# The Refusal of Foreign Arbitral Awards in Saudi Arabia on the Grounds of Public Policy – An Issue of Fairness and Justice

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**Abstract**

Saudi Arabia is a country which has gone to great effort to become part of the international commercial community which has required it to reform its international arbitration laws. The reforms have focused on aligning arbitration and enforcement practices with the rest of the world and to make the process easier for both foreign and local parties involved by giving them the freedom to choose terms and seats for arbitration. While this has been successful, the recognition and enforcement of awards in Saudi Arabia has been met with suspicion that refusal to enforce such awards on the grounds of public policy is taking place for motives other than what is afforded by the grounds of public policy, which is mostly founded on the protection of Sharia principles, in order to protect political or economic interests. This study seeks to establish whether or not such refusals on the grounds of public policy are fair and just, in that there is sincerity in their application. The study examines arbitration law in Saudi Arabia and its application, and though semi-structured interviews seeks to reveal the opinions of legal professionals working in private and government sectors. The results reveal that there is not much apparent scope for the abuse of the public policy privilege afforded by the New York Convention 1958 and that it was the overall opinion of legal personnel that the application of Sharia principles in public policy enforcement refusal were applied justly. The results also revealed, by a minority of respondents, that there is the possibility that public policy could be used for ulterior motives which would be unfair and unjust.

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## Chapter 1 Introduction

### 1. Introduction

Saudi Arabia is a country that has earned a reputation for refusing to recognize and enforce international arbitral awards based on the grounds of public policy. The problem has been blamed on Article V of the New York Convention because it leaves the door open for an award not being enforced on public policy grounds.[1] In order for the Convention to be successful, there is a need for Article V to be interpreted uniformly as part of the grounds for non-recognition afforded by the Convention, however, it has been argued that some of the grounds for refusal have been ambiguous and therefore, Article V may not be successful in achieving unity. This ambiguity refers to possible ulterior motives for using public policy to refuse foreign arbitral awards and this study is concerned with establishing if there is justice and fairness in this process.

With reference to Saudi Arabia, it has been suggested that it is a country that is misunderstood and has been mistaken for a country that wants to discourage the arbitration of foreign awards without considering or understanding local laws for foreign arbitration.[2] The present study will build on this idea by looking at the reasons for the refusal of arbitral awards and whether it is genuinely based on public policy and whether that public policy is itself a fair ground for refusal. More specifically, this study is concerned with the justice and fairness that is associated with the refusal to recognise and enforce an award which will also be determined in relation to the

[1]Gregory Mayew and Mark Morris, "Enforcement Of Foreign Arbitration Awards In The United Arab Emirates" (2014) 81(3) *Defense Counsel Journal* 285

[2]Abdulaziz Mohammed Bin Zaid, *The Recognition And Enforcement Of Foreign Commercial Arbitral Awards In Saudi Arabia: Comparative Study With Australia* (PhD Thesis, University of Wollongong, 2014).

intentions of the Saudi authorities for invoking the privilege of public policy afforded by the New York Convention. The intentions may be the genuine use of public policy to refuse awards in order to uphold the principles of Sharia, upon which public policy is based, or the intentions could be insincere where public policy is used as an excuse to refuse awards in order to protect commercial interests, in which case it would be an unfair and unjust use of public policy.

The enforcement of a foreign arbitral award defined by the Convention as including *"not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted*"[3] can be refused if it is contrary to public policy in Saudi Arabia. There is support for the idea for legal change in Saudi Arabia and that because Sharia law principles are different to western legal principles, at the time before the introduction of the new arbitration law, the Saudi Arbitration Code had a number of deficiencies.[4] Therefore, there was a historical need to reform the arbitration regime in the country so that the country could increase commercial activities with western nations.However, at the same time, the country has had to hold onto its principles of Sharia which it applies through the use of public policy.

Arab countries have had to change their approach to international arbitration to satisfy the needs of the business community because the use of international arbitration is

[3]*Convention on The Recognition and Enforcement of Foreign Arbitral Awards*Art 1 (2)

[4]Abdulrahman Mamdoh Saleem, "A Critical Study on How The Saudi Arbitration Code Could Be Improved And On Overcoming The Issues Of Enforcing Foreign Awards In The Country As A Signatory State To The New York Convention" [2012] *SSRN Electronic Journal*.

becoming increasingly necessary and is important for attracting business and investment[5].

There is also the fact that Saudi Arabia has moved in terms of award enforcement, both local and foreign, with the introduction of a new enforcement law in 2012 and that Sharia law is a compatible concept because it does not require the decision of a judge for an award that has been granted, however, if the opposing party does not want to enforce the award, then the judgement of an Islamic judge must be sought.[6] With new developments that have attempted to align Sharia principles upon which public policy is based, with international norms of arbitration, the present study will highlight the current situation in Saudi Arabia in terms of the aforementioned issues, i.e. the use of these principles for refusing to recognise and enforce foreign arbitral awards.

It is also recognised that local law is also to blame where the civil Procedure code allows non-enforcement of foreign arbitral awards[7]. In Saudi Arabia, the New York Convention also offers protection as the convention provides a safe harborthe country because it does not have to enforce awards from a non-Saudi body that are contrary to Saudi public policy which is based on Sharia principles. This situation is doubly beneficial to Saudi Arabia because it allows the country to participate in international dispute resolution while at the same time, protect its own public policy. While this may be suitable for Saudi Arabia, the country's negative attitude to the enforcement

[5]Abdulrahman Mamdoh Saleem, "A Critical Study on How the Saudi Arbitration Code Could Be Improved And On Overcoming The Issues Of Enforcing Foreign Awards In The Country As A Signatory State To The New York Convention" [2012] *SSRN Electronic Journal*.

[6]Anon, "The New En Forcement Law of Saudi Arabia: An Additional Step Toward A Harmonized Arbitration Regime" [2013] *Jones DayPublications*

[7] Ibid

of foreign arbitral awards stems from the conflict between Sharia rules upon which public policy is based and the principles of the New York Convention, therefore, the enforcement of foreign awards in Saudi Arabia is almost impossible, even after it signed up to the New York Convention in 1994. The relevant provisions of the 2012 Saudi Arbitration Law, the 50th Article part 2,statethat an arbitration award will be invalid "if it contains what is contrary to the provisions of the Islamic Sharia and public order in the kingdom"[8] and the 55th Article part 2 (B) which states "The order to execute the arbitration award in accordance with this law shall be done only after verifying the following….. It does not include what is contrary to the provisions of the Islamic Sharia and public order in the Kingdom".[9]

The issue of fairness and sincerity in Saudi Arabia is seen in a negative light.[10] The present study will examine whether this is a justifiable assertion. Saudi Arabia has been accused of being overly protective of their public policy and this therefore, raises the issue of whether or not the Saudi authorities, in their pursuit of protecting public policy, are being unfair and unjust to recipients of foreign arbitral decisions. Moreover, the present study will also serve to understand the public policy grounds for refusal to recognise awards which will further clarify whether there is justice and fairness in line with the aims of the study.

[8]*Saudi Arabia Law of the Council of Ministers* 2012 50th Article part 2
[9]*Saudi Arabia Law of the Council of Ministers* 2012 55th Article part 2 (B)
[10]Mark Fathi Massoud, "International Arbitration and Judicial Politics In Authoritarian States" (2014) 39(01) *Law & Social Inquiry*.p.1

Some countries actually receive an advantage from international arbitration which allows them to keep domestic control as well as attracting foreign investment,[11] and this includes Saudi Arabia. The reason that it attracts foreign investment is because international arbitration is something that happens outside of the domestic purview, removing the need for these types of states to create independent courts,[12] however, the enforcement itself takes place in the state by enforcing courts. The downside to this is that these countries are helped by the promotion of international arbitration to repress their judiciaries and the development of their legal institutions.[13] The present study hopes to verify whether or not these ideas are a reality, and it is important to note that the study seeks the views of those who are advocates of the recipients of foreign arbitral awards and those who are responsible for refusing awards based on public policy in order to ensure that a fair conclusion is reached.

### 1.1 Recent Legal Reforms

An overview of the legal reforms that have taken place in Saudi Arabia in relation to international arbitration and the processes of the recognition and enforcement of foreign awards is required here because it will reflect the current situation and also it will be shown that despite the apparent intentions of these reforms,this being to bring Saudi Arabia more in line with international norms for international arbitration, they are based on the preservation of Sharia principles or the dishonest preservation of political or economic interests, which could be seen as the unfair use of public policy to refuse awards.

[11]Mark Fathi Massoud, "International Arbitration and Judicial Politics In Authoritarian States" (2014) 39(01) *Law & Social Inquiry*.p.1
[12] Ibid 1
[13] Ibid 1

Since 2000, the country has embarked on a number of reforms. In 2007, a Royal Decree was issued to restructure the Board of Grievances, and part of this restructuring was to transfer jurisdiction over commercial disputes to the Commercial Division of the General Islamic Court. Therefore, there is more clear evidence that Sharia principles were prioritised, and in consideration of the fact that much public policy in Saudi Arabia is based on Sharia principles, such reforms can be seen as a move to protect public policy against international arbitral judgements.

In 2012, Saudi Arabia introduced an arbitration law which replaced the old law from 1983, the main idea being to overhaul the arbitration regime.[14] This was in response to the fact that the old law was not suitable for international arbitration and this was especially the case because there was difficulty in understanding Sharia law and the Arabic language. The new law provided the parties involved in arbitration more powers, more autonomy and importantly, it reduced the influence of the courts during the arbitration process.[15]

The new law was not only about local arbitration in Saudi Arabia but also related to international arbitration and was based on the UNCITRAL law model.This allows participating parties to choose the applicable law for their disputes and it also affords the parties choice over the rules that are used during their arbitration, however, this is only permitted if it does not inhibit the involvement of the Saudi courts and does not conflict with Sharia law.[16] Although this is a development that has been positively

[14]Khalid Alnowaiser, "The New Arbitration Law and Its Impact on Investment In Saudi Arabia" (2012) 29(6) *Journal of International Arbitration*.
[15] Ibid
[16] Ibid

received, it is wholly dependent on the Saudi courts' implementation and interpretation of this new arbitration law.[17]

Further evidence of the prominent importance of Sharia law principles in the legal framework in Saudi Arabia, despite the fact that there were intentions to allow parties independence in their dealings, was in the form of the Procedural Law. In 2013, the new Procedural Law was introduced for the Board of Grievances and Article 1 of this law says that the courts of the Board of Grievances, which were responsible for requests for the execution of foreign judgments and arbitral awards, should apply Islamic Sharia law.

Therefore, there is now a situation where the legal reforms in Saudi Arabia have moved to a certain extent towards more liberalisation, independence and autonomy (in terms of laws that apply to disputes and rules that are used during arbitration) however, at the same time, providing there is no conflict with Saudi law, or more specifically, Sharia principles which form the basis of public policy. Not conflicting with Saudi law or Sharia law has been emphasised here by the arbitration law and the Board of Grievances procedures. The application of Sharia principles raises questions about the refusal of awards allegedly based on these principles merely as an excuse to refuse awards. The study is not concerned with the Sharia principles themselves, rather it is concerned with such principles which form public policy being used to refuse awards.

[17]Khalid Alnowaiser, "The New Arbitration Law and Its Impact on Investment In Saudi Arabia" (2012) 29(6) *Journal of International Arbitration*

## 1.2 Significance of Research

The New York Convention allows nations to refuse to recognise and enforce foreign arbitral awards on the grounds of public policy, importantly, however, the convention does not define what public policy is and allows nations to interpret what constitutes public policy as they wish, because they are in the best place to establish their own public policy in terms of its interpretation. Saudi Arabia, in more recent times, has witnessed the introduction of reforms designed to bring Saudi Arabia in line with the rest of the world in terms of international trade and commercial activity, and while it is the intention of these legal reforms related to international arbitration to make doing business with Saudi Arabia easy and clear, the very same reforms also emphasise the dominant position of Sharia law, which is used as public policy to refuse awards.Therefore, this research is significant because it examines whether or not the refusal of awards on the grounds of public policy, in a situation where public policy is emphasised, is fair and just post-reforms for the system of arbitration in the country. Through understanding the application of public policy and the principle on which such policy is based, it may be possible to establish if a lack of recognition and enforcement of arbitral awards is just and fair. Therefore, this study will look at the inclusion of Sharia principles as public policy during the development of reforms and its clarity and implications for parties in relation to international arbitral agreements.

## 1.3 Contribution to Knowledge

Several studies have addressed the new Arbitration Law 2012, mainly focusing on the issue of arbitration and how it is conducted and the implications it has for commercial interests. However, the present study will address the historical accusation or

reputation that public policy is used unfairly in Saudi Arabia to refuse awards on the grounds of public policy. Therefore, the contribution to knowledge is focused on the issue of justice and fairness in the refusal of awards as well as a further understanding of the laws of arbitration and their application.

The results of this research will also form an invaluable resource for use by the Saudi Arabian courts and related countries, especially those governed by Sharia law in determining the effectiveness of the use of public policy as a viable, fair and just grounds for the refusal of recognition of foreign arbitral awards. This study will contribute to just and amicable decisions regarding foreign arbitral awards that conflict with public policy.

In conclusion, one of the contributions of the study is that it will contribute to the theory that is related to the influence that public policy has on foreign arbitral awards, especially within a context that considers Sharia law and cultural issues as well as the abuse of the New York Convention for domestic means. Moreover, it will contribute to the debate on whether such actions are justified and fair.

The research will also be an invaluable resource for all stakeholders in the arbitration process in Saudi Arabia, including contracting parties and the judiciary, and will help to provide clarity in a system that is marred by judicial conflict in Saudi Arabia. Ultimately, based on the findings of this study, it is hoped that practitioners can achieve just and amicable decisions regarding foreign arbitral awards that conflict with the public policy.

## 1.4 Background

There is acknowledgement that there must be limitations on the use of public policy in international law which includes avoiding national exclusiveness and prejudice. Withreference to English courts, there is encouragement to not invoke public policy too quickly, use common sense, be tolerant and exercise judicial restraint.[18]Saudi Arabia has been accused of not exercising restraint in this sense and being too quick in invoking public policy.

The issue of public policy and the enforcement of foreign arbitral awards has been approached from two angles, on one hand there is positivity that public policy can be used as a tool, and on the other handpublic policy can be a weapon.[19] On a negative note, in an international setting, public policy can be used as an exception to the use of foreign law or it can be used to stop the enforcement of foreign awards.[20]

Evidence for the benefit of the doctrine of public policy in the recognition and enforcement of foreign awards is the fact that public policy has been derived from sources other than the state, which include European and international law.[21]

There has been refusal to enforce arbitral awards based on the violation of public order[22]. The concept of public order is very complex and attempts to define it in doctrinal studies have not been satisfactory.It is where a judge has the power to reject enforcement if it is deemed to go against public order; the problem is, however, there

[18]Ibid p.202
[19]Loukas Mistelis, "International Law Association – London Conference (2000) Committee On International Commercial Arbitration "Keeping The Unruly Horse In Control" Or Public Policy As A Bar To Enforcement Of (Foreign) Arbitral Awards" (2000) 2(4) *International Law FORUM du droit international*.
[20] Ibid
[21]Charles N. Brower and Jeremy K. Sharpe, "International Arbitration And The Islamic World: The Third Phase" (2003) 97(3) *The American Journal of International Law*.pp.643 - 656
[22]Ahmed Ouerfelli, "Enforcement Of Foreign Arbitral Awards In Maghreb Countries" (2008) 25(2) *Journal of International Arbitration*. pp. 241 - 256

is no clarity over what public order actually is, and it is questioned as to whether it is domestic, international or transnational public order.[23]

The understanding of public policy differs because it is open to interpretation. With reference to a uniform definition of public policy in the context of arbitration, because there is no statutory definition of public policy, it is up to each state to define the idea.[24] For some jurisdictions, the idea is defined in the context of arbitration regardless if a contravention of public policy is raised; in other jurisdictions nuances exist between public policy as grounds for setting aside an award and grounds for refusing an award.There are even jurisdictions that are newly signed up to the New York Convention that have not yet dealt with the definition of public policy in the context of foreign arbitral awards[25]. There are also differences between jurisdictions in terms of how they define public policy, depending on whether they are civil law or common law jurisdictions.For civil law jurisdictions, the definition is based on the principles on which society rests and in common law jurisdictions,it is based on values of justice, fairness and morality.[26]

It is important to understand that for most countries, it is not enough that there is a violation of public policy, but the level of that violation is what needs to be considered and this differs from country to country. This is the case in Saudi Arabia where only part of an award would be enforced and the part of the award that contravenes Sharia is rejected. Other examples include that the violation should be 'clear' in Portugal, 'concrete' in Nigeria, 'evident' in Mexico, 'blatant' in Lebanon,

[23]Ahmed Ouerfelli, "Enforcement Of Foreign Arbitral Awards In Maghreb Countries" (2008) 25(2) *Journal of International Arbitration*. pp. 241 - 256
[24]IBA Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention (2015)
[25] Ibid
[26] Ibid

and ‘severe’ in Germany.[27] However, although there is this requirement for a certain level of intensity in the violation, there is no uniformity between jurisdictions in the extent of the review by the courts, though it is important to note that there is uniformity between the different jurisdictions in that the review is limited to a conformity check of the arbitral decision itself and not the reasons behind it.[28]

### 1.5 Conceptual Framework

In order to understand the concept of fairness and justice, it is necessary to understand the different approaches to the ideas of justice and fairness. Rawls introduced the idea of distributive justice which is based on the idea of how benefits and burdens and economic resources should be distributed, and any discussions that take place about distributive justice consider Rawlsian methodology that is based on the presumption that talents and social status are undeserved and cannot be used to support entitlement.[29] Moreover, justice in a society should be measured by its willingness to neutralise these morally arbitrary factors in the distribution of economic resources.[30] An important consideration such as public policy in Saudi Arabia is based on public morality, and the accusation in terms of the refusal of awards is sometimes related to the protection of economic interests.

Where Rawls’ principles are applied in international law, Rawls claims that there should be no obligation of distributive justice among nations.This is part of a rejection

[27] IBA Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention (2015)p.11

[28] IBA Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention (2015) p.18

[29]David Elkins, "Responding To Rawls: Toward A Consistent And Supportable Theory Of Distributive Justice" (2007) 21(267) *BYU Journal of Public Law.*

[30] Ibid

by Rawls of the idea of a world government where distributive justice could be applied on a global scale in preference to a commitment to state sovereignty while at the same time endorsing distributive justice as a principle for governing international relations.[31]With reference to the present study, it is important to note that Rawls does not see inequality between nations as important and that countries do not have an obligation to reduce this inequality, only to ensure the minimum for everyone, and this is achieved through assistance from well-ordered countries to help burdened societies.The study is not concerned with justice in this comparative sense, rather it is concerned with the idea of justice and fairness in refusing awards using public policy. The present study is concerned with the application of public policy to refuse awards and is not concerned with the justice and fairness of the award in the first place where there could be an argument for the application of distributive justice where a claimant was weak against a large and powerful organisation for example.

Where public policy in Saudi Arabia is concerned, it is mostly based on the religious principles of the Islamic faith, something which is important to Saudi Arabia and its people and forms part of the moral values of the society as well as the laws in the country. If the principles of social justice are applied, there needs to be consideration of Dworkin who put forward the idea of law as integrity, where interpretation of the law should be made in consideration of moral principles. Moreover, there is the idea that the moral principles that are held by people can be wrong.This may be the view of Saudi Arabia's public policy based on Islamic principles which is used by the government to make decisions about foreign arbitral awards for recognition and enforcement. In regard to this, Dworkin is known for the idea that "the Government

[31]Joseph Heath, "Rawls On Global Distributive Justice: A Defence" (2005) 35(sup1) *Canadian Journal of Philosophy*.

must be neutral on what might be called the question of the good life," and that "political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.".[32]It is one of the assumptions of this study that political motives could be behind the use of public policy as grounds to refuse to recognise and enforce foreign arbitral awards.

Because this study is concerned with international law, specifically international awards, there has to be consideration of what is right for those awarded a claim according to the interpretation of the principles of international law and not the principles that are held by Saudi Arabia. This idea is supported by the theory of complex equality put forward by Michael Walzer who says that a person who is in one sphere of justice, in this case the one who received the arbitral award, should not be undercut because they are standing in another sphere, in this case the sphere of the Saudi justice system. Because the main issue is the use of Saudi public policy being used to refuse awards, then it is the justice of one sphere affecting a judgement that has been made in another sphere and therefore, this study adopts this idea towards understanding whether or not there is justice and fairness. Because it is taking place in an international setting, the principles of international justice must prevail.

The ideas of justice as translation have been considered for this study. Again, the issue lies in the both the fidelity of the Saudi legal language and text and that of the jurisdiction of the international arbitrator. According to White, the idea is that neither the international law nor the national law dominates, rather there should be a consideration of both and the relationship between them. Specifically, White says that the activity of translation involves knowing and responding to another person's

[32]Ronald Dworkin, 'Liberalism', in *A Matter of Principle* (Clarendon Press, 1986) p.191

language.With reference to the issue of law and justice, interpretation is translation which involves composing one text in response to another.[33] Bhahbha brings attention to the idea that theory is often in the language of the elite and those who are socially privileged, and that the textualised language of theory is a power ploy by the West.[34]

Another idea related to the approach to the idea of justice and fairness is that of comparative law by Knop. However, this study is not concerned with like for like, meaning that it is not the intention of the study to make a comparative assessment between different jurisdictions because foreign arbitration takes place in a jurisdiction of the parties choosing, rather the study is interested in the application of public policy and whether it is fair, therefore, the ideas of Dworkin and justice as integrity and the ideas by Walzer are deemed more appropriate because they look at justice and fairness from a more international or universal perspective.

Because public policy in Saudi Arabia is based on Islamic principles, it would be appropriate to see how the use and the extent of the use of public policy complies with the ideas of Islamic justice and fairness. Kamali says that justice is an overriding principle of Islam that is not affected by time.[35] Importantly, it is essential to use this idea of justice in this study because it separates the justice of Islam from the nationalist sentiment,[36] and therefore, is appropriate for examining the use of public policy by government which is based on Islam and whether such use for the national benefit is fair according to Islam.It would be reasonable to examine if the intentions

[33]Kenneth L. Karst. 'White: Justice as Translation: An Essay in Cultural and Legal Criticism' (1990) 88 *Michigan Law Review*p.1655.

[34]Homi Bhabha. 'The commitment to theory' (1988) 5 *New Formations* 5

[35]Mohammad Hashim Kamali *Freedom, Equality and Justice in Islam*. (Cambridge, UK: Islamic Texts Society, 2002).

[36] Ibid

are purely based on national interests,in which case they may be unfair according to the Islamic principles on which they are based.

In light of ideas about fairness and justice being strongly related to the idea of procedural justice and substantial justice, the study is based on the perceptions of those involved in the fairness of the refusal to recognise arbitral awards on the ground of public policy in Saudi Arabia. If a refusal of awards can be justified on the basis of them not being procedurally or substantively fair, then the refusal itself may be perceived as being procedurally or substantively unfair in favouring the interests of the country. This is combined with ideas that are related to the refusal of awards on the grounds of public policy and its various applications. Moreover, the framework of the study considers ideas about where public policy is derived from, in this case, it is very dependent onSharia law principles.

If the reasons for refusing to enforce awards are heavily based on procedural fairness, the question that the present study wishes to answer is whether or not the process behind the process of the award has procedural and substantive fairness. Unfairness in the decision would be where there is no sincerity in procedural or substantive justice in favour of the interests of the country which could be political or economic national interests. The latter is related to the idea identified in the above that there has to be limitations on the use of public policy in international law which includes avoiding national exclusiveness and prejudice.[37]

### 1.5.1 International Arbitration and the Arab World

There are differences in terms of challenging and nullifying international arbitral awards.In Jordan, for example, the law does not distinguish between international

[37]Alex Mills, "The Dimensions of Public Policy In Private International Law" (2008) 4(2) *Journal of Private International Law*.p.202

arbitration and local arbitration, whereas in Egypt, international arbitration can only go before the Court of Appeal unlike normal arbitration that can go before the Second Instance Court.[38] In Saudi Arabia, a distinction has more recently been made between national and international arbitration.

Although there has been discussion about Arab arbitration and the access that Arab practitioners have to international arbitration, there is still a lack of statistical information on this subject.[39] It has been suggested that there needs to be wider debate on these issues, that there is a need to understand what Arab arbitration is, a need for better representation of practitioners from the Arab world and a need for the creation of a body of Arab arbitrators as exists in Europe.[40]

Looking at the position of Arab countries in international arbitration, specifically the involvement of Arab arbitrators in the International Chamber of Commerce (ICC) arbitrations, Arab countries are going through changes where they are making efforts to expand their economic activity and attract investors, one example being Saudi Arabia and its accession to the WTO, hence there needs to be an analysis of the position of Arab countries in international arbitration.[41]An example of this are the reforms that have taken place in Saudi Arabia, in particular the new Arbitration Law 2012.

Although in the past, there has been hostility to arbitration and foreign arbitral awards in Maghreb countries, in more recent times a more moderate position has been taken.

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[38]Omar Aljazy, "Arbitration in Jordan: From Old To New" (2008) 25(2) *Journal of International Arbitration*.
[39]Jalal El Ahdab, "Arab Arbitration V. International Arbitration? The Case for A Reconciliation" (2008) 25(2) *Journal of International Arbitration*.
[40]Ibid 5
[41]Lara Hammoud and Sami Houerbi, '*ICC Arbitration in the Arab World*', (2008) 25(2) Journal of International Arbitration, national 2008, Volume 25 Issue 2 pp. 231 - 240

Unfortunately, however, the rules related to the enforcement of foreign arbitral awards have not been harmonized in these countries, however, efforts to harmonise regional law and the impending ratification of the New York Convention show promise for foreign arbitration in this region.[42]

It has been questioned whether or not Saudi Arabia's adoption of the New York Convention will improve international arbitration for non-Saudi investors. Moreover, it has been claimed that the New York Convention allows countries like Saudi Arabia that have unique legal systems to give the appearance that they are becoming part of the international community, while at the same time allowing them to reject arbitral awards on the basis of public policy.[43]

There is a point in consideration of Islamic countries and the adoption of the Convention that would suggest that religion should not be a reason to refuse awards. There are other countries in the region, such as Syria and Kuwait, that have signed up to the Convention and have not been traditionally hostile to arbitration, and importantly, in the case of Syria, they have a legal system based on the ancient laws of Islam but at the same time, have had contact with Western cultures and therefore, their laws reflect Western views.This means that Syria's public international policy encourages the enforcement of non-Syrian awards[44] which is not the case in Saudi Arabia. Therefore, Islamic principles as public policy cannot be used entirely as an excuse to refuse awards.

[42]Ahmed Ouerfelli, "Enforcement of Foreign Arbitral Awards in Maghreb Countries" (2008) 25(2) *Journal of International Arbitration*. pp. 241 - 256
[43]Kristin Roy, "The New York Convention and Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?" (1994) 18(3) *Fordham International Law Journal*.
[44] Ibid pp. 936 - 937

Although this has been seen as a positive development, it entirely depends on the Saudi courts' implementation and interpretation of the new law,[45] which includes the enforcement of judges who are well versed in the principles of Sharia.

Another law that is relevant to arbitral awards is the new Enforcement Law which is concerned with the enforcement of arbitral awards,both foreign or domestic. According to Article 9, an enforcement judge is required to follow Sharia principles. Moreover, awards may be enforced if the award does not contain anything contradictory to Saudi public policy.[46]

The specific articles that are concerned with conflicts with Sharia law are Article 2 which states 'Without prejudice to provisions of Islamic Sharia and international conventions to which the Kingdom is a party, the provisions of this Law shall apply to any arbitration'[47](note here the mention of international conventions with Sharia law), Article 5 which ensures that there should be no 'conflict with the principles of Sharia' [48], Article 25 which allows the parties to agree on procedures for the arbitration 'provided said rules are not in conflict with the provisions of Sharia'[49] and where no agreement on procedures is made 'the arbitration tribunal may, subject to the provisions of Sharia and this Law, decide the arbitration proceedings it deems fit'.[50]

Sharia law and public policy are mentioned together in the Saudi Arbitration Law where the provisions for the proceedings for deciding arbitration cases are addressed. Article 38 part 1 reads as follows: 'Subject to provisions of Sharia and public policy

[45]Khalid Alnowaiser, "The New Arbitration Law And Its Impact On Investment In Saudi Arabia" (2012) 29(6) *Journal of International Arbitration*.
[46]*Saudi Arabian Enforcement Law* 2012 Art 9
[47]*Kingdom of Saudi Arabia Law of Arbitration* 2012 Ch 1 Art 2
[48]*Kingdom of Saudi Arabia Law of Arbitration* 2012 Ch 1 Art 5
[49]*Kingdom of Saudi Arabia Law of Arbitration* 2012 Ch 4 Art 25 part 1
[50]*Kingdom of Saudi Arabia Law of Arbitration* 2012 Ch 4 Art 25 part 2

in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following'[51]. It is not clear from the Saudi Arbitration Law whether Sharia and public policy are one of the same or separate, however, they are mentioned together in reference to the nullification of awards in Article 50 part 2 where it says 'nullify the award if it violates the provisions of Sharia and public policy in the Kingdom'[52] and again in Article 55 2 (b) they are also mentioned together. It is important to remember that the New York Convention allows each country to interpret their own understanding of public policy.

With reference to the fact that Saudi Arabia has been given a way to reject foreign awards by the New York Convention, this could be abused further due to the fact that civil and commercial laws are not codified and therefore, it is difficult to achieve a clear definition of public policy because there are four Islamic schools of thought.[53]

In relation to the above ideas, countries are allowed to rule if public policy and its associated issues are part of a country's public policy because it has been accepted by the courts that Article V is discretionary and that awards can be rejected if they violate public order in terms of violating principles of the legal system and principles of society.[54] The principles of society in Saudi Arabia are largely based on Sharia principles as religion is largely a part of everyday life, in addition to the legal system which is also largely based on Sharia.

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[51]*Kingdom of Saudi Arabia Law of Arbitration* 2012 Ch 5 Art 38 part 1
[52]*Kingdom of Saudi Arabia Law of Arbitration* 2012 Ch 6 Art 50 part 2
[53]*Penn Racquet Sports v Mayor International Ltd* (2011) EX.P. 386/08 & E.A. Nos.451/2010, 704-705/2009 & 77/2010, decided on 11.1.2011 Delhi High Court (2011).
[54]Erman Radjagukguk, "Implementation Of The 1958 New York Convention In Several Asian Countries: The Refusal Of Foreign Arbitral Awards Enforcement On The Grounds Of Public Policy" (2011) 1(1) *Indonesia Law Review.*

As shown in the aforementioned discussion, the new Saudi Arbitration Law does not change the requirement that there should be compliance with Sharia law and there is still recognition that the courts have the authority over arbitral awards to ensure they are Sharia compliant, including for example, if they include the payment of interest or the payment of losses for a business at a future time.

Other international laws that are relevant to Saudi Arabia and international arbitration include the Convention of the Arab League on Judicial Cooperation between the states of the Arab League (Riyadh Convention)which is a treaty by the League of Arab States governing the enforcement and recognition of arbitral awards between the Arab League states. The Riyadh Convention was implemented before the New York Convention and supersedes the New York Convention where an Arab League state is involved, even if that state is also a signatory to the New York Convention as well.

Other relevant conventions include the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and the Washington Convention. It is important to note that these conventions have been dealt with restrictively by Saudi Arabia. With reference to the Hague Convention, it has hardly even been registered in the country and the need for public policy and the need to maintain a competitive advantage reveals a gap between the rhetoric of the ideas of the WTO and the actions of Saudi Arabia as a signatory to treaties such as the Hague Convention.In other words, there has been inconsistency between trade liberalization and a barrier which has been established by Sharia principles even though Saudi Arabia says it is committed to the principles of the WTO.[55]

[55]Abdul Hamid El-Ahdab, "Arbitration With The Arab Countries" (1991) 6(1) *Arab Law Quarterly*.

The study examines the application of public policy as grounds for the refusal of the enforcement of foreign awards and whether or not this is fair and just. Therefore, there is a need to review the idea of fairness and justice in relation to the refusal of awards in order to highlight the intentions of the authorities in Saudi Arabia.

The importance of fairness and justice in the process of international commercial arbitration is overwhelming. Specifically, a philosophical or idealistic idea of justice which includes procedural and substantive justice is very important to those who participate in international arbitration.[56] It would be unfair to say that a party that is involved in an international arbitration simply sees winning the case as an indication of justice, i.e. substantive justice, rather it has been shown that the most important aspect in international arbitration is fairness in the procedure itself, and that parties would rather win in the right way, because simply winning does not necessarily reflect the characteristics of fairness and justice.[57]

With reference to public policy as grounds for the refusal of foreign awards, under the New York Convention, refusal can be made on grounds which range from that which is a threat to national interests to decisions that are not up to internationally accepted standards.[58] The latter grounds are based on arbitration that is tainted by fraud and

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[56]Nana Japaridze, "Fair Enough? Reconciling The Pursuit Of Fairness And Justice With Preserving The Nature Of International Commercial Arbitration" (2008) 36 *Hofstra Law Review*.p.1416

[57]Nana Japaridze, "Fair Enough? Reconciling The Pursuit Of Fairness And Justice With Preserving The Nature Of International Commercial Arbitration" (2008) 36 *Hofstra Law Review*. 1416 P.1424

[58] Ibid P.1443

corruption and even a lack of arbitrator impartiality, and the absence of due process and fairness have been successful public policy grounds for refusing awards.[59]

### 1.6 Aims and Objectives

This thesis addresses a problem, this being that there is or there has been suspicion that the process for the recognition and enforcement of foreign arbitral awards in Saudi Arabia has been, in some instances, unfair and unjust. This is based on the idea that Saudi Arabia as a signatory to the New York Convention 1958 is allowed to refuse to recognise and enforce foreign arbitral awards on the grounds that it contravenes its public policy. Public policy in Saudi Arabia is mainly based on the principles of Sharia and includes for example, the payment of interest in an award. The suspicion is that while there have been major developments in the arbitration laws in Saudi Arabia that have aimed to make it easier for international commercial partners to do business with Saudi entities, there is the opinion that awards in Saudi Arabia are refused in terms of recognition and enforcement, and that this is not sincerely on the grounds of public policy to protect the Sharia principles of the country, but that they are refused to suit other political or economic needs, in other words refusal on this basis would be considered unjust and unfair.

In light of this problem, the present study sought to examine the arbitration law in Saudi Arabia, how it has developed and how it is administrated with a view to understanding the intentions of the Saudi authorities, and the study also sought the opinions of legal professionals in relation to fairness and justice, both private and state, in relation to the state's refusal of foreign arbitral awards. Therefore, the first aim of the study was to determine if the use of public policy as grounds for the refusal

[59] Ibid P.1443

to enforce foreign arbitral awards in Saudi Arabia is justified and fair. This highlighted if the recipients of foreign arbitral awards are being treated fairly, therefore, the second aim of the study is to determine if the recipients of international arbitral awards are being treated fairly by Saudi courts.

In order to achieve these aims, it was important to achieve a number of objectives that are established in this study. Firstly, the research sought to determine how public policy is being used to refuse the recognition of foreign arbitral awards in Saudi Arabia. This objective was essential to provide a background of the arbitral system and how it is used to refuse awards, because it is necessary to understand these mechanisms to potentially reveal insincere behaviour on the part of the courts and judges during the arbitral process. Furthermore, it is necessary to understand the reasons why foreign arbitral awards are refused on public policy grounds. Identifying these reasons is necessary so that an analysis can be undertaken to determine if there justice in the use of the convention, therefore, in light of this requirement, another objective of this study was to determine the reasons or justifications for the application of the convention for refusing awards. Finally, a culmination of these objectives is the establishment of the extent to which the refusal of awards is fair and just which leads to the third objective of the study which was to establish the extent of fairness and justice for the recipients of foreign arbitral decisions.

Achieving the aims and objectives of this study allowed a number of important research questions to be asked. The first question is related specifically to justice in the grounds for refusal, such as interest payments and asks does public policy provide justified grounds for the refusal of the recognition of foreign arbitral awards in Saudi Arabia? The second research question asks is public policy use an impediment to fairness and justice for the recipients of foreign arbitral awards in Saudi Arabia?

Finally, this research also makes recommendations to the authorities in Saudi Arabia based on the results of the secondary and primary research and asks what modifications are necessary in the public policy of Saudi Arabia that may help in ensuring justice to both parties in an arbitration process?

### 1.7 Methodology

The research methodology employs a qualitative approach because it sought to understand the issue of fairness and justice in the refusal of awards which requires the revealing and understanding of opinions, for which a quantitative methods approach may not be suitable. Qualitative semi-structured interviews were conducted with law experts involved in arbitral awards in Saudi Arabia. Specifically, the research took place at the Ministry of Commerce and Industry in Saudi Arabia, involvinglegal department management, those involved in appeals for arbitration, trade management involved in legal proceedings and finally legal advisors for the local Hail government and private organisations.In total, 10 personnel were interviewed.

In reference to the theoretical framework which guides the methodology, much of the literature on foreign arbitral awards and public policy focuses on how public policy, which is based on local cultures and laws, has an impact on the refusal of awards, and while this study sought to address these ideas in Saudi Arabia, it also sought to identify whether such decisions are fair and just. Moreover, studies also discuss the use of the New York Convention for refusing awards.This may be used with genuine intention out of the need for protecting local culture and laws through public policy, or it may be used as a smoke screen to avoid honoring awards.This study aimed to show whether this is true or not in Saudi Arabia and whether such actions are just and

fair. It is these ideas found in the literature[6061] that was examined in the context of Saudi Arabia and in the context of fairness and justice.

In achieving this, there will be a consideration of the interpretation of international law. Interpretation of international law involves assigning meaning to texts in order to understand legal rights and obligations. The specific methodology that is relevant to this study is related to conventions, the New York Convention 1958, among others, where its application has been important as there is a greater need for the methodological awareness of interpretive theory and practice in international law.[62]

### 1.7.1 Semi-structured Interviews

An aim of this study is to establish whether or not fairness and justice for award recipients has been impeded by the refusal to recognise awards on public policy grounds. Therefore, it is important to obtain the views of all those who are involved in thesecases. Specifically, this includes legal professionals who represent the recipients of arbitral awards or at least have experience related to this situation, in order to understand their views on the use of the convention to refuse an award on public policy grounds and how they think this has an impact on the fairness and justice afforded to recipients. Moreover, in order to ensure a fair balance, interviews were conducted with professionals who have experience as part of their position in the

[60]Abdulaziz Mohammed Bin Zaid, *The Recognition And Enforcement Of Foreign Commercial Arbitral Awards In Saudi Arabia: Comparative Study With Australia* (PhD Thesis, University of Wollongong, 2014).

[61]Massoud, Mark Fathi, "International Arbitration And Judicial Politics In Authoritarian States" (2014) 39(01) *Law & Social Inquiry* pp. 1 - 30

[62]Daniel Peat Matthew Windsor, "Playing The Game Of Interpretation - On Meaning And Metaphor In International Law" in *Interpretation In International Law* (Oxford University Press, 1st ed, 2015).

ministryin the refusal of the recognition of arbitral awards based on public policy, or at least they have experience of relevant situations. This balance will allow the researcher to a gain a complete view of the situation in order to determine the reasons for and the extent of the refusal of awards, the public policy on which they are based and the extent of fairness and justice for the recipients.

The research made use of different arbitration cases which are of Saudi Arabia origin and some which are of foreign origin in nature. This helps in gaining a thorough perspective into the way the cases have been handled in the past as relates to public policy and its use in the refusal of foreign arbitral awards. More focus were placed on cases that have sought recognition and enforcement in Saudi Arabia and were exempt from the New York Convention due to public policy.[63] These different cases therefore are used in evaluating whether justice prevailed and if it also seemed to prevail. Examples of these cases are those that are related to the oil industry because the situation in this industry has had a significant effect on the development of arbitration law in Saudi Arabia and in Arab countries in the gulf region more generally.

Because the researcher wanted to focus on the aforementioned areas, in line with the aims of the research, it is important to conduct semi-structured interviews because they allow the research to maintain this focus while at the same time allowing the researcher to probe areas further as they arise and also to allow the interviewees to speak more freely about the issues under discussion. This approach to interviewing

[63]M.B. Hooker, '*Concise Legal History of South East Asia*' (Oxford: Clarendon Press, 2008)

allowed the researcher to have a guide or a schedule that does not have to be followed strictly and can be used to set a loose agenda.[64]

The questions in the semi-structured interviews are based on the research questions and the questions are organized around these ideas but at the same time allow depth as well as flexibility in the scope of the interview.[65]This is particularly important because it allows the researcher to investigate new ideas as they arise.

Overall, the researcher has chosen this approach to interviewing because it is necessary to understand opinions, which are subjective, on the fairness and justice, or otherwise, of the refusal to recognise foreign arbitral awards. The researcher felt that a qualitative semi-structured approach will give the participants the opportunity to express their opinions in a more detailed manner, unlike a more structured approach where it is difficult to understand the reasons behind opinions. This is as opposed to the other types of interview, such as structured interviews that do not allow flexibility in responses, or unstructured interviews where the focus of the topic may deviate.

Semi-structured interviews are used in a wide variety of fields for collecting qualitative data, especially where the researcher is interested in people's experiences and opinions and this approach also considers how they express themselves.[66] In light of the fact that one of the aims of the research is to elicit the opinions of those who should be in receipt of arbitral awards and whether or not they feel there is fairness in

[64]Jonathan A Smith, Michael Larkin and Paul Flowers, *Interpretative Phenomenological Analysis* (SAGE, 2008).

[65]Kathryn May, "Interview Techniques In Qualitative Research: Concerns And Challenges" [1991] *Qualitative nursing research: A contemporary dialogue*.

[66]Matthews and Ross (2010)

the process, semi-structured interviews will reveal the opinions and potential concerns that they have about the fairness and justice of arbitral awards. It is important to note at this point that semi-structured interviews, as a primary research method, complement secondary research methods in relation to the issue of whether there is fairness in giving arbitral awards.Whereas secondary research will reveal fairness and justice in relation to certain accepted international standards and a certain understanding of fairness and justice, the interviews, as primary research will reveal feelings and opinions about fairness and justice from the perspective of those who should be in receipt of awards.

With consideration of these ideas, semi-structured interviews can be used to evaluate what people think about a particular issue of which they already have knowledge.[67] Moreover, semi-structured interviews allow the researcher to explore different aspects of a phenomenon and also allow those being interviewed to elaborate on their opinions as they arise during the conversation,[68] in this case the fairness or otherwise of the refusal of international arbitral awards on the grounds of public policy.

The interview guide, or schedule, is designed to help the researcher conduct the semi-structured interviews. The interview guide is not merely a list of questions, but instead provides an agenda to aid the researcher in asking questions to achieve the aims of the study.

[67]Mathhews and Ross (2010)
[68]Ibid

### 1.7.2 Data Analysis

The interviews were audio recorded and then transcribed. Interviews were conducted in English, so no translation was required. The research looked at the data to identify any recurring ideas before carrying out a full analysis using coding. The researcher identifiedthe themes and organize them to identify the ideas and opinions that emerge. It is important that the researcher acknowledges that there will be an element of bias in the interpretation of the findings.

All data that is collected is for analysis purposes only for the present study and the data will not be made available to any third party as it is for the purposes of thisthesis. The data will be stored on a password protected computer which is kept under lock and key and no other persons, such as research assistants, are involved in the study which means only the researcher will have access.

### 1.7.3 Ethical Issues

Because semi-structured interviews are used to understand the personal opinions and experiences of people, it is important to ensure that all data is kept confidential and cannot be accessed by other people.[69] This is especially the case as the data collected in the interview is transcribed and this data may be available for some time. Furthermore, there are also religious and cultural as well as nationalistic considerations, as the study involves discussion of Sharia law in Saudi Arabia.

It is also important to note that the sampling process for the semi-structured interviews involves selecting people based on a specific phenomenon that they have

[69]Matthews and Ross (2010)

experienced.This means that there is a risk that they can be identified from this criterion, therefore, it is important not to include any data, including quotations, that can be used to identify participants.[70] An additional concern in relation to this is that the topic that is being investigated may be sensitive.[71] In the present study, there was a need to question the actions of certain bodies, legal and otherwise, in terms of refusing arbitral awards and whether such actions are fair. Therefore, this is further reason to protect the anonymity of the participants, and if they are assured of this, then they may be more willing to express their opinions.

Ethical approval was obtained from the Ethics Committee for the present study asthe research involves asking participants questions via interviews, hence, it is important to establish whether or not the questions might offend or upset the participants and it is also important that the researcher justify that the use of these questions is necessary. An example in the proposed study is that the researcher aske those who have refusedto recognise foreign arbitral awards why they did so which could be a sensitive issue because their actions are being questioned in a negative light. Another example is that the researcher asks questions about public policy as part of its justification for the refusal of awards and as these questions was asked of those who are involved in public policy, it could be sensitive to question public policy. The sensitivity associated with the two examples is further compounded by the fact that the study is being conducted in Saudi Arabia and that public policy is very much based on religious and cultural values and any questioning of these could be construed as being

[70]Matthews and Ross (2010)

[71]Matthews and Ross (2010)

offensive or sensitive as Saudis are known to be sensitive about their country and its cultural and religious values.

### 1.7.4 Consent

Informed consent is something that was gained from the participants through the use of an information sheet and a consent form. It is very important that the participants understand the study in terms of its aims and objectives before they can consent to participating in the study. Moreover, the participants needed to understand their rights in relation to the research, for example, that they have the right to withdraw both themselves and any data they have contributed to the research at any time, they were assured anonymity and that the data they have contributed will be kept secure. Moreover, the participants were informed that they have the right to check and validate the data that they have contributed. This wasdone through the distribution of an informed consent document which potential participants must sign and return before the researcher could conduct research with them.

### 1.7.5 Access

The researcher gained access to a number of different institutions, which include law firms and government organisations, and needed

to identify a person who can give permission for the researcher to enter these organisations. Moreover, it is possible that this same person may be the contact within the organisation and can assist with identifying suitable participants for the research as well as being the person who may have the authority to give these personnel permission to participate in the study.

The researcher has a relationship with a number of senior government officials in the Saudi Ministry of Justice who can provide direct access to those who are involved in the refusal of foreign arbitral awards and the relevant proceedings or at the very least, have experience and inside knowledge of these procedures. In order to identify those who have been the recipients of foreign arbitral awards, the researcher identified international organisations that have a presence in Saudi Arabia which have been refused an award on the grounds of public policy. Staff from the legal department will be sampled for the interviews; however, any law firms involved were not approached due to confidentiality issues on their part.

### 1.7.6 Sampling

It was deemed appropriate to use purposive sampling which uses a non-representative subset of a larger population and the interviewer will interview whoever is available. In consideration of the type of access to potential participants mentioned in the above, a subset of purposive sampling, a snowball sample, will be used.This is where the participants are picked along the way by asking existing participants if they know other professionals who can participate in the study. This is an important approach because the researcher does not have the knowledge to identify those who are suitable within the sample organisations.

## 1.8 Risks associated with the research

With reference to the occupational health and safety risks that are associated with the research, the researcher ensuredhe had an understanding and knowledge of the health and safety regulations in the environments in which the study is being conducted, considering both the participant and the researcher. Examples of these considerations include fire procedures in the premises where research is being conducted. The

research contacted the building management and enquire about any health and safety issues. Moreover, any health and safety legislation that is relevant to interview situations on the premises were carefully considered.

In terms of the risk to the researcher, it is important to note that that the researcher works in the area of law in Saudi Arabia and upon completion of their PhD study, they wish to continue in this area. Given that the researcher conducted research that potentially could be sensitive and may cause some parties offence, and that the research was conducted in both the private and public sectors, the researcherwas anxious about gaining a negative reputation which may affect opportunities in the future. Additionally, there may be a conflict of interest between the researcher and the Saudi government, a consideration that is also relevant to the participants in the study.

The budget for the research is purely associated with the costs of travelling to the interview venues and hotel accommodation in Riyadh, printing interview schedules, and purchasing meals during the research during the day for both the researcher and the participants where necessary. The estimated cost of travel and accommodation plus other expenses is 3000 SR.

### 1.9 Summary

In summary, this chapter introduced the study and explained what the study aims to do and justifies the need to pursue this study. A background to the problem of the recognition and enforcement of foreign arbitral awards in Saudi Arabia as well as the key concepts relevant to the study was given as well as a conceptual framework. A justification was also given in relation to the contribution to knowledge and the

significance of the research. Furthermore, the methodology of the research was presented with a justification and explanation of the methodological approach as well as a discussion of the methods that are used and the sampling for the study. Importantly, this chapter also presented the aims and objectives of the study and the research questions that it aims to answer.

## Chapter 2 Literature Review

### 2. Introduction

The literature review examines the current literature relevant to this study and provides a background on the different issues that are related to international arbitration in Arab and Muslim countries generally, and in Saudi Arabia specifically. The chapter also focuses on the use of public policy and how it is founded on Sharia principles and the relevance of these principles to the process of arbitration, as well as the implications in its application.

### 2.1 International Arbitration and Public Policy

Not only is domestic public policy considered a factor in international arbitral award, so too is a country's foreign public policy.[72] It has been proposed that domestic and international policy should be divided further into regional public policy, transnational public policy and public international public policy.[73]With reference to the issue of foreign public policy and domestic policy, according to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards if a domestic court is presented with a challenge, theyhave to determine to which public

[72]Loukas Mistelis, "International Law Association – London Conference (2000) Committee on International Commercial Arbitration "Keeping The Unruly Horse In Control" Or Public Policy As A Bar To Enforcement Of (Foreign) Arbitral Awards" (2000) 2(4) *International Law FORUM du droit international*. pp. 248-253.

[73] Ibid

policy, domestic or foreign, the exception applies.[74] International public policy is now an evolving issue and something that is interesting to academics and practitioners; however, it has not been received well by the judiciary.[75]

It has been recognised that public policy is something that is unique to a country and is sacrosanct because it is based on moral, political, religious, economic and cultural standards.[76] This idea of the uniqueness of public policy is also recognised,and although it is a concept that is accepted by all countries, there is a wide variety of contexts and meanings.[77] Moreover, public policy itself may cover a wide range of issues or may have limited scope, have a narrow or broad application and may be applied generally or more strictly.[78] With reference to Saudi Arabia, much of the public policy is based on the principles of Sharia and is often considered to be strict in its application.

### 2.1.1 Public Policy

The first thing to note about public policy in relation to the New York Convention is that the convention does not properly define public policy, which leads to a situation where public policy can be interpreted differently by different states which therefore makes it very difficult to understand the scope of this exception.[79] This has been

[74]Leonardo V. P. de Oliveira and Isabel Miranda, 'International Public Policy and Recognition and Enforcement of Foreign Arbitral Awards in Brazil'*Journal of International Arbitration* (2013) 30 p.49
[75] Ibid
[76]Loukas Mistelis, "International Law Association – London Conference (2000) Committee on International Commercial Arbitration "Keeping The Unruly Horse In Control" Or Public Policy As A Bar To Enforcement Of (Foreign) Arbitral Awards" (2000) 2(4) *International Law FORUM du droit international*. pp. 248-253.
[77]Jingzhou Toa, 'Salient Issues in Arbitration in China' (2012) 27 807 *International Law Review*
[78] Ibid
[79]J.M. Gaitis, Esq.; "International and Domestic Arbitration Procedure: the Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned

shown to be the case for parties that have awards enforced in Saudi Arabia where there has been a misunderstanding of the principles of Sharia upon which public policy is based. According to Strong (2008), "It appears that there is no universally accepted definition of public policy. It is clear that it reflects the fundamental economic, legal, moral, political, religious, and social standards of every state or extra-national community.".[80] It is also important to understand that under this convention, courts can consider a number of different factors in the interpretation of public policy which include that the spirit of the New York Convention is pro-enforcement and respects party autonomy and is also sensitive to the needs of the international commercial system which requires that there is finality in decision-making and awards.

Ghodoosi (2016) says that where there is a situation where awards are unenforceable for whatever reason, it does not actually shed light on public policy or what public policy is, in fact it has been seen as something that is as ambiguous as an idea.[81] The only way that the concept of public policy can be understood is that if it is revisited and redefined in order to overcome this problem of it being a convoluted and neglected idea.[82] At this moment in time, it is clear that this has happened and not only is public policy understand as a concept but in liberal democracies, public order is considered to be as important as individual freedom.[83]

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Awards" TDM 5 (2006) Retrieved from www.transnational-dispute management.com, p.9.

[80]S. I. Strong, Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns, (2008) 30 76 *University of Pennsylvania Journal of International Law*

[81]Farshad Ghodoosi, "The Concept of Public Policy In Law: Revisiting The Role Of The Public Policy Doctrine In The Enforcement Of Private Legal Arrangements" (2016) 94(3) *Nebraska Law Review.*

[82] Ibid

[83] Ibid

In Saudi Arabia, public policy is based on Sharia law which is derived from the Quran and the life of the Prophet Mohammed (PBUH) and is often associated with morality as is the religion itself. Originally protecting public morality was the main intention of public policy, as it was seen in common law, and it was a consideration related to concerns of the community, specifically, the values upon which a society is based should not be encroached upon by the private actions or agreements between two or more parties[84]. Courts have used different terminology to use this type of public policy which have included 'common sense', 'public morals' and 'common conscience' and other similar terminologies.[85]

The present study is concerned with whether or not public policy in Saudi Arabia, which is based on Sharia law and is therefore closely associated with the public morals in the country, is used fairly and justly to refuse awards. Therefore, there is a question of intentions, in other words, is public policy used genuinely or is it used for other reasons? If public policy is used unfairly by the authorities in Saudi Arabia for the economic benefits of a few and not for the benefits of the society as a whole, then it is questionable that this is the correct use of public policy. This issue has been addressed by Ghodoosi (2016) who said that the economic interest of a society is not the most important thing in public policy and that there is a paradox between the interests of a society as a whole and the interest, for example, of one single economic party, where the society as a whole has no interest in the questions of public policy in that particular case.[86] Therefore, there is a need for judges to approach public policy more actively and consider the interests and needs of the society as a whole and they

[84]Farshad Ghodoosi, "The Concept of Public Policy In Law: Revisiting The Role Of The Public Policy Doctrine In The Enforcement Of Private Legal Arrangements" (2016) 94(3) *Nebraska Law Review.*
[85]Ibid
[86] Ibid

should use a critical approach and personal reasoning when considering ethical issues.[87] This would also be a consideration for the enforcement judge who is ultimately responsible for making enforcement decisions.

Public morality is an important consideration in this study. The idea of public morality has gone through a paradigm shift and can be considered as something that is related to the morality of the state instead of what is considered to be moral according to societal norms. This is based on a state-centric notion from the philosophy of German idealism, whereby personal morality can only flourish is a civil society because it allows private morality to thrive.[88] This is a significant consideration in Saudi Arabia where the law is based on Sharia principles and the people within this society also mostly govern their own lives by the very same principles. Therefore, whether public policy is considered on a national or collective social level or whether it is considered on a personal level, the important factor behind public policy in Saudi Arabia is very much related to Islam. Even if there has been a shift from the societal notion of public policy to the notion that is more based on the idea of statehood, Islam and Sharia principles are still very relevant.

It is recognised that public policy is something that is unique to a country and is sacrosanct because it is based on moral, political, religious, economic and cultural standards.[89] This idea of the uniqueness of public policy is also recognised by the fact that although it is a concept that is accepted by all countries, there is a wide variety of

[87] Ibid

[88]Farshad Ghodoosi, "The Concept Of Public Policy In Law: Revisiting The Role Of The Public Policy Doctrine In The Enforcement Of Private Legal Arrangements" (2016) 94(3) *Nebraska Law Review.*

[89]Loukas Mistelis, "International Law Association – London Conference (2000) Committee On International Commercial Arbitration "Keeping The Unruly Horse In Control" Or Public Policy As A Bar To Enforcement Of (Foreign) Arbitral Awards" (2000) 2(4) *International Law FORUM du droit international*. pp. 248-253.

contexts and meanings.[90] Moreover, public policy itself may cover a wide range of issues or may have limited scope, have a narrow or broad application and may be applied generally or more strictly.[91] Through understanding public policy and its application in decisions related to arbitral awards, this study highlights the uniqueness of public policy in Saudi Arabia and also helps to justify its often strict principles in its application.This will be achieved through the viewpoints of the parties on the public policy side of the situation. Moreover, as previously mentioned, the study shows that there is a stricter application of public policy which may impede fairness and justice.

Domestic public policy is not only considered as a factor in international arbitral award, it also considers a country's foreign public policy and that domestic and international policy should be divided further into regional public policy, transnational public policy and public international public policy.[92] As noted in the introduction, the present study recognizes these three levels of public policy because they are necessary to understand public policy in Saudi Arabia in its entirety, therefore, a contribution of the present study is that it addresses public policy on these levels in relation to justice and fairness in the refusal to recognise awards.Without this approach, there would be a weakness in the study in that it would not fully address public policy and how it is affected by and played out in the international arena.

[90] Jingzhou Toa, 'Salient Issues in Arbitration in China' (2012) 27 807 *International Law Review*

[91] ibid

[92] Loukas Mistelis, "International Law Association – London Conference (2000) Committee On International Commercial Arbitration "Keeping The Unruly Horse In Control" Or Public Policy As A Bar To Enforcement Of (Foreign) Arbitral Awards" (2000) 2(4) *International Law FORUM du droit international*. pp. 248-253.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards sought to provide legislative standards in the recognition of arbitration agreements and the recognition of domestic courts of non-domestic arbitral awards.[93] Specifically, Article V of the Convention allows the recognition and enforcement of a foreign award to be refused if 'the recognition or enforcement of the award would be contrary to the public policy of that country'.[94]

National courts have the power to refuse to recognise or enforce a foreign judgement on the basis of inconsistency with public policy where such a judgement is incompatible with public policy or 'ordre public'.[95] Public policy acts as a safety net to the rules that govern the recognition and enforcement of foreign arbitral awards where the outer limits of the 'tolerance of difference' are found in those rules.[96] This has been especially important in a world that is multicultural where it can easily be the case that an award is granted in one jurisdiction that contains provisions that if enforced, would contravene the culture of another jurisdiction.

Unfortunately, there are criticisms of public policy exceptions used in international private law which has included uncertainty. In relation to this, there are two main concerns, firstly, the use of public policy is often considered to involve broad and unfettered discretion which means that the judiciary can have unguided and excessive power.[97] Secondly, where public is applied by the courts, it is not always clear what

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[93]*Convention on The Recognition and Enforcement of Foreign Arbitral Awards*

[94]*Convention on The Recognition and Enforcement of Foreign Arbitral Awards* Art V part 2 (b)

[95]Alex Mills, "The Dimensions Of Public Policy In Private International Law" (2008) 4(2) *Journal of Private International Law.* p.202

97Alex Mills, "The Dimensions Of Public Policy In Private International Law" (2008) 4(2) *Journal of Private International Law.* p.202

the content of the public policy is or the consequences of its application, hence these two issues create unpredictability about the public policy rule.[98]

## 2.2 International Arbitration in Arab Countries

There have been three distinct phases in the development of international arbitration in the Islamic world.[99] Each of these three phases is addressed in the following where the political and economic influences that have played their role in the development of arbitration law in the Islamic world, particularly the Gulf region, are explained.

### *2.2.1 The First Phase*

The first phase was from the end the Second World War to the 1970s. This was a period when Arab countries were not doing very well while at the same time there was a lack of respect for Islamic jurisprudence internationally, and the only real arbitrations that took place in the Islamic world at this time were those that arose from disputes about oil concessions.[100] Before 1973, these concessions basically allowed foreign oil companies the right to access and control the oil supplies of these states for periods of 50 years or even more which also involved a freeze on the law which was achieved through clauses that were referred to as stabilisation clauses which meant that these concessionaries could secure their investments effectively for a lifetime.[101] Any arbitration that came as a result of a dispute between these parties was

98 Ibid p.202
[99]Charles N. Brower and Jeremy K. Sharpe, "International Arbitration And The Islamic World: The Third Phase" (2003) 97(3) *The American Journal of International Law.*
[100] Ibid
[101]Ibid

characterised by the use of domestic Islamic law and general principles of law which had their foundations in Western jurisdictions which meant that they were often more beneficial to foreign claimants, and the western principles of law were found to be more elevated in this case[102]. From the perspective of Muslims or from the Islamic perspective, this experience of arbitration at that time would have seemed to be redolent or even an extension of the historic system where extra-territorial courts[103] from the European courts exercised their powers in other Islamic lands as a throwback to the days of colonialism. A classic situation that illustrates this situation at that time was the era where there was arbitration related to oil with Abu Dhabi. In 1939, a 75-year oil concession which had a specified geographic scope was awarded to the Petroleum Development (Tru- cial Coast) Ltd by the Sheikh although it was a British protectorate at that time. When it came to the law that would govern the contract, it was acknowledged by Lord Asquith that due to the fact that the contract was formed in Abu Dhabi and would also be carried out in that country, the local system of law would be applicable and would take priority, which was in fact grounded in Islamic law.[104] One of the issues that has been raised about Islamic law in relation to its use in international arbitration, specifically, its use in public policy to refuse to recognise and enforce foreign arbitral awards, is that it is something which is open to interpretation by Islamic jurists at a particular time and a particular place and there is a resulting need for the codification of Islamic law that is related to international arbitration. The codification of Islamic law has been addressed by more recent

[102]Charles N. Brower and Jeremy K. Sharpe, "International Arbitration And The Islamic World: The Third Phase" (2003) 97(3) *The American Journal of International Law.*
[103]Ibid
[104]Ibid

scholars and it is not considered to be contrary to Islamic law in principle. These ideas are relevant to the present study because of the perception by western commercial parties that Islamic jurisprudence is not contained in a codified legal body leading to the suspicion that Sharia principles can be used to refuse foreign arbitral awards in order to achieve other political or national interests that are not related to the protection of Sharia law and similar public policy concerns such as public morality. It seems that these suspicions related to arbitration in the region, and in the case of this study, Saudi Arabia, are well founded in consideration of the perceptions at this first phase of arbitration development in the region.

The above argument is clearly illustrated in the first phase situation that involved Abu Dhabi and foreign oil companies. Where it was considered that local law in Abu Dhabi had to be the primary law by Lord Asquith, it is also important to remember that at that time, the Sheikh who offered the concessions to Petroleum Development (Tru- cial Coast) Ltd was an absolute feudal monarch that carried out justice using discretion with consideration of the Holy Quran and that it would be a fanciful idea that in a region that was primitive, there would be a body of legal principles that could be used together with the application of commercial instruments from a more modern time.[105] Therefore, as a result of this situation, it was decided that it would be best if the terms of the contract were founded on common sense and common practice that was found generally in what were considered to be civilised nations, which was referred to as a 'modern law of nature'.[106] Although it is also important to note that Lord Asquith did concede that English municipal laws were also not suitable in some circumstances, however, where English laws were applied as being principles of

[105]Charles N. Brower and Jeremy K. Sharpe, "International Arbitration And The Islamic World: The Third Phase" (2003) 97(3) *The American Journal of International Law.* P.644
[106]Ibid p.644

international law, it was said by Lord Asquith that Petroleum Development (Tru- cial Coast) Ltd had the right to take oil from the sub-soil and seabed that were subjacent to the territorial waters of Abu Dhabi but not from beyond those waters.[107]

### *2.2.2 The Second Phase*

The second phase of development for arbitration in the Islamic world was from the 1970s to the early 1980s during which time the Organisation of Petroleum Exporting Countries (OPEC) nations had the upper hand in the situation with international oil companies and because they had this upper hand, these nations sought to change international law in relation to expropriation to suit their own needs, and this was to be achieved through the adoption of the United Nations Conventions which included the Charter of Economic Rights and Duties of States and the Declaration on the Establishment of a New International Economic Order.[108] Politically, there were a number of factors that allowed this situation to arise and to enable these countries to have a more powerful position. These factors included that there was an end to colonialism and an increase in Arab nationalism as well as an increase in the wealth of oil producing countries and using oil as an economic weapon.[109] This is particularly true for Saudi Arabia which has one of the largest oil reserves in the world and even in the present day, it has a significant influence both in the region and globally. This era saw the emergence of a number of different Islamic countries that were completely dependent on the sale of oil, however, they still had the burden of the

[107]Ibid p.644
[108]Ibid
[109]Charles N. Brower and Jeremy K. Sharpe, "International Arbitration and The Islamic World: The Third Phase" (2003) 97(3) *The American Journal of International Law.* p.645

concessions that they had agreed to in the past with foreign investors and it was perceived by these newly emerging states that this was something that was not wanted and it was from an era for which they had no respect.[110] This situation was further compounded by the fact that western countries became more and more dependent on oil from these countries and as a result, the global economic and political community became increasingly dependent on an international legal system that was suitable for the exploration and distribution of oil that would be suitable for dealing with disputes that arose from these oil-related activities.[111]

These Arab countries at that time were developing states and they felt that they could not participate in a legal system that was developed without their participation, and importantly, it is relevant to the present study that they felt that this system of law had values that were inconsistent with their own values, culture and legal traditions, and as a result these countries started to challenge the legal system, especially the law that allowed expropriation which controlled how they could engage with foreign investors which dominated their natural resources.[112] As a result, an era followed in which these developing countries started to repudiate contractual obligations, nationalise oil concessions which also included the renegotiation of existing concessions, and importantly to the present study, they rejected arbitration initiated by western commercial entities.[113] However, it is important to note that at this time, these countries did not have their own systems for arbitration which was suitable for the

[110]Charles N. Brower and Jeremy K. Sharpe, "International Arbitration and The Islamic World: The Third Phase" (2003) 97(3) *The American Journal of International Law*.p.645
[111]Ibid p.645
[112]Idid
[113]Ibid

needs of a modern world and they were not signed up to a number of different conventions that formed a growing system of international arbitration.[114]

From the description of the phases so far, evidence is starting to emerge that explains the fundamental sides of the same coin. Firstly, the present study is based on a notion that western countries may not trust Islamic countries when awards are refused on the grounds of public policy which is based on Sharia law, and this may be because Islamic law has been seen historically as being inferior, furthermore, as these oil exporting countries developed, they took political and economic action to change the law to strengthen their own economic positions and protect their own interests which may explain why there may be suspicions that they are using international conventions such as the New York Convention to protect their own interests. Specifically, the convention allows these countries to refuse to recognise foreign arbitral awards on the grounds of public policy which could be used as a cover to protect national economic interests. The other side of the coin is the perception of developing Islamic countries that the international law and the law of the west does not respect or consider their cultural, traditional and religious concerns as countries that have emerged as Islamic in terms of law, and therefore, the refusal of awards based on public policy concessions designed to protect local concerns are valid and genuine.

### *2.2.3 The Third Phase*

The third phase is the one we are in presently in, in relation to the relationship between Arab countries and international arbitration. As countries that are responsible

[114]Charles N. Brower and Jeremy K. Sharpe, "International Arbitration And The Islamic World: The Third Phase" (2003) 97(3) *The American Journal of International Law.* p. 646

for a significant output of global capital, they have now joined an international system of international arbitration, or at least they have promoted the idea.[115] This is evidenced by the various laws and associated reforms that have taken place in Saudi Arabia designed to integrate the country further into the international system of arbitration. It is important to mention the idea of globalisation at this point because it is relevant to the developments that are being presented here. Globalisation involves the proliferation of broader capital flows, privatisation and an increase in the interrelationship between commercial entities which involves all countries in the world, including the Arab countries, and it has meant that these countries have come out of their previous isolation and therefore, there has been an increasing need for an adjudication system that is global and comprises numerous bilateral and multilateral agreements that require the provision for the arbitration of disputes arising from these international relationships.[116] In this phase, more than ever before, there is a preferable system of arbitration that is suitable in comparison to national court litigation and there has been agreement on the idea that arbitration is both fair and effective as a form of dispute settlement in the international arena, and importantly, there has been a need for a supportive relationship between arbitration tribunals and national courts.[117] With reference to Saudi Arabia, this is an important point because it had been the national courts which were required to recognise and then enforce foreign arbitral awards, but currently, it is the responsibility of the enforcement court to ultimately make the decision.

[115]Charles N. Brower and Jeremy K. Sharpe, "International Arbitration And The Islamic World: The Third Phase" (2003) 97(3) *The American Journal of International Law.* p.648
[116]Ibidp.648
[117]Ibid p.648

With reference to the New York Convention, it is worth mentioning that a few Islamic countries have signed up to this convention, the reason being that it caters for the international enforcement of arbitral awards and arbitration legislation in these countries that is considered ineffective or even hostile,[118] as may be the case in Saudi Arabia.

Another issue that is arises in the third phase is that courts in Islamic countries have been seen to interfere with arbitration cases and have been concerned with its subject matter, however, this problem has been alleviated by the fact that these countries have increasingly joined conventions for international arbitration, and as a result of this they have developed their own arbitration systems that are considered to be more arbitration friendly.[119] This has certainly been the case with Saudi Arabia which signed up to the New York Convention and developed its own arbitration laws with the latest development being the new Arbitration Law 2012. It has been mentioned that Islamic countries were being accused of interfering in the specifics of cases, however, the new arbitration laws in Saudi Arabia do not allow the courts to do this, in other words, they are not involved in the details of a decision. The courts in Saudi Arabia are now only allowed to consider how the arbitration procedures were carried out to determine if there have been inconsistencies in the procedures so that an award can be refused on these particular grounds. Furthermore, the courts in Saudi Arabia are also only concerned with the award itself and whether or not it contravenes public policy and not with the reasons for the awards being given in the first place.

[118]Ibid

[119]Charles N. Brower and Jeremy K. Sharpe, "International Arbitration And The Islamic World: The Third Phase" (2003) 97(3) *The American Journal of International Law.*

A significant number of Arab countries are now signed up to the New York Convention which has been absolutely critical for the success of international arbitration, and there have been two obligations that have been imposed on signatory countries which include that national courts should always refer cases to arbitration if it is a suitable option and secondly, they are obligated to recognise and enforce foreign arbitral awards and to treat them in the same way that they would if they were decisions that were reached in the domestic courts.[120] Unfortunately, historically, these obligations could not be found in the arbitration laws of these countries, as under the convention, a petitioner would only have to show the award to be granted the right to recognition and enforcement, however, it has been the case in a number of Islamic countries that they have required that the petitioner has to prove the finality of the award, and this is not easy because this can only satisfy the Islamic country courts if they produce an enforcement order from the country where the award was granted.[121] The problem with this situation is that it has been expensive and time consuming to deal with arbitration in this way which goes against the idea of arbitration in the first place and why arbitration is preferred as a dispute resolution mechanism over litigation because by comparison, it is easier to enforce foreign arbitral awards.[122]

The New York Convention has had a controlling effect on these countries with regard to the grounds upon which they can refuse awards, and with specific reference to Saudi Arabia before they signed up to the convention, they required petitioners for an award to complete a domestic court review related to the merits of the dispute.

[120]Ibid
[121]Charles N. Brower and Jeremy K. Sharpe, "International Arbitration And The Islamic World: The Third Phase" (2003) 97(3) *The American Journal of International Law.*
[122]Ibid

Significantly, this meant that the award itself was relegated to being one part of the proof related to the obligations of the parties.[123] Even if they did not have to prove the merits of the dispute, the courts in Saudi Arabia still scrutinised the foreign arbitral award in the same way that they would a domestic award. This was typical of those Islamic countries where there was no distinction made between domestic and international arbitration.[124]

The present study focuses on Saudi Arabia refusing to recognise and enforce foreign arbitral awards on the grounds of public policy, and this has been an issue not only for Saudi Arabia but for Islamic countries generally. While it is true that the New York Convention allows these countries to refuse awards on the grounds of a public policy of a particular country, it has been claimed that the important issue is international public policy and not domestic public policy, which is why countries like Djibouti, Algeria, Tunisia and Lebanon are considered to be progressive because they have incorporated the idea of international public policy in their international arbitration laws.[125] However, Saudi Arabia cannot be blamed for not doing this because the New York Convention clearly states the following: "The recognition or enforcement of the award would be contrary to the public policy of that country".[126]

Sharia law has been an influencing factor of Arab legal systems and investigates how Arab courts and laws have accommodated international standards of international

[123]Ibid
[124]Ibid
[125]Charles N. Brower and Jeremy K. Sharpe, "International Arbitration And The Islamic World: The Third Phase" (2003) 97(3) *The American Journal of International Law.*

[126]*Convention on The Recognition and Enforcement of Foreign Arbitral Awards*Art V (2) (b)

arbitration into their legal environment,[127] for example as evidenced in the development of the arbitration system in Saudi Arabia and the associated legal reforms. Specifically, in the arbitration process, religion plays a significant role in Arab countries in terms of how arbitration is accepted and if it is successful.It is necessary to have a background of Sharia law to understand how international arbitration works in Arab countries.[128]

There are differences in terms of challenging and nullifying international arbitral awards, in Jordan for example, the law does not distinguish between international arbitration and local arbitration, whereas in Egypt international arbitration can only go before the Court of Appeal unlike normal arbitration that can go before the Second Instance Court.[129]

It can be concluded that Arab countries have had to change their approach to international arbitration to satisfy the needs of the business community because the use of international arbitration is becoming increasingly necessary and is important for attracting business and investment.[130]

Although there has been discussion about Arab arbitration and the access that Arab practitioners have to international arbitration, there is still a lack of statistical information onthis subject, and it has been suggested that there needs to be a wider debate on these issues.There is a need to understand what Arab arbitration is, a need

[127]Omar Aljazy, "Arbitration In Jordan : From Old To New" (2008) 25(2) *Journal of International Arbitration*.

[128]Omar Aljazy, "Arbitration In Jordan : From Old To New" (2008) 25(2) *Journal of International Arbitration*.
[129] Ibid
[130] Ibid

for better representation of practitioners from the Arab world and a need for the creation of a body of Arab arbitrators as exists in Europe.[131]

The position of Arab countries in international arbitration, specifically the involvement of Arab arbitrators in the International Chamber of Commerce (ICC) arbitrations has been addressed[132]. Sharia law is an underlying principle that affects approaches to international arbitration[133], and although Arab countries share the same language, there are a multitude of different influences which include differences in culture, political and economic differences and geographic differences because the Arab world is spread over two different continents.[134] It is worth mentioning that Saudi Arabia is an important location in the Islamic world because it is the home of two holy sites of Islam, Mecca and Medina. Arab countries are going through changes where they are making efforts to expand their economic activity and attract investors; one example given is Saudi Arabia and its accession to the WTO, and there needs to be an analysis of the position of Arab countries in international arbitration.[135]

With reference tothe refusal to enforce arbitral awards based on the violation of public order, the concept of public order is very complex and attempts to define it in doctrinal studies have not been satisfactory.It is where a judge has the power to reject enforcement if it is deemed to go against public order; the problem is, however, there

[131]Jalal El Ahdab, "Arab Arbitration V. International Arbitration? The Case For A Reconciliation" (2008) 25(2) *Journal of International Arbitration*.
[132] Lara Hammoud and Sami Houerbi, '*ICC Arbitration in the Arab World*', (2008) 25(2) Journal of International Arbitration, national 2008, Volume 25 Issue 2 pp.231 - 240

[133]Omar Aljazy, "Arbitration In Jordan : From Old To New" (2008) 25(2) *Journal of International Arbitration*.
[134] Lara Hammoud and Sami Houerbi, '*ICC Arbitration in the Arab World*', (2008) 25(2) Journal of International Arbitration, national 2008, Volume 25 Issue 2 pp. 231 - 240

[135] Ibid

is no clarity over what public order actually is, and there is the questionas to whether it is domestic, international or transnational public order.[136]

In relation to the idea of the influence of Sharia law on legal systems in Arab countries and ultimately on the stance towards arbitral awards, Ouerfelli (2008) says that although there are legal texts that make a distinction between public order and Sharia, this is not the case for domestic laws in Maghreb countries.This is contrary to international conventions that have been made between countries in the Maghreb and in the Muslim and Arab world beyond; this main issue is to determine whether or not Sharia law is a part of public order or not.

Sayed (2008) looks at the issue of arbitration in the Arab world from a different perspective.He attempts to understand the various meanings that Arab practitioners have of the development of arbitration in the field of arbitration, specifically, he explores the ways in which Arab practitioners'analyse their own positions and their role in the field of arbitration.This is done to highlight the way Arab practitioners engage with these meanings.[137]The study concludes that there are few opportunities for Arab practitioners to engage in the formation of groups, discussion or conferences on the issue of international arbitration, furthermore, legal education in Arab universities was found to be mediocre.[138] This is not a promising picture and there is concern about how the new generation of Arab practitioners will become the driving

[136]Ahmed Ouerfelli, "Enforcement Of Foreign Arbitral Awards In Maghreb Countries" (2008) 25(2) *Journal of International Arbitration*. pp. 241 - 256

[137]Abdulhay Sayed, '*Towards a Reflexive Sociology of the Arbitration Field in the Arab World*' (2008) 25 Journal of International Arbitration p.294

[138] Abdulhay Sayed, '*Towards a Reflexive Sociology of the Arbitration Field in the Arab World*' (2008) 25 Journal of International Arbitration p.294

force behind a new and alternative field of international arbitration, where there are equal opportunities for all practitioners.[139]

In a study of foreign arbitration enforcement and public policy in the UAE[140], public policy considerations were found to be the most significant obstacle to the enforcement of foreign arbitral awards in the UAE. This problem has been blamed on Article V of the New York Convention because it leaves the door open for an award not being enforced on public policy grounds, however, local law is also to blame where the civil procedure code allows the non-enforcement of foreign arbitral awards.[141] A comparison is made where the common law doctrine of public policy is viewed narrowly in common law jurisdictions, for example the United States or England, but the public order doctrine is viewed subjectively in the UAE.[142]

**2.3 Public Policy in the Arab World**

Al Enazi brings attention to the idea that public policy is something that is an elusive concept, especially in consideration of the comparison between different countries and cultures. Al Enazi provides an example of a case in 2012 where the District Court of Cologne ruled that the circumcision of a four-year-old boy was unlawful and that it was actual bodily harm. This understandably caused outrage among Muslim and Jewish communities. However, the reason that the idea of public policy, especially in some countries, is an elusive concept is because while it is expected that public policy in the Muslim world upholds religious requirements such as the prohibition of usury and alcohol, it is in fact not generally the case. Al Enazi states that although the

[139] Ibid
[140]Gregory Mayew and Mark Morris, "Enforcement Of Foreign Arbitration Awards In The United Arab Emirates" (2014) 81(3) *Defense Counsel Journal*.pp.279 - 287
[141]Gregory Mayew and Mark Morris, "Enforcement Of Foreign Arbitration Awards In The United Arab Emirates" (2014) 81(3) *Defense Counsel Journal*.pp.279 - 287
[142] Ibid

prohibitions of Islam are considered public policy, countries such as Bahrain and the UAE are more accepting of the commercial practices of the west. This is less so in the case of Saudi Arabia because it is a country that is known for its strict adherence to Islamic law, more than other countries in the same region.

## 2.4 Enforcement in the Arab World

It is important to note that arbitration itself could be considered as something that is relatively new to the Islamic world and that it was something that appeared in the region during the 1970s, with a number of different international events having a bearing on this development which included 'the end ofcolonialism, resurgence of nationalism, pan-Arabism, Arab-Israel wars, anti-capitalist ideologyfueled by the Cold War divisions, the meteoric rise in the wealth of oil-producing Islamic Arabcountries, and countries' use of oil as an economic weapon'.[143]

Much like in Saudi Arabia, the use of arbitration has been difficult in the gulf region, despite the original intention of arbitration rules to promote investment and international commerce in the region. This has created a large variation in the world in terms of the level of arbitral awards that are recognised and enforced in different countries.[144]The main reason for this has been that the development of arbitration law has been slow is often based on post-colonial rule in developing countries. Saudi Arabia is a country that has never been under the colonial rule of countries from the west, and the only time it was ruled by a foreign country in more recent times was

[143]Charles N. Brower and Jeremy K. Sharpe, "International Arbitration And The Islamic World: The Third Phase" (2003) 97(3) *The American Journal of International Law.*

[144]Mohamed Saud Al-Enazi, '*Grounds for Refusal Of Enforcement Of Foreign Commercial Arbital Awards In Gcc States Law*' (PhD Thesis, Brunel University, 2013)

under the Ottoman Empire, itself ruled by the principles of Islamic law. The reason this has been a problem is because the arbitral regimes at this time were designed to meet the needs of western countries and were neglectful of the needs of poorer countries.This is evidenced by the fact that the design of arbitration generally, which includes arbitral forums, is mostly something that has come from corporate law firms in the west which they encouraged their large corporate clients to adopt because of the need to deal with risks when undertaking commercial activity on an international level.[145]

At that time, countries in the Arab world were not supportive of arbitral proceedings and were very much against the idea of enforcing foreign arbitral awards. This attitude by some Arab countries was not unexpected because it was often the case at the time that arbitrators would ignore the wishes of the parties to an agreement in terms of the law that would govern a dispute. These agreements often contained public international law together with Islamic law and arbitrators often favoured international law because they said that Islamic law conflicted international law.Furthermore, they also felt that Islamic law was indeterminate and was not suitable for the needs of their business.[146]

These days, awards are often not recognisedor enforced in Muslim countries because they contravene public policy or Muslim public policy. Therefore, it was often the case that Arab countries, including those in the gulf region, were not concerned with

[145] A Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge University Press, 2001); M. Sornarajah, The UNCITRAL Model Law: A Third World Viewpoint (1989) *Journal of International Arbitration* p.20.

[146]*Petroleum Development (Trucial Coasts) Ltd* v. *Sheikh of Abu Dhabi* (1951) 18 ILR 144, per Lord Asquith at 149; *Ruler of Qatar* v. *Int'l Marine Oil Co. Ltd* (1953) 20 ILR 534, per Bucknill J at p.545.

the issue of enforcement because this was part of a larger process of arbitration to which they had a negative attitude.[147]This was because it was something that was developed in western countries and it was something that they did not fully understand or did not trust. In fact, Islamic law or Sharia principles that govern normal jurisdictions for arbitral proceedings is a difficult issue. This mistrust of foreign arbitral awards by these countries leads to the problem of increasingly refusing to recognise and enforce foreign arbitral awards.

Getting a foreign ruling to be recognized can be a very long and difficult process in gulf cooperation council (GCC) countries. This is despite the fact that there have been a number of ambitious attempts by these countries in relation to the recognition and enforcement of foreign arbitral awards.[148]However, despite these attempts, the local courts in these countries still have reservations in relation to foreign rulings[149].

Unfortunately, countries in this region assume that they have a lot of authority in the review of foreign judgements, however, in more recent years, there have been changes, the most notable being those that have taken place in Saudi Arabia with the introduction of new laws such as the 2012 new Arbitration Law[150]which governs the enforcement of foreign judgments.[151]It has been said that this has created a situation

[147] Mohamed Saud Al-Enazi, '*Grounds for Refusal Of Enforcement Of Foreign Commercial Arbital Awards In Gcc States Law*' (PhD Thesis, Brunel University, 2013)

[148]Nicolas Bremer. 'Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries' (2016 – 2017) 3 37 *McGill Journal of Dispute Resolution*

[149]Ibid

[150]*Kingdom of Saudi Arabia Law of Arbitration* 2012

[151]Nicolas Bremer. 'Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries' (2016 – 2017) 3 37 *McGill Journal of Dispute Resolution*

where the different legal regimes of this GCC region became more unified, as evidenced by the fact that legislative trends show that countries in this region have adopted a less restrictive approach to the way that they operate and their view of what can be called an international jurisdiction.[152]

There are plenty of examples where these countries have loosened their approach to arbitration.This has included accepting international procedures for arbitration by all the countries in the region, such as the UAE and Saudi Arabia's accession to the New York Convention which is the most important legislation that is designed for the recognition and enforcement of foreign arbitral awards and represents a significant change in these countries' attitudes towards arbitration.[153] This was in addition to the reformation of laws culminating in the introduction of the new Arbitration Law.Furthermore, a number of arbitration centres were set up in the region, for example, the Abu Dhabi Commercial Conciliation & Arbitration Center which was opened in 1993[154]and increasingly over the years, other centres have been set up in countries which include Bahrain, Dubai, Qatar and Kuwait.[155]However, despite all of these efforts, there are still problems with the recognition and enforcement of foreign arbitral awards which remains a difficult process.

[152]Ibid p.37
[153]Ibid p.37
[154]"Abu Dhabi Commercial Conciliation And Arbitration Centre - Home", *Adccac.Ae*(Webpage, 2018) <http://www.adccac.ae/English/Pages/Default.aspx>.
[155]Nicolas Bremer. 'Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries' (2016 – 2017) 3 37 *McGill Journal of Dispute Resolution*

However, it may have been the case that these countries had no choice but to adopt the New York Convention. The countries of this region have had a poor reputation and were notoriously difficult to do business with in relation to international commerce and arbitration, and it may have been for the sake of attracting business investment that they adopted the Convention, however, they still held onto their attitude to foreign awards which would manifest itself through the refusal to recognize or enforce awards.

It has been said[156] that Saudi Arabia and other countries in the region were traditionally difficult countries in terms of their recognition and enforcement of foreign arbitral awards but that because of the reforms that have taken place,this is no longer the case. Therefore, it is important to consider the obstacles that must still exist in the country in terms of the recognition and enforcement of foreign arbitral awards and the implications this has for Saudi Arabia in an international commercial system.

**2.5 Saudi Arabia and Foreign Arbitration**

In 2005, Saudi Arabia became a member of the World Trade Organisation (WTO) and as part of the conditions of accession, the country had to make a number of significant legal and regulatory reforms, mainly in areas related to the facilitation of trade in goods and services, the liberalization of the market and attracting foreign investment. In order for this to take place, it was necessary to create an environment where foreign investors felt safe and this included commitments to international arbitration. There is a conflict between the need to carry out legal reform in this area and the need for the

[156]Nicolas Bremer. 'Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries' (2016 – 2017) 3 37 *McGill Journal of Dispute Resolution*

Saudi courts to ensure that Saudi sensitivities, particularly those related to Sharia law and culture are not compromised, and in fact it has been the case that these issues are sometimes used to refuse foreign arbitral awards.

In 2012, Saudi Arabia introduced an arbitration law which replaced the old law of 1983, the main idea being to overhaul the arbitration regime.[157] This was in response to the fact that the old law was not suitable for international arbitration.This was especially the case because there was difficulty in understanding Sharia law and the Arabic language. The new law provided the parties involved in arbitration more powers, more autonomy and importantly, it reduced the influence of the courts during the arbitration process.[158] However, as public policy grounds were allowed to be used to refuse the enforcement of foreign awards, the influence of the courts was effectively not reduced because they had the power, afforded by the convention, to stop the awards altogether.

The new law repealed the arbitration regulations that were in the 1983 law and was designed to modernize the arbitration regime by curtailing court intervention through recognizing the parties' autonomy to tailor their own arbitration procedures.[159]

The new law not only covered local arbitration but also international arbitration based on the UNCITRAL law model which allows the participating parties to choose the law that will apply to their disputes and it also allows the parties to choose the rules that are used during the arbitration.However, this is only allowed if it does not inhibit

[157]Khalid Alnowaiser, "The New Arbitration Law And Its Impact On Investment In Saudi Arabia" (2012) 29(6) *Journal of International Arbitration*.
[158]Khalid Alnowaiser, "The New Arbitration Law And Its Impact On Investment In Saudi Arabia" (2012) 29(6) *Journal of International Arbitration*.
[159]Abdulaziz Al Bosaily and Ben Cowling, "New Arbitration Law In Saudi Arabia – A Major Development For Commerce In The Kingdom" [2012] *Clyde and Co Insight*.

the involvement of the Saudi courts and does not conflict with Sharia law[160]. Although this has been seen as a positive development, it entirely depends on the Saudi courts' implementation and interpretation of the new law.[161] Saleem (2012) supports the idea for legal change in Saudi Arabia and says that because Sharia law principles are different to western legal principles, at the time before the introduction of the new arbitration law, the Saudi Arbitration Code had a number of deficiencies.[162]

Specifically, the new law acknowledges that the parties are allowed to arbitrate under institutional rules such as the London Court of International Arbitration (LCIA) or the International Chamber of Commerce (ICC).This development removes any uncertainty that was associated with the 1983 law and removes the obligation for parties to file their arbitration with the courts for validation purposes.[163]

Moreover, the new law created efficiency in the process by design, examples of which include when there is a challenge to the jurisdiction of the tribunal, the new law allows the tribunal to make a decision about the jurisdiction, and it allows arbitrators the power to continue with the arbitration even where there is an allegation by one of the parties about the submission of false documents.[164] This recognition by the new law that arbitrators have the power to determine the admissibility of evidence is

[160]Khalid Alnowaiser, "The New Arbitration Law and Its Impact on Investment In Saudi Arabia" (2012) 29(6) *Journal of International Arbitration*.
[161]Khalid Alnowaiser, "The New Arbitration Law and Its Impact on Investment In Saudi Arabia" (2012) 29(6) *Journal of International Arbitration*.
[162]Abdulrahman Mamdoh Saleem, "A Critical Study on How the Saudi Arbitration Code Could Be Improved and On Overcoming The Issues Of Enforcing Foreign Awards In The Country As A Signatory State To The New York Convention" [2012] *SSRN Electronic Journal*.
[163]Abdulaziz Al Bosaily and Ben Cowling, "New Arbitration Law in Saudi Arabia – A Major Development For Commerce In The Kingdom" [2012] *Clyde and Co Insight*.
[164] Ibid

international best practice in the process and negates attempts to disrupt the process.[165]

The third benefit of the new Saudi arbitration law is that it empowers, at the request of the parties, Saudi courts to implement interim protectionist measures into the arbitration proceedings, which was a new idea in Saudi Arabia.[166]

### 2.4 Public Policy and Foreign Arbitral Awards in Saudi Arabia

However, there have been criticisms of the new arbitration law,for example, that it fails to enforce foreign arbitral awards, although the new law places an emphasis on the idea that the courts have to consider to the country's obligations that it has under international agreements.[167] There have been limitations in addressing the issue of the enforcement of foreign arbitral awards in Saudi Arabia, the most significantproblembeing that awards are rarely enforced. With reference to this issue, the new arbitration law contains numerous grounds whereby an award can be annulled and they are based on grounds that are contained within the UNCITRAL model law.The courts are not permitted to considerthe details or the facts of a dispute duringthedecision-making process when they consider the merits of the challenge.[168] This represents a deviation from the old law where it was the case that the annulment procedures were considered against the merits of the dispute.However, such changes

[165]Abdulaziz Al Bosaily and Ben Cowling, "New Arbitration Law in Saudi Arabia – A Major Development For Commerce In The Kingdom" [2012] *Clyde and Co Insight*.
[166] Ibid
[167] Ibid
[168] Ibid

in the approaches by the courts ensure that decisions are considered against Sharia principles in addition to public order.[169]

Public policy and the associated enforcement foreign awards have been approached from two different angles. Firstly, there is the idea that public policy can be used as a tool which is considered a more positive approach, and secondly, as a more negative approach, public policy can be employed as a weapon.[170]

Countries that are authoritarian in naturecan take advantage of a system of arbitration, that is, international arbitration provides them with a certain level of control while at the same time,allows the country to attract foreign investment.[171]

However, there is a disadvantage to these ideas, this being that it allows these types of regimes to repress their judiciaries as well as develop arbitration systems. There has been an omission in the research on judicial politics in these types of country and there has been a lack of consideration that they have exploited international arbitration tribunals.[172]

Arbitration is better than litigation because states are diversified in culture, languageand religion.[173]Saudi Arabia is a country that has been misunderstood and it has a reputation of being country that is keen on the idea of discouraging

[169]Abdulaziz Al Bosaily and Ben Cowling, "New Arbitration Law In Saudi Arabia – A Major Development For Commerce In The Kingdom" [2012] *Clyde and Co Insight.*
[170]Loukas Mistelis, "International Law Association – London Conference (2000) Committee On International Commercial Arbitration "Keeping The Unruly Horse In Control" Or Public Policy As A Bar To Enforcement Of (Foreign) Arbitral Awards" (2000) 2(4) *International Law FORUM du droit international*. pp. 248-253.

[171]Massoud, Mark Fathi, "International Arbitration And Judicial Politics In Authoritarian States" (2014) 39(01) *Law & Social Inquiry*
[172] Ibid
[173]Abdulaziz Mohammed Bin Zaid, *The Recognition And Enforcement Of Foreign Commercial Arbitral Awards In Saudi Arabia: Comparative Study With Australia* (PhD Thesis, University of Wollongong, 2014).

arbitration.[174] However, more recent developments in the country's arbitration system have improved the enforcement of awards, including the introduction of the Enforcement Law and the News Arbitration Law in 2012. Furthermore, in the development of these new laws, Sharia principles have been shown to be compatible.[175]

In Saudi Arabia, the New York Convention has given the country refuge and protection because it allows the country the choice of whether or not they want to enforce awards, specifically, they are free to refuse to recognise and enforce an awardthat has come from a non-Saudi body which can contain provisions that are contrary to Saudi public policy which are founded on the principles of Sharia law.[176]

There are numerous benefits for Saudi Arabia with this type of arrangement because they can take part inthe process of international dispute resolution and protect public policy.[177]Until now, it seems that the system of international arbitration is beneficial to the country, which begs the question as to why Saudi Arabia has or is perceived to have a negative perception of the enforcement of foreign arbitral awards? The answer to this question lies in the fact that there is a conflict between Sharia principles upon which public policy is founded and the spiritof the New York Convention.[178]

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[174]Abdulaziz Mohammed Bin Zaid, *The Recognition And Enforcement Of Foreign Commercial Arbitral Awards In Saudi Arabia: Comparative Study With Australia* (PhD Thesis, University of Wollongong, 2014).
[175]Anon, Anon, "The New En Forcement Law Of Saudi Arabia: An Additional Step Toward A Harmonized Arbitration Regime" [2013] (1) *Jones Day*
[176]Yasser Almuhaidb '*The recognition and enforcement of foreign arbitral awards in Saudi Arabia: An examination of the function of Article (V) of the 1958 New York Convention in the Saudi legal order*' (PhD Thesis, University of Hull, 2013)
[177] Ibid
[178] Ibid

If there is an enforcement of a foreign arbitral award that contravenes the principles of Sharia, then it will be refused because it goes against public policy.[179] Issues of public order which relate to the principles of Sharia law can also include the fairdistributionof wealth, freedom to trade and having the right to private ownership, however, even these ideas are actuallyrelated tothe principles of Islamic Sharia. This therefore meansthat an arbitral award can be appealed against because these matters are seen subjectively, unlike common law countries such as the United Kingdom.[180]

Whether Saudi Arabia can use the public policy defence to refuse the recognition and enforcement of foreign arbitral awards has been addressed.[181] It is possible that there is a conflict between the Saudi system for arbitration and international arbitration and the adoption of the New York Convention, although Article V(2)(b) does allow Saudi Arabia which is a country that has a uniquesystem of law founded on Sharia, to show they are integrating themselves into the international commercial community, and allows them to reject foreign arbitral awards that conflict with public policy at the same time.[182]

**2.5 Justice and Fairness**

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[179] Yasser Almuhaidb '*The recognition and enforcement of foreign arbitral awards in Saudi Arabia: An examination of the function of Article (V) of the 1958 New York Convention in the Saudi legal order*' (PhD Thesis, University of Hull, 2013)
[180]Gregory Mayew and Mark Morris, "Enforcement Of Foreign Arbitration Awards In The United Arab Emirates" (2014) 81(3) *Defense Counsel Journal*.pp.279 - 287
[181]Kristin Roy, "The New York Convention And Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?" (1994) 18(3) *Fordham International Law Journal*.
[182] Ibid

This study is concerned with finding out if there is justice and fairness where foreign awards are considered for enforcement in the Saudi legal system and fairness and justice if these foreign awards are rejected on the grounds of public policy. Thus,to find out if there is justice and fairness in these processes, it is necessary to consider the different ways that justice and fairness in the process of award recognition and enforcement can be measured.

Because there have been developments in the arbitration of investment, this has meant that private entities have been freed from diplomatic protection which means they can have access to international dispute settlement mechanisms.[183]Investment arbitration as a part of international law is a mechanism that has allowed the consolidation of justice and is founded on the principles that are found in customary law pertaining to human rights.[184] However, there are concerns that foreign investment guarantees have become part of national regulation and it has to be questioned whether or not this should be counterbalanced by opportunities to access justice for the society in the host country.[185]

Restorative justice is about restoring an injured party to their pre-injury state and to makethe perpetrator of the injury acknowledge what they have done as well as redress the injustice that has been caused. Distributive justice is about the perception of fairness that is found within a procedure and the perception of fairness related to the outcomes of a certain process or procedure[186], such as the process of recognising and enforcing foreign arbitral awards.Furthermore, it has also been claimed that early

[183]F. Francioni, "Access To Justice, Denial Of Justice And International Investment Law" (2009) 20(3) *European Journal of International Law.*
[184] Ibid
[185] Ibid
[186]Alan Tomkins and Kimberly Applequist, "Constructs of Justice: Beyond Civil Litigation" (2008) 17 *Alan Tomkins Publications*

theories about justice had more of a focus on the fairness of the outcome which was used as a way to measure if there had been justice in the decision. Furthermore, the idea of distributive justice that has been discussed here is founded on the notion that the fairness of the outcome is perhaps the greater concern.[187] Foreign arbitral awards are awarded by international tribunals that are essentially quasi-judicial entities which include arbitration tribunals and the fairness of the procedure itself in these types of entity is a significant concern.[188]

### 2.6 Summary

This chapter has highlighted the pertinent issues that need to be considered to understand the current position of Saudi Arabia in relation to foreign arbitration. There was a historical overview that served to further the understanding of the possible position of Saudi Arabia in terms of the reasons why it may refuse awards on the ground of public policy, whether this is for genuine reasons to protect the religious beliefs of the country or if it is protecting national economic and political interests. Therefore, this review has been necessary to answer the research questions that are related to whether or not there is fairness and justice in the refusal of awards.The chapter also addressed fairness and justice to achieve the aims of the study.

## Chapter 3 Legal Structure for Arbitration and International Arbitration in Saudi Arabia

### 3. Introduction

[187] Alan Tomkins and Kimberly Applequist, "Constructs of Justice: Beyond Civil Litigation" (2008) 17 *Alan Tomkins Publications*
[188] Ibid

This chapter presents the structure of arbitration in Saudi Arabia which also includes international arbitration. In order to understand arbitration in the country, a historical overview is necessary and is presented here.There is a thorough explanation of the historical development of arbitration law in Saudi Arabia with reference to each of the arbitration laws. Furthermore, there is an explanation of the procedures for arbitration and how decisions are reached, as well as an explanation of the arbitration agreement itself. This chapter therefore, provides a foundation that can be used in the determination if there is fairness and justice in the refusal of foreign awards.

### 3.1 Historical Development of Arbitration Law in Saudi Arabia

Arbitration is something that is well recognised in the region and in Saudi Arabia particularly. Sharia law is based on the religion of Islam and informs the law in Saudi Arabia and Sharia law recognises the principles of arbitration and recognises arbitration as a method for dispute settlement from the early days of the religion. In fact, there is even evidence that arbitration was used to settle disputes before Islamic Sharia was established.[189]

The principle of arbitration can be found in the Holy Quran where it says: '*If ye fear a breach between them twain appoint (two) arbiters one from his family and the other from hers; if they wish for peace God will cause their reconciliation: for God hath full knowledge and is acquainted with all things'*.[190]Furthermore, there is also evidence from the life of the Prophet Mohammed (SAW) which also informs Islamic Sharia that the prophet used arbitration for dispute resolution, one classic example being that

[189]S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.
[190]Holy Quran 4:35 A. Yusuf Ali translation

the prophet arbitrated between the tribes of Mecca. In this situation, the holy Kabah was being renovated and there was a dispute between two tribes about who should replace the Blackstone in the Kabah after the renovation was complete.This was considered a great honour and none of the tribal chiefs wanted to give up this honour. The Prophet Mohammed (SAW) arbitrated between the two tribes and allowed them to replace the Blackstone using a piece of cloth which was held equally by the tribes.This was so significant that it was said to have prevented war between these tribes.

Furthermore, the history of the first treaty that was signed by the Muslims, specifically the treaty of Medina, included clauses for using arbitration and the main schools of thought in Islamic jurisprudence all agreed with the idea and have used arbitration for hundreds of years.

Commercial contracting principles in Saudi Arabia are different to western principles for a number of reasons which include the issue of usury which is forbidden in Islamic law as gaining something from nothing is viewed as being inherently wrong.[191]It is the refusal to recognise and enforce foreign arbitral awards on the basis that the award includes interest payments that is perceived as being a problem for western commercial organisations, and this is still a problem in the present day which is source of the perception that doing business with Saudi Arabia can be risky in relation to dispute resolution using arbitration.

Another Islamic contracting principle which is different from Western concepts is the concept of uncertainty (Gharar) which prohibits gambling or speculation. Specifically,

[191]Kristin Roy, "The New York Convention And Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?" (1994) 18(3) *Fordham International Law Journal*.

this means that it forbids a clause in a contract that is based on a specified yet uncertain event.[192]

Although there was a historical acceptance of the principles of arbitration in Saudi Arabia and in the Middle East generally, this acceptance was challenged by a number of international arbitration awards related to the oil industry.Examples of these disputes include Saudi Arabia v Arabian American Oil Co. (ARAMCO) where although the laws of Saudi Arabia that governed the contract were applied, the dispute-resolution was not prepared to apply Sharia law and supplement Sharia law with the general principles of law and the customs found in the oil industry.[193]This case had detrimental consequences for the Saudi government and as a result the Saudi Council of Ministers enacted Resolution No. 58 which prevented government organisations from taking part in arbitration, however as shown later in this chapter, this attitude to the government's involvement in arbitration changed when Saudi Arabia ratified the New York Convention in 1994.

Saudi Arabia has signed up to a number of international arbitration conventions and treaties which have had a significant impact on arbitration and they include the following.[194]

1952 Arab League Convention: Saudi Arabia is party to the Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards (1952) which deals

[192]Kristin Roy, "The New York Convention And Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?" (1994) 18(3) *Fordham International Law Journal*.
[193]S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.
[194]Anon, Arbitration in the Kingdom of Saudi Arabia Shearman and Sterling 2017 *International Arbitration*

with the enforcement of arbitral awards in the country and other countries in the Arab League.

1983 Riyadh Convention: The Convention on Judicial Cooperation between States of the Arab League in 1983 and ratified in 2000 which recognizes and enforces foreign judgments and arbitral awards without consideration of public order or morality or the overriding principles of Sharia law.

1958 New York Convention: In 1993, the Kingdom acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

### 3.1.1 The Aramco Case

It is important to thoroughly explain the historical development of arbitration law in Saudi Arabia with reference to each of the arbitration laws. Furthermore, arbitration procedures and how decisions are reached are explained as well as an explanation of the arbitration agreement itself. Furthermore, it is important to bring attention to a moment in history that has had a significant influence on foreign arbitration in the Kingdom of Saudi Arabia, namely the Aramco case. There was a dispute between the Saudi government and Aramco and it was referred to arbitration. It was common practice from the time of World War I for governments of developing countries to have an arbitration clause included in the contracts that they had with foreign companies when they were involved together in the exploitation of mineral resources such as oil.[195] The contract which related to the concession for the exploration of oil between Saudi Arabia and Aramco is an example of this type of concession contract. Specifically, in this contract, there was a clause which referred to arbitration in case a

[195] Abd al-Ḥamīd Aḥdab and Jalal El-Ahdab, *Arbitration with The Arab Countries* (Wolters Kluwer, 3rd ed, 2012).

dispute arose between the parties.[196] A dispute did arise between Aramco and Saudi Arabia as a result of the Saudi government requesting Aramco to comply with the provisions of a Royal Decree which related to the coming into force of the Onassis Agreement which was considered to have the same binding power as the law itself.[197] The nature of the Onassis agreement is that it allowed A.S. Onassis the right to incorporate a private company in Saudi Arabia which was named the Saudi Arabia Maritime Tankers company (SATCO).[198] The contract required a number of reciprocal obligations for the Saudi government and for SATCO. The dispute arose in relation to the fact that Aramco refused to abide by the Onassis agreement and it was then proposed by the Saudi government to refer the dispute to arbitration, to which SATCO agreed.[199] This took place in 1955 and it is worth noting that the principles of Sharia were considered in the arbitral process at that time, as evidenced by the fact that Article 4 states that this dispute had to be settled in compliance with Saudi law as indicated in the agreement. This essentially meant that Saudi law was Sharia law according to the Hanbali school of thought if the dispute fell in the jurisdiction of Saudi Arabia.[200]

### 3.1.2 Law of Commercial Court 1931

The first phase of commercial law relating to arbitration in Saudi Arabia began in 1931 with the introduction of the Law of Commercial Court. This law comprised five articles that specifically dealt with arbitration (articles 493 – 497) to cater for the

[196]Ibid
[197] Abd al-Ḥamīd Aḥdab and Jalal El-Ahdab, *Arbitration with The Arab Countries* (Wolters Kluwer, 3rd ed, 2012).
[198]Ibid
[199]Ibid
[200]Ibid

requirements of the Saudi government whichwas increasingly doing business with foreign oil companies. However, this law was considered to be an ad hoc approach to arbitration. The development of arbitration in the Arab oil producing countries of the Gulf region was in fact largely influenced by the oil industry and the relationship that Saudi Arabia had with foreign oil companies, which at that time often had the upper hand in the arbitration relationship because it was based on western legal principles.

This law was first applied in the case of *Saudi Arabia Government vs Arabian American Oil Co (ARAMCO)*.[201]The main issue with this case was that arbitration did not take into consideration the principles of Sharia law, mainly because they did not have knowledge of these principles, especially those that are related to commercial transactions. Therefore, this meant that the Saudi government had doubts about the use of international arbitration.[202]This would seem to suggest that the reason for not considering Sharia law was because of a lack of knowledge, however, an alternative view is that Islamic law was avoided because it lacked clarity and was considered unsuitable and inadequate for international commercial purposes, even if it was the applicable law in the contract.[203]In fact, in this particular case (Saudi Arabia v. Arabian American Oil Co.), the tribunal said the following:

*In view of the insufficiency of Muslim law as interpreted by the school of Imām Aḥmad bin Ḥanbal and as the law in force in Saudi Arabia contains no determined*

[201]Saudi Arabia vs. Arabian American Oil Co. (ARAMCO), [1958] 27 ILR 117
[202]Kristin Roy, "The New York Convention And Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?" (1994) 18(3) *Fordham International Law Journal*.
[203]Torki A. Alshubaiki, "Developing The Legal Environment For Business In The Kingdom Of Saudi Arabia: Comments And Suggestions" (2013) 27(4) *Arab Law Quarterly*.

*rule concerning oil exploitation, it is necessary to resort to the general principles of*

*law.*[204]

This is an issue that has been associated with Islamic law in other countries in the region, for example, in Sheikh of Abu Dhabi v Petroleum Development Corp, Lord Asquith said the following:

*If there exists a national law to be applied, it is that of Abū Dhabi. But no such law canreasonably be said to exist. The Sheikh administers a purely discretionary justice with*

*the assistance of the Qurʾān, and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to theconstructionof modern commercial arbitration.*[205]

Finally, in the case of The Governor of Qatar v. The International Marine Oil Co. Ltd, Sir Alfred Bucknill said the following:

> *I need not set out the evidence before me about the origin, history, and developmentof Islamic law as applied in Qatar or as to the legal procedure in this country. I haveno reason to suppose that Islamic law is not administered there strictly, but I am convincedthat this law does not contain any principles which would be sufficient tointerpret these particular contracts.*[206]

[204] Saudi Arabia vs. Arabian American Oil Co. (ARAMCO), [1963] 27 ILR 117
[205]Sheikh of Abu Dhabi v Petroleum Development Corp (1952) 1 ICLQ 247.
[206]The Governor of Qatar v. The International Marine Oil Co. Ltd (1953) 20 ILR 534

With reference to the question of whether or not the Saudi government uses public policy to refuse awards based on the interests of the country or whether they use it genuinely as it contravenes Sharia principles, it is important to understand that at this time, the Saudi government did not favour arbitration because it felt that this favoured foreign companies, however, as shown in the above, the Saudi government did not favour international arbitration because they felt it neglected Sharia principles. Therefore, it can clearly be seen there are two motivations or intentions behind this opinion of the Saudi government which brings into question the government's sincerity, that is, are they concerned about the contravention of Sharia principles or are they concerned solely with the business or economic interests of the country. This question is relevant later in the consideration of justice and fairness, specifically, whether or not the government or the relevant courts refuse to recognise and enforce foreign arbitral awards on the grounds of public policy, which is associated with Sharia, or they have other interests such as protecting the country's economic and business interests.

This attitude of the Saudi government towards the involvement of government agencies in international arbitration continued throughout the development of competition in the country. Specifically, this attitude can be seen in the 1983 arbitration and the associated implementation regulations in 1985 right up to the 2012 new arbitration law. This can be seen as an attitude or behaviour of the country in that it seeks to protect its political and economic interests, specifically, by protecting its government agencies against international arbitration.

The second phase of the development of arbitration law in Saudi Arabia was signified by the Labour and Labourers law (1969).[207]Specifically, article 183 was concerned with the regulation of labour arbitration and it states the following:

> *'In all cases, the disputing parties may appoint by common agreement a sole arbitrator or several arbitrators for each of them in order to settle the dispute, in lieu of the committees foreseen in present chapter'.*[208]

The third phase in the development of arbitration was found within the Chamber of Commerce and Industry Law (1980). Specifically, Article 5 (h) of this law stated the following:

> *'The Chambers of Commerce and Industry have the competence in the following matters ... (h) taking verdicts about the commercial and industrial disputes through arbitration if the parties of the conflict agreed to refer the case to the chamber'.*[209]

This was seen as an attempt by the Saudi government to institutionalise some form of arbitration, as evidenced by Article 37 (3) which says 'The Saudi Council of Chambers of Commerce and Industry...shall have the following jurisdictions: - (3) Practicing the arbitration and settle the commercial and industrial disputes, if the parties to the conflict agreed to refer the case to it, and if the dispute is among the

[207]*Labor Law* (Saudi Arabia approved by Royal Decree No. M/21 dated 15 November 1969).
[208]*Labor Law* (Saudi Arabia approved by Royal Decree No. M/21 dated 15 November 1969). Article 183
[209]*Chamber of Commerce and Industry Law* 1980Art5 (h)

parties that belong to more than one chamber or if one party is national and the other is a foreigner'.[210]

The fourth stage of the development of arbitration in Saudi Arabia, the introduction of the Saudi Arbitration Law (1983), was perhaps the most significant. This was the first time that there had been a specific reference to arbitration, as until this point, the development of arbitration was found in laws not specifically concerned with arbitration. The law was introduced in 1983 and the associated implementation regulations were introduced in 1985. This is discussed in more detail in the following. It is important to note that even at this stage, the principles of Sharia law were paramount and if there was any contravention, then an award could be refused. This was something that has continued up to the present day where the principles of Sharia are protected.

The new 2012 Arbitration Law was a necessarypart of Saudi Arabia joining the WTO in 2005 as there was a need to bring its arbitration regime in line with the rest of the world. This law was an improvement and a modification of the 1983 law and sought to help disputing parties, both local and international, in dispute resolution. Again, this is presented in more detail below.

It is important to note that this new law places an emphasis on adherence to the principles of Sharia and attempts to create a harmonisation between the needs of the international business community and Sharia principles.

### 3.1.3 The Committee for the Settlement of Commercial Disputes

[210] *Chamber of Commerce and Industry Law* 1980 Art 34 (3)

The Committee for the Settlement of Commercial Disputes had jurisdiction over commercial disputes that were between private parties and was most often appropriate and used if one of the parties was a foreign plaintiff seekingto takelegal action.[211]One of the main concerns of the committee was the regulations that governed the relationship between a Saudi agent and a foreign contractor, however, there was no jurisdiction over disputes that involved land, so in a case where a foreign plaintiff made a claim that was related to leasing premises, this would have to be taken up with the Sharia courts.[212]

Further evidence of the importance of Sharia at that time was the fact that each of the branches of the committee had three judges, one of whom was a legal expert appointed by the Ministry of Commerce and the other two were judges who were trained in the principles of Sharia.[213]

Therefore, it is important to note that the concern for upholding the principles of Sharia was important at that time, and as the evidence will show, has remained important up to the development of the latest arbitration law in 2012, namely the new Arbitration Law 2012, where the principles of Sharia are given equal importance and must be adhered to. It is important to remember that at this time, the Sharia courts were not involved and the advantage of having commercial experts, in addition to Sharia experts, was an advantage to the commercial parties because these judges had experience in commercial litigation, which would in fact, create a balance between the requirements of Sharia and the requirements of commercial activity.[214]The

[211]L. L. Boshoff, 'Saudi Arabia: Arbitration Vs. Litigation' (1986) (1) 3 *Arab Law Quarterly*pp.299 - 311
[212] Ibid
[213]Ibid
[214]L. L. Boshoff, 'Saudi Arabia: Arbitration Vs. Litigation' (1986) (1) 3 *Arab Law Quarterly*pp. 299 - 311

implementation of the new Arbitration Law 2012 is also evidence that the authorities in Saudi Arabia are adhering to Sharia principles while at the same time considering the needs of the commercial community.

However, this type of arbitration had its problems and would not have been a convenient prospect for commercial parties involved in arbitration. It took up to three months to be granted a first hearing and it could have taken up to three years to obtain a judgement.[215]

### 3.1.4 Prior to Saudi Arbitration Law 1983

Before the introduction of the arbitration law in 1983, any clause in an arbitration agreement was seen simply as a statement of intent but was not binding on the parties to the agreement. However, if it did come to a situation where there was a dispute between the parties and reference was made to the agreement,the Saudi courts would be required the parties to abide by those conditions.[216] This is because under the principles of Sharia, the terms of a contract between two parties are respected and should be adhered to, unless those terms contravene the principles of Sharia. If this was not the case, then it would not be able to prevent one of the Saudi parties applying to the appropriate Saudi court directly.[217]

Furthermore, at that time, prior to the 1983 Saudi Arbitration Law, there was a perception among foreigners that foreign arbitration was unlawful in Saudi Arabia,

[215]Ibid
[216]L. L. Boshoff, 'Saudi Arabia: Arbitration Vs. Litigation' (1986) (1) 3 *Arab Law Quarterly*pp. 299 - 311
[217]L. L. Boshoff, 'Saudi Arabia: Arbitration Vs. Litigation' (1986) (1) 3 *Arab Law Quarterly*pp. 299 - 311

however, this was not true where there was arbitration between two private parties.[218] If this was the case, then it has to be questioned why the Saudi Ministry of Commerce would not allow the incorporation of a Saudi company if the articles of association contained a clause that would allow any disputes to be settled by foreign arbitration.[219]

With reference to the idea that Saudi Arabia protects its own interests, this may be justified in light of the idea that foreigners at that time found it very difficult to enforce foreign arbitral awards.

### 3.1.5 Saudi Arbitration Law 1983

Before the Saudi Arbitration Law 1983, arbitration was only considered to be possible theoretically for a number of reasons. Firstly, prior to 1983, the courts did not recognise arbitration clauses and agreements.This was even the case where the parties to an arbitrageur agreement claimed contractual entitlement. Furthermore, even if the court did approve the arbitration clause or agreement, enforcement of the award after this was completely on a voluntary basis and therefore, the use of arbitration was extremely limited.[220]Secondly, arbitration was deemed to be ineffective and considered to take too much time because of the conflict that existed between the Sharia courts and the Saudi Commercial Court, and despite the fact that the arbitration law superseded the provisions for arbitration found in the Commercial Code 1931,

[218]Ibid
[219]Ibid
[220]A. Baamir and I. Bantekas, "Saudi Law As Lex Arbitri: Evaluation Of Saudi Arbitration Law And Judicial Practice" (2009) 25(2) *Arbitration International*.

where arbitrations were ad hoc because they lacked a commercial character, they were still to be governed by the Commercial Court Code.[221]

Furthermore, in addition to the aforementioned ad hoc arbitration, there was a further classification of arbitration in Saudi Arabia which was based on whether or not the dispute involves voluntary or compulsory arbitration.Generally, arbitration is voluntary unless compulsory arbitration is recommended by the regulator for specific reasons relating to a particular case.[222]The reason for this classification was to control the jurisdiction of the Sharia courts due to the fact that aspects of Sharia law are controversial, and the intention was to avoid any conflict between Saudi law and Sharia law on the one hand and Saudi law and customs and traditions on the other hand.[223]Here, it can be clearly seen that there is consideration of not only Sharia principles but also of the customs and traditions in Saudi Arabia. However, in much of the material where there is discussion about public policy, it is always mentioned as something that is derived from Sharia law and there is no mention of the consideration of customs and traditions when it comes to public policy as a tool to protect them, rather, the focus is always on Islamic Sharia principles.

Historically, Saudi Arabia began to ratify a number of conventions while at the same time, they also enacted the Arbitration Law in 1983. However, it will be shown that this law was not suitable for resolving disputes between commercial parties, furthermore, the 1983 law allowed the Saudi courts to intervene at any time in the arbitration process which often led to many arbitrations being stopped and associated

[221] Ibid
[222] Ibid
[223] Ibid

awards not being enforced.In fact, it was often the case that Saudi courts were involved in the re-examination of arbitration awards when it was requested of them to enforce the results of these arbitrations, and parties often had to go through litigation again and have the case arbitrated in non-Saudi courts.[224]

The implementation rules of the 1983 Arbitration Law were designed to offer guidance about arbitral proceedings in Saudi Arabia. The main reason for this is because the act itself does not mention the number of procedural issues which include rules about how arbitral awards are delivered and the notifications related to the communications and processes between the two parties and the arbitration tribunal itself as well as rules about the seat of the operation.[225]

Although before 1983, Saudi Arabia did not have legislation to regulate arbitration that took place within the country, arbitration was still seen as a suitable mechanism for settling disputes. An example of this was Articles 493 – 7 of the Commercial Court Code (1931)[226]whichprovidedforarbitration. Furthermore, under the Labour Code (1969), disputes between employers and employees were allowed, and according to Article 183 of this code, these types of dispute can be submitted to arbitration[227]instead of the Committee for the Settlement of Labour Disputes which was the organisation specifically set up for this purpose.

In more recent times, since the economic boom in the 1970s, arbitration has been increasingly used to settle commercial disputes, especially those that involve foreign

[224]Yahya Al-Samaan, "The Settlement Of Foreign Investment Disputes By Means Of Domestic Arbitration In Saudi Arabia" (1994) 9(3) *Arab Law Quarterly*.
[225]A. Baamir and I. Bantekas, "Saudi Law As Lex Arbitri: Evaluation Of Saudi Arbitration Law And Judicial Practice" (2009) 25(2) *Arbitration International*.
[226]*Commercial Court Code* 1931
[227]*Labor Law* (Saudi Arabia approved by Royal Decree No. M/21 dated 15 November 1969).

organisations. As a result of this,the Saudi authorities had no choice but to develop a local system for arbitration that was efficient for the needs of their commercial activity and efficient in the resolution of disputes. The resulting code, the Arbitration Code was introduced in 1983, followed by the implementation rules for this code in 1985. The implementation rules were designed to make sure that arbitration proceedings were both flexible and quick, to suit the needs of the business community.[228]Furthermore, these rules were also designed to address some of the issues not covered by the code itself. At that time, the Arbitration Code was considered to be successful in improving arbitration within the country because it provided an alternative to other dispute resolution methods related to commercial transactions within Saudi Arabia. Furthermore, there has been evidence to suggest that the code created an acceptable and efficient way for the private sector to resolve disputes which was evidenced by the number of cases that were submitted to arbitration.[229]

An example of the implementation rules addressing the issues founded the Arbitration Code is Article 2 of the arbitration code which says that it will not allow cases where conciliation is not permitted.[230]However, this is something that is not clear but the implementation rules make it clear by saying that conciliation is not allowed in personal status matters or criminal matters for any matters that are related to public order.[231] At this stage, it is possible to see what the origins of public policy in Saudi Arabia could be because public order in Saudi Arabia is related to issues that are

[228]Yahya Al-Samaan, "The Settlement Of Foreign Investment Disputes By Means Of Domestic Arbitration In Saudi Arabia" (1994) 9(3) *Arab Law Quarterly*.
[229] Ibid
[230]*Kingdom of Saudi Arabia Law of Arbitration* 1983 Art 2
[231]*Kingdom of Saudi Arabia Law of Arbitration Implementing regulations* 1985

forbidden by Islamic Sharia, for example gambling and interest and other matters related to administrative law.[232]

However, even at this late stage, there is evidence of a level of restriction particularly relating to government agencies which are not allowed to submit their disputes that arise from a commercial relationship with private parties to arbitration without permission from the President of the Council of Ministers.This can be found in the arbitration code (Article 3)[233]which does in fact echo the Royal Decree no. 58 which says the same.[234] However, there was evidence at that time that there were intentions to abolish the restrictions in arbitration that were related to government agency disputes. This evidence could be found in Article of the code, specifically in the last sentence, which says that the article can be amended by the Council of Ministers.[235]

In fact, there have not been many cases where Saudi government entities have been involved in disputes with foreign investors which have reached the stage of arbitration, furthermore, more recently in 2004,a number of gas concession agreements have allowed for a period of nine months before the party can refer the dispute to any form of arbitration.[236]

Both the arbitration code and the associated implementation rules do not mention the nationality of any one who is a part of an arbitration process, hence, it could be concluded from this that foreign and local persons are allowed to use arbitration under the Arbitration Code.

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[232]Yahya Al-Samaan, "The Settlement Of Foreign Investment Disputes By Means Of Domestic Arbitration In Saudi Arabia" (1994) 9(3) *Arab Law Quarterly*.
[233]*Kingdom of Saudi Arabia Law of Arbitration* 1983 Art 3
[234]*Kingdom of Saudi Arabia Law of Arbitration* 1983 Art 58
[235]*Kingdom of Saudi Arabia Law of Arbitration* 1983 Art 3
[236]A. Baamir and I. Bantekas, "Saudi Law As Lex Arbitri: Evaluation Of Saudi Arbitration Law And Judicial Practice" (2009) 25(2) *Arbitration International*.

There are two types of arbitration instruments that are considered by the Arbitration Code, specifically these are the arbitration agreement and the arbitration clause. For example, the parties involved in arbitration could submit an existing dispute which refers to the submission agreement or they can include a clause in the contract that allows for future disputes to be resolved which refers to the arbitration clause. Specifically, Article 1 allows arbitration for existing disputes and it can also allow for arbitration in advance in relation to a dispute that could come up during the execution of a contract.[237]

Overall, it can be said that allowing for arbitration has meant that it has been easier to resolve disputes and that even the presence of contractual clauses for dispute resolution has meant that the agreements are made before a dispute arises. Furthermore, it is important that when Saudi partners, which include government and private agencies, and their foreign investors agree to resolve any future potential disputes using arbitration, then it is important for this to be included in the investment agreement.This is much more advisable that deciding upon a dispute resolution mechanism after a dispute has occurred.[238] If an arbitration clause is not inserted, which means that there will be dependence on voluntary submission to arbitration, it could harm one of the parties if the other party refuses to submit to the arbitration, therefore an arbitration clause offers security for both parties because there is an assurance that any potential disputes will be submitted to arbitration, even if one of the parties is against the idea.[239] As a result of the security that is offered by including clauses for arbitration, many agreements between Saudi companies and foreign

[237]Yahya Al-Samaan, "The Settlement Of Foreign Investment Disputes By Means Of Domestic Arbitration In Saudi Arabia" (1994) 9(3) *Arab Law Quarterly*.
[238]Yahya Al-Samaan, "The Settlement Of Foreign Investment Disputes By Means Of Domestic Arbitration In Saudi Arabia" (1994) 9(3) *Arab Law Quarterly*.
[239] Ibid

investors include these clauses, although it is important to remember that such clauses need to be written carefully and it is especially important that they are written according to the rules of the Arbitration Code. However, it is important to note that this was a rule of the 1983 code where at that time, approval of the Ministry of Commerce was required for the registration of articles of association related to the joint company between Saudi and foreign partners.This approval would not be given if the articles of association allowed for arbitration outside of the country.[240]

Therefore, even after the Saudi government had recognised the need for arbitration for private and government organisations as part of improving the overall dispute settlement mechanism, there were still restrictions placed on parties to determinewhether arbitration should take place within the country. It was only with later laws and regulations that the needs of the international business community were recognised, and parties were free to choose to go to arbitration. In fact, to place restrictions on arbitration would be to place restrictions on how parties form their own relationships, and this goes against the principles of Islamic Sharia which promotes mutual consent

### 3.1.6 New Saudi Arbitration Law 2012

The introduction of the new Saudi Arbitration Law 2012 and the Enforcement Law show that the country's unfriendly image in relation to arbitration is changing. These reforms are part of an overall reform of the legal system in Saudi Arabia which is designed to create a suitable environment for international business to take place which will increase foreign investment in the country.[241] Further evidence that Saudi Arabia wants to align itself with the international community is that the new Saudi

[240] Ibid

[241]Yahya Al-Samaan, "The Settlement Of Foreign Investment Disputes By Means Of Domestic Arbitration In Saudi Arabia" (1994) 9(3) *Arab Law Quarterly*.

Arbitration Law 2012 is based on the principles of the UNCITRAL Model Law onInternational Commercial Arbitration which is used as the foundation for the development of arbitration for almost 70 countries.[242]

However, despite this apparent integration with other countries which use the Model Law to develop their legal systems, in some cases, quoting the Model Law verbatim, Saudi Arabia has been the exception. Although Saudi Arabia used the Model law as a starting point, it very quickly made changes in order to address the concerns that it had about the violation of Sharia principles.[243]

It seemed that the issue of government departments not being able to participate in an arbitration agreement without permission from the Prime Minister continued with the introduction of the new Arbitration Law (2012). Specifically, government departments needed permission from the Prime Minister in order to go to arbitration.[244]

### 3.1.7 The New York Convention

Saudi Arabia acceded to the New York Convention in 1994 which required the country to recognise arbitration agreements and arbitral awards that are issued by other member countries.[245] The reason that Saudi Arabia adopted the convention was because of the need to increase its position and role in the international business

[242] Ibid
[243]Ibid
[244]*Kingdom of Saudi Arabia Law of Arbitration* 2012 Art 10 (2)
[245]Kristin Roy, "The New York Convention and Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?" (1994) 18(3) *Fordham International Law Journal*.

community, as well as securing increased investment interest in Saudi Arabia at that time.

### 3.2 Attitude of the Saudi Legal System and Authorities Towards Arbitration

Arbitration is something that is generally acceptable within the Saudi legal system, mainly because it is something that is recognised by most of the early scholars of Islamic law. The first mechanism for resolving disputes through arbitration was by the code of the Commercial Court introduced in 1931 which allows disputing parties a form of resolution through arbitration.[246] Prior to this time, international arbitration was used for dispute resolution between foreign oil companies and the government.

It was, in fact, the oil industry that had a significant influence on the country's attitude to arbitration, specifically, the Aramco Arbitration Award 1958[247] and other awards between foreign oil companies and Arab countries. The problem at this time was that the principles of Sharia were not considered in the arbitration process and furthermore, Sharia principles were considered to be insufficient for the interpretation of agreements, as it was thought that Sharia did not have a body of legal principles which could be used for commercial contracts.[248]

However, it can be argued that Sharia principles can be applied to different types of contracts and that at that time, the real intention of those arbitrators was to prevent the law of the host country being applied, and because of this, the Saudi government did not trust international arbitration because with the reference to the Aramco case, they

[246]Yahya Al-Samaan, "The Settlement of Foreign Investment Disputes By Means Of Domestic Arbitration In Saudi Arabia" (1994) 9(3) *Arab Law Quarterly*.
[247]Aramco v Saudi Arabia (1963) 27 ILR 117
[248]Yahya Al-Samaan, "The Settlement of Foreign Investment Disputes By Means Of Domestic Arbitration In Saudi Arabia" (1994) 9(3) *Arab Law Quarterly*.

thought that if Sharia principles were applied, then the award may have been in their favour.[249] Therefore, it would be reasonable to say that the Saudi government saw international arbitration as a mechanism used to further the interests of western companies. This negative attitude by the Saudi government led to the Council of Ministers Resolution (no.58) 1963 which did not allow government organisations to engage in arbitration as a method of dispute resolution with any third parties,eitherlocal and foreign, nor did it permit the use of foreign law in agreements.[250] As a result of this resolution, government organisations had to refer to the Board of Grievances for dispute resolution.

It is important to note that despite this ban on the use of arbitration, there were exceptions. Disputes of a technical nature or those that came about as a result of concession agreements, which were important to the interests of the country, did not come under the resolution and could be resolved through arbitration.[251]

The economic boom arrived in the 1970s which meant that foreign companies were conducting a lot of business with Saudi Arabia and it was at this time that attitudes towards arbitration started to change. Part of this change in attitude was to soften the approach to arbitration which involved government organisations. The relevant article of the arbitration code was Article 3 which restricted the use of arbitration for the settlement of disputes unless approval was sought from the Prime Minister.[252] Section 8 of the Implementation Rules of the Arbitration Code states the following:

> *In disputes wherein a Government authority is a party along with others and decides to submit to arbitration, such authority shall prepare a memorandum with respect to*

[249] Ibid
[250] *Saudi Arabia Law of the Council of Ministers* 2012 55th Article part 2 (B)
[251] Yahya Al-Samaan, "The Settlement of Foreign Investment Disputes By Means Of Domestic Arbitration In Saudi Arabia" (1994) 9(3) *Arab Law Quarterly*.
[252] *Implementation Rules of the Arbitration Code* Art 3

*arbitration in such dispute, stating the subject matter, the reasons justifying resort to arbitration, and the names of the parties to be submitted to the Council of Ministers for approval to resort to the arbitration. The Prime Minister may, by a prior resolution, authorise a government authority to settle disputes arising from a particular contract, through arbitration. In all cases, the Council of Ministers shall be notified of the arbitration award delivered.*[253]

Therefore, because of Article 3 and the associated implementation rules, specifically section 8 of the Arbitration Code, this is a clear indication of the intention of the Saudi government to shift their attitude towards international arbitration for disputes that involve government agencies. An important indication of this shift was the convention for the establishment of the International Centre for the Settlement of Investments Disputes (ICSID, 1965)[254] whereby the country and their foreign policy mayallow a dispute resulting from an investment relationship and where the Saudi government ratified this convention, it was seen as a major shift in its attitude to arbitration.[255] Furthermore, the Saudi government signed up to the Unified Foreign Capital Investment Code in the Gulf Cooperation Council (GCC)[256] which was also an indication of its shift in attitude to international arbitration. This code contains a provision which allows for investment disputes to be settled in the gulf states through the use of arbitration.[257]

### 3.3 Saudi Legal System for Arbitration

[253]*Implementation Rules of the Arbitration Code* s.8
[254]Yahya, Al Samaan, "The Settlement of Foreign Investment Disputes By Means Of Domestic Arbitration in Saudi Arabia" (1994) 9(3) *Arab Law Quarterly*

[255]Ibid
[256]*Implementation Rules of the Arbitration Code*
[257]*Implementation Rules of the Arbitration Code*

Unfortunately, in the past, Saudi Arabia had a reputation for rejecting methods of dispute resolution that were non-domestic, and they also had a reputation for policies that aimed at restricting or even prohibiting international commercial arbitration.[258]As a result, it is understandable that commercial organisations from western countries were suspicious that Saudi Arabia would use public policy to refuse foreign arbitral awards. Not being supportive of dispute methods that are not based in Saudi Arabia could be a reflection of the country's determination to adhere to or protect the principles of Sharia.

A notion exists that international law is incompatible with Islamic law, however, there is no such thing as un-Islamic international law. In fact, if there were to be an international Islamic law, it would have the intention of creating unity across the global Islamic community which has the same beliefs and is ruled by the same laws of Islam, however this idea goes against western theories about international law which are based on the idea that peace comes from a mutual respect and understanding of the different philosophies and laws from around the world.[259]

Traditionally, Saudi Arabia has rejected western international law because it believes that this law is based on conventions and treaties to benefit the interests of the west and is not concerned about the interests of other countries. This is based on the idea that countries are only interested in their own economies, politics and defence and this

[258]Kristin Roy, "The New York Convention and Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?" (1994) 18(3) *Fordham International Law Journal*.
[259]Kristin Roy, "The New York Convention And Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?" (1994) 18(3) *Fordham International Law Journal*.

is a principle that is in fact against the principles of Islam which rejects self-interest because it is something that is seen as selfish.[260]

Historically, international disputes that involved the government of Saudi Arabia were relegated to Saudi Arabian litigation because other resolution mechanisms were not allowed by Saudi law. However, private corporations were permitted to use other methods of dispute resolution which includes arbitration, providing that they are carried out within Saudi Arabia in accordance with Saudi Arabian law.[261]

Arbitration is something that has been accepted within the country as a way of settling disputes, despite the fact that the country has traditionally rejected international commercial dispute resolution. This is based on the idea that mutual reconciliation is an appropriate method of dispute resolution.

It was only when Saudi Arabia adopted the New York Convention that arbitration involving the government and international organisations became an option for dispute resolution in addition to being a method of dispute resolution for private organisations, the latter being traditionally promoted by the country. At this time, any non-Saudi contractors that entered into arbitration in Saudi Arabia had to follow the laws of Saudi Arabia and as a result, these organisations were resistant to arbitration in Saudi Arabia because it was perceived that it favoured the local party.[262]

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[260]Ibid

[261]Kristin Roy, "The New York Convention And Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?" (1994) 18(3) *Fordham International Law Journal*.

[262]Kristin Roy, "The New York Convention And Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?" (1994) 18(3) *Fordham International Law Journal*.

With reference to the issue of enforcement, in the past, any non-Saudi entity seeking the enforcement of an award for assets that were in Saudi Arabia had to submit the award to a Saudi Court, but the Saudi Court, as part of its duty to implement Saudi law, would then carry out their own investigation as to whether or not the award is enforceable and unfortunately most of the time, before the adoption of the New York Convention, most of the awards were not enforced. Therefore, this could have implications for this research in establishing whether or not the refusal of international awards on the basis of public policy is fair and just because it could be said that Saudi Arabia has a propensity to refuse awards to protect its own interests. Now that Saudi Arabia has adopted the New York Convention, the procedure does not require the Saudi Court to make a decision about the arbitral award, it is only allowed to refuse the award on the grounds of public policy and administrative issues, however, these may now be used to refuse awards simply as an excuse to protect local interests. In other words, whatever the legal structure, there is a possibility that the Saudi authorities will refuse awards.

However, it is important to note that although it may seem that Saudi Arabia is moving to a fairer system of arbitration through the New York Convention and their own conventions, these conventions allow member states to refuse to enforce awards if it contravenes public policy, as can be found in Article V.2 of the New York Convention where it allows, but not requires, a court to refuse to enforce an award on the grounds of contravening public policy.[263] The same principle is found in The Riyadh Convention as stated in Article 30(a) where signatory states can refuse both

[263]*Convention on The Recognition and Enforcement of Foreign Arbitral Awards*Article V (2)

the recognition and enforcement of foreign awards if they go against the principles of Sharia.[264]

This study is concerned with whether or not the refusal to recognise and enforce foreign arbitral awards is fair and whether or not the Saudi courts are sincere in the application of their rights under these conventions. It can be said that the courts in Saudi Arabia depend on the exceptions that are offered by these conventions, however, it is important to understand that they use the allowances of the conventions in a clear way whereby a clear violation of the principles of Sharia is also a violation of public policy, and there is transparency in the process whereby they review cases for compliance with Sharia.[265]

### 3.3.1 The Arbitration Agreement Procedure and Decisions

It can be seen from the history of the development of arbitration law in Saudi Arabia that the need for arbitration came from a need to resolve commercial disputes in international transactions.[266] In this section, the procedure and decisions of arbitration will be discussed.

The arbitration agreement is a representation of an agreement between two parties that they will resort to arbitration to resolve any disputes that may arise between them. This agreement is so important that the entire arbitration process would not be valued

[264]*Riyadh Convention* 1983 Art 30 (a)
[265]Yahya Al-Samaan, "The Settlement Of Foreign Investment Disputes By Means Of Domestic Arbitration In Saudi Arabia" (1994) 9(3) *Arab Law Quarterly*.
[266]A. Al-Ghadyan, 'The Changing Phases of Arbitration in Saudi Arabia' (1997) 63 132 *Arbitration London*

without it.[267] Therefore, it is very important, as part of the overall arbitration process, to validate the arbitration agreement. The conditions that need to be validated are related to the formation of the arbitration agreement itself as well as the two parties that are in dispute.

There are a number of requirements for the formation of an arbitration agreement such as it should be in writing, which is something that can be found in the English Arbitration Act 1996 as well as the New York Convention, Article II (2) which states the following: '*the term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams*'.[268]

This idea is also found in UNCITRAL Model Law (Article 7 (2)) which states the following: 'the arbitration agreement shall be in writing'.[269]

The 1983 Saudi Arbitration Law does not specifically mention that the arbitration agreement has to be in writing, however, the Saudi law does say that the agreement has to be drafted in a new arbitration agreement, therefore, the Saudi law goes further than other laws in terms of the requirement for the operation agreement to be in writing.[270] The reason for this is related to the principles of Islamic Sharia whereby the written word can be used as proof for the verification of an agreement. More

[267] Mohammed I. ALEisa '*A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?*' (PhD Thesis, University of Essex, 2016)

[268] *Convention on The Recognition and Enforcement of Foreign Arbitral Awards* Art II (2)

[269] *UNCITRAL Model Law on International Commercial Arbitration* 1985 Art 7 (2)

[270] Mohammed I. ALEisa '*A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?*' (PhD Thesis, University of Essex, 2016)

specifically, Islamic scholars will only acknowledge forms of proof that are mentioned in the Quran and the Sunnah which include the written form and oral testimony for anything that can be proved.In relation to this idea, the 1983 Arbitration Law allows any form of an agreement so long as it can be proved.[271]

However, there is evidence that with the development of arbitration law in the country there has been a return to the international principle requiring an arbitration agreement to be in writing. The 2012 Saudi Arbitration Law was more restrictive because it required an arbitration agreement to be in writing.This can be found in Article 9 (2) which states the following: '*The arbitration agreement shall be in writing; otherwise, it shall be void*'.[272]

Another important consideration in relation to the Saudi Arbitration Law is that the 1983 law, specifically, Article 5 requires that there is a particular type of agreement or arbitration instrument in order for arbitration to be approved, as stated in the following: '*The said instrument shall be signed by the parties or their officially delegated attorneys-in-fact and by the arbitrators, and it shall state the subject matter of the dispute, the names of the parties, names of the arbitrators and their consent to have the dispute submitted to arbitration. Copies of the documents relevant to the dispute shall be attached*'.[273] Furthermore, Article 5 establishes a number of requirements for the arbitration agreement which includes that the parties must sign the agreement, they agree on who the arbitrators will be and the subject of the dispute and they agree to settle any disputes through arbitration.[274]

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[271] Ibid
[272]*Kingdom of Saudi Arabia Law of Arbitration* 2012 Art 9 (2)
[273]*Kingdom of Saudi Arabia Law of Arbitration* 1983 Art 5
[274] Mohammed I. ALEisa '*A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New*

Generally, the parties to an agreement should have the legal capacity to enter into this agreement and that those bodies have the capacity to dispose of their responsibilities.[275] This principle can be found in the New York Convention whereby an arbitration agreement can be avoided if any of the parties do not have the capacity, as stated in the following: *recognition and enforcement of the award may be refused when the parties to the arbitration agreement are under some incapacity*.[276]

### 3.3.2 Government Agency Participation

In order to understand Saudi Arabia's position in relation to attrition, it is necessary to understand the distinction between private parties and governments parties. Private parties are those corporations or persons that have the legal capacity to act[277]which is different in the case of government parties. It is important to understand that different countries take different positions on the involvement of government parties in arbitration. Many countries, especially those that are common law jurisdictions, should not restrict government involvement in arbitration.This can also include some civil law jurisdictions such as France. However, in Saudi Arabia as with other Arab countries, traditionally it has been required that if the government agency wishes to participate in arbitration in relation to international commercial disputes, they have to

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*Saudi Arbitration Law (2012) Resolve the Main Legal Problems?*' (PhD Thesis, University of Essex, 2016)

[275] Ibid

[276]*Convention on The Recognition and Enforcement of Foreign Arbitral Awards*Art V (1.a)

[277]*Kingdom of Saudi Arabia Law of Arbitration* 1983 Art 2

seek permission from the authorities.[278] It was, in fact, the ARAMCO case which changed the Saudi position towards government agency participation in arbitration.

### 3.3.3 Arbitrators

The appointment of an arbitrator is an important part of the arbitration tribunal. The specific requirements of an arbitrator are found in the 1983 Arbitration Law and the associated implementation regulations 1985. According to the 1983 Arbitration Law,the arbitrator is required '*to be experienced and of good conduct and reputation and full legal capacity*'[279] and it is also interesting to note that the arbitrator should be a Saudi national or a Muslim expatriate from the private sector, or they can be government employees as long as they have obtained permission from the department for which they work.[280]

The influence of Sharia principles on the rules regarding who is permitted to be an arbitrator is very clear and makes exact stipulations. The stipulations are based on the Islamic rules of who can be a judge or 'qadi', specifically, they have to be male, free, Muslim and should be intelligent in order to be able to solve difficult problems, should have knowledge of Islamic law and should not be deaf or blind.[281]

Furthermore, the binding force of the decision made by the arbitrator, according to Islamic principles of Al tahkim, is dependent on whether the arbitrator has been chosen by the litigants to decide between them on the basis of the abitrator's

[278] Saudi Arabia vs. Arabian American Oil Co. (ARAMCO), [1958] 27 ILR 117.
[279] *Kingdom of Saudi Arabia Law of Arbitration* 1983 Art 4
[280] *Kingdom of Saudi Arabia Law of Arbitration Implementing regulations* 1985 Art 3
[281] Mohammed I. ALEisa '*A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?*' (PhD Thesis, University of Essex, 2016)

discretion in addition to their willingness and commitment to abide to the decision freely, of mutual accord and in agreement with the arbitrator.[282]

However, the situation is different in the new Arbitration Law 2012 because the new law does not mention anything about requirements related to gender or religious background. Specifically, Article 14 of the new Arbitration Law says that an arbitrator should be of full legal capacity, have a good reputation and be of good conduct and should have attained at least a degree level in Sharia law.[283]

At this point, consideration should be made as to whether or not restricting arbitrators to being from Saudi Arabia or a restriction on Muslim womenhas an effect on fairness and justice in the recognition and enforcement of foreign arbitral awards. Apparently, it seems that the national economic interest, as opposed to other genuine public policy concerns that are allowed by the New York Convention, could be perceived as taking precedence if the arbitrators are local and Muslim. However, it could also be the case that having Saudi and Muslim arbitrators would ensure sincere adherence to the principles of Sharia and therefore, genuine adherence to public policy concerns.

### 3.3.4 The Seat of Arbitration

The idea of *lex arbitri* or the seat of arbitration is different in Saudi law in comparison to other arbitration regimes because it is based on Islamic law. Specifically, in Islamic law, the seat of arbitration is not important because the resolution of disputes that are under Sharia principles are subject to Sharia law which must be applied to Muslims wherever they reside, thus it is the case that Islamic law allows the parties

[282]Delfina Serrano, "Bringing Arbitration (Taḥkīm) And Conciliation (" [2016] (140) *Revue des mondes musulmans et de la Méditerranée.*
[283]*Kingdom of Saudi Arabia Law of Arbitration* 2012

freedom of choice regarding arbitration.[284] This idea is reflected in the 1983 Arbitration Law because it does not pay much attention to the idea of the seat of arbitration and is based on the nationality of the parties.

The new 2012 Arbitration Law offers more clarity on the issue of the seat of arbitration. Firstly, it allows disputing parties to choose their own seat of arbitration, and if the disputing parties have not decided on the location for arbitration, the tribunal itself will make the decision based on the circumstances of the case.This can be found in the 2012 law Article 28 which states the following: *the circumstances of the case, including the convenience of the venue to both parties.*[285]

### 3.3.5 Applicable Law

Another area where arbitration law in Saudi Arabia is different to other international jurisdictions is applicable law. Saudi jurists tend to follow the Hanbali school of thought and manmade laws are not permissible as only Islamic law should be applied. Because of this, a number of issues arise in the following situations: firstly, where disputing parties choose a law that is not based on Saudi law for disputes that are to be settled in Saudi Arabia; secondly, where the nature of the dispute is international and therefore there will be uncertainty about the procedures and laws that are to be applied in this situation where the disputing parties have not decided on the law that will govern the dispute; and thirdly, the issue of what law is to be applied in consideration of whether the dispute is international or national in nature, especially

[284]Mohammed I. ALEisa '*A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?*' (PhD Thesis, University of Essex, 2016)
[285]*Kingdom of Saudi Arabia Law of Arbitration* 2012 Art 28

as the 1983 Arbitration Law does not differentiate between national and international disputes.[286]

These issues which show that there may be discrimination between national and international disputes in terms of which law should be applied has been controversial, mainly because it has gone against the doctrine of allowing disputing parties to choose their own law of arbitration.

### 3.3.6 Arbitral Decisions

Important aspects of arbitral decisionsare the information that has to be included in the decision and the issuance of the arbitral decision. These are provided for in the 1983 Arbitration Law as follows:

ARTICLE 16: *The award of the arbitrators shall be made by majority opinion, and where they are authorized to settle, the award shall be issued unanimously.*

ARTICLE 17: *The award document shall contain in particular the arbitration instrument, a summary of statements of the parties and supporting documents, the reasons for the award, its text, date of issue and the signature of the arbitrators. Where one or more arbitrators refuse to sign the award, this shall be recorded in the document of the award.*

ARTICLE 18: *All awards passed by the arbitrators, even though issued under an investigation procedure, shall be filed within five days with the authority originally*

[286] Mohammed I. ALEisa '*A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?*' (PhD Thesis, University of Essex, 2016)

*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.*

ARTICLE 19: *Where one or more of the parties submit an objection to the award of the arbitrators within the period provided for in the preceding Article, the authority originally competent to hear the dispute shall hear the objection and decide either to reject it and issue an order for the execution of the award, or accept the objection and decide thereon.*

ARTICLE 20: *The award of the arbitrators shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute. This order may be issued at the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in the Shari'ah .*

ARTICLE 21: *The award made by the arbitrators, after issuance of the order of execution in accordance with the preceding Article, shall have the same force as a judgment made by the authority which issued the execution order.*[287]

**3.4 Summary**

This chapter has highlighted the legal structure of arbitration and the number of problems that have plagued international arbitration in relation to Saudi Arabia. Furthermore, this chapter has also shown how arbitration and the recognition and enforcement procedures in Saudi work. This has been important in answering the research questions because it is necessary that there is an understanding of how Saudi

[287] *Kingdom of Saudi Arabia Law of Arbitration* 1983 Arts 16 - 21

Arabia conducts itself in terms of the procedures which serve to highlight whether it is acting according to its laws and the conventions to which it has agreed to abide by for the purpose of arbitration. Therefore, this chapter has provided insight into the possible intentions in terms of the refusal to recognise and enforce foreign arbitral awards.

## Chapter 4 New Developments in Arbitral Law in Saudi Arabia

### 4. Introduction

This chapter looks at the latter developments in arbitration law in Saudi Arabia with particular attention to the new Arbitration Law 2012. Importantly, the chapter addresses the reasons why this new arbitration law was needed. It therefore highlights the deficiencies in the previous laws and also positions Saudi Arabia as an apparently progressive country in terms of its attitude to international arbitration. The chapter also addresses the reasons for the need for a new law which include its desire to attract foreign investors and integrate into the international commercial community. Particular attention is paid to the issue of Sharia law and how it is incorporated into the new Arbitration Law 2012 which is relevant to understanding the role and use of Sharia in the refusal of foreign arbitral awards.

### 4.1 Reason for New Law – national reform

The Middle East in general, including Saudi Arabia, has witnessed a situation that has gone from an economic boom due to oil revenues to a situation of decreasing oil revenues therefore, there has been a need to create more business opportunities which requires attracting investors. While this situation has been taking place, there has been an Islamic reaction to political unrest in the region which has reinforced the idea that there is a need to adhere to tradition and Islamic values, and Islamic law is something

that is not only designed to regulate the individual in religious matters but also commercial matters.[288]

There are conflicting pressures from the need to increase commercial activity with the rest of the world and the need to adhere to Islamic principles in commercial matters, particularly apparent in Saudi Arabia, which is both a religiously conservative state and the West's most important trading partner. Therefore, there is a need to create confidence that commercial disputes will be resolved fairly and quickly while at the same time not straying from the principles of Sharia.[289] Therefore, the question that has been asked is how far is the Saudi government prepared to go to meet the requirements of the Western business community while remaining loyal to Saudi legal tradition?

### 4.1.1 Failure of Foreign Investment Law

A number of countries have recognised the need to conduct reforms because their legal framework contains provisions that impede foreign investment,[290]while at the same time, there is a need to conduct reforms in order to attract foreign investors. In fact, many countries have carried out significant amendments to attract international investment.[291] Saudi Arabia is one of these countries that has sought to update its laws for the purpose of attracting foreign investment. Specifically, Saudi Arabia introduced the Saudi Arabian Investment Law in 2001 which was deigned to afford foreign

[288]George Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (2003) 24 *University of Pennsylvania Journal of International Economic Law*p.905

[289] Ibid p.905

[290]Susan D. Franck. 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2007) *Foreign Direct Investment*

[291]Susan D. Franck. 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 *Harvard International Law Journal*p.435

investors in Saudi Arabia a number of different rights which included the right to acquire information, clarification and services, however, its failing was that it did not provide a suitable dispute resolution mechanism.[292] Furthermore, it has been the foreign corporations themselves that have blamed the fact that they experience difficulties in their operations in the country in relation to a lack of a dispute mechanism.[293] The Saudi Arbitration Law at that time was seen as an obstacle to resolving disputes between foreign investors and business entities in the country and foreign investors mentioned a number of specific problems that they faced. At that time, foreign investors complained that they did not have any rights in relation to a decision about what would be the most applicable law in conflict resolution other than Saudi law itself, and foreign investors were also not allowed to select non-Muslim or foreign arbitrators which meant that foreign investors were effectively bound to the Saudi judicial system.Finally, it was very difficult for female arbitrators to be afforded the same rights and privileges as male arbitrators, not because of any personal or cultural prejudices, but rather of the Saudi regulation itself.At that time, all of these issues were considered to be public order issues in the Kingdom.[294] There were also a number of other concerns about the arbitration law at that time, including that the proceedings were conducted in Arabic, foreign investors had to obtain permission from the judicial authorities if they wanted an extension to the arbitration process, and proceedings had to be in accordance with Islamic law.[295] However, for the latter issue, it will be shown that the requirement to adhere to the principles of Sharia was something that was maintained and emphasised in the new Arbitration Law 2012.

[292]Abdulrahman F. Alsulami. 'Obstacles of Dispute Resolution Mechanism of The New Saudi Arabian Foreign Investment Law'(2018)
[293]Ibid
[294]Abdulrahman F. Alsulami. 'Obstacles of Dispute Resolution Mechanism of The New Saudi Arabian Foreign Investment Law'(2018)
[295] Ibid

Furthermore, it is also important to note at this point that it is Sharia principles in Saudi Arabia that form the basis of public policy.

As a result of these identified issues, Saudi Arabia was compelled to enact the new Arbitration Law and repeal the old law in 2012.

It important to understand that the United Nations also had a role to play in these reforms, specifically, the United Nations Commission on International Trade Law encouraged Saudi Arabia to carry out these reforms as it was an international body that was designed to encourage countries to take up these types of reform.[296]

The new Arbitration Law aimed to promote investment in the Kingdom. It is important to note that investment in the country affects Saudis and non-Saudis. This idea is important with reference to the new Saudi Arbitration law because it contains both a national and international nature.[297]

In consideration of the different phases of the development of Saudi Arbitration Law, the fifth stage is relevant to this chapter. This stage is the new Saudi Arbitration Law (2012). Historically, Saudi Arabia joined the WTO and as a result, there was a need to modernise its legal system, specifically, its arbitration law. Therefore, there was a need to improve on the existing 1983 Saudi Arbitration Law so the dispute process could be improved in relation to both domestic and international disputes. There was a need for the new Arbitration Law to increase harmonisation between Saudi law and international law.

[296]Abdulrahman F. Alsulami. 'Obstacles of Dispute Resolution Mechanism of The New Saudi Arabian Foreign Investment Law'(2018)
[297]Khalid Alnowaiser, "The New Arbitration Law And Its Impact On Investment In Saudi Arabia" (2012) 29(6) *Journal of International Arbitration*.

The ruler of Saudi Arabia introduced the new Arbitration Law in order to address the problems associated with the old arbitral regime. There was a need to assure investors in the Kingdom and this was achieved through Article 52 of the new law which states the following:

> *Subject to the provisions of this Law, the arbitration award rendered in accordance with this Law shall have the authority of a judicial ruling and shall be enforceable (Article 52).*

As long as the arbitral awards comply with the new Saudi law, they will be enforced.

An important development of the new law is that the Saudi Competent Court cannot examine the facts of the dispute which was the case with the old law.[298] This is evidence that there is no need to check whether or not there is fairness and justice in terms of the details of the case being scrutinised, instead it is the case that fairness and justice is being established against refusal of the award on the grounds of Sharia law or public policy.

Despite the fact that the new law was designed with consideration of international commercial arbitration, the basic rules that are found in the law can be used in domestic arbitration.[299]

Although the Kingdom ratified the New York Convention in 1983, since that time and since the 1983 law was established, there was little distinction between domestic and international arbitration as the new Arbitration law applies to domestic arbitration

[298]Ahmed Altawyan 'Arbitral Awards Under the Saudi Laws: Challenges and Possible Improvements '(April 2017) 3 (1). *International Journal of Law and Interdisciplinary Legal Studies*.

[299]S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.

and only applies to international arbitration if there is mutual agreement by the parties, as stated in Article 3 of the new law.

### 4.1.2 Saudi Arabia in International Commerce - issues

Although there were many commercial regulations in Saudi Arabia that were designed to deal with commercial transactions, there was still concern, especially in the business community, that contracts were subject to Islamic jurisprudence, whichwas worrying for international investors and traders because the contracts are subject to a law that is not codified and does not have any commercial principles.[300]

The arguments from the Islamist jurists is that Islamic jurisprudence has been effective without codification and that the parties to a contract are free to choose their own terms, and it is simply the case that the role of the court is to check that the general principles of Sharia are applied. Therefore, the specific concern is that it is difficult for foreign parties to assess liabilities and damages that can be claimed under Islamic jurisprudence, however, the need for this codification has become more recently a consideration for Islamic figures. There was recognition that the lack of codification of the relevant Islamic principles could result in inefficiency in business relationships.[301] These concerns were also understood by the government of Saudi Arabia who wanted to promote international trade and they understood that international contracts can be judged in the host state and in the situation of Saudi

[300]Torki A. Alshubaiki, "Developing the Legal Environment for Business In The Kingdom Of Saudi Arabia: Comments And Suggestions" (2013) 27(4) *Arab Law Quarterly*.
[301]Torki A. Alshubaiki, "Developing the Legal Environment for Business In The Kingdom Of Saudi Arabia: Comments And Suggestions" (2013) 27(4) *Arab Law Quarterly*.

Arabia, international standards have limited application.[302] Another issue is that because the Saudi commercial Agency Law did not deal with the termination of commercial contracts, liabilities and damages were dealt with using Islamic jurisprudence which presented an issue in terms of consistency because each decision was based on an independent reasoning of the judge.[303]Islamic principles have not been set aside with the new Arbitration Law.

### 4.2 New Arbitration Law – the Arbitration Agreement

One of the distinguishing features of the new Arbitration Law is that it is more liberal in its requirements for an arbitration agreement to be considered valid.This is applicable to both the terms of the formalities of the arbitration clauses and the types of disputes that are covered.[304] However, although the new arbitration law is more liberal, it still bans certain state parties from being party to an arbitration agreement without being authorised.

With reference to the arbitration agreement, it is stated in Article 5 that where the parties put their relationship to a document, such as a contract, then any of the provisions within that contract should not contravene the principles of Sharia.

### 4.3 New Arbitration law - international issues

[302]Torki A. Alshubaiki, "Developing the Legal Environment for Business In The Kingdom Of Saudi Arabia: Comments And Suggestions" (2013) 27(4) *Arab Law Quarterly*.
[303] Ibid
[304] Jean Pierre Harb and Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a', 30 *Journal of International Arbitration*, p.113

International conventions have had an impact on Saudi arbitration law. The main reason for this is because amendments have been made to international arbitration regulationsdue to the number of different international commercial disputes.[305]

It is important to note that the Saudi Arbitration Law that is currently in place is in line with most of the international conventions that govern international arbitration which is evidenced by a number of different factors.[306] One area where there is clear influence from international conventions is in the area of equality.Evidence of the fairness of the Saudi Arbitration Law is that it contains a rule of equality between two parties. This provision is found in Article 27 of the Law which states: 'Each of the Parties shall be treated equally, and full equal opportunities shall be created for both of them to provide his case or defense' (REF Article 27 Saudi Arbitration Law). Similarly, Article 18 of the UNCITRAL states: 'Both Parties shall be treated equally, and full opportunity shall be created for both of them to provide his case'.[307]

However, there is also evidence that parts of the new Saudi arbitration regime are not influenced by international agreements. Specifically, these include the arbitration notification, the impartiality of the arbitrators and the execution of the arbitral award.[308]

Article 3 of the new Arbitration Law establishes whether or not an arbitration is considered international. There are four cases where an arbitration is considered to be

[305]Fahad Alrefaei, "International Arbitration Agreements As A Source Of Legislation And Its Impact On The Saudi Arbitration Law" (2017) 63 *Journal of Law, Policy and Globalization*. p. 69 - 85
[306] Ibid
[307]*UNCITRAL Model Law on International Commercial Arbitration* 1985 Art 18
[308]Fahad Alrefaei, "International Arbitration Agreements As A Source Of Legislation And Its Impact On The Saudi Arbitration Law" (2017) 63 *Journal of Law, Policy and Globalization*. p. 69 - 85

international: the parties to the arbitration should have their head offices in more than one country and in the case where a party has many locations for their business, the location that is most relevant to the arbitration will be considered;[309] if each party has their head office in the same country when the arbitration agreement concludes, they have to also have a place located outside of the country which should include a venue of arbitration;[310]or a place where a substantial part of the activity under the agreement is carried out;[311] or a place that is most connected to the subject matter of the dispute.[312]

### 4.4 Issuance of Arbitral Awards

Under the new Arbitration Law, the final award should be rendered within a period of time agreed upon by the participating parties.If there is no agreement, then the award has to be issued within twelve months of the commencement of the arbitration proceeding, although it can be extended by six months on the authority of the tribunal.[313]

In this sense, the new arbitration Law is much fairer and more realistic than the old Arbitration Law because it is a more realistic period of time to allow hearing and deciding on commercial disputes.[314]

### 4.5 New Arbitration Law based on UNCITRAL Model Law

[309]*UNCITRAL Model Law on International Commercial Arbitration* 1985 Art 3 (1)
[310]*UNCITRAL Model Law on International Commercial Arbitration* 1985 Art 3 (2.a)
[311]*UNCITRAL Model Law on International Commercial Arbitration* 1985 Art 3 (2.b)
[312]*UNCITRAL Model Law on International Commercial Arbitration* 1985 Art 3 (2.c)
[313]S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.
[314] Ibid

The new Arbitration Law has its foundations in the Hanbali school of thought while at the same time it is a modernising influence on the arbitral regime in Saudi Arabia because it contains 'arbitration-friendly'[315] principles which are found in the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

Article 43.1 of the new Arbitration Law requires that the tribunal provide a copy of the arbitration award to all parties to the arbitration within fifteen days from when the award was issued. Furthermore, Article 44 of the new Arbitration Law requires that the tribunal provides the original award together with an Arabic translation to a Saudi court also within fifteen days of the award being issued. This is relevant to this study in terms of understanding that the procedure in Saudi Arabia ensures that local courts make a concerted effort to file the award very shortly after it has been issued by the arbitration tribunal, compared to standard international practice.

However, the requirements of the new Saudi Arbitration Law are contrary to Article 36(2) of the Model Law which elaborates on what is expected of the involved parties and the arbitration tribunal under the standard international arbitration practice which is found in the Model Law as follows:

> *The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language. (Article 36 (2) Model Law)*

[315] Jean Pierre Harb and Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a', 30 *Journal of International Arbitration*, p.113

Additionally, there is a footnote which is associated with this article which states the following:

> *The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.*

Therefore, there are clear differences between the new Arbitration Law and the Model Law because international arbitration practice which can be found in the Model Law says firstly that it is only a requirement that the award is filed with the court by the party who wants to enforce the award instead of being filed by the arbitration tribunal itself and the award is only enforced at the court at the time the relevant party wants to enforce it, not when it is issued by the arbitration tribunal.[316]

Therefore, this is clear evidence of the additional involvement of the Saudi courts, particularly in relation to the award itself. This is in contrast to international arbitral awards, the majority of which globally are conducted voluntarily without needing any recourse to local courts. Furthermore, it is rare that a party which has won an arbitral award needs to go to court in order to enforce the award because the vast majority of awards are enforced voluntarily without the need to go to the courts.[317]

The situation in Saudi Arabia is unique where the successful party must file their award in a Saudi court, even if the award has been paid voluntarily.This places a

[316]S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.
[317]Ibid

burden on the parties because they have to obtain a professional translation and file the award in a short period of time.[318]

If the award is not filed according to the requirements of the new Saudi Arbitration Law within the required time, there is a risk that the award will not be enforceable because of Article 53 which states the following:

> *The competent court, or designee, shall issue an order for enforcement of the arbitration award. The request for enforcement of the award shall be accompanied with the following:*
>
> *1. The original award or an attested copy thereof.*
>
> *2. A true copy of the arbitration agreement.*
>
> *3. An Arabic translation of the arbitration award attested by an accredited authority, if the award is not issued in Arabic. (Article 53 New Arbitration Law)*
>
> *4. A proof of the deposit of the award with the competent court, pursuant to Article 44 of this Law.*

It is important to note that the international institutional arbitration rules that are found in UNCITRAL deal with Sharia principles, for example, they do not say anything at all on the issue of interest. In fact, the payment of interest is something that is addressed in international arbitration rules, although for the purposes of this study, it is important to note that imposing interest is not mandatory under a number of different international arbitration rules. Therefore, a Saudi court's refusal of an award on the grounds that it contains interest would be acceptable in relation to

[318]S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.

international standards. In fact, international rules are mostly silent on this issue and tribunals can apply interest at their own discretion, based on the relevant law and the contract. If there were two parties and one was Saudi, in this case, it would be acceptable to either include a clause about interest or to choose Saudi Arabian law as the governing law of the contract, which parties are free to do.

The oldArbitration Law stipulated that where there was no agreement to the contrary by the two parties, an award must be issued by the tribunal within 90 days from when the arbitration document is issued, however, by permission of the court, there could be an extension. Fortunately, the new Saudi Arbitration Law reflects more realistically arbitration practice that is now taking place because it extends the issuance period to 12 months from when proceedings begin, with the possibility of an extension up to a further six months.[319] However, either of the two parties can request referral of the dispute to the courts when the specified period has expired, and the new Saudi Arbitration Law allows extensions to be requested from the court or allows a party to request the arbitration proceedings be terminated. Those responsible for the development of the new Saudi Arbitration Law made efforts to reduce the strict provisions that were found in the old Saudi Arbitration Law in relation to the time limits established for issuing awards.[320] Furthermore, the new Saudi Arbitration Law allows a foreign substantive law to be applied, which is something that can be found in the UNCITRAL Model Law,[321] however, under the old law there was no similar provision where a foreign law could be applied by a tribunal in the decision-making process.

[319]*Kingdom of Saudi Arabia Law of Arbitration* 2015 Art 40 note 3
[320]*Kingdom of Saudi Arabia Law of Arbitration* 1983 Art 9 note 3
[321]*UNCITRAL Model Law on International Commercial Arbitration* 1985 Art 28

The new Saudi Arbitration Law says that a commercial tribunal has to adhere to the terms and conditions of the contract of which the dispute is about, furthermore, the tribunal has to consider the customs of the trade of which the parties are members and should also consider previous the commercial relationships between the parties when considering the award.[322]

Another way that the new Saudi Arbitration Law is different to the UNCITRAL Model Law isthat it requires awards to be issued by the majority of arbitrators.On the other hand,the UNCITRAL Model Law allows parties to agree differently.[323] The new Saudi Arbitration Law requires that an umpire arbitrator is appointed by the tribunal or the Competent Court in cases where it is not possible for the tribunal to reach a decision.

### 4.6 Role of Sharia

Arbitration in Saudi Arabia is both recognised and accepted within Sharia which is principally composed of the Quran and the Sunnah (sayings and actions of the Prophet Muhammed).

The new law still maintains the role of Sharia in arbitration law which is seen as being the same as the use of public policy in other legal jurisdictions.[324] It is important to note that under Article 25 of the new Arbitration Law, parties are allowed to choose the procedure for arbitration as long as the procedure does not contravene Sharia principles. Sharia has procedural and substantive conditions which means that

[322]*Kingdom of Saudi Arabia Law of Arbitration* 2012Art 38 (1)(C).
[323]*UNCITRAL Model Law on International Commercial Arbitration* 1985 Art 29
[324] Jean Pierre Harb and Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a', 30 *Journal of International Arbitration*, p.113

arbitrators have to respect Sharia if they want to have any chance of their award being enforced in Saudi Arabia.[325]

Reference to public policy together with Sharia can be found in the new Arbitration Law, an example of this being Article 38 which instructs the tribunal that the choice of law should not prejudice Sharia or public policy.[326]

Despite both Sharia and public policy being mentioned together in the new Arbitration Law, there is difficulty in distinguishing between the two because religion and government are very closely linked and many of the laws and government policy are founded on Sharia principles.

It is a principle in Sharia that contracts are sacred and that there is an utmost duty to uphold contracts. However, it is important to note that this principle is only applicable provided that any matters of Sharia have not been voided.[327]

If foreign arbitral awards are to be enforced in Saudi Arabia, then it is clearly stated in the new Arbitration Law that both parties have to take into consideration the Sharia, and if this is not the case, there is a possibility that the Saudi courts will not recognise and enforce the awards.[328] With reference to the ideas of fairness and justice in the refusal to enforce awards, it is important to note that this provision is clearly mentioned in the new Arbitration Law so the relevant parties are aware of it.

One of the basic premises of Sharia is that there is a sacred duty to uphold contracts except in cases where Sharia deems the contract unenforceable. Therefore, according

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[325] Jean Pierre Harb and Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a', 30 *Journal of International Arbitration*, p.113

[326] Ibid

[327] S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.

[328] Ibid

to the Sharia principles, parties are able to enter into any contract they wish which would be fully enforceable except for any issues that contravene Sharia because the enforcement of Sharia principles is strictly adhered to.[329]

Specific Sharia prohibitions include the following:

Riba –interest

Gharar – to speculate or gamble on an uncertain event

Jahala – unclear terms

Ghabn – deceit such as an inflated market price

Wa'ad Ta'aqud – an agreement to agree or a future promise

As the majority of public policy in GCC countries is based on Sharia principles, it may seem that it goes without saying that all public policies view interest payments as a contravention of these principles, however, this is not the case, the reason being that there are a variety of rules in the region regarding this.[330]

Interest is cited as being the most common reason for the refusal of foreign awards in Saudi Arabia because of its strict application of Sharia principles where interest is forbidden. The Quran clearly states:

> *Those who devour usury will not stand except as stands one whom the Evil One by his touch hath driven to madness. That is because they say: "Trade is like usury but God hath permitted trade and forbidden usury. Those who after*

[329]S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.
[330] Mohamed Saud Al-Enazi, '*Grounds for Refusal Of Enforcement Of Foreign Commercial Arbital Awards In Gcc States Law*' (PhD Thesis, Brunel University, 2013)

*receiving direction from their Lord desist shall be pardoned for the past; their case is for God (to judge); but those who repeat (the offence) are companions of the fire: they will abide therein (forever).*[331]

Further evidence of the strict approach to the issue of interest can be found with the Grievance Board where it is clear that any award that is related to an arbitral agreement that has a provision for interest payment will be rejected. However, in support of the idea that Saudi Arabia is fair and just in the way it deals with the enforcement of awards, even where an award contains interest payments, the Saudi courts will enforce the payment of the part of the award that does not contain interest. Therefore, the inclusion of interest will not automatically lead to the rejection of an award, which is evidence that the intentions of the Saudi authorities are only sincerely concerned with the contravention of the principles of Sharia and are simply protecting commercial interests.

This therefore, shows that Saudi Arabia is a society which adheres to the principles of Sharia much more strictly than some of the other countries, however, with reference to the issue of justice and fairness in the refusal of awards on the grounds of public policy, this does not mean that there is any less justice and fairness because Saudi Arabia is more likely to refuse an award in this case, rather it means there is much more certainty in Saudi Arabia's position.

Another Sharia principle that was mentioned in the above is 'ghabn' which basically means to cheat or misrepresent the facts in order to deceive. Sometimes corruption or fraud can be used as a public policy defence in order to refuse to recognise and

[331]Holy Quran chapter 2 verse 275 A. Yusuf Ali translation

enforce a foreign award. In GCC countries generally, behaviour such as corruption, bribery and fraud are seen to be contrary to public policy. The Kuwaiti Arbitration Code 1995 says the following:

> *The award rendered by the arbitrator shall be based on the law provisions, unless he is authorized to compromise and conciliate, where he shall not comply with such provisions, save those relating to the public order.*[332]

Although it is possible to claim damages under Sharia, it is important to note that under Sharia, a party will only be restored to their original position before the breach of the contract, not the position that a party could have been in if there had not been a breach.This is because this would be speculative, which goes against the principles of Sharia.[333]

Because of these aforementioned principles of being against speculation, it is often the case where damages or compensation are being determined,that only actual damages that can be quantified with certainty are awarded and speculative damages are not considered.[334]

Therefore, if damages are awarded in an international arbitration and the Saudi court is considering recognition and enforcement, the Enforcement Law and the new Arbitration Law require the courts to be compliant with Sharia law.

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[332]Kuwaiti Arbitration Code (1995) Article p.182
[333]S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.
[334]S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.

Returning to the idea of fairness and justice, the principles on which the refusal to recognise awards are clearly based on Sharia principles, which are abundantly clear. Whether or not such principles are fair or are implemented fairly may be subjective, however, they are clear and well established.

An important question, therefore, arises from this discussion: does the government of Saudi Arabia use these principles to refuse foreign arbitral awards genuinely on the basis of Sharia or do they have other motives?

With reference to the development of the legal system in Saudi Arabia for the international commercial community, there has been a call by modern Islamic thinkers that there should not be any confusion between the terms Islamic Sharia and Islamic fiqh (jurisprudence).[335] This is because the early jurists had different findings and solutions because they were based on different customs, in a different time and in a different place.[336] This is supported by the idea that great Islamic scholars did not like the idea of imitating other scholars and supported the idea that because their decisions were no more than opinions, other scholars in other times and in other circumstances could also reach different opinions and that these should also be followed if such decisions were more suitable for that time and place.[337] This is referred to as the custom of the time, and as long as there is no conflict between these customs and the principles of Sharia, they should be considered as a tool that can be

[335]Torki A. Alshubaiki, "Developing The Legal Environment For Business In The Kingdom Of Saudi Arabia: Comments And Suggestions" (2013) 27(4) *Arab Law Quarterly*.
[336]Ibid
[337]Torki A. Alshubaiki, "Developing The Legal Environment For Business In The Kingdom Of Saudi Arabia: Comments And Suggestions" (2013) 27(4) *Arab Law Quarterly*.

used to develop commercial laws in a country like Saudi Arabia where Islamic law is supreme over other forms of law.[338]

### 4.7 Non-Sharia Public Policy

With reference to public policy, this is something that is allowed under the New York Convention as a means by which to refuse awards. It is important to note that the New York Convention is a legal framework designed for arbitration, and both the convention and the UNCITRAL Model Law on Arbitration, do not contain anything that can be called non-Islamic or is in conflict with the general principles of Islam.[339]

Therefore, there are number of examples in GCC countries of public policy exemptions that are not related to the principles of Sharia. It is important to note that in this thesis, public policy as something that is based on Sharia has been emphasised, mainly because much of the emphasis has been on the contraventions of public morals or what is acceptable to an Islamic society. This is even more so the case in Saudi Arabia which adopts a strong application of Islamic principles in all aspects of everyday life, both by the authorities and individuals. However, it is important to note that there are other grounds for refusal of foreign arbitral awards on the grounds of public policy that are not necessarily related to the principles of Sharia.

Although for some of the countries in the GCC region, such as Oman and Bahrain, there is no need to provide a reason for an award, in Saudi Arabia it is a requirement, as stated in the Arbitration Law (1983) as follows:

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[338]Ibid

[339]Torki A. Alshubaiki, "Developing The Legal Environment For Business In The Kingdom Of Saudi Arabia: Comments And Suggestions" (2013) 27(4) *Arab Law Quarterly*.

> *The award document shall contain in particular the arbitration instrument, a summary of statements of the parties and supporting documents, the reasons for the award, its text, date of issue and the signature of the arbitrators. Where one or more arbitrators refuse to sign the award, this shall be recorded in the document of the award.*[340]

Further evidence of the fact that a reason has to be offered for the award is found in the 1985 implementation regulations, specifically Article 41.

However, an important question is raised here. An examination of how the courts operate in terms of the recognition and enforcement of a foreign arbitral award has shown that the judges in such cases, who have a Sharia background, are not concerned with the details of a case, only whether or not enforcement of that case would lead to a contravention of public policy, mostly associated with Sharia principles. Therefore, why would a reason for the award be required? The answer lies in the fact that in reality, the courts in Saudi Arabia do not require a reason in practice or that only a brief reason is required, in fact in reference to a foreign award, a lack of a reason would not contravene public policy as long as it was agreed by the parties and is something that is found in the relevant law.[341]

Another reason for a refusal of an award on the grounds of public policy is a lack of impartiality by the arbitrator. It is important to note however, in this case, there are a number of different biases that are considered. With reference to the New York Convention, it may be the case that there was simply a lack of impartiality by the

[340] *Kingdom of Saudi Arabia Law of Arbitration* 1983 Art 17
[341] Mohamed Saud Al-Enazi, '*Grounds for Refusal Of Enforcement Of Foreign Commercial Arbital Awards In Gcc States Law*' (PhD Thesis, Brunel University, 2013)

arbitrator which can be seen in what is referred to as the appearance of bias or imputed bias or it may be the case that the arbitrator did not act in an impartial way which is referred to as actual bias.In most cases, the court will only refuse to enforce the awards for the latter type of bias.[342]

Therefore, it can be seen here that although public policy is a European concept that reflects the fundamentals of a national legal order, [343] it manifests as being based on Sharia principles in Muslim countries, especially, Saudi Arabia, so in relation to the idea of public policy in Islamic law it is that Islamic law itself is designed to protect society as a whole which is reflective of public policy.

### 4.8 Institutional and ad hoc arbitration

In the past, Saudi Arabia made a distinction between ad hoc and institutional arbitration, however, in the new Arbitration Law 2012, the parties can choose to have their relationship subjected to any document or arbitral award, as this is provided for in Article 5 of the new law which states the following:

> *If both parties to arbitration agree to subject the relationship between them to the provisions of any document (model contract, international convention, etc.), then the provisions of such document, including those related to*

[342]Albert Jan van den Berg, Consolidated Commentary on the Court Decisions Concerning the New York Convention, the latest version of which appeared in XXVIII

[343]Maurits Berger, "PUBLIC POLICY AND ISLAMIC LAW: THE MODERN DHIMMĪ IN CONTEMPORARY EGYPTIAN FAMILY LAW" (2001) 8(1) *Islamic Law and Society*.

*arbitration, shall apply, provided this is not in conflict with the provisions of Sharia.*[344]

Under the new Arbitration Law, it is the agreement between two parties which forms the institutional rules to which they submit their relationship as long as there is an agreement in place, and under the previous law, any differences between the parties were subject to a competent authority which referred to the legal authority of the state which, in the case of Saudi Arabia, included the Board for the Settlement of Commercial Disputes, Board of Grievances.[345] Furthermore, the idea of authority is not found in the new Arbitration Law, however, the new law does refer to the court of competent jurisdiction which is referred to different places in the law.[346] Furthermore, the supervision of the case is carried out by an arbitral institution and less so the courts, however, this depends on the arbitration agreement agreed to by the parties.[347]

### 4.9 Change of jurisdiction – Enforcement Law

One of the differences between the old arbitration regime and the new regime under the new Arbitration Law 2012 is that there was no longer a need for an award to be put forward to the Board of Grievances for Enforcement. Instead, under the new law, it is a requirement to bring the enforcement proceedings to a new jurisdiction, this being the enforcement judge in line with the Enforcement Law.

A case that demonstrates that international commercial parties are suspicious of having an award enforced in Saudi Arabia and being decided under the new

[344]*Kingdom of Saudi Arabia Law of Arbitration* 2012 Art 5
[345]Jean Pierre Harb and Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a', 30 *Journal of International Arbitration*, p.113
[346]Ibid
[347]Ibid

Arbitration Law is the case of Jadawel International v. Emaar Property.[348] This is considered to be a very good example of where one of the parties felt that they were treated unfairly.

In this case, Jadawel in 2006 initiated arbitration procedures in front of a three-member tribunal situated in Saudi Arabia. Jadael claimed US$1.2 billion in damages for a breach committed by Emaar Property in relation to a joint venture agreement concerning a construction project. It was contended by Jadawel that Emaar Property had entered into a partnership with another party. Jadawel considered that this was a breach of the agreement they had with Emaar Property. The arbitration process lasted for two years. The result of the arbitration was that the claim by Jadawel was dismissed and they were ordered to pay legal costs. When the award was put before the Board of Grievances for enforcement purposes, they considered the merits to make sure that there was compliance with the principles of Sharia. In their ruling, the award was reversed by the Board of Grievances; and as a result of this, the damages that were awarded to Emaar were in fact annulled and furthermore, Emaar had to pay over US$250 million in damages. The outcomes of this case are not something that would happen in the current situation where enforcement is under the Law of Enforcement and the enforcement judge and not before the Board of Grievances. Enforcement under the Enforcement Law is detailed further in the following chapter.

It is important to understand why there would be different outcomes in this case if it were enforced under the Enforcement Law and not under the Board of Grievances. This is due to a number of changes that are worth mentioning at this point. Firstly, it is important to note that Article 1 of the Enforcement Law refers to ‘the Chairman and

[348]Jadawel International (Saudi Arabia) v Emaar Property [2004] PJSC (UAE)

Judges of the Enforcement Circuit, the Enforcement Circuit Judge, or the Judge of the Single Court' which establishes who the judge can be. The new execution law was created in 2007 as a response to the procedure under the Board of Grievances which was shown to be difficult and lengthy and the idea was that a judge, as described in the Enforcement Law, would be someone who specialised in the enforcement of these types of arbitral awards which means that the overall process would be much quicker.[349] The old regime under the Board of Grievances only made mention of foreign judgements, however, the new Enforcement Law explicitly refers to arbitral awards. The enforcement judge also has a number of significant powers in relation to the enforcement of arbitral awards, not only do they enforce the award, they can also monitor the enforcement of awards, however, it is important to note that this is not the case for awards that are associated with criminal matters.[350]Much has been written about the importance of adherence to the principles of Sharia in the recognition and enforcement of foreign arbitral awards and that they can be refused on the grounds of public policy. Even with the introduction of a new regime for the enforcement of awards which uses an enforcement judge, the judge is still bound by the principles of Sharia. The enforcement judge is obligated to respect and follow Sharia principles during enforcement unless the law says otherwise.[351]

Further powers are given to the arbitration judge under the new Enforcement Law which significantly changes the regime. Article 11 of the Enforcement Law states that an enforcement judge is allowed to enforce a foreign arbitral award only on the grounds of the principles of reciprocity and Article 7 allows the enforcement judge to seek precautionary steps and gain assistance from the relevant authorities if there is a

[349]Anon, "The New En Forcement Law Of Saudi Arabia: An Additional Step Toward A Harmonized Arbitration Regime" [2013] (1) *Jones Day p.2*
[350]Ibid
[351] Ibid

violation of enforcement by the parties, and finally, the procedures for enforcement itself are clearly laid out in the new law.[352]

### 4.10 Application of New Arbitration Law

The first important point to make with reference to the application of the new Arbitration Law is that it is clearly stated that Sharia will be applied to arbitrations that are conducted in Saudi Arabia.[353] It is this assertion about the applicability of Sharia law that is relevant to the argument or questions raised in this study. Specifically, this research seeks to establish whether or not arbitral awards are refused on the grounds of public policy which is derived from Sharia principles and whether there is justice and fairness in this refusal. To support the idea that it is fair and just, it is clearly stated in the new Arbitration Law 2012 that Sharia principles have to be adhered to and all parties need to be aware of this before entering an agreement. Furthermore, it is also stated that the same principles will be applied to arbitrations that take place in other countries, providing that the parties to the agreement have agreed to subject their agreement to the new arbitration law.[354]

It is interesting to note that the provision that says Sharia should be conformed with gives the same importance to international conventions. Article 2 of the new law states the following:

> *Without prejudice to provisions of Islamic Sharia and international conventions to which the Kingdom is a party, the provisions of this Law shall*

[352]Anon, "The New En Forcement Law Of Saudi Arabia: An Additional Step Toward A Harmonized Arbitration Regime" [2013] (1) *Jones Day p.2*
[353] Jean Pierre Harb and Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a', 30 *Journal of International Arbitration*, p.113
[354]Ibid

> *apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom or is an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this Law.*[355]

This is further evidence against the argument that public policy is used unfairly because it is clear that Saudi authorities are clearly committed to the requirements of international conventions.

The new Arbitration Law is clearly more international in nature, as evidenced by Article 3 which refers to international trade as follows:

> *Under this Law, arbitration shall be international if the dispute is related to international commerce*[356]

However, it is important to note that this international nature is only applicable if the parties involved in the dispute agree to subject their agreement to the new Arbitration Law.[357]

One thing that is different about the new Arbitration Law is that, unlike other arbitration laws, it does not make a distinction between domestic arbitration and international arbitration.[358]

The principle of competence-competence is also included in the new Arbitration Law, which basically means that the tribunal has the power to make decisions on its own jurisdiction and there is also respect for the parties' choice of arbitration regarding

[355] *Kingdom of Saudi Arabia Law of Arbitration* 2012 Art 2
[356] *Kingdom of Saudi Arabia Law of Arbitration* 2012 Art 3
[357] Jean Pierre Harb and Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a', 30 *Journal of International Arbitration*, p.113
[358] Jean Pierre Harb and Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a', 30 *Journal of International Arbitration*, p.113

state court proceedings.[359] This is therefore further evidence that Saudi authorities have the commercial interests of the commercial parties at heart because they allow the arbitration process to run by itself and they give this high level of independence and decision making to the arbitration itself. More specifically, the new arbitration law states that the tribunal makes decisions about non-jurisdiction before considering the merits of the case itself, but they may join these merits to the issue if they feel they need to, something that was not found in the old Arbitration Law.[360] Specifically, provisions for this are found in Article 20 of the new Arbitration Law which states the following:

> *The arbitration tribunal shall decide on pleas referred to in Paragraph 1 of this Article prior to deciding on the subject of the dispute. However, it may join said pleas to the subject and decide on them both. If the arbitration tribunal decides to dismiss the plea, such plea may not be raised except through the filing of a case to nullify the arbitration award ending the entire dispute, pursuant to Article 54 of this Law.* [361]

### 4.11 Summary

The chapter has highlighted the idea that there has been a conflict between the desire to be part of the international commercial community and a need to protect the principles of Sharia which are very important to Saudi Arabia religiously, culturally and socially. Furthermore, it showed how central Sharia law is to the process of

[359] Ibid
[360] Ibid
[361] *Kingdom of Saudi Arabia Law of Arbitration* 2012Art 20 (3)

recognition and enforcement. The chapter also showed that there is a real need for reform, highlighting that inept and archaic laws do not suit the purposes of the country as well as the needs of foreign investors. The chapter has shown that Saudi Arabia is willing to reform, and although there has been little evidence to suggest that the country has reformed in terms of the application of Sharia principles which has included the partial enforcing of awards, it has made real progress in terms of allowing parties to a contract for independence in their arbitration relationship. Importantly, this chapter also showed that Sharia principles are not the only principles that inform public policy.

## Chapter 5 - Recognition, enforcement and refusal of awards in Saudi Arabia

### 5. Introduction

This chapter specifically addresses the recognition, enforcement and refusal of foreign arbitral awards, particularly on the grounds of Saudi public policy. The chapter deals with a relatively new law in Saudi Arabia, the Enforcement Law and its relevance to

Saudi Arabia's approach and attitude to international arbitration. It is necessary to reveal the intricacies of the process because it can potentially highlight the possible areas, reasons or opportunities where the authorities could use public policy to refuse awards for unfair and unjust reasons. In this chapter, there will also be consideration of Sharia as being relevant to the process of recognition and enforcement. Finally, justice and fairness are revisited in this chapter.

## 5.1 Recognition

In all cases of foreign arbitral awards, it is absolutely necessary for the Ministry of Justice, headed by the Minister of Justice and the President of the Supreme Judicial Council, to ensure that the recognition and enforcement of awards is simplified and expedited, and that there is a clear mechanism in place to ensure this. This is important to assure investors and to protect the country's international credibility and reputation in relation to honouring international agreements.[362]

A consideration of the enforcement of foreign arbitral awards includes a consideration of the secular framework of the law, specifically, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in addition to the UNCITRAL, however, it is important to note that there is nothing in this law that is non-Islamic.[363] In light of this idea, it is important to note that a return to Islamic law does not mean that international commercial practices should be rejected when they are not un-Islamic in principle.

[362]Khalid Alnowaiser, "The New Arbitration Law And Its Impact On Investment In Saudi Arabia" (2012) 29(6) *Journal of International Arbitration*.
[363]Torki A. Alshubaiki, "Developing The Legal Environment For Business In The Kingdom Of Saudi Arabia: Comments And Suggestions" (2013) 27(4) *Arab Law Quarterly*.

Historically, in the 1950s, the courts in Saudi Arabia often refused to enforce international arbitral awards because it was perceived that these awards went against Sharia, but this situation changed when Saudi Arabia signed up to the New York Convention in April 1994.[364] This convention required Saudi Arabia recognise and enforce foreign awards.[365]

It is important at this point to note that there is a difference between recognition and enforcement. According to the Convention, recognition is an acknowledgement which is valid and binding, in other words, there is no dispute about its procedure and it is binding, therefore, it has a legal status because it cannot be re-litigated or arbitrated again.[366] This can be seen in the new Arbitration Law where Saudi Arabia recognises international arbitral awards if they are compliant with the rules of arbitration.[367]

With reference to enforcement in Saudi Arabia, there is a difference between international awards and local awards awarded in another country and international and local awards issued from Saudi Arabia. International awards from another country are not required to go to the Competent Court of Appeal for ratification purposes, instead they are enforced in the Enforcement Courts.[368] This means that foreign awards issued in another country only face a one-stage process in Saudi Arabia, much

[364]Ahmed Altawyan 'Arbitral Awards Under the Saudi Laws: Challenges and Possible Improvements '(April 2017) 3 (1). *International Journal of Law and Interdisciplinary Legal Studies*.

[365]*Convention on The Recognition and Enforcement of Foreign Arbitral Awards*Art III.

[366]Ahmed Altawyan 'Arbitral Awards Under the Saudi Laws: Challenges and Possible Improvements '(April 2017) 3 (1). *International Journal of Law and Interdisciplinary Legal Studies*.

[367]*Kingdom of Saudi Arabia Law of Arbitration* 2012Art 3, 8 (2)
[368]*Saudi Arabian Enforcement Law* 2012 Art 9

easier than awards issued locally, therefore, in consideration of this, the enforcement of foreign arbitral awards is easier.

### 5.2 Requirements for the recognition and enforcement of foreign arbitral awards

In addition to the award not contravening Saudi public policy which is largely based on Sharia principles, arbitral awards have to be rendered by a majority of the tribunal, be in writing and be signed by the arbitrators.[369] Further requirements are that the arbitration includes the place and date of issue, the names and addresses of arbitrators and the involved parties, reports and pleadings, a summary of the agreement, and details of the costs of the arbitral process.[370]

A new introduction in the new Arbitration Law is a unique provision that requires the tribunal to file an Arabic translation of the award at the Competent Court within 15 days of the award being issued (Article 44 NEW LAW). The article states the following:

> *The arbitration tribunal shall deposit the original award or a signed copy thereof in its original language with the competent court within the period set in Article 43 (Paragraph 1) of this Law, accompanied by an Arabic translation of the award attested by an accredited body if the award is issued in a foreign language.* [371]

#### 5.2.1 Enforcing arbitral awards

[369]S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.
[370] Ibid
[371]*Kingdom of Saudi Arabia Law of Arbitration* 2012Art 44

The Implementation Regulations of the old Arbitration Law under Article 20 provided the following:

> *The award of the arbitrators shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute. This order may be issued at the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in the Shari'ah.*[372]

This article contains a provision to protect Sharia law, and as with the new Arbitration Law, there is a requirement that the award of the arbitrators is subject to the competent authority. Evidence of this is found in the Implementation Regulations of the old Arbitration Law (1983) introduced in 1985, which states that in order for an award to be enforceable, it had to be first ratified by the court, which, under the old Arbitration Law was the Grievances Board. The Grievances Board was responsible for hearing any objections to the award, but only to determine if there were any issues in the award that would prevent enforcement under Sharia.[373]

Therefore, under the old Arbitration Law,there was a risk that the supervising court, with its power to reconsider a disputecould become too involved in the decision-making process and that there was a risk that they would impose their own decisions in the case, despite the fact that a decision had already been made by the arbitration tribunal.

Under the new Arbitration Law,this situation is avoided, specifically, where the court can impose their own decision on the case. Article 52 of the new Arbitration Law states the following:

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[372]*Kingdom of Saudi Arabia Law of Arbitration* 1983Art 20
[373]S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.

> *Subject to the provisions of this Law, the arbitration award rendered in accordance with this Law shall have the authority of a judicial ruling and shall be enforceable. (Article 52 New Law)*

Furthermore, in support of this idea, Article 50 (4) of the new Arbitration Law states the following:

> *The competent court shall consider the action for nullification in cases referred to in this Article without inspecting the facts and subject matter of the dispute. Article 50 (4) of the New Arbitration Law)*

In order for the court to execute the arbitral award, a number of documents have to be submitted to the Competent Court which include a copy of the arbitration agreement, a copy of the award itself, an Arabic copy of the award if it is in a foreign language, and finally, evidence that the award was filed at the court, as required by Article 44.

The Competent Court will, at this stage, ensure that the award does not conflict with Sharia principles or public policy, which is a requirement of Article 55 (2) (b)) of the new Arbitration Law.

### 5.2.2 Enforcement Law

A consideration as to whether or not Saudi Arabia adheres to the spirit of Article V of the New York Convention when they use grounds to refuse to enforce foreign arbitral awards requires an examination of the Enforcement Law.With reference to the consideration of international conventions, Article 11 of the Enforcement Law

requires that procedures that are carried out in order to ensure the enforcement of foreign arbitral awards are in adherence with the requirements of international conventions and treaties.[374] The most important conventions are clearly those related to enforcement, namely, the New York Convention 1958 and the Riyadh Convention 1983, therefore, a pertinent question is does Saudi Arabia adhere to the requirements of Article V of the convention in their grounds when they enforce awards.[375] It is important to remember that Saudi Arabia is obligated to recognise and enforce awards under these conventions, and it is the spirit of the Enforcement Law which encourages this. In line with this obligation to adhere to the conventions, the refusal of foreign arbitral awards on the grounds of public policy is allowed. This is provisioned for by Article V (2) of the New York convention which states, 'When the arbitral award is in conflict with the public policy of the country that will enforce it'[376] and the Riyadh Convention, the most significant part being Article 37 (e) which states the following in relation to public policy as a grounds for the refusal of foreign awards ''If any part of the adjudication be in contradiction with the provisions of Islamic Sharia'.[377]The point that is being made here is that Saudi Arabia is very much within its rights to refuse the recognition and enforcement of awards because of their Enforcement Law which actually encourages recognition and enforcement based on the fact that Saudi Arabia has signed up to these conventions.

[374]Mohammed I. ALEisa '*A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?*' (PhD Thesis, University of Essex, 2016)
[375]Ibid
[376]*Convention on The Recognition and Enforcement of Foreign Arbitral Awards*Article V (2)

[377]*Riyadh Convention* 1983 Art 37

Once an award has been recognised, it is a requirement of Article 53 of the new Arbitration Law that:

> *The competent court, or designee, shall issue an order for enforcement of the arbitration award (Article 53 New Law)*

The process of enforcement then continues from this point whereby the enforcement order issued by the court is passed to the Enforcement Circuit. The Enforcement Circuit is not solely for the purpose of enforcing foreign arbitral awards but is responsible for other areas, such as the custody of children, divorce and debts.

This study is concerned with whether or not the refusal of the recognition and enforcement of foreign arbitral awards is fair and whether the process of recognition is dependent on compliance with Sharia principles, however, when it comes to the enforcement of an award, it is also important to consider the fact that the enforcement judge, who is the head of the Enforcement Circuit, can decide whether or not to enforce an enforcement order (Article 1 Enforcement Law). It is important to note at this point that the enforcement judge is also under the obligation to apply Sharia principles in their decision making.

Any party that seeks to enforce an international arbitral award has to meet the requirements of the Enforcement Law. Article 11 of the Enforcement Law refers specifically to foreign court judgements; however Article 12 of the same law states the following:

> *the provisions of the previous article shall apply to the arbitral awards issued in a foreign country (Article 12 Enforcement Law)*

Article 11, which relates to a foreign court judgement states the following in relation to granting the enforcement of an award:

> *an Enforcement Judge may only enforce on the basis of the principles of reciprocity and after being satisfied that (v) the judgment or order does not contain anything that contradicts Saudi public policy (Article 11 (v) Enforcement Law).*

Therefore, a consideration of fairness in the enforcement of foreign arbitral awards requires not only consideration of the new Arbitration Law but also consideration of the Enforcement Law and the actions of the enforcement judges and the grounds upon which they make their decisions. This issue also raises an additional concern in the enforcement of foreign arbitral awards. There are two layers or procedures that an award has to go through before it can be enforced, namely, the Arbitration Law and the Enforcement Law, and this supports suspicions that Sharia and the associated public policy are used to refuse the enforcement of awards. While this is not evidence of unfairness, and there is a need to look at individual cases that have gone through the enforcement process, it does show that there is an increased difficulty in having awards enforced in Saudi Arabia.

The new Saudi Arbitration Law also emphasises the finality and enforceability of the awards issued, as long as they comply with the requirements[378]which also includes complying with public policy and Sharia law requirements. In contrast, this was not the case under the old Arbitration Law because all awards needed to be approved by the Competent Court before becoming final and enforceable.[379] Under the old law, this would take a long time to process. However, it is important to understand that not only are there enforcement proceedings to consider, there are also potential annulment proceedings to consider as well.The new law seeks to simplify the processes and

[378]*Kingdom of Saudi Arabia Law of Arbitration* 2012Art 52
[379]*Kingdom of Saudi Arabia Law of Arbitration* 1983 Arts 18 – 20

requirements for enforceability and not just make the awards final and enforceable, hence, this a development on the old law. Moreover, under the new Saudi Arbitration Law, if a party wants to apply for the enforcement of an arbitral award, they can only do so after the 60-day period for the annulment proceedings has passed.[380] This is the situation whether the annulment proceedings have started or not, therefore, it could be the case that there are enforcement and annulment proceedings taking place at the same time under the new Saudi Law. However, it is possible to suspend the enforcement proceeding if there are serious grounds for doing so and the applicant is required by the court to provide a guarantee in this type of situation.[381]

With reference to public policy and Sharia requirements, before the Competent Court can issue an order for the enforcement of an award, they have to make sure that the award does not go against a previous judgment issued by a Saudi court and also does not go against Sharia and if it does, then the offending part of the award is removed and the remainder of the award is enforced; and finally, the losing party has to be properly notified about the award (New law Article 50 (2))

### 5.3 Execution Law

As explained, the Competent Court responsible for the recognition of foreign judgments was the Board of Grievances, however, this was only the case until 2013 with the introduction of the Saudi Execution Law[382] which repealed Article 13 (g) of the Saudi Board of Grievances law which meant that the competent authority that was

[380] *Kingdom of Saudi Arabia Law of Arbitration* 2012Art 55(1)
[381] *Kingdom of Saudi Arabia Law of Arbitration* 2012Art 54
[382] *Saudi Arabia Execution Law* 2013

then responsible for hearing applications for the recognition of foreign awards under the new law was a department, the Execution Department established by the new Execution Law.[383] According to Article 11 of the Execution Law, any treaties that govern reciprocal recognition take precedence over any provisions of the Execution Law.[384] This would therefore, be applicable to the New York Convention. Furthermore, in the absence of any treaty, foreign judgments can still be recognised according to Article 11 of the same law providing the following:

1. That the Saudi courts are not competent to hear the case in respect of which the court judgment or order was passed and that the foreign courts which passed it are competent in accordance with the international rules of jurisdiction set down in the laws thereof.

2. That the litigants to the case in respect of which the judgment was issued were duly summoned, properly represented and enabled to defend themselves.

3. That the court judgment or order has become final in accordance with the law of the court that passed it.

4. That the court judgment is in no way inconsistent with any judgment or order previously passed by the Saudi courts.

5. That the judgment does not provide for anything which constitutes a breach of Saudi public order or ethics.[385]

Further analysis of Article 11 shows that Article 11 (1) could lead to the understanding that the courts in Saudi Arabia do not have any jurisdiction over the

[383]Nicolas Bremer, "Seeking Recognition And Enforcement Of Foreign Court Judgments And Arbitral Awards In The GCC Countries" (2017) 3 *McGill Journal of Dispute Resolution*p.37
[384]*Saudi Arabia Execution Law* 2013 Art 11
[385]*Saudi Arabia Execution Law* 2013 Art 11

subject matter at all and therefore, as a consequence, the foreign judgment could not be recognised in Saudi Arabia in a situation where the Saudi courts and the foreign court have competing international jurisdiction.[386] However, Article 11 (4) of the same law appears to be a conflict because under Article 11 (4),a foreign judgment is not recognised in Saudi Arabia if there is a conflict with a prior judgment that has been passed in a Saudi Court on the same subject, and this conflict would therefore cause Article 11 (1) to be interpreted in a much more restrictive way.[387]

With reference to public order, under the previous regime, it was the case that foreign judgments could be recognised by the Board of Grievances according to Article six of the Procedural Rules Before the BoG[388] which does not require the foreign judgment to comply with public order in Saudi Arabia, unlike Article 11 of the Execution Law, however, it is important to understand that Article 6 of the Procedural Rules doesn't require compliance with the principles of Sharia which, in fact, form the basis for public policy in Saudi Arabia, and therefore, any foreign award that conflicts with the principles of Sharia would also not be recognised under the new regulation.

### 5.4 Refusal of recognition and enforcement (grounds) under the new law

[386]Nicolas Bremer, "Seeking Recognition And Enforcement Of Foreign Court Judgments And Arbitral Awards In The GCC Countries" (2017) 3 *McGill Journal of Dispute Resolution*p.37
[387]Ibid 37
[388]*Procedural Rules Before the BoG,* Art 6 (Council of Ministers Regulation 190/1409H)

Saudi Arabia has been using Article V (2(b)) as a defence in situations where it does not enforce arbitral awards because it emphasises the fact that it is an Islamic country.[389]

### 5.4.1 Public Policy (definition)

Generally, it has been difficult to define public policy properly because the relevant conventions do not offer any definitions nor do they suggest how public policy should be applied in the refusal of awards, rather, they simply say that it can be applied for this purpose.[390] Furthermore, in different national contexts, public policy means different things.

The best way to understand the definition of public policy is to look at different conventions that relate to the refusal of awards on public policy grounds. Firstly, the New York Convention's approach to public policy, being the convention that allows the refusal of awards on public policy grounds, is an important consideration. The New York Convention provides the following:

> *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: ... the recognition or enforcement of the award would be contrary to the public policy of that country.*[391]

[389]Abdulrahman F. Alsulami. 'Obstacles of Dispute Resolution Mechanism of The New Saudi Arabian Foreign Investment Law'(2018)
[390]Mohamed Saud Al-Enazi, '*Grounds for Refusal Of Enforcement Of Foreign Commercial Arbital Awards In Gcc States Law*' (PhD Thesis, Brunel University, 2013)
[391]*Convention on The Recognition and Enforcement of Foreign Arbitral Awards*Art V (2) (b)

However, a definition of public policy is not offered here.Another convention that is relevant to Saudi Arabia and international arbitration is the Arab League Convention which pertains to the execution or enforcement of an award, stating that an award may not be enforced:

> *if the arbitrators' decision includes anything considered to be against general order or public morals in the state requested to carry out execution*[392]

In the above, there is a clear reference to the idea of morality, while the New York Convention is largely silent on what constitutes public policy or offers little definition The Arab League Convention offers more insight into what is meant by public policy in the region. Given that public policy is based on Sharia principles and it is these same principles that inform public morals, this definition gives a clearer understanding of where the contraventions could take place, however, it would require a better understanding of what constitutes a contravention of public policy specifically in Saudi Arabia. It would be expected that the answer to this question may lie in a convention that is directly associated with Saudi Arabia. The Riyadh Convention offers more insight as to what constitutes public policy in Saudi Arabia, and in relation to the refusal of an award, it states the following:

> *the competent judicial authority of the requested party may not discuss the subject of such arbitration nor refuse to execute the judgement except in the following cases: ... If any part of the adjudication be in contradiction with the provisions of Islamic Shari'a, the public order or the rules of conduct of the requested party.*[393]

[392]Arab League Convention Article 3 (e)
[393]*Riyadh Convention* (1983) Art 37 (e)

Furthermore, there is also evidence established by the Grievances Board in Saudi Arabia which states that the enforcement of foreign arbitral awards must be done in line with public policy.Specifically, the Grievances Board said in reference to the Arab League Convention that a court is empowered to refuse an award if it goes against public policy or the public morals of the country that has to carry out the enforcement. Importantly, the Grievance Board said the consideration of such enforcement is discretionary for the relevant court. Specifically, the grievance Board stated the following:

> *it is not possible in any case to grant execution of any foreign award that violates any general principles of Shari'a*[394]

It is important to note that Sharia does not offer a proper definition of public policy which is somewhat problematic because public policy in Saudi Arabia is based on Sharia. What tends to happen is that public policy is simply stated as being a respect and adherence to the spirit of the Sharia in that agreement should not authorise what is considered to be unauthorised in Islam.[395]

The GCC states that the idea of public policy is designed to protect the enforcing state from the contravention of its principles. Therefore, with reference to the idea about which law should be used to govern the idea of public policy and what it constitutes, it is clear that it should be the law of the enforcing country. Furthermore, this is an idea that is explicitly mentioned in the New York Convention as stated in the following:

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[394]*Circular of the Grievance Board regarding Enforcement of Foreign Judgements and Arbitral Awards* no 7. 15/8/1405 H (1985) Art 3, 5

[395] Mohamed Saud Al-Enazi, '*Grounds for Refusal Of Enforcement Of Foreign Commercial Arbital Awards In Gcc States Law*' (PhD Thesis, Brunel University, 2013).

*The recognition or enforcement of the award would be contrary to the public policy of that country.*[396]

The emphasis here is on the words 'that country'. The idea of that country is also found in other, more local conventions, the Arab League Convention (Article 3 (e)) and the Riyadh Convention (Article 37 (e)).

### 5.4.2 The difference between domestic and international public policy

Because there is a difference between national or local arbitration and international arbitration, there also has to be consideration of the fact that there is a need to distinguish between national and international public policy. It is important to note that the allowances that are made by the New York Convention refers to the public policy of a particular country with reference to the allowance to refuse foreign arbitral awards on the grounds of public policy. Considering that the difference between domestic and international public policy is very important in understanding the issues of the refusal of awards,it has been claimed that it is rarely the case that an enforcement is refused on the grounds of public policy and the distinction between domestic and international policy has been one of the reasons for this.[397]More specifically, what is seen to be public policy in a domestic situation in terms of domestic relations may not be the same as what is seen in international relations. The distinction between the two is determined by the purpose of domestic relation and

[396]*Convention on The Recognition and Enforcement of Foreign Arbitral Awards*Art V (2) (a)

[397]Albert Jan van den Berg, "New York Convention Of 1958: Refusals Of Enforcement" (2007) 18(2) *ICC International Court of Arbitration Bulletin*. p.1

international relations.[398] In consideration of arbitrability and in relation to the question of public policy, courts will often make a distinction between domestic and international relations. However, there has been a non-restrictive interpretation of Article V (2) of the New York Convention, firstly, in a case in 1983 where the Austrian Supreme court handed down a judgement refusing to enforce a Dutch award as it contravened Austrian public policy.It was held by the court that there was no distinction between domestic and international public policy in the New York Convention[399] because the convention clearly refers to the idea that an award will not be enforced where it is contrary to the public policy of the country where it is being enforced.

Again, there is room for interpretation for what public policy is and this together with the fact that the New York Convention allows countries to decide and does not offer much of a definition gives member states freedom in their definition of public policy and whether or not it has been contravened.

Therefore, it is clear from this that there is justification in suspecting that Saudi Arabia uses public policy to refuse awards, however, because of the mention of Sharia and public morals, the grounds upon which Saudi Arabia is refusing an award would be clear. Therefore, because Sharia principles form the basis of public policy, it would not be too difficult to check the grounds of refusal. For example, if an award was refused on the basis that it contained interest payments or that it sought damages according to a predicted future loss, then the reasons for the refusal would be clear and there would be no room for suspicion.

[398]Albert Jan van den Berg, "New York Convention Of 1958: Refusals of Enforcement" (2007) 18(2) *ICC International Court of Arbitration Bulletin*. p.1
[399]Ibid p.1

In relation to the aforementioned argument, historically, Saudi Arabia has had a reputation for refusing awards because of the sheer number of awards that it has refused, but it is also true that this could simply be because these awards were refused on genuine Sharia-related grounds, which are clear and therefore, suspicion of unjust and unfair motives would be unfounded. Even with the introduction of the new Arbitration Law and the process and history behind its development, there has been an emphasis on the adherence to Sharia principles.In fact, this is even more so for the new Arbitration Law 2012, its implementation regulations and other more recent legal developments.

This situation where many western commercial enterprises are refused awards in Saudi Arabia can be seen as a clash of ideals, where many businesses in the west include interest payments, especially related to penalties for late payments or late work in projects. The only way this can be avoided is for those western commercial enterprises to understand the implications of doing business with Saudi Arabia in terms of the recognition and enforcement of an award to avoid potential disputes and the associated dispute resolution process.

However, beyond the clues that can be found in the abovementioned convention, it is extremely difficult to formulate a definition of public policy. This leaves the door open to interpretation by the individual states. Despite this issue, it can be determined that public policy in the gulf states, and in Saudi Arabia in particular, is something that relates to Sharia law and public morality. In fact, it has been claimed[400] that despite the fact that there are number of different terminologies used by the countries

[400] Mohamed Saud Al-Enazi, '*Grounds for Refusal of Enforcement Of Foreign Commercial Arbital Awards In Gcc States Law*' (PhD Thesis, Brunel University, 2013).

in the gulf region, which include public order, public policy, morality and Sharia law, collectively these terminologies have the same meaning because they are based on the same paramount values that are absolutely fundamental to these countries. This supports the argument that a refusal to recognise and enforce awards is purely intended to protect such values, and that if, for example, Saudi Arabia were to reduce the number of refusals, it would compromise the very values upon which their societies are founded. But, it also important to remember that even between these states in the gulf region that seek to preserve Sharia principles, these principles can be different, for example, an award based on interest is unenforceable in Saudi Arabia, but it would be enforceable in other GCC countries. This, therefore, raises an interesting question in relation to the intentions of Saudi Arabia refusing to recognise and enforce awards, this being, do they apply Sharia principles to the utmost extent in order to protect commercial interests and why do other countries in the region have a laxer approach in this regard, i.e. interest in awards? Why is Saudi Arabia stricter in this sense?

### 5.4.3 Public policy

There is debate about the issue of using public policy to refuse foreign arbitral awards and this debate is more fluid in Saudi Arabia and other countries in the Gulf region. There are a number of reasons for this which include issues related to transparency, a legislative process that is not clear and is often based on Royal edicts and are not debated in parliament and the apparent favouritism and protection of government sectors in preference to the private sector.

There has been a perception that where the community in Saudi Arabia wishes to gain its interests it has been associated with state policy which also seeks to achieve its interests. This idea is associated with the fact that public policy is something that is very much associated with the state itself because public policy is linked to other attributes of national interest which include the achievement of economic, social and political objectives.Furthermore, public policy has been said to have a bearing on these objectives.[401] Because of these national interests, it has meant that the judiciary in Saudi Arabia has had the controlling hand over these matters in that they have control over the interpretation of public policy and what it involves and therefore, the Saudi judiciary has acted as a source of legislation.[402]

Therefore, because Saudi Arabia is a country that is changing all of the time in terms of social, economic and legal development, achieving dispute resolution using arbitration is very much dependent on the claim that is being made and the compensation that is being requested. Therefore, it is worth it for parties to look for a resolution mechanism that is suitable for conducting arbitration that is considerate to the requirements for enforcement in Saudi Arabia.

Article 38 of the SAL 2012 says that the procedure for deciding arbitration cases is subject to provision of Sharia law and public policy.[403]

Public policy is also referred to in Article 50 which states, in reference to the nullification of an award, that nullification should take place if there is a violation of

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[401] Mohammed I. ALEisa '*A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?*' (PhD Thesis, University of Essex, 2016)

[402] Abd al-Ḥamīd Aḥdab and Jalal El-Ahdab, *Arbitration with The Arab Countries* (Wolters Kluwer, 3rd ed, 2012).

[403]*Kingdom of Saudi Arabia Law of Arbitration* 2012Art 38.

Sharia and public policy in the Kingdom.[404] Furthermore, in reference to issuing a reward, it is dependent on the award not violating the provisions of Sharia law and public policy. Article 55 (2) (b) states the following:

> *(2)The order to execute the arbitration award under this Law shall not be issued except upon verification of the following: (b) The award does not violate the provisions of Sharia and public policy in the Kingdom. If the award is divisible, an order for execution of the part not containing the violation may be issued.*

### 5.4.4 Public Policy and Enforcement

With consideration of the enforcement of arbitral awards, public policy is very important whether the enforcement is local or foreign. As has been said before, an arbitral award will not be enforced if it contravenes public policy. Unfortunately, it is often the case in Saudi Arabia that foreign arbitral awards are not enforced due to the fact that public policy in the country covers a large area of practice that is often unknown to foreign investors and commercial partners which are situated in other countries and often apply non-Saudi *lex arbitri*.[405]

### 5.4.5 Sources of Public Policy

[404] *Kingdom of Saudi Arabia Law of Arbitration* 2012Art 50.
[405] A. Baamir and I. Bantekas, "Saudi Law As Lex Arbitri: Evaluation Of Saudi Arbitration Law And Judicial Practice" (2009) 25(2) *Arbitration International*.

There are three main sources of public policy in Saudi Arabia, Sharia, the royal power which is derived from or supported by the Sharia together with public interests and customs within the parameters of Sharia, and finally, public morals.[406]

It is important to note that there is a distinction between Sharia and Islamic jurisprudence, and at the time when Muslim classical scholars started to react against western influence, the concept of Islamic law was not being used at that time. Sharia is a much broader concept than jurisprudence, in fact jurisprudence is one of the aspects of Sharia, with other aspects including sciences and Islamic creed.[407]

The word Sharia is derived from a meaning that refers to a path that should be followed and it is on this path that a Muslim has to walk. Therefore, the best translation for this word is a 'way of Muslim Life' which is a very broad area, much broader than the legal provisions and rites. On the other hand, Islamic law is considered to be the whole system of law and jurisprudence that is related to Islam as a religion.

### 5.4.6 Refusal on public grounds

Public policy is a defence under Article V (2)(b) of New York Convention where it is a contravention of public policy in the enforcing country to recognise or enforce the arbitral award, so if a judge in the enforcing country is convinced that the recognition and enforcement of a foreign arbitral award may conflict with public policy, then a defence against the award would be accepted. This is the most form of defence in

[406] A. Baamir and I. Bantekas, "Saudi Law As Lex Arbitri: Evaluation Of Saudi Arbitration Law And Judicial Practice" (2009) 25(2) *Arbitration International*.
[407] Ibid

litigation against the recognition and enforcement of foreign arbitral awards. However, it is often the case that the court considers public policy using a narrow interpretation and therefore, such defences are not often successful.

### 5.4.7 Sharia (as grounds for refusal)

It is emphasised in the new Arbitration Law that Sharia principles have to be considered by both arbitrators and parties when they want to enforce an international arbitral award in the country.If this does not happen, then there is a possibility that the award will not be recognised or enforced.

Although Saudi courts have a wide scope and are flexible when they assess claims for damages, the amount of compensation involved and fault of negligence, due to the principles of Sharia, Saudi courts often only award direct and actual damages that can be quantified. Therefore, in Saudi Arabia, where a court awards damages, they are not speculative, consequential, punitive or indirect.[408] This principle also includes the loss of profits and emotional distress, therefore, it is often the case that smaller damages are awarded in Saudi Arabia.

In relation to these principles that are based on Sharia, they are also extended to a situation where the Saudi courts consider international arbitral awards. Where a Saudi court considersthe recognition and enforcement of an international arbitral award, the scope for recognition and enforcement is limited by the abovementioned principles, and this is enforced by the fact that the new Arbitration Law requires the courts to be Sharia compliant.

[408]S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.

It is important to note that the New York Convention does not define the meaning of public policy which opens the door for countries to apply it differently.[409]Accusations have been made that some countries intentionally narrow the scope of public policy in order for enforcement to take place, and other countries broaden the scope in order to protect their national interests.[410]

With consideration of Saudi Arabia and the scope of public policy, in this sense it is important to consider that public policy is a unique issue under Saudi law because Sharia law is considered part of public policy.[411] However, there are two reasons why public policy cannot be specified in the Saudi courts, the first being that there are not enough published cases as only a few have been released, but this is enough to determine what public policy means in the country;[412] secpmd, the principle of *stare decisis* is not recognised by the courts in Saudi Arabia, therefore, it is difficult to predict outcomes even in very similar cases.[413] Importantly, the decision as to what constitutes public policy is not bound by precedents, therefore, the court is completely free to refuse an award if they feel it goes against Sharia or public policy, even where there is no consensus among the jurists.

To illustrate this issue,in case 3375/1, an award was refused for enforcement because the original judgment was based on singing and dancing and because these are forbidden according to the Quran and the teaching of the Prophet Mohammed (PBUH peace be upon him). However, although the court in this case acknowledge that there

[409]Ahmed Altawyan 'Arbitral Awards Under the Saudi Laws: Challenges and Possible Improvements '(April 2017) 3 (1). *International Journal of Law and Interdisciplinary Legal Studies*.

[410] Ibid
[411] Ibid
[412] Ibid
[413]S. Al-Ammari and A. Timothy Martin, "Arbitration In The Kingdom Of Saudi Arabia" (2014) 30(2) *Arbitration International*.

are differences in opinion between Islamic jurists about whether singing and music are not permitted, the court will not change its decision because it was based on faith.[414]

It is important to note at this point that what has been shown here is that according to Sharia principles, different decisions will be made based on the Quran and the teachings of the Prophet (PBUH) and there is even acknowledgement that there are different interpretations all of which are acceptable. Within Islamic law, there is no issue as to whether or not there is fairness in this case. Therefore, it is very important to note that it is not within the scope of this study to ascertain the fairness of the decisions to refuse awards based on the principles of Islamic law, but instead this study is interested in the fairness of refusing a decision on the grounds of public policy. In other words, the present study is concerned with whether decisions to refuse awards on the grounds of public policy are genuine refusals based on genuine public policy or Sharia concerns, or is public policy simply used to refuse awards for other motives that are not genuine?

However, Saudi Arabia, using Article V(2) (b) of the New York Convention to provide themselves with a safe harbour whereby they are allowed to refuse awards on the ground of public policy or Islamic principles, creates issues for foreign contractors and investors, despite the fact that the New York Convention is supposed to reassure foreign contractors that disputes will be adjudicated fairly.[415]

[414]Ahmed Altawyan 'Arbitral Awards Under the Saudi Laws: Challenges and Possible Improvements '(April 2017) 3 (1). *International Journal of Law and Interdisciplinary Legal Studies*.

[415]Ibid

Unfortunately, the New York Convention makes it easier for Saudi Arabia to reject foreign arbitral awards and it could even be the case that it is not required to enforce any more awards since ratifying the New York Convention than they were before ratifying the Convention in 1994 (Roy, 1994, p. 953–955). Therefore, it could be considered that it is important for Saudi Arabia to address how it deals with the issue of public policy so that it may achieve the intended aims of the Convention.[416] Thus, it is important for Saudi Arabia to reconsider how it handles public policy in order to achieve the original intentions of the convention.[417]

In relation to fairness and justice, it has been recommended that if Saudi Arabia has a narrow reading of Article V (b), this would mean that the defences are effective when enforcing an award that does not violate the fundamental ideas of justice (Roy, 1994, p. 953–955). This may be in Saudi Arabia's interests because it needs the confidence of the international commerce community.

### 5.5 Criticisms of Enforcement

However, there are criticisms of the new law, one such example being that it fails to enforce foreign arbitral awards, despite the fact that that the new law emphasises that the courts should give due regard to the country's obligations that it has under international agreements.[418] There has been little scope to address the problem of the enforcement of foreign arbitral awards in Saudi Arabia, the main issue being that they are often not enforced on very narrow grounds under the New York Convention. In

[416]Ahmed Altawyan 'Arbitral Awards Under the Saudi Laws: Challenges and Possible Improvements '(April 2017) 3 (1). *International Journal of Law and Interdisciplinary Legal Studies*.
[417] Ibid
[418]Ibid

relation to this problem, the new law lists exhaustive grounds on which an award can be annulled in the country, and these grounds are based on those found in the UNCITRAL model law as the courts are no longer allowed to look at the subject matter or the facts of a dispute when making a decision on the validity of the challenge.[419] This is very different from the old law where annulment proceedings were based on the merits of the dispute, however, it is important to note that these changes in the practice by the courts are very much subject to the courts' power to ensure that decisions are made in accordance with Sharia law as well as public order.[420]

The issue of public policy and the enforcement of foreign arbitral awards has been approached from two angles, on the one hand from a positive viewpoint that considers public policy can be used as a tool, and on the other hand, from the viewpoint that considers public policy can be a weapon.[421] On a negative note, an international setting public policy can be used as an exception to the use of foreign law or it can be used to stop the enforcement of foreign awards.[422]

Authoritarian regimes actually benefit from international arbitration which allows them to keep domestic control as well as attracting foreign investment.[423] The reason that it attracts foreign investment is because international arbitration is something that

[419]Ahmed Altawyan 'Arbitral Awards Under the Saudi Laws: Challenges and Possible Improvements '(April 2017) 3 (1). *International Journal of Law and Interdisciplinary Legal Studies*.

[420]Abdulaziz Al Bosaily and Ben Cowling, "New Arbitration Law In Saudi Arabia – A Major Development For Commerce In The Kingdom" [2012] *Clyde and Co Insight*.

[421]Mistelis, Loukas, "International Law Association – London Conference (2000) Committee On International Commercial Arbitration "Keeping The Unruly Horse In Control" Or Public Policy As A Bar To Enforcement Of (Foreign) Arbitral Awards" (2000) 2(4) *International Law FORUM du droit international* pp. 248-253.

[422] Ibid

[423]Massoud, Mark Fathi, "International Arbitration And Judicial Politics In Authoritarian States" (2014) 39(01) *Law & Social Inquiry*

happens outside of the domestic purview, removing the need for these types of states to create independent courts.[424] The downside to this is that illiberal regimes are helped by the promotion of international arbitration to repress their judiciaries and the development of their legal institutions and importantly, research about judicial politics in authoritarian countries has neglected the fact that these types of countries have been using international arbitration tribunals.[425]

There are benefits of using arbitration instead of litigation but also, countries are different in terms of language, culture and religion and as a result, conflicts may arise when applying foreign arbitration awards.[426] Saudi Arabia is a country that is misunderstood and has been mistaken for a country that wants to discourage the arbitration of foreign awards without considering and understanding local laws for foreign arbitration.[427]

Saudi Arabia has moved in terms of award enforcement, both local and foreign, with the introduction of a new enforcement law in 2012 and that Sharia law is a compatible concept because it does not require the decision of a judge for an award that has been granted, however, if the opposing party does not want to enforce the award, then the judgement of an Islamic judge must be sought.[428]

In Saudi Arabia, the New York Convention also offers protection as the convention provides a safe harbour for Saudi Arabia because it does not have to enforce awards

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[424]Massoud, Mark Fathi, "International Arbitration And Judicial Politics In Authoritarian States" (2014) 39(01) *Law & Social Inquiry*
[425] Ibid
[426]Abdulaziz Mohammed Bin Zaid, *The Recognition And Enforcement Of Foreign Commercial Arbitral Awards In Saudi Arabia: Comparative Study With Australia* (PhD Thesis, University of Wollongong, 2014).
[427] Ibid
[428]Anon, Anon, "The New En Forcement Law Of Saudi Arabia: An Additional Step Toward A Harmonized Arbitration Regime" [2013] (1) *Jones Day*

from a non-Saudi body whichis contrary to Saudi public policy based on Sharia principles.[429] It is argued that this situation is doubly beneficial to Saudi Arabia because it allows the country to participate in international dispute resolution while at the same time,protecting its own public policy.[430] While this may be suitable for Saudi Arabia, the country's negative attitude to the enforcement of foreign arbitral awards stems from the conflict between Sharia rules upon which public policy is based and the principles of the New York Convention. Thus, it is concluded that the enforcement of foreign awards in Saudi Arabia is almost impossible, even after it had signed up to the New York Convention in 1994.[431]

The issue of Sharia has been addressed directly and any enforcement of a foreign arbitral award can be refused if it is contrary to public policy which, in Saudi Arabia, means it is contrary to Sharia principles.[432] Sharia law as a factor of public policy is a consideration in Saudi Arabia and the UAE. Matters of public order, which include the circulation of wealth, the freedom to trade and private ownership, are based on the fundamental principles of Islamic Sharia which means that there is always an opportunity for an appeal against a foreign arbitral award because such matters are construed broadly and subjectively in contrast to common law countries such as the UK.[433]

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[429] Yasser Almuhaidb '*The recognition and enforcement of foreign arbitral awards in Saudi Arabia: An examination of the function of Article (V) of the 1958 New York Convention in the Saudi legal order*' (PhD Thesis, University of Hull, 2013)
[430] Ibid
[431] Ibid
[432] Ibid
[433]Gregory Mayew and Mark Morris, "Enforcement Of Foreign Arbitration Awards In The United Arab Emirates" (2014) 81(3) *Defense Counsel Journal*., pp. 279 - 287

The issues of whether or not Saudi Arabia can use the public policy defence to refuse the enforcement of foreign arbitral awards has been addressed.[434] Conflict may arise between the Saudi legal system and the adoption of the New York Convention, however, it is argued that Article V(2)(b) of the convention will allow Saudi Arabia, a country that has a unique legal system, to appear as though they are accepting the international community, while at the same time allowing them to reject foreign arbitral awards that conflict with their national policy.[435]

Roy (1994) is against the idea of Saudi Arabia being able to reject foreign arbitral awards on public policy grounds as evidenced by the fact that she makes recommendations that Article V(2)(b) be modified to stop countries from refusing foreign arbitral awards.[436]

### 5.6 Justice and Fairness

In relation to the refusal to recognise and enforce foreign arbitral awards and the use of Sharia for this purpose, and whether or not this is fair, the use of Sharia principles is often misunderstood by other countries. It is important for other countries to understand that Sharia principles do in fact further the cause of justice and are not a

[434]Kristin Roy, "The New York Convention And Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?" (1994) 18(3) *Fordham International Law Journal*.
[435] Ibid
[436]Kristin Roy, "The New York Convention And Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?" (1994) 18(3) *Fordham International Law Journal*.

hindrance to justice. There has been a demonisation of Islamic principles, that it is repressive, when in fact this is not the case.[437]

Many of the laws in Saudi Arabia which include the Companies Law, Intellectual Property Law, Labour Law and E-commerce Law are very similar to laws in developed countries, and the Arbitration Law itself is largely based on the UNCITRAL rules.[438] This has meant that the parties are free to choose the law, arbitrator and venue as long as Sharia principles are respected, therefore, there is a large degree of flexibility in the new arbitration law and clarity about its conditions pertaining to Sharia law.

The present study is focussed on addressing whether or not there is justice and fairness in the Saudi legal system where foreign arbitral awards are refused on the basis of public policy. Therefore, in order to determine this, it is important to consider how justice and fairness in arbitration can be measured.

Developments in investment arbitration has freed private entities from traditional diplomatic protection and allowed then access to international dispute settlement mechanisms.[439] Investment arbitration in international law has been a way to consolidate justice and has its principles in customary law on human rights and the treatment of aliens.[440] However, this has raised questions about the fact that foreign investment guarantees, which are far-reaching, have penetrated into areas of national regulation and whether this should be counterbalanced by opportunities for access to

[437]Khalid Alnowaiser, "The New Arbitration Law And Its Impact On Investment In Saudi Arabia" (2012) 29(6) *Journal of International Arbitration*.
[438] Ibid
[439]F. Francioni, "Access To Justice, Denial Of Justice And International Investment Law" (2009) 20(3) *European Journal of International Law.*
[440] Ibid

justice for society in the host state.[441]With reference to the protection of aliens and foreign investment, the concept of access to justice is the right to have the protection of the law and access to legal remedies before a court or a quasi-judicial body.[442]

Tomkins and Kimberly (2008) bring attention to the idea of restorative justice which is concerned with restoring an injured party to their pre-injury state while at the same time getting the party who caused the injury to recognise their acts and also to redress the injustice. Moreover, Tomkins and Kimberly (2008) also bring attention to the idea of distributive justice which is about the perceived fairness of a procedure and the perception of fairness of the outcome of a given procedure. Moreover, they say that earlier theories about justice were more focussed on the fairness of the outcome itself of a dispute process, and this is the way that satisfaction is gauged. This idea of distributive justice is based on the idea that people are mostly concerned with the fairness of the outcome.[443]

It is important to note that arbitral foreign awards are given by international tribunals that are quasi-judicial, which include arbitration and there should be consideration of the fairness of the procedure itself.[444]

**5.7 Summary**

This chapter has addressed in detail the law and procedures for the recognition, enforcement and refusal of foreign arbitral awards. The chapter has shown that the

[441] Ibid
[442] Ibid
[443]Alan Tomkins and Kimberly Applequist, "Constructs of Justice: Beyond Civil Litigation" (2008) 17 *Alan Tomkins Publications*
[444]Alan Tomkins and Kimberly Applequist, "Constructs of Justice: Beyond Civil Litigation" (2008) 17 *Alan Tomkins Publications*

law in Saudi Arabia is designed to adhere to the requirements of international arbitration in that there are proper procedures for enforcement that are followed and the judiciary are only involved in the process to enforce awards and not make decision about the merits of an award while at the same time ensuring that the enforcement of an award will not contravene Sharia. The following chapter will present the results of the primary research of this thesis, which are interviews with legal personnel, both state and private, about their opinions on the refusal of awards on the grounds of public policy.

## Chapter 6 Results and Analysis - interviews

### 6. Introduction

This chapter presents the results of the analysis of the interviews with legal professionals in Saudi Arabia. Some of the professionals worked for government organisations and some worked for private organisations. They were all involved at some point in a foreign arbitration process. Their opinions are valuable because they represent both sides of the relationship, from the state and from the private sector. Specifically, the respondents to the interviews were asked questions about whether or not they felt that the use of public policy to refuse foreign arbitral awards was fair and just or whether Sharia principles are used as an excuse to refuse awards. Even where there was genuine refusal on the grounds of public policy, the respondents were asked if refusal was fair and just. The respondents were also questioned about the fairness of the Enforcement Law and whether overall, the new foreign arbitration system in Saudi Arabia makes it easier for foreign contractors and investors.

### 6.1 Analysis

There is the idea that the truth is very important and that there can be no excuses for using public policy. The idea is that this goes against the idea behind the legal reforms in the first place which used to attract more business.

> *I know that Saudi Arabia has a reputation in the past for refusing awards using public policy but I feel that our government is reforming and this shows*

*in our arbitration law and we want to be seen as an open country that can do business with the world and attract investment (R1)*

The idea of public policy being something that is, in itself, truthful and that it cannot be used in an untruthful away was reflected in the following statement in response to the question about whether or not public policy is used as an excuse to refuse foreign arbitral awards:

*Public policy is not used as a refusal excuse for foreign arbitral awards as it seeks the truth and the excuses do not match up with facts. (Atif Khamis)*

What is noticeable in the statements above is the concern for truth and justice that is associated with Sharia principles by the respondents who are Muslim. Therefore, the respondents feel that public policy is something that represents morality and justice and certainly cannot be used as a mere excuse to refuse an award. In fact, although there are numerous definitions and applications of public policy, at the heart of all understanding is that public policy is about encompassing the core of local laws and the fundamental ideas of morality and justice.[445]

The idea of justice and the religion of Islam are inextricably linked and therefore, it is understandable that the respondents made an association between the two.

Many of the respondents were of the idea that if public policy was used just as an excuse to refuse awards, then this would be detrimental to the country. One of the respondents said the following:

[445] Mohamed Saud Al-Enazi, 'Grounds for Refusal Of Enforcement Of Foreign Commercial Arbital Awards In Gcc States Law' (PhD Thesis, Brunel University, 2013)

*International companies are not stupid.If we use public policy to refuse awards for other reasons then they will know. I think you have to understand that public policy in Saudi Arabia is very clear that it is based on our Sharia law. We are a Muslim country and we have to show an example to the world about our religion (R2)*

Another respondent said the following:

*There has to be respect for the honour of Islam.This means that it can never be used as an excuse to deny an award. I don't think that you would find a Muslim who really believes in their religion would use Sharia in that way (R1)*

Another idea that arose from the interviews is that arbitral awards will be recognised and enforced if they comply with Sharia therefore, Sharia law is applied correctly and is the criteria by which awards are judged. This idea reflects the opinion that where foreign arbitral awards are refused, it is sincerely and genuinely on the grounds of public policy, specifically, the contravention of Sharia principles. One of the respondents said the following:

*As for the principles of Sharia, I don't think that the reforms shall be used to refuse a foreign arbitral award rather to enable the judge take award not contradicting with the foreign arbitral award as long as it is not breaching any of the direct Sharia principles. (R1)*

*In my opinion, if there is refusal, it will be based on the policy relevant to the public benefit as it involves public morality or security. (R1)*

There was also a strong opinion that something which is sacred, such as Sharia law, cannot be used as an excuse to refuse arbitral awards. In principle, some of the respondents were of the opinion that using public policy which is based on Sharia as an excuse to refuse awards would be an insult to the religion itself.

There was even the idea that public policy was seen by some of the respondents as being related to the moral code of other countries generally. This is a reflection of the idea that in Saudi Arabia, these legal professionals see public policy as something that is associated with morality, therefore morality is an important element of public policy in Saudi Arabia. In support of this idea, one of the respondents stated the following:

> *It is obvious that each country stipulates that foreign arbitral awards should not breach the general regulation or what is called the public code or morals set out by that country.(Al Saif)*

There was also a closely associated idea that Sharia law is sacred, and using the principles of Sharia for the recognition and enforcement of foreign arbitral awards is seen as a positive because Sharia law is something that promotes justice and fairness. Therefore, Sharia law cannot be used in an unfair or unjust way. Many of the respondents emphasized the idea that it would be against the principles of Islam and Sharia law to make excuses to or not to recognise and not enforce an award that has been made according to contractual agreement, which in itself is the Sharia law principle.

Another finding from the interviews is that there is sincerity and that anaward is only refused when it goes against genuine public concerns and not for personal reasons.

This is in line with the principles of the convention.In relation to this idea, one of the respondents said the following:

> *Refusal, if any, does not strive from any personal desire or particular standards, it rather comes from proper legal standards aiming at the public interest, public morality, public security, etc… Such standards achieve great benefits. (ATF)*

Furthermore, from the statement above, it is clear that public policy is something that is related to public interest, public security and public morality, and the latter is related to Sharia principles.

The respondents also felt that where there was a refusal to process foreign arbitral awards, this would have been fair because they said that there are legal systems in place to avoid unfairness, however, there was some acknowledgement that there may be a few cases where there was unfairness.

Overall, there was also the idea that the new law would make it easier for foreign companies to work and invest in Saudi Arabia, however there is a need for clarity on the rules and regulations related to the recognition and enforcement of foreign arbitral awards.

### 6.1.1 Understanding what public policy is in Saudi Arabia

From the results of the interviews, it was clear that there were different understandingsof the meaning of public policy in Saudi Arabia and what it involves. However, it is important to understand that the majority of the respondents related public policy to the principles of Sharia.

In relation to this idea that public policy is universally understood by the respondents, it is not relevant to the New York Convention because the convention allows countries to decide what public policy is. Furthermore, in history and in more recent times, public policy has been based on Sharia principles.

In the above, it is clear that the respondents felt personally attached to Sharia principles, which is understandable as they are Muslims. However, the respondents also expressed the idea that Sharia principles that something that is associated with the country. This means that for these respondents, public policy, expressed as Sharia principles and moral and religious values, is something that relates to the state as well as the individual on a personal level. This idea is related to the idea presented by Ghodoosi (2016) who says that morality is now something that is associated with the state or the morality of the state and that personal morality can only flourish in a moral state.[446] Certainly, in this study, both personal and public morality has been emphasised and there is a suggestion that morality is held strictly.

One of the respondents referred to the idea of public policy being related to public benefit, public security and public morality. It can be said that the latter is related to Sharia principles, however, public benefit and public security are ideas that cannot be attributed to Sharia principles. Furthermore, one of the respondents referred to the economic matters of the decision to refuse foreign arbitral awards, stating the following:

> *The recognition of the award with the fair if it matters Sharia principles but also we I have to think about economic issues as well because economists*

[446]Farshad Ghodoosi, "The Concept Of Public Policy In Law: Revisiting The Role Of The Public Policy Doctrine In The Enforcement Of Private Legal Arrangements" (2016) 94(3) *Nebraska Law Review.*

*have different perspectives about the enforcement of an award and the effect that it would have on the country (Abo Jaber)*

However, most of the respondents felt that public policy was related to Sharia principles, public morality and the cultural and traditions of the country.

A suggestion was made by some of the respondents that public policy was something that was more related to nationalism, that it was an expression of adesire to protect the needs of the nation, and while this is precisely what public policy is designed to do, it was a different description to that of public morality or tradition. In response to the question about whether or not the refusal of foreign arbitration awards on the grounds of policy was related to public interest, public morality or public security, one of the respondents said the following:

*The general system of the law is designed for national protection and interpretation of the cases and the decisions that have been made are subject to national interests. (Al Saif)*

The researcher was interested in this idea because it was the first time that the idea of national interests had been raised and that public policy was framed in this way. It is important to note at this stage that one of the accusations or suspicions about the use of public policy to refuse awards in Saudi Arabia was to protect national interests. As a result of this statement, the researcher probed further and asked the respondent what they meant by national interests.They responded with the following:

*We have to protect our national interests which means to protect our religion because the religion is the most important thing in our country. We want to have business relationships with other countries because we need that, but we should not compromise our religion (Al Saif)*

Therefore, even where there is reference to national interests, it is not related to commercial national interests but rather it is a reference to the protection of religious principles. It is important to note that this is precisely why the New York Convention allowed countries to make a decision about what they saw public policy to be.It may be different for many countries, but the results of the interviews and the review of the law in Saudi Arabia clearly indicate that national interests are related to protecting the principles that are associated with the religion and the culture.

### 6.1.2 Ease for Foreign Investors

There is the idea that the new arbitration law makes it easier for foreign investors to conduct business in Saudi Arabia while at the same time, upholding the principles of Sharia. For example, in response to the question as to whether or not the new arbitration law makes it easier for foreign investors, one respondent said:

> *Yes, as some of the foreign contractors and investors faced difficulties while acting for the foreign arbitration in Saudi Arabia as the previous Saudi arbitration law has (30) years and in order to register the procedures of foreign investors in Saudi Arabia, the arbitration system has been modified to fully match the Islamic Sharia which is very significant. (Al Saif).*

There was also a sense of doubt that the new arbitration law made it easier for foreign investors.In response to the same question, one of the respondents said the following:

> *Every arbitral law in the world has advantages and disadvantages. Regarding the new arbitral law in Saudi Arabia, it will somehow facilitate the affairs of foreign contractors and investors but not in all aspects which needs deeper clarification for the arbitral regulations. (Atif Khamis)*

### 6.1.3 Sharia law used as an excuse

Overall, the results suggest that mostly, the respondents felt that Sharia law was not used as an excuse to refuse the recognition and enforcement of foreign arbitral awards. This was an important question because it was related to the overall research question of this thesis which was to determine whether or not there was justice and fairness in the refusal of foreign arbitral awards. More specifically, the question relates to the idea that public policy being informed by Sharia principles is used as an excuse to refuse awards. The overall feeling among the respondents was that the use of public policy, or referred by them as Sharia principles, were genuine in their application and there was an overall feeling of defending the Sharia.

Their refusal of a foreign arbitral award could take place for a number of reasons and one of the respondents used an example of other jurisdictions where an award can be refused for a number of different reasons, however the response to this question was in a way a deflection from the question because it was concerned specifically with the use of Sharia all of the policies to refuse awards. Furthermore, the same respondent also said that there could be discretionary matters that would lead to the refusal of an award, again a deflection from the question about Sharia.More specifically, they said the following:

> *No, because there are other regulations that might result in refusing the foreign arbitral award such as laws especially in some countries who have not entered into agreements of approving the foreign arbitral and there are others who refuse foreign arbitral in case it is violating the direct text of appropriate*

*Sharia. On the other hand, discretionary matters are subject to disputes. (Abo Jaber)*

This research sought to determine if there was justice and fairness in the use of public policy to refuse foreign arbitral awards. Therefore, it is important to consider that if the principles of Sharia are applied properly and that refusal on the grounds of public policy reflects these principles, then it can be said that there is fairness and justice. Many of the respondents were of the opinion that foreign arbitral awards would be considered fairly in the light of Sharia principles, an indication that there is sincere application and that these principles do stand for justice and fairness

*The foreign arbitral award would be recognized if it matches with the principles of Sharia if it does not match then there is a conflict between the award and the principles of Sharia. It is important that Sharia is applied properly when approving awards and there should be no contradiction with it (Atif Khamis)*

Another idea that arose from the interviews was that Sharia principles are clearly part of public policy in Saudi Arabia and therefore, parties to an arbitration agreement should already be aware of public policy, what the public policy is based on and the implications for its use to refuse awards. The respondents felt that there was considerable clarity in the Saudi arbitration regime and that any use of public policy should come as no surprise and that its application and the reasons for its application should already be known. There are a number of statements by the respondents to the interviews that illustrate this point.

In response to the question about whether or not Sharia principles are applied sincerely, one of the respondents said the following:

*The new arbitration or 2012 is very clear about foreign arbitral awards it clearly says that an award will not be enforced if it goes against public policy and our Sharia law (Al Otaibi)*

*It is a very basic regulation in the court there should be no confusion about of the policy because Islamic law is the only door that is applied in the local courts in Saudi Arabia (Al Otaibi)*

It may be the case that Sharia principles are fairly applied as part of public policy in the refusal of awards. This would suggest that there is fairness and justice in the procedure for refusing awards based on the genuine contraventions of Sharia principles. However, it may be argued that the inclusion of Sharia principles in the first place into the arbitration law, particularly the new 2012 Arbitration Law, was intended to protect Saudi national and economic interests rather than the religious sensitivities of the country. However, from the results of the interviews, it can be clearly seen that the use of Sharia principles as part of public policy is based on genuine concerns about religious infringement. Afterall, Saudi Arabia is well known as a country that has strict cultural and religious adherence to Islam. Therefore, a disregard for the exclusion of any of the principles of Sharia law from arbitration, and in particular, the recognition and enforcement of awards, would be an infringement on the fabric of society generally. There were a number of statements that revealed this idea, especially in response to the question about whether or not priority has been given to Sharia principles in legal reforms regarding arbitration and whether or not this has been used merely for refusing awards.

*There has been no prioritisation of Sharia principles in arbitration law in our country, it is our right as a Muslim country that any awards do not go against our religion so it is there for this reason (Abo Jaber)*

### 6.1.4 Opinions about the New Arbitration Law

The respondents were asked if the new Arbitration Law made it easier for international companies to do business with Saudi Arabia. The reason for asking this question was because the researcher wanted to know if the respondents felt that it was easier to do business with the country which would be a reflection of their perception that the system is fair and just and that awards were not refused in terms of recognition and enforcement on the grounds of public policy.

Overall, there was a generally positive response to this question. There was recognition of the idea that the new Arbitration Law 2012 was something that was designed for the benefit of international investors and contractors.

One idea that arose was the fact that although the new Arbitration Law in Saudi Arabia answered some of the problems with the previous law, the development of the new Arbitration Law was based on ensuring that the principles of Sharia law are fully complied with.This is illustrated in the following statement in response to the question about whether or not the new Arbitration Law made it easier for foreign investors and contractors:

*Yes, as some of the foreign contractors and investors faced difficulties while acting for the foreign arbitration in Saudi Arabia as the previous Saudi arbitration law has (30) years and in order to register the procedures of*

*foreign investors in Saudi Arabia, the arbitration system has been modified to fully match the Islamic Sharia which is very significant.(Al Saif)*

In fact, the idea of the importance and significance of Sharia principles in the new arbitration was a common theme among the respondents to the extent that the respondents were proud of its inclusion. There was no suggestion at all that the principles of Sharia were implemented as public policy to refuse the recognition and enforcement of foreign arbitral awards.

However, there were some respondents who were concerned about the new Arbitration Law. Specifically, there was the idea that it had to be reformed and developed as one of the respondents said:

*Yes, but it has to be developed and reformed to fix notable defects within it.(Abo Jaber)*

This idea about the need to develop the new Arbitration Law was also reflected in the idea that it was not always clear and was something that had to be developed further. One of the respondents said that the new law would facilitate the needs of foreign investors but also said the following:

*but not in all aspects which needs deeper clarification for the arbitral regulations. (Atif)*

### 6.1.5 Saudi Arbitration Law is clear

In this thesis, ideas related to recognition and enforcement were discussed and it was noted that public policy in Saudi Arabia was based on public morality and the principles of Sharia and that these principles are clear in Saudi Arbitration Law. In

consideration of this idea, the respondents also mentioned, in response to the question about whether the new Arbitration Law makes it easier for investors, some respondents mentioned this idea of clarity, in that because it is clear that awards can be refused on the grounds of public policy and what constitutes public policy then it makes it easier for foreign investors. In relation to this idea, one of the respondents said the following:

> *The new law makes it easier for foreign companies because it is basic and straight forward that the only way they will not receive an award is if it is against our moral and religious ideas that we have. (Abbas)*

Similarly, anotherrespondent said the following:

> *I think all arbitration laws say that rewards can be cancelled if they against the public policy of that country. If you look at the New York Convention which we are a part of it allows you to do that so that any foreign investors should not be surprised by this because it is clear and it is for everyone (Waleed)*

There was also the idea that the new Arbitration Law was suitable for the modern commercial environment which often includes complex and technical disputes and it was felt that the new Arbitration Law could tackle these disputes.One of the respondents said the following:

> *Of course and especially those contracts with technical aspects as the new arbitration system stated in more than one article some supporting clues aiding the flow of investment capitals to be applicable.(Abbas)*

### 6.1.6 The Enforcement Law

The respondents were asked about whether or not the Enforcement Law was used unfairly to refuse awards. It is important to note that the Enforcement Law also has to follow the principles of Sharia because according to Article 9 of this law, the judge has to adhere to Sharia principles.[447]This was reflected in the responses of a number of the respondents who said something similar in their responses about the new Arbitration Law 2012 which made it clear that it is based on the principles of Sharia, something that parties to an arbitration are aware of and therefore, refusal on the grounds of these policies is fair and just. In response to this question, one of the respondents said the following:

> *The enforcement law is clear and it is clear that it should be judged by a Sharia judge and considering Sharia law. (Waleed)*

Furthermore, the idea of fairness was also expressed by one of the respondents. Before giving their response to this question, it is important to note that under the Enforcement Law, the judge should not be concerned with the details of the case or why the decision was reached, they are purely there to see whether or not the award contravenes Sharia principles. One respondent said the following:

> *The Enforcement Law is fair for foreign awards because there is no method for the judge to see inside the authenticity of the case itself or making guesses about the reasons it was awarded, they only have to make sure that Sharia law is followed before that can enforce. (Atif)*

[447]*Saudi Arabian Enforcement Law,* 2012 Article 9

One of the respondents said that it was not possible for the Enforcement Law to be used unfairly because of where it was in terms of the stages of the procedure of arbitration law in the country.Specifically, they said that:

> *It is not true as after approval and accreditation in the Board of Grievances, it is final and applicable. (Al Shaibani)*

Therefore, it seems that there is awareness of the fact that in addition to instructing enforcement, the role of the judge at this stage is to check, as a final check, that the award is compliant with Sharia principles.

With reference to the consideration of the idea of justice and fairness and whether Sharia law is used to stop the enforcement of awards for unjust reasons, the theme that has emerged from these interviews is that the law related to arbitration in Saudi Arabia is clear in that it will only refuse an award if Sharia principles are contravened. Furthermore, this idea is clarified by the respondents who say that adherence to Sharia principles and the associated public policy is something that is open for all parties to see.

### 6.1.7 Sharia Principles

The respondents were asked if they felt that Sharia principles were applied properly in the refusal to recognise and enforce foreign arbitral awards. It has already been established in this thesis that there is clarity and openness about the use of Sharia principles in both the recognition and enforcement law. Furthermore, the idea that there is clarity and openness about the importance of Sharia principles as the foundation for recognition and enforcement has been clearly expressed by the respondents. However, although there may be this clarity, Sharia principles can still

be applied improperly to achieve another motive not related to the concern for the contravention of these principles.

One of the respondents felt that Sharia principles were not applied properly, however, this was not in reference to the incorrect use of these principles, instead the respondent felt that there was room for flexibility and discretion in cases in which Sharia principles allowed for consideration because it is interpretive in nature. The respondent said the following in relation to this idea:

> *No, because there are cases and updates that require discretion and the Sharia judge should apply this discretion, but sometimes this is not the case. For example, if the foreign arbitral matched with them and have no violation to Sharia, then it will be approved. (Abo Jaber)*

The idea that there is a level of discretion in the application of principles was expressed by one of the respondents who said the following:

> *It is not allowed to consider the implementation of a foreign award if it is violating a general principle of Islamic Sharia. If the violation is full then the award will be refused as a whole, but if the violation is in a part, then only that violating part will be refused. (Al Saif).*

The statement above shows that if part of an award contravenes the principles of Sharia, then that part can be refused and the rest can be recognised. Although the flexibility that is afforded by the principles of Sharia seems to be positive, it goes against the idea that has already been established in this thesis that there is clarity in the fact that Sharia principles dominate. More specifically, while parties to an arbitral agreement understand that any subsequent awards will be subject to the principles of Sharia, the status of their award is made not clear because of this interpretative

element. These parties may be well versed and well advised about the issue of public policy but they cannot be expected to predict the outcomes based on interpretation of Sharia principles by a Sharia judge.

This interpretation opens the question, and in fact, justifies asking the question about whether Sharia principles are being applied properly. However, the results of this study generally indicate that the respondents felt that this was the case, with one exception. This exception was expressed by one of the respondents who felt that the principle of discretion made the law unclear.They said the following:

> *There is a principle of discretion in Islamic Sharia, but it is not possible for us to know if the principles of Sharia are being implemented. (Al Shaibani)*

### 6.1.8 Priority of Sharia principles in legal reforms for arbitration and its usein refusing awards

It is well accepted and understood that the principles of Sharia are to be included in Saudi Arbitration Law.This is even more evident because its role has been maintained and enforced in the development of Saudi arbitration over the years. The question about whether or not the principles of Sharia have been prioritised in the development of Arbitration Law is designed to find out if the respondents feel that the prioritisation of such principles was intentionally designed to ultimately refuse awards to protect Saudi commercial interests.

Overall, most of the respondents did not feel that the consideration and inclusion of Sharia principles had been prioritised as a way to refuse awards. It is important to note that the development of the arbitration regime in Saudi Arabia has been to ensure that the country can further participate in international commercial activity and therefore,

the reforms are a reflection of the times and the needs of the times. According to the respondents, the inclusion of Sharia principles should not be compromised.One of the respondents expressed this idea in the following:

> *The principles of Sharia will always be prioritised when we develop the laws, this has always been the case, not just for arbitration but for all of the laws in our country. This does not mean that we include Sharia because we want to refuse awards, it is very that using Sharia is not something new we always did it. (Waleed)*

Furthermore, the idea that was also been expressed in the above is that Sharia will always be used. This was also expressed by another respondent who brought attention to the idea that Sharia is for all situations at all times.This respondent said the following:

> *Islamic Sharia is legible for each place and time, and in case there is no reference in the Islamic Sharia, this does not mean a shortage of it, it was rather left for human discretion. I do not think that the principles of Sharia refuse arbitration. (Al Shaibani)*

Interestingly, in the statement above, the respondent says that they do not think that the principles of Sharia are for refusing arbitration.This implies that it is not the intention to use the principles of Sharia to refuse awards, which is a common argument about the use of the principles that has been expressed by a number of the respondents in this study.

Further evidence that the respondents were sure about the intended use of the principles of Sharia as public policy is that they are not prioritised for other purposes,

i.e. the respondent clarified those situations where Sharia was used as a reason for a refusal to recognise or enforce an award in the following statement:

> *Foreign arbitral awards will be approved if they are matching with the Sharia principles and will not be approved if they are not matching with the Sharia principles. Hence, the Sharia principles are properly applied when approving the foreign arbitral awards with no contradiction to it. (Atif)*

The same respondent also expressed the idea that the principles of Sharia are 'blessed' and because of this, they make the law regarding arbitral awards even better and offer more protection.They said the following:

> *Of course not, these principles are blessed seeking to add what makes arbitral awards better under the legal protection. (Atif)*

Here, it has been clearly shown that the respondents feel that Sharia principles are applied fairly. This idea has also been supported by the example that where an award contains interest payments, the court will still enforce the award but without the interest payments. Therefore, this is an indication that the Saudi authorities are concerned with the continuance of commercial activity, because if this was not the case, they would have used the interest payment as a contravention of public policy and refuse to enforce the entire award which they would be in their rights to do. It has to be borne in mind that Saudi Arabia is known for its strict adherence to Sharia principles and it has managed to adhere to these principles, in other words, it has had the courage of its religious convictions, while at the same time upholding the spirit of the arbitration law which is designed for the recognition and enforcement of foreign arbitral awards.

### 6.1.9 More clarity needed for foreigners

Despite the fact that the respondents felt that it was clear that the principles of Sharia were something that had to be adhered to and that there was no unjust or unfair use of these principles, a number of respondents expressed the idea that they understood the concerns that foreign commercial parties may have, and there were even some suggestions made in relation to this idea.One of the respondents who was involved in arbitration with foreign organisations said the following in response to the question as towhetherthe refusal of foreign arbitral awards on the grounds of public policy is fair in Saudi Arabia:

> *It is fair because the law is very clear about public policy and what it means for us that it is important that it is not broken. But I also want to be fair to the foreign company, they may not understand the Islamic principles that we have and if we want a better business relationship with them, we should explain more clearly in the law what they are. Things like interest are clear to everyone, but it is not always that straightforward when decisions are made (R8).*

In the statement above, there is an expression for the need to codify Sharia principles so that they are clear and understandable to foreign investors.

> *We have improved out arbitration law many times to make it easy for foreign investors but to be honest with you I do feel sorry for foreigners when an award is refused and we cannot expect them to always understand the reasons why this happens. You have to remember that our public policy is not like*

*other public policy because it is especially for Islamic law and maybe they will not understand it (R9)*

The emerging theme here is that foreigners may not understand,nor should they be expected to understand, the principles of Sharia. Furthermore, the respondents seem to empathise with them about this issue.

Another statement made by another respondent also supported this idea, saying the following in response to the same question:

*Yes it is fair because the decisions are meeting with our Sharia principles, but I do understand why the foreigners think that it is not fair because they don't understand anything about our culture that we try to protect here. When an award is refused it should be explained much more clearly to the foreigners, so they understand the reasons (Abo Jaber)*

The same respondent said the following in response to the question about whether or not the new Arbitration Law in Saudi Arabia makes it easier for foreign contractors and investors:

*Yes the new law makes it much easier for foreigners because they are free to choose the terms of their contract and they are free to choose where the arbitration will take place. The courts he will recognise and enforce awards with no issues as long as there is not a problem with public policy. But I still think there is room for improvement where the law should make the public policy much clearer so they can be referred to by all of the parties that are involved so they know their own position in the enforcement procedure (Abo Jaber)*

Again, in the statement above there is a call for more clarity with the new Arbitration Law, particularly in reference to public policy or Sharia principles. This idea ties in with the suggestion to codify Sharia principles which is something that is possible and has been seriously considered by the authorities in the country. The codification of Sharia principles will allow foreign participants in a commercial relationship to understand what the situation will be if they are involved in a dispute and go through the arbitration process.

The Enforcement Law was also a concern for some of the respondents and there were recommendations made in response to the question about whether the Enforcement Law is used to refuse awards unfairly:

> *I do not have enough information, but I tend to say No. I assume that the Enforcement Law uses the same principles of public policy protection and it is just another layer in the process, but I do not fully understand how it works. l I think if we have this in our procedures here then it is important that Saudi businesses and their foreign investors should be clear about this law and how it fits in with the whole procedure. (Abo Jaber)*

So far, the findings have suggested more clarity. However, this emphasis of more clarity when considered against other findings does not suggest that a lack of clarity is a problem that is related to the insincere use of the public policy clause to refuse awards in an unfair way. It is more the case that the recommendations that are made by the respondents are simply to improve the existing situation. Specifically, there has much praise for the improvement in the law in relation to arbitration procedures generally, but it is still felt that there is a need to improve clarity in relation to public policy and arbitration procedures.

### 6.1.10 Public Policy could be used as an excuse to refuse awards

Although the majority of the respondents were of the opinion that public policy was not used to refuse foreign arbitral awards, there were some opinions that seemed to indicate that this was the case. This idea is in relation to the fact that the new Arbitration Law 2012, and indeed previous laws, as well as the New York Convention put Saudi Arabia in a strong position legally to refuse awards and that it was difficult to accuse them of other intentions other than protecting the principles of Sharia. In response to the question of whether or not public policy is only used as an excuse to refuse a foreign arbitral award, one of the respondents said the following:

> *To be honest with you it is difficult to know the true intentions behind the refusal of awards, the enforcement judge has to enforce the award and if they do not there are strict rules and conditions why they cannot which includes the public policy we have here (R7)*

In the above statement, there was clear acknowledgment that the very structure of the arbitration system in Saudi Arabia allows for the refusal of awards while at the same time, the law also strongly encourages the enforcement of awards. This clearly means that there is little room to manoeuvre in terms of the refusal awards for other motives.If it is claimed that the refusal is on the grounds of public policy, then there is little scope to accuse the intentions of the enforcing judge of otherwise.

Another respondent also said that it would be difficult to know the intentions of the authorities because public policy is something that cannot be made up.

> *If it is used as an excuse or not can be difficult to know because it is based on the intentions of those who are responsible for enforcing awards but I don't*

*think it is easy to use the excuse of public policy all the time because everyone knows what public policy is (R8)*

The statement above expresses the idea that it could be that the intentions of those who are responsible for enforcing awards are unclear, however, as with the previous statement, there is still the idea that there are restrictions of the law itself that would not allow this to happen because public policy is clear in the law.

An idea also expressed by one of the respondents was that sometimes they do not know what is taking place behind the scenes and because of this, they may not always know the real reasons why an award is refused. In relation to this idea, one of the respondents said the following:

*It is a process that we are not fully aware of and we do not know what the enforcing judge is thinking and why they make a decision, we do not know who they are influenced by and what other influences there are in their decision making (R10)*

This statement indicates that this respondent felt there may be some kinds of influences on the enforcing judge. The researcher was unclear as to what the respondent meant by 'other influences'so the researcher asked a probing question about what exactly the respondent meant when they referred to an influence.The respondent replied as follows:

*I do not want to make any accusations because to be honest with you I do not have any evidence but in this country, there are very powerful people and many of the private companies are owned by people who have wasta[448] and they may want to protect their assets against a foreign award and they can use*

[448]Wasta – a term to denote favouritism and connections with the ruling class

*their influence to change the decision about enforcement. But like I said I do not have evidence it is just a feeling that people here have that people in a good position who own the companies can do whatever they want (R10)*

In the above statement, there is clear reference to a level of possible corruption, and although it was not explicitly mentioned, there was an implication that some people in Saudi Arabia have a level of influence in legal and governmental matters. While this is an interesting point that would further support the idea of suspicions about sincerity in the refusal of awards, there is no evidence given and it could just be speculation. However, this is not to say that Saudi Arabia does not have reputation for protecting its own national interests.

### 6.1.11 Public policy used as an excuse

Some responses that were much more straightforward about this issue of public policy being used as an excuse to refuse foreign arbitral awards., Although only two respondents expressed this idea, it is still worth mentioning to provide a clear and balanced picture of all the respondents' opinions. In response to the question of whether or not public policy is used as an excuse to refuse foreign arbitral awards, one of the respondents said the following:

*Yes, I do. I have experience in my organisation of an award being refused for one of our clients and it was on the grounds of public policy, I cannot talk in detail or give you the name at this time but the foreign company felt that it was not fair and the reasons given relating to public policy were weak (R2)*

The above statement clearly indicates that there was weaknesses or a lack of clarity in the explanation of why the award was refused on public policy grounds. Furthermore,

this respondent indicated that the issue of fairness was associated with the idea that the explanation for the refusal of the award was weak, and that they felt it was unfair because they felt the explanation was weak. This would certainly support the idea that there could be suspicion about the fact that public policy is used as an excuse to refuse awards in that the one who made the decision is hiding behind public policy and they are not giving a thorough explanation.

The researcher was interested in why this respondent said that the decision to refuse an award was not fair and asked a further question in relation to this.The respondent replied as follows:

> *When I said it was not fair, I meant that it was not clear why the award was refused, they did mention the overall reason, and it was something about payment for business losses in the future, but the client felt this was unfair. Like I said before they were not clear, they didn't properly explain the reasons (R2)*

It is important to point out at this stage that that much of the negative statements, or to put it another way, much of the scepticism about the use of public policy grounds to refuse foreign arbitral awards, came from those respondents who work in the private sector, in law firms that have represented companies that have experienced being awarded an award that had to be enforced in Saudi Arabia. There are two possible explanations why the employees from the private sector are more sceptical in this sense. Firstly, there could be an element of bias because these are people who represent private foreign organisations who are seeking awards from Saudi companies to be enforced, or it may be the case that they have had first-hand experience of awards being refused. Another explanation for scepticism among private sector

personnel could be explained by the attitudes of the government personnel who work for the ministry, in that both government and private sector workers may be sceptical about the refusal of awards, but government workers cannot be critical of the establishment. This is a plausible explanation because the culture in Saudi Arabia is very hierarchical and there is very little criticism of the government or the law and the associated procedures.

### 6.1.12 Against the use of Sharia in international arbitration

Another idea that emerged from the interviews was that there was some doubt about the use of Sharia principles in the first place as a foundation for public policy. It is important to note that this was a minority opinion expressed by two of the respondents, nevertheless, it gives a clear indication of the attitudes towards public policy and its use in refusing awards.In response to the question about whether or notthe refusal of foreign arbitration awards on the grounds of policy related to public interest, public morality or public security, one of the respondents said the following:

> *I think that public morality is more likely to be the reason because it is related to the religion of Islam in our country, public security is another issue so I am not sure which one of these is used to refuse awards in reality. But I sometimes think that if there was a dispute between two companies and they are allowed to choose how the dispute is arbitrated, if they are given this freedom why are they then subject to Sharia law where maybe they cannot get their award enforced because of religious reasons that they do not know about (R8)*

This was an interesting point raised by this respondent. The idea was expressed that there are reforms in the law that have given parties freedom in a dispute and associated arbitration dealings and that this should also be extended to the principles that govern the enforcement of awards.

Similarly, another respondent also brought attention to this idea that perhaps the principles of Sharia should not be involved in the process of enforcing awards.The idea that was expressed here was that although it is something that is important and governs many people's lives, there was a question about whether or not it had to be part of the international arbitration process. The respondent said the following:

> *Why should the decision at the end of the day come down to Sharia, I do respect Sharia and it should be used to govern our everyday lives… this way all of the parties can feel that the process is fair and just and no one can complain about public policy (R7)*

The law, which includes international conventions for international arbitration and more recent Saudi law, has been developed to make it easier for parties to arbitrate when there is a dispute. One of the defining features of these laws, which has been shown in this thesis to also be the case for the new Arbitration Law 2012, as well as being in the spirit of the New York Convention, is that parties to a commercial contract are given the freedom to choose the place and procedures for arbitration, however, this level of freedom does not extend to freedom from the local laws of a particular country which although do not have a bearing on the decision of the award itself, because local judges are not allowed to interfere, they do have a very significant bearing on the overall outcome of the award in terms of its ultimate enforcement.

The only way out of this would be to allow the contracting parties to choose or opt out of the public policy that will be used to govern the enforcement of the award. However, this then raises the question about whether a state that is opposed to certain practices, such as the payment of interest, could enforce an award that would contravene the principles of Shariah, even though the Saudi party to the contract would not mind.

These ideas certainly support the idea of international public policy as opposed to a local public policy based on the principles of Sharia in Saudi Arabia.

## 6.2 Summary

Overall, a number of themes emerged from the interviews with the legal professionals. It was clear that most of the respondents held Sharia principles in high regard and they felt that using these principles for unjust and unfair purposes went against the principles themselves because Sharia is fair and just. Furthermore, there was a strong opinion that Sharia principles were applied correctly. There was even the idea that the only way to achieve fairness and justice was judging the award using Sharia principles, however, there may be confusion here between using Sharia principles to refuse an award because issuing the award would cause a contravention of these principles or using Sharia principles to consider the merits of the case and the award itself. It is important to note that Sharia principles are used for the former.

Credit has to be given to these professionals that they have a level of understanding of Sharia principles, however, it is also important to note that Sharia principles are not codified and there is a certain amount of room for interpretation and application by the judges who are versed in Sharia, and the respondents would not be expected to have the same high level of understanding as the judges. Therefore, any claims they make about Sharia may not be based on full knowledge, only their experience of working in arbitration and the refusal of arbitral awards.

Not all of the respondents saw only a link between public policy and Sharia principles, there were those who also understood public policy to be a public moral code.

There was a common idea expressed by the respondents that the arbitration law in Saudi Arabia makes it easy for foreigners to do business in the country.

There was some acknowledgement that it may be case, albeit to a certain extent, that Sharia principles are used to refuse awards for other motives, however, this was a minority opinion. However, these opinions were accompanied by an idea that could be used for further reform in the future, but at the more extreme of these opinions, that the principles of Sharia be removed completely. However, the problem with the latter suggestion is that it would undermine the integrity of Saudi Arabia as an Islamic country and it would in fact go against the spirit of the convention which recognises these concerns, in other words the need to protect a country from enforcing actions that run completely contrary to the principles upon which the state of Saudi Arabia was founded.

## Chapter 7 Conclusions and Recommendations

This research was based on the premise that Saudi Arabia is a country that has had a reputation for refusing to recognise and enforce foreign arbitral awards. More specifically, there is an accusation that public policy, which is based on the principles of Sharia law, has been used to refuse awards not for genuine public policy concerns, but rather for national economic and political interests. The question of interest to this research was whether or not public policy and Sharia law are used to refuse awards unjustly and unfairly.

In order to answer the research question, the research used an analysis of laws and their development. Specifically, there was an analysis of the reasons for the development of Saudi Arbitration Law in order to determine the intentions of the Saudi authorities. There was also an investigation into the opinions of legal professionals who work in both government and private sectors about the use of public policy to refuse foreign arbitral awards and whether or not such refusals are fair and just.

Consideration of this question requires consideration of the intentions behind the use of public policy to refuse awards and the intentions behind including or using Sharia law as the basis for public policy. It would be easy to say, for example, that an award that included interest payments would be rejected because it contravened Sharia principles, but is this due to concern about the contravention of religious principles or is this rejection due to ulterior motives? A review of the literature has shown that one of the problems historically and also more presently, is that the Sharia law in Saudi Arabia is not codified,[449] particularly in relation to matters of international arbitration. As Sharia law is not codified, when judges consider issues relating to the possible contravention of public policy,they have an amount of flexibility and interpretation. Therefore, the international commercial parties cannot be blamed for thinking or suspecting that public policy can be used to refuse their award for other motives and they will not be able to understand the details behind a decision. Therefore, there is a real need for the codification of Sharia law. Further support for the idea that international commercial parties are not to blame for being suspicious of the application of Sharia principles has been provided in the review of the literature

[449]Charles N. Brower and Jeremy K. Sharpe, "International Arbitration And The Islamic World: The Third Phase" (2003) 97(3) *The American Journal of International Law.*

where it has been said that as countries such as Saudi Arabia developed and became more powerful due to the oil industry and as a result, they pursued the development of their arbitration laws but with the intention of strengthening their own political and economic positions and protecting their own interests.[450] This would certainly further justify the suspicions that foreign parties have. It is no use saying that historically, the laws were considered inferior and that is why there would have been a negative perception of the ability to have awards enforced in Saudi Arabia because in the present day, as it was in the past, there has been no change regarding the position of Sharia law in terms of codification. Therefore, there have been efforts to develop arbitration law, however, for the most important aspect that is required for recognition and enforcement of awards, i.e. public policy based on Shariah, the position has stayed the same for decades. It can even be said that the New York Convention has strengthened this position because it has allowed countries such as Saudi Arabia the freedom to use and interpret their own public policy. This therefore, raises an interesting question: is there a need to reform the convention itself so that it may become more in line with the idea of an international public policy which is more attuned to international arbitration and the world in which it operates? However, this would not solve the problem,nor would it address the issue of Saudi Arabia protecting their Sharia principles, which is unique to Saudi Arabia in the sense that it is a strict Islamic country.

Chapter two provided a review of the literature which addressed the issue of international arbitration and public policy. Specifically, this review looked at what public policy is and how it is used to refuse foreign arbitral awards. The review also

[450]Ibid

covered the situation in Arab countries generally, with a reference to arbitration generally and the use of public policy in the Arab world with a focus on enforcement. The review then moved specifically to Saudi Arabia in relation to foreign arbitration and foreign arbitral awards. The study is concerned with whether or not the refusal of awards on the grounds of public policy is just and fair and the issues of justice and fairness were addressed.

Chapter three was concerned with the legal structure for arbitration in Saudi Arabia which also included its historical development. This was necessary in order to present a background of the actions in terms of the development of arbitration which highlighted the efforts made by the Saudi authorities in this area.This contributed to an understanding of the inclusion and use of Sharia principles in arbitration law which was necessary in answering the questions of the research. There was also a review of the Saudi arbitration system generally and the specific procedures that were involved.

Chapter four was designated specifically to the new Arbitration Law 2012 and the reasons why this new law was needed. This was also necessary to provide a background to the development efforts that have been made by the Saudi authorities in the area of arbitration and international arbitration which sheds light on their intentions which served to further answer the question of whether or not the authorities are sincere in their intentions to protect Sharia principles through the use of public policy to refuse awards. The chapter covered its application and procedure to show how it is easier for foreign commercial parties to deal with. The role of Sharia in this new was also presented.

Chapter five was concerned specifically with the recognition, enforcement and refusal of foreign arbitral awards in Saudi Arabia. This chapter looked at the law behind

recognition and enforcement and how public policy as grounds for refusal played a role, and offered criticisms of enforcement. The idea of justice and fairness in the recognition and enforcement of awards was also considered in this chapter.

Chapter six presented the findings of the interviews with the legal professionals in relation to their opinion of the use of public policy for refusing awards. The results revealed that generally, it was considered that the use of public policy for refusing awards was fair because it was required to protect the Sharia principles of the country, and that such concerns were sincere and there were no other motives for using public policy. The findings also revealed that Sharia principles were held in high esteem and it would be against these principles to use them as an excuse to refuse awards in order to protect commercial interests.

Historically, Saudi Arabia is a country that has been misunderstood, especially culturally, and this has included the fact that the country did not want to integrate into the global commercial community and used Sharia principles in the past to refuse to recognise and enforce foreign arbitral awards. However, Saudi Arabia has shown a willingness to become integrated into the global commercial community by itsseries of legal reforms, particularly in the area of operation. The problem is however, that even the new laws, specifically the 2012 Arbitration Law, while being designed to attract foreign investment and to integrate the country further into the commercial global network, have still held on to the principles of Sharia law and continues to refuse to recognise and enforce awards on the basis of the contravention of these principles, hence there still remains a suspicion that such principles which form public policy are used to refuse awards for the same reasons that they were refused in the past.

With reference to the historical reputation that Saudi Arabia has had for refusing awards and the associated argument that this refusal is based on the disguise of public policy derived from the principles of Sharia, it has raised the question of sincerity in using public policy to refuse awards. The argument that there is insincerity in the use of public policy is supported by the argument that Saudi Arabia had no choice but to sign up to the New York Convention because they needed to attract business while at the same time protecting their Sharia principles. However, in this case, using public policy in this way would be counterproductive to the reason why the country signed up to the Convention in the first place, that is, to attract foreign investment. Therefore, given that the respondents to the interviews were of the opinion that Sharia law was something that cannot be compromised and its use in an insincere way would be counterproductive, it leaves one explanation, that the use of public policy is used genuinely to protect the Sharia principles of the country and not to protect national business interests. This argument is further support by the fact that during the development of arbitration law in the country, there has been adherence and emphasis of the principles of Sharia, even including the development of the 2012 new Arbitration Law, something that was designed to make it easier for foreign entities to do business with Saudi Arabia.

In support of these ideas, the results of the study have clearly shown that public policy is solely used for the protection of the principles of Sharia and even where there is the idea of the protection of national interests, which could be misconceived as being something that is related to national economic or commercial interests, the perception of Saudi legal professionals is that national interests are those related to Sharia and culture. It is important to note that much of the culture in Saudi Arabia has developed from its religion and this also includes public morality.

The development of the arbitration regime in Saudi Arabia has been presented in this study, and what has been noticeable is that from earlier times where the arbitration framework was somewhat primitive, there has been consistency in the adherence to the principles of Sharia. Therefore, the only fundamental changes that have taken place in more recent times have been changes not to Sharia, but to the aspects of the framework that are related to commercial practices. Therefore, even with the advent of the situation where Saudi Arabia acceded to the New York Convention, prior to this time, there were still experiences of commercial activity with Saudi Arabia where the principles of Sharia were paramount. This would then be a serious consideration as to whether or not the refusal of awards on the grounds of public policy is fair and just. Even prior to the Convention which gave the authorities the right to refuse the awards on the grounds of public policy, which is mainly comprised of Sharia concerns, awards would have been refused on the same Sharia principles, and therefore, not much has changed. Therefore, the historical experience up until the present time has been the same with regard to the refusal of awards on the grounds of Sharia. Any claim that after Saudi Arabia joined the New York Convention they started to abuse the affordances of the convention would be unfounded because they have always adhered to the same Sharia principles historically.

Because of Saudi's past reputation for making it difficult to enforce foreign arbitral awards and that public policy is still enforced now, it would be important in a future study to compare the reasons given in the past for the refusal of awards and the reasons given in more recent times. This would question or clarify the idea that has been put forward by Bremer (2017) who said that arbitration and the recognition and enforcement of awards were traditionally difficult in countries like Saudi Arabia but that this is no longer the case now that reforms have taken place.

It seems that the introduction of Sharia principles as informing public policy is problematic because these principles are often different from western legal principles. However, this was not the concern of this researchto address whether or not Sharia principles and the public policy in Saudi Arabia are fair and just in themselves, rather it was the intention of the research to investigate if the use of the New York Convention to refuse awards on the grounds of public policy is fair and just.

Furthermore, this accusation has been centred around the allowances afforded by the New York Convention where there could be ambiguity in its application. The issue of fairness and justice has been addressed in this study. It has been shown that it is about sincere intentions in the use of legal allowances (New York Convention).

In regard to the Saudi authorities being overly protective of their public policy and at the same time being unfair and unjust to the recipients of foreign arbitral awards, the results of the interviews showed that public policy was applied fairly because it was based on Sharia law which was seen by the respondents as not only being just and fair but it was also something that was clearly stated in the arbitration law. If these principles were used to refuse awards, then as long as they were applied according to what is set out in the arbitration law, then it would be difficult to judge the intentions of the authorities in terms of ulterior motives for refusing awards.

It is important to note that religion and culture are acceptable aspects of public policy and they are accepted by the global community, however, there has been confusion and disagreement in the application of these aspects.

With reference to the intentions of the Saudi authorities, it is very important to note that this study has shown that their intentions have been both to integrate with the global economy and attract foreign investment, as evidenced by a series of legal

reforms in the area of arbitration designed to make the arbitration regime in the country much more flexible and in line with international standards. It seems that while Saudi Arabia is willing to reform in this way, they are not willing to compromise their principles, i.e. Sharia principles. However, this is not a reason to believe that the authorities refuse awards unfairly.

The issue of the recognition and enforcement of foreign arbitral awards by Arab countries that have Islamic law codes is something that goes back decades. It has not only been the case that these countries have refused awards on the grounds of a contravention of Islamic principles, it has also been the case that these countries have been suspicious of other arbitration systems which they feel favours western countries and those that use western law. In fact, the suspicions are not unfounded because the development of arbitral law has taken place in the west and is based on western law principles. Therefore, the rejection, in this case by Saudi Arabia, to recognize and enforce foreign arbitral awards may be to protect national interests and, in this case, may not be a sincere application of public policy. However, this comes from a sense of self-preservation, whereby the country wishes to protect its own interests against the interests of large western corporate organisations. If this was the case, then it could be said that the use of public policy to refuse the enforcement and recognition of awards is both unfair and unjust.

In the argument above, the reason for the possible unjust and unfair application of public policy to refuse awards is not based on the need to protect Sharia principles and the Islamic sensitivities of the country. In fact, in the 1950s and 1960s, the dislike of foreign arbitral awards was due to a dislike of arbitration in general because

it was something designed by the west for the west and in this case, contravention for the infringement of Sharia principles is not the relevant factor.

In consideration of these arguments, it is important to understand that Saudi Arabia in recent years, has shown a willingness to be integrated into the international arbitral regime, as evidenced by the new 2012 Arbitration Law. In this law, there is clearly an attempt to align the arbitral regime with international standards. Therefore, this negates the argument that Saudi Arabia has a negative attitude, as it did in the past, to international arbitration and that this is the reason for it to refuse awards. This idea supports the findings of the interviews, these being that the use of Sharia principles in the form of public policy to refuse awards is genuine and therefore just and fair because any refusal is clearly not due to its historic negative approach to international arbitration.

It is also important to understand that Saudi Arabia only uses its own public policy to refuse awards which is a privilege that is afforded by the New York Convention. However, there have been arguments in relation to the international nature of public policy, for international public policy as opposed to local public policy, as evidenced by Article V(2)(b) of the Convention which refers to the "transnational" or "international" public policy, as opposed to local public policy.[451] But Saudi Arabia cannot be blamed for adopting an understanding of public policy that is local public policy because Article V(2)(b) explicitly mentions 'that country'.[452] However, this does not mean the Saudi Arabia is not able to change the meaning of a policy to suit its needs, but if this were possible, then surely it could also change the meaning of

[451] *Convention on The Recognition and Enforcement of Foreign Arbitral Awards* Art V(2)(b)

[452] Ibid

public policy to be more in line with 'international public policy'. The fact that Saudi doesn't do this while at the same time trying to align their arbitral regime with international standards shows that may be Saudi Arabia genuinely cannot compromise their Sharia principles as part of their local policy.

Another important consideration is that Saudi Arabia will recognise and enforce part of an award and refuse to enforce another part that requires, for example, the payment of interest. This is further evidence that Saudi Arabia is concerned about commercial interests while at the same time being equally concerned with the preservation of Sharia principles.

There has been clear evidence in this study that the historical situation regarding arbitration was very poor.This was not only the case in Saudi Arabia but also for other countries in the gulf region. The evidence for this historical situation was presented in an overview of the development of arbitration law in Saudi Arabia which showed that initially,the consideration of arbitration was very weak if not non-existent. However, credit has to be given to Saudi Arabia for the development of its arbitration regime, particularly in more recent years tomake it easier and more secure to do business in the country.

Furthermore, it has been shown that Saudi Arabia has been caught between two ideals, that of an arbitral regime suitable for the international commercial community and that of the principles of Sharia. Given this issue and given that Saudi Arabia has developed a workable arbitration system that has had to satisfy both concerns, the country should be credited, especially for the introduction of the new Saudi Arbitration Law. This has raised the question of whether or not Saudi Arabia is

refusing, or has a reputation for refusing, foreign arbitral of awards on the grounds of public policy because they are genuinely concerned about the contravention of Shariah principles, or if they are trying to protect their commercial interests.

Therefore, this study has shown a dichotomy or potential dichotomy related to the interests and intentions of the Saudi authorities.Are they genuinely protecting Shariah principles or are they protecting commercial interests? Perhaps the answer to this question is the very reason for the development of arbitration in the first place which was to promote commercial interests, meaning its interests lie in commercial success. However, the Saudi authorities have made every effort to accommodate commercial interests within the parameters of Shariah and any subsequent refusal of awards could be construed as being a genuine concern for public policy. This argument is further supported by the fact that developments in the arbitration law were designed to answer the deficiencies that existed historically.

### 7.1 Justice and Fairness

The new Arbitration Law 2012 is not concerned with the details of a case only if the award contravenes Shariah principles.This therefore shows that the scope of the arbitration law is not to delve into the details of the case. This further supports the idea that the only concern is the contravention of Shariah principles and therefore there is justice and fairness as long as what has been contravened is apparent.

Further evidence of justice and fairness in the arbitration law of Saudi Arabia is that the laws are intended for both domestic and international disputes and it makes little

distinction between the two. However, the level of the use of public policy to refuse awards for international arbitrationwould need to be determined.

This study sought to establish if there was fairness and justice in the refusal of awards. With consideration to distributive justice presented by Rawls and in the application of a Rawlsian methodology, it is important to understand that a part of distributive justice is that social status is not deserved and that it should not be used to support entitlement.[453] This idea of justice is directly related to one of the findings of this study where it was found among the opinions of those who were interviewed that public policy could be used to refuse awards to suit the needs of the political elite or the ruling class, and there were suspicions that people with power in the country, also those who own many business interests, could influence the process in order to suit their own economic or political needs. In this case, therefore, it can be said that there is no distributive justice.

Another aspect of Rawls distributive justice is that states should have their own sovereignty in the governance of justice in international relations.[454] This idea of justice is certainly found in the New York Convention and its allowance for states to apply their own public policy in the process of considering the enforcement of awards. However, there were suggestions in the interviews that there should be less state involvement in the process, in others words, the enforcement of awards should not be dependent on the needs of the Saudi state, and while this may seem to be more just because the contracting parties have more freedom, the very fact that Saudi

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[453]David Elkins, "Responding To Rawls: Toward A Consistent And Supportable Theory Of Distributive Justice" (2007) 21(267) *BYU Journal of Public Law.*

[454]JOSEPH HEATH, "Rawls On Global Distributive Justice: A Defence" (2005) 35(sup1) *Canadian Journal of Philosophy*.

Arabia has this power to choose and apply its own public policy at its own discretion is the achievement of justice in itself. Furthermore, these suggestions that were made by two of the respondents to the interviews, that a move away from public policy and Sharia principles would in itself be a move away from justice. This is based on Dworkin's idea of of justice as the law of integrity[455] where the interpretation of the law can be based on moral principles, in this case Sharia principles. However, the idea put forward by these respondents, that the arbitration process and the enforcement of awards should free of the restrictions of public policy grounds, is supported by the theory of complex equality by Michael Walzer which states that when a person is in one sphere of justice, in this case the place of arbitration, they should not lose out if they are standing in another field of justice, in this case Saudi arbitration law and public policy. However, this is not exactly justice and fairness related to true intentions to refuse the enforcement of an award.

## 7.2 Implications of the study

This study has implications for a number of different parties that are involved or could be involved in international arbitration to be enforced in Saudi Arabia.

The study has implications for commercial organisations, particularly from western nations, who may be more reassured that when doing business with Saudi organisations that there is a level of fairness in the application of public policy in the consideration of the recognition and enforcement of foreign awards.

[455]Ronald Dworkin, 'Liberalism', in *A Matter of Principle* (Clarendon Press , 1986) p.191

This study also has implications for those who are involved in the reform and development of arbitration law in Saudi Arabia. While it has been shown that the refusal of foreign awards on the grounds of public policy is mostly fair and just, there is still the perception that Saudi Arabia uses public policy for reasons other than protecting the principles of Sharia. Therefore, this has implications for these parties in their further consideration of reforms in this area.

This study may even have an influence on those who are responsible for decision making in the enforcement of foreign arbitral awards, namely enforcement judges. More specifically, these are judges that are well versed in the principles of Sharia and therefore have a responsibility to uphold these principles, and this study will serve as a reminder of those principles and those responsibilities which will make the process even fairer.

The academic community is important. The study has implications for the understanding of the situation in Saudi Arabia as a study in terms of justice and fairness in the process of award enforcement. Furthermore, it has highlighted the numerous detailed considerations in this particular area which will form the basis of or inform future study. In light of this, the study has served to highlight issues that need further academic investigation such as the decision-making process when awards are considered for enforcement.

### 7.3 Limitations of the study

The study has highlighted two main areas where the use of public policy to refuse foreign arbitral awards may be perceived as being unfair. Firstly, in line with the historical reputation that Saudi Arabia has for refusing awards to protect its own

interests rather than sincerely protecting Sharia principles, there is potential for a lack of justice and fairness in the consideration of the award.This is one of the main concerns that this research has addressed. Another potential area where there may be an issue with justice and fairness is through a lack of understanding of public policy and the associated Sharia principles. It has been shown in this study that there is a case for codification of the Sharia in relation to arbitration and foreign arbitration because it will make the process much clearer for the parties that are involved.

In light of these two potential areas where there can be injustice and unfairness in relation to the application of Sharia principles, one of the limitations of this study was that it did not consider other possible sources of unfairness. This is related to questions of whether or not foreign commercial parties feel that they should be bound by the principles of Sharia. Although in relation to this idea it is necessary to note that the parties are aware that they will be subject to the requirements of Sharia, it would be important to find out if these foreign parties feel that the principles themselves are fair.

The legal personnel who were interviewed had experience with private organisations that had been involved in seeking the enforcement of an award in Saudi Arabia and these personnel were from organisations that represented these foreign companies. While their views were more inclined toward these private organisations, it is a limitation of this study that the views of the actual companies were not sought. This was mainly because of practical reasons which included difficulty in accessing these organisations.

### 7.4 Recommendations to authorities

It has to be recognised that it has been shown in this study that there have been significant developments in arbitration law in the country which has been design to keep up with the economic and commercial needs, however, there is still scope for further improvements. One such area of concern for the international business community is that even at this stage, it is still possible that contracts will be subject to Islamic jurisprudence which is something that stopped developing in the 10th Century.[456] It is therefore, understandable that because of this, there has been fear among foreign investors that the contracts that they are entering will be subject to a law that is not codified and does not take into consideration new commercial principles.[457] As a result of this, it is difficult for foreign investors to understand in advance the liabilities and damages that can be claimed for under a contract that is governed by Islamic jurisprudence. In light of this, it is important that the authorities in Saudi Arabia look further into the possibility of codification as far as international arbitration is concerned as this would reduce uncertainty, confusion and the suspicion that Sharia principles being used for insincere purposes. It is important to note that this recommendation would not be something new to the authorities because there have been movements in the past for codification.In particular, the first King, King Abdulaziz pushed for codificationwhen the Kingdom of Saudi Arabia was a new state and subsequent kings did the same.[458] Now that there have been more recent concerns about commercial interests from both the commercial community and well know Islamic figures in the country, and there has been an emphasis by these parties to

[456]Torki A. Alshubaiki, "Developing The Legal Environment For Business In The Kingdom Of Saudi Arabia: Comments And Suggestions" (2013) 27(4) *Arab Law Quarterly*.
[457] Ibid
[458]Torki A. Alshubaiki, "Developing The Legal Environment For Business In The Kingdom Of Saudi Arabia: Comments And Suggestions" (2013) 27(4) *Arab Law Quarterly*.

apply Islamic law to these commercial matters,[459] now is the time for the authorities to act to ensure that there is certainty and confidence among foreign investors entering into business relationships with Saudi parties where recognition and enforcement of awards is to take place in the country.

It is important from an Islamic perspective that there is nothing wrong with these recommendations. A well-known judge in Saudi Arabia, Sheikh Abdul Mohsen al-Obeikan, took a serious look at the matter and said the following:

> *Why would this be religiously prohibited? What is the difference between the books of jurisprudence and the codification of the rules? We know that the books of jurisprudence contain rules directly or indirectly taken from the Qur'5in and the Sunnah to make it easier to teach students and to facilitate legislation. Codification and the books of jurisprudence are the same.*[460]

Furthermore, Sheikh Abdul Mohsen al-Obeikan also said the following:

> *The human mind is limited, which may cause conflict between opinions. It is forthisreason codification is necessary. It would contribute to establishing justice.It willfacilitate a judge's work and relieve him of conducting difficult researchin the booksof jurisprudence. We are living in times that require rapid verdicts in accumulatingcases. This process will be speeded up by codification. Codification would also be usefulto end the serious matter of conflicting judgments that sometimes occur within thesame case and in the*

[459] Ibid

[460] Sheikh Abdul Mohsen al-Obeikan was a member of the Shura council and a former judge. He was also a consultant for the Ministry of Justice (cited from Torki A. Alshubaiki, "Developing The Legal Environment For Business In The Kingdom Of Saudi Arabia: Comments And Suggestions" (2013) 27(4) *Arab Law Quarterly*.)

*same city, perhaps even in the same court or that are passed bythe same judge.*[461]

Therefore, based on these ideas, it is recommended that Sharia scholars understand that a lack of codification has led to inefficiency in business relationships in the country.

It has been established in this study that judgements according to Sharia principles are flexible in terms of being suitable for the customs of a particular time and place. Therefore, to improve the development of the law while at the same time promoting these customs within this development, it is recommended that this is started at the educational level in Saudi Arabia. Specifically, it has been recommended by Alshubaiki (2013) that academic institutions should be established in Saudi universities that can specialise in comparative legal studies so that a body of knowledge and skills can be developed in different legal subjects under the wider scope of private law. Importantly, recently, there have been calls by the Saudi authorities to require that judges on the Board of Grievances are educated so that they become more knowledgeable about international commercial cases so that they are in a better position to analyse and make decisions about both local and international cases.[462]

### 7.5 Recommendations for future study

[461] Ibid

[462]Torki A. Alshubaiki, "Developing The Legal Environment For Business In The Kingdom Of Saudi Arabia: Comments And Suggestions" (2013) 27(4) *Arab Law Quarterly*.

Simplification of the law of arbitration is very important in order for the whole system of arbitration to be suitable for the needs of the commercial community. Furthermore, there has to be enforcement and importantly, the perception of enforcement being carried out in order for firstly to have an effective system of dispute resolution in place, and secondly, confidence in the justice and fairness of that arbitration system. It has already been shown in this study that the legal professionals that are involved in the process of arbitration in Saudi Arabia feel that the new law is clear and fair. Specifically, the overall opinion was that the law is clear in terms of the fact that it states clearly that public policy, meaning the principles of Sharia, should not be contravened. A possible reason that foreigners may feel that arbitration in Saudi Arabia is difficult is because they do not understand the principles of Sharia, and that as this is something they are involved with and something that is misunderstood, thiswill make it something that they will be worried about. However, in addition to this issue of clarity, particularly clarity in relation to what the Sharia principles are, there is also a need to answer the question of whether the use of public policy is fair and just, and perhaps the problem is that if foreign investors do not understand the principles of Sharia, they will feel that it can be used by those who do understand to suit their own needs. Therefore, in light of these ideas, a future study could thoroughly investigate the views of foreign investors in relation to what they understand about the new law and the principles of Sharia upon which it is based.

The new Arbitration Law was clearly designed with the needs of the international community in mind and a future study could investigate the perception of the new law in terms of it being an instrument for arbitration, excluding consideration of refusals on the grounds of public policy.This would be a way of considering the opinions of foreign investors about the intentions of the law, i.e. to serve the needs of the

international community, and it would create a situation where this and the use of public policy could be considered separately. This would allow the negative issues that are associated with the public policy side of arbitration to be further highlighted.

### 7.5.1 The Issue of Sharia

It has been shown in this study that there is a level of flexibility in the principles of Islamic Sharia, that Islamic scholars of today are allowed to consider the customs of the present day and arrive at decisions based on the conditions of a particular time and place, in this case the present and arbitration recognition and enforcement in Saudi Arabia. A future study could investigate further, from an Islamic perspective, to what extent have the commercial needs of the international business community been addressed. In other words, although the idea of Sharia is something that is well established in Saudi Arabia, has it been reconsidered to meet the needs of this community?

Furthermore, there should be efforts in the future to explain more clearly the Sharia principles that form the basis of public policyto the international business community.This would have the benefit of parties understanding what they are getting into and would provide clarity about the reasons behind a refusal to recognise and enforce awards.

In light of the limitations addressed in the above, that there has not been consideration of whether or not foreign commercial parties feel that Sharia principles are in themselves fair, a subject for future study could be to investigate if parties to an agreement where any potential arbitral award would have to be recognised and enforced in a country that bases their public policy on Sharia principles, feel that such

principles are in themselves fair. It is important to understand that countries in the Middle East have made efforts to implement legislation that is more reflective of western legislation in order to reassure foreign investors and to align themselves further, both politically and commercially, however, it may be the case that these countries in the Middle East face bias from their western counterparts because there is a misunderstanding of the culture or the religion which has made the process more challenging.[463]

There are a number of different countries in the gulf region where public policy is largely based on Sharia. In consideration of the fact that these countries have a number of political and economic agreements between them, for example they are all members of the Gulf Cooperation Council, a future study could look at the possibility of a unified coding of Sharia principles for the entire gulf block.

One of the issues that arose from the interviews was that when an award was refused, explanations as to the reasons behind this refusal relating to public policy or Sharia principles were unclear and, in some cases, weak. This was clearly seen by the respondents as being something that was unfair because a weak reason would not satisfy them. Perhaps it has been a limitation of this study that the specifics of the reasons for refusing awards on the grounds of public policy have not been fully addressed, especially in the primary research. Therefore, it is recommended as part of a future study to examine the way in which the reasons for refusing an award are presented. The extent of the explanation that is to be provided in relation to the refusal of an award and how this affects the perception of those involved in terms of fairness and justice needs to be established. It may be the case that if the grounds for refusal

[463] Babak Hendizadeh, *International Commercial Arbitration: The Effect of Culture and Religion on Enforcement of Award* (Masters Thesis Queen's University 2012)

are explained fully and there is clarity in the procedure, there may be a perception that justice and fairness have been achieved. This idea is further associated with the idea of suspicion, that without clarity there is much more scope to suspect that the award has been refused for other motives.

There have been numerous studies on the possible integration of Sharia principles with other laws from secular nations, providing that the principles of Sharia are not contravened. A future study could examine the extent to which the principles of Sharia that form the basis of public policy can be integrated into the international system of law that governs arbitration.

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**Appendix 1 – information sheet**

**Refusal Grounds for Arbitral Awards: Saudi Arabia**

Participant Information Sheet(Interview)

**Dear Participant,**

I would like you to participate in a study on the refusal grounds for arbitral awards in SaudiArabia and whether they are fair and just. The research is being conducted by a researcher at Victoria University in Melbourne, Australia.

**Overview of the study**

Public policy is often used as grounds to refuse to recognise and enforce foreign arbitral awards and often Saudi Arabia has been accused in the past of using public policy to refuse awards based on national interests. There have been a number of legal reforms in Saudi Arabia in the area of international arbitration which seek to improve the countries position in the international arena of trade and industry. The new regime has considered the requirements of international arbitration, while at the same time maintaining the prominence of Sharia principles.

**Participation in this study is voluntary and will involve an interview, which will take approximately 45 minutes to 1 hour. The interview will be audio recorded.**

**You have the right to withdraw at any point during the research. Upon withdrawal from the research all of the obtained identifiable data will be destroyed.**

**Excerpts from the interviews may be used in publications derived from this research.**

**Confidentiality, privacy and anonymity is assured. Any quotations will be anonymous.**

**The information that is gained in this research will not be used for other projects.**

**All data will be kept in a secure location and will only be open to the researcher.**

If there are any questions in relation to this research please contact:

Ahmed Alsirhani, Faculty of Business and Law, Victoria University, 299 Queens Street, Melbourne, Australia

shater111333@hotmail.com. tel +966 58 170 3333

## Appendix 2 – participant consent form

Refusal Grounds for Arbitral Awards: Saudi Arabia

Consent Form for Questionnaire - Teacher

| Issue | Participant's initial |
|---|---|
| I have read the information sheet about the study: Refusal Grounds for Arbitral Awards: Saudi Arabia | |
| I have been given the opportunity to ask questions about the study. | |
| I understand participation is voluntary and that I have the right to withdraw from the study at any time and I can request that my data is destroyed. | |
| I have been made aware that excerpts from the interview may be used in publications based on this study, and I have been made aware that all data will be anonymous. | |
| I have been informed that data will be kept secure and will only be for research purposes. | |
| I understand that the data will be destroyed upon completion of the study. | |
| I acknowledge that some of the data collected during this study may be looked at by people at Victoria University. | |

With knowledge of the aforementioned issues, I agree to participate in this study.

I agree to be contacted in the future by the researcher for cross reference reasons.

☐Yes ☐No

If answered yes, the appropriate method of being contacted is:

☐telephone ……☐ email ……

| | | | |
|---|---|---|---|
| Participant Name: | | | |
| Participant Signature: | | Date | |

**Appendix 3 - sample interview transcript**

**Name** **: R3**
**Title** **:** Legal Researcher

## Interview Questions

**The following questions are related to the use of public policy (which is based on Shariah principles) to refuse foreign arbitral awards.**

1. **Do you feel that public policy is only used as an excuse to refuse a foreign arbitral award?**

   It is obvious that each country stipulates that foreign arbitral award should not breach the general regulation or what is called the public code or morals set out by that country.

2. **Do you feel that Shariah principles are properly applied in the refusal of foreign arbitral award?**

   It is not permissible to consider the implementation of a foreign award if it is violating a general principle of Islamic Shariah. If the violation is full then the award will be refused as a whole, but if the violation is in a part, then only that violating part will be refused.

3. **There has been a priority of Shariah principles in legal reforms regarding arbitration. Do you feel this is used for refusing awards?**

4. **Is the refusal of foreign arbitration awards on the grounds of policy related to public interest, public morality or public security?**

   Generally, the system considers national interests as well as the relationships that are governed by arbitration and is limited to these.

5. **Do you think that the refusal of foreign arbitral awards on the grounds of public policy is fair in Saudi Arabia? If so why? If not, why not?**

Yes, since Islamic Shariah is the basic condition, the non-contradiction of a foreign award is more important so its implementation will be refused.

6. **Is the Enforcement Law and enforcement used to refuse enforcement unfairly?**

   An application to implement a foreign award will not be accepted unless the period specified for annulment action has expired and in the case where annulment action has been moved, this will not prevent an application to implement the foreign award on the basis that the act of annulment does not result in stopping the award implementation except in certain cases.

7. **Do you think the new Arbitration Law in Saudi Arabia makes it easier for foreign contractors and investors?**

   Yes, as some of the foreign contractors and investors faced difficulties while acting for foreign arbitration in Saudi Arabia as the previous Saudi arbitration law was 30 years old and in order to register the procedures of foreign investors in Saudi Arabia, the arbitration system has been modified to completely align with Islamic Shariah which is very significant.