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The Development of an Arbitration system attractive to international commerce: Analysing the new Saudi law of arbitration 1433H (2012).

By

Abdulkarim Saud Alotaibi

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Supervisors: Shaheen Ali

William O'brian

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Declaration

I Abdulkarim Alotaibi declare that this thesis is entirely my original work and effort and where other sources were used they have been fully referenced. I also confirm that this thesis has not been submitted either in part or in full for any degree or diploma to the University of Warwick or any other university. The following parts of the thesis were published.

- 1- A paper in the (KILAW, 2018) conference proceedings titled: "Enforcement (Amendment) Act 2017 to the implementation Act 2013 of Saudi Arabia: A Critical Review". Part of this paper is incorporated in Chapter Seven.

- 2- An abstract and powerpoint slide in the (AICLEF, 2018) Conference titled: "Critical assessment of the 2012 SAR and its success in attracting foreign commerce". The abstract and the presented slides are incorporated into Chapters Five and Six.

Abstract

The practice of International Commercial Arbitration (ICA) has undergone several developments in the legislative history of the Kingdom of Saudi Arabia (KSA) largely influenced by the surrounding political, economic and legal circumstance. This was evident in the welcoming approach to ICA at the time of its establishment, which later changed to a hostile approach following the Aramco case. This hostile attitude hindered the development of the KSA arbitration framework up until the 1970s when it realised the importance of ICA in creating a reliable formwork for international commerce. Since then, the KSA has gradually developed a cautious and welcoming approaching to ICA, while at the same time reserving its sovereign rights over local disputes.

This thesis critically assesses the development of the KSA arbitration regulation and the influence of both Sharia and the KSA culture in its development. In this regard, this thesis discusses the influence of the various Sharia sources on the KSA legal system and how such sources could be reconciled with current Islamic law theories. Such reconciliation will help remove issues evident in the KSA's interpretation and application of Sharia principles. This is particularly necessary when ascertaining the limits of KSA public policy, which is primarily based on Sharia rules. The Islamic natural law theory and Maqasid Al Sharia theory provide an effective rationale for resolving issues arising under Islamic law. If such theories are well utilised by the KSA lawmakers, the issue of public policy and any other upcoming issues will be effectively resolved within the boundary of Sharia.

This thesis additionally discusses the 2012 Saudi Arbitration Regulation SAR and how it develops the earlier practice of ICA in the KSA. It draws comparisons, where relevant, with the UNICTRAL Model Law and other institutional and developed states' rules in order to compare the new regulation's provisions with those of internationally recognised standards. This is particularly important in light of the KSA's aims in attracting international commerce, which requires a system of developed and reliable legal regulations capable of governing disputes. In this regard, this thesis examines the influence of the 2012 SAR on the KSA practice of ICA through the researcher's collected interviews and enforcement cases. It also examines the influence of the 2013 Saudi Enforcement Regulation (SER) on the enforcement of both local and international awards. This regulation, alongside the

2012 SAR, governs the process of ICA from its start until its enforcement, requiring such processes to be of international standard in order to achieve the KSA goal of attracting foreign commerce.

This thesis concludes by acknowledging the development introduced by the 2012 SAR into the KSA arbitration framework. It also acknowledges the 2012 SAR's failures to address some of the important issues inherited from the predecessor regulation. The author additionally recommends certain steps that should be taken by the KSA in order to develop the 2012 SAR and the 2013 SER. The contentious issues in the KSA's interpretation of Sharia rules are also addressed and specific recommendations are put forward to help clarify these issues. Finally, the author believes that the KSA arbitration framework, as it currently stands, is much more attractive than any predecessor regulation, but it is nevertheless not attractive enough to draw foreign commerce. Therefore, this thesis puts forward several recommendations aimed at making the KSA's arbitration framework more attractive to both local and foreign commerce. These recommendations include: embracing a hybrid view of ICA, clarifying the ambiguities present in the 2012 SAR, developing the consultative council's role, codifying the general provisions of Sharia, refining the scope of the KSA's public policy and reconsidering the scope of interest in the KSA's legal practice. The implementation of these recommendations will create an appropriately attractive and reliable arbitration framework.

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List of Abbreviations

ICA: International Commercial Arbitration

NYC: New York Convention

SAR: Saudi Arbitration Regulation

SER: Saudi Enforcement Regulation

KSA: Kingdom of Saudi Arabia

USA: United States of America

UK: United Kingdom

UNICTRAL: The United Nations Commission on International Trade and Law

ICSID: International Centre for Settlement of Investment Disputes

ICC: International Chamber of Commerce

ARIAS: The Insurance and Reinsurance Arbitration Society

PBUH: Peace be upon him

Translation of terms

Fatwa: A ruling on a new Islamic ruling

Fiqh: Islamic Jurisprudence

Gharar: Uncertainty

Ijma: Muslim scholars' consensus over specific rulings

Qiyas: Analogy

Ijtihad: Intellectual effort for reaching new rulings

Riba: Usury

regles materielles: Material rules

lex loci arbitri: Law of the seat

Cour de Cassation: Court of cassation

lex mercatoria: Merchant law

pacta sunt servanda: Agreement must be kept

Zakah: Obligatory charity on all capable Muslims

Hajj: Pilgrimage

Wajib: Compulsory

Haram: Forbidden

Mandub: Recommended

Makruh: Disapproved

Mubah: Permitted

Usul Al Fiqh: Islamic jurisprudence roots

Furu' Al Fiqh : Islamic jurisprudence branches

Magasid: Purposes

Istihsan: Juristic preference

Bai'ah: Pledge of allegiance

Chapter One: Introduction

1.1. Background

Arbitration may be defined as “a mode of resolving disputes by one or more third persons who derive their power from agreement of the parties and whose decision is binding upon them” (de Vries, 1982, p.43). It is 'based on contract, rather than on legal norms established by the states for the creation of judicial settlement of disputes' (de Vries, 1982, p.42). International commercial arbitration (ICA) is arbitration between two commercial parties where the nature of the contract the parties or their commercial practice creates a transnational context for the dispute.

As an alternative to resolving a dispute by litigation, arbitration is nevertheless dependent on the domestic, national laws of the jurisdiction hosting the arbitration. The relationship between national law and ICA is both a cause and a reflection of the tension between the autonomy of the parties to self-determine the arbitration process and the sovereignty-based interest of the nation-state in retaining control and ultimate authority over the resolution of disputes within its territory (Paulsson, 2011, p.292). In theory, the appropriate balance between state control and the autonomy of ICA is modelled by four main approaches: the jurisdictional, which emphasises the importance of national laws; the contractual, which rejects the importance of national law; the hybrid, which balances these two extremes; and the autonomous, which sees ICA as supra-national and hence independent of any national law (Hong-lin Yu, 2008). In practice, the balance is influenced by a number of factors, including the nation-state's relations with other states, its historical experience of ICA and the commercial pressure to attract and facilitate ICA within its borders.

While the economic advantages of ICA motivate states to liberalise domestic laws to provide a legal framework that supports an arbitration-friendly environment, this motivation is tempered by the opposing force of the state's interest in sovereignty and the protection of the values crucial to the identity of the state and its citizens.

In Islamic countries such as the KSA, the most important value that impacts ICA is the need to comply with Sharia. Furthermore, alongside the cultural and political context, the development of ICA within the KSA must be historically situated.

The KSA has been comparatively slow to respond to the commercial pressure of liberalising its domestic law of arbitration. Brower and Sharpe, following the end of World War II, identify three phases in analysing the development of international arbitration in Islamic countries. During the first phase, which lasted until the 1970s, international arbitration was primarily concerned with disputes over oil concessions. The second phase, which lasted from the 1970s into the early 1980s, was marked by a rise in power of the Organization of Petroleum Exporting Countries (OPEC),¹ alongside the end of colonialism, a renewed interest in forging an Islamic identity and economy in opposition to Western capitalist ideology,² and the use of oil as an "economic weapon". During these first two phases, Islamic oil-producing states were encumbered by long-term concessions to foreign investors, which were seen as an 'unwelcome legacy of a repudiated era'. This resulted in a number of disputes that were resolved unfavourably for the Islamic country involved (*Petroleum Dev (Trucial Coast) Ltd v Sheikh of Abu Dhabi* (1952) L. Q. 247; *Ruler of Qatar v International Marine Oil Co* (1957) 20 ILR 534; *Saudi Arabia v Arabian American Oil Co (ARAMCO)*) 27 ILR 117, creating and entrenching a distrust of international arbitration, conceived as a tool of an unjust "Western" system. The third, and present, phase reflects the ongoing impact of global commerce as a motivation for engaging more meaningfully with ICA (Brower and Sharpe, 2003, pp.643-646).

In the KSA, the 1958 ARAMCO case, which directly involved the KSA, had a prolonged impact and resulted in an abstention from international arbitration that lasted for decades (Schwebel, 2010, p.255). The tribunal in this case stated that Saudi law had to be either construed or enhanced by the general principles of law, the custom and practice in the oil trade and the "pure jurisprudence," notions. This resulted in a dramatic shift in the KSA government's view of international arbitration, which had regarded it as a tool used to safeguard Western corporations' interests (Al Saman 1994).

¹ OPEC was first formed in September 1960 (OPEC, 2015).

² A major expansion of Islamic finance in the mid 1970s followed the increase in energy prices and the oil-based growth of Arab wealth (Wilson, 1995).

In 1983, the KSA began a process of liberalisation by enacting the regulation on Arbitration 1403H (1983), which provided a more 'comprehensive' and 'accessible' system of rules for international arbitration, but still allowed the state to maintain significant control over the system (Sayen, 1987, pp.216-217). This was followed by accession to the New York Convention in 1994 (The New York Convention, 1958) and most recently by the enactment of the 2012 SAR. This new regulation is based on the UNCITRAL³ Model Law 1985 (as amended), but under the Basic Law of Governance 1412H (1992), it remains subject to the authority of Sharia (see articles 8, 23, 26, 46, 48, 55). Beyond this, Sharia, as a comprehensive Islamic way of life, is a crucial part of the culture of the KSA and will necessarily influence Saudi arbiters and arbitration. The relevance of Sharia to both law and public policy cannot be ignored (Elsaman, 2011).

While it is arguable that “ultimately, arbitration must always take into account the existence of national legal systems and the limits or interference that may derive from them” (Di Brozolo, 2013, p.42), one of the main criticisms of the old rules of arbitration in the KSA is that it was too conservatively dependent on national law and the “extensive supervision of arbitral proceedings by the Saudi judiciary” (Zegers, 2011, p.4). Other criticisms crucially included a reliance on public policy and Sharia to refuse the enforcement of foreign awards (Zegers, 2011, p.46)⁴, restrictions on who may act as arbitrator, and the procedural requirements necessary to avoid Sharia-prohibited *gharar* (uncertainty) (Thomas, 2006, pp.233-235). Prior to the introduction of the new regulation, Baamir and Bantekas (2009, p.239) observed that:

“Unlike other Arab nations, particularly the United Arab Emirates and Egypt, which have successfully instilled trust in the minds of foreign and local investors with regard to [arbitration and] ... enforcement ... the Kingdom of Saudi Arabia has notably failed in both respects.”

The question, then, is to what extent the relatively recent legal forms address the problems of the previous regulation, particularly given the ongoing cultural and

³ The United Nations Commission on International Trade and Law.

⁴ The Sharia prohibition of *riba* (interest) is particularly problematic.

religious context of Sharia (Kutty, 2006). The 2012 SAR is approaching its seventh birthday and has had the opportunity to bed-in. Its impact on the arbitration culture of the KSA has been facilitated by the establishment of a new commercial centre for arbitration, based in Riyadh (Al-Zamil, 2014). It is, therefore, a good time to consider its provisions, its impact and the perception held by relevant judicial bodies of arbitration in the KSA since the enactment of the statute.

1.2. Aims and Objectives

1.2.1. Working Research Question

How well does the current arbitration Regulation in the KSA achieve an appropriate balance between the commercial interests of international business and the values of Sharia?

1.2.2. Aims

Aim: The aim is to produce a critique of the current Saudi Arbitration Regulation which considers, in an Islamic country context, how well the recent amendments meet the needs of international commerce.

1.2.3. Objectives

1. To assess the nature of Sharia and its influence on international arbitration.
2. To critically analyse the relationship between arbitration, domestic law and the interests of the state.
3. To analyse the arbitration regulations in the KSA given the cultural and religious context of Sharia.
4. To empirically examine the extent to which the current arbitration regulation has succeeded in overcoming the deficiencies of the old arbitration regulation.
5. To consider the possible future development of the law and the practice of arbitration in the KSA.

1.3. Contribution to the Literature

The present literature may be divided into three: those pieces that address arbitration in the KSA prior to the new regulation (Alkhamees, 2011; Baamir, 2010), those that examine the impact of the new regulation, and those that focus on issues which transcend recent legal developments (Kutty, 2006; Fadlallah, 2009). This thesis will primarily add to the body of literature focused on the new regulation, but will also contribute to the transcendent issues of religion, culture and the needs and interests of international commerce. It should also contribute to the debate regarding the most appropriate way to conceive the nature of ICA and its relationship with the laws and interests of individual nations (Yu, 2008).

Since the new regulation is only Seven years old, the body of literature that specifically examines this specific law is small, but growing. Although there is inevitably some engagement with arbitration theory, the focus of such literature is mostly doctrinal (Al-Ammari and Martin, 2014; Harb and Leventhal, 2013), with a particular emphasis on the general relevance of Sharia rather than on the specific law of the KSA (Badawy, 2012). Understandably, the bulk of the literature consists of journal articles (e.g. Alnowaiser, 2012 and Nesheiwat, 2015), with only a limited number of more sustained analyses available through completed PhD theses, and these tend to focus on specific and limited aspects of the new regulation, such as the recognition and enforcement of foreign awards (Almuhaidib, 2013, Zaid, 2014, and Aleisa, 2016).

There is, therefore, ample scope for this thesis to contribute to this body of literature. Such contribution has been achieved through a sustained analysis of the 2012 SAR that goes beyond a comparative doctrinal analysis with the 1983 Arbitration Regulation. This thesis explores the interests, needs and perspectives of international commercial actors balanced against the religious, cultural, economic and sovereignty interests of the KSA. It also adds to the body of literature focused on the new regulation and contributes to the transcendent issues of religion, culture and the needs and interests of international commerce. Additionally, it contributes to the debate regarding the most appropriate way to conceive of the nature of ICA and its relationship with the laws and interests of individual nations (Yu, 2008). Finally, unlike any previous research to date (to the best of the author's knowledge),

this thesis considers the practical influence of the 2012 SAR, the 2013 Saudi Enforcement Regulation SER and the 2012 SAR implementation act of 2017 on the KSA arbitration practice. Such analysis provides a clear picture of how arbitration is dealt with in practice, from the moment the disputing parties choose to arbitrate their dispute, up until the dispute is either enforced or rejected by the KSA enforcement courts.

1.4. Methods and Methodology

This thesis relies on both text-based resources and original empirical data. Material for the text-based analysis has been retrieved by structured keyword search using electronic databases such as Westlaw, Heinonline and Lexis. Sources included journals, monographs, textbooks, statutory material, case reports, as well as national and international documents. Both hard and soft copies of legal material related to the KSA have been collected from Arabic books, periodicals, official documents and reports, as well as other sources. These materials were retrieved from the central library of King Abdul-Aziz University in Jeddah, the central library of King Saud University in Riyadh and the library of Umm-Alqura University in Makkah.

The author also explored court cases taking place after the enactment of the 2012 SAR in order to examine the extent to which the new regulation fulfils its promise of making a tangible change. The collection of these cases was challenging since judicial decisions are not available to the general public. Nevertheless, the author was able to attain them through personal contacts and visits to the enforcement courts, which are the competent authorities for reviewing and enforcing foreign arbitral awards. Although the names of individuals and entities were removed from the transcripts, the cases have nevertheless been of great benefit for the author's research, as illustrated in chapter eight.

As a result of the limited literature and small number of reported court cases examining the 2012 Arbitration Regulation, the research relied on empirical work to enrich the currently available data. The empirical research utilised qualitative methods of data collection and analysing (Dobinson and Johns, 2010). The data was obtained by semi-structured interview, whereby a representative sample of

judges from both *Diwan Al mazalim*, the enforcement courts and the Saudi commercial arbitration centre were approached. This approach provided an accurate insight into how the 2012 arbitration is interpreted by the relevant authorities. The interviews were taped and transcribed before being incorporated into the analysis of chapters six and seven.

The research methodology may be broadly described as a qualitative sociolegal analysis. This approach allowed the researcher to analyse the 2012 Regulation and directly link it to the social context of the KSA. This research engaged a mix of methodologies, including doctrinal and normative, which helped to analyse and compare the new arbitration regulation with its predecessor. This empirical research was subject to the methodology of discourse analysis (Jorgensen and Phillips, 2002, p.196), which is well suited to the qualitative elucidation of meaning from interviews (Savago, 2015).

1.5. Limitation

This thesis studies the 2012 SAR and the influence it has on arbitration practice in the KSA. In doing so, the author relies on both primary and secondary sources of data to help enrich the study and make it as reflective of the practice as possible. This study considers the influence of KSA culture, religious belief and legal practices in perceiving any new regulation. Such study was nevertheless limited to the Sunni branch of Muslims with particular focus on the Hanbali school of jurisprudence since it is the official school of jurisprudence in the KSA. The author also considers the 2013 SER only in as far as the enforcement of arbitral awards is concerned.

1.6. Thesis Structure

Chapter One: Introduction

This chapter provides an introduction to the whole thesis and outlines its Aims, Objectives and Research question. Chapter One also considers the contribution this thesis makes to existing literature, as well as outlines the researcher's adopted methods and methodology for conducting such research. This chapter also provides a brief literature review of the main studies available in the field of

arbitration in the KSA and the extent to which each of these studies contributes to the aforementioned field.

Chapter Two: Sharia Law and Islamic Legal Theories

This chapter considers Islamic law from a Sunni perspective since the KSA follows the Sunni views of Fiqh. This leads to the consideration of the main sources of Islamic law and their influence on the law of Muslim states such as the KSA. Chapter Two also considers the main schools of Islamic jurisprudence and briefly discusses their differences. It then discusses two of the most important theories in Islamic law, the natural law theory and *Maqaisd Al Sharia*, which have both enriched the Islamic side of this thesis' framework. Both theories are discussed in detail and their influence on the development of Islamic law is addressed.

Chapter Three: General Background of the KSA Legal System

This chapter provides a general overview of the background of the KSA legal framework and its judicial system. It starts by providing a brief description of the establishment of the KSA and its cultural values and belief. The chapter then moves on to provide a discussion of the main constitutional development initiatives since the KSA was established. Chapter Three discusses judiciary law in terms of the court's hierarchy and the different judicial organs currently working in the KSA, namely: Sharia courts, *Diwan Al mazalim* and quasi-judicial committees. Last but not least, the sources of the KSA legal system are discussed, including Sharia law, state-issued regulations, international treaties and others. The hierarchy of these sources is also addressed in this chapter.

Chapter Four: Arbitration Theory and Practice.

This chapter considers the relationship between the state's interest in preserving its sovereignty in relation to disputes taking place within its jurisdiction and the parties' autonomy with respect to only being bound by their arbitration agreement. This chapter discusses the four most popular arbitration theories: the jurisdictional, contractual, hybrid or mixed, and autonomous. This chapter also discusses the principles of party autonomy and state sovereignty and the variety of opinions that arise when trying to determine which of these principles should preside over the other. This chapter, alongside Chapter Two, form the basis of this thesis' theoretical framework, which analyses the 2012 Saudi Arbitration Regulation.

Chapter Five: The Development of the KSA Arbitration System

The history of arbitration development in the KSA is covered in depth. The discussion of these development initiatives will lead to a critical examination of the old arbitration regulation of 1983 and its main deficiencies that led to the enactment of the new regulation aimed at producing a more developed legal framework. Chapter Five also provides a clear picture of the KSA's attitude towards arbitration, which changed over time dependant on various circumstances.

Chapter Six: Critical Assessment of the 2012 Saudi Arbitration Regulation SAR

This chapter critically assesses the new arbitration regulation and whether it has succeeded in overcoming the deficiencies inherent in the old regulation. This chapter refers continuously to the 1983 Arbitration Regulation to help highlight the development of the new arbitration regulation. It makes reference to the UNCTRAL model and some other institutional rules to emphasise the suitability of the new arbitration regulation in governing international commercial disputes. The author relies on interviews conducted solely for the purpose of this study to assist in providing a practical insight into how the new regulation is interpreted and applied by relevant stakeholders.

Chapter Seven: The Enforcement of Awards Under the 2012 Saudi Arbitration Regulation

This chapter builds on the analysis in Chapter Six of the 2012 Regulation, placing particular emphasis on the recognition and enforcement stage of arbitral awards. This chapter addresses some of the developments introduced aimed at ensuring both national and international awards are effectively enforced within the KSA. The chapter also addresses the 2012 SAR implementation rule of 2017 and the extent to which it succeeds in clarifying some of the ambiguities that were not clarified by the regulation.

Chapter Eight: A Practical Study on the Enforcement of Foreign Awards Under the 2012 SAR

This chapter critically analyses the enforcement of five foreign awards which sought enforcement in the KSA following the enactment of the 2012 SAR and the SER 2013. This matter is of importance because the difficulty inherent in enforcing

foreign awards was one of the main obstacles facing foreign commerce operating within the KSA. Therefore, in order for the new regulation to reach its goal of providing an attractive system for international commerce, the legal obstacles in regard to enforcing foreign awards had to be eliminated.

Chapter Nine: Conclusion

This chapter concludes the thesis by identifying its main findings, as per the previous chapters' discussions of the KSA arbitration regulations. In addition, it provides specific recommendations for further developing the SAR and increasing both its reliability and attractiveness. Additionally, Chapter Nine addresses whether the 2012 SAR Regulation has succeeded in creating an attractive legal framework for international commerce. Finally, this chapter discusses areas within this field which require further research and which were omitted by the researcher due to the limited scope of this thesis.

Chapter Two: Sharia Law and Islamic Legal Theories

2.1. Introduction

This chapter discusses Islamic Sharia and its sources, schools, theories, as well as their views of how arbitration should be applied in the context of a Muslim state. Such discussion enriches this thesis's analysis of the 2012 SAR and its relation with foreign commerce. This is because Sharia is the Kingdom of Saudi Arabia's (KSA) constitution and, as such, is the basis for all of the KSA's legal legislations. Sharia influences all stages of International commercial arbitration ICA in the KSA because it determines arbitrable disputes, arbitrators' qualification, award recognition and enforcement. Before discussing Sharia and its sources and theories, it is important to provide a brief background of the religion of Islam in general.

Islam is a religion that caters to both the spiritual and material needs of people, irrespective of their race, colour, nationality and language (Amin, 1996). It provides a comprehensive legal framework that addresses people's relationships with their fellow human beings and their relationship with their creator. As such it could be divided into Devotional and Transaction Laws. The first deal with matters that are concerned with achieving closeness to the creator such as prayers, fasting and charity. The second category is concerned with regulating people's actions at both the individual and national levels (Ramadan, 2006). While the first category has remained the same since the birth of Islam because it is related to God's rights, the latter is susceptible to evolution and modification as time passes because it is related to people's rights (Kamali, 2008). The second category is also concerned with providing a legal framework for the governance of people's commercial, personal and other legal dealings (Ahmad, 2010). As a result, Islamic law, to varying degrees, has shaped the national legal systems of 45 Muslim-majority states and it is, by all standards, among the world's most significant legal systems (Amin, 1996). In addition to these Muslim-majority states, Islam is now emerging as the fastest spreading religion in the world (Escobed, 2017). Along with the wide spread of Muslims across the globe, there is a real desire by some of them to base their contractual agreements on Islamic legal principles (Sisson, 2015). Therefore,

arbitration offers ample opportunity for Islamic law to be applied as the mutually agreed rule for resolving disputes between Muslims, regardless of their geographical location.

This chapter will consider the Islamic theories of *Maqasid* and the natural law theory. The natural law theory will be discussed from an Islamic perspective and with respect to how such a theory may help in the application of the Islamic rules of arbitration. In addition, the theory of *Maqasid Al Sharia* will be extensively discussed from its origins to the recent contributions made to it by Islamic jurists. Before considering such theories, this chapter provides a brief background to Sharia, Islamic Jurisprudence and Islamic law, highlighting their differences. This will be followed by a consideration of the primary sources of Islamic law and the different schools of thought as per the Sunni branch of Islam. This chapter will also argue that Islamic law is a flexible and operational law that possesses several legal methods that empower scholars to make new rulings in accordance with developing needs and situations. This will be highlighted by a discussion of Islamic jurisprudence, *Usul Al Fiqh* and other secondary sources of Islamic law.

2.1.1. Sharia

Sharia is the most significant and comprehensive concept for describing how Islam works. It literally means the road to be followed, or the road to be followed by the believer in pursuance of his spiritual belief (Ramadan, 2006). This concept was described by Professor Weiss as the “path to the water hole” (Weiss, 1998, p. 17). To the literal interpretation he added that “when we consider the importance of a well-trodden path to a source of water for man and beast in the arid desert environment, we can readily appreciate why this term in Muslim usage should have become a metaphor for a whole way of life ordained by God” (ibid). The concept of Sharia is technically viewed by Muslims as the only right road toward the worship of God and this is clearly stated in the following Quranic verse: “Then we put thee on the (right) Way of religion so follow thou that (Way), and follow not the desires of those who know not” (Qur'an 45:18). The concept of Sharia is a practical one since it governs all of a Muslims’ spiritual and physical behaviours. Therefore, the fact that the believer has spiritually accepted Allah as the only God is as much a part of Sharia as the performance of other religious practices such as prayer, *Zakah*

and *Hajj* (Rahman, 2006). In addition, Sharia can be viewed as a comprehensive framework for regulating all private and public aspects of Muslims' lives (Standke, 2008). Muslims are broadly defined into Sunnis, Shia and Mutazila, with each having its own followers. The biggest of these groups is the Sunni, which includes the KSA, as well as most of the Arab Muslims. For the propose of this thesis, Sharia and its sources and schools are discussed from a solely Sunni perspective because it is the most relevant branch of Islam to this thesis's scope and subject matter.

2.1.2. Fiqh

Fiqh, in Arabic, literally means "deep understanding" or "full comprehension" (Zulkiple, 2014, p. 286). Technically speaking, *Fiqh* means the science of Islamic law as derived from various Islamic sources. This term also refers to the process of studying Islam via jurisprudence in order to reach a legal solution (Singh, 2015). Ibn Khaldun also considered *Fiqh* as the

"knowledge of the rules of God which concern the actions of persons who are themselves bound to obey the law respecting what is required (wajib), forbidden (haraam), recommended (mandub), disapproved (makrūh) or merely permitted (mubah)" (Ruben, 1957, p. 150).

The burdens corresponding to these actions are illustrated in the below table.

Table 1: Burdens of Actions(Ali, 2000, p.32)

Action	Corresponding burden
<i>Wajib</i> or <i>Fardh</i>	Omission is punishable
<i>Mandub</i> or <i>Mustahab</i>	Omission is not punishable, while an action is rewardable
<i>Mubah</i> or <i>Jaiez</i>	Neither rewardable nor punishable
<i>Makruh</i>	A disliked action that has not punishable consequences
<i>Haram</i>	Commission is punishable

Fiqh was later recognised by Arabic standards as jurisprudence in general, whether it be Islamic or not (Mustafa and Agbaria, 2016). Thus, it can be said that any expert

in a particular legal jurisdiction could be referred to as a *faqih* (jurist) within the law of that jurisdiction.

Islamic jurisprudence developed during Prophet Mohammed's PBUH era when explicit rules were not relied upon. Reliance was, instead, placed upon the understanding of the Prophet's companions since they had already seen the revelation of the Quran to the Prophet Mohammed and the situation in which it was revealed (Daghbouche and Nadra, 2016). Along with a growth in Islamic responsibility, the Muslim community also grew to embrace the world's cultural and intellectual diversity. Simultaneously, the link with the Prophet (PBUH), and his companions' understanding of *Fiqh* became more distanced (Motzki, 2002). New situations were reported in these eras and occasionally scholars were faced with a lack of unequivocally clear answers in either the Quran or Sunnah on how to deal with such situations (Kamali, 2003). At these times, Muslim jurists attempted to reach decisions on these emerging issues by utilising other methods. At this stage, Islamic jurisprudence needed to be developed further through a deep and rational study of the Arabic language. This is the case because Arabic is the language of Quran and Sunnah and the rationale behind Quranic texts, as well as the Sunnah of Prophet Mohammed and other sources of Islamic law (Kamali, 2003). Classical Muslim scholars have classified *Fiqh* into the following two categories: *Usul Al Fiqh and Furu' Al Fiqh*.

Usul Al Fiqh, which is the plural of *Asl*, represents Islamic law roots through which the tools and methods used to examine Islamic sources are studied and from which the *fiqh* rules are derived (Hallaq, 1999). Such tools exist mostly in the Quran and Sunnah, which are Sharia's primary sources (ibid). *Usul Al Fiqh* has also been utilised in designing the tools for studying legal evidence and proof. When utilised effectively, these tools result in a greater awareness of Sharia rulings or, at a minimum, they result in the emergence of rational assumptions regarding Sharia rules, as well as the method through which the evidence is to be adduced and, in addition, the adducer's status (Alalwani, Ali and DeLorenzo, 2003). The second branch of *Fiqh* is *Furu' Al Fiqh*, which focuses on the branches of *Fiqh* that are related to the real practices of law. It is also concerned with reaching conclusions that are derived from applying *Usul Al Fiqh* (Fitzpatrick and Walker, 2014). *Furu'* is the plural of *Far'*, which literally means something that does not stand alone but is based and built on another thing. In order to understand this concept further, it is

important to note that *Aṣl* in the Arabic language is the basis upon which the *Far'* is built (Jokisch, 2007). For instance, a tree's roots are normally called *Usul* and its branches are called *Furu'*. Likewise, the Fiqh principles are named *Usul* and the decisions and conclusions adduced from these principles are named *Furu'* (Lancioni and Giovanna, 2017).

The interchangeable use by western academics of the terms 'Sharia' and 'Islamic jurisprudence' may result in confusion over their nature (Kutty, 2006). In practice, removing the line between Islamic jurisprudence and Sharia opens the door to claims of 'divinity' and 'sanctity' for people's juridical *ijtihad*. It has been historically demonstrated that such claims have led to two serious accusations; deviation from Sharia and opposition to any efforts to update and renew Islamic law (Auda, 2008). Therefore, more attention should be focused on the differences between these terms, because Sharia is the basis upon which all of the *Fiqh* rules have been formed and developed, and *Fiqh* is a method through which Sharia sources are understood (Kamali, 2008). In this regard Shaheen Ali had a contrary view of Sharia, claiming that Sharia is an "*overreaching umbrella of rules, regulations, values and normative frameworks covering all aspects and spheres of life for Muslims as developed over time*" (Ali, 2016, p22). Ali further believes that the human interpretation of Sharia has contributed to its development and, as a result, Sharia reflects the principle of Islamic law rather than the law itself (*ibid*). This line of thought is very significant to the understanding of how the principles of Sharia are viewed by different Muslim legal systems. For example, the KSA interprets Sharia to be the law rather than the principle from which Islamic law is to be derived. This interpretation of Sharia has resulted in its rigid application within the KSA legal system. This was particularly apparent in the application of Sharia to the enforcement of foreign awards in the KSA, as illustrated in Chapters Seven and Eight.

2.2. Islamic Law

Islam advocates that God alone is the ultimate source of authority. It is ideally recognised in Islamic law that every Islamic source of authority, including Prophet Mohammed PBUH, is subordinate to God's law, which stems from the holy revelation, i.e. the Quran (Malik, 2005). All of the sources of Islamic law originate

from God and their main goal is to discover and formulate God's will. His will is not limited to a defined and fixed framework, but rather it encompasses all aspects of people's lives and is continuously rediscovered (Hassan, 1982). Since Islam provides directions in all of life's aspects, *Fiqh* is the mechanism that has developed an Islamic law capable of addressing all of these aspects in both current and future related matters.

In this context, the law involves both moral law and legal legislations. Therefore, it is more precise to argue that since the moral aspects of the law by the will of God exist in both the Quran and Sunnah, Muslims and more specifically Muslim states, are under a religious obligation to embody it in their legal legislation within their jurisdictions (Hasan, 1994). Embodying God's enactment requires Muslim scholars to utilise *Fiqh* to deduce the right rulings for the legal issues encountered. Since legal issues vary over time because of global development, Muslim states should embody a corresponding legal development within their jurisdictions (Bearman, 2016).

2.2.1. Sources of Islamic Law

Islamic law sources have evolved over a period of 14 centuries, which represents a vast expanse of time since the divine revelation. During Prophet Mohammed's PBUH era, the only sources of law were what the Prophet said or did and the revelations he received from God, i.e. primary sources (Jan Michiel, 2010). Since that time, Muslims' numbers have increased dramatically to cover more nations and continents; furthermore, Muslims no longer have the Prophet or any of his companions to help make decisions regarding legal matters (Rohe, 2014). As a result, a number of secondary sources were developed by pre-modern Islamic jurists to help fill this legal vacuum. Both primary and secondary sources are discussed in the following sections.

2.2.1.1. Quran

The Quran is Islam's holy book and the supreme source of Islamic jurisprudence. Muslims believe that the Quran is the actual revelations of God, revealed to Prophet Mohammed PBUH over a period of twenty-three years. The Quran contains 114

chapters of different lengths and subject matters. The chapters are composed of 6,616 verses and 77,934 words (Faruqi and Faruqi, 1986). There is a situational context for the majority of God's revelations to his Prophet and these are called the revelations' situational causes (Vogel, 2000). The Quran governs the moral, spiritual and social lives of Muslims; specifically, it governs the relationship between the creator and creation, and between the creations themselves (Pearl, 1979). This holy book does not create a formal system of law offering particular remedies to all legal issues within a society, but rather it includes general principles from which those issues' remedies are derived (Seaman, 1979). This view is supported in the Quran, which directs Muslims to utilise its guidance to regulate their lives, even in the absence of Quranic rulings on a specific matter: "Now there has come to you a clear sign from your Lord, guidance and mercy" (Chapter 6, verse 157).

Furthermore, fewer than 500 verses of the Quran refer to legal issues. It could be argued that even these verses have gaps and uncertainties with regard to the extent to which their provided legal injunctions are compulsory or optional and the extent to which they are considered to be objective or subjective sanctions (Abd-Alhaqq, 1997). In fact, the existence of these gaps is viewed as advantageous since they have enabled the Quranic injunctions to be flexible and reliable across time and in all situations. This is clearly demonstrated by the current scholarly conflict over various matters, which are due to differences in how various parties conceive and interpret the Quranic verses (Hitti, 2002). Hence, when the Quran is silent on a specific legal matter, Islamic scholars refer to Sunnah and other sources of Islamic law to reach a decision.

2.2.1.2. Sunnah

The second primary source of Islam is Sunnah, which means 'habitual practice'. This is the Prophet's PBUH statements, deeds, and tacit confirmation or condemnation of someone's acts or practices (Abdal-Haqq, 2002). There are three categories of Sunnah: oral Sunnah, which is derived from the Prophet's speeches and/or statements; practical Sunnah, which is focused on the Prophet's actions; and *Al Taqririah*, which is related to the silences on, or tacit approvals of, deeds that occurred with the Prophet's awareness (Kamali, 2003). The question of whether Sunnah is a direct divine revelation or just the Prophet's reasoning has

prompted much scholarly debate. It was argued that the Sunnah is not the direct revelation of God, as with the Quran, but rather the reasoning of the Prophet Muhammad (Baamir, 2010). Nevertheless, this view clashes with the Quranic verse that states: "He, Prophet Muhammad, does not speak out of his own desire. It is but a revelation revealed to him" (Chapter 53, verses 3-4). Most Muslims believe that the Quran is direct divine revelation, while Sunnah represents the Prophet Mohammed's actions and statements, which were simply inspired by God (Hourani, 1991). Therefore, Sunnah was "heard, witnessed, memorised, recorded, and transmitted" from scholar to scholar via the Arabian significant oral tradition (Faruqi, 1986, p.114). Since the 3rd century, the Prophet Mohammed's reported Sunnah was compiled into certain collections. As time passed, six of these collections were considered to be the authoritative sources of Sunnah.⁵ Particularly, Al-Bukhari and Muslim's collections are viewed by Sunni Muslims as the most authoritative collections of the six (Faruqi, 1986). They were classified as such by Muslim scholars in accordance with both the collectors' method of collection and *Isnad*, namely scrutiny of references and witness cross-checking (Vogel, 2000). *Isnad* refers to the chain of authorities' credibility when confirming the accuracy of a specific Hadith. Hadith and Sunnah are sometime used interchangeably; however, Hadith refers only to the reports of narrations which are not the only source of Sunnah. Sunnah was also derived from the practices of the people of Madinah at the time and imam Malik would reject hadiths if they contradicted with such practices (Abdal-Haqq and Ramadan, 2006). In other words, Sunnah clarifies the Quran and interprets its general provisions (ibid). Consequently, when the Quran is silent regarding a rule for a specific problem, Muslims rely on the Sunnah ruling (Christian, 2007).

2.2.1.3. Secondary Sources

The secondary sources of Islamic law involve but are not limited to *Ijtihad*, *Ijma* and *Qiyas*, which play a critical role in Islamic jurisprudence. Following the Prophet Mohammed's PBUH death, and as Islam spread to various parts of the globe, issues arose to which the primary sources of Sharia did not provide clear solutions (Bassiouni and Gamal, 2002).

⁵ Sahih Bukhari, Sahih Muslim, Maliks Muwatta, Shama-il Tirmidhi, Abu Dawud and Ibn Majah.

2.2.1.3.1. Ijma

Ijma is Muslim scholars' consensus over specific rulings where there is uncertainty in the current rule, or if a matter is not covered by the Quran and Sunnah. *Ijma* has been followed and applied in such situations ever since the Prophet PBUH passed away (Brian, 2011). This mechanism has its roots in the Quran, which states: "O ye who believe! Obey God, and obey the Apostle, and those charged with authority among you. If ye differ in anything among yourselves, refer it to God and His Prophet, if ye do believe in God and the Last Day: That is best and most suitable for final determination" (Chapter 4, verse 59). *Ijma* participants are called scholars or *Fugaha'* – they must be fully knowledgeable of the primary sources and their related sciences, most significantly, the Arabic language. Such knowledge is essential in order to extract and perceive the intention behind certain Sharia texts (Aghndies, 2005). In theory, *Ijma* has been described by some scholars as the most significant Islamic legal notion because it enables Muslim communities to create lasting legislative institutions (Abd-Alhaqq, 2002). However, in practice, Islamic scholars have failed to reach any successful *Ijma* since the time of the companions of the Prophet Mohammad because of political disunity and cultural differences (Ibid). Even though complete *Ijma'* is practically difficult, a partial *Ijma'* could take place by way of some Islamic scholars representing a specific geographical region or country.

2.2.1.3.2. Qiyas

Qiyas, which means 'analogy', has been used by Muslim scholars to reach a ruling when the Quran, Sunnah and *Ijma* are vague about a rule on a new issue (Vogel, 2000). They enable scholars to apply the same rule in situations where a new issue is similar to an old issue in terms of its cause or effect (Makdisi, 1985). In other words, *Qiyas* enables scholars to extend the Quran and Sunnah rulings to new issues, as long as the precedent (*Asl*) and the upcoming problem (*Far'*) have a similar operational cause (*Illah*) (Ibid). *Qiyas* is clearly seen in the Quranic ban on alcohol, which was extended by scholars to a ban drug use, although this was not mentioned in the primary sources. An extension to include drugs was possible because drugs result in a similar outcome to that of alcohol intoxication (Kermeli,

2001). As stated earlier, the Quran does not provide laws and regulations for every matter; however, when reading, it is important to know that all things are legal as long as there are no prohibitive injunctions from the primary sources of Sharia (Weiss, 2002). *Qiyas* was initially recognised by the primary sources as a flexible concept of reasoning via analogical arguments (Gleave and Kermeli, 2001). Such arguments allowed *Qiyas* reasoning to be sufficiently wide to allow the law to develop in a flexible manner since it allowed restrictions and expansions of the current norms through a wide range of techniques (Aghndies, 2005). Over time, *Qiyas* was limited due to a lack of understanding of its actual sense and literal interpretations with respect to the law. *Ijtihad* was developed as a mechanism for solving this limitation. It encouraged the spiritual and fundamental societal purpose of the law, in order to guarantee that human interests were satisfied (Makdisi, 1985).

2.2.1.3.3. Ijtihad

Ijtihad is the intellectual effort made by juris-consults (*Mujtahideen*) to reach rules that are consistent with Islamic principles (Weiss, 1978). It also refers to the utilisation of *Qiyas* in relation to a legal issue, or acts done by *Mujtahideen*, taking into account *Maqasid Al-Sharia*, which will be discussed later. Before employing such methods, it is vital for *mujtahids* to "*be familiar with the broad purposes of the Law, so that when choices are to be made they will be able to choose interpretations which accord with the spirit of the Law*" (Weiss, 1978, p.210). In principle, Sharia allows for the changing and amending of legal rules in line with changes in situations. Iqbal referred to *ijtihad* as "*[t]he principle of movement in the structure of Islam*" (Iqbal, 1974, p 203). According to scholars, *Ijtihad* can operate in three ways. Firstly, in relation to speculative (*zann*) textual rulings in the primary sources of Sharia because of either meaning or transmission. *Ijtihad* could then be used to decide on the right interpretation, taking into account *Maqasid Al-Sharia*. Secondly, where there is an obvious injunction or *Ijma*, *ijtihad* could be used providing that *Maqasid Al-Sharia* is taken into account. This dynamic is known as *ijtihad* based on opinion. Thirdly, *ijtihad* can be used with regard to the current rules of *Fiqh*, originating from *Qiyas* or *istihsan* (juristic preference) and in addition to other types of *ijtihad* (Kamali, 1989). In such cases, *mujtahid* may carry out a new *ijtihad* if such rulings no longer serve *Maqasid Al-Sharia*, at the same time taking into account any relevant developing social, political, and cultural issues (ibid). Before pursuing

Maqasid Al-Sharia, certain factors identified by Sharia must be taken into account: individual education to strengthen faith and instil reliability and virtue; establishing justice, which is among the most widely covered themes in the Quran; and finally, public interest, which must be taken into account before reaching a specific decision (Weiss, 1978).

Although *ijtihad* is done individually, as soon as the result of that *ijtihad* gets approved by other *mujtahids* then such *ijtihad* becomes *ijma*. This *ijma* is essentially a collective exercise in law-making which exists to meet the developing legal matters. This exercise of *ijtihad* is the Islamic way of legislating laws based on primary sources of Islamic law (Harasani, 2013). *ijtihad* is the gate through which Muslims continue to live by the Islamic code, despite unprecedented developing legal issues (Harasani, 2013). Therefore, Muslim states such as the KSA continuously develop their legal process by relying on the Council of Senior Scholars to exercise *ijtihad* to reach fatwas on developing legal issues (see Chapter 3).

2.3. Sunni Schools of Jurisprudence (Madhahib)

The Muslim world is largely divided into Sunni Muslims and Shia Muslim who agree on the main pillars of Islam and disagree on th other areas such as Islamic jurisprudence. This thesis is focused on the Sunni views because the KSA and its people are Sunnis and Practice the Sunni form of Islam. Therefore, it is important to note that the various backgrounds, circumstances and individual perceptions of Sharia manuscripts and *Usul Al fiqh* applications in the Sunni form of Islam have had a considerable impact on legal interpretations in real life. Certain Islamic scholars have relied only on the wording of the primary sources, while others have considered sources such as analogies, reasoning and sometimes their individual views in order to reach a greater understanding of a matter (Al-Jaziri, 2009). The distinction between these schools is important for both individuals and corporations since some schools are more flexible than others when it comes to commercial transactions, dress codes and the role of women within dispute resolution mechanisms. The Sunni branch of Islam has four main established schools of thought: Hanafi, Maliki, Shafie and Hanbali (Madhahib) (Vogel, 2005).

2.3.1. Hanafi School

This school of thought was established by Numan Bin Thabit, also called Abu Hanifah who died in 767 AD (Cornell, 2006). The Hanafi School is the first Sunni school of thought and it differs from other schools in its tendency to place less reliance on oral traditions when it comes to legal sources (Burak, 2015). This school developed Quranic interpretations by relying on analogical reasoning. Additionally, through *Ijma*, this school developed the principle of the global concurrence of the Islamic nation on particular matters of law (Kamali, 2008). It views the concurrence of legal and religious scholars, acting as national representatives in this context, as evidence of God's will. Thus, this school's teachings recognise the secondary sources of Islamic law but always afford priority to the primary sources and then to its founder's opinion (Zaman, 2013). This school has been recognised for providing legal views or fatwas in suggested or occasionally imaginative scenarios, which have not yet actually taken place (Hallaq, 2009). It was also the official school of the Ottoman Empire and a subset of its rulings were incorporated into the Majalla in an initiative to collect the financial provisions of the Hanafi teachings (Burak, 2015).

This school believes that arbitration agreements are valid, arguing that such validity is evident in both the primary and secondary sources of Islamic Law (Gemmell, 2011). The Hanafi scholars believe in the importance of this dispute mechanism for fulfilling a significant social need, since its procedures are less complicated than those of a judicial court (El-Ahdab, 2011). The Hanafi School considers arbitration to be similar to both agency and conciliation and arbitrators thought to bare the same functions as a court judge (ibid). This is the most widely followed school of thought and its followers mostly reside in Turkey, Albania, the Balkans, Central Asia, Afghanistan, Pakistan, China, India and Iraq (Al-Jaziri, 2009).

2.3.2. Maliki School

This school was founded by Malik Ibn Anas, one of the legal experts in Madinah at the time (Khadduri, 2010). Imam Malik was born in 711 AD and died at the age of eighty-four in 795 AD (Omran, 2012). His school is mostly followed by people in Algeria, Sudan, Morocco, Libya and countries in western and northern Africa (Mansour, 1995). In addition to relying on primary and secondary sources of Islamic

law (the same as other schools), Malik Ibn Anas additionally relied on the practices of the people of Madinah as a source of Islamic law (Melchert, 1997). This was evident in his major academic contributions to Al-Muwatta, which included a code of law founded, at the time, on the people of Madinah's functional legal practices (Aisha, 1989). This school is different from other schools mainly in minor matters, such as the best way of performing a prayer and how one's hands should be positioned when praying (ibid).

The scholars of this madhhab have great faith in the arbitration process, to the extent that they allow one party to act as an arbitrator if appointed by the other party (El-Ahdab, 2011). The apparent bias in this situation has been justified by viewing it as similar to one of the parties relying on the conscience of the other party when it comes to taking the oath (ibid). The Maliki scholars believe that arbitrators' decisions are final as long as they do not constitute flagrant injustice. In order to ensure this is not the case, this school enables judges to review arbitrators' awards (Rafeeq, 2010). Although this may seem contradictory, since final awards should not be subject to any further reviews by courts, the judge's review is not about the merits of the case but is limited to ensuring that there have been no flagrant injustices.

2.3.3. Shafie School

This school, like other Sunni schools, is named after its founder Abu Abdullah Mohammad bin Idrees, also known as Imam Alshafie. Imam Alshafie was born in 767 AD and died at the age of seventy-five in 820 AD (Omran, 2012). He was taught by a number of prominent Muslim figures of his time, such as Imam Malik (Melchert, 1997). He has not only benefited from their jurisprudence, but also from the variety of local thoughts that were passed to him through his teachers, who were from varying parts of the Islamic world (ibid). This is the third Islamic school and it is based on the Quran and Sunnah, which are its principal sources of legal authority (Lowry, 2015). This school views *Ijma'* and *Ijtihad* – which are conducted through *Qiyas* – to be of reduced authority. Therefore, when faced with interpreting unclear passages of the Quran, a Shafie School jurist would first try to interpret them in accordance with the consensus among Muslim scholars and, if no consensus were available, the jurist would resort to *Qiyas* (Abdul-Raof, 2013). *Usul Al fiqh* was first

considered by Imam Alshafie in his book *Alresalah* (Bakar, 1993). The Shafie School is primarily followed in Egypt, Indonesia, the Philippines and a number of other Asian countries (Abbasi-Shavazi and Jones, 2001).

Shafie scholars believe that arbitration is legal and a valid path of dispute resolution, since, in Islamic history, arbitrations were conducted by both the Prophet and his companions (Black, Esmaeili and Hosen, 2013). The followers of this school believe that arbitrators have a lesser role and lower status than those of a judge since an arbitrators' appointments can be revoked, unlike judges, who cannot be dismissed unless certain serious conditions are met (Islam, 2012). The Shafie School recommends the use of arbitration where there is no court in that area; however, where a court exists, a number of Shafie scholars reject the validity of arbitration on the basis that the practice may weaken the court's power (Chern, 2016). This being said, different Shafie scholars have different views about this issue and some of them allow arbitration regardless of the subject matter, as long as it does not involve a criminal dispute (Farhoun, 1986).

2.3.4. Hanbali School

Imam Ahmed Bin Hanbal was a major theologian of the 9th century and the founder of the Hanbali school of thought. Imam Ahmed was born in 780 AD and died at the age of seventy-five in 855 AD (Omran, 2012). His school adduced its rulings from the primary sources of Islamic law prior to the formation of any scholarly consensus or views (Melchert, 1997). It also recognises the authoritative opinions of the prophet's companions as long as they do not clash with the authoritative opinion of another companion. However, where there is a conflict of opinions between companions, those opinions will be evaluated under the scale of the primary sources and the opinion closest to the teachings of these sources will be followed (Al-Matroudi, 2006). This school began in the 9th century as a strict, traditionalist school. It refused the rationalist opinions which, over time, developed into the mainstream legal theory of *Usul Al-Fiqh* (Venardos, 2012). The Hanbali School has, nevertheless, gradually recognised *Usul Al Fiqh* theory and, in the 11th century, the School fully adopted it as developed by both the Shafie and Hanafi Schools (Melchert, 1997). Therefore, two hundred years after the death of Imam Ahmed Bin

Hanbal, the Hanbali School finally emerged as a fully formed school of jurisprudence (Schimmel, 1984).

While the Hanbali School is strict with regard to religious rituals, it is nevertheless flexible when it comes to commercial dealings (Vogel, 1998). For example, in ICA, the Hanbali scholars provide arbitrators with similar powers to those enjoyed by court judges. Therefore, an award issued by an arbitrator will have the same effect on the parties as a court decision, since they are the ones who appointed the arbitrator (El-Ahdab, 2011). However, some scholars of this school, such as Ibn Taymiyah, believe that arbitral awards are of no value until they are reviewed by the judicial system (Al-Matroudi, 2006). This school allows arbitration in all disputes, other than those that are criminal; the nature of the latter generally requires a court judge's decision (Alqurashi, 2003). This school is mostly followed by the people of Saudi Arabia and other neighbouring Gulf states.

2.4. Summary

The above primary sources of Sharia are the foundations of Islamic law and are not subject to change. The secondary sources are subject to change since they are the driving force behind the development of the Islamic legal system. These secondary sources rely on Sharia scholars' interpretations of the primary sources to legislate new laws that address newly developing issues. This guarantees that, as time passes, Islamic law develops alongside, as does the way of interpreting and applying certain texts from the primary sources. This variety of interpretations has resulted in the formation of the above Sunni schools of jurisprudence and, from within these schools, scholars have been addressing the issues that arose after the era of the school's founder. The Hanbali school is of most relevance to the scope of this thesis and it is the school upon which the KSA arbitration regulation is established. Although the Hanbali school is the official school in the KSA, its legislators and judges have, in many instances, relied on other schools' views for particular legal matters (See Chapter seven). Having considered these sources and the various schools of jurisprudence, it is now imperative to consider the theoretical grounding through which such sources could be applied.

2.5. Natural Law Theory

As stated above, all secondary sources must be based on the primary sources and this process of referring each aspect of the law to its natural order is fundamental in the development of the Islamic legal system. Therefore, natural law theory is addressed in this thesis to help explore the natural order of Islamic law rulings.

The term 'law' signifies order and refers to the way in which things are organised. Thus, the concept of natural law signifies the natural way in which things are ordered within the law. The term 'law' also refers to the natural order people are obliged to abide by (Van Dun, 2003). With respect to human matters, natural law theory elucidates both the natural order of people's lives and how they are expected to abide by it (Finnis, 2011). John Finnis, a leading theorist in natural law, explains that natural law "*claims to be able to identify conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct*" (ibid, p.18). Natural law is also viewed as an analytical and evaluative theoretical framework that assists in differentiating between both good and bad behaviours, and helps those who are interested to act based on practical reflections (Emon, 2011). The jurisprudence of this theory covers a broad range of matters, such as determining the existence of principles or investigating what authority of reason helps with ascertaining such principles. When viewed in a religious context, some theorists have attempted to use this theory to help identify the relationship between God and the philosophy of natural law (ibid).

This theory was divided by Aquinas into four kinds of law: eternal, divine, natural and man-made. According to this theorist, God's impressive design for the universe is revealed by eternal law. On the other hand, divine law is reflected by the different principles derived from the Scriptures (Aquinas, 1993). The application of eternal law to people's behaviours resulted in the formation of natural law. Last but not least is man-made law, which is constructed by people to fulfil the requirements of natural law within the context of continuously changing societal needs and settings. Aquinas uses nature to form the basis for the authority of natural rationality about eternal law (Aquinas, 1993). Westerman argues that God's law was not viewed by Aquinas as a fixed form of concepts and codes. Instead, Aquinas viewed eternal law as focused on the divine style, since the divine demonstrates a style of doing things and adheres to it when creating. Natural reasoning results from adherence to this style and demonstrates its impact on how the globe is ordered: "*The eternal*

law is an ordering principle regulating God's creation rather than a set of coercive precepts" (Westerman, 1983, p 29). It is important to take into account that natural law theorists such as Aquinas linked the authority of reason to God's mind through the medium of the designed globe, which is considered to be a reflection of God's will. Theorists' ability to develop the authority of reason was based upon the fusion of both fact and value, which made use of the world as designed by God in reaching its goal and forming normative grounding for reasonable analysis regarding human behaviour norms (Emon, 2011).

2.5.1. Islamic Natural Law Theory

Before considering the existence of natural law within the Islamic law tradition, it must be noted that some leading Islamic theorists such as Makdisi and Crone reject the existence of such a theory in Islamic law (Makdisi, 1999; Crone, 2004). Their views are justified if what they were actually referring to was the non-existence of an orthodox tradition enabling classical Muslim scholars to refer something to God's will without basing it on texts from the Quran or Sunnah (Emon, 2011). It has been the tradition of many classical scholars not to assume any ontological authority equal to that of the Quran and Sunnah, since this may lead to justifying its use in determining and building duties that stem from God (Makdisi, 1999). This belief is clearly shown in the dominant argument of positivists, as is illustrated by the classical *Usul Al-Fiqh* theory. This theory holds that, in the absence of a clear Quranic or Sunnah text on a legal issue, one is left in legal suspension. Positivists believe that in the absence of an epistemically sufficient approach to ascertaining God's law on a particular issue, no person is in possession of a coherent epistemic status that enables them to make rules by relying on normative forces and associating them with divine will (Emon, 2005). Essentially, this position of strict scriptural positivism is cherished within Islamic traditions (ibid). Positivist jurists claim that in order to determine a divine law, scriptures have to be searched and an expression has to be identified that would directly or indirectly lead to the identification of God's law on this matter (Brunner, 2011).

Different theologies regarding the concept of God's omnipotence have influenced the way in which classical jurists have understood the authority of reason. This variety in theological views led to the formation of the hard and soft models of

natural law theory (Maritain, 2001). Those theorists responsible for the hard natural law theory based their theological presumption on the idea that God only does good. This presumption was the start of what later evolved into the hard natural law theories, through which Sharia was given the ontological authority to reason by connecting God's will with human rationale through nature (Bender and Klassen, 2010). On the contrary, soft naturalists hailed from the position that something is good because of the divine desire for it to be so. They differentiated between goodness and Sharia norms and claimed that rationality could distinguish good from bad (Al Juwayni, 1981). However, that reasonable conclusion is unable to assume the authority of Sharia norms. Both of these categories will be discussed in the following sections.

2.5.2. Hard Natural Law

The hard natural law theory was founded by Al-Jassaş, Başran Mutazilites and a number of other classical theorists (Emon, 2011). This theory is constructed on the theological presumptions of the divine and the nature and it argues that God only does good and, as such, is unable to do any evil. As a result, hard naturalists believe that when the world was created, it was intended to benefit only human beings (Al Jassass, 2000). Further, they claim that God did not make such a great creation solely for his own benefit because he does not need it. He did not create it for the purpose of causing suffering and pain for others, in spite of their conduct, since such a thing is considered by these theorists to be unjust for those disadvantaged by it (Bearman, 2016). This hard naturalist belief is very problematic when we consider the fact that what is considered good or bad varies from one society to another. The same applies when considering the above belief that God is incapable of doing evil. Again, what is evil in this sense? If it refers to hardships such as poverty, wars and other injustices, then it may contradict the Muslim belief that this life is nothing but a test whereby people are tested with good and bad circumstances to examine how they will behave. This is evidenced in the following Quranic verse: "And We test you with evil and with good as trial; and to Us you will be returned" (chapter 21, verse 35). Positivist Muslim theorists have also raised concerns about this belief and its theological implications. They claim that God's omnipotence would be challenged by believing both that God is incapable of doing

evil and that he is bound to reward or penalise people due to their rational decisions (Mattison and Berkman, 2014).

The hard natural law theorists argue that God is just and, as a result, his creation must be of benefit to others. In accordance with this presumption, they believe that people could discern such benefits by utilising their rationality to devise norms of conduct that are grounded on the normative authority of God's will, which deliberately created such benefits (Hakim, 1953). This train of thought resulted in serious theological concerns since its implications adversely influenced God's theological omnipotence (Emon, 2005). If God is omnipotent, how it is possible to bind him with human rationality for designing obligations and prohibitions when rewarding or penalising specific behaviours (Emon, 2005)? The hard naturalists defended their point of view on the basis of the theology of a fair divine, and the nature in which his will and human rationality could be connected. Taking into account the fair God assumption outlined above, nature could be considered to be neutrally good for human beings (Izzatī, 2002). As a result, hard naturalists claim that good can be reasonably deduced from nature and that this finding can be transformed into a normative value within Sharia. They argue that this natural, empirical goodness reflects the divine will (Al Jassass, 2000). However, this argument has been opposed by positivists, who claim that if rationality is exclusively used to draw Islamic rulings, God could be bound by his human creations to enforce their own created rules, with zero reference to his will. As a result, God's decisions would be based on the outcome of reasonable human study (Hourani, 1960). The theological standing point of the one and powerful God, who is subservient to no one, would potentially be challenged by this hard naturalist view (ibid).

Furthermore, fusing fact and value is a key argument for theories such as the Al Jassas and Aljabbar natural law theories. These theorists believe that, subject to the absence of any opposing evidence, everything is good at a base level and is legally allowed (Al Jassass, 2000). They claim that good and bad can be rationalised by people through the study of nature, where their primary empirical evaluations would convert into normative evaluations. They argue that the normative content of the empirical assessments is grounded on fusing both facts and values, through which nature is used with a presumptive normativity that originates from God's intended creation of nature for the benefit of people (ibid). They argue that, due to the fusion of both fact and value through the study of nature,

a reasonable ascertainment of good and evil is possible, which would then form the basis of Godly obligations (Jassass, 2000). Once it is reasonably determined that an act is good, it can be transformed into an obligation with consequences in the hereafter (ibid). Soft naturalists expressed their concerns about such a belief, claiming that nature alone cannot coherently and objectively determine the basis of the authority of rationality and, as such, there will be no fusion between facts and values (Al Qarafi, 2000). Their rejection of such fusion was grounded on the following Quranic verse: "We do not punish until We send a messenger" (Chapter 17, verse 15). This Quranic text preserves the belief that God's penalties need a clear expression of will and not a simple rational study of good and evil. If nature alone is considered the rational authority, it is too much of an assumption of God and the capacity of people to ascertain his will (Emon, 2005). Ibn Hāzīm, one of the 11th-century jurists, argued that the hard natural law theorists' attempts to fuse fact with values in nature was 'plain pomposity'. He claims that humans, by nature, are open to different temptations such as drinking alcohol and adultery, which have been expressly forbidden by God. Therefore, it cannot be argued that the factors of nature can be transformed into moral norms and duties with the stamp of God (Ibn Hāzīm, 1984, p 54). Positivists also acknowledged that people are able to reach reasonable conclusions; however, such conclusions cannot be attributed to God's rule of normative authority, which holds God bound to enforce rewards or punishments (Al-Ghazzali, 1894).

2.5.3. Soft Natural Law

In spite of positive theorists' denial of the role of rationality in forming an obligation, some have nevertheless acknowledged the possibility of relying on the discretion of jurists to reach conclusions on some Islamic rules (Ahmed, 1971). The continuity presumption was not a method for asserting good duties in circumstances where there was no unequivocally expressed rule in the Quran or Sunnah, but was merely a non-liability rule (Al-Shirazi, 1908). The positivist theorists encountered an essential challenge concerning the justification of the use of juristic discretion for determining new Islamic rules (Montgomery, 1973). As a result, some assumed a softer form of natural law than the one adopted by hard natural law theory. Hard naturalists acknowledged the normativity of nature in a form which implies that God not only acts purposely, but also does only good. This implication was viewed by

positivists as an infringement of the principle of God's omnipotence (Montgomery, 1973). Consequently, in spite of the positivist's reliance on the hard naturalists' argument to validate their juristic discretion, they nevertheless constructed their theory in a form that meant God's omnipotence would be preserved (Emon, 2005).

The positivists' efforts resulted in the development of soft natural law. This theory uses the nature concept similar to that of hard naturalists, who view nature as created for the good of people and, as a result, fuse both facts and values. On the contrary, positivists, by relying on God's grace and accepted authorities, justified the basis for their use of nature as a basis for making and updating laws (Al Razi, 1997). By studying nature empirically, it seems this designed globe has different benefits for the existence of mankind. For soft naturalists, this evidence of benefit reveals that God designed the globe in order to support, keep and preserve human interests (Wacks, 2017). However, they believe that this is all done merely by God's grace which, if he desires, he could easily change as he sees fit (ibid). The soft naturalists' claim of grace enables them to fuse facts and values in nature and this authoritative nature rationale is consequently capable of maintaining a religious guarantee of God's omnipotence (Emon, 2010). Soft natural theorists argue that God does not have to provide guidance by creating nature. However, he did so and allowed humans to use it all out of grace. They did not use it because of an assumption that God's powers are limited. However, our ability to discern good and evil as grounds for new rules stems exclusively from God's deliberate and gracious creation of this ability within us, which he could withdraw at any time, as he sees fit (Al-Ghazzali, 1894). Since both models of natural law merge fact and values in nature, proponents of soft natural law claimed that the constancy of such merging is limited by God's will, which is subject to change at his discretion. Soft naturalists have further argued that nature, in its current form, is a source of goodness. However, it could be changed and its goodness is not undoubtable (Hourani, 1960). Such a belief is grounded in the theological possibility of the continuous goodness of nature and, as a result, it was called a soft theory (Hakim, 1950). Notwithstanding the nature contingency, God's grace theory provides that, in the absence of an unequivocally clear ruling within scripture, natural theory jurists have merged both fact and value in nature for the purpose of rendering rationality an ontologically reliable source for Islamic law (Al Qarafi, 2000).

One of the leading founders of the soft natural law theory, Imam Al Ghazali, in his form of discretion, used intuition, God's grace theology, and texts to induce rationality, through which he fashioned the fundamental objectives of a legal framework (Al-Ghazzali, 1894). He claimed that the objectives of the legal framework were those that would be recognised by most legal frameworks. He further clarified that the existence of such objectives was founded on various sources of Islamic law. These objectives or *Maqasids* are discussed further below (ibid).

To sum up, it is clear that both soft and hard natural law theories argue for the development of Islamic rulings by fusing both facts and values. Although they have different views on such fusion, they nevertheless agree that nature is created for the benefit of humans. Consequently, it should be referred to by *mujtahids* to deduce new Islamic rulings. Thus, the practice of fusing facts and values is likely to develop Islamic law and its practice by Muslim states. In particular, the KSA could develop its legal system by encouraging its Islamic scholars to refer to nature in order to deduce new rulings on newly arising matters. This is to be done by utilising both *Usul Alfiqh* and *Foru' Alfiqh* to study the sources of Islamic jurisprudence and nature before reaching conclusions on arising matters. In this regard and in the KSA, the Council of Senior Scholars are the body authorised to exercise such legislative powers (see Chapter Three).

2.5.4. Natural Law and Arbitration

Having discussed natural law theory and its models, it is now important to assess the implications of this theory on ICA. An arbitral legal order could be established if there was a willingness to recognise and apply the rationality of natural law theory (Gaillard, 2010). This natural law theory advocates that nature could reveal higher values that sometimes justify positive law solutions to consolidate them, and at other times encourage their development through questioning such solutions. This belief could be understood in a way that would justify establishing a legal order that has superiority over all legal frameworks, whose only advantage is the fact that they were introduced by sovereign nations (Emon, 2011).

This being said, it is nevertheless hard to analyse natural law theory's various schools when it comes to international arbitration. This is mainly due to the confusion caused by the many trends that exist within the philosophical traditions of natural law (Gaillard, 2010). Certain trends are conservative, and others are more prepared to acknowledge that theory evolves as society changes. This theory is sometimes grounded on religious values and at other times on non-religious ones (ibid). In spite of these trends, the different directions in natural law theory share a common consensus on the existence of higher values that stem from nature, regardless of whether they have been transformed into a positive legal framework or not (Gurvitch, 1935).

Moreover, referring a dispute to arbitration is viewed by 20th-century arbitration practitioners as a clear sign of the parties' desire to adjudicate their dispute in a different manner to that of litigation (Gaillard, 2010). A similar viewpoint was expressed by Bruno Oppetit, who stated that international commercial law

“for its part, clearly manifests a desire for unity, based on the common needs and interests of the international economic community. As such, it does not accord with a fragmentation of the international legal framework and encourages the use of unifying legal notions, such as Lex mercatoria, general principles of law, or truly international public policy (Oppetit, 1999, p.119).”

Islamic natural law theories could also be of benefit to the development of Islamic arbitration practices, which are either fully or partially adopted by many Muslims states. In the absence of a clear ruling from either the Quran or Sunnah, Islamic jurists could fuse facts and values in nature for the purpose of filling this gap within Islamic law rulings. These jurists' empirical investigation of nature is likely to lead to a common consensus between them with respect to long-standing legal issues. For instance, the concept of public policy within Islamic law is yet to be properly defined for those from other religious backgrounds. This is mainly due to the variety of schools of thought, which lead to different views of what should constitute public policy. This researcher believes that Muslim state jurists should meet to deliberate the use of natural law theory as a potential tool for finding solutions to the vagueness inherent in their application of Islamic law. This would lead to more certainty in the legal framework and equip Muslim state jurists with the skills that will enable them to face upcoming legal issues within their jurisdictions.

2.6. Maqasid Al Sharia

The term '*Maqasid*' refers to the rationale behind an Islamic law ruling. Such rulings include charity, which was mainly introduced in order to enhance social welfare, and fasting, with its underlying rationale of realising God's grace (Chapra, Khan and Alshaikh, 2006). It also refers to the law's allowance or prohibition of certain matters with the purpose of achieving a positive outcome. Therefore, Islamic law's strict prohibition of alcohol and drugs is mainly the result of an attempt to preserve the souls and minds of individuals (Auda, 2008). El-Mesawi (2006) sees the word '*Maqasid*' as meaning the purposes, objectives, principles, intentions, goals and ends. It is also viewed by some Islamic legal theorists as a substitute expression for people's interests. For instance, Al-Juwayni, one of the first jurists to contribute to the theory as it is known today, referred to both *Maqasid* and public interests (*Masalih Al Mujtama'*) interchangeably (Al-Juwayni, 1981). Also, Abu Hamid Al-Ghazali expanded the *Maqasid* classification by placing it entirely under what he named unlimited interests (Al-Ghazzali, 1894). Public interest was defined by Najem Al-Deen Al-Tufi as something that achieves the legislator's purpose (Lubis, 1997). Al-Qarafi, on the other hand, linked *Masalih* (Good actions) and *Maqasid* through a key rule of *Usul Al Fiqh* that considers *Maqasids* to be invalid unless they either accomplish *Masalih* or avoiding *Mafased* (Bad actions) (Al Garafi, 1994).

2.6.1. Maqasid Dimensions

In Islamic law, *Maqasids* are classified in different ways in accordance with various dimensions. Such dimensions include the necessity level, which is the traditional classification, the ruling scope, the people scope and the universality's purpose level (Al-Shatibi, 1997). Figure 1 describes how the traditional classification of the necessity level functions. For the sake of this thesis, only this dimension will be discussed in detail since it is the most important and relevant one of the above four dimensions.

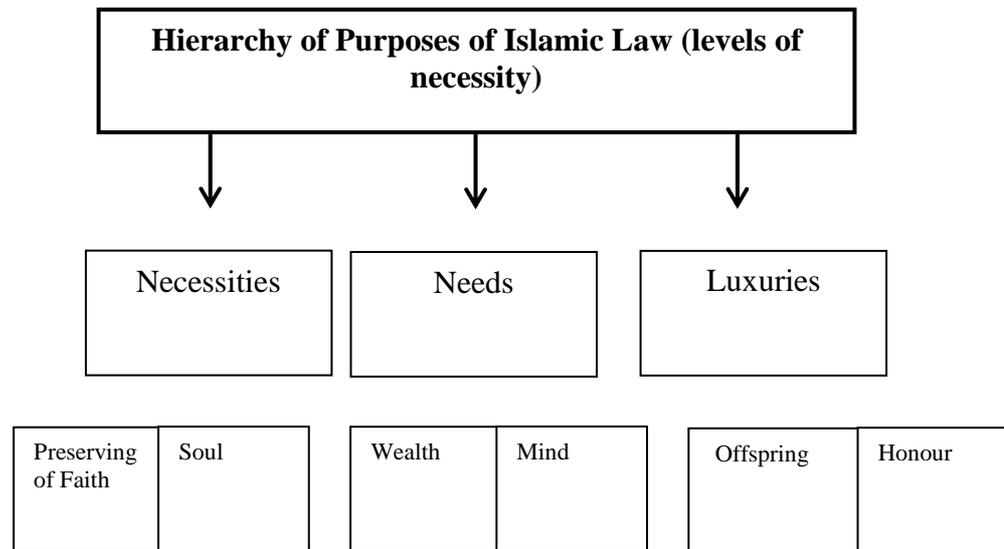


Figure 1: Levels of Necessity Chart. Adopted from Auda (2008)

Maqasid are classified and divided into the above levels of necessities. The first level is further divided into the preservation of people’s faiths, souls, wealth, minds and offspring (Dusuki and Abdullah, 2007). Certain *Usulis*, such as Al-Ghazali, introduced the preservation of honour into the earlier five broadly known levels of necessities (ibid). This category of necessity was considered to be a significant factor in people’s lives. Additionally, the preservation of such necessities is generally thought to be the primary motivation behind any Islamic ruling (Al-Shatibi, 1997). Furthermore, at the needs level, purposes are of lesser importance for people’s lives and luxuries, in the traditional expression, are considered to be for beautifying purposes (ibid). Figure 1 illustrates the levels within the hierarchy of necessity. These levels are interconnected in accordance with Al-Shatibi’s views. Each of these levels supports and preserves the level below it. For instance, the needs level preserves and protects the necessities level (ibid). This is the reason certain scholars prefer to perceive necessities in the form of overlapping circles instead of in a strictly hierarchical form (Attia, 2001).

Auda (2008) believes that the levels of necessity are similar to Maslow’s 20th-century hierarchy of human objectives, the ‘hierarchy of needs’ (Maslow, 1943). Maslow believes that human needs are various, representing essential physiological requirements and security, to emotional feelings and self-actualisation. In 1943, Maslow proposed five levels of ‘needs’, revising this in 1970 to include seven-levels (Maslow, Frager and Fadiman, 1970). Al-Shatibi’s and Maslow’s theories are similar in respect to the importance placed on levels and with

regard to their goals. A further similarity between the Islamic goal theories and the Maslow's later theory is that they both focus on the capacity for development (Auda, 2008).

2.6.2. Contemporary Perception of Maqasids

Over time, the theory of the Islamic *Maqasid* evolved and its most important overhaul took place in the 20th century. Recent jurists of Islamic law have criticised the *Maqasid's* traditional classification (mentioned above) for several key reasons. Firstly, the traditional *Maqasid* scope is entirely focused on Islamic law. Nevertheless, it failed to contain precise goals for either individual texts or collections therein, or of law that covers particular subjects or chapters of *Fiqh*. Also, the traditional *Maqasid* classifications are focused on individuals more than on groups such as families, communities or humanity at large. They also identified the above classification's failure to incorporate justice and freedom and other values that are globally recognised as being fundamental rights. Finally, all of the above *Maqasid* were deduced from Islamic jurisprudence literature instead of from original sources and scripts (Al shaykh, 1957).

In order to remedy the above deficiencies, contemporary scholars introduced modern notions and classified *Maqasid* in accordance with contemporary dimensions (Emara, 1981). Primarily, the earlier classifications place *Maqasid* into levels based on the scope of the rulings they cover. General *Maqasid* are witnessed in the entire Islamic law body, comprising of necessities, needs, justice and freedom. The second level is the specific *Maqasid* that are seen throughout Islamic law in the form of children's welfare and family law matters, crime prevention for criminal law matters, and monopoly prevention in commercial law matters. Finally, there are partial *Maqasid*, which attempt to determine the wisdom underlying each Islamic script or ruling. For instance, discovering true intent by demanding a specific number of witnesses in specific judicial claims; alleviating the difficulty of intent by permitting a sick person to break his/her fast; and feeding poor intent by prohibiting the storage of meat throughout Islamic festival days (Jughaim, 2002).

To remedy the shortcoming of individuality, a further expansion to this notion of *Maqasid* was made by contemporary scholars to cover a larger group of individuals,

societies and human beings in general. For instance, Ibn Ashur prioritised *Maqasid* that are related to the *Ummah* (nation) over those that are related to individual people (El-Mesawi, 2006). Another example is Rashid Rida, who incorporated a reform to include women's rights in his *Maqasid* theory. Yusuf Al-Qaradhawi, in his *Maqasid* theory, incorporated human dignity and human rights. This growth in the scope of *Maqasid*'s permits them to address universal matters and develop alongside rulings underlying wisdom and practical proposals for reform and development (Kamali, 2008).

It is important to note that contemporary Muslim scholars have recently initiated a global *Maqasid*, which is deduced from the Quran and Sunnah, rather than having to rely on Islamic jurisprudence literature which differs depending on jurist madhhab. This method has enabled *Maqasid* to overcome the *Fiqh* edicts' historicity and better reflect the higher principles and values of the Quran and Sunnah (Auda, 2008). Comprehensive rulings subsequently result from such global values.

Rashid Rida is one of the scholars who conducted a survey of surveyed the Quran in order to uncover its *Maqasid*. His theory of *Maqasid* included, "reform of the pillars of faith, and spreading awareness that Islam is the religion of pure natural disposition, reason, knowledge, wisdom, proof, freedom, independence, social, political, and economic reform, and women's rights" (Rida, 1948, p. 100). In addition, Al-Tahir Ibn Ashur suggested that the global Islamic law of *Maqasid* exists to keep "orderliness, equality, freedom, facilitation, and pure natural disposition preservation" (Fitrah) (El-Mesawi, 2006, p. 236). The freedom purpose, suggested by various contemporary scholars including Ibn Ashur, has been identified as different from that of the concept of 'freedom' (*Itq*) as stated by jurists (Auda, 2008). *Itq* means 'to be freed from slavery', which contrasts with the standard notion of freedom as it is understood today. 'Freedom' (*Hurriyah*) is a newly introduced purpose in the Islamic law literature. Ibn Ashur has, excitingly, accredited his reliance on the term *Hurriyah* to the literature regarding the French revolution, which was translated into Arabic in the 19th century (El-Mesawi, 2001).

Similarly, Mohammad Al-Ghazaly has argued that we should benefit from the earlier fourteen centuries of Islamic traditions. Consequently, he included both justice and freedom in the necessity level of *Maqasid* (Attia, 2001, p. 183). Moreover, following

his survey of the Quran, Yusuf Al-Qaradhawi, a contemporary Islamic scholar, included the following global *Maqasid*: “true faith preservation, preserving human dignity and rights, inviting people to worship God, soul purification, reinstating moral values, strengthening families’ relations, fair treatment of women, strengthening the Islamic nation and seeking global cooperation” (Al-Qaradhawi, 1999, p 3). Al-Qaradhawi illustrates that it is wise to suggest a theory in global *Maqasid* only after developing a good level of knowledge of the script’s details (ibid). Taha Al-Alwani also surveyed the Quran with the purpose of ascertaining its highest and most predominant *Maqasid*. He came up with the following *Maqasid*: the oneness of God, soul purification, and building civilisation on earth (Al-Alwani, 2001).

2.7. Application of Islamic Theories

Having discussed the significance of both the natural law theory and *Maqasid* Al Sharia theory in the development of Islamic law rules, it is now important to address the contentious issue of interest in light of these theories. The provision of interest has been the cornerstone upon which most international awards were rejected in the KSA. Therefore, it is important to define the scope of interest and whether or not it is similar to *Riba*. *Riba* is an Arabic word meaning increase or growth and is referred to in English as interest in spite of their differences (El-Gamal, 2011). The more accurate translation of *Riba* is *Usury*, which refers to an agreed increase in the repayment of debt imposed by the lender on the debtor for the sake of profit. It should be noted that interest encompasses different forms of compensations; for example, damages for any incurred loss or for the loss of profit (Noorzoy, 1982). This concept is discussed in more detail herein.

2.7.1. Riba

Both the Quran and Sunnah Prohibit all forms of *Riba* due to the destructive impact it has on communities. This is evident from the following verses: “You who believe, do not consume usurious interest, doubled and redoubled. Be mindful of God so that you may prosper” (Chapter 3, verse 130). “Whatever you lend out in *Usury* to gain value through other people’s wealth will not increase in God’s eyes, but whatever you give in charity, in your desire for God’s approval, will earn multiple rewards” (Chapter 30, verse 39). “Allah destroys *Usury* and gives increase for

charities” (Chapter 2, verse 276). A number of other Quranic verses and Hadiths also warn believers to avoid *Riba* and instead encourages them to give charity, which reflects the converse influence of *Riba* and Charity on communities. While the former enables wealthy people to exploit the less fortunate, the latter encourages the wealthy to give to the poor for the purpose of increasing social justice within communities (Ali, 2016). This restriction on Islamic commerce prevents the wealthy from placing excessive burdens on vulnerable community members. Thus, restriction was viewed by Ali as “a logical outcome of the Qur’anic ethos of social justice” (Ibid, p 121).

Although there is a complete *Ijma* between all scholars, and especially schools of jurisprudence, that *Riba* is forbidden, there is nevertheless a lack of consensus on what constitutes *Riba* (Noorzoy, 1982). In fact, the uncertainty in the scope of *Riba* was first uncovered in the early years that followed the passing of the prophet Mohammed PBUH. This was evidenced in Omar Bin Al Khattab’s statement that “The last verse to be revealed was on *Riba* and the Prophet, peace be upon him, passed away without explaining it to us; so give up not only *Riba* but *Ribah* [i.e. whatever is doubtful].” (Asad, 1980, p 622). This shows that there is a controversy over the definition of *Riba* rather than the legality of *Riba*, which has to be addressed. The ascertainment of what form *Riba* takes had the power to significantly develop the practice of Islamic finance in Muslim states and consequently their enforcement of foreign awards.

The ascertainment of *Riba* could be reached by utilising the above theories of Islamic law. Natural law theory would help refer the concept of *Riba* to its original practice, enabling Islamic jurists to understand the rationale behind such prohibition and determine which of the modern practices fall under its scope. Prior to the establishment of *Riba*, pre-Islamic Arabs used to double the original sum of debt if a debtor failed to pay, doubling it again should they fail to pay the originally doubled sum. This practice was not accepted as a fair transaction by Islam, since Islam, while encouraging profiting from trade, discourages profiteering through it (Ali, 2016). Therefore, it is important to contextualise the prohibition of *Riba* and distinguish it from legitimate trade profits. This is because “Not all interest is the prohibited *Riba* ...[and] Not all *Riba* is interest” (El-Gamal, 2001, p 3). Understanding such distinction and applying it to modern day commercial

transactions is likely to increase the effectiveness of Islamic finance as well as the amount of enforced awards in Muslim states.

Muslim jurists should also rely on the theory of *Maqasid Al Sharia* in order to ascertain the scope of *Riba*. They should do this by considering the rationale behind the prohibition of *Riba* and subsequently applying it to modern financial practices in term of *Masalih* and *Mafasid* (Kahf, 2006). *Riba* was prohibited because it:

“reinforces the tendency for wealth to accumulate in the hands of a few, and thereby diminishes man's concern for his fellow man. (B) Islam does not allow gain from financial activity unless the beneficiary is also subject to the risk of potential loss; the legal guarantee of at least nominal interest would be viewed as guaranteed gain. (C) Islam regards the accumulation of wealth through interest as selfish compared with accumulation through hard work and personal activity” (Gotanda, 1996, p 47).

A reliance on such rationale would enable Islamic Jurists to clearly define the scope of *Riba*. It would also enable them to categorise the current practices of modern commerce into those that fall within such scope and those that do not. Thereby creating a more reliable and consistent framework of Islamic finance, which Muslim states would feel encouraged to adopt and enforce within their legal jurisdictions.

2.7.1.1. Compensation for Lost of Future Profit

One of the areas that differentiates between interest and *Usury* is the compensation for loss of profit that would have been attained had the parties fulfilled their contractual obligations. In this regard, there are two types of future profits: definite future profit and potential future profit. Definite future profit is what the innocent party has lost due to the other party's breach of contract or other harmful actions (Zaraq and Elgari, 1991). Potential future profit, on the other hand, is mostly concerned with one party losing a real opportunity as a result of another's actions, which would have resulted either in obtaining profit or avoiding losses (Awni, 2007). This dynamic can be illustrated thus: if someone's actions resulted in a horse dying before it participated in a global competition in which the horse had a real opportunity of winning. In this case, the party would not be compensated for

whatever potential profit he would have had if the horse had participated because it is not a definite profit, but rather mere speculation as to the potential of profit, a circumstance that Islamic law does not allow compensation for. However, the horse's owner would be compensated for the lost opportunity itself because the opportunity is definitive and, as such, it has to be compensated for (Alshagawi, 2010).

In this regard, in the KSA, *Diwan Almazalim* held in decision no: (893/S/6. 2008) that the *Diwan* takes into account only the claimant's incurred loss and definitive future profit, but not the potential one. Therefore, any damages issued must be measured by the definitive reality and not by speculative scenarios that may or may not happen. The *Diwan* reached similar decisions in two other cases involving the closing of someone's business and a wrongful imprisonment (Decision no:3747/2/G/2008, Decision no: 524/1/G/2006).

The Egyptian court of appeal adopted a more flexible approach in decision no: 4797/ 64/ G/ 2007, which states that the claimant is to be compensated for both the incurred damages and the loss of profit. It further defined the loss of profit as what the innocent party hoped to gain providing that such hope is based on reasonable grounds, since the lost profit is potential but the loss of opportunity is definitive. What is considered to be reasonable ground may differ between judges and this court's decision may motivate other judges to accept potential profits providing that their decision is based on reasonable grounds. The flexibility in the Egyptian court of appeal's view may be attributable to the judge's referral to Egyptian civil law in his judgments, rather than the provisions of Islamic law. Although the Egyptian law relies on Sharia as its most supreme source, it also relies on other sources that may contradict with some Islamic law provisions.

Based on the above, it is clear that the current interpretations of Islamic law provisions compensate for any definitive future loss, but will not compensate for any potential loss that avoids being in *gharar*. This area needs to be revisited by Islamic scholars so they may clearly define what encompasses definitive future loss. This could be done by considering the above Islamic theories and applying them to this subject matter. It could be argued that the presence of a strong possibility of the attainment of profit is enough to determine the concept of definitive loss over potential loss. Looking back at the earlier example of a horse missing an

opportunity to participate in a global competition, if this horse had been the champion of this competition for several years and in good health, the profits generated for the owner from this competition should be considered more than just potential.

2.7.1.2. Compensation for the Time Value of Money

The concept of inflation or the time value of money is a very sensitive topic to discuss. This is particularly true in the KSA because it shares similarities with *Usury* or *Riba* (Al-Zuhayli, 2008). It is, nevertheless, a clear example of the small lines that differentiate *Usury* from interest in as far as contracts of sale are concerned. This concept is problematic because it is calculated on the basis of the time value of money in a similar way to that of *Usury* (Khir and Fairouz, 2013). Therefore, there was a controversy of opinions as to the legitimacy of this concept in Islamic law. Some scholars argue that compensation for inflation is not legitimate in Islamic law due to it being recognised by conventional economies as a financial concept that is relied upon to justify *Usury* (Al-Mawdudi, 1958). Others have argued against this attitude, claiming that it is a recognised concept in Islamic law because of its significance in ensuring justice between contracting parties. In this regard, Mr Khan states:

“Islam has nothing against having a positive time preference. However, it is more reasonable to think of the time preference as a function of time rather than treating it as fixed and independent of the time-frame under consideration. There is also nothing against realising time value of money as long as it is not claimed as a predetermined value” (Khan, 1991, p44).

Therefore, it could be concluded that compensating for inflation in commercial contracts is legitimate as long as it does not involve a loan or a pre-agreed arrangement for such compensation. This view is supported by *Diwan Al mazalim* in the KSA who stated:

“due to a defendant's failure to allow the contractor to initiate the required work, the plaintiff would be compensated for the increase in the market value of materials due to inflation. The conduct of the defendant led to the extension of the contract to take into account

the rate of inflation. An increase in the market value of materials and wages would have been avoided if the defendant had performed the contractual obligation, as intended at the signing of the contract” (No. 392/ 1979).

The KSA position in this regard is clear when the case involves a breach of contract, but it is nevertheless unclear when it comes to loans. This is particularly evident in the KSA bank’s continuous charge of additional payments for loans, where such loans are disputed and enforced by the committee of banking disputes (See Chapter 3). The KSA’s lack of consistency in its view of the concept of the time value of money should be considered by its Council of Senior Scholars. This council could subsequently rely on the above theories to investigate the Sharia views in this regard and whether or not loans should be treated the same as those of contractual arrangements.

2.7.1.3. Compensation Due to Procrastination

Another important area that could be confused with *Usury* is the innocent party’s claim of being compensated for the other party’s procrastination in spite of being able to pay in due course. This act of procrastination is forbidden in Islam due to the harm it inflicts on other people’s properties, as well as any other injustices that it may cause (Ahmed, 2015). The Prophet PBUH stated that “Procrastination (delay) in repaying debts by a wealthy person is injustice” (Al-Bukhaari, 1994, No: 2400). Since injustices are forbidden in Islam, there must be a way of compensating the innocent party for any incurred loss. In this regard, Shaikh Mustafa Alzarga suggested that “this compensation for procrastination is deserved as long as the debtor has no legitimate reason for withholding the repayment” (Alzarga, 1985, p 95). He further described the procrastinator as an “oppressor” of someone else’s property and that expressed oppression is not acceptable in Islam (Ibid). Shaikh Abdullah Almanee’ has also acknowledged the legitimacy of compensating the innocent party for procrastination, providing that “the procrastination is proven in addition to proofing the procrastinator’s ability to repay” (Almanee’, 1996, p 401).

In spite of the above-described acceptance of compensation for procrastination, the matter is still subject to conflicting opinions. Since some scholars believe that compensation should be limited to any cost incurred by the creditor in his pursuit of

obtaining his debts. This includes any travel costs, attorney fees or any similar fees that directly result from the procrastination (Al Amin, 1985, Shaa'ban, 1988). Other than this, the creditor should not be compensated any extra money because this would be some sort of *Usury* (ibid). In addition, a consensus was reached between contemporary scholars in the prohibition of predetermined agreements on the compensation for any future procrastination (Ghaith, 2010). This is because such agreements rely on the same foundations as *Usury* in terms of determining the percentage of compensation and the method of its calculation and this is prohibited in Islam (Ahmed, 2015). Therefore, it is unclear how the innocent party is to be compensated and on what basis such compensation should be calculated. This area needs to be revisited by Islamic scholars in order to clearly define the process of compensation for the innocent party for the procrastination of the debtor; the exact form the compensation would take also needs to be addressed. These scholars could rely on *Magaisid* Al sharia imperative stand towards the protection of people's property as the basis for studying such subject matter.

2.8. Conclusion

It is obvious from the issues presented in this chapter that there are sufficient dynamism and autonomy within Sharia to introduce amendments and reconsiderations to *Fiqh* rules which will reflect better commercial transactions and cultural positions. In the event of legal principles and methodology being insufficient, the sanctity of contractual obligations, such as treaties within Sharia, make it more likely that amendments will be made to Islamic law (Kutty, 2006). This chapter highlighted the variety of interpretations of Islamic jurisprudence, as demonstrated by the various schools of thought, where these schools of thought are viewed by Muslim scholars to be a mercy from God "because these disagreements injected Islamic laws with the degree of flexibility necessary for a religion which proclaimed itself suitable for all times, all people and all societies" (Al-Hibri, 1979 p 1). It is unrealistic to assume that ICA rules will be entirely consistent with Sharia interpretations. However, when considering Sharia's inherent flexibility, it is also impractical to assume that the rules and practices of ICA will still have legitimacy in Muslim states if the principles and methodologies of Sharia are completely disregarded (Kutty, 2006).

This chapter also considered natural law theory from an Islamic perspective. The different views of Islamic natural law theory and their resultant natural law models were extensively discussed. Therefore, in spite of Islamic jurists' competing theological arguments for both models of Islamic natural law, they all uphold the natural law philosophy of merging facts and values in nature. In addition, although the jurists of natural law permit rational deliberations, they nevertheless restrict the scope of such deliberations by developing particular analytical methods such as the legal reasoning of *Maqasid Al-Sharia*. This has led to the discussion of the theory of *Maqasid Al-Sharia* and the views taken of it by different scholars. In addition, it shows the importance of *Maqasid* in determining Islamic rulings and in developing Islamic jurisprudence. Hence, there is considerable need for Islamic law to be reformed from within for the purpose of addressing contemporary norms, transactions, and institutions (El Fadl, 2014). There is, equally, a need to deal with matters of concern from an Islamic perspective in order to better accommodate them.

Chapter Three: General Background of the Saudi Legal System

3.1. Introduction

After assessing the main theories and sources of Sharia, it is now imperative to discuss its influence on the legal system of the Kingdom of Saudi Arabia (KSA), which relies on traditionalist Islamic views to form the basis of its legal system. Sources of Sharia are considered to be the most authoritative legal sources in the KSA and they represent its public policy. Furthermore, the KSA has experienced a number of changes since oil became a very important factor in the world's economy. Such changes influenced its legal system leading to modifications in the legal structure of the KSA. It also led to the issuance of many regulations and laws, in addition to the creation of several new courts and committees to deal with matters arising from such changes (Alabdullah, 2016). This chapter begins by providing an overview of the KSA legal system and the structure of its courts. To this end, it will provide an overview of authorities who are competent to review arbitral disputes. These include the Committee for the Settlement of Banking Disputes (CSBD), which hears claims involving banking disputes, as well as the *Diwan Al mazalim*, which hears commercial disputes and reviews foreign decisions. This chapter then considers the main sources of the KSA's legal system and the extent of their application. Lastly, it will consider the influence of foreign legal systems on the development of KSA legal practice.

3.2. The Kingdom of Saudi Arabia

The Arabian Peninsula, the original homeland of the Arabs and Islam, is largely occupied by the KSA, with a population of 31,015,999 (Central Department of Statistics, 2015). King Abdulaziz Al Saud united the KSA in 1932 and then declared himself its absolute monarch, ending a long series of clashes between different tribes and territories of the Arabian Peninsula (Faisal, 2002). He began the building process of the nation with the aim of meeting the needs and aspirations of the country's citizens, who hoped for a more civilised and developed state. This significant initiative joined all of the KSA's nationals under a single governing

system that helped to create a unified sovereign state (Faisal, 2002). Since then, the government of the KSA has gradually been transformed from a humble governing body to a number of developed institutions that helps the executive authority to manage the affairs of the country. He then began establishing an Islamic based governance structure in accordance with the principles of Sharia (ibid). The cultural identities of KSA nationals are mainly informed by those of Islam and Arab cultural norms, connecting them to millions of people outside the country's borders (Al Farsi, 1986). The KSA culture is intensely influenced by the Islamic religion, society's customs and traditions, and family and tribal orientations (ibid). These practices and customs go back thousands of years, and were inherited from earlier traditions of their ancestors (Tripp & North, 2003). Nevertheless, as it developed from an undeveloped society of nomads to become a rich oil-producing country (post-oil-boom in the 1970s) the KSA's culture has been characterised by dramatic transformations, (Tripp & North, 2003).

3.3. Constitutional Developments

Five years before uniting the whole Kingdom, King Abdulaziz established Makkah's Consultative Council in 1925 to formulate the basis of a constitution. It had extensive powers and was charged with managing most of the country's institutional affairs (Al-Fahad, 2005). A year later, the King approved a comprehensive body of law for the Hejaz province called the Basic Directives. These directives were, at the time, consistent with the developed world's constitutions and were considered as the foundation on which other directives could be developed (Ibid). Such directives were divided into nine parts and 79 provisions, which concerned major constitutional matters including the government system, administrative roles, the Kingdom of the Hejaz affairs, and the Department of Accounting (Al-Fahad, 2005).

The Inspection and Reform Commission, which was in charge of constantly assessing the country's governance structure, was formed in 1927 with the role of providing recommendations on a number of reforms for the administration. The Commission's recommendations led to the creation of the Consultative Council Decree, which received approval in July of the same year (Al Kahtani, 2004). In response to the complications of that era, the recommendations of the Commission

for the Establishment of the Council of Directors were implemented at the beginning of 1932. The Council of Directors worked for more than two decades while limited to the Hejaz province, but this changed when the Council of Ministers was created in 1953 who possessed the power to cover all parts of the KSA (Ibid).

In the 1930s, oil was discovered in the Kingdom, which resulted in growing complications in governmental matters and made the previous administration structure inadequate (Richard, 1984). Therefore, in order to guarantee the future efficiency of the administrative organisation, a number of ministries were established. These included, in 1930, the Foreign Affairs Ministry, the Finance Ministry in 1932, the Defence Ministry in 1944, and the Ministries of Internal Affairs and Communications in 1953. The KSA also successfully created diplomatic relations based on political representation by appointing ambassadors (Faisal, 2002).

In the 1980s, the Council of Ministers formulated the Kingdom's policies on the economy, education, social welfare and a large number of other public issues. The Municipal Affairs Ministry was established in 1975, after which there was a declaration for the issuance of a specific law for such affairs that would lead to the creation of municipal councils and encourage decentralisation (Ansari, 2015). This shift towards decentralisation empowered local councils to regulate themselves while still being under the supervision of the government. The devolution of powers eased the burden on the government since most of its focus at the time was devoted towards developing the country's regulations. Between 1975 and 1982 an expert, high-level Committee (including senior officials chaired by Prince Naief Bin Abdulaziz) drafted the KSA's most important regulations (Faisal, 2010). At the beginning of March 1992, these drafts were approved by Royal Decree and published in the official Gazette (Royal Decrees No. A/90-92, UM Al-Qura Gazette, 1992):

- The Basic Law;
- The Shura Law;

3.3.1. The Basic Law

This regulation (the Basic Law), is considered to be the most significant constitutional legislation issued to date by the KSA. It declares the Quran and Sunnah to be the Constitution of the KSA (Article 1). Sharia is considered by Article 7 to form the foundation of the KSA and, in the same article, the monarch's power is considered to be derived from Sharia. This is because the monarch has been appointed through Bay'ah (pledge of allegiance) from the Bay'ah council members and subsequently from all the KSA citizens.

The Bay'ah concept is derived from the Muslim practices in the eras that followed the death of prophet Mohammed, PBUH. The Basic Law also confirms the government's functions and aims are to ensure that Sharia is fully protected and enforced (Article 23). The Basic Law is governed by Sharia when describing the identity, aim, and role of the government; the relationship between the monarch and the citizens is, similarly, founded on Shura (Consultation) (Al-Muhanna, 2009). This Shura is encouraged by the holy Quran, which states "consult them in the matter and when you have decided, then rely upon Allah. Indeed, Allah loves those who rely [upon Him]" (Chapter 3, verse 159). Furthermore, in another verse, it is stated: "And those who have responded to their lord and established prayer and whose affair is [determined by] consultation among themselves, and from what We have provided them, they spend" (Chapter 42, verse 38). However, these verses show that the outcome of the Shura's is not meant to be compulsory but rather advisory since the Prophet was asked to consult and then make the decision in his own (Ali, 2016). However, this might represent a special case, since the Prophet is unlike any other person and his ability to ascertain what is right no longer exists.

It is, nevertheless, worrying that there is no evidence on how Shura is to be applied in Islamic constitutionalism (ibid). Therefore, it has been suggested that Shura should be exercised by the whole public, rather than by selected scholars and should, therefore, also form the basis of institutionalising the constitutional principles of Islamic law (Hosen, 2007).

The significance of the Basic Law enactment lies in its similarity to other state constitutions in terms of content. It has nine chapters: governance law, general principle, national social values, principles of economy, privileges and

responsibilities, authorities of the state, financial matters, and institutional audit. The Basic Law stresses the monarchical system of the state (Articles 5 and 13) and emphasises several principles of governance (Articles 8 and 9). It defines each branch of the state comprehensively, and interactions between the judiciary, executive and legislature are also defined in Article 44. The Basic Law, in the same way as all other laws in this field, has failed to clearly separate these various powers, particularly with respect to executive and legislative powers (Gregory, 1994). The monarch, the Ministers' Council, Ministries, and other independent and partly independent public departments are all part of the executive, while the legislative power is exercised by the monarch, the Ministers' Council and the Shura Council (Articles 44, 67, 70). Institutions of the judiciary can be divided into three branches: Sharia courts, *Diwan Al mazalim*, and other judicial Committees. The role and hierarchy of these institutions will be discussed in more detail below.

The enactment of the Basic Law theoretically enlarged the scope of democratic participation in decision-making and checks and balances in the affairs of the state. For instance, people are now able to participate in the management of the Municipal Council (MC) by selecting half its members in elections held every four years (Saudi National Portal, 2016). The introduction of The Basic Law, alongside other constitutional documents, was followed by a number of Royal orders which modified them. Those major reforms and subsequent amendments increased citizens' participation in the conduct of public affairs and established civil and political rights in governance (Ansary, 2015). The Basic Law is the largest constitutional reform since the establishment of the KSA. It provides a codified document that governs both citizens and monarch, as well as constitutional protection for the people's basic rights of education, housing, and safety. Although The Basic Law is silent on some rights, this does not nullify all of the merits the introduction of such enactments produces. While the above represented a significant step towards the codification of the KSA's constitution, it is still not close to the globally practised standards of civil and political rights and was also long overdue. Ever since King Abdulaziz united the country in the 1930s, a promise had been made for the promulgation of laws that would enable citizens' participation in government and allow public evaluation and criticism of state decisions. The final product is disappointing and falls well short of expectations (Al-Fahad, 2005).

It is reasonable to have high expectations regarding a law, the adoption of which was awaited for six decades and remained for half of that period in the drafting stage. However, these expectations were not satisfied as the act failed to represent any significant sign of ushering in a new age of constitutionalism, nor did it present any considerable amendments or modernisations in the structures and practices of the state (Al-Fahad, 2005). Apart from it eventually being issued, it is argued that there is little significance in this document at all (Al-Fahad, 2005). If anything, it is a prism through which the deterioration of Saudi governance can be observed over the same period (ibid). Early state practices permitted a certain level of participation in political, transparency and accountability affairs. On the contrary, this law regulates exclusion from political participation. This lack of participation in the country's politics on the part of citizens, while unfortunate in a number of regards is, however, comprehensible because the oil boom permitted the state a level of independence from citizens that was unimaginable several decades ago (Al-Fahad, 2005).

The law was written in secret and the names of Drafting Committee members were only publicly known after its enactment (Aba Namy, 1993). Both public debate and the normal processes of consultation through state agencies was absent (Al-Fahad, 2005). The procedure that was followed in the creation of the document seemed to reflect the will of the King, which was unsurprising since the constitutional Committee members were not chosen following any law or standard, but rather appointed by the King himself. This constitutional document was created without any allowance made for the basis of its authority in popular sovereignty. This meant that no popular ratification was required, whether in the form of constituency's representatives or wide referendum. Therefore, it is often argued that the constitution appeared only to reflect the wishes of the Royal family (ibid).

With regard to the modern notion of rights, the new law reflects various standing points; for example, it defends private and economic rights, but is seen as contrary to public rights. This is apparently in the law which provides for the improvement of standards of living for citizens through the creation of employment opportunities, the promotion of science, the accessibility of free health and educational services and the encouragement of environmental protection (Articles 27 to 32). However, it does not offer much protection in the public sphere, since it fails to include certain

rights that are incorporated into most states constitutions (Al-Fahad, 2005). Although human rights protections were recognised by this law, it is exclusive to those living within Sharia principles (Article 26). Certain rights are entirely absent, such as the right to religious freedom, while others are tightly restricted, such as freedom of expression (Article 39). The right of association is unsurprisingly absent, since the KSA forbids political movements and groups, which are looked upon only with suspicion (Tarazi, 1993).

Finally, this constitutional document failed to create any substantive amendments to the law of succession in the KSA. The 1992 Act, for the first time, codifies that succession is limited to male descendants of King Abdulaziz and maintains that the KSA ruler retains the power to select or dismiss his successor (Article 5). Although this power is theoretically efficient and clear, it is problematic from a practical perspective because there is no historical precedent for any Saudi King removing his successor up until 2015. A successor has always been appointed as soon as a new King has been put in place and this appointed successor has always become the monarch of the KSA on either the previous King's death or his serious illness, as was the case with King Saud (Al-Fahad, 2005). However, in 2015 and 2017, King Salman Bin Abdulaziz exercised his constitutional powers and changed two of his crown princes in an attempt to allow a younger generation of the ruling family to have their say in the country's governance (Royal order No: A 255, 2017). This was additionally supplemented by a number of internal changes that empowered the younger generation of Royals to manage a number of the KSA's provinces.

3.3.2. The Shura Council

The Shura Council undertakes a consultative role in the legislative process of KSA issued regulations alongside the King and the Council of Ministers (Article 67, the Basic Law of 1992). This council has 150 members, appointed by the King for a term of four years. Most of the councils' members have their term extended for a further four years. Until 2013, it only consisted of male Saudi nationals and women had no representation in this public forum. However, the situation changed in 2013 when King Abdullah appointed, for the first time, 30 female Shura members (The Guardian, 2013). Ever since, these seats have been reserved for female Saudi nationals only.

The Shura Council holds regular monthly meetings and, for meetings to proceed, two-thirds of its members in addition to the speaker, or his deputy, are required to be in attendance, as per article 16 of the Shura Council law. This council has limited powers for expressing opinions on sensitive government affairs such as budget management and commercial relations with foreign states, with most of its deliberations relating to limited aspects of the state's economic, legal and public welfare (Article 15, Shura Council law). The Shura Council may also issue resolutions and submit them to the King who decides which of these resolutions gets transferred to the cabinet for deliberation and approval. Resolutions will only have legal effect after receiving the King's approval, as per article 17 of the Shura Council law. One of the most relevant and important regulations in relation to the scope of this research are the detailed deliberations in the Shura Council of the 2012 SAR. During these deliberations, members of the Shura requested expert opinions on the subject; the minister of justice also attended one of these discussions and answered questions and concerns raised by Shura members (Alalshaikh, 2017).

Although this council is thought to be similar to parliaments in the developed world, it is, in fact, a body chosen by the executive authority and its resolutions are also approved by such authority. Therefore, it could be argued that the Shura Council is not actually a public forum, but one of the consultative departments of the executive authority. This fact is evidenced in its name i.e., "Shura" which means consultation. The author believes that, whilst the Shura Council consists of well qualified Saudi nationals, their limited decision-making powers both undermines them and limits their effectiveness.

3.3.3. The Court System

The 1975 judicial system of the KSA included a Supreme Council, courts of first instance and appeal courts. It also had a number of administrative committees that decided on a variety of commercial, civil and administrative cases. The Royal Decree under which each committee was established determined its judicial jurisdiction (Ansary, 2015). In October 2007, Royal Decrees were issued approving

amendments to that system. This resulted in the creation of the High Court, which is empowered by the Supreme Council's role as the KSA's highest court.

Another important amendment was the creation of courts of appeal in all Saudi provinces. The Decree additionally introduced specialist courts for hearing criminal, commercial, or labour disputes across different regions and judicial centres (Royal Decree No M/78, 2007). A number of these courts are currently considering disputes that were previously considered by special administrative committees (Ansary, 2015). The 2007 amendments have largely altered the KSA's judicial structure, due to the historical introduction of specialised courts in the judicial system of the KSA. Before the 2007 law, judges decided criminal matters and, for a short while after, heard claims for inheritance disputes. This old practice is indicative of a legal system that is unreliable with respect to settling large, complicated commercial disputes due, in part, to a lack of specialisation (Al-Jarbou, 2007). Figure 2 below displays the structure of the present judicial system in the KSA.

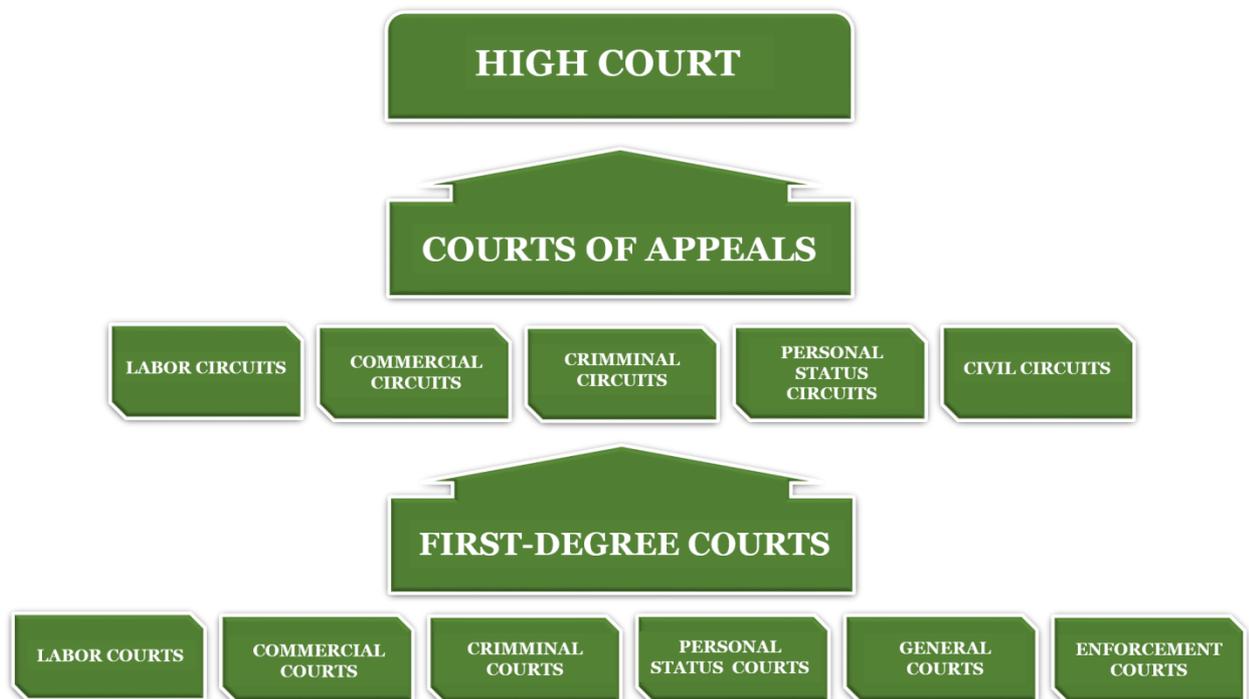


Figure 2: Structure of the Saudi judicial system. Adopted from Ansary (2015)

To maintain an efficient judicial system in the KSA, and overcome the barriers that judges and litigants were facing, the Judiciary law of 1975 was annulled in 2007 by Royal Decree and initiatives were taken for the creation of a reliable judicial system

equivalent to the that of other developed nations. The Decree changed certain statutes that were applicable for more than three decades in general courts and more than two decades in the case of *Diwan Al mazalim* (Royal Decree No M/78, 2007). A budget of seven billion Saudi riyals⁶ was allocated to restructuring the judicial system in order to develop and upgrade the judiciary as a whole. This budget was utilised for the building and renovating of courts facilities and for the training of judges. The KSA's judicial system is currently working through a period of transition, during which the 2007 judicial amendments will be implemented (Implementation Mechanism Decree, 2007).

3.3.4. Enforcement Courts

Following the discussion of the impact of the Judiciary law of 2007 on the ordering and hierarchy of courts, it is now important to consider the establishment of enforcement courts. Article 19 of the judiciary law stipulates that the general courts must have specialised circuits of enforcement consisting of one- or three-judges' boards, to be decided by the Supreme Judicial Council. This 2007 Regulation replaced the 1982 system of enforcement before *Diwan Al mazalim* and delegated enforcement power to enforcement judges (Royal Decree No M/78, 2007). Under article 19 of the 2007 Judiciary law, more than 160 enforcement circuits have been set up to provide effect to court rulings and accelerate their enforcement (Al-Rashid 2014).

The Supreme Council is empowered by the judiciary law to create specialised courts for approval by the King (Article 9). The same judiciary law states that the Supreme Judicial Council can, when needed, create specialised enforcement courts (Article 8(3)). In response to the substantial caseload, a Royal Decree for the creation of these courts was issued. Following this Royal order, a resolution was adopted on August 27, 2014 by the Supreme Judicial Council to create specialised enforcement courts as the first phase of enforcement (Resolution No. 530 - 4 – 34). These courts execute, in a speedy manner, judgments delivered by other courts, thus assisting in safeguarding people's interests and avoiding delays (Arab News, 2014).

⁶ US\$ 1.8 billion.

The 2007 Law identifies enforcement judges as “The chief justices and judges of enforcement circuits, enforcement court judges, or judges of single-judge courts (Article 3).” Their role is the enforcement or supervision of all judgments and awards enforcement within the KSA, excluding rulings and decisions coming from administrative or criminal disputes (Al-Jarbou, 2007). The judge is obliged to conform with provisions of procedural law of the Sharia courts, except where the 2013 SER instructs otherwise (Article 3). The enforcement judge may seek help from the Internal Ministry for the purpose of imposing or lifting travel bans, or ordering detention and release. His decisions are final, except those on issues and proceedings of insolvency, in which case his decision could be appealed and the appeal decision will be final (Article 6). The finding is suspended pending the outcome of the appeal (Article 10).

Enforcement courts have jurisdiction to enforce all decisions seeking enforcement in the KSA including those of foreign awards and judgments. Prior to the 2014 resolution, the enforcement of foreign decisions rested within the jurisdiction of *Diwan Al mazalim* (Jones and Day, 2013). This process, when it was assigned to the *Diwan*, was long and exhausting (Al-Amr and Al-Ayoni 2013). Issuance of the 2013 SER, alongside the establishment of the enforcement courts, has made a remarkably positive impact on the laws of the KSA, upgrading them to a higher standard. They have also facilitated flexibility in arbitral awards enforcement through establishing explicit jurisdiction and procedures for dealing with such enforcement (Jones and Day, 2013). This 2013 SER and the 2014 resolution appear to have repaired the lack of confidence in those commercial dealings requiring prompt dispute resolution through orders of enforcement. In 2015, the KSA enforcement courts settled almost 7,946 disputes and allowed for the recovery of more than ten billion Saudi riyals from sellers and other concerned parties (The Ministry of Justice, 2016).

3.3.5. The Board of Grievances System (Diwan Al mazalim)

A Royal Decree was issued in 2007 to approve amendments to the *Diwan Al mazalim* system in the KSA (Royal Decree No M/78, 2007). The new structure of *Diwan*'s administrative courts remain similar to those of the Sharia courts. The 2007 law stipulates that such *Diwan* is to be situated in Riyadh and considered as an

independent entity accountable directly to the King (ibid). The 2013 *Diwan Al mazalim* procedural law provides in Article 1 that: “[t]he Board of Grievances courts shall, in the cases filed therewith, apply the rules of the Islamic Sharia in accordance with the Quran, the Sunnah and laws not conflicting with the present law, and their proceedings shall comply with the provisions thereof.”

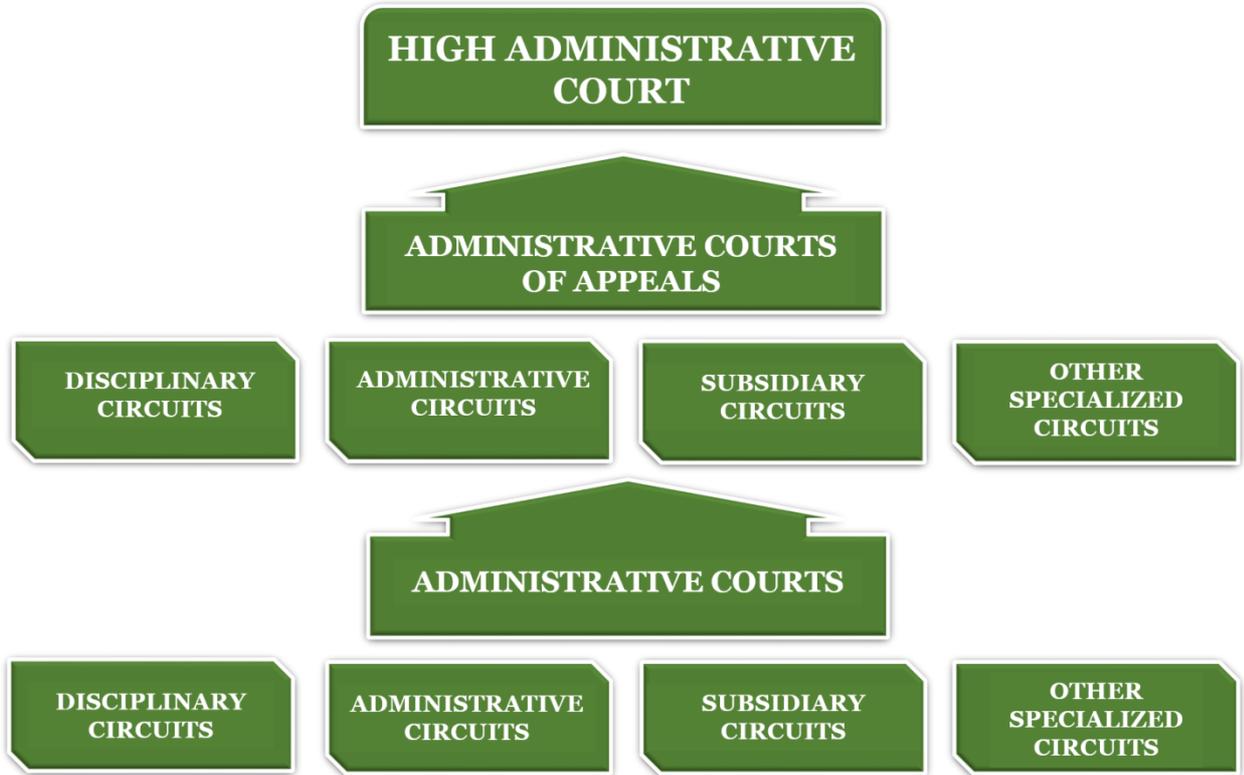


Figure 3: Structure of the Diwan Al mazalim. Adopted from Ansary (2015)

Diwan Al mazalim includes a ministry-ranked President, with one or more Vice Presidents and their assistants in addition to other judges (law of Procedure 2013, Article 2). An Administrative Judicial Council was also created by the 2007 law to include the President of the *Diwan* and High Administrative Court Chief Justice in addition to the *Diwan*’s Senior Vice-President, and four judges, all assigned by the monarch (Article 4). This Administrative Judicial Council has a number of administrative jobs which are undertaken in their twice-monthly meetings. These meetings are valid only if a minimum of five members are present and decisions are taken by majority vote (Article 6). The council has created a number of committees such as the Jurisdictional Dispute Committee (Article 15); the Committee for Judicial Discipline; and the Judicial Inspection Department (Articles 16-24).

3.3.5.1. High Administrative Court (HAC)

The 2007 law created the HAC, which includes the ministerial rank Chief Justice selected by the monarch and an adequate number of judges of certain rank that are also chosen by the monarch as recommended by the Administrative Judicial Council (Article 10). The HAC performs its functions via specialised circuits consisting of three-judge panels. It is empowered by the 2007 law to review rulings made by the Administrative Appeal Court when the appeal is based on certain grounds, such as the court's incompetence and Sharia provision violation.

3.3.5.2. Administrative Courts of Appeal

The 2007 law contains provisions for a minimum of one Administrative Court of Appeal working through special circuits and comprising of a three-judge panel. This court hears appealable judgments from the lower administrative courts (Articles 8 and 12). *Diwan Al mazalim* has established four such courts in Riyadh, Aseer, the Eastern Province, and Makkah, all of which are empowered to hear appeals from all of the KSA provinces (Ansary 2015).

3.3.5.3. Administrative Courts

The 2007 law provides for the creation of one or more administrative courts. These courts operate via special circuits including a panel of one- or three judges (Article 8). These courts are empowered to hear claims such as tort cases against decisions or actions made by administrative authorities, cases linked to contracts to which the other party is an administrative authority, a competent authority filing disciplinary claims, other administrative cases, and the enforcement of foreign judgments and arbitral award requests (Article 13).

Consequently, it is clear that under the 2007 law, *Diwan Al mazalim* continues to consider administrative disputes that involve a government agency. The old law of *Diwan Al mazalim*, was approved in 1982 and provided the *Diwan* with the jurisdiction to consider crimes related to forgery, bribery, misuse of official effects, misuse of power in criminal proceedings, or human rights violations (*Diwan Al mazalim* law, 1982). The 2007 law removed their authority over criminal offences, which was given by the 1982 law to the present Ordinary Court System.

Additionally, *Diwan Al mazalim* has no jurisdiction to consider claims related to sovereign acts, objections against rulings made by normal courts in their designed jurisdictions, judgments made by either the Administrative Judicial Council or the Supreme Judicial Council (Article 14). *Diwan Al mazalim* is still regarded as having jurisdiction over supervising award proceedings within the KSA. Prior to the 2013 SER that established the enforcement court in Saudi Arabia, the *Diwan* had the jurisdiction to enforce both national and international arbitral awards (See Riyadh Convention next chapter). However, this is no longer the case since the enforcement courts are now the competent authority to enforce all awards, in accordance with the 2013 SER (Almuhaidb, 2013).

3.3.6. Quasi-Judicial Bodies

Alongside the Sharia courts and *Diwan Al mazalim*, several quasi-judicial committees exist with limited powers. These committees are bound by judicial procedures similar to those followed by other judicial authorities in the Kingdom and produce binding decisions (Al-Samaan, 2000). The establishment of these committees was needed in order to ease the courts' burden and, more importantly, to refer these disputes to specialists who are competent to hear disputes of such a nature (Al-Samaan, 2000). These include the following:

3.3.6.1. The Committee for the Settlement of Banking Disputes (CSCD)

The CSCD deals with the settlement of disputes related to the business conduct of banks in relation to their customers and other banks, which is competent to hear such claims in the KSA (Shoult, 2006). These committees comprise three members who consider matters submitted to them by relying on contractual agreements made by the disputing parties, other applicable Saudi laws and recognised international banking practices. While deliberating, the committee may seek consultation from any expert it deems appropriate for the settlement of the disputed matter (ibid). Furthermore, the CSCD role is in acting as a mediator between the parties to the dispute. In other terms, following the hearing stage, both parties are invited by the committee to reach a final settlement of the dispute in light of the committee's guidance (Rolf, 1995). The committee will make a decision containing the settlement of the dispute if the parties accept the committee's invitation and,

therein, such a decision will be final and binding on both parties. The committee will decide the disputed matter and render a decision if the parties reject the committee's invitation (Rolf, 1995).

Moreover, it is notable that para 3 of CSCD's Internal Rules and Procedures stresses that, when the CSCD's decision for settling the dispute fails to satisfy both parties, the dispute will have to be litigated before a competent court (CSCD,1987). This might be construed to mean that the committee is supposed to act as mediator between the parties and not make binding decisions on the disputed matter. Consequently, such interpretation of the above provision is considered to be a shortcoming, since it undermines the committee's effectiveness as a competent authority for settling disputes between banks and their clients (Al-Saman, 2000). The matter is exacerbated by the fact that, apart from the CSCD, the Kingdom has no judicial body with competence to hear banking disputes. Although Sharia courts have general jurisdiction, they refrain from hearing disputes of this nature (ibid). As a result, it is advised that, unless disputing parties reach an amicable settlement, once invited to do so by the committee, they should refer to arbitration under the 2012 SAR and inform the committee of their decision. This is because the parties are permitted to resort to arbitration by virtue of article 10 of the CSCD's Internal Rules and Procedures (CSCD, 1987).

3.3.6.2. The Commercial Papers Committees (CPC)

This Committee was established in 1963 for the purpose of providing an efficient forum to hear disputes involving debts evidenced by commercial papers such as promissory notes and cheques (The CPC 1963). This committee has branches in Riyadh, Dammam and Jeddah, and each committee has a chairman, as well as two legal counsels from the Ministry of Commerce. This committee's decision can be appealed within 30 days from the parties' notification of the decision. The procedure and time limit of the appeal are identical to those of the CSCD, because the same rules of procedure are applied by both committees (Shoult, 2006).

However, theoretically, a creditor with a dispute over a claim evidenced by a commercial paper is better off pursuing his/her claim before the CPC rather than pursuing it before the CSCD on the basis of the underlying transaction (Boshoff,

1985). Claims brought before the CPC only take around 12 months from inception to final decision, as opposed to claims brought before the CSCD, which can take up to three years, without reaching a final judgment (ibid). Theory and practice are not always in line since, in strict law, the CPC is only required to provide its ruling by relying on the commercial paper upon which claims are made. However, it has been suggested that the CPC is able to review the underlying transaction if requested by the defendant to do so (Baamir, 2010). If such requests were to become common, the commercial paper's attractiveness as security for payments would diminish because it relies on a quick solution being available before the CPC (Baamir, 2010).

3.3.6.3. The Committees for the Settlement of Labour Disputes (CSLD)

The CSLD is empowered by the Labour and Workmen Regulations of 1987 to hear disputes involving labour in addition to providing how such committees should function. The CSLD is composed of primary committees and higher committees. The primary committees have branches in every city with a labour office and operate under the supervision of the Ministry of Labour (Almuhaidb, 2013). According to Article 173 of the regulation, the committees have an exclusive jurisdiction over labour disputes involving claims that are less than SR3000, requests for the enforcement of a ruling for the termination of a labour contract, and an employer's imposition of fines upon his/her employees under Article 125 (Labour Regulation of 1987). An appeal could be made with respect to any decision resulting from the above claims to the higher committees, provided the appeal is made within 30 days of receiving the notification (ibid).

On the other hand, the higher committees' decisions are final and binding over all disputes referred to them. Both the higher and primary committees' rulings are based on the majority votes of their members; in addition, dissenting members are obliged to justify their dissention (Article 187). Although these quasi-judicial committees are doing a good job within their assigned jurisdiction, the Saudi government ended such committees and recently established the Labour and Commercial Courts with jurisdiction to hear all labour and commercial disputes within the domain of their speciality (Saudi Gazette, 2018).

3.3.6.4. Judicial Precedents

Having considered the different judicial and quasi-judicial bodies hierarchy, it is now important to consider the effect of the KSA's judges' decisions and the doctrine of judicial precedence. The law of judicial precedent is a method of compelling judges to stand by already decided matters as long as they share similar facts so as to increase the consistency of court decisions (Garner and others, 2016). Different legal jurisdictions have different ways of looking at judicial precedents. Some jurisdictions, like the United Kingdom, binds future judges by the judicial precedent system unless the judge could distinguish the case at hand from the decided one, or overrule or reverse the previous decision (Duxbury, 2008). The techniques for avoiding previous decisions are limited to those decided by a court of the same level as the one deciding the new case. However, if an upper court set the precedent, the lower court's judges must follow the upper court's decisions. And the upper court judges are not bound to judicial precedents set by a lower court and, instead, its only obligation is courts of a similar or higher level (Cross and Harris, 1991). For example, the English County Court judges' decisions will not bind the High Court judges and the High Court judges' decisions will not bind the Supreme Court judges.

On the other hand, some countries, like the KSA, have chosen to only give judicial decisions an advisory role that a future judge could rely on or consider, but do not have to follow (Shoult, 2006). The KSA's view is based on giving judges discretionary powers to cope with the continuously changing legal issues and legal rules that may have been omitted, or not available to, the previous judge. This is particularly important when realising that KSA judges rely on Sharia sources as well as domestic regulations to reach a particular ruling (Alabdli, 2007). This interpretation of Sharia texts could differ from one era to another. Binding judges by previous decisions that were decided within a completely different timeframe may not serve justice. However, such a lack of precedent in the KSA has resulted in entirely inconsistent decisions regarding similar cases occurring within similar contexts and timeframes (see Chapter Five). It also enabled the judges of lower courts to deduce the Islamic ruling based on their personal preference, even if there are contrary views on the matter. The knowledge these lower courts judges have of Sharia rules is not as deep as it should be to allow them to review scholarly views

on a particular ruling and chose the one that is most applicable (*Diwan Al mazalim*, 2019).

Therefore, it might be appropriate for a country like the KSA to consider the option of establishing a judicial precedent system, whereby a higher court judge's decisions binds those of lower courts. This would increase the consistency of judicial decisions and increase their reliability because higher courts judges are generally more experienced and have a deeper knowledge of Sharia rules than lower court judges. Enabling such a judicial precedent system would also have a positive impact on the enforcement of foreign awards in the KSA, since it would be easier to predict the KSA's view on a particular case by reviewing past precedents. The impact of such a dynamic would bring the KSA closer toward achieving its goal of creating an attractive legal system for foreign commerce.

3.4. Sources of the Legal System

Since the KSA is based on Sharia principles, most of its regulations are derived from the teaching of Islam. Even those originating from other sources must not clash with the principles of Sharia. These sources fall into four categories: Islamic law, state regulations, international treaties, customs and practices.

3.4.1. Islamic Law

Islamic law is the supreme source of law in the KSA and, therefore, all other sources must avoid clashing with its principles and rulings or they will be considered void. The Islamic law governs a great proportion of legal areas such as property rights, criminal behaviour, family and all other areas of law that are not specifically governed by regulations (Vogel, 2000). This law is derived from the primary sources of Islamic jurisprudence the Quran and Sunnah, and from secondary sources such as Ijma, Qiyas and Ijtihad (Ansary, 2015). The Hanbali school of thought is the official Madhhab in the KSA for applying Islamic law principles (Saudi Basic Law, 1992). Judges in the KSA also refer to other Sunni schools of thought when making judgments, especially if the Hanbali view on the matter is not clear or the judge believes another school's ruling is more appropriate.

Islamic jurisprudence in the KSA has developed through the issuance of Fatwas (rulings) on new arising matters of Islamic law and Sharia in general. The power to issue Fatwas is exclusively in the hands of the Council of Senior Scholars (Royal Order No. B/13876, 2010). This council was last formed in 2008 by King Abdullah Bin Abdulaziz where, for the first time, the council consisted of twenty-one scholars, included scholars from other Sunni schools of thoughts (Scholarly Research and Fatwa Portal, 2018). Prior to this time, only the Hanbali view was reflected only in officially agreed *Fatawa* (plural of *fatwa*) in the KSA. This change indicates a better appreciation of the importance of being open to other Sunni schools of thoughts in providing more effective Fatwas. The Council of Senior Scholars undertakes a number of tasks such as issuing Fatwas based on the views of various Sunni schools and conducting research on Islamic law to help meet the developing needs of Sharia (Scholarly Research and Fatwa Portal, 2018).

It will be interesting to see such councils expand to include scholars from all branches of Islam as well as scholars in fields other than Sharia. This is likely to make such *Fatawa* a more unifying act and universally accepted by all Muslims. It will also help combine the expertise of Sharia scholars and others from different fields such as law, economy and finance, which will produce *Fatawa* that are easily applicable to disputes of both Muslims and non-Muslims alike. The proposed inclusivity in the council could be more effective in dealing with transcendent issues of interest, as well as public policy under Islamic law in general. This is particularly important when realising that the KSA's public policy is based on Sharia as per article 11 (3) of the 2013 SER. All of these sources and their hierarchy were discussed in the previous chapter.

3.4.2. State Regulations and Resolutions

The second category consists of state regulations and Resolutions adopted to deal with contemporary legal issues arising from developments in different fields. These resolutions have to be in line with the principles of Sharia, and so Sharia will override any regulations if it conflicts with it. The goal of such regulations is not to amend Sharia, but to supplement it (Michiel, 2010). In fact, the words legislation and regulations differ only in terminology and have no practical significance in the KSA. This is because the KSA's regulations enjoy all the characteristics of

legislation, and also enjoy the same force, jurisdiction, significance, and sanction as any legislation in any other developed state (Amin, 1985).

The procedure for making such regulations can be summarised as follows. A Committee consisting of legal advisors in the relevant ministry formulates an appropriate text for the draft regulation. The draft is then sent to the Council of Ministers' division of experts to be reviewed and revised. The division then sends the draft to the council for consideration, and once the council approves the draft, it is submitted to the Consultative Council for review (Article 67, Basic Law of 1992). Following this review, the draft is returned, with notes and suggestions, to the Council of Ministers who study the notes and submit the final draft regulation to the King, who approves it and issues a Royal Decree that is published in the official Gazette, *Um al- Kura* (Council of Minister law 1993). In addition to the official procedure of making regulations, all ministers and several heads of public agencies have the power to issue administrative resolutions and laws through ministerial circulars. Such circulars are not published in the official Gazette since they carry less weight than Royal Decrees. Consequently, Royal Decrees will be applied over these circulars in the event of any conflict between them (Council of Minister law, 1993).

3.4.3. International Treaties

The third category is international treaties, which form an essential source of the legal system of the KSA. The controversy existing between theories of monism and dualism is reflected in trying to define the relationship between international and national law. The monists agree that international law in the form of treaties and conventions is part of the national law without legislation, as long as it was concluded according to the constitution and has already come into force (Aust, 2000). On the contrary, the dualists believe, "that international law is separate from municipal law and that a treaty has no special status in domestic law unless specific legislation is in force to give effect to such treaty" (Aust, 2000, p 143). The difference between these theories has attracted much controversy among international lawyers over the past years, which is crucial when it comes to considering whether a rule of international law should be applied by domestic courts (Rothwell and others, 2010). This is very problematic since it is important to know if international

and domestic laws represent two distinct legal orders, operating individually from each other, and if that is the case, then it is essential to determine the grounds upon which one legal order should be considered superior to the other (Haris, 1998). According to the monist view, they are to be considered part of the same legal order (ibid).

The KSA's Basic Law recognises international law by stating that "laws, international treaties and agreements, and concessions shall be issued and amended by Royal Decrees" (Article 70). The same law, in its general provisions, also states that "The enforcement of this law shall not prejudice whatever treaties and agreements with states and international organisations and agencies to which the Kingdom of Saudi Arabia is committed" (Chapter 9, article 81). Therefore, the KSA adopted the dualist view regarding the recognition and application of international law, which corresponds with international law's general rules that all parties of treaties in force are bound by them and must perform them in good faith (Alkahtani, 2010). Such treaties hold the same weight as regulations, since they are ratified by the King and a special Decree is issued for them (Jeanne, 1982). The process of incorporating such treaties within the KSA, whether bilateral or multilateral treaties, is the same as that for regulations issued within the KSA. The process usually starts with the concerned ministry and goes to both the Shura Council and the Ministers Council; the monarch then receives it for approval. If the King approves the treaty then it is published in the official gazette as a Royal Decree (Council of Minister law, 1993). Therefore, the importance of international treaties in the KSA legal system stems from the fact that they are incorporated into the KSA's legal system by Royal Decree. Without the Royal Decree, such treaties would have no implication on the KSA's legal system.

3.4.4. Customs and Practices

Customs and practices are considered to be very important sources in the KSA's legal framework, particularly those modern practices of international commerce and trade, which have contributed significantly to the development of the KSA's contemporary legal system (Amin, 1985). Following the discovery of oil in 1938, the Saudi businessmen entered into new kinds of contracts with both the government and foreign international companies. These contracts involve importation,

exportation and investment contracts. Hence, a considerable portion of Western legal views derived from such contracts has increasingly influenced Islamic traditions in the KSA (Maren, 1987). These relationships between domestic and international entities resulted in the issuance of several regulations dealing with modern commercial and financial needs such as commercial agencies, companies, papers, banking transactions and maritime aspects (Amin, 1985).

In addition to the above international customs and practices, it is of great importance to discuss the significant influence of the national culture of the KSA on the development of its own legal system. The KSA's national culture is entirely based on Sharia and Arab traditions, since they determine every aspect of both people and government behaviours (Moran et al., 2014). Sharia governs all legal, political, economic, family and societal affairs in the KSA. At the political level, it regulates the relationship between the ruler and the citizen on the basis of allegiance, loyalty, consultation or Shura as referred to in the KSA (At-Twajiri, Al-Muhaiza, 1996). On a legal level, it forms the basis of the Kingdom's constitution and no regulation can be issued if it does not comply with Sharia principles (Saudi Basic Law, 1992). On a societal level, Sharia advocates all noble deeds such as generosity, hospitality, truthfulness, debt repayment and the keeping of promises (At-Twajiri, Al-Muhaiza, 1996). In addition to Sharia's influence on the KSA's national culture, indigenous Arab traditions continue to play an important role in how people behave and how the state perceives and applies Sharia. For example, there is no Islamic ruling that prohibits women from driving in all Islamic schools and branches, but women still only drove for the first time in the KSA in 2018 (The Guardian, 2018). This shows that legislators in the KSA also take into account cultural traditions when issuing regulations. Since society's traditions change with time, regulations also develop to correspond with such changes. This may result in the legislators amending some of the current unclear legal issues of public policy and women's representation in courts and arbitral tribunals.

3.4.5. The KSA's Law and Foreign Jurisdictions

At the time of its establishment, the KSA's limited experience led to a reliance by the government on the Ottoman Codes that existed at the time in order to form the basis for the KSA's legal system alongside Sharia principles (Al-Fahad, 2005). The

KSA then strived to create a robust legislative body using existing bodies of law and the practices of other developed states. This view is represented in the King's command for the Hejaz attorney general to follow the Ottoman Codes until told otherwise (Royal Decree, 1927). The Ottoman Code of 1885 clearly influenced the KSA's Commercial Courts Regulation of 1931. This 1931 Regulation existed with few changes until 2012, when it was replaced by the 2012 Arbitration Regulation. The 1931 code had a large amount of Turkish legal terms, which indicates that they were literally translated from the Turkish Code (Article 290, The Ottoman Commercial Code, 1885).

The Kingdom's journey to developing its own legal system was also indirectly influenced by the French civil system. France's considerable influence on the KSA's legal system was largely driven by a reliance on foreign experts by the KSA government when developing its regulations, where most were from Arab states (Holden and Johns, 1981). The majority of these experts were from Egypt, which was occupied by France between the 18th and 19th centuries. Furthermore, most of the King's legal advisors at the time were from either Egypt or Syria, because of birth or origin, and had a legal background enormously influenced by French law (Maren, 1987). This resulted in the King's order for the Egyptian laws, which were actually translated from French laws, to have full adoption and application in the KSA's jurisdictions.

Nevertheless, before the adoption of these laws in the KSA, they had to comply with the principles of Sharia. The 1966 enactment of the Regulation Governing Bids for Government Procurement,⁷ is one of the imported regulations of the time. This regulation was literally copied from the Egyptian Regulation of 1957, which was itself copied and translated from the French Regulation of 1953 (Maren, 1987). Enactment of the Saudi Companies Law in 1965 is another example of the influence of French law,⁸ since it was also literally adopted from the law of Egypt, which in turn was inspired by the company law of France (ibid). The list of these imported laws is long and they governed many aspects of the KSA's law; however, these regulations had to be compliant with Sharia or at least not clash with its principles (Thabet, 2000). The KSA's Labour Law of 1969 provides an example of the state's

⁷ Royal Decree No. (M/6) dated 24/02/1386 H

⁸ Royal Decree No. (M/6) dated 22/03/1385 H. (1965)

efforts to ensure that western-style regulations are in line with Sharia (Labour and Workers Regulation of 1969). In spite of the law being based on the Egyptian Labour Law, it nevertheless contained some articles banning males' and females' presence in the same workplace, and allowing special vacations for pilgrimages that did not exist in its Egyptian counterpart (Thabet, 2000).

3.5. Conclusion

In conclusion, the discussion within this chapter indicates that the change and development processes in the legal system of the KSA has had a social and political impact on the country. Despite the ongoing attempts toward creating a proper constitution for the KSA, the 1992 Royal Decree created a similar document referred to as the KSA's Basic Law. It reflects a humble and long-awaited action in acknowledging the state's structural need for development in order to institutionalise the government's management of its increasingly complicated community. After the Basic Law, several Royal orders were issued regulating certain areas of the Kingdom's institutions. One of the most important Decrees was the 2007 Royal Decree from King Abdullah, which revamped the Kingdom's legal structure. This judiciary law made a number of structural changes to the judicial system of the country leading to the establishment of several specialised courts. In addition, this chapter considered the quasi-judicial committees and their role in developing legal practice within the KSA. Such committees eased the courts' burden and, more importantly, referred disputes involving banking transactions, promissory notes and labour to specialists who were competent to hear disputes of this nature (Al-Samaan, 2000).

Furthermore, this chapter discussed the Kingdom's main sources of law and the extent of their influence and application within the KSA's legal jurisdiction. It also highlighted the influence of foreign countries on the development of the Kingdom's legal practices, such as French law, which formed the basis of most Saudi commercial laws between the 1940s and 1970s. To conclude, the above discussion indicates that the Kingdom's legal system has developed significantly since its establishment and that the recent development initiative has created a more reliable legal system in the country. In addition, the variety of court specialisations offered a better chance for claims brought within the Kingdom's jurisdiction to be

considered by the right experts. This shows a clear departure from the KSA's early habits of referring all claims, regardless of their nature, to Sharia courts, which resulted in a negative image of the KSA's legal system in the eye of foreign commerce.

Chapter Four: Arbitration Theory and Practice

4.1. Introduction

The most well-known mechanism of alternative dispute resolution is international commercial arbitration (ICA). Several aspects of arbitration have been differentially interpreted by national courts, mainly because that they do not all perceive ICA and its theories uniformly. This has resulted in conflicting perceptions of the state's roles and those of the parties involved, giving rise to some completely contrasting theories that attempt to explain the nature of arbitration (Paulsson, 2011). These theories have been summarised by scholars into the following distinct categories: jurisdictional, contractual, hybrid or mixed, and autonomous (Hong-lin Yu, 2008), which highlight the scope and limit of both state sovereignty and party autonomy. In addition to the various theories that impact how ICA is perceived and applied in various jurisdictions, the doctrines of party autonomy and state sovereignty too, as distinct concepts, influence perceptions and approaches to ICA. Therefore, this chapter analyses these theories, the doctrine of party autonomy and state sovereignty, and their influence on how ICA is perceived.

4.2. Party Autonomy and State Sovereignty

Before discussing the main theories on ICA, it is important to discuss the doctrines of party autonomy and state sovereignty in order to examine how to reconcile the interests of states to have their sovereignty protected, and arbitration parties to have their autonomy respected. The discussion of these doctrines will, in turn, lead to an examination of the ICA theories, which are very informative in understanding the nature of ICA.

4.2.1. Party Autonomy

Arbitration is one of the most widely used mechanisms for settling ICA disputes. Its increasing popularity is mostly due to the doctrine of party autonomy. This doctrine empowers parties by giving them the freedom to enter into contracts and formulate the substance of international commercial agreements (Redfern and Hunter, 2015). This substance includes the contractual terms, the parties' rights and obligations. It is also important to the process of arbitration itself, since it enables parties to enter into arbitration agreements that empower an arbitral tribunal with the competence to settle a dispute while relinquishing the courts' ability to do so (Mills, 2018). In addition, it limits the court's ability to interfere with an arbitral process, making it possible for different legal practices to be shaped within the autonomy of the arbitral procedure (ibid). Therefore, the choice of substantive law in arbitration can lead to the application of various laws and remedies arrived at in commercial disputes compared to those found in similar proceedings in national courts, making arbitration a significant factor in the development of *lex mercatoria* (Moss, 2015).

On the contrary, the procedural law of arbitration is more concerned with regulating the internal matters of the arbitration procedure and the relationship between the arbitration and the courts (Henderson, 2014). Most domestic laws have within their *lex arbitri* a default set of procedures to regulate the arbitration process in their territory. Such procedures are available to help the case's orderly development, where there are no other arrangements made by the parties, through adopting standard or alternative arbitral rules (ibid). Dicey and Morris (2000) defined this as the directory role of the *lex arbitri* but it could also be viewed as facilitative or as a safety net, which provides a basic procedural framework and minimum necessary guarantees of due process that are applicable as far as the parties have made no alternative provision (Dicey and Morris, 2000). Nevertheless, in practice, parties do regularly include other provisions for matters of procedure, yet they may not conceptualise this as a conscious decision for opting out of the law of the seat. They make such provisions through specifying the rules of arbitration to govern their dispute, which results in the displacement of the default provisions in the governing law, as far as the law and rules are inconsistent and to the extent that the law is not of mandatory application (ibid).

This doctrine of party autonomy was developed initially by academics but was later applied by domestic courts since it attracted wide acceptance in national systems of law. In this regard, Redfern and Hunter (2015) stated that all countries, despite their political systems, have been affected by the trend to allow parties to determine which law presides over their contracts. They further argued that there has been no concerted effort by nations to bring about this development, rather it has occurred independently in every nation; “it is the result of separate, contemporaneous and pragmatic evolution within the various national systems of conflict of laws” (ibid, p 187).

4.2.2. Rationale for Party Autonomy

The rationale behind the principle of party autonomy is that an arbitration agreement is initially a contractual agreement between parties to adjudicate their dispute by means of ICA (Seyda Dursun, 2012). The arbitration agreement is fundamental to the arbitration proceedings for several reasons. Primarily, it shows the parties' exercise their freedom to solve their disputes via arbitration rather than litigation (ibid). An arbitration agreement was described by Odoe as an obligatory promise formed by parties to solve any current and upcoming disagreements via ICA, rather than settling them in the courts of law (Odoe, 2014). Accordingly, parties have considerable autonomy when drafting their arbitration agreement to choose a dispute resolution system that they see fit. Consequently, the power of an arbitration agreement originates from party autonomy (Seyda Dursun, 2012). Secondly, parties have autonomy to construct the terms of their agreement and to design it in accordance with their needs – this is an essential principle of ICA (Boralessa, 2004). Finally, arbitration agreements exclude judges from settling disputes submitted to arbitration. If a party to the agreement tries to settle the dispute through the courts, then the other party can challenge the court's jurisdiction, arguing that the court's jurisdiction was waived (Odoe, 2014). Hence, the courts have no jurisdiction to resolve a conflict related to the matters involved in an arbitration agreement, unless both parties expressly or tacitly waive the arbitration agreement (Fagbemi, 2015).

Furthermore, a fundamental requirement for the formation of arbitration agreements is the attainment of consent from the parties. The parties' desire to settle their disagreements through ICA should be plainly stated in the agreement freely entered

into by them (Chatterjee, 2003). However, the agreement to arbitrate will be invalid for lack of consent if either party was subject to fraud, coercion or undue influence (Fagbemi, 2015). Therefore, the New York Convention NYC requires all of its members to acknowledge a written agreement undertaking to settle their disputes via arbitration (Article 2 (1)). This provision implies that the agreement must include a mandatory (not permissive) undertaking for resorting to arbitration in their disputes, rather than all other mechanisms of dispute resolution (Fagbemi, 2015).

4.2.2.1. Recognition for Party Autonomy

Both international conventions and the UNCITRAL Model law have recognised the doctrine of party autonomy, which focuses on the disputed parties' ability to choose the applicable law in respect to their contract (Redfern and Hunter, 2015). For instance, the Rome I Regulation, which applies to the EU's contractual obligations, recognises such doctrine and allows the parties to determine the governing law of their contractual relationship (Article 3).⁹ In addition, the UNICTRAL¹⁰ Model Law compels arbitrators to issue their award by relying on the parties to choose the law that is applicable to the substance of their dispute (Article 28). Furthermore, the International Centre for Settlement of Investment Disputes ICSID provides similar provisions, requiring arbitrators to reach a decision on the dispute by relying on the parties' chosen laws and the rules of arbitral institutions (Article 42). Moreover, the International Chamber of Commerce ICC Rules enable the parties of arbitration agreements to have the freedom to choose the governing law of the substance of their dispute (Article 21 (1)). A leading commentator on this field asserted that there are some principles which have wider global recognition in private international law than those acknowledged by the contract's applicable law terms. As a result, the contract's applicable law is the one selected by its parties, either expressly, or tacitly (Lew, 1978, p. 87).

4.2.2.2. Limitations to Party Autonomy

Parties to arbitration agreements theoretically possess significant autonomy to decide how to settle their disputes. For example, the parties' agreement may

⁹ Rome I is European parliament and council Regulation on the law applicable to contractual obligations

¹⁰ The United Nations Commission on International Trade and Law.

exclude the court's jurisdiction and allow them to perform the arbitral proceedings in the way they see fit (Fagbemi, 2015). Nevertheless, whether or not the parties' autonomy is absolute or limited is questionable, since without doubt the parties to arbitration have certain degrees of autonomy, provided that their arbitration agreement has been consented to by all parties, either expressly or tacitly (Boralessa, 2004). However, this freedom is subject to a number of limitations; for example, certain fundamental principles exist that arbitration parties are unable to violate or ignore under any circumstance. Such limiting principles have been codified into the different provisions of the Model Law (Moss, 2015).

In the resolution of international trade disputes, the principle of party autonomy, from a practical perspective, demonstrates that the creation of the transnational rule of law supporting such a doctrine is "almost too good to be true" (Redfern and Hunter, 2015, p 189). This is because, most of the time, there are limitations such as guarantees that the parties' choice of applicable law does conform to the state's public policy (Moss, 2015). This is evidenced in the Rome I Regulation which prohibits parties from selecting a different rule to supersede the state's mandatory rule of law, such as choosing foreign law to avoid taxes or competition regulations (Rome Regulation, 2008). This has been clearly demonstrated in the case of *Eco Swiss China Ltd v Benetton International NV* (1999) ECR I-3055, where a decision was reached by the European Court of Justice stating that breaching the EU competition law was considered to be a violation of public order. Additionally, in *Soleimany v Soliemany* (1999) QB 785 the Court of Appeal (CA) in England rejected the enforcement of an award on the basis that the transaction was permissible in the governing law; however, it was prohibited in English law. The CA rejected the enforcement of the contract on public policy grounds.

4.2.3. State Sovereignty

The concept of sovereignty is disputed in both law and politics. It was initially described as the supreme power equivalent. Nevertheless, in practice, it usually deviates from its traditional definition (Giuditta, 2013). The principle of state sovereignty can be demonstrated in a number of ways and measured by the use of different indices, such as competence, independence and the legal equality of states (Murat, 2008). Normally, such principles are inclusive of all matters under

which states are allowed by international law to make decisions and act independently, away from foreign sovereign countries or intervention or exclusion by entities (Daniel, 2001).

There are different theoretical views on state sovereignty and its influence on ICA. The first view considers ICA to be completely governed by a single legal order of the arbitration seat. Such a view is founded on the principle of state positivism which considers the party autonomy within ICA to derive its validity from a state law (Poudret and Besson, 2007). Francis Mann affirmed this view by stating:

“No one has ever or anywhere been able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law; even the idea of the autonomy of the parties exist only by virtue of a given system of municipal law and in different systems may have different characteristics and effects” (Mann, 1967, p157).

In the same way, all arbitrations are subject to the laws of a particular state. All private individuals must act at the level of municipal law, as all of the rights and powers that they enjoy are derived from or conferred by municipal law (Mann, 1967). Accordingly, arbitration cannot exist in a legal vacuum (Hinsley, 1986). As a result of geographical jurisprudence and the state sovereignty principle, arbitration that takes place in a country should be governed by its municipal law (Poudret and Besson, 2007). The arbitration’s legality and influence stem from the *lex loci arbitri* 11.12. In fact, the practice of arbitration clearly demonstrates that few countries are willing to abandon control over arbitration conducted within their territories (Reisman, 2014).

On the contrary, Gaillard believes that, in spite of the positivist view’s wide acceptance:

“State positivism cannot in itself justify the view that anchors international arbitration solely in the legal order of the seat. This conception in reality stems from the combination of state positivism and the desire to unilaterally ensure an improbable international

¹¹ The law of the forum place or court where the arbitration had taken place

¹² Law of the seat.

harmony of solutions regarding the fate of arbitral awards” (Gaillard, 2010, p 22).

He further questioned the right of a single state to make its domestic law, alone, the governing law of the ICA process, simply because it happened to be within its territory (Gaillard, 2010). In this regard, an alternative view of ICA was developed that considers it to originate from more than a single legal order. It argues that ICA originates from every legal order that commits itself to recognising the effectiveness of arbitral awards, provided certain conditions are met (Gaillard, 2010). This view considers the seat to be one of the legal orders rather than the only legal order for arbitration. In addition, all such orders will have an equal say over arbitration, which will lead to the removal of the arbitration’s nationality. This removal will decentralise arbitration and internationalise it, as opposed to the earlier positivist view that preferred centralising arbitration in the seat law (ibid). Both views have different standpoints since the first focuses on the starting point of arbitration while the other focuses on the outcome.

A different view of ICA argues that arbitration is a completely autonomous legal order. It acknowledges that the origin of arbitration stems from an independent transnational legal order, which could be referred to as the legal order of arbitration rather than the national laws of either the state of the seat or the enforcing state (Gaillard, 2010). This is in line with the arbitrator’s role of administering justice on behalf of the international community, rather than a particular state. This view of detaching arbitration into a transnational legal order would have a different impact on the states’ sovereignty over ICA. If such a view is accepted, the effectiveness of the award will be entirely governed by the party’s contractual terms and the requirements of the enforcing state (Paulsson, 1981). The seat, in this case, will have only marginal significance on the ICA award’s effectiveness as opposed to its position if the detachment process is rejected since the rejection of such a transnational approach will provide the state where the award was rendered with significant powers over the validity of ICA awards (Paulsson, 1981). Therefore, it is important for the disputing parties to choose the arbitration seat carefully in order to avoid any unpleasant decisions.

4.2.3.1. Limitations on State Sovereignty

State sovereignty is historically infringed by those in charge of political authority. Due to a number of factors involving cultural, environmental and economic influences, there has been a major drive towards globalisation in recent decades (Al-Adba, 2014). Accordingly, the common perception regarding the amount of influence exercised by state sovereignty has been reconsidered. Furthermore, in international law, both the principles of state sovereignty and of jurisdiction have a number of significant and commonly acknowledged restrictions (Christopher, 1997). It seems to be the case in contemporary times that most actions for restricting the sovereignty of the state frequently result in unimportant and conditional measures. For instance, any restriction enforced on the sovereignty of a nation-state provided within the interstate associations framework is normally considered to be voluntary (Vladimir, 2005).

4.2.3.2. State Sovereignty Versus the New York Convention (NYC)

Within the current ICA framework, states are bodies in possession of significant powers to determine the development of the practice of arbitration (Hong-lin Yu, 1998). This is due to their suitable and beneficial role in supervising arbitration proceedings and awards. Nevertheless, the courts' influence is ascertained by two important factors: jurisdiction and the award presented to them that is pursuing enforcement (Reisman, 2014). The controlling power of governments is visible at all stages of the arbitration process. The competent authority is enabled by Article V of the NYC to reject the enforcement of awards where the party against whom the award is invoked provides this authority¹³ with evidence that compels refusal. This proof could be that the award is not yet obligatory on the parties, or was refused or suspended by the competent court of the state under which that order was made (The New York Convention, 1958). This understanding of the article was questioned, since it was considered to be directly contradictory with the Convention's spirit and intention, being created for the purpose of supporting a system that enables member states to recognise and enforce arbitral awards (Wolff, 1991). This being said, it is important to note that states have chosen to enter into such conventions willingly and with the knowledge that their sovereignty is

¹³ In the state where recognition and enforcement is sought

preserved. Therefore, states should abide by the Convention and apply its reservation narrowly in order to benefit from its development within the arbitration framework. Otherwise, the broad application of this Convention's reservation will deprive the member state from actually relying on the ratification of this Convention to develop the reliability and attractiveness of its legal framework.

Moreover, it is particularly important to take into account the different arguments made in relation to the issue of party autonomy and territoriality. It should be noted that territorialists cited the NYC to support the role of *lex loci arbitri* position (Article II (1) and (3) of the New York Convention). Instead, party autonomy and the delocalisation of award advocates rely on Article VII to argue that the courts of enforcement in the enforcing country are able to apply other state's arbitral awards following local orders, notwithstanding their annulment by the state-of-origin courts. This is especially the case where the annulment was based on reasons associated with domestic laws and not on the basis of a domestic court's refusal to recognise such awards (Carmen, 2014). This was apparent from *Chromalloy Aeroservices Inc v, The Arab Republic of Egypt* (1996) 939 F. Supp. 907, where the Columbian district court agreed to enforce an award made in Egypt even though it was annulled by the Egyptian CA on misapplication grounds in relation to the Egyptian substantive law by the arbitration tribunal.

However, the US court of appeal revoked the Chromalloy's Columbian district decision in the case of *Baker Marine (Nig.) Limited v. Chevron (Nig)* 191 F.3d 194 (2d Cir. 1999), where it refused the enforcement of two annulled Nigerian awards. The court of appeal stated that: "It would not be proper to enforce a foreign arbitral award under the New York Convention when such an award has been set aside by the Nigerian courts". Another US court followed the ruling in Baker when it rejected the enforcement of an annulled Italian award in the case of *Spier v. Calzaturificio Tecnica, SpA*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999). Both of the above cases have impliedly rejected the Chromalloy case's interpretation of article VII of the New York Convention. This rejection was later affirmed by another judicial decision in *TermoRio S.A. E.S.P V Electrificadora Del Atlántico* 87 F.3d 928 (D.C. Cir. 2007), where a Colombian award was annulled by the highest administrative court in Columbia on the basis that the arbitration clause on the parties' agreement violated Colombian law. The parties sought enforcement in the US and the enforcement request was rejected by the US district court of Columbia. This rejection was in line

with the earlier trend to depart from the rationale of the *Chromalloy* case and interpretation of the New York Convention.

Furthermore, it is argued that the prospect of a stateless award is uncertain if Article VII provides for exceptions to the *lex loci arbitri* application in the way and extent to which it is permitted by the state where the award is sought to be recognised or enforced in law or treaties. Van den Berg, an expert in this Convention provision, stated:

“It is not only the legislative history of the Convention which seems to be contrary to the Convention applicability to the ‘a-national’ award. The system and text of the Convention to appear to be against such interpretation. The Convention applies to the enforcement of an award made in another state. Those who advocate the concept of the ‘a-national’ award, on the other hand, deny that such award is made in a particular country (‘sentence flottante’. ‘sentence apatride’). How could such award then fit into the Convention scope?” (Van den Berg, 1998. p 145)

4.2.4. Territoriality and Party Autonomy

The traditional territoriality principle is grounded in the international general principles of law whereby a country is supreme inside its territory and its courts enjoy absolute power to ascertain the legal consequences of actions conducted within that territory, including any arbitral awards subsequently made (Goode, 2014). By contrast, in arbitration, the party autonomy principle confirms that the arbitration tribunal and its award authority comes exclusively from the agreement of the parties, rather than from national laws (Mills, 2018). Neither territoriality nor party autonomy are a codification of one homogenous principle. The principle of territoriality deals with circumstances where a court must determine the effect of competent decisions from jurisdiction courts in foreign a territory, for example, whether to approve them or not (Chang, 2009).

The enforcing state law will, under normal circumstances, ask its court to reject the recognition or enforcement of arbitral decisions that were set aside by the

competent jurisdiction court (ibid). This is apparent in both Italian and Netherlands' laws where the first provides that:

“The court of appeal should refuse the recognition and enforcement of foreign arbitral awards, and if the opposing proceedings between the other party or adopted arbitral award prove to be one of the following condition: (5) the arbitral award has not yet been bound by the party, or been set aside or suspended by the competent authorities of the state either under, or in which the law was being made” (Article 840 (5) of the Italian Code of Civil Procedure).

The second, the Netherlands law, states something similar, but differently expressed:

“if there are no provisions relevant to recognition and enforcement that can be applied, or applicable provisions are permitted by provisions for the parties to depend on seeking the recognition and enforcing of the law of the states, the arbitral awards made in foreign states can be recognised and enforced in Netherlands....unless: (e) The arbitral award has been set aside by a competent authority of a state that made the award” (Article 1076 (1) (A) (E) of the Netherlands private International Law Act).

Therefore, the Italian model provides that arbitral awards are unenforceable if the seat of arbitration set them aside and both laws demonstrate clear examples of territoriality.

Moreover, the law of the seat enables the courts of the land to declare whether or not the arbitral awards made within that territory are legal or not (Goode, 2014). However, this is only related to domestic laws and domestic court decisions, provided that they are within the territory of the state and where there are no precise jurisdictions governing recognition and enforcement. Therefore, it could be argued that under the doctrine of state sovereignty, which is provided for in national and international laws alike, the enforceability of arbitration awards is governed by the enforcing states' laws (Robert, 2007). This is mainly due to the judicial system's deep involvement in the arbitration processes, in many occasions it is not possible to reach an appropriate balance between a national court's supervisory powers and party autonomy (Reisman, 2014).

4.3. Nature of International Commercial Arbitration

Having discussed the doctrines of party autonomy and state sovereignty, it is now crucial to address the key theories identifying the nature of ICA. Identifying the legal nature of arbitration is considered by Julian Lew to be the key to identifying both legal and non-legal standards open to arbitrators in ICA. Therefore, each theory of ICA impacts on the legal status of international arbitrators and the practise of their autonomy within any domestic legal framework under which they operate (Onyema, 2010). The above-named theories of ICA will be discussed in the following section.

4.3.1. Jurisdictional Theory

The jurisdiction theory emphasises the importance of a states' powers of supervision, particularly in relation to the arbitration place. This theory recognises the notion that the origin of arbitration stems from the disputing parties' agreement. Nevertheless, it argues that the parties' agreements and the arbitration procedure's validity must be regulated by a states' laws. Hence, an award's validity depends on the laws of the seat where recognising or enforcing the award is sought (Hong-lin Yu, 2008). The seat law normally applies to the proceedings of arbitration, but it has been argued that its application should be extended to cover the arbitration agreement's substantive validity, provided that such an agreement relates more to the law than to the parties' substantive rights and obligations (Bernardini, 1998).

The views outlined by this theory are evident in different jurisdictions' judicial decisions, which reflect the effectiveness of this theory in practice. For example, the UK, following its enactment of the 1996 Arbitration Act, has given more weight to the application of the seat law (Nazzini, 2016). This was evidenced in the case of *XL Insurance v Owen Corning* (2001) 1 All E.R. (Comm) 530 where the parties held an insurance policy that included a clause for arbitration providing that "[a]ny dispute, controversy or claim arising out of or relating to [the] Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Act 1996" (*XL Insurance v Owen Corning* (2001) 1 All E.R. (Comm) 530). The applicable law provided that the insurance document is to be interpreted following the State of New York domestic laws, except where there is a clash with any provision within the Policy.

An action was taken in the United States by Owens against XL Insurance. The latter applied for a restraining order from the English court against Owens to stop him making a claim in a place other than through arbitration in the UK in accordance with parties' agreement. The validity and enforceability of the arbitration clause was questioned (*XL Insurance v Owen Corning* (2001) 1 All E.R. (Comm) 530). The parties' likely intentions were directly considered by Toulson J, who viewed the arbitration clause's reference to the 1996 Arbitration Act as an indication of the parties' intended reliance on the seat law as the applicable law to the parties' dispute. Therefore, it was held that the seat law was the governing law with respect to the parties' agreement (*ibid*).

A similar decision reflecting the jurisdictional views application was reached by the English courts in *C v D (No2)* [2007] APP.L.R. 12/05). This case concerned a dispute over a Bermudan insurance contract form. Longmore LJ questioned whether, in the absence of an express law governing the parties' dispute, the one with the closest and most tangible link to the agreement is the underlying contract's law or the seat law. After studying the relevant cases in this regard, he answered that the seat law be applied (*ibid*). Also, in *Habas Sinai Ve v VSC Steel Company Ltd* (2013) EWHC 4071, Hamblen J held that, where there is no clear indication of the governing law to the parties' contract, choosing the seat law is overwhelmingly important, since such law will normally be the nearest and the most connected law to the parties' agreement. Accordingly, the law governing the arbitration agreement was considered to be the English law in spite of the Turkish law application to the original contract (*Habas Sinai Ve v VSC Steel Company Ltd* (2013) EWHC 4071).

Moreover, in *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12, the Singaporean High Court decided that, where there is no clear provision determining the law governing the original contract and there is a choice of the arbitration seat, the law of the seat is likely to govern the arbitration clause, even if this does not govern the original contract. A three-stage inquiry was followed by the judge exactly as did the CA in *Sulamerica*. He reached the conclusion that choosing the seat reflected an implied selection of the applicable law to the parties' arbitration clause. The following factors informed this conclusion; it cannot be inferred that the parties want their arbitration clause to apply the exact law as the one governing their dispute's substance because the two could be different. Also, the logical deduction when such association breaks down would be the parties' wish for

neutrality would be appreciated and, as such, the selected procedural law would apply rather than the substantive one. Finally, the arbitration seat is considered to be one of the most important factors influencing arbitration agreements and ensuring their effectiveness and validity (*FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12).

Having considered the practical applications of these views on jurisdictional theory, it is important to note that the proponents of jurisdictional theory recognise that all procedures of arbitration must be governed by the parties' selected law and the rule of law in the place of arbitration (Belohlavek, 2011). These proponents believe that arbitrators are similar to national court judges in terms of their powers, which originate from national states through the rule of law processes. In the same way as judges, arbitrators have to rely on a state's national law in order to settle the disputes before them (Hong-lin Yu, 2008). Additionally, awards reached by arbitration tribunals are as effective as the judgements a judge reaches in national courts. Consequently, they believe that, similar to the judgements of courts, arbitral awards are enforceable by courts in states where the enforcing party seeks recognition and enforcement (Onyema, 2010).

Advocates of this theory additionally emphasise the importance of the seat to arbitration. For example, Mann stressed how important a state's law is to arbitration, particularly in relation to the law of the seat. Mann believes that every sovereign country has the right to accept or reject any legal actions conducted within its territorial limits (Mann, 1983). Furthermore, arbitrators are obliged to conduct the arbitration proceedings according to the parties' choice in as far as the seat law allows (Mann, 1983). However, if their acts clash with the relevant territory's public policy or mandatory laws, then these acts will be considered judicially unjustified (Mann, 1967).

Jurisdictional theory empowers national courts with a strong basis for exercising supervision over disputes taking place within the state, by relying on the seat law of the state where enforcement is sought (Onyema, 2010). These powers of supervising disputes are also in the NYC 1958, which provides that when one party of the dispute breaches one of the grounds mentioned in Article V of the Convention, the competent authority may reject the award's enforcement at the request of the party against whom such an award is invoked (Article V). Their

refusal could be based on several grounds involving the parties' agreement validity, arbitration proceedings, the arbitrator's power, and the arbitral awards' submission and enforceability scope. This is to be carried out following the request of the party against whom it is invoked (Hong-lin Yu, 2008).

The state court's supervisory powers over arbitration, based on the application of the seat law, is based on the following arguments. Firstly, the state's delegation of its exclusive powers forms the basis of the arbitrator's power to create enforceable settlements. Secondly, all acts are bound by the state law where they took place. Finally, applying the seat law and relying on its courts tends to be the most effective way of resolving disputes (Samuel, 1989). However, practically speaking, the law could confer these powers of supervising disputes. The Scottish law, for example, provides the Scottish court with exclusive jurisdiction in all disputes seeking arbitration in Scotland, except those related to consumers. The Scottish law further provides that someone could be sued "In proceedings concerning an arbitration which is conducted in Scotland or in which the procedure is governed by Scots law (Rule 2(13) in Schedule 8 of the 1982 Act)."

The jurisdiction issue over arbitral proceedings and awards is well illustrated in the concept of arbitrability. Supervisory powers over arbitral proceedings compel arbitrators to consider a dispute in as far as the parties' chosen law permits; nevertheless, this chosen law cannot override the seat's mandatory rules (Hong-lin Yu, 2008). Moreover, where a choice of law is expressed, the seat's law where the arbitration takes place will govern the arbitrability issue. This means that national courts would hear challenge requests for any issued award if a dispute exceeding the scope of arbitrability under the governing law is considered by an arbitrator. (Hong-lin Yu, 2008).

Furthermore, the jurisdictional theorists believe that, in the state where recognising or enforcing awards is sought, courts have powers to supervise the arbitrability issue when it reaches the enforcement stage. Hence, courts are empowered by Article V (2) of the NYC with the option of rejecting an arbitral award recognition or enforcement where "The subject matter of the difference is not capable of settlement by arbitration under the law of that country" or where "recognition or enforcement of the award would be contrary to the public policy of that country (New York Convention, 1958)." A similar approach is also enforced by the law of the seat

courts, which are additionally empowered with supervisory power over the issue of arbitrability. This was demonstrated by the US Supreme Court's approval of the federal rule that favours arbitration in *Mitsubishi Motors. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985). This case deals with a dispute involving anti-trust that was previously forbidden from being solved through arbitration in domestic cases. The parties' arbitration agreement, including the anti-trust dispute, was enforced by the Supreme Court, with an assumption that in the domestic context a contrary decision would be expected. In this regard, Justice Blackmun stated that, at the stage of enforcing awards, local courts in the US are willing to "ensure that the legitimate interest in the enforcement of the anti-trust laws has been addressed" (*Motors. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985), p 629, 638). This is because the New York Convention gives each ratifying country the right not to enforce an award if doing so would be against that country's public policy (Samuel, 1989, p. 55). Relying on this point of view, it might be argued that, from the perspective of jurisdictional theory, there is a supervisory nature in the relationship between courts and arbitral tribunals.

While the above seat tests may be informative for the factors provided in *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12, there are still a number of situations where it would be inappropriate to apply the seat law (Nazzini, 2016). Significantly, the arbitration agreement's validity may need to be considered by the courts when the seat has not yet been chosen, or where the seat may be altered in the process of arbitration proceedings even after the decision is rendered on the arbitration agreement's validity with respect to the tribunal. Moreover, views in favour of considering the seat choice as the arbitration agreement's implied choice of law is not convincing enough, especially if such selection is made by an arbitral tribunal or institute (*ibid*). It is argued that the institute or tribunal selection is not entirely detached from the parties' will since the delegation of the choice was intended and made by the parties (Bernardini, 1998). Nonetheless, from a constructive point of view, it is harder to claim in the absence of an expressed choice that the parties intended the seat law to apply to their dispute, either due to the seat already having been agreed or because they failed to reach an agreement on it (Gaillard and Savage, 1999). Such a view does suggest that the parties have reached an agreement to arbitrate without basing it on the applicable laws and, therefore, they are unable to decide on whether their agreement is valid. Such an argument is illogical since it posits that the parties consciously chose to have their

model of dispute resolution remain uncertain (Nazzini, 2016). Consequently, where there is a clear statement of the parties' chosen law, it is going to be hard or maybe impossible to assume the location of the seat because the arbitrators may select any jurisdiction to be it. This means that the arbitration agreement's applicable law cannot be ascertained by the seat when the seat choice is delegated (ibid). In these circumstances, the contract's underlying law may be applicable, due to it being the parties' embedded intention or due to it being the closest to the arbitration agreement (International Tank and Pipe SAK v Kuwait Aviation Fuelling Co KSC, (1975).

4.3.2. Contractual Theory

Unlike jurisdictional theory, proponents of contractual theory reject the significance of the law of the seat, claiming that arbitration is based on the parties' agreement alone (Stone, 1966). They do not see that any considerable connection exists between the law of the seat and the arbitral proceedings since they argue that the parties have the power to make decisions about issues relevant to their arbitration procedures and that such power should not be limited by the state's power (Domke, 1965).

In contrast to jurisdictional theory, this theory considers the nature of arbitration from a contractual point of view. While contractual theory acknowledges that national laws could influence arbitration proceedings and agreements, they yet contend that arbitration is of contractual identity and stems from the agreement of the parties (Hong-lin Yu, 2008). Consequently, the parties' arbitration agreement is a contract that clearly stipulates the will of the parties to resolve their dispute through ICA. Parties enter into such contracts voluntarily, since it empowers them to decide both arbitration timing and location, to appoint arbitrators to consider their dispute and, in addition, to select the laws to be applied on both procedural and substantive issues (Onyema, 2010).

Supporters of contractual theory argue that dispute resolution via arbitral proceedings is better kept separate to state power, and the *pacta sunt servanda*¹⁴ concept should remain obligatory upon the parties to conduct their agreed

¹⁴ Means that agreements should be observed.

arbitration proceedings away from the pressure of the state. This concept was demonstrated by Kellor when he emphasised the voluntary nature of arbitration. There are no laws forcing parties to enter into arbitration, nor can one party force another to engage in arbitration. When the agreement to resort to arbitration is completed, the parties forgo any other rights that they may have, as they consider that arbitration will be of greater benefit to them (Kellor, 1941, p. 182). Therefore, the law of the seat does not hold influence over the outcomes or procedures of arbitration, apart from in regards to arbitrability and public policy. Klein goes on to conclude that "national arbitration laws only exist to supplement and fill lacunae in the parties' agreement as to the arbitration proceedings and to provide a code capable of regulating the conduct of an arbitration" (Klein, 1955, p 182).

The mechanism of ICA, in most jurisdictions, is designed following the contractual theory viewpoint. Since they recognise the desire of commercial interests for flexibility and informality in settling their disputes, courts in those jurisdictions consider the parties' and the arbitrators' relationship to be a contract (Hong-lin Yu, 2008). Taking the party and arbitrator relationship as an example, most jurisdictions follow views advanced by contractual theory. For example, in "Cie Europeene de Cereals SA v. Tradax Export SA, [1986] 2 Lloyd's Rep. 301" the English court held that parties and arbitrators share a contractual relationship. Subsequently, it was decided that in accepting their appointment as arbitrators, they had become parties to the arbitration agreement and, as such, they should be bound by the arbitration contract's terms from a contractual point of view. Although the English courts did adopt a contractual point of view in this regard, English law is mostly influenced by the jurisdictional view rather than any other. This was demonstrated in Lord Mustill's statement in the case of *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd* (1993) Adj.L.R 01/21, where he emphasised the inherent powers of the court to stay proceedings, despite the existence of an arbitration clause.

Furthermore, International commercial contracts normally include a provision stipulating for the law to be applied to the substance of the dispute. Thus, the issue lies in whether the selection of the main contract's applicable law remains pertinent to the arbitration agreement (Nazzini, 2016). The UK's relevant authorities, after the Arbitration Act 1996 came into force, stressed the significance of the seat. In *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2013] 1 WLR 102, the Court of Appeal had to make a decision on the

applicable law to the contractual clause requiring an arbitration based on the ARIAS Rules in the UK. This requirement was integrated into an insurance policy governed by the law of Brazil. Therefore, determining the validity of the arbitration clause was an important matter to consider when deciding whether to uphold or discharge an anti-suit injunction. The party with insurance argued that the arbitration clause under Brazilian law is enforceable exclusively upon their approval. The parties' agreement had no clear selection of the arbitration agreement's applicable law, so the judge had to consider whether a selection of governing law was impliedly made by the parties through choosing the law of Brazil as the original contract's governing law, or whether the English law was applicable to the arbitration agreement as the law of the seat of the arbitration, either through the implied choice of the parties or because the law is the nearest link to the arbitral process providing that an implied selection cannot be determined (*Sulamerica and others v Enesa and others* [2013] 1 WLR 102).

Moore-Bick LJ, with whom Hallett LJ agreed, said:

“In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate. A search for an implied choice of proper law to govern the arbitration agreement is therefore likely (as the dicta in the earlier cases indicate) to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion. These may include the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract” (*Sulamerica and others v Enesa and others* [2013] 1 WLR 102, para 26).

Nevertheless, this was merely a presumption that could be rebutted by the following factors: (1) choosing England as the law of the seat; (2) the outcome that would take place if the applicable law to the arbitration clause was the Brazilian law (*ibid*, paras 29-31). The latter factor was especially influential in this case since the arbitration clause was obviously made in order to oblige all parties, while the Brazilian law would result in the clause binding just the insured party. Therefore, the assumption that the original contract's applicable law also applies to the arbitration clause was refuted. He considered that the parties' implied selection of

the governing law cannot be determined and consequently, the nearest link test was applied and established that the arbitration agreement's closest link fell within the law of the seat (London) (bid, para 32).

4.3.3. Hybrid Theory

Both contractual and jurisdictional theories have great backing at opposite ends of the arbitration spectrum. Still, a number of jurists believe that neither theory gives a logically acceptable elucidation of the ICA's current structure. On this basis, Lew stated that there is no shock in the development of a mixed theory with a hybrid character (Lew and Julian, 1978). The hybrid theory was developed by a group of theorists who were convinced that the best operation of ICA uses both jurisdictional and contractual theoretical elements. Therefore, this theory was developed as a compromise theory, as a mix of both contractual and jurisdictional theory (Hong-lin Yu, 2008).

Surville (1925) created this theory, which was further developed by Sauser-Hall, to include the mixed character method of ICA. He argued that arbitration has a contractual element that stems from private contracts, where parties are empowered to select the arbitration tribunal and the governing laws to both procedural and substantive elements of arbitration (Sauser-Hall, 1952). He also agreed that arbitration has to be performed under a state's domestic laws in order to decide the parties' powers, the validity of arbitration agreements and the enforceability of awards (Sauser-Hall, 1952). Consequently, he defined arbitration as "a mixed juridical institution, sui generis, which has its origin in the [parties'] agreement and draws its jurisdictional effects from civil law (Ibid, p 398-399)." In other words, arbitration is of a jurisdictional nature when it comes to the procedural rule application, while the parties' arbitration agreement gives it effectiveness and existence (ibid). Sauser-Hall's argument has been accepted by certain practising scholars, such as Redfern and Hunter, who argue that ICA is of hybrid nature since it starts with mutual agreement by the arbitration parties. This agreement, following the arbitration procedure, should lead to a legally binding award that most states will recognise and enforce upon meeting certain conditions (Redfern et al., 1991).

Accordingly, the hybrid theory advocates for parties' right to freely enter into an agreement to arbitrate, appoint the arbitration tribunal and select applicable laws and stems from contractual arbitration origins (Redfern et al., 1991). However, the issues surrounding the validity of arbitration proceedings and arbitration agreements are subject to the enforcing state's mandatory laws and public policy, which reflects the jurisdictional element of arbitration agreements (Onyema, 2010). In addition, the validity of arbitral awards and their recognition or enforcement are to be considered in light of the enforcing state's mandatory rules and public policy (ibid). It is incorrect, according to Hunter, to reject the duality in the character of arbitration, given that arbitrators use an 'award' or 'arbitral Decree' to decide on the matter presented before them and, when doing so, must not contravene any laws. Thus the power that the arbitrator has over those submitting their case is based on a contract; however, arbitration is still partly judicial in nature (Hunter, 1987).

This duality in the character of arbitration has also been emphasised by Ancel, who argues that it is a concept that demonstrates the contractual basis of arbitration is since it originates from the parties' agreement. It is also jurisdictional since it is expressed in a way that involves a states' jurisdictions, especially at the stage of recognising or enforcing awards (Ancel, 1993, p 121).

The hybrid theory was also considered by Sander (1975) to be far more comprehensive than the first two in addressing arbitration-related issues. He argued that stressing only the contractual or jurisdictional view of arbitration is inadequate. Arbitration has to be based on consensus between all parties concerned in having agreed to arbitration since, without this agreement, arbitration cannot take place. If this concept is focused upon and then extended to cover the procedure and award of arbitration, it leads to the nature of arbitration being contractual. Alternatively, the quasi-judicial nature of arbitration can be focused upon, as arbitration is a form of judicial process – the role of arbitrators is similar to that of judges. They submit a decision on the differences that are brought before them, and these decisions act in the same way as the judgements of courts. "The dualistic character of arbitration has led to the intermediary view taken by those who adhere to what may be called the mixed arbitration theory" (Sanders, 1975, p 233-234). This is due to the character of arbitration, which is affected by its origins being both contractual and involved in judicial processing.

Jean Robert, in support of the dual character of arbitration, draws attention to the close proximity between arbitration procedures and forums. Robert states that the arbitration structure and the powers of the arbitration tribunal arise from the agreement of the parties. Whereas the agreement's validity and the award's enforcement are dealt with in accordance with the relevant state's public policy and mandatory laws (Robert as discussed in Sanders, 1975).

4.3.4. Autonomous Theory

Rather than defining arbitration within the available range between the above theories, Rubellin-Devichi focused on the practical aspects of arbitration and, accordingly, the autonomous theory was developed. Since she believes that the ICA's merits are the speed and flexible nature of the proceedings, she maintained a suitable theory by considering arbitration's use and purpose (Rubellin, 1965). Having the aim of creating an arbitration welcoming environment in the international commercial community, she contended that the autonomous nature of ICA's has to be acknowledged. She argued against the first two theories on the basis that they do not reflect the practice, while at the same time being contradictory of each other. She also rejected the third theory due to its undefined scope of application, citing that it is difficult to know exactly when arbitrators should follow the parties' contractual agreement and when they should follow state regulation (ibid).

Rather than participating in customary discussions over arbitration's jurisdictional or contractual nature, the true nature of arbitration was seen by Rubellin-Devichi as its use and purpose; thus, placing it on a supranational level while acknowledging its autonomous character. Following her study of ICA's societal and economic needs, she recommends that "in order to allow arbitration to enjoy the expansion it deserves, while all along keeping it within its appropriate limits, one must accept, I believe, that its nature is neither contractual, nor jurisdictional, nor hybrid, but autonomous" (ibid, p 365).

Furthermore, the dual nature of arbitration was not disputed by Rubellin; however, she rejected the arguments made in attempting to distinguish between the arbitration's contractual and jurisdictional elements. This is because of the difficulty in drawing a line between the elements. She argues that such an attempt to

segregate them will lead to a distortion in the development of ICA. She did not try to classify arbitration under either theory, since she believes that both elements have been "so inextricably intertwined that they have become impossible to separate" (ibid, p 363). In this regard, she argues that it is inappropriate for the law of contract to be applied to arbitration agreements, and those related to judgements to arbitral awards. This is because arbitral awards do not resemble court decisions while, at the same time, private contracts are not similar to arbitration agreements.

The autonomous theory was formed on the basis that ICA's existence and ongoing development corresponds with the demands of the international trade community (Rubellin, 1965). International commercial actors have recognised that ICA corresponds with their demands for a controllable and flexible method for their dispute settlements. For the purposes of satisfying the arbitration industry's development and expansion, the autonomous theory provides that parties to the arbitration agreement should have complete party autonomy (Hong-lin Yu, 2008). Accordingly, certain amendments should be introduced in national laws and institutional rules to meet the international commercial community's needs. This reflects the genuine importance of the principle of party autonomy in ICA, which accordingly suggests that the users of such mechanism should be empowered to drive its development and not sovereign states (Onyema, 2010). This will, therefore, lead to the redundancy of the seat law in practice, since an independent non-national regime's procedural rules could be chosen by the parties to govern their dispute. An example is the use of arbitration institute rules to govern the parties' substantive dispute. Such arbitration rules have no connection with any domestic laws and no states law has influence on them, even the state where such an institution is physically situated (ibid).

The need for such theory is explained by the parties' desire to have their dispute settled by arbitral tribunal with no court intervention. This choice of the parties is not plausible since courts sometimes involve themselves in the parties' dispute settlement process, particularly when it comes to the enforcement of awards. This is evident in *COMMISA v Pamex* (2013) Tul. J. Int'l & Comp. L. 22. This case is related to an award that was rendered in Mexico and then enforced under the Panama Convention 1975, notwithstanding the seat setting it aside. The courts in Mexico applied a legislation that was not yet enforceable at the time of the formation of the parties' contracts and, consequently, the award was set aside based on

Mexican law that considered Pemex, an oil company, as an organ of the state due to its being owned by Mexico (ibid). In approving the award and refusing the ruling of the Mexican court, the district court in the US was cautious to elucidate that it did not decide nor review the law of Mexico. Instead, the decision was based on the Mexican decision's infringement of the fundamental notions of justice. This was because the applied law was not enforceable when the parties' agreement was reached and, as a result, it left COMMISA unable to litigate its claims (ibid). The US court of appeal issued its final say on this decision in 2016 when it confirmed the district court's decision to enforce the award in spite of its being set aside by the court of the seat on the basis that it is infringing to the fundamental notions of decency and justice. Despite this ruling, enforcing awards that have been set aside by the seat courts is still contentious. A nulled award is very unlikely to be enforced by most courts around the globe in spite of a few remarkable exceptions (Redfern and Hunter, 2015).

The French court's view of enforcing such set aside awards is one of the most remarkable exceptions. The French courts totally disregard the seat court's views on the award on domestic law grounds. This was apparent in the case of *Société Hilmarton v. Société O.T.V* (1994) Rev. Arb. 327, where the French court had to consider the enforcement of a Swiss award that was set aside by the Swiss courts. It was held by the *Cour de cassation* that "the award in question was an international award which was not integrated into the Swiss legal order, such that its existence continued in spite of its being set aside". This decision was justified in the case of *Société PT Putrabali Adyamulia c/ SA Rena Holdings* (1994) Rev. Arb. 327, to be based on the notion that the seat's court decision to set aside an award should be limited to that court's jurisdiction and, as such, it should not affect the enforcing court's view of the award. Commenting on the French court's approach, Gaillard agreed with the approach on the basis that ICA is of transnational character and, as such, each enforcement court should form its own view of the award's validity (Gaillard, 2012). Thus, it is clear from the above case that court disputes could affect the parties' ICA outcome and, as such, autonomous theory advocates the removal of such court intervention in favour of a more delocalised platform of ICA.

The arguments for the delocalisation of the arbitration seat in order to apply universal principles of public policy to international arbitration has been influenced by autonomous theory (Onyama, 2010). The delocalisation advocates base their

theory on the principle of party autonomy, since it is their agreement for arbitration that initiates the proceedings, and it relies on the following important arguments. Firstly, there is an assumption of sufficient rules in international arbitration to regulate itself and such rules are adopted by the parties or made by arbitrators. The second argument provides for the enforcing state's exclusive supervision of the arbitration (Redfern and Hunter, 2015). Accordingly, it is obvious that autonomous theory delocalisation is one of its main ingredients. In spite of the similarities between autonomous and delocalisation theories, they still exhibit major differences when it comes to court intervention. The autonomous theory completely disregards a courts' role, which will result in real issues relating to the national court's extensive and important role in how arbitration is conducted. However, the delocalisation theory advocates for the complete detachment from the supervision of the seat and the enforcing state court's dual system. Instead, they are in favour of having only the enforcement state as a single point of control (Redfern and Hunter, 2015).

Furthermore, it is now broadly accepted in the context of arbitration for parties to select international rules for the governance of their disputes' substance. Guidance in that regard, within the context of England and Wales, was provided by Sir John Donaldson in *Deutsche Schachtbau-und Tiefbohrergesellschaft v Ras al Khaimal National Oil Co*, (1987) 3 WLR 1023 where he stated:

“By choosing to arbitrate under the rules of the ICC and, in particular, article 13.3, the parties have left proper law to be decided by the arbitrators and have not in terms confined the choice to national systems of law. I can see no basis for concluding that the arbitrators' choice of proper law - a common denominator of principles underlying the laws of the various nations governing contractual relations - is out with the scope of the choice, which the parties left to the arbitrators” (ibid, 1035).

Accordingly, if the parties are able to select the international principles governing their substantive contract, they may also be able to select such principles to govern their arbitration agreement, which is also certainly a contract. However, such a contract has as its subject matter the dispute resolution choice and regulation method instead of substantive rights and obligations (Nazzini, 2016). Certainly, the common law does not distinguish, in principle, between the conflict of laws rule that governs substantive contracts and those governing arbitration agreements (*Sulamerica v Enesa Engenharia*, (2013)). However, what is vague is whether the

parties' failure to include a choice, either expressly or impliedly, will enable courts to rely on international principles for the ascertainment of the arbitration agreement's validity (Nazzini, 2016).

Where the parties' choice cannot be identified either expressly or impliedly, the courts of England and Wales still resist the potential application of non-state rules to arbitration agreements. This view was illustrated in *Halpern v Halpern* (2007) EWCA Civ 291, in which case the court had to ascertain whether to apply the Jewish, English or Swiss law to the arbitration agreement. The parties' implied intention indicated the application of the Jewish law, since it was the parties' selection of the applicable law to their compromise. It was concluded by English courts that the principles of common law demand the choice of a state legal system as the agreement's proper law, therefore, the applicability of the Jewish law was denied (ibid). This conclusion was rebutted by the English court of appeal which provides that arbitration tribunal could refer to non-state rules or parties' considerations, if this reflects the parties' choice and, consequently, an award based on such rules or consideration will be enforceable by English courts (*Halpern v Halpern* (2007) EWCA Civ 291). This enforceability of the parties' choice is preconditioned by the existence of an arbitration clause expressing the parties' intentions. However, in this case, the court of appeal decided that English conflict of laws principles are applicable and the Jewish law is to be considered one of the applicable laws and it was a matter of which law applies to which part of the contract (ibid).

There is currently no transnational approach that is entirely independent of any state's law and this is demonstrated in the French law practice, which is presumably seen as the most internationalist approach in ICA. Since its judiciary views the *regles materielles* to be governing the validity of arbitration agreement independent from any states laws, even where the parties fail to either expressly or impliedly make a choice in this respect. In the *Dalico* case (1994) Rev arb 116, 117, the *Cour de Cassation* ruled:

"... according to a substantive rule of international arbitration law, the arbitration clause is legally independent from the main contract in which it is included or which refers to it and, provided that no mandatory provision of French law or international public policy is affected, its existence and its validity depends only on the common

intention of the parties, without it being necessary to make reference to a national law” (Nazzini, 2016, p 8).

This view was consistently adopted in successive French cases and was not influenced by the late adjustments to the French Code of Civil Procedure.

Some commentators criticise this approach, believing it to be contentious since, in their view, the outcomes are random and arbitrary (Blessing, 1997). Others, possibly more accurately, indicate that law’s transnational principles are represented by their recognition of domestic law or public international law, as opposed to the autonomous and detached legal systems (Wortmann, 1998). Although, French *regles materielles* might be viewed as transnational due to it being applied by French law only to international arbitration and not to local ones because the international business community practice is thought to have formed the origins of such rules. However, this does not make them applicable across national legal systems without the full adoption by each member state within its own legal rules (Nazzini, 2016).

4.4. The KSA Arbitration Framework.

Having discussed the above theories and their influence on how ICA is perceived by national states, it is now pertinent to ascertain which of the above theories reflect the KSA’s current arbitration practice. For the purpose of this thesis, the author adopts the jurisdictional theory for the theoretical analysis of the KSA arbitration regulations. This decision was made on the basis that jurisdictional theory, unlike the other theories, to a large extent reflect the views of the legislators in the KSA. As will be addressed in the following chapters, the KSA legislative bodies have always taken into account the state sovereignty doctrine before issuing any legislation. This is particularly important in the context of ICA after the Aramco case decision which is discussed in detail in the following chapter. Therefore, the KSA’s development of its arbitration regulation has always been within the scope of the jurisdictional theory views, since it attempts to provides disputing parties with certain autonomy over their dispute resolution while, at the same time, maintaining direct supervision of the whole arbitration process. Although such supervision was lessened in the 2012 SAR, as opposed to its predecessor, the KSA retains some

supervision over ICA taking place in its territory or seeking enforcement before its courts.

Despite the KSA's attempt to develop its regulation to attract foreign commerce, its most important doctrine of state sovereignty remains unchanged. Therefore, the contractual theory, in spite of its attractiveness to international commerce, is not adopted in this thesis due to its attempt to limit state sovereignty over ICA in favour of the disputing parties' unlimited autonomy. The application of such theory will significantly undermine developments introduced by the 2012 SAR in trying to ease the state's supervision over ICA and increase parties' autonomy over their dispute. At the same time, the hybrid theory is not applied in this thesis because it is too good to be practical. This theory tries to satisfy the needs of both of the above theories of ICA, while at the time failing to specify how an arbitrator could clearly ascertain which of the above views is applicable to each stage of the parties' arbitration. Last but not least, the autonomous theory is not adopted in this thesis analysis of the 2012 SAR due to its total rejection of the state's role in the process of ICA. This theory views arbitration as totally autonomous from any states regulation and such rejection is not particularly practical because most states would have an important role to play either due to the state being the seat of the dispute or the enforcing state. Therefore, unless there is an international court which could hear appeals of disputes' arbitrability and issue binding enforcement decisions on sovereign states, the application of this theoretical view will be of little significance in the context of the KSA, taking into account its administrative and legislative structures (see Chapter 3).

4.5. Conclusion

To conclude, this chapter discussed two significant doctrines to the application and development of ICA, party autonomy and state sovereignty. While both have a significant role in the practice of arbitration, there are still arguments favouring the application of one over the other. Law of the seat and state sovereignty advocates argues that ICA is based on relevant laws. Therefore, domestic courts have a sovereign position over the entire arbitral process. The recent growing global recognition of the commercial significance of arbitration has led to the modernisation of a number of domestic laws that apply to the process of ICA in

various parts of the globe. Such a liberal approach has managed to minimise court intervention. Nevertheless, such interference is not necessarily disruptive of the arbitration process, since it may be equally supportive (Sumer, 2008). Domestic laws have contributed significantly to the development of ICA practice, through legislating regulations to govern the application of ICA and facilitate the enforcement of its awards within a state's jurisdictions.

Party autonomy supporters argue that party autonomy is the essence of arbitration and that arbitration came into existence through parties' will. Therefore, parties have the freedom to select the method by which their arbitration is held. It is, then, the job of the courts to enforce the outcome of that arbitration process without considering the merits of the dispute. Although this seems theoretically plausible, there are certain considerations for the court to undertake, such as ensuring that the arbitral award is not inconsistent with the enforcing state's mandatory rules and public policy.

These opposing views of how arbitration should be conceived have led to the establishment of the four theories of ICA namely: contractual, jurisdictional, hybrid and autonomous. Understanding these theories is important since it enables a better understanding of how a particular state views ICA and practices it accordingly. Although the jurisdictional and contractual theories reflect opposite standpoints on the subject, a more acceptable theory was considered to be the hybrid theory, which adopted a middle-ground between the two earlier theories. The autonomous theory attempts to provide the foundation of a complete arbitration body. Contrary to the other three theories, this theory moved away from the reality of modern ICA. Since, the current framework of arbitration and the criteria ascertaining whether an award could be enforceable are managed and applied by the states' rules, accordingly, it is necessary to comprehend the various jurisdictions and the adoption of various theoretical views (Hong-lin Yu, 2008). In addition to the importance of arbitration theories in determining a state's arbitration practices, the state's culture and religion are equally important factors. Since this thesis focuses on Saudi arbitration law, the next chapter discusses the legislative development of arbitration in the KSA up until the enactment of the 2012 SAR.

Chapter Five: The Development of Arbitration Law in Saudi Arabia: A Historical Overview

5.1. Introduction

Arbitration was practised well before litigation and before the establishment of formal legal frameworks and systems. Although, at certain times in the past, an absence of judicial institutions and the presence of state power meant that the use of force was the main method for settling disputes (Ragib, 1993). Esteemed people nevertheless managed to intervene and reach solutions. Such dispute resolution practices developed over time to create a body of customs and traditions in accordance with which parties began referring their conflicts to others.

Ancient Arab traditions consisted of a set of general criteria for selecting arbitrators, such as choosing those reputed for their impartiality, fairness, wisdom or social power. Religious leaders were appointed for their religious influence, which was advantageous when enforcing a judgment, while the head of tribe was appointed for his social power, which was needed in the enforcement of decisions after they were reached (Albejad, 1999). Consequently, arbitration developed as a method for reaching a fair and final settlement of a dispute as delivered by an independent body. Nowadays, following the creation and development of judicial bodies, arbitration has become a supplementary dispute-resolution method, functioning under the supervision of judicial bodies (El-Ahdab, 2011).

The Code of Commercial Courts 1931 constituted the first step taken in the KSA towards codifying Sharia arbitration rules. It failed, however, to provide a set of comprehensive arbitration law provisions, resulting in the Sharia courts' refusal to acknowledge arbitration clauses. Even if recognised, the arbitral award's enforcement was not compulsory, but voluntarily, and this voluntary enforcement led to arbitration law existing only in theory in the KSA, without any practical impact.

In 1983 the Kingdom made another step towards establishing a robust arbitration framework by enacting the Arbitration Regulation of 1983. This regulation addressed many of the deficiencies inherited from the 1931 code but fell short of

producing a comprehensive set of articles governing all problems embedded in KSA arbitration practice.

The previous chapter considered the main legal theories governing the practice of ICA and the extent of their impact on the doctrines of state sovereignty and party autonomy. It also considered the applicability of these theories to the perspectives on ICA which were prevalent in the KSA. This chapter provides a historical overview regarding the chronological development of the KSA arbitration regulation up until the enactment of the 2012 SAR. It also provides a critical evaluation of the 1983 Regulation and its main deficiencies which led to the enactment of the 2012 SAR.

5.2. The Commercial Court Regulation 1931

The 1931 Code of Commercial Courts was the first set of rules governing commercial arbitration proceedings in the KSA. This code contained 633 articles, out of which nine short articles regulated arbitration proceedings in the KSA (Decree No.32 dated 15/01/1350 H). These nine articles provided limited rules governing commercial arbitration proceedings between private entities. For instance, disputants were enabled to refer to arbitration in a written, certified deed (Article 493). Such parties had the autonomy to select the arbitration tribunal, the timeframe, and procedures for the issuance of arbitral awards. The same code also forbade parties from revoking appointments of arbitrators after being approved by the court, but they were allowed to appeal the award before the judiciary (Article 496). Article 493 of this code provided for institutional arbitration, and for proceedings to be conducted under the supervision of the commercial courts. The procedural law of arbitration was provided in Article 494, whereby arbitrators were required to take into account Sharia procedural rules and the parties' arbitration agreement.

These provisions of the code were not implemented in practice for a number of reasons, including the courts' repeated failure to approve arbitration agreements and, even where agreements were approved, providing only voluntary grounds for the enforcement of awards (Albejad, 1999). Consequently, relying on arbitration was not a popular choice for parties with disputes to be settled. Conflict between the commercial and Sharia courts was another reason for its ineffectiveness (ibid).

The 1931 Regulation empowered the commercial courts to supervise the enforcement of arbitration awards. However, the commercial court's power was suppressed by the state as per the advice of its Islamic scholars who wanted to unite the legal system under the framework of the Sharia courts (Mohammed, 1987). This position, however, did not lead to the invalidation of the 1931 code and it continued to theoretically exist until the 1983 Regulation was enacted.

5.3. The Convention of the Arab League of Nations on the Enforcement of Judgments of 1952.

The Convention of the Arab League of Nations on the Enforcement of Judgments was ratified by the KSA on July 18, 1954, in the Council of Ministers Resolution No. 50, dated June 1960. This Convention was replaced by the Riyadh Convention for Judicial Cooperation of 1983. Both conventions were ratified by Arab member states in order to enhance the enforcement of both judicial and arbitration decisions rendered in fellow member states. Both conventions confirm the enforceability of arbitral awards rendered in any member states without regard to the party in whose favour the award was issued. This was a distinctly positive step towards facilitating the enforcement of foreign awards in the Kingdom, taking into account the fact that the KSA was not a member of the NYC at the time (El-Ahdab, 2011).

5.4. Saudi Arabia v Aramco 1954, 27 I.L.R.117.

When discussing the development of the KSA arbitration regulation, it is important to discuss the Aramco case and its influence on the KSA legal system. This case concerned a contract concluded between the KSA government and the Standard Oil Company of California (SOCC); its name being subsequently changed to the Arabian American Oil Company (Aramco). In 1954, the government of KSA made an agreement with Saudi Arabian Maritime Tankers Ltd (SATCO) that gave SATCO priority for the transportation of KSA oil for a period of three decades. The KSA government ordered Aramco to comply with the Royal Decree approving its agreement with SATCO (Royal Decree No. 5737, 1954). This order was refused by Aramco on the grounds that there was a clash between the SATCO provisions and the agreement with Aramco, which provided Aramco with the exclusive power of transporting oil from its contracted zone in the KSA. Although the government

made an effort to settle the dispute internally, this was unsuccessful and the issue was then referred to an arbitration panel in Switzerland. Having highlighted the root of the parties' dispute, it is now pertinent to address the parties' chosen applicable law in this case in order to understand the KSA's attitude following the Aramco case decision.

5.4.1.1. Applicable Law

Article 4 of the arbitration agreement contained the following provision in regard to the law applicable in cases of the parties' dispute:

An arbitration tribunal decision in case of the parties' dispute shall be:

- 1) In conformity with the KSA law as long as matters are within the KSA jurisdiction.
- 2) In conformity with arbitration tribunal applicable law, as long as matters exceed the KSA's jurisdiction. The Saudi applicable law was Islamic law:
 - a) following the Hanbali school; and
 - b) in accordance with its application in the KSA. (*Saudi Arabia v Aramco*, 1954, 27 I.L.R.117).

5.4.1.2. Parties' Positions

The method for distinguishing matters that fell under KSA jurisdiction was problematic. Aramco argued that the general principles of law, as acknowledged by the majority of states, should be applied to the matter because their 1933 agreement with the KSA was an international one. It also claimed that, in light of the international nature of the concession agreement, KSA law was exclusively applicable to domestic matters (*Saudi Arabia v Aramco*, 1954, 27 I.L.R.117). The KSA government responded that the SATCO agreement conformed with provisions of the concession agreement provided to Aramco, Sharia, the general principles of law as acknowledged by what were then known as 'civilised states', and international law (*Saudi Arabia v Aramco*, 1954, 27 I.L.R.117). Although both parties agreed to the applicable law terms stated in their agreement, they disagreed on how these terms should be interpreted and applied.

5.4.1.3. Panel Decision

In spite of the parties' agreement to arbitration outside the KSA, neither the KSA law nor the seat law was applied to this dispute. The arbitration tribunal provided that:

“Considering the jurisdictional immunity of foreign states, recognised by international law in a spirit of respect for the essential dignity of sovereign power, the tribunal is unable to hold that arbitral proceedings to which a sovereign state is a party could be subject to the law of another state” (Saudi Arabia v Aramco, 1954, 27 I.L.R.117. p. 154).

Moreover, although the parties mutually agreed to be governed by the principles of Sharia in accordance with the interpretation of the Hanbali school, the panel upheld Aramco's position by deciding not to apply the KSA law. The panel held that:

“The regime of mining concessions, and, consequently, also of oil concessions, has remained embryonic in Moslem law and is not the same in the different schools. The principles of one school cannot be introduced into another, unless this is done by the act of authority. Hanbali law contains no precise rule about mining concessions and a fortiori about oil concessions” (Saudi Arabia v Aramco, 27 I.L.R.117. 1954, pp. 162–163).

This decision shows a clear lack of knowledge of Sharia principles, which contain rules governing all types of agreements. Even if the Hanbali school did not have a rule on concession agreements, Islamic law is bigger than the interpretation offered by one school of thought and has the method of Qiyas that allows for resorting to other Islamic schools in order to solve a specific matter (see Chapter Two where Qiyas and other sources of Sharia were considered in further detail).

The law applicable to this case could only be the Saudi law. However, the panel still refused to apply it to this dispute on the basis that there are no legal regulations governing oil concessions in the KSA. This concession agreement was between a state and a private company, and therefore could not be heard under the rules of public international law since this applies exclusively to disputes between states (*Saudi Arabia v Aramco*, 1954, 27 I.L.R.117). The panel stated that “Any contract which is not a contract between states in their capacity as subjects of international

law is based on the municipal law of some country” (*Saudi Arabia v Aramco*, 1954, 27 I.L.R.117. p. 202).

Because of the nature of the dispute, international law was not applicable, while municipal laws were not applicable because of the principle of state sovereignty, which makes it unreasonable for a state to be subject to another state’s jurisdiction. So, the fact that the tribunal refused to apply KSA law and, instead, the UK and Swiss recognised practices were applied, may have impliedly considered the KSA as an uncivilised state (Al Saman, 2000). This might be considered discrimination against the KSA, as well as a misjudgement of Islamic law principles. The tribunal’s refusal to apply KSA law appears unfair because no law other than Saudi law can be seen to have any connection with the parties to the agreement. The concession agreement was made in the KSA, the contract was to be performed within the KSA’s jurisdiction and was given the force of law following its ratification and publication in the Saudi official gazette (*Saudi Arabia v Aramco*, 1954, 27 I.L.R.117.).¹⁵

5.4.1.4. Comments

The KSA’s relationship with Aramco was founded on each parties’ consideration of the other parties’ requirements. The US’s oil needs were realised by the KSA and, therefore, Aramco was enabled to operate in the KSA; Aramco understood the KSA’s need for money and organised loans and construction, as well as the training and employment of Saudi citizens (Baamir, 2010). If Aramco had agreed that SATCO should be given preferential treatment, this would have reduced the number of loans which it (Aramco) provided to the KSA, taking into account the substantial financial pressure that the KSA was under during that period (Holden, 1981). Nevertheless, Aramco refused the agreement for preferential treatment for SATCO.

Aramco and the KSA chose one arbitrator each and the Swiss national Georges Sauser-Hall was chosen by the arbitrators as the head of the arbitration tribunal. Mr Sauser was a well-known expert in international law and was also a member of the Permanent Court of Arbitration. In spite of his reputation, his appointment raised some questions regarding his knowledge of Sharia and the official language of the

¹⁵ No. 5737 of 09/04/1954.

concession agreement (Arabic) (*Saudi Arabia v Aramco*, 1954, 27 I.L.R.117). These concerns were not insignificant when taking into account one of the key points within the dispute, which was the interpretation of the parties' agreement. The issue was whether the Arabic word '*motlag*', in Article one of the agreement, is the same as the English word '*exclusive*', and whether '*moa'malat*' is the same as '*treatments*' (*ibid*). In order for a fair decision to be reached regarding the correct interpretation of these words, an excellent knowledge of both languages was necessary, which was something the panel failed to provide (Baamir, 2010).

The panel relied on the decision in *Petroleum Development Ltd. v Sheikh of Abu Dhabi* (1951) in order to not to apply a restrictive interpretation principle on the contractual commitment that a government owes to a private individual. However, this case cannot be relied on, since the nature of the dispute, in this case, was different from that of *Aramco v Saudi Arabia*. Unlike the KSA, Abu Dhabi was under UK control at the time and was thus not a sovereign state. This was evidenced by the fact that the UK government acted on its behalf in the Buraimi dispute with the KSA (Bin-Abood, 1992). Moreover, in *Petroleum Development Ltd v Sheikh of Abu Dhabi*, the arbitration tribunal, consisting of a sole arbitrator, stated that because Abu Dhabi was the place where the agreement was concluded and the place where it is to be exercised, the dispute should be governed by Abu Dhabi law. However, the Abu Dhabi law that was based on Sharia rule was then undermined when the sole arbitrator stated that:

"It would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments" (*Ruler of Abu Dhabi v Saudi Arabia*, 1956, pp. 251–252).

He applied English legal principles, claiming that they represented the common practices of civilised nations. Abu Dhabi law was rejected due to the claim that Islamic law had no general contract law (Kutty, 2006). That the *Abu Dhabi* case was cited by the *Aramco* tribunal shows the judge's lacked understanding of Islamic legal principles and their application in agreements where Islamic law is applicable.

The KSA's lack of experience, from the case submission, to arbitration outside the KSA, to compliance with the award, played a considerable role in its losing the case.

The dispute included a sovereign country and a private commercial party and, if it was to be heard today, it would be subject to ICSID arbitration rules and the KSA might well secure a better outcome (see Section Six below). SATCO should not have been brought in the matter by the KSA since it was a Saudi company and a private entity created in Saudi Arabia. Consequently, complete protection should have been granted to SATCO, as a Saudi company. As the KSA was in a period of establishing and updating its legal framework, errors such as this were common (Baamir, 2010).

Although the award found against the KSA, it delivered benefit in the sense of providing a useful lesson to it in respect to the structuring of its legal system (Al Saman, 2000). The KSA was encouraged by the award to be more cautious when concluding contracts with foreign entities, particularly when oil production was involved, and to avoid putting its national sovereignty at stake. The KSA indeed showed more caution when putting forward some reservations on its accession to the ICSID Convention (discussed below).

5.5. Resolution No. 58 of 1963

The *Aramco* award had a significant influence on KSA law and legal practice, especially aspects relating to ICA and commercial contracts. Following the *Aramco* case, a resolution was issued by the Council of Ministers in 1963 banning the government or its agencies from resorting to arbitration (Council of Ministers Resolution No. 58 of 1963). Prior to its issuance, the government had often used ICA to settle its disputes with private parties, both international and domestic (Al Saman, 2000). A Ministry of Commerce circular was issued in 1979 to supplement the 1963 resolution, imposing limitations on the recognition of arbitration agreements and clauses. The 1979 circular stated that any national company's inclusion of a clause in its article of association providing for arbitration outside the KSA shall be unequivocally void. It went further to reject any approval or registration of a company article of association if it includes such a clause (Ministry of Commerce, 1979).

5.6. Establishment of the Organisation of Petroleum Exporting Countries (OPEC), 1960

Following a number of awards concerning oil related disputes, oil producing nations desperately needed to protect their natural resources from foreign control taking the form of unjust concession agreements (Skeet, 1991). For instance, until the middle of the 1950s, the amount of money paid as petroleum tax to the USA was much higher than the KSA's percentage of its produced petroleum (Holdon and John, 1981). A ground-breaking idea was suggested by Perez Alfonso (the Venezuelan oil minister at the time) and Frank Hendryx (who was employed by the Kingdom's oil ministry since he had prior experience working with Aramco). Alfonso suggested the establishment of OPEC in order to protect national sovereignty over national oil fields and to regulate the sharing of profits with foreign concessionaires (Brower and Sharpe, 2003). Hendryx suggested that all oil agreements should be renegotiated from time to time when either one of the parties is no longer happy with it, or when the agreement becomes outdated due to a substantial change of conditions (Brower and Sharpe, 2003).

In 1960, OPEC was formed as a mechanism for collective self-protection and bargaining (Maugeri, 2006). This organisation empowered the process of bargaining for oil producers within the consumer-dominated market of the time (Griffin and Teece, 2016). Today, OPEC's power in controlling prices has diminished somewhat as a result of uncertainty and political instability, in addition to the large volume of oil that is produced by non-OPEC states. Nevertheless, the psychological effect of the organisation's statements is considered one of the biggest factors influencing the market (Griffin and Teece, 2016).

Some Arab states, such as Libya and Algeria, chose to engage in incremental participation when taking control over foreign company owned concessions in respect to their states' national resources, an approach which was thought to be both more technically beneficial and more politically safe (Alnasrawi, 1991). The KSA, by contrast, acquired full ownership of Aramco in 1980 as a result of their buying all of its assets from its US owners (Aramco, 2016). After the *Aramco* award, the KSA was encouraged to replace Western entities' control over its domestic oil, for a domestic concessionaire fully owned and controlled by the government. This was accompanied by the prohibition, on public policy grounds, of any international

investment in its oil industry (Brower and Sharpe, 2003). This might change in the near future if the KSA's implements its recent statements where it suggested opening the door to foreign investors so they may buy shares of ARAMCO, which is the world largest petroleum company (Guardian, 2017).

5.7. The International Centre for Settlement of Investment Disputes Convention (ICSID).

Saudi Arabia began transforming its economy in the 1970s, from relying completely on oil, to a more industrial and diversified economy, while also aiming to establish a petrochemical industry based on hydrocarbon (El Sheikh, 1984). Projects aimed at increasing foreign investment in the KSA would be unsuccessful if the economy's needs for flexibility with respect to regulations and adequate protection for these investments are not met (Nader, 1987). For instance, foreign investments require a just and neutral dispute-resolution mechanism where both parties are seen as equal before the law. To this end, a change began when, in 1975, the KSA agreed to resolve a number of disputes related to Private Investment guaranteed agreements, in addition to contracts and commercial transactions made by the KSA government in the US (Ocran, 1988). The KSA joined the ICSID Convention in 1979 and subsequently instigated a number of national amendments to its arbitration system in order to attract international commerce.

ICSID is an independent global entity closely connected with the World Bank. Member States of this Convention are also members of the World Bank. ICSID came into force in 1966, providing its members with recourse to conciliation or arbitration when a member state is engaged in investment disputes with a private commercial person, providing that such persons hold the nationality of another member state (ICSID, Chapter 2, Article 25). Reliance on ICSID facilities is voluntary, but a disputing party will not be able to unilaterally withdraw its acceptance, therefore all ICSID arbitration decisions must be enforced by all ratifying states (ICSID, Chapter 1 (3)). The recognition of ICSID jurisdiction was considered a significant tool for providing investors with the confidence they needed to continue with ongoing investments and as an instrument for attracting additional investment (Lew and Mistelis, 2003). The KSA ratified the ICSID in 1979; in the

following year, this Convention was incorporated into the law of the KSA by Resolution No 372.

According to Article 25(4) of the Convention, member states were allowed to inform ICSID of the type or types of claims that they might or might not submit for arbitration (ICSID, 1966). When the KSA ratified the Convention, it made reservations whereby all matters related to the KSA's sovereignty and public policy were excluded from being submitted to conciliation or arbitration at ICSID (Delaume, 1983). ICSID rules govern investment arbitration in the KSA, whereas the 1983 arbitration rule governed all commercial arbitration up until 2012, when the 2012 SAR came into existence.

The first investment arbitration dispute to take place after the KSA joined ICSID was *Ed. Züblin AG v Kingdom of Saudi Arabia*, 2003. The dispute was in relation to the construction of university facilities. At the beginning of 2003, a request was made by the Secretary General for the convening of an arbitral tribunal, but the parties settled the dispute before the arbitration panel was set up and the claimant requested the proceedings to be stopped, relying on Article 44 of the Arbitration Rules (case number ARB/03/1).

5.8. The Arbitration Regulation 1983¹⁶

The Arbitration Regulation 1983 was given effect by Royal Decree, through which the relevant articles of the earlier Code of 1931 were repealed (Royal Decree No. M/46 1983). Two years later a Royal Decree was issued providing the 1985 implementation rules for the Act. The 1983 SAR achieved two significant goals for the KSA government. Firstly, it contained general arbitration rules that were accessible to both foreign investors and their legal counsels. The 1983 Royal Decree was designed to remove concerns over the earlier absence of judicial and legislative encouragement for commercial arbitration (Allam, 1985). Secondly, the regulation created the state's control of the actual arbitration proceedings by requiring government agencies, courts, or quasi-judicial committees to supervise such proceedings (Allam, 1985).

¹⁶ These regulation articles are available on: *The Arab Quarterly*, Vol. 1, No. 3 (May, 1986), pp. 346-349. Available at: https://www.jstor.org/stable/3381756?seq=1#page_scan_tab_contents. Accessed on 12/01/2019.

The 1983 SAR provided a proper body of law that aimed to facilitate an effective and flexible method of resolution for international commercial disputes (Abdulrahman and Bantekas, 2009). For several reasons, there was no practical arbitration in the KSA prior to the issuance of the 1983 SAR and it only existed as a theoretical option. Neither arbitration clause nor agreements were recognised by the KSA courts at the time if the party had contractually agreed to arbitrate their dispute. In addition, if the court approved the agreements and clause, the enforcement of these arbitral awards was completely voluntary (Albejad, 1999). Accordingly, recourse to ICA in Saudi Arabia at the time was very rare. Second, the dispute between commercial and Sharia courts in regards to their jurisdiction over arbitration disputes resulted in the ineffectiveness and lengthiness of the arbitration process (Abdulrahman and Bantekas, 2009).

Three features of the arbitration procedure were particularly worrying and caused considerable concern among foreign observers (Allam, 1985). Primarily, despite the acknowledgement of contractual arbitration clauses in the 1983 SAR, its enforceability remained ambiguous if one party did not cooperate when disputes arose (Sayen, 1997). Neither was it certain the extent to which the KSA's law could apply to the substance of the dispute. The 1983 SAR also failed to stipulate the grounds upon which relevant authorities in the KSA could set aside an arbitral award (Sayen, 2003).

5.8.1. Enforceability of Arbitration Clauses

Two kinds of agreements were recognized by the 1983 SAR: (i) the arbitration of a current dispute in accordance with the parties' choice or (ii) an advance agreement for referring any future disputes to arbitration (Article 1). The 1985 Implementation Rule recognised, in article six, the validity of arbitration clauses, but the mandatory force of such clauses was questioned because the disputing parties were required to submit their arbitration documents to the relevant judicial authorities in order that they be validated (Article 5). Such documents had to include the names of the arbitrators, their consent to arbitrate in the dispute arising, the details of the dispute, and the signatures of both parties.

However, it was still unclear what would happen if one party, having given advance consent for the arbitration of disputes arising from a particular agreement, failed to cooperate with the other party in creating an arbitration instrument once the dispute occurred. It could be deduced from the provision of the 1983 SAR and the relevant timeframes and events, that the creation of an arbitration instrument is binding on both parties (Sayen, 2003). The 1985 Rule stressed the obligatory nature of an arbitration instrument, by making a distinction between an arbitration clause for future disputes and the selection of arbitrators, which is to be determined in an arbitration instrument by the disputing parties (Article 6). Different conclusions have been reached by commentators in regard to the legal effect of an arbitration clause (Saleh, 1984).

The 1985 Rule created confusion when empowering arbitrators to render a default ruling if either party failed to attend the initial hearing, “as long as the respective parties have filed their statements of claim, defences and documentation” (Article 18). If either party failed to cooperate in any phase of the proceedings, it was uncertain whether arbitrators would still be able to issue a default ruling. This lack of certainty in the drafting of the rule had to be seriously considered by foreign commercial entities, taking into account the earlier Saudi refusal to enforce arbitration clauses and the compelling questions regarding the validity of such clauses under Islamic law (Sayen, 2003). Under Islamic law, the legality of arbitration clauses could be challenged on a number of grounds. The agreement for future arbitration with no existing dispute might be interpreted as *gharar* (uncertainty), which is forbidden under Sharia contract law. In addition, the deferral of arbitration clause enforcement until the existence of the dispute between the contracting parties violates the doctrine that, according to the four Islamic schools, the arbitration clause’s contractual obligations are among the obligations that cannot be conditional (Al-Samaan, 2000). Nevertheless, the KSA’s official school of jurisprudence acknowledges the validity of contractual clauses provided they correspond with the purpose of the contract (Baamir, 2010). Principles of Sharia and its views on arbitration are discussed in more detail in Chapter Two.

It quickly became apparent that the 1983 Regulation and the 1985 Implementation Rule both contained sufficient uncertainty to enable any of the parties to delay proceedings. Article 7 of the 1985 Rule provided that “the authority shall issue a decision for approval of the arbitration instrument within fifteen days.” However, the

rules did not outline the course of action where authorities exceeded the assigned timing, which appears to be illogical and perhaps inapplicable if the instrument submitted had some required information missing. Also, if the authority was assumed to have the power to appoint arbitrators in such a case, both hearing and notice must be given when they are appointed (Article 10). The party seeking to avoid arbitration would then be given an opportunity to put forward their arguments concerning the validity of the arbitration clause and its applicability to the dispute and they could subsequently bargain over the various parts of the arbitration instrument (Sayen, 2003).

Furthermore, uncertainty was seen when considering the authority's potential intervention after the beginning of arbitration proceedings. This might happen in circumstances where one wished to replace arbitrators, or to hear challenges against them (Articles 10 and 12 of the 1983 Regulation). Article 37 stated that preliminary disputes concerning issues beyond the jurisdiction of the arbitration panel, such as criminal acts, would lead to the suspension of the arbitration proceedings until final judgment on the issue was heard from 'the concerned authority'. The possibility of the authority intervening in the arbitration proceedings after it had begun undermined the parties' autonomy, which is considered one of the core merits of arbitration. This led to a negative perception in the minds of foreign commerce actors who were discouraged from resolving their disputes under the KSA's legal framework.

5.8.2. Arbitrable Disputes

Generally, the arbitrability doctrine concerns whether the applied law of a particular jurisdiction allows arbitrators to solve the matter in dispute. Every jurisdiction bans certain disputes from being resolved through arbitration, resulting in these being litigated regardless of the existence of an arbitration agreement (Paul, 2003). In the KSA, relying on arbitration to solve a dispute is not limited to a specific kind of dispute. The 1983 Regulation covered a very wide range of civil disputes, making it a very comprehensive regulation (Article 1). However, Alassaf and Zeller (2010) argued that the claim that a single regulation was capable of, and appropriate for, regulating and resolving all internal, international, civil and commercial disputes is logically unreasonable. Therefore, arbitral disputes under the KSA's legal system

should be clearly drafted in order to enhance certainty within the KSA's legal framework.

This perspective was evidenced in Article 2 of the 1983 Regulation which prohibited certain disputes from being resolved under arbitration where conciliation was not permitted. Also, Article 1 confirmed the exclusion of matters from arbitration when conciliation was not allowed, but the legislator of the KSA's 1983 SAR failed to clearly identify the matters that could not be conciliated. Article 1 referred to limited subjects where conciliation was not permitted, such as Sharia limits and oaths after accusations of adultery. It also stressed that no dispute concerning public order should be accepted. Additionally, government agencies were prohibited from arbitrating their disputes before obtaining the Council of Ministers' prior approval (Article 14). Such a ban on government agencies entering into arbitration was issued by the council of ministers in response to the *Aramco's* award (Council of Ministers Resolution No. 58, 1963).

5.8.3. The Capacity to Enter into an Arbitration Agreement

The 1983 Regulation provided that the validity of arbitration agreements is limited by the legal capacity of the parties creating it (Article 2). The competent court provided authorisation to the natural guardian of minors, testamentary guardians, trustees and endowment administrators to rely on arbitration and, without such authorisation, they could not act. In contrast to other states, the KSA failed to clearly determine the legal age to act or enter into an agreement. Both Provision 2 of the 1983 SAR and the 1985 Rule stated that all arbitration members must be qualified and capable to be party to an arbitration agreement. However, it was still unclear what qualifications or capabilities those members needed to have, since both enactments failed to specify them. The Hanbali school of juristic thought, which is adopted by the KSA, has outlined the specific qualifications a party must have in order to enter into a valid arbitration agreement. These qualifications are (Samir, 2006):

- Reaching the age of puberty;
- No mental illness; and
- Never experienced bankruptcy.

The age of puberty in the KSA is not determined by a fixed age but, instead, the KSA follows the Sharia view which takes every case on its own merits. Therefore, the age of puberty varies from one person to another, depending on each individual's physical and mental maturity (Lerrick and Mian, 1987). There is also a difference in the age of puberty between males and females and, in some cases, it could be reached at a very young age in which the person would be incapable of rationally entering into commercial transactions (Çakmak, 2017). Therefore, the Hanafi school has fixed the age of puberty at eighteen years for males and seventeen years for females (Haddad and Stowasser, 2004). This being said, it is noticeable that the KSA requires all its nationals to obtain an independent identification card at the age of fifteen (The Agency of Civil Affairs, 2019) while, at the same time, preventing any KSA national from being employed in a public job until they reach the age of eighteen. Thus, it could be assumed that the age of puberty in the KSA is between fifteen and eighteen, depending on each person's physical and mental capacities. This area needs to be clarified by KSA legislators in order to create more certainty in the definition of when a person is legally capable of being party to an agreement. This would assist the KSA's judges in overcoming the issue of assessing the signs of puberty, which may differ from one person to another (Samir, 2006). Additionally, even if judges were able to decide on the 'age of puberty' (which might be quite young) the enforcement of this party's agreement in another country might give rise to public policy or contractual issues in that particular state (ibid). Consequently, in order for the KSA to have an internationally respected legal framework, these ambiguities needed to be clarified. Since a large number of contractual agreements contain international substance, parties to those agreements need an international set of rules to ensure that their rights are well protected.

5.8.4. Appointing Arbitrators

Both the 1983 SAR and the 1985 Rule listed a set of requirements that a person must comply with before being eligible to act as a member of an arbitration panel. The arbitrator must have experience in the matter in dispute and have a history of good conduct and reputation. Where there was more than a single arbitrator, the panel must be odd in number (Article 4 of the 1983 Regulation). Additionally, the arbitrator must be self-employed with Saudi nationality or at least a Muslim from

outside the KSA (Article 3 of the 1985 Rule). This article additionally stated that the arbitrator, or the chairman where there was an arbitration tribunal panel, had to be aware of the principles of Sharia and the laws and rules of the KSA, as well as any related customs or traditions. Several commentators believe that the Kingdom's 1983 Regulations suggested that the arbitrator had to be a Muslim man from the KSA or a foreign Muslim man (Abdulrahman and Bantekas, 2009). Such requirement had lessened the attractiveness of the KSA arbitration regulation and made foreign, non-Muslim parties wary of engaging in commerce with the KSA or any of its nationals.

The problem, nowadays, is that arbitrations are complex from both a technical and legal point of view. Consequently, excluding other nations' experts is a considerable drawback which made arbitrations in the KSA less attractive. The fact that an arbitrator must be a Muslim also had to be reconsidered, taking into account the principles of Sharia and its sources, since foreign decisions reached by non-Muslim arbitrators might not be enforceable in the KSA (El-Ahdab, 1999). This is because *Diwan Al mazalim*, the competent authority responsible for reviewing foreign awards at the time, generally viewed foreign awards rendered by foreign arbitrators with suspicion. This was evidenced in Case no: No. 101/1424 in 2003 involving a dispute between Saudi and French commercial parties, heard by an arbitration tribunal in Switzerland, where Swiss law was the applicable law as per the parties' choice. *Diwan Al mazalim* decided that such an award is null and void for violating the Islamic principles that prohibit Muslims from solving their disputes via non-Muslims parties (See Chapter Six).

Case No. 159/1416 in 1996 demonstrates a similar outcome. It involved a Saudi medical company and a Korean supply company who chose ICC rules as the applicable law of their arbitration clause and the UK as the seat of the dispute. *Diwan Al mazalim*, in its nullification of the subsequent award, stated that:

“Although the text of the arbitration clause is in the parties' contract; however, the basic rule in Islamic Law denies that the litigants can resort to the court or tribunal of non-Muslims, because resorting to non-Islamic Laws is considered non-belief, therefore, the arbitration agreement is considered to be nullified” (No. 159/1416, p 16).

Case no: No. 142/1409 in 1988 resulted in another, similar outcome. In this case, *Diwan Al mazalim* stated that:

“the parties have the right to refer their dispute to litigation even if they have a valid arbitration clause, since litigation is the primary method for settling disputes and arbitration is an exception, which itself has no bearing on public policy” (Baamir and Bantekas, 2009).

The suspicion of foreign awards indicated here was surely not related to ensuring Sharia was complied with but, instead, reflected a continuing hostility dating back to the Aramco award. Such awards, rendered by foreign or non-Muslim arbitrators and involving a Saudi party, are now enforceable under the 2013 Saudi Enforcement Regulation SER and the 2012 Saudi Arbitration Regulation SAR. These will be discussed in more detail in Chapters Seven and Eight.

There was also an issue concerning whether women could act as arbitrators. Neither the 1983 SAR nor the 1985 rule included any provision or guidance on the matter; however, there has never been a female judge or arbitrator in the KSA (Al-Fadhel, 2009). Although the 1983 Regulation did not expressly prohibit women from acting as arbitrators, the cultural practices of the KSA cannot be ignored, since they play a major role in defining people’s behaviour. Neither the regulation nor the rule prohibited women from relying on arbitration or acting as arbitrators and women are entitled to have full recourse to arbitration because they have a full legal right to perform and manage their own businesses (Al Jarba, 2001). Notwithstanding women’s legal status and the 1983 SAR’s silence on this matter, it was unclear whether courts would accept women as arbitrators in domestic disputes. In spite of the ambiguity of judicial practice towards women, it is notable that women’s status in the KSA has changed over recent years. One of the main reasons for prohibiting women from acting as arbitrators was their lack of qualification; however, this is no longer the case (Alassaf and Zeller, 2010). Saudi women have managed, in recent years, to acquire significant representation in the Consultancy Council and have won a number of seats in municipality elections after being allowed to stand under the Law of Municipal Councils, 2014. The fact that the 1983 law did not recognise their right to be arbitrators made it globally less attractive and, from a western point of view, backward.

5.8.5. Hearing Procedure

Article 5 of the 1983 Regulation stated that the competent authority must receive a submission of the arbitration agreement prior to the hearing. Once the arbitration agreement was accepted, the clerk of the competent authority would need to arrange a notification of the hearings (Article 8 of the 1983 Regulation and Article 9 of the 1985 Rule). He would inform the arbitrators and disputing parties of the decision and notify them of the hearings' time and location. Although it is in the process of being significantly developed, the postal system in the Kingdom remains inefficient, making delivery of court orders or notifications sent by post unreliable. The most efficient way of communicating notices in the KSA seems to be through telecommunications. Despite the efficiency of telecommunications, it was uncertain whether KSA judges would accept such methods. The method of communication used at the time was to inform the clerk of the competent authority who was empowered to seek the help of the police and mayors within their prescribed jurisdiction (Articles 11 and 19 of the 1985 Rule). This process of communication shows the extent of the courts' intervention in the arbitration agreement because the method through which notifications and other conditions were performed was identical to those used in litigation (Allassaf and Zeller, 2010). This may have resulted in depriving arbitration of its main qualities of being quick, confidential, and mostly relying on the parties' agreement.

Another significant issue in relation to the 1983 Regulation was the language of the hearing. In contrast to the Model Law, where parties are able to choose the notifications and language of the hearings, the 1983 Regulation stated that Arabic must be used (Article 12 of the 1985 Rule). Articles concerning the notification of parties in 1983 SAR demonstrated that most of these were introduced for domestic matters. For instance, a notification and hearings had to be in Arabic and any party to the dispute or arbitrator unable to communicate in Arabic had to be accompanied by a competent interpreter (Article 12 and 25 of the 1985 Rule). This then raised the question of whether these arbitration regulations had been introduced only to solve domestic disputes. Article 1 of the Arbitration Regulation 1983 unequivocally states that it was created to settle any dispute and it should, therefore, be applicable to all disputes, not just local ones. Article 15(c) of the 1985 rules declared that international corporations with branches in the KSA should be notified by way of

notice being delivered to its branch or agent. This indicates that the KSA regulations were introduced to solve national and international disputes alike. Yet, limiting the arbitration process to the Arabic language resulted in fewer agreements selecting the KSA as a *lex arbitri* (Alassaf and Zeller, 2010). This issue has been encountered by other countries in the region too. In 1999, Turkey eased language restrictions for foreign investors, in particular, for solving disputes resulting from concessions for public services and, as a result, the level of international capital investment in the country has since tripled (Brower and Sharp, 2003).

It is significant to consider the requirement that the arbitration tribunal should hear the dispute openly unless the panel or parties ask for it to be conducted in private (Article 20 of the 1985 Rule). This requirement for public hearings contradicted established arbitration principles. The main goal of having closed hearings is to ensure confidentiality for the parties, which is one of the main motives behind resorting to arbitration (Born and Born, 2012). The KSA's requirement for public hearings is to ensure that justice is served (Albejad, 1999). Such a requirement has its roots in, and has developed from, the KSA's judicial system and the Sharia courts law of procedure (Article 16). Although, in practice, the KSA's courts prohibits any person unrelated to the dispute from entering the court during hearings. This, again, shows a lack of certainty in the KSA's legal system, which was another reason for the lack of trust from international commerce in this system.

5.8.6. Issuing Awards

Once the dispute was ready to be settled, the tribunal would close the hearing for scrutiny and deliberations. The process of deliberation had to take place secretly and only the arbitration panel who attended the hearings had the right to attend (Article 38 of the 1985 Rule). During this process, the panel could hear no further clarifications from any of the parties unless they were both present. Additionally, no party was able to present documents to the tribunal unless the other party had been offered the chance to see it. If the documents were important, then the tribunal had the right to extend the award-issuing date and reopen the hearing (Article 40 of the 1985 Rule). If an extension was granted, the parties had to be notified regarding the date of further deliberation (Article 40 of the 1985 Rule). If no date was fixed, the award had to be declared in a period of ninety days from the date of the

competent authority's approval of the arbitration agreement (Article 5, 1983 Regulations). A majority vote of arbitrators could delay the time scale for the issuance of the award for reasons concerning the dispute. In practice, if the panel did not issue the award within 90 days, the dispute would be referred to the competent authority who would then make a decision (Article 15 of the 1985 Rule). This was another deficiency of the 1983 SAR that subjected the parties to the supervision of the court due to impractical timeframes.

At this stage, it is important to take into consideration whether an arbitration award was *res judicata* in the KSA. Disputing parties were empowered by the 1983 SAR to challenge arbitrators' awards within 15 days of the award being received (Article 18). This challenge had to be made to the competent authority. Any referral to the competent authority stressed, again, the extent of the courts' intervention in the process of arbitration in the KSA. Once the award became final, it was enforceable exclusively by order of the competent authority, provided the award complied with Sharia rules. The need for the competent authority's approval in respect to the award suggests that the drafters of the 1983 SAR intended to give any decisions made by arbitral tribunals less force than those decided by the judiciary (El-Ahdab, 1999).

After the competent authority's approval, the award became enforceable and, therefore, the clerk of that authority would send a copy of the execution decision demanding the execution of the award to the winning party and to all related government authorities and departments (Article 44 of the 1985 Rule). The competent authority responsible for executing foreign awards in the KSA was *Diwan Al mazalim*, which was given this role in response to the KSA's accession to the NYC, as will be discussed later (Article 13 of *Diwan Al mazalim* Law 2007). This is no longer the case since the 2013 Royal Decree established enforcement courts with the responsibility of executing all domestic and foreign awards (see Chapter Three).

5.8.7. Enforcing International Awards

With regard to the enforcement of foreign awards, the KSA's arbitration system was complex, since the reciprocity reservation was applied even between the NYC

ratifying states. *Diwan Al Mazalim* was enabled by Royal Decree to consider the enforcement applications of foreign awards in the KSA (Article 8(1)(g) of Royal Decree No. M/51). According to the procedural rules of the *Diwan Al Mazalim*, foreign awards were to be enforced in the KSA only if they met certain conditions (Article 6). Primarily, any evidence was to be presented by the party seeking enforcements, confirming the willingness of the award's jurisdiction to enforce the KSA's arbitral awards. Additionally, the same party had to demonstrate the award's compliance with Sharia rules, as enforced in the KSA. It was significant that foreign awards normally failed to comply with this requirement since common commercial practices include the application of *Usurious* interest, which is prohibited under Sharia principles and, consequently, their enforcement in the KSA was rejected (Group, 2007). In *Ninivo Company v The Redec Company* 185/2/q/149, the KSA court decided that the English court's award was not enforceable, notwithstanding the applicant's presentation of the British government's letter confirming the UK court's general willingness to enforce foreign awards. *Diwan Al mazalim* decided that, because of the letter's failure to guarantee reciprocity, the award would not be enforced. It is, nevertheless, important to note that *Diwan Al mazalim* considers the reciprocity requirement on a case by case basis, without being bound by prior decisions.

5.8.8. Public Policy in Saudi Arabia

Public policy provides the grounds upon which member states could reject the recognition and enforcement of awards (NYC section V). It is of considerable significance to arbitration, particularly when considering the enforcement of awards irrespective of nationality. Generally, an arbitration award is not enforceable if it fails to comply with the enforcing state's public policy requirements (Albejad, 1999). This applies in the KSA for both international and national arbitration awards, notwithstanding the fact that when national awards reach the enforcement stage, they would have already been carefully scrutinised by the competent authority (Abdulrahman and Bantekas, 2009). Therefore, the unenforceability of awards was very often applied to international awards, since KSA public policy was not clear and might cover a broad range of practices that were likely to be unknown to international arbitrators applying a non-Saudi *lex arbitri*.

When considering what amounts to a breach of the KSA's public policy, there is a real need to highlight the plurality of norms from which public policy could be inferred. Firstly, the principles and rules of Sharia do not appear to have a clear definition of what it encompasses under the KSA law. Nevertheless, several attempts were made to elucidate the public policy notion under both Islamic law and Saudi domestic law. Jalal argues that, under Islamic law, public policy is grounded in compliance with the general principles of Sharia, the Quran and Sunnah, in addition to the belief that "individuals must respect their clauses, unless they forbid what is authorised and authorise what is forbidden under Sharia law" (Jalal, 1998, pp 49). Asouzu, on the other hand, stated that the term public policy in Islamic law is 'the common interest' 'Masaleh Morsalah' (Asouzu, 2001, p46). Therefore, any principle advancing the common interest – i.e., the public interest – denotes public policy.

Another attempt to elucidate Islamic law as an effective norm for shaping the Kingdom's public policy was made by Alassaf and Zeller (2010). They argued that the KSA's public policy is founded on its Basic Law of 1992, which provides that the Quran and the Prophet's Sunna are the KSA constitution (Article 1). These sources, alongside the secondary sources of Sharia, such as Ijma and Qiyas, have to be taken into account by foreign lawyers when a Saudi national becomes party to a contract, since non-compliance with these sources would infringe the public policy of the KSA and lead to the rejection of awards or judgments (Gemmell, 2003).

The use of these secondary sources forms Islamic jurisprudence, an understanding of which is based upon the understanding and interpretation of these principles by religious scholars and judges (Abdulrahman and Bantekas, 2009). Since sources of Sharia form the basis of the KSA's public policy legal reasoning and, therefore, only Islamic scholars and judges are able to interpret them, any issue fully clarified by the Qur'an or Sunnah, will not be construed by the KSA's judges (see Chapter Two). However, previously, it was hard to know whether a particular foreign award was being rejected by a judge on public policy grounds, or even if the Kingdom's policy was limited to the Basic Law of 1992, the interpretation of which can, based on the individual analysis and the understanding of each judge, be either narrow or broad. That individual understanding can vary from one judge to another and from one time to another since no precedent is binding on a future judge (Alassaf and

Zeller, 2010). Consequently, ascertaining a list of issues that infringes the KSA's public policy is fraught with risk.

Alongside the norms of Sharia, the KSA's own regulations and ratifications of international conventions are another important norm that determines the essence of the Kingdom's public policy (Bühning-Uhle and 2006). The importance of local regulations in determining a state's public policy was highlighted by Redfern and Hunter, where they stated that:

“Public policy is based on the citizens in a given society and can be characterised as a single pattern, flow or path, often its most basic values that are embodied in domestic legislation; hence, each state has its own notion about what is required by its own public policy” (Redfern and Hunter, 2015. P 419).

Therefore, the term public policy is highly influenced by the state's domestic regulations, particularly those of a mandatory nature. Moreover, such regulations are largely associated with the notion of public policy, since the values that are advanced by such rules are normally of a public policy nature (Bermann and Mistelis, 2011). Courts could rely on mandatory rules to reject the enforcement of foreign judgments and awards on its being part of a state's public policy (Zhilsov, 1995). To that end, the KSA courts may interpret public policy widely to include all mandatory rules of the KSA. Accordingly, it is particularly important for any foreign party seeking enforcement in the KSA to ensure that the KSA's mandatory rules are not infringed. This is important because the lack of compliance with the KSA's mandatory rules would lead to the award's enforcement being rejected on public policy considerations.

The final norm influencing the Kingdom's public policy is society's common values (Urf). Such values are very influential in determining the scope of a particular country's public policy. This is because the formulation of a state's public policy needs to take into account the public values where such values define how public policy is to be perceived by business-men and -women from other states and cultural backgrounds. The importance of such values lies in their ability to ascertain the limit of what society would view as acceptable and such ascertainment plays a significant role in the success of transnational commerce (Gerston, 2014). Consequently, it is imperative for Saudi legislators to draft regulations that would enable the enforcement of Saudi perspectives on public policy in clearer terms

(ibid). Such regulations should highlight differences in position between Saudi Arabia and other countries when interpreting and applying public policy reservation, as per each state's societal values (Al Saman, 2000).

Furthermore, it is valid to say that a state's public policy would encompass the moral and social values of its society. Therefore, any infringement of a state's public policy would result in a direct and explicit breach of the legal text, in addition to the breach of that state's social and ethical values (Zaid, 2014). This is because the state's public policy includes a variety of aspects, from upholding trade and preserving the interest of those involved, as well as public interest at large. Accordingly, any detraction from such harmonious consideration would disturb the state's public policy in commerce (Brekoulakis and Devaney, 2017).

5.9. The Riyadh Convention 1983

The Riyadh Convention 1983 was ratified to meet the growing demand for Arab countries to liberalise their commercial legal frameworks for the purpose of allowing greater participation from international commerce (John, 2004). With the KSA being a signatory to both the Washington Convention and the NYC, the Riyadh Convention served as a method for recognising and enforcing judgments between Arab states in a manner similar to that provided for under the NYC member states (Mohd and Al Mulla, 1999). The Riyadh Convention is the Arab League's equivalent of the NYC, and covers more details, including court rulings and arbitration awards, thus making it a more comprehensive mechanism (Mohd and Al Mulla, 1999).

Article 37 sets out the basic requirements of this Convention, which starts with the requirement that all arbitral awards issued in one state be enforced and recognised by all others, although some exceptions are allowed. Grounds for non-enforcement include: void or expired arbitration agreements, incompetence of the arbitrator, the parties not being duly summoned to appear and the public policy considerations of the recipient state (Articles 28, 30 of the Convention). These exceptions have been relied upon by the KSA as grounds for the non-enforcement of awards rendered within the nations of the Arab League (John, 2004). These exceptions are similar to those specified in the NYC, particularly those concerning public policy, non-arbitrable disputes, incapacity and invalidity. Nonetheless, there are some

reservations in this Convention that are not specified by the NYC, such as the requirement for conformity with Sharia law. This is not expressed literally in the NYC, but it is implied because public policy in the KSA requires compliance with Sharia (John, 2004).

5.10. The Gulf Cooperation Council (GCC) Commercial Arbitration Centre

In 1993 leaders from the Gulf countries established this centre as a non-profit, independent institution (The GCC Commercial Arbitration Centre, 2016). The Centre was announced during the fourteenth summit of the GCC states, held in the KSA and with offices in both the KSA and Bahrain. In 1994 the centre's rules were published and became functional the following year (The GCC Commercial Arbitration Centre, 2016). It is the busiest centre in the Gulf area for arbitrating disputes because its procedural rules are in full compliance with the legal systems of member states (Alyaum Newspaper, 2003). Choosing the GCC Arbitration Centre is beneficial for international parties seeking enforcement in the KSA, since the centre's procedural rules state that:

“An award passed by the Tribunal pursuant to these rules shall be binding and final. It shall be enforceable in the GCC member states once an order is issued for the enforcement thereof by the relevant judicial authority” (Article 36, The GCC Commercial Arbitration Centre, 2016).

The rules of the centre also provide grounds upon which an award could be rejected, which include rendering an award with no arbitration agreement or following one that is void (Article 36).

5.10.1. The New York Convention 1958

The United Nations Convention on recognising and Enforcing International Arbitration Awards 1958, generally known as the NYC, obliges its member states to enforce an award rendered within any other member state. The NYC was ratified by the KSA in 1994, making it the 94th contracting state. One of its key features is the empowerment of its members to rely on the following reservations to reject the enforcement of an award rendered in another state (Article 5.2). The first reservation for refusing an award is related to the dispute's matter being incapable

of being settled through arbitration under the state's national rules (Article 5.2(a)). The second is related to awards being contradictory to the state's national public policy (Article 5.2(b)). Both grounds can be problematic, depending on how states apply them. Therefore, it is important to establish whether the public policy reservation includes the non-arbitrability of the dispute and, if so, whether it should be viewed as an independent reservation stemming from the one based on public policy. Redfern and Hunter (2015) argue that:

“making non-arbitrability a distinct ground for resisting enforcement is unnecessary since its subject matter is considered as forming a section of the notion of public policy specified in Article 5(2)(b)”.

This is problematic in the KSA context since the public policy notion is broadly construed by the KSA's courts, which may result in the Convention being ineffective. When considering non-arbitrable disputes under the 1983 SAR, such as those involving government agencies, it is clear that such disputes were also unenforceable on public policy grounds because, following the Aramco award, such agencies were prohibited from resorting to arbitration for public policy reasons.

The latter ground for refusal could be applied broadly because the KSA's public policy encompasses many aspects which could be relied upon to reject any award. Hence, there was an argument claiming that the ratification of this Convention by the KSA does not oblige it to enforce other state's arbitral awards (Roy, 1994). This is because of its broad interpretation of Article 5(b) which should, therefore, be narrowly interpreted in order for the Convention to be of practical effect (Roy, 1994). Roy (1994) contended that the KSA's accession to the NYC dealt with its historical resistance to foreign arbitration because it facilitated a method through which foreign arbitral awards were recognised and enforced and, hence, it achieved the KSA's ambition of modernising its arbitration system. At the same time, the Convention offered, in Article V (2) (b), a safe harbour wherein the KSA would not be obliged to recognise international awards that were against its public policy. This article enables the KSA to correspond with international arbitration standards and practices and still apply its national public policy. Consequently, this article enabled the KSA to achieve both its needs: the modernisation of its arbitration system to be consistent with international arbitration, while preserving its rigid interpretation of religious teachings (Roy, 1994).

As has been mentioned a number of times in this thesis, foreign investors and contractors encounter problems when deciding to conduct business in the KSA. The KSA's accession to the NYC aimed at increasing the confidence of foreign commerce entities in concluding business transactions in the KSA, while being assured of a fair arbitration to any arising disputes (Roy, 1994). Article III of the Convention also aims to provide assurance for foreign investors and contractors that an arbitration award issued in one of this Convention's ratifying states will be enforced in the KSA. However, the public policy reservation in the Convention seems to invalidate this assurance, by allowing the Kingdom to refuse all arbitration awards that violate its public policy. Since the KSA's law and policy is completely different to the laws of most contracting states, its courts will find it easy to refuse foreign arbitral awards in accordance with these provisions (Roy, 1994). In fact, the KSA could find itself not obliged to enforce any more foreign arbitral awards than it did before entering into this Convention (Roy, 1994). Article 5(2) (b) allows the KSA to achieve its aim of acquiring acknowledgement from the international community while keeping its historical laws and religious interpretations. As a result, this article works against the main purpose on which the NYC was founded. The Convention was written to provide the international community with a tool that demands contracting states to enforce other signatory state's arbitration awards, as is clear from Article 3. However, the broad interpretation of Article 5 provides contracting nations with the ability to avoid this obligation and refuse to enforce awards that they have agreed to uphold.

5.11. Enforcement Regulation 2013¹⁷

On 3rd July 2012, Royal Decree No. M/53 was issued, approving the SER, which came into force in February 2013. This was followed by the issuance of its Implementation Act of 2013 in the same month that the 2013 Regulation came into force (Royal Decree No. M/53). This implementation act was later amended, in 2017, to clarify some ambiguities of the 2013 SER. This enforcement regulation is the first unified enforcement regulation in the KSA. Before its introduction, there was no single legal framework governing the enforcement of decisions and awards within the KSA. However, there were a number of regulations dealing with the

¹⁷ These regulation articles could be accessed on: The KSA Ministry of justice website: Available at: <https://www.moj.gov.sa/Documents/Regulations/pdf/En/76.pdf>. Accessed on 12/01/2019.

enforcement process, such as *Diwan Al mazalim* Law 2007 and the Law of Procedure before Sharia Courts 2007; both have now been replaced by the 2013 SER (Royal Decree No M/78 of 1st October 2007). These developments are considered to have transformed enforcement procedures in the KSA, in addition to being an important step towards codifying the KSA's legal system and creating an attractive forum for enforcing both local and international awards and decisions.

This 2013 SER and its Implementation Acts of 2013 and 2017 contain provisions governing the entire process of enforcing awards and decisions reached inside or outside the Kingdom's territory. Consequently, this regulation influences both corporate and personal entities operating in the KSA or conducting business with a Saudi party, by controlling the enforcement process of their dispute resolution decisions (Royal Decree No. M/53). The 2013 law clearly describes the enforcement judge's roles and responsibilities in enforcing court judgments' and arbitral awards in the KSA. Article 2 of the Law enables the judge to "enforce and oversee the enforcement of all judgments and awards in KSA except for judgments and decisions related to administrative and criminal cases". This article further provides that an enforcement officer should lend assistance to the enforcement judge and it requires judges to abide by the Sharia court hearing procedures, unless otherwise provided in this law (Royal Decree No. M/53).

Before the 2013 SER and its Implementation Acts were issued, the competent court for enforcing both foreign awards and judgments was *Diwan Al mazalim*. This led to parties wanting to enforce their awards or decisions being caught in the rigidity and slow procedures of *Diwan Al mazalim*. Such procedures may even have resulted in the parties seeking enforcement being adversely disadvantaged (Shoult, 2006). This deficiency in the enforcement process has been addressed by the 2013 law enabling enforcement courts to enforce all awards within the KSA's jurisdiction. It also prevented judges from reviewing the merits of foreign decision requiring them to enforce such decisions if they met certain criteria as shall be illustrated in Chapter Eight. This, in turn, has limited the scope of judge's discretion in ascertaining whether a particular foreign decision is to be enforced or not. The 2013 SER has also created some certainty in the KSA, enforcement procedure whereby all decisions seeking enforcement in the KSA are to be subject to the same single enforcement framework. In addition, the legislation of the 2013 Regulation forms

another step taken by the Saudi legislature to codify its legal system and make it more accessible and attractive to foreign commerce.

5.12. Conclusion

This chapter set out to provide a historical overview of the development of laws as well as approaches to arbitration in the KSA. This included laws promulgated within the KSA by Royal Decree as well as regional and international instruments governing the arbitration process and its enforcement within the Kingdom. This chapter demonstrated the influence of the Aramco decision as the driving force for the codification of laws regulating arbitration in the KSA. It also highlighted the fact that the main factors inhibiting successful international commercial arbitration in the KSA were, (i) Sharia as the body of principles underpinning the legal system, and (ii) public policy constraints leading to the non-enforcement of arbitral awards. Both are inter-connected concepts not easily subscribing to the written law in view of the ambiguity surrounding their meaning, scope and interpretation. This, it is submitted, is the core challenge in attracting international commerce as well as its resolution through arbitration in the KSA and the main subject of this study.

This chapter also discussed the KSA government's attitude towards ICA, which was initially welcomed and relied on by the KSA to resolve its dispute with the ruler of Abu Dhabi, as evidenced by the Buraimi case in 1955. However, the Aramco case changed this attitude to a hostile one, since its outcome was considered by the KSA government to be a violation of its national sovereignty (*Saudi Arabia v. Aramco*, 1958). Consequently, the government's view of arbitration after the Aramco award changed and became more hostile. This hostile attitude did not last for long, as the world's increasing reliance on oil forced the KSA to adopt a more flexible attitude. This flexibility began when the KSA accessed the ICSID and the New York Convention in order to embrace internationally legal standards, which functioned as an attractive legal feature for international commerce. It also enacted the 1983 SAR and its implementation rule of 1985 in order to depart from this hostile attitude towards ICA. Nevertheless, Aramco's influence remained clear in the KSA's arbitration practice. This was clearly demonstrated in the state's excessive control over the arbitration process from its start until the enforcement stage. This resulted in the KSA's enactment of the 2012 SAR, with the goal of removing any legal

obstacles facing foreign investors, in order to gain their trust in the KSA's legal framework. This new regulation is discussed extensively in the following chapters.

Chapter Six: The Saudi Arbitration Regulation 2012: A Critical Assessment

6.1. Introduction

Following the previous chapter, which provided a detailed discussion of the development of arbitration regulations in the KSA, it is now imperative to critically assess the last enactment of the Saudi Arbitration Regulation 2012 (2012 SAR). With the continuous development in global commercial and international relations between states and business corporations, the legislative body of the KSA realised the need for change in the KSA's legal framework. This change is particularly needed to help create certainty in the KSA's legal system through the development of a codified legal system that is easily accessible to both local and foreign entities. With this aim in mind, more than ten regulations were introduced in the last decade alone, with the 2012 SAR and the Saudi Enforcement Regulation 2013 (SER 2013), being the most important enactments. The KSA's efforts to modernise its legal system were accompanied by considerable caution, so as not to influence the significant status of Sharia in the KSA's existing legal practices. Therefore, the present chapter, as well as Chapter Seven, will critically analyse the 2012 SAR and compare it with its predecessor, as well as other known international institutional rules, where relevant. Both chapters will also rely on the researcher's interviews with a number of relevant professionals in the field with the purpose of providing better insights into how this new law is being applied in practice. These interviews were conducted with five participants, including three judges and two arbitrators, and their views inform the analysis of the 2012 SAR (see Chapter One).

6.2. Sources of the 2012 SAR¹⁸

Drafters of the 2012 SAR made a conscious decision to rely on the UNICTRAL Model Law on ICA as the basis of this new arbitration regulation. This model is used by more than 80 states as the basis of their respective arbitration systems (UNICTRAL, 1985).¹⁹ It represents a common consensus on key arbitration rules

¹⁸ This regulation is available at: <https://www.wipo.int/edocs/lexdocs/laws/en/sa/sa057en.pdf>. Accessed on 19/01/2019.

by a large number of states employing different legal and economic systems. The model encourages member states to adopt it into their legal systems with minimum changes, which has led to some states adopting the same version (Al-Fadhel, 2010). The KSA has relied on this model as its starting point but introduced a number of important amendments to ensure that certain issues of domestic concern were effectively addressed, such as emphasising the compelling need for the arbitral process not to violate Sharia, as applied in the KSA (Al-ammari & Martin, 2014). This is done by enabling the enforcement judge to ensure that the award does not contain any element that would infringe the KSA's public policy, which is informed by Sharia. The KSA's public policy, as interpreted today by enforcement judges, is considered in detail in Chapter Seven. The KSA's approach towards the UNICTRAL model is justified by its desire to develop an attractive legal system accessible to, and reliable for both local and foreign commerce, while at the same trying to preserve its Islamic values. The UNCITRAL model is globally recognised by arbitrators and is also applied either fully or partially by numerous states. Therefore, its adoption into the KSA's arbitration regulation is likely to make it more attractive to foreign commerce. At the same time, the KSA's reservation of its right to uphold its public policy is a guarantee for preserving sovereignty over disputes enforced within its jurisdiction.

In this regard, participant 3 stated that “the fact that the new arbitration regulation is largely based on the UNICTRAL model makes foreign investors less worried about their lack of knowledge of disputes’ adjudication procedures in Saudi Arabia”²⁰. He further added that “one of the most important factors in attracting commerce both locally and internationally is the existence of a clear and reliable legal framework, as well as the existence of an independent arbitration centre that applies widely recognised legal principles”. This sentiment was also emphasised by participant 4, a senior judge in the Board of Grievance who is also in charge of reviewing and enforcing foreign awards. He stated that “the main feature of this new regulation is its compatibility with the developed world’s arbitration regulations, which are mostly influenced by the UNICTRAL model in one way or another”. Therefore, such compatibility has strengthened this new regulation and provided an additional economic feature to attract foreign investors, who will find this new

²⁰ Participant 3 is a previous judge and a practicing arbitrator.

arbitration regulation more in line with international practices than the old one. Although this sounds promising in theory, in practice things are still developing and it is yet to be seen whether this new regulation will successfully attract foreign commerce.

The KSA's emphasis on Sharia is understandable considering its legal system. Which is based on Sharia, unlike other Arab states that rely on Sharia alongside other sources in their issuance of legislation (Nesheiwat and Al-Khasawneh, 2015). It is also worrying to realise that Sharia is not codified and could not be resorted to in the form of listed rules, as opposed to the civil codes that exist in some other Arab countries such as Egypt, Jordan and Lebanon (ibid). The KSA, in the process of legislating new regulations such as the 2012 SAR, is attempting to create a codified legal body of rules that could be accessed by any interested party. However, when the regulation does not provide for a particular rule, or is silent about it, the legal rule on this specific matter will only be extrapolated by scholars of Sharia. This being said, it is important to note that the continuous development of regulations in the KSA, as well as its recent trend of publishing case decisions, means that most of the outstanding ambiguities are likely to be clarified with the passage of time.

6.3. General Provisions

We now turn to some important general provisions of the 2012 SAR with a view to highlighting some important changes from previous legislative enactments.

6.3.1. Arbitration Agreement

The terms "arbitration clause", "arbitration instrument" and "submission agreement" were first introduced into the KSA's arbitration practice by the 1983 SAR. This regulation made a distinction between two kinds of arbitration agreements – the submission agreement and the arbitration clause (Article 1, 1983 SAR). This distinction existed only in theory, while in practice they have both been used as if they were the same; this is seen in the fact that both types had to be redrafted into an arbitration instrument prior to their submission (ibid). This need for an arbitration instrument opened a window for the party who is looking to delay the arbitration, or

prevent it from taking place, to do so through a sustained lack of cooperation with the other party in the drafting of such an instrument.

This is no longer the case because the 2012 SAR has closed such a window through its clear definition of what constitutes an arbitration agreement. Article 1 of the 2012 SAR states that “An arbitration agreement may be in the form of an arbitration clause in a contract, or in the form of a separate arbitration agreement”. The 2012 SAR also provides that an agreement to resort to arbitration could be made before or after the dispute takes place and this could be made in a separate document such as an email or letter, or as part of the parties’ contractual agreement (Article 9). The parties’ reference to a different document in their contractual agreement – involving a clause for arbitration such as FIDIC – is sufficient to create a legally binding arbitration clause (Nesheiwat and al-Khasawneh, 2015).²¹ Article 9 (2) of the 2012 SAR stresses the importance of the arbitration agreement being in writing and states that “The arbitration agreement shall be in writing; otherwise, it shall be void”. The 1983 Regulation did not stress the importance of this being in writing, which could be justified if the law-makers believed that it is sufficient that the agreement has to be redrafted into an arbitration instrument before being approved (Article 1, 1983 SAR). Article 9 (3) of the 2012 SAR further stipulates the circumstances in which an arbitration agreement is deemed to be written and such circumstances are similar to those in the UNICTRAL model provided under Article 7 (UNICTRAL, 1985). This reflects the KSA’s changing attitude and its desire to become more in line with international standards in order to help achieve its goal of becoming an attractive and reliable legal system for both domestic and foreign commerce.

6.3.2. Severability

Another important development introduced by the 2012 SAR is the principle of severability, whereby the invalidity of the main contract does not invalidate the arbitration clause provided in it (Saleh, 2012). This is very important because, in a number of disputes, a challenge is made to invalidate the parties’ contract by arguing that the agreement has not been performed, the agreement is void or on other possible grounds. Without this principle of severability, as soon as the

²¹ FIDIC: International Federation of Consulting Engineers

agreement becomes invalid, the arbitration clause will also be automatically invalidated (Scanlon and Clare, 2007). However, with the severability principle in place, the arbitration clause is separated from the main contract in the sense that any invalidation of the main contract will not affect the validity of the arbitration clause (ibid). Article 21 of the 2012 SAR particularly introduced the severability of the arbitration clause principle by stating that:

“An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The nullification, revocation or termination of the contract which includes said arbitration clause shall not entail nullification of the arbitration clause therein, if such clause is valid.”

This provision introduces the severability principles in a similar way to that provided for by the UNCITRAL Model Law. Article 16.1 of the model law provides that:

“An arbitration clause which forms part of the contract and which provides for an arbitration under these rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause” (UNICTRAL Model, 1985).

This principle was not covered by the old law, despite its importance. This is indicative of the KSA’s effort to depart from the close-minded view on arbitration it used to hold, in an attempt to become more harmonised with internationally accepted standards.

In this regard, participant 2 stated that the new law is more open to recognising most internationally accepted principles, as long as they do not contradict Sharia.²² The default rule in this regard is that everything is permissible under Sharia unless there is a clear statement providing for the contrary. This participant further stated that “the severability principle is one of the most crucial and widely accepted principles and, as such, the KSA recognised it in its 2012 Arbitration Regulation”. This principle is very important because, with the increasing number of global commercial transactions, foreign commercial actors enter into contracts with their Saudi counterparts and, therefore, in some instances, the contractual agreements between them have some elements that contradict Sharia rulings. This makes them

²² Participant 2 is an enforcement judge in the capital city of Saudi Arabia (Riyadh).

invalid under Saudi public policy. As a result, unless the arbitration clause is severed from this contract, the foreign party may find themselves in a position where they have no recourse to arbitration under the KSA's legal framework, despite their agreement's arbitration clause. This issue has been resolved with the introduction of this principle in the 2012 SAR, thus creating a more reliable legal framework for attracting foreign commerce.

6.3.3. Institutional Arbitration

The 2012 SAR also enabled the arbitration parties to resort to any procedural rules, including those of international arbitration institutions, as long as Sharia rules were not infringed (Article 4 and 5, 2012 SAR). These institutions include, but are not limited to, the London's Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), and Dubai's International Arbitration Centre (DIAC). The application of these institutional rules would, straightaway, give them precedence in the case of any contradiction with the 2012 SAR procedural rules, provided they did not contradict Sharia principles (Harb and Leventhal, 2013). Therefore, it is important for the disputing parties to be aware that the application of such institutional rules may lead to the infringement of Sharia principles, which will make any subsequent award unenforceable in the KSA. The infringement of Sharia could take many forms, such as preventing the party from settling his case fully or cross-examining any witness and so on (Nesheiwat and al-Khasawneh, 2015). This openness to other institutional rules is in line with the KSA's jurisdictional view of arbitration since it allows disputing parties autonomy to determine how their dispute is to be governed, while stressing that such rights stem from state law. Although the currently-practiced form of jurisdictional theory in the KSA is less rigid than its predecessor under the 1983 SAR, the liberalisation of its regulation remains within the boundaries of such theory's scope.

In addition to the above institutional rules, the Saudi Commercial Arbitration Centre (SCAC) is one of the most attractive options for arbitrating because it guarantees enforceable awards that comply with Sharia, while simultaneously meeting international standards and the autonomy of the disputing parties. This was illustrated by participant 1, who stated that:

“the Centre is a perfect choice for both foreign and local parties to a

dispute, since it is in partnership with a well-known arbitration Centre in New York, which reflects that even foreign parties will be guaranteed an excellent and fair arbitration”.

He further added that the centre is aiming to fulfil the needs of the KSA’s markets as, according to him, “more than 70 million Saudi riyals are leaving the country annually for foreign arbitration centres”. Although this sounds promising, the work of the centre is yet to be seen in practice, since it has only been effectively working since the beginning of 2017. In the same vein, participant 3 stated that “the SCAC is one of the motivating factors alongside the new regulation that seeks to guarantee flexibility in the arbitration process and in the application and facilitation of institutional arbitration”. This participant is a former judge and a current arbitrator; he further believes that “the SCAC has the same features as those provided by most reputable arbitration Centres in the region and worldwide”. He stated that the SCAC has a list of qualified arbitrators in various legal fields and is able to conduct arbitration hearings in both Arabic and English with the ability to also provide instant translation in both languages. These factors are seen as good motivators for foreign businesses to invest in the KSA and chose the centre to settle any potential disputes.

6.3.4. Arbitrability

The 1983 SAR was rather vague when it came to determining arbitrable disputes, unlike the 2012 SAR, which provides a clearer view on the issue of arbitrability. Article 2 of the 2012 SAR provides that it “shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute”. The same article also excludes personal disputes and those that are not open for conciliation from being arbitrable, such as those of a criminal nature. This latter exclusion was firstly established by Resolution No. 58 and approved by both the 1983 SAR and the 2012 SAR (See Chapter 5). The 2012 SAR prohibits government agencies from referring to arbitration until the prime minister’s consent is acquired or until the Council of Ministers approves a new law permitting such referrals on a regular basis (Article 10 (2)). The exclusion of family law disputes was considered by participant 1 to be unrealistic, especially when realising that Islam urges people to refer to arbitration. That being said, he further stated that:

“you can understand the prohibition of arbitration in matters involving

*Ahwal shakhsiah (personal affairs) but in matters such as inheritance, which sometimes involve a complicated commercial enterprise, then this is where arbitration and other ADRs should be allowed.*²³

Another participant considered the prohibition on government agencies from arbitrating and thought that this was a very unclear matter, especially when considering the KSA's recent desire to transform its biggest oil company, Aramco, into a shareholding company (participant 5).²⁴ He said that "This is a particularly important matter because there must be a clear definition of what is considered a government entity". For example, it was the Aramco case that led the KSA to prohibit its government entities from resorting to arbitration without permission from the Council of Ministers. This was the case when the company was entirely owned by the KSA government, but if additional parties were to buy shares in the company, then it would technically become just a normal company, and it would resort to arbitration with no need for the Council of Ministers' consent. Therefore, it seems that this provision needs to be revisited if the KSA's plans to sell some of its Aramco shares to foreign investors are to be implemented.

6.3.5. Court Supervision

One of the main contentious issues facing arbitration parties prior to the introduction of the 2012 SAR was the Saudi judicial supervision of arbitration proceedings. This supervision was clearly stated in the 1983 SAR, whereby the entire arbitral process was supervised by the Saudi judiciary (Articles 5, 6, 8, 9, 10, 18, 19, 20, 22 and 23). This supervision was seen in a number of articles under the 1983 SAR, such as Article 5, which compelled arbitration parties to file their arbitration document with courts and to obtain their approval before initiating the arbitration process. The arbitral practices under the 1983 SAR were very complicated because the requirement for the court's approval of the parties' arbitration document implied that, in the absence of such approval, it was still possible for the dispute to be referred to court by one of the disputing parties (Article 5). If this occurred, the court would not be obliged to decline its jurisdiction over the dispute (1983 SAR, Article 5, 6, 7, 9 and 22). Another implication of the court's approval is that the court could

²³ Participant 1 is an arbitrator in the Saudi Commercial Arbitration Centre.

²⁴ Participant 5 is an arbitrator and a senior lecturer at one of the KSA's universities.

still nullify the arbitration tribunal award, simply because the arbitration document had not been approved by it. This was seen in a number of cases, such as Decision No. 53/1415 in 1994 and Decision No. 99/1415 in 1994, where arbitral awards in both cases were nullified by the competent authority at the time because these were made without the approval and the supervision of the court.

This requirement is no longer in force since the 2012 SAR provided in Article 26 that “[t]he arbitration proceedings shall commence on the day a request for arbitration made by one arbitration party is received by the other party, unless otherwise agreed by both parties”. This means that the parties could start their arbitration without the need to obtain any approval from the relevant court. In addition, the 2012 SAR compels courts to decline their ongoing jurisdiction, should parties wish to change their mode of adjudication and go for arbitration (Article 12). A similar provision is also provided for in the UNICTRAL model, while the 1983 SAR was silent on this particular matter (UNICTRAL, 1985, Article 20). Moreover, the 2012 SAR compels the KSA courts to decline jurisdiction over hearing any disputes involving a valid arbitration clause if this point is challenged in court by one of the arbitration parties (Article 11). This approach is in line with the UNICTRAL model law’s adopted approach and with domestic laws established in the region (UNICTRAL model, Article 8). For example, the UAE arbitration law of 2018 requires courts to reject any claim involving an arbitration agreement, even after the commencement of a litigation process (Article 8). On this subject, participant 3 stated that:

“this requirement for court approval in the old law was one of the main deficiencies that made the old regulation unfit for the 21st century. This is because arbitration now is more focused on upholding the principle of party autonomy and enabling them to shape their dispute settlement mechanism. The fact that the new law has removed this requirement and enabled the party with an arbitration agreement or clause to begin its arbitration when it wants, has brought the KSA’s legal framework more in line with international standards and made it more attractive for international commerce, which wants to keep the court’s intervention to a minimum”.

Whether this empowerment of the parties has motivated foreign commerce to invest in the KSA is yet to be seen, since those commercial actors want to see how this new regulation is implemented in practice. It is also important to note that when the

1983 SAR was introduced, it was thought that it would bring more certainty to the KSA arbitration practice and, as such, attract foreign commerce. This outcome was not achieved due to other limitations imposed by that law, which made the KSA arbitration regulation look backwards and unattractive for both local and foreign commerce. The courts' excessive intervention and the ambiguity over what constituted the KSA public policy were two of the most encountered limitations under the 1983 SAR. It is expected that the 2012 SAR will help to ease these limitations.

Furthermore, Article 20 (2) of the 2012 SAR provides that a challenge to the tribunal's jurisdiction could only be made within a certain time limit, which was considered necessary for the maintenance of the stability of the arbitration proceedings. Another important limitation on the court's intervention in the new law was also emphasised by participant 2, who stated that:

“the other feature that provides comfort for the foreign investor is the fact that the court's powers under the new law are very limited, meaning that the arbitral tribunal has the wider power and that after the issuance of the arbitral award the court's power is limited to the invalidation cases provided under the law.”

These limitations did not exist in the 1983 SAR which, in turn, resulted in the courts undermining the arbitration tribunals' decisions and, in some instances, reviewing and overturning their decisions.

This was clearly demonstrated in the case of *Jadawel International v Emaar Property PJSC No. 4713/1/G in 1425 [2004]*. This case involved an arbitration hearing that was commenced by Jadawel before an arbitral tribunal of three members, located in the KSA. Jadawel was seeking damages of US\$1.2 billion due to Emaar's breach of contract on a construction project. The arbitration process was too lengthy and took approximately two years but, finally, an award was issued in favour of Emaar; Jadawel's claim was dismissed and it was asked to pay the legal costs. Emaar submitted the award to the Board of Grievances for it to be enforced. However, the board held a different view, because upon reviewing the merits of the case, it decided not only to decline the enforcement of the award but to reject it and issue an enforcement decision in favour of Jadawel.

The 2012 SAR also increases the scope of the parties' autonomy, whereby

arbitration parties can really benefit from the merits of resorting to arbitration as a method of solving their disputes away from judicial intervention. It is strongly argued that one of the main reasons for resorting to arbitration is to uphold the parties' will, and this includes but is not limited to choosing the date the arbitration proceedings will commence, and the legal framework through which their arbitration should be dealt with and decided.

Furthermore, the 2012 SAR enables the arbitration tribunal to seek assistance from the relevant agency with regard to the arbitration process, including witness summoning or ordering the production of documents (Article 22). This article shows that both the arbitration panel and the court judges are meant to cooperate to enhance the success of the arbitration process. This is unlike the situation before the introduction of the new law, when judges seemed to give minimum regard to arbitrators, particularly those who were foreign or non-Muslims. That being said, the new law also upholds the court's power in the arbitration process, by enabling it to consider action for invalidating awards as per Article 8 of the 2012 SAR. This article specifies that only the Court of Appeal of the competent court is able to hear such claims, as opposed to the 1983 Regulation, which enabled the court of first instance to hear such claims, with the option of referring their decision to the Court of Appeal. Arbitration prior to the introduction of the new law was lengthy and enabled the party against whom enforcement was sought to rely on the court's intervention to lengthen the process further and deprive the other party of the benefit of adjudicating through arbitration.

The 2012 SAR emphasises the significant role of the KSA courts in the arbitration process since any breach of the arbitration procedure or infringement of the KSA public policy will result in the immediate court's intervention. This matter only applies in so far as the Saudi Law is applied; however, if the arbitration follows another legal system, then the KSA court's intervention is limited to ensuring the awards' compliance with the KSA's public policy (Harb and Leventhal, 2013). In this regard, participant 2 stated that "The new law strengthens confidence in arbitration practices since appeals are only allowed in local disputes, and in the event of a foreign award, it is only appealed in its country of origin and Saudi courts have no role in that regard". This shows that the KSA is doing its best to create a reliable legal framework that will instil trust in both local and foreign commerce, while at the same protecting its sovereign rights over awards rendered or seeking enforcement

in its jurisdiction.

Moreover, it is important to emphasise that in ICA conducted inside or outside the KSA, the court of appeal deciding the case in Riyadh will always have jurisdiction (2012 SAR, Article 8(2)). This development is also significant because it prevents cases involving international arbitrations from being heard by lower courts or by judges in some towns outside the capital city of Riyadh. This strategy could be very successful in attracting foreign investment to the KSA since their claims will be handled by specific appeal courts with judges who are well-trained in handling ICA disputes (Al-Ammari and Martin, 2014). The KSA government has heavily invested in ensuring that the Court of Appeal judges are receiving all the training they need (ibid).

That being said, it is important to note that most of the world's legal systems have some sort of supervisory powers over arbitrations conducted or seeking enforcement in their jurisdiction (Aleisa, 2016). However, the extent of such supervision varies depending on the state's view of arbitration. As stated earlier in Chapter Four, some states believe their sovereignty must be upheld over every legal matter in their jurisdiction and, therefore, impose excessive supervision thereby disadvantaging the arbitration process, as was the case in the KSA before the 2012 SAR. Some other states' view of arbitration is that it is a method of attracting more commerce and reliability to their legal system and, as a result, they aim to strengthen the arbitration party's autonomy while still protecting their fundamental belief through a limited degree of supervision.²⁵ The latter view is that which is currently in practice in Saudi Arabia, where court supervision has been limited to ensure that arbitral awards do not clash with the KSA's public policy. The rest of the courts' interference mainly takes the form of assisting the arbitration process, rather than monitoring it, as provided above.

6.3.6. Extended Jurisdiction

Although the KSA has been a member of the New York Convention for more than a decade, it nevertheless did not make a substantive distinction between domestic and international arbitration. Both the 1983 Regulation and its implementation rule

²⁵ This includes UAE and particularly the city of Dubai and Switzerland.

of 1985 have failed to draw a clear distinction between international and local arbitration and that, in turn, negatively influenced every aspect of the arbitration practice in the KSA (Ahdab, 2011). The importance of distinguishing between international and domestic arbitration under the KSA Law lies in the fact that the KSA courts have different criteria for dealing with the recognition and enforcement of arbitral awards when the arbitration is international (Aleisa, 2016). This is especially the case with regard to arbitration proceedings and the enforcement of awards. This lack of distinction was discussed by Saleh, who stated that one of the main issues concerning arbitration in Arab states was “the lack of distinction in status between domestic arbitration and international arbitration” (Saleh, 1985, p 283). He further said that “the effect in practice of this lack of distinction in the countries of the Arab Middle East is a ‘nationalisation’ of international arbitration, a kind of phagocytosis of the international by the local” (ibid).

The 2012 SAR, on the other hand, applies by default to all arbitral disputes taking place in the KSA. In addition, the 2012 SAR may apply to all other ICAs conducted abroad, if the disputing parties agree to apply it, something which the 1983 SAR did not provide for (2012 SAR, Article, 2). The new law states that, in order for an arbitration to be deemed international, it must meet the criteria stipulated in Article 3 of the regulation (2012 SAR). In this regard, Article 3 of the 2012 SAR defines international arbitration in a similar manner to that set out in the UNCITRAL Model Law (UNICTRAL model, 1985, Article 1 (3)). Therefore, it is now possible for parties to international commercial disputes involving the KSA to agree to apply the new law to arbitral proceedings, with a view to increasing the chances of the successful enforcement of an arbitral award in the KSA (Nesheiwat and Al-Khasawneh, 2015). This, again, shows the KSA’s commitment to liberating itself from the deficiencies embodied in the 1983 SAR in order to create an attractive legal system for international commerce. While doing so, the KSA continues to stress the importance of upholding its Islamic values by limiting every provision of this regulation with the requirement of compliance with Sharia.

6.4. Applicable Laws

6.4.1. Arbitration Procedural Rule

Arbitration systems nowadays, are assessed by the amount of autonomy and

discretion the parties have in selecting the applicable procedural and substantive laws for their arbitration. Unlike its predecessor, the 2012 SAR enables disputing parties to rely on any procedural rules they prefer, including those of international arbitration institutions, providing they do not contradict with Sharia and the KSA public policy (Article 25). Before the 2012 SAR was introduced, all institutional arbitration under the KSA's legal framework was automatically governed by the Chamber of Commerce arbitration rule. This chamber was the only arbitration institution in the KSA at the time (Ahdab, 2011). However, after the new law was introduced, the SCAC was established and equipped to handle all alternative forms of dispute resolution mechanisms, with the greatest focus on arbitration.

The 2012 SAR has further freed the parties from any procedural limitations, enabling them to refer their dispute to any arbitration institution. If the parties do not reach an agreement on such a matter, the arbitration tribunal should choose the procedures it sees fit, while taking into account the KSA's public policy (Article, 25). The effect of Article 25 is seen throughout the 2012 SAR, which frequently states 'unless the parties agree otherwise', thus reflecting the great credit being given to the parties' autonomy and discretion. This article also implies that the parties' choice of the rule of any international arbitration institution will automatically overcome most of the 2012 SAR default provisions, which is something that the 1983 SAR failed to provide for (Harb and Leventhal, 2013). That being said, it is mandatory under the 2012 SAR to respect the due process of the arbitration; all parties must be heard equally and given the opportunity to present their case in full (Article 27).

This right of relying on another procedural rule was also given in the old law, but with very undesired restrictions (SAR 1983, Article 39). Article 39 states that "The arbitrators shall issue their awards without being bound by legal procedures, except as provided for in the arbitration regulations and its rules of implementation...". In the case of any infringement of this article, there is evidence that the court would be willing to reject the arbitral award on the basis that both the 1983 SAR and its implementation rule of 1985 were not complied with. This was demonstrated in Decision No. 93/ T in 2001, which shows that the Board of Grievance rejected the arbitral award on the basis that the arbitral proceedings that were followed did not correspond with the ones provided for under the 1983 SAR and its 1985 implementation rule. This decision was analysed by Alsaman as follows: "The

officials based their rejection on the grounds that, since the Arbitration Code provides sufficient procedural rules, there is no need for foreign arbitration rules” (Alsaman, 1994, p 233).

The way in which such a provision was drafted reveals a lack of vision and appreciation of the principle of party autonomy and the evolution of law and practice. Apparently, the drafters of SAR 1983 did not foresee that the regulation would become outdated with time; the fact that arbitrators were limited by the 1983 procedural law and its implementation rule has resulted in the KSA’s arbitration regulation becoming less attractive with time. In addition, drafters of this provision seemed to be more influenced by a narrow interpretation of jurisdictional theory, which promotes upholding state sovereignty over domestic disputes, regardless of the disputing parties’ will. With the way commercial transactions are developing and the continuous growth in commercial activities, if this regulation had not been repealed it would have had a catastrophic impact on the KSA’s ambitions of attracting foreign commerce.

6.4.2. Default Procedural Rule

Even though, under the 2012 SAR, disputing parties are able to choose the procedural law applicable to their arbitration, this regulation still provides default rules to be applied when the parties do not have a prior agreement about such a law. This new regulation provides several procedural provisions designed to further facilitate arbitration and liberate it from its inherited limitations (Harb and Leventhal, 2013). Article 26 of the 2012 SAR states that the arbitration procedure starts when one of the parties receives the arbitration request, unless otherwise decided by the parties. The 2012 SAR also provides further instruction regarding how the notice should be communicated, stating that:

“Unless otherwise agreed upon by the parties to arbitration regarding notifications, the written notice shall be delivered to the addressee personally or to his designee, or to the mailing address specified in the contract subject of the dispute or in the arbitration agreement or the document governing the relationship addressed by the arbitration” (Article 6).

This new regulation further requires parties to raise any known violations of the new law within 30 days of their occurrence, otherwise, the right to invoke such a claim will be waived (Article 7).

This provision was considered by participant 2 as follows:

“the fact that the 2012 SAR requires parties to report any encountered violation of this regulation within 30 days is unrealistic, because this provision requires the 30 days to start from the day the violation took place, which may leave the other party with a much shorter period if he only knows about the violation just before the 30 days’ period expires”.

This provision is important since it guarantees certainty and ensures that the parties do not have an open-ended time-period in which to raise any violations allegedly encountered; this is something that could be resorted to by some parties in order to extend the arbitration period and negatively influence the arbitration proceedings. However, this provision should be reworded so that the violation could be reported within 30 days of the party becoming aware of it since otherwise this right will occasionally be waived before the disadvantaged party becomes aware of the violation. Furthermore, the new law allows, in a similar way to the UNICTRAL model, that one or more experts could be appointed for oral or written assessment on a particular issue and that the parties must cooperate and provide any information or documents needed by such expert(s) (Article 36). This being said, the most important provisions related to the default procedural rules were those related to the removal of the condition that the proceedings must be conducted in Arabic and the introduction of interim relief, which will be discussed next.

6.4.3. Language

One of the most important provisions introduced by the 2012 SAR was, perhaps, the removal of the prohibition on conducting the arbitration in any other language than Arabic. The 1985 implementation rule provided that:

“Arabic shall be the official language to be used before the arbitral tribunal whether at the hearing or in correspondence. Neither the tribunal nor the arbitrators shall speak any language but Arabic. The foreigner who cannot speak Arabic may bring an interpreter who will

sign with him the record of the interpreted statements from the session” (Article 25).

This shows that this regulation was never intended for international use, but merely for domestic use or regionally among the Arabic-speaking nations. It also reflects the short-sighted vision of the drafters of that regulation since, from that time, the KSA has been entering into major commercial transactions with global companies at both government and private business levels.

This condition for proceedings to be conducted in Arabic no longer applies, as under the 2012 SAR, Article 29 states that:

“Arbitration shall be conducted in Arabic, unless the arbitration tribunal or the two parties to [the] arbitration, agree on another language or languages. Such agreement or decision shall apply to the language of the written statements and notes, oral arguments and any decision, message or award made by the arbitration tribunal, unless otherwise agreed by both parties or decided by the arbitration tribunal”.

This means that the parties are able to select another language for their contract and, accordingly, conduct their arbitration hearings and issue their award in their chosen language and they will still be enforced in the KSA. Nevertheless, it is important to note that, if the parties want to employ a foreign language, they must state the selection of that other language clearly in the arbitration clause (Al-Ammari and Martin, 2014).

Alternatively, in the absence of such a clear choice, the default language will be Arabic as per Article 29 of the 2012 SAR. If a language other than Arabic is chosen, then the party seeking enforcement must submit to the enforcement court an 'Arabic translation of the arbitration award attested by an accredited authority' (Article 53(3)). This accredited authority must be one of the translation service providers accredited by the KSA Ministry of Commerce and Industry (Al-Ammari and Martin, 2014). In this regard, participants 2 and 5 agreed that such openness in the use of a foreign language as per the parties' wishes is a major development that will gain the trust of foreign companies, who would rather use a universal language such as English in their arbitration proceedings. Such trust in the 2012 SAR will mean that foreign commercial corporations will be more willing to invest in the KSA while, at

the same time, being able to conduct any dispute resolution in a language that they and their legal advisors feel comfortable with.

6.4.4. Interim Measures

The provision of interim relief is another significant feature introduced by the 2012 SAR; this is something that both the 1983 SAR Regulation and its implementation rule failed to provide (Aleisa, 2016). Article 22 of the 2012 SAR enables competent courts to order temporary or precautionary measures if either party or the arbitral tribunal request so and before the arbitration proceedings commence. The arbitral tribunal is also enabled, by the same article, to seek the competent court's help with whatever actions it needs assistance with, such as calling witnesses, the production of documents and so on. Participant 4 commented on this issue by saying that "arbitrators' power to resort to such interim measures is very important in advancing the arbitration practice in the KSA". The 2012 SAR empowers the tribunals further and enables them to take precautionary or temporary measures, subject to both parties' consent to such a procedure (Article 23). This was also viewed by participant 4 as a reflection of the party's autonomy in shaping arbitration proceedings under the 2012 SAR. The above two articles reflect important developments in the KSA's arbitration practice, since they enable both courts and the arbitral tribunal to pursue interim measures whenever required. In addition, such improvements in the KSA's arbitration regulations bring the country's legal framework closer to international arbitration institutions' standards, which have recently started to provide for such measures in their arbitration rules (Harb and Leventhal, 2013). For example, the ICC has clearly recognised such interim measures in Article 28 of the ICC rule of 2012.

This being said, it is important to note that the parties' application for interim measures before courts is likely to give rise to two contentious issues. The first is related to such an application being regarded as a waiver of the parties' right to arbitrate and this is a clear breach of their arbitration agreement (Redfern and Hunter, 2015). This issue has been viewed by most arbitration rules which confirmed that such an application does not affect the validity of the parties' arbitration agreement (ibid). In this regard, both the ICC in article 28 (2) and the UNICTRAL model in article 26(9) have been explicit in confirming that any

application for interim measures from court will not be considered as a waiver of the parties' agreement to arbitrate.

The second issue is related to whether such an application for interim measures should be made to the courts or to arbitration tribunals. This issue is entirely based on the applicable law and the nature of the measures sought. Some legal systems, such as the Swiss one, have empowered the arbitration tribunal by making it conditional for such measures to be sought from them in the first instance and followed by the issuance of orders for such measures or by seeking the court's assistance, where needed (Swiss PIL, Ch.12, s. 183(1,2)). However, some other legal systems, such as the English one, have no clear answer but depend entirely on the circumstances of the dispute, such as the urgency of it and the possibility of enforcing such an order if it were to be made by the arbitral tribunal (S 44 (3, 5)). The KSA, on other hand, has a clear view in this regard and only the courts are allowed to issue such orders. This reiterates the KSA's exercise of its sovereignty over arbitration disputes conducted within its territory.

6.4.5. Substantive Law

Arbitration parties frequently rely on ICA as a mechanism of resolving their disputes because it guarantees them more certainty and predictability regarding the legal framework governing their dispute resolution (Almeida, 2015). This certainty and predictability are vital for commercial disputes (ibid). ICA attempts to ensure a sufficient degree of predictability and certainty with respect to substantive matters by merging the choice of law clause with the arbitration agreement (Redfern and Hunter, 2015). The importance of these two elements was explained by the United States Supreme Court in *Scherk v. Alberto-Culver Co* (1974):

“uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”

This clearly demonstrates the important role played by the disputing parties when they choose the law applicable to the substance of their dispute. This role reflects the continuous trend in international commercial arbitration towards recognising the principle of party autonomy and its importance to the development of arbitration practices.

In this regard, the KSA's enactment of the 2012 SAR reflects its active effort to develop a friendly legal system whereby the principle of party autonomy is respected and recognised. Article 38 of the 2012 SAR provides that the arbitration tribunal shall:

“Apply to the subject matter of the dispute rules agreed upon by the arbitration parties. If they agree on applying the law of a given country, then the substantive rules of that country shall apply, excluding rules relating to conflict of laws, unless agreed otherwise”.

This article further enables the arbitration tribunal to apply the law most relevant to the dispute if the parties fail to select the substantive law that is most applicable. However, the fact that this article provides only for the application of the law of a country might raise some concerns regarding the applicability of other conventional, non-national rules. This matter of applying non-national rules was considered by the English courts in *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19 case, where the arbitration agreement took Sharia as the applicable law. Since Sharia rules are not national rules, the English courts decided that, as per the Rome Convention, it is not possible for two laws to govern a particular contract or for a non-national rule to do so; instead, a particularly defined national rule shall be applicable. Since the arbitration clause made reference to Sharia in general without specifying which aspects of Sharia were meant to be incorporated into the contract, English law was held to be the applicable law. Similar conclusions were reached by the English courts in *Halpern v Halpern* (2007) EWCA Civ 291 which made its way to the English courts of appeal. The court of appeal decided that the arbitration tribunal could refer to non-state rules or parties' considerations if this reflects the parties' choice and, consequently, an award based on such rules or considerations will be enforceable by the English courts (Chapter Four). This matter has not been considered by the 2012 SAR and it is not yet clear whether a similar approach to the one followed by the English court of appeal will be adopted or not. The researcher believes that, since the 2012 SAR has enabled disputing parties to select any applicable rules as long as they do not contradict

Sharia, it would mean that any application of non-national rules would not be problematic as long as such rules do not clash with Sharia rulings. This is particularly important when taking into account that the KSA is currently in the process of updating its national laws to be more attractive to international commerce. Therefore, it is unlikely that the KSA will reject the widely recognised non-national rules because such rejection would directly clash with its continuous attempts to modernise its regulation for the purpose of attracting foreign investments.

The 1983 SAR limited the applicability of foreign substantive laws and this was demonstrated in case No 155/T/4 of 1415 H (1995), in which the defendant (a foreign corporation) asked for arbitration to be held outside of the KSA. This request was denied by the competent court, which decided that the KSA law is the applicable law and, as such, the arbitration must be held in the KSA, following the KSA's law, as per the substantive law of the arbitration agreement. This right to apply foreign law to the substance of the dispute did not exist when both parties were from the KSA. This was clearly exposed by case 143/T/4 of 1412 H (1992), where both parties were KSA nationals and had mutually agreed to have their dispute solved through arbitration in Zurich following the ICC procedural rules. Since both parties were KSA nationals, and the subject matter of the dispute was related to the KSA, the arbitration clause was considered void on public policy grounds. This shows the outdated mentality governing arbitration practice in the KSA under the 1983 SAR and its implementation rule, which viewed every foreign arbitral element with suspicion, as discussed in Chapter Five.

Unlike this previous regulation, the 2012 SAR is open to foreign substantive laws, providing that such laws did not clash with Sharia or the KSA's public policy (Art 38). Although this is a major development from the situation under the 1983 SAR, there is a continuous and imposed limitation of complying with Sharia, which is quite problematic. This is because such a condition may render this new recognition of party choice ineffective, as both Sharia and public policy are very controversial terms when applied. Most of the world's legal systems recognise legal rules that do not conform to Sharia, as applied in the KSA; therefore, it is important that when the parties choose a foreign substantive law, they ensure that the award does not infringe Sharia or the KSA's public policy, or it will not be enforceable in the KSA. Although this restriction may look disappointing, it can be avoided by selecting an

arbitrator with knowledge of Sharia in the arbitration tribunal, who will then ensure that any subsequent award does not clash with Sharia. Even if the award involves elements that clash with Sharia, the offending element will not be enforced, but the remaining awards will still be enforced. This partial enforcement will be discussed later when considering the enforcement of arbitral awards in Chapter Eight.

6.5. Arbitration Seat

Normally, ICA is conducted in a neutral state, one in which the disputing parties are neither resident nor have a place of business (Redfern and Hunter, 2015). In practice, this implies that the law of the seat of the state where arbitration is conducted will normally be different from that which governs the dispute's substantive matter (ibid). The applicability of the law of the state hosting the arbitration is recognised in both the theoretical and practical aspects of ICA (Kaufmann, 1999). This arbitration seat concept has had an impact on the way that international conventions are worded, such as in the 1923 Geneva protocol to the New York Convention (Redfern and Hunter, 2015).

The law of the seat status in the KSA has been improved by the 2012 SAR, as it enables arbitration parties to choose their arbitration seat in either the KSA or outside of it (2012 SAR, Article 28). It may be argued that, as a result of this provision, the notion of party autonomy is appreciated and applied in this recent regulation, unlike the situation of its predecessor – the 1983 SAR. When considering the 1983 SAR, it is notable that the *lex arbitri* concept was not mentioned at all in any of this regulation's provisions, unlike the 2012 SAR (Aleisa, 2016). The 2012 SAR requires Saudi courts to acknowledge and enforce awards issued by foreign institutions outside of the KSA (2012 SAR, Article 4, 5). Yet, it is important to note that the position of the KSA courts has been of concern to foreign arbitral awards on the basis that there is a larger possibility that they will infringe upon Sharia rules (Sayen, 2003). This issue is of less concern following the enactment of the 2012 SAR, since the general attitude is now moving towards embracing international standards and, as such, foreign awards are likely to be enforced. In order to increase the potential of an award being enforced, parties to the dispute could select any of the Arabian Gulf states' arbitration centres or preferably the Saudi Commercial Arbitration Centre. This centre was not available

when the 1983 SAR was in force, but nowadays foreign and local commerce can utilise this centre, which was set up to strengthen the KSA's embracement of international standards. If some elements of the award contradict Sharia provisions then, as stated by participant 4, there will be a partial enforcement of the awards whereby such offending elements will not be enforced, whereas the remainder will. This issue will be discussed later when this thesis considers the enforcement of awards under the SAR 2012.

6.6. Arbitration Tribunal

Following the parties' decision to commence arbitration proceedings and the communication of the notice or request for such proceedings, selection of the arbitral tribunal is the next important step. Unlike national courts – before which parties can bring their claims any time they wish since they are fully formed standing bodies of law – an arbitral tribunal is established by the parties' will and, until they are fully formed, they have no jurisdiction over either the parties or their dispute (Redfern and Hunter, 2015). Therefore, selection of the arbitral tribunal is an important step in the success of the arbitration process and it must be carefully executed in order to ensure an effective adjudication (ibid). In this regard, both old and new arbitration regulations in the KSA have put forward provisions regulating the process of establishing the arbitral tribunal. The 1983 SAR was considered to be restrictive regarding the qualification and formation of arbitral tribunals. These restrictions were eased by the 2012 SAR in order to create an attractive arbitration system in line with international standards. The 2012 SAR's development with regard to arbitration tribunal provisions will be discussed next in terms of the tribunal's appointment, qualifications, independence and impartiality, challenges, fees and expenses.

6.6.1. Appointment of Arbitrators

As stated earlier, the selection of arbitrators is one of the most important phases prior to the commencement of arbitration proceedings. One of the most important features of arbitration is the parties' ability to select an arbitrator for their dispute without the intervention of a third party (Ahdab, 2011). In the KSA context, both the 1983 Regulation and the 2012 Regulation allow an arbitral tribunal to be formed of

one or more arbitrators, provided that the number of arbitrators is odd (Article 13, 2012 SAR, Article 4, 1983 SAR). Article 15 of the 2012 Regulation enables arbitration parties to agree on how to select their arbitrators in the way they see fit and this is also provided for in Article 11(2) of the Model Law of 1985. However, if they fail to reach an agreement, the 2012 SAR enables the court to decide on the matter (Article 15 (1)). Therefore, if the arbitral tribunal consists of a sole arbitrator, then the court will appoint him and must do so within thirty days of the petition submission date (Article 15 (3)). The 2012 SAR's empowerment of the court, enabling it to appoint a sole arbitrator when the parties fail to do so, is also provided for in other well-known institutional rules, such as Article 12 (2) of the International Chamber of Commerce (ICC) rule and Article 5 (8) of the London Court of International Arbitration (LCIA) rules. This, again, shows that the KSA is making a real effort to harmonise its domestic regulations so that they are in line with widely recognised international standards.

However, if the tribunal is formed of three arbitrators, as is mostly the case, each party will select one arbitrator and these arbitrators then appoint the third. In the event of one or both parties failing to appoint an arbitrator within fifteen days of receiving the petition, the umpire is appointed by the competent court (Article 15 (1)). Additionally, if the appointed arbitrators fail to assign the third arbitrator within fifteen days of their appointment, the competent court will also appoint an umpire within fifteen days of the petition submission date. The competent court's appointment of an arbitrator is not subject to any kind of appeal (Article 15 (4)). A similar provision was also present in Article 10 of the 1983 SAR, as well as in Article 11(3) of the Model Law. This being said, it is important to note that the 1983 SAR and its implementation rule of 1985 failed to specify a deadline by which both parties and the competent court had to appoint the arbitrators. This was one of the significant shortcomings of the old arbitration regulation since it allowed some dispute parties to rely on time wasting as a method of depriving the other party of the merits of resorting to arbitration as a fast dispute resolution mechanism.

6.6.2. Qualifications of Arbitrators

Most of the world's legal systems enable any natural person to act as an arbitrator, providing that the person has the required legal status (Redfern and Hunter, 2015).

The situation in the KSA is a little different since the KSA is entirely governed by Sharia rules, unlike any other state around the world. The way in which Sharia rules are interpreted determines the flexibility, or otherwise, of the KSA's legal system. This is reflected in the development introduced by the 2012 SAR which, unlike its predecessor, was legislated with a more flexible view of Sharia rulings. The 1983 SAR and its implementation rule of 1985, required an arbitrator to be either a Saudi Muslim male or a Muslim foreigner (Article 4 1983 SAR; Article 3, 1985 implementation rule). This short-sighted aspect of the regulation made it suitable only for domestic application or among Muslim-majority states. With the increasing development of international commerce and the lack of qualified arbitrators in the KSA, the application of this regulation became particularly impractical. Therefore, the 2012 SAR was enacted which successfully removed the religion and gender requirements; it required only that one arbitrator possess legal capacity, good conduct and a Bachelor degree either in law or Sharia. It also demanded that the chairman of more than one arbitrators' tribunals meet such requirements (Article 14).

The fact that the 2012 SAR did not mention the arbitrator's gender or religion as part of the arbitrator's qualifications raises contentious issues. Firstly, it could be argued that the arbitrator's religion is only important when there is a sole arbitrator since Article 14 only emphasises the importance of Sharia knowledge when there is a sole arbitrator or the chair of more than one arbitrators' tribunal. As a result, when there is more than one arbitrator, the disputing parties may choose two non-Muslim arbitrators, provided that the chair of the tribunal is Muslim. However, a contrary argument may be raised when considering the Sharia view of non-Muslim arbitrators.

In this regard, a distinction must be made over whether non-Muslim arbitrators will be appointed to adjudicate a dispute between two Muslim parties, or a dispute where one of the parties is not a Muslim. If the dispute involves a party who is not Muslim, the Sharia view is in favour of permitting non-Muslim arbitrators to adjudicate such a dispute (Alkhudair, 2011). This position stems from the view that arbitrators are not to be considered as judges and, as such, the requirement related to acting as judge do not apply to an appointed arbitrator (Alghannam, 2016). However, if the disputing parties are all Muslim and the dispute takes place within a Muslim territory, then a non-Muslim arbitrator is prohibited from adjudicating such

a dispute under the Maliki, Hanbali and Shafie schools of jurisprudence (Al-Kenain, 2000). However, the Hanafi school of jurisprudence allows a non-Muslim arbitrator to act as such on the basis that the other schools' views contradict with the following Quranic verse "So let the People of the Gospel judge according to what God has sent down therein" (Chapter Five, verse no 47). Therefore, parties to the dispute must be aware of this Islamic ruling because any infringement of this rule will make any subsequent award unenforceable the 1983 SAR. This is no longer the case under the 2012 SAR, which allows the enforcement judge to rely on any school's jurisprudence to accept the enforcement of an award (see Chapter Eight).

Another equally contentious issue, raised by the omission in Article 14 of the 2012 SAR, is the ability of women to act as arbitrators. Historically, Saudi women have never occupied the role of an arbitrator in the KSA due to legal and religious prohibitions. It was the 2012 SAR that gave women arbitrators hope regarding a change in their status due to the deliberate omission of the condition for an arbitrator to be a male, as stipulated in the 1983 SAR. This omission left the matter in the hands of the judiciary, who were tasked to decide whether or not to accept the appointment of a female arbitrator. Participant 2, who is an enforcement judge, when asked whether or not he would accept the enforcement of an award rendered by a female arbitrator, replied that "there is no legal basis at the moment for not enforcing it". He further stated that there is substantial scholarly debate over whether an arbitrator should be considered as a judge and that this debate determines women's status. If an arbitrator is not to be considered a judge, then there is no reason for preventing women from being arbitrators. However, if an arbitrator is considered a judge, with the same qualifications therein, then the matter is subject to various views, with the majority being in favour of disqualifying women from acting as arbitrators.

Nevertheless, it is important to discuss the Damam Administrative Court of Appeal's lack of objection to the appointment of Shaima Aljubran (a Saudi female arbitrator) to adjudicate a commercial dispute in May 2016 (Almulhim, 2016). This case was a breakthrough since it was considered by many commentators as an approval of women acting as arbitrators and a dismissal of the practice of disqualifying arbitrators based on their gender. In this regard, participant 2 stated that this decision brought more clarity to the issue and that, in the same way as in other developed states, the judiciary has the power to interpret any ambiguity in any

legislation. However, since the KSA is not a common law country and does not recognise the precedent system, the field is still open for another judge to rule in the opposite direction, based on his understanding of the 2012 SAR and Sharia principles. Commenting on this issue, participant 3 stated that:

“A lot has been said about this decision, but it is mostly imprecise because the issue that took place was regarding the parties’ appointment of their arbitrators as per Article 16 of the 2012 SAR. One of the parties (the defendant) failed to appoint his arbitrator and, as such, the claimant, who was looking to expedite the process, and in accordance with Article 16, asked the court to appoint an arbitrator on his behalf. The defendant replied by appointing a female arbitrator so, to be precise, the court ruling was not an approval of women’s appointments as arbitrators, but a confirmation that the claim, which is the court’s appointment of an arbitrator on behalf of the defendant, is over. It was over by the defendant’s appointment of an arbitrator, regardless of his/her gender and the court cannot hear any challenge against any arbitrator until the arbitral tribunal is fully formed”.

Therefore, it is clear that the judge was not concerned about the arbitrator’s qualifications, as long as he/she was appointed. It will be interesting to see what happens if the claimant challenges her appointment after the arbitral tribunal has been established. Participant 3, who was interviewed in September 2017, said that “I am not aware of any decision literally approving or disapproving a female arbitrator since the 2012 SAR came into existence”. This shows that the issue is not yet resolved; however, the fact that all of the participants thought that there was nothing to prevent a female from being an arbitrator, is indicative of the currently welcoming environment for women’s empowerment and equality.

6.6.3. Arbitrators’ Independence and Impartiality

It is a fundamental principle in international arbitration that arbitrators must remain independent and impartial with regard to parties and disputes (Steenkamp, 2007). This matter has been emphasised by both the 1985 implementation rule and the 2012 SAR, both of which require appointed arbitrators to have no vested interest in the dispute. The 1983 SAR did not cover this matter at all; its implementation rule

simply stated that it was one of the disqualifying factors for the appointment of an arbitrator, without clarifying it further (Article 4). The 2012 SAR, on the other hand, considered this matter in detail in Article 16 of the regulation. Article 16(1) states that the arbitrator shall have no interest in the dispute and must, from the day he/she is appointed until the end of the arbitration proceedings, declare (in writing) any situations that may raise justifiable doubts over his/her impartiality or independence, unless such situations have already been raised before the beginning of the arbitration proceedings. This provision is very similar to that provided for under Article 12(1) of the UNICTRAL Model Law 1985, which again demonstrates the KSA's attempt to move in line with internationally recognised standards. The legislature of the 2012 SAR shifted the focus from the selected arbitrator's gender and nationality to more important factors – their independence and impartiality. These two terms exist in almost every developed country's legal framework as, without them, the arbitration would lose its effectiveness and the parties would lose the right to fair adjudication.

6.6.4. Grounds for Challenging Arbitrators

Challenges to arbitrators were, at one time, very rare events. This is because, if a vacancy occurred, it was usually because of the death or resignation of an arbitrator (Redfern and Hunter, 2015). However, the last decades have witnessed an unprecedented number of challenges to arbitrators' appointments (Baker and Greenwood, 2013). A look at the statistics of the ICC (one of the major arbitration institutions) confirms that, in the period between 2000 and 2009, challenges were raised against 3.43 percent of arbitrators appointed by the parties (Ibid). Therefore, most legal systems and international arbitration institutions have set clear guidelines to govern the process of challenging arbitrators, to help ensure that the challenge is only accepted if there are genuinely acceptable grounds for it (Horn, 2014). The 2012 SAR states that an arbitrator should be treated as a judge in the sense that any factors that may lead to a judges' prohibition from hearing a particular case should also apply to arbitrators, even if none of the parties so request (Article 16 (2)). Article 16 further states that an arbitrator may be disqualified only if there is a circumstance that leads to a justifiable doubt about the arbitrator's impartiality (Article 16 (3)). The use of justifiable doubt as a measure for determining independence and impartiality is also provided for in Article 12 (1) of the UNICTRAL

Model Law, Article 24 (1) of the English Arbitration Act and Article 10 (3) of the LCIA rule.

The use of the phrase 'justifiable doubt' in Article 12 (1) of the UNICTRAL Model Law was viewed by some commentators as a sign of a clear will to introduce an objective standard for arbitrators' impartiality and independence (Caron and Caplan, 2013). The International Centre for Settlement of Investment Disputes (ICSID), on the other hand, took further measures to ensure the arbitrators' impartiality and independence by requiring them to sign a declaration confirming that there were no disqualifying factors, such as a vested interest in the dispute, before embracing the arbitration process (Article 57). The lack of this requirement, in the Saudi legal context, to sign a declaration would not affect the express obligation provided in Article 16 (1) that arbitrators must be totally independent and impartial. Article 16 of the SAR also prohibits a party from disqualifying an arbitrator appointed by them, unless reasons for this become known after the appointment (Article 16 (4)). Therefore, if a party knew of any circumstances that might disqualify an arbitrator prior to the commencement of the arbitration proceedings, but chose to ignore them, this would be considered a waiver of their right to disqualify the appointed arbitrator (Article 4, the Model Law 1985). This particular provision is important since it stops parties from treating arbitrators as their own agents and deprives them of any influence over the appointed arbitrator.

Moreover, an arbitrator could also be disqualified if they fail to carry out their duties or cease to do so in a way that would lead to an unreasonable delay in the arbitration proceedings (Article 18, 2012 SAR). This ensures that arbitral proceedings remain attractive in terms of the time taken for the adjudication, which matters a great deal to large commercial entities. This provision was derived from Article 14 (1) of the UNICTRAL Model Law 1985 and was included in most of the developed world's legal systems because it represents a situation of impossibility to act. That being said, it is important to note that all grounds for refusal included in the 2012 SAR are directly quoted from the UNICTRAL Model Law 1985 provisions. This reliance on the Model Law provisions shows the KSA's relentless desire to gain the trust of foreign investors by modernising its legal system and making it more accessible and reliable for any interested party.

6.6.4.1. Challenge Procedures

The 1983 SAR and its 1985 implementation rule were unclear regarding the procedure of disqualifying an appointed arbitrator. Although they stated that arbitrators must have no vested interest in the dispute, it was not clear from either the regulation or its rule which other factors could lead to the disqualification of an arbitrator and who could commence the disqualification procedure. This issue was considered by Article 17 of the 2012 SAR in more detail. Article 17 (1) of the 2012 SAR states that, in the event of the parties failing to agree on the disqualification procedure for arbitrators, the party wishing to disqualify an arbitrator must send a written statement providing the basis for this disqualification order within five days of becoming aware of the arbitral tribunal's formation. If this submission is rejected by the other party within five days of it being sent, then the arbitral tribunal is required to make a decision on the matter within fifteen days of receiving the disqualification petition. The party seeking disqualification can then take the matter to the competent court within 30 days, and the decision of the court is not appealable.

This article is derived from Article 13 of the UNICTRAL model, but with a slight amendment. Article 13 of the Model Law enables a party to send their statement within fifteen days, which is a more reasonable period than the five days provided for in the 2012 SAR. This five-day period was considered by participant 5 to be “unreasonable and disadvantageous for disputing parties since they will have a short time in which to ascertain and write the grounds on which the appointed arbitrator should be disqualified”. Article 17 (2) of the 2012 SAR states that a disqualification provision may not be accepted by the other party if this party has already submitted a petition for disqualification of the same arbitrator for the same reasons. Once a petition is submitted for the disqualification of an arbitrator, arbitral proceedings are to be suspended and any appeal of the tribunal's subsequent decision shall result in the same effect (Article 17 (3)). If the disqualification petition succeeds, then all of the arbitral procedure prior to this petition will be null and void (Article 17 (4)).

6.6.5. Fees and Expenses for Arbitrators

A party that enters into a litigation dispute is likely to incur lower costs than if the same dispute were to be heard by an arbitral tribunal. This is mainly due to the fact that the dispute parties not only pay for the cost of adjudication but arbitrators' fees, costs for the arbitration venue and the institution fees if the dispute is referred to one of the arbitration institutes (Redfern and Hunter, 2015). Generally speaking, arbitration fees are determined by the parties of the dispute and the appointed arbitrators, or by the institution hosting the arbitration proceedings in the case of institutional arbitration (Thacher and Bartlett, 2013). Both the 1983 SAR and 2012 SAR enabled parties to negotiate and agree on the arbitrator fees with their appointed arbitrator. They also empowered the competent court with the authority to appoint the arbitrator and determine their fees if the parties failed to do so. The only difference between the 1983 SAR and the 2012 SAR in this regard is that the latter imposed an obligation on the parties to conclude a separate contract with the appointed arbitrator, specifying their fees (Article 24). This shows that the relationship between the arbitrator and the party appointing him is contractually distinct from that of the disputing party's contract. Article 24 also states that if both parties fail to determine the arbitrators' fees then these fees shall be determined by the competent court. This court interference is of a supportive nature and only takes place if the parties do not exercise their right to specify the arbitration tribunal's fees.

The parties' right to appoint arbitrators is often misunderstood by some arbitrators. This was illustrated by participant 4, who stated that "We are faced in courts with cases involving arbitrators who do not understand the limits of their role since they believe that they are working for the party who appointed them because he is paying their fees". The payment is not directly made to them but to the competent court of hearing the dispute, as per article 22 of the 1983 SAR. Still, the fact that they were chosen by them and the price negotiated by these parties, resulted in the occurrence of unprofessional practice. He further states that, sometimes, arbitrators come to court to trace the enforcement of their arbitrated case and try and represent the party who appointed them in the enforcement courts. Such a lack of awareness is also seen in the fact that most arbitrated cases in the KSA fail to reach unanimous decisions, even if the disputed case is straightforward and lacks any real complications. When reviewing each party's decision, it appears that each arbitrator

decides in favour of the party appointing him. Participant 4 further believes that the main reason for this issue is a lack of qualified arbitrators who have the right legal background and are fully aware of the rights and roles in the arbitral process. This problem could be solved by assigning the role of appointing arbitrators and determining their fees to the competent court originally in charge of hearing the case. However, this would reduce the parties' autonomy and take away their right to decide how their dispute should be adjudicated. Alternatively, the legislature could set stricter qualification criteria for acting as an arbitrator, such as requiring a certain number of years' experience, in addition to the current qualifications stipulated in section 14 of the 2012 SAR.

6.7. Conclusion

This chapter addressed the significant developments introduced by the 2012 SAR and how such developments have brought the KSA's legal framework in line with internationally recognised arbitration standards. Harmonisation with these standards is likely to create greater reliability within the KSA's legal system and, as a result, remove some major concerns felt by foreign investors over subjecting their disputes to a backward and outdated legal system. One of the major developments introduced by this regulation was the advancement of the principle of party autonomy, as reflected in almost every section of this regulation. In many places, this regulation emphasises, through different phrases, the fact that party choice has precedence over any other standard rules, providing that such a choice does not infringe upon Sharia rules. This empowerment of the arbitration parties comes at the expense of the court's supervisory powers since the 1983 Regulation provided courts with more power than the dispute parties. The situation is now the opposite because disputing parties are now able to choose how their disputes shall be adjudicated while, at the same time, being able to resort to courts for any further assistance.

This new regulation has also, for the first time in the KSA's legislative history, introduced the principle of severability, whereby invalidation of the parties' contract will not affect the validity of the arbitration clause stipulated within it. This major development, in particular, exists in most developed states' legal systems and the KSA has finally adopted this internationally recognised practice (Redfern and

Hunter, 2015). Last but not least, the new regulation deliberately omits to specify the arbitrators' gender and religion, showing a significant departure from the rigid religious interpretations of women's status in arbitration. Looking at the developed world, it is clear that women are more than capable of not just deciding on a dispute, but accepting much larger responsibilities, such as deciding on international relations between states. Although the regulation did not expressly allow women to act as arbitrators, both judges and arbitrators interviewed for this research believe that such an omission is an implied recognition of women's ability to act as such. The 2012 SAR analysis will be continued in the next chapter, covering the following areas: issuing awards, recognising them and then enforcing them.

Chapter Seven: The Enforcement of Awards Under the Saudi Arbitration Regulation 2012

7.1. Introduction

Following the discussion of the arbitration tribunal and the applicable procedural and substantive rules for governing arbitral disputes under the 2012 SAR, it is pertinent to consider the mode of issuance of arbitration tribunal awards and what happens thereafter. This is very important, since reaching an award is the fruit of any arbitration process and, as such, both the way in which an award is reached and its contents will largely determine the enforceability of the award (Bermann, 2017). This is particularly relevant when considering the enforcement of an award in a country like the KSA which strictly applies Islamic Sharia rules. Therefore, this chapter will build on the comparative analysis of the 2012 SAR with its predecessor, the 1983 SAR, with particular focus on the award issuance and challenge process. In addition, it will discuss the process of recognising and enforcing any issued awards under both the 2012 SAR and the 2013 SER. To this end, this chapter will be informed by interviews with the same five research participants, in order to assess the practical influence of these regulations on the practice of enforcing awards in the KSA (See Chapter One research methodology details). This will then be followed by a critical analysis of the 2012 SAR implementation rule of 2017 and whether or not it has met the expectations of the KSA arbitration community.

7.2. Issuance of Arbitral Awards

Parties to an international commercial activity refer disputes to international arbitration, with the hope that an award will result from this process, unless a settlement is reached prior to the issuance of the award (Redfern and Hunter, 2015). These disputing parties also expect that such an award will be final and binding on both parties, with the possibility of appeals and recourse being in accordance with the law applicable to their arbitration agreement (ibid). Rendering awards and enforcing them in the KSA was one of the main deficiencies of the 1983 SAR, particularly in the case of foreign arbitral awards. It is, therefore, important to

see whether such deficiencies have been removed by the 2012 SAR because, if not, the KSA's goal of attracting foreign commerce will be hard to achieve.

7.2.1. Majority Voting

In arbitration tribunals with more than one arbitrator, different institutional and national rules have adopted different ways of regulating the voting process when issuing awards. The UNICTRAL model, for instance, provided in Article 29 that, when there is more than one arbitrator, the decision should be reached by a majority vote (UNICTRAL 1985). However, the same article made an exception for procedural questions, which are to be decided by the presiding party, if authorised to do so by the rest of the tribunal (Art 29). Article 39 of the 2012 SAR adopted the same position as that stipulated in the Model Law and addressed certain areas that were not considered by it. An example of such areas is seen when the arbitration tribunal cannot reach a majority vote, which is generally possible, particularly in construction contracts. This is mainly due to the fact that there are often various issues related to different claims and, as such, it is possible for each member of the arbitration tribunal to hold a distinct view on these various issues (*Tokios Tokelés v. Ukraine*, 2004 No. ARB/02/18). Commenting on this issue, Professor Sanders stated that “the arbitrators are... forced to continue their deliberation until a majority, and probably a compromise solution, has been reached” (Sanders, 1977).

The 2012 SAR, on the other hand, stated that:

“If members of the arbitration tribunal fail to reach an agreement and a majority decision is not attainable, the arbitration tribunal may appoint a casting arbitrator within fifteen days. Otherwise, the competent court shall appoint a casting arbitrator” (Article 39 (2)).

Although this solution might lead to the intervention of the court, this is only possible if arbitrators have exhausted all other options for reaching a majority vote or appointing a casting arbitrator. The ICC rule introduced another remedy for the failure to reach a majority vote by enabling the chairman of the arbitration tribunal to reach a decision alone (Article 31 (1), ICC Rules, 2012). Although this practice might seem odd, it is indeed better than losing the merit of arbitrating the parties' dispute due to the court's intervention, as proposed by the 2012 SAR. The ICC rule approach is also adopted by Section 20 (3) and (4) of the English Arbitration Act

1996, Chapter 12, s. 189 of the Swiss Private International Law Act 1987 and other institutional rules (Article 26 (3) LCIA Rules, 2014).

It is important to highlight that, in this regard, the 1983 SAR only provided that awards have to be issued by a majority, with no further details on what should happen when this option is not possible (Article 16). The 1983 Regulation also did not provide any rules on what to do with questions of procedure and who is entitled to decide them. Instead, Article 38 of the implementation rule of 1985 provided that the rules of procedure before the national court are applicable in this regard. Such a lack of procedural rules and the invitation of court jurisdiction on arbitration matters are an example of how the 1983 SAR is outdated and incapable of governing 21st-century disputes. It also demonstrates the improvement introduced by the 2012 SAR in developing the KSA's arbitration practice by bringing it in line with the developed world's legal standards. As a result, the KSA's attempt to attract foreign commerce is much more achievable now than under the 1983 SAR.

7.2.2. The Arbitral Award: Form and Content

The 2012 SAR specifies certain requirements that have to be followed in regards to the content and manner of deciding arbitral awards (Article 41 (3)). Such requirements exceed the ones specified in Article 36 of the UNCITRAL Model Law, despite being adapted from it. The 2012 SAR follows the Model Law in requiring awards to be in writing and signed by the arbitration tribunal members; nevertheless, it does not require all members to sign as long as most members do and those who do not sign are not obligated to justify their omission (2012 SAR, Art 42 (1)). The 2012 SAR always requires reasons for any rendered award, unlike the Model Law, which enables parties to agree otherwise (UNICTRAL, 1985 Art 36). In addition, any rendered award must contain the award date, the parties' names and addresses, the names and addresses of the arbitrators and also meet a number of other requirements (2012 SAR, Art 42 (2)). These requirements are related to arbitrations taking place in the KSA, or where the 2012 SAR is the chosen applicable law to the parties' dispute resolution.

The 2012 SAR also requires an original copy of the award to be delivered to the parties of the dispute within fifteen days of it being issued and this award must not

be published, unless otherwise agreed to by the parties (Article 43). The 2012 SAR further requires a party whose arbitral award was issued in a language other than Arabic to supplement it with a translation from an accredited authority. Moreover, it is important to note that both the 1983 SAR and the 2012 SAR require parties to deposit the arbitral award with the competent court. However, the 1983 Regulation required the party to do so within five days of the date of issuance (Article 18), while the 2012 Regulation allowed the parties more time, enabling them to do so within fifteen days (*ibid*). When considering both timeframes, it is clear that the 1983 five-day period was impractical because any extenuating circumstance could take place and prevent the party from doing so on time. The fifteen-day timeframe allows the party more time for translation and to deposit the award as required and, thus, makes the KSA arbitration practice more practical.

Article 45 of the 2012 SAR enables disputing parties to reach a settlement by requesting the arbitration tribunal to record the terms of their settlement and issue the arbitral award, including these terms, thereby ending the arbitration proceedings. A similar provision is also provided by Article 30 of the Model Law which, again, shows the KSA's attempt to modernise its arbitration framework through embracing international standards. The parties are able to request any clarification of the issued award within thirty days of its issuance, providing that proper notice of this request is communicated to the other party (Article 46). This provision does not clarify whether disputing parties are allowed to agree on a different timeframe, as provided by Article 33 of the UNICTRAL Model Law. The fact that the legislators of the 2012 SAR have adopted a similar provision to the one provided by the Model Law, then deliberately omitted the inclusion of this choice, demonstrates that they are not meant to agree. This, again, is a striking shortcoming in the new law that may jeopardise its attempt to attract foreign commerce, since it undermines the principle of party autonomy.

Article 46 (2) further obliges the arbitration tribunal to clarify any ambiguities stated in the party's clarification request within thirty days of receiving it and any subsequent clarification would be included in the original award. However, this might provide an opportunity for a party looking to delay the enforcement process, as they may submit trivial clarification requests in order to extend the adjudication time and disadvantage the other party accordingly. The 2012 SAR imposed an obligation on the tribunal to respond, which could be utilised by some parties as a

postponement tool. An alternative option would have been to follow the Model Law, which empowers the tribunal with the autonomy to decide whether such clarification requests are justified and respond to them or ignore them if they are merely time-wasting requests accordingly (Article 33 (b)).

Article 44 of the 2012 SAR introduced a unique provision that was not provided for in the 1983 SAR or the UNICTRAL model of 1985. This article obliged the tribunal to deposit the award and its accredited translation with the competent court within fifteen days of its issuance date. This requirement is very rigid and hinders the development of arbitration practice in the KSA because it may lead to undesired court intervention, even if the other party voluntarily complies with and enforces the award. The general practice of international arbitration demonstrates a common trend for the voluntary enforcement of arbitral awards with no need for the court's involvement. For instance, a study conducted in 2008 shows that only 11% of awards require the intervention of courts, while the rest are voluntarily enforced by the parties (Alwyn and others, 2008). A similar result can be observed in the ICSID, where the UNCTAD reported that most states had honoured their obligation in this regard (UNCTAD, 2014). Therefore, the requirement introduced by Article 44 is very unusual and does not reflect the common consensus of ICA practices, which aims to increase the parties' autonomy at the expense of the national courts' involvement. The researcher believes that the main reason behind such an unprecedented provision in KSA arbitration regulations is the legislature's desire to maintain some sort of sovereignty over arbitration by unnecessarily involving national courts. This would be understandable if one party refused to enforce or reject the award, in which case the court's intervention would strengthen the arbitration tribunal's award. However, the intervention of the court, regardless of the voluntary compliance of the party against whom enforcement is sought, shows that the arbitration tribunal's powers are being undermined under this feature of the 2012 Regulation.

7.2.3. Issuing Arbitral Awards Timeframe

The 1983 SAR made it compulsory for the arbitration tribunal to issue its award within 90 days of the start of the arbitration proceedings, providing that no other period was specified by the dispute parties in their agreement (Article 9). This

regulation also allowed for an extension to the 90 days' deadline, if this extension was made by the supervising court or the arbitration tribunal itself (Article 9). However, if the 90 days passes and none of the above extensions have been made, the disputing parties (or one of them) would be able to start another independent proceeding before the court that is already in charge of reviewing such disputes. This article made arbitration practice in the KSA very ineffective and made the court's intervention much more likely since either party could disadvantage the other by referring their dispute to the court as soon as the deadline was reached. This disadvantage could be seen most clearly in disputes involving major commercial corporations who did not want to be subject to the rulings of the court of another country's legal system. Therefore, the 90 days' deadline was not practical and even disadvantaged some parties who had complex arbitration cases. This is because arbitrators had to either rush to reach an award, which could possibly be wrong because they had had insufficient time to review all the evidence, or exceed the 90-day period and enable one of the parties to seek judicial adjudication.

On the contrary, the 2012 SAR provides that the "... arbitration tribunal shall render the final award, ending the entire dispute, within the period agreed upon by both parties. In the absence of agreement, the award shall be issued within twelve months from the date of commencement of arbitration proceedings", with the provision that the tribunal could extend it for a further six months (Article 40). This timeframe is more practical when hearing and deciding upon significant commercial cases than it was under the 1983 SAR. In this regard, participant 3 stated that the new law will diminish the possibility of errors in issuing awards, since arbitration tribunals will have enough time to study the case well before reaching a decision. The researcher views these time restrictions of both the new law and the old law from a distinct point of view, since some disputes can be settled quickly and, allowing them to go for twelve months with the possibility of extending them for a further six months, might be considered too lengthy and may disadvantage the party who is referring to arbitration from achieving a quick resolution of the dispute. However, in complex disputes, the new timeframe specified by the 2012 SAR seems to be reasonable. Therefore, it is crucial for parties to specify the timeframe of their arbitration in order to avoid the application of this regulation's default time restriction. This being said, it is important to note that the arbitrator does not have

to take the full timeframe, but rather this is the maximum time that it must take to reach an award.

7.3. Annulment of Arbitral Awards

Unlike clarifications or amendment requests, which are heard by the arbitration tribunal deciding the dispute, a party's claim for annulment is viewed by the competent authority originally in charge of hearing such claims (Article 46). Under the 1983 SAR, parties were empowered to make claims of annulment before the competent court of the first hearing and its decision was appealable to the competent Court of Appeal (El-Rayes, 2006). The same regulation did not specify the grounds upon which such claims of annulments could be made and parties, therefore, made these claims on any grounds they saw appropriate, even where such grounds were not necessarily valid (Al Fadhel, 2009). This uncertainty in the 1983 Regulation meant that the enforcement of arbitral awards was at serious risk of losing its importance and finality because the KSA courts would be able to decide on the dispute despite the arbitral tribunal's existing award (AL-Bjad, 1999). Fortunately, this is no longer the case; the 2012 SAR has restricted the hearing of annulment claims to the competent Court of Appeal and in international arbitral awards it is the competent Court of Appeal in Riyadh (Article, 8 (2)).

The 2012 SAR also provides, in Article 50, grounds for the annulment of an arbitral award, including: a lack of arbitration agreement, a void arbitration agreement, an expired arbitration agreement, a parties' lack of legal capacity, a parties' failure to present defence, the wrongful composition of the arbitration tribunal and several more. Even if one or more grounds of annulment exists and the party does not submit the claim of annulment within 60 days of being notified of the award, this right will be considered waived and the award will be final (Article 51). This time window for making annulment requests is more realistic than the one provided in the 1983 SAR, which stipulated in Article 19 that dispute parties must make such claims within fifteen days of being notified of the award. The fifteen days' period was too short and parties were not given enough time to evaluate the award and decide whether to make an annulment claim or not. This was another shortcoming of the 1983 SAR that made it unattractive for foreign commerce. This being said, after the claim of nullification is made, the award will be final if the competent

authority decides to uphold the award, but if its decision is to annul it, then this decision is appealable within 30 days of it being made (Article 51 (2)).

Another important provision introduced by the 2012 SAR was Article 51, which enables the party that has already waived their right of annulment prior to the issuance of the award to do so after the award is issued. This means that the party's waiver will not guarantee the automatic enforcement of the award upon its issuance, but a party may claim for the award's annulment as long as this is done within 60 days of being notified of the award. However, the 2012 SAR did not consider the situation whereby the party may wave such a right following the issuance of the award. In other words, it is not clear what would happen if the party did waive such a right after the award was issued, but then before the enforcement of the award and within the 60 days' annulment window, revoked the waiver and claimed for annulment. It is not clear from the regulation whether or not this is allowed. However, participant 2 commented on this issue and said: "I do believe that he is not able to do so because such a waiver would have already been communicated to the other party, arbitration tribunal and maybe the enforcement court". The researcher believes that the party might be able to revoke such a waiver as long as he does so within the 60 days and the waiver could be communicated to the relevant parties.

7.4. Recognition and Enforcement of Arbitral Awards

After the award is rendered and the time for appeal has passed, the winning party would expect the other party to perform the award, either voluntarily, as is normally the case, or by a court order (Moses, 2017). Under the 2012 SAR, this stage would form the end of the arbitration tribunal's powers and, as such, the enforcing party would have to take control of the enforcement process (Aleisa, 2016). Before expanding further on the 2012 SAR's view of awards recognition and enforcement, it is important to highlight the position of the 1983 SAR in this regard. Article 20 of the 1983 SAR implementation rule of 1985 required the competent court's ratification before the award became enforceable. This ratification process enabled the court to review the merits of the case and consequently undermine the arbitration tribunal award. This review may lead to the issuance of a different decision to the one made by the tribunal, as seen in the case of Jadawel

International (Saudi Arabia) v. Emaar Property PJSC (UAE)²⁶. This ratification process was disadvantageous to the disputing parties since it deprived them of the main benefits of resorting to arbitration, such as effectiveness and speediness in the adjudication process. A number of cases revealed that dispute parties had suffered from delays in the enforcement process caused by this ratification requirement (Decision No. 18/1416, Decision No. 57/1414, 1994).

This is no longer the case under the 2012 SAR, which provides in Article 52 that “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”. This is a remarkable development in the new regulation since it gives arbitral awards the same weight as judicial rulings and, as a result, arbitral awards are final, subject to any nullification appeals. This limitation on the court’s intervention increases the scope of the party’s autonomy, which is an important factor in modernising the KSA’s legal system in order to attract foreign commerce (Article 50 (4)). The 2012 SAR further requires certain documents to be tendered before the execution order is issued, including an original or attested copy of the award, a copy of the arbitration agreement, an authentic translation of the foreign award into Arabic and evidence that the award was supplied to the competent court when it was issued, as per Article 44 (Article 53). The same regulation requires the competent court to ensure that the award does not clash with previously rendered judgments in the KSA, does not violate the KSA’s public policy or Sharia rulings and is effectively communicated to the other party. This being said, it is important to note that, where there is a partial infringement of the KSA’s public policy or Sharia rules, the award will be severed and the violating part of the award will be rejected (Chapter Five).

After providing all of the required documents and fulfilling the enforcement requirements, the award, whether domestic or international, will be issued with an enforcement order. This will then be followed by the final stage of the enforcement of the order, which is carried out through the enforcement courts in accordance with the 2013 Enforcement Regulation (Aleisa, 2016). This regulation and its relation to the enforcement of awards will be considered in further detail in the next section.

²⁶ See chapter Five for more details.

7.4.1. Saudi Enforcement Regulation 2013

One of the most important developments introduced in the KSA in the last decade is the Saudi Enforcement Regulation 2013 (SER). This regulation came into force in 2013 to form the first unified Enforcement Regulation in the KSA's legislative history; it is one of the most developed enforcement frameworks in the entire region²⁷. Although the 1983 SAR and the 2012 SAR had a few provisions governing the enforcement of arbitral awards, these provisions were very limited. The process of enforcing awards, or the conditions of such enforcement, are stipulated in detail in the 2013 SER. With both local and foreign judgments and awards being governed by a single regulation that could be easily accessed by any interested party, the process of enforcing awards in the KSA has become much clearer and more reliable which, in turn, is likely to attract both local and international commercial actors.

7.4.2. Enforcement of Local Awards

Apart from criminal and administrative disputes, the enforcement judge is empowered to decide enforcement disputes, no matter how big and complicated they are. He is also empowered to seek the help of the police or another government agency to ensure the parties' compliance with the enforcement judge's decisions (Article 2, (3)). The power of the enforcement judge to enforce arbitral awards and decisions is crucial since the 2012 SAR obliged the enforcement judge to enforce all arbitral awards with an enforcement order unless the award violated Sharia rule or the KSA's policy (Article 52, 2012 SAR). These grounds for refusal are very problematic when considering foreign awards, while for local awards the practice shows that such awards were completely in compliance with the KSA's public policy and Sharia rules even before the 2012 SAR came in to force (El-Ahdab, 2011). Furthermore, Article 9 of SER 2013 obliges the enforcement judge to enforce arbitral awards when being presented in an enforcement document. This shows that the SER 2013 has limited court's intervention to the minimum possible level in locally rendered awards since such awards are not expected to violate Sharia or the KSA public policy; as such, their enforcement is compulsory. In this

²⁷ See Chapter 3 for more details

regard, participant 2 states that “locally rendered awards get enforced as soon as they reach the enforcement judge, providing that all the necessary documents are provided”. This elucidates the benefits of arbitration being conducted in the KSA by Saudi arbitrators who are aware of Sharia rules, as well as the KSA’s public policy, as this guarantees a quick enforcement of their awards.

If the issued enforcement decision does not satisfy one of the parties, they may appeal the Enforcement Judge’s decision and, as a result, the enforcement would be suspended (Article 10). The Court of Appeal’s decision will be final and parties will have to abide by its decision. Participant 2 asserted that “appeals are frequently made by the party against whom enforcement is sought to postpone the process of enforcement”. But he added that:

“the process of appeal does not take much time now since the appeal will not consider the merits of the case but would focus on any mistake in the procedure followed by the enforcement judge or any violation of the 2013 Enforcement Regulation provisions”.

This shows that the drafters of the 2013 SER realised the importance of party autonomy and, as such, confined the court’s role in enforcing arbitral awards if they are compatible with Sharia rules or the KSA’s public policy. This speed and lack of restrictions in enforcing locally rendered awards is likely to attract foreign businesses who seek enforcement in the KSA to adjudicate within its territory.

7.4.3. Enforcement of Foreign Awards

In addition to the New York Convention NYC and the other regional conventions that were ratified by the KSA, the Enforcement Regulation in 2013 is the most important legal framework for enforcing awards in the country (Chapter Four). This regulation has developed the practice of enforcing foreign decisions by providing clear provisions that deal with such enforcement. Drafters of this regulation have further provided in Article 14 that:

“Judgments, judicial orders, arbitral awards, and attested documents issued in a foreign country shall be presented to the enforcement judge in charge of enforcement of foreign judgments to ascertain that the document fulfils the conditions required for enforcement and affix the seal of enforcement thereon”; and after making sure that the

conditions in the award intended to be enforced, the judge puts the seal of enforcement, including the phrase 'judicial decision'.

This seal of enforcement will inform the relevant authorities of the winning party's right to enforce the award.

Article 14 of the 2013 SER shows the legislature's attempt to facilitate the enforcement of foreign awards by requiring a special judge, who is well aware of arbitral enforcement proceedings, to handle these awards in the enforcement court. These judges are chosen on the basis of their knowledge of the KSA's international legal obligations in term of its ratified international conventions and bilateral treaties, as well as being able to uphold the principle of reciprocity (Aleisa, 2016). In this regard, Baamir, who is a well-known arbitrator and academic author, suggested that "Saudi Arabia needs specialised arbitration courts with highly trained judges and staff and these arbitration courts should be branches of the commercial courts" (Baamir, 2016, p 225).

On the contrary, the researcher holds a different view which is based on what he witnessed during his visit to the enforcement court in Riyadh, when he saw special care being taken over the enforcement of foreign awards and judgments. This care was in the form of assigning specifically chosen judges with knowledge and experience of the international and local legal frameworks that govern the process of enforcing such decisions. Therefore, Baamir's suggestion in this regard might further regulate the matter, but it would not have much practical benefit since there are already specialised enforcement circuits in the enforcement court performing the same function as Bamir's proposed arbitration courts. The researcher, on the other hand, believes that what is needed is to separate the enforcement of foreign awards from foreign judgments, since assigning them to the same judge may result in them being treated the same. Instead of the current system, these enforcement circuits should be divided into those that deal with foreign awards and those that deal with foreign judgments because awards and judgments have different procedural rules for issuing and enforcing. For instance, the enforcement of a foreign award in KSA requires the competent court's approval in order to be rendered enforceable, whereas the foreign judgment is enforceable without such a requirement. Alongside the many other differences between them, the researcher's argument for separating their enforcement is likely to increase the consistency of

the enforced awards and develop the KSA's legal framework for enforcing foreign awards in a way that will be more attractive for foreign commerce.

7.4.4. Conditions for Enforcing Foreign Awards

In order for these specialised enforcement court judges to enforce foreign awards, the principle of reciprocity must be established and, once it is established, the following requirements must be complied with (S11, Enforcement Regulation 2013). Firstly, the KSA's courts must have no jurisdiction over the dispute and, if the KSA court jurisdiction could be established, then the enforcement would be rejected. Secondly, the award must have been rendered following proceedings in compliance with the requirements of due process and the award must be in its final form, as per the law of the seat of the arbitration. This means that, any breach of the law of procedure upon which the arbitration was conducted or any award still subject to appeal, will not be enforced. Thirdly, the award must not contradict a judgment or order issued on the same subject by a judicial authority of competent jurisdiction in KSA. This is a very important requirement since it might be very difficult for a foreign arbitrator to determine whether the issued awards contradict an already established judicial decision in the KSA. This is hard even for Saudi arbitrators, since not all judgments are published and, as a result, this requirement must be clarified to avoid any inconvenience to the party seeking enforcement. The issue might not be problematic in the future because, since 2014, the KSA has been publishing a number of reports containing court judgments. This has been continued year on year, so if these publications endure and as time passes, there will be enough precedents to refer to to ensure a lack of conflict in the KSA's locally rendered judgments.

Finally, and most importantly, the award must not contain anything that contradicts the KSA's public policy (S11, Enforcement Regulation 2013). What exactly constitutes the KSA's public policy has always been controversial for foreign arbitrators because it could mean many things. Therefore, this controversial principle will be discussed in more detail in the following section. This will then be followed by a detailed discussion of the principle of reciprocity, in order to help gain a deeper knowledge of these two important principles for the process of foreign award enforcement.

7.4.5. Public Policy

The term public policy is considered to be one of the most controversial and complicated legal issues in the world because of its connection with states' domestic legal systems, which regulate the social interest of the states' communities, as well as the states' interest in upholding their national policies (Aleisa, 2016). Therefore, the state's public policy and its role in upholding it are connected with its sovereignty over its territory and the application of its legal and moral norms within its jurisdiction (Born, 2001). As a result, most domestic regulations and international conventions and treaties governing the enforcement of foreign decisions have identified the importance of public policy and allowed states to make reservations so as not to enforce any decision that violates its public policy (ibid).

Due to its obvious importance, the KSA has made a reservation on the enforcement of foreign awards if they conflict with the KSA's public policy, as per Article V of the NYC 1985. This was also stressed in both the 2012 SAR and the 2013 SER whereby, in many instances, the legislature emphasised the need for compliance with the KSA's public policy (Article 38, 50 and 55, 2012 SAR). For this reason, the KSA has stopped enforcement courts from reviewing the merits of foreign awards or judicial judgments while, at the same time, empowering them to ensure that such decisions do not violate the KSA's public policy (Article 50 (4) 2012 SAR).

It is important to note that, prior to the introduction of the 2013 SER, the term public policy had no legislative definition and, as such, it was left to judges to determine what formed the KSA's public policy and whether it had been breached. This resulted in a number of conflicting decisions whereby similar cases received different decisions from the Board of Grievance, the competent court in charge of enforcing foreign awards at the time (El-Ahdab, 2011). This contradiction was demonstrated in a case involving two Saudi parties which was arbitrated by non-Muslim arbitrators due to the parties' choice of arbitrator in their dispute in the USA, France and Austria. This arbitration was upheld by the Board in decision number 43/1415 in 1995. However, in a different case, where both parties were also Saudi nationals who chose to arbitrate their dispute in Zurich, in accordance with the ICC

rules, the court made a contrary decision to the case above and decided that, on public policy grounds, the arbitration clause was null and void (Decision No. 143/1412 in 1992). This decision was commented on by the Board of Grievance's review committee as follows:

“This dispute is subject to Saudi law and the arbitration clause providing for the settlement of the dispute by means of arbitration in Zurich under the rules of the ICC is null and void. Regardless of its contradiction with the Saudi law of arbitration and its Implementing Rules, this is an attempt to eliminate the jurisdiction of the Saudi judiciary over the dispute, which is against the public policy of Saudi Arabia” (ibid).

This shows that the judiciary's interest was considered to be part of the KSA's public policy and that such interest is not defined such that it is difficult for parties to avoid violating it. This shortcoming created more controversies and prevented parties from enforcing their awards, delaying their rights of resolution (Wakim, 2008).

The uncertainty over the KSA's public policy has been reduced with the introduction of the 2013 SER, which defined public policy in Article 11 (3) of this regulation implementation rule as “Islamic Sharia rules”. Although this definition is a very important development in this regard. Still, the term ‘Islamic Sharia rules’ remains a very wide area that cannot be easily ascertained by foreign arbitrators (Seyadi, 2017). Commenting on this issue, participant 2 stated that: “the KSA's public policy is violated when Sharia rules are violated and the difference in the interpretations between the schools of jurisprudence will not affect the enforcement of a particular award”. He further added that “an award may be rejected if the award violates Sharia scholars' ijma (common consensus) even if such violation may not be considered so from some scholars' point of view”. This shows that Sharia rule is meant to include all the different Sunni views of Sharia and, where such schools have agreed on a particular ruling, any opposition from some scholars will be disregarded when determining what constitutes the KSA's public policy.

The matter was further elaborated on by participant 3, who stated of the KSA's public policy: “from my point of view the rules that are well recognised and applied in the Kingdom even if not written, provided that they are derived from the Kingdom's constitution, which is Sharia”. He believes that this could be ascertained by the judge and that such a matter would not have one right answer, but many

right answers, depending on the facts of the award. This statement reflects an outdated line of reasoning because it implies that the court will have to review the facts of the case, as opposed to the provisions made in the 2012 SAR. This line of thinking could be attributed to the long-standing application of the 1983 SAR, which instilled such reasoning in the minds of Saudi arbitrators and enforcement judges.

A more realistic view was taken by participant 5, who believes that “the Kingdom’s public policy has been problematic for a long time and, despite the good introduced by the 2013 SER, it nevertheless created another dilemma by simply defining it as Sharia rule”. He believes that the KSA’s public policy entails more than Sharia rule since it involves the KSA’s social, economic and religious interests which must be upheld when enforcing an award. He claims that a clearer definition of public policy in the KSA will address all of these elements and how not to violate them. The researcher believes that the Sharia rules which form the KSA’s public policy will become much clearer as time goes by and more arbitral awards are enforced in the KSA. This is because different cases will trigger different issues which have to be addressed by the enforcement court which, in turn, will result in a clearer view of what constitutes the KSA’s public policy.

Having said this, it is important to emphasise that there are currently positive signs that the KSA is willing to create more certainty in this regard. One of the most important signs is the KSA’s numerous regulations, which have been legislated in the past five years with the aim of creating a reliable legal system that would attract foreign commerce (Gulf Legislation Network, 2018). Such legislations demonstrate a continuous review of the legislative body in the KSA to the current regulations and the attempt to remove any shortcomings that may disadvantage the country’s legal system.

7.4.6. Reciprocity

Despite the fact that the KSA is party to a number of regional and international conventions for the enforcement of foreign awards, it has always reserved any enforcement of a foreign award with the principle of reciprocity. Alongside the reservation stipulated in s. 11 of the Enforcement Regulation of 2013, the KSA’s Government also presented its reservation when they joined the NYC (1958) on

19th April 1994. The KSA made a reservation on the enforcement of foreign awards with the need to prove the existence of reciprocity, as per Article I (3) of the NYC (1958) (see Chapter Four).

This reservation has historically been a cause of uncertainty because it was not clear what would establish such a principle before the Board of Grievance, which was the competent court in charge of enforcing such awards (AL-Firyaan, 2007). Some practitioners argued that it was not clear whether the mere reference to the KSA's ratification of any convention to which another state is also a party will suffice to establish the existence of the reciprocity of the other state (Ghaith, 2016). Otherwise, the party seeking enforcement will have to provide evidence of a Saudi judgment being enforced in that state, which is sometimes an impossible condition to meet. Unfortunately, this view was adopted prior to the 2012 SAR and the 2013 Enforcement Regulation when the Board of Grievance was in charge of the enforcement of foreign awards. This resulted in a number of enforcement decisions from the UK and the USA being rejected, despite such countries being members of the NYC. This was demonstrated in case No. 115/D/A/15 in 2008, which involved a British award that was rejected for violating the KSA's public policy and for failure to prove reciprocity.

Since the introduction of the 2013 SER, this is no longer the case since Article 11 (5) of its implementation rules provided that "The enforcement judge shall verify that the state in which the foreign award or order was issued, reciprocates with Saudi Arabia by an official statement from the Ministry of Justice". Thus, the burden of proof for such evidence has been shifted to the enforcement court, which has to enquire from the Ministry of Justice whether reciprocity exists between the KSA and the country from which the award was rendered. This is problematic because the ministry has no officially accredited list of the state's reciprocating its decisions (Aleisa, 2016). As a result, the ministry's failure to provide an answer to the enforcement court is likely to cripple the enforcement process unless the party seeking enforcement can establish evidence of such reciprocity themselves, as was the practice before the 2012 SAR. Al-Ammari and Martin suggested a solution to this issue by stating that:

"Arbitration awards issued by tribunals seated in countries that have ratified either of those conventions should satisfy the requirement of reciprocity since Saudi Arabia has ratified those same conventions"

and has acquired similar reciprocal rights” (Al-Ammari and Martin, 2014, p. 404).

Al-Ammari’s view relies on the KSA’s appreciation of international conventions, which is evidenced in Article 94 of the 2013 SER which states that “The application of this Law shall not prejudice treaties and agreements concluded between the Kingdom and countries, international institutions and organizations”. This reflects the legislature’s desire to uphold the KSA’s international obligations and rely on international conventions to support the arbitration practice in the KSA, not the opposite.

Such a view was further approved by the 2016 ICC award involving 18.5 million US dollars in favour of a UAE subsidiary to be enforced in the KSA. Despite the award being rendered in the UK, the KSA enforcement court approved it and issued an enforcement order for the party seeking enforcement. In this case, the requirement of reciprocity was satisfied simply by referring to the UK’s accession to the NYC (Ghaith, 2016). This is a huge development in the KSA’s arbitration practice since, before the 2012 SAR and the 2013 Enforcement Regulation, the UK’s accession to the aforementioned Convention did not satisfy the reciprocity requirement, as mentioned earlier.

Another development in this regard was introduced by the 2017 amendment to the 2013 Enforcement Regulation Implementation Rule. This amendment provides in Article 6 (1) that the burden of proving reciprocity is on the party seeking enforcement and as such enforcement courts will no longer be in charge of obtaining this evidence. This amendment is beneficial to the KSA’s arbitration practice since it removes the uncertainty introduced by the 2013 implementation rule. Such uncertainty is seen when trying to establish what would happen if the Ministry of Justice did not respond to the enforcement judge’s query of reciprocity, or simply did not have an answer. Now the burden is on the party seeking enforcement and the burden is not as onerous as it was prior to the introduction of the 2013 SER, because the party will simply have to show that the country in which the award was rendered is party to a convention that is also ratified by the KSA, in order to establish the principle of reciprocity. The NYC, the Arab League Convention and the Riyadh Convention are examples of the conventions that would establish reciprocity between the KSA and these conventions’ member states.

7.5. The 2012 SAR Implementation Act of 2017

On Monday 22 May 2017, the KSA Council of Ministers passed the Implementing regulations of the 2012 SAR (Implementing Rule) in order to further develop arbitration practice in the KSA (Resolution No 34/M). The 2017 Act came five years after enacting the 2012 SAR, and ushered in a development that would create an attractive legal system for foreign commerce. Such an act had been long-awaited by arbitration practitioners, who had high expectations of its success in clarifying the continued uncertainty even after the introduction of the 2012 SAR. Areas of uncertainty included the arbitrators' gender and religion, ascertainment of the KSA's public policy boundaries and a number of other procedural matters. The 2017 Act consists of 19 provisions, including definitions of some of the terms used in the Act and the condition that it will be enforceable from the moment it is published in the KSA's official gazette (ibid).

The legislators of this Act clarify in Article 2 that the competent authority referred to in the 2012 SAR is the Appeal Court, which was originally in charge of reviewing such claims, except in circumstances provided for in Articles 9 (1), 12, and 40 (3) of the 2012 SAR. This matter was less clear under the 2012 SAR because it only stressed that the Court of Appeal is the competent court when it comes to foreign awards (2012 SAR, Art 8 (2)). However, when the matter involved a domestic award, it was not clear which court would have competence in this regard. With the introduction of this new article, the jurisdiction is now clearer for arbitration parties in the KSA.

Article 3 of the 2017 act introduces another important development in relation to the summoning of the disputing parties. This new article enables parties to be notified of the arbitration proceedings electronically via email or other electronic means (2017 Implementation Rule). This is an important development, which is beneficial to the parties since they only have to communicate the notice by electronic means to the other party's registered contact details. Furthermore, such communication will be legally binding in establishing that the other party has been notified of the arbitration proceedings and any subsequent decisions. Nevertheless, it may raise issues regarding the protection of the parties' privacy and the potential for cyber-attacks, which may influence the process of arbitration (Piers and Aschauer, 2018).

These issues will have to be dealt with as soon as possible in order to avoid the potential for the parties to be disadvantaged by them.

The 2017 implementation rule further regulates the appointment of arbitrators through a number of provisions, such as the arbitrator's ability to withdraw from the arbitration without justifying their withdrawal and the effect of having to appoint a replacement arbitrator in the arbitration process (Article 5 (1), 6). It also introduces additional guidelines on the appointment of experts and on imposing a timeframe on the court's appointment of a sole arbitrator in case the parties fail to agree on a particular arbitrator (Article 12 (1), 10). This implementation rule also provides, in Article 13, that upon the dispute parties' agreement, the arbitration tribunal may agree on the joinder or intervention of a third party. Although the 2012 SAR was silent on this issue, it was still understood that such a third-party joinder would be permitted with the consent of the disputing parties. This view was reinforced by participant 5 (participant 5).

The implementation rule also clarifies the annulment process provided for under the 2012 SAR, by stating (in Article 18 (2)) the required documents that must be included with the annulment request. The same rule provides (in Article 17) that the party whose award was set aside at the request of one of the dispute parties, or who was refused enforcement by the competent court (the Court of Appeal), could appeal such a decision to the Supreme Court directly. This appeal process reflects an important development since it guarantees that the parties have recourse to a higher authority to appeal the competent court's decision. In addition, the clear reference to the Supreme Court as the body responsible for hearing such a claim is crucial in developing the KSA's legal body. Although it is common sense for the Supreme Court to hear appeals from the court of appeal since it is the only higher court in the hierarchy of the KSA judiciary system, a lack of reference to it in the 2012 SAR was considered a deficiency – a deficiency now resolved by the 2017 implementation rule.

7.5.1. Failures of the 2017 Implementation Rule

Although the 2017 implementation rule introduced developments clarifying some of the ambiguities of the 2012 SAR, it nevertheless failed to address some key issues

unaddressed in the 2012 SAR. The first issue that was left unclarified by both the 2012 SAR and its 2017 implementation rule, was the failure to define international arbitration. This definition is important because most of the developed world's jurisdictions impose slightly different rules for international arbitration compared to domestic cases (Tweeddale, 2007). On the contrary, the 2012 SAR failed to provide any important rule that could be applied differently to local or international disputes. Article 8 (2) is the only provision that provides some sort of distinction by stating that the Court of Appeal in Riyadh is the competent court for hearing ICA cases, unless the party chooses a different Court of Appeal in the KSA. This failure by the KSA legislation to define international arbitration in the implementation rule, despite its importance, could also be interpreted as a lack of political will to do so which may, in turn, form an obstacle for the development of an attractive arbitration framework.

Another issue, which was highlighted in Chapter Six, is that the arbitrator's gender and religion remain uncertain, even after the issuance of the 2012 SAR; therefore, the 2017 implementation rule was expected to address and clarify this issue. Prior to the 2012 SAR, it was explicitly required that the arbitrator be both Muslim and male, but these requirements were removed from the 2012 SAR (1985 Implementation Rule, Art, 29 (2)). This 2012 Regulation instead required the sole arbitrator, or the chair of the tribunal, to have a university degree in either law or Sharia, dropping the faith and gender requirements (Article 14 (2)). This removal of the religious and gender requirements left the field open for different interpretations of the arbitrator's qualifications, but there was an understanding that the implementation rule would impose some requirements in the same way that the 1985 implementing rule had done with the 1983 Arbitration Regulation (1985 Implementation Rule, Art, 29 (2)). Fortunately, the 2017 act does not impose such requirements. But still, the mere absence of a non-equivocal provision clarifying the position of both female and non-Muslim arbitrators leaves the scope open for them to be excluded on public policy grounds. The 2017 rule should have addressed these two issues and not have left them to the court's discretion since this would invite unwanted court intervention, which might be a hindrance to the development of an attractive arbitration framework.

7.6. Conclusion

To conclude, this chapter engaged in a critical analysis of the 2012 SAR and the 2013 SER and compared them with the 1983 SAR in terms of award issuance, award challenge procedures and the recognition and enforcement of arbitral awards. In doing so, this chapter relied on international institutional rules to draw a comparison between the KSA's arbitration practices and those of such esteemed legal frameworks. This analysis has revealed the importance of the 2012 SAR in developing the KSA's arbitration regulations in terms of the voting procedures of issuing awards and what should happen if the arbitration tribunal fails to reach the majority vote required, which is something that was not touched upon by the 1983 SAR. The 2012 SAR also saw an important development with regard to the time restrictions of issuing an award, which were very impractical under the 1983 SAR. It also provided detailed provisions on the procedure for challenging awards and the grounds on which this could be done, which was something that was poorly dealt with in the 1983 SAR. Such developments are now mostly in line with the Model Law provisions and create a legal framework that is arbitration-friendly for both national and international commerce.

Furthermore, the process of recognising and enforcing arbitral awards was further developed by the 2012 SAR by, among other measures, which limited the scope of the court's intervention, as opposed to the practice prior to its introduction. The 2012 SAR and the 2013 SER have made the enforcement of arbitral awards much more accessible to foreign commerce and empowered the dispute parties with the autonomy to decide how they want to adjudicate their dispute. Although such autonomy is a remarkable development in the KSA's arbitration practice, it is still limited in scope and such limitation might hinder the KSA's goal of achieving an attractive legal system. This limitation is merely due to the vagueness inherent in the drafting of some of the 2012 SAR provisions, particularly those related to defining international arbitration, the arbitrator's gender and religion, and the scope of the KSA's public policy. The KSA's legislator will have to clarify these ambiguities in order to enhance the arbitration regulation of the KSA and make it more reliable and attractive.

This being said, it is notable that a number of academics expected these ambiguities to be dealt with by the 2012 SAR implementation rule (Al-Ammari and

Martin, 2014; Aleisa, 2016). However, this rule was enacted in 2017 and clarified some of the ambiguous provisions of the 2012 SAR, while failing to consider most of the serious uncertainties within it. This will, unfortunately, result in the KSA's arbitration regulation attracting less commerce than it could otherwise have done if these uncertainties had been clarified by the 2017 implementation rule. In general, the 2012 SAR and its implementation rule have resulted in the remarkable development of the KSA's arbitration framework. However, there is still scope for further development in this area.

Chapter Eight: the Enforcement of Foreign Awards Under the 2012 SAR – a Critical Analysis of Case Law

8.1. Introduction

The 2012 SAR has developed arbitration practices in the KSA by removing most of the ambiguities inherited from the previous regulations. These developments, and the extent to which they enhanced the arbitration framework in the KSA, were addressed in detail in the previous chapters. Therefore, it is now crucial to conduct a study of relevant cases, published for the first time in the KSA, in order to assess how the 2012 SAR is perceived and implemented in practice. This chapter considers how enforcement courts have enforced a number of foreign awards despite their lack of compliance with some of the requirements stated in the 2012 SAR and the 2013 SER. It also considers the enforcement court's flexibility in applying some of the provisions of the 2013 SER as opposed to the previous practices under the 1983 SAR. The analysis of these cases will be limited to the empirical materials obtained by the researcher since some cases have less material than others and accordingly a more limited analysis. This chapter will also consider the statistics published by the KSA Ministry of Justice, highlighting the importance of a developed arbitration framework in dealing with such cases in an effective and efficient manner.

8.2. Case Law Analysis

One of the most important targets of the 2012 SAR is the creation of an arbitration-friendly environment for the purpose of attracting foreign commerce. As illustrated in Chapters Five and Seven, the enforcement mechanisms of foreign awards were a major deficiency of the 1983 SAR that led to creating a hostile environment for foreign commerce. This is particularly reflected in the KSA's application of the 1983 SAR and the New York Convention 1958, in which it relied upon the public policy reservation to reject the enforcement of some foreign awards. The principle of reciprocity was another issue facing international commerce when trying to enforce their awards in the KSA since establishing its existence was not an easy task. The

2012 SAR attempted to address these inherited deficiencies, but whether it succeeded in practice is to be examined in the analysis of case law below.

8.2.1. Case No: 0785/2014

8.2.1.1. Nature of the Dispute

This dispute arose from a sale of goods contract signed on May 9th, 2009, between Claimant A, and the first respondent, B. This contract is related to the sale of garments and other export products by the Chinese claimant to the Saudi respondent, who had previous dealings with the claimant. Such dealings began in early 2008, where both parties conducted their business on an oral basis. In May 2009, the first respondent bought more products from the claimant prior to payment for the previous business transaction. Before manufacturing the said garments, two confirmation of sales were signed by the claimant and the first respondent for the 2008 and 2009 transactions. Following the signing of the contract, the claimant prepared the required goods but did not send them due to the first respondent's failure to pay the sum due from the 2008 transaction. In 2010, the claimant and first respondent signed a letter of commitment on the basis that the claimant would resume implementation of both contractual obligations under the confirmation of sales. The letter of commitment included the second Saudi respondent C, guaranteeing any liability for the first respondent's debt. After the first respondent's failure to meet their contractual obligation, the claimant relied on the arbitration clause of their contract to bring an arbitration case before the Chinese arbitration commission. This commission relied on the China International Economic and Trade Arbitration Commission's rules of 2012 (hereafter referred to as "the arbitration rules") as the procedural law governing the dispute.

8.2.1.2. Summary of the Arbitration Proceedings

After continuous delay by the respondents to appoint an arbitrator or authorise the chairman of the arbitration commission to do so, the chairman of CIETAC²⁸, in accordance with article 27, item 3 of the arbitration rules, assigned a panel of three arbitrators to form the arbitration tribunal. On November 28, 2013, in Beijing, the

²⁸ Hong Kong Arbitration Centre

constituted arbitration tribunal began hearing the case as scheduled. The authorised attorneys and both respondents appeared at the hearing and presented their statement and defence. In their adjudication, the claimant asked for the following: a) the first respondent to pay the contract's balance of 4,414,137 Yuan; b) the first respondent to pay interest of 482,612.31 Yuan, as per the annual interest rate 6.56% of a loan at the People's Bank of China over the period of 2011 to 2013, during which time the claimant's money was due; c) the second respondent to assume joint liability for the debt owed by the first respondent; d) both respondents to bear all arbitration fees incurred in this case.

The second respondent, however, argued that he should have no obligation to assume the liability as he is not bound by the arbitration clause. The attorney argued that, although his client's name was printed out in the field for entering the concerned parties of the letter of commitment signed in 2010, it is nevertheless the first respondent's name that was printed in the field for declaring the undersigned letter of commitment. Therefore, the second respondent's signature was just a representation of the first respondent, since the letter of commitment had only one acceptor and that would be deemed to be the first respondent. Secondly, the first respondent and their attorney alleged that the claimant submitted a confirmation letter which had the amount of money due from the parties' contract, which was forged. This was because the original letter was lost by the claimant and, as a result of the first hearing, it was thought that it was beyond recovery, but the letter in question was later found. However, the first respondent's attorney argued against taking such a letter forward as evidence, since the claimant had asked for it to be withdrawn in the first hearing. The first respondent also argued that the claimant's request for interest lacked any lawful or factual basis. Finally, the first respondent argued that the claimant's request for paying the arbitration costs of this case lacked any lawful or factual basis.

8.2.1.3. Arbitration Tribunal Award

The Arbitration Tribunal arrived at the following decisions:

The Arbitration Tribunal considered the first respondent to have failed to provide any corresponding evidence to prove their claim that the confirmation letter was false. It also stated that, since the original letter was later found, the decision was

left with the tribunal to decide whether to accept it or not. To ensure the fairness of the hearing and instead of taking the confirmation letter as a basis, the tribunal confirmed the debt owed to the claimant by another means. To ascertain the amount of debt still due to the claimant, the tribunal relied on the amount stated on the letter of commitment and on the amount of another shipment of goods that followed it, minus what had already been paid by the respondent. Since the first respondent had failed to provide any evidence that such an amount had been paid, the tribunal supported the claimant's claim of 4,414,137 Yuan.

The tribunal decided to support the claimant's claim for the amount of interest requested. The tribunal stated that, because the amount of debt ascertained by the tribunal corresponds with what was already claimed by the claimant and, relying on the claimant's method of calculating the interest rate, which left no room for criticism, the first respondent was required to pay the aforementioned interest rate.

The Arbitration Tribunal stated that the arbitration costs should be reasonably shared by both parties in accordance with article 50 of the arbitration rules. This meant that the claimant would assume 20% and the first respondent 80%. The arbitration tribunal rejected the claimant's other requests.

8.2.1.4. Enforcement of the Award

The claimant, via their Saudi attorney, requested the enforcement of the award despite the respondent's attempt to annul the award at the Board of Grievance for infringing the KSA's public policy. This infringement claim was on the basis that the award contains an element of *Usurious* interest, which is prohibited under Sharia rules. The award was partially enforced by the KSA's enforcement court on the amount of the debt, 4,414,137 Yuan, as per article 21 of the 2012 SAR and payment of interest rejected in the enforcement decision (Enforcement Order No: 38454477/2017). The respondent also raised a number of other grounds for annulling the award, such as not agreeing to the arbitration panel and not being well represented in the arbitration hearing, but these claims were rejected by the enforcement judge in issuing the aforementioned enforcement order (Article 1, 2012 SAR).

8.2.1.5. Comments

As it appears from this case, it is important for parties to choose the right substantive law for their contract, since it will have a significant effect on the success of their dispute resolution. This award would have been worthless to the claimant had the 2012 SAR not been introduced since prior to the introduction of this law, awards containing an element of interest were rejected outright by enforcement courts on public policy grounds (143/T/4 of 1412 H (1992)). This partial enforcement decision also shows the importance of applying internationally recognised legal principles, such as the severability of an award in the KSA's legal system. This openness to international legal standards is likely to increase foreign commerce interest in the KSA's arbitration framework while, at the same time, preserving the KSA's national sovereignty.

Finally, it is noteworthy that this award was rendered by non-Muslim arbitrators in a dispute involving a Muslim party, which was a problematic issue that could have breached public policy under the 1983 SAR (Article 12). Thus, the enforcement of such awards by the KSA courts shows a more flexible way of construing the KSA's public policy, as opposed to the situation prior to the introduction of the 2012 SAR. It is hoped that such flexibility will lead to more disputes being settled and enforced in the KSA, which would help achieve the KSA's goal of attracting foreign commerce.

8.2.2. Case No: 19366/MCP

8.2.2.1. Nature of the Dispute

The dispute arose out of a sale contract dated 23/07/2012, entered into between the Lebanese claimant A and the Saudi Arabian respondent B. Under the contract, A, the seller, agreed to deliver to B, the buyer, 6000 metric tons of plain wire rods for a total price of USD 4,032,000. The claimant submitted that, under the contract, the purchase price was to be paid by the respondent in two instalments; the first was the pre-payment of 20% of the total purchase price, to be made by 25/07/2012 at the latest. The second, for the remaining 80% of the purchase price, was to be made within 48 hours of the receipt of certain documents at the counter of the buyer's bank account in the KSA. The claimant, who did not deliver the plain wire

rods to the respondent, contended that the latter failed to make the pre-payment as contractually agreed, and made a damages claim in the amount of USD 465,392.64, for the damages allegedly caused by the non-performance of the sale contract by the respondent.

The claimant commenced arbitration proceedings by filing a request for arbitration. The claimant's proceedings were based on an arbitration clause in the party's contract for the settlement of any arising dispute by the ICC in Geneva and under its rules. The clause also provided for the arbitrator to be appointed by the ICC in accordance with its rules and that the losing party would bear costs of such proceedings.

8.2.2.2. Summary of the Arbitration Proceedings

Following the claimant's request for arbitration, transmitted to the ICC secretariat who, in turn, informed the respondent that they had 30 days to file a response to the request for arbitration. Since the respondent failed to file a response, the ICC secretariat informed the parties that the arbitration would proceed and the arbitration tribunal would decide any question of jurisdiction pursuant to Article 6 (3) of the ICC rules (ICC Rules, 2013). The parties were also informed that, due to the dispute parties' non-appointment of a sole arbitrator, a sole arbitrator would be nominated, unless informed otherwise. The ICC secretariat also noted that the arbitration language was not agreed upon by the parties and, as such, the sole arbitrator would decide on it pursuant to Article 20 of the ICC rules (ibid). On 14/08/2013, a sole arbitrator was appointed who, in turn, decided that the language of arbitration would be English due to the contract being drafted in English and that both parties, during the course of their dealings, communicated in English.

The arbitration evidentiary hearing took place in the sole arbitrator's office, where the claimant was represented during the hearing by their counsel, whereas the respondent did not participate in the evidentiary hearing, despite having been informed of it and invited to attend. The claimant's witnesses were heard via a video conference and confirmed their written statements, as well as answered questions posed by the arbitrator and the claimant's counsel. The claimant provided the

requested information on the 16th June 2014, while the respondent failed to reply, the same as he failed to reply to any request since the beginning of the proceedings.

In this case, the parties, whose places of business were in different countries, entered into a sale contract governed by Swiss law and did not explicitly exclude the application of the CISG²⁹. In their choice of law clause, the parties neither referred to national Swiss law, nor to the Swiss law code of obligation. Thus, the question arises as to whether reference to Swiss law tacitly excluded in the application of the CISG. During the evidentiary record, the sole arbitrator considered that there was no element showing the parties wanted to exclude the application of the CISG. The sole arbitrator noted in this respect that a number of Swiss courts, as well as leading scholars, are of the view that a reference to a national law is, in itself, sufficient to exclude the application of the CISG. Nevertheless, the sole arbitrator decided to apply the CISG and, for matters not covered by it, he would apply Swiss substantive law.

8.2.2.3. Arbitration Tribunal Award

The sole arbitrator in this case was satisfied that the respondent was under a contractual obligation to make a 20% pre-payment by 25/07/2012. This obligation was shown in the evidentiary hearing to have not been fulfilled and, as such, the arbitrator found the respondent in breach of their contractual obligation for the payment of the 20% pre-payment as of 26/07/2012. So, the question was then whether the claimant was entitled, following the respondent's breach of obligation, to avoid the contract and sell the goods to a third party. The disputing parties had expressly agreed in their contractual document that breach of the pre-payment would entitle the claimant to avoid the contract. On this basis, the arbitrator asserted that the claimant was entitled to and he avoided the contract.

In this case, the claimant contended that they made three substitute transactions for a total quantity of 4,695.58 MT and that they were unable to resell a quantity of 1,304.42 MT. In their contract, the parties did not exclude or modify rules of the CISG on damages. Therefore, it was significant to determine whether the claimant was entitled to claim damages for each of the substitute transactions according to

²⁹ The United Nations Convention on Contracts for the International Sale of Goods

CISG provisions (Articles 74, 75, 76). The claimant contended that they were entitled to damages corresponding to the difference between the sale price in the sale contract with the respondent and the price in the substitute transaction. Article 75 of the CISG requires that four conditions be fulfilled: (a) the contract is avoided; (b) a substitute transaction has been entered into; (c) the substitute transaction was made in a reasonable manner; and (d) the substitute transaction was made within a reasonable time after avoidance (CISG, 1980). The arbitrator provided that all of these conditions were met by the claimant in this case and ascertained damages the claimant was entitled to claim based on the substitute transaction – USD 312,632.16.

The claimant also contended that they were entitled to damages for the remaining goods that it was unable to resell. Article 76 of the CISG requires that three conditions are met: (a) the contract is avoided; (b) the party claiming damages has not made a purchase or resale under Article 75 of CISG; and (c) there is a current price for the goods at the time of the avoidance (*ibid*). The sole arbitrator considered all these conditions to have been met by the claimant.

Based on the above facts, the arbitrator decided that the respondent owed the claimant an amount of USD 419,117.74, plus interest at a rate of 5% per annum until full payment is delivered. The arbitrator decided for all of the arbitration costs to be paid by the respondent, plus interest at the rate of 5% per annum, from the date the award was rendered, until full payment was received. The respondent was also asked to pay the legal fees and costs, plus interest at the rate of 5% per annum, from the date of this award, until full payment is received. The arbitrator rejected all other requests and claims.

8.2.2.4. Enforcement of the Award

This award was partially enforced by the KSA's enforcement court in Riyadh on 02/12/2016, with enforcement order No: 28158542, despite the respondent's attempts to annul the award for lack of representation in the arbitral hearings and for containing a *Usurious* interest that breaches public policy grounds. The enforcement judge also asserted that the respondent's request to review some of the case's merits is rejected since such issue is outside the scope of his jurisdiction

and any issue to deal with the merits of the case should be dealt with by the Swiss courts and not the KSA enforcement courts. Therefore, the enforcement order was for enforcing the incurred damages of USD 419,117.74, arbitration costs of US\$ 56,000 and legal costs of GBP 1,748, the interest being severed in this case. The enforcement judge asked for the respondent's full compliance with the enforcement order within five days of being notified of it, failing which, they would be subject to procedural sanctions stipulated in the 2013 Enforcement Regulation.

The respondent did, however, appeal the enforcement judge's decision to the KSA Court of Appeal on the following grounds: the enforcement judge did not review whether the foreign award had followed the requirements stipulated in Article 5 (2) of the 2013 SER. These requirements include the parties' proper representation and defence in the arbitration hearing and that this has been infringed as per the respondent's allegation. Secondly, the award could not be severed because *Riba* was not the only infringement of public policy, indeed, the entire amount was mostly based on some form of *Riba*, which is against the KSA's public policy. Thirdly, the arbitrator applied the CISG rules, which are not what the parties agreed on, as Article 22 of their contract cites Swiss law to be the applicable law. Finally, the arbitrator decided for payment of damages to be paid to the claimant, when such payment was indeed for the difference in prices after the goods were sold to a third party. The respondent claimed that such payment conflicts with the solutions agreed on by the parties, which are the extension of payment time or the cancellation of this initial bill and notifying the respondent. The Court of Appeal stated that, ensuring compliance with the requirements of Article 5 (2) of the enforcement regulation is within the jurisdiction of the enforcement judge and, as such, asked the enforcement judge to hear the party before deciding on what he deemed appropriate. The enforcement judge's decision was the same as his initial decision and, accordingly, Enforcement Order No: 28158542 was issued.

8.2.2.5. Comments

This case, similar to the previous one, shows the importance of the severability principle, which has protected the claimants' rights in the enforcement of arbitral awards. Under the 1983 SAR, such awards would have been rejected and the party seeking enforcement would find itself in a position where it cannot enforce the

award. This was evidenced in Case No: No. 115/1429 in 2008, where an arbitral award involving payment of interest was rejected on the basis that *Usurious* interest is forbidden under Islamic law, even if it forms a small part of the award. Such an award was based on the Board of Grievance's decision No: 116, which stressed that an arbitral award shall not include the payment of sums that are contrary to Islamic law, regardless of the percentage of such a sum on the overall payment. Therefore, the introduction of the severability principle and limitation of the court's power to review such awards in the 2012 SAR, has made it possible for arbitral awards containing public policy-infringing elements to be applied, where such elements are being severed from the enforcement. The enforcement of this award also raises a very important issue regarding a non-Muslim arbitrator adjudicating a dispute between Muslim parties. Although both the dispute parties are companies and hence have no religion, they are both located in Muslim majority states. It would be interesting to hear the court's view on this particular issue, since the 1983 SAR and Sharia rules, as applied in the KSA, forbid Muslim parties from referring their dispute to a non-Muslim arbitrator unless one of the dispute's parties is non-Muslim (Saleh, 2012).

The researcher believes that enforcement of this award shows the KSA's total respect for party autonomy in choosing their arbitrator and focus only on preserving its sovereignty through severing the enforcement of any infringing elements of an internationally rendered award. This award is likely to result in conflicting decisions, whereby some enforcement judges would enforce an award totally rendered by a non-Muslim sole arbitrator in a dispute between Muslim parties, while others would not. The enforcement judge in this case appears to have followed the Hanafi school of jurisprudence, which permits such appointment, whereas other enforcement judges may follow the Hanbali school's view and reject enforcing the award because this school is the official school of jurisprudence in the KSA.

Furthermore, the researcher believes that the cases of partial enforcement analysed in this chapter may be the beginning of a trend towards complying with the demands of international commerce, which could be developed further to include full enforcement. However, this may not be foreseeable in the near future, due to the enforcement courts' jurisdiction over enforcing arbitral awards. Although, this trend may develop and special committees in charge of enforcing arbitral awards might be created in order to avoid the strict application of Sharia rule. This

is seen in the practice of banking dispute committees, which issue decisions involving *Usurious* interest that is contrary to the essence of the country's constitution and public policy. Such committees were created for the purpose of removing the Sharia court's jurisdiction over disputes involving banks, which had previously resulted in their failure to enforce their contractual agreements due to the existence of interest (Case No. 1464/1/s of 1996). The KSA's allowance of interests to be imposed on loans in its banks, and such loans being enforced by the aforementioned committee, was mainly an attempt to protect its banks' interests (Royal Order No 37441, 2012). Therefore, the KSA's current desire towards attracting foreign commerce may develop its practice and lead to the full enforcement of foreign awards in spite of interest. The development of Islamic economics may also lead to a change in Islamic *fiqh*. Such a change may redefine what constitutes *Riba* in Islamic law and what may be considered to be mere compensation.

8.2.3. Case No: 360262842

8.2.3.1. Nature of the Dispute

This case is related to the dispute between claimant A, a Saudi company and respondent B, a British national, regarding a contract of services. In this contract, the respondent agreed, in accordance with the contract terms, to provide the claimant with certain services in return for the payment of a specified amount as fees. These services were to be provided in phases and, after each phase, the payment would be made prior to moving to the next one. Following the second phase, the claimant terminated the contract due to an allegedly repudiatory breach by the respondent. Both parties agreed in their contract for English law to be applicable for all disputes or differences that may arise between the parties during the term of their contract or thereafter. They also agreed for a single arbitrator to be nominated by the parties and, in case of their failure, the sole arbitrator to be nominated by the ICC.

8.2.3.2. Summary of the Arbitration Proceedings

The claimant commenced arbitration proceedings as per the arbitration clause in the disputing parties' contract and a sole arbitrator was mutually nominated by the

parties. This sole arbitrator was in charge of hearing this case and the disputing parties' counter-claims. The seat of arbitration was London. During the arbitration hearing, the claimant requested the return of various sums of money paid by it to the respondent in relation to the first phases of the overall service and claimed an alleged repudiatory breach of the contract. The respondent denied the claimant's right to recover the money and made a counterclaim for the sums due for the remaining phases of the contract. The respondent also claimed damages for the claimant's repudiatory termination of the contract and for an injunction restraining the claimant from using the services already provided in the first phases, as well as damages for unlawful use of these services. In addition to these submissions by the parties, the sole arbitrator heard oral evidence from factual and expert witnesses called by both parties. Following the hearing, both parties provided the arbitrator with written and oral closing submissions, which was followed by the issuance of the award.

8.2.3.3. Arbitration Tribunal Award

The sole arbitrator issued the following award after having carefully read and considered the documents and evidence put forward by the parties. Firstly, the respondent had breached the contract for service, but such a breach is not repudiatory. Secondly, the respondent is entitled to retain all the sums paid to it by the claimant under and in relation to the contract of services and, as such, the claimant's claim for their return was dismissed. Thirdly, the respondent's counterclaim for payment due from the remaining phases succeeded, with a total amount of USD 267,579.28. Such payments were asked to be paid immediately by the claimant, with additional interest. The sole arbitrator dismissed all other counterclaims.

8.2.3.4. Enforcement of the Award

The respondent, through his attorney, requested the enforcement of the award in Enforcement Order No: 360262842 from the enforcement court in Riyadh. The respondent requested enforcement of the award excluding the *Usurious* interest element, which is contrary to the KSA's public policy. The claimant made a request to the enforcement court to stop the enforcement of the award on the following

grounds. Firstly, the award is not final in its country of origin since it was issued by a sole arbitrator and was not registered with the competent court in the UK.

In this regard the, claimant argued that article 66 of the English arbitration law requires arbitral awards to be registered with the competent court in a provision similar to the one provided for in article 44 of the 2012 SAR. Secondly, the award was not stamped by the English Ministry of Justice, as per the requirement of article 11(4) of the enforcement regulation but, instead, it was stamped by the English Chamber of Industry and Commerce. Thirdly, the principle of reciprocity was not established by the respondent who was seeking enforcement and there was no evidence of the UK's willingness to enforce the KSA's locally rendered awards. Finally, the award had *Usurious* interest, which is against Islamic Sharia rules and, as such, should be unenforceable for infringing the KSA's public policy.

The respondent replied to these arguments a week later and before the same enforcement judge and at the Saudi Enforcement Court in Riyadh. In his response, he asserted that the arbitral award was final and this is proved in the award draft that states it is final and rendered in accordance with the English Arbitration Act, 1996. This finality is also proven by Article 85 (1) of the English Arbitration Act, which provides that arbitral awards are final and obligatory for the dispute's parties. Also, the sole arbitration nomination was in accordance with the parties' arbitration clause and, as such, they mutually chose the arbitrator.

Secondly, there is no law that requires the judiciary to make an Executive Order final, and this is proved in the relevant legal frameworks to the enforcement of this Executive Order, which are the New York Convention of 1958, the English Arbitration Act of 1996 and the Saudi Arbitration Regulation of 2012. In regard to Article 66 of the English Arbitration Act, which clarifies how to enforce arbitral awards in the UK and names the conditions for such, this is irrelevant since the enforcement here is in the KSA and, as such, the SER is the only relevant legal framework. Thirdly, the need for the official stamp of both the Foreign Ministry and the Ministry of Justice, as per article 11(4) of SER, are referring to the Saudi ministries and not to the ministries of a foreign country in which the award was rendered. Accordingly, the award was officially stamped by both the Saudi Ministry of Justice and the Foreign Ministry. Fourthly, the principle of reciprocity exists between the KSA and the UK on the basis of their ratification of the New York

Convention, 1958, and they both comply with its provisions. Both countries' accession to the New York Convention were confirmed by the KSA Ministry of Justice, which reveals that such accession means their compliance with such a convention's provisions. Therefore, unless the claimant has evidence to the contrary, such compliance with the Convention is enough to ensure the existence of reciprocity. Finally, the award has some infringing elements relating to the KSA's public policy, but such elements were not put forward for the enforcement to the KSA's enforcement courts and, therefore, there is nothing in the enforcement request that would infringe the KSA's public policy.

Following the respondent's response, the Enforcement Judge made an enforcement order for the respondent's enforcement request and ordered the claimant to comply with such an enforcement order within five days. Alternatively, the claimant would be subject to penalties, as per the SER of 2013.

8.2.3.5. Comment

The enforcement of this award shows that the 2013 Enforcement Regulation is attractive enough for foreign disputes since it guarantees the parties' rights, in as far as the KSA's public policy is complied with. This award sets another precedent for satisfying the principle of reciprocity by mere reference to the KSA's accession to an international convention that the country from which the award was rendered is also a party to the same convention. This was not the case prior to the introduction of both the 2013 SER and the 2012 SAR, since a similar award from the same country (the UK) was rejected on the grounds of a lack of reciprocity, despite the continuous referral by the party seeking the enforcement to both countries' accession to the New York Convention (Case No. 115/D/A/15 2008). Furthermore, the manner in which this award was enforced shows that there is flexibility when dealing with foreign award's infringing elements to the KSA's public policy. Such flexibility is seen in the court's reliance on the party enforcement's request in this case, rather than the award itself. Even if it relied on the award, the enforcement judge would have exercised severability to partially enforce the award, as seen from the above cases. This development in the KSA's practice of enforcing foreign decisions is likely to attract foreign commerce while at the same time ensuring the KSA's protection of its sovereign rights.

8.2.4. Case No:37286586

8.2.4.1. Nature of the Dispute

This case is related to the dispute between claimant A, an Egyptian company, and respondent B, a large Saudi commercial corporation, regarding a contract of services. In this contract, the claimant agreed, in accordance with the terms of the contract, to provide the respondent with certain services in return for the payment of a specified amount of fees. The latter refused to make a payment for a service obtained from the claimant and, accordingly, the claimant referred the dispute to arbitration as per article 9 of the party's contractual agreement. Both parties had no objection to the chosen arbitrators, agreeing for the arbitration tribunal to decide on the matter.

8.2.4.2. Summary of the Arbitration Proceedings

The arbitration tribunal commenced its proceedings in 2010 in Cairo and both parties were given the chance to present their case, which they did through their appointed lawyers. The arbitration tribunal followed the procedure of the parties' chosen applicable law which, in this case, was the Egyptian Arbitration Law of 1994. The arbitration tribunal reached a decision on this case which was, in turn, communicated to both parties at their registered addresses. The materials available to the researcher do not show any further details on the evidence or arguments submitted by the parties, but do show that proper procedure was followed and that neither party raised any complaints regarding the process through which the award was issued.

8.2.4.3. Arbitration Tribunal Award

The arbitration tribunal decided in favour of the claimant and requested the respondent to pay the claimant compensation of 1,127,205 Saudi riyals. It also decided for the arbitration fees, which were 105,000 Egyptian pounds, to be paid by both parties equally. This award was later approved by the Egyptian Court of Appeal in Cairo and stamped, in 2014, by the KSA's Foreign Ministry and Ministry of Justice. Again, the material available regarding the case does not offer any more

details as to how the award was issued and whether such a decision was unanimous or not.

8.2.4.4. Enforcement of the Award

The claimant made a request for the enforcement of the award to the KSA's enforcement court in 2015, supplying them with the award and the stamps of both Saudi ministries, in addition to proof of the Egyptian Court of Appeal's approval. However, the enforcement judge stated that there is no evidence that this award was final and enforceable and the award does not state so, which means that it infringes article 11 of the enforcement regulation of 2013 and its implementation rule of 2013. Therefore, the party seeking enforcement was asked to complete their application request, which in turn was declined by the party on the basis that the Egyptian Arbitration Law stated, in Article 52, that arbitral awards that are rendered in accordance with the provisions of this law are enforceable and cannot be challenged and this is enough to establish that this rendered award is final. The same party also argued that the KSA Court of Appeal does not give proof of the finality of awards and the same is practised by the Egyptian courts. Furthermore, the party against whom enforcement is sought has already attempted to challenge the award and its challenge was rejected, implying that the award is final and that there is no need for any further proof.

The enforcement judge then revisited the request and stated that, since the award is stamped by the two Saudi ministries and both parties have been represented before the arbitration tribunal, in addition to the fact that Egypt is party to the Riyadh Convention, which establishes the principle of reciprocity, an enforcement order for the payment of 1,127,205 Saudi riyals was to be provided to the claimant, in addition to the equal share of the arbitration fee, which is 105,000 Egyptian pound.

8.2.4.5. Comments

The enforcement of this award elucidates interesting arguments, as presented by the party seeking the enforcement, in order to establish that the award was final. The fact that Article 11 of the 2013 Enforcement Regulation failed to determine precisely what makes an award final, has left the field open for enforcement judges

to do so. Therefore, this decision is of great importance in establishing the principle if the award fails to do so in clear terms. However, since judges in the KSA are not bound by any precedent, a different judge may refuse to accept the aforementioned argument as sufficient basis for establishing finality. Consequently, the party seeking the enforcement of an arbitral award needs to avoid such complexity by ensuring that the arbitration tribunal clearly mentions that the rendered award is final. Prior to the 2012 SAR, the enforcement circuit was in charge of verifying that the award is final in its home country (The Board of Grievance Circular No. 7). This was problematic because there were no clear channels for doing so and the process was likely to make the enforcement lengthy unless the party seeking enforcement produced such proof. Therefore, the enforcement judge's initial decision of requiring proof of the award's being final shows that ambiguity still exists. However, the general trend of flexibility in enforcing awards is very likely to overcome such ambiguities, although there are no guarantees.

Furthermore, it is arguable that the grounds upon which the enforcement judge decided the finality of the award, and accordingly issued enforcement orders, are not strong enough to establish such finality, since an alternative judge may require the party seeking enforcement to exercise its right of amendment and ask the arbitration tribunal to clearly state that the rendered award is final. In addition, the Saudi ministries' stamps do not imply that the award is final, but merely that the award is authoritative; the stamps are simply a matter of administrative procedure. Finally, it is worth noting that the judge has relied on Egypt's accession to the Riyadh Convention to establish the existence of reciprocity, which leaves no doubt that it is no longer a difficult task for both judges and enforcing parties to ascertain the existence of reciprocity between the KSA and the country from which the award was rendered. This is a very major development that ensures the easier enforcement of foreign decisions, which would help in creating an attractive legal system for international commerce. It also highlights another step in the trend towards the KSA's desire to meet the needs of international commerce. It is very likely that this step will lead to other steps that ease the KSA's basic requirements for enforcing arbitral awards. This flexibility in establishing the reciprocity requirement will reverse the generally held view of the KSA's legal system as a closed system, as opposed to other developed legal systems.

8.2.5. Case No:37286586

8.2.5.1. Nature of the Dispute

This dispute is related to the payment of a loan that was given by claimant A, an Omani national, to respondent B, a Saudi national, in the form of a promissory note. Upon the respondent's failure to pay what was due at the required time, the claimant brought an action before an arbitration tribunal in Oman, as per the agreement of the loan. This dispute was arbitrated and a decision issued that sought enforcement in the KSA in accordance with the KSA SER of 2013.

8.2.5.2. Summary of the Arbitration Proceedings

The Omani arbitration tribunal was formed in 2013, following the claimant's request and in accordance with the party's agreement. The tribunal then attempted to communicate the hearing time and location to both parties but, unfortunately, the Saudi respondent failed to show up to any of the hearings. He did not communicate any sort of defence to the arbitration tribunal due to receiving no notifications of such hearings in the first place. This was mainly due to the arbitration tribunal's inability to find a valid address for the respondent to communicate hearing notices. Therefore, the arbitration tribunal reached a decision in the absence of the respondent or any of his representative and applied the parties' chosen law which, in this case, is the Oman Commercial Law of 1990.

8.2.5.3. Arbitration Tribunal Award

The arbitration tribunal provided its award after hearing the claimant's claim and in the absence of the respondent's representation. The tribunal decided on the right method for effectively communicating the defendant's notice, as per Article 1 of the Omani ministerial order no: 467/ 2013.³⁰ This includes communicating through authorities or through publishing such a notice in the country's official newspaper at the claimant's expense. The arbitrators in this case communicated such notice by publishing the notice in one of the leading Omani newspapers and, since the

³⁰ Article 1 of the Omani ministerial order no: 467/ 2013 states that, if the respondent's address is not known, which makes it impossible to communicate direct notices, it is up to the arbitrator to decide on the best method of communicating such notice.

respondent failed to appear despite this notice, their right to defend their case was considered waived. The arbitration also stated that, since the documents presented clear evidence of a promissory note being made to the claimant by the respondent, the fact that the respondent failed to fulfil his requirement and pay that money despite the promissory notes fulfilling all required conditions for such notes, the respondent in this case is liable to make such payment as per the party agreement. Consequently, the arbitration tribunal's decision was for the respondent to pay 78181,06 Omani riyals in fulfilment of the promissory note that was made between him and the claimant. The tribunal also decided that the cost of publishing the notice in the newspaper had to be paid, totalling an amount of 312 Omani riyals.

8.2.5.4. Enforcement of the Award

The claimant sought enforcement, in the KSA, for the payment of a loan, as per the promissory, for the total amount of 78181,06 Omani riyals, in addition to the price for publishing the notice in the newspaper, of 312 Omani riyals. The respondent, on the other hand, made a counterclaim for non-enforcement of the Omani arbitration award on the basis that he was not represented in the hearing, which is one of the mandatory requirements under the 2012 SAR which would invalidate any arbitral award. The enforcement judge issued a decision for enforcement of the award and responded to the respondent's claim for lack of representation by merely referring to the parties' applicable law, which would consider the publication of a notice in the newspaper to be sufficient in ensuring that the notice has been served if the respondent's address is not known by the arbitration tribunal. Consequently, the enforcement judge ordered the respondent to pay, within five days of being notified of the enforcement decision, in order to avoid being subject to additional penalties and to ensure compliance with such an order. The respondent did not comply within the required period of time and, accordingly, the enforcement judge put his name on the travel ban list, in addition to other penalties. Several weeks later, the claimant applied to the enforcement judge to lift all penalties after a settlement was reached between the parties for the payment of the promissory note's financial obligations.

8.2.5.5. Comments

This case is very interesting, since it shows the enforcement judge's lack of interference in the way the dispute was arbitrated, as opposed to the situation prior to the introduction of both the 2012 SAR and the 2013 SER. This is particularly evident when considering the fact that the newspaper in which the notice was published is an Omani newspaper and that the party against whom the enforcement is sought is a Saudi national living in the KSA. So, the communication might be seen to have been ineffective, unless it was published in one of the KSA gazettes. If such a case was to be enforced prior to 2012, the party against whom the enforcement was sought would have been able to challenge the award for lack of communication of notices and hearing dates that resulted in the lack of representation in the arbitration hearings. The Board of Grievance in charge of enforcing such awards would have been able to consider the dispute's merits from the start and may have reached a contrary decision to the one reached by the arbitration tribunal.

This was demonstrated in the case of *Jadawel International v Emaar Property PJSC*. In 2004, an arbitration hearing was commenced by Jadawel before an arbitral tribunal of three members located in the KSA. Jadawel was seeking damages of US \$1.2 billion due to Emaar's breach of contract on a construction project. The arbitration process, on its own, was too lengthy and took approximately two years but, in the end, an award was issued in favour of Emar, Jadawel's claim was dismissed and he was asked to pay the legal costs. Emar submitted the award to the Board of Grievances in order to get it enforced. However, the board held a different view whereby they reviewed the case's merits and decided not only to decline the enforcement award, but to reject the award and issue an enforcement decision in favour of Jadawel. So, the fact that it is no longer possible for enforcement courts to review the merits of a case is a very significant step towards developing the KSA's legal framework to be more attractive to international commerce, since it guarantees that the parties' autonomy in choosing the applicable law to their dispute resolution is upheld. At the same time, it protects the state's interest in enforcing only the awards that do not clash with its public policy and mandatory rules.

Another important issue raised by this award, is the respondent's lack of representation in the arbitration hearings. Although, the parties' chosen procedural law considered the publication of notices to be effective communication and, as such, the respondent was considered to have waived his right to attend, this award would have been decided differently if the enforcement was sought before 2012, since it would have been rejected for failure to comply with the KSA's procedural law. This was evidenced in Case No: 93/1422/2001, where the award was rejected on the basis of a lack of compliance with the 1983 SAR and its rules of 1985. Therefore, it is clear that the 2012 SAR has increased the autonomy of the parties to choose the procedural law applicable to their disputes, even if it contradicts the 2012 SAR. Such increased importance to the parties' will is also a step towards creating a more attractive arbitration system to international commerce.

8.3. The Enforcement of Foreign Awards in the KSA

The development of the KSA's arbitration system to be more compatible with internationally recognised standards is very important. This is particularly the case when considering the number of awards seeking enforcement in the KSA and the amount of money involved. These numbers were published by the Ministry of Justice in June 2018, stating that, since 2015 the enforcement court has received more than 100 enforcement requests for foreign awards, amounting to billions of Saudi riyals. Out of these requests, the enforcement court had enforced 92 foreign awards up to the date of the Ministry of Justice's announcement (Ministry of Justice, 2019). When looking at the number of enforced foreign awards since 2015, it is apparent that there is an increase in the number of enforced awards and the amount of money involved. This reflects increased the reliability of the KSA's enforcement framework, which has gradually increased since the enactment of the 2012 SAR and the 2013 SER. The numbers show that, in 2015, only nine foreign awards were enforced for the total amount of 209,918,031 Saudi riyals (Ibid). In the same year, the total amount of enforced awards was 656 awards, for the total amount of 329,176,898 Saudi riyals. The fact that, out of these hundreds of awards, there were only 9 foreign awards, shows that, following the enactment of the 2013 SER and 2012 SAR, the reliance on arbitration as a method of resolving disputes within the KSA has attracted both local and foreign parties. In 2016, the number of enforced awards in the KSA was 745, representing a total amount of 102,446,619

Saudi riyals. Out of these awards, the enforcement courts enforced 31 foreign awards for the total amount of 345,352,156 Saudi riyals (Ibid).

It is remarkable to see that the number of foreign awards enforced in 2016 tripled compared to the previous year. This is indicative of greater efficiency and effectiveness on the part of the enforcement courts, as well as increased flexibility when dealing with foreign awards. Such flexibility is mostly in the form of exercising severability to partially enforce foreign awards, rather than in rejecting the whole award on the basis of some infringing element of it to the KSA's public policy. This was clearly seen in the cases discussed in this chapter which show, more than once, that a foreign award was partially enforced despite the party against whom the enforcement is sought attempting to get it rejected on public policy grounds.

Furthermore, the Ministry of Justice's figures show that the number of awards enforced in 2017 was almost double what was enforced in 2016. The enforcement courts enforced 1255 awards in 2017 for a total amount of 1,165,786,261 Saudi riyals. Out of these awards, there were twenty three foreign awards, which is less than the amount of foreign awards in 2016 (Ministry of Justice, 2019). This could be attributed to the disputing parties increased reliance on the KSA as the law of the seat in order to avoid any potential complications when enforcing an award in the KSA. This was shown in the total amount of enforced awards in 2017, which was more than the total number of enforced awards in both 2016 and 2015 put together.

So far in 2018 (final figures released June 2019), the enforcement courts enforced 709 awards for the total amount of 721,224,831 Saudi riyals. Out of these enforced awards, there have already been twenty five foreign awards, which is an increase when compared with 2017. If the enforcement of the awards continues in the same pattern, the end of 2018 may show that the amount of enforced awards in this year exceeds the figure for 2017 number of enforced award. These numbers indicate that there is a lot of money involved in the KSA arbitration process and, as such, having a reliable legal framework to govern the process is imperative to the development of the KSA's legal and economic affairs. This being said, it is important to highlight that these numbers only cover the period between the beginning of 2015 until the date in which these data were obtained on June 2018.

Commenting on these developing numbers and their impact on attracting foreign commerce, the Deputy Minister of the Ministry of Justice, Shaikh Abdulaziz Slaleh Al Suhaiman stated that “The recent increase in the number of enforced awards and foreign awards, especially in Saudi enforcement courts, is mainly due to the 2013 Saudi Enforcement Regulation’s efficiency and speed” (Okaz Newspaper, 2018). He further stated that the merits of the 2013 Regulation have made the enforcement of foreign awards much clearer and brought them in line with international standards. This, according to him, has resulted in foreign commercial entities being attracted towards referring their disputes to the 2012 SAR or to any other alternative legal framework, knowing that the 2013 SER will guarantee them an efficient and fast enforcement process. He further stated that these enforced foreign awards hail from different countries such as Switzerland, France, the UK, the US and Asian and regional states (ibid). Shaikh Abdul-Aziz also asserted that the number of enforced awards shows the KSA’s complete fulfilment of its obligations under regional and international conventions for the enforcement of foreign awards. He believes that the enforcement of foreign awards is likely to facilitate more investment and commerce between the KSA and the countries from which such awards were rendered (ibid). This shows the Ministry of Justice’s full awareness of its expected role in facilitating the enforcement of foreign decisions in order to enhance the KSA’s chances of attracting international commerce. It is hoped that such awareness is linked with actions for such facilitation in the form of removing some of the ambiguities of the 2012 SAR provisions that may influence the enforcement of both local and foreign awards (see Chapter Six).

8.4. Conclusion

This chapter critically analysed the practical side of the 2012 SAR and the 2013 SER, with particular focus on the enforcement of foreign awards in the KSA’s jurisdiction, based on five foreign awards which sought enforcement in the KSA. All were either fully or partially enforced by the KSA’s enforcement courts, despite some being controversial. An example of these controversies is the enforcement judge enforcing case No: 37286586, despite a component of Usurious interest in the award, which is one of the elements that would give rise to a public policy consideration. The fact that such an award was partially enforced shows a clear change of attitude in the KSA’s enforcement of foreign awards since judges before

the introduction of the 2012 SAR would have rejected the enforcement of this arbitral award on public policy grounds.

The analysis of these five awards shows a robust compliance by enforcement judges with the 2013 SER, which prohibits them from considering the merits of the dispute in spite of some parties' attempts to force them to do so, in order to either reject the award or lengthen the process of enforcement. This was seen in Case No: 19366/MCP, where the enforcement judge rejected the request by the party against whom enforcement was sought for a review of some of the dispute's merits.

It is also clear from the above analysis that enforcement judges are willing to consider the established principle of reciprocity by merely proofing the award-rendering country's ratification of a convention that is also ratified by the KSA. This is seen in case No: 360262842, where the reciprocity requirement was established by the UK's ratification of the New York Convention which is also ratified by the KSA. Another example was also highlighted in Case No: 37286586, where Egypt's accession to the Riyadh Convention was considered sufficient basis for establishing reciprocity since the KSA is also a member of the same Convention. Establishing what constitutes the principle of reciprocity has been an ongoing issue for decades and, therefore, the enforcement judge's flexible approach in establishing it is likely to be an important factor in developing the KSA's enforcement framework to be attractive to international commerce. This is particularly important when considering the quantity of enforcement orders received annually by the KSA's enforcement courts and the large amount of money involved.

Chapter Nine: Conclusion

9.1. Introduction

This thesis critically assesses the 2012 SAR and the extent to which it develops the arbitration framework of the KSA to make it attractive for international commerce. In addition, it studies the religious and cultural influences on the KSA's legislative attitude and how such factors have restricted the development of the KSA's arbitration regulations. This concluding chapter discusses the main findings of this study, following this with the author's recommendations for developing the current arbitration framework with the purpose of enhancing the KSA's attempts to modernise its legal regulations, relying on a critical study of the 2012 SAR.

9.2. Findings

In order to directly link the research findings with the aforementioned research focus, the findings of this thesis have been divided into the followings themes.

9.2.1. Sharia Law and the KSA Legal Practice

This thesis reveals that certain legal practices were considered to be in violation of Sharia due to cultural reasons, rather than Sharia rulings, such as those related to women's rights. It also shows that, gradually, there appears to be a departure from the Hanbali school of juristic thought, in Islam, as the only applicable school in the KSA, and the inclusion of other Sunni schools of jurisprudence. Finally, the present research highlights an imperative need for further research in the area of interest, and *Riba*, under Sharia rules in order to cope with developments in Islamic finance and other related Muslim state's practices.

9.2.2. The Doctrine of State Sovereignty and Party Autonomy

The doctrine of state sovereignty has always been of major concern to the KSA government and its legislative bodies resulting in a rigid interpretation of its public policy which hinders its attempt to create a modern and reliable legal system for

foreign commerce. The KSA has attempted to ease its rigidity by gradually embracing international standards and strengthening the scope of party autonomy at the expense of the court's intervention (see Chapters Five and Six).

9.2.3. The Extent to Which the 2012 SAR Succeeded in Developing the KSA Arbitration Practice.

This research also finds that the 2012 SAR has succeeded in updating most of the ambiguous provisions in the 1983 SAR, including the clear statement of the grounds upon which an award might be challenged. This was an area that was not covered by any predecessor regulation in the KSA (Article 50). The 2012 SAR has additionally introduced the principle of severability into the KSA's arbitration practice for the first time. It has, nevertheless, failed to address some of the more important issues that were inherited from the predecessor regulation, including those related to the arbitrator's qualifications and certain public policy requirements.

9.2.4. The Effectiveness of the Enforcement of Foreign Awards Under the 2012 SAR and the 2013 SER

The 2012 SAR only considers the enforcement of awards in a very limited manner, its greatest focus being the award as a document and the process it should follow until it reaches the enforcement courts. Most of the 2012 SAR provisions in this regard are related to the enforcement of domestic awards and failed to provide sufficient details for foreign award enforcement. This could be related to the legislators' prior knowledge of the issuance of the 2013 SER, which covered, in great detail, the enforcement of all decisions in the KSA. The 2013 SER provided certain requirements for enforcing both foreign awards and judgments in the KSA. It has, however, failed to effectively engage with the issue of public policy, which is one of the main deficiencies inherited from the predecessor regulations.

9.3. Recommendations

With the above findings in mind, the following recommendations are proposed for further research and action:

This study reveals several ambiguities in the 2012 SAR that require clarification and further development if the KSA is to achieve its goal of creating an attractive and reliable arbitration system for international commercial activities. The following recommendations suggest some steps that could be swiftly implemented by the KSA's government in order to stoke the interest of foreign commerce in the legal system of the KSA.

9.3.1. Embrace the Hybrid Theory of ICA

As stated in Chapter Four, the KSA adopts a jurisdictional view of ICA which argues for state supervision over arbitrations conducted within its territory. It is clear that the KSA feels the jurisdictional theory provides a comfort zone for introducing the amendments it needs, since it guarantees that any delegation of the state's power over how disputes are to be conducted in its territory is the state's choice and could be rebutted by it when it sees fit (see Chapter Four). This is why the KSA is slowly easing its control over the process of private dispute resolution while, at the same time, being cautious of losing control over them (see Chapters Five and Six). Therefore, there is a need to adopt a hybrid view which recognises both parties' rights in exercising their autonomy over their private dispute and the KSA's right to protect its sovereignty.

9.3.2. Clarify Ambiguities in the 2012 SAR

The researcher recommends the introduction of a new implementation rule to address contentious issues relating to the 2012 SAR. The suggested implementation rule should clearly address the issues surrounding an arbitrator's qualifications, such as their gender and religion. It should also consider the impracticality of some of the 2012 SAR timeframes, as well as all other issues considered in Chapters Six and Seven.

9.3.3. Develop the Consultative Council's Role in the KSA Legislative Process

The Consultative Council's role in the legislative process in the KSA is limited to providing consultations which will be considered by the KSA's monarch. This limited

role has resulted in the slow development of the KSA's legal regulations in general and arbitration regulations in particular. Therefore, the researcher advocates for the empowerment of the KSA Consultative Council in its ability to issue binding regulations, provided that such regulations receive the King's approval. This would ensure that the Consultative Council could expedite the process of new regulations where needed while, at the same time, protecting the King's role in the legislative process (the Basic Law, 1992). The implementation of such a process in the KSA will lead to the development of the KSA's legislative image in a way that would attract foreign commerce.

9.3.4. Codify the General Principles of Sharia

The researcher recommends the establishment of a unified code based upon the general principles of Sharia, as extracted from across all Sunni schools of jurisprudence. Unlike the Majallah, the proposed codification would not focus on codifying Islamic rulings in detail, but act as general principles that could be referred to in order to ascertain Sharia views on the matter. This would limit the judges' ability to interpret the principles of Sharia since some judges are not qualified to explore the main sources of Sharia. Instead, the general principles would have to be collected by the Senior Scholar's Council, enabling judges to rely on such codified principles to issue their judgments.

9.3.5. Redefine the Scope of the KSA's Public Policy

The author strongly recommends the introduction of new provisions covering all aspects of the KSA's public policy. This new provisions ought to be drafted in a way that would enable both parties and arbitrators to predict what violates the KSA's public policy. This ability to predict a particular state's public policy would increase its certainty and reduce the number of awards which infringe it (Ghodoosi, 2016). The wording of such provisions should be drafted in explicit statements such as, "It is against the KSA's public policy to...", or "the commission of ... is considered to go against the KSA's public policy", or "an arbitration should... in order to comply with the KSA's public policy". These suggested provisions should avoid reference to general terms, such as 'Sharia rules' or 'KSA sovereignty' or from referencing unascertainable terms. On the contrary, the award's elements which normally

infringe Sharia principles, such as *Riba*, should be clearly stated as a ground for breaching the KSA's public policy.

9.3.6. Reconsider the Scope of *Riba* in the KSA's Legal Practice

The present research shows that awards with an element of interest tend to be the most common triggers for the rejection of enforcements and courts often strike such awards down as being against KSA's public policy. Yet, the concept of interest and damages remains uncertain in the KSA's legal practice, since interest is confused with *Usury* and treated as such (see Chapter Two). This dynamic creates a lack of accuracy because the concept of interest is wider than *Usury*, which is related to an agreed automatic increase in order to achieve a profit. Interest encompasses more forms of compensations in ICA, such as damages for incurred loss or profit. Therefore, the scope of *Riba* should be clearly defined, alongside all other types of compensation that are not necessarily under its scope.

9.3.7. Create a Binding System of Precedents

As is clear from the discussions in Chapters Five and Six, judges' decisions in the KSA are inconsistent, which affects the reliability of the KSA's legal system as a whole. The lack of decisions that are binding on future judges empowers judges in the KSA with unlimited discretion to evaluate the rules of Sharia and reach decisions based on what they, as individual judges, see fit. This is a very unattractive practice for foreign commerce, since it is important for them, as part of the evaluation of their business hazards, to be able to predict the law of the state they have targeted for investment (Gazzini and others, 2012). Therefore, the author recommends that KSA legislators create a system of binding precedents, whereby judges' decisions are binding on future ones, bearing in mind the usual hierarchy of courts.

9.4. Further Research

Due to the limited scope of the present project's research questions, the author has either touched briefly on some important issues or not been able to address them. Therefore, he recommends future researchers discuss these areas further as part

of future PhD researches, or as the subject of future publications. These areas have been divided by the researcher into the following titles: a) the development of Islamic finance and its influence on some of the prohibited practices in the KSA's arbitration framework; b) the KSA's 2030 vision on developing its arbitration practice and how it can be reconciled with the doctrine of state sovereignty; c) the KSA culture's influence on developing both legal regulations and Sharia interpretations within the state; d) the role of women in developing the KSA's legal practice in light of Sharia support and current cultural restraints.

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