law of Procedure before the Shari'a Courts.⁵³³

The arbitral award should be made by majority unless in the case of sole arbitrator, and it should contain all the related information to the parties, the disputes and the arbitral tribunal.⁵³⁴ Under the classical Shari'a literature, the award should comply with the opinion of the majority of the arbitrators. There are four methods to issue the arbitral award if unanimity could not be reached: First, when forming the arbitration agreement, the number of arbitrators should be odd. Second, seeking the assistance of an external arbitrator and decide the case according to his opinion. The external arbitrator is not allowed to come up with a new opinion; his job is to choose one of the available decisions only.⁵³⁵ Third, if the arbitrators failed to issue the award, the dispute can be decided by another tribunal or by a sole arbitrator.⁵³⁶ This option may lengthen the dispute which contradicts with the objective of the arbitration as swift

⁵³² See article 40 of the implementing rules

⁵³³ See articles 66, 159 and 160 of the Law of Procedure before the Shari'a Courts.

⁵³⁴ See article 41 of the implementing rules

⁵³⁵ Supra 18 Al Kenain p. 124

⁵³⁶ Supra 5 Ibn Qodamah, vol. 10 p. 546

dispute settlement mechanism. Fourth, if the unanimity could not be reached, and the parties to the dispute exhausted the above mentioned methods, they can refer to litigation as a last resort.⁵³⁷ In practice, if the arbitral tribunal failed to issue its decision within 90 days from the date of approving the arbitration agreement by the supervisory authority, the whole case will be referred to the *Diwan* and it will either act like an external arbitrator and chose one of the available opinions, decide the case anew or it will give the arbitral tribunal a time extension.⁵³⁸

When making the award, the arbitral tribunal should not exceed its terms of reference and look at issues that are not included in the arbitration agreement. In decision number 33/T/4 of 1414 H. (1994), the arbitration agreement gives the arbitration tribunal the jurisdiction to decide on the amount of damages for late performance of the contract. The tribunal decided in the same award on the claim for the initial cost of the contract which was rejected by the *Diwan* for unconformity with the arbitration agreement.⁵³⁹

The arbitral tribunal is responsible to correct technical, typographic and mathematical errors.⁵⁴⁰ Also it is in charge of issuing supplementary award to explain ambiguity and uncertainty in the text of the arbitral award which should be issued under request of the parties to the arbitration.⁵⁴¹

If the parties to the arbitration did not prevail in some claims, a judgment may be made apportioning the fees between them according to the determination of the supervisory authority or allocating the whole fees on one of the parties.⁵⁴² Any party may object to an order assessing the arbitrators' fees to the authority; however, the authorities' decision on the objection is final.⁵⁴³

⁵³⁷ Ibid

⁵³⁸ *Diwan Almazalim* decision No. 35/T/4 of 1418 H. (1998)

⁵³⁹ *Diwan Almazalim* decision No. 33/T/4 of 1414 H. (1994)

⁵⁴⁰ See article 42 of the implementing rules

⁵⁴¹ See article 43 of the implementing rules

⁵⁴² See article 45 of the implementing rules

⁵⁴³ See article 46 of the implementing rules

The arbitral award shall become an enforceable instrument upon the issuance of the enforcement order which is the responsibility of the supervisory authority.⁵⁴⁴ The supervisory authority should deliver to the prevailing party the enforcement copy of the arbitral award which should set forth the enforcement order ending with the following statement: “All government departments and agencies concerned are hereby requested to execute this judgment by all available legal means even if it may require the use of coercive force by the police”,⁵⁴⁵ The supervisory authority cannot issue the enforcement order unless requested to do so by the winning party or third parties having interest in the enforcement of the arbitral award. The request of enforcement of arbitral awards should be accepted from third parties provided that they have interest in the enforcement of the award like Guarantors and creditors and the argument that they are not a party to the arbitration agreement has been rejected by the *Diwan*.⁵⁴⁶ In addition, the competent authority should ensure that the party requesting the enforcement have interest in the enforcement of the award and it should also review the award and ensure that it does not violate the public policies of the Kingdom.⁵⁴⁷

4.9 The Enforcement and Recognition of Foreign Arbitral Awards in Saudi Arabia

The recognition and enforcement is the most important step after the issuance of the final award. Although Saudi Arabia started to co-operate with the international legal community at a late stage, it has been in co-operation with its neighbouring countries since the 1950s. The Saudi law does not have a clear answer for the conflict that arises when there is more than one application for the enforcement of different arbitral awards issued against the same person on the same specific issue. Some judges give priority to the application that is submitted first, whereas some other judges give priority to the award that is issued first. Another opinion prefers that judges should look at the conflict of laws rules to decide which jurisdiction has the most connections

⁵⁴⁴ See article 44 of the implementing rules

⁵⁴⁵ Ibid article 44 and see also article 196 of the Law of Procedure before the Shari'a Courts

⁵⁴⁶ *Diwan Almazalim* decision No. 136/T/4 of 1409 H. (1989)

⁵⁴⁷ *Supra* 2 Albejad, p. 240

with the arbitration and which law is more competent to govern the arbitration.⁵⁴⁸ There are two important multilateral conventions of which Saudi Arabia is a member. These agreements are: The Riyadh Convention for Judicial Co-operation of 1983 “Riyadh Convention” and the New York Convention for the Enforcement and Recognition of Foreign Arbitral Awards of 1958 “New York Convention”.

4.9.1 Riyadh Convention for Judicial Co-operation of 1983

The Riyadh Convention came into effect in order to replace the old Arab League Convention of 1952 in a way that mixed the spirit of the New York Convention of 1958 with the Shari’a principles. In its preamble, the Convention states that reaching a degree of legal harmony between the parties to the Convention is the main objective of the Convention for the reason that these countries share many legal principles and fundamentals.⁵⁴⁹ The Convention borrowed some certain basic rules from the New York Convention and from some Western bilateral agreements. The main benefit of the principles borrowed from the Western conventions is the rule restricting the courts in the place of enforcement from examining the merits of the dispute.⁵⁵⁰ This principle was demonstrated in article 37 of the Riyadh Convention, which prohibited the judicial authority in the place of enforcement from looking at the merits of the dispute; however, it seems that the judicial bodies in Saudi Arabia do not comply with this article of the agreement as it claims that the interpretation of the principle of public policy in Saudi Arabia differs even from most of the neighbouring countries. Actually, this claim is partly true especially in cases involving prohibited or disputed issues under Shari’a such as banking interest and the sale of musical instruments. The same article provides that an arbitral award issued and recognised in one of the member states of the Convention cannot be set aside except in the following circumstances: if the dispute at issue is not arbitrable under the law of the place of arbitration; the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings; the award deals

⁵⁴⁸ This piece of information was provided by one of the judges of the Shari’a Supreme Court of Jeddah who preferred his name to remain confidential.

⁵⁴⁹ The member states of the Conventions are: Jordan, the UAE, Bahrain, Tunisia, Algeria, Djibouti, Saudi Arabia, Sudan, Somalia, Iraq, Oman, Palestine, Qatar, Kuwait, Lebanon, Libya, Morocco, Mauritania and Yemen.

⁵⁵⁰ Supra 407 Saleh, p. 151.

with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; if the recognition of the award would be contrary to the principles of the Islamic Shari'a, the relevant laws and regulations or the public order. When reading article 37 in conjunction with article 30 of the same agreement, a foreign arbitral award cannot be recognised or enforced if the award is issued *in absentia* unless the losing party was duly informed of the arbitration; if the dispute was referred to litigation in the place of the issuance of the award; if one of the parties lacks the legal capacity under the law of the place of the issuance of the award or if the law of the place where the enforcement is sought has no connection with the dispute at issue. According to the Convention, a party seeking the enforcement of an arbitral award in a place other than the place of the issuance of the award should provide, with the arbitration agreement, a certificate from the court of the place of the issuance of the award stating that the award is enforceable. In contrast with the New York Convention of 1958, which requires the arbitral award to be binding on the parties, the Riyadh Convention called back the condition of double exequatur, which requires the award to be final and operative in the place of the issuance.⁵⁵¹ It can be said that for the load of official procedure required by the Riyadh Convention, the Convention seems to be ineffective, and enforcing a foreign arbitral award under the New York Convention might be more practical for the party seeking the enforcement of the award.

4.9.2 New York Convention for the Enforcement and Recognition of Foreign Arbitral Awards of 1958 “New York Convention”

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, hereinafter New York Convention came into effect to overcome some of the impracticalities of the Geneva Convention of 1927 and to make the enforcement and the recognition of foreign arbitral awards easier and set arbitration as an effective dispute settlement mechanism. According to the first article of the Convention, the scope of the application of the Convention should include “*the recognition and*

⁵⁵¹ See article 4.1 of the Convention on the Execution of Foreign Arbitral Awards (Geneva Convention) (26 Sept. 1927) and Article 5.1.e. New York Convention of 1958.

enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought". In relation to Saudi Arabia, an arbitral award issued in a territory other than Saudi Arabia relating to a non-domestic dispute will be considered foreign. Moreover, if the arbitral award relating to a domestic dispute is issued outside Saudi Arabia it will also be considered foreign and the provisions of the New York Convention will apply. Parties seeking the enforcement should apply to *Diwan Almazalim*, which will consider the enforcement after reviewing the award.

The New York Convention provides general guidance on the procedure of enforcing foreign arbitral awards and sets the documents that are required from the place of enforcement of the award. The parties seeking the enforcement of an arbitral award should accompany their application with the following documents: the duly authenticated original award or a duly certified copy; the original arbitration agreement or arbitration clause or a duly certified copy. The same article of the agreement added that in cases where the award is made in a language other than the official language of the place where the parties are seeking the enforcement, the documents should be translated to the official language of the place of enforcement. The translation should be certified by an official or sworn translator or by a diplomatic or consular agent.⁵⁵² Furthermore, parties seeking the enforcement should be bound by the internal procedure of the place of enforcement of the award. Most of the jurisdictions in the world make their rules of procedure clear to everyone seeking the enforcement of an award, whereas in Saudi Arabia, the rules of procedure rely heavily on Royal Decrees and Ministerial Circulars; but this is not the problem. The problem might arise when such Royal Decrees, Ministerial Circulars and Internal Regulations contradict each other and one has to search through hundreds of Royal Decrees, Orders and Circulars issued in a period of 40 years which are mostly not available to the public. The Royal Decree No. 51/M dated 17/02/1402 H. (1981) held *Diwan Almazalim* responsible for the recognition and enforcement of foreign arbitral awards in Saudi Arabia as well as judgments issued in the Courts of the Arab League

⁵⁵² Article 4 of the New York Convention of 1958.

countries. The new Law of *Diwan Almazalim* upholds the latter decree and provides that the Administrative Department of *Diwan Almazalim* is the competent authority for the enforcement and recognition of foreign arbitral awards in the Kingdom.⁵⁵³

Diwan Almazalim's Circular No. 7 dated 15/05/1405 H. (1985) determined the procedure for filing an application for the enforcement of a foreign arbitral award in Saudi Arabia. According to the Circular, the party seeking the enforcement of a foreign arbitral award in Saudi Arabia should submit a request for the enforcement of the arbitral award in the same way as bringing a new claim before the *Diwan*. In order to commence the procedure, the party seeking the enforcement should submit certified copies of the relevant documents; however, in cases when the parties do not have certified copies, the *Diwan* may arrange for the submission of the original documents. After receiving the request for enforcement, the *Diwan* will notify all the parties to the arbitration award. The person against whom the award has been made would have the right to see the application that was submitted against him and he would be allowed to defend himself before the *Diwan*.⁵⁵⁴ This Circular is one of the main elements that determine the credibility of arbitration as an alternative for litigation. The main problem here is that the *Diwan* would re-examine all arbitration awards brought before it anew. Such practices are no more than a waste of time, effort and resources, and at the same time, it indicates that arbitration is not a reliable dispute settlement mechanism.

The Saudi law provides many remedies for cases when the award is challenged before the *Diwan* and the *Diwan* accepts the challenge; however, foreign arbitral awards do not enjoy such treatment. The law is silent with regard to this issue; nonetheless, it can be understood from the silence of the law that foreign arbitral awards are of no effect unless approved by the *Diwan*.⁵⁵⁵ It is not clear whether foreign arbitral awards or judgments can be used to establish facts before Saudi courts, as many judges have not yet reached the level of understanding how legal systems really work. In addition, the Saudi Courts might enforce foreign arbitral awards or judgments on the basis of reciprocity; however, the application of this concept is still a matter of theoretical argument and no one knows how the *Diwan* applies it. The concept of reciprocity

⁵⁵³ See article 13 of the Law of Diwan Almazalim.

⁵⁵⁴ Diwan Almazalim's Circular No. 7 dated 15/05/1405 H. (1985).

⁵⁵⁵ O. Bakhshab, 'The Concept of Extraterritoriality in the Saudi Arbitration Act', *King Abdul-Aziz University Journal*, 14/1 (2000), p. 152.

does not have a fundamental impact on the enforcement of foreign arbitral awards in Saudi Arabia nowadays as most of the country members of the United Nations have adopted the New York Conventions, and for the countries that have not become members to the Conventions, Saudi Arabia has other instruments of enforcement of arbitral awards with some of them.⁵⁵⁶

4.10 Public Policy in Saudi Arabia

Public policy is of great importance to arbitration, especially when it comes to the enforcement of an arbitral award, irrespective of whether it is a domestic or a foreign award. As a general rule, an arbitral award is unenforceable if it violates the public policy of the country where the enforcement is sought.⁵⁵⁷ This is also true in Saudi Arabia and is applicable to both foreign and domestic arbitral awards, despite the fact that the latter proceedings would have, by the time of the enforcement, already been very closely monitored by the supervisory authority. As a result, refusals to enforce are more common when setting aside foreign arbitral awards because public policy in Saudi Arabia covers a vast area of practice that might be unknown to foreign arbitrators sitting abroad and applying non-Saudi *lex arbitri*. The following section aims to provide an overview of Saudi public policy, its sources and how it is applied in practice.

Public policy in the Saudi Kingdom is derived from three principal sources: a) the Shari'a; b) Royal power which itself is drawn from the Shari'a with an emphasis on public customs and public interest within the framework of the Shari'a's prescriptions; and c) public morals. At the outset, it should be noted that historically a distinction has been drawn by Muslim scholars between Shari'a and Islamic jurisprudence, or what is known in Arabic as *fiqh*. The concept of Islamic law was not in use at the time of the Muslim classical scholars and began to develop as a reaction to Western influence. The concept of Shari'a is broader than jurisprudence and the jurisprudence itself comes within, as well as other concepts of Islam such as Islamic creed and Quranic sciences, the umbrella of Shari'a. Shari'a or *Ash-Shari'a* literally

⁵⁵⁶ There are five countries who are members of the Riyadh Convention but not yet of the New York Convention, which are: Iraq, Yemen, Somalia, Libya and Sudan.

⁵⁵⁷ See Article 5 of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 538.

means the pathway or a way to be followed and the way that a Muslim has to walk in life. In its original usage, the term Shari'a meant the road to the watering place or the path leading to the water, i.e., the way to the source of life.⁵⁵⁸ From the latter point of view, Arab Lexicographers treated the term and developed it to mean "the law of water" and in time it was extended to cover all aspects of Muslim life, both spiritual and that pertaining to the exigencies of everyday life.⁵⁵⁹ Shari'a is best translated as the "way of life" and *Ash-Shari'a* as the "way of the Muslim life" which is wider than the mere formal rites and legal provisions. Islamic law may be defined as the entire system of law and jurisprudence associated with the religion of Islam.

The primary sources of Shari'a are the Quran and the *Sunnah* and there exist a number of other secondary sources or methods for adducing appropriate normative behaviour in response to new incidents and unregulated circumstances. These secondary sources are *Ijma'*, *Ijtihad*, *Qiyas*, public interest and custom, or what is known in Arabic as *Urf*. The methods of *Ijma'*, *Ijtihad* and *Qiyas* are employed in the light of current circumstances in order to shed light on and analyse the Quran and the *Sunnah*. The sustained use of these secondary sources led to the creation of a body of law known as *fiqh*. Western scholars tend to use the terms Shari'a and Islamic jurisprudence as "*fiqh*" interchangeably. The aforementioned distinction between the two should become clear and receive scholarly attention, given that Shari'a is the foundation of all doctrines formulated and developed under *fiqh*, whereas the *fiqh* represents a human understanding and analysis of Shari'a sources. The term Saudi law is more comprehensive than Shari'a and encompasses Islamic law and the Codes and Regulations adapted from other laws within the general framework of Shari'a principles.⁵⁶⁰ There are a few exceptions to this rule, particularly as regards Saudi legislation that is unrelated to Islamic teachings and principles, such as the Banking Control Law, because it regulates some activities that are clearly prohibited under Islamic Law.

In Saudi Arabia, the Shari'a's primary sources, the Qur'an and the *Sunnah*, have supremacy over all laws and man-made regulations or normative instruments. In the

⁵⁵⁸ Ibid.

⁵⁵⁹ See generally Supra 60, Mallat. See also The Quran 45: 18 and 5: 48.

⁵⁶⁰ See generally p. 45, Usul Alfihq.

1920s, King Abdul-Aziz attempted to codify the teachings of the four Islamic schools in a manner similar to that by which the *Majalla* codified *Hanafi fiqh*. Despite his best efforts, this project was vociferously opposed by certain radical scholars and did not materialise. In combination with his codification project, the King ordered Shari'a judges not to be bound by the rules of one school of *fiqh*, with the aim that the prevalence of one school should not have the result of abrogating another.⁵⁶¹ At the same time, however, some *Ulamas* had their own agendas; they not only opposed the King's reform plans, but moreover sought to exert pressure on judges in all Saudi courts with a view to applying exclusively *Hanbali fiqh* under the teachings of the late Scholar Ibn Taymiyyah. The main reason for their opposition rested in their fear that the expansion of civil codes could eventually culminate at the expense of the Shari'a and ultimately lead to the promulgation of secular laws that have little or no connection with Shari'a. In practice, although the Saudi legal system is premised on Shari'a on the basis of *Hanbali* teachings, judges have the freedom to apply any of the four schools of *fiqh*. This judicial latitude granted to Saudi judges is the direct result of the aforementioned order of King Abdul-Aziz to Shari'a judges.⁵⁶² Saudi judges currently rely on a number of legal commentaries – authored by recognised Islamic legal scholars – in the delivery of their judgments, but it should be noted that a codification of these dispersed commentaries is expected in the foreseeable future. Apart from Ibn Qudamah, the majority of scholars who authored these commentaries follow the teachings of the *Hanbali* scholar Ibn Taymiyyah.⁵⁶³

According to Article 7 of the Saudi Basic Law, the ruling regime derives its power from the Holy Quran and the Prophet's *Sunnah*, which have supremacy over all State laws.⁵⁶⁴ Accordingly, the imposition of public policy restrictions within the Kingdom cannot be relied upon to violate Shari'a principles under any circumstances. The Basic Law even emphasised that even a temporary state of emergency during turmoil cannot violate Article 7, which renders the Shari'a the only source of regulation in the Kingdom.⁵⁶⁵

⁵⁶¹ Supra 289, Sfeir, pp. 729-744.

⁵⁶² Ibid. p. 732.

⁵⁶³ These books are: *Almoghni* by Ibn Qodamah; *Asharh Alkabeer* by Ibn Qodamah; *Sharh Zad Almustaqna'* by Albahouti and Alhajjawi; *Sharh Montaha Al Eradat* by Alfoutohi and Albahouti and; *Manar Assabeel* by Meri'e Alhabnali and Ibn Douawan.

⁵⁶⁴ See Article 7 of the Saudi Basic Law, Royal Decree No. (90/A) dated 28/06/1412 H. (1992).

⁵⁶⁵ Ibid., Articles 1 and 7.

Just like Saudi law, the Kingdom itself as a political entity is inseparable from religion.⁵⁶⁶ Regardless of his considerable regulatory authority, the King lacks the power to legislate in the very extensive field that has already been regulated by the Shari'a, in respect of which he is bound by the same duty of obedience as are all of his subjects.⁵⁶⁷ Consequently, it can be said that the separation of law from religion is impossible in most aspects affecting public life in Saudi Arabia. Given the Kingdom's political structure as an absolute monarchy, the King is endowed with authority to promulgate regulations by issuing such royal decrees that supplement existing Shari'a rules with a view to adapting to new circumstances, especially in relation to trade and commerce. "In doing so, the Government tries to balance traditional prospects against modern needs".⁵⁶⁸ Royal Decrees can also be considered a codification of some aspects of Shari'a law. This codification is achieved with the assistance of foreign laws and common practices that do not necessarily violate Shari'a principles. The decisions of judicial bodies have little impact on public policy because in Islamic legal practice, they merely offer an interpretation of the Shari'a and relevant royal decrees and are, moreover, subordinate to these.

What exactly constitutes public morals, interests and customs is not clearly delineated in Saudi law. What is abundantly precise, however, is that anything that is deemed as violating the Shari'a would certainly fall outside acceptable public policy constraints. When discussing about Saudi society in search of public morals and interests, it should be noted that the terms *Deen*, which means religion, and *Adat*, meaning custom, have been used interchangeably. The reason for this lies in the fact that most customs and traditions have been either derived from religion or upheld by it. This observation, however, may produce the result of restricting the enforcement of foreign arbitral awards in cases where the outcome of an arbitral award is contrary to Saudi public customs. The determination of the concept of public interest under Shari'a is derived through the use of the method of *istihsan*. The term *istihsan* may be translated as "juristic preference".⁵⁶⁹ Another scholar preferred to translate it as "public

⁵⁶⁶ D. Karl, 'Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know', *Geo Wash J Intl Law & Economics*, 25 (1991), p. 131.

⁵⁶⁷ *Supra* 68, Schacht, pp. 133-136.

⁵⁶⁸ *Supra* 557, Karl, p. 142.

⁵⁶⁹ *Supra* 86, Fadel.

interest". Conceptually, *istihsan* may be defined as the process of selecting one acceptable alternative over another, on the grounds that the first appears more suitable for the situation at hand, even though the selected solution may be technically weaker than the rejected one. Equally, *istihsan* has been viewed as a process for selecting the best solution for the general public interest as a form of *ijtihad*.⁵⁷⁰ *Istihsan* allows judges and scholars some flexibility when interpreting the law to allow for the infusion of elements deemed useful. In other words, *istihsan* constitutes a permit for the spirit of the law to prevail over its letter.⁵⁷¹ Slight divergences exist between the various schools. *Hanbali* scholars call it *istislah*, which may be translated as equity or public interest, whereas *Maliki* scholars refer to it as *Almasaleh Almursalah*, which denotes a departure from strict textual adherence in favour of public welfare.⁵⁷² The principal pre-condition for the validity of *istihsan* is its compliance with the principles of Shari'a. Nonetheless, there are situations where the non-application of a Shari'a rule is more beneficial for public interest than strict textual application. For instance, in the field of finance and commerce, the application of Shari'a may obfuscate socio-economic development, as is the case with the so-called *istisna'* contracts.⁵⁷³ As a general rule, the object of the contract must exist at the time when the contract becomes binding upon the parties. The requirement of the existence of the object at the moment of the conclusion of the contract was made to protect the parties from assuming any risk through a hazard or uncertainty likely to harm party interests.⁵⁷⁴ Public interest, therefore, required a relaxation of strict contract rules. This was done by Prophet Muhammad himself when he allowed Muslims to conclude contracts with future objectives under certain circumstances, even though the general rule required otherwise. At present, public interest is determined by reference to specific suitable options within the framework of the main principles of Shari'a.

⁵⁷⁰ Supra 82, Makdisi, p. 66.

⁵⁷¹ Supra 86, Fadel, p. 150.

⁵⁷² Supra 82, Makdisi, p. 73.

⁵⁷³ *Istisna'* contracts are derived originally from *slam* contracts, wherein one party paid a year in advance for crops of a particular weight at the time of harvest. *Istisna'*, or sale by manufacture, is a contract to manufacture a particular good not yet in existence, for an agreed price. The buyer need not pay for the goods until its acceptance and both parties may revoke their agreement at any time before delivery. Some scholars distinguished between the *slam* and *istisna'* contracts, but both seem to be based on the same theory; however, the *slam* is used mainly in respect of crops and carries a greater risk of a future discounted price. *Istisna'* contracts, on the other hand, are more common in construction and manufacturing and are more flexible in that they serve as financing and hedging tools.

⁵⁷⁴ N. Comair-Obeid, 'Particularity of the Contract's Subject-Matter in the Laws of the Arab Middle East', *Arab Law Quarterly*, 11 (1996), pp. 331-336.

The Kingdom maintains a negative list of activities excluded from foreign investment. This is a fine example of activities prohibited for the benefit of public interest.⁵⁷⁵ When it comes to the protection of public interest, Saudi authorities consider the Shari'a at first instance, as well as the will of its population. King Abdullah bin Abdul-Aziz, in one of his speeches to the *Shura* Council, underlined the fundamental tenets of Saudi policy, stating that "we will work in the interest of the religion, homeland, our citizens and our traditions".⁵⁷⁶

4.11 Conclusion

In assessing a legal system that is fundamentally different to the types of legal systems that western lawyers are used to, one must necessarily examine the underlying reasons for such diversity. In the case of Saudi arbitration law, it is evident that two reasons are particularly prevalent. The first concerns the Kingdom's troubled past during which some of the arbitral tribunals that determined cases to which it was a party rejected Islamic law as the law governing its contractual relations with third parties, even though this law was clearly stipulated in the relevant contracts. The frustration and embarrassment caused as a result had an impact far greater than merely downgrading the law of a particular country under the pretext that it was undeveloped and backward. Given that Islamic law pervades not only all aspects of normative conduct, but also all other social and public conduct within Muslim societies, those arbitral awards were perceived as having broader implications about Islam and Muslim States. Moreover, Saudi Arabia is a very conservative country in every respect, whose official policy strives to strike a balance between tradition and modernisation.⁵⁷⁷

The result in the Kingdom's contemporary arbitral law and judicial practice is hardly surprising. Disputes conducted in Saudi Arabia, or containing Saudi elements, are

⁵⁷⁵ The Saudi Arabia General Investment Agency (SAGIA), 'Negative List: Activities Excluded from Foreign Investment' <<http://www.sagia.gov.sa/en/business-environment/investment-laws/negative-list.html>>, accessed 14 Nov. 2007.

⁵⁷⁶ King Abdullah bin Abdul-Aziz, speech to the Shura Council in Riyadh, 14 April 2007.

⁵⁷⁷ "Some countries have sacrificed the soul of their culture in order to acquire the tools of Western technology. We want the tools but not at the price of annihilating our religion and cultural values". Statement made by Bakr Abdullah Bakr, the Head of King Fahd University of Petroleum and Minerals Cited by W. Ochsenwald, 'Saudi Arabia and the Islamic Revival', *International Journal for Middle East Studies*, 13 (1981), pp. 271-272.

governed by the Kingdom's *lex arbitri*, which requires that not only the arbitration clause and *compromis* be submitted to a designated competent authority for approval, but that the proceedings be supervised by the said competent authority throughout their duration, save where conflict of laws rules permit the parties to refer to a foreign jurisdiction. Western lawyers may at first glance find these restrictions as unduly compromising the benefits of arbitration, but closer examination reveals that equivalent procedures exist in developed arbitral *fora*. For one thing, both in Europe and North America the arbitration clause may be subject to scrutiny, either by the tribunal itself or by reference to the courts of the *lex arbitri*. Equally, the parties are not generally free to turn to the civil courts during the course of the arbitral proceedings; institutional arbitration is to some degree monitored by the relevant institutions, and where significant improprieties occur, whether in terms of corruption or other, the parties may approach the courts of the *lex arbitri*. Finally, some western arbitral legislation provides that the award requires ratification by the courts before enforcement proceedings can be undertaken.⁵⁷⁸ Moreover, as with western public policy that is dictated by reference to local laws and perhaps social customs, so it is with Saudi Arabia that the Shari'a is the benchmark in respect of public policy. In the light of this, Saudi arbitration law does not seem to differ much from its western contemporaries. Why, then, is it deemed problematic? The primary reason is obvious; where a Saudi element is involved, the parties cannot escape being subjected to Saudi *lex arbitri*. They could, of course, arbitrate outside the Kingdom and avoid all the relevant hustles, but their award would subsequently be unenforceable in Saudi Arabia. Furthermore, although in most countries there exists a consistent judicial practice that embraces the supervisory authority of civil courts over arbitral proceedings, in Saudi Arabia the situation is problematic. Despite the fact that the Saudi competent authorities (particularly the *Diwan*) do offer some jurisprudence as to their reasoning for either accepting or rejecting arbitration clauses – and the validity of the proceedings and compliance with public policy – there is no sense of precedent.⁵⁷⁹ The judges decide on the basis of their personal opinions and are not obliged to adhere to any precedent, even if a decision of the Review Committee of the *Diwan* exists on a particular matter. Moreover, these cases are not generally

⁵⁷⁸ See generally A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (4th edn., Sweet and Maxwell, 2004), especially chapters 9 and 10.

⁵⁷⁹ Nonetheless, as we have demonstrated, the *Diwan* is not opposed to the parties themselves introducing foreign judgments, or arbitral awards, as evidence backing up their particular claims.

accessible and it is only telling that this is the first instance in which a compilation has been made with a view to their examination. As a result, arbitration remains a very speculative business since the parties and their lawyers navigate through legal uncertainty. From an international law point of view, it may be argued that the decisions of all competent authorities are an expression of State practice on the basis that they are organs of the State. Thus, even if their decisions carry no binding precedent within the Saudi legal system, at least the said decisions reflect the will of the Kingdom and bind it in its international relations. In any event, there is no doubt that a *Hanbali* arbitration law does exist, which itself informs Saudi arbitral law. My analysis has demonstrated that this *Hanbali* corpus of law is in fact more flexible than Saudi law, particularly on the grounds of interpretative techniques. This finding should dismiss the notion that *Hanbalism* is an archaic and backward-looking institution.

Parties intending to draft arbitration clauses and undertake arbitral proceedings in Saudi Arabia, or elsewhere in cases where a Saudi element is involved, should ensure that they are fully compliant with Shari'a law and Saudi public policy. Given the requirements regarding the status of arbitrators, foreign lawyers dealing with such disputes must constantly be alert as to reliable arbitrators that fulfil these exact criteria.

5 Arbitration for the Settlement of Banking Disputes in Saudi Arabia

In all legal systems around the world, the contradiction of public policy is a great threat to the arbitral process. The banking and general legal systems of Saudi Arabia are structured in quite a strange manner due to the obvious conflict between the Shari'a principles and the way in which conventional banks function. This conflict has created a gap between the Shari'a and Statutes within the Saudi legal system in various fields, especially where the dispute involves an unacceptable element under the Shari'a, such as the imposition of interest, hereinafter *riba*, which is the primary motive of the conventional banking system. As discussed in the previous chapter, this conflict has proved to be a fatal legal tactic against banks by those defaulting debtors trying to avoid serving their debts, at least in part, and to lengthen the time of the disputes, which render the loan practically "interest free". After examining arbitration as a general mechanism of settling commercial disputes in general, this chapter examines the issues related to arbitration as a mechanism for the settlement of banking disputes in Saudi Arabia and will discuss the following points:

- Arbitrability of banking disputes
- Arbitration clause in financial transactions
- The concept of duality in the Saudi legal system
- Alternative remedies when arbitration fails to serve its objectives which will include, in addition to arbitration, the resort to the Committee for the Settlement of Banking Disputes and to the Committee for the Settlement of Negotiable Instruments Disputes.

The study will be conducted in a comparative way between the Shari'a, the Statutes and current practices, and in some parts will compare the Saudi law with the laws of some of the countries neighbouring Saudi Arabia, such as Egypt and the UAE. The reason behind comparing the Saudi law with the Egyptian law is due to the fact that the Egyptian law is practically one of the sources of the Saudi legislations. On the other hand, the UAE is a growing economic power in the region that has a close business ties with Saudi Arabia.

5.1 Banking Disputes under the Law of Saudi Arabia

Before proceeding to discuss the nature of banking disputes in Saudi Arabia, the scope of the word “banking” under Saudi law should be determined in order to give a clearer vision of banking activities. The Banking Control Law of 1966 defined the term banking business as “the business of receiving money on current or fixed deposit account, opening of current accounts, opening of letters of credit, issuance of letters of guarantee, payment and collection of cheques, payment orders, promissory notes and similar other papers of value, discounting of bills, bills of exchange and other commercial papers, foreign exchange transactions and other banking business”.⁵⁸⁰ The latter definition may bring up a few questions regarding the scope of banking business and consequently banking disputes; however, the most important question is about the reason behind the absence of money-lending operations in the definition of banking business under the Act when it should be considered as the core of banking business. It can be noticed that the Saudi legislators broadened the scope of the definition by inserting the following sentence “and other banking business”. It can be assumed that the Saudi legislators added that sentence in order to allow the practice to encompass controversial matters under the Shari’a. For instance, the drafters of the Act were unable to include explicitly the activity of money lending with interest, or *fawaid*, in the Act because *riba* is clearly prohibited under the Constitution of the country, bearing in mind that the Act was drafted in 1966, at a time when the concept of banking and the imposition of interest was totally unacceptable by the majority of Saudis due to its obvious violation of the Shari’a. Similar to other GCC countries, the Saudi society has been experiencing rapid changes following the first oil boom of the 1970s, when the business sector began to accept what it formerly used to reject, as well as transforming its attitude toward banking interest. One may expect that if Saudi Arabia were to redraft its Banking Act, the law would not differ from any banking statute anywhere in the world and interest might not be the dilemma that it used to be.

⁵⁸⁰ See article 1.b of the Banking Control Act of Saudi Arabia. Royal Decree No. M/5 dated 22/02/1386 H. (1966). *Umm Alqura Gazette*, issue No. 2126 dated 05/03/1386 H. (1966).

The quoted activities in the definition, in addition to money lending which has constituted an accepted practice of the commercial banks under the supervision of the Government, are the main subject matters of banking disputes in Saudi Arabia. The question of which competent authority should settle banking disputes in Saudi Arabia carries an even greater deal of ambiguity. Despite the recent law reform, which requires a minimum period of two years before it can take practical effect, Saudi Arabia does not possess proper commercial courts, and the competence of settling commercial disputes in general is devolved among several semi-judicial committees and it is understandable that in many cases a great conflict of authority is manifested.⁵⁸¹ In any event, even the creation of specialised courts entrusted with the settlement of commercial disputes would not solve the problem, especially if the case relates to “banking business”, as these prospective courts would work under the supervision of the Ministry of Justice, which itself would never tolerate any violation of the Shari’a.⁵⁸²

In addition to arbitration, disputes relating to banking business can be settled through one of the following two committees in accordance with the subject matter of the dispute, irrespective of whether it relates to negotiable instruments or concerns other banking activities:

- a) The Committee for the Settlement of Banking Disputes under the Saudi Arabian Monetary Agency (SAMA), which is competent to settle disputes arising as a result of pure banking activities only, such as the opening of current and deposit accounts, letters of credit, money exchange, foreign transfer, money lending, etc.⁵⁸³
- b) The other Committee is that for the Settlement of Disputes Involving Negotiable Instruments, which functions under the auspices of the Ministry of Commerce and Industry and possesses the jurisdiction to settle disputes related to cheques and other negotiable papers only. The Committee for Negotiable Instruments is also known as the Negotiable Instruments Office.

⁵⁸¹ Examples for such cases can be found in the cases of cheques and negotiable instruments disputes involving the payment of interest.

⁵⁸² See in general the Law of Judiciary and the Law of the Board of Grievances of Saudi Arabia. Issued by Royal Decree No. M/78 dated 19/09/1428 H. *Umm Alqura Gazette*, issue No. 4170 dated 30/09/1428 H. (12/10/2007).

⁵⁸³ See Royal Order No. 4/110 of 1409 H. (1989) and Ministry of Finance Circular No. 17/5583 dated 19/09/1409 H. (1989).

5.2 Arbitrability of Banking Disputes

The doctrine of arbitrability generally relates to the question of whether the applicable law allows a matter to be resolved by arbitration. All legal systems exclude some matters from the scope of arbitration and the non-arbitrable matter is referred to litigation even if the parties to the dispute agree to arbitrate.⁵⁸⁴ Similar to other areas of the Saudi commercial law, arbitration in general has not received sufficient attention from legislators, who prefer to rely on the classical Shari'a teachings and, in some cases, oppose modernising the legal system even if the said modernisation proffers to exist within the scope of the Shari'a. This attitude has resulted in a great deal of ambiguity in Saudi day-to-day affairs, especially when a prohibited or disputed element is the subject matter of a dispute. Saudi law is relatively vague when providing an answer to the question of arbitrability. Under Saudi law, whether a dispute is arbitrable is answered by reference to the Arbitration Act and its Implementing Rules. According to Article 2 of the Arbitration Act, arbitration is permitted in disputes where conciliation is permitted.⁵⁸⁵ Therefore, the Act excludes some criminal disputes, as will be seen below, and disputes concerning public policy, which themselves are encompassed under the jurisdiction of the Shari'a courts and the *Diwan Almazalim*, in addition to disputes relating to national sovereignty.

With regard to banking disputes, a few opinions exist under the Shari'a as to whether to allow the use of conciliation. The reason for the difference between these opinions is due to the legal status of banking business under Shari'a law, given that the Shari'a prohibits particular banking transactions, and the question here is whether conciliation should be permitted where prohibited contracts are concerned. As a general rule, none of the Shari'a courts in Saudi Arabia or the Board of Grievances would decide on a dispute concerning a prohibited subject matter or, likewise, issue a decision entitling one of the parties to perform an unlawful act under the Shari'a.⁵⁸⁶ In order to determine the issue of arbitrability of a dispute in general, one needs to examine the

⁵⁸⁴ M. Paul, 'Arbitrability of Copyright Disputes: Desputeaux v. Les Editions Choutte (comments)', *Canadian Business Law Journal*, 38 (2003), pp. 125-149.

⁵⁸⁵ Article 2 of the Arbitration Act of 1983.

⁵⁸⁶ This information was given by a senior judge in the Shari'a Supreme Court of Makkah, Saudi Arabia, who preferred his name to be confidential; and he added, as a general rule, Shari'a courts assume jurisdiction over all claims brought before them. They do not decide on cases that entitle a violation of the Shari'a law.

Shari'a law on conciliation as the fundamental basis for deciding the arbitrability of a dispute, especially when the process of conciliation concerns *riba*.

5.2.1 The Law on Conciliation in Saudi Arabia

Having said that disputes should be amenable to conciliation in order to be arbitrable, there are no specific rules on conciliation in the law of Saudi Arabia and the procedure depends wholly on Shari'a teachings. In the Arabic language, there is no semantic difference between conciliation and mediation and both terms can be translated as *sulh*. The doctrine of conciliation or *sulh* was established by the Quran, the *Sunnah*, the teachings of the various schools of *fiqh*, as well as by common practice and customs. The Quranic verses recommend conciliation as a means of settlement of disputes in general and as the main mechanism for the settlement of family disputes in particular, stating that: "*If a woman senses oppression or desertion from her husband, the couple shall try to reconcile their differences and conciliation is best for them.*"⁵⁸⁷ The Quran also recommends conciliation in inheritance matters, as in the case of an unfair will, stating that: "*If anyone fears partiality or prejudice on the part of the testator, and conciliates between the parties concerned, there is no wrong in him.*"⁵⁸⁸ Moreover, the Quran regarded conciliation as the best practice in the settlement of disputes generally, as the following verse recommends: "*If a person forgives and makes conciliation, his reward is due from Allah as Allah loves conciliators.*"⁵⁸⁹

With regard to the *Sunnah*, it was reported that the Prophet Muhammad conciliated between disputants or deferred deciding on a dispute in order to give the parties some time to reach an amiable settlement outside the court. In support of his practice, Prophet Muhammad also said: conciliation is permitted except if it legalises a prohibited matter or prohibits a lawful matter.⁵⁹⁰ After that, conciliation became a

⁵⁸⁷ The Quran 4: 128.

⁵⁸⁸ The Quran 2: 182.

⁵⁸⁹ The Quran 42: 40.

⁵⁹⁰ Supra 156, bin Gasim, vol. 5, p. 128.

customary practice under Islamic law and an essential part of procedure before any Shari'a judge.

Under *Hanbali* law, the conciliation agreement is a valid contract, similar to the arbitration agreement, and all the rules applicable to the arbitration agreement should apply to the conciliation agreement *mutatis mutandis* in accordance with the general principles of contract under Shari'a.⁵⁹¹ Despite the latter similarities, there are some fundamental differences between conciliation and arbitration under the Saudi law and Shari'a law in general. In arbitration, the arbitrators are chosen on the basis of the mutual agreement of the parties to the dispute, whereas in conciliation the entire process depends on the parties to the dispute or their representatives and the conciliators have no authority to impose their view on the parties. Unlike arbitration, there are no rules to regulate the conciliation procedure, as conciliation may be initiated by the parties to the dispute or by the judge as part of the common procedure.⁵⁹² The issue of the predictability of the arbitral award makes conciliation less harmful to the parties, especially if one of them intends to waive some of his claims in order to end the dispute, because in conciliation both parties know the acceptable limits for their waiver, which are not known in arbitration. In addition, the conciliation results can be enforced in a way similar to enforcing arbitration awards provided that they take the form of an award after concluding a valid conciliation agreement or if done before the court. Similar to arbitration awards, a conciliation award is not enforceable without an enforcement order from the authority having original jurisdiction over the dispute, which will review the award to ensure its conformity with public policy. Judicial review is not required for the enforcement of conciliation awards concluded before the court and they carry the same strength as court decisions.⁵⁹³

Classical Scholars emphasised the legality and the importance of *sulh* as the primary basis for settling most kinds of disputes, but some scholars did not consider the *sulh* or the conciliation agreement as an independent contract, as is the case with the

⁵⁹¹ I. Alhamoud, *Conciliation in Commercial Disputes and Its Applications*. A paper presented at the Conference on Arbitration and Conciliation, Taif, Saudi Arabia, 15-16/05/1424 H. (2004).

⁵⁹² *Supra* 2, Albejad, p. 77.

⁵⁹³ *Ibid*.

arbitration agreement.⁵⁹⁴ It has been argued that under *Hanbali* law, a conciliation agreement is not an independent agreement and it cannot stand on its own. Scholars who supported that view assume that there is nothing to be called conciliation agreement and such agreements are to be attached to the type of contract such that the conciliation award possesses most of its features. For instance, the conciliation agreement in commercial disputes may be considered as a sales contract, lease contract, gift agreement, termination of a contract agreement, settlement agreement, loan agreement, etc.⁵⁹⁵ In other words, they claimed that there is no conciliation in commercial disputes and what is thought to be conciliation is merely negotiations of a new contract or amendments of an existing contract. However, the latter opinion seems to add more ambiguity to the legal status of conciliation and also contradicts the contractual nature of the conciliation agreement, which is actually independent and should not be influenced by other contracts.

5.2.2 The Conciliation Practice in Saudi Arabia

5.2.2.1 Conciliation in Criminal Disputes

Besides family disputes, conciliation is one of the primary methods for settling many kinds of criminal disputes in Saudi Arabia, especially those concerned with private injury, such as murder and personal criminal injuries. Under Shari'a, any offence committed against a person is amenable to conciliation, i.e. arbitration. This issue requires a distinction between so-called *hodoud* offences, which are those committed against society as a whole, such as terrorism, assassination and adultery; and crimes committed against individuals, such as murder and personal injury, which can be subject to conciliation proceedings. Moreover, there are some crimes that are of a mixed nature, but which are nonetheless classified under the category of *hodoud*, particularly theft and rape, which cannot be subject to any kind of settlement, even though they involve a private entitlement, because of their relation to state power and society and whose punishment has already been determined by the Quran.

⁵⁹⁴ *Supra* 28, Ibn Qodamah, vol. 4, p. 322.

⁵⁹⁵ Muhammad bin Moflih, *Kitab Alforou'* (1st edn., Dar Alkotoub Alilmiyah, 2003), vol. 4, p. 268.

Consequently, *hodoud* crimes cannot be subject to any kind of extrajudicial settlement.⁵⁹⁶

It is obvious from the case law that criminal disputes can be subject to conciliation as long as they do not concern a *hodoud* crime. In a case before the Shari'a Supreme Court of Riyadh, the Court ordered the execution of a murderer by beheading him in a public place; however, following a process of conciliation, a settlement was reached between the defendant and the plaintiffs, i.e. the family of the victim, which entitled the defendant to pay the amount of 1.7 million Riyal in exchange for a direct waiver of the claim of execution of the defendant.⁵⁹⁷ In order to encourage conciliation and other types of ADR in general, Saudi courts prefer to delay the execution of particular sentences in order to give third parties the chance to intervene between the disputants and thus save the guilty party from the death penalty. This tendency has its roots in the practice of the companions of the Prophet, as Omar bin Alkhattab, the second Caliph after the Prophet, said: "defer the issuance of your judgments; let the disputants conciliate."⁵⁹⁸ In another case where conciliation was involved, the parties reached a settlement requiring the defendant to pay double the amount of the actual compensation in exchange for a prompt waiver of the plaintiff's right. In this case, the plaintiff was shot by the defendant and as a result, the plaintiff was rendered paralysed, which, according to the law, entitled him to receive damages of 500,000 Riyal. The defendant preferred to pay the amount of one million Riyal and get released from prison promptly.⁵⁹⁹ No statistics exist concerning the exact number of criminal cases in which conciliation has been involved, but it may be said that conciliation has been a great influence on the finality of decisions in criminal matters in Saudi Arabia.

⁵⁹⁶ Supra 175 Ibn Taymiyyah, vol. 3, p. 139. If an offence is not reported to an authority, i.e. the court or the police, the persons who are concerned with the offence have the right not to report it; nonetheless, the settlement is of no value if the claim reaches the authority.

⁵⁹⁷ See A. Aloraini, 'Conciliation in Criminal Matters', *Al-Adl Journal*, 8 (2001), pp. 1-23.

⁵⁹⁸ T. Alonaizan, 'Conciliation Before and After the Death of the Victim', *Al-Adl Journal*, 7 (2000), pp. 1-29.

⁵⁹⁹ Ibid.

5.2.2.2 Conciliation in Commercial Disputes

Conciliation in commercial disputes has been divided into two main types according to the characteristics of the conciliation award; the first is *sulh moua'wadah* and the other is *sulh isqat*.⁶⁰⁰ The second type of *sulh*, i.e. *sulh isqat*, is the one that is most related to banking disputes nowadays because such disputes mainly involve financial claims and the settlement may be reached through reducing the amount of the claim or rescheduling the remainder of the claim.⁶⁰¹ In a claim brought before the Shari'a Supreme Court in Taif "Saudi Arabia", a conciliation award was approved by the Court in order to reduce the amount claimed by the plaintiff from S.R 840,000 to S.R 700,000 that was subject to immediate payment.⁶⁰² The conciliation award can also assist in rescheduling the claim, as was achieved in another case brought before the Board of Grievances, where the plaintiff agreed to reschedule his claim against the defendant if the defendant paid the instalments on time; otherwise, the payment of the full amount was due on demand at any time.⁶⁰³ The same kind of *Sulh* may also result in rescheduling the payment of outstanding claims, which is accepted by the Shari'a as long as the deferral of the payment itself does not bring any benefit to the claimant; otherwise, such deferral would be considered as *riba* or usury.⁶⁰⁴

Moreover, *sulh* can also result in a total waiver of a part of the claim, while also simultaneously discounting another part of the same claim, as what occurred in the following case: a company claimed a payment of S.R 192,084 as damages for some defective goods, in addition to an amount of S.R 300,000 as compensation for certain direct and indirect losses as a result of faulty goods. The Board of Grievances approved a conciliation award entitling the defendant to pay only the amount of S.R 120,000 out of the S.R 492,084 initially claimed by the plaintiff. In this case, the parties agreed to reduce the amount of the claim from S.R 192,048 to S.R 120,000 and omit the payment of the compensation.⁶⁰⁵ The above-quoted cases constitute examples for claims arising out of normal commerce and not from banking activities.

⁶⁰⁰ *Sulh moua'wadah* results in a barter deal between the parties to the dispute, whereas in *sulh isqat*, one of the parties waives or discounts part of the claim.

⁶⁰¹ Supra 156, bin Gasim, vol. 5, p. 141.

⁶⁰² See *sulh* document No. 51 dated 26/06/1421 H. (2001) from the Supreme Shari'a Court of Taif (Saudi Arabia).

⁶⁰³ The Board of Grievances "Makkah branch" decision No. 369/2/Q of 1421 H. (2001).

⁶⁰⁴ The Board of Grievances decisions "Makkah branch" No. 992/2/Q of 1421 H. (2001).

⁶⁰⁵ The Board of Grievances decision No. 651/1/Q of 1423 H. (2003).

If the claim relates to banking business, the Shari'a courts and the Board of Grievances will not approve the conciliation award unless the conciliation award discards the interest and requires payment of the capital initially received from the bank without any additional cost. Nonetheless, the voluntary payment of interest can still be an effective extrajudicial method for the settlement of banking interest disputes, but the enforcement of the conciliation award is totally dependent on the good faith of the parties to the dispute, as well as the business relationship established between them.⁶⁰⁶

Despite the argument that conciliation is inapplicable in prohibited subject matters, common practice nowadays clearly suggests that banking disputes can be subject to conciliation in accordance with the main principles of Shari'a and the general Quranic verses, as well as the tradition of the Prophet, which did not specify the scope of conciliation. Moreover, the following Quranic verse encourages people to give more flexibility in terms of rescheduling the repayment of a debt if the borrower is facing hardship and is unable to pay the sum owed on time: *"If the debtor is in hardship, let him have respite until it is easier, but if you forego out of charity, it is better for you if you realize."*⁶⁰⁷ Although, the latter Quranic verse does not include the word conciliation, the conciliatory spirit can be felt within its teachings.

Theoretically, banking disputes are arbitrable in Saudi Arabia because they can be subject to conciliation, whereas, in reality, banks are faced with a great deal of discrimination when it comes to the ratification of arbitration agreements and execution of arbitral awards. This discriminatory treatment may have negative effects on many aspects of Saudi Arabia's commercial and social life. Firstly, banks may restrict the provision of conventional banking facilities, on the basis that the settlement of disputes arising out of related transactions may not be fair for the bank. For the same reason, the restriction in the provision of banking facilities might slow economic growth, especially when the alternative is more costly for the customers.⁶⁰⁸

⁶⁰⁶ This piece of information was given by the Deputy Chairman of the GCC Commercial Arbitration Centre, Mr. Ahmad Mazhar, in a visit to his law firm in Jeddah Saudi Arabia on 20/12/2007.

⁶⁰⁷ The Quran 1: 280.

⁶⁰⁸ When considering Islamic Banking as an alternative to the Conventional banking system, the Islamic banking system has not been developed to attract large-scale businesses and the cost of Islamic facilities is almost the same as the conventional ones, if it not higher. For more details see M. El-

Another direct effect of the unfair treatment of banking disputes can be seen in attempts to avoid choosing Saudi Arabia as the applicable forum, where it would otherwise be the most convenient forum for the particular conventional banking dispute. For the sake of public interest, banking disputes should receive more attention both in arbitration and in litigation for the reason that discrimination against banks has the potential to undermine the credibility of Saudi Arabia as a potential financial centre and may slow the flow of foreign investment to the Kingdom.

5.3 Arbitration Clause and Arbitration Agreement in Financial Transactions in Saudi Arabia

As a general principle of Shari'a contract law, parties to the contract are free to stipulate whatever they want. According to some Schools of *fiqh*, there are some restrictions on this principle and conformity with the general principles of Shari'a is required.⁶⁰⁹ Following the principle of freedom of contract as established in Ibn Taymiyyah's treatises, arbitration clauses or agreements of this nature (*compromis*) are permissible even if the subject matter of the dispute at issue is prohibited.⁶¹⁰ This opinion enhances the autonomy of the arbitration agreement as an agreement separate from the underlying transaction and drives us to regard arbitration agreements related to banking transactions as lawful independent agreements of their own accord regardless of the subject matter of the dispute. The following few paragraphs will not discuss the legality of arbitration agreements concerned with banking transactions, this being the subject of a long-contested debate in the field of contract law, but will instead discuss the use of arbitration clauses in banking transactions in Saudi Arabia.

In the light of common practices, financial transactions in Saudi Arabia can be classified as either Islamic or conventional. The classification is undertaken in accordance with the nature of the transaction as a whole and whether it is Shari'a compliant. Nonetheless, the law treats each class of disputes differently, as disputes

Gamal, *Islamic Finance, Law, Economics and Practice* (1st edn., Cambridge University Press, 2006), pp. 77-78.

⁶⁰⁹ N. Hammad, 'Adhesion Contracts in the Islamic Jurisprudence', *Al-Adl Journal*, 24 (2005), pp. 51-78.

⁶¹⁰ See generally F. Vogel and S. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (1st edn., Kluwer Law International, 1998), Chapter 5, pp. 97-128.

relating to Islamic banking are settled like any other normal commercial dispute, given that Islamic banks function in a manner similar to normal commerce. In such transactions, the arbitration clause usually provides for the settlement of disputes by means of domestic arbitration in accordance with the Arbitration Act of 1983 of Saudi Arabia and under the supervision of the *Diwan Almazalim*.⁶¹¹ In these cases, the arbitration is performed normally without any impediment and the award is enforced in a way similar to that of the enforcement of any ordinary arbitral award. This is due to the nature of Islamic banking transactions, which shifts the nature of the underlying transaction from a loan agreement with interest to a sales transaction in order to avoid *riba*.⁶¹²

Domestic conventional banking transactions are arbitrable in principle; however, when it comes to the ratification of an arbitration agreement or the enforcement of an arbitral award, arbitration might encounter some obstacles from *Diwan Almazalim*, it being the supervisory body for arbitration proceedings in Saudi Arabia.⁶¹³ The *Diwan*'s attitude does not seem to serve the main objectives behind resorting to arbitration as a fast, cheap and reliable dispute settlement mechanism; moreover, some of the decisions of the *Diwan* can be considered as a great waste of time and resources and undermine the credibility of arbitration in general. Nowadays, arbitration for the settlement of domestic conventional banking disputes has proved to be ineffective, as will be seen below.

As a general rule, if both parties to the contract are of Saudi nationality, their choices for adopting a method of dispute settlement are very limited. Saudi parties have to resort either to the Committee for the Settlement of Banking Disputes or to arbitration in Saudi Arabia, which excludes all those elements that are deemed to violate the Shari'a, i.e. interest accruing from the enforcement order.⁶¹⁴ On the other hand, the existence of a foreign element to the arbitration agreement can offer more choices to the disputants and the resort to international arbitration anywhere in the world can

⁶¹¹ This piece of information has been provided by the Shari'a Compliance Officer at the Islamic Retail Banking Division of one of the commercial banks in Saudi Arabia (12 Jan. 2008).

⁶¹² For more details on this kind of transaction, please see A. Saeed, *Islamic Banking and Interest* (2nd edn., Brill Publishers, 1999). See also, T. El Diwany, *The Problem with Interest* (2nd edn., Kreatoc Ltd, 2003), pp. 135-192.

⁶¹³ See *Diwan Almazalim* decision No. 50/1418 dated 24/01/1409 H. (1988).

⁶¹⁴ See *Diwan Almazalim* decision No. 59/1419 dated 28/10/1419 H. (1999).

become a possible option provided that, for the purpose of enforcement in Saudi Arabia, the arbitral award is in conformity with the Shari'a rules.⁶¹⁵ It has been noted that the *Diwan* upholds the parties' right to arbitrate wherever they stipulate, as long as a foreign element exists in the dispute. In a dispute between a Saudi bank and a foreign company, the arbitration agreement provided for the settlement of disputes arising out of the contract by means of arbitration in Zurich, subject to the rules of the International Chamber of Commerce. The foreign party insisted that Saudi Arabia be the seat of the arbitration proceeding and for the Shari'a to be the substantive law applicable to the dispute. It was obvious that the foreign party tried to escape the payment of interest as provided in the loan agreement between the parties to the dispute. However, the *Diwan* issued a decision denying the jurisdiction over the dispute on the grounds of the existence of an arbitration agreement that the parties had an obligation to comply with, and resort to arbitration in Zurich and under the rules of the ICC. The Review Committee added: "the *Diwan* has no jurisdiction over this dispute for two reasons; first, the existence of the arbitration agreement. The parties should resort to arbitration in Zurich as they stipulated. Secondly, the *Diwan* is not the authority with original jurisdiction over the dispute and the parties. We conclude that the parties to the dispute should either resort to arbitration in accordance with the arbitration agreement or refer the case to the Committee for the Settlement of Banking Disputes of the Saudi Arabian Monetary Agency."⁶¹⁶ It can be said that having a foreign party involved in a dispute is the only way to enforce the full payment of interest. This method has been upheld by the *Diwan*, but on what grounds? There are two main arguments on this issue and one of them suggests that the *Diwan* allowed resorting to international arbitration on the grounds of the principle of *Alaqqd Shari' at Almouta'qedeem*, which is the Islamic equivalent for *Pacta Sunt Servanda*. It may be understood from the latter view that the parties to the arbitration agreement are obliged to respect the terms of the said agreement as long as they are allowed to. Another argument suggests that the *Diwan* did not rely on principles of contract law, not because it wanted to enhance the freedom of contracts generally, but because it was instead forced to uphold the original arbitration clause for the reason that the *Diwan* lacked competence over the dispute and there was no possible defence against

⁶¹⁵ This information was provided by an official in the Saudi Arabian Monetary Agency, who prefers his name to be confidential (7 Jan. 2008).

⁶¹⁶ The author was given access to the archive of a Saudi commercial bank on the condition that all the relevant information about the parties and the dispute remain confidential.

the insistence on the right to arbitrate outside Saudi Arabia. This issue will be elaborated in more detail below.

5.4 Duality in the Saudi Legal System: Banking Interest as an Example

In Saudi Arabia, the existence of two governing bodies of law with regard to banking business created a great deal of uncertainty. The uncertainty was not caused by the existence of the two bodies themselves; rather, it was created because both bodies of law contradict each other in some very sensitive matters. Interest payment is one of the main points of conflict between the Shari'a and existing banking regulations and practices because, despite the fact that it represents the main motive for the conventional banking system, it is prohibited under Shari'a. In Saudi Arabia, judicial review will lead to an indirect application of the Shari'a law if the arbitration is governed by a law other than the Shari'a or Saudi law, or is granted in a non-Muslim country. When *Diwan Almazalim* reviews an arbitral award, it searches for any contradiction of the main Shari'a principles as well as contradictions of other areas of public order. If contradictions are found, the party seeking the enforcement of the award will have two options;

- Enforce the award after excluding the part contradicting public policy or;
- Refer the entire dispute to the competent authority to decide the case anew.

In the second scenario, the competent authority is the *Diwan* itself, one of the Committees of the Ministry of Commerce and Industry or the Committee for the Settlement of Banking Disputes of SAMA. Disputes relating to conventional banking are a clear example of the duality in the Saudi legal system for the reason that the *Diwan*, as the competent authority for the enforcement of arbitral awards, will not enforce the parts that contradict with the Shari'a, whereas someone else would. Despite the Committee for Settlement of Banking Disputes' willingness to enforce interest payment, it is unable to impose its decision and force the losing party to comply fully with its judgments. The weakness in the enforceability of the Committee's decisions is due to its nature, which does not give it the power to act as a judicial committee, because if it were considered so, it would have to comply with the Shari'a rules, which is not the reason for its existence. Another face of this duality can be found even in the existence of the Committee for the Settlement of Banking

Dispute itself. The function of the Committee contradicts with article 1 of the Basic Law, which states that “*The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; the Quran and the Sunnah are its constitution*”; and article 7, which states that “*the Government in Saudi Arabia derives power from the Holy Koran and the Prophet's tradition*”.⁶¹⁷ Although the Committee for the Settlement of Banking Disputes works under the supervision of SAMA, the function of the Committee violates article 6 of the Charter of the Saudi Arabian Monetary Agency, which does not allow SAMA to act in any manner which contradicts with the teachings of the Islamic law, and what the Committee does can be considered as support of a prohibited activity under Shari’a.⁶¹⁸ The reason for arguing for the prohibition of the function of the Committee is due to a well-known principle under Shari’a that provides for the prohibition of all activities associated with *riba*, as will be seen below. The legal status of interest under Shari’a and under the Statute law of Saudi Arabia as a sign of contradicting duality within the legal system as well as the methods of settling banking disputes will be examined in the next part of this chapter.

5.4.1 Interest under Shari’a

The issue of interest has been a religious and ethical dilemma for many Muslim businessmen since the early years of Islam for many reasons. First, usury or *riba* is very similar to some kinds of sales contracts, especially futures contracts for the sale of not-yet-existing subject matters or what is known as *Bay’ al salam*. The latter view was the argument for the *riba* in the Quran as can be seen in the following verse: “*They said “Trade is like interest” while Allah has permitted trade and forbidden interest*”.⁶¹⁹ Second, interest is the main motive for modern banking business and can be considered as the cornerstone of any modern economy.

Islam came to abolish some of the pre-Islamic practices in order to protect the whole society from its negative effects. In the pre-Islamic era, charging interest was a

⁶¹⁷ The Basic Law of the Kingdom of Saudi Arabia, issued by Royal Decree No. A/90 dated 27/08/1412 H. (1992). *Umm Alqura Gazette*, issue No. 3397 dated 02/09/1412 H. (1992).

⁶¹⁸ See generally Article 6 of the Charter of the Saudi Arabian Monetary Agency. Issued by Royal Decree No. 23 dated 23/05/1377 H. (1957). *Umm Alqura Gazette*, issue No. 1698 dated 06/06/1377 H. (1957).

⁶¹⁹ The Quran 1: 275.

standard condition for any loan agreement; however, the total prohibition went through different stages and took a long time during the life of Prophet Muhammad in order for it to become final. When looking at the legal basis of the prohibition of *riba*, the complete ban has gone through four stages, starting with showing that *riba* is not recommended for Muslims and they should avoid it as much as they can, and ending up with a definite prohibition.

The first stage discouraged people from charging interest over loans given to other people; this discouragement can be understood through the following verse: *“That which you give as interest to increase within other the people’s wealth increases not with Allah; but that which you give in charity, seeking the goodwill of Allah, multiplies manifold”*.⁶²⁰

In the second stage, the prohibition took the form of reminding what previous nations had done before the Quran showed that their practices were not the right thing to do. The following verse might indicate that Muslims should stop charging interest over loans: *“And for their taking interest even though it was forbidden for them, and their wrongful appropriation of other peoples' property, we have prepared for those among them who reject faith a grievous punishment”*.⁶²¹

The third stage clearly demonstrated that *riba* was prohibited and it was a sin. It can be seen in the following verse that the *riba* had not reached the level of being one of the major sins that Muslims must not even get close to: *“O believers, take not doubled and redoubled interest, and fear Allah so that you may prosper. Fear the fire which has been prepared for those who reject faith, and obey Allah and the Prophet so that you may receive mercy”*.⁶²²

In the fourth and final stages, the prohibition of *riba* became final and since then, *riba* has been considered as one of the major sins, i.e. very close to murder, worse than adultery and similar in guilt to terrorism, which can be understood through the following verses of the Quran: *“O believers, fear Allah, and give up the interest that*

⁶²⁰ The Quran 30: 39.

⁶²¹ The Quran 4: 161.

⁶²² The Quran 2: 130.

*remains outstanding if you are believers”;*⁶²³ *“Those who charge interest shall be raised like those who have been driven to madness by the touch of the Devil; this is because they say: "Trade is like interest" while Allah has permitted trade and forbidden interest. Hence those who have received the admonition from their Lord and gave up may have what has already passed, their case being entrusted to Allah; but those who revert shall be the inhabitants of the fire and abide therein for ever”.*⁶²⁴

This latter Quranic verse determines the legal basis for settling disputes involving interest or *riba*, and judges in Shari’a courts and *Diwan Almazalim* apply the principle established by this verse when deciding on any disputes or when reviewing arbitral awards: *“If you do not do so, then be sure of being at war with Allah and His Messenger. But, if you repent, you can have your principal. Neither should you commit injustice nor should you be subjected to it”.*⁶²⁵ In accordance with the teachings of this verse, interest must be avoided; however, if a person involved in a usurious transaction, he must not take more than the principal amount that he lent and interest must be excluded from any Shari’a-compliant judgment. The prohibition of *riba* in the *Sunnah* was not just a restricted prohibition like the prohibition of many unlawful actions. The prohibition of interest followed the doctrine of extended prohibition, i.e. the prohibition covers all activities related to the prohibited subject matter and all the people involved in it are sinners on equal basis.

The doctrine of extended prohibition of interest was established by the following *Hadeeth*: *“Prophet Muhammad cursed the receiver and the payer of riba, the one who records it and the witnesses to the transaction and said: they are all alike”* (in the sin).⁶²⁶ The latter *Hadeeth* can also be the legal basis for arguing for the prohibition of the functions of the Committee for the Settlement of Banking Disputes, as when the Committee upholds a *riba* transaction, it is considered to be involved in it if not as the one who records it, as witness to the transaction. Moreover, another *Hadeeth* establishing a general rule for detecting unlawful transactions reads as follows: *“any*

⁶²³ The Quran 1: 278.

⁶²⁴ The Quran 1: 275.

⁶²⁵ The Quran 1: 279.

⁶²⁶ Al-Imam Alzaylai’e, *Tabeen Alhaqaiq Sharh Kanz Aldaqaiq* (1st edn., Dar Alkotoub Alilmiyah, 2000), vol. 4, p. 84.

loan attracts a benefit is riba".⁶²⁷ The latter *Hadeeth* is a safety measure against some practices employed by some "Islamic banks" which take advantage of some differences in legal opinion among Scholars with regard to the scope of the prohibition of *riba*. *Riba* is generally classified as unlawful advantage by way of excess, or what is known as *riba alfadl*, and rescheduling *riba alnasi'ah*.⁶²⁸

The issue of *riba alfadl* arises in contracts of sale when there is an increase in the terms of exchange when the subject matter of the contract and the consideration are identical. For instance, the exchange of a certain amount of US dollars for a higher amount of US dollars can be considered as *riba*, but if the consideration is different from the subject matter, like in the case of exchanging US dollars for Saudi Riyals, there is no *riba* as long as the exchange is made on the spot.⁶²⁹ There are some similarities between this class of *riba* and the practices of some Islamic banks nowadays, as some of them avoid *Riba alnasi'ah* to get involved in *riba alfadl*. The law on *riba alfadl* was established by the following *Hadeeth*: "*the selling of gold for gold is riba (usury) except if the exchange is from hand to hand and equal in amount and similarly, the selling of silver for silver is riba (usury) unless it is from hand to hand and equal in amount*".⁶³⁰

Riba alnasi'ah, what is mostly referred to as *riba aljahiliyah* or what is sometimes called the obvious *riba*, literally means the *riba* of the pre-Islamic era because it was a very common practice among Arabs before Islam. This type of *riba* is similar to charging interest over loans and to delaying damages. It has been reported that Prophet Muhammad said: "*all contracts of riba of the pre-Islamic period are null and void. The first contract of riba I am cancelling is that of Abbas bin Abdulmottalib*" (the Prophet's uncle). Moreover, in the treaty of the Prophet with the Christians of Najran,⁶³¹ the Prophet cancelled the interest accrued on their debts, which had originated in the pre-Islamic period.⁶³²

⁶²⁷ Supra 558, Vogel, p. 77.

⁶²⁸ H. Ramadan, *Understanding Islamic Law from Classical to Contemporary* (1st edn., Alta Mira Press, 2006), p. 117.

⁶²⁹ Ibid.

⁶³⁰ Supra 599, El-Gamal, p. 68.

⁶³¹ Najran is a city in the south of Saudi Arabia.

⁶³² A. Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Riba and its Contemporary Interpretation* (2nd edn., Brill Publisher, 1999), p. 30.

For the sake of representing some of their practices as Shari'a compliant, some of the pioneers of modern Islamic banking adopted the narrowest scope available for determining *riba* and recognised the latter type i.e., *riba alnasi'ah*, only, arguing that it is the only prohibited practice mentioned in the Quran. They also relied on the reasoning of some of the companions of Prophet Muhammad, who said: “*there is no riba except riba alnasi'ah*”.⁶³³

Having said that interest is prohibited under Shari'a, we should know the reason behind this prohibition. There are many social, ethical and economic factors that support the prohibition of *riba*, which have been summarised by Kula (2008) as follows:

*“The reason why usury is prohibited in Islam is manifold. First, the taking of interest, in the main, implies appropriating another person's property without giving him/her anything in exchange, because one who lends one pound for two pounds gets an extra pound for 'no real effort'. Second, dependence on interest prevents some people from working for a living, since the person with money can earn much more through interest without working for it. In this way individuals with money who will not bother to take the trouble of running a business will inevitably undermine the worth of work in the community. This will not only deprive the individuals with wealth of justly earned benefits, but it will also depreciate the wellbeing of the Islamic community for it is not possible to sustain the flow of goods and services by simply borrowing and lending money alone. The third and perhaps the most important aspect of riba is that it is, essentially, a transfer of money from the 'poor' to the 'rich', which is contrary to Islamic teaching”.*⁶³⁴

The prohibition of *riba* can be considered as one of the main rules in Islamic economics nowadays. Modern economists have defined the *riba* in the new contexts as any unjustifiable increase in capital, whether through loans or sales. More precisely, any positive, fixed, predetermined rate tied to the maturity and the amount

⁶³³ Ibid.

⁶³⁴ E. Kula, 'Is Contemporary Interest Rate in Conflict with Islamic Ethics', *Kyklos International Review for Social Sciences*, 61/1 (2008), pp. 45-49.

of the principal (i.e., guaranteed regardless of the performance of the investment).⁶³⁵ The distinction should be made between the *riba* and the rate of return or profit on capital, as Islam encourages the earning and sharing of profits, because profits represent a successful entrepreneurship and the creation of additional wealth; whereas interest can be considered as a cost that is accrued regardless of the outcome of the business operations and may not create wealth if there are business losses.⁶³⁶

To sum up, all forms of interest charged over loans are totally prohibited under Shari'a and contradict with the public policy of Saudi Arabia, and a contract involving such terms is null and void in the part including the prohibited action. This view has been upheld by the teachings of all *fiqh* schools, *fatawa* of the *Ulama*, the judgments of the Shari'a courts and the Board of Grievances. For instance, the Minister of Justice ordered all Shari'a courts and *kitab aladl* "the notaries" not to authenticate the mortgages of commercial bank loans on which such banks take interest from the debtor by a certain percentage. The order covers any agreement or contract involving the payment of interest because it is prohibited by Shari'a.⁶³⁷ The Minister of Justice's order was upheld by the Supreme Judicial Council, which prohibited borrowing from commercial banks because they charge interest. The same decision exempts judges from deciding on disputes that involve the payment of any form of interest or loans associated with benefits.⁶³⁸ It can be said that when *kitab aladl* refuse to authenticate loan agreements, they might go against the injunction provided in one of the verses of the Quran that obliges them to authenticate any agreement, as they are not held responsible for their content. That verse reads as follows: "*O you who believe! When you contract a debt for a fixed term, record it in writing. Let a scribe record it in writing between you in (terms of) equity. No scribe should refuse to write as Allah hath taught him, so let him write, and let him who incurred the debt dictate, and let him observe his duty to Allah his Lord, and diminish naught thereof*".⁶³⁹

Interest is prohibited under Shari'a as applied in Saudi Arabia, but the overall status is not really clear and a great deal of ambiguity surrounds the issue as a whole which

⁶³⁵ Z. Iqbal and H. Tsubota, *Emerging Islamic Capital Markets: A quickening pace and new potential* (The World Bank Publications, 2006), p. 6.

⁶³⁶ Ibid.

⁶³⁷ See the Minister of Justice Circular No. 107/2/T dated 25/08/1389 H. (1969).

⁶³⁸ See the decision of the Supreme Judicial Council No. 291 dated 25/10/1401 H. (1980).

⁶³⁹ The Quran 1: 282.

might be due to the fact that the two bodies of law, i.e. the Shari'a and the Statute, are applied in parallel with the theoretical supremacy of the Shari'a ruling. The current practice in Saudi Arabia has not identified whether *riba* is prohibited; however, it can be observed that *riba* is prohibited but the prohibition is unenforceable in the sense that a person or a bank can charge interest as long as no dispute reaches the authority.

Arbitral awards entitling one of the parties to perform any unacceptable act under Shari'a, such as paying interest, will be set aside and the Board of Grievances will not enforce the parts contradicting with the Shari'a. A typical case in which a party seeks the enforcement of an arbitral award including interest can be seen in the following: an application for the enforcement of an arbitral award made in Bahrain was refused because it entitled one of the parties to pay interest. The Board allowed the enforcement of the part that complied with Shari'a only and the losing party was forced to repay the principal only without interest.⁶⁴⁰

It can be said that, although banks claiming interest is against the Shari'a, a client refusing the performance of a binding contract is against the Shari'a as well because it contradicts with one of the main principles of the Shari'a contracts law, which is *Alaqd Shari' at Almouta'qedeen*, which is the Arabic for *Pacta Sunt Servanda*. The non-performance of a contract may contradict with some of the Quranic texts such as: "*O ye who believe! Fulfil (all) obligations*".⁶⁴¹ Nonetheless, these principles can be easily challenged by the assumption that the Shari'a prevails over the terms of any contract if the contract provides for a breach of one of the established principles of the Shari'a.⁶⁴²

5.4.2 Interest under the Banking Regulations

The banking system is the heart of any modern economy and a strong economy cannot exist without a sound banking system.⁶⁴³ From this fact, Saudi Arabia had to allow the establishment of commercial banks and the first Saudi bank was established

⁶⁴⁰ Diwan Almazalim decision No. 19/28 of 1399 H. (1979).

⁶⁴¹ The Quran 5: 1.

⁶⁴² Supra 617, Al Imam Alzaylai'e, vol. 4, p. 98.

⁶⁴³ R. Sylla, 'Financial Systems and Economic Modernization', *The Journal of Economic History*, 62 (2002), pp. 277-292.

in the 1930s. Banks started, from that time, providing its services and charging interest and it expanded its network largely, especially in the 1960s and 1970s. The Oil boom of the 1970s resulted in the establishment of some public funds that started lending to individuals and some kinds of businesses with zero interest and on very flexible terms.⁶⁴⁴ The Oil Boom also resulted in an accumulation of a huge amount of cash and liquid assets in a very short period of time, which led commercial banks to be more generous in providing their facilities without thorough consideration of the creditworthiness of its clients. Following that, banks started to suffer from a major legal problem represented in the refusal of Shari'a courts and the Committee for the Settlement of Commercial Disputes to recognise the validity of interest in banking transactions.⁶⁴⁵ The official position was not clear as the government allowed banks to charge interest as long as it was necessary for the financial system and charging interest served the public interest, but it refused to recognise it in the case of disputes.

Despite article 149 of the Code of Commercial Courts of 1931, there is no mention of interest in the Saudi regulations.⁶⁴⁶ Financial regulations in Saudi Arabia do not give a clear answer to the question of whether charging interest on loans or awarding interest in arbitral awards is a permitted action. Even the Banking Control Act and its implementing rules did not mention the word interest or *fawaied* in its text. The situation is truly vague and confusing to the extent that nobody is able to determine whether interest is legal or illegal for different reasons such as, *riba* has been practised for many decades even though such practices contradict with the main principles of the Shari'a and because the government itself deals with it in some of its contracts. Having said that *riba* violates Shari'a, there is no punishment for *riba* dealing and all that the judicial bodies do is annul the contradicting part of the contract.

⁶⁴⁴ These funds were established by the Government, and they work under its direct supervision: The Saudi Arabian Agricultural Fund established in 1963; The Saudi Credit Bank founded in 1971; The Public Investment Fund created in 1973; The Saudi Industrial Development Fund established in 1974; The Real Estate Development Fund established in 1974.

⁶⁴⁵ Supra 597, Mazhar.

⁶⁴⁶ Article 149 of the Code of Commercial Court does not really deal with interest charged over loans; it deals with one of the tricks applied by the Islamic bank to circumvent the prohibited *riba*. The example given in that article describes exactly the *Tawarrouq* transactions applied by Islamic banks nowadays.

It is appropriate to quote a conversation between King Faisal bin Abdul-Aziz (1903-1975) and a businessman, which shows that some regulatory bodies were more or less impartial with regard to banking interest. A bank customer complained to King Faisal that his bank was claiming interest, which he refused to pay because it is against the Shari'a. The businessman expected the King to abolish the payment of interest but the King said: since the bank granted the complainant a certain facility for a specified period, and he refused to pay interest, the complainant must return this favour to the bank and give the bank an equal amount for an identical period, after which time the bank is to repay it to him without interest. The complainant is said to have settled the interest to his bank without further objection.⁶⁴⁷ By the early 1980s, banks complained to the authorities, arguing that they were losing too much and that the risk was too high. This complaint led to the establishment of the Committee for the Settlement of Banking Disputes in 1987.⁶⁴⁸ The establishment of the Committee as a last resort for banks did not serve the banks' objectives in full and interest remained to be an avoidable obligation.⁶⁴⁹

As a general rule, the Saudi law is the law applicable to all governmental contracts. This choice of law may indicate that whatever the Government stipulates is not against the law or the public policy. The practice of the Saudi government adds more ambiguity as charging interest became a valid practice in most of the Governmental contracts, both domestically and internationally. For instance, the recent gas concession agreements concluded in 2004 have a specific clause for interest charged on the amount of the financial guarantee in case of late payment. Article 18 in all three gas concession agreements provides for interest to be charged for late payment at the rate of LIBOR plus 1%, which is exactly the prohibited *riba* under Shari'a.⁶⁵⁰ Moreover, and in contrary to its Charter, the Saudi Arabian Monetary Agency "SAMA" receives interest on assets deposited or invested with international financial institutions.⁶⁵¹ For one reason or another, the Saudi Government has been investing in

⁶⁴⁷ M. Alameldin, 'Banking Disputes in Saudi Arabia', *International Financial Law Review*, 10 (1991) pp. 36-38.

⁶⁴⁸ Ibid.

⁶⁴⁹ Supra 597, Mazhar.

⁶⁵⁰ See article 18 of the Concession Agreement between Saudi Arabia and Lukoil Saudi Arabia Ltd. *Umm Alqura Gazette*, issue No. 3990 dated 15/03/1425 H. (04/05/2005).

⁶⁵¹ *Saudi Arabian Monetary Agency v. Dresnder Bank AG* (2003), WL 23145143.

the US treasury securities, which are simply debt certificates with interest charged over it.⁶⁵² In addition, the government of Saudi Arabia has been financing its budget deficit through internal borrowing where the major lenders are the General Organisation for Social Insurance and the Pension and Retirement Fund. Both organisations work under the supervision of the Ministry of Finance and the Government has been serving the debt owed to those funds since mid-1980 with a total interest accounting for S.R 30 billion in the year 2000.⁶⁵³ It can be said that charging interest is a governmental practice, but it does not usually apply to domestic transactions, i.e., contracts with the private sector other than banks, for the reason that *Diwan Almazalim* is the applicable forum for settling disputes arising out of the execution of such contracts and the *Diwan* does not recognise interest. It can be said again that interest payment is prohibited under the Saudi law, but the prohibition is unenforceable as long as the parties voluntarily comply with their agreement.

The clash on this very specific legal issue represents a bigger point of controversy between two schools of thought within the Saudi authorities or even within the society as a whole; a conservative party who rejects any attempt of reform or development and insists on leaving this vague situation against a larger group who seeks the modernisation of the system without prejudice to the established principles and moral values of the society and arbitration in such an economically, religiously sensitive issue is one example of this clash.⁶⁵⁴

5.5 The Settlement of Banking Disputes in Saudi Arabia

Having said that interest is partly contrary to the public policy of Saudi Arabia and arbitral awards should not include interest in order for them to be enforced; now we will examine the ways of settling such disputes in Saudi Arabia. First of all, Shari'a courts and *Diwan Almazalim* are not competent for the settlement of disputes relating

⁶⁵² See generally, D. Spiro, *The Hidden Hand of American Hegemony: Petrodollar Recycling and International Markets* (1st edn., Cornell University Publication, 1999).

⁶⁵³ A. Shoult, *Doing Business with Saudi Arabia* (3rd edn., GMB Publishing Ltd, 2006), p. 42.

⁶⁵⁴ The Chairman of Diwan Almazalim, Sheik Muhammad Alissa. *Okaz Newspaper*, issue No. 2459 dated 11/03/2008. The Sheik added that some judges even oppose computerising the archive system in addition to the reform of some existing regulations and procedures.

to banking activities.⁶⁵⁵ In addition, if a claim for interest is brought before the Shari'a Courts or *Diwan Almazalim*, the contract will be considered null and void in the part that violates the Shari'a law. Therefore, the available remedies refer the dispute to:

- Arbitration;
- The Committee for the Settlement of Banking Disputes; or
- The Committee for the Settlement of Negotiable Instruments Disputes.

5.5.1 Arbitration

The previous chapter examined the arbitration law and practice in case of normal commercial dealings which does not violate the principles of Shari'a and public policy, the following part of this chapter will examine arbitration in disputes relate to domestic conventional banking in Saudi Arabia. As concluded above, arbitral awards violating the Shari'a law are of no effect and they cannot be enforced in Saudi Arabia either wholly or at least in the contradicting part of the award. Even though arbitration is an independent dispute resolution method, arbitration is found to be attached to the domestic legal system and the public order of the place of the issuance and the place of enforcement for the reason that arbitral awards cannot be enforced unless they are judicially approved in the place of enforcement and they should be, at the same time, valid at the place of issuance. It can be said that unlike some other neighbouring states, there is no way whatsoever to enforce an arbitral award concerning domestic conventional banking in Saudi Arabia if it provides for the performance of a prohibited act under Shari'a. Prior to the establishment of the Committee for the Settlement of Banking Disputes, arbitration was the only available remedy for banks; nonetheless, the enforcement of the award was totally dependent on the good faith of the parties to the dispute. For instance, in a loan agreement concluded in 1985, a Saudi bank agreed to settle a dispute that arose between him and a Saudi businessman, who refused to serve his debt, by means of arbitration in Saudi Arabia subject to the ICC arbitration rules and under the supervision of the Jeddah Chamber of Commerce and Industry. The final award upheld the bank's right to receive interest on the principal amount in addition to the immediate repayment of the principal amount in cash. The arbitration panel applied the principle of *Alaqd Shari' at*

⁶⁵⁵ Royal Order No. 729/8 dated 10/07/1407 H. (1987).

Almouta'qedeen, where the terms of the contract prevail over the law and arbitrators should rely on it when issuing their decisions without prejudice to the public order. When the bank filed a request for the enforcement of the award, the *Diwan* rejected the enforcement of the part contradicting with Shari'a and gave the bank a choice between executing the award in the part compliant with the Shari'a or referring the whole dispute to the competent authority, i.e., the Committee for the Settlement of Commercial Disputes, to decide it anew. In another case, the *Diwan* blocked all possible solutions, rejected the whole award on the grounds of the prohibition of the subject matter of the dispute and denied jurisdiction on the case. The bank had to settle the dispute through conciliation with the debtor, who had the upper hand at that time, and asked for rescheduling of the principal only, which the bank had to agree upon as the very last resort.⁶⁵⁶ I have gone through a number of arbitration cases concluded before the establishment of the Committee for the Settlement of Banking Disputes and in many of them the *Diwan* gave the party seeking the enforcement of the arbitral award a choice between executing the Shari'a-compliant part of the award or referring the case to the Committee for the Settlement of Commercial Disputes under the Ministry of Commerce and Industry; however, on most occasions, the *Diwan* rejects the enforcement of an arbitral award, leaving no room for alternative remedies. In such cases, the parties to the dispute have to initiate a new claim before the competent authority, which is very costly and time consuming.

After the establishment of the Committee for the Settlement of Banking Disputes, arbitration became less attractive, in settling domestic disputes, for banks, as resorting to the Committee for the Settlement of Banking Disputes under SAMA gives banks a better chance of recovering the outstanding claims for interest.⁶⁵⁷ Moreover, in some circumstances, arbitration is a useless dispute settlement mechanism for banks due to the *Diwan's* inflexibility or even hostility against banks, as the *Diwan* considers all banking activities as violations of the Shari'a. The legal doctrine of “*ma boniya ala batil fahowa batil*”, applied by the *Diwan*, provides for the illegality of all actions and practices if they are based on illegal principles, which might be the legal basis for

⁶⁵⁶ Ibid.

⁶⁵⁷ This piece of information has been provided by one of the Shari'a Controllers at the Islamic Banking division of one of the Commercial Banks in Saudi Arabia (9 Jan. 2008).

denying the enforcement of arbitral awards providing for interest.⁶⁵⁸ It can be assumed that the *Diwan* regards arbitration agreements and awards as illegal because of the nature of the underlying contract, which is a void contract under Shari'a.

As a result, the number of arbitration cases in which banks are involved has become very limited and, practically, banks in Saudi Arabia do not resort to arbitration anymore in disputes relating to domestic conventional banking. The banks refrain from resorting to arbitration in domestic conventional contracts because the Committee for the Settlement of Banking Disputes of SAMA gives better solutions, as it looks at the dispute from a contractual point of view without the strict adherence to the Shari'a rules applied by the *Diwan*. Therefore, arbitration remains a very speculative business since the parties and their lawyers navigate through legal uncertainty.

It has been noticed that the *Diwan* denies jurisdiction over any claim involving banks, even if the case falls within the *Diwan*'s general jurisdiction as the competent authority for the enforcement of arbitral awards in the Kingdom. In the following case, the *Diwan* rejected the whole application for the enforcement of a domestic award on the grounds of having banks as parties to the dispute. The application for the enforcement of an arbitral award in relation to a dispute involving a Saudi company and two national banks was filed but rejected by the *Diwan* on the grounds of lacking jurisdiction to hear disputes in which a bank is involved.⁶⁵⁹ In its decision, the *Diwan* quoted the Royal Order No. 8/729 of 1407 H. (1987) as being the basis for its refusal; however, the previous Royal Order determines the competent authority for the settlement of a banking dispute and the *Diwan*, when reviewing the arbitral award, is not settling the dispute; it is merely enforcing the decision of the arbitration committee with regard to the dispute after a general review of the award. It was a disappointment when the *Diwan* exceeded its terms of reference and tried to decide on the case anew. Accordingly, the presence of a bank as a party to the dispute can be grounds for setting aside an arbitral award without looking at the merit of the award itself, which can be considered as discrimination against banks. On the other hand, it

⁶⁵⁸ See Diwan Almazalim decision No. 11/D/F/2 of 1417 H. (1997). The legal doctrine of “*ma boniya ala batil fahowa batil*” can be translated as: anything based on something illegal, is illegal.

⁶⁵⁹ Diwan Almazalim decision No. 50/1418 dated 24/01/1409 H. (1988).

can be said that there was a misunderstanding by the *Diwan* because the *Diwan* treated the enforcement application in a manner similar to treating an initial claim where, if it were the case, the reasoning of the *Diwan* would be accurate, but as the application was for the enforcement of a final arbitral award, the *Diwan* should not have intervened in such a discriminatory way. If the latter possibility is real, the *Diwan* should really consider the qualifications and the quality of its judges. In a case where the party seeking the enforcement of the arbitral award insisted on the full enforcement of the award, the *Diwan* gave the choice of referring the whole case to the competent authority, i.e., the Committee for the Settlement of Banking Disputes, which was supposed to be the second option after looking at the award, but the *Diwan* did not look at the award in the first stage on the grounds of having banks as parties to the arbitration. In another case, after the parties to the dispute spent a great deal of time and money, the award was set aside by the *Diwan* even though none of the parties challenged it. The latter case shows the main difference between arbitration under the *Diwan* and the judgments of the Committee for the Settlement of Banking Disputes, which are binding on the parties if they are not opposed by the parties before issuing the award, as will be seen below.

It can be assumed that the *Diwan* follows one of the opinions under the *Hanbali* School that considers contracts related to prohibited subject matters as null and void and there is no real dispute because the whole transaction is of no value at all.⁶⁶⁰ Nonetheless, the *Diwan*'s practices led to a movement among banks to avoid the jurisdiction of the Saudi authorities over their transactions, as will be seen below. On the other hand, the high level of legal risk encouraged banks to move toward Islamic banking, which seems to be ethically acceptable for customers and judges and has proved to be more profitable and less risky for banks in Saudi Arabia.

In international banking transactions where at least one of the parties to the dispute is considered to be a foreign party even though it is not, parties to the contract can stipulate to arbitrate anywhere outside Saudi Arabia, which is usually their first preference. In any scenario, the Shari'a secures its position by not allowing the enforcement of arbitral awards contradicting it, as the enforcement order must be filtered by the *Diwan* in the light of the Shari'a ruling. However, arbitration is not the

⁶⁶⁰ Supra 617, Alzaylai'e, vol. 4, p. 101.

favourite dispute settlement mechanism, as in most cases the parties to the contract stipulate that the English law or the law of New York is the proper law of the contract and London or New York is the appropriate forum. This tactic is mainly preferred by banks because there are no impediments to the enforcement of interest and other prohibited or disputed sale contracts like in Saudi Arabia. By doing so, the Saudi court will not be involved in the dispute by any means; however, if the arbitration award is brought to Saudi Arabia for the sake of enforcement, it will be regarded invalid and the *Diwan* will consider it a circumvention to avoid the jurisdiction of the Saudi Judiciary. In most cases, the parties to the dispute are wholly Saudis but the legal entity is incorporated somewhere outside Saudi Arabia, so they would be considered as foreign parties, like in the following case. The case of *Islamic Investment Company of the Gulf (Bahamas) Ltd. v. Symphony Gems NV and others* is a clear example of such tactics of circumvention to avoid the application of the Shari'a law on transactions where the application of the Shari'a could affect the parties' right to receive interest. In this case, the English Court quoted: "*The fact that the claimant was based in Saudi Arabia, and the offer made in that country was insufficient to bring into play the illegality principle, on the assumption that the agreement was contrary to Saudi law*".⁶⁶¹

It has been noted that a great deal of care was put into the drafting agreements concerning international conventional banking and they tried to find a way in which the law of Saudi Arabia becomes inapplicable to the transaction even though the actual parties to the contract were of Saudi nationality and Saudi Arabia was the place of characteristic performance and the place of the conclusion of the contract. Some Saudi businessmen adopted this attitude because of the pressure put on them by foreign parties, as adjudication under any law other than the Saudi law is more convenient for both of them.

In *Midland International Trade Services Ltd. and others v. Al-Sudairy and others*, the English court decided on a case related to their actions in Saudi Arabia. The agreement provided for the Saudi Company to pay interest on the sums advanced and to repay the third plaintiff by honouring bills of exchange payable in Riyadh. The agreement was expressly to be governed by, and construed in accordance with, English law and the parties to it agreed to submit their disputes to the jurisdiction of

⁶⁶¹ See *Islamic Investment Company of the Gulf (Bahamas) Ltd. v. Symphony Gems NV and others*. [2002] All ER (D) 171 (Feb.).

the English courts without prejudice to the right of the third plaintiff to sue the Saudi Company in Saudi Arabia. The case was first brought to the Committee for the Settlement of Negotiable Instruments Disputes in Riyadh where interest was not awarded. Then a claim was initiated in London where the English court concluded by awarding interest to the second and third plaintiffs.⁶⁶²

From the current practices, it can be noted that, in the absence of good faith, there are a few ways to avoid the intervention of the courts of Saudi Arabia in arbitration, which can be summarised as follows:

- The party benefiting from the banking facilities should incorporate a business entity outside the Kingdom of Saudi Arabia with total independence from other Saudi corporations like in the above case of *Islamic Investment Company of the Gulf (Bahamas) Ltd. V. Symphony Gems NV and others*. By doing so, the Saudi authorities would have no way to intervene in the arbitral process and there would be a need to resort to the *Diwan* for enforcing the award, as everything would be done outside Saudi Arabia provided that the parties have enough assets outside the jurisdiction of the Saudi court.
- Another way in which foreign banks can deal with Saudi parties safely is if they have a well-drafted agreement and the bank is assured that Saudi Arabia is not the applicable forum to settle the dispute, and that by taking the following steps:
 - The Saudi party establishes a branch in the home country of the bank to carry out business activities and have a permanent address.
 - The place of the characteristic performance should be that of the home country of the bank which means that if there is a dispute, it will be out of the reach of the Saudi judiciary as it concerns an action done outside Saudi Arabia and the Saudi judiciary is not competent to decide on it unless both parties are of Saudi nationality. In this case, arbitral awards should be enforced in the place where the contract was executed.
 - Finally, the bank providing the facilities should retain sufficient collateral against the debt within its own legal system to avoid forum shopping in case the debtor defaults, as if that happens, the bank has to

⁶⁶² *Midland International Trade Services Ltd v. Al-Sudairy* (Q.B.D., 11 April 1990), *The Financial Times*, 2 May 1990.

resort to the Saudi judiciary to recover its claims where interest is contrary to the public policy.

5.5.2 Banking Disputes in Neighbouring Countries

In comparison to Saudi Arabia, other neighbouring states that have their laws based on principles similar to Saudi Arabia, such as Egypt and the United Arab Emirates, have a different approach to the issue of banking interest in general.⁶⁶³ It should be noted that the Constitution of the UAE followed the Kuwaiti model and both Constitutions were drafted by Egyptian scholars and inspired by the Egyptian Constitutions, especially the Constitution of 1971.⁶⁶⁴ The approaches adopted by the neighbouring countries reflected their tolerance of interest in arbitral awards, as in some cases interest has been treated as being totally compliant with the public policy, like in the UAE, and in some cases interest is allowed with some restrictions, such as the case of Egypt. In Egypt, the law has recently been hesitant with regard to banking interest. Apart from the UAE and Oman, other GCC states do not have a clear answer to the question of whether interest is contrary to public policy. The hesitation is due to the fact that interest contradicts with the Constitutions of all these countries including the UAE itself; however, they do allow interest to be charged either on loans or as delay damages in commercial transactions.

In Egypt, as the pioneer of modern statute law in the Arab Countries, the issue of interest in general and in arbitral awards in particular has become theoretically vague in the last two decades as a result of the 1980 amendment of the Constitution and because the decisions of the Commercial Court contradict each other.⁶⁶⁵ For instance, article 227 of the Civil Code of 1949 stipulated that the contracting parties could agree on interest rates of up to 7%. On the other hand, basing on the fact that the amended constitution of 1980 identifies the Shari'a as the principal source of legislation, the Sheik of Alazhar brought a claim before the Supreme Constitutional

⁶⁶³ W. Ballantyne, 'The States of the GCC: Sources of Law, the Shari'a and the Extent to which it Applies', *Arab Law Quarterly*, 3 (1986), pp. 1-18.

⁶⁶⁴ See generally B. Al-Muhairi, 'The Position of Shari'a Within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause Concerning Shari'a', *Arab Law Quarterly*, 11 (1996), pp. 219-244. The Kuwaiti Constitution was drafted by Abdulrazzaq Al-Sanhuri and the UAE Constitution was drafted by Professor Wahid Ra'fat, and both are well-known Egyptian jurists.

⁶⁶⁵ S. Habachy, 'Commentary on the Decision of the Supreme Court of Egypt Given on 4 May 1985 Concerning the Legitimacy of Interest and the Constitutionality of Article 226 of the New Egyptian Civil Code of 1948', *Arab Law Quarterly*, 1 (1985), pp. 239-241.

Court pleading against a lower court judgment obliging *Alazhar* to pay the debt and the 4% interest on it according to the relevant article of the Civil Code of 1949. The court dismissed the case, arguing that “the Shari’a rulings cannot be applicable to the already existing legislation retroactively without creating confusion and instability for the commercial and judicial process”.⁶⁶⁶ However, the Sheik of Alazhar himself, in his well-known fatwa, allowed interest on banking deposits, as he said: “*riba is haram but banking interest is halal*”. Sheik Alazhar Muhammad Sayed Tantawi was the first respectful figure in the Islamic world to give such an opinion. The fatwa itself can also be regarded as a shift in the attitude of many Muslims toward banking interest, even though the Sheik himself put some restrictions on the application of interest in various contracts where the main condition is not to take advantage of the hardship of debtors and also not to enhance the difference between the classes of the society.⁶⁶⁷ The Sheik of Alazhar’s fatwa encouraged some Islamic banks to adopt various methods to calculate interest charged on loans and cover it with different names which result in a similar interest rate to conventional loans or even a higher rate on some occasions.⁶⁶⁸ There is another opinion given by some Egyptian scholars with regard to banking interest, but it proved to be based on a misunderstanding of the mechanism of interest. This opinion suggests that a fixed interest rate is prohibited and a variable interest rate is permissible. It can be said that variable interest rate does not differ from the fixed one as interest will be charged in both cases but with a different manner of calculation, and instead of determining the rate at the beginning of the agreement, the rate would be reviewed at the beginning of each sub-period into which the loan is divided.⁶⁶⁹ On the other hand, the decisions of the Egyptian Courts, even after the claim of the Sheik of Alazhar, did not pay any consideration to the argument that interest violates the Constitution. The Court of First Instance at the South of Cairo decided that the Egyptian Government represented the Ministry of Finance and the Taxation Department should pay an operator of a hotel the amount of

⁶⁶⁶ F. Nomani, ‘The Problem of Interest and Islamic Banking in a Comparative Perspective: The Case of Egypt, Iran and Pakistan’, *Review of Middle East Economics and Finance*, 1/1 (2003), pp. 37-70.

⁶⁶⁷ See the fatwa of *Majma’ Albohouth Al Islamiya Bil Azhar*, “the Islamic Research Committee of Alazhar”, concerning banking interest dated 23/09/1423 H. 28/11/2002, Cairo, Egypt.

⁶⁶⁸ One of the methods is what is called cost plus profit, where the bank estimates the real value of the principal on the maturity date and adds what they consider as administrative fees, which sometimes result in a rate that is higher than the conventional rate; however, according to this method, banks are not allowed to charge any additional fees after the maturity date.

⁶⁶⁹ *Supra* 560, Tarek, p. 137.

33,320.13 Egyptian Pound as compensatory interest for late payment of three years.⁶⁷⁰

The confusion created by the amendment of the Constitution did not apply to the legal system as courts continued to regard charging interest as part of the public policy of Egypt.

Conversely, the legality of the practice of charging interest in the UAE is not disputed as the law has integrated it as a fundamental practice to the extent that charging interest is not a matter of conflict, and if there is a dispute, it will be about when to charge it and how much the rate is. For instance, article 76 of Federal Law No. 18 of 1993, or what is known as Commercial Transactions Law, emphasised on the right of a commercial debtor to charge interest, as article 76 states: “*A creditor is entitled to receive interest on a commercial loan as per the rate of interest stipulated in the contract. If such rate is not stated in the contract, it shall be calculated according to the rate of interest current in the market at the time of dealing, provided that it shall not exceed 12% until full settlement*”.⁶⁷¹ The structure of the economy and the ruling system has contributed to the relaxed regulatory attitude toward many traditionally controversial issues and represented *riba* as a normal and even necessary practice in the economic life in the UAE.⁶⁷² As a result, interest became an established principle within the UAE law; it is not considered as a religious dilemma and it is not even faced with opposition like in Saudi Arabia or Egypt.⁶⁷³ Furthermore, it has been argued that the Dubai International Financial Centre enjoys actual independence in the fields of civil and commercial law, with the express authorisation of the amended UAE Constitution, which introduced common law-based regulations. The regulators did that hoping to attract foreign investment even at the expense of the established principles of the society. Some commentators added that Law No. 18 of 1993 concerning commercial transactions is an attempt to circumvent the application of the Shari’a in commercial matters.⁶⁷⁴

⁶⁷⁰ The Court of First Instance at the South of Cairo, decision No. 4615 of 1992. see also, The Supreme Court of Egypt decisions No. 93/6/7 of 1996 and decision No. 26/16/8 of 1996.

⁶⁷¹ The UAE Federal No. 18 of 1993, Commercial Transactions Law, article 76.

⁶⁷² H. Tamimi, ‘Interest under the UAE Law and as applied by the Courts of Abu Dhabi’, *Arab Law Quarterly*, 17 (2002), pp. 50-52.

⁶⁷³ This is due to the various degrees of influence of the religious institutions on the regulatory bodies and on the public. It can be said that Shari’a has very little influence on the commercial law of the UAE.

⁶⁷⁴ A. Carballo, ‘The Law of the Dubai International Financial Centre: Common Law Oasis or Mirage within the UAE?’, *Arab Law Quarterly*, 21 (2007), pp. 91-104.

One of the similarities between the mechanisms that banks employ in paying interest on deposits in the UAE and Saudi Arabia is the way of stipulating. As a general rule, banks in Saudi Arabia and the UAE do not pay interest unless the client requests it; however, the main difference is that in Saudi Arabia there are no certain rules to regulate interest and everything is based on the market practice and the terms of the contract. In the UAE, the law provides for the interest rate to be determined by agreement between the parties and in the case of not specifying the interest rate, the rate would be determined by the common interest rate in the market provided that it does not exceed 12%.⁶⁷⁵

Bearing in mind that the UAE is a Muslim state having the Shari'a as a principal source of legislation, it has been noted that the economic necessity led it to change its view of interest, which led to allowing interest in commercial matters first, and then interest became an ordinary practice in all areas of commercial activities. As an obvious violation of the Shari'a, the UAE law allowed for, what some Scholars call, the obvious *riba* or *riba aljahiliyah*, which is the *riba alnasi'ah* discussed above. This kind of *riba* cannot be circumvented and the law allowing it reads as follows: "*Where the contract stipulates the rate of interest and the debtor delays payment, the delay interest shall be calculated on the basis of the agreed rate until full settlement*".⁶⁷⁶ Another article in the same law stated clearly that the debtor is obliged to pay interest over the debt to the creditor subject to their agreement.⁶⁷⁷ Consequently, charging interest is not disputed at all and the latter ceiling for the interest rate is also upheld by the case law. It can be said that in the absence of an agreement between the parties on the interest rate, the UAE law allows simple interest to be charged on all financial transactions within the limit of 12% per annum. The same rule also applies to the delay interest as a means of compensation or what is known in Shari'a as *riba aljahiliyah*.

In a case decided in 1980, the Federal Supreme Court had considered certain provisions of the Abu Dhabi Code of Civil Procedure that expressly allowed interest. The statutory language under review in 1980 provided that the rate of interest

⁶⁷⁵ Commercial Transactions Law of the UAE article 399.1. A

⁶⁷⁶ Ibid., article 77. See also, article 7 of the Federal Constitution of the United Arab Emirates of 1971.

⁶⁷⁷ Ibid., article 409.3.

determined by the court may not exceed the rate of interest agreed upon by the parties, or upon the basis of which they transacted, and that in the absence of an agreement the court may determine the rate provided that it does not exceed 12% with respect to commercial transactions and 9% with respect to non-commercial transactions. In its 1980 judgment, the Federal Supreme Court held that these statutory provisions were constitutional, but that banks would not be permitted to charge rates of interest in excess of 12% and that only simple interest would be allowed. In the current case, the Federal Supreme Court first considered an objection by the borrower that all interest-bearing transactions were void pursuant to Article 714 of the Civil Code (promulgated pursuant to Federal Law No. 5 of 1985). Article 714 provides that if a contract of loan provides for a benefit in excess of the essence of the contract, then such a provision will be void. However, the Federal Supreme Court held that the Civil Code did not apply to banking transactions, which were commercial by nature and were therefore governed by the Commercial Code. The Federal Supreme Court therefore held that the borrower's challenge to the entirety of the interest owed to the bank could not be sustained. However, the Federal Supreme Court agreed with the borrower's challenge to the bank's attempt to collect interest in excess of 12% and held that the interest rate ceiling established by the 1980 judgment continues to apply.⁶⁷⁸ In the decision of the Federal Supreme Court of Abu Dhabi No. 245/20 dated 7 May 2000, the Court established that charging interest in excess of the statutory ceiling of 12% per annum is permitted as long as the parties agreed to it. In accordance with article 76 of the Commercial Transactions Law of 1993, the Court did not distinguish between interests charged before or after the maturity date and the Court argued that the statutory limit should apply in the absence of such an agreement.⁶⁷⁹ The scope of judicial review under the UAE law is very limited compared to that of Saudi Arabia. Apart from the general grounds provided in article 5 of the New York Convention of 1958, no obvious obstacles for the enforcement of arbitral awards can be found in Saudi Arabia, which might be due to the fact that the economic situation in that country forces the legal regime to be more tolerant in this respect.⁶⁸⁰

⁶⁷⁸ Ibid.

⁶⁷⁹ Supra 621, Tamimi. See also, the UAE Supreme Federal Court decision dated 06/09/1983.

⁶⁸⁰ N. Angell and G. Feulner, 'Arbitration of Disputes in the United Arab Emirates', *Arab Law Quarterly*, 3 (1988), pp. 19-32.

To sum up, interest is not considered as an impediment to arbitration at all in the UAE as it has become an essential element of the economy and the legal system. Some may argue that arbitral awards providing for interest can be challenged in Egypt on the grounds of its contradiction of the Constitution, i.e., the Islamic Shari'a. This argument is still theoretical only, and setting aside an arbitral award in Egypt on the grounds of interest is not likely to happen as the Egyptian Courts have their own rules of determining and enforcing interest obligations.⁶⁸¹

5.5.3 The Committee for the Settlement of Banking Disputes

The Committee for the Settlement of Banking Disputes is the only authority in Saudi Arabia that recognises charging interest as a valid practice. The Committee is competent to settle disputes arising out of the conduct of banking business between banks and customers, and disputes between commercial banks in Saudi Arabia. Settlement of cheques and negotiable instruments disputes were excluded from the jurisdiction of the Committee as they fall under the jurisdiction of the Committee for the Settlement of Negotiable Instruments Disputes and the Shari'a courts in some cases. If *Diwan Almazalim* finds an arbitral award to be contrary to the public policy and the dispute relates to banking business, the *Diwan* will refer the whole case to the Committee to be decided anew, as one of the remedies available to the parties to the dispute. In the following paragraphs, the procedure of the Committee will be described with reference to the available cases and materials.

First of all, it should be noted that the Committee was established as a compromise between Shari'a and economic interest in order to remove the burden from Judges who face a religious dilemma when deciding on disputes related to banking business. The dilemma occurs because of the gap between the legal right of the bank to collect the amount of interest in full, as stipulated in the agreement between the parties following the principle of *pacta sunt servanda*, on the one hand and the fact that the whole transaction is unacceptable under Shari'a on the other. It should also be noted

⁶⁸¹ See *Southern Pacific Properties (Middle East) Limited [SPP(ME)] v. Arab Republic of Egypt*, Case No. ARB/84/3. ICSID report (1st edn., Cambridge University Press, 1995), p. 242.

that there are no statutory rules of procedure for the Committee and proceedings rely fully on the practice.⁶⁸²

In Saudi Arabia, legal prosecution concerning banking disputes or financial claims in general may be brought initially to the Civil Rights Department under the Ministry of the Interior, or what is known as *Alhoqooq Almadaniyah*, which in its turn will refer the case to the Committee for the Settlement of Banking Disputes. The claim can be initiated directly to the Committee or through the Regional Governorate, or what is known as *Al Amarah*, and all these bodies will refer the case to the Committee. In the case of bringing the claim before the Civil Rights Department, the Department has the right to take action against the debtor to force him to pay off the debt if it finds the claim to be genuine. If the debtor challenges the claim either in full or in part, the whole case is sent to the competent authority, which would be the Committee for the Settlement of Banking Disputes in the case of banking disputes.⁶⁸³

After obtaining approval to look at the dispute, the secretary of the Committee will then notify the respondent of the claim, attaching a copy of the claim and asking him to respond to it within one month. All claim notifications must be in writing and in full detail. Such details include the names of the parties, the nature of the relief or order applied for or the directions sought from the Committee, the names and addresses of the persons on whom it is intended to serve the application and the applicant's address for service in addition to the signature of the applicant or his representative. The applicant may state the amount of his claim in foreign currency. Notifications of claims, hearings and decisions are sent through the claimant bank to the respondent if he is a customer; in the case of having another bank as a respondent, the secretary will notify him directly.⁶⁸⁴ The secretariat prepares a report about the suit, and in some cases, an accountant is called by the Committee to check the amount of the claim. The Committee may also order a deposit by way of security for the administrative fees. It has been noted that accountants mainly admit banking service charges, as a substitute term for interest, until the end of the facility agreement between the parties. In this way, no tacit renewal of the facility can be claimed unless

⁶⁸² Supra 596, Alameldin.

⁶⁸³ Ibid.

⁶⁸⁴ Ibid.

it is proved that an amount was withdrawn by the customer after the end of the facility agreement, and in such cases, interest can be granted up to the date of the later withdrawal. The Committee used to consider such an accountancy report as final and binding on the parties without giving the parties the chance to challenge it or even to know its content, and the Committee gave the parties a notice of it during the hearing only. The Committee appoints a venue for the hearing, which is usually the Headquarters of the Saudi Arabian Monetary Agency in Riyadh. The hearings are held in private and the attendance is restricted to the parties to the disputes or their authorised lawyers; however, the power of attorney must contain the right to settle and transact on behalf of the principal. The Committee looks at the case as it was on the day of its presentation to the Civil Rights Department or to the Committee, but the amount of the claim can be amended. A written record of the examination is made and signed by the plaintiff and the defendant, which is considered as evidence against any statement that the debtor makes during the examination.⁶⁸⁵

According to the Royal Decree providing for the establishment of the Committee, the Committee was formed in order to find solutions for banking disputes, and in the case of not reaching a fair settlement between the parties, the Committee should refer the case to the competent authority because the Committee is not a judicial body.⁶⁸⁶ In practice, the Committee does not follow the instructions of the Royal Decree and it tries to impose its own view on the parties even if the parties or one of them rejects the proposed solution. If the parties accept the proposed, or sometimes imposed, settlement and the parties conclude a transaction agreement, the Committee will add the following statement to the award: “This decision is considered an injunction enforceable by the authorities legally competent”. Nonetheless, if the parties or one of them refuses the proposed solution, the award will not include the latter statement, which shows the conciliatory nature of the Committee’s decisions, or in other words, the Committee’s decisions are treated in the same way as conciliation awards, which are non-binding on the party who reject to accept it. As a general rule, the decisions of the Committee are binding and enforceable; however, it has been noticed that the Civil Rights Department found difficulties executing the decisions of the Committee either because of a lack of clear instructions concerning the execution of the

⁶⁸⁵ Ibid.

⁶⁸⁶ See the Circular of the Minister of Interior No. 10207 of 07/02/1407 H. (1987).

Committee's decisions or because of the unwillingness of the debtors to pay off their debts, and all that might be due to the fact that the Committee is not a judicial body.⁶⁸⁷ Another reason for the weakness in the decisions of the Committee is the possibility that the decisions of the Committee can be challenged before *Diwan Almazalim* on the grounds of contradicting the public policy. In one of the *Diwan's* cases, the losing party, i.e., the debtor to the bank, argued that SAMA, when instructing the losing party to pay interest, did not violate the Shari'a only, it violated even its own charter that prohibits SAMA from acting in any manner contradicting with the Shari'a. The *Diwan* did not issue a decision for this dispute as the plaintiff requested a stay of proceedings, as the plaintiff reached a settlement with the bank outside the *Diwan*.

As an attempt to add some strength to the decisions of the Committee, the Minister of Finance advised the Ministry of the Interior that the decisions of the Committee are final, enforceable and unchallengeable and asked the Minister of the Interior to put on more pressure to oblige debtors to pay off their debts, because the delay in the payment would have a negative effect on local banks and on the economy as a whole. Nonetheless, the enforcement of the Committee's decisions through the Ministry of the Interior faced many obstacles which led the Ministry of Finance to impose its own measures to ensure the enforcement of the decisions of the Committee. As a remedy, plaintiffs can ask the Committee to place the defendant's name on a blacklist in order to prevent him from travelling abroad and prevent banks from giving him new facilities. Moreover, the Committee can freeze or seize the defendant's banking assets; however, there has been a dispute about whether the Committee can freeze or seize all the moveable and immovable property of the defendant. It can be observed that in most cases the Committee cannot order a seizure of the defendant's non-banking assets unless it is pledged as a security against the debt for the reason that such orders must be made through one of the bodies of the Ministry of Justice or *Diwan Almazalim*, and these bodies will not usually approve such actions if the seizure is to be made to recover a claim of banking interest; but if the claim is brought to recover the principal only, the *Diwan* or the Shari'a court will usually approve it. Appeals can be made through the Governor of the Saudi Arabian Monetary Agency, the Minister of Finance or to the Committee directly.

⁶⁸⁷ Supra 596, Alameldin.

Since it was founded in 1987, the Committee has been facing some problems, making it unable to serve the objectives of its establishment. First is the absence of clear procedural rules, as there are no procedural rules for the working of the Committee and all the proceedings are done in a vague manner. Second is the lack of enforceability of the Committee's decisions, which can be considered as the biggest problem faced by the Committee. This issue makes the Committee totally dependent on other governmental bodies such as the Ministry of the Interior, the Ministry of Justice and *Diwan Almazalim*. The dependence on other governmental bodies for enforcing the judgments of the Committee is not a problem on its own as all other judicial bodies rely on some other authorities to enforce their decisions; the problem occurred as a result of the contradiction between the principles applied by the other bodies, i.e., the Ministry of Justice and the *Diwan*, and the principles applied by the Committee. For instance, in cases where a real property is pledged to the debt, the enforcement of the agreement will face great difficulties when authenticating the agreement at *kitab aladl* and when reaching *Diwan Almazalim* to obtain the order to sell the pledged property, since the *Diwan* might not approve the selling of such property for the recovery of interest.⁶⁸⁸ Moreover, banks have some problems with securities other than real property, especially in the case of guarantees. Guarantees under the Saudi law can be classified into two types; presence guarantee, or what is called "*Kafalah Hodouriyah*", is where the guarantor guarantees the presence of the debtor before the official authorities only. The other type of guarantee can be translated as a full guarantee or "*Kafalat Ghorm wa Ada*"; in the existence of this kind of guarantee, the bank has the option of claiming the debt from the guarantor directly, but in practice the bank should exhaust all of the available remedies before claiming the payment from the guarantor. The main problem associated with such guarantees arises when the amount of the claim is not stated in the letter of guarantee provided by the guarantor. The guarantee will be considered void and of no effect or the amount claimed by the guarantor will be considered as the correct amount.⁶⁸⁹

⁶⁸⁸ See for details: The Commercial Mortgage Act, Royal Decree No. M/75 dated 21/11/1424 H. (2004). *Umm Alqura Gazette*, issue No. 3981 dated 07/01/1425 H. (2004).

⁶⁸⁹ *Supra* 596, Alameldin.

Third, similar to conciliation, the acceptance of the award by the parties is an essential condition for the enforcement of the award and that shows the conciliatory nature of the Committee's decisions. Fourth, in addition to the absence of clear procedural and substantive rules and due to the fact that none of the members of the Committee have a legal background, the Committee cannot function as a judicial body and some of its decisions even seem to be impractical and harmful on the parties, like in the case of rescheduling a debt in annual instalments for 20 years with a fixed interest. In this case, a debtor refused to pay his instalments due to some financial difficulties. The defendant presented an official document issued from the Shari'a court stating that he was unable to pay off his debt and he should enjoy very flexible terms of repayment.⁶⁹⁰ The Committee calculated the amounts claimed by the bank and divided it by 20 years instead of five years. The decision was accepted by both parties as being the last resort for the bank.⁶⁹¹ In another case, the Committee totally cancelled the interest in exchange of the repayment of the principal in cash. The decision is seen to be reasonable in normal circumstances, but in this case the bank had to accept the decision after more than two years of not receiving any payment for the facilities granted to the defendant, which means that the defendant enjoyed an interest-free loan.

It has been noted that in many of its decisions the Committee rescheduled debt claims for various periods ranging from five years to up to 30 years. Nonetheless, the Committee could issue relaxed decisions if it finds the defendant willing to pay the full amount in cash. Such relaxations include discounting part of the interest as in the following example: a businessman borrowed an amount of S.R 19,000,000 from one of the commercial banks in Jeddah. The parties stipulated on charging interest at the rate of 5.5% per annum for five years. Following the market depression in the late 1990s, the businessman was unable to pay the instalments for 14 months and that was due to some financial difficulties. The bank brought a claim before the Committee asking for the payment of the principal plus the stipulated interest in full or a direct liquidation of the collateral in accordance with the terms of the contract. The

⁶⁹⁰ This kind of document is known as *Saq E'isar*; one of the main advantages of obtaining such a deed can be the very relaxed repayment terms as such documents are issued for insolvent persons.

⁶⁹¹ This case and the following cases have been provided by one of the commercial banks in Saudi Arabia and the author is not allowed to disclose any information that might give any assumption of the identity of the parties to the dispute, by either providing numbers, dates or names, etc.

Committee, during the hearing, proposed that the businessman could end the dispute if he paid the principal in cash and the bank should exclude 50% of the outstanding claim of interest; the parties agreed on that.⁶⁹²

Following the Stock Market crash in early 2006, the Committee has been experiencing some difficulties dealing with the large number of disputes between banks and their clients, vice versa with regard to banking facilities granted to buy shares with the guarantee of existing shares owned by debtors. This kind of dispute started to appear as a result of the common banking practice of selling the securities when the market value of it falls below a certain limit without notifying the clients even though it is a violation of SAMA's regulations.⁶⁹³ For many years, securities related disputes provide one of the most frequent occasions for arbitration in the financial service industry.⁶⁹⁴ However, until recently, commercial banks used to conduct stock brokerage directly, not through a specialised subsidiary, which raised the suspicion that banks contributed to the crisis because of the conflict of interest between conducting stock brokerage, holding shares as debt security and managing speculative funds. This problem was also worsened by the ill supervision of the Capital Market Authority, who denied supervision of the practices of the commercial banks because it fell under the competence of SAMA, and SAMA in its turn denied the responsibility because such activities related to the stock market and the Capital Market Authority should have been in the position of supervising such activities.⁶⁹⁵ The settlement of such disputes would take a long time because the competence of this kind of dispute is still a matter of conflict between the Committee for the Settlement of Securities Disputes of the Capital Market Authority and the Committee for the Settlement of Banking Disputes, and also because of the large number of disputes. Such disputes related to banking business for the reason that they arose out of the execution of banking transactions, and they could also fall under the jurisdiction of the Committee for the Settlement of Securities Disputes of the Capital Market Authority because they were related to price manipulation and they were related to the selling of securities without the owner's permission.

⁶⁹² Ibid.

⁶⁹³ See Circular No. 333/BC/200 dated 22/08/1413 H. (1993).

⁶⁹⁴ See generally W. Park, 'Arbitration in Banking and Finance' *Yearbook of International Financial and Economic Law*, ed., J. Norton, The Hague: Kluwer Law International (1997)

⁶⁹⁵ See generally, A. Baamir, 'Issues of Disclosure and Transparency in the Saudi Stock Market', *Arab Law Quarterly*, 22 (2008), pp. 88-108.

5.5.4 The Committee for the Settlement of Negotiable Instruments Disputes

Another competent body for the settlement of banking disputes is the Committee for the Settlement of Negotiable Instruments Disputes, which is competent to settle disputes arising out of negotiable instruments such as cheques, promissory notes and bills of exchange. Established by the Law of Negotiable Instruments, the Commercial Paper Committee is also known as the Office for the Settlement of Commercial Papers Disputes and has the jurisdiction to hear claims concerning bills of exchange, promissory notes and cheques only.⁶⁹⁶ The Negotiable Instruments Law provides the substantive legal provisions applied by the Commercial Paper Committee. The law largely reproduces the provisions of the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes of June 7, 1930 and for Cheques of March 9, 1931, even though Saudi Arabia has not become a party to the conventions themselves. The Law of Commercial Papers can be considered as a mixture of the Code of Commercial Courts of 1931 and the above-mentioned Conventions, with some modifications to meet the Shari'a requirements. For instance, as Shari'a forbids the payment and charging of interest, any provisions in the Conventions relating to prohibited practices under Shari'a were omitted from the Negotiable Instruments Law. In practice, this position has been applied by offsetting interest payments voluntarily made by the debtor, against the principal of the debt. The procedure before the Committee is subject to the provisions of the Code of Commercial Courts of 1931 and decisions may be appealed to the Minister of Commerce or to the Committee itself.⁶⁹⁷

Unlike the Committee for the Settlement of Banking Disputes where most of the submitted disputes occur between banks or between banks and customers, the majority of the disputes submitted to this Committee do not involve banks as parties. Banks try to avoid adjudicating to this Committee because it applies the Shari'a law and does not recognise the obligation to pay interest as a valid contract. At the same time, the Committee does not have the competence to award damages and all claims

⁶⁹⁶ See in general, The Law of Commercial Papers, *Nizam Alawraq Altejariyah*. Issued by Royal Decree No. 37 dated 11/10/1383 H. (1963). *Umm Alqura Gazette*, issue No. 2010 dated 15/10/1383 H. (1963).

⁶⁹⁷ Ibid.

for damages should be directed to the appropriate authority.⁶⁹⁸ With regard to *riba*, negotiable instruments related to usurious transactions are considered by the Committee to be void and of no value because the underlying contract is considered void.⁶⁹⁹ Appeals against the Committee's decisions are made either to the Minister of Commerce and Industry or to the Committee itself. When the decisions of the Committee become final, they are enforced by the Civil Rights Department who detain the losing party till full payment is made. The Committee is not really a committee and contrary to its name, it consists of one of the legal advisors of the Ministry of Commerce and Industry only, who is usually not a Shari'a-trained advisor. The legal advisor usually works as the secretary and arbitrator at the same time. The hearings of the Committees are held in the legal department of the Ministry of Commerce and Industry where the attendance is restricted to the parties to the disputes only. It has been noticed that the decisions of this Committee are easier to enforce than the decisions of the Committee for the Settlement of Banking Disputes for the reason that the decisions of this Committee do not contradict with the Shari'a. The decisions of this Committee are directly enforced by the Civil Rights Department, which will detain the respondent until full settlement of the claim is reached.

Unlike Saudi Arabia, the majority of the legal systems in the Muslim world have no problem with regard to arbitration in banking disputes, as it is treated in the same manner as other commercial disputes. In Saudi Arabia, the problem occurred because the principles of conventional banking contradict with the principles of the Shari'a, especially when it comes to some very sensitive issues such as interest. Nowadays, interest is the main motive for the banking system, which can be considered as the core of modern economies; nonetheless, the Saudi law did not give even a clear answer to the question of arbitrability of disputes in general and of banking disputes in particular, and referred the whole issue to the law on conciliation. The law on conciliation itself carries a great deal of ambiguity and conflict among the *Fiqh* Schools and that was added to the fact that there were no rules on conciliation in Saudi Arabia till now, and what is practiced over there is no more than a personal

⁶⁹⁸ See the decision of the Committee for the Settlement of Negotiable Instruments Disputes No. 82/1405 dated 08/05/1405 H. (1985).

⁶⁹⁹ The Committee for the Settlement of Negotiable Instruments Disputes, decision No. 67/1404 dated 11/04/1404 H. (1984).

effort to find pacific solutions to disputes or to avoid litigation. Another issue that worsens the situation is the duality within the Saudi law. This duality is not a problem in itself, as if there are two straight lines, they can go in parallel without clashing and two different schools of thought can complement each other in many cases unless a fundamental point of conflict occurs between them, which is the case of interest in arbitral awards in Saudi Arabia. The contradiction between the two bodies of law with regard to interest is the main problem and it has caused a great deal of uncertainty in relation to arbitration, as the Shari'a prohibits all forms of banking interest and the Saudi law does not enforce this prohibition. After being the best solution for banking disputes, it can be concluded that arbitration becomes a less attractive method for the settlement of domestic conventional banking disputes for the reason that the Committee for the Settlement of Banking Disputes offers a better chance for recovering interest claims. Moreover, arbitration for banking disputes tend to be more risky as the *Diwan* will consider arbitral awards providing for the payment of interest as contrary to the public policy and it will refuse the enforcement either in part or in full. In the latter case, the *Diwan* will either exclude the interest from the award or refer the whole dispute to the Committee for the Settlement of Banking Disputes to be decided anew, and that is a waste of time and money and weakens the credibility of arbitration as a fast, cheap and effective dispute settlement mechanism. It was also noted that banks attempted to avoid the jurisdiction of the Saudi judiciary in international banking contracts and tried to apply a mechanism in which the Saudi law would have no influence on the transaction in general and on the settlement of disputes in particular.

The future of the semi-judicial Committees is not yet clear as the new law of Judiciary stated that such Committees should be incorporated in the proposed commercial courts that should be formed in the next couple of years.⁷⁰⁰ The Law first calls for a reform in the procedural law before joining the specialised committees within the competence of the Ministry of Justice.⁷⁰¹ The new Law excluded some of the committees from this merger because it deals with some sensitive issues on the one

⁷⁰⁰ These Committees are: the Committee for the Settlement of Negotiable Instruments Disputes; the Committee for the Settlement of Commercial Disputes, the Committee for the Settlement of Labour Disputes, the Committee for the Settlement of Media Disputes, The Committee for the Settlement of Securities Disputes, The Committee for the Settlement of Customs Disputes and the Commercial Departments of *Diwan Almazalim*.

⁷⁰¹ See article 9.1 of the Law of Judiciary of Saudi Arabia.

hand and on the other hand, because Shari'a judges are not qualified enough to decide on them. The law excluded the Committee for the Settlement of Banking Disputes, the Committee for the Settlement of Securities Disputes and the Committee for the Settlement of Customs Disputes.⁷⁰² There are a few reasons behind excluding the Committee for the Settlement of Banking Disputes from the expected merger: first, the Ministry of Justice, when upholding the practice of *riba*, violates the Constitution of the Kingdom, especially articles 1 and 7 which regard the Quran and the *Sunnah* as the main sources of legislation, and these sources state clearly that *riba*, speculation on banking assets like shares and bonds, is forbidden. Second, recognising *riba* contradicts with the main objectives behind the establishment of the Ministry as a tool to apply Shari'a in daily life and it also violates the law of Judiciary which states that the Shari'a prevails over all man-made regulations.⁷⁰³ Finally, it can be said that the reason for excluding the Committee for the Settlement of Banking Disputes from the competent of the general judiciary is exactly the same reason for establishing it in the first place.

As an issue related to arbitration, the Saudi judiciary suffers from the lack of judges in general and specialised judges in commercial matters in particular. This is due to the nature of the training received by judges, who do not receive enough training in modern commerce, and even if they have received some, the training programmes are neither efficient nor sufficient. The curriculums of the Shari'a faculties and the High Institute of the Judiciary totally depend on the classical Shari'a treatises that had been written a few centuries ago before the creation of the current business practices. Moreover, it has been difficult to find people who are qualified well in Shari'a and commercial laws equally. Even if that person is found, like in the case of some experienced lawyers, such a person must hold a Shari'a degree in order to be appointed as a judge, in addition to some hidden requirements. The old guard within the Ministry of Justice considers any attempt of reform as a threat to the application of Shari'a in Saudi Arabia, and Shari'a in their view should be kept in the same way that it is applied by classical scholars. Such attitudes resulted in a conflict between the application of Shari'a and the economic interest that is not a result of the application

⁷⁰² See generally, Section three, articles 1 and 2 of the Law of Judiciary of Saudi Arabia.

⁷⁰³ See the Law of Judiciary of Saudi Arabia, issued by Royal Decree No. M/78 dated 19/09/1428 H. (2007). *Umm Alqura Gazette*, issue No. 4170 dated 30/09/1428 H. 12/10/2007.

of the Shari'a itself; it is a result of not developing the application of the Shari'a principles on the modern commercial life. The failure in updating the Shari'a teachings in Saudi Arabia had many negative impacts, where the difficulties faced in arbitration in banking disputes reflected the wider scene of daily life in the continuous conflict between the different schools of thought, nepotism, slow procedures, etc.

The application of the Saudi Arbitration law on banking disputes contradicts with the main objectives behind resorting to arbitration as a reliable, independent, swift and cheap dispute settlement mechanism. Unlike many arbitration rules, the arbitration agreement should be sent to the *Diwan* in order to obtain approval before the commencement of the arbitration. According to some officials at the *Diwan*, the ratification may take a period of between one and three months and in some cases it may take years! Furthermore, the law did not give a clear answer to the question of whether banking interest is prohibited; however, as a final conclusion, we can say that interest is prohibited in Saudi Arabia but the prohibition is unenforceable in the sense that the prohibition will only apply if there is a dispute before a Shari'a court. There are some other alternative remedies in case arbitration fails to serve its objectives, such as resorting to the Committee for the Settlement of Banking Disputes of the Saudi Arabian Monetary Agency, which would be the best solution in a case where the party is claiming the payment of interest; nonetheless, the decisions of this Committee are not binding on the party that rejects them. The avoidance of the jurisdiction of the Saudi judiciary have been proved to work on such occasions; however, if the enforcement is sought in Saudi Arabia, the Shari'a rules will apply and such steps of jurisdiction avoidance will not work.⁷⁰⁴

⁷⁰⁴ For more details on the mandatory application of Shari'a rules and Saudi public policy, please see p. 175-180 above.

Conclusions

As a necessary part of the main argument of this study, chapter 1 gave a brief history of arbitration under Shari'a as well as the development of the Islamic Shari'a law and the different schools of thought. It was noted in this chapter that the arbitration of the early times of Islamic history does not fundamentally differ from modern arbitration rules in many aspects, such as the formation of the arbitration agreement and its essential components as well as the applicable law and its sources. The chapter also includes the important elements needed to understand the Islamic law and the evolution of the four schools of thought. The chapter also showed how Prophet Muhammad and his companions employed arbitration in the settlement of different kinds of disputes, from financial claims to political conflicts regarding the leadership of the whole Muslim nation.

Chapter 2 discussed arbitration law under the fully developed Islamic law. The chapter started by drawing the difference between arbitration and litigation in Shari'a as a first step before comparing the teachings of the four schools on arbitration, from the formation of the arbitration agreement to the enforcement of the final arbitral award. The rulings discussed in this chapter are the foundations of the current arbitration law in Saudi Arabia, which can be seen if this chapter is looked at in conjunction with chapter 4, which is an analysis of the Saudi arbitration regulations of 1983 and 1985. It was seen that the differences in the legal status of arbitration led to different interpretations of the same legal texts in various areas, such as the revocability of the appointment of the arbitrators, the qualifications of the arbitrators, the finality of the arbitral award and the enforcement of the arbitral award. The chapter also showed that there is no substantial difference between the arbitration rules that Shari'a has been applying since the 7th century and the current arbitration rules of Saudi Arabia.

At first, chapter 3 gave a brief overview of the structure of the Saudi judicial bodies. The chapter also showed the influential factors of the law of Saudi Arabia, both external, like the French, Turkish and the Egyptian law, and internal factors, like the official Mufti. The chapter also demonstrated the shift in the governmental attitude

toward arbitration, which has gone through three different stages. Until the late 1950s, the Saudi government welcomed arbitration, as shown in the enactment of the Code of Commercial Courts of 1931, the participation in Wahat Alburaimi arbitration and the acceptance of the arbitration agreement in the Aramco dispute of 1955. The results of the Aramco Award changed the attitude toward arbitration and the Saudi government introduced a set of regulations to eliminate the use of international arbitration, at least in governmental contracts. However, it was shown that the openness of the economy, especially after the 1970s, forced the Saudi legislator to reactivate the use of arbitration again and the government had to reform its regulations and policies with regard to arbitration, which resulted in the enactment of the arbitration act in 1983, its implementing rules in 1985 and the ratification of the New York Convention in 1994. It was also shown that, although Saudi Arabia joined the ICSID Convention, it reserved the right to protect its petroleum industry as the main national wealth and as an important element of its national sovereignty and security. The chapter also showed the change in the way of dealing with foreign parties in oil concessions after achieving a degree of economic and political power greater than what it had in the 1933 concession. The increasing negotiation power was shown in the provisions of the later concession agreements from the Agreements with Japan Petroleum Trading Co. of 1957, the Auxirap Agreement of 1965 and the recent gas concessions of 2004.

Chapter 4 was an evaluation of the Saudi arbitration law and the judicial practice. The chapter examined the provisions of the Arbitration Implementing Rules of 1985 with reference to the available case law and the relevant regulations in effect in Saudi Arabia. The chapter also examined the public policy of Saudi Arabia, its sources, and its application and effect on arbitration practices, which proved to be fundamentally different to the types of legal systems that Western lawyers are used to. The scope of public policy in Saudi Arabia is too vast compared to its neighbouring countries.

Chapter 5 examined the issues relating to arbitration as a mechanism for the settlement of conventional banking disputes in Saudi Arabia. The chapter started by answering the question of arbitrability of banking disputes, which required a reference to the law on conciliation as provided by article 2 of the arbitration law of 1983. After that, the legal status of interest was examined both under Shari'a and under the Saudi banking regulations. That part of the chapter showed that, unlike Shari'a, the Saudi

statutes are silent regarding banking interest. Both banks and clients are facing losses because of this silence because, logically, if interest is prohibited, banks should not be allowed to charge it and if it is not prohibited, why do Shari'a courts dismiss it from any dispute brought before it? However, it was proved that arbitration is not the best mechanism to use in the settlement of banking disputes in Saudi Arabia for the reason that banking interest contradicts with the public policy of Saudi Arabia i.e. the Islamic Shari'a. This fact left some Saudis with two options to find other ways of financing in which the Saudi law has no effect on the transaction or at least move toward Shari'a-compliant financial instruments. The first trend was evidenced by the cases *Islamic Investment Company of the Gulf (Bahamas) Ltd. v. Symphony Gems NV and others* and *Midland International Trade Services Ltd v. Al-Sudairy*. The second option led to the development and the spread of Islamic banking as a reaction to the illegality of conventional banking in case of a dispute. The alternative remedies, in case arbitration failed to serve its purpose, varied depending on the parties in the disputes. Despite the non-binding nature of the decisions of the Committee for the Settlement of Banking Disputes of SAMA, it provides a better settlement in a case where all of the parties are of Saudi nationality. On the other hand, the existence of a foreign element in a dispute expands the variety of choices for the parties and international arbitration can be a possible solution. In all events, the Shari'a law will apply to any case if an enforcement of a foreign arbitral award is sought in the Kingdom. The chapter also compared the treatment of conventional banking disputes under the Shari'a, the Statutes and current practices in the Saudi banking industry with the laws of some neighbouring countries of Saudi Arabia, namely Egypt and the UAE. It was also seen that Saudi Arabia is the only place where the recovery of interest is not guaranteed at all.

Main Findings

The following are the main findings of this thesis:

- The Shari'a regulates arbitration tightly compared to its time. There is no fundamental difference between the classical Shari'a arbitration rules and the Saudi Arbitration regulations, which are the codification of the Hanbali law on arbitration.
- Although the Shari'a established adequate methodologies for updating its teachings, Muslim states are not employing them as they really should.
- Under the Hanbali law on arbitration, there is no substantial difference between arbitration and litigation.
- The Saudi law in general heavily depends on some very traditional Shari'a treatises and methods that need some revision.
- Arbitration has existed in the Saudi law since the 1930s but it was not activated until the 1980s.
- There is a difference between Islamic law and Saudi law. The latter one is more comprehensive as it includes Islamic law and the borrowed codes and acts of other laws.
- The Saudi law is silent on some controversial issues that were left without clear answers and the legality of banking interest is one of them.
- The legal impacts of the Aramco Award of 1958 are still in effect today. The regulatory impacts are represented in the restriction on resorting to international arbitration by the Saudi government and its entities under Article 3 of the Arbitration Act of 1983 and the reservation made on the ratification of the ICSID agreement.
- Unlike other arbitration laws, almost all kinds of disputes can be settled by arbitration in Saudi Arabia, and these include family and some criminal disputes such as murder and personal injuries.
- The legal status of banking interest under the Saudi law is not clearly defined and it is not clear whether riba contradicts with the public policy of Saudi Arabia.

- Banking interest is not likely to be recovered in the case of a dispute. Arbitration is not effective in the settlement of domestic conventional banking disputes in Saudi Arabia.
- Although resorting to the Committee for the Settlement of Banking Disputes of SAMA might provide a better solution, the decisions of the Committee are not strong enough to be enforced completely.
- The best way of recovering interest claims is to avoid the jurisdiction of the Saudi law in the underlying transaction and when drafting the arbitration agreement.
- The scope of public policy is too wide in Saudi Arabia as, in addition to the normal public policy restrictions, Saudi Arabia has conservative social traditions.
- Saudi regulators protect arbitration in Saudi Arabia from any possible regulatory competition through the compulsory application of the Saudi arbitration law on all disputes occur between Saudi parties.

Recommendations for Reform

The Saudi law of arbitration needs some reforms to enable it to serve as a real alternative dispute mechanism. Generally, there are many obstacles in the way of radical regulatory reform such as:

- The great influence of Diwan Almazalim on the arbitral proceedings.
- Problems relating to the enforcement of final arbitral awards.
- Lack of updated regulations.
- Lack of judges.
- Insufficient specialised training for judges and judicial staff.
- The existence of many elastic principles and regulations.

I will draw some recommendations for removing these obstacles and for reforming arbitration regulations in Saudi Arabia that I personally recommend and I expect it to take place in the coming reform to the arbitration act, which is expected to take place some time before 2010.

First, the influence of Diwan Almazalim should be restricted in the sense that Saudi Arabia should establish independent commercial arbitration centres to get rid of the time-consuming procedure of Diwan Almazalim, which might be due to the fact that the Diwan as well as the Ministry of Justice suffers from the lack of judges.

Second, the issuance of the final award or judgment is not the most important step in the process of settling any dispute; the full enforcement of the final award needs more strictness. Although the enactment of the Enforcement Code might improve the enforceability of court decisions and arbitral awards, I suspect it will not stop the selectivity in enforcement that the Saudi legal system generally suffers from.

Third, the application of the Shari'a principles should be developed to accommodate the current circumstances i.e. the ruling of the Shari'a should be codified without prejudice towards the established values of the Shari'a. Despite their weaknesses, the arbitration act of 1983 and its Implementing Rules of 1985 can be good models that should be followed in modernising the Shari'a.

Fourth, judges dealing with commercial matters should be specialists. The recent reform to the judiciary law was a good step forward, but Saudi judges need intensive training.

Fifth, the number of judges should be increased. The lack of judges contributed to the severe delay in the legal proceedings. The number of judges does not match with the workload placed on them, as recent statistics show that in 2006, only 690 judges decided on more than 691,000 cases, which explained the length of the procedure.⁷⁰⁵ I could not find official statistics for Diwan Almazalim as the supervisory body for arbitration proceedings in Saudi Arabia, but it is suffering from the same problem as well. The solution might come with the employment of some non-Shari'a degree holders, such as the graduates of the civil law departments. Such graduates can be appointed as judges after receiving enough training in Shari'a law.⁷⁰⁶

⁷⁰⁵ Ministry of Justice of Saudi Arabia, Annual Report of 1426/2006, p. 13.

⁷⁰⁶ Article 31.d of the Judiciary Law of 2007: a judge must hold a bachelor degree from a Shari'a faculty in Saudi Arabia. The law means that holders of civil law degrees are not allowed to be judges.

Sixth, the Saudi society has a kind of identity crisis, which should be resolved. The conflict occurs between the stereotypes of the Saudis as relatively religious individuals with strong conservative cultural traditions and the reality that indicates that they are like anyone else around them. For instance, unlike the reality, Islam strongly encourages Muslims to deal with all human beings in good faith regardless of their race, faith, gender, etc. Banking interest is a clear example of such conflict as interest is prohibited in Islam, but it becomes a socially acceptable anti-Islamic practice. The legal reform must be coupled with curriculums reform that makes everyone understand that good faith in any dealing is as important as Friday prayer, for example.

Seventh, as a part of the comprehensive legal reform, the issue of arbitrability of a dispute should be codified precisely. It is not enough to refer the question of arbitrability to the elastic rules of conciliation, which are not clearly defined even in classical Shari'a texts.

Eighth, the standards of transparency and publicity should be improved. Transparency is one of the most important elements of any successful legal system, which Saudi Arabia lacks. With the exceptions of protecting family and national security, all cases should be published and the relevant provisions of the law of judiciary with regard to the publicity of court proceedings should be activated.

Ninth, the banking control act of 1966 needs some fundamental reforms, as it seems to be quite out of date. Similar to other 1960s Acts, which were copied directly from similar Egyptian codes, the Act lacks many essentials such as a clear definition for the scope of "banking business" which ignores money lending, which is the heart of the banking industry.

Tenth, article 25 of the Implementing Rules, which provides for the Arabic language to be the official and the exclusive language before the arbitration panel, should be reviewed. According to that article, all communications should be made in Arabic,

and in the case of non-Arabic speakers, they should be provided with a translator. Despite communications with official authorities, this condition should be amended and left to the will of the parties to the arbitration agreement, as the application of this article might restrict the use of arbitration in Saudi Arabia for domestic disputes between nationals only.

Eleventh, the arbitration act should define some important procedural issues such as the term “days”. The Act did not determine whether the word days refers to working days or calendar days as in article 18, for instance, the period in which the Diwan accept appeals against arbitral awards is 15 days for the reason that public holidays in Saudi Arabia are too long.⁷⁰⁷

Twelfth, judges and officials in general should change their attitude toward the public as it is noticed that judges in particular lack professionalism. It is common in Saudi Arabia for judges to leave at any time before the hearing or work from 9 a.m. to 12 p.m. only when they should work from 8 a.m. to 2:30 p.m., which is another form of corruption.

Thirteenth, public policy should be defined and codified clearly and precisely to enable everyone to know the limitations imposed by the law, culture and religion. Such rules should be reviewed regularly in accordance with the changes in daily life.

Fourteenth, Saudi legislators should answer the question of whether banking interest is prohibited, because if it is not prohibited, why do courts not settle its disputes? On the other hand, if interest is prohibited, why do banks practice it under the supervision of the Saudi Arabian Monetary Agency? And who is responsible for the loss suffered by both the banks and clients?

Fifteenth, the regulatory mechanism should allow swifter actions to be taken to deal with new events, especially when Saudi Arabia is working on its new economic cities

⁷⁰⁷ According to article 2 of the Basic Law of Saudi Arabia, the country has two national holidays, which are *Eid Alfitr* and *Eid Aladha*, and for each of them, public authorities have a holiday of around 10-12 days.

where banks will have a major part to play in its establishment and development and after the accession to the WTO.

Sixteenth, Saudi Arabia should regulate the elastic principles under its law and replace them with more firm and precise rules. Many examples were shown throughout this thesis such as contract law, conciliation law and, to a lesser degree, banking regulation.

Limitations of the Research

Similar to any study on any topic on Saudi Arabia, the author struggled with many issues, notably bureaucracy and the lack of publicity of information, arbitral awards, court decisions and other official documents. Although Diwan Almazalim is obliged to publish all arbitral awards ratified by him, the Diwan treats all his decisions as secret material. There are no published arbitral awards, and even when visiting the Diwan in person, a researcher will be faced with many obstacles such as the complicated process of obtaining permission from the head of the Diwan, the poor retrieval system where a researcher has to search through thousands of documents, and after that, many related information cannot be published. All these obstructions led the author to seek assistance from the private sector directly and this thesis would have never been completed without the assistance of the members of staff of one of the commercial banks in Saudi Arabia, who allowed the author access to their sensitive material, provided that all kinds of information that gave any indication of the identity of all the parties to the dispute remained confidential. Other problems like the lack of literature on the Saudi law in general and on Saudi arbitration and banking law in particular; and the small number of arbitration awards were of obvious difficulty on many occasions. I would like to remind the reader that although some Arabic books in addition to some PhD theses have referred to this topic, they are in fact shallow and mainly descriptive.

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