

# Preserving the Local Culture While Modernising Arbitration in Saudi Arabia: A Blessing or a Curse?

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## Abstract

One of the cornerstones of the Saudi Arabia 2030 vision is to facilitate the flow of private investments in the Middle East. It is against this background that the Saudi Regulator has enacted new regulations with the principal aim to drive confidence in investment by providing investors with a modern framework for an out-court resolution of their disputes.

Even though the New Regulations are considered to be a great achievement for arbitration in Saudi Arabia, reference to Sharia within the New Regulations may constitute a barrier to the achievement of the proposed underlined goals and may raise some concerns for investors as to the predictability of the set of rules, both procedural and substantive that may apply to their dispute and the enforceability of the ensuing arbitral awards.

The purpose of this paper is to study the interaction between Sharia and arbitration in the Kingdom of Saudi Arabia, by analysing whether and to what extent of compliance with the local culture, may undermine the development of arbitration. If so, what may be the solutions that could be taken into account by the Saudi Regulator and Saudi Courts to transform Saudi Arabia into an arbitration-friendly jurisdiction and an attractive seat of arbitration.

## Keywords

Arbitration; dispute resolution; Sharia law; Saudi Arabia; investment

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## Table of Contents

Introduction .....	7
1. A brief description of the KSA legal system and the current place of Sharia within the KSA legal order 8	
1.1 The original Saudi legal model: Sharia law enforced by Sharia courts .....	9
1.1.1 Sharia: definition and sources .....	9
1.1.2 The place of Sharia in the KSA legal system.....	10
2. The paradigm shift in the Saudi Arabian landscape following the enactment of the New Regulations .....	13
2.1 An environment receptive to arbitration and backed by a welcoming position of Sharia to out courts dispute resolution .....	13
2.2 The Arbitration Law of 1983: A justified hostility towards (international) arbitration .....	14
2.3 The New Regulations: An alignment of Saudi Arabia to international arbitration standards? 16	
2.3.1 Liberation of the arbitration proceedings from the grips of State courts .....	16
2.3.2 Parties' autonomy in respect to the applicable procedure and the substantive law .....	17
2.3.3 The enforcement of arbitration awards .....	17
3. The preservation of local traditions: a neutralisation of the New Regulations? .....	19
3.1 The interaction between Sharia and arbitration in Saudi Arabia .....	19
3.1.1 Sharia and procedural issues .....	19
3.1.2 Sharia and substantive law issues .....	22
3.1.3 Sharia, Saudi Public Policy and the enforceability of arbitral awards in Saudi Arabia ..	24
4. Suggested solutions .....	28
Conclusion.....	30

## Introduction

One of the cornerstones of the Saudi Arabia 2030<sup>1</sup> vision is to facilitate the flow of private investments and improve Saudi Arabia's *competitiveness* as a prospective hub for foreign investments in the Middle East. It is against this background that the Saudi Regulator has enacted new regulations with the principal aim to drive confidence in investment by providing investors, among other things, with a modern framework for an out-court resolution of their disputes. These new regulations consist mainly of (i) an Arbitration Law dated 2012<sup>2</sup>, "supposedly" based on international arbitration standards and inspired by the UNCITRAL Model Law and which was complemented five years later by its long awaited Implementing Regulation<sup>3</sup> (altogether designated by the "New Arbitration Law"), a New Enforcement Law dated March 2013 establishing for the first time in Saudi Arabia specific enforcement courts and providing a more lenient scheme in respect of the recognition and enforcement of foreign arbitral awards (the "New Enforcement Law"),<sup>4</sup> and a Cabinet Decision dated 2014 ("Cabinet Decision") establishing the Saudi Centre for Commercial Arbitration<sup>5</sup> (altogether designed by "New Regulations").

Even though the New Regulations constitute a great achievement for arbitration in Saudi Arabia, their application in practice may not achieve the proposed underlined goals. It may raise some concerns for local and foreign investors alike as to the predictability of the set of rules, both procedural and substantive, that may apply to their dispute and the enforceability of the ensuing arbitral award.

Indeed, the Saudi Basic Law of Governance<sup>6</sup>, which is considered to be the Constitution of Saudi Arabia<sup>7</sup> ("Basic Law"), provides in its Article 1 that the "*religion of Saudi Arabia shall be the Book of God and the Sunnah (Traditions) of his Messenger*". This means that from a theoretical point of view, all regulations in the Kingdom shall be compliant with the "Quran" and "Sunnah", which both constitute the first two formal components of what is commonly known or designed by "Sharia" or "Islamic Law"<sup>8</sup>. In the absence of a Constitutional Court that controls the conformity of the newly enacted regulations to Sharia, courts in Saudi Arabia may disqualify non-compliant Sharia provisions. In other terms, even if modern regulations have been enacted, their enforcement by Saudi Courts is not necessarily fully guaranteed. It is conditional upon passing a Sharia conformity test, which may be deployed *ab initio* by the competent court hearing the dispute. Needless to mention that such post-dispute Sharia test is a source of legal uncertainty for disputed parties, all the more that Sharia does not constitute a set of pre-determined rules which are applied in a consistent way by Saudi courts. It consists of general principles where application may substantively differ from one judge to another based on several factors and circumstances.

<sup>1</sup> Saudi Arabian's 2030 Vision available at <https://www.vision2030.gov.sa/en#>

<sup>2</sup> Royal Decree No M/34, dated 24/5/1433H (corresponding to 16/4/2012 Gregorian) concerning the approval of the Law of Arbitration, available at: <https://www.idc.gov.sa/en-us/RulesandRegulations1/Arbitration%20Law.pdf>. For a general overview about the New Arbitration Law, see: Salah Al Hejailan, *The New Saudi Arbitration Act: A Comprehensive and Article-by-Article Review*, 4(3) Int'l J. Arab Arb. 15 (2012).

<sup>3</sup> Implementing Rules of Arbitration Regulations of Saudi Arabia, in effect 9 June 2017 in 4 ICCA International Handbook on Commercial Arbitration 1 (ICCA & Kluwer Law International 2020). For a general overview about the implanting Rules of Arbitration Regulations, see: Mohamad Mahayni & Zaid Mahayni *Saudi Arabia: An Overview of The New Implementing Regulations To The Saudi Arbitration Law 13 June 2017*, <https://www.mondaq.com/saudi-arabia/arbitration-dispute-resolution/601494/an-overview-of-the-new-implementing-regulations-to-the-saudi-arbitration-law>.

<sup>4</sup> Royal Decree No. M/53 dated 13/8/1433 H (corresponding to 3/7/2012 Gregorian) concerning the approval the Enforcement Law, available at: <https://www.moj.gov.sa/Documents/Regulations/pdf/En/76.pdf>.

<sup>5</sup> Hamel Alsulamy, *The Saudi Center for Commercial Arbitration: The Catalyst Most Needed*, in Matthias Scherer (ed), 37 (3) ASA Bulletin, 585, 591 (2019).

<sup>6</sup> Basic Law of Governance, Royal Order No. (A/91), 27 Sha'ban 1412H – 1 March 1992, Published in Umm al-Qura Gazette No. 3397, 2 Ramadan 1412H - 5 March 1992, available at : <https://www.wipo.int/edocs/lexdocs/laws/en/sa/sa016en.pdf>.

<sup>7</sup> Mohammed Aleissa, *A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?* (PhD Thesis, University of Essex, 2016), <http://repository.essex.ac.uk/17245/>, at p.17.

<sup>8</sup> In this paper, "Sharia" and "Islamic Law" will be used interchangeably. Article 48 of the Basic Law of Governance provides: "*The Courts shall apply rules of the Islamic Sharia in cases that are brought before them, according to the Holy Qur'an and the Sunna, and according to laws which are decreed by the ruler in agreement with the Holy Qur'an and the Sunna*".

Whilst the Saudi Regulator has subtracted a certain number of industries from the grips of the local culture<sup>9</sup> (i.e., Sharia and the Saudi Public Policy<sup>10</sup>) by - for instance – allocating jurisdiction to specialised courts instead of the normally competent courts to hear disputes involving non-Sharia compliant laws such as in the banking sector<sup>11</sup>, the same approach has not been embraced in the context of arbitration. Indeed, the Saudi regulator seems to prevail the application of Sharia over the legal certainty which is one of the cornerstones on which (international) arbitration lies on. Indeed, Article 2 of the New Arbitration Law which states that “*without prejudice to the provisions of Islamic law the provisions of this regulation are applied to every arbitration*”, insists on the prominence of the principles of Islamic law and its prevalence over any provisions that may entail the application of New Arbitration Law.

Maintaining the local practice by insisting on the observance of the principles of Sharia and the Saudi Public Policy while at the same time adopting modern regulations for arbitration and enforcement of arbitral awards would result in creating a “*hybrid set of rules that simultaneously deviate from and converge with the international arbitration practice*”<sup>12</sup>. As we shall see details, such approach may constitute a great source of uncertainty, especially for business actors from both procedural and substantive standpoints.

This paper aims to study the interaction between Sharia and arbitration in the Kingdom of Saudi Arabia. It aims to analyse whether and to what extent compliance with the local culture may undermine the development of arbitration in Saudi Arabia.

This paper is divided as follows: the first part consists of a brief description of the current Saudi Legal System with a focus on the current place of Sharia within the Saudi Legal Order. After analysing the main provisions of the New Regulations and providing a brief comparison with the previous arbitration regime, Part two will shed light on the paradigm shift operated by the enactment of the New Regulations in the context of arbitration. Part three will argue that references to Sharia within the New Regulations may render the paradigm shift aforementioned more theoretical than practical as it may hinder the legal certainty and the adherence of the Arbitration Regulations to the international arbitration standards. Against this background, Part four will provide some insights and recommendations that may be taken into account by the Saudi regulator and Saudi Courts so that Saudi Arabia can be placed on the list of modern and arbitration-friendly jurisdictions.

## **1. A brief description of the KSA legal system and the current place of Sharia within the KSA legal order**

Sharia has exercised a great influence in shaping the current Saudi Legal System<sup>13</sup>. Disputes of all types were essentially adjudicated before Sharia courts by judges having received their education in Islamic studies<sup>14</sup>. However, the past ten years have witnessed a real “law revolution” having as a principal aim the enhancement, among other things, of the legal certainty that has been comprised by the previous regime according to which the outcome of disputes would be essentially left to the judges’ own interpretation of Sharia principles. Although such reforms may be interpreted as lessening the grip of Sharia over the Saudi legal system and enhancing legal certainty, one should be careful before jumping to such a conclusion. Indeed, the enforcement of any law is subject to a Sharia conformity test that may be deployed *ab initio* by the court hearing the dispute. The New Regulations with arbitration are not an exception to such principle.

<sup>9</sup> In this Paper, local culture refers to Sharia and to Saudi Public Policy.

<sup>10</sup> While the observance of Public Policy is admitted by most of the countries, however the specificity of the Saudi Public Policy, which is essentially steeped in Sharia, makes the reference to it within the New Regulations a source of uncertainty for parties in the context of arbitration. Unless specified otherwise, reference to Sharia in this Paper is also a reference to the Saudi Public Policy

<sup>11</sup> Royal Order No. 8/729 dated 10/7/1407H corresponding to 3/10/1987 (Gregorian) established the Committee for Settlement of Banking Disputes. The Royal Order No. 37441 dated 11/8/1433H corresponding to 7/1/2012 (Gregorian) changed the “Committee for the Settlement of Banking Disputes” to the “Committee for Banking Disputes”, available at: <http://www.aljadaan.com/files/file/SAMA%20Committee%20Restructuring%20Briefing%20Note.pdf>.

<sup>12</sup> Faris Nesheiwat and Ali Al-Khasawneh, *The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia*, 13 Santa Clara J. Int’l L. 443,445 (2015).

<sup>13</sup> Al Ghaydan, *The judiciary in Saudi Arabia*, 13 (3) Arab Law Q. 235 (1998).

<sup>14</sup> Abdullah F. Ansary, *A Brief Overview of the Saudi Arabian Legal System*, [http://www.nyulawglobal.org/globalex/saudi\\_arabia.htm#\\_Toc200894573](http://www.nyulawglobal.org/globalex/saudi_arabia.htm#_Toc200894573).

### 1.1 The original Saudi legal model: Sharia law enforced by Sharia courts

After briefly introducing the notion of Sharia and its main sources, this part will address the place of Sharia within the Saudi legal Order.

#### 1.1.1 Sharia: definition and sources

In Islamic literature, Sharia or Islamic law referred to the set of principles and rules prescribed by Allah in the Quran or dedicated by his almighty to the Prophet Mohamed. The materialised through the Prophet's practices<sup>15</sup>, actions and sayings, also referred to as the "Sunnah"<sup>16</sup>. The Quran and the Sunnah constitute the two essential components of Sharia with the prevalence of the Quran over the Sunna in case of contradiction<sup>17</sup>.

Sharia encompasses principles and rules that can be divided into two main components: a spiritual component which relates to the Islamic faith and beliefs and contains rituals that should be followed by Muslims in their daily life in respect of the cult<sup>18</sup>; and a legislative component which contains principles and rules that aim at providing a regulatory framework to the society from every perspective be it political, social, economic or legal<sup>19</sup>. In this paper, reference to Sharia or Islamic Law only concerns the regulatory component and refers more precisely to the law that deals with issues arising from contractual transactions<sup>20</sup>.

Despite the abundance and sophistication of Sharia, the latter is far from containing a comprehensive set of rules that purport to address all the aspects of human transactions or all the legal questions that have been encountered during the Islamic era or throughout the new millennium. Indeed, the different analysis and interpretations of the two primary sources of Sharia – the Quran and the Sunnah – by Islamic scholars have resulted in the emergence of three secondary sources of Islamic Law - the *Ijma'a*, the *Ijtihad* and the *Qiyas* – as well as the apparition of different schools of jurisprudence<sup>21</sup>.

*Ijma'a*<sup>22</sup>, which may be associated with the civil law concept of "Doctrine Majoritaire", constitutes the consensus of the majority of Islamic scholars on a particular issue. When such common consensus is reached, it becomes a source of law and may be considered a basis to reach a particular decision<sup>23</sup>.

*Ijtihad*, which is similar to the civil law concept of "jurisprudence", is the recourse of Islamic scholars to reasoning in their interpretation of the Quran and Sunna in order to find solutions to unprecedented situations as long as such solutions are in line with the general principles contained in the Quran and the Sunna<sup>24</sup>.

*Qiyas* (reasoning by analogy)<sup>25</sup> can be categorised under the umbrella of *Ijtihad*. It refers to a methodology embraced by Islamic scholars consisting of drawing analogies between similar or comparable situations in

<sup>15</sup> Maria Bhatti, *The Role of Sharia in International Commercial Arbitration*, 36(1) Wis. Int. Law J. 46, 49 (2019).

<sup>16</sup> The Sunnah has been compiled into a written collection designated by Hadeeth. See Wael Hallaq, *A History of Islamic Legal Theories*, Cambridge University Press (2004).

<sup>17</sup> Samir Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt* 10-13 (Hart Publishing 2 ed. 2006).

<sup>18</sup> Shaheer Train, *An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices*, 26 (1) ARIA 131, 133 (2015).

<sup>19</sup> Md. Shahadat Hossain, *Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview*, *Journal of Philosophy, Culture and Religion*, <https://iiste.org/Journals/index.php/JPCR/article/viewFile/9231/9449>.

<sup>20</sup> In this article, criminal and family law are excluded from the scope of Sharia /Islamic Law definition.

<sup>21</sup> Shaheer Train, *An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices*, 26 (1) ARIA 131, 134 (2015). For a general presentation of the sources of Sharia, see: Faisal Kutty: *The Sharia Factor in International Commercial Arbitration*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=898704](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=898704), at p. 22.

<sup>22</sup> David J. Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 25 Geo. Wash. J. Int'l L. & Econ. 131, 139 (1991-1992).

<sup>23</sup> Jean-Pierre Harb & A. G. Leventhal, *The New Saudi Arbitration Law: Modernization to the Tune of Sharia*, 30 (2) J. Int. Arbitr. 113, 115 (2013).

<sup>24</sup> Shaheer Train, *An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices*, 26 (1) ARIA 131, 134 (2015); Abdulrahman Baamir & Ilias Bantekas, *Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice*, 25 (2) Arbitr. Int. 239, 256 (2009).

<sup>25</sup> See Oxford Islamic Studies Online, <http://www.oxfordislamicstudies.com/article/opr/t125/e1936>.

order to reach a position for a situation that has not been addressed by the Quran and Sunnah, based on consecrated solutions for a similar and comparable situation<sup>26</sup>.

The different interpretations developed by Islamic scholars with regards to situations and instances where the Quran and Sunnah were not explicitly clear, have resulted in the emergence of several schools of thoughts which are the Hanafi school, Maliki school, Shafi school, and Hanbali schools<sup>27</sup>. Several differences among the schools arose on a variety of jurisprudential matters relating to, among other things, civil and commercial transactions.

### 1.1.2 The place of Sharia in the KSA legal system

Place of birth of Islam and home for the two most important Islamic shrines (Mecca and Medina); it is not surprising that Sharia has exercised a great role in shaping the Saudi legal system. However, this could not have been possible without a political will from the founders to establish a State that embraces people's aspirations to be ruled and governed in accordance with the will of Allah, which can only be made through establishing Sharia as the ultimate and superior source of law<sup>28</sup>.

Indeed, the primacy of Sharia has been recognised by the Saudi Basic Law of Governance which plays the role of the Constitution in Saudi Arabia<sup>29</sup>. Its Article 1 clearly states that the religion of the State shall be Islam and its Constitution shall be the Book of God and the Sunna.

The consecration of Sharia as the Constitution of Saudi Arabia has been clearly reflected in the Saudi Legal system, in terms both the regulatory framework and the organisation of the judiciary.

In terms of the regulatory framework, despite the founder's Abdul Aziz<sup>30</sup> determination to create a modern society and his plan to liberalise and codify the sources of Sharia<sup>31</sup> – which have been vividly resisted by Muslim scholars - the early years of the Kingdom were characterised by a shortage in regulations and disputes of all nature – be it commercial, civil, or in the construction arena - were adjudicated by judges in accordance with Sharia principles<sup>32</sup>.

Even though the *Hanbali* School – which is the most conservative school of teaching - constitutes the dominant source of interpretation of Sharia in the Kingdom of Saudi Arabia<sup>33</sup>, solutions to disputes would essentially depend on judges' own interpretation of Sharia, which makes judges' determination “very extensive, even imprecise, and hence casuistic”<sup>34</sup>. Therefore, there is no guarantee whatsoever that a matter that has been decided on a certain issue will be decided the same way by the same or another judge. In other terms, the principle of *stare decisis* is not recognised by the Saudi legal system<sup>35</sup>. Needless to mention,

<sup>26</sup> A. Alkhamees, *International Arbitration and Sharia Law: Context, Scope, and Intersections*, 28(3) J. Int. Arbitr. 255, 256 (2011).

<sup>27</sup> Shaheer Train, *An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices*, 26 (1) ARIA 131, 134 (2005).

<sup>28</sup> Abdullah F. Ansary, A Brief Overview of the Saudi Arabian Legal System, [http://www.nyulawglobal.org/globalex/saudi\\_arabia.htm#\\_Toc200894573](http://www.nyulawglobal.org/globalex/saudi_arabia.htm#_Toc200894573).

<sup>29</sup> Basic Law of Governance, Royal Order No. (A/91), 27 Sha'ban 1412H – 1 March 1992, Published in Umm al-Qura Gazette No. 3397, 2 Ramadan 1412H - 5 March 1992, available at : <https://www.wipo.int/edocs/lexdocs/laws/en/sa/sa016en.pdf>.

<sup>30</sup> The Modern Saudi Arabia was founded in 1932 by King Abdulaziz who united all the provinces of Arabia. He ruled from 1932 until 1953. For more information, see Abdullah F. Ansary, *A Brief Overview of the Saudi Arabian Legal System*, [http://www.nyulawglobal.org/globalex/saudi\\_arabia.htm#\\_Toc200894573](http://www.nyulawglobal.org/globalex/saudi_arabia.htm#_Toc200894573).

<sup>31</sup> Nathalie Najjar, *Sharia Applicable to the Merits in International Commercial Arbitration* in Liber Amicorum Samir Saleh: *Reflections on Dispute Resolution with Particular Emphasis on the Arab World* 215 (Kluwer Law International 2009).

<sup>32</sup> Article 48 of the Basic Law of Governance obliges the courts to “...apply the rules of Sharia'a in the cases that are brought before them, in accordance with the precepts contained in the Quran and the Sunnah, and regulations decreed by the ruler which do not contradict the Quran and the Sunnah...”.

<sup>33</sup> Ahmed Alsirhani, *The Refusal of Foreign Arbitral Awards in Saudi Arabia on the Grounds of Public Policy – An Issue of Fairness and Justice* (January 2019), <http://vuir.vu.edu.au/39482/1/ALSIRHANI%20Ahmed-thesis.pdf>, at p. 81.

<sup>34</sup> Nathalie Najjar, *Sharia Applicable to the Merits in International Commercial Arbitration* in Liber Amicorum Samir Saleh: *Reflections on Dispute Resolution with Particular Emphasis on the Arab World* 215 (Kluwer Law International 2009).

<sup>35</sup> Van Eijk, *Sharia and national law in Saudi Arabia*, In J. M. Otto (Ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* 139, 161-162 (Leiden University Press 2010).

leaving the dispute's determination to the judge's own interpretation of Sharia principles constitutes a source of legal uncertainty, especially for foreign investors that may not be able to envisage clearly the set of rules that would apply to their dispute.

Legal reforms in Saudi Arabia were principally underpinned by economical rather than social considerations and were carried out on account of supporting the Kingdom's social and economic development specially after the emergence of Saudi Arabia as the most important oil exporter in the world<sup>36</sup>. Although the legal reforms that took place in the Kingdom have extended for several years, three marketable eras may be taken as a reference.

The first wave of reform was initiated between 1970 and 1995. Following the country's establishment of the Central Planning Organisation and the launching of its economic development<sup>37</sup>, the need to modernise the laws and the court system becomes very pressing. In fact, such developments were highly dependent on foreign know-how and technology. Integration into the Kingdom couldn't have been possible without the existence of modern regulations at least in the commercial field<sup>38</sup>. Such period has witnessed a review of the different rules regulating foreign investments, government procurements, business associations, agency arrangements and labour relations<sup>39</sup>.

Concerning the organisation of the judiciary, the reforms mentioned above have not constituted a revolution *per se* to the prevailing system. Indeed, Sharia courts have been granted general jurisdiction to settle all disputes except those excluded by specific regulations<sup>40</sup>. These exceptions concerned essentially disputes of administrative nature involving either government or governmental entities or disputes of commercial nature which adjudication was assigned to the Board of Grievance - a court body operating outside the Sharia court system<sup>41</sup> and which was subsequently vested with the power to entertain applications for the enforcement and execution of foreign judgments.

In 2007 after King Abdullah's approval of a plan for a new judicial system, a new Decree including the Law of the Judiciary and the Law of the Board of Grievances<sup>42</sup> was enacted, shaping the new judicial system and bringing Saudi Arabia closer to other civil law jurisdictions. The New Decree<sup>43</sup> institutes a Supreme Court (Court of Cassation), operates the replacement of the existing courts of appeal by new courts of appeal seated in different provinces in the Kingdom and more importantly replaces the general Sharia courts by first instance courts in various provinces with specialised circuits dealing with civil, labour, criminal, commercial<sup>44</sup> and other specialised areas of law<sup>45</sup>. In addition to that, the Board of Grievance was restructured and returned to exercise its original role as an administrative court,<sup>46</sup> with its jurisdiction extending to deal with matters related to the execution and enforcement of foreign judgments and arbitral awards.

Finally, the last wave of reforms concerns the last decade which has witnessed a regulatory and legislative frenzy specially after 2017, the date of Mohamed Ben Salman appointment as the Crown Prince of Saudi Arabia who has led (and still leading) successful reforms aiming essentially at modernising the Kingdom and diversifying its economy through promoting foreign investments as part of his 2030 Vision Plan. Recent years have witnessed the enactment of, among other things, a very modern Bankruptcy Law<sup>47</sup>, a new E-

<sup>36</sup> Saleh Mubarak Bin Abbadi, *Arbitration in Saudi Arabia: The Reform of Law and Practice*, SJD Dissertations, Penn State Law e Library (2018), available at <https://elibrary.law.psu.edu/sjd/9>, at p.36

<sup>37</sup> George N. Sfeir, *The Saudi Approach to the Law Reform*, 36 (4) Am J Comp Law 729, 733 (1988).

<sup>38</sup> George N. Sfeir, *The Saudi Approach to the Law Reform*, 36 (4) Am J Comp Law 729, 733 (1988).

<sup>39</sup> George N. Sfeir, *The Saudi Approach to the Law Reform*, 36 (4) Am J Comp Law 729, 733 (1988).

<sup>40</sup> George N. Sfeir, *The Saudi Approach to the Law Reform*, 36 (4) Am J Comp Law 729, 741 (1988).

<sup>41</sup> Decree No. 2/13/8759 of 1374/1995, <https://www.saudiembassy.net/board-grievances-law>.

<sup>42</sup> Royal Decree No. M/78 of 1428 H corresponding to 1/10 2007 (Gregorian)

<sup>43</sup> For a general presentation of the current court system in the KSA, Saleh Mubarak Bin Abbadi, *Arbitration in Saudi Arabia: The Reform of Law and Practice*, SJD Dissertations, Penn State Law e Library (2018), <https://elibrary.law.psu.edu/sjd/9>, at p.42.

<sup>44</sup> Commercial disputes have been removed from the jurisdiction of the Board of Grievance and were assigned to specialized commercial courts within the realm of the specialized Sharia courts.

<sup>45</sup> Practically speaking, commercial courts were finally established and started their official mission in 2017.

<sup>46</sup> Nicholas Gould & Fenwick Elliott, *The Saudi Board of Grievances*, available at : <https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/11/saudi-board-grievances>.

<sup>47</sup> Royal Decree No. M/05 dated 28/05/1439H, corresponding to 13/02/2018 Gregorian.

commerce Law<sup>48</sup>, a new Competition Law<sup>49</sup>, a new Government and Tenders Law<sup>50</sup>, a new Franchise Law<sup>51</sup>, a new Commercial Law Courts Law<sup>52</sup> and the instauration of class actions procedures in financial and commercial disputes<sup>53</sup>.

Several comments can be made with respect to all the legal reforms that have been carried out by Saudi Arabia in the past three decades.

First, with the enactment of a wide variety of regulations, the legal system in the Kingdom has shifted from a divine non-codified system to a man-made legal system where enacted regulations occupy an important part of the legal system and cover a wide array of industries. Indeed, Saudi Arabia, one of the latest Muslim countries to resist codification, becomes more or less similar to other Muslim countries where Sharia also plays an important role in their legal system, such as Dubai, Qatar and Egypt.

However, this is not to say that each and every aspect of the law is codified in Saudi Arabia. Indeed, reforms and codifications touch upon specific areas of law, leaving the general law regulating the relations of individuals with one another in a state of flux. Indeed, despite all the reforms that took and are still taking place, the civil law which is the branch of law applying by nature to all transactions except for those excluded by specific regulations – is still subject to the non-codified principles of Sharia and therefore to the arbitrary determination of the judge. This means that all issues associated with contracts and torts - which constitute the bulk of disputes submitted to arbitration - are not subject to a predefined set of rules. The unpredictability of Sharia is such that even in the context of Islamic financing transactions, it has been stated that investors are generally reluctant to choose Sharia as the governing law as they prefer to have a degree of legal certainty and to avoid any immutable system that would be subject to divergent opinions among scholars<sup>54</sup>.

All of this may render unattractive the legal system in Saudi Arabia, more that the resolution of disputes by way of arbitration and the choice of foreign law to govern the transaction would not dissipate all such difficulties, as we shall see in further detail.

Another observation is that even though all regulations, particularly those enacted in the last decade, are in line with international standards and present great similarities with the most advanced regulations in the West. Sharia still however exercises a great influence over the content and the validity of any newly enacted regulation. In fact, all Royal Decrees by virtue of which laws are enacted start with a statement of faith in God. More importantly, enacted laws contain provisions insisting on the prevalence of Sharia over any provision to the contrary contained in the statute. In other words, as rightly pointed out by a commentator, even though these regulations have forged an existence of their own parallel to Sharia; they cannot be considered independent from it<sup>55</sup>. Not only does Sharia constitute the common law to which one would turn to complement statutory provisions when such provisions do not fully comprehend the concerned transactions but also, in the event of a discrepancy between the statute and the Sharia, the latter supersedes the former. Against this background, the legitimacy of any statute may become uncertain since Sharia has a “veto power”<sup>56</sup> over provisions considered to sit at odds with its principles. Such may put at stake the autonomy of the legislative process as a whole. Also, the predictability of the solutions that a particular regulation tries to achieve becomes questionable. Indeed, the conformity of the statute to Sharia would depend on a twofold test: the judge’s own interpretation of Sharia, which may differ from one judge to another and the judge’s determination as to whether or not a discrepancy exists between Sharia and any of the provisions contained in the statute. It is true that the Court of cassation’s oversight power over the proper application of the provisions of Sharia Law<sup>57</sup> may establish a certain harmonisation with regards to what is considered

<sup>48</sup> Royal Decree No. M/126, dated 7/11/1440 H, corresponding to 10/7/2019 Gregorian.

<sup>49</sup> Royal Decree No. M/75, dated 29/6/1440 H, corresponding to 6/3/2019 Gregorian.

<sup>50</sup> Royal Decree No. M/128, dated 9/2/1440 H, corresponding to 16 /7/ 2019 Gregorian.

<sup>51</sup> Royal Decree No. M/22, dated 9/2/1441 H, corresponding to 8/10 2019 Gregorian.

<sup>52</sup> Amer Tabbara, *Group actions in the Middle East*, Mena Business Law Review, 31 (April 2019).

<sup>53</sup> George N. Sfeir, *The Saudi Approach to the Law Reform*, 36 (4) Am J Comp Law 729, 734 (1988).

<sup>54</sup> Umar A. Oseni & Kabir Hassan, *Regulating the governing law clauses in Sukuk transactions*, 16 (3) JBR 220, 241 (2014).

<sup>55</sup> George N. Sfeir, *The Saudi Approach to the Law Reform*, 36 (4) Am J Comp Law 729, 731 (1988).

<sup>56</sup> George N. Sfeir, *The Saudi Approach to the Law Reform*, 36 (4) Am J Comp Law 729, 751 (1988).

<sup>57</sup> Royal Decree No. M/21, 20 Jumada I, 1421 corresponding to 19 August 2000 Gregorian, Article 193. [http://hrlibrary.umn.edu/research/saudiArabia/law\\_of\\_procedure.html](http://hrlibrary.umn.edu/research/saudiArabia/law_of_procedure.html);



against or in line with Sharia; however, such control can only be exercised by the Supreme Court upon an application filed to that effect by any dissatisfied party from a decision rendered by a Court of appeal.

On a different note, the establishment of specialised judiciary machinery since 2007 reform has resulted in the suppression of general Sharia courts in favour of more specialised circuits within both the courts of first instance and courts of appeal<sup>58</sup>. However, despite the above, appointed judges are not required to have a specialisation in law but should hold a degree from one of the Sharia Colleges in the Kingdom as a prerequisite to their appointment<sup>59</sup>. When having an equivalent degree (i.e., in law), the judge's appointment is conditional upon sitting for a special examination prepared by the Supreme Judicial Council. Only a training of two months is required for judges sitting in specialised courts<sup>60</sup>.

Education diversity among judges sitting in the same districts is specific to the Saudi Legal System. It may undermine the certainty of the judgment-making process as judges may embrace different approaches depending on their background and education. For instance, a Sharia qualified judge may show reluctance in applying the statutes and its determination may be based on his Sharia background to the determinant of the applicable regulation.

## **2. The paradigm shift in the Saudi Arabian landscape following the enactment of the New Regulations**

Even though the New Arbitration Law has been considered by the majority of arbitration scholars and professionals as bringing Saudi Arabia into the realm of arbitration-friendly jurisdictions<sup>61</sup>, the relationship between arbitration and the Saudi Legal System remains somehow conflictual. The scepticism of the Saudi Regulator *Vis à Vis* arbitration may be understandable and could be justified by historical considerations which made arbitration to be perceived by Saudi Arabia as a weapon used against its economic and social interests.

Contrary to what one may think, arbitration regulations have existed since 1930 within the Saudi legal system and early disputes in connection with Oil and Gas have been settled through arbitration. From an environment receptive to arbitration and backed by a welcoming position of Sharia to dispute adjudication by means of arbitration (A) to an environment hostile and sceptical *vis à vis* this out court dispute resolution mechanism consecrated by the Arbitration Law of 1983 (B), a friendly yet a cautious environment seems to dominate today the arbitration scene following the enactment of the New Regulations (C).

### **2.1 An environment receptive to arbitration and backed by a welcoming position of Sharia to out courts dispute resolution**

Provisions with respect to arbitration in Saudi Arabia are as old as the law of the Commercial Court enacted in 1931. Such law contained concise provisions with respect to arbitration reflected in five articles. The provisions address the formalities that should be followed by the parties when deciding to submit their disputes to arbitration, arbitrators' duties to examine parties' allegations according to Sharia provisions and the enforceability of arbitration awards upon its validation by the commercial court<sup>62</sup>.

The early consecration of arbitration in the KSA is not surprising, as Sharia, the principal source of law in Saudi Arabia has been considered as embracing and even favouring arbitration as a means for dispute resolution, whether through the holy Quran or the Sunna<sup>63</sup>; whilst interest in arbitration at the global level has only been on the rise in the last decades. In this regard, Islamic scholars consider that the Prophet accepted

<sup>58</sup> Saleh Mubarak Bin Abbadi, *Arbitration in Saudi Arabia: The Reform of Law and Practice*, SJD Dissertations, Penn State Law e Library (2018), available at <https://elibrary.law.psu.edu/sjd/9>, at p. 42.

<sup>59</sup> Royal Decree No. M/78 of 1428 H corresponding to 1/10 2007 (Gregorian), Article 31.

<sup>60</sup> Saleh Mubarak Bin Abbadi, *Arbitration in Saudi Arabia: The Reform of Law and Practice*, SJD Dissertations, Penn State Law e Library (2018), available at <https://elibrary.law.psu.edu/sjd/9>, at p.55.

<sup>61</sup> See for instance, Khalid Alnowaiser, *The New Arbitration Law and Its Impact on Investment in Saudi Arabia*, 29 (6) J. Int. Arbitr. 723 (2012).

<sup>62</sup> Law of the Commercial Code of 1930, issued by virtue of Decree Law No 32, dated 15/1/1350 H corresponding to June 2, 1931 Gregorian, Article 493 to 497.

<sup>63</sup> Saud Al-Ammari and A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, available at <http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf>, at p. 388.

and enforced arbitration decisions and advised others to arbitrate. His closed companions have also followed such pro-arbitration approach<sup>64</sup>.

However, it should be mentioned that the “Islamic” version of arbitration does not really look like the Western version, as we know it today. In fact, the Islamic arbitration practiced by the Prophet is closer to mediation than arbitration. Resort to arbitration was essentially made in order to settle family disputes – which are not arbitral according to the Western version of arbitration – or disputes having a political connotation between the tribes<sup>65</sup>. In addition, it is important to mention that the Islamic version of arbitration practiced by the Prophet and his companions did not provide a procedural or substantive framework for carrying out the arbitration proceedings. This is due to the fact that there is not any set of procedural rules in the Quran or Sunna governing the conduct of arbitration and references to such mechanism are essentially made in the form of themes and moral values, preaching arbitration as a Sharia preferred method of dispute resolution<sup>66</sup>.

## 2.2 The Arbitration Law of 1983: A justified hostility towards (international) arbitration

Even though the arbitration provisions contained in the Commercial Law of 1931 represented an embryonic form of arbitration, it however portrayed a pioneering reception of arbitration by the Saudi legal system at a point of time where such an out-court dispute resolution mechanism was overlooked in today’s most arbitration-friendly jurisdictions. In this regard, it has been considered that until 1950, arbitration was the preferred method for resolving disputes in the context of oil concession agreements<sup>67</sup>.

However, this receptive environment was repudiated following the Aramco arbitration case<sup>68</sup> which was held in accordance with the provisions of the Commercial Law of 1931. The dispute involved a disagreement between the Government of Saudi Arabia and Aramco with regards to the Aramco’s exclusive right of oil transport as defined in the concession agreement. The parties referred the dispute to arbitration in accordance with the contractual provisions. Despite being the law applicable to the merits of the dispute, the arbitration tribunal disqualified Saudi Law<sup>69</sup> under the pretext that Sharia is too simplistic and unsophisticated to be applied to commercial matters. The arbitral panel went on to consider that Sharia should be supplemented by the general principles of law, custom and practice in the oil business, and notions of pure jurisprudence<sup>70</sup>.

In his award, the arbitral tribunal ruled against the Government. Saudi Arabia has interpreted the disqualification of Sharia as a tool used by the panel to uphold Aramco wrongful allegations, on the account that if Sharia has been applied to the dispute, the outcome of the award would have been in the Government’s favour<sup>71</sup>. Whatever the case may be, a feeling of distrust has been developed by the Saudi Government against international arbitration, the latter has been perceived as a tool favouring Western international oil companies as the determinant of Saudi Arabia’s economic and social interests<sup>72</sup>. This sentiment may be justifiable, especially since other Western legal experts have acknowledged the maturity and sophistication of Sharia to

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<sup>64</sup> Faisal Kutty : *The Sharia Factor in International Commercial Arbitration*, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=898704](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=898704), at p. 31; Saud Al-Ammari and A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, available at <http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf>.

<sup>65</sup> Saleh Mubarak Bin Abbadi, *Arbitration in Saudi Arabia: The Reform of Law and Practice*, SJD Dissertations, Penn State Law e Library (2018), available at: <https://elibrary.law.psu.edu/sjd/9>, at p. 70.

<sup>66</sup> Shaheer Train, *An Analysis of the Influence of Islamic Law on Saudi Arabia’s Arbitration and Dispute Resolution Practices*, 26 (1) ARIA 131, 135 (2005).

<sup>67</sup> Samir Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt* 50 (Hart Publishing 2 ed. 2006).

<sup>68</sup> 27 I.L.R. 117 (1963).

<sup>69</sup> The same approach has been embraced in other international arbitration with the UAE and Qatari Governments (respectively, *Petroleum Development Ltd v. Sheikh of Abu Dhab* and *Ruler of Qatar v. International Marine Oil Co*) where Sharia was also the law applicable to the merits of the dispute. For more details about the two cases above-mentioned see Faisal Kutty : *The Sharia Factor in International Commercial Arbitration*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=898704](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=898704), at p.33.

<sup>70</sup> Stephen M. Schwebel , *The Kingdom of Saudi Arabia and Aramco Arbitrate the Onassis Agreement*, <http://jwelb.oxfordjournals.org/content/early/2010/09/28/jwelb.jwq012>.

<sup>71</sup> Yahya Al-Samaan, *The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi. Arabia*, 9 (3) Arab. Law Q. Arab Law Quarterly, 217, 222 (1994).

<sup>72</sup> Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Award*, 18 (3) Fordham Int. Law J. 920, 958 (1994).

address modern commercial transactions, rendering suspicious the real reasons behind the disqualification of Saudi law by the arbitral panel in this case<sup>73</sup>.

In retaliation to the award, the Council of Ministers passed a resolution, which placed a prohibition on all governmental entities from entering into arbitration agreements or the use of foreign law as the law applicable to the merits of the dispute<sup>74</sup>. Any dispute involving a Governmental entity should therefore be referred to the Board of Grievance and should be subject to Saudi Arabian law.

The Arbitration Law of 1983<sup>75</sup> and its implementing Regulations, which superseded the provisions of the Commercial Law Court, reflected the Government's scepticism towards arbitration. Its unfriendly arbitration provisions have been described as being contrary to Sharia. Yet, it has been considered as an important evolution for arbitration<sup>76</sup> as it contained and, for the first time in Saudi Arabia, a set of provisions specifically dealing with arbitration.

The Law of 1983 departed from the international arbitration standards as we know it today. Indeed, it instituted – among other things, a judicial control over the arbitration proceedings and the outcome of the arbitral awards, imposed a specific language for the carrying out the proceedings and failed to address a certain number of procedural issues.

The control vested by state courts by virtue of the Law of 1983 over the arbitration proceedings applies throughout the whole arbitration process. Indeed, Article 5 of the abovementioned Law required that the arbitration agreement be approved by the relevant authority having jurisdiction over the dispute<sup>77</sup>. Furthermore, state courts have been vested with oversight authority over the conduct of the proceedings and, more precisely, in respect of announcements, notifications and control of correspondence<sup>78</sup>. Upon completion of the proceedings and the handing down of the award, it would be possible for the competent authority to revisit the substance of the dispute in the event an objection is filed by any dissatisfied party<sup>79</sup>.

The relevant authority interference with the arbitration proceedings as described above has been criticised as being contrary to Sharia which gives arbitration the same status as court litigation and therefore does not require any control to be exerted by the competent authority over the proceedings or the arbitral award<sup>80</sup>.

Another requirement that has been described as having no foundation in Sharia is that the arbitration should be conducted in Arabic Language<sup>81</sup>. This requirement constituted a big burden for foreign entities, especially when the documents relating to the dispute were drafted in foreign languages.

Finally, the law of 1983 is deficient regarding a certain number of procedural issues such as the rules relating to the delivery of arbitral awards, communication between the parties and the arbitral tribunal and/or between

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<sup>73</sup> According to professor John Makdisi: "The Islamic legal system was far superior to the primitive legal system of England before the birth of the common law. It was natural for the more primitive system to look to the more sophisticated one as it developed three institutions that played a major role in creating the common law. The action of debt, the assize of novel disseisin, and trial by jury introduced mechanisms for a more rational, sophisticated legal process that existed only in Islamic law at that time. Furthermore, the study of the characteristics of the function and structure of Islamic law demonstrates its remarkable kinship with the common law in contrast to the civil law. Finally, one cannot forget the opportunity for the transplant of these mechanisms from Islam through Sicily to Norman England in the twelfth century" in John Makdisi, *The Islamic Origins of the Common Law*, 77 (5) NCLR 1637, 1738 (1999).

<sup>74</sup> Saud Al-Ammari & A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, available at <http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf>, at p. 388.

<sup>75</sup> Arbitration Law, enacted by Royal Decree No. M/46 of 12/07/1403H corresponding to 4/24/1983 Gregorian.

An English version of the law can be found at <http://www.wipo.int/wipolex/en/details.jsp?id=8502>.

(accessed May 2017). Council of Ministers Resolution 7/2021/M dated 8/9/1405H corresponding to 27/5/1985 Gregorian issued the Implementing regulations of the Law; See Abdulrahman Baamir & Ilias Bantekas, *Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice*, 25 (2) *Arbitr. Int.* 239, 263 (2009).

<sup>76</sup> Abdul Hamid El-Ahdab & Jalal El-Ahdab, *Arbitration with the Arab Countries* 612 (Kluwer Law International 2013).

<sup>77</sup> Article 5 of the New Arbitration Law.

<sup>78</sup> Article 8 of the New Arbitration Law.

<sup>79</sup> Article 18 of the New Arbitration Law.

<sup>80</sup> Shaheer Train, *An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices*, 26 (1) *ARIA* 131, 146 (2015).

<sup>81</sup> Article 15 of the Implementation Rules of the Saudi Arabian Arbitration Regulations 1983, available at: <http://www.trac.ir/law.aspx?id=45>.

the arbitral tribunal and third parties, and the seat of the arbitration. It also failed to address the procedure to be followed to enforce foreign awards that the New York Convention of 1958 has left to the law of the contracting State.

### 2.3 The New Regulations: An alignment of Saudi Arabia to international arbitration standards?

The enactment of the New Arbitration Law cannot be separated from the economic changes that have occurred (and still occurring) in Saudi Arabia. Since the joining of the World Trade Organisation in 2005, a lot of pressure has been exerted onto the Saudi legal system – as part of the conditions of accession - to attract foreign investments<sup>82</sup>, which is believed to be enhanced by among other things, the possibility to solve disputes through a modern arbitration framework. As a reminder, the New Arbitration Law was followed by the enactment of the Enforcement Law which moved the process in respect of the enforcement of arbitral awards from the jurisdiction of the Board of grievance to the Execution Court making therefore the enforcement of arbitral awards faster and more efficient.

The New Arbitration Law which is believed to be drawn upon the provisions of the UNICTRAL Model Law on International Commercial Arbitration has been positively received within the arbitration *milieu* in Saudi Arabia and has been described as providing a clearer and more comprehensive regime than the one previously in place<sup>83</sup>. It has also been considered as giving effect to arbitration-friendly principles prevalent in modern arbitration laws around the world.

A basic analysis of its provisions reflects a clear liberation of the arbitration proceedings from the grips of state courts (1) and a consecration of a certain number of well-established principles enshrined in modern arbitration practice (2). All of these provisions, which will be explored succinctly undoubtedly bring Saudi Arabia closer to the international arbitration community.

#### 2.3.1 Liberation of the arbitration proceedings from the grips of State courts

One of the most important achievements of the New Arbitration Law is the consecration of the independence of the arbitration proceedings. In fact, contrary to the previous regime established by the Law of 1983, there is no requirement whatsoever for any kind of validation of the arbitration agreement by State courts before the commencement of the proceedings. In order to be valid, the arbitration agreement should be in writing<sup>84</sup>, whether it takes the form of an arbitration clause or a submission agreement<sup>85</sup>. Furthermore, the arbitration award is elevated to the same stance as a judicial ruling and therefore competent courts are not in a position to review or reassess the merits of the dispute.

Another manifestation of the independence of the arbitration process is the consecration of the principle competence – competence<sup>86</sup> according to which the arbitral tribunal is vested with the power to rule upon its own jurisdiction and to hear, once the arbitration has commenced - if certain conditions are satisfied - applications for precautionary measures<sup>87</sup>.

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<sup>82</sup> Ahmed Alsirhan, *The Refusal of Foreign Arbitral Awards in Saudi Arabia on the Grounds of Public Policy – An Issue of Fairness and Justice*, A Thesis Submitted to the School of Law, Victoria University for the Degree of Doctor of Philosophy (PhD) Melbourne, Australia (2019), <http://vuir.vu.edu.au/39482/1/ALSIRHANI%20Ahmed-thesis.pdf>, at p. 6.

<sup>84</sup> Article 9.2 of the New Arbitration Law which provides that: “The arbitration agreement shall be written, or it is null and void”.

<sup>85</sup> Article 9.1 of the New Arbitration Law which provides that: “The arbitration agreement may be earlier to the dispute, whether it is independent, self-contained, or contained in a particular contract. Also, the arbitration agreement may be later to the dispute, even if there is a suit concerning it before the competent court. In this case, the agreement shall specify the issues covered by the arbitration, or the agreement is null and void”.

<sup>86</sup> Article 20.1 of the New Arbitration Law which provides: “The arbitral tribunal shall judge the defenses of its non-competence, including the defenses based on the absence of an arbitration agreement, or its fall, or its annulment, or its lack of coverage of the subject of the dispute.”

<sup>87</sup> Article 23.1 of the New Arbitration Law which provides: “It is permissible for the parties of the arbitration to agree that the arbitral tribunal may - at the request of one of them - command either of them to take what he sees of provisional or conservatory measures required by the nature of the dispute. The arbitral tribunal may oblige the party that requires taking such measures to provide an appropriate financial guarantee for the execution of this procedure”.

### 2.3.2 *Parties' autonomy in respect to the applicable procedure and the substantive law*

When the arbitration is international according to the test instituted by the New Arbitration Law<sup>88</sup> and whether the arbitration is seated in Saudi Arabia or elsewhere, the parties can choose the law applicable to the procedure, including the rules of any arbitration Centre, whether such Centre is located in the Kingdom or elsewhere<sup>89</sup>. Parties' autonomy also extends to the choice of the law applicable to the merits of the dispute<sup>90</sup>.

The recognition of parties' autonomy in respect of the choice of procedural rules resulted in the establishment of the Saudi Arbitration Centre, the first independent arbitration institution in the Kingdom, which paved the way and laid the foundation of institutional arbitration. The Centre administers both civil and commercial disputes and works in collaboration with well-established arbitration institutions. In addition to the arbitration rules, the SCCA adopted in 2018 the Rules for Conciliation, Expedited Arbitration and Code of Ethics<sup>91</sup>.

Parties' autonomy with respect to the law applicable to the merits of the dispute embraced by the New Arbitration Law constitutes a great achievement, as it is the first provision in the Saudi legal system that admits the possibility for the parties to choose a foreign law to govern their disputes. What is more, the New Arbitration Law contains a conflict of law rule allowing the arbitrator to determine the law applicable in the absence of any agreement by the parties<sup>92</sup>. Such provision constitutes an innovation in Saudi Arabia as the Saudi legal system does not contain provisions in respect of conflicts of law nor has the Saudi Courts filled such gap by developing a jurisprudential arsenal dealing with conflicts of law issues. As we will see in further detail, the absence of private international law regulations and principles is a weakness of the Saudi legal system that may negatively affect the development of international arbitration in Saudi Arabia.

### 2.3.3 *The enforcement of arbitration awards*

A reading of the New Arbitration Law and the New Execution Law suggests that the procedure for the enforcement of arbitral awards would depend on whether the arbitration takes place in Saudi Arabia or abroad, irrespective of the domestic or international nature of the arbitration.

The enforcement of local awards or awards issued in the context of an international arbitration seated in the Kingdom of Saudi Arabia, is subject to a two-stage process: the ratification of the arbitral award by the Competent Court<sup>93</sup> and the submission of such ratification, which confers the arbitral award the status of an enforcement writ for immediate execution before the Execution Court<sup>94</sup>.

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<sup>88</sup> Article 3 of the New Arbitration Law states: "According to this law, the arbitration shall be international if its dispute is related to the international trade, and this occurs in the following matters:

1- If the headquarter of both parties of the arbitration lies on more than one country at the time of the arbitration agreement; if one party has more than a business center, it depends mainly on the most relevant center to the subject of the dispute, and if one or both parties do not have a certain business center, it depends mainly on their normal residence address.

2- If the headquarter of both parties of the arbitration lies on the same country at the time of the arbitration agreement, and one of the following places lies outside that country:

A- The place of the arbitration procedures as assigned in the arbitration agreement, or referred to its way of assignment.

B- The place of executing an essential side of the obligations arising from the trading affairs between both parties.

C- The most relevant place to the subject of the dispute.

3- If both parties agree to resort to an organization or a permanent arbitration authority, or an arbitration center lies outside the Kingdom.

4- If the arbitration subject included in the arbitration agreement is related to more than one country".

<sup>89</sup> Article 25.1 of the New Arbitration Law which provides: "The parties of the arbitration may agree on the actions adopted by the arbitral tribunal, including their right to subject these actions to the valid rules in any organization, or authority, or arbitration center in the Kingdom or abroad, provided they do not violate the provisions of the Islamic Sharia".

<sup>90</sup> Article 38.1. A of the New Arbitration Law which provides: "Taking into account the non-violation of the provisions of the Islamic Sharia and public order in the Kingdom, the arbitral tribunal, during the hearing of the dispute, shall: Apply the rules agreed upon by the parties of the arbitration on the subject of the dispute, and if they agree on the application of a law of a particular state, the substantive rules shall be followed without those of dispute-of-laws, unless agreed otherwise".

<sup>91</sup> See : <https://sadr.org/arbitrators-code-of-conduct?lang=en>.

<sup>92</sup> See Article 38.1.B of the New Arbitration Law which provides: "If the parties of the arbitration do not agree on the statutory rules applicable to the subject of the dispute, the tribunal shall apply the substantive rules in the law that it considers the most relevant to the subject of the dispute".

<sup>93</sup> Article 53 of the New Arbitration Law which provides: "The competent court or its representative issues an order with the execution of the arbitrators' award (...)".

<sup>94</sup> Article 9 of the Enforcement Law which provides: "Compulsory execution may not be carried out except with an enforcement document for a due and specified right. Enforcement documents are : (...) 2- arbitral awards which include the enforcement order in accordance with the Law of Arbitration".

In what pertains to international awards rendered in different jurisdictions, they only face a one-stage process as they are not required to go to the Competent for ratification purposes and can be enforced immediately before the Enforcement Court.

Whether the arbitration is of a domestic or international nature, the grounds for a refusal to ratify a domestic arbitral<sup>95</sup> award by the Competent Court or to enforce an international arbitral award by the Enforcement Court<sup>96</sup> are very limited, which makes Saudi Arabia in appearance close to the international arbitration community. The same conclusion may be drawn with regard to the grounds for setting aside an arbitral award.<sup>97</sup> What is more is that Saudi Arabia is a party to a certain number of regional and international conventions with respect to the recognition and enforcement of foreign arbitral awards such as the 1952 Convention of the Arab League in respect of the Enforcement of Judgments and Arbitral Awards, the Convention on Judicial Cooperation between States of the Arab League (the “Riyadh Convention”) signed in 1983; and more importantly the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “New York Convention”). All these conventions aim at facilitating the execution and enforcement of regional and foreign awards in Saudi Arabia.

As bright as the picture may appear, the reality is somehow different. Despite the limited grounds for the refusal of ratification / recognition and enforcement/ setting aside arbitral awards, the circulation of arbitral awards in Saudi Arabia is not without challenges and may encounter several barriers such as the Sharia and Public Policy conformity test that would apply indistinctively to any award be it domestic or international.

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<sup>95</sup> Article 55 of the New Arbitration Law provides the following : “ *The order to execute the arbitration award under this Law shall not be issued except upon verification of the following:*

- a- *The award is not in conflict with a judgment or decision issued by a court, committee or commission having jurisdiction to decide the dispute in the Kingdom of Saudi Arabia;*
- b- *The award does not violate the provisions of Sharia and public policy in the Kingdom. If the award is divisible, an order for execution of the part not containing the violation may be issued.*
- c- *The award is properly notified to the party against whom it is rendered”.*

<sup>96</sup> In accordance with Article 12 of the New Enforcement Law, the conditions for enforcement of foreign awards apply *mutatis mutandis* to foreign arbitral awards. These conditions have been provided for by Article 11 of the Enforcement Law which provides: “ *Without prejudice to treaties and agreements, the enforcement judge may not execute a foreign judgment or order except on the basis of reciprocity and upon ascertaining that :*

- 1- *The courts of the Kingdom have not jurisdiction to review a dispute regarding which a judgment or order issued, and that the foreign courts issuing such judgment or order have jurisdiction over it in accordance with rules of international jurisdictions stated in their laws;*
- 2- *The litigants of a lawsuit in which a judgment is rendered are summoned to appear, are duly represented and are given the right to defend themselves ;*
- 3- *The judgment or order becomes final in accordance with the law of the court issuing it*
- 4- *The order or the judgment is not in conflict with any other order of judgment issued on the same case by a competent judicial body in the Kingdom; and*
- 5- *The judgment or the order is not in conflict with public order in Saudi Arabia”.*

<sup>97</sup> Article 50 of the New Arbitration Law provides : “ *An action to nullify an arbitration award shall not be admitted except in the following cases:*

- a- *If no arbitration agreement exists, or if such agreement is void, voidable, or terminated due to expiry of its term*
- b- *If either party, at the time of concluding the arbitration agreement, lacks legal capacity, pursuant to the law governing his capacity;*
- c- *If either arbitration party fails to present his defense due to lack of proper notification of the appointment of an arbitrator or of the arbitration proceedings or for any other reason beyond his control;*
- d- *If the arbitration award excludes the application of any rules which the parties to arbitration agree to apply to the subject matter of the dispute;*
- e- *If the composition of the arbitration tribunal or the appointment of the arbitrators is carried out in a manner violating this Law or the agreement of the parties;*
- f- *If the arbitration award rules on matters not included in the arbitration agreement. Nevertheless, if parts of the award relating to matters subject to arbitration can be separated from those not subject thereto, then nullification shall apply only to parts not subject to arbitration”.*

### 3. The preservation of local traditions: a neutralisation of the New Regulations?

While the enactment of a New Arbitration Law inspired by the UNICTRAL Model Law is undoubtedly a positive development of arbitration in Saudi Arabia, if one would draw a comparison with the ancient arbitration regime, the author is of the opinion that one should not jump to the conclusion that Saudi Arabia is, more than eight years after the enactment of the New Regulations, on the list of arbitration-friendly jurisdictions or an active seat of arbitration. Indeed, despite all the legislative changes, it is the author's view that the New Regulations do not provide business actors with the required degree of certainty whether in respect of the carrying out of the arbitration proceedings, the outcome of the dispute, and the enforceability of the award. This may put at stake the quest for legal certainty lying behind business actors' choice of (international) arbitration as a means for dispute resolution. Such uncertainty is created by the Saudi regulator's insistence on preserving the local culture through instituting a Sharia and Public Policy "compatibility test" under both the New Arbitration and the New Enforcement Law in respect of the conduct of the proceeding, the merits of the dispute and the arbitral award alike. In light of the above, it becomes questionable whether the purported alignment of Saudi Arabia to the international arbitration community is more a fiction than a concrete reality.

Indeed, the Saudi Regulator has referred to Sharia within the New Arbitration Law more than he ever did in previous arbitration regulations<sup>98</sup>. In addition to Sharia, the New Regulations refer to Public Policy as a condition for the validity of an arbitral award and as a pre-requisite for the enforcement of domestic or international arbitral awards. While the exception of Public Policy is also embraced by most arbitration laws around the world and by international and regional conventions alike, the blurring nature of Saudi Public Policy raises ambiguities about its content and nature.

#### 3.1 The interaction between Sharia and arbitration in Saudi Arabia

The interaction between Sharia and arbitration may concern procedural and substantive issues, the validity of an arbitral award and issues relating to the recognition and enforcement of arbitral awards.

##### 3.1.1 Sharia and procedural issues

Despite the consecration by the New Arbitration Law of the parties' procedural autonomy with regards to the conduct of the arbitral proceedings, such autonomy should be however compliant with the provisions of the Islamic Sharia<sup>99</sup>. Among the questions that may raise Sharia conformity issues are those related to the gender and faith of arbitrators and witnesses.

While the adjudicator's gender and faith, be it a state judge or an arbitrator, are not issues that would normally raise any problem in secular countries, things are completely different when it comes to theological States such as Saudi Arabia. Indeed, it is a matter of Sharia law that only Muslims be vested with judiciary functions<sup>100</sup>.

<sup>98</sup> See for instance Article 2 of the New Arbitration Law which provides : " Without prejudice to the rules of the Islamic Sharia and the rules of the international conventions in which the Kingdom is included as one of its parties, the provisions of this law are valid for any arbitration..."; Article 5 : " If the parties of the arbitration agree to subject their relationship to the provisions of any document (a model contract, or an international convention or others), they shall act under the provisions of this document, for including special provisions of arbitration and that shall not be contrary to the provisions of the Islamic Sharia"; Article 25: " 1- The parties of the arbitration may agree on the actions adopted by the arbitral tribunal, including their right to subject these actions to the valid rules in any organization, or authority, or arbitration center in the Kingdom or abroad, provided they do not violate the provisions of the Islamic Sharia ; 2- If there is no such agreement, the arbitral tribunal may - taking into account the provisions of Islamic Sharia, and the provisions of this law - choose the arbitration proceedings as it deems appropriate"; Article 38.1 " 1- Taking into account the non-violation of the provisions of the Islamic Sharia and public order in the Kingdom, the arbitral tribunal, during the hearing of the dispute, shall:

A- Apply the rules agreed upon by the parties of the arbitration on the subject of the dispute, and if they agree on the application of a law of a particular state, the substantive rules shall be followed without those of dispute-of-laws, unless agreed otherwise.

B- If the parties of the arbitration do not agree on the statutory rules applicable to the subject of the dispute, the tribunal shall apply the substantive rules in the law that it considers the most relevant to the subject of the dispute (...); Article 50: 2 "The competent court that hears the claim of invalidity delivers an award of its own with the invalidity of the arbitration award if it contains what is contrary to the provisions of the Islamic Sharia and public order in the kingdom, or what is agreed upon by the parties of the arbitration, or it finds that the subject of the dispute is of the matters that may not be arbitrated under this law".

<sup>99</sup> Article 5 of the New Arbitration Law

<sup>100</sup> Most Islamic Schools do not allow non-Muslims to be appointed as Arbitrators. See Mohammed I. Aleisa, *A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law*

On a different note, although from the Islamic faith, women are prohibited for exerting any adjudicative function within the jurisdiction of Saudi Arabia and such position is held by the majority of Muslim scholars and consecrated by the law<sup>101</sup>. The question remains whether gender and religious discriminations embedded in the Saudi Legal system are extended to the arbitration arena.

The New Arbitration Law is silent in respect of the requirements related to the selected arbitrator's gender or religious background. Indeed, article 14, which sets the requirements that selected arbitrators should satisfy, does not mention any condition in respect of the arbitrator's gender, religion or nationality. It only requires that the selected arbitrator be full of legal capacity, have a good reputation, be of good conduct and hold a degree in Sharia or in Law. When the arbitration tribunal is a three-panel tribunal, only the chair is required to hold a degree in Sharia or in law<sup>102</sup>.

While the New Arbitration Law's silence as to the gender and faith requirements for selected arbitrators has been received positively by the legal community and interpreted in the sense of circumventing the gender and religious discriminations enshrined in the Saudi legal system,<sup>103</sup> it is the author's view that such issue is far from being conclusively established. Indeed, from a Sharia law perspective, the requirements of qualifications of an arbitrator are associated with the same qualifications as those of a judge<sup>104</sup> and such requirement has been also consecrated by the Saudi jurisprudence<sup>105</sup> and insisted on by some scholars<sup>106</sup>. With the silence of the New Arbitration Law, there is nothing to prevent future recurrence of such opinions which may most likely put the parties involved in the arbitration process, in a legal uncertainty as to the possibility to appoint – without enduring the risk of having the award set aside before Saudi courts on the account of Sharia violation - women and/or non-Muslims as arbitrators. Also, doubts may be raised as the enforceability in Saudi Arabia of an award rendered by a panel of non-Muslims or women arbitrators on the ground of Sharia violation.

Even if the Court of Appeal of Dammam in the Eastern Province has not objected in a recent decision dated 2016 to the appointment of the first woman arbitrator in Saudi Arabia,<sup>107</sup> such decision is far from being sufficient to dissipate doubts concerning arbitrators' gender requirements under the current legal regime. First, the Court of Appeal is not vested with the power to approve or disapprove the appointment of arbitrators. Still its role consists only in supporting the arbitration process by completing the constitution of the arbitral tribunal in the event any of the difficulties enounced in Article 15 arise. In the case at hand, both parties appointed their arbitrators - including a woman arbitrator- after the Court of Appeal set a hearing for such purpose. Subsequently, the Court of Appeal confirmed and approved the constitution of the arbitral tribunal and found that the case was ended upon the appointment of the chair. It did not make any

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(2012) *Resolve the Main Legal Problems?* (2016), <http://repository.essex.ac.uk/17245/1/ALEisa-PhDThesis-May2016-Final-2.pdf>, at p.170.

<sup>101</sup> Abdul Hamid El-Ahdab & Jalal El-Ahdab, *Arbitration with the Arab Countries* 40 (Kluwer Law International 2013).

<sup>102</sup> The New Arbitration Law, Article 14.

<sup>103</sup> Saud Al-Ammari & A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, <http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf>, at p. 393.

<sup>104</sup> Samir Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt* 28 (Hart Publishing 2 ed. 2006). For a different opinion with regards to the gender and faith requirements of an arbitrator from a Sharia perspective, see Mohammed Al Jarba, *Commercial Arbitration in Islamic Jurisprudence: A study of its role in the Saudi Arabian Context* (2001), [https://pure.aber.ac.uk/portal/en/theses/commercial-arbitration-in-islamic-jurisprudence\(d8d3926d-724f-442c-89bc-4a576605aee8\).html](https://pure.aber.ac.uk/portal/en/theses/commercial-arbitration-in-islamic-jurisprudence(d8d3926d-724f-442c-89bc-4a576605aee8).html), at p.73.

<sup>105</sup> Saud Al-Ammari & A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, available at <http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf>, at p. 392. For instance, in its decision dated 1998, the Board of Grievance – commercial department - stressed on the fact that the requirements of judges in terms of faith shall be extended to apply to the arbitrator and that if the parties have appointed a non-Muslim arbitrator, the award shall not be enforced (Case No. 159/1416 in 1995 of the Board of Grievance, p.16), cited in Mohammed I. Aleisa, *A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?* (2016), <http://repository.essex.ac.uk/17245/1/ALEisa-PhDThesis-May2016-Final-2.pdf>, p.166.

<sup>106</sup> Abdulrahman Yahya Baamir, *Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* 28 (Routledge 2016): “In accordance with Sharia ruling women cannot be appointed as judges or arbitrators. This is not a matter for discussion in Saudi Arabia; Cyril Chern, Chern on Dispute Boards: Practice and Procedure 54 (2008): “It should also be taken into consideration that Saudi Arbitration Law does not allow non-Muslims to act as arbitrators in domestic arbitrations or even international ones. Neither does it allow women to act as arbitrators”.

<sup>107</sup> Mulhim Hamad Almulhim, *The First Female Arbitrator in Saudi Arabia*, <http://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/>.



determination whatsoever as to whether or not gender discrimination applies in the context of arbitration. Also, nothing would guarantee that the appointment of a woman arbitrator would not be challenged at the enforcement stage, all the more true that the enforcement or annulment court and more generally any court in the Kingdom of Saudi Arabia is not bound by the decision of any other court as mentioned elsewhere.

Given the sensitivity of the topic it would have been wiser for the Saudi Regulator and in light of the specificity of the Saudi legal system, to eliminate any doubts in respect of the abovementioned issue by expressly embracing under the New Arbitration Law, the principle of non-discrimination with regards to arbitrators' gender and faith, in a similar manner as other regulators have proceeded in other Muslim jurisdictions. For instance, the Egyptian and Emirati regulators have both lifted within their arbitration laws any gender or faith requirement with regards to appointed arbitrators<sup>108</sup>. However, the Saudi Regulator has elected not to settle the debate and to leave this question open with all the ensuing legal uncertainties for the parties. In contrast, it has been expected that such a matter would be finally settled after the enactment of the long-awaited Implementing Arbitration Regulation, but not at all. Unexpectedly, the Implementing Regulation did not address, whether directly or indirectly, the debatable topic of the selected arbitrator's gender and faith.

Even if the principle of non-discrimination has been embraced under the New Arbitration Law, it is questionable whether or not the appointment of women or non-Muslims as arbitrators would pass the Sharia conformity test and whether or not a dissatisfying party may successfully invoke the violation of Sharia in order to set aside or to resist the recognition and enforcement of arbitral awards rendered by an arbitral tribunal which composition is in contradiction with the Sharia provisions abovementioned. Such uncertainties would undoubtedly make parties to arbitration reluctant to choose Saudi Arabia as a seat of arbitration or to take any risk that may involve the appointment of non-Muslims and women as arbitrators in the context of a Saudi seated arbitration or any other international arbitration having connections with the Saudi legal system.

Another procedural issue that may raise a question of Sharia conformity is that of the gender and faith of witnesses. According to Article 28 of the New Arbitration Law, witnesses are means of evidence that may be used throughout the arbitration proceedings<sup>109</sup>. While the New Arbitration Law is completely silent about the conditions that witnesses should satisfy, the principles of Sharia law would eventually apply to complement such gap. Such requirement has been explicitly consecrated under the old arbitration law where it has been stipulated that the admission of witnesses and hearing of their statements shall be conducted before the arbitration panel pursuant to Sharia rules<sup>110</sup>.

In this respect, Sharia does not allow an unbeliever (i.e., a non-muslim) to testify against a Muslim<sup>111</sup>. The interaction between such prohibitive rule and arbitration is far from being clear. If one would recourse to Sharia principles, the outcome of such rule may be drastically negative for arbitration in Saudi Arabia. In fact, a party could be deprived of presenting its case in the event the success of such case is based, whether partially or completely, on witnesses who are not from the Islamic faith. Even if the arbitral tribunal decides not to apply such prohibitive rule, it is not clear whether the arbitration award may be immune from annulment or denial of enforcement before Saudi courts. All these ambiguities created by the infiltration of Sharia to a so-called modern arbitration law would not make Saudi Arabia attractive for arbitration.

<sup>108</sup> Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, <https://www.wipo.int/edocs/lexdocs/laws/en/eg/eg020en.pdf>; Federal Law No. 11 of 1992 Issuing the Law of Civil Procedure, Amended by Federal Law No. (30) of 2005 dated 30/11/2005 and Federal Law No. (10) of 2014 dated 20/11/2014, <https://legaladvice.me.com/legislation/143/uae-federal-law-11-of-1992-concerning-issuance-of-civil-procedures-code>.

<sup>109</sup> Article 28 of the New Arbitration Law states: "The two parties to arbitration may agree on the venue of arbitration within the Kingdom or abroad. In the absence of such an agreement, the venue of arbitration shall be determined by the arbitration tribunal, having regard to the circumstances of the case, including the convenience of the venue to both parties. This shall not prejudice the power of the arbitration tribunal to convene at any venue it deems appropriate for deliberation; hearing of witnesses, experts or the parties to the dispute; inspection of the subject matter of the dispute; and examination of documents or review thereof" (emphasis added).

<sup>110</sup> The Implementation Rules (1985) of the Saudi Arabia Law (1983), Decree of Council of Ministers, No (7/2021/M), corresponding to 28/5/1985 (Gregorian), Article 33. An English translation of these rules is available in 8 International Handbook on Commercial Arbitration 1-8 (Kluwer Law International 1984).

<sup>111</sup> Abdul Hamid El-Ahdab & Jalal El-Ahdab, *Arbitration with the Arab Countries* 40 (Kluwer Law International 2013).

In what pertains to witness's gender, Sharia does not give equal treatments for women and men testimonies<sup>112</sup> and considers the evidence of two women equivalent of that of one man on account of women's alleged lack of memory, incompetence, and general weakness in character which may render their testimony less credible. In addition to this, women are considered to be unable to give testimony in business transactions as they are not involved in the commerce and therefore are not apt to understand its complexities<sup>113</sup>.

It is not clear whether such rule would apply in the context of an arbitration-taking place in the Kingdom. The New Arbitration Law is silent on this matter; however, the Sharia conformity test may suggest that both the parties and the arbitral tribunal should deal with this matter carefully.

Several legal consequences may transpire from the above. First, it is most likely that the parties and/or the arbitral tribunal due to its inferior legal status as a means of proof versus men's testimonies would avoid women's testimonies. It also means that two women witness statements should be submitted in order to rebut a witness statement made by a man witness. Such discrimination in treating men and women witnesses could raise a problem in respect of the enforceability of the award in other jurisdictions as the principle of non-discrimination is considered as part of the Public Policy in most Western. In the same vein, if the parties or the arbitral tribunal decide not to take into account the discrepancy between the legal status of men and women testimonies, such may give a room for a dissatisfied party to challenge the award on the basis of Sharia violation.

Another concern that may be raised in Saudi Arabia, which has been actually raised in many Muslim countries in the Middle East, is related to witnesses' requirement to swear an oath while presenting their oral testimony before the tribunal during the hearing. Such matter has not been addressed by the New Arbitration Law despite having raised several problems in other middle eastern jurisdictions such as in Dubai, where for instance the Supreme Court of Dubai has refused to enforce a \$25 million award on the account of Public Policy due to the fact that the arbitral tribunal has not requested from the witness to swear using the formula prescribed for hearings in Dubai courts<sup>114</sup>.

### 3.1.2 *Sharia and substantive law issues*

On the substantive level, the interaction between Sharia and arbitration revolves essentially around the question of the law applicable to the merits of the dispute. As mentioned earlier, the New Arbitration Law embraced the principle of parties' autonomy as to the law applicable to the substance of the dispute provided that such choice does not violate Sharia and the Saudi Public Policy. In the absence of a choice of law made by the parties and taking into account the provisions of Sharia law and the Saudi Public Policy, the arbitral tribunal should apply the substantive rules of the law he considers the most relevant to the subject of the dispute<sup>115</sup>.

When it comes to the law applicable on the merits of the dispute, one should envisage several scenarios. First, when the arbitration is domestic, the Saudi Law – based on Sharia - would apply to the merits of the dispute. In such event, and despite the legal uncertainty that may entail the application of Sharia which outcome would depend on the arbitral tribunal's interpretation, it could be argued that it has been completely foreseeable for

<sup>112</sup> Najib Ghadbian, *Islamists and Women in the Arab World: From Reaction to Reform?* 12 AJISA 19, 29(1995).

<sup>113</sup> Faisal Kutty : The Sharia Factor in International Commercial Arbitration, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=898704](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=898704), at p.53.

<sup>114</sup> *Bechtel vs. the Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, Petition No. 503/2003, (May 15 2005) as cited in Mohammed I. Aleisa, *A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?* (2016), <http://repository.essex.ac.uk/17245/1/ALEisa-PhDThesis-May2016-Final-2.pdf>, p.148.

<sup>115</sup> Article 27 of the New Arbitration Law provides that : “ *Subject to provisions of Sharia and public policy in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following:*

- a. *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.*
- b. *If the arbitration parties fail to agree on the statutory rules applicable to the subject matter of the dispute, the arbitration tribunal shall apply the substantive rules of the law it deems most connected to the subject matter of the dispute”.*

the parties, which transaction took place within the Saudi borders to have Sharia, with all its unpredictability, as the corpus of law according to which their dispute would be adjudicated.

However, such unpredictability would largely affect the investment environment in Saudi Arabia and may certainly make foreign investors reluctant to incorporate their business in Saudi Arabia by preferring to keep their place of business outside the Kingdom so that their transaction qualifies as international – and therefore the arbitration arising out of it – which would make it possible for them to choose a different law to be applied to the merits of their dispute even if the transaction is strictly and exclusively connected to Saudi Arabia.

Even if the transaction<sup>116</sup> giving rise to arbitration qualifies as international, the author has some doubts as to the effectiveness of the parties' choice of law, since any law chosen by the parties should be compliant with Sharia and with the Saudi Public Policy<sup>117</sup>.

At the first glance, it may appear that such provision is not uncommon and may refer to the notion of mandatory rules (“*lois de police*”) which are recognised by most arbitration-friendly jurisdictions to be automatically applied to the dispute despite any choice of law made by the parties. By definition, mandatory rules are “laws that purport to apply irrespective of a contract’s proper law or the procedural regime selected by the parties”<sup>118</sup> and “can reflect states internal or international public policy, and generally protect economic, social or political interests”<sup>119</sup>. While it may be legitimate for any legal order which has connections with the transaction (i.e., the legal order of the seat of arbitration or the legal order where the arbitral award will be enforced) to have its mandatory rules applied despite any choice of law made by the parties<sup>120</sup>, the specificity of Saudi law which is Sharia based calls upon the following comments.

First, the identification of mandatory rules that may apply to international transactions having connection with the forum irrespective of any choice of law made by the parties or the applicable conflict of law rule, is the result of a tremendous intellectual work deployed essentially by the jurisprudence<sup>121</sup> and the doctrine in most of the developed jurisdictions where private international law is considered a well-established branch of law<sup>122</sup>. As mentioned earlier in this article, the notion of private international law is unknown by the Saudi legal system<sup>123</sup> and therefore there are not any jurisprudential or doctrinal foundations on which one could rely upon in order to identify Saudi mandatory rules that may apply to international transactions having connection with the Saudi forum.

More importantly, being a Sharia-based legal system, it would be hard to identify mandatory rules as there is no such distinction between mandatory and not mandatory rules when it comes to provisions dictated by God. As rightly pointed out, Sharia is by definition “personal and absolute”<sup>124</sup>. As a result and despite the theoretical possibility for the parties to choose the law applicable to the contract, the conformity to Sharia which is all mandatory may render such option practically obsolete<sup>125</sup> – specially that the principles of Sharia contract law differ largely from contract principles embraced by other legal systems – and the arbitrator – who is “under the duty to render an arbitral award which is capable of enforcement under the New York

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<sup>116</sup> Article 3 of the New Arbitration Law.

<sup>117</sup> Article 27 of the New Arbitration Law.

<sup>118</sup> Andrew Barraclough & Jeff Waincymer, *Mandatory rules of law in international of commercial arbitration*, 6 Melb. J. Int. Law, 205 (2005).

<sup>119</sup> Andrew Barraclough & Jeff Waincymer, *Mandatory rules of law in international of commercial arbitration*, 6 Melb. J. Int. Law, 208 (2005).

<sup>121</sup> G. Radicati di Brozolo, Luca, *Arbitrage commercial international et lois de police : considérations sur les conflits de juridictions dans le commerce international*, 315 RCADI 265, 308 (2005).

<sup>122</sup> For doctrinal work, see for instance: Pierre Mayer, *Mandatory Rules of Law in International Arbitration* 2 (4) Arbitr. Int. 274(1986); M. Blessing, *Mandatory Rules of Law versus Party Autonomy in International Arbitration*, 14 (4) J. Int. Arbitr. 23 (1997).

<sup>123</sup> See A. Alobud, *Developing Saudi Private International Law to accommodate Ecommerce transactions growth*, [https://www.researchgate.net/publication/336230121\\_DEVELOPING\\_SAUDI\\_PRIVATE\\_INTERNATIONAL\\_LAW\\_TO\\_ACCOMMODATE\\_E-COMMERCE\\_TRANSACTIONS\\_GROWTH](https://www.researchgate.net/publication/336230121_DEVELOPING_SAUDI_PRIVATE_INTERNATIONAL_LAW_TO_ACCOMMODATE_E-COMMERCE_TRANSACTIONS_GROWTH).

<sup>124</sup> Nathalie Najjar, *Sharia Applicable to the Merits in International Commercial Arbitration* in Liber Amicorum Samir Saleh: *Reflections on Dispute Resolution with Particular Emphasis on the Arab World* 215, 227 (Kluwer Law International 2009).

<sup>125</sup> Fadi Nammour, *De l'applicabilité de la charia islamiya dans l'arbitrage international*, [https://www.academia.edu/6698880/De\\_l\\_applicabilit%C3%A9\\_de\\_la\\_charia\\_islamiya\\_dans\\_l\\_arbitrage\\_international](https://www.academia.edu/6698880/De_l_applicabilit%C3%A9_de_la_charia_islamiya_dans_l_arbitrage_international).

Convention”<sup>126</sup>, may apply the Sharia Law automatically without any consideration to the choice of law made by the parties particularly in events when the arbitration is seated in Saudi Arabia or when Saudi Arabia is a potential place for the enforcement of the award.

In this regard, it has been considered that the mere application of a foreign law would be *ipso facto* considered by a Saudi judge to be contrary to Sharia<sup>127</sup>. As pointed out, a divinely inspired system of laws precludes parties’ the choice of any other law<sup>128</sup>. This explains why Saudi courts and regulations do not recognise Western conflicts of law principles. Indeed, Saudi courts have incessantly ruled that non-Islamic laws are not permitted to be applied, especially when the parties to the conflict are Muslims<sup>129</sup>. While it is true that such decisions have been made under the old arbitration regime and before the enactment of the New Arbitration Law; however, it is the author’s view that the enactment of the New Arbitration Law which enforces the choice of law clauses does not operate a change in what pertains to the legality of the application of a foreign law under Sharia principles and nothing would guarantee that such choice of law would be considered as Sharia compliant by Saudi courts.

Another important question that should be taken into consideration is the method of Sharia interpretation deployed by arbitrators when deciding the dispute. In fact, the arbitrator should adapt its school of thought to the one prevailing in Saudi Arabia in order to reduce the risk of non-circulation of the award in the Kingdom as the Saudi judge may assert his own school of thought and therefore deny the enforcement of the arbitral award<sup>130</sup>.

### 3.1.3 Sharia, Saudi Public Policy and the enforceability of arbitral awards in Saudi Arabia

Sharia role emerges once again in the context of the enforceability of arbitral awards. According to Article 55 of the New Arbitration Law, the order to execute an arbitral award shall only be made if the arbitral award does not include what is contrary to the provisions of Islamic Sharia and Public Policy in the Kingdom of Saudi Arabia<sup>131</sup>. Such provision applies to domestic and international awards when the arbitration is seated in the Kingdom. The order rendered by the Competent Court amounts to an enforcement deed<sup>132</sup> that could be automatically enforced by the interested party before the enforcement courts. Furthermore, in order to be immunised from annulment, any arbitral award rendered in the Kingdom shall be among other things, Sharia compliant. The scrutiny of the conformity of the arbitral award to Sharia and to the Saudi Public Policy could be made *ex officio* by the judge hearing an action for setting aside arbitral award<sup>133</sup>.

In what pertains to international awards rendered outside the Kingdom, the New York Convention on the recognition and enforcement of foreign awards applies as Saudi Arabia joined this convention on April 19, 1994, with the reservation of reciprocity. However, as rightly pointed out, the effect of the reservation clause is reduced since most of the countries have joined the New York Convention<sup>134</sup>.

<sup>126</sup> Nathalie Najjar, *Sharia Applicable to the Merits in International Commercial Arbitration in Liber Amicorum Samir Saleh: Reflections on Dispute Resolution with Particular Emphasis on the Arab World* 215, 235 (Kluwer Law International 2009).

<sup>127</sup> A. Alobud, *Developing Saudi Private International Law to accommodate Ecommerce transactions growth* 53, [https://www.researchgate.net/publication/336230121\\_DEVELOPING\\_SAUDI\\_PRIVATE\\_INTERNATIONAL\\_LAW\\_TO\\_ACCOMMODATE\\_E-COMMERCE\\_TRANSACTIONS\\_GROWTH](https://www.researchgate.net/publication/336230121_DEVELOPING_SAUDI_PRIVATE_INTERNATIONAL_LAW_TO_ACCOMMODATE_E-COMMERCE_TRANSACTIONS_GROWTH); . A Ikamees, *International Arbitration and Sharia Law: Context, Scope, and Intersections*, 28(3) J. Int. Arbitr. 255, 264 (2011).

<sup>129</sup> See courts decisions cited by Mohammed I. Aleisa , *A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?* (2016), <http://repository.essex.ac.uk/17245/1/ALEisa-PhDThesis-May2016-Final-2.pdf>, at p. 166.

<sup>130</sup> Aisha Nadar, *Islamic Finance and Dispute Resolution*, 23 Arab Law Q. 1, 24 (2009).

<sup>131</sup> Article 55 of the New Arbitration Law.

<sup>132</sup> Article 9 of the New Execution Law states: “Compulsory execution may not be carried out except with an enforcement document for a due a specified right. Enforcement documents are :

1- ...  
2- arbitral awards which include the enforcement order in accordance with the Law of Arbitration”.

<sup>133</sup> Article 50.2 of the New Arbitration Law states : “The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of Sharia and public policy in the Kingdom or the agreement of the arbitration parties, or if the subject matter of the dispute cannot be referred to arbitration under this Law “.

<sup>134</sup> Mohammed I. Aleisa, *A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?* (2016), available at: <http://repository.essex.ac.uk/17245/1/ALEisa-PhDThesis-May2016-Final-2.pdf>, at p. 85.

When the arbitral awards are rendered in a jurisdiction which is not a signatory of the New York Convention, the provisions of the Enforcement Law apply. According to Article 12 of the New Enforcement Law, the enforcement of foreign judgments applies *mutandis mutatis* to arbitral awards issued in a foreign country. Article 11 sets forth the conditions for the enforcement of foreign judgments and arbitral awards and provides that such enforcement should be refused by the enforcement court if the judgment /the award is among other things, in conflict with Saudi Public Policy. It is interesting to mention in this regard, that Article 11 does not refer to Sharia but only to Public Policy; however, as we shall see, the Enforcement Law considers that Sharia constitutes the main component of Saudi Public Policy which means any arbitral award subject to the provisions of the Enforcement law should also pass a Sharia conformity test.

The conformity of foreign arbitral awards to Sharia as a condition for their enforcement and recognition raises a certain number of issues which, according to the author's view, may neutralise the quest of modernity and alignment to the international arbitration standards that the New Regulations seek to achieve.

First, as previously pointed out in this article, Sharia is far from being a set of rules that apply consistently by judges; therefore, the conformity of an arbitral award to Sharia may essentially depend on the judges of the Competent Court or the judges of the enforcement court own interpretation of the principles of Sharia and its determination as to whether a given award is Sharia - compliant or not<sup>135</sup>. In addition, the principle of *stare decisis* is not recognised by courts in Saudi Arabia<sup>136</sup>, making it difficult to predict the outcome of the Sharia conformity test even when the cases are similar. Such would most probably result in a certain inconsistency in respect of what may be considered Sharia - compliant and what may not be, specially that Saudi judges do not necessarily come from the same legal background and that two different courts (i.e., Competent Court and Enforcement Court) depending on whether the arbitration is seated in Saudi Arabia or not may be asked to initiate the Sharia - conformity test.

Such uncertainty may be dissipated with codification which unfortunately has not as of yet taken place for the branch of civil law which obeys as of the date of the draft of this article to Sharia principles. Needless to mention that civil law issues such as the principle of contract interpretation, compensation, penalty clauses, interests etc. are issues that would most likely arise in every arbitration irrespective of the nature of the dispute and that the uncertainty surrounding these notions due to the absence of codification would make it difficult for the parties to envisage the approach that Saudi courts would embrace in this regard.

Second, the principles of Sharia contract law differ largely from those existing in other jurisdictions and, more generally, from the modern commercial practice<sup>137</sup>. For instance, parties are prohibited under Sharia to enter into aleatory contracts or to agree on contractual clauses that may depend on the happening of an unsure event<sup>138</sup>; therefore, transactions such as insurance, asset recovery, and forex are considered null under the principles of Sharia and by the same logic any arbitral award rendered in connection with a dispute arising from the above, could be denied enforcement by Saudi Arabia courts or annulled at the seat of arbitration. This may also be the case for entertainment contracts such as those related to artists' performance based on the fact that singing and dancing are prohibited under Sharia principles<sup>139</sup>.

<sup>135</sup> Mohammad Motlg Althabity, *Enforceability of Arbitral Awards Containing Interest – A Comparative Study between Sharia Law and Positive Laws*, A Thesis submitted for the degree of Doctor of Philosophy in law (PhD), School of Law University of Stirling (2016), <https://dspace.stir.ac.uk/handle/1893/23090#.X5aSQ9AzaMo>, at p. 82.

<sup>136</sup> Saud Al-Ammari & A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, <http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf>, at p.405.

<sup>137</sup> As pointed out by an author: "The Sharia is one of the greatest system of laws but it is not in my view appropriate in many aspects to what the world has made of commerce" in W.M. Ballantyne, *Arbitration in the Gulf States : Delocalization: A short Comparative Study*, 1 Arab Law Q. 205, 215 (1985).

<sup>138</sup> Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 (3) Fordham Int. Law J. 920, 947 (1994).

<sup>139</sup> For instance, in case 3375/1, an arbitral award was denied recognition on the account that it was rendered in the context of a dispute arising out of an entertainment contract (singing and dancing) which consist of activities prohibited by the Quran and the teaching of the Prophet Mohammed (as cited in : Ahmed Altawyan, *Arbitral Awards Under the Saudi Laws: Challenges and Possible Improvements* (2017), [https://www.researchgate.net/publication/316598002\\_Arbitral\\_Awards\\_Under\\_the\\_Saudi\\_Laws\\_Challenges\\_and\\_Possible\\_Improvements](https://www.researchgate.net/publication/316598002_Arbitral_Awards_Under_the_Saudi_Laws_Challenges_and_Possible_Improvements), p. 23.

Also, the principles of Sharia consider void and null any contract that charges interest rates or builds profit margin on account of “*Riba*”, the term refers to the obtainment of something from nothing, which is considered immoral and wrong<sup>140</sup>. In this regards, Saudi courts have constantly refused to enforce arbitral awards awarding interests<sup>141</sup>.

In the same vein, the principles of damage compensation, whether in contract or tort lies under Sharia on different dynamics than the ones prevailing in the West<sup>142</sup>. In this regard, penalty clauses, delayed damages, lost profits, loss of use, emotional stress and pain and suffering<sup>143</sup> are, among other things, considered contrary to the principles of Sharia<sup>144</sup>.

Against this background and in the context of an international arbitration seated in Saudi Arabia or having connections with the Kingdom, the arbitral tribunal when confronted with such contractual provisions, may disqualify any law chosen by the parties that is not Sharia - compliant by applying Sharia law as a mandatory law or the Arbitral tribunal may apply the law chosen by the parties’ despite being non – Sharia - compliant. In either situation, the results may not be really desirable. In the first situation, the choice of law made by the party would become obsolete which goes against the principle of party autonomy in international arbitration. In the second situation, the arbitral award may be set aside or denied recognition in Saudi Arabia. In this respect, it has been considered that “refusals to enforce foreign arbitral awards have been the norm, because public policy in Saudi Arabia covers a vast area of practice that might be unknown to foreign arbitrators sitting abroad and applying non-Saudi *lex arbitri*. Establishing whether or not the award complies with Sharia law may result in the enforcement court examining the case on its merit”<sup>145</sup>.

In addition to Sharia, arbitral awards should pass the test of Saudi Public Policy, whether as a condition precedent for the competent court to issue an order for the execution of the arbitral award<sup>146</sup> or the enforcement of foreign awards<sup>147</sup>. The Public policy test applies as well in the context of an action for setting aside an arbitral award<sup>148</sup>. While the conformity of an arbitral award to Public Policy is a condition precedent for the enforcement of arbitral awards elsewhere and is consecrated by the New York Convention<sup>149</sup> to which Saudi Arabia is a party, it is not clear under Saudi Law what kind of tests should an arbitral award be subject to recognition and enforcement as the boundaries of Public Policy – similarly to those of Sharia - are far from being clearly defined. As rightly pointed out by a scholar, the fact that Saudi Arabia is a signatory to the New York Convention provides no guarantee to foreign entities, which have entered into contracts with Saudi Arabian entities, in terms of enforceability of arbitral awards<sup>150</sup>.

Indeed, the notion of Public Policy in Saudi Arabia is far from being clear,<sup>151</sup> and no consensus has been reached among scholars and judges on what the notion of Public Policy stands for. Whatever the case may

<sup>140</sup> Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 (3) Fordham Int. Law J. 920, 947 (1994).

<sup>141</sup> See for instance: Marubeni Corporation v. Abdullah Saeed Bugshan & Brothers (Case No. 37163202/1437H); Sumitomo Corporation v. Abdullah Saeed Bugshan & Brothers (no case reference available) as cited by Jean-Benoît Zegers, *National Report for Saudi Arabia (2019 through 2020)* 1, 36 in ICCA International Handbook on Commercial Arbitration (ICCA & Kluwer Law International 2019, Supplement No. 109, March 2020).

<sup>142</sup> Mohammad Motlg Althabity, *Enforceability of Arbitral Awards Containing Interest – A Comparative Study between Sharia Law and Positive Laws*, A Thesis submitted for the degree of Doctor of Philosophy in law (PhD), School of Law University of Stirling (2016), <https://dspace.stir.ac.uk/handle/1893/23090#.X5aSQ9AzaMo>, p. 83.

<sup>143</sup> See Saud Al-Ammari and A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, available at <http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf>, at p.406.

<sup>144</sup> For a detailed analysis in respect of the discrepancy between sharia contract law and other civil law systems. See: Mohammed I. Aleisa, *A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?* (2016), <http://repository.essex.ac.uk/17245/1/ALEisa-PhDThesis-May2016-Final-2.pdf>, at p.184 et seq.

<sup>145</sup> Jean-Benoît Zegers, *National Report for Saudi Arabia (2019 through 2020)* 1, 29 in ICCA International Handbook on Commercial Arbitration (ICCA & Kluwer Law International 2019, Supplement No. 109, March 2020).

<sup>146</sup> Article 55 of the New Arbitration Law.

<sup>147</sup> Article 11 of the New Enforcement Law.

<sup>148</sup> Article 50.2 of the New Arbitration Law.

<sup>149</sup> Article V (2) (b) of the New York Convention.

<sup>150</sup> Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 (3) Fordham Int. Law J. 920, 954 (1994).

<sup>151</sup> M. WAKIM, *Public Policy concerns regarding enforcement of foreign international arbitral award in the Middle East* (2008), available at:

be, Public Policy in a religious state such as Saudi Arabia would encompass a large area of practices that may often be unknown to foreign investors and commercial partners which transactions take place outside Saudi Arabia.

The New Arbitration refers simultaneity to Public Policy and Sharia<sup>152</sup>. Hence, it is not clear whether Sharia and Public Policy are same or separate. It seems, however, that the two notions are confused<sup>153</sup>. For instance, in its definition of Saudi Public Policy, the Implementing Regulation of the New Execution Law considers that the latter refers to Sharia<sup>154</sup>.

This has also been confirmed by the answer of the Kingdom of Saudi Arabia by virtue of a Royal Decree<sup>155</sup> to an inquiry filed by the Supreme Judicial Council regarding the notion of Public Policy<sup>156</sup> stating that Public policy in Saudi Arabia encompasses the provisions of Islamic Sharia based on the interpretation of the Holy Book and the traditions of his messenger<sup>157</sup>. Such a position seems to be upheld by a certain number of authors who claim that in the gulf region, Public Order, Public Policy, morality and Sharia law, collectively refer to the same thing as they are based on the same paramount values that are fundamental to these countries<sup>158</sup>.

Despite the confusion between Public Policy and Sharia in Saudi Arabia, it is the author's view that the notion of Public Policy is wider and encompasses other mandatory regulations which may not be necessarily related to Sharia such as regulations which aim at protecting the economic and political interests of Saudi Arabia, and which are not necessarily matters that are dealt with by Sharia. Hence, it can be placed under the auspices of Public Policy, mandatory regulations that deal with anti-competitive practices or security regulations. Such areas of Public Policy remain, however largely unexplored in Saudi Arabia.

Another important thing is that there is no distinction within the New Regulations between domestic Public Policy and International Public Policy. Indeed, despite the distinction between domestic arbitration and international arbitration, the New Arbitration law does not draw any concrete consequences, particularly as to whether the exception of Public Policy could be applied with a different intensity depending on whether the arbitration is domestic or international or as to whether the dispute has a strong connection with Saudi Arabia or not. Such a legislative gap may not be easily filled by the Saudi jurisprudence, similarly, to what the case has been in other jurisdictions. This may be due to the fact that the notion of private international law is quite unfamiliar within the Saudi Legal system which makes Saudi courts unlikely to recourse to theories and methods of private international law similarly to Western courts in order to draw a distinction between domestic and international Public Policy<sup>159</sup>. Should Saudi Courts apply the exception of Public Policy indifferently and without consideration as to the domestic or international nature of the arbitration, this would impede the circulation of foreign awards in Saudi Arabia rendered in accordance with non-Sharia applicable substantive laws.

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file:///C:/Users/atabbara/Documents/Personel%20information/Research/Arbitration%20Project/PP\_Concerns\_re\_Arbitral\_Awards\_in\_the\_ME%20(2).pdf, at p.27. According to this author: "Other countries, such as Saudi Arabia, remain unclear about public policy standards that will be invoked upon review during the enforcement proceedings".

<sup>152</sup> Article 38.1 of the New Arbitration Law : " Subject to provisions of Sharia and public policy in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following ....."; Article 50.2 : " The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of Sharia and public policy in the Kingdom or the agreement of the arbitration parties, or if the subject matter of the dispute cannot be referred to arbitration under this Law"; Article 55.2 (b) : "The award does not violate the provisions of Sharia and public policy in the Kingdom. If the award is divisible, an order for execution of the part not containing the violation may be issued".

<sup>153</sup> Ahmed Alsirhan, The Refusal of Foreign Arbitral Awards in Saudi Arabia on the Grounds of Public Policy – An Issue of Fairness and Justice, A Thesis Submitted to the School of Law, Victoria University for the Degree of Doctor of Philosophy (PhD) Melbourne, Australia (2019), <http://vuir.vu.edu.au/39482/1>, at p. 27.

<sup>154</sup> Article 11.3 of the New Execution Law Implementing Regulation.

<sup>155</sup> Inquiry number 8898 dated 27/5/2012.

<sup>156</sup> Inquiry number 8898 dated 27/5/2012.

<sup>157</sup> Royal Order Telegraph No. 4498 dated 22/8/2012.

<sup>158</sup> Mohamed Saud Al-Enazi, *Grounds for Refusal of Enforcement of Foreign Commercial Arbitral Awards in GCC States Law* (2013), available at: <https://bura.brunel.ac.uk/bitstream/2438/11079/1/FulltextThesis.pdf>, at p. 117.

<sup>159</sup> Gary Born, *International commercial arbitration* 3655 (2ed Wolters Kluwer 2014).

Ambiguities and uncertainties revolving around the two notions of Sharia and Public Policy and the application of these two notions indifferently, irrespective of the domestic or international nature of the arbitration would have a drastic negative impact on the development of arbitration, in Saudi Arabia as well as on Saudi Arabia's ability to access the club of arbitration-friendly jurisdictions. Furthermore, there are important concerns that Saudi courts may take advantage of the blurring boundaries of both Sharia and Public Policy to refuse the enforcement of foreign arbitral awards, especially those which are considered to be against its economic interests (arbitral awards rendered against Saudi governmental entities for instance).

In this respect, several private entities which have been involved in arbitration resulting in arbitral awards subsequently sought to be enforced before Saudi Arabia have expressed their dissatisfaction as to Saudi Court's recourse to Public Policy to resist the enforcement of arbitral awards considering that the reasons given relating to Public Policy were weak or not enough substantiated<sup>160</sup>.

Even practitioners in Saudi Arabia, be they lawyers or judges do not agree on what may constitute a violation of Public Policy in Saudi Arabia<sup>161</sup>. In his PhD dissertation entitled "Arbitration in Saudi Arabia: The Reform of Law and Practice", Mr Bin Abbadi concluded after interviewing several judges regarding what may constitute a violation of Public Policy, that every judge defines Public Policy differently and applies it the way he sees it<sup>162</sup>.

Also, it should be noted that it is quite hard in Saudi Arabia to apprehend Saudi Court's approach to public policy as Saudi Law does not require the courts to publish their cases making accessing court records very challenging<sup>163</sup>.

All the above issues demonstrate that a party attempting to enforce a foreign arbitral award in Saudi Arabia still faces considerable challenges and that an arbitral award rendered in a seated Saudi Arabia faces great risks of being set aside.

#### 4. Suggested solutions

Although more than eight years have lapsed following the enactment of the New Arbitration Law, many issues remain unclear in Saudi Arabia as demonstrated throughout this paper. This may explain why Saudi Arabia is not today an attractive seat for arbitration in the Middle East. As rightly pointed out by a commentator, unless a foreign company is specifically required to enter into an agreement containing an arbitration clause which specifies Riyadh or another city in the Kingdom as the seat of the arbitration, arbitration using a foreign seat will remain the preferred dispute resolution method<sup>164</sup>. It is against this background, that the author would propose some suggestions that may be taken into account by the Saudi Regulator and courts in order to provide business actors and, more specifically, foreign entities a more attractive environment for arbitration in Saudi Arabia.

As incessantly mentioned in this paper, the lack of legal certainty is one of the most challenging issues that business actors may face in Saudi Arabia, whether in the context of a Saudi seated arbitration or in the context of a foreign arbitration which award may be subsequently solicited for recognition and enforcement before Saudi Courts.

From a procedural point of view, the consecration of express legal provisions through the enactment of a new implementing regulation would be very important to dissipate doubts about a certain number of procedural issues, such as gender and faith arbitrators and the witnesses.

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<sup>160</sup> Ahmed Alsirhan, *The Refusal of Foreign Arbitral Awards in Saudi Arabia on the Grounds of Public Policy – An Issue of Fairness and Justice*, A Thesis Submitted to the School of Law, Victoria University for the Degree of Doctor of Philosophy (PhD) Melbourne, Australia (2019) available at <http://vuir.vu.edu.au/39482/1>, p. 199.

<sup>161</sup> Saleh Mubarak Bin Abbadi, *Arbitration in Saudi Arabia: The Reform of Law and Practice*, SJD Dissertations, Penn State Law e Library (2018), <https://elibrary.law.psu.edu/sjd/9>, at p.138.

<sup>162</sup> *Ibid.*

<sup>163</sup> Saleh Mubarak Bin Abbadi, *Arbitration in Saudi Arabia: The Reform of Law and Practice*, SJD Dissertations, Penn State Law e Library (2018), <https://elibrary.law.psu.edu/sjd/9>, at p.148.

<sup>164</sup> Shearman and Sterling, *Arbitration in the Kingdom of Saudi Arabia*, <https://www.al-maarifa.shearman.com/siteFiles/15472/Arbitration-in-the-Kingdom-of-Saudi-Arabia-IA-012017>.



From a substantive standpoint, the codification of civil law principles may allow the parties to have a clear vision of the Saudi Civil law, by making it possible for them to envisage which choice of law may be enforceable by the arbitrator and which choice may be disqualified for violating Saudi mandatory rules. It would also be possible for the arbitral tribunal to assess whether the application of foreign law could raise problems at the stage of recognising and enforcing the arbitral award before Saudi Courts.

Even if the codified civil law would be based on Sharia principles, the legal certainty that may entail the enactment of such law would help the parties to design their transaction to be conform to Saudi Arabian regulations and may provide a guideline for the arbitral tribunal to render an arbitral award that may not be subsequently challenged by the parties.

The codification of Sharia principles may also help transform Saudi Arabia into an arbitration hub for arbitration dealing with Islamic transactions. In this regard, it is interesting to mention that because of the legal uncertainty which is a characteristic of the Saudi law of civil transactions, even business actors which follow the Islamic model of doing business have always avoided choosing Saudi Arabia as a seat of arbitration and other countries which have codified the Sharia principles have emerged as a preferred seat of arbitration<sup>165</sup>.

While codifying Sharia principles is an important step that may positively impact the development of arbitration in Saudi Arabia, other issues also need particular attention. Indeed, due to the fact that Sharia law principles – whether codified or not - differ largely from the principles of contract law as embraced in the West, and in order to practically enforce parties' choice of law or protect arbitration awards from annulment or denial of recognition, the Saudi legal system needs to embrace a more tolerant position in respect to what may be considered as contrary to Sharia/Saudi Public Policy. Hence, the intensity of the Sharia/Public Policy test should not be applied the same way in the context of purely domestic arbitration versus when the arbitration is international. A more lenient approach to Sharia and Public Policy should be adopted when the arbitration is of an international nature.

Despite the fact that the New Arbitration Law has distinguished between domestic and international arbitration, it has not however drawn any practical legal consequences from such distinction. This is why it may be relevant to take such a distinction as a basis to draw some legal consequences notably in respect of the intensity of the Sharia /Public Policy test that would apply to arbitral awards either before the courts of annulment or the courts of enforcement. The intensity of such a test should depend on the domestic or international nature of arbitration, and a more lenient approach in respect of Sharia/Public Policy compatibility test should be embraced by the courts with regards to arbitral awards resulting from international arbitration. This could be achieved through a New Implementing Regulation requesting the courts to lower the intensity of the Sharia/Public policy conformity test – over both substantive and procedural matters - when the arbitration is international<sup>166</sup> or through a jurisprudential movement operated by Saudi courts in a fashion similar to certain Western courts which set the basis of the notion of the “International Public Policy”<sup>167</sup>. By varying the intensity of the Sharia/Public Policy exception depending on the domestic or international nature of arbitration, Saudi Arabia would achieve a certain balance between the preservation of its local culture and the adherence to the international arbitration standards.

Even more, the author is of the view that international arbitration should be completely liberated from the grips of Sharia and Saudi Public Policy alike. While such a suggestion may seem awkward at first glance, it is not, however without any legal foundation. Indeed, the Saudi Regulator has created a whole system completely separate from Sharia, in a certain number of industries. For instance, in the banking sector, despite the illegality of interests, most banking transactions are identical to the banking model in the West and

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<sup>166</sup> In order jurisdictions, national arbitration laws provide expressly for the application of “international public policy” in the context of recognition proceedings under Article V(2)(b) of the New York Convention . To take an example from the Middle East, Lebanon, has expressly consecrated an exclusively “international public policy” exception in its arbitration laws which means that the public policy defense would only be successful if enforcement of the award is contrary to the notions of morality and justice as imbedded within the international community .

<sup>167</sup> Gary Born, *International Commercial Arbitration* 3478 (Wolters Kluwer 2014).

involve interests. If such transactions are brought before the competent courts in case of a dispute, the courts would most likely invalidate such transactions for being Sharia non-compliant. This is why, a dispute resolution committee for banking disputes called the “Banking Disputes Settlement Committee”<sup>168</sup> has been established and operates independently from the Saudi judicial system and has been attributed the competence to decide on cases involving banking transactions that do not comply with Sharia. The reason behind the creation of a separate system is the need for Saudi Arabia to modernise its banking practices in order to be in line with the international banking business model and to have contemporary banking matters aggregated in a specialised forum in a more experienced and flexible manner than when disputes are brought before the normal competent courts.

If the Saudi Regulator and for the purpose of modernising its domestic business model, has already liberated a certain number of domestic transactions from the grips of Sharia by creating a separate aggregative system, then nothing should prevent the adoption of the same logic when it comes to international arbitration where it makes more sense to lessen the grips of Sharia and Saudi Public Policy or even to exclude it when controlling international arbitral awards. Hence, it may be completely foreseeable to establish within the realm of the Competent court and the Enforcement court a judicial committee that deals exclusively with applications in respect of the annulment or recognition and enforcement of foreign arbitral awards and which reduces the Sharia/ Saudi Public Policy conformity test in favour of a more flexible and pragmatic approach that would be in line with the international arbitration practice.

### **Conclusion**

To answer the question raised in this paper, “Preserving the local culture while modernising arbitration: A blessing or a curse?”, the author has tried to demonstrate throughout the previous developments that it is not enough to modernise arbitration laws in order to promote the development of arbitration, but such effort should be completed by providing a legal environment that would allow the regulations to operate efficiently.

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<sup>168</sup> See Royal Decree No 8/729 on 10/07/1407 HA.