UNIVERSITY OF PORTSMOUTH
SCHOOL OF LAW

CHALLENGES TO THE ENFORCEMENT OF FOREIGN ARBITRAL
AWARDS IN THE STATES OF THE GULF COOPERATION COUNCIL

A

DOCTORAL DISSERTATION

BY

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In the Name of Allah, the Most Gracious, the Most Merciful

[We said], “O David, indeed We have made you a successor upon the earth, so judge between the people in truth and do not follow [your own] desire, as it will lead you astray from the way of Allah.” Indeed, those who go astray from the way of Allah will have a severe punishment for having forgotten the Day of Account.¹

¹ The Holy Qur’an, Saad 38:26, Sahih International Translation.
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ABSTRACT

The topic of this thesis is the enforcement of foreign arbitral awards in the GCC states with the aim of offering a proposal for unifying the substantive and procedural rules for enforcing foreign arbitral awards under the ambit of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, the Riyadh Convention, and the ICSID Convention to which all the GCC states are signatories. The significance of this thesis is its comprehensive comparison of the Shari’a, international arbitration agreements, and the arbitration laws of GCC states.

The research argues that the weaknesses in the arbitral enforcement mechanisms of GCC states do not necessarily stem from the Shari’a, as most Western scholars suspect, but from the very same problems facing non-Islamic countries regarding the enforcement of foreign arbitral awards. These include the failure to create an international consensus on the enforceability of a foreign arbitral award that has been previously set aside, overt judicial activism, and protectionist attitudes against foreign arbitral awards.

As research into the enforcement of foreign arbitral awards under the New York Convention have been shaped largely by the interpretation and analysis of Western scholars, this thesis gives voice to the perspectives of Shari’a scholars to address many of the uninformed criticisms lodged at the GCC states regarding arbitration as a whole and the enforcement of foreign arbitral awards more specifically.

The methodologies employed in this thesis include both (1) a review and comparison of the existing literature, including scholarly works on the topic, cases in the GCC states and elsewhere, national rules and legislation in the GCC states, and regional/international agreements or conventions; and (2) a survey of those engaged in the field of arbitration in the GCC states, using survey methodology and Survey Monkey, an online survey design, collection and analysis tool. The survey measures the perspectives of practitioners engaged in the field of arbitration in the various GCC states.
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DEDICATION

This dissertation is lovingly dedicated to my parents, siblings, and most especially to my wife and children.
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The progress of countries, peoples and civilisations starts with education. The future of nations start in their schools.

-H.H. Sheik Mohammed bin Rashid Al Maktoum

If I have seen further it is by standing on the shoulders of Giants.

-From a letter written by Isaac Newton to Robert Hooke, 5 February 1676

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“Whilst registered as a candidate for the above degree, I have not been registered for any other research award. The results and conclusions embodied in this thesis are the work of the named candidate and have not been submitted for any other academic award.”

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NOTE

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ABBREVIATIONS AND ACRONYMS

AAA: American Arbitration Association
ABA: American Bar Association
ADCCCA: Abu Dhabi Centre for Commercial Conciliation and Arbitration
AD: Anno Domini
ADR: Alternative Dispute Resolution
AH: Anno Hegirae or After Hijrah
AJIL: American Journal of International Law
Am J Comp L: American Journal of Comparative Law
Am Rev Int’l Arb: American Review of International Arbitration
Am U Int’l L Rev: American University International Law Review
Ann Rev Banking & Fin L: Annual Review of Banking and Finance Law
APC Act: Pakistan’s Arbitration Protocol and Convention Act of 1937
Arab L Q: Arab Law Quarterly
ARAMCO: Arabian American Oil Company
Arb: Arbitration
Arb Int’l: Arbitration International
Arb Journal: Arbitration Journal
Art: Article
BCDR: Bahrain Chamber of Dispute Resolution
BGBI: BUNDESGESETZBLATT, official law gazette of Germany
BIT: Bilateral Investment Treaty
BSCD: Board for the Settlement of Commercial Disputes
Bus L Int’l: Business Law International
Cass: Cassation/Cassazione
CCASG: Cooperation Council for the Arab States of the Gulf
CCPA: Bahrain Civil and Criminal Procedure Act
CFI: Court of First Instance
Ch: Chapter
Chinese J Int’l L: Chinese Journal of International Law
Chi J Int’l L: Chicago Journal of International Law
CLOUT: Case Law on UNCITRAL Texts
Colum J Transnat’l L: Columbia Journal of Transnational Law
Cornell Int’l LJ: Cornell International Law Journal
Cornell L Rev.: Cornell Law Review
CPR: International Institute for Conflict Prevention and Resolution
CPR International Rules: Conflict Prevention and Resolution International Rules
CRCICA: Cairo Regional Centre for International Commercial Arbitration
Croat Arb YB: Croatian Arbitration Yearbook
CSCD: Committee for the Settlement of Commercial Disputes
CSD: Commission for the Settlement of Disputes of the GCC Supreme Council
CUP: Cambridge University Press
DIAC: Dubai International Arbitration Centre
DIFC: Dubai International Financial Centre
Disp Resol J: Dispute Resolution Journal
DRC: Democratic Republic of Congo
DWS: Denton Wilde Sapte
ed/eds: Editor/Editors
edn: Edition
et seq: et sequentes or et sequentia, meaning “and the following”
EU: European Union
EWCA: England and Wales Court of Appeals
Fordham Int’l LJ: Fordham International Law Journal
GA J Int’l & Comp L: Georgia Journal of International and Comparative Law
GCAC: GCC Commercial Arbitration Centre
GCC: Gulf Cooperation Council
Geo Mason J Int’l Com L: George Mason Journal of International Commercial Law
ICC: International Chamber Commerce
ICCA: International Council for Commercial Arbitration
ICC Bull: International Chamber of Commerce Bulletin
ICCLLR: International Company and Commercial Law Review
ICC Int’l Ct Arb Bull.: ICC International Court of Arbitration Bulletin
ICDR: International Centre for Dispute Resolution
ICLQ: International & Comparative Law Quarterly
ICSID: International Centre for Settlement of Investment Disputes
IIITIC: International Industrial Trading and Investment Company
ILA: International Law Association
ILR: International Law Reports
ILSA J Int’l & Comp L: International Law Students Association Journal of International and Comparative Law
Ind J Global Legal Stud.: Indiana Journal of Global Legal Studies
Int’l & Comp L Q: International and Comparative Law Quarterly
Int’l ALR: International American Law Reports
Int’l Bus Lawyer: International Business Lawyer
Int’l Invest L and Arb: International Investment Law and Arbitration
Int’l J of Arab Arb: International Journal of Arab Arbitration
Int’l L: International Lawyer
J: Journal
J of Arb: Journal of Arbitration
JDI: Journal du Droit International
J Arab Arb: Journal of Arab Arbitration
J Int’l Arb.: Journal of International Arbitration
JIBLR: Journal of International Banking Law and Regulation
J L & Com.: Journal of Law and Commerce
J Legal Stud: Journal of Legal Studies
J Mar L & Com.: Journal of Maritime Law and Commerce
JWELB: Journal of World Energy Law & Business
JWIT: Journal of World Investment and Trade
JWTL: Journal of World Trade Law
KLJ: King’s Law Journal
KSA: Kingdom of Saudi Arabia
Law & Pol’y Int’l Bus: Law and Policy in International Business
Ll R: Lloyd’s List Law Reports
Lloyd’s Rep: Lloyd’s Law Reports
LCIA: London Court of International Arbitration
Loy LA Int’l & Comp LJ: Loyola of Los Angeles International and Comparative Law Journal
LQR: Law Quarterly Review
Ltd: Limited
LRAC: Law Reports, Appeal Cases (Second Series)
MAA: Malaysian Arbitration Act
Mealey’s Intl Arb Rep: Mealey’s International Arbitration Reports
MIT: Multilateral Investment Treaty
MqJBL: Macquarie Journal of Business Law
n: Note
NCCP: French New Code of Civil Procedure
NCJ Int'l L & Com Reg: North Carolina Journal of International Law and Commercial Regulation
No: Number
NW U L Rev: Northwestern University Law Review
NYC: New York Convention
OIC: Organisation of Islamic Cooperation
OJLS: Oxford Journal of Legal Studies
OUP: Oxford University Press
p: page
para: paragraph
Pace Int’l L Rev.: Pace International Law Review
PBUH: Peace Be Upon Him
PBUT: Peace Be Upon Them
Penn St L Rev: Penn State Law Review
PILA: Swiss Private International Law Act
pp: pages
Qatari CPC: Qatari Civil Procedure Code of 1990
QB Comm Ct: Queen’s Bench Commercial Court
QFC: Qatar Financial Centre
QICA: Qatar International Centre for Arbitration
REAO: Pakistan Recognition and Enforcement of Arbitration Agreements and Foreign
Arbitral Awards Ordinance of 2005
S Ct: Supreme Court
Santa Clara J of Int’l L: Santa Clara Journal of International Law
SCC: Stockholm Chamber of Commerce
SDNY: Southern District of New York
SICAC: Sharjah International Commercial Arbitration Centre
TDM: Transnational Dispute Management
Tex Int’l LJ: Texas International Law Journal
UAE: United Arab Emirate
UAE CPC: United Arab Emirates Civil Procedure Code
UCLA J Islamic & Near E L: University of California in Los Angeles Journal of
Islamic and Near East Law
UN: United Nations
UNCITRAL: United Nations Commission on International Trade Law
UP: University Press
USC: United States Code
Utah L Rev: Utah Law Review
Va J Int’l L: Virginia Journal of International Law
Vand J Transnat’l L: Vanderbilt Journal of Transnational Law
Vindobona J Int’l Com L: Vindobona Journal of International Commercial Law
VUWLR: Victoria University of Wellington Law Review
vol: Volume
W Ger: West Germany
WIPO: World Intellectual Property Organization
World J of Arb: World Journal of Arbitration
YAR: Young Arbitrator Review
YB Comm Arb: Yearbook of Commercial Arbitration
YB Int’l Fin & Econ L: Yearbook International Finance and Economic Law
CHAPTER ONE

GENERAL INTRODUCTION

1.0. Introduction

This research examines the need to create a modern unified arbitration law with sufficient enforcement mechanism for the Cooperation Council for the Arab States of the Gulf (CCASG)\(^1\) or as it is often referred to as the “Gulf Cooperation Council” (GCC).\(^2\) The thesis argues that existing GCC laws and practice of international arbitration,\(^3\) specifically with regards to the recognition and enforcement\(^4\) of foreign arbitral awards, are insufficient and must be updated to fully conform to modern international arbitration practice. The research examines and discusses hindrances to the enforcement of arbitral awards under current GCC laws by comparing the arbitration rules under Islamic Shari’a\(^5\) (which is also known and hereafter referred to as the “Shari’a”\(^5\)), international and regional agreements, and the national arbitration laws of

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\(^3\) This research generally covers only international commercial arbitration, and non-commercial arbitration such as those dealing with family law is beyond the scope of this research.

\(^4\) For purposes of brevity, any reference to enforcement throughout the rest of this research also refers to recognition and enforcement unless otherwise stated.

\(^5\) The word “Shari’a” in Arabic means “the right path.” See Ian Edge (ed), *Islamic Law and Legal Theory* (Dartmouth 1996) xvi-xvii. See also Essam Alsheikh, “Court Intervention in Commercial Arbitral Proceedings in Saudi Arabia: A Comparative Analytical Study of Shari’a Based Statutes and International Arbitral Practices” (DPhil thesis, University of Portsmouth 2011) Ch 2, fn 2; Abd Ar-Rahman and Abdassamad Clarke, *Shari’a Islamic Law* (Ta-Ha Publishers 2008) 23 (stating that “the literal meaning of the word Shari’a in Arabic is ‘the way to a watering place’. More generally, it is taken to mean ‘the road to be followed’. Allah, the Creator, has revealed this path to mankind through the Prophet, His Messenger.”) For a full background discussion on the Shari’a, see Section 2.2.1. Islamic law is also known as the Shari’a. This thesis author disagrees with references to the Shari’a as “Shari’a law” since Shari’a in the Arabic sense also encompasses the meaning of the words “law” and “rule.” To say “Shari’a law” is in essence a misnomer and the same as saying “Law law.” For Islam, there is no distinction between Shari’a and any other law because the definition of Shari’a in Arabic is “law and rule” given by God, but a distinction later arose through use of the word Shari’a in the English language and some erroneously use the phrase “Shari’a law.” The more appropriate term is Islamic Shari’a or to simply refer to it as the Shari’a. However, since it is common practice to refer to Shari’a as “Islamic law” in the English lexicon and because many sources refer to the Shari’a as “Islamic law”, this thesis author may
GCC states. The research concludes that while the Shari’a affects the enforcement of foreign arbitral awards, the substantial number of potential challenges to enforcement in the GCC states stem from the domestic arbitration laws or practice, and not necessarily from the Shari’a. The domestic arbitration laws of GCC states, therefore, coupled with judges who have limited experience with Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) and the Model Law of the United Nations Commission on International Trade Law for Arbitration (UNCITRAL Model Law) are the main culprits for the numerous cases that deny enforcement of foreign arbitral awards.

The study includes a survey conducted among practitioners in the field of arbitration in the GCC states, the results of which corroborate the conclusions drawn in the literature review. A full report of the survey results is included as Appendix II, while the pertinent results of the survey are discussed throughout the research wherever appropriate.

Finally, the thesis proposes a set of rules relating to the enforcement of foreign arbitral awards, which balances the requirements of the Shari’a with the norms of international arbitration, to be included in a Uniform GCC Arbitration Law.

1.1. Background of the Study

Arbitration is an important means for resolving commercial disputes worldwide, and it is certainly needed in the GCC states due to the economic boom in the region, which has become one of the most attractive markets for foreign investments. Although oil still plays an important role in the economy, the GCC states are trying to diversify their economic base by becoming less dependent on oil as a

have to refer to the Shari’a as “Islamic law.” For the rest of the research, however, this thesis author will refer to the Islamic Shari’a as “Shari’a.”


source of gross domestic product. In recent years, various GCC states have been working hard to diversify the resources of their national economy. This is particularly true, for example, in the United Arab Emirates (UAE) where businesses in construction, tourism, manufacturing and financial services have developed rapidly. However, many foreign investors have largely remained reluctant to engage in arbitration in the GCC states because of the perception that arbitration in the region is still in its infancy.

Therefore, aligning arbitration in the GCC states with international arbitration norms will likely attract more foreign investments, and will dispel the notion that GCC states are incapable of becoming an international hub for arbitration. Substantive changes, therefore, should be made to the arbitration laws of the GCC states, especially as to the rules and procedures for the enforcement of foreign arbitral awards.

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10 GCC states like Qatar and the UAE, for example, have pursued various strategies for increasing their tourism industry. Qatar has been granted the 2022 Football World Cup by FIFA, while the UAE has been granted the 2020 World Expo. Ian Traynor, ‘FIFA says there is little it can do about labour conditions in Qatar’ (The Guardian, 13 February 2014) <http://www.theguardian.com/world/2014/feb/13/fifa-labour-conditions-qatar-world-cup> accessed 15 February 2014; Aarti Nagraj, ‘Dubai Wins Expo 2020 Bid’ (Gulf Business, November 2013) <http://gulfbusiness.com/2013/11/dubai-wins-expo-2020-bid/> accessed 15 February 2014.


12 George Smith and Matthew Marrone, ‘Recent Developments in Arbitration Law in the Middle East’ (Weinberg Wheeler, 15 September 2010) <http://www.wwhgd.com/news-article-71.html> accessed 10 March 2014 (there is also the perception that the training of judges and lawyers lags far behind the rest of the world).

13 Ahmed Almutawa and AFM Maniruzzaman, ‘The UAE’s Pilgrimage to International Arbitration Stardom – A Critical Appraisal of Dubai as a Centre of Dispute Resolution Aspiring to be a Middle East Business Hub’ (2014) JWIT 15, 193-244; Smith and Marrone (n 12) 2.
As an example, the UAE has so far taken major steps towards recognizing the important role of arbitration in economic development. In July 2006, the UAE acceded to the New York Convention,\(^{14}\) which has been in effect since 19 November 2006. The UAE is also a signatory to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965\(^{15}\) (ICSID Convention). At present, legislative support for arbitration in the UAE consists of 20 provisions [Articles 203-218 and Article 235-238] in the UAE Civil Procedure Code.\(^{16}\) However, the UAE plans to adopt a new UAE Federal Arbitration Law based on the UNCITRAL Model Law.\(^{17}\) Furthermore, the UAE, like other GCC states, has witnessed the establishment of several modern arbitration centres, including the Dubai International Arbitration Centre\(^{18}\) (DIAC), the Dubai International Financial Centre – London Court of International Arbitration (DIFC-LCIA) Arbitration Centre,\(^{19}\) the Abu Dhabi Centre for Commercial Conciliation and Arbitration (ADCCCA),\(^{20}\) the Sharjah International Commercial Arbitration Centre (SICAC),\(^{21}\) and many other smaller institutions.\(^{22}\) All of them provide strong demonstrations for the importance of arbitration as a reliable

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\(^{14}\) Smith and Marrone (n 12) 2 (UAE became the 138th state to adopt the New York Convention).


\(^{16}\) UAE Civil Procedure Code, Federal Law No (11) of 1992. It is important to note that the UAE Code does not govern disputes arising out of commercial contracts to which the Dubai Government or any of its subsidiary departments are a party. Such disputes, if submitted to arbitration, fall under other specific laws. See Mark Hoyle, ‘Topic in focus: demystifying UAE arbitration law’ (Lexology, 8 Nov 2013) <http://www.lexology.com/library/detail.aspx?g=fc4f6d6-cafb-4063-8dc1-f20f15449e9e> accessed 15 January 2014 (stating that a “handful of Articles relating to arbitration…do not provide a template for a modern arbitration system”).

\(^{17}\) On February 2, 2008 the UAE’s Ministry of Economy released a Draft Federal Law on Arbitration and the Enforcement of Arbitral Awards, which is based closely on the UNCITRAL Model Law. Smith and Marrone (n 12) 10-11 (UAE became the 138th state to adopt the New York Convention).


\(^{22}\) Smith and Marrone (n 12) 2 (stating that these events have strengthened Dubai’s position to bid as the international center for arbitration). For a full discussion of arbitration in the UAE, see generally Almutawa and Maniruzzaman (n 13).
dispute resolution mechanism for the business community in the UAE. The Kingdom of Saudi Arabia (KSA) has also taken major steps with the recent passage of the Saudi Arbitration Law of 2012, which generally puts KSA in line with international arbitration norms.\(^{23}\)

However, despite these positive indications, a full recognition of arbitration is still facing various challenges in the GCC states.\(^{24}\) This includes the difficulties facing the enforcement of foreign arbitral awards in these states, which is largely due, as will be shown in this study, to the ambiguity of the procedures and the unpredictability of court practices.\(^{25}\) In the survey,\(^{26}\) the respondents gave the Kingdom of Bahrain (Bahrain) and the UAE the highest rating at 7.44 out of 10 and 7.43 out of 10, respectively, when asked to rate the friendliness of GCC states towards the enforcement of foreign arbitral awards. KSA, despite having recently passed the Saudi Arbitration Law of 2012,\(^{27}\) was rated low at 3.44 out of 10. The Sultanate of Oman (Oman) received a rating of 6.25 out of 10, the State of Kuwait (Kuwait) was rated at 5.78 out of 10, and the State of Qatar (Qatar) was rated at 5.74 out of 10.\(^{28}\) In other words, GCC arbitration practitioners see that much work is yet to be done with the GCC states to improve their enforcement of foreign arbitral awards, despite that all the GCC states are signatories to the New York Convention.

The end goal of any arbitration proceeding is that an arbitral award should easily be enforced.\(^{29}\) The easy enforceability of arbitral awards is considered to be one of the

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\(^{24}\) Smith and Marrone (n 12) 3.

\(^{25}\) ibid. Ostensibly, the adoption of the New York Convention by 16 Middle Eastern countries -including Bahrain, Oman, KSA, Jordan, Kuwait, Qatar and the UAE- should provide for more straightforward enforcement of foreign arbitral awards in those states. The New York Convention severely restricts the grounds on which a county’s courts can refuse to enforce foreign arbitral awards. However, the New York Convention also contains an exception allowing courts to repudiate foreign arbitral awards that are “contrary to the public policy of that country.” Many Middle Eastern countries rely on this exception to deny enforcement of foreign arbitral awards that do not comply with the Shari’a.

\(^{26}\) Appendix II, Survey Report on Arbitral Award Enforcement in the GCC, II(2.2.1.) [hereinafter “Appendix II, Survey Report”]

\(^{27}\) ibid; Saudi Arbitration Law (n 23).

\(^{28}\) Appendix II, Survey Report, II(2.2.1.).

\(^{29}\) “But I think that the question of enforcement of [foreign] arbitral awards must be in the centre of our worries if we really look for the success of international arbitration.” Muhammad Huchan, ‘Untitled’ (Euro-Arab Arbitration conference, Tunisia, 1985), cited in Abdul Hamid El-Ahlab and Jalal El-Ahlab, Arbitration with the Arab Countries (3rd ed, Wolters Kluwer 2011) 665. See also Emelia Onyema, ‘Formalities of the Enforcement Procedure (Article III and IV)’ in Emmanuel Gaillard and Domenico Di
main factors in the success of international arbitration. As Baamir stated, “arbitration loses its objective of settling disputes if arbitral awards lack enforceability.” The GCC states, therefore, should work towards a system where the enforcement of foreign arbitral awards is consistent with international arbitration norms.

Through the survey this study shows that perhaps the lack of knowledge by the judiciary in international agreements may contribute to the challenges in enforcing foreign arbitral awards in the GCC states. Survey respondents perceive public policy as the main challenge to the enforcement of foreign arbitral awards followed by the lack of knowledge of the judiciary in the GCC states and then by the failure of the arbitration statutes in the GCC states. The sources of these challenges may also relate to the nature, development and background of the arbitration systems in these states. This research will examine whether the perception of the survey respondents correspond with the review of the literature.

It is known that the legal system in the GCC states is based upon the Shari’a, which has its own valuable features, the application of which may lead to different results if applied in the realm of international arbitration. With the Shari’a in mind, this research examines to what extent and in what phases the Shari’a affects the outcome of the enforcement of arbitral awards in the GCC states, especially while keeping in mind a comparative view of the international and regional arbitration agreements as well as the national arbitration laws of each of the GCC states. The study


31 Baamir (n 29) 91; Al-Kenain (n 29) 141-145.
32 Appendix II, Survey Report, II(2.2.2.). Survey Respondents view judges in the GCC as having low familiarity with international agreements, and especially so with the ICSID Conventions (3.78 out of 10) which has had very little history in the GCC states. The respondents also rated the judges’ familiarity with the New York Convention (5.86 out of 10) and the judges’ familiarity with the UNCITRAL Model Law (4.97 out of 10).
33 Appendix II, Survey Report, II(2.3.).
34 Smith and Marrone (n 12) 2.
shows through the literature review that the effect of the Shari’a as a potential source for challenging the enforcement of foreign arbitral awards through the public policy defence is exaggerated, and that the Shari’a is largely consistent with international arbitration norms. The same conclusion is supported by the responses to the survey questions aimed at determining how those in the field of arbitration in the GCC states perceive the effect of the Shari’a on the enforcement of foreign arbitral awards.35

1.2. Objectives and Scope of the Study

1.2.1. General Objective

The general objectives of this study are to examine the current state of international arbitration in the GCC states and to find a way to establish a bridge between arbitration in the GCC states and the current systems of international arbitration. This study aims to add to the general literature on arbitration by comparing the Shari’a, international conventions, and the arbitration laws of all GCC states, while examining the five potential sources of non-enforcement of a foreign arbitral award: (1) the distinction between domestic, foreign, and international arbitral awards, (2) the conditions to enforcement, (3) grounds for non-enforcement, (4) public policy, and (5) grounds for setting aside an arbitral award. The study generally examines current practices for the enforcement of foreign arbitral awards in the GCC states, with the end goal of identifying specific challenges to enforcement, the root causes of the challenges, and then propose a set of rules relating to enforcement in a prospective uniform GCC arbitration law.

1.2.2. Specific Objectives

The specific objectives of this research are to address multiple issues necessary to fully understand the state of arbitration enforcement in the GCC states, and to eventually propose a system of enforcing foreign arbitral awards in the GCC states that

35 Appendix II, Survey Report, II(2.6.).
is compatible with international arbitration norms. The specific objectives are as follows:

(i) To examine the practice of applying modern international arbitration in the GCC states, and to determine whether harmonisation with the Shari’a is possible.

(ii) To examine the application of international arbitration treaties and/or conventions, such as the New York Convention and the ICSID Convention;

(iii) To identify the key legal and policy obstacles that may hinder the process for developing arbitration in the GCC states, specifically as to the enforcement of foreign arbitral awards, and to propose a set of rules relating to enforcement in a prospective Uniform GCC Arbitration Law that takes into account the applicable international standards, such as the principles contained in the New York Convention and the UNCITRAL Model Law, while harmonising it with the Shari’a;

(iv) To provide a necessary understanding of the Shari’a for practitioners of international arbitration when they encounter the application of the Shari’a at the stage of enforcing foreign arbitral awards in the GCC states.

1.3. Importance and Justification of the Study

This research will attempt to recognize various challenges that may face the enforcement of foreign arbitral awards in the GCC states;\(^\text{36}\) and whether or not international arbitration rules and practices are recognized effectively by the arbitration

laws, the competent judicial authorities, and the arbitration practitioners in the GCC states.37

Also the research focuses on the effect of the Shari’a on the application of international arbitration.38 The research looks at the various phases at which the enforcement of foreign arbitral awards may face challenges with a comparative analysis of the Shari’a, international agreements, and the national laws of each of the GCC states. The research also examines the distinction between the terms “domestic,” “foreign,” and “international” arbitral awards. Further, it examines the conditions which the GCC states may require prior to the enforcement of an arbitral award. Additionally, the research discusses the various grounds upon which an arbitral award may face challenges based on non-enforcement and also based on a setting-aside application. The use of the public policy defence is a major subject examined in this research, specifically in Chapter Five.39 The main conclusion attempts to find flexible tools that may be available within the Shari’a, which could be used to harmonise with international arbitration norms.

The importance of this research is to (1) identify challenges to the enforcement of foreign arbitral awards in the GCC states; (2) determine the extent to which the Shari’a becomes the source for the challenges to the enforcement of foreign arbitral awards and whether alternatively the source may be judicial activism guised behind Shari’a public policy; (3) determine the possibility of harmonising rules for the enforcement of foreign arbitral awards between the Shari’a, international agreements, and the domestic legislation of GCC states; and (4) provide a proposal for overcoming the challenges through a uniform set of rules relating to enforcement in a prospective Uniform GCC Arbitration Law.

37 Roy (n 36) 935 (“Each Middle Eastern Nation, in considering the adoption of international arbitral legislation, faces its own set of issues and problems. Many Middle Eastern countries, including Yemen, Oman, and Qatar, have not acceded to an international arbitration convention, finding the terms of these conventions contrary to their internal legal systems”).
39 See generally, Chapter Five.
1.4. Research Questions

The following questions have been addressed in this study:

Question One: How have arbitration and foreign arbitral awards been applied and developed in the GCC states?

Question Two: To what extent does the Shari’a affect the enforcement of foreign arbitral awards in the GCC states, and does the Shari’a apply to domestic, foreign, and international arbitral awards?

Question Three: Are there differences in interpreting the Shari’a among the GCC states, and how would these differences, if any, affect the enforcement of foreign arbitral awards?

Question Four: Do international agreements like the New York Convention and the ICSID Convention harmonise the various arbitration principles of different legal systems?

Question Five: How does public policy affect the enforcement of foreign arbitral awards in the GCC states?

Question Six: What are the major challenges to the enforcement of foreign arbitral awards in the GCC states, and what are their sources?

The above research questions are answered through a review of the literature, culminating in an analysis of each of the research questions in Chapter Seven as the concluding part of the thesis. Additionally, a survey was conducted to corroborate the conclusions reached regarding the research questions.
1.5. Research Methodology

The study adopts both comparative and international law approaches to the issues concerned and includes a survey result on those issues.

1.5.1. Comparative Methodology

As far as comparative law is concerned, the research looks into the current international paradigm of unifying and harmonising the international arbitration system vis-à-vis the New York Convention. The research is also comparative because it compares arbitration in multiple legal systems (Shari’a and international arbitration in the GCC states and international arbitration), the enforcement of foreign arbitral awards in each system, the policies of arbitration in each system, the obstacles faced by both systems in creating an international arbitration system, the causal relationships between the arbitration paradigm in each of the two legal systems, and the legal evolution and current stage of international arbitration in each system.40 Finally, while previous scholars avoided a comprehensive comparison of particular legal systems, this research uses a methodology of comparative law analysis through the comparison of two or more legal systems vis-à-vis the Shari’a, the national legislation of GCC states, and international arbitration agreements, a specific comparison in international arbitration that has now become ripe and can contribute to contemporary discourse on this topic.41

1.5.2. Survey Methodology42

A survey was concluded with the results and the full analysis of which is attached to the study as Appendix II. The survey aimed to test the findings from the literature review by measuring the perception of:

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41 ibid.
42 For the full report and analysis, see Appendix II, Survey Report.
(1) those with experience in the field of arbitration in the GCC states regarding the definition of domestic, foreign and international arbitral awards in their respective jurisdictions;
(2) the same group on whether courts in the GCC states apply the same or different conditions to the enforcement of domestic and foreign arbitral awards;
(3) the same group on what are the most likely reasons for the non-enforcement of foreign arbitral awards in the GCC states, including the perception of the group on the extent to which judges in the GCC states are familiar with the New York Convention, the UNCITRAL Model Law, and the ICSID Convention;
(4) the same group as to the role of the Shari’a in determining the public policy defence;
(5) the same group regarding a perspective Uniform GCC Arbitration Law, and their opinion on potential language to be proposed for inclusion in the Uniform GCC Arbitration Law.

The survey generally attempted to complement the findings in the literature review, including the divergent views of Western and GCC states practitioners with regard to the role and impact of the Shari’a on the enforcement of foreign arbitral awards. In short, the survey’s primary role is to explain and bolster the examination of the relevant international Conventions and arbitration rules in the GCC states.

There were a total of 41 respondents to the survey out of more than 321 survey invitations sent via email and web link. Budgetary and time constraints were the main factors that limited the sample size, a limitation that was weighed with the explanatory and ancillary purpose of the survey results which are not intended to show and does not establish statistical significance. Of the 41 respondents, 87.5% directly practised in the field of arbitration, with the same percentage of 87.5% having experience with arbitration in the GCC states, and with 60% having 10 or more years of experience in arbitration. Such background experiences of the respondents make the survey reliable, especially with regard to open-ended questions. For a more in-depth discussion of the survey’s methodology and the specific results of each question, refer to Appendix II.

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43 See Appendix II, Survey Report, I(2.1.7.).
44 Appendix II, Survey Report.
In order to achieve the goals set out above, the following steps have been taken:

(a) A research carried out into the published literature, legal journals and academic works, and descriptions of the origins and developments in the field of arbitration especially in the Shari’a. The focus is on characterising the various arbitration practices and procedures prevalent in international arbitration and arbitration in the GCC states.

(b) From the available literature, this study describes the major issues in arbitration practice and procedures, specifically the issue of the enforcement of foreign arbitral awards. This research, particularly in Chapters Two, begins by examining the distinction between “domestic,” “foreign,” and “international” arbitral awards, and the impact such a distinction makes for the enforcement of arbitral awards. Further, Chapter Two considers the impact of the Shari’a on “foreign” arbitral awards, keeping in mind the complicated jurisdictional reach of the Shari’a, which draws the line based on a person’s religion. The study proposes a way forward under the New York Convention on this issue.

(c) The chapters that follow, specifically Chapters Three, Four, Five, and Six, examine the various potential sources of the challenges to the enforcement of foreign arbitral awards in the GCC states. The research tracks the various phases that a foreign arbitral award undergoes in the enforcement process. In this regard, the research examines the conditions which must be met prior to being granted the application for enforcement. The research then delves into the potential grounds that parties, or courts *sua sponte* [of one’s own accord], may rely upon to refuse enforcement of a foreign arbitral award. These grounds for non-enforcement are tied closely, and almost mirror, the grounds under which arbitral awards may be set aside, which occurs after an arbitral award has been granted but parties may seek to annul or set aside at some reasonable time after it has been granted. The grounds for setting aside will be examined separately.
(d) This research also examines the emerging norms and trends in international arbitration. For this purpose, this research highlights the existing principles of international arbitration law and subsequently summarizes and discusses the enforcement of foreign arbitral awards in various conventions and agreements. The study undertakes an analysis of the New York Convention, which must be considered by the GCC states in formulating a Uniform GCC Arbitration Law.

(e) The research also addresses as a separate issue the concept of public policy, not only under the New York Convention, but also under the Shari’a and the national arbitration laws of each of the GCC states. Keeping in mind that public policy has been seen, rightly or wrongly, by the international arbitration community as the most compelling obstacle to the enforcement of foreign arbitral awards in the GCC states, the research examines to what extent the Shari’a public policy diverges from the public policy as espoused and interpreted in the New York Convention. The research proceeds by examining both procedural and substantive public policy with the goal of identifying where the divergence may take place among the Shari’a, international and regional agreements, and the national arbitration laws of the GCC states.

(f) The research identifies the major challenges to the enforcement of foreign arbitral awards in the GCC states, and the sources of these challenges. After critically examining other more comprehensive proposals for a Uniform GCC Arbitration Law, the thesis proposes a set of rules aimed at improving the enforcement of foreign arbitral awards in the GCC states, while aiming to harmonise the Shari’a with international arbitration norms.

(g) Finally, a survey was conducted of arbitration practitioners in the GCC states, and a report and analysis of the survey data and charts are given in Appendix II. The survey bolsters the findings and conclusions from the literature review, and also tests the language of the rules proposed by the thesis to be included in a prospective Uniform GCC Arbitration Law. It is important to make clear at the outset that the survey does not intend to show or establish statistical significance.
1.6. Structure of the Study

Chapter Two discusses the distinction between “domestic,” “foreign,” and “international” arbitral awards, and the complicated jurisdictional reach that the Shari’a creates when distinguishing between “domestic” and “foreign” award. Chapter Two analyses how the New York Convention’s definition for “foreign” and “non-domestic” awards, when analysed in light of the competing interpretations by Shari’a scholars of the definitions of these terms in the Shari’a fiqh [jurisprudence], could be harmonised with the Shari’a and that the New York Convention’s “non-domestic” arbitral award supersedes the Shari’a’s potentially troublesome distinction.

Chapter Three compares the conditions for the enforcement of arbitral awards under the Shari’a, the international and regional agreements, and the national arbitration laws of each of the GCC states. Chapter Three also identifies where the conditions overlap and where there are inconsistent and/or additional conditions from any of the three sources of rules for the enforcement of arbitral awards in the GCC states. The purpose of Chapter Three is to identify whether the conditions for the enforcement of an arbitral award could be a source for the non-enforcement of foreign arbitral awards in the GCC states, especially when those awards are not enforced based on technical grounds.

Chapter Four compares the potential challenges to the enforceability of foreign arbitral awards in the GCC states, between the Shari’a, international and regional agreements, and the national arbitration laws of each of the GCC states. This chapter also examines whether the Shari’a provides for more sources for the potential challenges to the enforceability of foreign arbitral awards as compared to the New York Convention and the national arbitration laws.

Chapter Five discusses the public policy defence that the GCC states have often been criticized for over-reliance. It, therefore, also examines the procedural and substantive sources for the public policy defence under the Shari’a, the international and regional agreements, and the national arbitration laws of each of the GCC states. Furthermore, it analyses to what extent Shari’a public policy diverges from the international norm.
Chapter Six discusses the grounds upon which arbitral awards may be set aside or annulled in the GCC states. It also discusses the general concepts in the Shari’a for the setting aside of an arbitral award, and takes a closer look at the grounds for setting aside under the New York Convention and the national arbitration laws of each of the GCC states. Furthermore, it determines to which extent the Shari’a allows for the setting aside of a foreign arbitral award, and whether foreign arbitral awards are set aside in GCC states because of unwarranted judicial activism.

Chapter Seven provides some conclusions on the above issues discussed, answers the research questions posed in the introduction, proposes a set of rules relating to enforcement in a prospective Uniform GCC Arbitration Law, submits that the writer has succeeded to contribute substantively to the literature, and addresses additional issues beyond the scope of the research but may be relevant for further consideration.

There are additional Appendices of most relevance to the research. Appendix I is a Chart of Conditions to Enforcement in the GCC States, which compares the conditions for enforcement between all the GCC states, the New York Convention, and the Riyadh Arab Agreement for Judicial Cooperation (Riyadh Convention). This Chart should be useful for understanding the discussions set out in Chapter Three.

Appendix II is the Report on the Survey of Arbitral Award Enforcement in the GCC States. This Appendix includes a detailed discussion of the survey methodology, ethical considerations, procedures followed, and the results of the survey with analysis and charts. The results of the survey are also discussed throughout the thesis wherever relevant.

1.7. Contribution to the Field of Knowledge

The contribution of this research is to show how international arbitration can be harmonised in the GCC states specifically, with international arbitration norms, in the backdrop of the Shari’a. This research identifies the specific and unique concerns of GCC states when it comes to the Shari’a and the public policies of GCC states.

Additionally, this study applies the New York Convention’s exception under Article V(2)(b)\textsuperscript{46} when analysing the public policies of GCC states. Finally, this thesis proposes a set of rules relating to enforcement in a Uniform GCC Arbitration Law.

Issues relating to the challenges to the enforcement of foreign arbitral awards in GCC states have not been fully addressed by any leading scholarly materials and literatures identified. On the other hand, the leading scholarly articles and materials look at the Middle East as a whole. A view of arbitration in the context of the Shari’a will differ between GCC states and non-GCC states. Furthermore, there has been a gap in the literature in analysing the extent to which the Shari’a contributes to the challenges to the enforcement of foreign arbitral award in the GCC states. This research contributes to the knowledge by analysing the issue of enforcement of foreign arbitral awards and demonstrating that the Shari’a can be harmonised with international norms for arbitration, and that such harmonisation is becoming more possible in the GCC states. The research then contributes to the knowledge by considering approaches taken towards this harmonisation, and then by proposing a set of rules relating to enforcement in a Uniform GCC Arbitration Law that balances the Shari’a with the New York Convention. Thus, these issues make this research very important, adding to the current literature.

Additionally, a survey conducted in the study on the enforcement of arbitral awards in the GCC states adds greater value to the literature, as there has been no survey conducted on the issue of enforcement and with the aim of identifying what arbitration practitioners in the GCC states perceive as the source for challenges to the enforcement of foreign arbitral awards.

\textsuperscript{46} New York Convention, art V(2)(b).
CHAPTER TWO

DEFINING THE SCOPE OF DOMESTIC, FOREIGN, AND INTERNATIONAL ARBITRAL AWARDS WITHIN THE FRAMEWORK OF THE GCC STATES

2.0. Introduction

This chapter primarily explains the interplay of the rules governing the enforcement of foreign arbitral awards. Delineating the scope of “domestic,” “foreign,” and “international” arbitral awards at the outset would make it easier to determine the overlap, if any exists, among the rules governing the enforcement of foreign arbitral awards in the GCC states, and to determine the common grounds among them. Part I of this chapter discusses the generally accepted distinction of domestic, foreign, and international arbitral awards in international arbitration. Part II discusses the concept of “foreign” arbitral award under the Shari’a, and the different views of the four Shari’a schools of thought on determining whether an arbitral award is foreign. Part III explains arbitration rules governing domestic, foreign, and international arbitral awards in the GCC states.

Part IV analyses the New York Convention’s applicability in the GCC states, keeping in mind especially what the New York Convention classifies as a “non-domestic” arbitral award,¹ the same being discretionary, according to van den Berg,² and to be determined by the enforcing state. This thesis author argues that the non-domestic award under the New York Convention is consistent with the Shari’a paradigm and the same ought to be harmonised by GCC states by creating a uniform rule for determining a non-domestic award, keeping in mind the Shari’a. Part IV also analyses when the ICSID Convention applies in the GCC states, and how the same avoids the problem inherent in the New York Convention’s definition of “foreign

award” under a supranational paradigm. Finally, part V discusses the more-favourable-right provision of the New York Convention.

PART I

2.1. Commonly Accepted Distinctions of Domestic, Foreign, and International Arbitral Awards

Arbitral awards can be categorised according to the seat of the arbitration.\(^3\) There are variations, however, in practice; and for purposes of this study, the variations will be analysed in this chapter, including the impact of the Shari’a on the distinctions between domestic, foreign, non-domestic, international, and ICSID arbitral awards. This section explains these distinctions and clarifies their scope. As stated by Redfern, “even states that make no formal distinction between “domestic” and “international” arbitrations in their legislation are compelled to recognise the distinction when it comes to the enforcement of arbitral awards.”\(^4\) A problem, however, is that “each state has its own test for determining whether an arbitral award is ‘domestic’ or ‘foreign.’”\(^5\)

2.1.1. Domestic Arbitral Award

According to Hwang and Lee, “the lack of universality as to which awards the New York Convention applies to is derived from the differing definitions of what constitutes a domestic award, as well as the reservations made to the NYC. As a result, there is no ‘one-size-fits-all’ approach.”\(^6\) An arbitral award is generally categorised and hence appropriately applied as domestic when it is made within one state, arises out of an arbitration agreement between parties who are all from the same state, and the

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\(^5\) Redfern and Hunter (n 4) 16 (explaining that this problem was recognised by the New York Convention and its approach to defining a “foreign” award).

dispute in question has little or no connection with another state. There are exceptions to this general definition depending on how one defines a domestic, foreign, or international arbitral award within the national legislation.

In India, for instance, a previous rule was set out by the Supreme Court in *Bhatia International v. Bulk Trading S. A. & Anr.*, which held in Paragraph 23 that “relying on the definition of ‘domestic award’ in Section 2(7) of the Indian Act that foreign awards …are those awards which have been made pursuant to arbitration in a convention country, whereas the awards made outside India in an international commercial arbitration in a non-convention country is to be considered a ‘domestic award’ …” Under the former Indian approach, an arbitral award may be domestic even when it had been rendered outside of India if the seat of the arbitration is not a member of the New York Convention. This approach was overruled by the Indian Supreme Court in the *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services*, where the Indian Supreme Court revisited the rule in *Bhatia* and held that the Indian parliament’s intention was not to give the Indian Arbitration and Conciliation Act of 1996 extra-territorial application. The *Bharat* court held that the application of the UNCITRAL Model Law was limited to the territoriality principle and the seat of arbitration is the centre of gravity. Further, the court held that the omission of the word “only” did not mean that the Indian Parliament intended to depart from the territoriality principle. The *Bharat* decision clarified that arbitral awards passed in foreign seated arbitrations cannot be challenged under Article 34 (application for setting

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7 Greenberg, Kee and Weeramantry (n 3) 400.
8 *Bhatia International v Bulk Trading S A & Anr*, Case No App (Civil) 6527 (13 March 2002).
9 ibid. See also *Bharat Aluminium Co Ltd v Kaiser Aluminium Technical*, AIR 2005 Chh 21, 2006 (1) MPHT 18 CG (10 Aug 2005).
10 *Bharat Aluminium Co v Kaiser Aluminium Technical Services*, Civil Appeal No 7019 of 2005. This case is held to be important for bringing India in line with international arbitration standard. Ashish Chugh, ‘The Bharat Aluminium Case: The Indian Supreme Court Ushers in a New Era’ (*Kluwer Arbitration Blog*, 26 September 2012) <http://kluwerarbitrationblog.com/blog/2012/09/26/the-bharat-aluminium-case-the-indian-supreme-court-ushers-in-a-new-era/> accessed 11 March 2014 (stating that the decision is “likely to go down the annals of arbitration reports as the watershed decision that heralded a new dawn for Indian arbitration”).
11 Chugh (n 10).
aside an arbitral award) of the Indian Arbitration and Conciliation Act of 1996.\textsuperscript{13}

Certain GCC states reserved the reciprocity exemption, which means that they require the foreign arbitral award to have been made in a Contracting State. This includes Kuwait, KSA, and Bahrain.\textsuperscript{14} Those GCC states which made reservations for the reciprocity exemption, thus, will not enforce foreign arbitral awards from non-Contracting States. Those arbitral awards would be considered a-national awards.\textsuperscript{15} The other three GCC states, the UAE, Oman, and Qatar did not reserve the exemption,\textsuperscript{16} and a foreign arbitral award from any state may be enforced in these three states.

\textbf{2.1.2. Foreign Arbitral Award}

Generally, a state would consider an arbitral award as foreign if it were made in a foreign state.\textsuperscript{17} This is, of course, tempered by a court’s interpretation of the non-domestic prong of the New York Convention as discussed in the section below, and which, if one were to agree with van den Berg, would still have to be rendered under the procedural and substantive law of another state party to the New York Convention to be enforceable.\textsuperscript{18} The New York Convention defines a foreign arbitral award as an arbitral award “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.”\textsuperscript{19} This territorial criterion\textsuperscript{20} means that the arbitral award


\textsuperscript{15} van den Berg, ‘An Overview’ (n 2) 41.

\textsuperscript{16} Abdul Hamid El-Ahdab and Jalal El-Ahdab, \textit{Arbitration with the Arab Countries} (3rd edn, Wolters Kluwer 2011) 50.

\textsuperscript{17} Greenberg, Kee and Weeramantry (n 3) 400. The Jordanian Act No 8, Article (2) states that a judgment (or award) is foreign when it is rendered by a non-Jordanian court. See also Iraq Act No 30, Article (1).


\textsuperscript{19} New York Convention, art I, s 1.
could have been made in any State other than the one where enforcement is being sought.  

An exception is when a state opts for the reciprocity exemption, wherein the New York Convention would only apply to foreign arbitral awards made in a foreign state that is also a signatory to the New York Convention.

### 2.1.3. Non-Domestic Arbitral Award

Even with a definition of “foreign arbitral award,” countries like France and the United States have also struggled with defining “foreign arbitral award” in relation to “non-domestic arbitral awards.” This is so because, as Senger-Weiss and van den Berg have noted, “the question of what constitutes a ‘nondomestic’ arbitral award within the meaning of the Convention has been recognized as one of the most complicated issue posed by this treaty.”

According to Toope, a court will not necessarily consider an arbitral award “domestic” but would instead deem it “non-domestic” even if the arbitral award was rendered in the same country as the enforcing court.

The New York Convention additionally applies to “arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought,” a controversial addition among the delegates during the Conference as

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21 van den Berg, ‘An Overview’ (n 2) 40.
23 Bergesen v Joseph Muller Corp 710 F2d 928 (2nd Cir 1983).
25 Toope (n 18) 125.
26 van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20) (explaining that “the New York Convention always applies to the recognition and enforcement of an arbitral award made in another State (that the first criterion), whilst it may, in addition, apply to the recognition and enforcement of an arbitral award made in the State where the recognition and enforcement are sought if such an award is considered nondomestic”).
27 ibid; see also van den Berg, ‘An Overview’ (n 2) 40-42 [“in view of the second definition, the second definition is relevant only for an arbitral award made in the country where its recognition and enforcement are sought. Conceptually, an arbitral award made in another (Contracting) State can also be considered non-domestic, but for the purpose of the Convention’s scope this appears to be irrelevant”].
explained by van den Berg.\textsuperscript{28} Van den Berg has explained non-domestic arbitral awards as those that are made and enforced in the same country, but are not domestic.\textsuperscript{29} The second criterion under Article I(1) of the New York Convention, however, allows, but does not obligate\textsuperscript{30} a court to determine when and whether an arbitral award is non-domestic. As explained by van den Berg, the non-obligatory nature of non-domestic arbitral awards under the New York Convention can be gleaned from the use of the word “considered.”\textsuperscript{31} The state where enforcement is sought has discretion to determine whether an arbitral award is domestic or non-domestic according to the laws of the enforcing state.\textsuperscript{32} After referring to the first two definitions under Article I(1) of the New York Convention, van den Berg explained the discretionary power of the enforcing court as follows:

These two definitions exclude the Convention’s applicability to the recognition and enforcement of an arbitral award made in an enforcement State which are considered domestic in that State…\textsuperscript{33}

Redfern pointed that the consequence of the New York Convention’s non-domestic category is that “an award which one country considers to be ‘domestic’ (because it involves parties who are nationals of that state) might well be considered by

\begin{itemize}
  \item \textsuperscript{28} van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20). The addition was proposed by a group of eight delegates who foresaw the possibility that an arbitral award made within the territory of a state where enforcement is also sought may qualify as a “foreign” arbitral award.
  \item \textsuperscript{29} van den Berg, ‘An Overview’ (n 2) 40; van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20) (emphasizing that “the second criterion of the Convention's scope applies only to the recognition and enforcement of an arbitral award made in the territory of the state where recognition and enforcement are sought”).
  \item \textsuperscript{30} ibid.
  \item \textsuperscript{31} ibid.
  \item \textsuperscript{32} This proposition is supported by Article I(1) of the New York Convention. Under Article VII(1) of the New York Convention, an interested party cannot be deprived of “any right he may have to avail himself of an arbitral award.” This means that if there is a choice between domestic law and the New York Convention, the party may choose the one that most favors enforcement of the arbitral award. In the Shari’a context, however, this “Most Favorable Right” provision is limited depending upon the enforcing court. Article VII(1) is indeed limited “to the extent allowed by the law or the treaties of the country where such award is sought to be applied.” In other words, the enforcing court, or better yet, the Shari’a has the ultimate say on whether an arbitral award is foreign or domestic. See Emmanuel Gaillard, ‘The Relationship of the New York Convention with Other Treaties and with Domestic Law’ in Emmanuel Gaillard and Domenico Di Pietro (eds), Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice (Cameron May 2009) 70.
  \item \textsuperscript{33} van den Berg, ‘An Overview’ (n 2) 42. The author also notes that a country may unilaterally adopt the Convention’s system for enforcement and thus enforce an arbitral award irrespective of the country where it was made.
\end{itemize}
the enforcement state as not being domestic (because it involves the interest of international trade).”

The issue of non-domestic arbitral awards made in the US and also sought to be enforced in the US have also arisen between two foreign parties, a Swiss corporation and a Norwegian ship-owner. The Federal Appellate Court for the Second Circuit, reviewing the travaux preparatoires and finding no definition in the New York Convention for non-domestic, observed in Bergesen that the Convention deliberately omitted a definition for non-domestic arbitral awards “to cover a wide variety of eligible awards as possible, while permitting the enforcing authority to supply its own definition of ‘non-domestic’ in conformity with its national law.” The Bergesen court held that an arbitral award that was made in the US between two foreign parties could be enforced under the New York Convention as a non-domestic arbitral award.

Van den Berg, however, cautioned that the Bergesen decision may have gone too far in its pro-enforcement bias, and “troublesome for the question of what constitutes a non-domestic award.” In contrast to Bergesen, the Federal District Court for the Northern District of Illinois in Lander Co Inc v. MMP Investments Inc held that an arbitral award made in the US between two US parties was domestic even if the contract provision required performance in a foreign country.

According to Toope, there is nothing that would prevent enforcement of a “procedurally delocalised award, whether rendered inside or outside the state where enforcement is sought.” This means that under the non-domestic prong of the New York Convention, there is no territorial requirement as there would be for the “foreign” award prong. Toope suggests that the New York Convention “allows for almost complete national discretion in determining what will be classified as a non-domestic award.” In essence, non-domestic arbitral awards are not rendered in another state, as

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34 Redfern and Hunter (n 4) 16.
35 Bergesen (n 23).
36 ibid.
37 ibid.
38 van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20) (adding that “Muller also argued that the award in question could be considered a so-called "stateless award."”)
39 927 F Supp 1078 (ND Ill 1996).
40 Toope (n 18) 125, 127 (stating that delocalized awards would certainly not be considered domestic in the enforcing state, but could be enforceable as a non-domestic award).
41 Toope (n 18) 126.
would “foreign arbitral awards,” but instead are rendered in the same state as the enforcing court, and the enforcing court, keeping in mind the more-favourable-provision of the Convention, would not deem domestic for various reasons. In *General National Maritime Transport Co v Societe Gotaverken Arendel AB*, the Paris Court of Appeals stated that the arbitral award was not domestic because it had “no connection whatsoever with the French legal system” even if the arbitration was held in Paris. The New York Convention would also apply to a-national awards rendered in another Contracting State. In the end, this view of non-domestic arbitral award would allow the enforcement of international arbitral awards.

For Hwang and Lee, non-domestic arbitral awards fall under the category of international arbitral awards, stating that “the other (potential) situation [in the New York Convention] is those of international arbitral awards, i.e., not strictly ‘foreign’ but not considered as domestic arbitral awards in the state where their recognition and enforcement are sought.” The New York Convention, however, unlike the UNCITRAL Model Law, does not define an international arbitral award, but “the provisions of the NY Convention are clearly meant to apply to awards that are not only ‘foreign’ in the sense that they have been made in a state other than the enforcing state, but also to awards that have an international element.”

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42 Toope (n 18) 126.
43 In Bergesen, the reason was that both parties were foreign. Bergesen (n 23).
46 Hwang and Lee (n 5) 875. Toope had argued that the term “international” is more appropriate than “foreign” with regards to the New York Convention, especially because awards are enforceable under the New York Convention even when they are not “foreign.” See Toope (n 18) 99.
47 Toope (n 18) Ch IV.
2.1.4. International Arbitral Award

When the seat of arbitration is within a state, courts in that state could still consider the arbitral award as international. There is, however, no internationally agreed upon definition of “international.” 49 “A variety of factors influence whether or not an arbitral award is international in character *inter alia* the nationalities of the parties; venue of the arbitration; the subject matter of the arbitration.” 50 According to Redfern, the terms international have been defined based on two factors: the nature of the dispute or the nationality of the parties. The UNCITRAL Model Law Article 1(3), however, adopted a combined approach 51 and defines an arbitral award as international when (1) the parties to the arbitration have places of business in different states, (2) the location of one of the party’s places of business is in a foreign state, (3) at least one of the party’s countries of business is different to the place where a substantial part of the commercial relationship’s obligations was performed, or (4) the parties agree that the subject matter of the arbitration agreement relates to more than one country. 52 A country’s adoption of the UNCITRAL Model Law may impact the distinction between domestic, foreign, and international arbitral award. According to Hwang and Lee, “the Model Law…draws the distinction, not between foreign and non-foreign awards, but between awards derived from domestic as opposed to international commercial arbitrations.” 53

The US adopted an even more expansive scope of international award than the UNCITRAL Model Law under 9 USC §202, with the phrase “reasonable relation with one or more foreign states.” 54 The term “reasonable relation” could arguably be interpreted by a court to cover a large number of arbitral awards. 55

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49 Redfern observes that the absence of a definition for “international” may pose problems for international arbitration. Redfern and Hunter (n 4) 16.
50 Jamil, ‘REOA’ (n 48).
51 Redfern and Hunter (n 4) 13-17.
52 Greenberg, Kee and Weeramantry (n 3) 400; Jamil, ‘REOA’ (n 48).
53 Hwang and Lee (n 6) 875.
54 9 USC §202
55 See generally, Toope (n 18) 17, fn2 (Toope explains the difference between the terms “international” and “delocalised”). The US approach allows for non-territorial application of the New York Convention, and would cover delocalised awards. Such determination of what constitutes an international arbitral award in the United States is left to the court applying 9 USC §202.
Other countries, however, may take a different approach to defining an international arbitral award. In Indonesia, the Supreme Court in *Ascom Electro AG v. PT Mangala Mandiri Sentosa*\(^56\) held that an “international award” referred only to arbitral awards made outside of Indonesia, thereby dismissing “an application to enforce as an international award an award issued in an arbitration seated in Indonesia between a local party and a foreign party.”\(^57\)

Jamil, in the context of Pakistan’s definition of “foreign arbitral award” stated the importance of having a clear line of what constitutes a domestic, foreign, or international arbitral award: “…determining the character of an award is important, since the practical consequence that flows is that a domestic award can be set aside by the Pakistani court under [section] 30 of the Arbitration Act [of] 1940\(^58\) (and thus potentially be unenforceable in other NY Convention countries). However, if the award is considered foreign, then the powers of a Pakistani court are restricted to refusing or accepting the recognition and enforcement of a foreign arbitral award under the [Ordinance] and the award can still potentially be enforced in other jurisdictions.”\(^59\)

In the end, the question of whether an arbitral award is international “will depend on the provisions of the relevant national law.”\(^60\) It is, therefore, important for the GCC states to create a uniform definition of a domestic, foreign, and international arbitral award that is consistent with their obligations to the New York Convention.\(^61\)

In the survey, the respondents were asked to rate their satisfaction with their country’s definition of domestic, foreign, and international arbitral awards.\(^62\) Respondents from the six GCC states were most satisfied with their country’s definition of domestic arbitral award at 8.09 out of 10 or 80.9% satisfaction, less satisfied with

\(^{56}\) *Ascom Electro AG v PT Mangala Mandiri Sentosa*, Decision of 22 (Indonesia S Ct, September 1993).

\(^{57}\) Greenberg, Kee and Weeramantry (n 3) 400.

\(^{58}\) “A bill for the enactment of a new consolidated arbitration law based on the UNCITRAL Model Law was presented in the lower house of the Parliament, the National Assembly, on 27 April 2009. This bill is still pending before the National Assembly.” Norton Rose, ‘Pakistan’ <http://www.nortonrose.com/files/pakistan-26271.pdf> accessed 16 October 2013.


\(^{60}\) Redfern and Hunter (n 4) 17; Jamil ‘REAO’ (n 48).

\(^{61}\) GCC states should additionally consider their obligations under the ICSID Convention and enforce arbitral awards pursuant to the ICSID Convention’s supranational approach. See Section 2.1.5.

\(^{62}\) Appendix II, Survey Report, II(2.2.4.).
their country’s definition of foreign arbitral award at 7.06 out of 10 or 70.6% satisfaction, and least satisfied with their country’s definition of international arbitral award at 6.16 out of 10 or 61.6% satisfaction. The survey suggests that the GCC states could improve their arbitration laws by adopting a uniform set of definitions, especially for international and foreign arbitral awards. What is surprising from the survey is the lower satisfaction rating for the definition of a “foreign arbitral award,” which ought to be consistent with the New York Convention’s definition.

2.1.5. ICSID Arbitral Award

Article 54(1) of the ICSID Convention requires each Contracting State to recognize an arbitral award pursuant to the ICSID Convention as binding and to enforce the pecuniary obligations imposed by the arbitral award as if it were a final judgment of the State’s courts. Under Article 54(2) of the ICSID Convention, recognition and enforcement of the arbitral award may be obtained from the competent court of a Contracting State on simple presentation of a copy of the arbitral award certificate by the Secretary-General of the Centre.

At the enforcement stage, domestic courts still play a potentially important, albeit limited, role in investment arbitration. Under Article 54 of the ICSID Convention, arbitral awards are to be recognized as binding and their pecuniary obligations are to be enforced like final domestic judgments in all states parties to the ICSID Convention. Enforcement may be sought in any state that is a party to the ICSID Convention. In other words, the prevailing party may select a State where enforcement seems most promising.

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63 ibid.
64 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar 18, 1965, 17 UST 1270, 575 UNTS 159, art 54 (1) [hereinafter ICSID Convention].
65 ICSID Convention (n 64) art 54(2).
66 ibid.
68 Article 54(1) of the ICSID Convention provides in relevant part: “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”
Unlike the New York Convention, under the ICSID Convention, domestic courts are not empowered to review ICSID arbitral awards even during the enforcement process. Domestic courts cannot even review the arbitral award based on public policy. Greenberg, Kee and Weeramantry explained how the ICSID Convention arbitration process is insulated from domestic court interference from commencement up until the enforcement of the arbitral award, where an enforcement order is granted. Additionally, a non-ICSID arbitral award will be subject to any setting aside proceedings that the national law of the place of the arbitration may provide. In contrast to the ICSID Convention, in proceedings before a domestic court for the foreign arbitral award’s enforcement, a foreign arbitral award under the New York Convention will be subject to the reasons for non-enforcement listed in Article V of the same.

The procedure for the enforcement of ICSID arbitral awards is governed by the law on the execution of judgments in each country. The Contracting States are to designate a competent court or authority for this purpose. Some countries have designated a single court or authority. Others have designated certain types of courts such as the locally competent district courts. Most designations refer to courts but some refer to executive authorities. Where courts have been designated, these are sometimes the courts of first instance or district courts and sometimes the respective supreme

69 Ivar Alvik, Contracting with Sovereignty: State Contracts and International Arbitration (Hart 2011) ch 3.
71 Greenberg, Kee and Weeramantry (n 3) 400.
73 Schreuer, ‘Interaction of International Tribunals’ (n 70).
Article 54 of the ICSID Convention allows the domestic court determining the execution request to apply the “laws concerning the execution of judgments in force in the State in whose territory such execution is sought.” Article 55 further clarifies that “nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution.” State immunity, therefore, at the stage of execution remains in the hands of the domestic courts, and what Alvik calls the “clearest obstacle to the enforceability of ICSID Convention awards.” Schreuer calls this the “Achilles’ heel” of the ICSID Convention, explaining as follows:

The self-contained nature of the procedure which excludes the intervention of the domestic courts does not extend to the stage of execution…The Convention does not enjoin the courts of the States parties to the Convention to enforce ICSID awards if this would be contrary to their law governing the immunity from execution of judgments and arbitral awards. Therefore, a State whose courts refuse execution of an ICSID award for reasons of State immunity is not in violation of Art. 54.

Aside from state immunity, ultimately the ICSID Convention’s self-contained regime will depend on the municipal court’s compliance. As Alvik puts it, “the last word nevertheless necessarily remains with the municipal court confronted with a claim for recognition or enforcement.” While the municipal court has an international obligation to recognize and enforce such ICSID arbitral award, the municipal court may be faced with a dilemma concerning its international obligation under the ICSID Convention and its obligations to municipal procedures, substantive law, fundamental constitutional requirements, or even another equally compelling international

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75 ICSID Convention (n 64) art 54.
76 ICSID Convention (n 64) art 55.
77 Alvik (n 69) 125.
78 Christoph Schreuer and others, The ICSID Convention: A Commentary (CUP 2009).
79 Alvik (n 69) 125.
80 ibid.
obligation. Alvik even suggests that ICSID arbitral awards can conceivably be reopened\(^{81}\) or set aside by a municipal court regardless of what the ICSID Convention envisaged.\(^{82}\)

PART II

2.2. The Concept of “Foreign” Arbitral Award Under the Shari’a

This section explains the concept of “foreign” arbitral award under the Shari’a. It discusses, first, the historical development of arbitration under the Shari’a followed by a discussion of what constitutes a “foreign” arbitral award under the Shari’a.

2.2.1. Historical Development of Arbitration Under the Shari’a

Discussing the development of arbitration under the Shari’a is necessary to get a proper foundation before attempting to compare and eventually reconcile Shari’a concepts of arbitration with that of modern international arbitration norms. This section gives background information on (1) the Shari’a, (2) statutory laws and the Shari’a, and (3) the development of arbitration under the Shari’a.

2.2.1.1. The Shari’a\(^{83}\)

To understand the arbitration system in the Shari’a, “one must first recognize the

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\(^{81}\) An award could be challenged and reopened according to the forum state’s procedural law. Alvik (n 69) 125. See also, Edward Baldwin, Mark Kantor and Michael Nolan, ‘Limits to Enforcement of ICSID Awards’ (2006) 23(1) J of Intl Arb 8.

\(^{82}\) Alvik (n 68) 125.

\(^{83}\) The word “Shari’a” in Arabic means “the right path.” Ian Edge (ed), *Islamic Law and Legal Theory* (Dartmouth 1996) xvi-xvii; Essam Alsheikh, ‘Court Intervention in Commercial Arbitral Proceedings in Saudi Arabia: A Comparative Analytical Study of Shari’a Based Statutes and International Arbitral Practices’ (DPhil thesis, University of Portsmouth 2011); Abd Ar-Rahman and Abdassamad Clarke, *Shari’a Islamic Law* (Ta-Ha Publishers Ltd 2008) 23, stating that “The literal meaning of the word Shari’a in Arabic is ‘the way to a watering place’. More generally, it is taken to mean ‘the road to be followed’. Allah, the Creator, has revealed this path to mankind through the Prophet Muhammad, His Messenger” (PBUH).
important role that religion plays in Middle Eastern law and society.” One scholar stated the role of religion, “Islamic law pervades the commercial world, as well as a Muslim’s way of life. Islam is a complete way of life: a religion, an ethic and a legal system all in one.” There are four primary sources of the Shari’a: the Holy Qur’an, the Sunna of Prophet Muhammad (PBUH), the Ijma, and the Qiyas.

A. Arbitration Sources from the Holy Qur’an

The Holy Qur’an itself supports arbitration as a method of dispute resolution. There are many ayahs [verses] in the Holy Qur’an that supports arbitration in Shari’a. In Surah An-Nisa 4:35, the Holy Qur’an states as follows:

If you fear a breach between them twain (husband and wife), appoint (two) arbitrators, one from his family and the other from her’s; if they wish for peace, Allah will cause their reconciliation. Indeed Allah hath full knowledge and is acquainted with all things.

Surah An-Nisa 4:35, however, has been interpreted to deal with mediation since the

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84 ibid.
85 ibid. See also Alsheikh (n 83) ch 2, fn 2; Taqi ad-Din Ahmad Ibn Taymiya, Collections of Fatwa of Ibn Taymiya Al-Hanbali (1985) vol 11, 344-45, stating that “Islamic Shari’a is based upon the attraction of interests and harm prevention for human beings. This guiding principle is that everything of interest to human beings that does not cause harm is permissible (i.e. Halal) without regard to whether the thing is beneficial in whole or in part.”
86 The Holy Qur’an is divided into 30 Juz’ (parts), 114 Surahs (chapters) and 6,236 Ayah (verses). As the first primary source of the Shari’a, Muslims consider the Holy Qur’an to be the revealed word of God in the Arabic language through the Prophet Muhammad (PBUH) (570-632 AD).
87 The second primary source of the Shari’a, the Sunna, constitutes the Prophet Muhammad’s (PBUH) sayings and traditions as recorded into what is known as the Hadith. The Sunna is deemed secondary sources just as the Holy Qur’an is held to be the literal word of God.
88 Alsheikh (n 83) ch2, 22, fn 6. See also Arthur Gemell, ‘Commercial Arbitration in the Islamic Middle East’ (2006) 5 Santa Clara J of Int’l L 169; Imran Ahsan Khan Nyazee, Islamic Jurisprudence (Adam Publishers & Distributors 2006) 183. The third source of the Shari’a, the Ijma, translated from Arabic as “consensus,” can only become a valid source of the Shari’a after there has been widespread consultation (Shu’ra) by Islamic scholars and the use of juristic reasoning (Ijtihad).
89 The fourth source of the Shari’a, the Qiyas, consists of legal principles derived through analogy or analogical deduction so long as the logic used is based on the Holy Qur’an, Sunna or Ijma. An analogical reasoning that is not based on the recognized primary sources of the Shari’a cannot be part of the Qiyas. Though difficult, Qiyas is often used to apply Islamic principles to the problems and legal issues of the modern era. For more detailed discussion on Qiyas, see Kemal Faruki, Islamic Jurisprudence (National Book Foundation 1975) 63.
parties are given the option for reconciliation with the non-mandatory language “if they wish for peace,” whereas arbitration is binding on the parties. Nevertheless, the reference to the appointment of an arbitrator is an obvious approval of arbitration (and mediation) as means of dispute resolution.

In Surah Al-Imran 3:23, the *Holy Qur’an*,

\[\text{Hast thou not turned Thy vision to those who have been given a portion of the Book? They are invited to the Book of Allah, to settle their dispute, but a party of them Turn back and decline (The arbitration).}\]

Additionally, Surah An-Nisa 4:58 is commonly cited to support arbitration since it states that “and when you judge between people to judge with justice.”

**B. Arbitration in the Sunna**

Since the *Sunna* is the sayings and traditions of the Prophet Muhammad (PBUH), it is a strong source for support of arbitration, especially since the Prophet Muhammad (PBUH) himself acted as an arbiter of disputes. Shari’a scholars can, thus, look to the Prophet Muhammad (PBUH) as an example of a great arbitrator, to look at what he did as an arbitrator, and to refer to his sayings about arbitration.

However, since the *Sunna* is the second primary source in the Shari’a, different schools of thought in Islam will give different weight or significance to the *Sunna* as a source of arbitral decision-making. Others may give equal or more weight to *Qiyas*, for example, as further described in the next section.

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C. Muslim’s Major Schools/Groups

There are two major schools of thought that compete in the interpretation of Islam: The Sunni and the Shi’a. While Sunni and Shi’a Muslims share in common the most fundamental Islamic beliefs and articles of faith, their differences in interpretation stem from their belief in the leadership of Islam after the death of the Prophet Muhammad (PBUH). This section briefly provides a background on each of the Shari’a schools of thought, including the Sunni and the Shi’a schools.

i. Sunni Schools

Beside the Sunni/non-Sunni division, the Sunni branch has four major schools of thought that interpret the Shari’a, each varying in its doctrinal approach to dispute resolution: the Maliki School, the Hanafi School, the Shafi’i School, and the Hanbali School. “Arbitration differs from one jurisprudence school [within the Sunni branch] to another.” It is not disputed, however, that all four schools of the Sunni branch recognize arbitration as a means of dispute resolution. Still, it is important to consider the differences in approach of each of the Sunni schools, and to later examine how each

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93 The word “Sunni” (Al-Sunna in Arabic) means a group of people who follow the traditions of the Prophet Muhammad (PBUH). The word Sunna refers to the sayings and traditions of the Prophet Muhammad (PBUH).

94 Similar to the common law, there is no single unified interpretation of the Shari’a, and Shari’a will vary from country to country. See John Donboli and Farmaz Kashefi, ‘Doing Business in the Middle East: A Primer for US Companies’ (2005) 38 Cornell Int’l LJ 413 at 418; Edge (n 83).

95 Sunnis selected Prophet Muhammad’s (PBUH) close friend and advisor, Abu Bakr Al Sadeeq, as the first Caliph [Khalifa] of the Islamic nation. After the death of the third Caliph (Othman) and during the fourth Caliph (Ali ibn Abi Talib), the Shi’a maintained that the leadership of Islam followed the Prophet Muhammad’s (PBUH) bloodline, appointment, or through Imams appointed by God directly. In this view, the Shi’a contends that Prophet Muhammad’s (PBUH) cousin/son-in-law, Ali ibn Abi Talib and his descendants, became the leader of Islam after the Prophet Muhammad (PBUH).

96 See Alsheikh (n 83), stating that Muslims today “belong to one of four Islamic Schools, which are most important at present – Hanafi’h, Malaki’h, Shafi’i and Hanbali’h.” See also Ar-Rahman and Clarke (n 83) op cit, 131-67. In the survey, the respondents were asked which Shari’a school is followed by the majority of judges and lawyers in their respective country. The majority of respondents at 30% indicated Maliki as followed by the majority in their jurisdiction. This was followed with Hanbali at 17.50%, Hanafi at 15%, and Shafi’i at 2.50%. As a word of caution, however, these figures have not been tested for statistical significance. See Appendix II, Survey Report, II(2.1.7.).

97 Alsheikh (n 83) 23.

school’s tradition may vary in enforcing a foreign arbitral award.

The Maliki School\textsuperscript{99} relies on “the Ijma of the Medina legal scholars, local Medina customs, the \textit{Holy Qur’an}, and the \textit{Sunna} and \textit{Qiyas}.”\textsuperscript{100} For the Malikis, the notion of public opinion is a valid jurisprudential principle. One unique feature of the Maliki School is that, unlike the other three schools, “an arbitrator cannot be removed after the commencement of the arbitration proceedings.”\textsuperscript{101}

Under the Hanafi\textsuperscript{102} School, an arbitral award more closely resembles conciliation than a court judgment. Thus, Hanafis stress the close connection between arbitration and conciliation.\textsuperscript{103} and give lesser force to arbitration than a court judgment. Hanafi scholars focus on “the contractual nature of arbitration, and arbitral awards are characterized by the use of subjective opinions.”\textsuperscript{104} Thus, “a disputing party is obliged to abide by the arbitral award because the agreement to resort to arbitration binds the parties like any other contract.”\textsuperscript{105} Hanafis analyse new legal and factual issues through the use of analogy or \textit{qiyas}, using reason and equitable principles.\textsuperscript{106} According to Saleh, while Hanafis give priority to the \textit{Holy Qur’an} and the \textit{Sunna}, they anticipate and examine new problems through \textit{qiyas}, though without insisting on rigid analogy and by permitting modest flexibility in the use of human reasoning or judgment.\textsuperscript{107}

Shafi’i\textsuperscript{108} teaching is eclectic, borrowing from the Hanafis and the Malikis, and often appears to be torn between logic and traditional teaching. Shafi’i stress upon the importance of both, the \textit{Holy Qur’an} and the \textit{Sunna}, but select the \textit{Sunna} more critically than the Malikis. Unlike the Hanafis, there is little use of \textit{qiyas} in the arbitral process. Shafi’i arbitration is a legal practice; however, the position of arbitrators is inferior to that of judges since arbitrators under this School, unlike the Malikis, may be removed by the parties up to the time of the issuance of the arbitral award.

\begin{footnotesize}
\begin{enumerate}
\item[99] Founded by Imam Malik bin Anas (93–179 AH).
\item[100] Smith and Ibrahim (n 98).
\item[101] ibid.
\item[102] Founded by Imam Abū Ḥanīfa an-Nu’man ibn Thābit (80-150 AH).
\item[103] Gemmell (n 88) 175.
\item[104] Smith and Ibrahim (n 98); Gemmell (n 88) 175.
\item[105] ibid.
\item[107] Saleh (n 106) 8.
\item[108] Founded by Abu ‘Abdillah Muhammad ibn Idris al-Shafi’i (150-204 AH).
\end{enumerate}
\end{footnotesize}
The most “conservative” of the four schools is the Hanbali School. Hanbali teachings are deeply centred on the Holy Qur’an, and uncritically accept the authenticity of the Sunna, even those rejected by other schools. The Hanbalis make few concessions to personal reasoning (ra’y), or equity. According to the Hanbali School, a decision made by an arbitrator has the same binding nature as a court judgment. Thus, the arbitral award made by an arbitrator (who must have the same qualifications as a judge) carries a res judicata effect or finality upon both of the parties since it was they who chose him.

While the four Sunni schools may have varying opinions on specific issues relating to arbitration, the most significant differences between the schools relate to the nature and purpose of arbitration. The Hanafi and Shafi’i schools view arbitration as a form of conciliation, similar to mediation, where decisions are not binding on the parties. On the other hand, the Maliki and Hanbali schools treat arbitral decisions to have the same binding force as judicial decisions.

Notably, “despite some difference between the schools, modern Islamic scholars agree that arbitration is a valid and legal method of dispute resolution and can be binding under the Shari’a.” Shari’a does not prohibit the adoption and application of modern-day international arbitration. The differences among the four Sunni schools, especially as to the binding effect of an arbitral decision, however, may be significant enough that it can affect the enforcement of an arbitral award. Other issues may affect the outcome of an arbitration proceeding. These differences can also be viewed by those foreign to the Shari’a arbitral tradition as a sign of inconsistency in the Shari’a and their application of arbitration rules. A reconciliation of Shari’a arbitration with international arbitration must begin with an understanding of these differences among the Sunni schools, and must take these differences into account when considering the enforceability of a foreign arbitral award in the GCC states.

It is also just as important to realize that the jurisprudences of each of the four

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109 Founded by Ahmad ibn Hanbal (164-241 AH).
110 Examples include the appointment of an arbitrator, the number of arbitrators, and others that will be discussed further in Chapter 4. See El-Ahdab, Arbitration with the Arab Countries (n 16) 19-21.
111 ibid.
112 ibid at 20-21.
113 ibid.
114 Smith and Ibrahim (n 98).
Sunni schools are flexible and not rigid. These doctrines are not only subject to interpretation, but also to argumentation.

**ii. Non-Sunni Schools**

The non-Sunni branch has two major schools of thought that interpret the Shari’a, each varying in its doctrinal approach to dispute resolution: the Shi’a and the Khawarej schools. The differences between the non-Sunni branches are significant, and may affect the outcome of an arbitration proceeding. The Shi’a branch can also be classified into various schools like the Ithna Asharis School, the Zaydi School, the Ibadi School, the Isma’ilis School, and many others. A detailed discussion of these Shi’a schools, however, is beyond the scope of this research, which focuses on the GCC states, a predominantly Sunni region.

There are differences in the Sunni and Shi’a views on arbitration. In general, the Shi’a accepts the principle of resorting to arbitration, even in political disputes, like their first leader, the Ali ibn Abi Talib. The Shi’a consider the *Holy Qur’an* and the *Sunna* as the main source of law, but the *Sunna* is not recognized unless ratified by the *Imams*. Further, use of reasoning such as *qiyan* [deductive analogy] or *ijtihad* [independent reasoning] are prohibited, unlike the Sunni schools. The Shi’a, however, do not say that arbitration is *haram* or prohibited. The Shi’a, thus, may accept arbitration as a fair and acceptable form of dispute resolution under their doctrine of the Shari’a.

The Khawarej, another group in Islam, accepts arbitration as a form of dispute resolution, but limit its use only to the area of individual rights. Further, the Khawarej do not accept arbitration or acknowledge it as a God-given right. Also, they do not accept arbitration as a nation’s right, which it is, in political disputes, especially if the

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115 El-Ahdab, *Arbitration with the Arab Countries* (n 16) 21.
116 See Saleh (n 106) 9-10.
117 ibid.
118 ibid.
120 ibid.
dispute is about Muslim blood.\textsuperscript{121} In addition, the Khawarej refuse to resort to arbitration with anyone that they have a disagreement with, such as those who regard them as infidels and renegades, even if the arbitration is to be with some Muslims.\textsuperscript{122}

2.2.1.2. Statutory Laws and the Shari’a

The influences of secular European statutory laws like Roman or French civil codes and the English common law in the Middle East also adds another layer of challenge to understanding arbitration in the GCC states in light of the Shari’a. The mixture of Islamic and European norms mostly since the 20\textsuperscript{th} century mostly resulted in new legal paradigms that at first appeared Western, but yet remained inherently based on Shari’a principles.\textsuperscript{123} The result of the blending of European and Islamic norms can be seen in the constitutions and legislations of Shari’a countries, some of which, like Yemeni statutes, skilfully combine Shari’a with Egyptian statutes.\textsuperscript{124}

Statutory laws in most Islamic countries, despite adopting secular statutes that often emulated European civil law codes, is still largely considered a conglomeration of divine laws and principles revealed by God and eternally recorded in the \textit{Holy Qur’an}. In this sense, the Shari’a is still the highest form of law, and non-Shari’a statutes are only intended to allow governments to have administrative and organisational authority in areas where the \textit{Holy Qur’an} has not addressed.

Modern Islamic countries, thus, maintain two separate bodies of law: Shari’a and non-Shari’a (secular statutory) laws. The Shari’a, or statutes derived therefrom, still governs issues of family law and inheritance. International trade and commerce, however, has forced Islamic countries to enact a new body of commercial laws regarding arbitration, foreign investment, labour, commercial transactions, corporate taxation, business organization, and intellectual property.

\textsuperscript{121} ibid.
\textsuperscript{122} ibid.
\textsuperscript{123} Saleh argues that the Shari’a is losing ground as a result of the proliferation of secular statutes and of the pressures from foreign investment. Saleh (n 106) 3 et seq, 7.
\textsuperscript{124} ibid.
Ushered by the fast onset of globalization, Shari’a countries, in response to the need for more secular statutes especially relating to international commerce, created secular courts to address disputes arising from this newly created area of the law. There is, thus, a dichotomy of Shari’a courts and secular courts. For example, secular courts today hear cases relating to commercial codes that were created by legislation. Secular courts will usually have jurisdiction over commercial and civil disputes (particularly those involving foreigners), while Shari’a courts will usually have jurisdiction over family law and civil disputes strictly affecting national citizens. There is often, however, a difference in the application of the Shari’a to nationals and the application of a different set of rules and regulations to foreigners.

When issues arise regarding international commerce, Shari’a countries especially in the GCC states resolve them by legal principles adopted from international treaties or organizations. As part of this trend, GCC states have taken the lead in adopting these international treaties. It is also in GCC states like the UAE and Bahrain that the movements toward an international arbitration system have taken the strongest root.

2.2.1.3. Development of Arbitration in the Shari’a

The Islamic world has had centuries of commercial and trading history. In fact, “Islam has always been a religion of trade and of world traders and that the Prophet [Muhammad’s (PBUH)] wife was herself a trader whose earnings permitted the Prophet Muhammad (PBUH), to conduct his proselytizing efforts.” As a legal, social, and religious system closely tied to trade, it is not surprising that the Islamic world has had a method of dispute resolution since the times of the Prophet Muhammad (PBUH). Long before the appearance of Islam in the Arabian Peninsula, tahkim [arbitration] had

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126 Donboli and Kashefi (n 94) 423.
already been used as a method of dispute resolution. Pre-Islamic Arabs used arbitration as the most prevailing means of dispute resolution. Islam through the Prophet Muhammad (PBUH) continued to recognize the validity of pre-Islamic arbitration as a dispute resolution mechanism. More importantly, the Prophet Muhammad (PBUH) took the role of hakam [arbitrator]. There are two notable examples in the literature showing the Prophet Muhammad (PBUH) as hakam.

128 See Alsheikh (n 83) 25, stating that “arbitration was known to pre-Islamic civilizations for a long time.” Arbitration had been used by Pharaohs, Sumerians, Greeks, and Arabs. F Mabrouk, ‘The Phenomena of Popular Judicature in Ancient Civilizations’ Legal & Economic Sciences Magazine (Egypt, 1974) 1 (for use of arbitration in Egypt); Taha Baqir, An Introduction to the History of Ancient Civilizations (The Trade & Printing Co Ltd 1955) 2, vol 1, 282 (for use of arbitration by Sumerians); Douglas MacDowell, ‘Greek Law’ in Michael Grant and Rachel Kitzinger, Civilizations of the Ancient Mediterranean (Scribner’s 1988) vol 1, 603 (for use of arbitration by the Greeks); Ibrahim Hassan, The Political, Religious and Cultural History of Islam (7th edn, Maktabat An-Nahda Al-Misriyyah 1965) vol 1, 7 (for use of arbitration by Arabs); Smith and Ibrahim (n 98). They consisted of clans or a tribal system with no judicial authority to settle disputes. In Pre-Islamic times, Arabs had no central authority to administer and maintain order. See also Alsheikh (n 83) 25, fn 18, stating that “[t]he Arabs had neither any organized governmental system before the advent of Islam, nor any kings with powers to resolve disputes and restore rights to aggrieved parties.” In Pre-Islamic times, Arabs had no central authority to administer and maintain order.

129 ibid, stating that “[t]he most outstanding Arab arbitrators at the time during the pre-Islamic period were Aktham Bin Saifi, Hajib Bin Zurara, Al-Aqra’ Ibn Habis, and Abdul Mu’ttalab, grandfather of the Prophet Muhammad.” See Alsheikh (n 83); Smith and Ibrahim (n 98). Pre-Islamic arbitration consisted of an agreement by the parties to arbitrate. An agreement would be prepared that would describe the dispute and identify the arbitrator. Arbitral awards were not binding and their enforcement depended on the moral power of the arbitrator. Many arbitrators required undertakings by the parties to ensure that arbitral awards would be accepted and enforced. The arbitration proceedings were simple and the arbitrator was not bound by any procedural rules. However, the arbitrator was required to hear both parties on equal bases.

130 The advent of Islam in the 7th century radically changed the legal system in the Arabian Peninsula and the Middle East as a whole. In the early days of Islam, the Prophet Muhammad (PBUH) called for arbitration of any dispute in the Treaty of Medina of 622 AD (A security pact among the city’s Muslims, non-Muslim Arabs, and Jews.) El-Ahädab, Arbitration with the Arab Countries (n 16) 3-14. See also Alsheikh (n 83) 24, arguing that arbitration finds support in the Shari’a through the public interest, called Almasalh Almurs’alah, which is used when an issue has no text in the Holy Qur’an. Further, Alsheik notes that “the word ‘Muslih a’ in the Arabic language has a totally different meaning from Almasalh Almurs’alah in the Shari’a. This is commonly misunderstood by researchers, who, in trying to understand arbitration through the notion of Almasalh Almurs’alah, confuse the jurisprudential and linguistic meaning.”

131 See also Brower and Sharpe (n 127). In fact, “for a Muslim, arbitration carries with it no better imprimatur than that given to it by the Prophet himself.”

132 ibid. Abu-Nimer wrote of “an instance when the Prophet was involved in a dispute between himself and the Banu Qurayza (from a Jewish tribe). The Prophet, notwithstanding his prominence, agreed with the Jewish people to submit their dispute to a third party chosen by them.” Additionally, Abu-Nimer wrote that the Prophet Muhammad (PBUH) was selected “to arbitrate a conflict between Arab and Jewish tribes.” According to Brower and Sharpe, “Muslim rulers subsequently followed his example, notably in the disastrous arbitration between Muawiya (the governor of Syria) and the Caliph Ali [the Prophet Muhammad’s (PBUH) son-in-law] in 659 A.D. to determine the succession to the Caliphate. Ali’s refusal to accept the arbitrators’ ruling in favour of Muawiya made permanent Islam’s enduring split into the Shi’a and Sunni branches.” Brower and Sharpe (n 127).
The Prophet Muhammad’s (PBUH) commitment to the arbitral process was such that, not only did the Prophet Muhammad (PBUH) give great importance to being appointed by the believers as a hakam, but his subsequent authority as a political and military leader resulted in the Prophet Muhammad (PBUH) becoming a “Prophet-Lawgiver.” This arbitral practice of the hakam continued as a dispute resolution practice even after the death of the Prophet Muhammad (PBUH).

Yet, despite the Prophet Muhammad’s (PBUH) and the Holy Qur’an’s support for the arbitral process and despite that “Bahrain has been an international commercial-arbitration centre long before Paris and London,” modern international arbitration, since the late nineteenth century, and particularly since World War II, perhaps for legal, political, and religious reasons, has been difficult for the Islamic world. In most Islamic countries, modern international arbitration has long been viewed with doubt and scepticism, though the recent developments in the GCC states seem to show a trend towards acceptance of modern international arbitration. Historically, Islamic countries have had national legislation that has been unfavourable to international arbitration, especially as to the enforcement of arbitral awards, and Islamic courts all too often impermissibly interfere with international arbitration cases and foreign arbitral awards.

While the historical backdrop behind international arbitration in Islamic countries seems marked with scepticism against modern international arbitration as conceptualized in Western legal systems, there seems to be a present trend towards the realization of the importance and hence a growing acceptance of modern international arbitration.

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133 Historically, in the Arab tribes, if negotiations between the parties failed to resolve a dispute over property, succession, or torts, a hakam was appointed. Brower and Sharpe (n 127).

134 ibid. “The Prophet Muhammad’s (PBUH) commitment and participation in the arbitral process caused Majeed to refer to the Prophet Muhammad (PBUH) as an ‘exemplary standard for the independence of arbitrators.’” The hakam could be “any male possessing high personal qualities who enjoyed a favourable reputation in the community and whose family was noted for their competence in dispute settlement.”

135 ibid.

136 ibid.

137 ibid.

138 Despite this trend toward acceptance of international arbitration, there also seems to be a call for a more fundamental Shari'a based legal system. See Alsheikh (n 83) 21, ch 2, stating that there are “increasing calls from GCC countries to return to Shari'a as a source of jurisdiction in all aspects of life. The most significant of these calls concerns individuals, properties and trade.”

139 Brower and Sharpe (n 127).
arbitration, especially as it relates to commercial disputes.\textsuperscript{140}

\textsuperscript{140} Ibid. According to Brower and Sharpe, international arbitration in the Islamic legal system has undergone three stages of development, and currently it is in the third stage, characterized by acceptance and even promotion of international arbitration in the Islamic legal system. The first phase of international arbitration in the Islamic legal system occurred roughly between the end of the Second World War and the 1970’s. In the first phase, international arbitration in the Islamic world came principally from “disputes arising out of long-term oil concessions.” These concession agreements seemed to take advantage of Islamic states and granted foreign oil companies “unrestrained access to, and control over, states’ petroleum supplies for fifty years or more, prescribed and then ‘froze’ extant law through so-called stabilization clauses.” Additionally, these concession agreements contained mandatory arbitration clauses that required arbitration of any disputes that may arise within the framework of Western arbitration, which in turn failed to take into account not only the historical background of arbitration in the Islamic world, but also its governance within the paradigm of Shari’a rule. In essence, before 1973, arbitration of these concession agreements and the Western arbitration system only protected the interests of foreign oil companies and secured their investments during the lifetime of the concessions. To the Islamic world, as a result, international arbitration was seen as part of the colonization of Islamic states and their oil. An example of the unfair imposition of Western arbitration into the Islamic legal system was the Abu Dhabi oil arbitration case, which “involved the geographic scope of a 75-year oil concession granted in 1939 by the Sheikh of Abu Dhabi (at that time a British protectorate) to Petroleum Development (Trucial Coast) Ltd.” In the Abu Dhabi oil arbitration case, Lord Asquith sought to determine the law governing the contract, and stated that “since the contract was made in Abu Dhabi and was to be performed there, ‘If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi,’ which was grounded in Islamic law.” In the end, however, Lord Asquith ignored Islamic law and held that “the sheikh, an ‘absolute, feudal monarch,’ ‘administers a purely discretionary justice with the assistance of the Holy Qur’an, and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.’” Not surprisingly, Lord Asquith held in favour of the foreign oil company. “Four and five decades later, cases like Abu Dhabi and the later Qatar and ARAMCO arbitrations continue to frame the historical backdrop against which international arbitration often still is viewed in the Islamic world.” Brower and Sharpe (n 127).

According to Brower and Sharpe, the second phase of international arbitration in the Islamic legal system was generally characterized by Islamic states challenging and rejecting the Western system of arbitration, especially growing out of the imposed mandatory arbitration clauses in the concession agreements prior to 1973, and not participating in an already growing system of international arbitration, seen by Islamic eyes as a by-product of the Western and thus unfair system of dispute resolution. The second phase of arbitration lasted between 1970’s and early 1980’s, a time when the power of OPEC countries, mostly Islamic states, grew against international oil companies. Western countries became increasingly dependent on Middle East oil. It is perhaps this second stage when the West saw the Islamic world as unwilling participants, not only in the creation of an international legal system, but more specifically in the modern, albeit Western, international system of arbitration. The third phase of international arbitration in the Islamic legal system, however, was a turning point for many Islamic states towards acceptance and support of the international arbitration system. During this third phase, which began since the mid 1980’s until the present, many Islamic countries accumulated wealth and themselves became capital exporters and investors in the increasingly globalized economy. Islamic countries, thus, joined international conventions and treaties, specifically the New York Convention. During the third phase, Islamic states have become party to international arbitration conventions and treaties such as the New York Convention, enacted arbitration friendly national legislation, and established, as the case of Dubai, international and national arbitration centres, some in cooperation with such centres as the London International Arbitration Centre. Brower and Sharpe (n 127).
2.2.2. “Foreign” Arbitral Award Under the Shari’a

An important issue in the enforcement of foreign arbitral awards in the Shari’a based countries like the GCC states is the definition of “foreign”; the same being critical to a comparative discussion of how enforcement of a foreign or international arbitral award may be perceived and practically applied by judges and practitioners of international arbitration who are trained in the Shari’a. A discussion of the Shari’a perspective towards defining a foreign, and for that matter international, arbitral award is imperative towards a harmonisation of the GCC states’ rules for defining domestic, foreign, and international arbitral award and the enforcement of the same. This section explains that Shari’a scholars such as Imam Malik, Imam Abu Hanifa, Imam Shafi’i, and Imam Ibn Hanbal took different approaches than international arbitration in defining a foreign arbitral award. This study argues that the Shari’a approach, however, could be reconciled and harmonised with the concept of an arbitral award under the New York Convention and the ICSID Convention.

Although the word “foreign” under the traditional Western arbitration practice refers to arbitral awards made outside of a country where the arbitral award is being enforced, as described more fully above, the definition of “foreign” arbitral award under the Shari’a can become more complicated in its jurisdictional reach because of the religious aspects of the Shari’a. According to El-Kadi and El-Ahdab, “as soon as a Muslim becomes a party to the contract, Islamic Law governs the contract and one must

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take into account such rules of Islamic law.”¹⁴³ However, just because an arbitral award is foreign does not automatically mean that it violates the Shari’a without a further look into what fundamental notion of Shari’a is actually violated.

Saleh, however, has proposed that the definition of a “foreign” arbitral award under the Shari’a as “an award made under a law other than the Shari’a.”¹⁴⁴ He further explains that an arbitral award is foreign if it does not meet one of the conditions of the Shari’a. This thesis respectfully disagrees with Saleh on this point as it would essentially turn current international arbitration practice on its head. For instance, an arbitral award made within an Islamic country but is deemed to violate a condition of the Shari’a could then be argued as constituting a foreign arbitral award, and then confusingly enforced under the New York Convention as a “non-domestic” arbitral award. Instead, a more careful analysis should be made as to when Shari’a must be applied to an arbitral award, and thereafter consider whether the Shari’a can be reconciled with the New York Convention and international arbitration norms.

Some lawyers and judges in the GCC states misunderstood foreign arbitration thinking it against the Shari’a, based on the opinion that foreign arbitration was essentially a device to oust the application of the Shari’a. This view was not universally held and it became necessary for the judiciary to clarify the situation. A defendant brought a suit before the Abu-Dhabi Court of Appeal challenging the enforcement of foreign arbitral awards rendered under foreign law claiming a violation of the principle of Shari’a. The Abu-Dhabi Court of Appeal ruled in A.A Commercial Co. v. S. Motors Ltd Co. and D. Industrial Ltd Co.,¹⁴⁵ that it is a widespread error in the UAE to presume that applying a foreign law or international treaty is violating the Shari’a just because it is foreign. Without manifest evidence by the defendant that the foreign law violated any precepts of Shari’a, the court dismissed the challenge. The court came to the conclusion that arbitration, which takes place outside the UAE under foreign law, is not contrary to the Shari’a unless there is a clear indication of a violation of the Shari’a.

¹⁴³ Omar El-Kadi, L’Arbitrage International entre le Droit Musulman et le Droit Francais et Egyptien (DPhil thesis, University of Paris 1984) 327. See Saleh (n 106) 57-65 (stating that “In Shari’a, the foreign character of a party to an agreement is based not on the concept of nationality but on religion.”).
¹⁴⁴ Saleh (n 106) 64-65.
Further, in *G. Steel Industry Co. v. International Steel and Contractors Co.*, the Federal Supreme Court ruled that an agreement to submit a dispute to arbitration outside the UAE did not represent a violation of the Shari’a where the arbitral award was within the scope of the Shari’a.

The Abu-Dhabi Court of Appeal emphasised the evolutionary nature of the Shari’a stating as follows: “Shari’a has the capacity to accommodate the arbitration rules, because of its ability to develop to satisfy the needs of the developing society.”

El-Kadi further explains that “the attitude of Islamic Law towards foreign judgments and awards is based on the principle providing that non-Muslims are free to enter into contracts and to have business relations that are valid according to their own religions without the need to take into account the concept of prohibition and authorization in Islamic Law.”

To the contrary, some scholars like El-Ahdab note that the Shari’a should govern as soon as one of the parties to the contract is a Muslim since the prohibitions and authorizations of the Shari’a apply thereto. In other words, a “foreign” arbitral award is an arbitral award that is not governed by the Shari’a. The applicability of the Shari’a, however, follows the person’s religion. A Muslim could potentially remain governed by the Shari’a regardless of physical location. This is a key distinction between the jurisdictional applications of the Shari’a as opposed to the jurisdictional reach of secular laws that normally follow the geographically defined borders of a sovereign. Therefore, to determine whether an arbitral award is “foreign” under the Shari’a, the first concern is whether the arbitration, and hence the arbitral award, took place within or outside of an Islamic country.

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146 *G Steel Industry Co v International Steel and Contractors Co*, UAE Supreme Court Case No 138/10, unpublished.
147 *AA Commercial Co* (n 145).
148 El-Kadi (n 143).
149 El-Ahdab, *Arbitration with the Arab Countries* (n 16) 50.
150 This is the same approach taken by El-Ahdab. El-Ahdab, *Arbitration with the Arab Countries* (n 16) 50. See also, Saleh (n 106) 61-64 (explaining the distinctions between contracts made in *dar al Harb* and contracts made in *dar al-Islam*).
2.2.2.1. Arbitration and Arbitral Awards Taking Place Within an Islamic Country

If the arbitral award was made within an Islamic country, an issue arises when none of the parties is Muslim. According to Rashid, “an arbitral award is considered foreign if both parties are non-Muslims, even if both are residents of the state in which the arbitration is being held.”\(^\text{151}\) Abu Zakaria Al-Ansari agrees to Rashid’s view, taking the position that “if arbitration takes place within an Islamic country, it is deemed foreign if all the parties are non-Muslims (foreigners or non-Muslim citizens) provided that the subject of the dispute is legal with respect to their respective religions.”\(^\text{152}\) In the view of Rashid and Al-Ansari, an arbitral award involving only non-Muslims is foreign because the prohibitions and authorizations of the Shari’a do not apply to non-Muslims.\(^\text{153}\) Under this view, such an arbitral award would be similar to being deemed non-domestic under the New York Convention.\(^\text{154}\)

There is an opposing viewpoint as explained by El-Ahdab that an arbitral award involving only non-Muslims is domestic, and thus not foreign, because it took place within an Islamic country.\(^\text{155}\) In the opinion of Abu Yussef, as translated and explained by El-Ahdab, “Islamic law must apply to all parties residing within the jurisdiction of an Islamic court, regardless of their nationality or religion.”\(^\text{156}\) Abu Yussef’s position seems to be consistent with the framework of the New York Convention, which draws the line between foreign and domestic based on where the award was made.

The New York Convention, however, does not obligate\(^\text{157}\) courts to find an arbitral award “non-domestic” as it leaves it to the courts to make the determination. So, application of “non-domestic” awards should therefore be clearly covered by national rules or legislation. Such clarity is needed in the aim of harmonizing the Shari’a based

\(^\text{151}\) Rashid (n 142) 95.
\(^\text{152}\) Abu Zakaria Al-Ansari, *Asl Al Mataleb Fi Charh Raud El Taieb*, vol IV, 204 et seq, also cited by El-Ahdab, *Arbitration with the Arab Countries* (n 16) 50.
\(^\text{153}\) Ibid. This is true regardless of whether the person is a foreigner or local non-Muslim.

\(^\text{154}\) This type of award is regarded as “a-national.” van den Berg, ‘An Overview’ (n 2) 41.


\(^\text{156}\) Yussef (n 142).

\(^\text{157}\) van den Berg, ‘An Overview’ (n 2) 40.
arbitration of GCC states with that of international arbitration, while still taking into account the Shari’a.

2.2.2. Arbitration and Arbitral Awards Taking Place Outside an Islamic Country

There is a larger division among Shari’a scholars on the definition of a “foreign” arbitral award when the arbitral award took place outside of an Islamic country. According to El-Ahdab, “when arbitration takes place outside an Islamic country, the situation is less clear...” There are three competing views on this issue. The first view, held by the Malaki school according to Imam Malik, Hanbali school according to Imam Ibn Hanbal, and Shafi’i school according to Imam Shafi’i, is that an arbitration, hence an arbitral award, that took place outside an Islamic country is foreign only if none of the parties is Muslim, but domestic if one of the parties is Muslim. The second view is that an arbitration that took place outside an Islamic country is foreign even if one of the parties is Muslim, but domestic if both parties are Muslims. According to Abu Yussef, “arbitration between Muslims held abroad in civil or commercial matters is not considered to be foreign.” The third view, which is held by the Hanafi, deems an arbitration that took place outside an Islamic country as always foreign even if a Muslim is involved. Rashid agrees with the Hanafi view because according to him “the [arbitral] award is also considered foreign if the

158 El-Ahdab, ‘Arbitration by Reconciliation’ (n 155) 180-182.
159 El-Ahdab, Arbitration with the Arab Countries (n 16) 50; Abu Hanifa (n 142) 132 and et seq; Yussef (n 142); Malik (n 142) 355; Shafi’i (n 142) 358; Hanbal (n 142) 439; Al Kabir (n 142).
160 El-Ahdab, ‘Arbitration by Reconciliation’ (n 155).
161 Malik (n 142) 355; El-Ahdab, Arbitration with the Arab Countries (n 16) 50.
162 Hanbal (n 142) 439; El-Ahdab, Arbitration with the Arab Countries (n 16) 50.
163 Shafi’i (n 142) 358; El-Ahdab, Arbitration with the Arab Countries (n 16) 50.
164 See El-Ahdab, ‘Arbitration by Reconciliation’ (n 155); El-Ahdab, Arbitration with the Arab Countries (n 16) 50; Abu Hanifa (n 142) 132 and et seq; Yussef (n 142); Malik (n 142) 355; Shafi’i (n 142) 358; Hanbal (n 142); Al Kabir (n 142).
165 Yussef (n 142); El-Ahdab, Arbitration with the Arab Countries (n 16) 50; El-Ahdab, ‘Arbitration by Reconciliation’ (n 155).
166 El-Ahdab, Arbitration with the Arab Countries (n 16) 50.
167 Abu Hanifa (n 142) 132 and et seq; El-Ahdab, ‘Arbitration by Reconciliation’ (n 155) 181.
168 ibid.

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arbitration took place outside of an Islamic state.”

The first and second approaches to defining a “foreign” arbitral award under the Shari’a contradict with the New York Convention and the ICSID Convention. As mentioned above, the New York Convention, according to van den Berg, defines a foreign arbitral award as an arbitral award “made in any other State” without regard to nationality or religion, while the first and second view considers an arbitral award domestic whenever it occurs outside of an Islamic country and one or both of the parties to the arbitration are Muslims. This thesis author agrees to the third view of the Hanafi School and to Rashid that an arbitral award should be considered foreign if the arbitration took place outside of an Islamic country, as this approach would be consistent with obligations of the GCC states to the New York Convention.

Even pursuing the arguments in the first and second approach of interpreting “foreign” under the Shari’a, arbitral awards made in another state but considered as domestic in the enforcing state, according to van den Berg, remain foreign under the New York Convention’s non-domestic criterion. Van den Berg clarified this point when he stated that “the rule that the New York Convention is always applicable to the recognition and enforcement of an arbitral award made abroad applies even if the award made in the other country is considered domestic by the enforcing court.” Likewise, even if Shari’a scholars were to apply the first and second view of the fiqh to the definition of a “foreign” arbitral award, they must apply the New York Convention regardless because the determination that an arbitral award made outside of an Islamic country (in other words in another state other than the enforcing state) remains within the purview of the New York Convention’s definition of “foreign” arbitral award.

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169 Rashid (n 142) 95.
170 van den Berg, ‘An Overview’ (n 2) 2.
171 van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20), referring to Law of Mar 15, 1961, § 2, Bundesgesetzblatt [BGBI] II, 121 (W Ger) (van den Berg used as an example the West German law which applies the New York Convention to an award made abroad even if it would have been deemed domestic for having employed German procedural law).
PART III

2.3. Rules Governing Domestic, Foreign, and International Arbitral Awards in GCC States

After discussing the general rule and the competing interpretations of the rule for the definition of a “foreign” arbitral award under the Shari’a, this section discusses the rules in the GCC states governing domestic, foreign, and international arbitral awards.

2.3.1. Domestic Arbitral Awards

There are two sets of rules that govern domestic arbitral awards in the GCC states: the Shari’a, and the domestic laws of GCC states.

The Shari’a is governing law in all GCC states, but the interpretation of the Shari’a depends largely on how a GCC state expressed the Shari’a as the “source of law” or the “primary source of law.” For example, the KSA follows the Shari’a as the source of law in the KSA, while the UAE follows the Shari’a as the primary source of law. Accordingly, in the KSA, all laws must strictly follow the Shari’a. As to legislatively enacted rules regarding the enforcement of arbitral awards, the Shari’a is incorporated into the enacted rules. In the UAE, on the other hand, the Shari’a acts as a guiding principle for enacting rules on the enforcement of arbitral awards. Once the legislature has consulted the Shari’a as a primary source of law and enacted a set of rules governing, say, the enforcement of domestic arbitral awards, the enacted rules are able to stand on their own. The extent to which the Shari’a will influence rules on the enforcement of domestic arbitral awards depends on a specific GCC state.

Having stated the extent to which the Shari’a will impact rules on the enforcement of arbitral awards, all GCC states have enacted their own arbitration acts or law with rules on the enforcement of arbitral awards. These national rules and legislations on arbitration provide a secular definition of what is a domestic arbitral award. The interplay of these arbitration rules and legislations with the Shari’a varies,
and there are differences from the rules of one GCC state to another. The national rules and legislation of each of the GCC states will be addressed in more detail in Chapter Three.

As a rule of thumb, judges in GCC states that apply the Shari’a as the source of law will tend to define domestic arbitral awards as those involving at least one Muslim party. On the other hand, judges in GCC states that apply the Shari’a, as the primary source of law will tend to define domestic arbitral awards as those that took place within an Islamic country - the majority view in the GCC states. In this regard, it is worth noting again that the survey, in which the respondents were asked about their satisfaction with the definition of domestic arbitral award in their countries, the majority at 8.09 out of 10 or 80.9% stated that they were satisfied.172

2.3.2. Foreign Arbitral Awards

The rules governing foreign arbitral awards can be divided into arbitral awards that took place in an Arab country that is a signatory to the Inter-Arab Convention on Judicial Co-operation of 1983173 (“Riyadh Convention”) and/or the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications (“GCC Convention”),174 on the one hand, and arbitral awards that took place in a non-Arab country, on the other. For purposes of clarifying this distinction, it is worth noting here that all GCC states and almost all Arab countries are signatories to the Riyadh Convention. An arbitral award that took place in an Arab country that is also a signatory to the Riyadh Convention and/or the GCC Convention would almost always be covered under the regional agreements, while arbitral awards that took place in a non-Arab country can only be covered under an applicable international agreement for the enforcement of a foreign arbitral award like the New York Convention.

172 Appendix II, Survey Report, II(2.2.4.).


2.3.2.1. Regional Agreements

There are two regional agreements that are pertinent to the enforcement of a foreign arbitral award in the GCC states: the Riyadh Convention and the GCC Convention. The GCC Convention and the Riyadh Convention have provisions that require it to not to contravene against any international treaty obligation to which a signatory state is a party. Therefore, in all GCC states, the GCC Convention and the Riyadh Convention have been superseded by the New York Convention except when a foreign arbitral award was made in a country that is not a signatory to the New York Convention and at the same time is party to the Riyadh Convention such as Libya, Iraq, and Yemen, the only remaining Middle Eastern countries that have not yet joined the New York Convention. The GCC Convention’s application may perhaps be possible under the New York Convention’s more-favourable-right provision if the GCC Convention permits enforcement of an arbitral award but the New York Convention does not.

A. The Riyadh Convention

The Riyadh Convention is one of the most commonly used treaties in the Middle East for the recognition and enforcement of both court judgments and arbitral awards between Arab nations. Since all Arab nations that are party to the Riyadh Convention are Islamic countries, the Riyadh Convention would always be applicable to arbitral awards where one or more of the parties are Muslims. Therefore, there is no confusion regarding the definition of a foreign or domestic arbitral award under the Riyadh Convention.


In terms of grounds for non-enforcement, what makes the Riyadh Convention compatible and consistent with Islamic countries like the GCC states, and what makes it different from the New York Convention, is that the Riyadh Convention allows non-enforcement of an arbitral award that is contrary to the Shari’a. Under the Riyadh Convention, an arbitral award may be refused if it is “contrary to Shari’a or the constitution, public policy or good morals of the country in which enforcement is sought.”177 Thus, “enforcement of a foreign arbitration award in [the KSA] is made easier if the foreign country is also a signatory to the Riyadh Convention.”178

B. The GCC Convention179

It is also worth mentioning that all six of the GCC states have long ago entered into their own agreement to recognize and enforce arbitral awards within the GCC states.180 The GCC Convention covers the recognition and enforcement of both court judgments and arbitral awards between the GCC states without re-examination of the merits.181

Under the GCC Convention, GCC states are required to execute the final judgments issued by courts of any member state in civil, commercial and administrative cases and the personal affairs cases in accordance with the procedures as provided under the agreement. One of the features of the GCC Convention is that the execution of a judgment may be rejected completely or in part if the judgment violates the Shari’a, the Constitution, or public order of the enforcement state. The GCC Convention provision regarding the Shari’a is similar to the Riyadh Convention. The GCC

178 M Payton, ‘Security for and Enforcement of Arbitration Awards’ (London Maritime Arbitration Association, 50th Anniversary Conference) <http://www.lmaa.org.uk/uploads/documents/C50SecurityandEnforcement.pdf> accessed 10 May 2013 (“The difficulties of enforcing a foreign arbitration award in Saudi Arabia are well known. Even when Awards are rendered within Saudi Arabia, they are not considered final and binding, so parties are still likely to face difficulties.”).
179 The signatories to the GCC Convention are Bahrain, Kuwait, Oman, Qatar, the KSA, and the UAE.
180 The nations of the Gulf Co-operation Council entered into an Agreement on the Execution of Rulings, Requests of Legal Assistance and Judicial Notices in Oman in 1995 (known as the GCC Convention).
181 Herbert Smith (n 177).
Convention also allows the enforcement state to refuse enforcement if execution of the judgment is in conflict with international conventions and protocols in which the executing state is a party.

2.3.2.2. International Agreements

If arbitral awards were sought to be enforced exclusively to and from GCC states, there would practically be no need for other conventions for the enforcement of arbitral awards since that would be covered by the Riyadh Convention and the GCC Convention. The globalized business world, however, has made it possible for arbitral awards to be made in a non-Arab country, and sought to be enforced in an Arab country. Arab countries in turn have felt compelled to ratify international agreements and to enforce these non-Arab arbitral awards if they sought to attract foreign investors into their country.

A. The New York Convention182

The New York Convention applies only to the recognition and enforcement of foreign arbitral awards. “Enforcement of arbitration awards is mandatory in all New York Convention signatory states. If a party wishes to contest the award, it bears the burden of proof.”183 The New York Convention requires that foreign arbitral awards are recognised by the courts in the signatory States.184 Further, “unlike the pan Middle East treaties, there is no condition that a competent court in the country which is the ‘seat’ of the arbitration gives leave to enforce the award.”185

A foreign arbitral award, however, may be refused if contrary to the public

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182 Most Middle Eastern and North African countries that are members of the Arab League of Nations have become signatories to the New York Convention. Essam Al-Tamimi, The Practitioner’s Guide to Arbitration in the Middle East and North Africa (JurisNet 2009) 194. (The only Middle East countries which are not signatories to the 1958 NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) are: Iraq (but accession to the New York Convention is currently being considered); Libya; and Yemen).
183 Payton (n 178).
184 Herbert Smith (n 177).
185 ibid.
policy of the enforcing states, a defence that have been used by the GCC states to refuse enforcement if the arbitral award does not comply with the Shari’a. The view, however, that the Shari’a and the New York Convention are incompatible arises from a misunderstanding of the New York Convention and the Shari’a. The key to understanding the issue is to look deeper into what constitutes a public policy and what constitutes a foreign arbitral award under both.

B. ICSID Convention

All GCC states have become signatories to the ICSID Convention. In order for ICSID Convention arbitration to apply, three essential jurisdictional requirements must be met under Article 25 of the ICSID Convention: (1) there must be consent from the parties that their dispute will be submitted to ICSID Convention arbitration, (2) the dispute must be between a Contracting State, or their authorized agencies or subdivisions, and a national of another Contracting State, and (3) the dispute must directly arise out of an investment.

As to the consent requirement, the consent must be an unambiguous one, as indicated by the tribunal in Mobil Corporation and Others v. Bolivarian Republic of Venezuela, which found in that case that there was insufficient evidence of an intent to provide “consent to ICSID Convention arbitration in the absence of a BIT.” The requirement for consent by the state cannot be overridden by any contractual agreement by a subdivision or agency, as illustrated in the ICSID Convention award in Hamester v. Ghana. In Hamester, the joint venture agreement states that “the dispute shall be

186 ibid.
187 ibid, ICSID Convention website member list.
189 Mobil Corporation and Others v Bolivarian Republic of Venezuela, ICSID Case No ARB/07/27 (10 June 2010).
190 ibid.
referred to the International Centre for the Settlement of Investment Disputes,”192 but Ghana never gave consent that the Board was a subdivision or agency as required under Article 25 of the ICSID Convention. The ICSID Secretariat rejected the claimant’s request for arbitration under Article 25 in the absence of the required consent by Ghana.193

State responsibility can also arise where the conduct in question is directed or controlled by the state. This is dealt with in Article 8 of the ICSID Convention, which states that “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”194 International law applies a high threshold here, in the form of the “effective control” test as exemplified by Nicaragua v. United States (Contra Case).195 Clear evidence of actual control or direct influence by public officials would be needed to discharge the evidential burden.

As to the requirement that the dispute must be between a Contracting State, or their authorized agencies or subdivisions, and a national of another Contracting State, in Soufraki v. United Arab Emirates,196 an ICSID Convention case involving the UAE-Italy BIT was dismissed for lack of jurisdiction because the claimant failed to prove his Italian nationality.

Further, the ICSID Convention requires that the case must involve an investment dispute. In Mitchell v. The Democratic Republic of Congo,197 an ICSID ad hoc annulment committee set aside an ICSID Tribunal award because it did not establish that the Mitchell’s interest constituted an investment for the purposes of the ICSID Convention. The Committee in essence required that the definition of “investment” be met both in the bilateral investment treaty (“BIT”) and the ICSID Convention. The ad-hoc Committee considered only four interdependent characteristics of an investment as

192 ibid.
193 ibid.
194 ICSID Convention (n 63) art 8.
196 Soufraki v United Arab Emirates, ICSID Case No Arb/02/07.
identified by ICSID [Convention] case law: “(i) commitment by the investor; (ii) duration of the project; (iii) assumption of risk; and (iv) a contribution to the economic development of the host state. It was the last element that was critical to the ad-hoc Committee’s considerations.”¹⁹⁸ In the end, the Committee found that Mitchell’s investment did not contribute to the economic development of the host state and therefore did not constitute an investment.

A similar definition was given by the ICSID Tribunal in *Toto Costruzioni Generali SpA v. The Republic of Lebanon*, where the tribunal stated that “the underlying concept of investment…implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time.”¹⁹⁹

On the other hand, the ICSID Tribunal in *Malicorp Ltd. v. Arab Republic of Egypt*,²⁰⁰ seemed to have stretched²⁰¹ the definition of “investment” when it stated as follows: “The fact of being bound by that Contract implied an obligation to make major contributions in the near future. That commitment constitutes the investment; it entails the promise to make contribution in the future for the performance of which that party is henceforth contractually bound. In other words, the protection here extends to deprivation of the revenue the investor had a right to expect in consideration for contributions that it had not yet made, but which it had contractually committed to make subsequently.”²⁰²

There is also a distinction between contractual and non-contractual ICSID Convention arbitration. Traditionally, ICSID Convention arbitration arose out of investor-state contracts where the contract expressly refers to the ICSID Convention for

¹⁹⁸ Maxwell (n 197) stating that “the tribunal had identified a number of elements of the firm’s business as constituting Mitchell’s investment, including: (i) the moveable property and documents, files, records and similar items of the firm; and (ii) rights with respect to know-how and goodwill. The ad-hoc Committee accepted that these elements fell within the definition of investment in the DRC/US BIT, but was unconvinced that they brought it within the concept of investment under the ICSID Convention.”)
¹⁹⁹ *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction (11 September 2009).
²⁰⁰ *Malicorp Ltd v Arab Republic of Egypt*, ICSID Case No ARB/08/18 (7 February 2011).
²⁰¹ See Julien Fouret, ‘The Malicorp Saga: A Spaghetti Bowl of Proceedings’ (2012) Int’l J of Arab Arb, vol 4, No 2 (stating that the notion of investment by the Malicorp ICSID Tribunal appears stretched to its limit mainly because the arguments are based on conjectures and promises, and even more so contractual ones).
dispute resolution, jurisdictional limits are met, and the host state and the investor’s home state are ICSID Convention members. The non-contractual ICSID Convention arbitration arose out of a state’s consent to ICSID Convention arbitration via (1) a host State’s national investment laws, (2) a Bilateral Investment Treaty (BIT) between a host state and the investor’s home state, or (3) a Multilateral Investment Treaty (MIT) or Free Trade Agreement (FTA) between or among countries that include the host state and the investor’s home state. The recent proliferation of BITs has been the primary reason behind the substantial growth of non-contractual ICSID Convention arbitration.

ICSID Convention arbitration can also be based upon the national investment legislation of the host state where the host state offers to submit investment disputes to ICSID Convention jurisdiction. Once the foreign investor either accepts the state’s offer to arbitrate or files a claim, the consent becomes effective. The host state can withdraw its consent by either amending or repealing the investment legislation. By adopting laws that include consent to arbitration, host states can limit the matters that can be arbitrated by the ICSID.

Additionally, the ICSID Convention provides for a supranational arbitration regime, which includes a specific and compulsory mechanism for review of arbitral awards thereby removing such review from national courts’ jurisdiction. There is no seat of arbitration that would trigger the applicability of national arbitration law and the ICSID Convention under Article 26 expressly excludes recourse to “any other remedy” available under national laws. Section 6 of the ICSID Convention also provides for an independent regime of setting aside and/or enforcement of ICSID Convention awards. Thus, enforcement of an ICSID Convention award is governed exclusively by the ICSID Convention. Under Article 54 of the ICSID Convention, each contracting state must ‘recognize an award rendered pursuant to the ICSID Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it

203 Reed et al (n 188) 13. By January 2010, however, only 22 percent of ICSID Convention arbitrations were contractual, while the remaining 78 percent were non-contractual, 73 percent of which were brought under a BIT or some other international investment agreement and 5 percent of which were brought under the investment law of the host state.

204 Clarisse von Wunschheim, Enforcement of Commercial Arbitral Awards in China (West 2011) 94.

were a final judgment of a court in that State.\textsuperscript{206}

Article 54 of the ICSID Convention has three implications: (1) there is no ground for non-enforcement of an ICSID Convention award, (2) ICSID Convention awards must be enforced in the same way and under the same laws as applicable to the execution of court judgments, and (3) enforcement of the award is limited to monetary awards.\textsuperscript{207} Monetary damages could, however, be used to award moral damages such as the award in \textit{Desert Line Projects LLC v. Republic of Yemen}\textsuperscript{208} of $1 million in “moral damages” against Yemen and in favour of an Omani company.\textsuperscript{209} However, moral damage was not awarded in an LCIA case between a Syrian national and a US company, in \textit{Dr. Alla Chafic Dib v. F &F International Ltd},\textsuperscript{210} because under English law, the chosen law of the parties, such arbitral award can be recovered only in exceptional circumstances.

### 2.3.3. International Arbitral Awards

International arbitral awards could be governed by the UNCITRAL Model Law, the national law of a GCC state, and implicitly by the New York Convention as a non-domestic arbitral award. Most GCC states, however, have not expressly addressed international arbitral awards. Only Bahrain and Oman have national legislation specifically covering and defining international arbitral awards. It is not surprising, therefore, that the majority of respondents in the survey only gave a 6.16 out of 10 or a 61.6% satisfaction when asked to rate their country’s definition of international arbitral award.\textsuperscript{211}

The Saudi Arbitration Law of 2012 does cover domestic and international arbitration. It defines an international arbitration along the lines of the definition in

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\textbf{206} & ICSID Convention (n 64) art 54. \\ 
\textbf{207} & Wunschheim (n 204) 101. \\ 
\textbf{208} & \textit{Desert Line Projects LLC v Republic of Yemen}, ICSID Case No ARB/05/17 (6 February 2008). \\ 
\textbf{210} & \textit{Dr. Alla Chafic Dib v F &F International Ltd}, LCIA, Case No 4533 (20 December 2004) in (2011) Int’l J of Arab Arb, vol 3, No 3, 211. \\ 
\textbf{211} & See Appendix II, Survey Report, II(2.2.4). \\
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\end{tabular}
\end{table}
Article 1(3) of the UNCITRAL Model Law (Article 3), but does not distinguish between domestic and international arbitration. These GCC states have adopted into legislation, whether in part or in full, the UNCITRAL Model Law and so have also adopted the Model Law’s provisions regarding international arbitral awards. Article 1(3) of UNCITRAL Model Law (2006 Amendment) defines “international arbitration” as follows:

An arbitration is international if:
(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
(b) one of the following places is situated outside the State in which the parties have their places of business:
   (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
   (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Bahrain follows the UNCITRAL Model Law definition of international arbitral awards. Oman’s definition, however, slightly differs from the UNCITRAL Model Law definition. Omani law defines an “international” arbitral award under Article 3 of the Arbitration Law 47/97 as follows:

The arbitration shall be considered as international… provided the subject matter of the dispute is related to international commerce under the following circumstances:
(1) in case, the principal business centre of either party to the arbitration is located in two different countries at the time of execution of the arbitration agreement…
(2) In case, both parties to the arbitration have agreed to have recourse to either a permanent arbitration organization or arbitration centre located either in the Sultanate of Oman or abroad.

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213 UNCITRAL Model Law (2006 Amendment), art 1(3).
(3) If the subject matter of the dispute, which comes under the arbitration agreement is linked with more than one country.

(4) If the main business centre of either party to the arbitration is based in the same country at the time of execution of the arbitration agreement while one of the following places are based outside such country:
   (a) the place of arbitration, as stipulated in the arbitration agreement or there exists a reference regarding the mode of its selection;
   (b) the place where execution of the substantial part of the obligations, arising from the commercial relationship between the parties, has to be carried out;
   (c) the place which is very much relevant to the subject matter of the dispute.\textsuperscript{214}

PART IV

2.4. Applicability of the New York Convention or ICSID Convention

After reviewing the potential rules that would govern the enforcement of a foreign arbitral award, this section analyses the applicability of the New York Convention or the ICSID Convention given the nexus between Muslim and non-Muslim parties, and an arbitral award that takes place within or outside an Islamic country. Most Islamic countries and especially the GCC states have leaned towards deciding the issue of which rule to apply based on where the arbitral award took place, following the New York Convention, and not whether any of the parties is a Muslim under the Shari’a.\textsuperscript{215}

2.4.1. Treaty Obligations and the Shari’a

One of the questions that arbitration practitioners in the GCC states continue to grapple with, deals with the reconciliation of a treaty obligation as with the New York Convention and the Shari’a. In the survey, the respondents were asked which would prevail if there is a conflict between the New York Convention and the Shari’a. The respondents were generally split on this question with 53.13% choosing the New York

\textsuperscript{214} Omani Arbitration Law 47/97, art 3,

\textsuperscript{215} Al-Tamimi, The Practitioner’s Guide (n 181)194; see Section 2.2.2.2.
Convention and 46.88% choosing the Shari’a,\footnote{See Appendix II, Survey Report, II(2.6.1.).} and there were those who explained further their choice, and only two comments correctly stated that there ought to be no conflict between the two, as discussed more fully below.\footnote{ibid.}

Accession to the New York Convention poses different challenges for Islamic countries in terms of reconciling the same with the Shari’a. “The constitutions of the Arab States prescribe the Shari’a as a source of legislation (Kuwait, Bahrain, UAE); in some (Qatar, and since 1980, Egypt) - it is the main source of legislation.”\footnote{Mary Ayad, ‘International Commercial Arbitration and Harmonisation of Contract Law with a Focus on Reform in the Mena Region’ (2009) 6 MQJBL 93, 96; William Ballantyne, Arab Comparative and Commercial Law: The International Approach (Graham Trottman 1987) vol 1.} In the KSA, Article 1 of its Basic Law declares that the constitution of KSA is the \textit{Holy Qur’an} and \textit{Sunna (Traditions) of the Messenger (PBUH)}.\footnote{Basic Law of Governance issued by the Royal Order No (A/90) 27/08/1412 H corresponding to 01/03/1992, and published in Umm Al-Qura Gazette No 3397 on 02/09/1412 H corresponding to 05/03/1992.} Generally speaking, the public policy of KSA arguably may be intended to be the obligation to follow the basic laws and the constitution of the country. Kuwait, on the other hand, where the Shari’a is a source of legislation and not the main source, faced little difficulty acceding to the New York Convention. Kuwait acceded to the New York Convention in 1978.\footnote{El-Ahdab, Arbitration with the Arab Countries (n 16) 384; Roy (n 6) 936.} Roy explains that “this accession…did not pose a conflict for Kuwait because Kuwait’s general rule of civil procedure was to recognize international arbitration agreements and to subordinate the Kuwaiti legal system to the rules of the arbitration tribunal.”\footnote{Code of Civil and Commercial Procedure, art 173(5) (Kuwait); Roy (n 6) 936.} In KSA, enforcement of a foreign arbitral award requires compliance with the Shari’a “as enforced in Saudi Arabia.”\footnote{Salah Deeb, ‘Kingdom of Saudi Arabia’ in Al-Tamimi, The Practitioner’s Guide (n 182) 195.} This is true even with the enactment of the Saudi Arbitration Law in 2012.

The core instrument for interpreting treaties is the Vienna Convention on the Law of Treaties\footnote{United Nations Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol 1155, 331 <http://www.refworld.org/docid/3ae6b3a10.html> accessed 17 February 2014.} (Vienna Convention), to which virtually all countries are adherents.\footnote{Baldwin, Kantor and Nolan (n 81) 1–24.} Article 31(3)(c) of the Vienna Convention states that treaties should be...
interpreted in good faith and in light of “any relevant rules of international law applicable in the relations between the parties.” The GCC states that have joined the New York Convention, or any other treaty like the ICSID Convention, would also be bound to meet their obligations under the treaty pursuant to the international law principle of pacta sunt servanda [agreements must be kept] and the Holy Qur’an, which requires all Muslims to follow their contractual obligations. The Holy Qur’an states, “O ye who believe! fulfil (all) obligations.” [Ya’ayuh al-ladhīn a manū awfū bil-’uqūd], enjoining Muslims to commit to fulfilling their contractual obligations. In disputes where one party is a non-Muslim, choosing a non-Islamic Shari’a system is recognized by the Maliki, Shafi’i and Hanbali Schools as valid. Recourse to a non-Islamic Shari’a system is valid as long as the rules to be applied on the contract do not violate express provisions of the Holy Qur’an and Sunna.

As stated by Hoyle, for example, “there has been a long tradition of freedom of contract for non-Muslims in Muslim countries, and there is no tension between the principles that Muslims are forbidden, for example, to deal in pork, but (again for example) Christians are permitted to do so. While subtle arguments could pertain regarding a contract between a Christian and Muslim concerning pork, two Christians contracting for something which would be forbidden to a Muslim would, generally, have their contracts upheld, unless there was overriding public policy. This might occur if the agreement was analogous to the two Christians setting out to sell pork to Muslims. Equally, therefore, if there was a question about arbitration of such a dispute, the outcome could either be a refusal to arbitrate by Muslim judges, or a declaration by the Muslim arbitrators that the contract was unenforceable.”

In this context, the GCC states must meet their treaty obligation under the New

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227 Alassaf and Zeller note in the context of the KSA that “ratification of the New York Convention and accession to the WTO have shown that modernisation of the Saudi legal system is possible without violating Shari’ah and its basic laws.” Alassaf and Zeller (n 141).
228 Maurer (n 225) 6.
230 Abu Hanifa (n 142) 132 and *et seq*; Yussef (n 142); Malik (n 142) 355; Shafi’i (n 142) 358; Hanbal (n 142) 439.
231 ibid.
York Convention and the ICSID Convention. They must not interfere with supranational arbitral awards under the ICSID Convention, except at the execution stage, to determine such defence as State Immunity. They must also follow the New York Convention’s straightforward definition of a “foreign” arbitral award as an award “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.” This definition of the New York Conventions is not controversial. Yet, there remains uncertainty regarding the second definition in the New York Convention covering non-domestic arbitral awards. This is especially true when a GCC state simply refers to the New York Convention as a whole in its implementing arbitration legislation, since the New York Convention itself does not define non-domestic arbitral award and leaves it to the domestic court to “consider” whether an arbitral award is non-domestic. These arbitral awards, in essence, are arbitral awards that are made within a GCC state but that a domestic court would deem non-domestic.

2.4.2. Arbitral Awards Taking Place in an Islamic Country

As stated previously, an issue theoretically arises under the Shari’a in an arbitral award made within an Islamic country when all the parties are non-Muslims. In an arbitration that was made in an Islamic country involving two non-Muslims, there are two competing views on whether the arbitral award is foreign or domestic. Al Ansari and Rashid categorize such an arbitral award as foreign, going as far to say that the result would be the same even if the parties were both residents. This view among Shari’a scholars, El-Ahdab explains, is supported by the proposition that it is not domestic because it is not subject to the prohibitions and authorizations of the Shari’a.

It is foreseeable that a judge in a GCC state could take the Al-Ansari/Rashid position and hold that an arbitral award made within an Islamic country and between

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233 New York Convention, art VII.
234 Al-Ansari (n 152).
235 Rashid (n 142) 95.
236 El-Ahdab, *Arbitration with the Arab Countries* (n 16) 50.
two non-Muslims is a foreign arbitral award. Such a position could arguably be consistent with the New York Convention taking lead from the Bergesen court in the United States. In Bergesen, the court held that the arbitral award was foreign, making the New York Convention applicable, because it involved two non-US parties: a Norwegian and a Swiss party. According to van den Berg, “what really motivated the court of appeals to hold the award to be non-domestic was the foreign nationality of both parties involved (Norwegian and Swiss).” Bergesen, however, involved the parties’ nationality (non-US citizens) and not the parties’ religion (being non-Muslims). One cannot assume that non-Muslims parties are also not citizens or residents since there are non-Muslims residents and citizens in Islamic countries, including the GCC states.

Further, van den Berg criticized the Bergesen court’s misplaced reliance on the parties’ nationality, stating as follows:

…the legal basis is scant. Neither the text nor the legislative history of the Convention indicate that recognition and enforcement of an award made between two foreign parties under the arbitration law of the country in which recognition and enforcement are sought should be deemed to fall under the Convention…a legal basis can be found only if the text of the second criterion is read in isolation.

Still, the Bergesen case continues to stand for the rule that in an arbitration between foreign nationals, an arbitral award falls under the New York Convention as non-domestic. Such a situation could apply to an arbitral award made in an Islamic

237 van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20) 47.
238 When non-Muslim citizens live under Islamic sovereignty, they enjoy a special status and are known along with other minorities as "ahl adh dhimma" or dhimmis. Dhimma is an Arabic word, which means safety, security, and contract. Hence, they are called dhimmis because they have agreed to a contract by Allah, His Messenger, and the Islamic community, which grants them security. This security granted to dhimmis is like the citizenship granted by a government to an alien who abides by the constitution, thereby earning all the rights of a natural citizen. Thus, upon the preceding basis, a dhimmi is a citizen of the Islamic state, as described by Muslim jurists or a bearer of Islamic nationality, as described by contemporary writers. See As-Sarakhi’s As-Siyar Al-Kabir, vol 1, 140; Al-Kasani’s Al-Bada’i, vol 5, 281 and Ibn Qudamah’s Al-Mughni, vol 5, 516; Aswa, Abdul Qadir, Islamic Criminal Legislation, vol 1, 307; Abdul Karim Zaydan, Ahkam Adh-Dhimmiyin Wa Al-Musta’minin Fi Dar Al-Islam, 49-51 and 63-66; Muhammad Nazeer Kaka Khel, ‘The Right of Non-Muslims in Islamic State’ <http://www.qurtuba.edu.pk/thedialogue/The%20Dialogue/1_2/5_Dr.%20M.%20Nazir.pdf> accessed 6 July 2013.
239 van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20) 47.
country between non-Muslims if both non-Muslims are concurrently foreign nationals. If both non-Muslim parties are nationals of the place where the arbitral award was made, the New York Convention would not apply according to van den Berg as supported by the legislative history of the New York Convention.\textsuperscript{240}

The opposing view held by Abu Yussef, that the Shari’a applies not only to Muslims but to all who reside within the jurisdiction of an Islamic court regardless of their nationality or religion, would render an arbitral award between non-Muslims domestic.\textsuperscript{241} The Abu Yussef view would generally not conflict with the New York Convention, assuming both parties are also nationals of the place where the arbitral award was made. As a result, the Shari’a actually provides more opportunity for the New York Convention to enforce an arbitral award. According to van den Berg, “if enforcement of the arbitration agreement under the Convention would be more difficult than enforcement under domestic law (for instance, because the arbitration agreement does not comply with the formal requirements of the Convention), a party can still rely on domestic law by virtue of the Convention’s more-favourable-right-provision.”\textsuperscript{242} Unfortunately, no published case law is yet available to appraise the positions of these scholars.

There are still exceptions to what constitutes a domestic arbitral award, of course, as was seen in the first UAE case wherein the Dubai Appeals Court upheld the enforcement of a foreign arbitral award under the New York Convention.\textsuperscript{243} In that case, the arbitral award was actually made in Dubai, but was rendered a foreign arbitral award because the arbitration clause made London the seat of arbitration.\textsuperscript{244} In other words, an arbitral award that was made within the same country where enforcement was sought was rendered by a Dubai court as a foreign arbitral award. Still, the New York Convention would apply under the second sentence of Article I (1) of the New York Convention, which allows enforcement of arbitral awards not deemed a domestic

\textsuperscript{240} van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20).
\textsuperscript{241} Yussef (n 142).
\textsuperscript{242} van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20) 53.
\textsuperscript{243} Emmerson and Hutchison (n 176).
\textsuperscript{244} van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20) 53.
arbitral award in the state where enforcement was sought.\textsuperscript{245}

The facts in \textit{Lander Company, Inc. v. MMP Investments, Inc.},\textsuperscript{246} would classify the arbitral award in that case as “non-domestic” because the arbitration held in New York between two American companies involved a contract for distribution of products in Poland.

\textbf{2.4.3. Arbitral Awards Taking Place in a Non-Islamic Country}

Generally, when the arbitral award took place in a non-Islamic country, most GCC states will likely deem the arbitral award to be foreign.\textsuperscript{247} This is consistent with the New York Convention under the territorial criterion.\textsuperscript{248} Additionally, the New York Convention “allows, in theory, two nationals of the same nationality to arbitrate abroad on a domestic transaction.”\textsuperscript{249}

Shari’a scholars have three competing camps on the issue of arbitral awards made outside of an Islamic country:\textsuperscript{250} the Malaki/Hanbali/Shafi’i camp (first approach), the Abu Yussef camp (second approach), and the Hanafi camp (third approach). The first and second approaches contradict with the New York Convention and the ICSID Convention. As you may recall above, the New York Convention, according to van den Berg, defines a foreign arbitral award as an award “made in \textit{any} other State”\textsuperscript{251} without regard to nationality or religion, while the first and second approaches considers an arbitral award domestic whenever it occurs outside of an Islamic country and one or both of the parties to the arbitration are Muslims. This thesis author agrees with the third view by the Hanafi School that an arbitral award should be considered foreign if the arbitration took place outside of an Islamic country, as this approach would be consistent with obligations of GCC states to the New York

\begin{itemize}
\item \textsuperscript{245}See ch 3.1.2; New York Convention, art I (1); Bergesen (n 23), criticized in van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20).
\item \textsuperscript{246}107 F3d 476, 477 (7th Cir), cert denied, 522 US 811 (1997).
\item \textsuperscript{247}El-Ahdab, \textit{Arbitration with the Arab Countries} (n 16).
\item \textsuperscript{248}van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20).
\item \textsuperscript{249}van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 19) 54.
\item \textsuperscript{250}El-Ahdab, \textit{Arbitration with the Arab Countries} (n 16) 50; Abu Hanifa (n 142) 132 and \textit{et seq}; Yussef (n 142); Malik (n 142) 355; Shafi’i (n 142) 358; Hanbal (n 142) 439; Al Kabir (n 142). See Section 3.2.2 above.
\item \textsuperscript{251}van den Berg, ‘An Overview’ (n 2) 2.
\end{itemize}
Convention.

Even pursuing the arguments in the first and second Islamic approach, arbitral awards made in another state but considered as domestic in the enforcing state, according to van den Berg, remain foreign under the New York Convention’s non-domestic criterion. Van den Berg clarified this point when he stated that “the rule that the New York Convention is always applicable to the recognition and enforcement of an arbitral award made abroad applies even if the award made in the other country is considered domestic by the enforcing court.”  

Likewise, even if Shari’a scholars were to apply the first and second view of the fiqh as to the definition of a “foreign” arbitral award, they must apply the New York Convention because the determination that an arbitral award made outside of an Islamic country, in other words in another state, remains within the purview of the New York Convention’s definition of “foreign” arbitral award.

In the context of an ICSID arbitral award, which is supranational, the distinction made by Shari’a scholars would be irrelevant as domestic courts would not have the opportunity to refuse enforcement of the arbitral award or to even set aside the arbitral award since ICSID arbitral awards are taken out of the hands of domestic courts until the execution stage. While annulment of ICSID arbitral awards is “the primary avenue the [ICSID] Convention provides any disputing party to challenge an [arbitral] award” it must be done “within the context of the ICSID [Convention] system; and it limits such relief to specific and narrow grounds.” These features differ from those applicable under other types of arbitration regimes, which may allow for review of arbitral awards before national courts at the seat of arbitration based on applicable domestic law, and which provide for enforcement pursuant to the New York

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252 van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20), referring to Law of 15 March 1961, § 2, Bundesgesetzbblatt [BGBl] II, 121 (W Ger) (van den Berg used as an example the West German law which applies the New York Convention to an award made abroad even if it would have been deemed domestic for having employed German procedural law).

253 van den Berg, ‘When is an Arbitral Award Nondomestic’ (n 20) (explaining the concept of a stateless award like the ICSID arbitral award and explaining that such a concept is not supported by the New York Convention).

Convention. In *Saipem SpA v. The People’s Republic of Bangladesh*, for example, the domestic Bangladeshi court interfered with the ICC arbitration by not allowing the ICC Tribunal to continue, calling the ICC arbitration a “nullity,” and the ICSID Tribunal held that the interference by the court amounted to expropriation. The *Saipem* decision is another confirmation of the supranational nature of ICSID arbitral awards. In other words, ICSID arbitral awards will never be categorized as either domestic or foreign, the way a New York Convention arbitral award would.

### 2.4.4. State Entity as a Party to the Arbitration

An issue that further complicates this situation is the application of the New York Convention and the ICSID Convention on public or state-controlled entities.

In regards to the New York Convention enforcement of a foreign arbitral award, as opposed to a court judgment, is relatively straightforward. However, as to public entities, the New York Convention permits states to decline enforcement on public policy grounds or if the dispute is not considered arbitrable under the law of the state where enforcement is sought. Some GCC states have included in their arbitration

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256 Felipe Sucescun de Roa, ‘Comments on the ICSID Award Saipem v. Bangladesh: Would its rationale be applicable in future cases?’ (*International Institute for Conflict Prevention and Resolution* 2011) <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/714/Comments-on-the-ICSID-Award-Saipem-v-Bangladesh-Would-its-rationale-be-applicable-in-future-cases-2011-Writing-Contest-Winner.aspx> accessed 3 June 2013 (arguing that the *Saipem* decision is unique to its facts and will not likely apply in future cases).

257 New York Convention, art V(2)(b); see also *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 FSupp 2d 936, 939–40 (SD Tex 2001); *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F3d 357 (5th Cir 2003); Baldwin, Kantor and Nolan (n 81) 1–24. Morkin, Bergoff and Pike gave additional examples like a Thai court’s rejection of “the attempted enforcement of a foreign arbitration award against a Thai state entity because the dispute was of a type deemed not arbitrable. Similarly, Brazil, Finland, France, India, Ireland, Israel, Italy, Japan, South Africa, South Korea, and Spain all have national laws that generally disfavor or limit the arbitration of intellectual property disputes. National self-interest alone can make it difficult to enforce arbitral awards in the courts of the state against which judgment has been obtained.” Michael Morkin, Ethan Berghoff, and Richard Pike, ‘Doing Business with Foreign Sovereign Entities: Who Are They and What Are the Risks?’ (*ABA*, Nov/Dec 2007) ABA Business Law Today, vol 17, No 2.
legislation that an arbitral award cannot be enforced against the state. In other words, arbitral awards against a public entity would not be arbitrable. The outcome differs when the arbitral award is from an ICSID Tribunal in which all GCC states are signatories.

The ICSID Convention, under Article 25(1), applies only to those investment disputes that are between a contracting state and a “national” of another contracting state. As such, disputes between or among states will not fall under the ICSID Convention. In the *Westland Helicopters Ltd v. Arab Organisation for Industrialisation*, a case involving an arms manufacture agreement among Egypt, KSA, Kuwait, the UAE, and Oman, the ICSID Convention was held to have had no jurisdiction in the matter as the case was not between a private contracting party and a state.

For claims submitted to ICSID Convention arbitration by state-controlled or public entities, arbitral tribunals consistently have found that such entities meet the “national” requirement under Article 25(1), often without analysis of how investor-state and state-to-state disputes should be distinguished under the provision. In *Československá Obchodní Banka, A.S. [CSOB] v. The Slovak Republic*, the tribunal first observed that Article 25(2) defines “National of another Contracting State” to include both “natural” and “juridical” persons, but that neither of those terms is “defined as such in the Convention.” The tribunal then turned to “the accepted test” for analysing the “national” requirement with respect to a “mixed economy company or government-owned corporation”: whether the entity acts as an agent for the government.

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258 Kuwait apparently has no state immunity according. Mohammed Al-Noor, ‘State of Kuwait’ in Al-Tamimi, *The Practitioner’s Guide* (n 182) 195 (“No immunity is available to the State of Kuwait from enforcing an award rendered against it.”)

259 See *Soufraki v United Arab Emirates*, ICSID Case No Arb/02/07 (dismissed for failure to prove Italian nationality).

260 ICSID Convention (n 64) art 25(1).


262 See eg, *Hrvatska v Slovenia*, ICSID Case No ARB/05/24, decision on the treaty interpretation issue (12 June 2009); CDC v Seychelles, ICSID Case No ARB/02/14, award (17 December 2003); *Telenor v Hungary*, ICSID Case No ARB/04/15, award (13 September 2006).

263 *Československá Obchodní Banka, A.S v The Slovak Republic*, ICSID Case No ARB/97/4, decision on objections to jurisdiction (24 May 1999).

or discharges an essentially governmental function.\textsuperscript{265} Applying that test, the CSOB tribunal concluded that, so long as a state-controlled claimant’s activities are commercial in nature, the claim does not give rise to a state-to-state dispute, even if the claimant’s activities are “driven by” governmental policies and even if the entity is controlled by the state such that it is “required” to do the state’s “bidding.” According to the CSOB tribunal, the purpose (as distinguished from the nature) of a state-controlled claimant’s activities is not relevant when determining whether the claimant meets the “national” requirement under Article 25(1).\textsuperscript{266} Under the ICSID Convention, however, “states acting as investors have no access to the Centre in that capacity.”\textsuperscript{267}

In \textit{La Generale des Carrieres et des Mines v. F.G. Hemisphere Associates LLC},\textsuperscript{268} the Privy Council considered whether La Generale, a Democratic Republic of Congo (DRC) State-owned corporation, was directly liable for debts which the DRC owed to F.G., which had purchased two substantial arbitration awards against the DRC which it sought to enforce against La Generale. The question was whether La Generale was a state entity or an organ of the DRC. Considering the test set forth in \textit{Trendtex Trading Corp v. Central Bank of Nigeria}\textsuperscript{269} (Trendtex) to determine if the state-owned entity could be considered an ‘alter ego or organ’ of the government because of the control exercised by the state over the entity and the entity’s constitution, the Privy Council rejected the Trendtex test in favour of a more nuanced approach.

First, separate juridical entities established by a state are presumed to be separate from states. An entity’s constitution, control and function remain important, but constitutional and factual control, and the exercise of sovereign functions do not, without more, convert a separate entity into an organ of the state. Where a separate juridical entity is formed by the state for what are, on their face, commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that the state forming it should not have to bear the other’s liabilities. It would take ‘quite extreme circumstances’ to displace this presumption. The presumption may be displaced if in fact the entity has,

\begin{itemize}
  \item \textsuperscript{265} ibid at 17.
  \item \textsuperscript{266} ibid at 21.
  \item \textsuperscript{267} Schreuer, \textit{ICSID} (n 78) 161.
  \item \textsuperscript{268} \textit{La Generale des Carrieres et des Mines v FG Hemisphere Associates LLC} [2012] UKPC 27.
  \item \textsuperscript{269} \textit{Trendtex Trading Corp v Central Bank of Nigeria} [1977] 1 QB 529.
\end{itemize}
Despite its juridical personality, no separate existence.\textsuperscript{270}

There may be particular circumstances in which the state has so interfered or behaved towards a state-owned entity that it would be appropriate to look through or past the entity to the state. However, any remedy should be tailored to meet the particular circumstances. Merely because a state’s conduct makes it appropriate to lift the corporate veil to enable a third party or creditor of a state-owned corporation to look to the state does not automatically entitle a creditor of the state to look to the state-owned corporation. Lifting the veil may mean that a corporation is treated as part of the state for some purposes, but not others.\textsuperscript{271} In the end, the Privy Council found that La Generale was not an organ of the DRC and that its assets could not be answerable for the DRC’s debts.

Maniruzzaman clarifies the issue further by viewing sovereign immunity according to the approaches taken by different jurisdictions.\textsuperscript{272} A few jurisdictions take a structuralist view of sovereign immunity,\textsuperscript{273} which presumes that the creation of a separate entity separates it from the state; while the majority and recent trend follow a functionalist approach or restrictive immunity, which examines whether the state enterprise performs an act of a private or commercial nature.\textsuperscript{274}

In the \textit{Jan De Nul} arbitration case,\textsuperscript{275} the issue was whether the actions of the Suez Canal Authority (‘SCA’) could be attributed to Egypt, and the tribunal concluded that the Suez Canal authority was not an organ of the state, applying a ‘structural test’. The authority had been created to take over a nationalised activity - management and operation of the Suez Canal, overseeing and administering shipping traffic and transit, which the tribunal noted were public in nature.\textsuperscript{276} However, from a structuralist perspective the law establishing the authority required it to follow commercial methods

\begin{footnotes}
\item[271] Robertson and Chung (n 270).
\item[273] Also sometimes referred to as “absolute” sovereign immunity.
\item[274] Maniruzzaman (272) 337-339.
\item[275] \textit{Jan de Nul NV Dredging International NV v Arab Republic of Egypt}, ICSID Case No ARB/04/13 (November 2008).
\item[276] ibid.
\end{footnotes}
of management and exploitation, and it was to do so without any direction from the Egyptian state, with its own budget, and consisting of purely private funds.

With the restrictive immunity approach, the issue of how to determine whether a state entity is immune remains an ongoing debate. According to Maniruzzaman, restrictive immunity uses various tests depending on the jurisdiction. Some jurisdictions look at the nature of the transaction or agreement, an analysis that rests on whether the transaction falls under private or public law contract, while others apply the purpose approach to determine whether the contract is commercial in nature. The two approaches have been combined to create a nature/purpose approach. Additionally, another test examines whether only a sovereign can perform the transaction. Ultimately, there has not arisen a definitive test, creating a cloud of uncertainty in an area of ICSID arbitral award enforcement that remains its Achilles’ heel.

PART V

2.5. More-Favourable-Right Provision

The “more favourable right” provision in Article VII of the New York Convention is aimed at resolving conflicts between the New York Convention, and any other potential applicable law. This provision allows a party seeking enforcement to avail itself of whichever choice is best suited for enforcement, whether under domestic law, regional agreement, or under the New York Convention. Additionally, if an arbitral award is later set aside and not enforced in one country (i.e. the country where the arbitral awards was made) for reasons under Article V of the New York

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277 Maniruzzaman (272) 340.
278 Maniruzzaman (272) 340-343.
279 Maniruzzaman (272) 341.
281 Maniruzzaman (272) 342.
282 Gaillard (n 32) 76.
283 New York Convention, art VII; Gaillard (n 32) 70.
284 Gaillard (n 32) 70.
Convention (i.e. public policy defence), the arbitral award may still be enforced under Article VII’s more favourable right provision in a different country where enforcement is sought if the domestic law of that country allows enforcement.\textsuperscript{285}

Following the more favourable right provision, an arbitral award which was (1) made within an Islamic country, (2) deemed non-domestic because it was between non-Muslims, (3) applied the New York Convention, and (4) was not enforced in the same Islamic country under Article V(2)(b), could later be enforceable in another country where the domestic law would deem it enforceable.

The more favourable right provision under Article VII does not override the definition contained under Article I(1) of the New York Convention, nor does it override the discretionary power of domestic courts to determine whether an arbitral award is domestic or foreign. The more favourable right provision, thus, does not allow re-enforcement of the foreign arbitral award in the same country, though practically speaking it would be futile to try. Article VII instead gives would be enforcers of a foreign arbitral award another chance to enforce the foreign arbitral award in a more favourable setting, and also to shop for a better forum for enforcement.

\subsection*{2.6. Conclusion}

This chapter aimed to clarify and pave the way for the underlying premise behind the thesis of this research that a set of rules on enforcement in a Uniform GCC Arbitration Law is necessary and can be accomplished through a harmonisation of the Shari’a with the New York Convention and the ICSID Convention. This chapter explains that Shari’a trained judges in courts of GCC states determine whether an arbitral award is foreign or domestic, and in so doing will be influenced by the Shari’a. It is, therefore, important to examine the Shari’a concept of “foreign.” In addressing the definition of “foreign” arbitral award under the Shari’a, one is able to clarify whether the Shari’a distinction between domestic and foreign, as expressed by different scholars,\footnote{Gaillard (n 32) 76-87 (European courts seem to be on consensus about the interplay between Article V and Article VII of the New York Convention, allowing for the most favorable right provision to play out in favor of enforcement, but US courts seem to more skeptical and are likely to hold that an award that was already held unenforceable in another country, especially where it was made, will not be given a second chance at enforcement in the US).}
whether from the Maliki, Hanbali, and Shafi’i or Hanafi schools. This chapter concludes that the New York Convention’s definition of foreign and non-domestic arbitral awards is compatible with the Shari’a. In light of this chapter, the chapters that follow will discuss the concept of conditions for enforcement and challenges to enforcement under the Shari’a, the New York Convention, and domestic arbitration laws of the GCC states.
CHAPTER THREE

CONDITIONS FOR THE ENFORCEMENT OF ARBITRAL AWARDS IN THE GCC STATES

3.0. Introduction

The end goal of any arbitration proceeding is that an arbitral award be easily recognized and enforced.\(^1\) While most arbitral awards are complied with by losing parties to the dispute, a party who has been granted an arbitral award would seek enforcement of the arbitral award where the losing party fails or refuses to comply with arbitral award voluntarily.\(^2\) This situation is called non-compliance with the arbitral award.

The party to whom an arbitral award was granted would have to seek out the assets of the non-complying party. According to Onyema, “enforcement of an arbitral award is typically sought before the relevant courts in the State where assets of the party against whom the award was sought to be enforced [are] located.”\(^3\) Once the assets have been identified, the enforcing party would have to rely on the applicable enforcement rule of the place where the asset is located,\(^4\) and would have to follow the applicable conditions and/or procedures of the enforcing state.

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\(^2\) See Onyema (n 3) 601.

\(^3\) Onyema (n 1) 602.

\(^4\) ibid.
This chapter is about the conditions necessary for the proper enforcement of an arbitral award. Not meeting the required conditions can be a basis for an enforcing court to refuse enforcement or to render the arbitral award null.⁵ In Egypt, for example, the Cairo Court of Appeals for the Seventh Commercial Circuit annulled two arbitral awards because both awards failed to state the “grounds supporting the findings and lacked most of the particulars, i.e., the addresses and nationalities of the parties and a copy of the arbitration agreement.”⁶ The plaintiff in the said case relied on Article 43, paragraph 3 of Egyptian Law No. 27 of 1994, which requires that the “arbitral award must include the names, addresses, nationalities and capacities of the parties, a copy of the arbitration agreement, a summary of the parties’ claims, statements and documents, the text of the ruling, the date and place of issue and the reasons therefore when noting such reasons is mandatory.”⁷

This chapter discusses the conditions required by GCC states for enforcing an arbitral award and argues that domestic arbitration laws set more conditions to enforcement than the Shari’a, the New York Convention, and the ICSID Convention, making domestic arbitration rules the most likely source for the non-enforcement of foreign arbitral awards.

Part I of this chapter discusses the different viewpoints among Shari’a scholars with regards to the conditions for enforcement of an arbitral award. Part I argues that even under the Shari’a, there are conflicting interpretation and application of arbitration rules in general and rules covering the conditions for the enforcement of arbitral awards. GCC states may interpret and apply the Shari’a on the enforcement of foreign arbitral awards, differently. For example, the application of the Shari’a differs between the KSA and the UAE.⁸ The legal system of the KSA is based on the Shari’a, while the legal

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⁶ ibid.
⁷ Egyptian Law No 27 of 1994, art 43, para 3. For an example of a case, which shows how the court considers each of the conditions prior to enforcing an arbitral award, please see The Eleventh Court of First Instance of Damascus, Main Case No 336, Decision No 39/2010, dated June 30, 2010.
system of the UAE is influenced by the Shari’a. Kutty explains that “the UAE arbitration law, unlike its Saudi counterpart, has done away with some of the stringent restrictions such as stipulating the religion and gender of the arbitrator.” Additionally, even within the same country, there may be conflicting interpretation and application the Shari’a depending on which Islamic school of thought one consulted, and there is even conflicting opinions within the same school. According to Baamir, for example, the “Hanafis have two opinions regarding the scope of arbitration.”

Part II discusses the conditions for enforcement of arbitral awards under the New York Convention and the ICSID Convention, and argues that the conditions for enforcement in the Shari’a are largely consistent with international agreements.

Part III discusses the conditions for the enforcement of foreign arbitral awards that are based on the domestic legislation of GCC states. The domestic legislations of GCC states have the strictest sets of conditions for the enforcement of arbitral awards as compared to the Shari’a and the New York Convention. The likelihood that an arbitral award will fail should be attributed to the country specific rules in these GCC states, more particularly protectionist requirements that are subjectively decided by one designated authority, usually the President of the Court, when reviewing requests for leave to enforce an arbitral award. This chapter argues that conditions placed prior to the enforcement of arbitral awards are uniform throughout the GCC states during the enforcement stage, but substantially diverge when a designated authority reviews the request for leave to enforce.

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10 Kutty (n 8) 85; see also UAE Civil Procedure Code, Federal Law No (11) of 1992, art 206(1).
11 Baamir (n 1) 75-76.
12 See AFM Maniruzzaman, ‘International Commercial Arbitration in the Asia Pacific: Asian Values, Culture and Context’ (2002) 30 Int’l Bus Lawyer 11, 512 (showing that there are many factors that contribute to the difficulty in enforcing arbitral awards “non-cooperation tendencies and the anti-arbitration bias of local courts…inefficiency in handling the matters, and a serious lack of understanding of international arbitration rules and conventions…”).
PART I

3.1. Conditions for Enforcement of Arbitral Awards Under the Shari’a

The Shari’a has its own rules on the conditions for enforcement of arbitral awards. For arbitration enforcement proceedings where the Shari’a may also be applicable, there may arise a conflict between Shari’a conditions to enforcement of arbitral awards, and conditions to enforcement dictated by domestic legislation, or regional and international agreements. Even assuming arguendo that no conflict de jure exists involving the Shari’a because an international agreement such as the New York Convention trumps the Shari’a, courts in GCC states would likely remain influenced by the Shari’a. As Saleh stated, “behind the statutes of most Arab countries and in the mind of an Arab party, counsel or arbitrator, lies a rich layer of Shari’a.” In essence, the Shari’a does “form the basis for most arbitration regulations in most Muslim countries nowadays.” It remains important to consider the Shari’a, its conditions for enforcement of an arbitral award, and then to compare those conditions with the conditions for enforcement provided by regional and international agreements, and domestic legislation.

This section begins by discussing the conditions for enforcement of arbitral awards in the Shari’a. Next the section discusses the necessary contents of an arbitral award under the Shari’a, and then the necessary conditions under the Shari’a relating to form and substance of the award. This section generally sets the foundation for the argument that Shari’a conditions for enforcement of arbitral awards are largely consistent with the New York Convention.

It is also possible for the Shari’a to apply even to foreign arbitral awards made outside of an Islamic country (whenever one party is a Muslim). Baamir explains that

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13 Essam Alsheikh, ‘Court Intervention in Commercial Arbitral Proceedings in Saudi Arabia: A Comparative Analytical Study of Shari’a Based Statutes and International Arbitral Practices’ (DPhil thesis, University of Portsmouth 2011); Kutty (n 8) 63; Baamir (n 1); El-Ahdab (n 1).
15 Baamir (n 1) 93.
16 Baamir (n 1) 77.
“Islamic law pays no attention to states, borders and other concepts such as nationality and domicile; it only recognizes two main categories of legal subjects, Muslims and non-Muslims. With regard to Muslims, Shari’a is a personal law and is applicable regardless of whether the Muslim travels or resides in or outside Islamic territory. In other words, Shari’a applies extraterritorially to Muslims.” In such an instance where the Shari’a is applicable, the conditions for enforcement of arbitral awards would have to consider the Shari’a, depending of course on the status and role of the Shari’a within the enforcing state’s domestic legislation.

Finally, this section lays the foundation for the argument that the domestic laws of GCC states require even stricter conditions than the Shari’a for the enforcement of arbitral awards. The more likely reasons for the non-enforcement of arbitral awards, therefore, will not likely come from the Shari’a, but rather from the domestic laws of the GCC states and the application of these conditions by the judiciary.

3.1.1. Enforcement Conditions Under the Shari’a

Most Shari’a scholars are in agreement that an arbitral award is enforceable on its face. Baamir states that “an award is enforceable and binding on the parties from the moment it becomes final and has the same effect and power as a court judgment.” An arbitrator or an arbitral tribunal, however, has no authority to enforce an arbitral award, making it necessary for a court to carry on the enforcement. In enforcing the arbitral award, the court generally cannot revisit the merits of the arbitral award or

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17 Baamir (n 1) 77.
18 Kutty (n 8) 86.
19 In Egypt, for example, despite an arbitral award not strictly meeting the conditions for enforcement of an arbitral award, the Cairo Court of Appeals explained that the omission of particular conditions or an error in all or part of them would not necessarily result per se and principally in annulment, as long as it is possible to provide the missing information or to correct the error that vitiated the arbitral award from the rest of the arbitration documents. Cairo Court of Appeals, Seventh Commercial Circuit, Case No 50/128j (4 January 2012). Such stance by the Cairo Court, unfortunately, is not common practice among the GCC states’ judiciary.
20 “The objective of an arbitral award is to settle the dispute and put an end to the conflict between the parties, known as ‘raf alneza’ in Arabic.” Baamir (n 1) 91.
21 El-Ahmad (n 1) 49.
22 Baamir (n 1) 91.
23 El-Ahmad (n 1) 49.
challenge the reasoning of the arbitrator. In other words, the enforcing court cannot re-arbitrate the arbitral award. The court’s realm is generally limited to examining whether the party seeking enforcement has met the necessary conditions before the court can enforce the arbitral award in question. According to Al-Kenain, Hanbali scholars have required that a judge ratify or approve the arbitral award before it can be enforced.

3.1.2. Contents of the Arbitral Award

Under the Shari’a, the arbitral award must contain four distinct parts:

1. a sufficient description of the merits of the dispute;
2. the findings of facts substantiated by the Shari’a rules of evidence;
3. the reasoning of the arbitral award with reference to the Shari’a source; and
4. the decision itself.

An arbitral award that lacks the finding of fact under the rules of evidence of the Shari’a or the reasoning with reference to Shari’a sources cannot be enforced. These four requirements will certainly create difficulties in international arbitration when an arbitral tribunal or a non-Islamic court deciding the enforceability of an arbitral award is to apply the substantive Shari’a. These requirements, thus, at the outset create difficulties in international arbitration cases involving the Shari’a. In the view of the author of this thesis, the requirements that the content of the arbitral award include the

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24 Alsheikh (n 13).
25 Al-Kenain (n 1) 141-145.
27 Baamir (n 1) 91. In a domestic arbitral award, an arbitrator has the right to make corrections to the award to make it compliant as long as he does so before the award is referred to the court.
28 British judges in Sheikh Abu Dhabi v Petroleum Development, Ruler of Qatar v International Marine Oil Company, Saudi Arabia v Arabian American Oil Company (ARAMCO ), Beximco Pharmaceuticals v Shamil Bank of Bahrain, and Musawi v Re International, for example, when faced with such a choice of applying Shari’a law, have refused to do so. Sheikh Abu Dhabi v Petroleum Development (1952) ICLQ 247; Ruler of Qatar v International Marine Oil Company, 18 ILR (1951) 144; Saudi Arabia v Arabian American Oil Company (ARAMCO), 27 ILR (1958) 117, 120; Beximco Pharmaceuticals v Shamil Bank of Bahrain, [2004] EWCA Civ 19; Musawi v Re International, [2007] EWHC 2981 (Ch) 14 December 2007.
finding of facts substantiated by the rules of evidence of the Shari’a and include the reasoning of the arbitral award with reference to Shari’a sources are the most troubling with respect to international arbitration. These two conditions will now be discussed in more detail.

3.1.2.1. Finding of fact substantiated by the Shari’a rules of evidence

This requirement is troublesome from the perspective of international arbitration because it requires a review of the finding of facts, which in turn would be a review of the merits of the arbitral award, the “double exequatur” that the New York Convention eliminated. Second, that the finding of facts must be substantiated by the Shari’a rules of evidence presupposes knowledge of the Shari’a, and by implication that the arbitrator is Muslim and/or a Shari’a scholar. This would be consistent with the view that the arbitrator must be Muslim whenever one of the parties is a Muslim, yet none of the GCC states requires that the arbitrator must be a Muslim. A non-Muslim arbitrator, however, will likely have difficulty in applying the rules of evidence of the Shari’a and referencing its reasoning to Shari’a sources.

3.1.2.2. The Reasoning of the Arbitral Award

The decision of the Cairo Court of Appeals in Case No. 114/124 is an example of an arbitral award deemed null by the court for failing to give the reasoning of the arbitral award. The court took the same approach as the UNCITRAL Model Law, which adopted the principle of justifying the arbitral award under Article 31(2).
While the majority of Shari’a scholars have not addressed the issue of justifying an arbitral award,34 some scholars like the Shafi’i view that the Shari’a, by analogy to court judgments, requires the arbitrators or arbitral tribunal to state the rationale for the arbitral award.35 According to Moses, the Shafi’i School does require the arbitrator to give reasons for the arbitral award, and failure to do so will render the arbitral award unacceptable.36 Likewise, according to Al-Ramli, some Shafi’i scholars37 have rendered an arbitral award null, just as in the Egyptian case, for failure to justify the arbitral award.

One could argue that the requirement of a rationale or “motivation of the arbitral award” seems to contradict one of the very essences of arbitration, which is the ability of the parties to maintain confidentiality regarding the dispute, its factual circumstance, and the subject of the dispute.38 The reason for the arbitral award would not be made public, however, but remains confidential to the eyes of the reviewing judges. Additionally, Mourre goes further and argues that “the public interest in the development of arbitral case law, in the enhancement of the quality of arbitration, and in providing transparency and predictability to the business community overrides the principle of confidentiality as far as the publication of arbitration awards is concerned.”39 According to Moses, some arbitration laws in the West have even considered the importance of arbitral award rationalization.40

One could also argue that the rationale requirement should no longer be necessary for enforcement since the parties already had the opportunity to raise such

34 Alsheikh (n 13) 50-52.
36 Margaret Moses, The Principles and Practice of International Commercial Arbitration (Cambridge University 2012); Alan Redfern and others (eds), Law and Practice of International Commercial Arbitration (4th edn, Sweet and Maxwell 2005) 304; Alsheikh (n 13) 50.
37 ibid; Al-Ramli (n 35) 240.
39 Mourre (n 38).
40 Moses (n 36) 184.
issues during the arbitral proceedings. Article 52 of the English Arbitration Act and Section 31 of the Indian Arbitration and Conciliation Act, both issued in 1996, allowed the rendition of an arbitral award without reasoning, if the parties have so agreed.\textsuperscript{41}

While the content of an arbitral award will not usually be a surprising issue in practice for purely domestic arbitral awards, it is another and very significant matter whenever a Muslim is involved in an arbitral award which was made outside of an Islamic country.\textsuperscript{42} Since such an arbitral award may be treated as a domestic award under the Shari’a, it must comply with the “contents” requirement. An arbitral award decided in a non-Islamic country by non-Muslim arbitrators, however, will not likely include a factual finding under the rules of evidence of the Shari’a, nor will it likely include references to Shari’a sources in its reasoning. It is even possible for an arbitral award to fail to include a description of the merits. The “contents” requirements is another example of a situation where the distinction between domestic (Muslim) or foreign (non-Muslim) arbitral award under the Shari’a significantly impacts the enforceability of an arbitral award.

3.1.3. Specific Conditions for the Enforcement of Arbitral Awards Under the Shari’a

There are also conditions relating to the form and substance before arbitral awards may be enforced under the Shari’a. An arbitral award must meet the following conditions before it can be enforced: (1) the arbitral award must be in writing, (2) there must be a valid arbitration agreement or a valid agreement to arbitrate, (3) the arbitral award must have been made by a majority or all of the arbitrators, (4) the arbitral award must deal with the subject of the dispute, (5) the subject of the dispute must be capable of settlement by arbitration, (6) there was no flagrant error or injustice, and (7) it is not

\textsuperscript{41} English Arbitration Act 1996, art 52; Indian Arbitration and Conciliation Act 1996, s 31; Mohamed Chalghoum, ‘The Judicial Annulment of the Arbitral Award in Light of Islamic Law’ (2012) Int’l J of Arab Arb, vol 4, No 1. But see, El-Ahdab (n 1) 49 (arguing that a “judge is not empowered to review the merits of the dispute nor the reasoning of the arbitrator”).

\textsuperscript{42} See generally Chapter Two.
contrary to public policy.  

3.1.3.1. Writing requirement

According to El-Ahdab, an arbitral award, by analogy to court judgments (both of which are subject to the same rules), must be in writing under the Shari’a but only if the arbitral award was issued by a court other than the enforcing court. As El-Ahdab puts it, “writing was only required as a proof when the judgment is not enforced by the court that issued it, but by another court.” The written arbitral award evidences the arbitral award of the other court.

Additionally, the Holy Qur’an states the following regarding written documentation: “When you deal with each other, in transactions involving future obligations in a fixed period of time reduce them to writing. Let a scribe write down faithfully as between the parties.” So in practice, court judgments were made in writing. Even then, the written court judgment was not by itself sufficient for proof, and witnesses, called “witnesses of the judge,” were needed, according to Farhun, to state that a judge drafted a particular document.

By analogy, it is possible for courts enforcing an arbitral award to also require witnesses to state that the arbitrators in fact, drafted a particular arbitral award document. If such a witness was needed for court judgments, it is even more necessary to have a witness for arbitral awards that take place outside of the court. In practice, a written arbitral award would likely suffice as evidence of an arbitral award as long as it is duly authenticated and certified. As Alshiekh notes, “all of the Hanafis, Shafiiyyah

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43 El-Ahdab (n 1) 49. “Under Sharia, an arbitration must meet the following conditions if the arbitral award is to be upheld: ‘(a) The dispute must have already arisen (that is future disputes cannot be covered in anticipation), and the dispute is to be defined clearly…; (b) There must be an arbitration agreement; (c) The arbitrator must be appointed by name…; and (d) The arbitrator must be mentally and physically competent.’” See Elana Levi-Tawil, ‘East Meets West: Introducing Shari’a Into The Rules Governing International Arbitrations at The BCDR-AAA’ (2011) 12 Cardozo J of Conflict Resolution 619; Khalid Rashid, ‘Alternative Dispute Resolution in the Context of Islamic Law’ (2004) 8 Vindobona J Int’l Com L 95.
44 El-Ahdab (n 1) 47.
45 ibid.
and Hanabilah state that the arbitrator’s award must be attested in the court or testified through two just witnesses.” These three schools argue that the arbitrator’s power terminates with the issuance of the arbitral award and so, as proof of the arbitration or that of a statement from the arbitrator vis-à-vis the disputing party, attestation is necessary.\(^\text{49}\)

### 3.1.3.2. Valid Arbitration Agreement or Arbitration Clause

Another requirement under the Shari’a is that there must be a valid agreement to arbitrate.\(^\text{50}\) Alsheikh narrows the arbitration agreement requirement to its very essence, and considers the offer and acceptance as “two essential pillars of contract in general [and hence arbitration specifically] under Shari’a.”\(^\text{51}\) Baamir explained the arbitration agreement requirement through the Majalla, stating the conditions as follows: (1) the dispute must already have arisen and be clearly defined (ripeness); (2) the parties must have agreed to arbitration by a reciprocal offer and acceptance and they must say the following to the arbitrator - ‘arbitrate between us because we have appointed you as arbitrator’; (3) the arbitrator must be appointed by name; and (4) the arbitrator must have the capacity to be a witness.\(^\text{52}\)

The most difficult requirement for a valid arbitration agreement is the first one, requiring an existing dispute. This requirement seems counterintuitive to the purpose of modern arbitration agreements. However, the requirement implies that arbitration under the Shari’a was envisioned not as a future mechanism to settle disputes, but as an
alternative to litigation at the time the dispute arises. The invalidity of an arbitration agreement to settle future disputes also stems from the prohibition on *gharar* [an uncertain subject matter]. In Shari’a, a contract whose subject matter did not exist at the time of the conclusion of the contract is not valid. In this sense, an arbitration clause, according to Baamir, could be challenged if it might involve uncertainty or *gharar*. As discussed in Chapter Five, however, all GCC states recognise arbitration agreements as falling outside the prohibition on *gharar*.

In *Claimant (Mr. X Successors) v. Defendant (Government of D Country)*, an International Chamber of Commerce (ICC) case with an Islamic country’s laws governing the contract, thus invoking the Shari’a, the defendant argued that the arbitration agreement was invalid because it violated numerous points under the Shari’a. While the ICC arbitrator stated that the customary law of the Islamic country applied to commercial cases and not the Shari’a, the arbitrator, interestingly, went on to discuss the arguments under the Shari’a, stating that the agreement would have been enforceable under the Shari’a. The arbitrator found that there was no violation of the prohibition on *gharar* because there is “nothing wrong with having two conditions in one contract, provided the whole contract does not thereby become excessively uncertain.”

An alternative view on the existing dispute requirement arose regarding the arbitration clause. This view came from the Hanbali School, which is strict on most matters but very flexible with regards to commercial and financial transactions.

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56 *Claimant (Mr X Successors) v Defendant (Government of D Country)*, ICC Award Case No 8677/FMS, reported in (2009) 4 J of Arab Arb 334.
57 ibid. Interestingly, when it came to the issue of the prohibition on *riba* [interest], the arbitrator found that the contractual provision for interest would not be enforceable and in the end the arbitrator did not award interest, not because of the Shari’a, but rather because the arbitrator deferred the issue of interest to the judiciary.
58 Baamir (n 1) 74-75.
According to Baamir, the Hanbali School recognized the validity of an arbitration clause or any other contractual clauses so long as they are not contrary to public order and do not permit an action prohibited under the Shari’ā.\(^{59}\)

In light of the Hanbali School, this thesis argues that the requirement of a valid arbitration agreement should be an issue determined during the arbitral proceedings. The first requirement for a valid arbitration agreement should be replaced with the Hanbali view, substituted with the inquiry on whether the arbitration agreement or arbitration clause violates public order or involves an act prohibited by the Shari’ā. The rest of the requirements for a valid arbitration agreement could be met during the arbitration proceedings.

An issue, however, remains regarding the method of proving the requirement for a valid arbitration agreement at the enforcement stage. This is especially true of arbitral awards made outside of an Islamic country, where the specific requirement of capacity and name appointment, even if complied with, may not have been put on record. At the very least, an inquiry into the validity of the arbitration agreement would delay the enforcement of an arbitral award and would re-litigate an issue that had been settled at the arbitration proceeding.

It should be noted that, in Baamir’s view, the Shari’ā requires that the arbitration agreement should be documented in writing to prevent any future disputes regarding the arbitration.\(^{60}\) The Yemeni Supreme Court in Commercial Circuit, Panel A, Commercial Challenge No. 35642,\(^{61}\) addressed the Shari’ā requirement that an arbitration agreement must be in writing and must define the subject matter. The Yemeni court stated that the Yemeni statute had adopted the writing requirement in Article 15 of Yemen Arbitration Law No. 22/1992, as modified by Law No. 22/1997, that the arbitration agreement is null if not made in writing and if it fails to define the subject matter of arbitration. The writing requirement under the Shari’ā, therefore, has been adopted into legislation by

\(^{59}\) ibid.


\(^{61}\) Yemen Supreme Court, Commercial Circuit, Panel A, Commercial Challenge No 35642 (16 January 2010).
Islamic countries. The same is true for the GCC states. In modern practice, a copy of the arbitration agreement must be submitted.\textsuperscript{62} The Shari’a, however, has also been interpreted to mean that any way of concluding an arbitration agreement (writing, oral, or any other means) is acceptable as long as it is applied and approved by customs that are acceptable under the Shari’a.\textsuperscript{63} And since the Islamic Fiqh Academy has endorsed the use of electronic communication to form a contract,\textsuperscript{64} then an arbitration agreement would also likely be valid via email or by other electronic means.

### 3.1.3.3. An Arbitral Award Must Have Been Made by a Majority or All Arbitrators

While the Shari’a allows multiple arbitrators, the Shari’a also requires that the arbitral award be made by a majority or all of the arbitrators.\textsuperscript{65} In pre-Islam, multiple arbitrators were unheard of since sole arbitrators settled disputes.\textsuperscript{66} Today, according to Al Kenain, all Shari’a schools permit multiple arbitrators\textsuperscript{67}: the Shafi’i allowing two arbitrators like the case between Ali and Muawiyyah\textsuperscript{68} and the other schools allowing

\begin{footnotes}
\item[62] Egyptian Law of Arbitration, art 41. See also, Egyptian Court of Cassation, Civil and Commercial Circuit, Challenge No 98 of 79 (24 December 2009) (stating that the requirement of submitting a copy of an arbitration agreement is an essential requirement, and the court affirmed the prior annulment of the arbitral award by the lower court because the arbitration agreement was not attached, and attaching it to the arbitration case exhibits is not a sufficient remedy for the fundamental requirement). Though one could argue that the easiest solution is for the enforcing court to defer to the arbitrators’ finding of validity during the arbitration proceedings, such an argument is difficult to propose when the arbitrator is not considered to have capacity to interpret and apply Shari’a. An alternative approach is to view the requirement as having been waived if neither party had raised the necessity for the requirement during the arbitration proceedings. In this regard, the enforcing court could take judicial notice of the validity of the arbitration agreement; any challenges to it thereby having been waived.


\item[64] The Islamic Fiqh Academy, ‘Decision No 52(3/6) about Concluding Contracts by Modern Means Communications’ (1990) 2 (6) The Islamic Fiqh Academy Journal 785.

\item[65] See Alsheikh (n 13) 46; Muhammad Ash-Shirbini, Al-Igna’ Fi Hal Alfath Abi Qina, vol 2 (Dar Ehia Al-Kutob, Al-Arabia, Cairo) 615; Syeikh Zain ad-Din Al-Malibary, Fat’h Al-Muain (Dar Alulu’m, Beirut) vol 4, 220; Muhammad Al-Jawy, Nihayat Az-Zain (Dar Al-Fikr, Beirut) 367. See also Baamir (n 1) 83 (stating that a majority is all that is required).

\item[66] Baamir (n 1) 83.

\item[67] See also Alsheikh (n 13) 46 (“it is permissible for the disputing parties to select more than one arbitrators”).

\item[68] According to Alsheikh, the arbitration case between Ali and Muawiyyah involved two arbitrators. See Alsheikh (n 13) 46.
\end{footnotes}
more than two arbitrators. While the Shari’a does not require an odd number of arbitrators, the Hanbali School does not recommend an even number of arbitrators because of the difficulty of arriving at a majority vote. Baamir opines that the majority of the scholars agree that a majority of the arbitrators is sufficient for an arbitral award to be fair and just, as long as there is consensus among them. Alsheikh, however, explains that the Hanafis discussed the issue of majority vote, and that “in the event of a disagreement among the arbitrators, the decision should be passed by the majority.”

Alsheik further differs from Baamir in their explanation of the majority vote rule, Alsheik clarifying that “a consensus of all of the arbitrators” is required when “there are more than three arbitrators.” What is essential is the proof that the arbitrators themselves gave the arbitral award “by the agreement of all of them,” and so the signatures of the arbitrators on the arbitral award are essential.

In discussing the rule under Article 760 of the Procedure Law of Libya, Supreme Court Judge Al Werfalli compares the ICC rule that provides that “…an award is given by a majority decision. If there be no majority, the award shall be made by the chairman of the Arbitral Tribunal alone.” The Libyan and ICC rules allow for a majority of the arbitrators to agree if all of the arbitrators cannot arrive at a unanimous vote.

A difficulty may arise, however, if one of the arbitrators does not meet the

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69 Al-Kenain (n 1) 105-106.
71 Baamir (n 1) 83.
72 Ash-Shirbini (n 65) 615; Al-Malibary (n 65) 220.
73 Baamir (n 1) 93 (explaining that the Hanbali treatises give four methods for dealing with the problem of unanimity in the arbitrators’ decision).
74 Alsheikh (n 13) 46.
75 See Alsheikh (n 13) 47.
76 ibid; Haidar (n 52) 642.
77 See Alsheikh (n 13) 46; Ash-Shirbini (n 65) 615; Al-Malibary (n 65) 220; Al-Jawy (n 65) 367.
78 Libya Rule of Commercial and Civil Procedure, art 760 (requires that the arbitral award “must include the reasons of the award, its merits, place and date of its render and the signature of the arbitrators”);
79 Libya Rule of Commercial and Civil Procedure, art 760.
80 Werfalli (n 78) 11-14.
81 ibid.
capacity requirements of the Shari’a, as when an arbitrator is a female, or a non-Muslim and a Muslim is a party to the dispute. According to Alsheikh, there is ample support in the Shari’a to allow a woman to act as an arbitrator, and that “there is no proof in the Shari’a that a woman is prohibited from being an arbitrator.”

In Kuwait, for example, the Judicial Arbitration Court of Appeal in Ruling No. 445, ruled that a woman may be appointed as an arbitrator. The Malaki, Shafi’i, and Hanbali Schools, however, do take the position that a woman cannot act as an arbitrator, leaving only the Hanafi School, which allows a woman to act as an arbitrator.

The Saudi Arbitration Act of 2012 has abandoned the old rule requiring an arbitrator to be male. As Hachem explained, “Under the old law, arbitrators of a Saudi arbitral tribunal were required to be Muslim and male, with experience and a good reputation. The new law no longer places a requirement that the arbitrators are male, but they must hold a university degree in either Shari’a or law. However, where the arbitrators form part of a panel, this requirement extends only to the head of the panel.”

As regards the requirement that the arbitrator be a Muslim, most Islamic jurists, according to Alsheikh, agree that it would not be appropriate for a non-Muslim to act as an arbitrator whenever one of the parties is a Muslim. In the Shari’a, there is a rule that the testimony of a non-Muslim is inadmissible against a Muslim, which derives from the Holy Qur’an, which states:
...And never will Allah grant to the Unbelievers a way (to triumph) over the Believers.\textsuperscript{88}

This verse has been broadly interpreted by Shari’a jurists to mean that an arbitrator must be Muslim whenever one of the parties to the dispute is a Muslim.\textsuperscript{89} Whenever all the parties are non-Muslims, then a non-Muslim can act as an arbitrator, a position held by the Hanafis.\textsuperscript{90} Alsheikh, however, argues that “there is no evidence whatsoever, either in the Holy Qur’an or in the Sunna, of a provision stipulating that the arbitrator be a Muslim.”\textsuperscript{91} Regardless, one can anticipate the scenario when a judge, asked to enforce a foreign arbitral award constituting non-Muslim arbitrators and a Muslim party, could view that the arbitral award violates the Shari’a.

Some scholars argue that a non-Muslim can be an arbitrator if appointed by Muslims.\textsuperscript{92} According to Saleh, the distinction is whether the arbitration occurs within or outside an Islamic society, and that the arbitrator must only be Muslim within \textit{dar al-Islam} [Muslim territory].\textsuperscript{93} However, according to Al-Siyabi, the Hanafis believe that non-Muslims can be an arbitrator over disputes within Islamic society.\textsuperscript{94} According to Baz, even the \textit{Majalla} does not require that a judge or arbitrator be a Muslim.\textsuperscript{95} One could, therefore, conclude, as has Al-Siyabi, that “if Muslims consent to refer a dispute to a non-Muslim private individual [as opposed to non-Muslim sovereignty], it may be permitted.”\textsuperscript{96}

Likewise, in \textit{Shipowners v. Charterers},\textsuperscript{97} the Fujairah Federal Court of First Instance enforced a foreign arbitral award under the New York Convention, where the

\textsuperscript{88} The Holy Qur’an, An-Nisa 4:141, Yusuf Ali Translation.
\textsuperscript{89} Al-Shafie (n 30).
\textsuperscript{90} Al-Shafie (n 30).
\textsuperscript{91} Alsheikh (n 13) 31; Al-Shafie (n 30) 305. David and Solomon, Peace Be Upon Them, acted as arbitrators even before the advent of Islam. See The Holy Qur’an, Al-Anbiya 21:78, Yusuf Ali Translation.
\textsuperscript{92} Alsheikh (n 13) 31; Baamir (n 1) 83; El-Ahmad (n 1).
\textsuperscript{93} Mohamed Al-Siyabi, ‘A Legal Analysis of the Development of Arbitration in Oman with Special Reference to the Enforcement of International Arbitral Awards’ (DPhil thesis, University of Hull 2008) 123; Muhammad Al-Sheybani, \textit{Al-Sair Al-Kabir} (Cairo) vol 1, 363-364.
\textsuperscript{94} Saleh (n 5) 436. The concept of \textit{dar al-Islam} is generally no longer applicable in the modern world.
\textsuperscript{95} Al-Siyabi (n 92) 123.
\textsuperscript{96} Salim Baz, \textit{Shark Ahkam al-Majalla} (3rd edn, Dar al-kutub al-‘ilmiiyya, Beirut, Lebanon, 1923) art 1797.
\textsuperscript{97} Al-Siyabi (n 92) 123.
\textsuperscript{98} \textit{Shipowners v Charterers}, (2011) XXXVI YBCA 353 (Fujairah Court of First Instance 2010).
sole arbitrator was appointed with no conditions of religion and gender. Even in the KSA, the strictest adherent to the Shari’a, the Saudi Court of Appeal has upheld arbitration proceedings involving Saudi parties but before non-Muslim arbitrators because the parties had agreed to resolve their disputes by arbitration in the US, France, and Austria.\footnote{The 4th Review Committee, Decision No 43/T/4 (Saudi Arabia 1995); The 4th Review Committee, Decision No 18/T/4 (1992); The 3rd Review Committee, Decision No 15/T/4 (Saudi Arabia 2002).}

In modern practice, the religion of the arbitrators and the parties remain undisclosed, and no GCC state requires as a condition\footnote{The issue of capacity of an arbitrator also becomes a defence to an arbitral award enforcement proceeding, which will be discussed in more detail in Chapter Four, Section 4.1.2.} a statement as to whether the parties or arbitrators are Muslims.\footnote{Alsheikh (n 13).} This likely means that most practitioners and Shari’a jurists today would agree to Alsheikh’s position that the religion of the arbitrators or parties is irrelevant.\footnote{For a discussion on the issue with regards to the challenges to enforcement, see Chapter Four, Section 4.1.2.}

\section*{3.1.3.4. An Arbitral Award Must Deal With the Subject of the Dispute}

The Shari’a also requires that the arbitral award must deal with the subject of the dispute, which would have been defined under the valid arbitration agreement requirement.\footnote{El Ahdab (n 52) 26.} In other words, the enforcing court wants to make sure that an arbitral award is not given for a different dispute, whether or not it relates to the actual subject of the dispute. This requirement limits the scope of the arbitral award to those subjects that the parties have agreed to settle by arbitration. This requirement, however, would seem unnecessary in modern contracts where the arbitration agreement covers the entire contractual agreement as a subject, or “any” dispute that may arise from the contractual agreement would be subject to the arbitration agreement unless otherwise prohibited by law.

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3.1.3.5. Arbitrability or the Subject of the Dispute Must be Capable of Settlement by Arbitration

The Shari’a is not unique in declaring that some types of disputes are not arbitrable. Generally, disputes arising out of contract or commercial matters are arbitrable, but some other types like bankruptcy and the validity of intellectual property are not. Until the mid 1980s, for example, antitrust or competition law was not arbitrable in the US. According to Baamir, “unlike Western laws, Shari’a does not restrict arbitration to commercial matters only.” Yet, the four Shari’a schools disagree as to the scope of arbitration in the Shari’a. The Hanafis have two different viewpoints on the issue: (1) arbitration is allowed in all subject matters except Hodoud [crimes with pre-established punishments] and Qissas [revenge crimes], and (2) arbitration is allowed in Qissas but not in Hodoud. The Malikis limit arbitration to commercial matters only. The Shafi’i have three views on this issue: (1) denies the validity of arbitration if there exist a court in the town, (2) deems arbitration as equal to litigation, and (3) allows arbitration to proceed in all subject matter except in criminal cases. Finally, the Hanbalis give arbitrators the same scope as court judges, limited

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103 There is a distinction between arbitrability and enforceability. Arbitrability deals with the subject matter of the arbitration and whether, tied to the public policy of the country, such subject matter can be arbitrated as a matter of law, while enforceability deals with the enforcement of an arbitration agreement or award.

104 Intellectual property is not arbitrable in Morocco; for example, under Section 306 of the Moroccan Civil Procedure Code because arbitrability of such disputes is considered a “public policy” question. The same applies to cases relating to public law, divorce, and criminal matters. See Leila Hanafi, “Improving the Legal Infrastructure in the Middle East and North Africa Region Through Alternative Dispute Resolution” <http://slconf.uae.ac.ae/images/%D9%85%D8%A4%D8%AA%D9%85%D8%B1%2019%20%20%D8%A7%D9%84%D8%A7%D8%B3%D8%AA%D8%AB%D9%85%D8%A7%D8%B1/part%204%20E/19.pdf> accessed 24 February 2012.

105 Moses (n 36) 216-217 (“The arbitrability of various matters may vary widely from jurisdiction to jurisdiction. Therefore, before parties begin an arbitration in a particular jurisdiction, they should consult with local counsel to ensure that the matters they intend to arbitrate are arbitrable. In general, however, there are few cases where awards have been denied on the ground of non-arbitrability.”)

106 Baamir (n 1) 75.

107 ibid; Alsheikh (n 13) 43.

108 ibid, 75-76.

109 Farhun (n 47).

110 Baamir (n 1) 76.
sometime from criminal matters, but otherwise the same as litigation.\footnote{Al-Kenain (n 1) 49.}

In this regard, the Council of the Islamic Fiqh Academy issued Resolution No 91/8/9, Concerning the Principle of Arbitration in Islamic Fiqh,\footnote{Islamic Fiqh Academy, Resolutions and Recommendations of the Council of the Islamic Fiqh Academy (1st edn, Islamic Development Bank 1985-2000), Resolution No 91/8/9 (Abu Dhabi, UAE 9th session) 1-6 April 1995.} and stated as follows:

“No arbitration is permissible in matters that are exclusively divine rights such as Hudud (matters for which a specific punishment is already defined in the Quran), nor in matters for which a verdict is dependent on the establishment or rebuttal of another verdict concerning a third party over whom the arbitrator has not trusteeship, such as “Li’aan” (cursing somebody), in view of its impact on the child’s right; Nor is arbitration permissible in matters that fall within the exclusive realm of jurisdiction. Any arbitration in matters that are not eligible for arbitration is null and void.”

\subsection*{3.1.3.6. Flagrant Error or Injustice}

The requirement that there was no flagrant error or injustice\footnote{El-Ahdab (n 1) 49; Muhammed Al-Hattab, Mawaheb Al-Jalil (3rd edn, Dar Al-Fikr, Cairo 1992) vol 6, 112.} in the arbitral award is tied directly to the requirement that the arbitral award should include a rationale for the granting of the arbitral award. According to El-Ahdab, the general statement of the reason “is necessary in order to control the award and to know whether or not it contains any flagrant injustice.”\footnote{El-Ahdab (n 1) 47.} This requirement relates to the ability of courts to review the arbitral award and to determine whether there was any flagrant error or injustice.\footnote{ibid.} It is sufficient, according to El-Khadi and El-Ahdab, that the rationale be a general statement of the reasons.\footnote{ibid, El-Kadi (n 35) 190-191.} In some instances, the enforcing judge may ask to interview the arbitrator regarding the rationale for the arbitral award.\footnote{ibid.}

Avoiding flagrant error or injustice should not be a condition for recognition of an arbitral award, but may be a condition for enforcement. As a condition for enforcement, however, this thesis author argues that the burden of proof for raising the
requirement should not be on the enforcing party, but on the disputing party. This would, in essence, render the flagrant error or injustice inquiry as a defence and not a condition for enforcement.

3.1.3.7. Public policy\textsuperscript{118} Under the Shari’a

The concept of public policy under the Shari’a, according to El-Ahdab, is based on the general spirit of the Shari’a and the sources of law of the Shari’a: the \textit{Holy Qur’an}, the Sunna, the Ijma, and the Qiyas.\textsuperscript{119} It is also based on the principle that “individuals must respect their clauses, unless they forbid what is authorized and authorize what is forbidden.”\textsuperscript{120}

3.1.4. \textit{Res Judicata} Effect of Arbitral Awards

Shari’a scholars agree that an arbitral award is final.\textsuperscript{121} Malaki scholars deem an arbitral award as final as long as it does not violate the main sources of Shari’a.\textsuperscript{122} Hanbali scholars view arbitral awards as final just like court judgments.\textsuperscript{123} Hanafi scholars view arbitral awards as final and can revoke them only if they violate the rules of a disputing party’s mathhab [school].\textsuperscript{124}

The Shafi’i scholars also view arbitral awards as final but they are divided into two camps: whether an arbitral award has a jurisdictional or contractual character. The majority view is that an arbitral award is jurisdictional, while the minority view is that it is contractual in nature.\textsuperscript{125} Under the jurisdictional view, the arbitrator’s authority is elevated, like that of a judge, and the arbitral award is seen as independent from that of

\textsuperscript{118} The public policy defence will be treated in more depth in Chapter Five.
\textsuperscript{119} El-Ahdab (n 1) 49.
\textsuperscript{120} ibid.
\textsuperscript{121} El-Ahdab (n 1) 47-48; Wakim (n 53) 22.
\textsuperscript{122} Baamir (n 1) 92.
\textsuperscript{123} ibid.
\textsuperscript{124} ibid.
\textsuperscript{125} ibid.
the will of the parties. In other words, the parties are bound to the arbitral award as soon as it is made.

The minority view, by contrast, deems arbitral awards as contractual in nature and sees the agreement of the parties as the basis for the arbitral award. As a consequence, a contractual view of arbitral awards also requires the consent of the parties for its enforcement. In effect, the subject matter of the arbitration is res judicata, but its enforcement is only res judicata if the parties also consent to it.

As both views were derived from Imam Shafi’i, it is easier to reconcile these two views. It is practical to state that the majority view will likely prevail, not only because it is the majority view, but also because it is the most reasonable. The minority view seems to be flawed in one important respect: it fails to consider that the parties have already consented to enforcement (1) when they entered into the arbitration clause and (2) when they proceeded with the arbitration process. It would be unreasonable to argue that one entered into an arbitration clause and continued with the arbitration proceeding knowing that any arbitral award rendered therefrom would be unenforceable anyway absent consent to enforce the arbitral award.

Smith and Marrone observed that Islamic countries will often ignore the parties’ choice of law or procedure to be applied to the arbitration, and consistently mandate that for an arbitral award to have res judicata effect [finality], it must be approved by a court. According to Smith and Marrone, “[t]his system of court review means that the rendering of an arbitration award does not ‘necessarily bring finality to a dispute between the parties. Sufficient room is left, procedurally, for either expeditious judicial management or judicial meddling, procrastination, and delay.” The court approval requirement for choice of law and procedure is in principle, generally incompatible with international arbitration norms.

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126 ibid; see also Al-Mawirdi (n 84) vol II, 382.
127 El-Ahdab (n 1) 47-48.
128 ibid; see also Baamir (n 1) 91 (stating that an award is enforceable and binding once it becomes final despite that some scholars require the parties’ approval).
129 Smith and Marrone (n 26).
130 ibid.
PART II

3.2. Conditions for the Enforcement of Foreign Arbitral Awards Under the New York Convention and the ICSID Convention

The New York Convention and the ICSID Convention have a different set of requirements for a party seeking enforcement of a foreign arbitral award than the Shari’a and the domestic laws of each GCC state. This section addresses the conditions for enforcement under the New York Convention and the ICSID Convention.

3.2.1. Conditions for the Enforcement of Foreign Arbitral Awards Under the New York Convention

The New York Convention severely restricts the grounds upon which courts may refuse to enforce foreign arbitral awards based on their domestic law.\(^{131}\) According to Brower and Sharpe, “[p]rior to their accession to the New York Convention, states such as Oman, Qatar, and Saudi Arabia required petitioners seeking enforcement of their foreign arbitral awards to survive domestic court review of the entire merits of the dispute; the foreign award was simply one element of proof of the parties’ rights and obligations. Even when parties were not forced to re-litigate the merits of their disputes, national courts often subjected foreign arbitral awards to the same invasive scrutiny with which they examined domestic awards. Indeed, the laws of many Islamic states failed even to distinguish between international and domestic arbitration.”\(^{132}\)

The enforcement conditions and procedures of the New York Convention are set out under Article III and Article IV.\(^{133}\) Once the assets of a losing party to a foreign arbitral award are located within any Convention State, then Articles III and IV apply.\(^{134}\) According to Onyema, both of these articles are drawn in positive and

\(^{131}\) Brower and Sharpe (n 29); Smith and Marrone (n 26).
\(^{132}\) ibid.
\(^{133}\) New York Convention, art III & IV.
\(^{134}\) In this sense, the court at the seat of arbitration is transformed into an enforcing court, and the arbitral award may be enforced in multiple Convention States where the assets of the non-complying party may
mandatory language and Conventions States may not deviate from these articles in their implementing statutes. Additionally, disputing parties cannot opt out of these articles in their arbitration agreement. Disputing parties, however, according to Onyema, can always avail themselves of a more favourable enforcement regime under Article VII.

3.2.1.1. Article III

Article III of the New York Convention imposes an obligation on Contracting States to enforce foreign arbitral awards. Further, Article III also makes a clear distinction between “conditions” for the enforcement of a foreign arbitral award and “rules of procedures” to be applied to the enforcement of a foreign arbitral award. In other words, the New York Convention only states the necessary conditions and it is up to the Contracting State where the foreign arbitral award is sought to be enforced to apply the procedures of their courts.

Finally, Article III does not allow Contracting States to impose more onerous conditions than the conditions used for the recognition or enforcement of domestic arbitral awards. In other words, Contracting States cannot add more conditions than

be located. Onyema (n 1) 597; Julian Lew, Loulas Mistelis, Stefan Kroll, *Comparative International Commercial Arbitration* (Kluwer 2003) 704. See also Redfern and Hunter (n 36) 434 (“[r]ecognition and enforcement are concerned with giving effect to the award, either in the state in which it was made or in some other state or states”).

135 Onyema (n 1) 597.
136 Onyema (n 1) 597, 598.
137 ibid.
138 New York Convention, art III. “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”
139 Onyema (n 1) 597.
140 The New York Convention also leaves it to the Convention States to designate in its implementing legislation the court or courts that has jurisdiction over the recognition and/or enforcement of foreign arbitral awards, thereby giving that court the power to determine the procedures to apply to the recognition and enforcement of the award. It is possible for one court to be given jurisdiction over recognition and another court to be given jurisdiction over enforcement, as in Brazil. See generally Onyema (n 1) 598, fn 7, 602.
those set in Articles III and IV whenever the New York Convention applies to a foreign arbitral award.\(^\text{142}\)

To the contrary, Contracting States may apply stricter conditions for non-New York Convention arbitral awards, which are arbitral awards the Contracting State “considers” domestic and purely domestic arbitral awards.\(^\text{143}\) By implication, since Contracting States have the discretion\(^\text{144}\) to determine which arbitral awards are foreign or domestic, it is theoretically possible for the GCC states to circumvent the conditions of Articles III and IV, and thereby apply stricter conditions, by ruling that an arbitral award is domestic and not foreign. In the context of the GCC states and the Shari’a, this situation could apply whenever one of the parties is Muslim.\(^\text{145}\)

### 3.2.1.2. Article IV

According to van den Berg, Article IV of the New York Convention\(^\text{146}\) is designed to place the most minimal conditions for the enforcement of foreign arbitral awards.\(^\text{147}\) An error of fact or law cannot be a ground for the refusal of enforcement.\(^\text{148}\)

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\(^{142}\) ibid.

\(^{143}\) See generally Chapter Two; Onyema (n 1) 599, fn 12.

\(^{144}\) ibid.

\(^{145}\) See generally Chapter Two.

\(^{146}\) New York Convention, art IV. Article IV states as follows:

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
   
   (a) The duly authenticated original award or a duly certified copy thereof;
   
   (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.”

\(^{147}\) See Albert van den Berg, ‘Why Are Some Awards Not Enforceable?’ in Albert van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No12 (Kluwer 2005) 299, 323 (‘Art. IV is set up to facilitate enforcement by requiring a minimum number of conditions to be fulfilled by the party seeking enforcement….’). See also Klaus Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (Kluwer 2006) vol II, 591-599 (“All a party seeking enforcement of an award needs to do under the system of the New York Convention is to submit the original of the arbitration agreement or a certified copy of it and a duly authenticated original of the award or a certified copy.”)

\(^{148}\) Berger (n 147) 597-598, quoting *International Standard Electric Corp v Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F Supp 172, 177 (SDNY 1990)* (“The whole point of arbitration is that the merits of the dispute will not be reviewed in the courts, wherever they be located…” [and] “…that the Courts should review arbitrations for procedural regularity but resist inquiry into the
An enforcing party must produce two primary documents under Article IV: (1) the arbitration agreement, which evidences the consent of the parties to arbitrate; and (2) the final arbitral award, which evidences the decision of the arbitrators.  

The Lebanese court in Civil Court of Appeal, Beirut, First Chamber, Decision No. 718/2011 stated that the non-existence of an arbitration agreement or the existence of a void arbitration agreement can result from (1) the refusal of the party who is challenging the arbitral award by means of annulment to resort to arbitration, (2) the fact that the clause is not written, (3) the non-inclusion therein of the appointment of the arbitrator or of the method for his appointment, (4) the fact that it relates to a non-arbitrable dispute, or (5) the nullity of the original contract containing it.

### 3.2.1.3. Specific Conditions for the Enforcement of Foreign Arbitral Awards under the New York Convention

**A. Final Arbitral Award Requirement**

The first condition for the enforcement of a foreign arbitral award under Article III and IV is that the foreign arbitral award is final (has *res judicata* effect) before it can be enforced. The New York Convention, however, does not define “final award” in any of its provisions, and it is also silent on what law would determine whether an arbitral award is final.

Since the arbitral award evidences the “entitlement of the party seeking enforcement,” it must be a “duly authenticated original award or a duly certified copy...}
thereof.” The enforcing court relies on the arbitral award to determine what it was that the arbitral tribunal had awarded, and what it must order the defaulting party to comply with. Cases have shown that the arbitral award requirement is compulsory, and courts in Italy and Hague have refused enforcement unless there is a complete duly authenticated original or a duly certified copy of the arbitral award.

B. Valid Arbitration Agreement Under Article II: Written and Arbitrable

The next requirement under Article IV (b) is the original arbitration agreement. It is possible for an enforcing court to refuse enforcement if the arbitration agreement does not meet the validity requirements of Article II. Other courts with a pro-enforcement view, however, have enforced the foreign arbitral award by finding a valid arbitration agreement, or in the absence of an arbitration agreement based on a waiver by failing to raise the issue during the arbitration proceedings, or by allowing the Applicant to cure the defects later. Still, other courts require the production of the arbitration agreements at the time of application.

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155 New York Convention, art IV(1)(a).
157 New York Convention, arts II and IV; Onyema (n 1) 606.
158 Moscow Dynamo v Ovechkin, 412 F Supp 2d 24 (DDC 2006) (a US court refused enforcement because the arbitration agreement failed to meet the requirements of Article II of the New York Convention as required by Article IV(1)).
Enforcing courts, thus, may look at whether the arbitration agreement is valid under Article II of the New York Convention. In so doing, enforcing courts can revisit the validity of the arbitration agreement, including, pursuant to Article II, whether (1) it was in writing\(^\text{162}\) and (2) whether the subject matter is capable of settlement by arbitration (“arbitrability”).\(^\text{163}\)

In *Comandate Marine Corp v. Pan Australia shipping Pty Ltd*,\(^\text{164}\) the Full Federal Court of Australia held that this writing requirement may be satisfied by clear, mutual documentary exchange showing the terms of, and the parties’ assent to the arbitration agreement. Thus, the scope of “in writing” in Australia is sufficiently broad to include the situation in which a formal agreement has not yet been printed and signed by the parties.\(^\text{165}\) The Swiss Supreme Court’s position is consistent with the Australian position.\(^\text{166}\) Interestingly enough, the new French Arbitration law (Decree dated 13 January 2011) has got rid of the formal requirement of an arbitration agreement in international arbitration (Article 1507).\(^\text{167}\) It may herald the modern international arbitration practice.

It is necessary to note that scholars like van den Berg, taking the pro-enforcement view, argue that the enforcing party need not comply with Article II(1) because “the original or certified copy of the document is *prima facie* an arbitration agreement.”\(^\text{168}\)

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\(^{162}\) Article II(2) provides as follows: “The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” New York Convention, art II(2).

\(^{163}\) Article II(1) of the New York Convention states as follows: “Each Contracting State shall recognize an agreement in writing, under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.” New York Convention, art II(1).

\(^{164}\) *Comandate Marine Corp v Pan Australia shipping Pty Ltd*, [2006] FCAFC 192.


agreement…”168 An enforcing court which reads the language of Article IV(b) otherwise would proceed with an analysis of Article II. The Supreme Court of Slovenia, however, in Slovenia: Vrhovno sodišče Republike Slovenije, Sklep Cpg,169 stated, “the Contracting States of the NYC are bound by Article II to recognize a written arbitration agreement.”

There is also the signature requirement under Article II(2), requiring the signature of parties on the arbitral clause or arbitration agreement. In an arbitral clause, the validity of the arbitration agreement would depend on the validity of the main contract itself in which the arbitral clause relies.170 In an arbitration agreement, however, that is separate from the main contract (i.e. the severability doctrine of the arbitration agreement), the issue becomes more complicated. The Swiss Supreme Court in G. SA v. T. Ltd.171 held that a general reference to a separate arbitration agreement suffices even without a signature on the arbitration agreement.172 English courts in Trygg Hansa Insurance Co. Ltd. v. Equitas Ltd.173 and AIG Europe (UK) Ltd. v. Ethniki,174 however, hold that the main contract and the arbitration agreement must be signed unless they are included in an exchange of letters or telegrams. The court in Ruler of Qatar v. International Marine Oil Co. Ltd.175 held that exchange of letters or telegrams that are unsigned176 satisfies the requirement of Article II(2) as an alternative

168 van den Berg, ‘New York Convention’ (n 141) 648.
169 Slovenia: Vrhovno sodišče Republike Slovenije, Sklep Cpg, 2/2009, CLOUT Case No 1174.
171 G SA v T Ltd, (1990) XV YBCA 509 (Switzerland Supreme Court 1989); Ibeto Petrochemical Industries, Ltd v M T BEFFEN, 412 F Supp 2d 285 (SDNY 2005). See also Gaffin v Schumacher Homes of Cincinnati, Inc., 2013 Ohio 992, Case No 2012 CVH 0900 (Ohio Twelfth App Circuit, 8 March 2013) (holding that extrinsic documents relating to Scope of Work related to and were covered by the arbitration clause even if they were not attached to the arbitration agreement).
172 See also Gaffin v Schumacher Homes of Cincinnati, Inc, 2013 Ohio 992, Case No 2012 CVH 0900 (Ohio Twelfth App Circuit, 8 March 2013).
174 AIG Europe (UK) Ltd v Ethniki, [2000] 1 All ER (Comm) 65 (CA).
to the signature. Courts have extended this rule to modern electronic communications like the fax and email.\textsuperscript{177}

While the New York Convention permits the enforcing state to determine the validity of the arbitration agreement between the parties, the enforcing court can only do so “under the law that the parties have chosen” and if the parties have failed to so choose, then “the law of the state where the award was made.”\textsuperscript{178} In this regard, GCC courts could apply the Shari’a only if the parties have chosen the Shari’a to determine the validity of the arbitration agreement.\textsuperscript{179}

According to Carbonneau and Jaeggi, “the enforcing state is empowered to decide the arbitrability of the dispute under its local standard”\textsuperscript{180} that in the context of the GCC states would also include arbitrability under the Shari’a. Further, “if the grounds of a dispute cannot be settled by arbitration under domestic law, a court may refuse to enforce an award granted through a foreign arbitration panel.”\textsuperscript{181} The same defence was raised and successfully barred enforcement of a foreign arbitral award against Libya in \textit{Libyan American Oil Co. (LIAMCO) v. Socialist People’s Libyan Arab Jamahirya},\textsuperscript{182} where Libya argued that nationalization was not subject to arbitration.

\footnotesize


\textsuperscript{179} Choosing the Shari’a to govern an arbitration agreement, however, has not had a positive history in the English courts, which have not recognized the Shari’a as a proper choice of law. See generally Christina Dias da Costa, ‘Shari’a (Islamic Law) in International Arbitration: How They Got it Wrong – an analysis on the acceptance (or lack thereof) of the Shari’a as the law applicable to the substance of an arbitration’ 9 YAR 2012; Sheikh Abu Dhabi v Petroleum Development, (1952) ICLQ 247; Ruler of Qatar v International Marine Oil Company, 18 ILR (1951) 144; Saudi Arabia v Arabian American Oil Company (ARAMCO), 27 ILR (1958) 117, 120; Beximco Pharmaceuticals v Shamil Bank of Bahrain, [2004] EWCA Civ 19; Musawi v Re International [2007] EWHC 2981 (Ch) 14 December 200.

\textsuperscript{180} Carbonneau and Jaeggi (n 178).

\textsuperscript{181} ibid.

\textsuperscript{182} Libyan American Oil Co v Socialist People’s Libyan Arab Jamahirya, 482 F Supp 1175 (DDC 1980), vacated without op, 684 F2d 1032 (DC Cir 1981).
C. Authentication and Certification

Article IV(1) of the New York Convention requires prior to enforcement “the duly authenticated original award or a duly certified copy thereof.”183 “Authentication” refers to the attestation of the signature as genuine while “certification” refers to the attestation of a copy of a document as a true copy of the original. If a duly certified copy was submitted, there is no need to authenticate the signatures, as the certified copy was an alternative provided by the New York Convention. In Civil Court of Appeal, Beirut, First Chamber, Decision No. 718/2011,184 the Lebanese court had to address the request for annulment because the arbitral award was not signed by all members of the arbitral tribunal, but only by two arbitrators. Therefore, according to the Lebanese Civil Court, if the arbitral award does not feature the signature of the minority as a result of refusal to sign, the majority should mention this and sign in confirmation thereof so that the arbitral award will be considered as signed by all the arbitrators.

The more interesting issue is what law governs the validity of the authentication and certification. Some enforcing courts have stated that either the law of the forum (where the arbitral award is enforced) or the law of the origin (where the arbitral award was made) could govern the issue.185 Another position, taken by Lew and Platte, is that the law of the forum governs the issue of the validity of the authentication and certification.186 Still another position, held by Onyema, argues that the law of the origin makes the most sense, since it creates uniformity and would eliminate the need for authentication and certification at each place where the arbitral award is to be enforced.187 This thesis author agrees to the law of the origin approach because it is the most sensible in terms of policy and the purpose behind the New York Convention. GCC courts ought to adopt this view since it would also likely create uniformity among

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183 The authentication requirement of Article IV(1) ought not be confused with the signature requirement of Article II(2), the first covering the arbitral award, which is the main concern of this chapter, while the second covering the arbitration agreement.
184 Civil Court of Appeal, Beirut, First Chamber, Decision No 718/2011 (23 May 2011).
186 See Lew, Mistelis, and Kroll (n 134) 704; Platte (n 154) 307 (preferring the law of the place of enforcement).
187 Onyema (n 1) 609-610.
the GCC states, and eliminate needless arguments over formalities. It is very likely in a GCC state that a court may not enforce a foreign arbitral award because one of three signatures is not properly authenticated.\textsuperscript{188}

\textbf{D. Translation}

Article IV(2) of the New York Convention, for obvious practical reasons, requires that the Applicant submit a duly certified translation of the foreign arbitral award if the foreign arbitral award is not in the official language of the enforcing court’s country. Some arbitration centres like the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) provide that foreign arbitral awards shall be issued in Arabic and in the other language adopted in the arbitration proceedings.\textsuperscript{189} This requirement does not seem to create any controversy as the translation can be made by anyone and anywhere so long it is duly certified.\textsuperscript{190} Domestic courts, however, can add to this requirement and demand translation of a foreign law, as the Dubai Court of Cassation required an English claimant to present after arguing that English law permits the execution of foreign arbitral awards made in the UAE to establish reciprocity.\textsuperscript{191} The Dubai Court of Cassation rejected the appeal because the English claimant failed to provide the provisions of the English law translated into Arabic as material evidence.\textsuperscript{192}

\textsuperscript{188} \textit{SODIME - Societa Distillerie Meridionali v Schuurmans & Van Ginneken BV}, (1996) XXI YB Com Arb 607 (Corte di Cassazione, 14 March 1995, No 2919) (Court refused enforcement of award with only two of three arbitrators properly authenticated).


\textsuperscript{190} Onyema (n 1) 610-611.


\textsuperscript{192} ibid.
3.2.1.4. The Public Policy Exception in the New York Convention

The New York Convention has an exception that has created controversy in the context of international arbitration in the Islamic world: the New York Convention allows courts to repudiate foreign arbitral awards that are “contrary to the public policy of that country.”  

Carbonneau and Jaeggi stated it aptly:

This clause has the effect of relegating the ultimate decision on the efficacy of the Convention to the good faith of the Contracting States... Basically, the judge may refuse recognition and enforcement if he finds that it would be contrary to the public policy of his country.

Courts in the GCC states have rejected foreign arbitral awards on domestic public policy grounds, including grounds claiming a violation of the Shari’a. The issue of public policy will be discussed in more detail in Chapter Five.

3.2.2. Conditions for the Enforcement of Foreign Arbitral Awards Under the ICSID Convention

The rules concerning the forms and content of the arbitral award under the ICSID Convention, or in other words the conditions required to enforce an arbitral award “do not differ substantially from other international commercial arbitration rules.” The ICSID Convention requires the arbitral award to be in writing and signed by the tribunal. Additionally, the ICSID Convention requires the arbitral award to

194 Carbonneau and Jaeggi (n 178) 173.
195 Roy (n 193).
197 Lucy Reed, Jan Paulsson and Nigel Blackaby, Guide to ICSID Arbitration (Wolters Kluwer 2010) 89.
deal with every question presented. In other words, the arbitral award must address the entire scope of the arbitration agreement. Like the Shari’a, which according to El-Ahdab requires the arbitrators to state in the arbitral award the reasons upon which the arbitral award was based, the ICSID Convention also requires the tribunal to state in the arbitral award “the reasoning upon which [the arbitral award] was based.” For example, in Mitchell v. The Democratic Republic of Congo, an ad hoc committee set aside an ICSID arbitral award because the tribunal failed to state its reasons for the arbitral award.

The ICSID Convention provides in Article 54(1) that arbitral awards and pecuniary obligations stemming from arbitral awards are to be recognised by each state “as if it were a final judgment of a court in that State.” In this regard, the main advantage of the ICSID Convention, according to Bowman, is that it is largely self-contained, and leaves very little room for state and enforcing courts to review the arbitral award, with the prominent exception of the state immunity defence. According to Smolik, Article 53(1) of the ICSID Convention limits the parties from challenging the arbitral award by resorting to national courts because parties cannot resort to “any other remedy except those provided for in this Convention.” It is likewise mandated under Article 26 that the “review regime” of the ICSID arbitral

199 Smolik (n 198); ICSID Convention (n 196) art 48(3).
200 El-Ahdab (n 1) 47; Al-Ramli (n 35); El-Kadi (n 35); Alsheikh (n 13) 50-52. See also ch 3, s 4.1.2.
201 Smolik (n 198)162; ICSID Convention (n 196) art 48(3).
202 Maxwell (n 202).
203 ICSID Convention (n 196) art 54(1).
204 ICSID Convention (n 196) art 54(1).
205 Antonio Parra, ‘The Enforcement of ICSID Arbitral Awards’ (24th Joint Colloquium on International Arbitration, Paris, 16 November 2007); ICSID Convention (n 196) art 54(1).
207 AFM Maniruzzaman, ‘Sovereign Immunity and the Enforcement of Arbitral Awards Against State Entities: Recent Trends in Practice’ in American Arbitration Association, Handbook on International Arbitration Practice (JurisNet LLC 2010) ch 28, 335 (According to Maniruzzaman, the state can irrevocably waive state immunity by consenting to the arbitration, though a simple “undertaking to arbitrate” is not by itself consent amounting to a waiver under Article 55).
208 Smolik (n 198)163.
209 ICSID Convention (n 196) art 53(1).
award is exclusive to the ICSID tribunal.\textsuperscript{210}

However, under Article 49 of the ICSID Convention, either party may file within 45 days from the rendering of the arbitral award, a request that the tribunal decide on an issue it omitted or that the tribunal rectify a “clerical, mathematical, or similar error.” The ICSID ad hoc committee in \textit{Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic},\textsuperscript{211} stated that rectification is meant to provide parties with an opportunity to review the arbitral award and alert the tribunal to obvious mistakes, though it is not meant as a mechanism to reconsider the merits. In other words, the rectification mechanism is a process where conditions for enforcement of an arbitral award can be tested.

According to Parra, enforcement of the arbitral award may be obtained from the competent court of a Contracting State under Article 54(2) of the ICSID Convention on simple presentation of a copy of the arbitral award certified by the Secretary-General of the Centre.\textsuperscript{212} In this regard, the ICSID Convention in comparison to the New York Convention has opted for a “simplified” enforcement procedure, as so recognized by courts in the \textit{Benvenuti & Bonfant} case and the \textit{Societe Ouest Africaine} case.\textsuperscript{213} The courts in \textit{Benvenuti & Bonfant} and \textit{Societe Ouest Africaine} pointed out the “simplified” regime for enforcement adopted by the ICSID Convention,\textsuperscript{214} and also distinguished the

\begin{footnotesize}
\textsuperscript{210} Smolik (n 198) 164; ICSID Convention (n 196) art 26.
\textsuperscript{211} \textit{Compania de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic}, ICSID Case No ARB/97/3, Decision of the ad hoc Committee on the Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award (28 May 2003) para 11.
\textsuperscript{212} Parra (n 205); ICSID Convention (n 196) art 54(2); Georges Delaume, ‘ICSID Arbitration and the Courts’ (1983) 77 Am J of Int’l L 784, 785 (stating that “under the Convention, the role assigned to domestic courts relates to the recognition and enforcement of ICSID awards. As discussed below, that role is one of judicial assistance intended to promote the effectiveness of such awards.”).
concept of enforcement versus execution, the latter of which is beyond the reach of the ICSID Convention.\textsuperscript{215} According to Parra, “execution is, in accordance with Article 54(3) of the Convention, governed by the law on the execution of judgments in force in the country where the execution is sought.”\textsuperscript{216} However, according to Reed, Paulsson and Blackaby, while states are mandated under the ICSID Convention to recognize arbitral awards, ultimately, investors have very little recourse if states “refuse to recognize, enforce, and execute ICSID awards in spite of their Convention obligations.”\textsuperscript{217}

PART III

3.3. Conditions for the Enforcement of Arbitral Awards in the GCC States

3.3.1. Overview of Conditions for Enforcement of Arbitral Awards in GCC States

A general comparison of the conditions placed by the six GCC states on an arbitral award prior to its enforcement shows a consistency among the GCC states, and may mean that enforcement could become predictable.\textsuperscript{218} The six GCC states have much more in common with each other than differences in terms of the conditions they

\textsuperscript{215}Parra (n 205).
\textsuperscript{216}Parra (n 205); ICSID Convention (n 196) art 54(3).
\textsuperscript{217}Reed, Paulsson and Blackaby (n 197) 109.
\textsuperscript{218}It is also interesting to note that the conditions for recognition and enforcement of an arbitral award placed by GCC states is not substantially different from the conditions placed by the UK, where the requirements of an enforceable award stem from a combination of statute (Arbitration Act of 1996), common law, party autonomy, and any applicable rules. In the UK, requirements can be divided into formal and substantive requirements. The formal requirements include (1) writing and signature, (2) identification of the parties, (3) recitals, (4) reasons for the award, (5) date, (6) statement of the seat, (7) identification of issues/claims, and (8) notice. The substantive requirements include (1) cogency, (2) completeness, (3) certainty, (4) finality, (5) enforceability, (6) jurisdiction, (7) legality, (8) possibility, (9) consistency, and (10) compliance with submission. For a more detailed discussion of these UK requirements, see Ray Turner, \textit{Arbitration Awards: A practical approach} (Blackwell Publishing 2005) 8-13.
place prior to the enforcement of an arbitral award. As a tool for comparison, this thesis author has created a Chart of the conditions, cross referenced with the respective GCC states, the Shari’a, and the New York Convention.

After careful review and study of the Chart, this thesis author has created three general categories of conditions required by the arbitration laws of GCC states prior to the enforcement of arbitral awards: (1) conditions relating to the form and content of the arbitral award, (2) conditions relating to documents that must accompany the arbitral award, and (3) conditions relating to the request for leave to enforce. Of the first two categories of conditions, GCC states, for the most part, share the same requirements save for minor differences in formalities. It is the third category of conditions where GCC states, though still sharing substantial similarities, begin to show variations.

3.3.2. Specific Conditions for the Enforcement of Arbitral Awards in GCC States

3.3.2.1. Conditions Relating to the Form and Content of the Arbitral Award

These conditions relate to the arbitral award itself. Though these conditions may be easily dismissed as mere formalities, there are reasons for their inclusion in the arbitration laws of GCC states, usually relating to jurisdiction, or the authenticity and validity of the arbitral award. These conditions include the following:

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219 See generally El-Ahdab (n 1); Appendix I, Chart; Essam Al-Tamimi, Practitioner’s guide to arbitration in the Middle East and North Africa (JurisNet LLC 2009); Herbert Smith LLP, ‘Guide to Dispute Resolution in the Middle East’ (Herbert Smith, 2010/2011) <http://www.herbertsmith.com/NR/rdonlyres/EBFC4E7F-223C-41CE-941E-FF5C532C5830/0/GuidetoDisputeResolutionintheMiddleEast_worldwideversion.pdf> accessed 19 March 2014.

220 See Appendix I, Chart. This Chart was based largely on the books by El-Ahdab, Al-Tamimi, and other various sources already referenced throughout this research.

221 See generally El-Ahdab (n 1); Appendix I, Chart.

222 See Appendix I, Chart.

223 El-Ahdab (n 1).

224 ibid.
(1) the arbitral award itself;
(2) the arbitral award must be in writing;
(3) the arbitral award must be signed by a majority of the arbitrators;
(4) the findings of the arbitral award;
(5) the reason for the arbitral award;
(6) the date of issuance of the arbitral award;
(7) the place of issuance of the arbitral award; and
(8) the name and addresses of the parties and arbitrators, including the nationalities and capacities of the arbitrators.225

The only factor where GCC states are split as to its requirement is in regards to the names and addresses of the parties and arbitrators.226 Failure to include this factor in Oman,227 KSA,228 and the UAE229 would render the arbitral award unenforceable.

In Bahrain, the Court of Cassation in Challenge No. 259/2009, Second Circuit (4 May 2010),230 held that in a challenge to the arbitral award because the arbitral award failed to fulfil the conditions requiring an arbitration agreement in writing and that relates to the subject matter of the dispute, the arbitral award was still enforceable because of confirmation of the arbitration agreement in writing and the determination of the subject matter of the dispute in a memoranda during the proceedings. While the Bahraini court’s ruling in this case seems too liberalized, the case is an example that particular judges may apply the conditions strictly or liberally.231

In Nahed Showa v. Bab el Faraj Company, First Civil Court of Appeal in

225 See generally El-Ahdab (n 1); Appendix I, Chart. The condition in point 8 applies only in half of the GCC states.
226 For example, see the Egyptian case where the arbitral award was nullified for failing to state the name and address of the parties. Cairo Court of Appeals, Seventh Commercial Circuit, Case No 114/124 (2 December 2008), (2010) 2 J of Arab Arb 126-127.
227 El-Ahdab (n 1) ch 11.
228 El-Ahdab (n 1) ch 13.
229 El-Ahdab (n 1) ch 17.
231 For comparison, see Damascus First Civil Court of Appeal, Main Case No 2, Decision No 11 (21 January 2010) (the court rejected the request to grant leave for enforcement of the arbitral award because it did not mention at the beginning the names of the parties to the arbitration, did not include a copy of the arbitration agreement or a summary thereof, and did not mention the date as provided for in Article 39 of the Syrian Arbitration Law).
Aleppo, Decision rendered 23 Dec 2010, the Syrian court refused to enforce an arbitral award when the majority of the arbitral tribunal rendered an arbitral award but did not reply in the arbitral award to the dissenting arbitrator’s opinion. The court stated the condition requiring reply to a dissenting opinion is a matter of public policy and well settled law, which a court can raise ex officio.

There are also differences regarding the signature requirements of arbitrators. While all of them require a majority of the arbitrators, Oman, KSA, Bahrain, and Kuwait require the arbitral award to indicate the refusal to sign by any arbitrator. Additionally, Kuwait requires the majority to sign the refusal, and Oman requires that the arbitral award state the reason for the refusal. In the UAE, according to Federal Supreme Court, Petition No 32, 23rd Judicial Year, Article 212 (5) of the UAE Code of Civil Procedures provides that the arbitral award should be signed by the arbitrators, should have a summary of the litigants’ statements, evidence, grounds for the decision, and the date and place of the arbitral award. The Dubai Court of Cassation, Petition No 233/2007, judgment dated 13 January 2008, clarified this rule and held that the signature of the chairman is not sufficient in cases where several arbitrators are hearing the dispute. Moreover, the arbitrators shall sign both the reasoning and the dispositif; otherwise the arbitral award is deemed void. However, in Dubai Court of Cassation, Petition No 88/2001, the Court of Cassation has held that the presence of the signatures of all the arbitrators on the arbitration minutes is not a prerequisite for the validity of the arbitral award.

The reasoning for the arbitral award, just like in the Shari’a, is required in all GCC states, but may be waived by the parties in Oman and the UAE.

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233 See Appendix I, Chart; El-Ahdab (n 1).
234 ibid.
236 Dubai Court of Cassation, Petition No 831, 25th Judicial Year, Judgment of 23 May 2004.
237 ibid.
239 El-Ahdab (n 1) 47; Al-Ramli (n 35); El-Kadi (n 35); Alsheikh (n 13) 50-52. See also Section 3.1.2.
240 El-Ahdab (n 1).
constitutes sufficient reasoning will depend on the facts of the case, but as the Jordanian court has held in Court of Appeal, Request for Annulment No. 203/R/2009,\textsuperscript{241} examining the claims, pleas and defences of both parties, and discussing and analyzing the evidence submitted by the parties constitute sufficient reasoning. In Kuwait, the place of issuance of the arbitral award is essential, the lack of which would prevent enforcement, as it determines whether an arbitral award is foreign or domestic.\textsuperscript{242}

### 3.3.2.2. Conditions Relating to Documents That Must Accompany the Arbitral Award

Another set of conditions relate to documents that must be attached to the arbitral award prior to submitting it to the designated court for a request for leave to enforce.\textsuperscript{243} These conditions allow the enforcing court to review the substance of the arbitral award before granting an enforcement order.\textsuperscript{244} While the enforcing courts in the GCC states are generally not allowed to examine the merits of the arbitral award, the enforcing court would need to review the substance of the arbitral award to determine the other conditions such as a public policy violation or whether an arbitral award is arbitrable in the country where enforcement is sought.\textsuperscript{245} These documentary conditions include (1) a copy of the arbitration agreement; (2) summary of the parties’ statements, contentions, or arguments; and (3) supporting documentary evidence.\textsuperscript{246} The Appendix I Chart shows that the GCC states are in agreement on these requirements.\textsuperscript{247}

Article 212(5) of the UAE Civil Procedure Code requires that the arbitral award should contain a copy of the arbitration agreement.\textsuperscript{248} The Dubai Court of Cassation,

\textsuperscript{241} Jordanian Court of Appeal, Request for Annulment No 203/R/2009 (23 March 2010).
\textsuperscript{242} El-Ahdab (n 1) ch 7.
\textsuperscript{243} El-Ahdab (n 1).
\textsuperscript{244} ibid.
\textsuperscript{245} ibid.
\textsuperscript{246} El-Ahdab (n 1).
\textsuperscript{247} See Appendix I, Chart.
\textsuperscript{248} Supreme Federal Court, Petition No 438, 23rd Judicial Year, Judgment of 12 July 2004; Federal Supreme Court, Petition No 831, 25th Judicial year, Judgment of 23 May 2004. See also Article 41 of the Egyptian Law of Arbitration; Egyptian Court of Cassation, Civil and Commercial Circuit, Challenge No. 98 of 79 (24 December 2009) (stated that submitting a copy of an arbitration agreement is an essential requirement, and the court affirmed the prior annulment of the award by the lower court because the
Petition No. 103/2011, reversed the appellate court’s annulment of an arbitral award stating that the contested decision misapplied the law regarding the inclusion of the arbitration agreement. Instead, the Court of Cassation stated that Article 212(5) does not provide that the arbitral award should initially contain the entire arbitration agreement but should only mention its content. According to the Court of Cassation, the legislator’s purpose behind the requirement to confirm such particulars, i.e. the copy of the arbitration agreement, in the same arbitral award, is to make sure the arbitral award is used within the limits of the arbitrator’s power under the arbitration agreement. While it is a fundamental requirement for the validity of the arbitral award, the requirement to have a copy of the arbitration agreement included in the arbitral award does not equate with the quoting of the exact provisions of the agreement; it is sufficient to state the content thereof including the agreement on arbitration but without changing the meaning.

3.3.2.3. Conditions Relating to the Request for Leave to Enforce

The last set of conditions relate to the request for leave to enforce, and the basis on which the court may deny the granting of an enforcement order, despite that the first two sets of conditions above have been met. It is in these sets of conditions that GCC states begin to diverge on the rules. These conditions relating to the request for leave to enforce can be further divided into four categories: (1) public policy requirements,
(2) formalistic requirements, (3) protectionist requirements, and (4) miscellaneous requirements.

It should be noted that in a request for a leave to enforce, the court is not supposed to examine the merits of the case. The Moroccan court in Commercial Court of Appeal of Casablanca, Commercial Court First Chamber, Order No 679/2010,⁵⁵⁴ on this point, made clear that the president of the court does not have the right to examine, in any way, the merits of the case on the occasion of the request to grant leave for enforcement of the arbitral award.

A. Public Policy Requirements

All the GCC states require that the designated authority, usually the President of the Court,⁵⁵⁵ deny the enforcement of a foreign arbitral award if the foreign arbitral award violates the public policy of the country where the foreign arbitral award is sought to be enforced. To be clear, in addition or aside from the public policy defence under Article V(2) of the New York Convention,⁵⁵⁶ the domestic legislation of each of the GCC states has also formulated its own public policy “requirements” prior to enforcement of foreign arbitral awards. The New York Convention, therefore, uses public policy, not as a condition, but as a basis for non-enforcement.⁵⁵⁷ These domestic public policy provisions, on the other hand, are aimed as conditions for enforcement and are stated in varying degrees and wording, generally more expansive than the New York Convention’s narrowly interpreted public policy defence.

The challenge that the public policy requirement has created is the difficulty in defining it. Each country, and sometimes each judge, may have a different idea of public policy. As Ezrahi puts it, “the Shari’a compliance requirement, therefore, appears to provide yet another layer in addition to the exception to enforcement of a foreign

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²⁵⁴ Commercial Court of Appeal of Casablanca, Commercial Court First Chamber, Presiding Judge, Order No 679/2010 (31 March 2010 Morocco).
²⁵⁵ It is the President of the Court in Kuwait, Bahrain, and Dubai (for domestic awards, for international awards the President of the Abu Dhabi Federal Court of Appeals); Clerk of Court in Qatar; and President of CFI in Oman. El-Ahdab (n 1).
²⁵⁶ New York Convention, art V(2).
²⁵⁷ Non-enforcement will be discussed in more detail in Chapter Four.
arbitration award as found in the New York Convention.\textsuperscript{258} El-Ahdab further clarified the complexity in the context of Yemen’s public policy condition: “the award must comply not only with public policy but also with the provisions of the Islamic Shari’a. A distinction seems to be made between public policy and Shari’a. Therefore, such requirement would have a wide scope of implementation.”\textsuperscript{259}

In other words, there are three layers of public policy in the GCC states, the domestic legislation which could require “public order” and/or “good morals” as a condition to enforcement, the Shari’a with its much wider scope and varying interpretations according to the school of thought, and the New York Convention’s narrowly construed public policy defence for non-enforcement. Public policy can easily become an unpredictable obstacle for the enforcement of a foreign arbitral award, depending on how a country, or better yet a judge, determines what constitutes public policy. This thesis author suggests that the GCC states should arrive at a consensus on what public policy they recognize as obstacles to the enforcement of a foreign arbitral award.

\section*{B. Formalistic Requirements}

The formalistic requirements are shared by all the GCC states,\textsuperscript{260} as are conditions placed on the designated authority before approving a leave and issuing an order to enforce the arbitral award. This thesis author argues that these formalistic requirements will not likely be a hindrance to the enforcement of a foreign arbitral award because they are mere formalities that a party seeking enforcement of a foreign arbitral award could easily meet. These conditions include the requirement to provide (1) an original and signed copy of the arbitral award, (2) a copy of the arbitration agreement, (3) a translation of the foreign arbitral award if it is in a language other than the official language of the enforcing court, (4) some proof that a leave to enforce has been registered or filed with the designated authority, and (5) that there has been no

\begin{footnotesize}
\begin{enumerate}
\item El-Ahdab (n 1) 868.
\item See generally El-Ahdab (n 1).
\end{enumerate}
\end{footnotesize}
prior execution or judgment on the same subject or claim covered by the arbitral award.\textsuperscript{261}

The UAE Federal Supreme Court, Petition No 32, 23rd Judicial Year,\textsuperscript{262} for example, stated that a foreign arbitral award must include a photocopy of the arbitration agreement before it can be ratified and enforced. In the High Federal Court of Abu Dhabi, Annulment Case No 891, Commercial Cassation,\textsuperscript{263} the court rejected the recourse to set aside the arbitral award because the court found that the arbitral award met the conditions, mainly that the arbitral “award has indeed included the arbitration agreement signed by both the respondent to annulment and the arbitrator and dated 13/5/2000. The arbitral award then had been sent to the claimant for annulment who had refused to sign it, which was referred to in the award.”\textsuperscript{264} Since the arbitral award met the conditions for enforcement, the mere fact that the other part refused to sign the arbitral award did not render the arbitral award void.

If the arbitration agreement is not in writing, the arbitral award may be nullified on this point.\textsuperscript{265} This was the argument by the appellant in an Omani case in the Court of Appeal, 19 October 2010, where the appellant did not sign the contract containing the arbitration clause, and the court found that there was no arbitration without consent evidenced by a signed agreement.\textsuperscript{266} In Kuwait, the Court of Cassation\textsuperscript{267} held that for limited liability companies, the manager may sign on agreements which contain an arbitration clause without having any power of attorney or delegations. However, said manager’s name should be stated in the articles of association of the limited liability company.

Of the aforementioned formalistic requirements, only KSA differs in regards to

\begin{itemize}
  \item \textsuperscript{261} ibid.
  \item \textsuperscript{262} Federal Supreme Court, Petition No 32, 23rd Judicial Year, Judgment of 8 June 2003.
  \item \textsuperscript{263} High Federal Court of Abu Dhabi, Annulment Case No 891, Commercial Cassation, Hearing held 17 June 2006.
  \item \textsuperscript{264} ibid.
  \item \textsuperscript{265} Following Article 203(2) of the UAE Civil Procedures Code, an arbitration must be in writing and signed by the parties under the new rules of the Abu Dhabi Centre for Conciliation and Commercial Arbitration. Mechanta\textsuperscript{f (n 189)}.
  \item \textsuperscript{266} Oman Ct of Appeal (19 October 2010) in (2011) Int’l J of Arab Arb, vol 3, No 4, 55-59.
  \item \textsuperscript{267} Ossama Ghazy, ‘Kuwait Court of Cassation Judgment- Termination of a renewable commercial agency agreement’ \texttt{<http://www.altamimi.com>} accessed 20 May 2013. See also Dubai Court of Cassation, Annulment No 220 of 2004, Commercial Annulment, hearing held in 17 January 2005 (capacity of general manager of limited liability company and capacity of agent).
\end{itemize}
two issues. First, KSA does not require proof that a leave to enforce has been registered or filed with the designated authority. Second, KSA not only required an arbitration agreement, it also requires that the arbitration agreement is valid. This requirement is consistent with the Shari’a. This could be one reason that KSA is considered by Roy and other scholars and practitioners as a difficult country to enforce a foreign arbitral award. It is worth noting, however, that the New York Convention also requires a valid arbitration agreement, though the requirements for a valid arbitration agreement under the New York Convention differ from those in the Shari’a, as discussed earlier in this chapter.

One formalistic requirement that has caused a stir among the arbitration community in the GCC states is the requirement that the arbitral award be made in the name of “His Highness the Emir.” Cases such as these have caught much attention in Qatar, Kuwait, and Bahrain.

C. Protectionist Requirements

While the GCC states are similar with the formalistic requirements, differences among the GCC states arise on the protectionist requirements. The author of this thesis categorises these requirements as protectionist because they were likely added by the GCC states to protect themselves from the perceived shortcomings of the court or arbitral tribunal/arbitrators that granted the foreign arbitral award. These conditions

268 El-Ahdab (n 1).
269 El-Ahdab (n 1).
270 Roy (n 193) 923-924; El-Ahdab (n 1) 665; Dale Stephenson and Khulaif Al-Enezeee, ‘Enforcement of foreign arbitral awards in Saudi Arabia’ Financier World Magazine (December 2010)(stating that “there has been a particular wariness in Saudi Arabia towards international dispute resolution).
271 See generally Section 3.2.1.3. (B) above.
275 See Appendix I, Chart.
cover concerns regarding due process, notice, reciprocity, and arbitrability in the
country where the arbitral award was made. Because these conditions vary from country
to country, it is more practical to list the GCC states with these types of conditions for
enforcement: Oman, Qatar, Bahrain, and Kuwait.

Prior to the recognition or enforcement of a foreign arbitral award, Oman
requires seven additional conditions. Two of the additions, public policy and no prior
execution or judgment on the same subject or claim covered by the arbitral award, have
been addressed under the first two sets of requirements discussed above. The remaining
five include the following: (1) Oman has no jurisdiction as to the merits of the arbitral
award, (2) the arbitral award is not based on fraud, (3) the parties have been notified and
represented, (4) the request must be presented in legal action form, and (5) reciprocity.276

Like Oman, Qatar also requires seven protectionist conditions prior to the grant
of a leave to enforce a foreign arbitral award.277 Likewise, two of the conditions on
public policy and no prior execution or judgment on the same subject or claim covered
by the arbitral award, have been addressed above. Of the remaining five, Qatar only
shares two in common with Oman: (1) that the arbitral award is not in the exclusive
jurisdiction of Qatar, and (2) that there is reciprocity.278 Otherwise, the requirements for
(1) res judicata effect [finality] in the country of origin, (2) a leave of enforcement from
the country of origin, and (3) that due process be followed are not required in Oman, but
are required in Qatar.279

Bahrain requires five protectionist conditions prior to the enforcement of a
foreign arbitral award. These requirements are similar to Qatar in three aspects, one of

276 El-Ahdab (n 1).
277 See Appendix I, Chart.
278 See Appendix I, Chart.
279 El-Ahdab (n 1).
which is the only similarity with Oman. Bahrain, like Qatar and Oman, requires that the arbitral award does not fall within its jurisdiction.\textsuperscript{280} Bahrain, like Qatar, also requires that the foreign arbitral award is deemed final at the place where it was made, and that due process was followed.\textsuperscript{281} In addition, Bahrain requires that the foreign arbitral award is arbitrable in Bahrain, and that there is notice of the leave to enforce.

The conditions for Kuwait also differ from the conditions in the other three GCC states above, but do share some commonality.\textsuperscript{282} Like Bahrain and Qatar, Kuwait requires that (1) there should be notice and representation as to the foreign arbitral award, and (2) that the foreign arbitral award has res judicata effect [finality] in the country of origin.\textsuperscript{283} Like Bahrain only, Kuwait requires that the foreign arbitral award is also arbitrable in Kuwait.\textsuperscript{284} The only other condition for Kuwait is that the foreign arbitral award be also enforceable in the country of origin.

\textbf{D. Miscellaneous Requirements}

Aside from the conditions set out above, there are also miscellaneous conditions as well. The first one is applicable only to the KSA, Qatar, and Kuwait.\textsuperscript{285} It is a general requirement that there should be no obstacle against enforcement.\textsuperscript{286} KSA additionally states that the arbitral award must not violate a statute.\textsuperscript{287} The KSA also does not allow enforcement if (1) the arbitrator exceeded its authority, or (2) if there was a defect in the constitution of the tribunal.\textsuperscript{288} These two requirements, however, are consistent with the Shari’a.\textsuperscript{289} Additionally, a challenge to the capacity of the arbitrator is waived if not raised before the granting of the arbitral award.\textsuperscript{290} Kuwait also has one minor miscellaneous requirement: that the arbitral award is not governed by a summary

\textsuperscript{280} El-Ahdab (n 1).
\textsuperscript{281} El-Ahdab (n 1).
\textsuperscript{282} See Appendix I, Chart.
\textsuperscript{283} El-Ahdab (n 1).
\textsuperscript{284} ibid.
\textsuperscript{285} See Appendix I Chart.
\textsuperscript{286} El-Ahdab (n 1).
\textsuperscript{287} ibid.
\textsuperscript{288} ibid.
\textsuperscript{289} See Section 3.1.3.3. and Section 3.1.3.4. above; El-Ahdab (n 1).
\textsuperscript{290} El-Ahdab (n 1).
enforcement proceeding.\textsuperscript{291}

3.4. The Conditions for an Enforceable Arbitral Award Under the New York Convention as Compared to the Riyadh Convention, the ICSID Convention, and the GCC States

3.4.1. Recapitulating and Reconciling the Conditions in the Shari’a

There are conditions in the Shari’a that are consistent with the New York Convention, the Riyadh Convention, and that of all the GCC states, including the writing requirement, the existence of a valid arbitration agreement, and the request for leave to enforce. The conditions under the Shari’a that diverge with international arbitration norms relate to the content requirement: the condition relating to the finding of facts, that the content of the arbitral award be substantiated by the rules of evidence of the Shari’a, and that the reasoning cite to Shari’a sources. These conditions are inconsistent and difficult to reconcile with international arbitration norms. The only GCC state that requires a finding of fact is the KSA.

Additionally, the Shari’a condition relating to the validity of the arbitration agreement may be difficult to reconcile with international arbitration norms,\textsuperscript{292} but only as to the prohibition on gharar and the riba. Although, as discussed more fully in Chapter Five relating to public policy, these prohibitions under the Shari’a have somewhat been reconciled by most GCC states by creating exceptions, for example, to the prohibitions on the riba. Most GCC states courts enforce an award of interest included in an arbitral award. Like all GCC states, the Shari’a also requires the summary of claims and the reason for the arbitral award, which is not required under the New York Convention.

The New York Convention, likewise, has conditions absent from the Shari’a. These include the signature of arbitrators, the finding of an arbitral award, and that the

\textsuperscript{291} ibid.
\textsuperscript{292} The New York Convention, the Riyadh Convention, and all the GCC states require the existence of a valid arbitration agreement.
arbitral award has res judicata effect [finality]. Interestingly, GCC states are consistent with the New York Convention on these conditions.

The pertinent question is whether the Shari’a conditions will prevail over regional and international agreements, and the domestic legislation of the GCC states. The answer to this question is not simple. First, the New York Convention prevails in the GCC states, or one should aptly say should prevail. Whether the New York Convention actually prevails in practice is another matter. While there have been recent trends, for example in the UAE, to apply the New York Convention without resorting to the conditions of the Shari’a, practitioners remain apprehensive.

There would not be any conflict with the Shari’a as the Riyadh Convention expressly incorporated the Shari’a within its rules. Therefore, the requirements in the Shari’a that the arbitral award be in writing, the reason of the arbitral award, the summary of claims, and the finding of facts are also expressly incorporated into the Riyadh Convention. Lacking published case law, it is difficult to state with certainty the effect of the Shari’a on the Riyadh Convention, but it is very likely that a court would interpret the conditions of the Shari’a as conditions additional to the conditions stated in the Riyadh Convention.

Shari’a conditions trump domestic legislation in GGC states like the KSA where the Shari’a is the source of law. In GCC states like the UAE, where the Shari’a is a primary source of law, Shari’a conditions will prevail if the condition is considered a fundamental part of the Shari’a, which Islamic scholars may disagree upon depending on the school of thought. Overall, none of the GCC states have adopted the “content” requirement of the Shari’a, specifically the referencing to the Shari’a, in its commercial arbitration laws. Additionally, the GCC states allow interest in the arbitral award. Still, what happens in practice remains unpredictable; therefore making it necessary for the GCC states to harmonise their view on this issue, and to create a uniform set of rules covering the conditions for the enforcement of a foreign arbitral award.
3.4.2. Recapitulating and Reconciling the Conditions in the Riyadh Convention

The Riyadh Convention remains consistent with the Shari’a, which is expressly embodied in the Riyadh Convention. At the same time, the Riyadh Convention explicitly subjects itself to the international obligations of the member states. So, whenever a conflict arises between the Riyadh Convention and the New York Convention, the latter prevails. The condition under the Riyadh Convention, for example, requiring a certified arbitral award is inconsistent with the New York Convention, and the latter would prevail.

Generally, the Riyadh Convention remains consistent with the New York Convention since it only lacks in two conditions that the New York Convention requires: the writing requirement and the signature of the arbitrators. By reference to the Shari’a, however, the Riyadh Convention arguably also has the writing requirement.

Further, the Riyadh Convention could arguably have a conflict with the New York Convention if it adopts the following additional Shari’a requirements that are absent from the New York Convention: the reason of the arbitral award, the summary of claims, and the finding of fact. Such a situation creates a quagmire for the Riyadh Convention since, on one hand, it expressly adopts the Shari’a which has a set of these additional conditions, but, on the other hand, those conditions are in conflict with the New York Convention to which all the GCC states are members and as expressly stated in the Riyadh Convention such conflict with an international convention would give the international obligations the priority. No published case law that the author of this thesis is aware of has addressed this potential quagmire.

3.4.3. Recapitulating and Reconciling the Conditions in the ICSID Convention

The ICSID Convention is the least problematic when it comes to the conditions for enforcement. The ICSID Convention is consistent with GCC states and the New
York Convention with regard to its conditions for enforcement. In comparison, the GCC states and the New York Convention have imposed additional conditions for enforcement. This means that the ICSID Convention is more enforcement-friendly in comparison, especially against the domestic legislations of GCC states. The additional requirements present in the GCC states or in the New York Convention, however, would not bar enforcement of an ICSID arbitral award since enforcing states are mandated to treat such an arbitral award as final and binding, subject only to the state immunity defence in their respective jurisdictions.

3.4.4. Recapitulating and Reconciling the Conditions in the Domestic Legislations of the GCC States

It should initially be noted that all the GCC states have an obligation to follow the enforcement rules of the New York Convention. In practice, however, courts in most GCC states continue to apply rules from their domestic legislations and require applicants to meet additional conditions before enforcement, a practice that violates the New York Convention. In this regard, this chapter compared the similarities and differences in the conditions for enforcement set out in the domestic legislation of the GCC states and the New York Convention.

It is worth mentioning that in the survey conducted, respondents were asked whether domestic and foreign arbitral awards should have the same or different conditions for enforcement. The majority of respondents at 62.50% prefer that the conditions for enforcement for domestic and foreign arbitral awards be the same, while only 37.50% prefer different conditions for enforcement.293 This view suggests that the majority of arbitration practitioners in the GCC states favour an enforcement procedure that treats both domestic and foreign arbitral awards equally. When the respondents were asked whether conditions for enforcement of domestic arbitral awards equally apply in practice to foreign arbitral awards, the majority of the respondents at 75%

293 Appendix II, Survey Report, II(2.5.1.) and (2.5.2.).
answered “No”, while only 25% answered “Yes.” The GCC states not only have different conditions from one another, but also between domestic and foreign arbitral award enforcement.

The domestic legislation of the GCC states and the New York Convention are generally similar with regard to the following preliminary conditions: writing requirement, the signature of arbitrators, the existence of an arbitration agreement, the finding of an arbitral award, that the arbitral award has res judicata effect [finality], and that there is a request for leave to enforce. The only apparent differences are with regard to the signature of arbitrators since some GCC states require that the refusal of an arbitrator to sign be noted. The New York Convention has no such requirement, and in case of a conflict, the New York Convention ought to prevail.

The GCC states also added preliminary conditions not found in the New York Convention. Oman, the UAE, and the KSA require the names and address of the parties and arbitrators. Oman and the UAE go further and require the nationality and capacity of arbitrators, while the KSA additionally requires the domicile of the parties. Further, the GCC states uniformly added the following preliminary conditions: reason of the arbitral award, date of the arbitral award, place of the arbitral award, summary of claims, and evidence/documents used in the arbitration proceedings. Because these additional preliminary conditions are absent from the New York Convention, they in essence conflict with the New York Convention. In such a conflict, the New York Convention ought to prevail, but local judges may refuse enforcement without these conditions.

The GCC states are only uniformly consistent with the Shari’a as to some preliminary conditions: writing requirement, reason for the arbitral award, existence of a valid arbitration agreement, summary of claims, and request for a leave to enforce.

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294 ibid.
295 These include the KSA, Bahrain, and Kuwait.
296 Under the UAE Civil Procedure Code, Federal Law No (11) of 1992, art 206, the arbitrator cannot (1) be a minor, (2) have a criminal conviction, (3) have been bankrupt (without having been rehabilitated), and (4) be legally incapacitated (such as being placed under guardianship). Al Rowaad Advocates & Legal Consultancy, ‘Appointing arbitrators’ (Al Rowaad Advocates, 19 January 2014), <http://www.lexology.com/library/detail.aspx?g=7771e67c-bc03-4d11-924c-51f05b99064> accessed 24 February 2014.
Only the KSA is consistent with the Shari’a in requiring a finding of facts, while other GCC states deviate in this regard. The GCC states additionally have preliminary conditions that are absent from the Shari’a: names and addresses of parties and arbitrators, signature of arbitrators, finding of an arbitral award, date and place of the arbitral award, evidence and documents used, and *res judicata* effect [finality].

The GCC states also added country specific formalistic, substantive, and miscellaneous conditions that are absent in the Shari’a, the Riyadh Convention, and the New York Convention. That domestic legislation of the GCC states imposes a more stringent set of conditions than the Shari’a explains that the Shari’s is not the primary obstacle to the enforcement of foreign arbitral awards.

Some additional formalistic and substantive conditions present in the GCC states are consistent with the New York Convention. Formalistic requirements that are uniformly required in all GCC states and the New York Convention include conditions of an original and signed copy of the arbitral award, a copy of the arbitration agreement, and a translation of the arbitral award. The New York Convention, however, does not require proof of registration for leave to enforce, that the period of appeal has expired, no prior or parallel proceedings, and notice of leave to enforce. It should be noted that the *double exequatur* requirement has been abolished in the New York Convention, but continues in practice in the UAE and Bahrain.

The GCC states and the New York Convention converge with only one substantive condition: public policy. The New York Convention converge with some GCC states, though not all, on substantive conditions that the foreign arbitral award be arbitrable in the country of enforcement which is expressly required in Bahrain and Kuwait, and that the foreign arbitral award be final which is a condition only in Qatar, Bahrain, and Kuwait. None of the other formalistic, substantive and miscellaneous conditions present in the GCC states are present in the New York Convention. Therefore, the GCC states conflict with the New York Convention whenever they refuse enforcement based on these additional conditions. The New York Conventions ought to prevail whenever such a conflict arises, but in practice local judges may continue to insist on the additional domestic conditions. A harmonisation of the GCC
states’ rules for the enforcement of foreign arbitral awards must take into account that the GCC states cannot impose additional conditions in light of the New York Convention. The author of this thesis proposes the elimination of these additional conditions that conflict with the New York Convention.

3.5. Conclusion

This chapter showed that the conditions for the enforcement of arbitral awards under the Shari’a, though potentially expansive in some areas like public policy when applied by an enforcing court, is not burdensome. There are, in fact, fewer conditions placed by the Shari’a than by the domestic laws of the GCC states.

In other words, domestic courts and legislation is more likely the culprit in the non-enforcement of foreign arbitral awards through additional conditions that are protectionist in nature, or that are motivated by distrust of other countries’ legal systems and procedures. The source of this distrust, within the context of the GCC states is often misplaced on the Shari’a, but a careful analysis of the specific conditions that each GCC state places on foreign arbitral award enforcement is too often unrelated to the Shari’a.

After analysing the conditions placed by each of the GCC states prior to the enforcement of a foreign arbitral award, it is possible to conclude that the conditions placed by each of the GCC states are much more restrictive and more of an impediment to enforcement than the Shari’a itself and the New York Convention. In this regard, the additional conditions placed by the GCC states are likely the reason for the non-enforcement of foreign arbitral awards. When domestic courts have looked at the New York Convention as a guide to enforcement, instead of focusing solely on the domestic legislation, there seems to be more success in enforcement. On the other hand, failure by domestic courts to adhere to the pro-enforcement bias of the New York Convention, rather to take a protectionist stance in favour of domestic concerns lead to the non-enforcement of foreign arbitral awards. Courts could perhaps take note of the position of the Cairo Court of Appeals in the Seventh Commercial Circuit, Case No. 50/128j (4 January 2012), which explained that failure to meet certain conditions ought not to
automatically lead to non-enforcement or annulment, especially taking into account the possibility that one of the parties may have proceeded with the arbitration and waived such defects in the conditions. A more liberal and flexible stance by the GCC states’ judges with regards to the conditions, which look toward the bias in favour of enforcement, would be a positive step forward for international arbitration in the region.

This thesis proposes that the GCC states can find commonality in their laws relating to the enforcement of foreign arbitral awards. By doing so, the GCC states may be able to arrive at a set of conditions that are more in line with the New York Convention, but still take into account the Shari’a and the conditions for enforcement common to the GCC states. They can perhaps agree at a Unified GCC Arbitration Law for determining the proper conditions to be met in order to enforce a foreign arbitral award.
CHAPTER FOUR

POTENTIAL CHALLENGES TO THE ENFORCEABILITY OF FOREIGN ARBITRAL AWARDS IN THE GCC STATES

4.0. Introduction

Assuming that the party who prevails in an arbitration proceeding is able to meet the conditions for enforcement,1 the losing party may still be able to evade enforcement of the foreign arbitral award as specified under the New York Convention by invoking one of the grounds for the non-enforcement of a foreign arbitral award. The same is true under the domestic legislations of the GCC states that may add their own particular grounds for refusing the enforcement of a foreign arbitral award. Part I of this chapter discusses the grounds for challenging the enforcement of arbitral awards under the Shari’a, which in essence generally prohibits the enforcement of arbitral awards that violate the fundamental principles of the Shari’a.

Part II discusses the grounds for challenging the recognition or enforcement of arbitral awards, specifically foreign arbitral awards under the New York Convention and arbitral awards under the ICSID Convention. First, part II discusses the grounds enumerated in Article V of the New York Convention. There are seven grounds that the New York Convention recognizes: (1) the absence of a valid arbitration agreement, (2) the lack of a fair opportunity to be heard, (3) the foreign arbitral award exceeds the scope of the submission to arbitration, (4) improper composition of the tribunal, (5) the foreign arbitral award is not binding, (6) the subject matter is not arbitrable, and (7) the public policy of the forum. Finally, part II discusses the automatic enforcement mechanism of the ICSID Convention.

Part III examines grounds for non-enforcement that have been used in the GCC states’ context whether or not the non-enforcement was consistent with the New York Convention and/or the UNCITRAL Model Law. This section examines the provisions in each of the six GCC states and clarifies the specific grounds upon which the

1 See Chapter Three.
enforcement of arbitral awards, specifically foreign arbitral awards, may be challenged.

Part IV recapitulates and reconciles the challenges to the enforcement of foreign arbitral awards in the GCC states. Part V explains the results of the survey on the reasons for the non-enforcement of foreign arbitral awards in the GCC states.

Finally, this chapter argues that some of the potential challenges to the enforcement of foreign arbitral awards under the New York Convention encourage non-enforcement of foreign arbitral awards in the GCC states by giving national courts discretion to interpret some provisions. In essence, this chapter argues that the GCC states’ rules for the enforcement of foreign arbitral awards and the grounds upon which enforcement may be challenged are consistent with international arbitration norms. The chapter posits that the Shari’a does not add any more grounds for challenging the enforcement of a foreign arbitral award than allowed under the New York Convention. In fact, the Shari’a does not even provide for an express set of grounds for challenging the enforcement of an arbitral award. What this means is that the Shari’a is far from being the culprit in the non-enforcement of foreign arbitral awards. Instead, the likelihood that a court in a GCC state will refuse to enforce a foreign arbitral award may be based on a party’s failure to meet the conditions for enforcement;² or because the foreign arbitral award may be set aside under local rules that are not derived from the Shari’a.³ This chapter, however, limits the discussion to the potential challenges to the enforcement of a foreign arbitral award in the GCC states, which generally follow the international arbitration norms and that this thesis proposes should unify the enforcement rules in a Uniform GCC Arbitration Law.

² See generally, Chapter Three.
³ See generally, Chapter Six. The concern related to public policy whether at the setting aside stage or at the enforcement stage is addressed in Chapter Five.
PART I

4.1. Potential Challenges to the Enforcement of Arbitral Awards Under the Shari’a

The enforceability of an arbitral award under the Shari’a is based primarily on the concept of its binding nature. The majority of the Shari’a schools view arbitration as a contract, and which must be performed and executed like a contract under the *Holy Qur’an*, which says: “O ye who believe? Fulfill (all) obligations.”

The Shafi’i, however, deem an arbitral award as binding only if the arbitral award is accepted by all the disputing parties, since in their view the parties must agree to enter into the arbitration and must, hence, also agree as to the arbitral award made afterwards. Al-Sheik argues that the majority position is more useful than the Shafi’i position because the majority view is consistent with contemporary life. Further, Alsheik considers that the concern of the Shafi’i school is diminished since the arbitrator has the duty to make every effort to arrive at an enforceable award. The majority of Shari’a jurists, therefore, view that an arbitral award is binding on the parties once issued and the parties must comply with it, “provided that the award does not contradict [the] Shari’a.” According to Baamir, Hanbali scholars require ratification from a judge before enforcing any arbitral award. The judge would

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8 Alsheikh (n 4) 51. Al-Siyabi points out that it is binding even if it is based on the weakest point. Mohamed Al-Siyabi, ‘A Legal Analysis of the Development of Arbitration in Oman with Special Reference to the Enforcement of International Arbitral Awards’ (DPhil thesis, University of Hull 2008) 77; Samir Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Shari’a and Statute Law* (Graham & Trotman 1984) 390.

9 Baamir (n 6) 91.
presumably review whether the arbitral award meets the conditions of the Shari’a as previously discussed in Chapter Three. However, Saleh does not think that a qadi [judge] must confirm an arbitral award because an award already has the characteristics of a court judgment.\textsuperscript{10} In practice, nevertheless, “if the opposing party is not willing to enforce the [arbitral] award, the confirmation by a qadi [judge] must be sought.”\textsuperscript{11}

It is interesting to note that the KSA created an Enforcement Judge to replace the old system of enforcing an arbitral award before the Grievance Board, and the Enforcing Judge must follow Shari’a principles in the course of enforcement under Article 2 of the Enforcement Law, making the Shari’a rules on enforcement very relevant in the KSA.\textsuperscript{12} Further, the KSA courts have recognised foreign arbitral awards between a Saudi and a foreign party under the Shari’a.\textsuperscript{13}

Aside from the discussion of the basis on which arbitral awards are enforceable under the Shari’a, there is scant discussion\textsuperscript{14} regarding the express grounds on which the enforcement of an arbitral award may be challenged other than the generalized statement, as made by Al-Sheikh, that the arbitral award should not contradict the Shari’a.\textsuperscript{15} As such, the grounds upon which an arbitral award may be refused enforcement under the Shari’a are those that would violate the fundamental principles of the Shari’a. In the survey, for example, the 48.39% of respondents answered that judges and arbitrators should apply the Shari’a in determining public policy only when a violation of a fundamental Shari’a principle has been established.\textsuperscript{16}

Generally, however, the grounds for non-enforcement of an arbitral award under the Shari’a would be similar to the grounds for setting aside an arbitral award, and in

\textsuperscript{12} Giansiracusa and others, ‘The New Enforcement Law’ (n 11). The Enforcement Judge was created pursuant to the new Saudi Enforcement Law, Judiciary Regulation, Royal Decree No M/78 of 19/1428 (1 October 2007).
\textsuperscript{13} The 4th Review Committee, decision No 43/T/4 (Saudi Arabia 1995); The 4th Review Committee, decision No 187/T/4 (Saudi Arabia1992); The 4th Review Committee, decision No 208/T/4 (Saudi Arabia 1997).
\textsuperscript{14} Abdul Hamid El-Ahdab and Jalal El-Ahdab, \textit{Arbitration with the Arab Countries} (3rd edn, Wolters Kluwer 2011); Alsheikh (n 4); Baamir (n 6); Al-Siyabi (n 8).
\textsuperscript{15} The same is true regarding the specific grounds for setting aside an award as will be discussed in Chapter Six.
\textsuperscript{16} See Appendix II, Survey Report, II(2.6.2.).
most cases would overlap with the conditions necessary for enforcement of an arbitral award. The grounds would include the following: (1) there must be a valid agreement to arbitrate, (2) the agreement to arbitrate must be in writing, (3) the parties must have capacity to enter into an agreement to arbitrate, (4) the arbitrators must be competent, (5) the arbitrators must follow the applicable law including the scope of the agreement, (6) the procedure must follow the mandates of the Shari’a, and (7) the subject matter must be arbitrable under the Shari’a. The requirements that there is a valid arbitration agreement, that the arbitral award be in writing, that the arbitrator must follow the applicable law and scope of the arbitration agreement, and that the dispute be arbitrable under the Shari’a have all been covered in Chapter Three, regarding conditions for enforcement. These grounds will therefore not be repeated here.

This section, furthermore, discusses the capacity of the parties, the capacity of the arbitrator, and the procedural grounds as basis to challenge the enforcement of an arbitral award, since they were not separately required conditions for enforcement. Of course, a court, on its own, may always challenge the enforcement of an arbitral award because it fails to meet the conditions necessary for the enforcement of an arbitral award as previously discussed in Chapter Three. The grounds discussed in this chapter, different from the conditions for enforcement in Chapter Three, are those that the party must invoke and bring to the attention of the court for it to refuse enforcement.

4.1.1. Capacity of the Parties as a Challenge to Enforcement Under the Shari’a

Under the Shari’a, the parties must have capacity to enter into an arbitration agreement. Therefore, the same rules for the capacity of parties to enter into contract apply to arbitration agreements. Those who are “minors, the insane, bankrupts, and in some versions the disabled and terminally ill” have no capacity to enter into an agreement to arbitrate under the Shari’a.

17 Al-Siyabi (n 8) 120-130.
18 Al-Siyabi (n 8) 122.
19 ibid.
4.1.2. Capacity of the Arbitrator as a Challenge to Enforcement Under the Shari’a

There are requirements under the Shari’a regarding the characteristics of the arbitrator, who should have the same general traits as a judge.\textsuperscript{20} According to Al-Siyabi, although it is preferred that the arbitrator has a background in the Shari’a, it is not necessary that the arbitrator is an expert in Islamic \textit{fiqh} [jurisprudence].\textsuperscript{21} The Saudi Arbitration Law of 2012, however, now requires an arbitrator to hold a university degree in the Shari’a,\textsuperscript{22} a requirement that is unique to the KSA among all the GCC states, and that applies to both domestic and international commercial arbitration under Article 2.\textsuperscript{23} Another issue is whether a non-Muslim can be an arbitrator whenever a Muslim is a party to the dispute.\textsuperscript{24}

4.1.3. Due Process or Procedural Challenge to Enforcement Under the Shari’a

The Shari’a requires several procedural rules\textsuperscript{25} to be followed, including the right to equal treatment, the right to present a case and defences or the right to be heard, the right to present evidence which must be consistent, and the principle of substantive truth must be adhered to and outweigh judicial technicalities.\textsuperscript{26} The Shari’a also has

\begin{itemize}
\item \textsuperscript{20} The UAE, for example, under UAE Civil Procedure Code, Federal Law No (11) of 1992, art 206, requires that the arbitrator cannot (1) be a minor, (2) have a criminal conviction, (3) have been bankrupt (without having been rehabilitated), and (4) be legally incapacitated (such as being placed under guardianship). Al Rowaad Advocates & Legal Consultancy, ‘Appointing arbitrators’ (Al Rowaad, 19 January 2014) \textcolor{red}{<http://www.lexology.com/library/detail.aspx?g=7771e67c-bc03-4d11-924c-51ff05b990f4>} accessed 24 February 2014.
\item \textsuperscript{21} Al-Siyabi (n 8) 123.
\item \textsuperscript{22} Saudi Arbitration Law of 2012, Royal Decree No M/34, published in Official Gazette on June 8, 2012 (KSA 2012), art 14(3).
\item \textsuperscript{23} ibid art 2 (stating that “the provisions of this Law shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom or is an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this Law”).
\item \textsuperscript{24} For a discussion on this issue as a condition to enforcement, see Section 3.1.3.3.
\item \textsuperscript{25} The Shari’a conditions to enforcement does not provide for a procedural requirement, which is left to the enforcement challenge and setting aside process. The procedural requirements of due process under the Shari’a is clearly included as part of Shari’a procedural public policy as will be discussed in Chapter Five. See generally, Chapter Five.
\item \textsuperscript{26} Saleh (n 8) 383; Al-Siyabi (n 8) 124.
\end{itemize}
evidentiary rules that need to be considered, including the classification and priority of witnesses.27

PART II

4.2. Potential Challenges to Enforcement of Foreign Arbitral Awards Under International Conventions

After discussing the grounds for challenging the enforcement of foreign arbitral awards under the Shari’a, it is necessary to discuss the grounds for challenging the enforcement of foreign arbitral awards under the New York Convention and the ICSID Convention.28

4.2.1. Potential Challenges to Enforcement of Foreign Arbitral Awards Under the New York Convention

The grounds for which the courts may refuse to enforce a foreign arbitral award are listed in Article V of the New York Convention. The court in Int’l Trading and Industrial Investment Company v. Dyncorp Aerospace Technology et al29 emphasized the consensus among US courts that “the grounds for relief enumerated in Article V of

27 Al-Siyabi (n 8) 124. This category in essence gives priority and more weight to the testimony of believers over non-believers, and male over female. The weight of testimony of believers and non-believers is expressly stated in The Holy Qur’an, An-Nisa 4:141, Yusuf Ali Translation. The weight of the testimony of women is expressly stated in the Holy Qur’an, Al-Baqara 2:282, Yusuf Ali Translation, that “And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her.” The above Surah, however, which remains controversial and subject to different opinions, has been said to apply only to financial transactions, and that women may testify equally as men in other matters. WISE, ‘Testimony in Court’ <http://www.wisemuslimwomen.org/currentissues/testimonyincourts/> accessed 20 March 2014.

28 The ICSID Convention has little relevance because it has created an automatic enforcement mechanism, thereby removing the process from national courts.

the Convention are the only grounds available for denying recognition or enforcement of a foreign arbitral award.” Article V separates the types of grounds into two categories: five listed grounds, (a) to (e), under part (1) that the disputing party has the burden of proving; and two grounds (a) and (b) under part (2) that a court may apply *sua sponte* [on its own accord].

4.2.1.1. Lack of Valid Arbitration Agreement

A valid arbitration agreement is necessary because “courts should not enforce an award against a party that never agreed to arbitrate.”

Article V(1)(a) of the New York Convention states that enforcement may be refused if the agreement “referred to in Article II…is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.”

Article V(1)(a), thus, should be read in conjunction with Article II, which states that a court should enforce an arbitration agreement “unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

A. The Existence, Validity, and Operability of an Arbitration Agreement

The law governing an arbitration agreement is not as clearly addressed as the law governing a foreign arbitral award. As stated previously, however, Article II does explicitly govern the existence, validity and operability of the arbitration agreement. Under the New York Convention Article V(1)(a), the arbitration agreement is valid

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30 Elisabeth Senger-Weiss, ‘Enforcing Foreign Arbitration Awards’ in Thomas Carbonneau and Jeanette Jaeggi (eds), American Arbitration Association, *Handbook on International Arbitration and ADR* (JurisNet LLC 2006) 170 (noting that the validity of this defence has not been reported in any U.S. court and has been restrictively defined by US courts, leaving such decision to the arbitrator and not the court); *Prima Paint Corp v Flood & Conklin Manufacturing*, 388 US 395 (1967).
31 New York Convention, art II(3).
33 Lamm and Sharpe (n 32) 301.
34 ibid.
according to the law that the parties have chosen, but if there was no choice of law provision then the law of the country of origin, or where the foreign arbitral award was made. Parties, however, usually fail to include a choice of law provision covering the arbitration agreement. By default, thus, the arbitration agreement is usually governed by the law of the country where the foreign arbitral award was rendered. In the period before the tribunal is formed, however, courts will often apply the law of the forum to determine the existence, validity, or operability of the arbitration agreement.

Where the parties’ intention as to the governing law remains unclear, the Tokyo High Court in Japan Education Corp. v. Feld, stated that “we must presume, as it is the nature of arbitration agreements to provide for given procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply.” The Tokyo High Court follows the law of the seat of arbitration to determine the substantive validity of the arbitration agreement that is consistent with the position of English law under the English Arbitration Act. The English Commercial Court in Black-Clawson v. Papierwerke Waldhof-Aschaffenburg AG, clarified the English position, stating that “it would be a rare case in which the law of the arbitration agreement was not the same as the law of the place or seat of arbitration.”

It is also important to note the seminal judgement of Sulamerica Cia nacional de Seguros SA and Ors. v. Enesa Engenharia SA and Ors., where the court set out traditional conflict of law principles to determine the law governing the arbitration

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38 Lamm and Sharpe (n 32) 303.
42 Sulamerica Cia nacional de Seguros SA and Ors v Enesa Engenharia SA and Ors, [2012] EWCA Civ 638.
agreement as follows:

1. Whether there was an express choice of the parties with regards to the law applicable to the arbitration agreement,
2. If there is no express choice, then whether an implied choice has been made by the parties,
3. If there is no express and implied choice of the parties with regards to the law applicable then the law with the closest and most real connection with the arbitration agreement.

Following these principles set out in Sulamerica, the High Court of Justice in Arsanovia Ltd. & Ors. v. Cruz City 1 Mauritius Holdings, held that the parties in a London seated LCIA arbitration had chosen Indian law to govern the arbitration agreement. Where the parties’ choice is unclear, the approach in Sulamerica had previously been applied in an ICC arbitral award using the “most significant relationship” or “closest connection” test. In arbitration, however, unlike determining the law governing the contract, determining the law that is of closest connection can be difficult.

The ICSID Tribunal in SOABI v. Republic of Senegal, where there was a contract between the investor and the Government of Senegal, applied Senegalese law because the project was located in Senegal and Senegalese parties were involved. The SOABI ruling could also be interpreted to mean that any contractual nexus between the

46 SOABI v Republic of Senegal, ICSID Case No ARB/82/1.
investor and the host State triggers the application of the domestic law of the host state. In *Autopista Concesionada de Venezuela v. Bolivarian Republic of Venezuela*, the ICSID Tribunal applied domestic Venezuelan law because the dispute was contractual, and stated that international law plays a corrective and supplementary role but not more. Finally, even with a Bilateral Investment Treaty (BIT) based dispute, the ICSID Tribunal in *Asian Agricultural Products v. Sri Lanka*, stated that a BIT may incorporate domestic law and thus render the source of law supplementary to international law.

In the context of the GCC states, the law of a GCC state or the Shari’a would determine the validity of an arbitration agreement if the parties have chosen these laws to determine validity, or if the arbitral seat is a GCC state. However, choice-of-law rules simply do not exist in the Shari’a, and English courts have not been too friendly to parties choosing the Shari’a as the governing law.

**B. “Null and void” arbitration agreements**

“Null and void” agreements are intrinsically defective, or affected by some invalidity right from the beginning. Examples of null and void agreements are those involving misrepresentation, fraud, duress, illegality, unconscionability, mistake, lack of capacity, or undue influence. The US Court of Appeal for the Third Circuit explained the scope of “null and void” agreements under Article II(3) as follows:

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47 *Autopista Concesionada de Venezuela v Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5.
an agreement to arbitrate is ‘null and void’ only (a) when it is subject to an internationally recognized defence such as duress, mistake, fraud, or waiver [references omitted], or (b) when it contravenes fundamental policies of the forum State. The “null and void” language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate.53

The court in Buckeye Check Cashing Inc. v. Cardegena,54 held that the doctrine of autonomy applies and that the party making the challenge must prove that the arbitration agreement itself, and not just the main contract, is null and void under one of any invalidity defence. The modern approach to determining invalidity is through a prima facie verification. The Indian Supreme Court in Shin-Etsu Chemical Co v. Aksh Opticfibre Ltd,55 reasoned that the modern prima facie [in its face] approach is advantageous because it meets the basic requirements of expeditiousness at the pre-reference stage and a fair opportunity to contest the arbitral award after the full trial. Courts today are more willing to refer disputes to arbitration after just a prima facie review.

In an ICSID Convention case in Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt,56 Egypt contended that the arbitration agreement was null and void because the Egyptian officials violated procedures prescribed by Egyptian law, and the ICSID Tribunal held that because the decisions were “cloaked” with the mantle of governmental authority and communicated as such to foreign investors who relied on them in making their investments, they could not be avoided. Egypt, however, continues

54 Buckeye Check Cashing Inc v Cardegena, 126 SCt 1204 (2006).
to use the same invalidity argument as recently as the case in *Ministry of Civil Aviation v. Malicorp Ltd*, where the Cairo Administrative Court put forth an argument along the same vein.\(^{57}\)

**C. Inoperative\(^{58}\) arbitration agreements**

“Inoperative arbitration” agreements are those that have become inapplicable to the parties and their dispute at the time the court is asked to refer the parties to arbitration because of the actions of one or more parties.\(^{59}\) A classic example is the arbitration clause in *Shanghai Foreign Trade Corp v. Sigma Metallurgical Co.*, of which the court stated that a “settlement agreement without [an] arbitration clause rendered [the] arbitration clause in [the] earlier agreement ‘inoperative.’” The following, however, are not inoperative agreements:\(^{61}\) (1) agreements that are inconvenient, expensive,\(^{62}\) or burdensome to implement, (2) that an arbitral award may not be enforceable, (3) by framing a contract claim in tort,\(^{64}\) (4) a clause contemplating the possibility of litigation and arbitration,\(^{65}\) (5) the risk of multiple

\(^{57}\) *Ministry of Civil Aviation v Malicorp Ltd*, Council of State, Cairo Administrative Court, 6th Cir, Case No 18628 of 59J (10 February 2006).

\(^{58}\) Lamm and Sharpe argue that the word “inoperative” has no meaning in the English language; and a leading commentary argues that the word has no meaning in English law. Lamm and Sharpe (n 32) 300; Michael Mustill and Stewart Boyd, *Commercial Arbitration* (2nd edn, Buttersworth 1989) 464.

\(^{59}\) Lamm and Sharpe (n 32) 300.


\(^{61}\) Lamm and Sharpe (n 32) 306-310.

\(^{62}\) German courts have held that lack of funding renders an arbitration agreement incapable of being performed. Lamm and Sharpe (n 32) 300; Julian Lew, Loukas Mistelis, Stefan Kroll, *Comparative International Commercial Arbitration* (Kluwer 2003) 345.


\(^{65}\) *Westfal-Larsen & Co A/S v Ikerigi Compania Naviera SA* [1983] 1 Lloyd’s Rep 424, 425 (QB Com Ct); Khalil Mechantaf, ‘Overriding an agreement to arbitrate, a DIFC Court of First Instance rejects an application to grant a stay’ (Kluwer Arbitration Blog, 15 May 2012) <http://kluwerarbitrationblog.com/blog/2012/05/15/overriding-an-agreement-to-arbitrate-a-dific-court-of-first-instance-rejects-an-application-to-grant-a-stay/> accessed 16 May 2012 (discussing a Dubai Court’s refusal to grant a stay of litigation in the Dubai Courts when there is a clause allowing for the possibility of arbitration in the LCIA). DIFC Law of 2008, art 7 was later amended to allow for a stay in proceedings
conflicting decisions, and (6) an imperfect reference to arbitration.

In determining whether an arbitration agreement is inoperative, courts will look at the intent of the parties. In doing so, courts may look at the specific or general intent of the parties. If the courts can determine the specific intent, the court can direct the parties to the method of arbitration they supposedly meant to designate. However, if courts cannot determine the specific intent, courts look into the general intent of the parties and refer the parties to ad hoc or institutional arbitration. Failing to determine either types of intent, a court will likely render the arbitration agreement “null and void, inoperative or incapable of being performed.”

The question of when an arbitration agreement becomes inoperative boils down to whether any party to the agreement has waived the right to arbitrate disputes and rendering the arbitration agreement inoperative. Waiver of the right to arbitrate disputes can occur (1) by acquiescence to litigation or if the party begins arbitration proceeding and fails to request for a stay of the litigation, (2) by failing to invoke the arbitration agreement in the manner stated by the arbitration agreement, (3) by modifying the arbitration agreement whereby the parties agree to forgo arbitration in favour of litigation, or (4) by prosecuting related claims in court. In Spain, however, the Supreme Court held that “an application to a state court for interim protective measures

under DIFC Laws Amendment Law No 1 of 2013, which came into force on 15 December 2013. Article 7 now provides that Article 13 of the DIFC Law of 2008 (concerning the recognition of arbitration agreements) applies (1) where the seat of arbitration is the DIFC; (2) where the seat is other than the DIFC; and (3) where no seat is designated or determined. There can now be no doubt that the DIFC Courts will stay proceedings in favour of an agreement to arbitrate, irrespective of what seat, if any, is stated in the agreement. This brings the law into compliance with the New York Convention on this issue.


68 See generally, Lamm and Sharpe (n 32) 310.
69 Lamm and Sharpe (n 32) 310.
70 Lamm and Sharpe (n 32) 314; Mechantaf (n 65) (where Dubai Court’s refusal to stay litigation so a party can proceed with arbitration in LCIA under an option to arbitrate clause could theoretically render a case an arbitration agreement inoperative if the party proceeds with litigation in Dubai courts).
did not constitute a waiver of arbitration.”71 Additionally, the New South Wales Supreme Court held that “an application for document production, although invoking the arbitration agreement, did not constitute a waiver.”72

D. Arbitration Agreements Incapable of Being Performed

Agreements that are incapable of being performed are incapable of being set into motion73 because of various reasons including (1) the arbitration clause is too vague or indefinite referred to as pathological agreements,74 (2) dissolution of the chosen arbitration institution, (3) problems with the constitution of the tribunal which could include problems in the appointment process or an undetermined place of arbitration, (4) the arbitrator refuses to act despite a valid arbitration agreement, (5) there is a problem with the place of arbitration, (6) there is insufficient funding to participate in the arbitration, or (7) the arbitrators are unable to resolve all the issues, especially in a multiparty situation.75

In general, courts are allowed under the New York Convention to review whether an arbitration agreement is incapable of being performed, although courts will usually only apply a prima facie [on its face] review.76 The meaning of “incapable of being performed” will be determined by the law of the country where the arbitration was made. A proposed test for determining whether this defence applies is whether “the arbitration proceedings can be effectively set into motion even without the cooperation of the other party.”77

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71 Scandlines, AB (Sweden) and others v Ferrys del Mediterráneo, SL (2007) XXXII YBCA 555, 562 (Spain, Supreme Court 2002).
73 Lamm and Sharpe (n 32) 300; van den Berg (n 51) 159.
76 Kroll (n 75) 323.
77 Kroll (n 75) 326.
In *National Iranian Oil Co v. Ashland Oil, Inc.*,\(^78\) where the defendant refused to participate in the arbitration proceedings in Iran in 1979 because it was dangerous for Americans at the time, the US court held the circumstances insufficient to render the agreement incapable of being performed despite “the political atmosphere in Iran...” and despite “the maelstrom of chaos and confusion engendered during the Islamic Revolution in Iran.”

Some courts, however, seem too liberal and give life even to pathological arbitration agreements that seem too vague. In *Lucky-GoldStar v. Ng Moo Kee Engineering*, the Hong Kong High Court held valid an arbitration agreement that did not specify a country but only provided for arbitration in a “third country, under the rule of the third country and in accordance with the rules of procedures of the International Commercial Arbitration Association.”\(^79\)

### 4.2.1.2. Incapacity Defence\(^80\)

The other provision of Article V(1)(a) allows for the refusal of enforcement upon proof that “[t]he parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity.”\(^81\) The New York Convention does not define the term “incapacity” and the concept may vary from jurisdiction to jurisdiction.

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\(^78\) *National Iranian Oil Co v Ashland Oil, Inc*, 817 F2d 326, 328, 335 (5th Cir 1987).


\(^80\) The defence has a curious history, and was controversially added to the Convention at the last minute, and was neither fully debated nor explained. See C Ignacio Suarez Anzorena, ‘The Incapacity Defence Under the New York Convention’ in Emmanuel Gaillard and Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2009) ch 22, 616-620 (explaining that the adopted text was proposed by Prof. Sanders of the Netherlands on the last day, and after a failed opposition from the Soviet Union, a protest from Byelorusia, and a request for consideration, it remained on the final draft).

\(^81\) *New York Convention*, art IV(1)(a). This is known as the incapacity defence. The lack of capacity by a party to enter into an arbitration agreement is also known as subjective arbitrability. See Piero Bernardini, ‘The Problem of Arbitrability in General’ in Emmanuel Gaillard and Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2009) ch 17, 504.
There seems to be a general notion of capacity, however, in international law. The notion is that a person should enter into contracts or binding legal relationships out of their own free will or on his or her own name and account. 

Otherwise, incapacity of the person would exist. The incapacity defence under the New York Convention seems to cover the issue of whether a certain party had the requisite capacity at the time of the execution of the arbitration agreement. A clear example is when the person is insane at the time of entering into the agreement. Yet, the concept of incapacity does not only apply to physical persons but has also been held to apply to legal entities whether private or public.

Article V(1)(a) states that the capacity of the parties should be determined according to “the law applicable to them.” The New York Convention, however, does not specify the applicable law. In this regard, it is possible for the Shari’a to apply when determining the capacity of parties especially in the GCC states, and the grounds for incapacity under the Shari’a, as discussed previously in Sections 4.1.1. and 4.1.2., may differ from non-Shari’a jurisdictions.

In most jurisdictions, the capacity of a natural person could depend on the person’s place of usual residence, or on the person’s nationality. For business entities, the capacity could depend on the usual place of business or where the legal entity practices its business. The phrase “to them” creates difficulty in determining the applicable law. In interpreting this phrase, courts have used either the personal law approach or the law of the seat approach. Under the personal law approach, courts consider the nationality, domicile, or residence of the physical person and the place of

82 Anzorena (n 80) 621.
83 Ibid.
84 Ibid 632.
85 On rare occasions, incapacity would apply if a national court applied the virtually extinct ultra vires doctrine or when one of the companies is a non-existent company. Ibid 623-624.
86 Italy, Spain, Russia, Germany, and the US are examples of countries that have applied the incapacity defence to legal entities. Its application to public entities would apply if there is legislation that prohibits government entities from entering into arbitration agreements. Some countries like Syria have alternatively used the public policy defence. Ibid 623-627.
87 New York Convention, art V(1)(a).
88 Al-Siyabi (n 8) 123; see Sections 4.1.1. and 4.1.2.
89 van den Berg (n 51) 171.
90 Ibid.
incorporation or the seat of administration of a legal entity. A simpler approach followed by the UNCITRAL Model Law is to rely on the law of the forum to determine capacity whether or not the law of the forum applies the personal law approach.

Incapacity may be raised as a defence when there is legislation that prohibits governmental entities that perform governmental functions to enter into arbitration agreements. An Italian court, for example, in Societe Arabe des Engrais Phosphates et Azotes-SAEPA v. Gemanco srl, denied enforcement of an arbitral award because the two Tunisian government owned companies where public entities and were not permitted to enter into arbitration agreements under Tunisian law. As GCC states like the KSA have such similar limitations on government entities, the scenario could arise in the GCC states.

4.2.1.3. Lack of Due Process

Article V(1)(b) incorporates a basic notion of due process into the New York Convention. This provision has been considered by eminent authors as “the most important ground for refusal under the New York Convention (and the [UNCITRAL] Model Law)…” Article V(1)(b) allows the court to refuse enforcement if “the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”

The phrase “otherwise was unable to present his case” covers instances where a party is prevented from presenting a case at the arbitral proceedings due to force majeure [acts of nature] or other causes. The phrase acts as a catchall provision for any reasonable justification for a party’s inability to attend the arbitral proceedings to avoid

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91 Bernardini (n 81) 505 (“it is generally accepted that the law applicable to a party’s capacity to conclude an arbitration agreement is that party’s personal law, i.e., its national law”).
92 This approach is suggested by Anzorena. See Anzorena (n 80) 634.
94 Senger-Weiss (n 30) 171(arguing that the word “proper” seem to have been inserted to cover situation when the defendant is under some legal incapacity).
95 Alan Redfern and others (eds), Law and Practice of International Commercial Arbitration (4th edn, Sweet and Maxwell 2005) 448.
96 New York Convention, art V(1)(b).
ex parte arbitration proceedings. Courts, however, have not always liberally construed this catchall provision.

A. Definition of Due Process

The concept of due process, though considered of paramount importance, may not necessarily mean the same in all national laws. The Canadian Supreme Court in Corporacion Transnacional de Inversiones, SA de CV v. STET International SpA and STET International Netherlands NV[99] [hereinafter “STET”], recognized that there is no single, universal definition for due process. Though, there is a sense of a basic set of requirements for what process is due. The STET court states that due process, which pertains to public policy, implies a fundamental principle, that the parties have an equal opportunity to be heard.[100] This principle demands that each party must have been effectively offered such an opportunity.[101] Bernardini listed three fundamental principles of due process under international conventions: “(1) the right to be heard (at least in writing); (2) ‘audi alteram partem’ [i.e. make each party aware of its opponent’s case and allow it to rebut the same]; (3) the right to be treated alike.”[102]

B. Narrow Interpretation of Due Process

Despite the lack of a unified definition for due process, courts in various countries are in agreement that the due process defence ought to be interpreted

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97 See for example, Parsons & Whittemore Overseas Co v Societe General de l’Industrie du Papier (RAKTA), 508 F2d 969 (2d Cir 1974) (rejecting argument of due process for refusal to accommodate a witness’ speaking schedule); Biotronik Mess- und Therapiegerate GmbH & Co v Medford Medical Instrument Co. 415 F Supp 133 (DNJ 1976) (rejecting argument that rights and liabilities under agreement had not matured).
100 ibid.
101 ibid.
narrowly. Courts in Germany, Italy, Spain, and the US have applied a narrow interpretation. Further, courts distinguish between domestic and international public policy when determining due process, and courts tend to apply the forum state’s standard for due process. The Hamburg Court of Appeal made such a distinction and held that only in extreme cases, where a party had not been able to present his case in an arbitration held abroad, would the basic principles of German due process be violated.

C. Types of Due Process Challenges

It is important to note that most challenges to enforcement based on due process have been unsuccessful. This is perhaps due to the New York Convention’s pro-enforcement policy, but also because the process was actually due.

Notice is one of the most important requirements of fairness and due process. The notice should be proper, and should give the party sufficient knowledge and time to prepare a case. In *Sesostris SAE v. Transportes Navales SA and M/V Unamuno*, the US District Court of Massachusetts refused enforcement of a foreign arbitral award because a third party mortgagee in possession of the ship used for carriage of goods had not received proper notice of the arbitration proceedings. A mere letter stating, “it is our understanding that arbitration proceedings are presently being pursued in Madrid, Spain” was deemed insufficient notice by the court.

It would also be a violation of due process if a party was not given the names of the arbitrator and a party cannot challenge the fairness of the chosen or designated arbitrator. The German Court of Appeal refused enforcement of a foreign arbitral award.

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103 Verbist (n 98) 687.
104 Verbist (n 98) 687.
106 Ninety percent of cases where due process was invoked as a defence resulted in enforcement. Verbist (n 98) 693 and 701; Albert van den Berg, ‘Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few, in Arbitration in the Next Decade’ (1999) ICC Pub No 612E 75, 78.
108 *Sesostris SAE* (n 107).
109 ibid.
award because the German party was not informed of the names of all the arbitrators. In the KSA, such requirement will be crucial, as the Saudi Arbitration Law of 2012 requires, in addition to the requirements set out in the 1983 Law, that arbitrators be holders of at least a university degree in Shari’a. This is an important practical consideration when appointing an arbitrator given that the foreign arbitral award cannot contravene the Shari’a. The Dubai Court of Cassation, Action No. 128 of 2008 (15 June 2008), however, stated that a challenge to the appointment of an arbitrator will not be successful if the arbitrator has already issued an arbitral award or if the proceedings have been closed, meaning that the right to challenge the appointment of an arbitrator could be waived by the parties by not raising it during the arbitral proceedings.

One of the essences of due process is to give the parties sufficient and reasonable time to present a case. One-week time to submit a statement of defence, according to the Spanish Supreme Court in *Holargos Shipping Corporation v. Hierros Ardes SA*, was an inadequate amount of time to prepare a case, and refused enforcement. It is interesting to point out that the growing popularity of fast track arbitration may raise concerns of due process especially that a respondent may not have sufficient time to prepare a proper defence. The defendant should also be informed of the arguments made by the claimants because preparing a defence would be impossible otherwise.

A foreign arbitral award would also be refused enforcement if a party did not receive copies of documents submitted by another to the arbitral tribunal. The Amsterdam Court of Appeal in *GWL Kersten & Co BV v. Societe Commerciale Raoul-Duval & Cie*, found that the arbitration held in London violated the due process right.

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111 Dubai Court of Cassation, Action No 128 of 2008 (15 June 2008).
112 *Holargos Shipping Corporation v Hierros Ardes SA*, (1986) XI YB Com Arb 527, 528 (Tribunal Supremo, 3 June 1982).
114 Verbist (n 98) 696; Landgericht [Ct First Inst] Bremen, 20 January 1983, (1987) XII YB Com Arb 486, 487; *Ajay Kanoria and Others v Tony Francis Guinness*, [2006] EWCA Civ 222 (court upheld the refusal of enforcement as Mr. Guinness was not given proper notice of an allegation of fraud).
115 *GWL Kersten & Co BV v Societe Commerciale Raoul-Duval et Cie*, (1994) XIX YB Com Arb 708, 709 (Gerechtshof [CA] Amsterdam, 16 July 1992); see however, *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109 (Australian court rejecting a party’s argument of being unable to present a case because such argument would succeed only in extreme cases and not in this case where the parties who owed debt tried to buy time); Timana Hattam, ‘Australian Courts Aligned with the UK in...
to be heard when the claimant submitted documents to the arbitral tribunal without communicating them to the defendant and when the arbitral tribunal likewise failed to provide a copy to the defendant. The same is true regarding expert reports, a copy of which must be given to the other party with sufficient time to comment.  

4.2.1.4. Arbitration Scope

The defence under Article V(1)(c) is consistent with the principle of Article V(1)(a) that a foreign arbitral award should not be enforced against a party unless the party agreed to arbitrate the subject matter. Article V(1)(c) states that a court may refuse to enforce a foreign arbitral award if “[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration...” A foreign arbitral award, thus, should stay within the limits of the scope of submission to arbitrate. A separate part of a foreign arbitral award, however, can be enforced as long as it deals with a dispute within the scope of the submission.

The Article V(1)(c) defence, where there is a valid arbitration agreement and the issue is the scope of the arbitrator’s actions, should be distinguished from the Article V(1)(a) defence, where there is no valid arbitration agreement and the arbitrator cannot act. Under Article V(1)(c), there are two issues that arise. The first is when the arbitrators act beyond the scope of a valid arbitration agreement by issuing a foreign arbitral award that relates to disputes beyond the agreement. The second is when the arbitrators act within the scope of a valid arbitration agreement, but exceed their


116 Verbist (n 98) 700; Paklito Investment Ltd v Klockner East Asia Ltd, (1994) XIX YB Com Arb 664, 668-72 (Sup Ct Hong Kong, High Ct, 15 January 1993).
117 Senger-Weiss (n 30) 171.
118 New York Convention, art V(1)(c).
authority by addressing claims that the parties have not submitted to them.\textsuperscript{120}

4.2.1.5. Irregularity in the Arbitration Process

Article V(1)(d) of the New York Convention allows a court to refuse enforcement of the foreign arbitral award if “[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”\textsuperscript{121} In practice, there are relatively few cases where enforcement was refused under this defence.\textsuperscript{122} It is important to note here that party autonomy governs and then the law of the country where the arbitration proceeding was held.\textsuperscript{123}

In the GCC states, the Shari’a or the law of any GCC state regarding the composition of the arbitral tribunal and the arbitral proceedings would only apply if there was no party agreement covering this issue, the arbitration proceeding took place within a GCC state, and the New York Convention applies. Theoretically,\textsuperscript{124} such a situation could cover non-domestic arbitral awards, classified as such because

\begin{itemize}
  \item Anzorena (n 80) 641. Scholars are divided on whether the claims and counterclaims submitted by the parties would dictate whether the arbitrator exceeded the scope of the submission.
  \item Jarvin (n 122) 729.
  \item It is important to remember also that the burden of proof is on the defendant, and that it is a difficult and costly burden to prove. See Senger-Weiss (n 30) 172.
\end{itemize}
arbitration occurs in the same country where enforcement is sought but exclusively involving non-Muslims or foreign nationals, and foreign arbitral awards involving an arbitration that took place in a GCC state or a country that follows the Shari’a.

Consistent with the principle of party autonomy, the New York Convention allows parties to determine and agree as to the composition of the tribunal and the arbitral procedure. A related issue is when there is a non-agreement on the appointment of one or more arbitrators. The Egyptian court in Cairo Court of Appeal, Seventh Commercial Circuit, Case No. 38 of 126/j, Commercial Arbitration, stated that Article 17 of the Egyptian Arbitration Law authorizes the party who has an interest in the case to request the intervention of the court to compose the arbitral tribunal. The Egyptian court saw such tactic as possibly used to delay the arbitral proceedings, stating that the law does not allow a party to procrastinate or to have, as a pretext, the non-selection of an arbitrator to threaten the other party.

Regarding the “arbitral procedure,” the term is to be interpreted broadly. However, only serious or material procedural violations or when the violation substantially prejudices a party are covered by the defence. A more reasonable approach is to allow any procedural violation to bar enforcement if the violation affected the outcome of the foreign arbitral award. Most cases that rely on this defence for non-enforcement, however, resulted in finding that the irregularity in procedure was not proven. Most courts take a pro-enforcement view, and construe the defence restrictively.

### 4.2.1.6. The Foreign Arbitral Award is not Binding

Under Article V(1)(e), the court may refuse to enforce a foreign arbitral award if “[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which,

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125 Jarvin (n 122) 730. This agreement may be oral or written, implied or explicit.
126 Cairo Court of Appeal, Seventh Commercial Circuit, Case No 38 of 126/j, Commercial Arbitration (8 June 2010).
127 Jarvin (n 122) 730.
128 This is the position of many authors. Jarvin (n 122) 742.
129 Gaillard and Savage (n 121) 989.
that award was made.”130 “This provision was actually a response to concerns that the [foreign arbitral] award should not be given binding effect in one country when it is not binding under the law where it is made.”131

Article V(1)(e) can be divided into two categories. The first category covers foreign arbitral awards that have not yet become binding. Under the New York Convention, the word “binding” means there is no further arbitral appeal available.132 In Shell Egypt West Manzala GmbH v. Dana Gas Egypt Ltd.,133 the court considered an arbitration clause provision which stated that the arbitral tribunal’s foreign arbitral award “shall be final, conclusive and binding on the parties.” The court rejected the defendant’s argument that the provision excluded any rights of appeal under section 69 of the Arbitration Act 1996 because clear words were necessary to exclude rights of appeal, and the words “final and binding” alone were not enough.

The second category is a complicated defence that has created controversy and competing approaches by New York Convention signatories. It covers foreign arbitral awards that a court has set aside or suspended in the country where the foreign arbitral award was made. The basis for courts setting aside a foreign arbitral award in the second category is (1) the law of the place of arbitration, which may be more liberal in allowing the non-enforcement of foreign arbitral awards; and (2) even if the foreign arbitral award is rendered in another country, the law of the place of arbitration may have been chosen by the parties to apply as substantive law in the choice of law provision.134 The setting aside of a foreign arbitral award by the place of origin, however, has not prevented or deterred enforcement in countries like France, relying upon national legislation.135 A discussion on setting aside will be made in Chapter Six.

130 New York Convention, art V(1)(e).
131 Senger-Weiss (n 30) 172.
132 Senger-Weiss (n 30) 173 (stating that holding otherwise would validate a means for a losing party to evade enforcement by bringing, in a foreign court, a post arbitral action to set aside the award).
134 Dana Freyer, ‘The Enforcement of Awards Affected by Judicial Orders of Annulment at the Place of Arbitration’ in Emmanuel Gaillard and Domenico Di Pietro, Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice (Cameron May 2009) ch 26, 760; Karaha Bodas Co v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 264 FSupp 2d 490, 500 (SD Tex 2003) (noting the Central Jakarta District Court’s purported ‘annulment’ of an arbitral award where Indonesian law governed the substance of the contract but the seat of arbitration was Switzerland).
135 Freyer (n 134) 760. Belgian courts allow enforcement despite the set aside if the connection to the country was minimal.
4.2.1.7. Lack of Arbitrability

The provisions under Article V(2) differ from the previous five provisions because the two defences under Article V(2) are based on the respect for the authority of the country where the foreign arbitral award is sought to be enforced. The provisions under Article V(2), therefore, have the most applicability in terms of challenging foreign arbitral awards based on the laws of the Shari’a and/or the domestic laws of each of the GCC states.

A. The Problem of Arbitrability in General

Article V(2)(a) states that enforcement may be refused if “[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country.” In other words, the enforcing state may decide the arbitrability of the dispute using its domestic laws. In the GCC states, this means that GCC states can use their national arbitration laws and/or the Shari’a to determine the arbitrability of a dispute.

B. Subjective v. Objective Arbitrability

It must be noted here that there is a distinction between subjective arbitrability and objective arbitrability. Subjective arbitrability deals with issues covered by Article V(1)(a) relating to the incapacity of a party to enter into an arbitration agreement. This type of arbitrability deals with the aptitude of the party to enter into an agreement, lacking such aptitude thereby renders the agreement null and void for lack of consent. This is arbitrability ‘ratione personae.’ Such an issue arises in relation to a state’s or a public entity’s capacity to conclude an arbitration agreement. The Paris Court of Appeal in Gatoil v. National Iranian Oil Co, rejected Gatoil’s argument that the agreement

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136 New York Convention, art V(2)(a). This is also known as objective arbitrability.
137 Senger-Weiss (n 30) 173 (“If the grounds of a dispute cannot be settled by arbitration under domestic law, a court may refuse to enforce an award granted through a foreign arbitration panel.”).
was invalid because it lacked the necessary parliamentary authorisation.

Article V(2)(a) deals with objective arbitrability, a ‘reatione materiae,’ which concerns whether the subject matter is capable of arbitration. Under objective arbitrability, the agreement is deemed null and void, not because of consent, but because its object is contrary to law.139

Under objective arbitrability, it is not the parties that determine whether a subject matter is arbitrable. Instead, it is the prerogative of the state and its legislature to determine what subject matter is arbitrable. In the context of the GCC states, this area could be ripe for challenges to the enforceability of foreign arbitral awards based on the Shari’a, depending on the status of the Shari’a in a GCC state’s constitutional framework.

C. Applicable Law

There are two possibilities regarding who will determine the applicable law to the arbitrability of the arbitration agreement: the arbitrator(s) or the state court.140 The arbitrator will determine the law applicable to the arbitration agreement whenever the parties have designated so in the agreement, a paramount characteristic of party autonomy. It is, however, rare for parties to provide for the law applicable to the arbitration agreement in the arbitration clause.141

Regardless, when an arbitrator does decide which law applies to the arbitration contract, the arbitrator has three options: the law governing the contract, the law of the seat, or a-national rules.142 An arbitrator can look at the choice of law provision of the contract to see if the parties also intended to apply the choice of law to the arbitration agreement.143 The most common practice is for arbitrators to apply the law of the seat of the arbitration whenever the parties are silent as to the applicable law.144 Some arbitrators have applied an a-national approach to determining the applicable law by

139 Bernardini (n 81) 504.
140 ibid 509-517.
141 ibid 511 (“In this author’s experience, very few arbitration clauses contained in a contract provide for the applicable law.”).
142 ibid 512-514.
143 ibid 512.
144 ibid 513.
looking at an internationally accepted standard.\footnote{Bernardini (n 81) 514.}

Courts could also determine the law applicable to the arbitration agreement at the setting aside stage or at the enforcement stage. For purposes of this chapter, the focus will be on the enforcement stage. At the enforcement stage, Article V(2)(a) seems to be clear that the law of the \textit{lex fori} is exclusively the applicable law as the provision states that objective arbitrability is to be determined under “the law of that country” where enforcement was sought.\footnote{New York Convention, art V(2)(a); Bernardini (n 81) 516.} This is the view of van den Berg and the majority of relevant authorities.\footnote{See van den Berg (n 51) 289.} Bernardini argues, however, that it is theoretically possible to challenge the enforcement of a foreign arbitral award not under Article V(2)(a), but under Article V(1)(a).\footnote{Bernardini (n 81) 516-517.} In such a situation and under Article V(1)(a), the law determined by the parties, or absent such choice, the law of origin or where the foreign arbitral award was made, could apply and determine arbitrability. In other words, the foreign arbitral award has to be arbitrable at the place where the foreign arbitral award was made under Article V(1)(a) and at the place where the foreign arbitral award is being enforced under Article V(2)(a).

In the context of the GCC states, it is possible to apply the law of arbitrability of a GCC state when a foreign arbitral award is sought to be enforced in a GCC state and a challenge is made under Article V(2)(a), or when a foreign arbitral award is made in the GCC states, enforced outside of the GCC states, and challenged under Article V(1)(a).

\textbf{D. Arbitrable Dispute}

The determinations of what subject matter is arbitrable will differ from country to country as arbitrability depends on “the applicable national laws.”\footnote{Bernardini (n 81) 517.} For this reason, the answer to the choice of law is very important. Parties can agree to arbitrate arbitrability. In \textit{Schneider v. Kingdom of Thailand},\footnote{\textit{Schneider v Kingdom of Thailand,} US Ct of App, Second Circuit, Docket No 11-1458-cv (8 August 2012).} the US Second Circuit Court of Appeals held that because Walter Bau AG and Thailand clearly and unmistakably
agreed to arbitrate issues of arbitrability - including whether the toll way project involved “approved investments” - Thailand is not entitled to an independent judicial redetermination of that same question. For purposes of this study, this thesis author will only address the arbitrability of a subject matter within the GCC states and the Shari’a framework. This issue of arbitrability, however, will be discussed in Chapter Five with a more thorough coverage of specific subject matters that are not arbitrable in the GCC states and/or the Shari’a.

4.2.1.8. Public Policy

The most popular and also the most controversial provision allowing for the refusal to enforce a foreign arbitral award is the public policy defence under Article V(2)(b). This provision, however, also relates to other provisions in the New York Convention, namely Article V(2)(a), among others, that also allow a limit on the enforcement of foreign arbitral awards based on public policy arguments. That a subject matter is not arbitrable, for example, is also an issue of a state’s public policy. The concept of public policy will be discussed more fully in Chapter Five.

4.2.2. Potential Challenges to Enforcement of Foreign Arbitral Awards Under the ICSID Convention

The ICSID Convention does not leave much room for challenging the enforcement of an arbitral award. In fact, the ICSID Convention provides for


152 Hanotiau and Caprasse (n 151) 799-801(explaining the other provisions in the New York Convention that imply the public policy defence, including Article V(1)(a), Article V(1)(b), Article V(2), Article V(2)(a), and Article V(2)(b).

153 Hanotiau and Caprasse (n 151) 787 (“Public policy is thus central to the law of arbitration: first, through the rules governing arbitrability, it may limit the freedom of the parties to conclude an arbitration agreement; second, an award can be set aside when it violates public policy; finally, the recognition and enforcement of an award may be refused if it infringes public policy.”)

automatic enforcement under Article 54(1).\footnote{ICSID Convention, art 54(1). Article 54(1) states as follows: “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territory as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.” See also, Reed, Paulsson and Blackaby (n 154) 184.}

While the mandate of Article 54 for automatic enforcement seems clear, Argentina, on multiple occasions, unsuccessfully argued that Article 54 requires a successful claimant to first obtain enforcement of ICSID arbitral awards against it in the Argentine courts.\footnote{Luke Peterson, ‘Argentine Crisis Arbitration Awards Piled Up, But Investors Still Wait for a Payout’ (Focus Europe, 25 June 2009); Global Arbitration Review, ‘High Noon – A Round Table Over Unpaid ICSID Awards’ (2008) Global Arb Rev 3, No 6; Reed, Paulsson and Blackaby (n 154) 182-184.} In Continental Casualty Company v Argentine Republic,\footnote{Continental Casualty Company v Argentine Republic, ICSID Case No ARB/03/0, Decision on Argentina’s Application for a Stay of Enforcement of the Award (23 October 2009), para 12; Reed, Paulsson & Blackaby (n 154) 182-184.} the ad hoc committee denied Argentina’s arguments that “it would be necessary for Continental to follow the formalities applicable to enforcement in Argentina of final judgments of Argentine courts” stating that the position of Argentina is “inconsistent with Argentina’s obligations under Article 53 of the ICSID Convention to carry out without delay the provisions of the award without the need for enforcement action under Article 54.”\footnote{See also Enron Corporation and Ponderosa Assets, LP v Argentine Republic, ICSID Case No ARB/01/3, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) (7 Oct 2008), para 101; Enron Creditors Recovery Corp (formerly Enron Corp) and Ponderosa Assets, LP v Argentine Republic, ICSID Case No ARB/01/03, Decision on the Claimants’ Second Request to Lift Provisional Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) (20 May 2009), para 23-29; Compania de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic, ICSID Case No ARB/97/3, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award rendered on 20 Aug 2007 (Rule 54 of the ICSID Arbitration Rules) (4 Nov 2008), para 45; Sempra Energy International v Argentine Republic, ICSID Case No ARB/02/16, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules (5 March 2009), para 103-104. Article 54(2) of the ICSID Convention does require the party seeking recognition and enforcement to provide a certified copy of the award to the competent court or other authority designated by the State where enforcement is sought. Some States like the UK have taken it upon themselves to elaborate on the procedure by providing detailed instructions for parties applying for recognition, enforcement and execution in their territory. However, most Contracting States have provided little, if any, guidance at all.} While enforcement has been insulated from review by national courts, such is not the case with regards to execution on specific assets. The ICSID Convention does not obligate Contracting States to execute on assets that could not be executed through a final judgment in its own courts. Falling under this category would be the sovereign...
immunity defence, which may and have prevailed to avoid execution. Article 55 further clarifies the matter as follows: “Nothing in Article 54 shall be construed as derogating from the law in force in any contracting state relating to immunity of that State or of any State from execution.” 159

In Benvenuti and Bonfant v. Congo, 160 the court stated that it could not execute against the assets of the Congo located in France without the court’s prior authorization because those assets might be protected by sovereign immunity. On appeal, the Paris Court of Appeals held that the lower court exceeded its authority relating to execution when it was only asked to enforce the ICSID arbitral award. 161 In AIG v. Kazakhstan, 162 the English High Court held that under the 1978 UK State Immunity Act the London assets were at all times the property of Kazakhstan and so are immune from the enforcement process of the UK courts even though the National Bank of Kazakhstan had possession of the assets.

Aside from the immunity from execution discussed in the Benvenuti and Bonfant case above, courts distinguish between immunity from execution and immunity from jurisdiction. 163 In immunity from jurisdiction cases, the arbitration agreement usually constitutes waiver of jurisdiction; while in immunity from execution cases, the arbitration agreement, even with the New York Convention and the ICSID Convention, do not usually constitute a waiver. 164

Urbas summarised French case law on waiver of immunity as follows: “(i) a state’s agreement to arbitrate is sufficient to remove immunity from jurisdiction; (ii) this agreement can include the exequatur process, which is to be distinguished from execution proceedings; (iii) a waiver of immunity from jurisdiction is different from a waiver of immunity from execution; and (iv) an agreement to arbitrate is not sufficient

159 ICSID Convention, art 35.
162 AIG Capital Partners, Inc and CJSC Tema Real Estate Company v Republic of Kazakhstan, ICSID Case No ARB/01/6, Decision of the High Court, Queens Bench Division (Commercial Court)(20 October 2005), ICSID Reports 11 (2007).
164 Chung (n 163).
to constitute a waiver of immunity from execution." In *Creighton Ltd. v. Qatar*, however, the French Court of Cassation held that Qatar waived immunity from execution, stating as follows:

...the undertaking of the state having signed the arbitration clause to execute the award in the terms of Article 24 of the Rules of Arbitration of the International Chamber of Commerce implied its waiver of immunity from execution.

However, a state’s general waiver of immunity may still be insufficient, as courts may require a waiver of specific assets. In *NML Ltd et al. v. the Republic of Argentina*, the French Supreme Court held that a waiver of immunity from execution had to be express and specific by mentioning the assets or the category of assets over which the waiver is granted.

A question that arises in relation to sovereign immunity is whether the party claiming such immunity is a “separate entity” of a foreign State and whether the proceeding concerns an area of law where the immunity defence does not apply. The same issue was addressed by the Australian High Court and the Federal Court in *PT Garuda Indonesia Ltd v. Australian Competition & Consumer Commission*, where the court held that Garuda was a separate entity of the Republic of Indonesia under Section 11(1) of the Australian Foreign States Immunities Act 1985 (Cth), which states

168 Société NML Capital (Iles Caïmans) v Etat d’Argentine, Cour de Cassation (1ère Chambre Civile), n° 10-25/938, 11-10/450 and 11-13/323 (28 March 2013).
that foreign States and “separate entities” of foreign State are immune from jurisdiction except in cases of commercial transactions, employment contract or personal injury. Since the Garuda case involved allegations of anti-competitive conduct in relation to commercial freight services to Australia, a case of commercial transaction and business character, the court held that Garuda could not claim immunity.

Finally, despite the ease at which an ICSID arbitral award may be enforced, investors are in reality left with very little recourse whenever a Contracting State refuses to recognize, enforce, and execute an ICSID arbitral award. Under Article 64 of the ICSID Convention, the investor must rely on its own state to bring action on its behalf against the defaulting Contracting State in the International Court of Justice.

PART III

4.3. Potential Challenges to the Enforcement of Arbitral Awards in the GCC States

In the survey, the respondents were asked to rate in a scale of 0-10, the friendliness of the six GCC states towards enforcement of foreign arbitral awards. The respondents gave Bahrain and the UAE the highest rating with 7.44 out of 10 and 7.43 out of 10, respectively. The KSA, despite its passage of the Saudi Arbitration Law of 2012, was still rated the least friendly toward the enforcement of foreign arbitral awards with a rating of 3.44 out of 10. Oman was rated with 6.25 out of 10, Kuwait with 5.78 out of 10, and Qatar with 5.74 out of 10. It is interesting to see in this section whether the ratings of the GCC states’ friendliness toward the enforcement of foreign arbitral awards are tied directly with the GCC states’ rules on challenges to the enforcement of foreign arbitral awards.

170 Appendix II, Survey Report, II(2.2.1.).
171 ibid.
172 ibid.
173 ibid.
4.3.1. Challenges to the Enforcement of Arbitral Awards in Oman

Oman divides its laws for enforcement of an arbitral award under domestic arbitration and international arbitration. In domestic arbitration, after the domestic arbitral award has met the conditions for enforcement and has been deposited, the leave for enforcement cannot be granted until after three months.\footnote{Sultani Decree No 47/97, art 58(1), Issuing the Act on Arbitration in Civil and Commercial Matters, published in the Official Gazette No 602 (28 June 1997). This means that the rules allow the parties to raise the setting aside challenge within the three-month period, which is the time limit given for raising the set aside challenge. After three months, and even if there was an application to set aside pending, the leave for enforcement may be filed unless the court granted a stay on enforcement. El-Ahdab (n 14) 561.}

Under Article 58 of Sultanate Decree No 47/97, “leave for enforcement of the arbitral award is not subject to means of recourse.”\footnote{Sultanate Decree No 47/97, art 58, Issuing the Act on Arbitration in Civil and Commercial Matters, published in the Official Gazette No 602 (28 June 1997).} Omani law limits the ability of parties to challenge the enforcement of domestic arbitral awards, and sets only three grounds for denying enforcement of the domestic arbitral award:

   1. does not contradict a judgment previously rendered by the Omani courts on the subject-matter of the dispute;
   2. does not violate Omani public policy;
   3. was properly notified to the parties against whom it was rendered.

El-Ahdab notes that the Omani law exceeds the UNCITRAL Model Law and the New York Convention in making it easier to enforce arbitral awards because the additional grounds\footnote{See El-Ahdab (n 14) 562.} listed in the UNCITRAL Model Law to challenge the enforcement of an arbitral award are not available in Oman. El-Ahdab, however, criticizes the Omani law for making it possible to enforce an arbitral award that is obviously invalid.\footnote{El-Ahdab finds it difficult to imagine that a court would enforce an award where the arbitration agreement was clearly void or invalid simply because the time for filing an application to set aside the award had lapsed since the validity of the arbitration agreement is not a ground to challenge enforcement of a domestic award in Oman, unlike the UNCITRAL Model Law. El-Ahdab’s criticism is noteworthy because it recognizes that the grounds for challenging the enforcement of an award and the grounds for setting aside an award are separate, and because it supports the idea of repeating the basis for attacking the award at the enforcement stage and at the setting aside stage.}

Oman generally follows the New York Convention on the enforcement of
foreign arbitral awards.\textsuperscript{178} The enforcement of foreign arbitral awards under Royal Decree No. 13/97 is governed by a different set of rules than domestic arbitral awards.\textsuperscript{179}

Sultani Decree 29/2002 provides the grounds for refusing enforcement of foreign arbitral awards. It should be noted here that Oman has separate grounds for setting aside an arbitral award under Article 53 of Sultani Decree No 47/97.\textsuperscript{180} The grounds for refusing enforcement of foreign arbitral awards in Oman are as follows: (1) not being issued by a competent body, (2) non-compliance with Omani law or court decision, (3) improper notice and legal representation, (4) non-arbitrability of the dispute, (5) non-enforceability of the foreign arbitral award in the country where it is made, (6) non-final arbitral awards, and (7) against public policy and rules of morality.\textsuperscript{181} It is worth noting here that the Omani law, unlike the New York Convention,\textsuperscript{182} does not explicitly consider the invalidity of arbitration agreement, the incapacity of the parties to conclude the arbitration agreement, the wrong composition of the tribunal or the excess of the jurisdiction of the tribunal, as grounds for refusing enforcement of a foreign arbitral award.\textsuperscript{183}

Under Article 352(1), read in conjunction with Article 353, of Sultani Decree 29/2002,\textsuperscript{184} a foreign arbitral award cannot be enforced in Oman, if it is not issued by a competent arbitration tribunal according to the law of the country where it is made.\textsuperscript{185} In this sense, the Omani law is more restrictive than the New York Convention. Omani courts, however, recognize the \textit{competence-competence} principle. The Omani court in Commercial Circuit Muscat, Appeal No. 199/2008,\textsuperscript{186} held that “the arbitral tribunal will have the competency to settle the claim of annulling the contract in which the arbitration condition is included. This is known by the principle of \textit{competence-}
competence ...” However, Oman is not the most restrictive state in the GCC. Bahrain, which follows the Article 298(1) of the Egyptian Code of Civil and Commercial Procedure, go even further by requiring that foreign arbitral awards are not enforceable if a domestic court in their country also had jurisdiction over the dispute.

Under Article 352(3) of Omani Decree 29/2002, a foreign arbitral award that breaches an Omani law shall not be enforced. This provision is problematic, not only because it goes beyond the New York Convention’s requirement of not violating the enforcing country’s mandatory rules, but also because it is fraught with vagueness as to what type of laws must not be breached.

Additionally, Oman raises the issue of joint jurisdiction, where a foreign arbitral award that contradicts a prior sentence or order issued by a domestic court in Oman would not be enforceable. Prior Omani judgments, therefore, are given priority of enforcement over foreign arbitral awards. Bahrain, Qatar, and the UAE have similar provisions regarding the non-enforcement of a foreign arbitral award that contradicts a prior domestic court judgment.

Under Article 352(2) of Sultani Decree 29/2002, a foreign arbitral award is not enforceable unless both parties have been summoned to appear and are legally represented. According to Al-Siyabi, “although the Omani rule does not explicitly express equal treatment, fair hearing, full and proper opportunity for the parties to present their case and having access to the other party’s documents as conditions for the enforcement of a foreign award, it can be interpreted as prohibiting most types of failure

187 Bahraini Law No 12 of 1971 on Civil and Commercial Procedures, art 252.
188 Egyptian Code of Civil and Commercial Procedure, art 298(1).
189 Sultani Decree 29/2002 (Oman), art 352(3).
190 Al-Siyabi (n 8) 256. It is unclear whether breach of mere ordinary rules would trigger non-enforcement.
191 Sultani Decree 29/2002, art 352 (d). This rule follows the Egyptian rule in the Egyptian Code of Civil and Commercial Procedures 13/1968, art 298(4); Al-Siyabi (n 8) 257-258. According to Al-Siyabi, prior Omani judgment must have already been made, and not just begun, prior to the commencement of an arbitral proceeding.
193 El-Ahdab (n 14).
194 UAE Civil Procedures Code, art 235.
195 Sultani Decree 29/2002 (Oman), art 352(2).
to comply with fairness in arbitration proceedings.”

For instance, the arbitral tribunal’s refusal to hold a hearing requested by one of the parties may be regarded as a violation of due process, and thus a ground for denying enforcement of the foreign arbitral award.

Article 353 of Sultani Decree 29/2002 provides that a foreign arbitral award is not enforceable unless the subject matter of the dispute is arbitrable under Omani law. This requirement is consistent with Article V(2)(a) of the New York Convention. Kuwait and Bahrain are the two other GCC states that allow for the challenge of enforcement of foreign arbitral awards on the ground of non-arbitrability.

Oman requires that a foreign arbitral award is also enforceable in the country of origin before it can be enforced in Oman under Article 353 of Sultani Decree 29/2002. While the New York Convention allows for the refusal to enforce a foreign arbitral award that has been set aside at the country of origin, the Omani law goes further and is more restrictive than the New York Convention. The latter requires the foreign arbitral award to be binding, under the law at the seat of arbitration or under the applicable law, but Omani law requires it to be enforceable under the law at the seat of arbitration.

It should be mentioned that Qatar has a similar regulation. The UAE goes further than the need for the enforceability of a foreign arbitral award, and requires that the foreign arbitral award must have been granted leave to enforce at the seat of

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196 Al-Siyabi (n 8) 259.
197 Al-Siyabi (n 8) 250.
198 Sultani Decree 29/2002 (Oman), art 353.
199 New York Convention, art V(2)(a). It must be kept in mind that the Shari’a sets out rules on the non-arbitrability of disputes.
200 Al-Siyabi (n 8) 261.
201 Sultani Decree 29/2002 (Oman), art 353.
202 This means that if the foreign arbitral award is made in another country under the law of a third country, it cannot be enforced in Oman, unless it is enforceable in the country where it is made. This imposes an extra restriction on enforcement of foreign arbitral awards in Oman. The enforceability condition may amount to the need for double enforcement, at the seat of arbitration as well as in the enforcing country.
203 Qatari Law No 13 of 1990 on Civil and Commercial Procedures, art 380(c).
204 Dubai Court of Cassation Judgment 267/99 (November 1999); Dubai Court of Cassation Judgment 17/2001 (3 October 2001).
arbitration. On the other hand, Bahraini law does not specify enforceability under the law of the seat of arbitration as a condition for enforcing the foreign arbitral award in Bahrain. In this respect, Bahraini law is more facilitative of enforcement of foreign arbitral awards than Omani law.

Article 352 (a) of Sultani Decree 29/2002 requires that a foreign arbitral award is final at the country of origin to be enforceable in Oman. While this provision reflects Article V(1)(e) of the New York Convention, the Omani law is more strict than the New York Convention, which only requires a binding arbitral award.

It is common practice in the GCC states and under the New York Convention to not enforce a foreign arbitral award that violates the enforcing state’s public policy. As such, Article 532(4) of Sultani Decree 29/2002 is not unique in requiring that a foreign arbitral award must not contain anything contrary to the public policy or rules of conduct and morality in Oman. An important feature of Omani law on public policy, as well as its equivalents in most other GCC states, is that they emphasize the rules of morality and conduct as separate from public policy. Oman makes no distinction between Omani public policy and international public policy. Moreover, it is not clear whether the Omani court, when considering enforcement of a foreign arbitral award, takes into account international public policy or otherwise.

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205 El-Ahdab (n 14).
206 Al-Siyabi (n 8) 263-264. According to Al-Siyabi, “some types of interim awards, particularly conservatory measures, if they are considered to be binding, can be enforced under the Convention, but not under Omani law.”
207 Bahraini Law No 12 of 1971 on Civil and Commercial Procedures, art 252; Qatari Law of Civil and Commercial Procedures, art 380(d); UAE Civil Procedures Code, art 235(1)(e).
208 Sultani Decree 29/2002 (Oman), art 532(4).
209 Sultani Decree 13/97, art 120.
210 Such a distinction is made by the municipal laws of some Arab countries, including Lebanon, Algeria and Tunisia, with the effect of not enforcing foreign awards that violate international public policy. See El-Ahdab (n 14); Mohammed Aboul-Enein, ‘Egypt’ in Jan Paulsson (ed), International Handbook on Commercial Arbitration (Kluwer, Nov 2002) Supplement 36. Also, it remains unclear to what extent Oman will take into account the Shari’ah when determining its public policy and it also remains to be seen whether Oman is strict with regards to issues like the prohibition on the riba [interest]. Al-Siyabi (n 8) 265-266.
4.3.2. Challenges to the Enforcement of Arbitral Awards in the UAE

The UAE rules for the enforcement of domestic arbitral awards mirrors that of Oman’s rules for domestic arbitration, discussed previously. There are two main differences, however, between Oman and the UAE. First, the UAE only gives 60 days or two months time limit, as opposed to Oman’s and Egypt’s 90 days or three months time limit, to file an application to set aside the arbitral award. However, the arbitration deadline could be extended. Second, the UAE does not have a separate statute covering the enforcement of foreign arbitral awards, relying primarily on the New York Convention for such matters. In the UAE, therefore, the enforcement of a foreign arbitral award may be challenged according to the grounds provided by the New York Convention, and if the President of the Court finds one of the following:

1. that the arbitral award contradicts a judgment previously rendered by the courts on the Emirates on the subject matter of the dispute;
2. that the arbitral award violates the public policy of the UAE; or
3. that the parties against whom the arbitral award was rendered was not properly notified.

In the UAE, an arbitration clause that is incorporated by reference raises concerns and must make the reference explicit or it stands the chance of being challenged for invalidity. Such challenge to the validity of the arbitration agreement is consistent with Article V(1)(a) of the New York Convention. The Dubai Court of Cassation, however, has upheld such an arbitration clause incorporated by reference in a bill of lading to a charter party terms because the reference in the bill of lading was explicit.

Under Article 235 of the UAE Civil Procedures Code, a foreign judgment, and

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212 See Section 4.2.1.1 above.
therefore a foreign arbitral award, may be ratified, if UAE courts did not have jurisdiction over the subject matter of the dispute, and the foreign court had jurisdiction, according to the rules of international legal jurisdiction in the country where the judgment is made. 214 A foreign arbitral award must not conflict with a domestic court’s judgment previously made in the UAE. 215 Like in Oman, Qatar, and Bahrain, this rule follows the Egyptian rule, and therefore gives priority to prior domestic court judgments over foreign arbitral awards. Under Article 235(2)(d) of the UAE Civil Procedures Code, a foreign arbitral award must be final under the law of the country of origin to be enforceable. 216 Like in Oman and Bahrain, this rule is stricter than the New York Convention, which only requires a binding arbitral award. However, cases such as the Abu Dhabi Court of Cassation, Petition No 679/2010 217 and the Dubai Court of Appeal, Petition No 531/2011 218 have held that the conditions of Article 235 of the UAE Civil Procedure Code do not apply to foreign arbitral awards.

Furthermore, the UAE has required that UAE rules of procedure must be followed when enforcing a foreign arbitral award which means that the UAE requires that due process must have been followed for a foreign arbitral award to be enforceable. 219 The UAE in this regard, according to Al-Siyabi, is comparable to Oman and other GCC states. 220 Article 235(2)(c) of the UAE Civil Procedures Code uses the same wording as the Omani law requiring due process for enforcement of a foreign arbitral award. However, the UAE Supreme Court of Cassation upheld a ruling by the Sharjah Court of Appeal that upheld a decision by the Sharjah Court of First Instance to enforce a judgment made in France. The Court of Cassation ruled that the procedural law of the country where a case is heard must govern the court proceedings, unless such a law is contrary to public policy in the enforcing state. 221 It has been said, nevertheless, that on occasions the UAE courts went beyond this, and required that the UAE Civil

214 Al-Siyabi (n 8) 257.
215 Al-Siyabi (n 8) 257.
216 Dubai Court of Cassation Judgment 267/99 (November 1999); Dubai Court of Cassation Judgment 17/2001 (3 October 2001).
219 See however, Dubai Court of Cassation, Petition No 132/2012, Judgment of 22 February 2012.
220 Al-Siyabi (n 8) 260.
Procedures Code must also be complied with in making a foreign arbitral award that is going to be enforced in the UAE.\textsuperscript{222} However, in the Dubai Court of Cassation, Recourse No. 351 of 2005, Commercial Recourse (1 July 2006),\textsuperscript{223} the petitioner claimed that the arbitrator violated due process by holding a hearing without informing any of the two parties, but the court rejected the petition to annul the foreign arbitral award because the two parties had agreed and signed the court’s direction to submit their memoranda and to set a hearing within fifteen days.

As will be discussed in Chapter Six, the grounds for setting aside a foreign arbitral award in the UAE follows the grounds set forth in the UNCITRAL Model Law, which in turn mirrors the grounds for challenging the enforcement of a foreign arbitral award under the New York Convention. Thus, by adopting the New York Convention to govern the enforcement challenge of foreign arbitral awards and the UNCITRAL Model Law to govern the setting aside of arbitral awards, the UAE has largely followed the international arbitration norms. Nevertheless, the UAE ought to adopt a federal arbitration law that would make the arbitration laws in the UAE much clearer and easier for UAE courts to follow. The lack of a federal arbitration law in the UAE have led courts to arrive at different and often conflicting decisions about the applicability of the New York Convention, leading some courts to erroneously apply the UAE Civil Procedure Code (which ought to be applicable only to domestic arbitral awards) to foreign arbitral awards.\textsuperscript{224}

\textsuperscript{222} Essam Al Tamimi, Practitioner’s guide to arbitration in the Middle East and North Africa (JurisNet LLC, 2009) 46. See also Mark Hoyle, “Topic in focus: demystifying UAE arbitration law” (Lexology, 8 November 2013) <http://www.lexology.com/library/detail.aspx?g=fc4f6d6-cafb-4063-8dc1-f20fc1544c9e> accessed 15 January 2014 (stating that many procedural matters in the UAE become a public order or public policy issue).

\textsuperscript{223} Dubai Court of Cassation, Recourse No 351 of 2005, Commercial Recourse (1 July 2006).

\textsuperscript{224} See Ahmed Almutawa and AFM Maniruzzaman, ‘The UAE’s Pilgrimage to International Arbitration Stardom - A Critical Appraisal of Dubai as a Centre of Dispute Resolution Aspiring to be a Middle East Business Hub’ (2014) J World Inv Trade 15, 193-244; Al Rowaad Advocates & Legal Consultancy, ‘Enforcing arbitration awards’ (Lexology, 19 January 2014) <http://www.lexology.com/library/detail.aspx?g=ad551ed1-ad80-485c-b635-09e85cad3a3> accessed 24 February 2014 (stating that “the implementation of the New York Convention in the UAE did not expressly displace the enforcement provisions in the [UAE] Civil Procedure Code. Therefore, parties wanting to enforce an award under the New York Convention must satisfy the requirements of the UAE Civil [Procedure] Code. In practice, enforcing arbitration awards can be a lengthy and unpredictable process. It is common for the UAE courts to require that the foreign award satisfies the rules and procedures of the UAE, and may refuse to enforce it if there is a violation of local laws.”).
4.3.3. Challenges to the Enforcement of Arbitral Awards in the KSA

The KSA recently issued the Saudi Arbitration Law of 2012 by Royal Decree No. M/34. This Saudi law changed the landscape of arbitration law and enforcement in the KSA significantly, as it put the KSA more in line with the other GCC states and with international arbitration norms. This does not mean, however, that the principles of the Shari’a no longer apply, as the Saudi Arbitration Law of 2012 still defers to the Shari’a, and states in Article 5 that the rules to which the arbitration is submitted must be applied without prejudice to the Shari’a. Whereas there was an absence of provisions prior to the Saudi Arbitration Law of 2012 governing the grounds for challenging the enforcement of an arbitral award, the KSA like the other GCC states has set out provisions for both the grounds for non-enforcement and for setting aside an arbitral award.

Like other GCC states, Article 55 of the Saudi Arbitration Law of 2012 sets forth three grounds under which an arbitral award may be refused enforcement upon verification of the court as follows:

1. that the arbitral award does not contradict an arbitral award or decision rendered by a court, committee, or board having jurisdiction over the settlement of disputes in the KSA;

2. the arbitral award does not violate the Shari’a and public policy in the KSA; and

3. the party against whom the arbitral award has been rendered has been properly notified.

The three grounds above are similar to the grounds provided by Oman, the

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225 Royal Decree No M/34, published in Official Gazette on June 8, 2012 (Saudi Arabia).
229 ibid art 50.
UAE, and Qatar. The only difference is that the KSA expressly prohibits the violation of the Shari‘a, which in effect also applies in all the GCC states regardless of express mention. Harb commented that “while the new Saudi arbitration law can be said to significantly advance the position of arbitration in the Kingdom, the local Saudi courts and local law will still play an important role in the challenge or enforcement of any such awards in the Kingdom.”

Additionally, the KSA had passed an Enforcement Law in 2007, which took effect on March 2013, changing the landscape of enforcement of arbitral awards in the KSA. In the old system, a party aiming to enforce a foreign arbitral award in the KSA had to apply for enforcement with the Board of Grievances, which undertook a full review of the merits, determination of the foreign arbitral award’s compliance with the Shari‘a, and requiring submission of documents as outlined in Chapter Three as conditions to enforcement. According to Giansiracusa and others, citing the Jadewal v. Emaar case, “[p]arties seeking the enforcement of foreign judgments or awards thus faced significant delays and were exposed to a retrial of the dispute on the merits by the Board.” The Enforcement Law of 2007 created an Enforcement Judge to enforce and monitor the enforcement of judgments and arbitral awards in a more expedient manner. Also, the Enforcement Law of 2007 expressly mentions “arbitral

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231 Harb and others, ‘The New Saudi Arbitration Law’ (n 227); Al-Siyabi (n 8) 259; Husain Al-Baharna, ‘The Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain’ (May 1989) Arab LQ, vol 4, 339. The old Saudi arbitration law required that a foreign arbitral award must have been passed according to the principles of fair trial as set out under the Shari‘a. It is likely that this rule remains in the Saudi Arbitration Law of 2012, as a foreign award would violate the Shari‘a were it not so.
232 Royal Decree No M/53 of 13 Sha‘ban 1433 Hejra (3 July 2012); see also Judiciary Regulation, Royal Decree No M/78 of 19/1428 (1 Oct 2007) (creating the Enforcement Judge).
233 Giansiracusa and others, ‘The New Enforcement Law’ (n 11).
234 Emaar (UAE) v Jadawel (KSA) case (for a regional dispute) and (for a domestic dispute) Court of Grievance, Commercial Circuit, No 58/C/C3, May 7, 2003, Int’l J of Arab Arb, vol 2, No 2, 221.
235 Giansiracusa and others, ‘The New Enforcement Law’ (n 11).
236 Defined in Article 1 as “the Chairman and Judges of the Enforcement Circuit, the Enforcement Circuit Judge, or the Judge of the Single Court.” Saudi Enforcement Law, art 1, Royal Decree No M/53 of 13 Sha‘ban 1433 Hejra (3 July 2012).
237 Saudi Enforcement Law, art 2, Royal Decree No M/53 of 13 Sha‘ban 1433 Hejra (3 July 2012).
238 Giansiracusa and others, ‘The New Enforcement Law’ (n 11).
awards” as falling within its scope under Article 12, as opposed to the old system that only mentions “foreign judgments.”

Under Article 11 of the Enforcement Law of 2007, the Enforcement Judge may enforce an arbitral award, including foreign arbitral awards, if the party seeking enforcement establishes the following:

(1) KSA courts do not have jurisdiction with regards to the dispute;
(2) the arbitral award was rendered following proceedings in compliance with the requirements of due process;
(3) the arbitral award is in final form as per the law of the seat of the arbitration;
(4) the arbitral award does not contradict a judgment or order issued on the same subject by a judicial authority of competent jurisdiction in the KSA; and
(5) the arbitral award does not contain anything that contradicts KSA public policy.

Article 11 also requires reciprocity for foreign arbitral awards. The Enforcement Judge’s decision, however, is subject to appeal during which the enforcement would be stayed. Overall, the Enforcement Law of 2007 and the Saudi Arbitration Law of 2012 are developments that make arbitration in the KSA closer to the international arbitration norms.

4.3.4. Challenges to the Enforcement of Arbitral Awards in Kuwait

Foreign arbitral awards may be enforced in Kuwait under the New York Convention and under the Kuwaiti Code of Civil and Commercial Procedure. Kuwait made a reservation to the New York Convention that “the State of Kuwait reserves implementation of the convention to the recognition and enforcement of arbitral awards

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239 Saudi Enforcement Law, art 12, Royal Decree No M/53 of 13 Sha'ban 1433 Hejra (3 July 2012).
240 Giansiracusa and others, ‘The New Enforcement Law’ (n 11).
242 Saudi Enforcement Law, art 11, Royal Decree No M/53 of 13 Sha'ban 1433 Hejra (3 July 2012); Giansiracusa and others, ‘The New Enforcement Law’ (n 11).
243 Saudi Enforcement Law, art 10, Royal Decree No M/53 of 13 Sha'ban 1433 Hejra (3 July 2012).
made in the territory of another contracting State.”244 According to El-Ahdab, the reservation may have been a reaction by Kuwait to balance the position of Kuwait with countries that did not conclude a convention with Kuwait because even prior to joining the New York Convention, Kuwait enforced arbitral awards rendered against it while facing difficulties enforcing arbitral awards made in Kuwait’s favour.245 Like Oman, Kuwait has treated domestic arbitral awards differently than foreign arbitral awards, the latter being primarily governed by the New York Convention.

Under the domestic arbitration rules, the President of the Court must makes sure that (1) there is nothing that would hinder the domestic arbitration award’s execution, (2) the time for any appeal has expired, and (3) the domestic arbitration award is not governed by summary enforcement proceedings.246

Like Oman, Kuwait adopted the New York Convention, but created additional grounds for challenging the enforcement of a foreign arbitral award. For foreign arbitral awards, Kuwait requires and thus allows challenges to enforcement based on the following:247

1. the parties must have been duly notified and represented,
2. the foreign arbitral award must have become res judicata [final] according to the law of the seat of arbitration,
3. the foreign arbitral award does not contradict a judgment or ruling previously made in Kuwait,
4. the foreign arbitral award must not be contrary to public policy or Kuwaiti good morals,
5. the foreign arbitral award settles a dispute that is arbitrable under Kuwaiti law, and
6. the foreign arbitral award is enforceable at the seat of arbitration.

244 Kuwaiti Law No 10/1978, art 1, para 2.
245 El-Ahdab (n 14) 331.
246 ibid 330.
247 ibid 332.
Kuwait also approved the rules of the GCC Arbitration Centre. The Kuwait Court of Cassation, Commercial Circuit in Challenge No. 671/2004, laid out the procedure for challenging the arbitrators under the GCC Arbitration Centre. The Kuwaiti Court of Cassation stated that submitting the challenge of arbitrators directly to the court was a resort to a body not competent to decide the matter as the challenge of arbitrators had to follow the procedures of the GCC Arbitration Centre, which required submission of the challenge to the secretary general who shall decide the challenge within three days.

In cases where the parties could not decide on an arbitrator; if the arbitrator recused himself or abstained from the proceedings; or if the arbitrator was dismissed; then the Kuwaiti Judicial Arbitration Court of Appeals, Commercial, in Case No. 24, held that the court could appoint the arbitrator. The court further clarified that such court appointment pursuant to Article 175 of the Kuwait Pleading Law would not be subject to annulment.

4.3.5. Challenges to the Enforcement of Arbitral Awards in Bahrain

Bahrain distinguishes between domestic and international arbitration and has separate laws governing each. Bahrain’s domestic arbitration laws cover both domestic arbitral awards and foreign arbitral awards, while the international arbitral laws cover international arbitral awards as defined under the Bahraini International Arbitration Act.

Under Bahrain’s domestic arbitration laws in Articles 252 and 253 of the Code of Procedure, the enforcement of an arbitral award may be challenged on the following grounds:

(1) there was proper notice and representation and the order granting and denying enforcement was issued at the presence of the parties,
(2) an arbitral award made outside of Bahrain does not fall within the jurisdiction of Bahraini courts and does not violate any arbitration provision required by law,

(3) due process was followed during arbitration,

(4) the arbitral award is final according to the country of origin,

(5) the arbitral award does not violate a prior Bahraini court judgment,

(6) the arbitral award does not violate Bahraini public policy or good morals.

The second prong deals with joint jurisdiction as mentioned earlier in comparison to Oman. The Bahraini court, however, has already enforced a foreign arbitral award despite that it was made in Egypt and Bahraini courts also had jurisdiction. In 1991, the Bahrain Court of Cassation ruled that a judgment made by a foreign court on a dispute over which the Bahraini court has joint jurisdiction can be enforced in Bahrain.253 Referring to the Explanatory Memorandum to the Egyptian Code of Civil and Commercial Procedures that contains a provision identical to the above Bahraini provision, the Bahraini Court of Cassation held that it is only contradiction with a previous judgment or order rendered by Bahraini courts, and not the fact that the Bahraini court has joint jurisdiction over the dispute, that may lead to non-enforcement of a foreign judgment.254 Al-Siyabi explains that “the determining factor is whether domestic courts have the exclusive jurisdiction to rule on a dispute or not, according to the principles of private international law. Having exclusive jurisdiction results in non-enforcement of a judgment or award made abroad.”255

Likewise, the fifth prong that requires that the foreign arbitral award does not violate a prior Bahraini court judgment relates to the joint jurisdiction issue.256 The same rule exists in Oman, UAE, and Qatar. This means that in Bahrain, the prior judgments of a Bahraini court will have priority in enforcement over a foreign arbitral award.257

In the fourth prong, Bahraini law requires that the foreign arbitral award be

253 Bahraini Court of Cassation, Judgment No 34/1990 (5 December 1991); and Bahraini Court of Cassation, Judgment No 1136 of the 54th Judicial Year (28 November 1990).
254 Al-Siyabi (n 8) 254.
255 ibid.
256 See also Bahraini Law No 12 of 1971 on Civil and Commercial Procedures.
257 Al-Siyabi (n 8) 257.
final, which is stricter than the New York Convention’s requirement of a binding arbitral award to be enforceable. This Bahraini rule is similar to the rule in Oman and the UAE. It is interesting, however, that under the Bahraini International Arbitration Act discussed below, the international arbitral award only needs to be binding.

The Bahraini International Arbitration Act provides for separate grounds for refusal of enforcement of an international arbitral award. These grounds are the same as the New York Convention, except that Bahrain allows application of the grounds irrespective of the country where it was made. These grounds for refusal of enforcement are also the same as the grounds for setting aside an arbitral award as will be discussed more fully in Chapter Six.

Bahrain restricts the grounds under which the enforcement of an international arbitral award may be challenged into seven reasons as follows:

1. The agreement to arbitrate was not valid due to the incapacity of one of the parties, or the agreement was not valid under the law to which the parties have subjected it, or under the law of the country where the arbitral award was made.

2. A party against whom the arbitral award was made was not informed of arbitration proceedings.

3. The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the submission to arbitration.

4. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or with the law of the country where the arbitration took place.

5. The arbitral award did not yet become binding on the parties or has been set aside or suspended by the court of the country in which, or under the law of which, the arbitral award was made.

6. The arbitral award is contrary to public policy.

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258 Bahraini Law No 12 of 1971 on Civil and Commercial Procedures, art 252.
259 El-Ahdab (n 14) 146-147.
260 See generally Chapter Six.
261 Bahrain International Arbitration Act, arts 35 and 36; El-Ahdab (n 14) 146-147.
(7) The subject matter of the dispute is not arbitrable.

The above grounds are the same as the grounds set out in the New York Convention. As to the composition of the arbitral tribunal, Article 234 of the Bahrain Code of Civil Procedure requires an odd number of arbitrators, which is also required in the UAE. In a challenged based on a violation of Article 234 of the Bahrain Code of Civil Procedure in Court of Cassation, Second Circuit, Challenge No. 259/2009 (4 May 2010), where there were two arbitrators, the Bahraini court nevertheless affirmed the award because, it reasoned, the proceeding is the type that the court handles for the parties and was meant to expedite the case. Analysis of challenges to enforcement of an international arbitral award in Bahrain should, therefore, follow the analysis under the New York Convention.

4.3.6. Challenges to the Enforcement of Arbitral Awards in Qatar

In Qatar, upon filing by a party of a challenge to enforcement, the enforcement proceeding will be stayed. Qatar divides its rules for enforcement of an arbitral award under domestic and international arbitration. In domestic arbitration, the enforcement of an arbitral award may be challenged on the basis of the arbitration agreement, and if there is any obstacle against its enforcement, namely for reasons based on Qatari public policy.

In a case before the Qatari International Centre for Arbitration, Arbitration Case No. 2 of 2007(9 September 2007), the arbitral tribunal rejected a challenge based on the incapacity of the party who was not the signatory in establishing the company before the Ministry of Interior. The Qatari arbitral tribunal stated that the party had capacity because contracts entered into by the Vice President, who was the signatory in the formation of the company, were binding on the company.

In a challenge as to the capacity of the arbitrator who was not a national of

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262 El-Ahdab (n 14) 146-147.
263 Al Rowaad (n 20)(stating that the UAE requires an odd number of arbitrators).
264 El-Ahdab (n 14) 588.
Qatar, the Qatar Court of Appeals in Case No. 21/1992, held that the Pleading Law of Qatar No. 13 of 1990 did not prohibit the appointment of an arbitrator holding a different nationality than one of the parties or of the Court to which the enforcement of the arbitration condition is presented. The Court of Appeals further continued and clarified that the parties could even choose foreign law to govern the substantive law of the arbitration.

For foreign arbitral awards, Article 380 of the Code of Civil and Commercial Procedure governs the grounds upon which foreign arbitral awards may be challenged as follows:

(1) Qatari courts do not have exclusive jurisdiction over the dispute settled by the foreign arbitral award,

(2) the parties to the procedure settled by the foreign arbitral award were regularly summoned and represented,

(3) the judgement or foreign arbitral award has become res judicata [final] according to the law of the court which made it, and

(4) the foreign arbitral award is not contrary to a prior judgment issued by a Qatari court and does not violate the rules of public policy and morals in Qatar.

The rule prohibiting contradiction with a prior judgment by a Qatari court raises the joint jurisdiction issue similar to Oman, Bahrain, and UAE. As such, Qatar likewise gives priority to its own court judgements over foreign arbitral awards.  

\(^{266}\) Qatar Court of Appeals in Case No 21/1992, Hearing held 7 June 1992.  
\(^{267}\) Al-Siyabi (n 8) 257 (stating that Qatar requires that the foreign arbitral award not be contrary to a decision made by their national court).
PART IV

4.4. Recapitulating and Reconciling the Challenges to the Enforcement of Arbitral Awards in the GCC States

Despite that all GCC states ratified the New York Convention, the challenges to the enforcement of arbitral awards in GCC states are not uniform. The differences are generally twofold.

First, half of the GCC states (Oman, Bahrain, and Qatar) make a distinction between the enforcement of arbitral awards under domestic arbitration and international arbitration, thereby separating the types of challenges that may be lodged against an arbitral award. Though there are many similarities on the grounds for challenging an arbitral award under a domestic scheme versus an international scheme, namely regarding due process and public policy, the international scheme explicitly allows arbitrability as a basis to challenge the enforcement of an arbitral award, perhaps contemplating that other states would allow arbitration when the enforcing state would not.

The other half of the GCC states (the UAE, the KSA, and Kuwait) does not make the distinction between domestic and international arbitration. Kuwait, however, has separate and additional grounds for challenging the enforcement of foreign arbitral awards.

The additional grounds for challenging the enforcement of a foreign arbitral award are the second feature that prevents uniformity among the GCC states. While all the GCC states follow the New York Convention rules for enforcing a foreign arbitral award, each GCC state has its own set of grounds additional to the New York Convention grounds.

It is important to note, however, that all GCC states set out three common grounds for challenging the enforcement of a foreign arbitral award: (1) that the foreign arbitral award does not contradict a prior judgment, decision, ruling or arbitral award given by the court of the enforcing state, (2) that the foreign arbitral award does not violate the public policy of the enforcing state, and (3) that the parties have been
properly notified. In this regard, there are slight variations among the GCC states regarding these three common grounds, though all the GCC states cover these three grounds. For example, with regards to public policy, it is the public policy of the enforcing GCC state that is of concern. The KSA is the only GCC state that specifically mentions the Shari’a. Additionally, with regards to notice, half of the GCC states (Kuwait, Bahrain, and Qatar) require proper notice and representation, while the other half (Oman, the UAE, and the KSA) only explicitly require notice.

It is this thesis author’s suggestion that GCC states ought to agree on the three additional grounds for challenging foreign arbitral awards and adopt the same language for such three grounds, and then limit the grounds for challenge that are addition to the New York Convention. It is also possible, as will be discussed more fully in Chapter Five, for the GCC states to agree on a common definition of public policy, and therefore create uniformity in this regard.

PART V

4.5. The Survey: Reasons for Non-Enforcement of Foreign Arbitral Awards in GCC States

In the survey, respondents were asked an open-ended question as to the most likely reason for the non-enforcement of a foreign arbitral award in the GCC states.\textsuperscript{268} The question aimed to solicit ideas from respondents as to the reasons for non-enforcement, identify the most common reasons for non-enforcement, and to compare whether the most common reasons for enforcement are the same or similar to those identified by the research and especially this chapter.

The researcher grouped together the most common responses using textual analysis. The highest number of common responses is eleven. These responses identified public policy as the most likely reason for non-enforcement.\textsuperscript{269} The second highest number of common responses had a total of six. These responses identified the

\textsuperscript{268} Appendix II, Survey Report, II(2.3.); Appendix III.
\textsuperscript{269} ibid.
judiciary’s lack of familiarity or knowledge with international arbitration, the New York Convention, or some form of judicial activism or hostility as the reason for non-enforcement. The third highest number of common responses had five. These responses identified the failure of the arbitration statute as the reason for non-enforcement. The fourth highest number of common responses had four. These responses identified jurisdictional issues as the reason for non-enforcement. The fifth highest number of common responses had three. These responses identified social or political reason for non-enforcement. The rest of the remaining nine responses varied and included one response, which stated that the Shari’a is the most common reason for non-enforcement. It is interesting to note that public policy was identified in the survey as the most common reason for non-enforcement of foreign arbitral awards, when public policy is a common ground among the GCC states.

4.6. Conclusion

The New York Convention is a common thread and a point of convergence for the enforcement of foreign arbitral awards for the Shari’a, regional conventions, and the national laws of GCC states. The ICSID Convention, of course, is a different creature altogether, allowing only a challenge during execution of the ICSID arbitral award, but not during enforcement. The divergence occurs primarily when the national laws of GCC states allow additional grounds for challenging a foreign arbitral award.

Interestingly, the rating by the respondents to the survey of the GCC states’ friendliness toward arbitration do not seem to match with the GCC states’ laws for challenges to enforcement. In other words, one might expect that Bahrain and the UAE, as the highest rated GCC states in the survey, would share similar grounds for challenges to the enforcement of foreign arbitral awards and that both GCC states would have limited grounds for challenging enforcement. However, these two GCC

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270 ibid.
271 ibid.
272 ibid.
273 ibid.
274 ibid.
275 Appendix II, Survey Report, II(2.2.1.).
states do not seem to differ significantly from the remaining the GCC states with regards to common features in potential challenges to the enforcement of foreign arbitral awards.

On paper, since all GCC states ratified the New York Convention, the potential challenges to the enforcement of a foreign arbitral award are consistent with international arbitration norms. In practice, however, the GCC states like the UAE continue to deviate from the international practice, allowing for additional grounds for challenging the enforcement of foreign arbitral awards than allowed under the New York Convention. The Riyadh Convention likewise incorporates the Shari’a as grounds for challenging the enforcement of foreign arbitral awards. In reality, however, the grounds for challenging the enforcement of foreign arbitral awards under the Shari’a do not become a significant factor for whether a foreign arbitral award will be enforceable.

Instead, the majority of successful challenges to foreign arbitral awards are based on the national legislation of the each GCC state and the practice employed by courts inexperienced with the New York Convention. A lesson from this chapter is that the GCC states could improve their mechanisms for enforcing foreign arbitral awards if they create a Uniform GCC Arbitration Law that is consistent with their existing obligations under the New York Convention while keeping in mind the Shari’a.

While this chapter discussed the challenges to the enforcement of foreign arbitral award in the GCC states, a complete analysis of the enforcement of foreign arbitral awards in the GCC states remains incomplete without a discussion of public policy. The next chapter, Chapter Five, therefore, will examine the effect of public policy on the enforcement of foreign arbitral awards in the GCC states.
CHAPTER FIVE

THE EFFECT OF PUBLIC POLICY ON THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE GCC STATES

5.0. Introduction

“Public policy (ordre public) is a classic reason for excluding the application of foreign laws by domestic courts. It represents the superiority of basic value choices of the local community over the technical application of conflict of law rules.”¹ In Loucks v. Standard Oil Co. of New York, Justice Cardozo explained the role of courts with regards to balancing of the enforcement of foreign arbitral awards and the protection of public policy as follows:

... the courts are not free to refuse to enforce a foreign right at the pleasure of the judge, to suit the individual notion of expediency or fairness. They do not close their door unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of common weal.²

“The interpretation of ‘public policy’ as used in the New York Convention is neither defined nor settled law.”³ It also remains largely undefined and unsettled in the Shari’a and the domestic arbitration laws of all GCC states.⁴ The ICSID Convention has avoided the issue by excluding public policy entirely from its purview.

Public policy is an issue that has sparked debate within and among the countries that are signatories to the New York Convention. A continuing debate looms on what

exactly the phrase “public policy” means, not only in the English language, but its subtle difference in other languages as well.\(^5\) Indeed, many terms are used to express the same or similar concept, including such terms as *ordre public*, international public policy, transnational public policy, public interest, public order, public morals and order, and simply, public policy.\(^6\) Perhaps, the difficulty in arriving at an agreed definition for public policy is because its legal contours are normally shaped by the context of a national concern.\(^7\) As Wakim states, “the construction of ‘public policy’ by national courts turns on legal interpretation as much as it does on political, sociological, and even religious matters.”\(^8\)

While the meaning of public policy remains elusive, its effect on arbitration and the enforcement of foreign arbitral awards is glaringly clear. It can affect arbitration in three aspects:\(^9\) (1) it can shape the rules relating to arbitrability, (2) enforcement may be denied on the basis of public policy,\(^10\) and (3) a foreign arbitral award may be set aside on the basis of public policy.\(^11\) Potentially, the public policy of at least two countries must be met when dealing with foreign arbitral awards: at the place where the foreign arbitral award was made, and any other country where it is sought to be enforced.

It is necessary to devote a separate chapter on public policy as it has often been cited as the culprit for the non-enforcement of foreign arbitral awards in the GCC states. This chapter argues that it is not the Shari’a *per se* that is the source of the non-enforcement of foreign arbitral awards in the GCC states based on the public policy defence, but the domestic legislation and policies of individual GCC states and

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\(^6\) See generally, Hanotiau and Caprasse (n 5) 788.

\(^7\) Public policy is a relative concept dependent on the judgment of the legal community and that public policy can change through time. See Böckstiegel (n 3) 123-124.

\(^8\) Wakim (n 3) 50.

\(^9\) Böckstiegel (n 3) 123.

\(^10\) Ezrahi (n 4) 5 (stating that public policy is one of the grounds for refusal to enforce a foreign arbitration award).

\(^11\) Hanotiau and Caprasse (n 5) 787.
unwarranted judicial interference. As Hamid and Lara explained, “it is thus not the requirement itself that causes concern but rather the way in which it is applied.”

Part I of this chapter gives a general background on the concept of public policy. Part II addresses the concept of public policy under the Shari’a to provide a clear understanding of what exactly public policy means in this context. Part III discusses public policy under international agreements, namely the New York Convention and the ICSID Convention. Part IV discusses the different concepts of public policy in each of the GCC states. Part V gives a synthesis of public policy rules in the GCC states. In the end, this chapter shows that there are actually plenty of positive indications that, as stated by Ezrahi, “refusal of enforcement of foreign arbitration awards in the Arab world on grounds of public policy in general or the Shari’a in particular has not been a dominant feature of arbitration in the region,” and in the GCC states in particular. It seems that the real obstacle to the enforcement of foreign arbitral awards in the GCC states is “judicial interference with arbitration” cloaked as the guardian of public policy and the Shari’a.

PART I

5.1. Concept of Public Policy

The concept of public policy is an ambiguous one: difficult to define, relative in scope and application according to the relevant jurisdiction, and thus leading to

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13 Ezrahi (n 4) 7.
different terms used to refer to it.\textsuperscript{16} No universally agreed and comprehensive definition of public policy has ever been offered.\textsuperscript{17} In \textit{Egerton v. Brownlow}, the court explained the ambiguity and the difficulty in defining public policy as follows: “Public policy is a vague and unsatisfactory term...it is capable of being understood in different senses.”\textsuperscript{18}

It is perhaps because of the difficulty in defining public policy that the New York Convention never defined the term.\textsuperscript{19} There are many cases, however, like \textit{Thales Geosolutions Inc. (US) v Fonseca Almeida Representações e Comércio Ltda. - FARCO (Brazil)},\textsuperscript{20} that support the rule that a public policy violation under Article V(2)(b) requires proving that the foreign arbitral award is manifestly irreconcilable with a fundamental principle of national law.

Public policy, therefore, can be relative according to what an enforcing state may consider is fundamental, and therefore may vary from one state to another.\textsuperscript{21} In other words, an enforcing state can give its own nuanced meaning to what constitutes public policy. For example, in the context of the GCC states, a definition of public

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\textsuperscript{17} Julian Lew, \textit{Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards} (Oceana Publications 1978) op cit, 532; \textit{Egerton v Brownlow}, 4 HLC 1, 123(1853);
\textit{Fender v St John-Mildmay}, (1938) AC 10; \textit{Janson v Driefontein Consolidated Mines Ltd}, (1902) AC 484;
\textit{Richardson v Mellish} (1824) 2 Bing 228 (where Justice Burrough famously referred to public policy as “a very unruly horse, and when once you get astride it you never know where it will carry you”);
\textit{Enderby Town Football Club Ltd v The Football Association Ltd} (1971) Ch 591, 606 (where in response to Justice Burrough, Lord Denning stated that “with a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles.”).
\textsuperscript{18} \textit{Egerton v Brownlow}, 4 HLC 1, 123(1853). The International Law Association’s proposed definition of public policy is that it consists of principles and regulations that pertain to justice or morality or serves the fundamental socio-political and economic interests of that state, a definition that is similarly shared by most arbitral jurisdictions. Alan Redfern and others, \textit{Law and Practice of International Commercial Arbitration} (4th edn, Sweet and Maxwell 2005) 497.
\textsuperscript{20} \textit{Thales Geosolutions Inc (US) v Fonseca Almeida Representações e Comércio Ltda - FARCO (Brazil)}, (2007) XXXII YBCA 271, (Brazil Superior Court of Justice 2006). See also \textit{Construction company (UK) v Painting contractors (Germany)}, (2006) XXXI YBCA 722, (Germany, Munich Court of Appeal 2005);
\textit{Buyer (Austria) v Seller (Serbia and Montenegro)}, (2005) XXX YBCA 421 (Austria, The Supreme Court 2005).
\textsuperscript{21} Albert van den Berg, \textit{The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation} (Kluwer 1981) op cit 360 (stating that “the reason why the concept of public policy is so difficult to grasp is that the degree of fundamentality of moral conviction or policy is conceived differently for every case in the various states”); Al-Talhuni (n 15) 69.
policy may be anchored with the Shari’a. On the other hand, US courts have laid out a narrow guideline for applying the public policy defence. In Parsons v. Whittemore, the court held that the public policy defence should be construed narrowly and applied only when it would “violate the forum state’s most basic notions of morality and justice.” The public policy exception has been interpreted restrictively following the Parsons case. Still, instances of broad interpretation remain, including in GCC states like the KSA, because of state specific conception of public policy.

Article V(2)(b) of the New York Convention states that an enforcing court may refuse enforcement if it finds that doing so would violate the public policy of the country where enforcement is sought. In essence, the New York Convention relegates this very important issue to the good faith of contracting states. In doing so, it allows “a pocket of uncertainty to remain.”

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22 See Abdul Hamid El-Ahdab, ‘General Introduction on Arbitration in Arab Countries’ in Pieter Sanders (ed), International Handbook on Commercial Arbitration (Kluwer 1993) 12 (defining public policy as “based on the respect of the general spirit of the Shari’a and its sources (the The Holy Qur’an and the Sunna, etc) and on the principle that individuals must respect their clauses, unless they forbid what is authorized and authorize what is forbidden”).

23 See generally, Anton Maurer, The Public Policy Exception Under the New York Convention (JurisNet 2012) 64 (stating that the drafting changes in the history of the Convention supports a narrow interpretation).


25 See Waterside Ocean Navigation Co v International Ltd, 973-974 F2d 150 (2d Cir 1984); Senger-Weiss (n 24) 173 (stating that the public policy defence have had little success in the US); Photochrome Inc v Copat Ltd, 517 F2d 512 (1975).

26 Troy Harris, ‘The Public Policy Exception to the Enforcement of International Arbitration Awards Under the New York Convention’ (2007) J of Int’l Arb 24(1), 10. In Adviso NV v Korea Overseas Construction Corporation, (1996) 21 YB Com Arb 612, 14, the Korean Supreme Court held that Article V(2)(b) of the New York Convention should be construed restrictively and that due consideration should be given to stability of international trade. In Amaltal Corp Ltd v Maruha (NZ) Corp Ltd, (2004) WL 234 (2d Cir Ct) 871, the New Zealand Court of Appeal referred to Parsons v Whittemore, and held that its function was restricted to examining issues that raised an essential principle of law and justice. Previously, however, the New Zealand high court had taken a liberal approach to public policy in Kimberley Construction Ltd v Mermaid Holdings Ltd, (2004) 1 NZLR 386 at 392.


29 Senger-Weiss (n 24) 174 (arguing that the broad interpretation of this provision undermines the strength and effectiveness of international arbitration.); Levi-Tawil (n 19) (stating that the “exception has allowed countries to retain a large amount of discretion, and has caused much confusion”).

30 Levi-Tawil (n 19).
5.1.1. Role of Domestic Courts and National Public Policy

It is an important limitation to the use of public policy in the New York Convention that the introductory sentence of Article V(2) employs the word “may,” and therefore does not mandate domestic courts but gives the court discretion to determine and apply the public policy exception.\(^{31}\) Within this discretionary power given to the domestic court of signatory states, there has been a wide range of approaches as to the role of the court in determining public policy, from maximum judicial review to minimal judicial review.\(^{32}\)

In most jurisdictions, the approach seems to follow the pro-enforcement bias of the New York Convention, and favour enforcement “in case of doubt.”\(^{33}\) For example, the Paris Court of Appeal in *Intrafor Cofor v. Gagnant*\(^{34}\) held that “a breach of domestic public policy, assuming that it has been established, does not provide the grounds of which appeal against a ruling granting enforcement in France of a foreign arbitral award.” On the other hand, some courts apply the public policy of the forum itself, as is the case in the Austrian Supreme Court.\(^{35}\) There may also be varying degrees of application within the same jurisdiction’s lower and higher courts,\(^{36}\) leading to delay and confusion as to the position of the country regarding foreign arbitral award enforcement and public policy.

5.1.2. International and Transnational Public Policy

Some countries have also made a distinction between domestic and international public policy.\(^{37}\) Some authors like Gaillard and Savage go further and argue that the term “public policy” under Article V(2)(b) of the New York Convention only refers to

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\(^{31}\) Böckstiegel (n 3) 128; Maurer (n 23) 61.

\(^{32}\) Böckstiegel (n 3).

\(^{33}\) ibid.


\(^{36}\) Böckstiegel (n 3) 128.

\(^{37}\) Harris (n 26).
the “international public policy of the host jurisdiction.” According to Levi-Tawil, “the courts of most nations have chosen not to use their domestic public policies to refuse to recognize and enforce a foreign arbitral award, and will enforce the arbitral award as long as it is not contrary to international public policy.” An exception to this is when a Turkish court in Ankara in Osuuskunta Matex V.S. v. T.K.K. General Directorate refused enforcement of a Swiss arbitral award because it violated Turkish domestic public policy when it applied Swiss procedural law.

According to Sanders, international public policy is “confined to violation of really fundamental conceptions of legal order in the country concerned.” The court in Hebei Import & Export Corp v. Polytek Engineering Co. Ltd agrees with this conception when it held that the test of international public policy was whether the issue of public policy contravened the state’s own principles which are “fundamental to notions of morality and justice.”

Some authors have argued that there is a “transnational public policy” or a “truly international public policy.” Transnational public policy differs from international public policy in that transnational public policy “involves the identification of principles that are commonly recognized by the political and legal systems around the world.” One principle that has emanated from transnational public policy is the Internal Law Principle, which prohibits a state party to an arbitration agreement to invoke its own

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39 Levi-Tawil (n 19); Wakim (n 3).

40 Osuuskunta Matex V.S v TKK General Directorate, File Nr 94/662, Decision Nr 95/140, unreported 4th Commercial Court of Ankara.

41 This Turkish case, however, has been criticised for being a wrong decision. Al-Jerafi (n 15) 193-194.


45 Hunter and Conde e Silva (n 42).

internal law to avoid its contractual obligations. Cairns explained the distinction among domestic, international, and transnational public policy as follows:

Transnational public policy does not form part of the legal orders either of public international law, or any national legal order. The public policy of individual states is divided into domestic public policy and international public policy, with the latter being the (more restricted) public policy of the state as applied to international transactions. By contrast, transnational public policy is the common-core the international public policy of many states, which by its very nature also reflects fundamental principles of public international law. It is the amalgam of the public policy of multiple forums, but is the public policy of no individual forum. It embodies the transnational consciousness and solidarity of international commercial arbitration.

In general, transnational public policy is a narrower concept than international public policy, but it is also more uniform in application than international public policy. Maurer, however, states that by qualifying the term public policy in Article V(2)(b) with the phrase “of that country” means that the New York Convention did not aim for a transnational meaning of public policy.

In the end, as noted by Sanders in his definition of transnational public policy, the courts of a given “country concerned” will determine what constitutes public policy under Article V(2)(b), and they can take into account international public policy norms. This thesis author believes that it may be helpful for courts in the GCC states, if the GCC states were to issue a statement, and/or add to a regional convention a statement, that clarifies what constitutes basic domestic, regional, transnational, and/or international public policy among the GCC states.

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47 Cairns (n 46).
48 ibid; Gaillard and Savage (n 38) 16447-1648; Lalive (n 44). Another way of expressing the idea of transnational public policy is that it is the body of “general principles of morality” accepted by civilized nations. Hunter and Conde e Silva (n 42).
49 Hunter and Conde e Silva (n 42).
50 Maurer (n 23) 53; Redfern and Hunter (n 18) 541.
5.1.3. Mandatory Rules and Public Policy in International Arbitration

Parties to a contract will generally have the freedom to determine the governing law. Such freedom, however, may be limited by mandatory rules.\(^\text{51}\) While there are numerous definitions of mandatory rules,\(^\text{52}\) Mayer defined mandatory rules or *loi de police*, “as an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship. To put it another way: mandatory rules of law are a matter of public policy (*ordre public*) and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.”\(^\text{53}\) Unlike public policy in general, however, mandatory rules enforce only policies that are deemed to be so strong that national rules must take precedence over foreign law that govern the contract.\(^\text{54}\)

\(^{51}\) Weller (n 16) 244.


It is worth noting that scholars\textsuperscript{55} like Lew\textsuperscript{56} and Mistelis\textsuperscript{57} hold party autonomy in highest regard and reject the existence of mandatory rules.\textsuperscript{58} Their position reflects a vision articulated by the US Supreme Court in \textit{Mitsubishi Motors v. Soler Chrysler-Plymouth}, where it stated that:

The international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the interests of the parties...\textsuperscript{59}

Party autonomy was also recognized in \textit{VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners},\textsuperscript{60} where the court stated that while a court must answer the initial question of who decides the question of arbitrability using a “clear and unmistakable standard,” \textsuperscript{61} the parties may choose to commit to the arbitration panel any questions about the arbitrability of particular disputes.\textsuperscript{62}

According to Lew, “other than that of the chosen applicable law there is no mandatory law for international arbitration.”\textsuperscript{63} Mistelis states “there is no basis for a
tribunal to ignore the express choice of the parties because it determines that there is a contrary mandatory rule in one of the national laws.”

Contrary to Mistelis’ view, however, English courts have at times nullified the choice of parties because of some mandatory rules. For example, in The Morviken (The Hollandia) case, the House of Lords held that the parties’ choice of law clause was null and void because the court would not give effect to a choice of law clause that would lower the carrier’s liability than that dictated by the Hague/Visby Rules. The court in Boissevain v. Weil (1950) also refused to enforce a contract that violated the UK Exchange Control Act of 1947.

Mandatory rules, according to Bower, “reflect the premise that all legal systems require mechanisms to restrain the potential excesses of free will,” or party autonomy. Maniruzzaman justifies mandatory rules based on the sovereignty of states that continue to have responsibility over the public interest or public policy of the state, as demonstrated in the Kuwait v. Aminoil case, where the tribunal stated that “the general principles of law recognize the right of the State in its capacity of supreme protector of the general interest.”

Mandatory rules, however, could emanate from the arbitral seat or the state other than the forum as provided for in Article 7(1) of the Rome Convention and Article 187(2) of the Restatement (Second) Conflict of Laws. In one

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64 Mistelis (n 57).
67 ibid 341. In this case, Lord Radcliffe, stated that “when the transaction by which the money has reached the respondent is actually an offence by our laws, the matter passes beyond the field in which the requirements of the individual conscience are the determining consideration.”
69 Maniruzzaman, ‘Mandatory Public Law’ (n 52).
70 Kuwait v Aminoil, 21 ILM 976 (1982), para 99.
71 The application of these mandatory rules are not mandatory as can be seen by the language of Article 7(1) of the Rome Convention, which provides that “effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.” Rome Convention, art 7(1).
ICC case, the tribunal stated that it ought to consider both Swiss contract law and Turkish mandatory law even if Turkey was not a designated country.73

Bowers further argues that mandatory rules may prevail over party chosen laws, not because mandatory rules have peremptory status but because of conflict of law rules that validate their application in a specific case.74 As stated by Maniruzzaman, while party autonomy in a contract is basic to conflict of law rules, mandatory rules, especially “of a public nature, follow their own conflict of laws principles.”75 The application of mandatory rules, therefore, may be affected by the choice of arbitral seats, the relevant conflict of law rules, and the institutional rules applicable to the particular case,76 making the parties’ choice of these elements a key factor in the application of mandatory rules.

According to Maniruzzaman, the determination of which mandatory rules apply may be determined by (1) the place where the contract is to be performed, (2) the place of enforcement, or (3) where there is a close contact between the state and the contract, or parties.77 The determination of the applicability of mandatory rules, specifically in balancing the intent of the parties and the state’s interest in protecting its public policy, has been controversial, as illustrated in German and Belgian cases.78 In Belgium, the Court of Cassation in Von Hopplynus Instruments SA v. Coherent Inc., in reversing the lower court’s denial of mandatory rules based on the New York Convention’s Article II(3), created a rule relating to the Belgian Act of 1961, where “if the arbitration agreement is...subject to foreign law, the judge requested to decline its jurisdiction must exclude the arbitration if, by virtue of the lex fori [law of the forum], the dispute cannot be subtracted from the state courts’ jurisdiction.”79 In Germany, the Oberlandesgericht

73 Final Award in ICC Case No 8528, (2000) XXV YB Comm Arb 341, 348 (requiring “close connection” before applying foreign mandatory law).
74 Bower (n 68). See, however, Anne-Sophie Papeil, ‘Conflict of overriding mandatory rules in arbitration’ in Franco Ferrari and Stefan Kröll (eds), Conflict of Laws in International Arbitration (Sellier International Publishers 2011) 344 (stating that the choice of the parties can be an obstacle to the application of mandatory rules because of the contractual nature of arbitration).
75 Maniruzzaman, ‘Mandatory Public Law’ (n 52).
76 Bower (n 68).
77 Maniruzzaman, ‘Mandatory Public Law’ (n 52).
78 See generally, Kleinheisterkamp (n 52).
Munich reversed the lower court’s (Landgericht Munich) enforcement of the arbitration clause after it rejected the defendant’s argument that the mandatory rule would affect only choice of law issues and not jurisdictional issues. The German rule is that disputes can be decided by arbitrators, unless it cannot be reasonably expected that German international mandatory provisions designed to govern the claim will be applied. In the end, as stated by Maniruzzaman, an arbitral tribunal “should exercise its freedom to determine the applicable conflict of laws rules according to guidelines derived from general principles which are common to the developed conflict of laws systems.”

PART II

5.2. Public Policy Under the Shari’a

Only a limited number of authors like Saleh and Wakim have expressly discussed the impact of the Shari’a on public policy. The question, as aptly stated by Saleh, is “what does public policy mean in [the Shari’a] context?”

In the GCC states context, a discussion of Shari’a public policy does not end the inquiry as to what public policy means to each of the GCC states. As Wakim stated, “[i]t would be a mistake, however, to homogenize the political values of the Middle East or equate Islam with Arabic culture.” A discussion of public policy under the

80 Oberlandesgericht Munchen [Superior Regional Court], 17 May 2006, 2006 Wertpapier Mitteilunger 1556, 2007 Praxis des InternationalenPrivat- und Verfahrensrechts 322 (FRG); Landgericht Munchen [Lower Regional Court], Docket no 15 HKO 23703/04, 5 December 2005 (unreported, summarized in the appellate decision in Oberlandesgericht); Kleinheisterkamp (n 52).
81 Kleinheisterkamp (n 52).
82 Maniruzzaman, ‘Mandatory Public Law’ (n 52).
83 Samir Saleh, ‘The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East’ (1985) 1 Arab L Q 19, 26 (one of the earliest discussion of Islamic public policy).
84 Wakim (n 3) 45 (reiterating Saleh’s discussion on Islamic public policy).
85 Saleh (n 83) 26.
86 According to Wakim, “each Middle Eastern country’s public policy values should be assessed in light of the variety of factors influencing its government systems. It is therefore important to adjust the context of the following issues when they are assessed at the national level.” Wakim (n 3) 40-41; Roger Scruton, ‘The Political Problem of Islam’ (2002) The Intercollegiate Rev 1 <http://www.mmisi.org/ir/38.01/scruton.pdf> accessed 21 March 2014; Ali Gheissari, ‘Doing Business in the Middle East: A Guide for US Companies’ (2004) 34 Cal W Int’l LJ 273, 276-78 (illuminating the
Shari’a, therefore, is only the starting point for any discussion of public policy in the GCC states, and a separate discussion of the public policy of each of the GCC states will be made towards the end of this chapter.

5.2.1. General Concept of Public Policy Under the Shari’a

According to Wakim, “the Islamic criterion for public order is that of general interest” also known as *maslahah* [public interest]. Shari’a scholars often reiterate the Shari’a maxim that “Muslims must comply with contractual provisions except for those which authorize what is forbidden or forbid what is authorized.” This maxim was emphasized by the Abu Dhabi Court of Appeals in *AA Commercial Co. v. S. Motors Ltd Co. and D. Industrial Ltd Co.* El-Ahdab adds, however, that “a Muslim judge can only set aside foreign arbitration awards if the award is deemed to be ‘contrary to Moslem good morals’ or ‘contains a flagrant injustice.’” Muslims place a great importance on avoiding *haram* [that which is forbidden], a conceptualization that tends to give great credence to the public policy defence in the Islamic world; while Western practice has considered public policy as a last resort exception to the rule. As

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87 Wakim (n 3) 41.
89 Wakim (n 3) 41; Kutty (n 88) 610 (stating the rule in the Shari’a that “anything is permitted which is valid and that only which is forbidden or set aside by one of the texts or the Qiyas is forbidden”); Khaled El-Fadl, ‘The Place of Ethical Obligation in Islamic Law’ (2004) 4 UCLA J Islamic & Near E L 1, 8 (showing that contracts under the Shari’a must be free from coercion, fraud, deception, or misrepresentation and parties must honour their promises in good faith).
92 *Richardson v Melish*, (1824) 2 Bing 228 (252) (Court of Common Pleas, England), where the court stated that public policy “is never argued at all but when other points fail.” See also Dirk Otto and Oama Elwan, ‘Article V(2)’ in Herbert Kronke, Patricia Nacimiento, Dirk Otto and Nicola Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 365 (stating that “most international conventions contain a public policy clause as a last resort to prevent unwanted effects”).
El-Ahdab noted, what is taken into account are the prohibitions and authorizations contained in the Shari’a.\(^{93}\)

Notably, however, “there are countless controversies and subtle distinctions between the different schools.”\(^{94}\) But while Shari’a schools may differ on some issues, “a general Islamic public policy is evident to a degree relevant to international commercial transactions.”\(^{95}\)

According to Saleh and Wakim, Shari’a public policy can be generally divided into two types: procedural and substantive.\(^{96}\) Neither Saleh nor Wakim gives full treatment and explanation to the concept of procedural public policy\(^{97}\) and they deem substantive public policy to arise only in two scenarios: *riba* [interest] and *gharar* [uncertainty].

5.2.2. Procedural Public Policy Under the Shari’a

Saleh and Wakim discuss three fundamental rights covered by Shari’a procedural public policy: the right to equal treatment of the parties, the right to be heard, and the right to present a case or defence. The three fundamental principles “are not necessarily found in the *Quran* or *Sunna* but ... constitute the immutable rules of Islamic judicial law.”\(^{98}\) Wakim adds that these rules became part of Shari’a procedural public policy as a function of history.\(^{99}\) Saleh stated these three fundamental principles as follows: “(1) the strictly equal treatment of the parties to the judicial or arbitral action; (2) the prohibition against a judge or arbitrator deciding a dispute without hearing both

93 El-Ahdab (n 91) 45.
94 Saleh (n 83) 29. Thus far, Saleh’s article in 1985, one of a limited few articles that discusses the issue, has given the clearest summary of public policy under the Shari’a in the English language, one that has been relied upon by subsequent scholars.\(^{5}\)
95 Wakim (n 3) 41, citing Gemmell (n 88) 169, 173-176, 188, 192 (detailing the different Islamic schools of interpretation); Roy (n 27) 945-946 (identifying the different Islamic *fiqh*).
96 Saleh (n 83) 26; Wakim (n 3) 45(stating that “the features of Islamic public policy may be divided into two categories: those of a procedural nature and those of a substantive nature”); see also Richard Harding, ‘An Introduction to Arbitration in the Middle East’ *Mondaq Bus Briefing* (London, 8 June 2005) A1<http://www.keatingchambers.co.uk/resources/publications/2004/rah_intro_arb_middleeast.aspx> accessed 23 March 2014 (explaining that the two elements of law applicable to arbitration are substantive law and procedural law).
97 Both covered only the right to equal treatment, the right to be heard, and the right to present a case and defence.
98 Saleh (n 83) 27, followed by Wakim (n 3) 45.
99 Wakim (n 3) 45 (adding the term “historically” to describe the advent of the three principles).
plaintiff and defendant; (3) the prohibition against a judge or arbitrator making his judgment or award without giving the parties the opportunity to submit their evidence, pleas, and defences.  "100

These Shari’a procedural principles, as it turns out, are consistent with the New York Convention’s “universal norms of due process and fairness.”101 According to Wakim, “the procedural concerns of Islamic law are well addressed by the New York Convention.”102 The Shari’a procedural public policy requiring the right to be heard, and the right to present a case or defence, is consistent with Article V(1)(b) of the New York Convention, requiring proper notice and the ability to present a case.103 Wakim goes further to say that the Shari’a procedural principle of strict equal treatment of the parties may be consistent with Article V(1)(a) of the New York Convention, dealing with the capacity of the parties and the validity of their arbitration agreement.104 Though Wakim argues that Article V(1)(a) “may allow for the same type of exception to exist as contemplated by the Islamic principle”105 it remains unclear, due to the absence of cases on the matter, whether Article V(1)(a) of the New York Convention has the same scope as the Shari’a “strict equal treatment” requirement. It is this thesis author’s view that the Shari’a seems to require a more literal equality in the procedural treatment of the parties, since the Shari’a has separate conditions for the capacity of parties106 and a valid arbitration agreement.107

100 Saleh, however, gave no further elaboration on the three fundamental principles of procedural public policy under the Shari’a. Saleh (n 83) 27; Wakim (n 3) 45.
101 Wakim (n 3) 45, citing El-Ahbab (n 91) 45 (stating the fundamental principles of arbitral proceedings are due process and fairness); Jennifer Amundsen, ‘Membership Has Its Privileges: The Confidence-Building Potential of the New York Convention Can Boost Commerce in Developing Nations’ (2003) 21 Wis Int’l LJ 383, 390 (indicating that exceptions to the New York Convention exist to ensure fairness).
102 Wakim (n 3) 45.
104 Wakim (n 3) 45.
105 ibid.
107 For a discussion of the Shari’a requirements for a valid arbitration agreement, see Chapter Three.
Overall, what the Shari’a requires in terms of procedural public policy, seems to be consistent with international notions of due process and fairness; and there does not seem to be a substantial difference in procedural public policy. In discussing public policy within the context of “violation of procedural laws,” for example, Otto and Elwan, state that “in countries that strictly apply certain Islamic legal principles, the concept of what violates basic principles as well as public morals may differ substantially from such concepts in other parts of the world.”\textsuperscript{108} Such is not the case, however, in regards to procedural public policy under the Shari’a.

5.2.3. Shari’a Substantive Public Policy

Shari’a substantive public policy concerns mainly with two prohibitions that will likely affect the enforcement of foreign arbitral awards:\textsuperscript{109} the prohibition on riba [interest]\textsuperscript{110} and the prohibition on gharar [aleatory or uncertain obligations].\textsuperscript{111} These two prohibitions under Shari’a substantive public policy differ from Shari’a procedural public policy because they “are deeply rooted in the scriptural sources, the Holy Qur’an.”\textsuperscript{112}

5.2.3.1. Riba

The Shari’a prohibition on riba [interest], otherwise known in the West as usury,\textsuperscript{113} derives from the basic notion that the use of interests by lenders is inherently unfair or unjust\textsuperscript{114} to the borrower and is a “morally reprehensible”\textsuperscript{115} exploitation by

\begin{itemize}
\item Otto and Elwan (n 92) 390.
\item Saleh (n 83) 27; Wakim (n 3) 45.
\item Haider Hamoudi, ‘Muhammad’s Social Justice or Muslim Can’t?: Langdellianism and the Failures of Islamic Finance’ (2007) 40 Cornell Int’l LJ 89 111-113 (explaining that the many interpretations of riba can be attributed to multiple Hadith [tradition] on the subject).
\item Hamoudi (n 110) 409, 420 (2007) (labeling investments in futures as gharar and illegal).
\item Saleh (n 83) 27; Wakim (n 3) 45.
\item Saleh (n 83) 27.
\item Fatima Akaddaf, ‘Application of the United Nations Convention to Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?’ (2001) 13 Pace Int’l L Rev 1, 48-49 (explaining that the Qur’an prohibits riba because it is unjust); see also Kutty (n 88) 604 (stating that riba is prohibited because it is an unlawful or unjustified gain).
\item Wakim (n 3) 45 (Wakim calls the riba “morally reprehensible”).
\end{itemize}
one who has money over one who has none. According to Saleh, the scriptural basis of the prohibition on the riba is “unimpeachable.” The *Holy Qur’an*, Al-Imran 3:130, Yusuf Ali Translation, states as follows: “O ye who believe! Devour not usury, doubled and multiplied; but fear Allah; that ye may (really) prosper.”

The views, however, of each of the schools of thought of the Shari’a, though in agreement with the prohibition, differ as to the degree of strict adherence to the prohibition on the riba.

The Hanbalis traditionally apply the prohibition of the riba strictly, and view the prohibition as extending “beyond the geographical boundaries of Islam.” So, GCC states such as KSA and Qatar that generally follow the Hanbali School, strictly prohibit the riba. However, Oman and Qatar do not strictly enforce the riba in practice.

Further, in the KSA, some banks do pay and charge interest and place their funds in investments where interest will be earned. Also, liquidated damages as well

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116 See Natasha Affolder, ‘Awarding Compound Interest in International Arbitration’ (2001) 12 Am Rev Int’l Arb 45, 87 (addressing the public policy concern regarding prohibiting and asserting that the concept of Islamic public policy used in some Middle Eastern countries can void arbitral awards that include interest because of the prohibition against riba); Wakim (n 3) 45; Saleh (n 83) 27 (stating that “since interest could be an instrument of exploitation causing financial ruin it is treated as an unjustified increase in capital”).


119 Hesham Sharawy, Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Cooperation Between the Islamic and Western Worlds, (2000) 29 Ga J Int’l & Comp L 153, 163 (there is no uniform interpretation of the prohibition on the riba). The differences can be classified as methodological (i.e. linguistic interpretation) or on the practical application of the prohibition on the riba. Jurists have also divided the riba into two types: riba al-nas’a (involving deferment in counter value) and riba al-fadl (involving excess in counter value). The fiqh or schools are divided on the application of these two types of riba. See Abdullah Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation* (Brill 1999) 35.

120 Saleh (n 83) 27; Wakim (n 3) 45; Hasanuddeen Abdulaziz, ‘My Say: Taking Another Look at BBA Contracts’ *The Edge* (Malaysia, 20 February 2006) A1 (showing how the Hanbali school rejected a contract, rationalizing it was a way to cheat God and induce riba).

121 Saleh (n 83) 27.

122 Saudi Arabia Court of Grievance, Commercial Circuit, Case No 1767/2/J of 1422 AH, Ruling No 183/C/C/9 of 1425 AH (stating that usury is prohibited under the Shari’a).

123 According to Saleh, Saudi Arabia and Qatar follow Hanbali teaching. Saleh (n 83) 27.

124 Wakim (n 3) 45.


126 Mayer (n 53) 167; see however, John Donboli and Farnaz Kashefi, ‘Doing Business in the Middle East: A Primer for US Companies’ (2005) 38 Cornell Int’l LJ 413, 424 (noting Saudi Arabian banks provide interest-free funding).
as compensation for inflation are permitted in the KSA.\textsuperscript{127} A Saudi arbitral tribunal in Final Award No 7063 (1993) has also upheld an arbitral award that included interest, stating that the doctrine of the \textit{riba} under Saudi law did not bar all arbitral awards of reasonable compensation for financial loss.\textsuperscript{128} The \textit{tawarruq},\textsuperscript{129} a method of circumventing the prohibition against the \textit{riba} where an asset initially bought on a deferred payment is sold for cash to a third party at a lower price than the initial deferred purchase to create liquidity,\textsuperscript{130} may have even been acceptable to the Hanbali School.\textsuperscript{131} Seniawski stated that the founder of the Hanbali School, Ibn Hanbal, considered only one form of \textit{riba} as prohibited beyond a doubt in the Shari’a, the view of \textit{riba} as pay or increase, and that other types of increase or income derived are not as clearly prohibited under the prohibition on the \textit{riba} and were acceptable to Ibn Hanbal.\textsuperscript{132} Regardless, the Hanbali School is likely to refuse enforcement of an arbitral award that includes interests in the damage computation as violating Shari’a public policy.\textsuperscript{133} The Hanafis have treated the prohibition on the \textit{riba} less rigidly, and invented legal mechanisms\textsuperscript{134} or \textit{hiyal}\textsuperscript{135} to circumvent the prohibition on the \textit{riba}.\textsuperscript{136} The Shafi’i

\begin{footnotes}
\item[128] Final Award No 7063 (1993), (1997) 22 YB Comm Arb 87, IADR Ref No 112 (Saudi Arabia). But see \textit{Dr M Islam Khaki & Others v Syed Muhammad Hashim & Others}, PLD 2000 SG 225, 760, 770 (Supreme Court 225) (Pakistan Supreme Court 1999). In Pakistan, the Supreme Court in \textit{Dr M Islam Khaki & Others v Syed Muhammad Hashim & Others} has made clear that “all prevailing forms of \textit{riba} either in banking transaction or in private transactions” violate the Shari’a.
\item[129] See Asyraf Dusuki, ‘Commodity Murabahah Programme (CMP): An Innovative Approach to Liquidity Management’ (2007) 3 \textit{J of Islamic Econ, Banking and Fin} 1, 16.
\item[130] ibid. This definition is accepted by the Islamic Fiqh Academy in their deliberation on the issue on 1st November 1998 (11 Rejab 1419H).
\item[133] Saleh (n 83) 27; Gemmell (n 88) 180 (asserting that arbitration clauses are invalid if they permit the payment of \textit{riba} or interest); Wakim (n 3) 45. In Sudan, in an arbitration case where the chosen performance of the contract was in Dubai and which was to be governed by English law, the Supreme Court in Civil Court, Case Number: SC/CC/1095/2005, nevertheless, held that “interest falls under the usury which is strictly forbidden.” The Sudanese Supreme Court explained that “the relief sought by the appeal respondent is an interest not a compensation, no matter what it might be called, and represents a return on capital employed or the consideration for waiting and being deprived of the money known by economists as the cost of waiting and expressed in the expression ‘time value of money’ because time makes part of the cost.” Sudanese Supreme Court in Civil Court, Case Number: SC/CC/1095/2005.
\item[134] Saleh (n 83) 27 (calling them “legal tricks”).
\end{footnotes}
also accept the use of *hiyal* [legal devices]. One example of this *hiyal* is the *murabaha*, which allows certain interest-based transactions as an exception to the prohibition on the *riba* and where a bank purchases an item for a customer in exchange for an agreement that the customer will buy back the item from the bank at a set higher price. The Hanafi definition of *riba* has allowed the use of interest in certain situations. For example, in Egypt, where Hanafi doctrine is the majority, the *riba* only applies to transactions between two Muslims, and therefore, according to Klein, a Muslim may engage in *riba* with a non-Muslim in Egypt.

Further, the Hanafis do not prohibit some forms of “accumulated interest” as they do not deem it as *riba*, and a loan bearing interest is not automatically void as *riba*.

Some Shari’a scholars even believe that the *riba* does not prohibit all forms of interest on loans or all forms of compensation awards. According to Wakim, “the doctrine

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136 Saleh (n 83) 27 (stating that countries that follow the Hanafi *hiyal* like Egypt, Syria and Jordan have had for a long time domestic laws relaxing the prohibition on interest through rate regulations); Klein (n 3) 45.
137 Saeed (n 119).
140 Daniel Klein, ‘The Islamic and Jewish Laws of Usury: A Bridge to Commercial Growth and Peace in the Middle East’ (1995) 23 DenYJ Int’l L & Policy 535, 538. There are numerous cases in Egypt where the use of *riba* in a foreign arbitral award was not deemed to violate public policy except when the interest went beyond the maximum amount allowed by Egyptian law, which was 5% per annum and later at 7% per annum. Unpublished Case No 815/52 of May 21, 1990 (Supreme Court, Egypt); Otto and Elwan (n 92) 393, fn 218. For comparison, see also, Laminoirs-Treflères-Cablieres de Lens SA v Southwire Co, 484 F Supp 1063 (ND Georgia 1980) (US Federal District Court refused to enforce a foreign arbitral award under the New York Convention on public policy grounds because the arbitrators’ increase of interest rates by an additional 5% would amount to punitive damage and would not be enforceable). The Egyptian Court of Cassation upheld a foreign arbitral award that provided 5% interest for a period earlier than the final arbitral award because it deemed the domestic provisions on default interest as not to fall under the public policy exception of the New York Convention. Court of Cassation (decided 22 January 2008), (2009) 1 of Arab Arb 174, 177 (Supreme Court, Egypt). See also Court of Appeal, unpublished decision of 5 April 1999 (Cairo Court of Appeal, Egypt) (allowing 16% interest when the arbitrator acted as an *amiable compositeur*). In an arbitration award rendered by Cairo Regional Centre for International Commercial Arbitration (CRCICA), in CRCICA Arbitration No. 577 of 2008, the arbitrator reduced the interest award of 13% to the 7% allowed under Article 227 of the Egyptian Civil Code. Cairo Regional Centre for International Commercial Arbitration, Arbitration No 577 of 2008.
141 Seniawski (n 132) 711-714.
143 Akaddaf (n 114) 47.
of *riba* does not bar all interest-related awards, especially where a party experiences a financial loss due to the withholding of a monetary award to which he or she is otherwise entitled.” 144 As for arbitral awards, in countries that follow the Hanafi view of the *riba*, like Egypt145 and the UAE,146 an arbitral award that includes interest in the damage computation would likely be enforceable.

Modern practices have for the most part circumvented the prohibition on the *riba* through various methods that allow the charging of interest.147 In Egypt, Article 226 of the Civil Code148 specifically mentions interest, in addition to payment to the claimant, as part of the obligation to pay; a provision that according to Akaddaf violates the Shari’a.149 A challenge before the Egyptian Supreme Constitutional Court led to a dismissal of the challenge.150 Additionally, in Morocco, the legislator created a legal fiction whereby the prohibition on the *riba* is applicable to persons or *personnes physiques* while it is not applicable to artificial or legal entities or *personnes morales* like corporations, banks, and public agencies.151 The Dubai Court of Cassation has also ruled that a “creditor may collect a fifteen percent interest in a delayed payment pursuant to a contract for the sale of goods.”152 In the UAE, the Federal Supreme Court in Petition No 831, 23rd Judicial Year153 held that although interest is contrary to the Shari’a, the constitutional circuit of the Federal Supreme Court allows interest when it is proportionally less than the amount of the transaction.

These new ways to circumvent the prohibition on the *riba* signals that perhaps the prohibition is not as strong as it once was, and will not likely impede in the enforcement of a foreign arbitral award with interest.

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144 Wakim (n 3) 45.
145 Unpublished Case No 815/52 of May 21, 1990 (Supreme Court, Egypt).
146 Dubai Court of First Instance, Judgment No 190/98, 10 Nov 1998.
147 Kimberly Tacy, ‘Islamic Finance: A Growing Industry in the United States’ (2006) 10 NC Banking Inst 355, 357 (commenting on the difference of unacceptable risk, from high risk); Al-Jerafi (n 15) 171; Donboli and Kashefi (n 126) (arguing the Islamic systems approach regarding *riba* and *gharar*).
148 Egypt Civil Code, art 226.
149 ibid.
150 ibid. See also Al-Jerafi (n 15) 171-172.
152 Federal Supreme Court, Petition No 831, 25th Judicial year, Judgment of 23 May 2004, citing Federal Supreme Court, Petition No 14, 19th Judicial Year.
The survey conducted by this research also asked respondents whether interest should be allowed in an arbitral award. The question was asked in the survey to determine how those in the field of arbitration in the GCC states view interests in an arbitral award.

The majority of respondents, amounting to a total of 77.42% answered that interest should be allowed, while only a total of 22.51% answered that interest should not be allowed. Those who were in favour of allowing interest, however, differed three ways as to the extent to which interest ought to be allowed. Of those who are in favour of allowing interest in an arbitral award, 29.03% favoured interest according to the contract, 25.81% favoured interest but limited to a certain percentage, and 22.58% are in favour of interest without limitations.

5.2.3.2. Gharar

The second Shari’a substantive public policy prohibition is the gharar, or the existence of future disputes involving speculation and uncertainty. The prohibition on gharar originated directly from the Holy Qur’an, Al-Baqara 2:188 as follows:

And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people’s property.

Further, the Holy Qur’an, An-Nisaa 4:29, states as follows:

O ye who believe! eat not up your property among yourselves in vanities: but let there be amongst you traffic and trade by mutual good-will: nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful.

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155 Saleh (n 83) 28 (stating that gharar is prohibited by scriptural sources).
These verses from the *Holy Qur’an*, along with the *Sunna* of the Prophet Muhammad (PBUH), have been interpreted by Shari’a scholars as prohibitions on the *gharar*. One of the basic conditions for an arbitral clause or an arbitration agreement to be enforceable under the Shari’a is for the dispute to “have already arisen.”\(^{158}\) This basic requirement is aimed directly at the prohibition on *gharar*. According to Wakim, the *Holy Qur’an* requires that parties to a contract “must be fully aware of their obligations at the time they enter into the contract.”\(^{159}\) Therefore, according to Wakim, “contract clauses calling for the arbitration of future disputes are technically unenforceable.”\(^{160}\) Uncertainty in a contract means that there was a lack of consent between the parties to an agreement, and this unfairness is what the prohibition on *gharar* aims to eliminate.\(^ {161}\)

Because of the prohibition on *gharar*, certain types of agreements involving uncertainty or an element of risk will be deemed void under the Shari’a, including gambling and insurance.\(^ {162}\) Under the prohibition on *gharar*, the object of the transaction must be identified, and those objects of a sale or rental that have an uncertain existence\(^ {163}\) (i.e. unharvested crops)\(^ {164}\) would be void. The same applies to the price, which must be fixed at the time of the agreement.\(^ {165}\) According to Saleh, there are, of course, exceptions to the prohibition on the *gharar*, including the “production and supply of materials not in existence at the time the contract is made (e.g., construction).”\(^ {166}\)

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\(^{158}\) See Chapter Three, Part I; Alsheikh (n 106); Gemmell (n 88); Wakim (n 3) 48; Syed Rashid, ‘Alternative Dispute Resolution in the Context of Islamic Law’ (2004) 8 Vindobona J Int’l Com L &Arb 95, 105.

\(^{159}\) Wakim (n 3) 45-49; Saleh (n 83) 28.

\(^{160}\) Final Award No 7063 (1993), (1997) 22 YB Com Arb 87, IADR Ref No 112; Wakim (n 3) 45; David Karl, ‘Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know’ (2002) 25 Geo Wash J Int’l L & Econ 131, 134, 164 (stating that contracts providing for solutions to a future dispute should be unenforceable under the principle of *gharar*).

\(^{161}\) Akaddaf (n 114) 26.

\(^{162}\) Saleh (n 83) 28 (explaining that there are no insurance companies in the KSA, but Saudi nationals will arrange for insurance outside of the KSA).

\(^{163}\) ibid (explaining that it is not the existence of the object that is important but that the parties are uncertain as to the contract and have taken on a risk on whether the object will be delivered as agreed).

\(^{164}\) ibid.

\(^{165}\) ibid.

\(^{166}\) ibid.
With regards to arbitration, the Shari’a prohibition on *gharar* ought to render void agreements to arbitrate future disputes.\textsuperscript{167} Yet, according to Wakim, “arbitration takes place in the Middle East, based on clauses calling for arbitration of future disputes.”\textsuperscript{168} Today, all the GCC states “allow arbitration agreements for both present and future disputes.”\textsuperscript{169} Even in KSA, as stated by Roy, the government adopted regulations that made a contractual provision regarding the resolution of a future dispute, otherwise void under the prohibition on *gharar*, enforceable.\textsuperscript{170} In Bahrain, the GCC Arbitration Centre’s recommended standard arbitration clause includes future statements about uncertain disputes.\textsuperscript{171} In general, a large exception has been made to the prohibition on *gharar* with regards to arbitration, so agreements to arbitrate future disputes are enforced in the GCC states, including KSA mainly because arbitration clauses are “necessary to a contract.”\textsuperscript{172} However, according to Wakim, “arbitral awards upholding aleatory contracts or aleatory clauses, other than the arbitration clause itself, may be considered contrary to public policy.”\textsuperscript{173}

### 5.2.4. The Effect of Shari’a Public Policy on Arbitrability

What is not arbitrable under the Shari’a is generally of consensus and uniformity amongst the majority of GCC states, subject only to slight differences.\textsuperscript{174} Generally

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\textsuperscript{167} Wakim (n 3) 48-49.

\textsuperscript{168} ibid.

\textsuperscript{169} William Ballantyne, ‘Arbitration in the Gulf States “Delocalisation”: A Short Comparative Study’ (1985-86) 1 Arab LQ 205, 207 (listing the Middle Eastern states that have instituted legislation recognizing arbitration of both present and future disputes); Wakim (n 3) 48-49 (stating that “attempts to clarify this seeming paradox may incorporate notions of pragmatism, evasion, or the principle that ‘agreements must be observed’”).

\textsuperscript{170} Roy (n 27) fn 248.

\textsuperscript{171} Richard Kreindler, ‘An Overview of the Arbitration Rules of the Recently Established GCC Commercial Arbitration Centre, Bahrain’ (1997) 12 Arab LQ 15, 15 (analyzing the project “Model Law,” which seeks to overcome the pitfalls of the New York Convention); Wakim (n 3) 45-49; Kutty (n 88) 576-577.


\textsuperscript{173} Wakim (n 3) 45-49.

\textsuperscript{174} Saleh (n 113) 28-29. Arbitrability deals with the scope of arbitration. Alsheikh (n 106) 43. But see Hassam Al-Talhuni, noting that some scholars do not view public policy as identical to arbitrability, public policy being a wider concept under which arbitrability is a category dealing with the subject matter.
speaking, a dispute that cannot be the subject of *sul’h* [conciliation]\(^{175}\) is not arbitrable under the Shari’a.\(^{176}\) In Bahrain, the Supreme Court in Challenge No. 75/2007 (7 Jan 2008), rejected a challenge to the arbitral award because the court did not consider the case a dispute falling within the scope of purely personal status disputes which may not be subject to conciliation or to arbitration, but relates to the financial status of the partners and consequently are subject to arbitration. The scope of arbitration under the Shari’a is the same as that of *sul’h*.\(^{177}\) The question is what disputes generally cannot be the subject of *sul’h* under the Shari’a.\(^{178}\)

To begin with, arbitration that deals with actions or products that are *haram* [prohibited] are not arbitrable.\(^{179}\) Additionally, rights falling within the jurisdiction of religious courts are not arbitrable.\(^{180}\) As Alsheikh puts it, “to be valid it must concern the rights of human beings and not the rights of Allah, *hadd*, or *Tazeers*.\(^{181}\) This category would include the *hadd*, or the penalties fixed by the Prophet Muhammad [PBUH] for theft, adultery, consumption of pork or alcohol, among others.\(^{182}\) It is, however, always possible to arbitrate on the financial consequences of offences other than *hadd*.\(^{183}\) As for the arbitrability of matters relating to personal status such as marriage, affiliation, divorce and the guardianship of minors, this area is subject to

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\(^{175}\) Most Islamic scholars like Saleh and Wakim use the term conciliation and *sul’h* interchangeably, and others have used the term *sul’h* interchangeably with mediation or reconciliation. This is so because in the Shari’a there are no practical differences among these terms, except that there is a need to differentiate arbitration because of its scope. For a full discussion of the concepts of mediation, conciliation, *sul’h*, and arbitration under the Shari’a, see generally Alsheikh (n 106) Ch 3.

\(^{176}\) According to Saleh, Iraqi and Bahraini laws even adopted a principle of the equation approach, which makes arbitrability equal to conciliation and in Iraq “requiring the object of the conciliation to be identifiable and of market value.” Saleh (n 83) 28-29; Alsheikh (n 106) 44, 64 (stating that the Hanbali jurisprudence, despite its reputation for conservatism, hold that the scope of arbitration is unlimited).

\(^{177}\) Alsheikh (n 106) 64.

\(^{178}\) For a discussion of the types of cases in which *sul’h* is permissible and not permissible and the similarities between *sul’h* and arbitration, see Alsheikh (n 106) 59-66.

\(^{179}\) Saleh (n 83) 28-29. For example, relating to pork and alcohol.

\(^{180}\) ibid.

\(^{181}\) Alsheikh (n 106) 64 (further arguing that “the rights of the human being can be waived, but not the rights of Allah”); Jamaluddin Al-Zailaie, *Tabyeen Al-Haqaiq Shar’h Kanz Al-Daqaeq* (2nd edn, Dar Al-Maa’rifa, Beirut) vol 5 at 37.

\(^{182}\) Saleh (n 83) 28-29.

\(^{183}\) ibid.
controversy among the Shari’a schools. While each Islamic country might take a slightly different approach, as a general rule, questions of personal status and criminal acts are not arbitrable. Overall, it is clear that “all cases relating to religious law, hadd and any arbitration concerning haram goods are absolutely prohibited.”

Commercial disputes are another matter, and create a wider divergence of positions and rules among Islamic countries. Going back to the general prohibition on gharar [uncertainty], there are divergent views on the scope of this prohibition with regards to arbitration. According to Saleh, “future disputes between commercial agents/distributors cannot be made the subject of an arbitration clause in certain States but can be submitted to arbitration after the dispute has arisen (e.g., Lebanon). The same applies to an arbitration clause inserted in the printed terms of an insurance contract which the Libyan Civil Code renders null and void.” There are also different views as to the arbitrability of subject matters that are not expressly addressed under the Shari’a. There are, for example, different views as to the arbitrability of intellectual property and bankruptcy.

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184 ibid.
185 ibid. For example, Jordanian law enumerates non-arbitrable subject matters such as “any acts prohibited by law or regulation; acts contrary to moral or public policy or relating to personal status; the transfer of real property or waqf [a category of religious or family trust].”
186 ibid (stating that “this principle is embodied in the provisions of Syrian, Lebanese, Iraqi, Egyptian, Libyan and Kuwaiti law.”).
187 ibid.
188 ibid.
189 ibid.
190 The arbitrability of intellectual property rights has been subject to controversy, not only for the Middle East, but also in the international arbitration community. Marc Blessing, ‘Arbitrability of Intellectual Property Disputes’ (1996) 12 Arb Int’l No 2, 191 (stating that some countries like Italy do not allow for an arbitral tribunal to determine the scope and validity of intellectual property rights). The Italian Supreme Court, for example, ruled that only state authorities or courts can issue a binding decision relating to intellectual property rights. Scherk v Grandes Marques, Corte di Cassazione, 12 May 1977, in (1979) YB Comm Arb IV 289. Some countries like India do not deem intellectual property rights as a commercial dispute, while others like Egypt consider intellectual property disputes as commercial in nature. India Organic Chemicals Ltd v Chemtex Fibres Inc, High Ct, Bombay (Apr 1977) (India No 4) (holding that technology transfer was not commercial transaction). See Article 2 of the Egyptian Arbitration Act of 1994, defining commercial arbitration to include transfer of technology and technical know-how. Mladen Singer, ‘Commercial Arbitration as a Means for Resolving Industrial Property and Transfer of Technology Disputes’ (1996) 3 Croat Arb YB 107; Paul Carmichael, ‘The Arbitration of Patent Disputes’ (1983) 38 Arb Journal 3.
Overall, the Shari’a has expanded the scope of arbitration to cover, not only property disputes, but also family disputes. Such a view leaves open the possibility of a more flexible interpretation of arbitrability or the scope of arbitration under the Shari’a that is compatible with international arbitration norms. With regards to arbitrability in the GCC states, it is necessary to discuss the peculiarity of each GCC state in the latter part of this chapter.

5.2.5. The Effect of Shari’a on the Public Policy Defence

The limited scope of Shari’a public policy is puzzling when contrasted with the extent to which Western scholars and practitioners have criticized Islamic countries for refusing enforcement of foreign arbitral awards. As Al-Jerafi rightly observed, these criticisms are “only superficial and lack careful analysis.” For example, Shari’a procedural public policy, as explained above in Section 5.2.2., is largely consistent with the New York Convention. As Wakim puts it, “[p]erhaps because of their appeal to universal norms of due process and fairness, Islamic arbitration procedural concerns overlap well with the New York Convention.” Viewing Shari’a procedural public policy as consistent with international arbitration norms, what remains are concerns with the riba [interest] and gharar [uncertainty].

Yet, as explained above in Section 5.2.3.2., the gharar has not been strictly enforced with regards to arbitration and all GCC states allow an arbitration agreement to apply to future disputes. Also, the riba has been strictly applied arguably only in KSA, and has largely been circumvented with exceptions that in essence allow the riba. One scholar even goes as far as to state that the majority of Muslims are attempting to

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191 Alsheikh (n 106) 64; Samir Saleh, Commercial Arbitration in the Arab Middle East (2nd edn, Hart Publishing 2006) (for a discussion of the different views of Islamic Schools on arbitrability).
192 According to Saleh, Islamic law still determines the question of arbitrability in Bahrain, the KSA, Qatar, and Oman. Saleh (n 83) 28-29.
194 Al-Jerafi (n 15) 175.
195 Wakim (n 3) 45.
limit or to eliminate the prohibition on the *riba*.

In short, a closer look at Shari’a substantive public policy reveals two prohibitions that have been largely limited by most Islamic courts. The criticisms regarding Shari’a public policy as the biggest obstacle to foreign arbitral award enforcement in the GCC states, if only aimed at the *riba* and *gharar*, seem overly exaggerated given the discussion above. There seems to remain some other reason why public policy is deemed to be an obstacle to the enforcement of foreign arbitral awards in Islamic countries, but Shari’a public policy seems to play a limited role, regardless if in practice courts in GCC states refuse enforcement of foreign arbitral awards based on a sweeping claim of “public policy.”

PART III

5.3. Public Policy Under International Agreements

5.3.1. Public Policy Under the New York Convention

5.3.1.1. Overview of Public Policy Under the New York Convention

Generally speaking, the New York Convention makes an express reference to “public policy” only in Article V(2)(b), where the New York Convention provides as follows:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
> (b) the recognition of enforcement of the award would be contrary to the public policy of that country.

Article V(2)(b), however, is not the only source for the application of public policy in the enforcement of a foreign arbitral award. Other provisions of the New

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197 New York Convention, art V(2)(b).
198 Hanotiau and Caprasse (n 5) 788 (stating that “public policy underlies the application of other provisions of the Convention”).
York Convention imply the existence of the public policy defence in those provisions as well. In this regard, the overall public policy scheme of the New York Convention looks similar to that of the Shari’ah since public policy under the New York Convention, taking into account all the relevant provisions affecting public policy, can also be classified into two aspects: (1) procedural public policy and (2) substantive public policy. The basic notion of public policy under the New York Convention is generally viewed to be consistent with that of civil law systems, where public policy “encompass[es] substantive as well as procedural obligations.” The New York Convention’s procedural public policy falls within the ambit of Article V(1)(b), covering due process, while the substantive public policy falls within multiple provisions, mainly Article V(2)(b), expressly referring to public policy, and Articles V(1)(a), II(3), and V(2)(a) dealing with arbitrability.

A. Procedural Public Policy

Article V(1)(b) of the New York Convention states that the enforcement of a foreign arbitral award may be refused when “the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.” This Article on due process pertains to public policy, as it is generally agreed among commentators like van den Berg that the due process requirements of the New York Convention are also covered by the public policy exception. Most cases that allege a due process violation fall under Article V(1)(b) relating to the right to be heard, but many courts

199 ibid. (stating that public policy is implicitly present in other provisions of the Convention).
200 See Section 5.2.1.; Saleh (n 83) 26 (dividing Shari’a public policy into procedural and substantive public policy).
201 Böckstiegel (n 3) 127 (referring to “procedural public policy” under the New York Convention).
202 ibid 128 (referring to “substantive public policy”).
203 Hanotiau and Caprasse (n 5) 789.
204 ibid 801 (stating that the Article V(1)(b) condition refers to due process).
205 New York Convention, art V(1)(b).
206 Hanotiau and Caprasse (n 5) 801.
assume that the right to be heard simultaneously falls under Article V(2)(b)’s public policy defence.208

Under Article V(1)(b), each party must be able to fully present his case, arguments, or defence (right to be heard)209 and to answer all the submissions of its adversary.210 According to van den Berg, this article “is concerned with the fundamental principle of fair hearing and adversarial proceedings, known also as audi et alteram partem [“hear the other side too”].”211 It is important to note that according to Parsons & Whittemore, “this provision essentially sanctions the application of the forum state’s standard of due process.”212

Van den Berg more specifically articulated four categories of due process violations under Article V(1)(b) wherein courts have refused to enforce a foreign arbitral award.213 The first type deals with cases involving lack of notice or when there is a failure to inform a party about the arbitration, referred to as “ghost arbitration,”214 which may result from not properly locating the uninformed respondent.215 In Sesostris SAE v. Transportes Navales SA and M/V Unamuno,216 the US District Court of Massachusetts refused enforcement of a foreign arbitral award because the bank had not received proper notice of the arbitration proceeding. Refusal to participate in the arbitration after having been duly notified, however, constitutes a waiver.217

209 Otto and Elwan (n 92) 387.
210 This right, however, does not mean the arbitral tribunal has to agree. Inter-Arab Investment Guarantee Corp v Banque Arabe et Internationale d’Investissements S.A, (1998) YB Comm Arb XXIII 644, 650 (Courd’Appel de Paris, 1997).
213 van den Berg, ‘Refusals’ (n 211) 7.
214 ibid (using the term “ghost arbitration”); Danish Buyer v German Seller, Oberlandesgericht [Court of Appeal], Cologne, 10 June 1976, (1979) YB Comm Arb IV 258-260 (Germany No 14).
217 Italy Supreme Court Judgment No 78, Sub 3, (1985)10 YB Comm Arb 385 (“no review of the merits of the arbitral award is permitted under the Convention [New York Convention of 1958] even if the award is made in the absence of a party who was duly notified of the arbitration and did not participate”).
Likewise, the court in *Parsons & Whittemore*, 218 a case involving a US company that abandoned a construction project in Egypt following the severance of US-Egyptian diplomatic relations in 1967, rejected the public policy defence of the US company which claimed a due process violation when the arbitrators refused to postpone a hearing because one of the witnesses could not be present due to a prior commitment.

The second type of violation appears in cases that involve failure to inform a party of what the other party has submitted to the arbitrator or tribunal, thus denying the uninformed party of the proper right to a defence.219 The third type of violation involves cases where there is insensitivity by arbitrators to accommodate a party who is therefore denied of a meaningful participation in the arbitration and to present a proper case and defence.220 Finally, the fourth type of violation involves cases where an arbitral tribunal or arbitrator puts a party on the wrong track by misleading the party as to procedural requirements of the case.221

Additionally, one could include Article V(1)(c), (d), and (e) as part of the procedural public policy.222 There may also be a due process challenge covering a party’s right to support its claims with evidence and an opportunity to present such evidence,223 including the right to call a witness.224 It should be noted, however, that a


220 *Bauer & Grobmann OHG v Fratelli Cerrone Alfredo e Raffaelei*, Corte di Appello [Court of Appeal] Naples (Salerno Section) 18 May 1982, (1985) X YB Comm Arb 461-462 (Italy No 70) (one month notice insufficient when there was a major earthquake in same period where in area of respondent); *Ajay Kanoria, eSols Worldwide Limited, and Indekka Software Pot Ltd v Tony Francis Guinness*, Court of Appeal (Civil Division) 21 Feb 2006 and 8 March 2006, (2006) XXXI YB Comm Arb 943-954 (UK No 73) (insensitivity of arbitrator to the serious illness of a party).


222 Böckstiege (n 3) 127.

223 Otto and Elwan (n 92) 390-391.
simple breach of mandatory rules of the applicable arbitration law at the place of arbitration and at the place of enforcement are not sufficient to establish a breach of public policy.\(^{225}\)

**B. Substantive Public Policy**

The New York Convention’s substantive public policy, like the Shari’a, covers both a general public policy requirement and the concept of arbitrability, which could be viewed as two sides of the same coin.\(^{226}\) According to van den Berg, the concept of public policy may encompass arbitrability,\(^{227}\) but for historical reasons the drafters of the New York Convention addressed public policy and arbitrability in separate clauses under Article V(2).\(^{228}\) This section refers to Article V(2)(b) as the provision on express substantive public policy, and the articles on arbitrability under Articles V(2)(a), II(3), and V(1)(a) as implied substantive public policy.

### i. Express Substantive Public Policy Exception

Prior to the New York Convention, its precursor, the Geneva Convention on the Execution of Foreign Arbitral Awards (Geneva Convention)\(^{229}\) under its Article I stated that “the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.”\(^{230}\)

The New York Convention intentionally dropped the phrase “principles of law” in Article V(2)(b),\(^{231}\) which has been interpreted to mean that the New York Convention

\(^{224}\) Corporacion Transnacional de Inversiones SA v STET International SpA, 45 OR (3d) 183 (Ontario Superior Court of Justice, Canada).

\(^{225}\) Böckstiegel (n 3) 126 (pointing to the difficulty in proving these procedural breaches in practice).

\(^{226}\) Otto and Elwan (n 92) 346.

\(^{227}\) van den Berg, ‘NY Arbitration Convention’ (n 21).

\(^{228}\) Böckstiegel (n 3) 125 (explaining that the distinction is not superfluous because while arbitrability may invoke public policy, it may not always be part of public policy because it may form part of a law that is not so fundamental as to constitute public policy).


\(^{230}\) Geneva Convention, art I; Otto and Elwan (n 92) 365.

\(^{231}\) Otto and Elwan (n 92) 365 (referring to the Brazilian delegation failed attempt to reintroduce a phrase similar to “principles of law”).
intended to limit the scope of the public policy exception to those that are fundamental, and not to cover a mere violation or incompatibility with local laws.\textsuperscript{232}

Importantly, courts and writers often emphasize the pro-enforcement bias of the New York Convention.\textsuperscript{233} This pro-enforcement bias itself is a matter of public policy.\textsuperscript{234} It is also well established\textsuperscript{235} international law since the decision in the \textit{Parsons & Whittemore} case that the grounds for refusing enforcement under Article V(2)(b) are to be construed narrowly.\textsuperscript{236} In this regard, while the public policy provision under Article V(2)(b) seems to be a popular fall-back defence, the vast majority of courts faced with such an argument proceed with enforcement.\textsuperscript{237} The public policy defence should therefore be permitted only when enforcement of the foreign arbitral award would violate “the enforcing state’s most fundamental notions of morality and justice,”\textsuperscript{238} including constitutional rights and fundamental principles of civil law.\textsuperscript{239} The International Law Association Committee on International Arbitration (hereafter “ILA-CIA”) proposes a limitation on the application of public policy that goes even further: “the application of international policy narrowly defined should mean that public policy is rarely a ground for refusing enforcement of international arbitral

\begin{footnotesize}
\begin{enumerate}
\item van den Berg, ‘NY Arbitration Convention’ (n 21) 360.
\item Jan Paulsson, ‘May or Must Under the New York Convention: An Exercise in Syntax and Linguistics’ (1998) 14(2) Arb Int’l 227, 228; van den Berg, ‘Consolidated Commentary’ (n 207) 650; Redfern and Hunter (n 18) 457.
\item \textit{Waterside Ocean Navigation Co v International Ltd}, 973-974 F2d 150 (2d Cir 1984); \textit{Hebei Import & Export Corp v Polytek Engineering Co Ltd}, [1999] 2 HKC 205 (Hong Kong Court of Appeals followed the rule in \textit{Parsons & Whittemore}); \textit{PT Asuransi Jasa Indonesia (Persero) v Dexia Bank S.A}, [2007] 1 SLR 597 (Singapore); \textit{Downer Connect Ltd v Pot Hole People Space Ltd}, CIV 2003-409-002878, May 19, 2004 (Singapore) (requiring “shock the conscience” for the public policy defence).
\item Otto and Elwan (n 92) 365 (stating that it is a defence that in the majority of cases fails).
\end{enumerate}
\end{footnotesize}
awards.” Finally, it is the public policy of the country where enforcement is sought that applies under Article V(2)(b).241

ii. Implied Substantive Public Policy or Arbitrability

Aside from the express public policy provision under Article V(2)(b), substantive public policy is also implied under Articles V(2)(a), II(1) and (3), and V(1)(a). These articles in essence deal with the concept of arbitrability.242 Article V(2)(a) states as follows:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country

This provision, like Article V(2)(b), is to be determined by the enforcing state. As stated by Afrazadeh, arbitrability reflects a specific interest of the enforcing state that particular issues are to be decided by domestic courts.243 As such, “arbitrability is part of public policy.”244 However, “very few cases rendered under the [New York] Convention have led to the refusal of recognition or enforcement of an award on the basis of an alleged inarbitrability.”245

241 Ukrvnesprom State Foreign Economic Enterprise v Tradeway Inc, No 95 Civ 10278 (RPP), (1997) XXII YB Comm Arb 958, 963 (US Dist Ct for the SDNY); Soleimany v Soleimany, (1998) 3 WLR 811, where an English court refused enforcement on the grounds of public policy because the smuggling of carpets is illegal in Iran, though it is arguable that the basis for the public policy defence was the criminality involved in the case.
242 Böckstiegel (n 3) 125 (Article V(1)a and V(2)a permit refusal of enforcement of an arbitral award due to lack of arbitrability).
243 Homayoon Afrazadeh, ‘Arbitrability Under the New York Convention: The Lex Fori Revisited’ (2001) 17 Arb Int’l 73; Otto and Elwan (n 92) 349 (stating that “the issue of arbitrability touches on the specific national interest of a state in allowing or disallowing arbitration of certain disputes”).
244 Böckstiegel (n 3) 125; Hanotiau and Caprasse (n 5) 819.
245 Hanotiau and Caprasse (n 5) 819.
While Article V(2)(a) deals only with the law of the enforcing state, Article II(1) and (3) of the New York Convention covers arbitrability at the place of arbitration in an action for a court to either set aside the arbitral award or refuse to recognize an arbitration agreement.\textsuperscript{246} Unlike Article V, however, Article II provisions are made at the request of the parties and not by the courts, \textit{sua sponte}. Article II(1), otherwise known as the arbitrability condition,\textsuperscript{247} requires that the agreement concern a “subject matter capable of settlement by arbitration.”\textsuperscript{248} Under Article II(3), the court of a Contracting State “shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”\textsuperscript{249} Arbitrability, though not expressly stated in Article II(3), can be read implicitly into the provision because of its reference to an agreement, which is subject to Article II(1), and the term “null and void,” both of which imply the issue of arbitrability.\textsuperscript{250} Likewise, the word “null and void” implies the substantive public policy of the New York Convention.\textsuperscript{251} Article II(3) also allows a court in any state where litigation is commenced to continue litigation proceedings if it finds that the arbitration agreement is incapable of being performed, which includes the question of arbitrability.\textsuperscript{252}

Finally, Article V(1)(a), which deals with the refusal to enforce a foreign arbitral award if the parties to the agreement were under some incapacity or if the said agreement is not valid, raise a limited public policy concern regarding incapacity whenever the issue is the capacity of public entities to enter into an arbitration agreement.\textsuperscript{253} According to Böckstiegel, the difference between objective arbitrability under Article V(2)(a) and subjective arbitrability under Article V(1)(a), covering capacity, is that arbitrability deals with the question of \textit{what} can be arbitrated while capacity deals with the question of \textit{who} can submit to arbitration.\textsuperscript{254} There seems to be

\begin{itemize}
\item \textsuperscript{246} Otto and Elwan (n 92) 349; van den Berg, ‘NY Arbitration Convention’ (n 21) 369.
\item \textsuperscript{247} Hanotiau and Caprasse (n 5) 798.
\item \textsuperscript{248} New York Convention, art II(1).
\item \textsuperscript{249} New York Convention, art II(3).
\item \textsuperscript{250} Hanotiau and Caprasse (n 5) 799.
\item \textsuperscript{251} van den Berg, ‘Consolidated Commentary’ (n 207) 629; Hanotiau and Caprasse (n 5) 799.
\item \textsuperscript{252} Otto and Elwan (n 92) 349.
\item \textsuperscript{253} Hanotiau and Caprasse (n 5) 799-800.
\item \textsuperscript{254} Böckstiegel (n 3) 126.
\end{itemize}
an international consensus that public entities have the capacity to enter into arbitration agreements.\textsuperscript{255} With respect to the GCC states, however, one has to keep in mind that KSA does not allow public entities to enter into arbitration agreements.\textsuperscript{256}

\textbf{5.3.2. Public Policy Under the ICSID Convention}

``The [ICSID] Convention does not permit the review of an arbitral award on grounds of public policy.’’\textsuperscript{257} By design, there would be no “domestic legal system which would provide the standard for public policy.”\textsuperscript{258}

Articles 53 and 54, covering recognition and enforcement of an ICSID arbitral award, do not provide for a public policy exception to the obligation of states to enforce arbitral awards.\textsuperscript{259} Additionally, public policy is not listed as a ground for annulment under Article 52 of the ICSID Convention.\textsuperscript{260} Nor is it listed anywhere else in the ICSID Convention. This was an intentional omission of the public policy defence. “A proposal for an exception to the obligation to enforce an ICSID award under Article 54 on public policy grounds was rejected by a large majority of states (25 in favour of rejection; 9 against) negotiating the ICSID Convention.”\textsuperscript{261} This is the main advantage of the ICSID

\textsuperscript{255} Hanotiau and Caprasse (n 5) 800.
\textsuperscript{256} Belal Al-Ghazzawi, Meriel Buxton and Tammam Kaisi, ‘Saudi Arabia’ (2010) The European and Middle Eastern Arbitration Review <http://ghazzawilawfirm.com/files/EMEAR%20report%20Saudi%20Arabia.pdf> accessed 15 January 2013 (explaining that the Aramco case “led the Saudi government in 1963 to prohibit all Saudi public entities from entering into arbitration agreements unless explicitly authorised by the government, and this remains the case today. Article 3 of the Act that provides for that rule can only be amended by the Council of Ministers. However, if a dispute has already arisen and the concerned public entity wishes to arbitrate that dispute, it can prepare a memo for the prime minister (the king) explaining the dispute and the reasons behind its wish to arbitrate. In all cases the Council of Ministers shall be notified of all the arbitration awards where one of the parties is a government entity.”).
\textsuperscript{257} RSM Production Corp v Grenada, ICSID Case No ARB/05/14, 29 Oct 2009 (Washington DC ICSID), par 15, fn28.
\textsuperscript{258} Schreuer (n 1) 568.
\textsuperscript{259} Moshe Hirsch, The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes (Springer 1993) 127; Schreuer (n 1) 568 (stating that “reliance on the ordre public of another State in which an ICSID award may have to be enforced, would be equally unwarranted”).
\textsuperscript{261} RSM Production Corp (n 257), citing ICSID Convention: History vol II, 903.
Convention, which is that it is largely self-contained, and leaves very little room for state and enforcing courts to review the ICSID arbitral award.

Schreuer illustrated the ineffectiveness of a public policy argument under the ICSID Convention. According to Schreuer, “a State, after having consented to the subjection of a loan agreement to French law, could not argue that the obligation to pay interest is contrary to the public policy of its religiously inspired domestic law.” This is so because “a host State’s reliance on its own ordre public on the face of an agreed choice of law pointing to another system of law is simply a breach of the undertaking to make the chosen law controlling.”

The only possible public policy argument to be made in the ICSID Convention context are those involving “certain basic international tenets which may be described as the public policy of the international community,” including peremptory rules of international law. The limited list, according to Schreuer, would include “the prohibition of slavery, piracy, drug trade, terrorism and genocide, the protection of basic principles of human rights and the prohibition to prepare and wage an aggressive war.”

The application of international public policy would have to extend to arrangements which violate binding Security Council resolutions under Chapter VII of the UN Charter, even where the resolutions have not been made controlling by a domestic system of law chosen by the parties. In instances involving a violation of any of these basic international tenets, ICSID Tribunals would have no choice but to refuse to enforce the disputed arrangements.

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263 Schreuer (n 1) 569.
265 Schreuer (n 1) 569 (stating that any theoretical justification for this conclusion can be found in the foundation of the ICSID in the Convention and hence in international law).
266 ibid 569.
267 ibid.
268 ibid. Schreuer gives as an example an agreement or cooperation involving certain forms of weapons production, especially of weapons of mass destruction.
269 Schreuer (n 1) 569 (stating that “the refusal of an ICSID tribunal to apply and enforce arrangements that violate any of these principles would be the only appropriate response”); Georges Delaume, ‘The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal’ (1988) 3 ICSID Review – Foreign Investment L J 79, 90-91.
Further, Article 42(1) of the ICSID Convention states that “the Tribunal shall decide a dispute in accordance with such rules as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”

Since most investment arbitrations arise from dispute resolution and substantive provisions of international treaties, arbitral Tribunals cannot ignore the fundamental interests protected by international law, and must consider public policy issues that arise.

In this regard, Hunter and Conde e Silva argue that ICSID Tribunals in state party investment disputes must also consider both substantive and procedural transnational public policies. For example, as discussed earlier, the Internal Law Principle under transnational public policy would prohibit state parties to a contract from avoiding arbitration “either through the reliance on pre-existing mandatory provisions of its domestic law, or the ex post facto use of its legislative, executive or judicial powers for this purpose.”

The Cairo Court of Appeals in *Organisme des Antiquités v. G. Silver Night Company*, in interpreting Egyptian Law No. 27/1994 concerning Arbitration in Civil and Commercial Matters, stated that “State or public law entities may not reject an arbitration clause contained in their contracts by invoking legislative restrictions, even if they are genuine.”

In *Société des GrandsTravaux de Marseille v. EPIDC*, Bangladesh aimed to avoid its contractual obligation as a state

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270 ICSID Convention, art 42(1).
271 Hunter and Conde e Silva (n 42). Such issues include subjective non-arbitrability, absence of special powers by the signatory of an arbitration agreement, unilateral rescission of an arbitration agreement, immunity from jurisdiction, restrictive interpretations of State contracts, expropriation, bribery, fraud, contracts in violation of a UN resolution or embargo, protection of the environment, tax law, or exchange control regulations.
272 According to Cairns, the ultimate justifications for the Internal Law Principle are the universal principles of *pacta sunt servanda* [agreements must be kept] and good faith. It also finds supports under public international law, such as the obligations of NY Convention signatories under Article II (1) to recognise arbitration agreements. See generally, Cairns (n 46).
273 Cairns (n 46).
party by dissolving the state entity that is subject to the arbitration and by abolishing the subject matter of the arbitration. The Swiss arbitral tribunal held that the dissolution of the entity was in breach of Bangladesh’s obligations under international law, and the abolition of the subject matter violated Swiss public policy.  

PART IV

5.4. Public Policy According to the GCC States

5.4.1. General Concept of Public Policy in the GCC States

Public policy in the GCC states, though always linked to the Shari’a, is not solely based on Shari’a concepts and for most GCC states remain undefined. The concept of public policy, for example, could be found in modern laws that were not expressly covered by the Shari’a, such as “exchange control, the protection of tenants, illegal activities such as arms traffic, [terrorism, money laundering] and counterfeit currency, and in the statutory provisions which reserve to the exclusive jurisdiction of their national courts matters concerning labour law, commercial agencies and cases relating to immovable property including oil wealth.”

The Shari’a, however, is ever present. Even in GCC states that do not expressly mention the Shari’a in their rules for the enforcement of foreign arbitral awards but simply uses the term “public order” or “public morals,” which is the case for most GCC states, the Shari’a still forms part of the law or even the constitution of that state. The same question was posed by Ezrahi, as to whether generally accepted notions of public order applies in the absence of an express reference to the Shari’a in the domestic legislation for the enforcement of a foreign arbitral award, and Ezrahi explains that “although a national legislation may refer to public morals or order in general or public morals or order of the specific country, the Shari’a may form a part of the laws of that

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ibid.

Saleh (n 83) 26 (“It is noteworthy that most of the courts in the [GCC states] have not yet defined public policy.”).

ibid.
country and enter the equation by that route." Additionally, the Riyadh Convention, which expressly incorporates the Shari’a in arbitral award enforcement, would allow a GCC state to refuse enforcement under the Shari’a “even if public order in the enforcing country would authorise such provision.”

The term public order or public morals may carry different meanings among the GCC states, even in light of or regarding the Shari’a. One example of this scenario, discussed in the beginning of this chapter, is the diverse treatment of the *riba* among Islamic countries and among Shari’a schools, even though the *riba* is universally deemed to be *haram* [prohibited]. Public order in Egypt and Morocco, therefore, would not necessarily prohibit the *riba*, while public order in the KSA and Kuwait would strictly prohibit it. One approach suggested by scholars is to partially enforce the portion of the arbitral award that is Shari’a compliant and refuse enforcement only of the portion that violates the Shari’a, for example the portion relating to *riba*.

It is worthwhile now to proceed with a closer examination of the specific public policy legislation of each of the GCC states in relation to the enforcement of foreign arbitral awards. The closer look reveals an approach by GCC states that are in reality more sensible than one may expect. It is also interesting to note at the outset that “Albert Jan van den Berg in his article on the few cases where awards were refused enforcement under the New York Convention of 1958 does not mention a single Arab court case where for public policy reasons a foreign arbitration award was refused enforcement.”

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280 Ezrahi (n 4) 6.
281 ibid.
282 ibid (stating that “public order is not the same in each of the Arab countries”); El-Ahdab (n 91).
283 Ezrahi (n 4) 6; El Ahdab (n 91) 605-606 (mentioning the suggestion by Mohamed Huchan).
284 Husain Al Baharna, ‘The Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain’ (1989) 4 Arab LQ 332, 332-344 (stating that “the diversity of the laws and procedures in the GCC countries, coupled with the fact that some of them have not yet passed legislation on the topic, make the task of this study not so easy.”)
285 Ezrahi (n 4) 6 (courts in the Middle East have taken a sensible approach).
286 van den Berg, ‘Consolidated Commentary’ (n 207); Ezrahi (n 4) 7.
5.4.2. UAE: Public Policy and Public Order

A foreign arbitral award will not be enforced in the UAE if it includes elements that “contradict public policy or morals.”287 Hoyle criticised the UAE for placing too much emphasis on public policy, stating that the “risk of course is that public policy has a tendency to move and grow.”288 According to El-Ahdab, “the courts of the Emirates are not bound to accept the decision of a foreign court if it is contrary to the public order of the Emirates.”289 However, according to the Abu Dhabi Court of Appeal, simply “referring a dispute to arbitration taking place outside the UAE does not represent a violation of public order.”290

The UAE follows the same rule as that of its fellow GCC states, for example KSA,291 when it comes to the public policy exception. This pattern seems predictable within the context of the Shari’a, as interconnected as its commercial and other laws are to morality and public order. Article 3 of the UAE Civil Transactions Code292 defines public policy as follows:

> Are considered of Public Policy, rules relating to personal status such as marriage, inheritance, descent, and rules concerning governance, freedom of commerce, trading in wealth, rules of personal property and provisions and foundations on which the society is based in a way that do not violate final decisions and major principles of Islamic Shari’a.293

According to Mechantaf, “this definition is wide enough to encompass almost anything that goes into ‘trading in wealth’ and ‘foundations on which the society is

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287 For further discussion on UAE public policy, see Ahmed Almutawa and AFM Maniruzzaman, ‘The UAE’s Pilgrimage to International Arbitration Stardom - A Critical Appraisal of Dubai as a Centre of Dispute Resolution Aspiring to be a Middle East Business Hub’ (2014) J World Inv Trade 15, 193-244.
288 Mark Hoyle, ‘Topic in focus: demystifying UAE arbitration law’ (Lexology, 8 November 2013) <http://www.lexology.com/library/detail.aspx?g=fce4ff6f6-cafb-4063-8dce-f20fc1544c9c> accessed 15 January 2014 (setting out examples of when public policy may be used whenever there is a procedural violation).
289 Ezrahi (n 4); El-Ahdab (n 91).
291 Roy (n 27) 923-924.
293 UAE Civil Transactions Code [Federal Law No (5) of 1985], art 3.
based’, depending on the total discretion of UAE courts.”

Further, despite the existence of this definition, there is yet to be a coherent judicial definition or practice of defining the scope of public policy under this definition, owing largely to the fact that there is no official and systematic practice of precedent and publication of decisions.

What is important, therefore, is how courts in Dubai and the rest of the Emirates will define and limit the scope of public policy in the UAE. A recent criticism by Blanke regarding the Dubai Court of Appeals’ overly broad interpretation of public policy sheds light on this issue. Blanke explains that in a recent ruling in Baiti Real Estate Development v. Dynasty Zarooni Inc., the Dubai Court of Cassation set aside an order to enforce a DIAC rendered domestic arbitral award made by the Dubai Court of First Instance and the Dubai Court of Appeals because the court misconstrued the limited scope of public policy under Article 3 of the UAE Civil Transactions Code.

The Baiti court, according to Blanke, failed to take into account that the definition of public policy under Article 3 of the UAE Civil Transactions Code is limited “in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari’a.” In so doing, the Baiti court, according to Blanke, set a dangerous precedent for both domestic and foreign arbitral awards to be refused or set aside based on an overly broad standard of public policy that allows for application whenever the rules relate to the circulation of wealth or private ownership. Other commentators, disagree with Blanke’s outlook, viewing the

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295 Mechantaf, ‘Public Policy’ (n 294).

296 ibid (stating that “decisions rendered by national Courts refusing recognition on such ground limit to a mere reference to public policy without detailing the method of the Court’s reasoning, which would have helped the promotion of a coherent practice and the development of a consensus on principles and rules which may belong to public policy in the UAE”).


298 Baiti Real Estate Development v Dynasty Zarooni Inc, Dubai Court of Cassation, Appeal No 14/2012, Real Estate Cassation (16 September 2012).

299 Blanke, ‘Public Policy’ (n 297).

300 ibid.
decision instead as limited in its scope and application, and should not affect the enforcement in the UAE of foreign arbitral awards.\(^{301}\)

The Dubai Court of Cassation had also decided a similar case in Dubai Court of Cassation (Case No. 180/2011) on February 12, 2012.\(^{302}\) In that case, the Court held as follows:

the selling of units without compliance with the registration requirement as provided for in article 3 of Law No. (13) 2008 may not be the subject matter of arbitration simply because this sale without registration contravenes public policy. Therefore, where a dispute subject to article 3 of Law No. (13) of 2008 is brought before an arbitral tribunal, and that tribunal rendered an award settling that dispute, such award is null as only the Court shall decide on the same dispute, at its own discretion, as it is a matter which relates to public policy.\(^{303}\)

The arbitral award in the said case was a DIAC arbitral award, affirmed by the Dubai Court of First Instance and Dubai Court of Appeals, which had rendered a sale agreement between the parties to be null and void in light of article 3 of Law No. (13) of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai.\(^{304}\) What makes this case notable, according to Mechantaf is that the Court of Cassation had set aside a DIAC arbitrator’s ruling that nullified a sale agreement for not meeting the requirements of article 3 of Law No. (13) of 2008, a ruling which in effect does not violate any public policy since it only applies Dubai law.\(^{305}\)

In regards to public policy, therefore, the Dubai Court of Cassation has recently favoured a broad interpretation. On the other hand, recent trends in cases in the UAE

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\(^{301}\) See Nassif BouMalhab and Susie Abdel-Nabi, ‘Nullification of another DIAC Arbitration Award - Have the floodgates opened? No, says Clyde & Co.’ http://www.clydeco.com/insight/updates/nullification-of-another-diac-arbitration-award-is-it-time-to-panic-no-says accessed 12 May 2013 (stating that “the court is not opening the floodgates to review arbitral awards every time that a provision of public policy is interpreted.”).

\(^{302}\) Mechantaf, ‘Public Policy’ (n 294).


\(^{304}\) Mechantaf, ‘Public Policy’ (n 294).

\(^{305}\) ibid.
show courts favouring enforcement and disregarding technical requirements.\textsuperscript{306} Additionally, Luttrell proposed that when a foreign investor takes advantage of the DIFC, one could split the \textit{lex arbitri} [law of the place where arbitration is to take place] by choosing the DIFC as the seat while at the same time applying transnational procedures like the UNCITRAL Model Law, a choice that according to Luttrell could theoretically maximise the prospect that an enforcing court would apply an international or transnational standard of public policy and minimise the likelihood that UAE courts will refuse to ratify a foreign arbitral award.\textsuperscript{307}

In one case, implying the UAE’s less stringent adherence to the prohibition of the \textit{riba}, the Dubai Court of First Instance, though ultimately refusing enforcement on evidentiary grounds because the claimant failed to prove the finality of the arbitral award, dismissed the argument relating to the unlawfulness of an arbitral award that ordered a UAE entity pay the amount owed plus 7.75\% interest.\textsuperscript{308} This case is an example of where the reason for non-enforcement was a condition to enforcement and not a violation of public policy.

As regards arbitrability, the UAE follows the general rule that what cannot be subject to \textit{sul’h} [conciliation] cannot be arbitrable.\textsuperscript{309} Under Article 203 of the UAE Civil Procedures Code, arbitration is only permitted in matters capable of conciliation. In this regards, each Emirate may have its own peculiar rules on arbitrability. For example, “statutes in Dubai and Sharjah require that the dispute concerns the payment of a sum of money for it to be arbitrable.”\textsuperscript{310} In Court of Cassation, Case. No. 123/2009, hearing dated 15 March 2010,\textsuperscript{311} the court held that as a matter of public policy, the rights of employees under Articles 5-7 of the Work Regulation Law, are not arbitrable

\textsuperscript{306} See also Fujairah Federal Court of First Instance, Case No 35 of 2010, Judgment of 27 April 2010 (enforcing a foreign arbitral award under the New York Convention); Abu Dhabi Court of Cassation, Appeal No 519 of 2013, Decision on 2 October 2013 (in a pro-arbitration and pro-enforcement decision, the court held that an award-creditor can seek a precautionary attachment order without needing to first ratify the award); Robert Karrar-Lewsley, ‘UAE: attachment orders apply while recognition is pending’ (Lexology, 23 January 2014) <http://www.lexology.com/library/detail.aspx?g=42bd95b7-730a-4341-b93a-d2d64e911fd> accessed 24 February 2014.


\textsuperscript{308} Dubai Court of First Instance, Judgment No 190/98, 10 November 1998.

\textsuperscript{309} Saleh (n 83) 28-29; Alsheikh (n 106) 64.

\textsuperscript{310} Saleh (n 83) 28-29.

since the legislature established specific litigation procedures for labour law and since the rights of employees are not subject to conciliation. Also, in Abu Dhabi Court of Cassation, Petition No 814/2011, the court held that disputes arising out of commercial agency agreements that are registered in the Commercial Agencies Register cannot be subject to arbitration under Law No 18 of 1981, as amended by Law No 14 of 1988.

5.4.3. Oman: Public Order or Good Morals

Article 120 of Chapter VII, regarding the rules governing the enforcement of foreign arbitral awards of Oman, states that “the judgment or award must not be contrary to the laws in force in the Sultanate of Oman. It must not be against Omani public order or good morals.”

In Oman, there is always a possibility that the Shari’a will be applied to refuse enforcement of a foreign arbitral award. As Jarvin noted in reference to Oman, “here as in many Islamic jurisdictions...there can never be any guarantee that in any particular proceedings the Shari’a will not be applied.” Jarvin, however, also pointed to a 1985 Omani ICC arbitration case, where a Dane, British, and Dutchman, all non-Muslims, rendered an arbitral award, which included accrued interests on a promissory note, in favour of an English claimant and against an Omani company. The Omani Authority for the Settlement of Commercial Dispute ordered enforcement of the ICC arbitral award, despite the existence of interest, that the arbitrators were non-Muslims involving one Muslim party, and that the basis of the Omani Constitution is the Shari’a. This case led one scholar to comment that “it is true to say that the [Omani] Authority for Settlement for Commercial Disputes does not at present apply Shari’a precepts.”

313 Ezrahi (n 4) 5.
315 Jarvin (n 314); Ezrahi (n 4) 7.
316 Ballantyne (n 169); Ezrahi (n 4) 7.
317 Ballantyne (n 169); Ezrahi (n 4).
5.4.4. Qatar: Public Order and Good Morals

The Qatari Civil Procedures Code (CPC) refers to “public order and good morals.” Article 207 of the Qatari CPC provides the rules for challenging an arbitral award and states as follows: “every interested party may move for the nullity of the award of the arbitrators in the following cases…if the award…contravened a rule of public order or good morals.” Article 380 of the Qatari CPC states that a judgment or arbitral award is enforceable if it “is not contrary to a prior judgment made by a Qatari court and does not breach the rules of public order and good morals in Qatar.”

Public policy within the context of Qatar’s fairly young arbitration jurisprudence is still largely influenced by the Shari’a, which prior to 1990 was the main source for arbitration law in Qatar. The definition for Qatari public order and good morals, thus, would closely resemble the prohibitions under the Shari’a, including “participating in prohibited activity, such as, for example, earning interest (riba), excessive risk-taking (gharar), or profiting from the sale of non-halal products, such as pork, alcohol, or pornography.” According to Alrashid and others “the prohibition on riba has significant implications for international arbitrations seated in Qatar, including the prospect of awarding of funds from interest bearing accounts in banks headquartered outside of Qatar.” In the end, while Qatari arbitration law remains unclear as to the limits of the public policy defence, the Qatari CPC “seems to actually mandate judicial review for public order and good morals compliance as a threshold question to any challenge to an award.”

With regards to arbitrability, Qatari law does not expressly provide for what can or cannot be arbitrable. Instead, the third paragraph of Article 190 of the Qatari CPC

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319 ibid art 380; Ezrahi (n 4) 5; Reza Mohtashami and Merry Lawry-White, ‘The (Non)-Application of the New York Convention by the Qatari Courts: ITIIIC v Dyncorp’ (2012) 29 J of Int’l Arb 4, 429-436.
321 Alrashid and others (n 320) 9.
322 ibid.
323 ibid 14.
324 According to Maleh, “there is no reference to arbitrability under Qatari law.” Seem Maleh, ‘Is It Time To Amend The Articles Regulating Arbitration in Qatar?’ (Kluwer Arbitration Blog, 30 June 2011)
states broadly that “there can be no arbitration in matters which the parties cannot settle amicably.”\textsuperscript{325} It is in this sense that Qatar implicitly regulates arbitrability since there is a divide as to matters that can and cannot be settled amicably. The language of Article 190, however, can be a source of confusion, as Alrashid and others put it:

On its face, the clause would appear, paradoxically, to ban arbitration of disputes in general. It may refer to criminal and family law issues which are more appropriately resolved by courts rather than arbitral panels. A narrow reading, restricting the operation of the clause to the context of its surrounding paragraph, would give it significance: The subject matter of a dispute may be determined during the proceedings, but if that subject matter cannot be determined amicably, then there can be no arbitration. Confusion over what types of disputes may be arbitrated thus could present a serious problem.\textsuperscript{326}

According to Maleh, those that cannot be settled amicably could fall into two categories: personal status and public policy.\textsuperscript{327} Matters relating to personal status include the validity or termination of marriage, filiations, incapacity, guardianship and inheritance.\textsuperscript{328} Public policy, on the other hand, includes, but is not necessarily limited to, such matters as criminal liability,\textsuperscript{329} betting and gambling, drugs, prostitution and other “immoral” activities.\textsuperscript{330} There are now calls for Qatar to clarify the scope of arbitrability by explicitly stating in legislation the requirements, and clear guidelines for the types of disputes that can be subject to arbitration.\textsuperscript{331}

It is especially important for Qatar to clarify the limits of arbitration in the context of the Shari’a.\textsuperscript{332} As stated by Alrashid and others, “in the area of arbitration,}

\textsuperscript{325} Qatar Code of Civil and Commercial Procedure, art 190, Law No 16 of 1971 as amended by Law No 13 of 1990 (published in the Official Gazette, No 13 of 1 September 1990); Alrashid and others (n 320) 10.
\textsuperscript{326} Alrashid and others (n 320) 10.
\textsuperscript{327} Maleh (n 324).
\textsuperscript{328} ibid.
\textsuperscript{329} El-Ahdab (n 91) 517 (stating that “arbitration is not valid in criminal matters or matters of personal status”).
\textsuperscript{330} Maleh (n 324).
\textsuperscript{331} ibid.
\textsuperscript{332} Qatar invokes Shari’a in its constitution “as a primary source of law.” Samir Saleh, Commercial Arbitration in the Arab Middle East: A Study in Shari’a and Statute Law (Graham & Tortman, 1984) 11; El-Ahdab (n 91) 513; Qatar Provisional Constitution, art 2 (2 April 1970).
Shari’a is of particular importance; the arbitration laws of many Middle Eastern countries, including Qatar, explicitly provide for the setting aside of arbitration clauses, terms, and awards when ‘public policy’ or Shari’a so require.”

It is also important for Qatar to define arbitrability in relation to the jurisdiction of the Qatar Financial Centre (QFC), which much like the DIFC in Dubai, is a separate jurisdiction with its own laws within Qatar.

The QFC has set out its own set of arbitration rules that is modeled after the UNCITRAL Model Law.

5.4.5. Kuwait: Public Order or Kuwaiti Good Morals

With regards to public policy, the Kuwait Code of Civil and Commercial Procedure, under Article 199-200, states that a foreign arbitral “award must not be contradictory with a judgment or ruling previously made in Kuwait and it must not be contrary to public order or Kuwaiti good morals.”

In one arbitration case in Kuwait, the First Arbitral Tribunal stated that “pursuant to the provision of Article 173/3 of the Code of Civil and Commercial Procedure [Kuwait], that ‘arbitration is not permissible in matters in which conciliation is not allowed’ and whereas Article (554) of the Civil Code also stipulated that ‘conciliation shall not be allowed in matters related to public policy but maybe allowed on financial rights incumbent thereon.’”

Like the other GCC states, Kuwaiti public policy is largely influenced by the Shari’a so that a Kuwaiti court may set aside a foreign arbitral award or refuse enforcement if the foreign arbitral award violates the general principles of Shari’a and/or its sources.

Further, the enforcement of foreign arbitral awards are comparatively simpler if the matter in dispute is arbitrated according to Kuwaiti law,

333 Alrashid and others (n 320) 7.
334 Maleh (n 324).
335 Qatar Financial Centre: QFC Arbitration Regulations, Regulation No 8 of 2005; Maleh (n 324).
336 The Kuwait Code of Civil and Commercial Procedure is not based on the UNCITRAL Model Law.
338 Kuwait Code of Civil and Commercial Procedures, arts 199-200 (Kuwait).
provided it does not contradict mandatory provisions or constitutes criminal conduct under Kuwaiti law.\footnote{ARALF Firm (n 339).} Under Article 200 of the Kuwait Code of Civil and Commercial Procedure, the courts of Kuwait will enforce the foreign arbitral award, without retrial or examination of the merits of the case, if the subject matter of the foreign arbitral award is capable of settlement by arbitration under Kuwaiti law, the foreign arbitral award is enforceable in the jurisdiction in which it was rendered and certain procedural requirements have been satisfied.\footnote{Kuwaiti Code of Civil and Commercial Procedures, art 200 (Kuwait)} Article 200, thus, refers to arbitrability but without explicitly listing what disputes are not capable of settlement by arbitration under Kuwaiti law.

Kuwaiti courts have shown a tendency toward rigid rules with regards to arbitration and public order. An example is a Kuwaiti Court of Cassation case,\footnote{Kuwait Court of Cassation, Appeal No 32 & 33/1983 (16 November 1983).} where the court held that failure to render the foreign arbitral award “in the name of the Amir” pursuant to Article 16 of the Amiri Decree No. 19 of 1959 on the Regulation of Judiciary Law rendered the foreign arbitral award void “with regard to public order.”\footnote{ibid; Mashael Alhajeri, ‘A Critical Approach to the Kuwaiti Law of Judicial Arbitration No 11 of 1995 with Reference to the UNCITRAL Model Law on International Commercial Arbitration’ (2000) 15 Arab LQ 48, 49.} The Kuwaiti court, in Kuwait Court of Appeals, Request for Arbitration No. 16/2001 (8 May 2006),\footnote{Kuwait Court of Appeals, Request for Arbitration No 16/2001 (8 May 2006).} also annulled an arbitral award for violation of Kuwaiti economic public policy stating that “the imperative provisions regarding the trading of stocks related to the public policy and are closed linked to the national economy which is one of the State pillars; therefore, they should not be violated or consensually agreed to be. The consequence of such violation is the annulment which the court may rule on its own motion without being requested to do so.”

\section*{5.4.6. Bahrain: Public Order or Ethics, or Public Policy}

The enforcement of both domestic and foreign arbitral awards are governed in Bahrain under Articles 252 and 253 of Law No. 12 of 1971 on Civil and Commercial
According to Al-Baharna, the rules for the enforcement of foreign arbitral awards in Bahrain are very similar to that in Kuwait. Article 252 prescribes that no enforcement order can be passed in Bahrain unless the following conditions are also complied with: “...(4) that the court judgment is in no way inconsistent with any judgment or order previously passed by the Bahrain courts and does not provide for anything which constitutes a breach of public order or ethics.” Additionally, Article 36 of the Bahraini International Arbitration Act covers causes for refusing enforcement, and states that “enforcement may be refused for the following reasons: ... (7) the award is contrary to public policy.” The Bahraini International Arbitration Act allows for an application to the Bahraini Civil High Court of Appeal to set aside the award as long as the applicant shows that the subject matter of the dispute is not capable of settlement by arbitration under the law of Bahrain or the foreign arbitral award is in conflict with the public policy of Bahrain.

But what exactly is the public order or public policy of Bahrain cannot just simply be listed, but ought to be developed by courts. One decision issued by the Bahraini court in Merrill Lynch v. Abdul Falil Behbehani at least helps in establishing that the conditions for enforcement of a foreign arbitral award under Bahraini law is the same or similar as the conditions for enforcement of a foreign arbitral award under English law. The Bahraini Civil High Court of Appeals further stated as follows:

The conditions contained in Article 252 of the Bahraini Law of Civil and Commercial Procedures applicable to the admissibility of adopting an order for enforcing a foreign judgment are the same conditions required by English law for recognising a foreign judgment. Such conditions are that a judgment shall have been passed by an overseas court of competent jurisdiction, the rules of court procedures have been complied with as regards the appearance of the litigants ensuring for the defendant to make his defence and the judgment shall be a final one and shall not

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345 Kuwaiti Code of Civil and Commercial Procedure, art 252-253 (Kuwait); Al-Baharna (n 284) 332-344.
346 Kuwaiti Code of Civil and Commercial Procedure, art 252 (Kuwait).
347 Bahrain International Arbitration Act, art 36; Ezrahi (n 4) 5.
349 Merrill Lynch v Abdul Falil Behbehani, Case No 859/M/1985 before the Civil High Court of Appeal (Bahrain).
be inconsistent with the rules of public order and morals in accordance with the law of the country where it is being enforced.\textsuperscript{350}

The Bahraini Civil High Court suggests in its decision that the Bahraini courts are charged with determining the scope and application of Bahraini public policy. In the end, according to Al-Baharna, national laws and procedures do still have a bearing on the enforcement of foreign judgments and arbitral awards, and especially on the determination of what falls under the realm of public policy.\textsuperscript{351} According to the same case, foreign arbitral awards must relate to matters which are arbitrable under Bahraini law.\textsuperscript{352} With regards to arbitrability, Article 253 states that no foreign arbitral award can be enforced in Bahrain unless it was in respect of a question that is subject to arbitration in accordance with Bahraini law.\textsuperscript{353}

5.4.7. KSA: Shari’a and Public Policy

KSA’s legal system is deeply rooted in the Shari’a, and the Shari’a therefore constitutes the public policy with regards to the enforcement of a foreign arbitral award.\textsuperscript{354} Article 3 of the Circular of Grievance Board of KSA makes clear that “it is not possible in any case to grant execution of any foreign award that violates any general principle of Shari’a.”\textsuperscript{355} In the Saudi Arbitration Law of 2012, Article 55 states that “the order to execute the arbitration award under this Law shall not be issued except upon verification of the following …the award does not violate the provisions of Sharia and public policy in the Kingdom.”\textsuperscript{356} Allassaf and Zeller warn that in the KSA, “the question of public policy is ever present” even in the Saudi Arbitration Law of 2012.\textsuperscript{357} In the end, the “interpretation of

\begin{itemize}
\item \textsuperscript{350} ibid.
\item \textsuperscript{351} Al-Baharna (n 284) 332-344.
\item \textsuperscript{352} ibid.
\item \textsuperscript{353} Kuwaiti Code of Civil and Commercial Procedure, art 253; Al-Baharna (n 284) 332-344.
\item \textsuperscript{354} Saudi Basic Law of Governance of 1992, arts 1, 7 and 48.
\item \textsuperscript{355} The Circular of the Grievance Board regarding Enforcement Foreign Judgments and Arbitral Awards, No 7 (1985), art 3 (KSA).
\item \textsuperscript{356} Saudi Arbitration Law of 2012, art 55.
the principles of public policy remains in the hands of Saudi legal authorities,” as stated by Balouziyeh as follows:

Interpreting and predicting how a Saudi judge or arbitrator will apply the Shari’a remains difficult and somewhat evasive. Whereas some Shari’a principles are well-established principles rooted in tradition, others are subject to a judge’s individual view or considerations as to fair application under equity.358

Therefore, the Shari’a public policy enumerated in the beginning of this chapter is equally applicable in the KSA, in addition to any public policy rules enacted by the KSA government. This may even include the obligation to follow basic laws and the constitution of the country.359 According to Alassaf and Zeller, the concept of public policy “may be interpreted very broadly based on the legal culture and traditions of [KSA].”360

KSA acceded to the New York Convention in 1994.361 KSA, however, has been criticized for having “broadly invoked the public policy exception on previous cases.”362 El-Ahdab stated that there are no precise grounds expressly mentioned in the old KSA arbitration law for refusing to enforce a foreign arbitral award, but it appears that the grounds were those “that are generally accepted in most laws, including public order, which in Saudi Arabia is constituted by the Shari’a.”363 Alassaf and Zeller confirm that the grounds for public policy and arbitrability in KSA “have not been identified.”364 This implies that what public policy means in the KSA, aside from the Shari’a public policy discussed at the beginning of this chapter, could well be interpreted narrowly or broadly depending on the personal analysis and understanding of every single Saudi judge.365

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358 Alassaf and Zeller (n 357) 185; Balouziyeh (n 357).
359 Alassaf and Zeller (n 357) 185.
360 ibid.
362 Stephenson and Al-Enezee (n 361).
363 Ezrahi (n 4); El-Ahdab (n 91).
364 Alassaf and Zeller (n 357) 185.
365 ibid 186.
However, as Al-Jerafi stated, not every violation of the Shari’a would necessarily amount to a public policy violation in KSA as long as it is not a violation of a fundamental principle of the Shari’a.366 Further, Saudi courts have made a distinction between violations of Shari’a fundamental principles that violate public policy and violations of Shari’a general rules that would not constitute a public policy violation.367

PART V

5.5. Synthesis of Public Policy Rules in the GCC States

It can be said with certainty that there is currently no uniformity among the GCC states as to the enforcement of foreign arbitral awards.368 The same goes with the public policy defence. Even Al-Sanhouri, the principal drafter of the Egyptian Civil Code and who attempted369 to reconcile French law and the Shari’a,370 described public policy broadly as representing “good morals, the essential rules of the country and its public interests.”371

Al-Baharna explained the diversity in the arbitration laws of GCC states as a spectrum.372 On one end are states that have enacted a comprehensive arbitration law like Bahrain and Kuwait, and on one end are states like Oman and Qatar that have yet to pass an arbitration law.373 In the middle are KSA, which recently passed the Saudi Arbitration Law of 2012 based on the UNCITRAL Model Law, and the UAE, which, because of its federal system, poses a complicated landscape with its own diverse sets of arbitration jurisprudence according to the relevant Emirate either lacking an

366 Al-Jerafi (n 15).
368 Al-Baharna (n 284) 332-344.
369 Tarek Osman, Egypt on the Brink: From the Rise of Nasser to the Fall of Mubarak (Hobbs 2010) (calling Al-Sanhouri’s work “an admirable attempt at mixing the foundations of Islam with the necessities of modernity.”)
371 El-Ahdab (n 91); Abd Al-Razzaq Al-Sanhouri, Study on the new civil law [Al Wassi fi Sharh Al Qanun Al Madani Al Jadiid] (Ahmad Al-Maraghi ed, 2007) vol 1, 300 et seq.
372 Al-Baharna (n 284) 332-344.
373 ibid.
arbitration law or having a well developed set of jurisprudence as in the case of Dubai.\textsuperscript{374} The diversity in the arbitration laws among the GCC states in turn has created a diverse set of rules and interpretation of what constitutes public policy with regards to foreign arbitral award enforcement.

To create predictability among the GCC states as to the scope of the public policy defence, it would be necessary to propose a set of rules relating to enforcement in a Uniform GCC Arbitration Law, wherein GCC states would have to negotiate on an agreed scope of public policy within the framework of the Shari’a. Such an idea is not novel and has been put into the works by the Qatar International Centre for Arbitration (QICA), which proposed the “Draft Unified Law for Arbitration in States of [the] Gulf Cooperation Council” [“QICA Draft Unified Law”] in 2009.\textsuperscript{375} The QICA Draft Unified Law, however, failed to move closer towards the international arbitration norm of interpreting public policy. Instead, the QICA Draft Unified Law, while clarifying the role of the Shari’a, expanded the grounds upon which foreign arbitral awards may be set aside based on public policy.\textsuperscript{376} Article 50 of the QICA Draft Unified Law, for example, mandates that “[t]he court seized with the action for nullity shall rule \textit{sua sponte} for the annulment of the [foreign] arbitral award if its contents violate public policy and the Islamic Shari’a.”\textsuperscript{377} According to Alrashid and others, Article 50 goes beyond the Qatari arbitration law.

While a proposed unified law on the enforcement of foreign arbitral awards and a unified approach to public policy in the GCC state must incorporate aspects of the Shari’a,\textsuperscript{379} it should strike a balance and aim to harmonise the Shari’a with international arbitration norms. As explained by Al-Jefari, that KSA as a contracting Islamic country

\textsuperscript{374} ibid.
\textsuperscript{376} Alrashid and others (n 320) 13.
\textsuperscript{377} QICA Draft Unified Law (n 422) art 50; Alrashid, and others (n 320) 13.
\textsuperscript{378} Alrashid and others (n 320) 13.
\textsuperscript{379} Levi-Tawil (n 19) (criticizing the Bahrain Centre for Dispute Resolution (BCDR) and AAA failure to incorporate the Shari’a).
intends to take into account international public policy in relation to the enforcement of foreign arbitral awards; international public policy, henceforth, does not contradict fundamental Shari’a principles. Further, this thesis author agrees with scholars who view that the “Shari’a can be interpreted in a way that will make it compatible with international arbitration norms.” As Al-Jerafi puts it, “there is no valid reason that prevents Shari’a from accommodating contemporary developments in any field of law, particularly arbitration.”

5.6. Conclusion

Any sort of proposals to improve the enforcement of foreign arbitral awards in the GCC states has to take into account public policy. While it seems, at first glance, that the public policy of GCC states ought to be the same because all GCC states adhere to Shari’a public policy, a closer look reveals a landscape that is just as fraught with nuances over the concept of public policy as any part of the world. While there are large patches of commonality, each GCC state does differ at one point or another as to what constitutes public policy.

This chapter examined the effect of public policy on the enforcement of foreign arbitral awards in the GCC states. A common thread appears as to the division between procedural and substantive public policy under the Shari’a, international agreements, and the jurisprudence of each of the GCC states. There seems to be more in common among the Shari’a, international agreements, and even each of the GCC states with regards to procedural public policy, which is largely concerned with fairness and due process. It is with substantive public policy that a substantial divergence in the concept of public policy begins to emerge. This is true with regards to both express substantive public policy and implied substantive public policy, or arbitrability.

While there are differences in the concept and scope of public policy among the Shari’a, international agreements, and the jurisprudence of each of the GCC states, the difference that stem from the Shari’a could be narrowed to a very limited set of cases.

380 Al-Jerafi (n 15) 185.
381 Kutty (n 88); Levi-Tawil (n 19).
382 Al-Jerafi (n 15).
that when viewed in totality constitute a minute portion of arbitration cases. In this sense, what becomes the source for the obstacles to enforcement under the umbrella of public policy is whether a GCC state’s judiciary applies public policy narrowly or broadly. In the context of the GCC states, there is a tendency for judges, whenever the Shari’a is invoked, to cast a wide net in favour of public policy. There are, however, signs that such an approach is not necessarily the only path under the Shari’a, as is currently being demonstrated by recent cases coming from UAE courts. It is ultimately possible for all GCC states to balance the Shari’a and international arbitration concepts of public policy. As Wakim suggests, however, to arrive at this balance, “all this requires government function and public policy value judgments to be open and accessible.”

The survey also shows a sign that many arbitration practitioners are aware of the balance that must be made between public policy and the Shari’a. Respondents were asked when judges or arbitrators should apply the Shari’a when determining whether public policy has been violated. The majority of the respondents at 48.93% want judges or arbitrators to apply the Shari’a when determining whether public policy has been violated only when a violation of a fundamental Shari’a principle has been established. Still, some respondents at 35.48% voted that the Shari’a should “Never” be applied when determining whether public policy has been violated. These two competing views on the role of the Shari’a in determining public policy may also indicate the divide among the judiciary when faced with a public policy challenge based on the Shari’a.

After discussing public policy as a potential source for challenging the enforcement of a foreign arbitral award, it is now necessary to discuss the setting aside of an arbitral award in Chapter Six. In discussing the setting aside of an arbitral award in the next chapter, however, it is important to keep in mind how the public policy defence can arise at either the enforcement stage or at the setting aside stage.

383 Wakim (n 3) 51.
384 Appendix II, Survey Report, II(2.6.2.).
385 ibid.
386 ibid.
CHAPTER SIX

SETTING ASIDE THE ARBITRAL AWARD WITHIN THE FRAMEWORK OF
THE GCC STATES

6.0. Introduction

After the arbitrator(s) or the arbitral tribunal has rendered an arbitral award pursuant to an arbitration agreement, the party against whom the arbitral award was made cannot appeal the arbitral award, but is left with the sole recourse at the seat of arbitration of asking the court to set aside (also called annul, vacate, or nullify) the arbitral award.¹ For the majority of arbitration decisions, parties do settle or pay the amount ordered by the arbitral award, and setting aside is not a common practice.² However, a party may be left with a genuine belief that the arbitral award is flawed. It is largely in this context that the need for the setting aside of an arbitral award arises, and that the necessity for such mechanism has been defended. Van den Berg argues that “...exclusion of setting aside may create uncertainty about the status of an award for a long period of time. If an award is questionable, a party will not have the possibility of having the uncertainty adjudicated with finality in the courts. This may create a new breed of ‘ghost [arbitral] awards.’”³ Asouzu agrees with van den Berg and stated that “[s]ound legal policy, justice, convenience and maximum economy suggest that there should be an imperative opportunity to set aside an award at the place where it was

¹ Joseph Morrissey and Jack Graves, International Sales Law and Arbitration: Problems, Cases, and Commentary (Kluwer 2008) ch 10, 460; Ariel Ye and James Rowland, ‘Should arbitral awards that have been set aside be enforced in a different jurisdiction?’ (China Law Insight, 22 May 2012) <http://www.chinalawinsight.com/2012/05/articles/corporate/should-arbitral-awards-that-have-been-set-aside-be-enforced-in-a-different-jurisdiction/> accessed 2 February 2014 (discussing setting aside an award in Mainland China and in Hong Kong).
made.”

Regardless, according to van den Berg, “it rarely occurs that an action for setting aside the award in the country of origin is successful.”

This chapter aims at examining the framework for setting aside an arbitral award in the GCC states within the context of international agreements and the Shari’a. In doing so, the chapter reveals the inseparability of setting aside an arbitral award with the concept of enforcing foreign arbitral awards. Finally, this chapter argues that the setting aside of arbitral awards remains an unsettled area of international arbitration that it continues to create conflicting, and certainly non-uniform, rules or application of rules.

Part I of this chapter begins by providing a general overview of the scheme for setting aside an arbitral award. Most importantly, part I will clarify the distinction between setting aside an arbitral award and challenging the enforcement of a foreign arbitral award. It also discusses the concept of where an arbitral award may be set aside. Further, part I covers generally the common grounds for setting aside an arbitral award.

Part II discusses briefly the limited rules for setting aside an arbitral award under the Shari’a, which seems to prohibit the practice.

Part III discusses the limited rules in the international conventions for setting aside a foreign arbitral award. The ICSID Convention practically does not allow for the setting aside of an arbitral award by national courts. The New York Convention also fails to provide explicit guidelines except with reference to its enforcement rules, leaving the UNCITRAL Model Law with the sole express guidance and international consensus on the issue, assuming that it has been followed by a country. Unfortunately, the UNCITRAL Model Law is not yet adopted in all the GCC states. Even with the UNCITRAL Model Law, much remains unclear with regards to where an arbitral award may be set aside and the effect of setting aside an arbitral award.

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With unclear guidance from the Shari’a and the international agreements, part IV examines how the GCC states have approached the setting aside of a foreign arbitral award. This chapter ends with an examination of the effect of setting aside an arbitral award, especially in relation to the enforcement of foreign arbitral awards. Finally, part V discusses the problematic effect and enforcement of annulled arbitral awards.

PART I

6.1. An Overview of the Scheme for Setting Aside of an Arbitral Award by Courts

Before discussing of setting aside an arbitral award, it is important first to provide a general overview of the concept. It is especially important first to distinguish the concept of setting aside an arbitral award and the concept of challenging the enforcement of an arbitral award, two overlapping and complementary issues that are addressed separately in this study. It is also important to discuss where to set aside an arbitral award, and the grounds on which an arbitral award may be set aside common to the international community. This section creates the necessary background for understanding the layers of rules that create the GCC states’ viewpoint for setting aside an arbitral award.

6.1.1. Setting Aside Versus Non-Enforcement

At first glance, the concept of setting aside an arbitral award and challenging the enforcement of an arbitral award seem identical. This is especially so when one thinks of both concepts as a way of “challenging” the arbitral award before a court. According to Asouzu, “the setting aside of an award or its annulment and the recognition or enforcement of an award are two distinct procedures, though closely inter-related...”\(^6\) Below are important distinctions between these two forms of challenges.

\(^6\) Asouzu (n 4) 90.
First, there is a distinction as to the place where the challenge is brought. The setting aside of an arbitral award is usually, though not always, brought before a court at the place of arbitration, while the challenge to the enforcement of an arbitral award will always take place before the court of any country where the arbitral award is sought to be enforced, or the “intended place of enforcement.” Sometimes the place of arbitration and enforcement are the same, especially in domestic arbitration, but it is typically separate in international arbitration, where enforcement can even occur in multiple countries. According to Asouzu, “in most cases - the very common situations, an action to set aside and an application to recognise or enforce an award take place in different places (countries) and at different times.”

Second, there is a distinction as to who will bring forth the challenge. “They are pursued by different parties and for different purposes.” Either party may set aside the arbitral award at the place of arbitration. “While challenges [to set aside the arbitral award] are most often brought by the party required by the award to pay money, either party is entitled to [set aside] the award if it believes it has a valid basis to do so.” On the other hand, with an enforcement action, “the party entitled to receive money under the award will bring an enforcement action in a jurisdiction in which it believes the party obligated to pay money under the award has assets that can be seized or liquidated in payment of the award. Such an action to enforce the award may be brought before, or after, or irrespective of whether there has been any action by the other party to set aside or vacate the award in the place of arbitration. If one party brings an action to enforce the award, the party against whom enforcement is sought may seek to defend against

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7 Morrissey and Graves (n 1) 460.
8 See PT First Media TBK and Astro Nusantara International BV and others [2013] SGCA 57 (holding that in Singapore, parties to the arbitration are equipped with choice of remedies, and have the option to challenge an award immediately or wait until the enforcement proceedings); Paul Starr and Justin Lo, Singapore Court of Appeal’s approach towards the enforceability of an arbitral award and the tribunal’s power to join non-parties into an arbitration (Lexology, 11 February 2014) <http://www.lexology.com/library/detail.aspx?g=00c4711c-6ead-439a-8987-b999d09cad9a> accessed 23 February 2014.
9 Asouzu (n 4).
10 ibid.
11 Morrissey and Graves (n 1) 460–462.
12 ibid.
enforcement, irrespective of whether this party has sought to have the award set aside or vacated in the place of arbitration.”

Third, within the same country, the law governing the setting aside of an arbitral award and the law governing enforcement, and the basis for non-enforcement, including the grounds and standards upon which each type of challenge may be brought, will differ even if some rules are often the same and overlapping. Morrissey and Graves, for example, noted the different standards for setting aside an arbitral award and for its enforcement in the US as follows:

One example of such differences is found in the American Federal Arbitration Act. FAA Chapter 2 formally adopts the New York Convention and its standards of enforceability with respect to international awards. However, American courts typically apply the standards contained in Section 108 of FAA Chapter 1, including the court created “manifest disregard” standard when addressing an action to set aside an award. Thus, the standards in the United States for setting aside an award are different from the standards for enforcement. The potential for conflict and confusion should be evident.14

Fourth, the source of the law governing the setting aside of an arbitral award versus the enforcement or non-enforcement of an arbitral award will typically differ, at least in the context of international arbitration, because the two challenges will likely occur in two different countries. According to Giovannini, “the grounds for setting aside arbitral awards are set out in the law of arbitration at the place of arbitration, the ‘seat’ which establishes the link between an arbitration procedure and a given legal order.”15 While it is also possible, as set out in Section 6.1.2. on where to set aside an arbitral award, that an arbitral award may be set aside at the intended place of enforcement or at the country of the chosen applicable law, arbitral awards are often set aside at the seat of arbitration and even if they are not, the lex fori [law of the forum or the law of the state where the remedy is sought] would apply.16 Likewise, in the enforcement action,

13 ibid.
14 ibid 461.
15 Teresa Giovannini, ‘The making and enforcement of the arbitral award: What are the grounds on which awards are most often set aside?’ (2001) Bus L Int’l 115.
16 See, for example, Section 6.1.2.
the challenge to enforcement would be determined by the *lex fori* [law of the forum] in accordance with the New York Convention, as it is applicable in all GCC states. This means that the source of the law for setting aside would be in one country, where the arbitration took place, and the law for enforcement and to the challenge to enforcement would be in a different country or countries, wherever enforcement is sought.17

Fifth, the effect of setting aside an arbitral award and the effect of non-enforcement of an arbitral award differ significantly. “They achieve different results, with different legal implications.”18 If an arbitral award is successfully set aside, “it will no longer have any legal force and effect in the place of arbitration”19 and arguably anywhere else, with the exception of France and the US under the *Hilmarton* and the *Chromalloy* case, respectively.20 *Hilmarton* and *Chromalloy* aside, the setting aside of an arbitral award would invalidate the arbitral award globally,21 while the non-enforcement of an arbitral award would only be effective in the country where enforcement was sought. Born criticised early cases like *Hilmarton* and *Chromally* for having little analysis when holding that arbitral awards set aside at the place where they were made “ceased to exist.”22

As Asouzu stated, “[t]he effect of a decision refusing recognition and enforcement to an award is limited and strictly territorial. It does not also impinge on the award’s validity and thereby, international currency. Whereas, a decision on a

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17 Morrissey and Graves (n 1) 460-462 (noting that “in view of these two alternative, and potentially cumulative, forums in which the viability of the award might be addressed, one might reasonably ask whether the legal standards in each forum are the same or different. If they are different, then these differences could make the choice of forum for any challenge outcome determinative or could lead to inconsistent results in multiple forums. Is this a desirable effect?”).
18 Asouzu (n 4).
19 Morrissey and Graves (n 1) 460-462; Ye and Rowland (n 1) (stating that “most jurisdictions around the world are likely to refuse enforcement of an award that has been set aside in another country. However, this is not the universal position: courts in certain countries [i.e. France and US] have been receptive in the past to enforcing arbitral awards set aside elsewhere based on local annulment standards, and this trend may grow as international arbitration around the world becomes more transnational on character and less deferential towards the place of arbitration”).
20 See generally, Section 6.5.
21 van den Berg (n 5) 56 (stating that “the vast majority of the courts in the other Contracting States do not enforce arbitral awards that have been set aside in the country of origin, either under the Convention or otherwise”). See however, Gary Born, *International Arbitration: Law and Practice* (Kluwer 2012) ch 16-17.
successful application to set aside an award where it was made is pervasive. It directly attacks the award’s validity and currency.”

In other words, according to Al-Siyabi, “what makes examining the grounds for setting aside an award even more important is that refusing recognition or enforcement of an award by a court is valid and effective only in the forum country, whereas the setting aside of an award at the seat of arbitration may prevent the enforcement of that award in all other countries.” This is, of course, assuming that a court does not take the liberal view that an arbitral award annulled at the place where it was made remains effective elsewhere.

6.1.2. Where to Set Aside an Arbitral Award

Some scholars define the setting aside of an arbitral award as an action to challenge the arbitral award at the place of arbitration. Such a distinction, however, does not always apply because, an arbitral award may be set aside at a place other than where the arbitration proceedings occurred. In this instance, a question arises as to whether the court of the seat of arbitration or the court of the country of applicable law would be able to set aside the arbitral award.

In *International Standard Electric v. Bridas Sociedad Anonima Petrolera*, the plaintiff asked the New York District Court to set aside a Mexican arbitral award, applying Mexican procedural law and New York substantive law. The plaintiff argued that the New York Convention’s Article V(1)(e), allowing for the setting aside of an arbitral award by a court of the country in which, or under the law of which, it was made, referred to the substantive law and not to the procedural law, thereby allowing the setting aside under New York substantive law. The New York District Court

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23 Asouzu (n 4) 91.
25 Maniruzzaman, ‘Book Review’ (n 22); Born (n 21).
26 Morrissey and Graves (n 1) 460-461.
disagreed and refused to set aside the arbitral award, interpreting Article V(1)(e) as referring to the procedural law.

While the setting aside of an arbitral award usually occurs at the seat of the arbitration, thereby only invoking the law of the seat of arbitration, it is possible for the parties to choose the law of a country different from the country where the arbitration takes place. However, the agreement of the parties to allow for annulment at a place different from where the arbitral award was rendered must be proven. Hence, the Cairo Court of Appeals in Eighth Commercial Circuit, Case No. 59 of 125 (18 May 2011), held that it had no jurisdiction to annul a Texas arbitral award under the New York Convention and Egyptian Law No. 27 of 1994, though it would have otherwise been allowed to annul, because the condition to confer jurisdiction on Egypt to annul was not met as the exhibits did not include the agreement of the parties to subject the arbitration to annulment by Egyptian law.

The New York Convention and most other international agreements allow for the court in both countries (the seat of arbitration and the country of applicable law) to be able to set aside the arbitral award. The setting aside of the arbitral award at the seat of arbitration seems obvious enough as this is the normal practice for setting aside an arbitral award. Strict adherents to party autonomy, however, argue that the court of the country of applicable law should set aside the arbitral award. This is the same position taken by the English court in *Hiscox v. Outhwaite*, where the House of Lords ruled that English courts were competent to review a foreign arbitral award made in Paris under English law. In this instance, a foreign arbitral award that was made in one country can be set aside in another country, which could at the same time be the country of enforcement.

Additionally, some conventions and some countries, including the GCC states, have created a double system of reviewing an arbitral award. An arbitral award’s enforcement may be challenged, and concurrently or thereafter, the same arbitral award may be set aside in the same country before the same or different court for similar or different reasons. Interestingly, the UNCITRAL Model Law, though in essence

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allowing only the courts of the seat of arbitration to set aside an arbitral award in countries that have adopted it like Japan.\textsuperscript{30} still leaves room for such an occurrence. This issue becomes clearer in the discussion below of each of the GCC states.

Applying the above analysis, an arbitral award may be set aside in three different places: (1) at the seat of arbitration, (2) in the country of applicable law chosen by the parties, and/or (3) at the place of enforcement, which could involve one or more countries. The arbitral award could also be set aside concurrently\textsuperscript{31} in two or all of these possible places.

### 6.1.3. Common Grounds for Setting Aside an Arbitral Award

Giovannini noted four common grounds for setting aside an arbitral award under the UNCITRAL Model Law and the New York Convention, namely (1) the validity as to the form and substance of the arbitration agreement, (2) the regularity of the constitution of the arbitral tribunal, (3) the arbitral tribunal’s compliance with the mandate conferred to it by the parties, and (4) public policy.\textsuperscript{32} Giovannini also adds the lack of reasoning as an additional ground for setting aside an arbitral award.\textsuperscript{33} Giovannini concluded that the common thread for setting aside an arbitral award at the seat of arbitration is the concern for the right to be heard,\textsuperscript{34} which of course is one of the main principles of Shari’a procedural public policy as discussed in Chapter Five. Overall, the common grounds for setting aside an arbitral award will be discussed in two categories: procedural grounds and substantive grounds.

\textsuperscript{30} See UNCITRAL Model Law, arts 1(2) and 34; Takahashi (n 28); Arbitration Act 2003 (Jap), art 3(1).
\textsuperscript{31} Morrissey and Graves (n 1) 460-462 (stating that “the legal viability of an arbitration award may be addressed in: (1) a court action to set aside or vacate the award in the place of arbitration; (2) a court action to enforce the award in the place of enforcement; or (3) both”).
\textsuperscript{32} Giovannini (n 15) 116.
\textsuperscript{33} ibid 124.
\textsuperscript{34} ibid.
6.1.3.1. Setting Aside an Arbitral Award on Procedural Grounds

The procedural grounds for setting aside an arbitral award are generally identical to the procedural grounds for refusing the enforcement of an arbitral award. They usually include the following: (1) the right to be heard and the right to present or defend a case, (2) the competency of the tribunal, (3) the invalidity of the arbitration agreement, (4) coverage and scope of the arbitration agreement, and (5) arbitrability and public policy. This section will address each procedural ground in more detail.

A. Right to be Heard and the Right to Present or Defend a Case

The ground that immediately comes to mind under the procedural prong of the setting aside action is that which goes directly at the fairness and equality of the arbitration proceedings: the right to be heard and the right to present or defend a case. These rights are universally recognised fundamental or natural right, including under the Shari’a. This right is recognised in the European Convention of 1961 under Article IX(1)(b) which requires proper notice of the proceedings and the appointment of the arbitrator.

Article 6 of the European Convention on Human Rights (ECHR) - which covers the right to a fair trial and includes the right to be heard - corresponds roughly with the ancient common law principle of “natural justice” or the duty to act fairly. In ABB Ltd v. Bam Nuttall Ltd, Justice Akenhead stated that “[e]ven if an adjudicator’s breach of

35 Al-Siyabi (n 24) 81 (noting that the grounds for setting aside and refusal of enforcement in Oman are almost identical).
36 See also, Section 5.3.1.1(A).
37 European Convention of 1961, art IX(1)(b).
39 ABB Ltd v Bam Nuttall Ltd, [2013] EWHC 1983 (TCC) (Claimant successfully argued that an adjudicator’s decision should not be enforced because there had been a material breach of the rules of natural justice); Jeremy Glover, ‘Adjudication: breach of natural justice’ (Lexology, 6 August 2013) <http://www.lexology.com/library/detail.aspx?g=0f142546-b0bd-45+...feed&utm_content=Lexology+Daily+Newsfeed+2013-08-12&utm_term> accessed 5 October.
the rules of natural justice relates only to a material or actual or potentially important part of the decision, that can be enough to lead to the decision becoming wholly unenforceable essentially because the parties (or at least the losing party) and the Court can have no confidence in the fairness of the decision making process.”

It is also recognised in the UNCITRAL Model Law as consisting of right to equal treatment, full opportunity to present a case, right to a hearing, and the right to present claims, defences, and evidences. In Egypt, the Cairo Court of Appeals, Seventh Commercial Circuit Arbitration Case No 4 of 128/N, where the appellant sought to set aside the arbitral award for unequal treatment when the tribunal required the appellant, but not opposing party, to present proof of power of attorney, held there was no violation of the right to be heard because both parties were given equal time to review the allegations and submit their replies.

B. Improper Constitution of the Arbitral Tribunal

The improper constitution of the tribunal or the tribunal’s misconduct are recognised grounds for setting aside an arbitral award in most conventions and laws like the European Convention on International Commercial Arbitration of 1961 in Article IX(1)(d) and the UNCITRAL Model Law on International Commercial Arbitration in Article 34(2)(9a)(iv). The US also allows for the setting aside of an arbitral award if there is “evident partiality or corruption,” if the arbitral award was obtained by “corruption, fraud, or undue means,” or where the tribunal “exceeded their powers, or so imperfectly executed them.” In a Lebanese case, 8th Chamber of First Instance,

2013; TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd, [2013] SGHC 186 (Singapore High Ct, 23 September 2013) (in a challenge to set aside an arbitral award, the court had a duty to entertain the challenge but did not have to nit-pick every part of the award).

40 UNCITRAL Model Law, art 18; UNCITRAL Arbitration Rules, art 15(1); Al-Siyabi (n 24) 83.

41 Cairo Court of Appeals, Seventh Commercial Circuit Arbitration Case No 4 of 128/N, Session Dated 7 September 2011 (CRCICA Arbitral Award).

42 Ibid.


Jdeidet El Maten, Decision No 2/2011, the claimant sought for annulment of the arbitral award based on the lack of impartiality of the arbitrator, characterised by a contentious nature. In the GCC states, the number of arbitrators must be odd, and an even number of arbitrators may be a basis for challenging the arbitral award. However, the same Lebanese case above took a similar requirement and interpreted it less strictly, and therefore rejected a request to annul an arbitral award where there were only two arbitrators.

C. Incapacity of Party or Invalidity of Arbitration Agreement

The incapacity of a party or invalidity of the arbitration agreement is a ground for non-enforcement under the New York Convention, and a ground for setting aside under the UNCITRAL Model Law in Article 34(2)(a)(i) and the European Convention of 1961 in Article IX(1)(a). The controversy regarding this ground for setting aside is what law governs the determination of the party’s capacity or the agreement’s validity: (1) is it the law designated by the parties, (2) the law of the seat of arbitration, or (3) the law where the arbitral award is sought to be enforced. In Civil Court of Appeal, Beirut, First Chamber, Decision No. 718/2011, the Lebanese court decided the issue of capacity under Article 644 and 799 of the Lebanese Code of Civil Procedure, which give the party who lost the arbitration case the capacity to appeal the arbitral award.

D. Coverage and Scope of the Arbitration Agreement

A tribunal’s excess of its jurisdiction by addressing that which is not within the coverage and scope of the arbitration agreement is a well recognised ground for setting aside an arbitral award. It is recognized by US, English and Italian laws, among others, as well as by Article 34(2)(a)(i) of the UNCITRAL Model Law, and the European

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46 8th Chamber of First Instance in Mount Lebanon, Jdeidet El Maten, Decision No 2/2011 (17 January 2011).
47 ibid.
48 New York Convention, art V(1)(a).
49 Civil Court of Appeal, Beirut, First Chamber, Decision No 718/2011 (23 May 2011).
Convention of 1961 in Article IX (1)(c). The European Convention captures the essence of setting aside an arbitral award that deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.  

Additionally, an arbitral award may be set aside if it failed to address substantial arguments put forth by either party during the arbitration process. This is the case under German, English, and Italian laws, among others. The Yemeni court in Yemen Supreme Court, Commercial Circuit, Commercial Challenge No 39413, accepted a challenge to an arbitral award because the lower court’s ruling exceeded the defence and did not settle it, making it a violation of the right to defence as the lower court failed to take into consideration the defence submitted.

E. Arbitrability and Public Policy

Perhaps, one of the most controversial and universal grounds for setting aside an arbitral award is for violation of public policy and the non-arbitrability of the subject matter. The public policy ground for setting aside an arbitral award is recognised by English law, by US law, and by all the GCC states. In Switzerland, an arbitral award that is contrary to Swiss international public policy can be set aside. The same is true in the European Court of Justice, which in the Eco Swiss China case has set aside an arbitral award that it deemed contrary to European Union public policy. The non-arbitrability of a subject matter and public policy are recognised as grounds for setting aside an arbitral award under the UNCITRAL Model Law in Article 34(2)(b), which

50 European Convention of 1961, art IX(1)(c).
52 Yemen Supreme Court, Commercial Circuit, Commercial Challenge No 39413, Hearing dated 13 March 2010.
53 See generally Chapter Five. As discussed in Chapter Five, the two concepts are interrelated.
54 D’Arcy (n 51) 489-490.
55 De Ly (n 51) 352-253.
56 ibid 345.
states that an arbitral award may be set aside if its subject matter is not capable of being settled by arbitration, under the laws of the seat of arbitration, or if it violates that state’s public policy.58

### 6.1.3.2. Setting Aside an Arbitral Award on Substantive Grounds

Most countries and most international agreements substantially limit the ability of courts to review and set aside, on substantive grounds, arbitral awards. The substantive grounds cover questions of law and fact, and choice of law. Thus, the UK,59 France, the Netherlands, and Switzerland, among others, make it difficult to set aside an arbitral award based on a substantive ground, especially when such ground is mere error of law or fact.60 There are still, however, exceptions.

The US is perhaps the country leading the adoption of the “manifest disregard” standard for setting aside an arbitral award,61 including international arbitral awards.62 Under this standard, an arbitral award may be set aside (1) if the arbitrators knowingly refused to apply or ignored the law, and (2) the law is well defined, explicit, and applicable to the case.63 In the US state of Georgia, for example, courts require “clear evidence”64 in the form of a “transcript or findings of fact in the arbitrator’s award”65 which shows that a “well defined, explicit, and clearly applicable”66 governing law was “communicated to an arbitrator but that the arbitrator intentionally and knowingly chose

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58 This provision is similar to the non-enforcement provision(s) of the New York Convention.
60 De Ly (n 51) 351; Al-Siyabi (n 24) 87. Courts have asked an arbitral tribunal to reconsider an arbitral award when new evidence has been found that could have a substantial impact on the arbitral award. This ground for setting aside an arbitral award, however, is rarely if ever successful.
61 Al-Siyabi (n 24) 88.
64 America’s Home Place, Inc v Cassidy, 687 SE2d 254, 256 (Ga App 2009).
65 First Option Mortgage, LLC v S&S Fin Mortgage Corp, A13A0483 (Ga App May 24, 2013).
to ignore that law.” 67 Under such a narrow standard, it is quite difficult to establish and succeed on a manifest disregard argument. 68

While setting aside an arbitral award is difficult and rare under the “manifest disregard” standard, at least two US cases have done so: Halligan v. Piper Jaffray, Inc. and Montes v. Shearson Lehman Brothers, Inc., 70 where the courts found in both cases that the arbitrator failed to explain the reason behind the arbitral award and manifestly disregarded the law and facts. In Prestige Ford v. Ford Dealer Computer Services, Inc., 71 the US Court of Appeals stated that for there to be manifest disregards the error must be “obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator,” that the correct governing law was “well defined, explicit, and clearly applicable,” and that the arbitrators exhibited “willful inattentiveness” suggesting that they “appreciate[d] the existence of a clearly governing principle but decide[d] to ignore or pay no attention to it.”

The US Supreme Court, however, seemed to have cast a doubt as to the continued validity of the manifest disregard standard in Hall Street Associates, LLC v. Mattel, Inc., 72 when it ruled that “parties cannot agree to have a court expand the

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67 First Option Mortgage, LLC v S&S Fin Mortgage Corp, A13A0483 (Ga App May 24, 2013).
69 A review of recent cases on manifest disregard in the US, for example, shows that most courts deny the argument. See, for example, NYKCool AB v Pacific Fruit, Inc, No 11-4246 (2d Cir Jan 16, 2013) (confirming an arbitration award based on finding that defendant did not establish a “manifest disregard of the law”); Murray v Citigroup Global Markets, Inc, No 11-4355 (6th Cir Jan 10, 2013) (court could not determine whether the panel acted in “manifest disregard of the law”); Sward, LLC v Cohen, Case No 10-03188 (CD Cal Dec 7, 2012) (arbitrator’s application of the alter ego doctrine, finding of a written agreement, and reliance on the same evidence presented by plaintiff for two different claims is not a “manifest disregard of the law” under the FAA); Ometto v ASA Bioenergy Holding AG, Case No 12-1328 (SDNY Jan 9, 2013) (petitioners’ grounds for vacatur were without merit, including allegations that the tribunal acted in manifest disregard of the law); Budget Blinds Inc v Le Clair, Case No 12-1101 (CD Cal Jan 16, 2013) (petition to vacate did not establish “manifest disregard of the law”); Fuchs & Associates, Inc v Lesso, No B239246 (Cal Ct App Jan 8, 2013) (there was no “manifest disregard of the law”).
70 Montes v Shearson Lehman Brothers, Inc, 128 F3d 1456 (11th Cir 1997); Halligan v Piper Jaffray, Inc, 148 F3d 197 (2d Cir 1998).
72 Hall Street Associates, LLC v Mattel, Inc, 128 S Ct 1396 (2008); Schwartz (n 71).
grounds for vacating an [arbitral] award beyond the FAA’s express terms.” In Hall Street, the Supreme Court nonetheless failed to clarify what manifest disregard means, and in effect created further confusion among the lower courts as to the existence of the manifest disregard standard. The US First Circuit Court of Appeals in Ramos-Santiago v. United Parcel Serv., for example, interpreted the Hall Street case to mean that the US Supreme Court in dicta held “that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award” in US Federal Arbitration Act (FAA) cases. The U.S. Sixth Circuit Court of Appeals in Martin Marietta Materials, Inc. v. Bank of Oklahoma, however, disagreed with the First Circuit and stated that “the ‘manifest disregard’ standard continues to apply.” The same is true for the Second Circuit in Stolt-Nielsen SA v. AnimalFeeds Int’l Corp., and the Ninth Circuit in Comedy Club, Inc. v. Improv West Associates, which continues to apply their pre-Hall Street standard for manifest disregard, therefore allowing it. The Fifth Circuit in Citigroup Global Markets, Inc. v. Bacon, agreed with the First Circuit that manifest disregard is no longer valid, but it failed to explain the position of the Sixth, Second, and Ninth Circuits.

On the other hand, the UNCITRAL Model Law under Article 36 does not allow for setting aside when an error of law appeared or was manifest on the face of the arbitral award. A challenge to the constitutionality of the Australian International Arbitration Act of 1974, which adopted Article 36 of the UNCITRAL Model Law and which does not allow for the setting aside of an arbitral award because of an error of law that was manifest on the face of the arbitral award, was rejected by the High Court of Australia in TCL Air Conditioner (Zhongshan) Co Ltd v. The Judges of the Federal Court.

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74 Ramos-Santiago v United Parcel Serv, 524 F3d 120, 124 n3 (1st Cir 2008)
75 US Federal Arbitration Act, 9 USC § 1-14.
78 Comedy Club, Inc v Improv West Associates, 553 F3d 1277, 1290 (9th Cir 2009).
79 Citigroup Global Markets, Inc v Bacon, 562 F3d 349 (5th Cir 2009).
Court of Australia, because there were other grounds upon which to set aside the arbitral award, including on the basis of public policy. Another example is when an arbitral award is sought to be set aside because the arbitrator did not take into account specific grounds that complainant wanted it to address. The Lebanese court in Beirut Civil Court of Appeals, First Chamber, Decision No 313/2011 (3 Mar 2011), stated that one cannot force the arbitrator to adopt specific grounds or defences, and if the arbitrator adopted some specific grounds, that does not constitute a breach of the right to defence. The position of the Lebanese court seems to contradict the manifest disregard position.

Public policy, of course, is always a last resort. As previously stated in Chapter Five, which deals with public policy in more detail, the international consensus on public policy is that it ought to be interpreted narrowly. Yet, even in countries that follow this narrow interpretation, there are cases where an arbitral award has been set aside based on public policy, including two US cases: Warburg LLC and Cavalier Manufacturing, Inc. One should also keep in mind, as stated in Chapter Five, that public policy always could fall under the procedural rules, and may be determined by the law of the state where the setting aside is sought.

PART II

6.2. Setting Aside Under the Shari’a

It is important to point out, as did Alshiekh, that the majority of Shari’a jurists are in agreement that a judge may not set aside an arbitral award rendered under proper legal rules and principles, and “such an [arbitral] award shall be enforceable and not subject to cancellation, even if it is contrary to the opinion of the judge.” This is the

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80 TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia (2013) HCA 5 (Australia High Ct).
81 Warburg LLC v Auerbach, Pollak & Richardson, NY Sup Ct (Oct 2001).
majority view of the Malikis, Shafi‘i, Hanbali, and even some Hanafi scholars. However, according to Alshiekh, Imam Abu Hanifah and some Hanafis hold the opposite view, treating the arbitration as binding only upon the parties and not the judge, and therefore allowing the judge to cancel the arbitral award if the judge disagrees with it.86

El-Ahdab also supports the idea of setting aside an arbitral award if it is inconsistent with the Shari‘a. According to El-Ahdab, the setting aside of an arbitral award “is the sole means of recourse ever envisaged by the commentators” of the Shari‘a. The Majalla under Article 1849 states that “[i]f the arbitral award is referred to the judge appointed by the Sultan, and if it complies with the law, the judge will approve it else he shall set it aside.”89 This article expressly suggests that setting aside an arbitral award is a proper means of recourse. Further, El-Ahdab argues that the “contractual nature of the award adopted by the Majalla tends to suggest that an award may be set aside on the same grounds as a contract.”91 El Kadi and El Ahdab, who support the jurisdictional nature of the arbitral award, support a setting aside of the arbitral award only when there is “an error on the face of the award.”92 Such error could arise if the arbitrator was incapable, granted more than what was requested, failed to address a claim presented before it, made the arbitral award based on a void or invalid

85 Zainuddeen Ibn Nujaim, Bahr ur-Ra‘iq, vol 7 (Dar Al-Ma‘rifah nd) 25.
86 Alsheikh (n 83).
87 Abdul Hamid El-Ahdab and Jalal El-Ahdab, Arbitration with the Arab Countries (3rd edn, Wolters Kluwer 2011), 51. See also Radwa Elsaman, ‘Factors to Consider Before Arbitrating in the Arab Middle East: Religious and Legislative Constraints’ (2011) 3 Geo Mason J Int’l Com L 1, 62-63 (citing El-Ahdab for the same proposition and giving the riba as an example of a basis for setting aside an award).
88 El-Ahdab (n 87) 51.
89 The Majalla is an early codification of the Shari‘a enacted in the Ottoman Empire in the late 1800’s, though some have noted that it was strongly influenced by French civil law. A Smolik, Comment, The Effect of Shari‘a on the Dispute Resolution Process Set Forth in the Washington Convention, 2010 J Disp Resol 151 (2010) 157, fn 82; F Griffel, Introduction, in Shari‘a: Islamic Law in the Contemporary Context (A Amanat & F Griffel eds, 2007) 8-9; J Schacht, An Introduction to Islamic Law (1st edn 1964) 37.
90 Al Majalla, art 1849; El-Ahdab (n 87) Annexes, 900-901.
91 El-Ahdab (n 87) 51.
agreement, made an arbitral award that contravenes public policy, the Shari’a or contains a flagrant injustice, if the parties were not entitled to arbitration, or if there was no fair hearing.\textsuperscript{93}

\textbf{PART III}

6.3. Setting Aside a Foreign Arbitral Award Under International Agreements

6.3.1. Setting Aside an Arbitral Award Under the New York Convention

On its face, the New York Convention does not govern the setting aside of an arbitral award.\textsuperscript{94} The setting aside of an arbitral award, however, is explicitly mentioned in Article V(1)(e)\textsuperscript{95} of the New York Convention as follows:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority proof that:

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

Article V(1)(e) allows, but does not require, the court at the place of enforcement to refuse enforcement of a foreign arbitral award that has been set aside by either a court at the seat of arbitration or a court at the country of the chosen applicable law. The New York Convention, thus, through Article V(1)(e) recognises the international consensus that the law of the seat of arbitration\textsuperscript{96} governs the setting aside of a foreign arbitral award, and the court in a Contracting State “may only decide under the Convention whether or not to grant enforcement of the award within their

\textsuperscript{93} El-Kadi (n 92) 261; El-Ahdab (n 87).
\textsuperscript{94} van den Berg (n 5) 42.
\textsuperscript{95} New York Convention, art V(1)(e).
\textsuperscript{96} Pieter Sanders (ed), ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (ICCA 2011) 102 (describing the seat of arbitration as having “supervisory” or “primary” jurisdiction over the award, while the enforcement state as having “enforcement” or “secondary” jurisdiction over the award).
jurisdiction.” Article V(1)(e) of the New York Convention, thus, is the source of the extraterritorial effect of setting aside a foreign arbitral award among Contracting States.

Perhaps, an even more significant impact of the New York Convention to the law governing the setting aside of a foreign arbitral award, despite its lack of explicit provisions governing the procedure, is if a country adopts “all or almost all of the grounds for refusal of enforcement set forth in Article V of the Convention as grounds for setting aside arbitral awards made within its jurisdiction.” Van den Berg points to the UNCITRAL Model Law, discussed more fully in Section 6.3.2. below. Overall, the New York Convention’s lack of regulation regarding the setting aside of a foreign arbitral award and its permissive language regarding the non-enforceability of a foreign arbitral award that has previously been set aside, has created an unsettled and unpredictable post-arbitral award jurisprudence.

6.3.2. Setting Aside Under the UNCITRAL Model Law

The UNCITRAL Model Law is the only source for a uniform system for setting aside an arbitral award with explicit provisions on the grounds for setting aside, albeit adopted from the New York Convention. It is necessary to reiterate at the outset that only Oman, Bahrain, and the KSA have adopted the UNCITRAL Model Law, and so the UNCITRAL Model Law would only govern the setting aside rules of these three GCC states.

Article 34(2) of the UNCITRAL Model Law sets forth the limited grounds under which an arbitral award may be set aside. Article 34(2) states in pertinent part as follows:

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97 van den Berg (n 5) 42; Sanders (n 96) 102.
98 van den Berg (n 5) 42.
99 ibid.
100 ibid.
101 Robert Bird, ‘Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a “New” New York Convention’ (2011-2012) 37 NCJ Int’l L & Com Reg 1013 (stating that “not surprisingly, the result has led to a conflicted body of decisions that attempts to grapple with these provisions.”).
102 UNCITRAL Model Law, art 34(2).
An arbitral award may be set aside ... only if:
(a) the party making the application furnishes proof that:
   (i) a party to the arbitration agreement ... was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
   (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
   (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
   (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
(b) the court finds that:
   (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
   (ii) the award is in conflict with the public policy of this State.

The UNCITRAL Model Law limits the recourse against an arbitral award to a setting aside application.\textsuperscript{103} The UNCITRAL Model Law separates the grounds into two categories: those that a party must prove under (1)(a) and those that a court may consider on its own initiative.\textsuperscript{104} The grounds to setting aside the arbitral award are stated in Article 34(2), which “mirrors” the grounds in Article 36(1) for a refusal of enforcement.\textsuperscript{105} In turn, Article 36(1) “mirrors” the grounds for refusal of enforcement in Article V of the New York Convention, where Article 36(1) was taken from.\textsuperscript{106} According to van den Berg, Article 34 of the UNCITRAL Model Law states that “a

\textsuperscript{103} UNCITRAL Model Law, art 34(1).
\textsuperscript{105} ibid 35.
\textsuperscript{106} ibid.
court of a country that has adopted the Model Law may set aside an arbitral award rendered under that Law (as implemented) on grounds that are virtually identical to the grounds for refusal of enforcement listed in Article V of the [New York] Convention (except for ground (1)(e)).”107 Thus, while the New York Convention does not govern the setting aside of a foreign arbitral award, it does so vicariously through the UNCITRAL Model Law, assuming a state adopts both the New York Convention and the UNCITRAL Model Law.

Interestingly, in a recent case in Singapore, PT First Media TBK v Astro Nusantara International BV & others,108 the court of appeal held that under the scheme of the UNCITRAL Model Law as applied in Singapore, a party has a choice of remedies to challenge an arbitral award on the grounds of jurisdiction: actively, by seeking to set aside the arbitral award under Article 16(3) of the UNCITRAL Model Law, or passively, as a defence to enforcement under Section 19 of the IAA which allows for a refusal to enforce an international arbitral award issued in Singapore.

### 6.3.3. Setting Aside Under the ICSID Convention

While the ICSID Convention has significantly curtailed domestic court interference with the arbitration process and enforcement, one of its significant features under Article 52 is the remedy for the annulment or setting aside of an arbitral award, whether in whole or in part.109 Under Article 52(1), an ad hoc committee has jurisdiction to review and annul an arbitral award when either party requests

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107 ibid 35-36; van den Berg (n 5).
109 Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Wolters Kluwer 2010)162. The application for annulment is submitted to a new three-member ad hoc committee constituted for the sole purpose of determining the annulment application.
annulment\textsuperscript{110} of the arbitral award by written application to the Secretary-General\textsuperscript{111} on one or more of the following grounds that:

(1) the Tribunal was not properly constituted;
(2) the Tribunal has manifestly exceeded its powers;
(3) there was corruption on the part of a member of the Tribunal;
(4) there has been a serious departure from a fundamental rule of procedure; or
(5) the arbitral award has failed to state the reason on which it is based.\textsuperscript{112}

As for the fifth ground for setting aside an ICSID arbitral award, in \textit{Mitchell v. The Democratic Republic of Congo},\textsuperscript{113} an \textit{ad hoc} committee set aside an ICSID arbitral award because the ICSID Tribunal failed to state its reasons for the arbitral award.\textsuperscript{114} Interestingly, public policy cannot be a ground for annulment under the ICSID Convention.\textsuperscript{115} It is important to note that the ICSID annulment system was designed to protect the integrity of the ICSID Convention\textsuperscript{116} proceedings and not the outcome of the proceedings.\textsuperscript{117} Therefore, the committee cannot review the merits of the original arbitral award in any way. Additionally, a successful annulment invalidates the arbitral award in whole or in part, but it can never revise or amend the arbitral award, such proceeding being covered under Article 51.\textsuperscript{118}

While the arbitral award is subject to the annulment proceeding, its enforcement may be stayed pending resolution under Article 53(1), which states that “[e]ach party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”\textsuperscript{119} The stay will be granted at the discretion of the committee, except

\textsuperscript{110} It must be made within 120 days of rendering the award and not more than three years after the issuance of the award. ICSID Convention, art 52.
\textsuperscript{111} Al-Siyabi (n 24) 285 (noting that in most international conventions an annulment or setting aside of an award is possible by application to the court at the seat of arbitration).
\textsuperscript{112} ICSID Convention, art 52.
\textsuperscript{114} Maxwell (n 113).
\textsuperscript{115} Al-Siyabi (n 24) 285.
\textsuperscript{116} Ibid (calling it an “internal safeguard mechanism”).
\textsuperscript{117} Reed, Paulsson and Blackaby (n 109) 162.
\textsuperscript{118} Ibid.
\textsuperscript{119} ICSID Convention, art 53(1).
when a party requested a stay at the time of filing of the application. The stay then terminates after the committee is constituted, but a party may request for a continuation of the stay subject to a hearing.

In *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, however, an ICSID Convention *ad hoc* annulment committee denied respondent Paraguay’s request to stay enforcement of an arbitral award while the application to set aside the arbitral award was pending after SGS sought for the lifting of the provisional stay under ICSID Convention Arbitration Rule 54(2) or to require Paraguay to post a bond as security. The committee agreed with SGS’s argument and held that the plain language of Article 52 of the ICSID Convention and ICSID Convention Arbitration Rules 52 to 54 states that a stay of enforcement is not automatic and should be the exception rather than the rule subject to the committee’s discretion. The committee further took into consideration Paraguay’s history of non-compliance with payment of ICSID Convention obligations and arbitral awards and weighed such history against continuance of a stay, and held that Paraguay had not established that the circumstances of the case allowed the continuation of the stay of enforcement.

According to Reed, Paulsson and Blackaby, the most common grounds for annulment under the ICSID Convention are Article 52 (b) the Tribunal manifestly exceeding its powers, Article 52(d) a serious departure from a fundamental rule of procedure, and Article 52(e) failure to state the reason on which the arbitral award was based. An arbitral award can also be reviewed and reduced based on the principle of proportionality, as the ICSID Tribunal demonstrated in *Occidental Petroleum Corp. Occidental Exploration and Production Company v. The Republic of Ecuador* (hereinafter “OEPC” case). The OEPC Tribunal held that under Ecuadorean law,
administrative acts must be in accordance with the principle of proportionality. In respect of investment arbitration law, the ICSID Tribunal indicated that “the obligation for fair and equitable treatment has on several occasions been interpreted to import an obligation of proportionality.”

PART IV

6.4. Setting Aside a Foreign Arbitral Award in the GCC States

While the majority view under the Shari’a does not allow for the setting aside of an arbitral award, the GCC states in practice have nevertheless allowed for the setting aside of an arbitral award, both domestic and foreign. This section will examine the position and rules of each of the GCC states regarding the setting aside of a foreign arbitral award.

GCC states are all signatories to the New York Convention, the Riyadh Convention, and the ICSID Convention. However, only the New York Convention expressly allows for the setting aside of a foreign arbitral award. The New York Convention, however, does not expressly provide for the grounds for setting aside of a foreign arbitral award, as it does for the grounds for refusing enforcement of a foreign arbitral award. As stated by Al-Siyabi, “[t]he New York Convention, as the single important convention on enforcement of arbitral awards...do not specify the grounds for vacating arbitral awards, and leave the issue at the discretion of national law of the seat of arbitration.”

One could assume, as does Al-Siyabi and other scholars, that the grounds for setting aside a foreign arbitral award under the New York Convention would be the same as the grounds for enforcing a foreign arbitral award.

125 ibid. As of September 2010, there were 40 annulment applications, of which 22 decisions were publicly available and from which only 10 were granted annulment, whether partially or in whole. Reed, Paulsson and Blackaby (n 109) 174; Dany Khayat, ‘Enforcement of awards in ICSID arbitration’ (Lexology, 16 December 2011) <http://www.lexology.com/library/detail.aspx?g=ea90bf75-ee44-43be-9ec4-272124661401> accessed 14 October 2013.
126 Al-Siyabi (n 24) 79.
127 ibid.
Maniruzzaman rightly pointed that while the UNCITRAL Model Law aligns the grounds upon which a foreign arbitral award may be set aside with the New York Convention’s grounds for non-enforcement, the UNCITRAL Model Law marks an improvement:

Undoubtedly, the Model Law provides an improvement on the New York Convention 1958 on this matter. As the latter has no provision on setting aside an arbitral award and the matter is left to the arbitration law of the country of origin of the award, ‘the grounds for refusal of enforcement of the Convention may indirectly be extended (i.e. under Article V(1)(e) of the Convention) by the grounds for setting aside contained in the arbitration law of the country of origin.’ The New York Convention has thus left open this floodgate of grounds for setting aside arbitral awards to be compounded with those for refusal of recognition and enforcement creating an uncertainty of the fate of an award. The Model Law thus attempts to harmonize the grounds for setting aside and for recognition and enforcement of arbitral awards.  

The only remaining guidance for the setting aside of a foreign arbitral award would come from the UNCITRAL Model Law and the unique arbitration centres in each of the GCC states. However, only Bahrain, Oman, and the KSA have adopted the UNCITRAL Model Law.  

6.4.1. Setting Aside in the UAE

The grounds for setting aside a foreign arbitral award in the UAE are restrictive and limited to the grounds set forth in Article 216(1) of the UAE Civil Procedure

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Code[^131] and those relating to public order.[^132] The same is true for the Draft UAE Federal Arbitration Law under Article 53 and 54, which follows the approach of the Egyptian Arbitration Act in Articles 52-54. Setting aside is the only means of recourse against the foreign arbitral award, and a foreign arbitral award may only be set aside during the ratification process[^133] in “very determined cases where the defects in the award are so serious.”[^134] As stated by the Dubai Court of Cassation in Civil Challenge, Case No. 265/2007 (3 Feb 2008), “when the arbitral award is granted *res judicata* [finality], an action for annulment may be filed against it if the proper conditions are present.”[^135] The Dubai Court of Cassation further stated that “when granting recognition of the arbitral award, the Court does not have the right to examine the merits of the case and the extent of its conformity with the law...”[^136]

Article 216(1) of the UAE Civil Procedure Code provides the grounds for setting aside an arbitral award. This provision has been interpreted to allow the setting aside of an arbitral award in six categories[^137]: (1) that the arbitral award was made without a valid arbitration agreement (including the situation where either party had no capacity to enter into the arbitration agreement) or with a void, voidable, expired arbitration agreement;[^138] (2) failure to observe due process including lack of notice, the right to be heard, and the right to present a case or defence;[^139] (3) the constitution of the tribunal or the appointment of arbitrators violated UAE law or the parties’ agreement;[^140] (4) the arbitral award deals with matters beyond the scope of the arbitration agreement or the arbitrator or tribunal exceeded its mandate;[^141] (5) the arbitral award or

[^132]: Karrar-Lewsley (n 130).
[^134]: El-Ahdab (n 87) 822.
[^135]: Dubai Court of Cassation, Civil Challenge, Case No 265/2007 (3 February 2008).
[^136]: ibid.
[^137]: Blanke and Nassif (n 133).
[^138]: ibid; El-Ahdab (n 87) 822.
[^139]: ibid.
[^140]: El-Ahdab (n 87) 823; Blanke and Nassif (n 133); Abu Dhabi Court of Cassation, Petition No 980/2010, Judgment of 23 February 2011.
[^141]: El-Ahdab (n 87) 824; Blanke and Nassif (n 133).
proceedings are affected by other “procedural irregularities”\textsuperscript{142} or violated a UAE law,\textsuperscript{143} including the UAE Civil Procedure Code; and (6) the arbitral award is against UAE public policy or the subject of the arbitral award is non-arbitrable.\textsuperscript{144}

The Dubai Court of Cassation in Commercial Challenge No 148/2008 (16 Sept 2008),\textsuperscript{145} also set out grounds for annulment under Article 216 of the UAE Civil Procedure Code and gave eight grounds, showing that despite Article 216, courts may enumerate a different number of grounds for annulment, though mostly similar. It should also be noted that the Dubai Court of Cassation, Petition No 146/2008, judgment dated 09 November 2008,\textsuperscript{146} has ruled that public policy is not one of the grounds for setting aside an arbitral award because Article 216 does not explicitly state public order as a ground for annulment, but domestic public policy should be taken into account at the enforcement stage.

Though Article 216(1) of the UAE Civil Procedure Code does not seem to address all of these six categories, the language of Article 216 (1)(c) allows for a broader interpretation of potential grounds for setting aside an arbitral award. The Dubai Court of Cassation in two cases\textsuperscript{147} actually regrouped\textsuperscript{148} the listed grounds into two general categories: grounds linked to the arbitration agreement\textsuperscript{149} and grounds linked to the arbitral proceedings.\textsuperscript{150} The Dubai Court of Cassation’s categorisation adds

\textsuperscript{142} Blanke and Nassif (n 133). Examples of procedural irregularities include failure by the arbitrators to sign both the reasoning and the dispositive of the award. Dubai Court of Cassation, Petition No 233/2007, Judgment of 13 January 2008; Dubai Court of Cassation, Petition No 9/1996, Judgment of 13 July 1996 (award annulled because the time for issuance of the arbitral award expired and the period of issuance of extension must be uninterruptedly linked to the previously set period); see also El-Ahdab (n 87) 822, s (g).

\textsuperscript{143} El-Ahdab (n 87) 824.

\textsuperscript{144} ibid 824-825.

\textsuperscript{145} Dubai Court of Cassation, Commercial Case, Challenge No 148/2008 (16 September 2008).

\textsuperscript{146} Dubai Court of Cassation, Petition No 146/2008, judgment dated 09 November 2008.


\textsuperscript{148} ibid.

\textsuperscript{149} Namely: the non-existence or invalidity of the arbitration agreement; the expiration of the arbitration agreement; an arbitrator’s excess of authority in addressing matters outside the scope of the arbitrator’s mandate (listed in article 216, CPC); or the infringement of a public order rule (not listed in article 216, CPC). Karrar-Lewsley (n 130).

\textsuperscript{150} Namely: the irregular composition of the arbitral tribunal; the issuance of the award by a truncated tribunal with no authorisation to do so; failure to define the dispute in the arbitration agreement; lack of capacity to enter into the arbitration agreement (listed in article 216, CPC); or due process violations, such as a denial of opportunity to present one’s case and equal treatment of the parties (provided for
two additional categories: the issuance of the arbitral award by a truncated tribunal with no authorisation to do so and failure to define the dispute in the arbitration agreement.

UAE courts have stated that it will not consider the legal merits of the dispute since the setting aside of an arbitral award only deals with challenges to the proceedings.\textsuperscript{151} The Dubai Court of Cassation in Civil Challenge, Case No. 265/2007 (3 Feb 2008),\textsuperscript{152} clarified that the grounds for annulment relate only to the arbitral proceedings, to a nullity occurring in the arbitral award or to a nullity in the proceedings that affect the arbitral award. In other words, the court is limited to examining the essential rules of procedure such as the right to a defence, due process, and the procedures agreed upon between the parties.\textsuperscript{153}

While an arbitration agreement is void if it is not in writing, the Dubai Court of Cassation in Civil Challenge No. 103 of 2011 (20 November 2011), reversed the appellate court’s annulment of an arbitral award stating that the contested decision misapplied the law regarding the inclusion of the arbitration agreement. Instead, the Court of Cassation stated that Article 212(5) does not provide that the arbitral award should initially contain the entire arbitration agreement but should only mention its content.

An arbitral award, however, may be set aside for violation of due process if there is lack of notice to either party of the appointment of arbitrator(s) and of the arbitration proceedings.\textsuperscript{154} Due process may also be violated if there is a violation of a party’s right to be heard and the right to present a case and submit a defence. Additionally, the parties must be treated equally, and bias by the court in favour of one


\textsuperscript{152} Dubai Court of Cassation, Civil Challenge, Case No 265/2007 (3 February 2008).


\textsuperscript{154} El-Ahdab (n 87) 822.
party against the other would be grounds for setting aside an arbitral award.\textsuperscript{155} It is worth noting that these are the same grounds set forth under the Shari’a. In Dubai Court of Cassation, Commercial Chamber, Action No 268 of 2007 (19 February 2008), a case involving allegation of forgery of court admitted documents, the court, before rejecting the appeal, explained that “the failure to afford the parties due process violate the right to be heard.”\textsuperscript{156}

Once a party becomes aware of an arbitrator’s conflict of interest or any conduct or position that would shed doubt on the tribunal’s independence or impartiality, then the party could ask the court to set aside the arbitral award. In Abu Dhabi Court of Cassation, Petition No 980/2010, the court held that the independence and impartiality of an arbitrator is fundamental and pertain to public order, and therefore set aside an arbitral award because the arbitrator appointed by the respondent worked for the respondent’s legal representative.\textsuperscript{157} An arbitral award may also be challenged if there is an even number of arbitrators because UAE law, like all GCC states, requires that there must be an odd number of arbitrators.\textsuperscript{158} According to the Dubai Court of Cassation in Petition No 75/2007,\textsuperscript{159} an arbitral award may also be annulled if the arbitration proceedings continues despite a pending motion for recusal of an arbitrator as such recusal is a legal or actual impediment.

The most common basis in the UAE for setting aside an arbitral award in practice is that it is beyond the scope of the agreement.\textsuperscript{160} It is possible that only those portions that exceed the mandate may be partially set aside. For example, the Dubai Court of Cassation in Case No. 282/2012, Real Estate Cassation,\textsuperscript{161} partly affirmed the enforcement of a DIAC arbitral award and partly set aside the award of attorney fees

\textsuperscript{155} Ibid 823.
\textsuperscript{156} Dubai Court of Cassation, Commercial Chamber, Action No 268 of 2007 (19 February 2008).
\textsuperscript{157} Abu Dhabi Court of Cassation, Petition No 980/2010, Judgment of 23 February 2011.
\textsuperscript{158} El-Ahdab (n 87) 822-823; Al Rowaad Advocates & Legal Consultancy, ‘Appointing arbitrators’ (Lexology, 19 January 2014) <http://www.lexology.com/library/detail.aspx?g=7771e67c-bc03-4d11-924c-51f05b99f0f4> 24 February 2014. (stating that the UAE requires an odd number of arbitrators).
\textsuperscript{159} Dubai Court of Cassation, Petition No 75/2007, Judgment of 7 April 2008.
\textsuperscript{160} El-Ahdab (n 87) 823.
\textsuperscript{161} Dubai Court of Cassation, Case No 282/2012, Real Estate Cassation (3 February 2013).
because no specific power to award such costs has been granted to the arbitration tribunal under the DIAC rules or under the arbitration agreement.\textsuperscript{162}

An arbitral award may also be set aside if a procedural irregularity has a substantial effect on the arbitral award. According to Blanke and Nassif, procedural irregularities may also include failure to administer oaths before hearing oral evidence,\textsuperscript{163} and failure by the arbitrators to sign both the reasoning and the disposition of the arbitral award, which was indicated by the Dubai Court of Cassation, Petition No. 233/2007.\textsuperscript{164} In Dubai Court of Cassation, Petition No 9/1996, the arbitral award was set aside or annulled because time for issuance of the arbitral award expired and the period of issuance of extension must be uninterruptedly linked to the previously set period.\textsuperscript{165} In Dubai Court of Cassation, Petition No 503/2003,\textsuperscript{166} the court held that arbitrators shall require witnesses to take the oath before the witnesses provide testimonies regardless of whether or not the parties requested or agreed to such a procedure since Article 211 of the UAE Civil Procedure Code requires such an oath.

Finally, an arbitral award can be set aside for violating public policy “as understood in the UAE.”\textsuperscript{167} As a recent example, the Dubai Court of Cassation in Case No. 180/2011, Judgment of 12 February 2012,\textsuperscript{168} set aside an arbitral award that nullified a sale and purchase agreement in the off-plan real estate sector on the basis that the underlying property had not been properly registered in accordance with Article 3 of Law No. 13 of 2008, Regulating the Interim Real Estate Register in the Emirate of Dubai. This decision means that Article 3 of Law No. 13 of 2008 falls within the meaning of public policy in the UAE.\textsuperscript{169}

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\textsuperscript{163} Blanke and Nassif (n 133).
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\textsuperscript{164} ibid; Dubai Court of Cassation, Petition No 233/2007, Judgment of 13 January 2008
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\textsuperscript{165} Dubai Court of Cassation, Petition No 9/1996, Judgment of 13 July 1996.
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\textsuperscript{167} Karrar-Lewsley (n 130).
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\textsuperscript{169} Karrar-Lewsley (n 130).
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6.4.2. Setting Aside in Oman

In Oman, Article 54(1) of Sultani Decree 47/97 allows a party to request the setting aside of an arbitral award. According to Al-Siyabi, however, “it can be assumed that it is possible to request the nullification of only those [arbitral] awards that are made under Omani law, whether in Oman or outside of it.” The limitation of only setting aside arbitral awards rendered under Omani law largely results in not allowing a setting aside of a foreign arbitral award that is being enforced in Oman that must then follow the enforcement scheme in Oman largely covered by the New York Convention. This does not mean, however, that setting aside can only be applied for domestic arbitral awards because Omani law can be applicable to (1) foreign arbitral awards when the seat of arbitration is outside of Oman but the foreign court applied Omani law pursuant to the choice of law of the arbitration agreement or arbitral clause, and (2) international arbitral awards.

In Oman, the Buraimi Court of Appeal in Appeal No. 32 T/s/2003, Commercial Circuit (3 May 2011), considered a request to set aside an international arbitral award under the grounds for setting aside set forth in Article 53 of Omani Arbitration Law No. 47/1997, in a case involving an Omani owner of a rock crushing site in Oman and an Emirate licensee with a principal place of business in Abu Dhabi. The Buraimi Court held that it had no jurisdiction ratione materia [subject matter jurisdiction] as a matter of public order under Article 54/2 9 of the Omani Arbitration Law because the arbitration is international in nature under Article 2 and Article 3 of the Omani Arbitration Law since it involved parties from different countries.

The current Omani arbitration law is pro-enforcement and has restricted the grounds on which arbitral awards can be set aside. The Omani Supreme Court in Case

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170 Sultani Decree 47/97, art 52 (Oman).
171 Al-Siyabi (n 24) 207.
172 Rotana Hotel Management Corp Ltd v Gulf Hotels (Oman) Co Ltd, Case No 5/2001 (22 October 2001) Commercial Department, Supreme Court.
No. 1/2002,\textsuperscript{175} has made clear that the grounds for setting aside an arbitral award are exclusively provided in Article 53 of the Omani Arbitration Law, and may not be developed by analogy despite that they differ from the grounds provided for the setting aside of judicial decisions. The Omani Supreme Court has refused to set aside an arbitral award on grounds not provided for under Article 53 of the Omani Arbitration Law, and held by the Oman Supreme Court in Case No 2002/1,\textsuperscript{176} that failure to appoint an expert or to mention the nationality, titles, and qualifications of the arbitrators do not constitute grounds for setting aside under Article 53, which provides that “annulment shall not be adopted unless the law expressly provides so.”\textsuperscript{177} In Oman, the grounds for setting aside an arbitral award are limited to errors in the arbitration proceedings.\textsuperscript{178} Omani courts can no longer review the facts and law of the arbitral award, and can only review and set aside the arbitral award for the following circumstances:\textsuperscript{179}

1. validity of arbitration agreement and a party’s incapacity,
2. lack of due process and defect in the arbitral award and proceedings,
3. failure to apply the applicable law or going beyond the scope of the arbitration,
4. wrong composition of the tribunal, and
5. against public order.

In \textit{Rotana Hotel Management Corp Ltd v. Gulf Hotels (Oman) Co. Ltd.}, the Omani Supreme Court stated that an arbitral award may be set aside in Oman if there is no valid arbitration agreement between the parties to refer the dispute to arbitration.\textsuperscript{180} The Omani Court of Appeals has stated in Commercial Circuit, Appeal No. 34/2009 (27 Apr 2009),\textsuperscript{181} that in cases involving a voidable arbitration agreement, an arbitral award cannot be set aside if a valid waiver was made by the party who can benefit from such nullity to set aside the arbitral award. Under Omani law, an agreement has to be in

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\textsuperscript{175} Omani Supreme Court in Case No 1/2002, hearing of 28/5/2003, Decision No 92.
\textsuperscript{176} Oman Supreme Court, Case No 2002/1, Decision No 92, hearing held on 28 May 2002.
\textsuperscript{177} Amr Elattar, \textit{Enforcement of International Arbitration Awards: A Comparative Study between Egypt, USA, and the Gulf Cooperation Council Countries} (LAP Lambert Academic Publishing 2013) 373.
\textsuperscript{178} Elattar (n 177) 369.
\textsuperscript{179} Al-Siyabi (n 24) 211.
\textsuperscript{180} Sultan Decree 47/97, art 53(1)(1) (Oman).
\textsuperscript{181} Omani Court of Appeals, Commercial Circuit, Appeal No 34/2009 (27 Apr 2009), 2009 Int’l J of Arab Arb 3, 245.
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writing, the number of arbitrators must be odd, and the subject matter must be arbitrable. Additionally, a party’s insanity or incapacity to enter into an arbitration agreement could be a ground to set aside an arbitral award.\footnote{Sultani Decree 47/97, art 53(1)(2) (Oman).}

Oman, however, has failed to clarify what law governs incapacity and the validity of the arbitration agreement: the seat of the arbitration, the law chosen by the parties, or Oman. There seems to be a presumption that Omani law determines both incapacity (and insanity) and the validity of the arbitration agreement, but that assumption may be thwarted if a court, applying choice of law rules, determines that the law at the seat of arbitration prevails despite choosing Oman as the applicable law.\footnote{Al-Siyabi (n 24) 211.}

Regardless, an Omani court could still set aside an arbitral award if a foreign court refused to apply Omani law to the determination of the validity of the arbitration agreement or of the incapacity of the parties, under Article 53(1)(4) of Sultani Decree 47/97.\footnote{See Section 6.5. for a more detailed discussion.}

The Omani ground for setting aside an arbitral award because of a due process violation is consistent with the right to be heard and the right to present a case requirement under the Shari’a and the majority of international conventions. In Oman, an arbitral award may be set aside if a party was unable to present his defence or claims, even if given a chance by the tribunal, but unable to do so for reasons beyond the control of the deprived party.\footnote{Sultani Decree 47/97, art 53(1)(3) (Oman).} As such, failure to give notice to a party of the appointment of arbitrators or of the proceedings,\footnote{ibid; Al-Siyabi (n 24) 212-213.} lack of hearing,\footnote{El-Ahdab (n 87) 495.} breach of fairness and unequal treatment of the parties, and preventing a party from presenting evidence are all grounds for setting aside an arbitral award.\footnote{Al-Siyabi (n 24) 213.} Similarly, though still remaining undefined by the courts,\footnote{ibid 216 (questioning the meaning and relationship of this ground with the due process ground, and that this ground needs clarification).} as to the difference with the due process grounds, Article 53(1)(7) of Sultani Decree 47/97 states that a defect in the arbitral award or the
proceeding that affects the terms of the arbitral award may be a ground for setting aside the arbitral award.

Oman deviates from most countries and the international arbitration norm when it allows for the setting aside of an arbitral award if the tribunal did not apply or seriously misapplied the law agreed to by the parties. For example, the Oman Appeal Circuit in hearing session held on October 19, 1998, Case No. 2/98 Arbitration held that the contested arbitral award was vitiated by annulment because it failed to apply the agreement concluded between the two parties. This ground, however, “opens the way for the substantive review of the arbitral award,” even though it restricts such review to the applicable law, because a court would have to review the application of the law to determine this ground. The High Court of Oman in Commercial Circuit, 5 Apr 2006, also held that an arbitral award might be set aside if it deals with matters outside the scope of the arbitration agreement.

An arbitral award may also be set aside in Oman if the constitution of the tribunal is contrary to the law or to the parties’ intent. This would include the setting aside of an arbitral award because there is an even number of arbitrators, which is a mandatory requirement in Oman under Article 15(2) of Sultani Decree 47/97 and which the parties cannot waive. It would also include the setting aside of an arbitral award if an arbitrator was not independent and impartial, or if the arbitrator was appointed contrary to the procedures set out under Omani law.

Finally, Omani law allows for the setting aside of an arbitral award on the basis of public order. The Oman Supreme Court interpreted Article 53(2) of Sultani Decree 47/97 to mean that “contrary to public order” is one in which the “consequences

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190 ibid 213 (stating that UNCITRAL Model Law and many other legal systems do not contain this provision, and Oman seems to follow the Egyptian rule).
191 Sultani Decree 47/97, art 53(1)(4) (Oman).
193 Al-Siyabi (n 24) 214.
194 High Court of Oman, Commercial Circuit, 5 Apr 2006, (2010) 2 Journal of Arab Arb 199; Court of Appeal, no 15/94, 5 April 1994, (2010) 2 Int’l J Arab Arb 2. However, those parts of the award that do not exceed the scope of the agreement may be separated and only those that exceed the scope may be set aside.
195 Sultani Decree 47/97, art 53(2) (Oman).
contradict the basic principles of Omani law.”

Al-Siyabi states that this provision does not expressly cover arbitrability as part of public order, but in light of other grounds, lack of arbitrability may still be a basis for setting aside an arbitral award.

Setting aside an arbitral award based on public order, however, must be differentiated from the non-enforcement of an arbitral award based on a public policy violation. In the setting aside context, Omani law is explicit that a court can set aside the arbitral award on the basis of public order, *sua sponte* [of its own accord].

### 6.4.3. Setting Aside in Qatar

In Qatar, an arbitral award may be set aside under Article 207-209 of the Qatari Code of Civil and Commercial Procedure. Once a request to have the arbitral award set aside is submitted, the enforcement of the arbitral award is suspended, unless the courts decide otherwise.

Articles 207 and 208 provide that any interested party may apply to have the arbitral award set aside, in accordance with the rules of the courts originally having jurisdiction. The grounds for setting aside an arbitral award are as follows:

1. the arbitral award was made in the absence of a valid arbitration agreement,
2. the arbitral award breaches the scope of the arbitration agreement,
3. the arbitral award violates rules of public policy or Qatari good morals,
4. the subject matter of the dispute was not determined in the arbitration agreement or during the arbitration proceedings,
5. one of the parties or arbitrators does not have capacity.

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196 Case No 127, Appeal No 10/2000, Supreme Court Decision (Oman); Al-Siyabi (n 24) 217.
197 Al-Siyabi (n 24) 217-218.
198 ibid 217.
200 Qatari Code of Civil and Commercial Procedure, art 208, para 2 (Qatar).
202 Qatari Code of Civil and Commercial Procedure, art 207-208 (Qatar).
203 El-Ahdab (n 87) 590-591.
(6) the arbitrators who made the arbitral award were not correctly appointed or the number of arbitrators was not odd, or

(7) the arbitral award was void or there were procedural flaws that affect the arbitral award.

As to the absence of a valid arbitration agreement, the Qatari court in Court of First Instance, Civil, First Instance, Appeal, Summary, Third Circuit Doha, Case No. 137/CFDI, Third (31 May 2011), held that the arbitral award was subject to annulment because the arbitral award does not contain the original or a copy of the arbitration agreement; and the case record does not include any agreement between the parties to resort to arbitration after the dispute arose. The Qatari Court of Appeals in Decision No. 549/2002 (28 Dec 2002), set aside an arbitral award because the number of arbitrators was not odd under Article 207 of the Qatari Code of Civil Procedure. Finally, the Qatari Court of Cassation in Petition No 64/2012 (12 June 2012), a dispute regarding the value of assigned shares by an existing partner of a Qatari limited liability company, set aside an arbitral award rendered under the Qatar International Centre for Conciliation and Arbitration (QICCA) because the arbitral award was not rendered in the name of His Highness The Emir of Qatar.

6.4.4. Setting Aside in Bahrain

The grounds for setting aside an international arbitral award in Bahrain are set out in Article 34 of the Bahraini International Arbitration Act (BIAA). The BIAA

204 The court stated, however, that the arbitration clause was not void, and setting aside could be avoided if the award had been unanimously decided by the arbitrators. An odd number of arbitrators are, therefore, only required in split decisions, though such guidance is of little use when one would not know the outcome prior to the commencement of the arbitration proceedings.

205 Qatari Court of Cassation, Petition No 64/2012 (12 June 2012); Minas Khatchadourian, ‘A New Bump on the Qatar-New York Road’ (Kluwer Arbitration Blog, 28 January 2014) <http://kluwerarbitrationblog.com/blog/2014/01/28/a-new-bump-on-the-qatar-new-york-road/> accessed 24 February 2014 (discussing another Qatari case that required a foreign arbitral award to be made in the name of His Highness The Emir of Qatar).

206 Bahrain International Arbitration Act, art 34.
makes clear that setting aside is the only recourse against an arbitral award. The grounds for setting aside an international arbitral award are as follows:

1. the party was under some incapacity,
2. the arbitration agreement is invalid,
3. lack of notice as to the appointment of arbitrator or of the proceedings,
4. inability to present a case,
5. the arbitral award exceeds the scope of the arbitration agreement,
6. invalid composition of the tribunal or invalid arbitral procedure, or
7. non-arbitrability and public policy.

First, an international arbitral award may be set aside for invalidity of the arbitration agreement if the international arbitral award violates “the Bahraini International Arbitration Act, or any provision of law adopted by the Bahraini Supreme Court of Appeals, whether those provisions relate or domestic or international law.” Second, international arbitral awards that are subject to setting aside because it exceeds the scope of the arbitration agreement may be partially set aside only for the portion that exceeded its scope. Third, an arbitral award may be set aside for invalidity of the constitution of the arbitral tribunal if such constitution violates the parties’ agreement, or in the presence of the parties’ agreement, such constitution violates a mandatory rule set forth by Bahraini law or provisions adopted by the Supreme Court of Appeals, whether applying to international or domestic arbitration. According to El-Ahdab, if the parties did not agree as to the constitution of the tribunal, a mere violation of Bahraini law would permit setting aside an international arbitral award. Finally, the international arbitral award may be set aside, upon request or sua sponte [on its own accord], if the subject matter is non-arbitrable under the lex fori [law of the forum], or the law of the Bahraini Supreme Court of Appeals; or if the international arbitral award violates Bahraini public policy.

207 ibid; El-Ahdab (n 87) 105.
208 Bahrain International Arbitration Act, art 34.
209 El-Ahdab (n 87) 152.
210 ibid.
211 ibid 152-153.
According to El-Ahdab, the grounds listed in Article 34 are similar to the grounds for refusing enforcement of the arbitral award under Articles 35 and 36 of the same Act. It is also similar to Articles V(1) and VI of the New York Convention. One difference noted by El-Ahdab from the provisions on non-enforcement is that an arbitral award may not be set aside unless it has become binding on the parties or has been set aside in another country. Interestingly, the UNCITRAL Model Law as adopted via Article 34 does authorise the appointed court in Bahrain to set aside an arbitral award made outside of Bahrain. In other words, Bahrain’s adoption of the UNCITRAL Model Law has allowed it to set aside an arbitral award not only when Bahrain is the seat of the arbitration, but also when it is the place of enforcement because Bahrain applies the grounds for setting aside at the lex fori [law of the forum], or the law of the state (here Bahrain) and not the law of the country of origin. Additionally, under Article 36 of the Bahraini International Arbitration Act, the enforcing court may adjourn its decision upon the filing of an application to set aside the arbitral award, but at the same time may ask for security from the party filing the set aside application.

6.4.5. Setting Aside in Kuwait

The setting aside of an arbitral award in Kuwait is covered under Articles 186-188 of the Code of Civil and Commercial Procedure. Article 186 of the Code of Civil and Commercial Procedure includes a very short provision for the grounds for setting aside of an arbitral award. Article 186 states in pertinent part as follows:

Final arbitral awards may be subject to setting aside in the following cases even if the parties agreed otherwise before making of the award:

(1) if the award was made on the basis of a void arbitration agreement, outside the scope of the agreement or without an arbitration agreement;

212 ibid 151-152.
213 ibid 152.
214 ibid 153.
215 ibid 152-153.
(2) in all cases where a rehearing (of a court judgment) would be possible; and
(3) if the award is void or a nullity in the proceedings affected the award.

Under Article 187, a request for setting aside is made before the court originally having jurisdiction over the dispute, and must be made within 30 days following notification of the arbitral award. Finally, Article 188 states that a request for setting aside does not stay enforcement, although the court may grant the stay if serious damage would result without the stay and the setting aside is likely to be granted.

In Kuwait Court of Cassation, Second Commercial Circuit,216 the court held that a contract for the sale of company shares and investment portfolios in real estate which were not registered with the Kuwait Market for Financial Instruments violated public policy. Therefore, the court held that the contract was null and resulted in the setting aside of the arbitral award.

Further, an arbitral award generally may be set aside in Kuwait for failure to state its factual reasons, but the Kuwaiti Court of Cassation in Court of Cassation, Case No 9/91, Commercial Circuit, 10 Jan 1993, stated that an arbitral award cannot be set aside if it nevertheless states general reasons or if the basis for setting aside is error in legal reasoning. Further, if the arbitration is governed by the rules of an arbitral institution like the GCC Arbitration Centre, the grounds for setting aside would be limited to the rules of the arbitral institution.217

6.4.6. Setting Aside in the KSA

Under Article 49 of the Saudi Arbitration Law of 2012,218 an arbitral award is final and not appealable.219 However, a proceeding to set aside the arbitral award may be initiated within 60 days from notification of the arbitral award.220

216 Kuwait Court of Cassation, Second Commercial Circuit (4 June 2008), (2009) 1 J of Arab Arb 269.
217 Elattar (n 177) 346.
218 Saudi Arbitration Law, Royal Decree No M/34 dated 24/5/1433H (corresponding to 16 April 2012).
Article 50 of the Saudi Arbitration Law of 2012\textsuperscript{221} sets out the criteria and grounds upon which an arbitral award may be set aside:\textsuperscript{222}

(1) lack of or invalidity of the arbitration agreement,
(2) lack of capacity of one of the parties to the arbitration agreements,
(3) lack of notice,
(4) exclusion of rules that the parties have agreed upon in the arbitration agreement,
(5) improper appointment of arbitrators,
(6) the tribunal exceeded its scope under the arbitration agreement,
(7) irregularity in the arbitration proceedings, and
(8) the arbitral award violates the Shari’a, Saudi public policy, the arbitration agreement, or is not arbitrable.

Additionally, the Saudi Arbitration Law of 2012 requires that the arbitrator have a university degree in Shari’a, the lack of which can now be grounds for an annulment of the arbitral award.\textsuperscript{223} Under Article 50, courts considering a challenge to set aside an arbitral award must limit the analysis to the annulment criteria set out under Article 50 and cannot revisit the facts or subject matter of the dispute.\textsuperscript{224}

As stated previously in Chapter Five, public policy in KSA consists primarily of the Shari’a, although there are also additional KSA public policies like the prohibition

\textsuperscript{221} ibid art 50.
\textsuperscript{222} Harb and others (n 219).
\textsuperscript{224} Barakat and Mahayni (n 220).
on governmental entities to enter into an arbitration agreement. As such, the grounds for setting aside under the Shari’a ought to be the same grounds for setting aside in KSA, including the prohibition on the *riba* [interest] and the *gharar* [uncertainty]. As stated above, however, the majority of Shari’a jurists, including the Hanbalis, view that the Shari’a does not allow the setting aside of an arbitral award. This may partly be the reason for the absence of a setting aside provision in KSA in the 1983 Arbitration Law. However, this does not mean that Saudi courts have not set aside arbitral awards, especially since there is a minority view in the Shari’a that allows for the setting aside of an arbitral award. In *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE)*, the Board of Grievances declined to enforce the arbitral award and reversed it because it was not Shari’a compliant.

The Saudi Arbitration Law of 2012 eliminated the Board of Grievance system for arbitral award enforcement and instead created the Enforcement Judge, which is relatively new. Enforcement Judge is defined under Article 1 as “the Chairman and Judges of the Enforcement Circuit, the Enforcement Circuit Judge, or the Judge of the Single Court.”

Article 50(2) provides that a state court may raise annulment *ex officio* [by virtue of the office] if the award includes provisions that violate Shari’a and public policy in the KSA; violate the agreement of the parties, or where the subject of the dispute is not permitted to be arbitrated under the arbitration law. Interestingly, Article 54 states that a challenge seeking to set aside the arbitral award does not result in an automatic stay of enforcement, but rather the competent court may stay enforcement if the claimant’s request is based on “serious reasons.” The Saudi Arbitration Law of 2012 does not define what would constitute a “serious reason.”

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225 Association for International Arbitration, ‘In Touch’ (*AIA*, October 2009) <http://www.arbitration-adr.org/documents/?i=62> accessed 5 February 2014 (relating that Saudi Arabian court refused to enforce ICC award against Saudi party in *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE)* in April of 2009 because the award was deemed not to be Shari’a compliant).
226 Giansiracusa (n 219).
227 The Office of the Enforcement Judge was created by the Judiciary Regulation, Royal Decree No M/78 of 19 Ramadan 1428 Hejra corresponding to 1 October 2007 Gregorian.
228 Giansiracusa (n 219).
although according to Harb, “serious reasons” under Article 54 likely means a violation of the Shari’a or KSA public policy.\textsuperscript{230}

6.4.7. Synthesis: Setting Aside of Foreign Arbitral Awards in GCC States

While the grounds for setting aside an arbitral award in each of the GCC states might look similar at first glance, there are numerous grounds for convergence and divergence among the GCC states.

The grounds where GCC states have a commonality cover five areas: (1) the existence of a valid arbitration agreement, (2) the lack of capacity of a party to enter into an arbitration agreement, (3) that the arbitrator went beyond the scope of the arbitration, (4) that the arbitration agreement does not violate public policy or public order, and (5) that there was no due process violation relating to notice and the right to be heard. It is not surprising that these five grounds are common to the GCC states since these five grounds are also covered under the UNCITRAL Model Law’s grounds for setting aside, which mirrors the New York Convention’s grounds for non-enforcement. That the New York Convention does not explicitly cover the grounds for setting aside an arbitral award but leaves those grounds to the discretion of the arbitral seat raises a problem with regards to creating uniformity. The UNCITRAL Model Law actually adopted the same grounds for non-enforcement. In this regard, one could say that the UNCITRAL Model Law does not create a distinction between the grounds for refusal to enforce an arbitral award and setting aside an arbitral award.

Unfortunately, even GCC states that followed or adopted the UNCITRAL Model Law approach are not in complete uniformity with regards to the second half of the grounds for setting aside an arbitral award. Only Bahrain follows the UNCITRAL Model Law approach closely. The grounds relating to (1) the composition of the arbitral tribunal, and (2) the appointment and number of arbitrators are common to only half of GCC states and the UNCITRAL Model Law.

\textsuperscript{230} Harb and others (n 219).
The other grounds for setting aside an arbitral award, however, seem to have been arbitrarily added by GCC states, except for Bahrain, for whatever legislative reason. Of the GCC states, Kuwait seems to have the least number of grounds to set aside an arbitral award, perhaps explaining Kuwait’s pro-enforcement history, while the UAE has the most grounds for setting aside an arbitral award, also reflecting UAE’s tumultuous history with regards to enforcement of foreign arbitral awards. The remaining grounds for setting aside an arbitral award are as follows: (1) the arbitral award of the arbitrators or the arbitration proceedings is void, (2) failure to define the dispute in the arbitration agreement, (3) failure to apply the applicable law chosen by the parties, (4) that the dispute is capable of settlement by arbitration or arbitrability, (5) going beyond the scope of the arbitrator’s mandate, and (6) the issuance of the arbitral award by a truncated tribunal, which is unique to the UAE.

A careful look at the grounds for setting aside an arbitral award reveals that the reason for the non-uniformity among the GCC states can be attributed to the divergence of additional grounds for setting aside as provided by GCC states. One solution that would place GCC states towards a pro-enforcement policy is to follow Bahrain’s lead with regards to setting aside an arbitral award, which is that all GCC states ought to adopt completely the UNCITRAL Model Law’s grounds for setting aside an arbitral award.

In the survey, the respondents gave both Bahrain and the UAE an almost equal rating as the friendliest of the GCC states towards the enforcement of foreign arbitral awards scoring at 7.44 out of 10 for Bahrain and 7.43 out of 10 for the UAE.\(^{231}\) KSA scored the lowest with 3.44 out of 10.\(^{232}\) Interestingly, Bahrain and the UAE have different approaches with regards to setting aside, where Bahrain follows strictly the UNCITRAL Model Law, while the UAE has not yet adopted the UNCITRAL Model Law. In other words, the survey seems to indicate that the perception of the friendliness of a GCC state towards the enforcement of a foreign arbitral award may not necessarily be dictated by the GCC state’s rules on setting aside an arbitral award. Yet, it is possible

\(^{231}\) Appendix II, Survey Report, II(2.2.1.).

\(^{232}\) ibid.
that Bahrain was rated high as to “friendliness” because of its loyal adoption of the UNCITRAL Model Law.

PART V

6.5. Problematic Effect and Enforcement of Annullled Arbitral Awards

A party whose arbitral award was set aside in one country can seek to get the arbitral award enforced in an entirely different country.\(^\text{233}\) The New York Convention provides little guidance on the issue,\(^\text{234}\) and because the issue has only been raised occasionally,\(^\text{235}\) the answer to the question remains unsettled law.\(^\text{236}\)

Two prominent cases have allowed the enforcement of an arbitral award that has previously been set aside at the seat of arbitration: *Hilmarton* and *Chromalloy*. It is worth discussing these two cases and the problematic effect they create for the enforcement of foreign arbitral awards.\(^\text{237}\)

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\(^\text{233}\) Bird (n 101) 1013; Born (n 2) 2675-88.


\(^\text{235}\) Richard Kreindler, ‘Particularities of International Financial Arbitration in the Context of Challenges to Arbitral Awards’ (1997) 2 *YB Int’l Fin & Econ* L 201 (stating that “only occasionally have contracting states to the New York Convention enforced an arbitral award that has previously been set aside by the courts in its country of origin.”).

\(^\text{236}\) Claudia Salomon and Lilia Vazova, ‘Arbitral award enforced in the US although annulled abroad’ (*Latham Watkins*, 4 September 2013) Client Alert No 1582 (calling the issue an “ever-growing body of jurisprudence from courts around the world grappling with the issue of whether a national court of a signatory state to the New York Convention should recognize and enforce a foreign arbitral award that has been set aside at the seat of arbitration”). Jurisdictions that are likely to enforce foreign arbitral awards that have been set aside at the seat of arbitration include US, France, Netherlands, Austria, Brunei, Croatia, Denmark, Hong Kong, Ireland, Lebanon, Luxembourg, Mexico, Panama, Poland, Spain, and Turkey. Only the US, France, and Netherlands, however, have had occasion to consider the issue. Jurisdictions that are not likely to enforce foreign arbitral awards that have been set aside at the seat of arbitration are India, Italy, Japan, Korea, and Switzerland. *ICC International Court of Arbitration Bulletin* 733, ‘CC Guide to National Procedure for Recognition and Enforcement of Awards under the New York Convention’ (2012) v 23/Special Supplement [hereinafter *ICC Guide 2012*].

\(^\text{237}\) Born (n 21) (arguing in favour of enforcing foreign arbitral awards that had previously been set aside at the seat of arbitration).
6.5.1. The Hilmarton Case

In Societe Hilmarton v. Societe OTV,238 a French company, OTV, only paid half of the fees to a British firm, Hilmarton, which OTV had hired to help obtain a contract with the Algerian government.239 OTV won the Swiss arbitration proceedings. On appeal, the Swiss high court set aside the Swiss arbitral award.240 OTV nevertheless sought enforcement of the arbitral award in France, where the Paris Court of Appeals, relying on French law and the New York Convention’s more-favourable-right provision under Article VII(1), enforced the previously set aside arbitral award.241

In response, Hilmarton sought to enforce in France the Swiss court’s prior annulment of the arbitral award, and a French court recognized the Swiss court’s annulment.242 Meanwhile, in a resubmitted arbitration in Switzerland, Hilmarton won and successfully enforced the second arbitral award in France.243 There were, thus, at this point two conflicting arbitral awards in France: the Swiss annulled first Swiss arbitral award and the French enforced second Swiss arbitral award.244 In the end, the French courts resolved the conflicting arbitral awards by dismissing the second arbitral award.

240 Gharavi, Effectiveness (n 239); Bird (n 233).
242 Gharavi, Effectiveness (n 239); Gharavi, ‘Nightmare’ (n 238) 20-24; Bird (n 233).
243 Gharavi, Effectiveness (n 239); Gharavi, ‘Nightmare’ (n 238); Bird (n 233).
244 Gharavi, ‘Nightmare’ (n 238) 20-24.
award in favour of Hilmarton.\textsuperscript{245} Meanwhile, one arbitral award remained in force in England where it was granted enforcement by England’s High Court.\textsuperscript{246}

The Paris Court de Grande Instance reaffirmed the Hilmarton rule in Maximov v. NLMK, where the court recognized an arbitral award, rendered in Russia and later set aside by a Russian court on the grounds of non-arbitrability, because the Russian court’s annulment was not sufficient to refuse enforcement of the arbitral award in France.\textsuperscript{247}

6.5.2. The Chromalloy Case

In Chromalloy Aeroservices v. The Arab Republic of Egypt,\textsuperscript{248} an arbitral award rendered in Egypt was later set aside by the Cairo Court of Appeals. As a background,\textsuperscript{249} Chromalloy contracted with Egypt to provide maintenance of air force helicopters. Thereafter, Egypt terminated the contract and Chromalloy initiated and won the arbitration proceedings. Chromalloy took the arbitral award to the US for enforcement. Meanwhile, Egypt appealed the arbitral award to the Cairo Court of Appeal, which was asked to examine the proper application of Egyptian law by the arbitral tribunal.\textsuperscript{250} The Court of Appeal nullified the arbitral award because the arbitral tribunal should have applied Egyptian administrative law rather than civil law.\textsuperscript{251} The US court, despite the annulment by the Egyptian court granted leave for enforcement under Article V and Article VII of the New York Convention.\textsuperscript{252}

\begin{itemize}
\item \textsuperscript{245} ibid.
\item \textsuperscript{246} Omnium de Traitement et de Valorisation SA v Hilmarton Ltd, [1999] 2 Lloyd’s Rep 222 (Eng).
\item \textsuperscript{247} Salomon and Vazova (n 236).
\item \textsuperscript{250} Chromalloy Aeroservices v The Arab Republic of Egypt, 939 F Supp 907, 909 (DDC 1996), (1996) Mealey’s Int’l Arb Rep, August, C-54; Kreindler (n 235) (stating that “it was on the basis of Article 53(1)(d) of the 1994 Arbitration Law that the Cairo Court of Appeal undertook its examination of the ICC final award entered by the arbitral tribunal in Chromalloy’).
\item \textsuperscript{251} Kreindler (n 235).
The *Chromalloy* decision caused a stir in the international arbitration community. Three cases that followed *Chromalloy*, however, refused to enforce a previously annulled arbitral award.\(^{255}\)

In *Baker Marine (Nig) Ltd v. Chevron (Nig) Ltd*,\(^{254}\) the Second Circuit refused to enforce an arbitral award that was previously annulled by a Nigerian court because according to the *Baker Marine* court, there was no sufficient reason to override the judgment of the Nigerian Federal High Court. In *Spier v. Calzaturificio Tecnica SpA*,\(^{255}\) a US court likewise refused to enforce an annulled arbitral award because the Italian court set aside the arbitral award on the basis that the arbitrators exceeded their powers, which is also a valid ground under the US Federal Arbitration Act.

Finally, in *TermoRio S.A. E.S.P. v. Electranta S.P.*,\(^{256}\) the US Court of Appeals for the District of Columbia declined to enforce an annulled arbitral award, a ruling that did not overrule *Chromalloy*, but distinguished it on several grounds.\(^{257}\) The *TermoRio* court stated that to be overturned on public policy grounds, a foreign arbitral award would have to be “repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.”\(^{258}\) Some commentators view the *TermoRio* case as the correct result, which was arrived at with a comprehensive and in depth view of the policies underlying Article V(1)(e) and Article VII of the New York Convention.\(^{259}\)

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\(^{253}\) For other cases refusing to enforce an annulled award, see *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd*, 191 F3d 194 (2d Cir 1999) (refusing to enforce award annulled by a Nigerian court because there was no sufficient reason to override the judgment of the Nigerian Federal High Court); and *Spier v Calzaturificio Tecnica SpA*, 77 F Supp 2d 405 (SDNY 1999) (refusing to enforce annulled award because the Italian court set aside the award on the basis that the arbitrators exceeded their powers, which is also a valid ground under the US Federal Arbitration Act).

\(^{254}\) *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd*, 191 F3d 194 (2d Cir 1999).

\(^{255}\) *Spier v Calzaturificio Tecnica SpA*, 77 F Supp 2d 405 (SDNY 1999).

\(^{256}\) *TermoRio v Electranta SP*, 487 F3d at 938 (DC Cir 2007).

\(^{257}\) The *TermoRio* court distinguished itself from *Chromalloy* on the fact that the connections were with Colombia and that there was no finality clause precluding judicial review. Linda Silberman, ‘The New York Convention After Fifty Years: Some Reflections on the Role of National Law’ (2009) 38 GA J Int’l & Comp L 25, 31, fn 26; Bird (n 233).

\(^{258}\) *TermoRio*, 487 F3d at 938.

The latest of these series of cases decided very recently seems to harmonise US case law. In *Corporacion Mexicana de Mantenimiento Integral v. PEMEX-Exploracion y Produccion* [hereinafter *COMMISA*], the Southern District Court of New York [hereinafter SDNY] upheld an ICC arbitral award that had previously been set aside at the seat of arbitration in Mexico. In *COMMISA*, a case involving a contract for the construction of natural gas platforms, the SDNY court previously confirmed the ICC arbitral award, but PEMEX appealed and concurrently sought to set aside the arbitral award in Mexico City. After three failed attempts at setting aside the arbitral award in Mexico, PEMEX succeeded based on a new Mexican law prohibiting the arbitration of administrative rescissions. The Second Circuit remanded the case to the SDNY after the arbitral award was set aside in Mexico. The SDNY enforced the arbitral award stating that the Mexican court “violated basic notions of justice” when it set aside the arbitral award because the Mexican law was applied *ex post facto* [from after the fact] and because setting aside the award would leave *COMMISA* without a forum to litigate its claims. The *COMMISA* case seems to harmonise US case law regarding the enforceability of arbitral awards previously set aside at the place of arbitration, especially between the *Chromalloy* case which enforced an arbitral award that had been set aside at the seat of arbitration and the *Termo Rio* case, which refused to enforce an arbitral award previously set aside at the seat of arbitration because it did not violate basic notions of justice. The *COMMISA* case revived *Chromalloy*, while retaining the basic notions of justice or fundamental fairness standard of *Termo Rio*.262

While the *COMMISA* case seems to put the US in line with the French position in *Hilmarton*, what differentiates the two positions is that US courts will enforce an arbitral award that has been set aside at the seat of arbitration only within the framework of a fundamental fairness inquiry regarding the proceedings in the foreign


261 Although the *COMMISA* case was based on the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention), Article V of the Panama Convention is virtually identical to Article V of the New York Convention. Salomon and Vazova (n 236).

262 Salomon and Vazova (n 236).
court, while French courts will likely enforce a previously set aside foreign arbitral award at the seat of arbitration absent such an inquiry.  

Belgium has also been viewed by some commentators as allowing the enforcement of a foreign arbitral award that has been set aside at the place of arbitration because of the decision of the Court of First Instance of Brussels in *Sonatrach v. Ford Bacon Davies*.  

Matray notes, however, that *Sonatrach* is an isolated and outdated case and that no other case law supports such view of Belgium’s enforcement of a foreign arbitral award that has previously been set aside.  

In *Sonatrach*, the Belgian court denied the plaintiff’s motion to oppose enforcement of the foreign arbitral award, which had been previously set aside by an Algerian court because at the time the setting aside was made, Algiers had not yet become a signatory to the New York Convention. The Belgian court found that no ground for setting aside had been invoked by the plaintiff that could fall under the Belgian Code of Civil Procedure, nor any other ground allowing for setting aside in Belgium.  

Dutch courts, on the other hand, seem to follow the US approach and have in two instances enforced foreign arbitral awards that were previously set aside at the seat of arbitration. In 2009, the Amsterdam Court of Appeal in *Yukos Capital S.A.R.L. v. OAO Rosneft* held that a foreign arbitral award rendered in Russia but later set aside by a Russian court was nevertheless enforceable in the Netherlands because the setting aside of the foreign arbitral award was not based on an impartial and independent judicial process. However, in a more recent case, the Amsterdam Court of Appeal in *Maximov v. NLMK* held that the judgment of a Russian court to set aside an arbitral award that was rendered in Russia should be respected unless the party can show that the setting aside was based on an unfair trial. Like US courts, Dutch courts examine the

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263 ibid.
264 *Sonatrach v Ford Bacon Davies* (Brussels Court of First Instance).
266 Matray (n 265).
267 *Yukos Capital SARL v OAO Rosneft*, Case No 200-005-269/01, Amsterdam Court of Appeal (28 April 2009).
268 *Maximov v NLMK*, Case No 200-100-508/01, Amsterdam Court of Appeal (18 September 2012).
fairness of the proceedings to determine whether a foreign arbitral award ought to be enforced despite its having been set aside at the seat of arbitration.

6.6. Conclusion

This chapter examined the setting aside of foreign arbitral awards in the context of the GCC states. The research suggests that setting aside of foreign arbitral awards remains an unsettled area of international arbitration, that continues to create conflicting, and certainly non-uniform rules or application of rules, not only for GCC states but also for countries like France and the US. In the midst of this muddled jurisprudence, GCC states strive to strike a balance of embracing the international arbitration norm, while trying to remain consistent with the Shari’a and protect national interests.

The Shari’a itself only provides a general rule for the setting aside of an arbitral award. What remains are the New York Convention and the UNCITRAL Model Law at one hand and the national arbitration laws of each of the GCC states on the other hand. It seems that since the GCC states are all signatories to the New York Convention, and lacking any substantial difference between the New York Convention and the Shari’a on setting aside, GCC states ought to uniformly replace the grounds for setting aside under its national laws with the grounds under the UNCITRAL Model Law, which follows the New York Convention. Such an approach would be simple and achievable for GCC states to arrive at a uniform system for enforcing foreign arbitral awards.

After discussing the setting aside of foreign arbitral awards in this chapter and keeping in mind the discussions in earlier chapters, the last chapter that follows will discuss how the research questions have been addressed by the study, and then propose a set of rules to improve the enforcement of foreign arbitral awards in the GCC states.
CHAPTER SEVEN

CONCLUSIONS AND PROPOSALS

7.0. General Observations

The GCC states, in a journey to transform towards an economically diverse and internationally competitive region, unanimously embraced international commercial arbitration by acceding to the New York Convention and the ICSID Convention.

Accession is one thing, however, while practice is another. While some GCC states have long been signatories to the New York Convention, only recently has there been a positive outlook that the GCC states are eager to embrace the New York Convention’s pro-enforcement policy. The recent passage of the Saudi Arbitration Law of 2012, 1 the increase in the number of arbitration centres in the region, and recent pro-enforcement decisions in the UAE all seem to signal that GCC states are working towards an arbitration friendly environment consistent with international arbitration norms.

Yet, it may be too soon to celebrate. Concerns and criticisms remain as to the procedures for enforcing foreign arbitral awards in most GCC states that frustrate the very purpose of the New York Convention. Reliance on outdated and incomplete enforcement procedures has led courts in the GCC states to refuse enforcement on technical grounds, delay enforcement proceedings, or deny enforcement on unclear public policy reasoning.

This research compared and analysed the different potential sources for challenges to the enforcement of foreign arbitral awards in the GCC states. It examined the scope of domestic, foreign, and international arbitral awards within the framework of the GCC states in Chapter Two; the conditions for the enforcement of foreign arbitral awards in the GCC states in Chapter Three; the potential challenges to the enforceability of foreign arbitral awards in the GCC states in Chapter Four; the effect of

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public policy on the enforcement of foreign arbitral awards in the GCC states in Chapter Five; and the setting aside of arbitral awards within the framework of the GCC states in Chapter Six. These chapters aimed to answer the research questions set out in the introduction and discussed more fully in Section 7.1. Part I discusses the research questions and explains how the research has answered the questions supported by the literature review and the survey. Part II proposes a set of rules relating to enforcement of foreign arbitral awards in a Uniform GCC Arbitration Law. Finally, part III explains the research’s contribution to the literature.

PART I

7.1. The Research Questions

This study set out in the introduction to answer six research questions regarding the enforcement of foreign arbitral awards in the GCC states, with the overarching goal of identifying the challenges to the enforcement of foreign arbitral awards in the GCC states, whether these challenges can be overcome, and to then propose a set of rules to govern the enforcement of foreign arbitral awards in the GCC states that reconciles the requirements of the Shari’a, regional and international agreements, and the national laws of each of the GCC states. Additionally, a survey was conducted to determine the perception of practitioners in the field of arbitration regarding arbitration and the enforcement of foreign arbitral awards in the GCC states. The overall results of the survey strengthened many of the conclusions made by the research based on the review of existing literature. The survey was also used as a tool to test the six rules relating to the enforcement of foreign arbitral awards in a Uniform GCC Arbitration Law proposed in this chapter. The results of the survey, therefore, will be discussed throughout this chapter. This section discusses the answer to each of the six questions that this research set out to investigate.

2 See generally, Appendix II, Survey Report.
3 Appendix II, Survey Report, I(1.0.).
7.1.1. Question One: How have arbitration and foreign arbitral awards been applied and developed in the GCC states?

As regards arbitration in general, the Holy Qur’an and the Sunna of the Prophet Muhammad (PBUH) recognized the validity of arbitration as a mechanism for dispute resolution. Regardless, arbitration in the GCC states somehow failed to develop and reconcile itself with modern and international arbitration despite that “Bahrain has been an international commercial-arbitration centre long before Paris and London.”

Arbitration, especially public international arbitration or arbitration between Islamic countries or their nationals and non-Islamic parties, has had a long and often troubled history in the GCC states. In most GCC states, modern international arbitration has long been viewed with doubt and scepticism, though the recent developments in the GCC states seem to show a trend towards acceptance of modern international arbitration, as will be discussed below. Historically, GCC states have had national legislations that have been unfavourable to international arbitration, especially as to the enforcement of foreign arbitral awards, and GCC states’ courts all too often impermissibly interfere with international arbitration cases and foreign arbitral awards.

The Holy Qur’an gives general guidelines regarding arbitration and the enforcement of arbitral awards in Islamic countries. Therefore, GCC states adopted secular laws that set out the specific rules for arbitration and the enforcement of arbitral awards under their respective codes of civil procedures. These laws primarily applied to domestic arbitral awards. As GCC states acceded to the New York Convention, the ICSID Convention, and the Riyadh Convention, however, courts in GCC states continued to apply domestic arbitration rules and procedures to the enforcement of foreign arbitral awards. For some time, Bahrain and Oman were the only two GCC

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5 Brower and Sharpe (n 4).
6 Despite this trend toward acceptance of international arbitration, there also seems to be a call for a more fundamental Shari’a based legal system. Essam Alsheikh, ‘Court Intervention in Commercial Arbitral Proceedings in Saudi Arabia: A Comparative Analytical Study of Shari’s Based Statutes and International Arbitral Practices’ (DPhil thesis, University of Portsmouth 2011) (stating that there are “increasing calls from GCC countries to return to Shari’ah as a source of jurisdiction in all aspects of life. The most significant of these calls concerns individuals, properties and trade”).
7 Brower and Sharpe (n 4).
states that enacted a statute based on the UNCITRAL Model Law with a separate enforcement procedure and rules for international arbitral awards. Recently, the KSA enacted the Saudi Arbitration Law of 2012, which does not separately cover international awards, but is largely modelled after the UNCITRAL Model Law. The other three GCC states (Kuwait, Qatar, and the UAE) have not yet enacted an arbitration law based on the UNCITRAL Model Law and continue to rely on their civil procedure code for the enforcement of arbitral awards, both domestic and foreign.

The adoption of the UNCITRAL Model Law is usually seen as a positive sign, as discussed in the literature. In the survey, the majority of respondents viewed that the adoption by Kuwait, Qatar and the UAE of the UNCITRAL Model Law would be beneficial. The results were similar for the three states when asked whether adopting the UNCITRAL Model Law would be beneficial for each of these GCC states with respondents stating that it would be 8.42 out of 10 or 84.2% beneficial to Qatar, 8.67 out of 10 or 86.7% beneficial to Kuwait, and 8.82 out of 10 or 88.2% beneficial to the UAE. These results confirm the conclusion and the proposal by the research that all the GCC states ought to adopt the UNCITRAL Model Law and a Uniform GCC Arbitration Law.

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9 For comparison, see Zain Sharar, ‘Does Qatar Need to Reform its Arbitration Law and Adopt the UNCITRAL Model Law for Arbitration? A Comparative Analysis’ (2011) 3 Int’l J of Arab Arb 2 (stating that “the arbitration system in the Arab world may be classified as follows: a) Systems modernizing their laws by adopting the UNCITRAL Model Law on Arbitration [e.g. Jordan, Bahrain, and Oman], b) Systems modernizing their laws by adopting the trends in the new French law [e.g. Lebanon and Algeria], c) Systems adopting Islamic Law [e.g. Saudi Arabia and Yemen], d) Systems considering or reconsidering amending their laws or issuing new legislations on arbitration [e.g. Qatar]”); Zara Merali, Sharif Hamadeh and Adam Peters, ‘Kuwait to open representative office of GCC Commercial Arbitration Centre’ (DLA Piper, 26 September 2013) <http://www.dlapiper.com/kuwait-to-open-representative-office-of-gcc-commercial-arbitration-centre/> accessed 14 Oct 2013.

10 Appendix II, Survey Report, II(2.2.3.)
7.1.2. Question Two: To what extent does the Shari’a affect the enforcement of foreign arbitral awards in the GCC states, and does the Shari’a apply to domestic, foreign, and international arbitral awards?

One can examine the procedural and substantive rules for the enforcement of foreign arbitral awards to see whether GCC states judges could refer to the Shari’a as a basis for non-enforcement or the setting aside of a foreign arbitral award. In other words, one can look at the areas in the enforcement of a foreign arbitral award, where the Shari’a overlaps with the New York Convention and the ICSID Convention. In this context, this research identified that the Shari’a can affect the enforcement of foreign arbitral awards, whether or not it has been chosen by the parties as the governing law: (1) by the determination of whether an arbitral award is domestic or foreign under the Shari’a, (2) by conditions set forth by the Shari’a prior to enforcing a foreign arbitral award, (3) by the potential challenges the Shari’a provides against the enforcement of foreign arbitral awards, (4) by the grounds upon which the Shari’a may be raised as a public policy defence, and (5) by the grounds upon which a foreign arbitral award may be set aside under the Shari’a.

As to the first factor, the research reveals that the Shari’a does indeed have an approach to the definition of domestic and foreign arbitral awards that at first glance seems inconsistent with the New York Convention and the ICSID Convention. A closer look, however, shows that the Shari’a is largely consistent with the New York Convention, and the ICSID Convention for that matter. As one respondent to the survey aptly put it, “in my opinion, there is no conflict between the New York Convention and Shari’a principles.”

The extent to which the Shari’a influences rules on the enforcement of domestic arbitral awards depends on a specific country, an issue that is also touched upon in Question Three. As a rule of thumb, courts in GCC states that apply the Shari’a as the source of law will tend to define domestic arbitral awards as those involving at least one Muslim party. On the other hand, courts in GCC states that apply the Shari’a, as the

11 Appendix IIa, Survey Results, Q20, p 20/38.
primary source of law will tend to define domestic arbitral awards as those that took
place within an Islamic country, the majority view in the GCC states.

As regards foreign arbitral awards, although the word “foreign” under
international arbitration norms refers to arbitral awards made outside of a country where
the arbitral award is being enforced, the definition of “foreign” arbitral award under the
Shari’a can become more complicated in its jurisdictional reach because of the religious
aspects of the Shari’a. According to El-Kadi and El-Ahdab, “as soon as a Muslim
becomes a party to the contract, Islamic Law governs the contract and one must take
into account such rules of Islamic law.”\(^{12}\) In other words, under the Shari’a, a “foreign”
arbitral award is an arbitral award that is not governed by the Shari’a. The applicability
of the Shari’a, however, arguably follows the person’s religion. A Muslim could
potentially remain governed by the Shari’a regardless of physical location. This is a key
distinction between the jurisdictional applications of the Shari’a as opposed to the
jurisdictional reach of secular laws that normally follow the geographically defined
borders of a sovereign. To determine whether an arbitral award is “foreign” under the
Shari’a, the first concern is whether the arbitration, and hence the arbitral award, took
place within or outside an Islamic country.\(^ {13}\)

Courts in the GCC states will have to determine whether an arbitral award is
domestic or foreign and in so doing will likely be influenced by the Shari’a. In
addressing the definition of “foreign” under the Shari’a, one is able to clarify the
Shari’a distinction between domestic and foreign, as expressed by different scholars,
whether from the Maliki, Hanbali, and Shafi’i or Hanafi schools. While at first glance
the Shari’a distinction between foreign arbitral awards made within or outside an
Islamic country may seem inconsistent with the New York Convention. However, the
New York Convention’s definition of “foreign” and non-domestic arbitral awards is
ultimately compatible with the Shari’a position on “foreign” arbitral awards.

As to the second factor, the Shari’a could potentially affect the enforcement of a
foreign arbitral award based on conditions to enforcement required by the Shari’a but

\(^{12}\) Omar El-Kadi, ‘L’Arbitage International entre le Droit Musulman et le Droit Francais et Egyptien’

\(^{13}\) This is the same approach taken by El-Ahdab. Abdel Hamid El-Ahdab and Jalal El-Ahdab, Arbitration
not required by the New York Convention, the ICSID Convention, or even the national law of a GCC state. There are conditions in the Shari’a like the content requirement, the validity of the arbitration agreement, and the summary of claims that are inconsistent with the New York Convention. Whenever these conditions are raised as an issue, the question that must be addressed is whether the Shari’a conditions will prevail in light of regional and international agreements, and the domestic legislation of each of the GCC states. The answer to this question is not simple. At the outset, it is important to begin that the New York Convention will likely prevail in the GCC states, or one should aptly say should prevail.

In the survey, for example, the respondents were asked whether the New York Convention or the Shari’a would prevail if ever there were a conflict between the two, and the respondents were largely divided on the question with 53.13% correctly stating that the New York Convention would prevail, while 46.88% stated that the Shari’a would prevail. Answering the question is quite tricky, as it requires knowledge of both the New York Convention and the Shari’a, especially the Shari’a. After a review of the literature, this thesis concludes that the Shari’a and the New York Convention would not actually conflict since the New York Convention allows for the public policy defence under which the Shari’a would qualify. Further, the Shari’a requires all Muslims to honour their contract, which the majority of Shari’a scholars have interpreted to mean that Muslims have an obligation to follow international agreements.

Whether the New York Convention actually prevails in practice is another matter, and the split among practitioners in the GCC states on the same question is a sign that there will be instances when GCC states judges would ignore the New York Convention for fear of violating the Shari’a. While there have been recent trends, for example in the UAE, to apply the New York Convention without resorting to the conditions of the Shari’a, it remains to be seen whether the trend will continue.

As to the third factor, the Shari’a plays a limited role in the potential challenges to the enforcement of a foreign arbitral award because the grounds for which to challenge the enforcement of a foreign arbitral award under the Shari’a have largely been overshadowed by the New York Convention and the national laws of GCC

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14 Appendix II, Survey Report, II(2.6.1.).
states. In practice, a party challenging the enforcement of a foreign arbitral award would do so under the grounds listed in the New York Convention; and a party challenging the enforcement of a domestic arbitral award would do so under the national arbitration legislation of GCC states. This is especially true because the Shari’a had not explicitly stated grounds under which to challenge the enforcement of a foreign arbitral award.

As to the fourth factor, the Shari’a does affect the enforcement of foreign arbitral awards with regards to the public policy defence. In the survey, the respondents were asked an opened-ended question as to the most likely reason for the non-enforcement of a foreign arbitral award. The highest number of common responses is eleven (11), identifying public policy as the most likely reason for non-enforcement. This research reveals, however, that a closer look at the public policy under the Shari’a shows more compatibility than differences with the public policy under international and regional agreements and the public policy of each of the GCC states. There is, therefore, something else going on behind the application of the public policy defence, and this research shows that judicial activism is the culprit behind the use of the Shari’a to deny enforcement based on public policy, even when there is no public policy violation. The issue of public policy is discussed more fully in Chapter Five and Section 7.1.5. Suffice it to say that while Shari’a public policy could be harmonised with international arbitration norms, save for very specific fundamental issues under the Shari’a such as those which are haram [prohibited], there seems to be a practice among courts in the GCC states to refuse enforcement of foreign arbitral awards based on Shari’a public policy, which is confirmed by experienced arbitration practitioners in GCC states through the survey. In this sense, the Shari’a does indeed affect the enforcement of foreign arbitral awards.

As to the fifth factor, the Shari’a, generally speaking, does not affect the setting

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16 Appendix II, Survey Report, II(2.3.).
17 ibid.
18 A majority of respondents to the survey with 48.39% view that judges or arbitrators should apply the Shari’a when determining whether public policy has been violated only when a violation of a fundamental Shari’a principle has been established. Appendix II, Survey Report, II(2.6.2.).
aside of foreign arbitral awards. The Shari’a actually does not allow, as a general rule, for the setting aside of an arbitral award. What is left, thus, is the New York Convention and the UNCITRAL Model Law on one hand, with the grounds listed therein for non-enforcement and setting aside of an arbitral award, and on the other hand, the domestic arbitration laws of each of the GCC states with provisions on setting aside an arbitral award, some of which already follow the UNCITRAL Model Law. Since GCC states are all signatories to the New York Convention, and lacking any substantial difference between the New York Convention, the UNCITRAL Model Law, and the Shari’a, GCC states ought to actually adopt the mechanisms and grounds for setting aside as set forth in the UNCITRAL Model Law and the New York Convention.

7.1.3. Question Three: Are there differences in interpreting the Shari’a among the GCC states, and how would these differences, if any, affect the enforcement of foreign arbitral awards?

The interpretation of the Shari’a will depend largely on the Shari’a school and how an Islamic country expressed the Shari’a as the “source of law” or the “primary source of law.” In the GCC states, for example, KSA follows the Shari’a as the source of law under the Hanbali School, while the UAE follows the Shari’a as the primary source of law. Accordingly, in the KSA, all laws must strictly follow the Shari’a. As to legislatively enacted rules regarding the enforcement of arbitral awards, the Shari’a is incorporated into the enacted rules. In the UAE, on the other hand, the Shari’a acts as a guiding principle for enacting rules on the enforcement of arbitral awards. Once the legislature has consulted the Shari’a as a primary source of law and enacted a set of rules governing, say, the enforcement of arbitral awards, the enacted laws are able to stand on their own.

It is not disputed, however, that while “arbitration differs from one jurisprudence school to another,” all four schools of the Sunni branch recognize

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19 The different views of the schools of thought of Islam are discussed in more detail in Chapter Two.
20 Alsheikh (n 6) 23.
arbitration as a means of dispute resolution. In the survey, the respondents were asked which Shari’a school of thought or fiqh is followed by the majority of judges and lawyers in their respective GCC state. The majority of the respondents at 30% stated that Maliki is followed by the majority, followed by 17.50% for Hanbali, 15% for Hanafi, and 2.5% for Shafi’i.

Differences in the interpretation by Shari’a schools affect the enforcement of foreign arbitral awards. This can be seen in numerous instances. In the conditions for enforcement, the Shari’a requires the same contents of the arbitral award, and there is a difference in the view of the majority of Shari’a scholars and some Shafi’i scholars as to whether arbitrators or arbitral tribunals are required to state the rationale of the arbitral award. Differences among the schools also arise relating to the form and content of the arbitral award. In the writing requirement, only three schools, the Hanafis, Shafi’i, and Hanbali, are clear that an arbitral award must be attested to in court or testified by two just witnesses. Further, while Shari’a scholars in all schools agree that an arbitral award is final, there are differences in interpreting when the arbitral award or how the arbitral award becomes final. There is even a divide among Shafi’i scholars on this issue. A clearer difference emerges among the schools when it comes to arbitrability, an issue that will directly affect the enforcement of a foreign arbitral award. The four schools in the Sunni branch disagree as to the scope of arbitration in the Shari’a. Thus, the arbitrability of a dispute may also change among the GCC states depending on the Shari’a school a GCC state follows.

There are also differences among the schools as to the potential challenges to enforcement or grounds for non-enforcement, which under the Shari’a is also the same as the grounds for setting aside an arbitral award. The schools differ on whether a non-Muslim can be an arbitrator whenever a Muslim is a party to a dispute. While the majority of Shari’a scholars so requires, there are different viewpoints as to when a non-

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22 See Alsheikh (n 6) ch 2, fn 9 (stating that Muslims today “belong to one of four Islamic Schools, which are the most important at present – Hanafì’h, Malaki’h, Shafi’i’h and Hanbali’h”). The Sunni branch has four major schools of thought that interpret the Shari’a, each varying in its doctrinal approach to dispute resolution: the Maliki School, the Hanafi School, the Shafi’i School, and the Hanbali School.
23 Appendix II, Survey Report, II(2.1.7.).
Muslim can become an arbitrator over a dispute involving a Muslim, some like Al-Siyabi, stating that Muslims can consent to it. The same issue discussed earlier in the conditions for enforcement with regards to arbitrability also arises in the challenge to the enforcement of a foreign arbitral award.

Lastly, there are differences among the Sunni schools in interpreting the *riba* [interest] prohibition. The views of each of the schools of thought in the Sunni branch, though in agreement as to the prohibition, differ as to the degree of strict adherence to the prohibition on the *riba* [interest]. Generally, the Hanbali and Maliki views are stricter, while the Hanafi and Shafi’i views are less strict.

### 7.1.4. Question Four: Do international agreements like the New York Convention and the ICSID Convention harmonise the various arbitration principles of different legal systems?

GCC states are required to meet their treaty obligations under the New York Convention and the ICSID Convention, an obligation that is also imposed by the Shari’a. Still, the true measure for success for an international arbitration convention is the extent to which it can bring together different legal systems and harmonise them under the banner of international arbitration norms. With regard to the GCC states, this research has shown that the New York Convention and the ICSID Convention are to a large extent succeeding at harmonising the arbitration principles of GCC states. While it is too early to tell the extent to which optimal harmonisation is achieved, what can be said is that there are promising signs towards complete integration and harmonisation, especially the efforts by the UAE to embrace a pro-enforcement policy and the adoption by the KSA of a Saudi Arbitration Law of 2012 that is closer to the international arbitration norm. Additionally, a comparative analysis of the arbitration rules under the Shari’a, the New York Convention, ICSID Convention, and the national legislation of GCC states, shows that further harmonisation is very possible.

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In regards to the ICSID Convention, that the framers of the ICSID Convention made it difficult for states to interfere with the arbitration process and the enforcement of arbitral awards goes a long way in harmonising the arbitration of state investment disputes. It is through this approach that the ICSID Convention has succeeded, at least at the enforcement stage, in comparison to the New York Convention. Unlike the New York Convention, under the ICSID Convention domestic courts are not empowered to review ICSID arbitral awards even during the enforcement process.\footnote{Ivar Alvik, \textit{Contracting with Sovereignty: State Contracts and International Arbitration} (Hart 2011) ch \textit{3}.} Domestic courts cannot even review the arbitral award based on public policy,\footnote{Christoph Schreuer, ‘Interaction of International Tribunals and Domestic Courts in Investment Law, Contemporary Issues in International Arbitration and Mediation’ in Arthur Rovine (ed), \textit{Contemporary Issues in International Arbitration and Mediation} (The Fordham Papers 2010) \texttt{<http://www.univie.ac.at/intlaw/wordpress/pdf/interactions_int_tribunalsDomestic.pdf>} accessed 11 March 2014.} unlike Article V(2)(b) of the New York Convention. The ICSID Convention’s arbitration process is insulated from domestic court interference from commencement up until the enforcement of the arbitral award, where an enforcement order is granted. Because of the ICSID Convention’s insulated framework, it has been successful at harmonising state investment arbitration.

In regards to the New York Convention, harmonisation of the arbitration principles of different legal systems becomes possible so long as international arbitration norms emerge regarding the interpretation and application of the New York Convention. With that said, international arbitration norms have emerged that make it more possible to harmonise arbitration principles. One key principle is the pro-enforcement policy of the New York Convention. This principle, on its own, serves as a vision for signatories to the New York Convention, and in a way, as a litmus test for whether a signatory to the New York Convention follows the international arbitration norms. In this sense, the New York Convention has achieved harmonisation. As to the GCC states, harmonisation under the New York Convention may indeed be possible as shown by the analysis in this research.

The New York Convention can harmonise the definition of foreign arbitral award. The first and second approaches to defining a “foreign” arbitral award under the Shari’a contradict with the New York Convention since the New York Convention,
according to van den Berg, defines a foreign arbitral award as an arbitral award “made in *any* other State”27 without regard to nationality or religion, while the first and second view in the Shari’a considers an arbitral award domestic whenever it occurs outside of an Islamic country and one or both of the parties to the arbitration are Muslims. Arbitral awards made in another state but considered as domestic in the enforcing state according to van den Berg, however, remain foreign under the New York Convention’s non-domestic criterion. Van den Berg clarified this point when he stated “the rule that the New York Convention is always applicable to the recognition and enforcement of an arbitral award made abroad applies even if the award made in the other country is considered domestic by the enforcing court.”28 Likewise, even if Shari’a scholars were to apply the first and second view as to the definition of a “foreign” arbitral award, they must apply the New York Convention regardless because the determination that an arbitral award was made outside of an Islamic country, in other words in another state, remains within the purview of the New York Convention’s definition of “foreign” arbitral award.

While the New York Convention has not yet succeeded in doing so, harmonisation will also be possible in the GCC states with regard to the conditions for enforcement. Currently, the conditions placed by each of the GCC states are much more restrictive and more of an impediment to enforcement than the Shari’a and the New York Convention. In this regard, the additional conditions placed by GCC states are likely the reason for the non-enforcement of foreign arbitral awards. When domestic courts look to the New York Convention as a guide to enforcement, instead of focusing solely on the domestic legislation, there seems to be more success in enforcement. On the other hand, failure by domestic courts to adhere to the pro-enforcement bias of the New York Convention, but rather to take a protectionist stance in favour of domestic concerns lead to non-enforcement of foreign arbitral awards.

28 van den Berg (n 27), referring to Law of Mar 15, 1961, § 2, Bundesgesetzblatt [BGBI] II, 121 (W Ger) (van den Berg used as an example the West German law which applies the New York Convention to an award made abroad even if it would have been deemed domestic for having employed German procedural law).
The New York Convention has also succeeded in harmonising the potential challenges to enforcement in the GCC states. On paper, since all GCC states have ratified the New York Convention, the potential challenges to the enforcement of a foreign arbitral award are consistent with international arbitration norms. In practice, however, courts in GCC states like the UAE continue to deviate from the international practice, allowing for additional grounds for challenging the enforcement of foreign arbitral awards than allowed under the New York Convention.

The New York Convention, however, has largely lagged in harmonising the rules on public policy and the grounds for the setting aside of arbitral awards. As a caveat, however, the lack of harmonisation is not only limited to the GCC states, but for all New York Convention signatories. There is an ongoing debate as to the definition and scope of the public policy defence under the New York Convention. The drafters of the New York Convention may have intentionally left the issue of public policy largely undefined as seen in the inherent vagueness in the concept. For now, the majority of New York Convention signatories seem to follow the rule created by Parsons & Whittemore in favour of a narrow interpretation of public policy.

Finally, harmonisation has also seemed difficult as to the setting aside of arbitral awards. Setting aside remains an unsettled area, especially in light of Hilmarton and Chromalloy, and it continues to create conflicting, and certainly non-uniform rules or application of rules, not only for GCC states but also for countries like France and the US. In the midst of this muddled jurisprudence, GCC states strive to strike a balance of embracing the international arbitration norms, while trying to remain consistent with the Shari‘a and protect national interests.

7.1.5. Question Five: How does public policy affect the enforcement of foreign arbitral awards in the GCC states?

Any sort of proposal to improve the enforcement of foreign arbitral awards in the GCC states has to take into account public policy. While the public policy of GCC states ought to be the same because all GCC states adhere to the Shari‘a, a closer look reveals a landscape that is just as fraught with nuances over the concept of public policy.
as any part of the world. While there are large patches of commonality among the GCC states, stemming largely from the Shari’a concepts of public policy and arbitrability, each GCC state does differ at one point or another as to what constitutes public policy. The starting point for the difference could be the differences in the doctrinal interpretation and application of the Shari’a.

An examination of the effect of public policy on the enforcement of foreign arbitral awards in the GCC states reveals that there seems to be more in common among the Shari’a, regional and international agreements, and even each of the GCC states with regards to procedural public policy, which is largely concerned with fairness and due process. It is with substantive public policy that a substantial divergence in the concept of public policy begins to emerge. This is true with regards to both express substantive public policy and implied substantive public policy, or arbitrability.

Overall, what ultimately becomes the source for the obstacles to enforcement of foreign arbitral awards under the umbrella of public policy is how a GCC state’s judiciary approaches the application of the public policy defence: whether narrowly or broadly. In the context of the GCC states, there is a tendency for judges, whenever the Shari’a is invoked, to cast a wide net in favour of public policy.\(^{29}\) There are, however, signs that such an approach is not necessarily the only path under the Shari’a, as is currently being demonstrated by cases coming from UAE courts. In other words, it is ultimately possible for all GCC states to balance the Shari’a concepts of public policy with the concept of public policy as espoused by the international arbitration norms under the New York Convention. As Wakim suggests, however, to arrive at this balance, “all this requires government function and public policy value judgments to be open and accessible.”\(^{30}\)

\(^{29}\) Interestingly, judges in the GCC states are trained to give a strict interpretation to written words, though they tend to give a liberal interpretation when it comes to public policy. See Mark Hoyle, ‘Topic in focus: demystifying UAE arbitration law’ (Lexology, 8 November 2013) <http://www.lexology.com/library/detail.aspx?g=fc4ff6d6-cafb-4063-8dc1-f20fc1544e9c> accessed 15 January 2014 (stating that “the training of the judges [in the UAE] is to scrutinize the written words …rather than assume implied terms, there is a strict approach”).

7.1.6. Question Six: What are the major challenges to the enforcement of foreign arbitral awards in the GCC states, and what are their sources?

This research shows that there remain challenges to the enforcement of foreign arbitral awards in the GCC states. In the survey, respondents were asked what they thought were the most likely reason for the non-enforcement of a foreign arbitral award. The highest number of common responses is eleven (11) out of 38, identifying public policy as the most likely reason for non-enforcement. The second highest number of common responses had a total of six (6) out of 38, identifying the judiciary’s lack of familiarity or knowledge with international arbitration, the New York Convention, or some form of judicial activism or hostility as the reason for non-enforcement. The third highest number of common responses had five (5) out of 38, identifying the failure of the arbitration statute as the reason for non-enforcement. The fourth highest number of common responses had four (4) out of 38, identifying jurisdictional issues as the reason for non-enforcement. The fifth highest number of common responses had three (3) out of 38, identifying social or political reason for non-enforcement. The rest of the remaining nine (9) out of 38 responses varied and included one response, which stated that the Shari’a is the most common reason for non-enforcement. The result of the survey gives us a more detailed picture of possible sources for non-enforcement of a foreign arbitral award. Overall, the survey supports the literature review, which shows that many practitioners are concerned with public policy as a source of challenge to enforcement and that perhaps the source for overreliance on public policy is judicial activism and lack of knowledge by the judiciary with international arbitration norms.

The survey asked respondents to rate the level of knowledge GCC judges have with regards to the New York Convention, the UNCITRAL Model Law, and the ICSID

31 Appendix II, Survey Report, II(2.3.).
32 ibid.
33 ibid.
34 ibid.
35 ibid.
36 ibid.
37 ibid.
Respondents view judges in the GCC states as having low familiarity with international agreements, and especially so with the ICSID Convention, which has had very little history in the GCC states. Respondents gave GCC states’ judges a score of 3.78 out of 10 or 37.8% familiarity with the ICSID Convention, 5.86 out of 10 or 58.6% familiarity with the New York Convention, and 4.97 out of 10 or 49.7% familiarity with the UNCITRAL Model Law. This view confirms the conclusions based on the review of the literature that judges are deemed to have little experience with international agreements, and such limited experience may be one of the main reasons for the non-enforcement of foreign arbitral awards.

Additionally, the GCC states should clearly define domestic, foreign, and international arbitral award to draw a line for arbitral awards that are covered by domestic arbitration laws and those that are covered by international agreements like the New York Convention. As of the writing of this thesis, only Bahrain and Oman distinguish between domestic arbitration and international arbitration; yet they too fail to provide a clear definition of domestic and foreign arbitral award. The remaining GCC states do not make such distinction. Of concern, however, is that under the Shari’a, as a religious based legal system, the distinction between domestic and foreign arbitral award can become more complicated in its jurisdictional reach because of the religious aspects of Shari’a. Shari’a scholars generally agree that Shari’a governs if one of the parties is Muslim, even if a contract or arbitration occurs outside an Islamic country. On the other hand, there is an equally compelling argument that the New York Convention’s definition of a foreign arbitral award, one that has become the international arbitration norm, ought to prevail. To eliminate any potential confusion among the judiciary, GCC states should clearly define domestic, foreign, and international arbitral award in their arbitration laws.

The GCC states should not impose additional conditions to the enforcement of foreign arbitral awards than required under the New York Convention. As such, the GCC states should clarify that the additional conditions are only applicable to domestic arbitral awards and not to foreign arbitral awards. There have been numerous important

38 Appendix II, Survey Report, II(2.2.2.).
39 ibid.
cases in the UAE such as the Abu Dhabi Court of Cassation, Petition No 679/2010,\textsuperscript{40} the Dubai Court of Appeal, Petition No 531/2011\textsuperscript{41}; and the Dubai Court of Cassation, Petition No 132/2012,\textsuperscript{42} where the courts clarified that the domestic conditions do not apply to foreign arbitral awards and that the role of the court is to ensure compliance with the New York Convention. However, since cases are not published and do not have binding effect like in common law countries, other courts could arrive at an opposite decision. Domestic courts and legislation are the more likely culprit in the non-enforcement of foreign arbitral awards through additional conditions that are protectionist in nature, or that are motivated by distrust of other countries’ legal systems and procedures. This distrust, within the context of the GCC states and the Shari’a, is often misguidedly blamed on the Shari’a, but a careful analysis of the specific conditions that each GCC state places on foreign arbitral award enforcement is too often unrelated to the Shari’a. Conditions placed by each of the GCC states in their respective arbitration rules are much more restrictive and impede enforcement than the Shari’a and the New York Convention. The additional conditions placed by the GCC states, and the strict activist approach by courts, are likely the reason for the non-enforcement of foreign arbitral awards in the GCC states.

The GCC states, on paper, are already consistent with the New York Convention and the international arbitration norms with regards to the grounds for challenging enforcement of foreign arbitral awards. However, the judiciary of the GCC states, in practice, continue to allow additional grounds for challenging the enforcement of foreign arbitral awards. These additional grounds stem from judges misapplying domestic arbitration rules and procedures to foreign arbitral awards. An example is the UAE, where judges continue to require ratification of foreign arbitral awards under the UAE Civil Procedure Code, a practice that amounts to a \textit{double exequatur} that the New York Convention had eliminated. The continued application of outdated and incomplete domestic arbitration rules to foreign arbitral awards, thus, create additional challenges to the enforcement of foreign arbitral awards. Passage of an arbitration law based on the

\textsuperscript{40} Abu Dhabi Court of Cassation, Petition No 679/2010, Judgment of 16 June 2011.
\textsuperscript{41} Dubai Court of Appeal, Petition No 531/2011, Judgment of 6 October 2011 (enforcing a foreign arbitral award rendered by the Singapore International Arbitration Centre).
\textsuperscript{42} Dubai Court of Cassation, Petition No 132/2012, Judgment of 22 February 2012 (enforcing a DIFC-LCIA arbitral award).
UNCITRAL Model Law like the one currently being drafted in the UAE, could help resolve this issue.

An arbitration law based on the UNCITRAL Model Law could likewise be aided by explicitly detailing what grounds under the Shari’a, judges could rely upon for non-enforcement of a foreign arbitral award. In other cases, judges may rely on the Shari’a to create additional grounds for non-enforcement of a foreign arbitral award. These additional grounds that originate from the Shari’a may sometimes be expressed under the rubric of public policy. A closer look at the grounds for non-enforcement under the Shari’a, however, reveals that the grounds for challenging the enforcement of foreign arbitral awards under the Shari’a do not become a significant factor for non-enforcement. Instead, the grounds for non-enforcement under the Shari’a are very similar to the grounds for setting aside an arbitral award. A possible explanation for the incongruence between the Shari’a and the practice of non-enforcement of foreign arbitral awards in the GCC states is judicial activism.

Further, public policy should be interpreted narrowly and with the pro-enforcement policy of the New York Convention. This issue has already been discussed fully in Chapter Five and Question Five. As discussed in Chapter Five, however, the limitations placed by the Shari’a on public policy could be narrowed to a very limited set of cases generally dealing with arbitrability (i.e. haram [prohibited] subject matter). It is, therefore, possible for courts in the GCC states to create a clearer set of guidelines for when public policy ought to be interpreted narrowly for the majority of disputes that are not covered by the Shari’a, and when it ought to be interpreted broadly for a limited number of disputes expressly falling under the Shari’a.

Finally, the GCC states should adopt the paradigm for setting aside an arbitral award under the New York Convention and the UNCITRAL Model Law. Currently, the practice of most GCC states is to create a different set of grounds for the setting aside of an arbitral award, that do not exactly match the grounds listed under the New York Convention and the UNCITRAL Model Law. As clarified in Chapter Six, the Shari’a plays a minimal role in the dynamics as the Shari’a generally prohibits setting aside. Instead, the current paradigm for most GCC states is the remnant of arbitration laws that
were enacted prior to the accession to the New York Convention and that require updating to be consistent with the UNCITRAL Model Law.

As the above major challenges to the enforcement of foreign arbitral awards in the GCC states have been identified, the next section will propose a way forward for GCC states to create a uniform rule for the enforcement of foreign arbitral awards in the GCC states. The next section, therefore, will discuss this thesis author’s proposal for a set of rules for the enforcement of foreign arbitral awards in a Uniform GCC Arbitration Law in the GCC states.

PART II

7.2. Proposed Set of Rules Relating to Enforcement of Foreign Arbitral Awards in a Uniform GCC Arbitration Law

7.2.1. Overview of the Proposed Drafts for a Uniform GCC Arbitration Law

There have been numerous calls in the GCC states for a uniform arbitration law, and efforts have been made to propose a draft Uniform GCC Arbitration Law. In the survey, the respondents were asked whether they were in favour or against a Uniform GCC Arbitration Law, and 81.25% were in favour while only 18.75% were against it. The survey shows that there is a large support among the GCC states arbitration practitioners for creating uniformity in the arbitration laws of the GCC states. Judge Moussa Ben Salem Alzeri, President of the Court of First Instance in Bidbid, Oman recommends that “unifying the rules that organize arbitration on the GCC level is important, as is the adoption of the UNCITRAL Model Law by all states.”

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43 These efforts have been led by the Chamber of Commerce of the six GCC states.
44 Appendix II, Survey Report, II(2.4.).
45 Moussa Alezri, ‘The Role of the Omani Judiciary in Supporting Arbitration’ (2010) 2 J of Arab Arb 26 (Judge Alzeri makes numerous other recommendations with regards to improving arbitration in the GCC, including reviewing laws and regulations that impede the development of international commercial arbitration.); Amr Elattar, *Enforcement of International Arbitration Awards: A Comparative Study between Egypt, USA, and the Gulf Cooperation Council Countries* (LAP Lambert Academic Publishing
On November 27, 2007, representatives of the six GCC states’ chambers of commerce met in Dubai to discuss the need for a Uniform GCC Arbitration Law. By April 24, 2008, the same group assigned Ahmed Mohamed Abdel Badih Sheta (Sheta) of the Qatar Chamber of Commerce and Industry, to write a draft Uniform GCC Arbitration Law (“Sheta Draft”), which was then submitted by Sheta to the GCC states’ chambers of commerce in Kuwait. Thereafter, the same group formed a working committee to review the Sheta Draft, and the working group approved the Sheta Draft with suggestions and recommendations from the GCC states’ chambers of commerce and referred the Sheta Draft to the Secretary General of the GCC states.

In the Sheta Draft, which supposedly requires an arbitral award to be issued within three months, the law applies to all arbitrations occurring within the GCC states between public or private legal entities regardless of the nature of the legal relationship and subject of the dispute, unless limited by a special provision or the arbitrability rules of a GCC state. It can also apply to international arbitration occurring outside the GCC states if agreed by the parties. One advantage of the Sheta Draft is that recourse to annulment of the arbitral award does not stay its execution. However, the court can order stay of execution upon a claimant’s request that is based on serious grounds. Further, if the court sets aside the arbitral award, then the parties’ arbitration agreement shall remain valid despite the above annulment, unless they agree otherwise.

On January 19, 2011, the legal officials of the GCC states’ chambers of commerce met again to review the final procedures of the draft Uniform GCC

2013) 398-399 (proposing that Kuwait and Qatar should adopt the UNCITRAL Model Law and should revise their rules on the finality of awards under each country’s Civil Procedures law).
47 Sheta (n 46) 573; Alrashid and others (n 46); Kawach (n 46).
48 Sheta (n 46); El-Ahdab (n 13) 573; Alrashid and others (n 46); Kawach (n 46); Arabian Business, ‘Unified GCC commercial law within two months’ (Arabian Business, 19 February 2009) <http://arabic.arabianbusiness.com/society/politics-economics/2009/feb/19/16632/#.UQIEKx2ce8D> accessed 20 June 2013 (Ahmed Almutawa tr).
49 Arabian Business (n 48).
Arbitration Law. By December 5, 2012, Magdi Ibrahim Qassem, Executive Director of the Abu Dhabi Centre for Conciliation and Arbitration, announced that said Centre had finished a draft for Uniform Commercial Arbitration of the Gulf Cooperation Council (“Abu Dhabi Draft”), which had been submitted to the Secretary General of the GCC states.

7.2.2. A Comparison of the Sheta Draft and the Abu Dhabi Draft

A review of the Arabic version of the Abu Dhabi Draft, as reported by Al-Anba News on December 9, 2012, and the Arabic version of the Sheta Draft as reported by Sheta in the Journal of Arbitration shows substantial similarity between the two drafts. There are minor differences, however. One difference is in Article 31.4, where the Sheta Draft states that it is not necessary for a lay witness or an expert witness to take an oath when testifying before a tribunal, whereas the Abu Dhabi Draft states in the same Article 31.4 that the tribunal has the right to hear witnesses and experts if necessary.

Further, in Article 32.2, the Sheta Draft states that if the Defendant fails to provide a defence memorandum in accordance with Article 28, the tribunal shall continue with the proceedings without being deemed to have recognized the defendant’s defence to the prejudice of the plaintiff, unless the parties agree otherwise. The Abu Dhabi Draft eliminates the phrase “unless the parties agree otherwise” in Article 32.2. In Article 34.4, which deals with the tribunal’s expert report submitted to the tribunal, and which report the tribunal can either decide upon or allow the parties an additional

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52 Ahmed Yousef, Secretariat countries ‘cooperation’ in connection with the adoption of the draft Unified GCC arbitration, (Al Anba News, 5 December 2012) <http://www.alanba.com.kw/ar/economy-news/344434/05-12-2012/> accessed 20 June 2013 (Ahmed Almutawa tr). It remains unclear whether the Abu Dhabi Draft is a continuation of the work by the GCC Chamber on the Sheta Draft or whether it is an altogether new draft.
53 Yousef (n 52).
54 Sheta, ‘Meshru’ a Al-Qanoon’ (n 50).
55 Yousef (n 52); Sheta, ‘Meshru’ a Al-Qanoon’ (n 50).
56 Sheta, ‘Meshru’ a Al-Qanoon’ (n 50).
57 Yousef (n 52).
hearing to submit their own expert(s) opinion, the Sheta Draft adds the phrase “unless the parties agree otherwise” to the entire clause, and the Abu Dhabi Draft eliminates the said phrase.\textsuperscript{58}

In Article 41.1, which states that an arbitral award must be signed by a majority of the arbitrators, where there are multiple arbitrators, the Sheta Draft requires those arbitrators that did not sign to give the reason(s), in the arbitral award, for not-signing, whereas the Abu-Dhabi Draft eliminates the requirement for providing an explanation for not signing by non-signatory arbitrators.\textsuperscript{59} The Abu Dhabi Draft also eliminates Article 41.3, which is present in the Sheta Draft, dealing with the requirement of the arbitral award, if so required, to state the names, address, nationalities, and designation of arbitrators; the arbitration clause between the parties; the relief sought by the parties; testimonies and documents by the parties during the arbitration proceedings; the verdict of the tribunal; the date and place of issue of the arbitral award; and the reasoning of the arbitral award.\textsuperscript{60}

Also, Article 46.1 (C), under the Sheta Draft, allows the tribunal for any other reason to end the arbitral proceedings if there is no use to continue the proceedings or it is otherwise impossible.\textsuperscript{61} The Abu Dhabi Draft retains the same Article 46.1(C), but adds that the tribunal can only do so based on sufficient reasons that are justified and legitimate.\textsuperscript{62} Article 47.1, under the Sheta Draft, allows a party to seek clarification of any part of the arbitral award within fifteen days from the date of receipt of the judgment, while the Abu Dhabi Draft removes the time limitation for requesting clarification.\textsuperscript{63} Additionally, the Sheta Draft in Article 47.4 allows the court to intervene under Article 7 in case the tribunal is unable to convene regarding a party’s request for clarification; and this article was eliminated in the Abu Dhabi Draft.\textsuperscript{64} Article 49.1-49.2 of the Sheta Draft, which allows the parties to request within 15 days upon receipt of the judgment to request for judgment on additional matters that the tribunal failed to

\textsuperscript{58} Yousef (n 52); Sheta, ‘Meshru’a Al-Qanoon’ (n 50).
\textsuperscript{59} ibid.
\textsuperscript{60} Sheta, ‘Meshru’a Al-Qanoon’ (n 50).
\textsuperscript{61} ibid.
\textsuperscript{62} Yousef (n 52).
\textsuperscript{63} ibid; Sheta, ‘Meshru’a Al-Qanoon’ (n 50).
\textsuperscript{64} Sheta, ‘Meshru’a Al-Qanoon’ (n 50).
address, was completely eliminated in the Abu Dhabi Draft.\textsuperscript{65} Article 53.1 (A) of the Abu Dhabi Draft and Article 54.1 of the Sheta Draft are similar except that the Sheta Draft states “an original copy or a copy signed by it” whereas the Abu Dhabi Draft states “an original copy or a copy signed by the arbitral tribunal.”\textsuperscript{66}

Finally, in Article 55 of the Sheta Draft and Article 54 of the Abu Dhabi Draft, which does not allow a stay of execution upon an application to annul the arbitral award but allows the court to order a stay of execution upon an application to annul the arbitral award based on serious reasons, both drafts allow the arbitration agreement between the parties to remain in effect after the order of the court to annul the arbitral award, but the Sheta Draft states that it remains in effect unless the parties agree otherwise, while the Abu Dhabi Draft states that it remains in effect unless the parties agree otherwise \textit{and if} the arbitration agreement was rendered void by the court.\textsuperscript{67}

\textbf{7.2.3. Proposals for Improving the Enforcement of Foreign Arbitral Awards in the GCC States}

The Abu Dhabi Draft of the Uniform GCC Arbitration Law follows international arbitration norms with regards to the enforcement of foreign arbitral awards.\textsuperscript{68} According to Maita, arbitral awards under the Abu Dhabi Draft are “valid from their issuance and courts are required to recognize and enforce them except for limited public policy reasons.”\textsuperscript{69} Further, the setting aside of an arbitral award is allowed for the following reasons under Article 50(1) and (2) of the Abu Dhabi Draft:\textsuperscript{70}

1. Lack of an arbitration agreement,
2. Incompetence of a party,
3. Inability to present a defence due to procedural defect,
4. The arbitral tribunal refused to apply a law that the parties agreed to,
5. Improper formation or appointment of the arbitral tribunal,

\begin{itemize}
\item[\textsuperscript{65}] Sheta, ‘Meshru’a Al-Qanoon’ (n 50).
\item[\textsuperscript{66}] Yousef (n 52); Sheta, ‘Meshru’a Al-Qanoon’ (n 50).
\item[\textsuperscript{67}] ibid.
\item[\textsuperscript{68}] Aida Maita, \textit{Development of a Commercial Arbitration hub in the Middle East: Case Study - The State of Qatar} (SJD Dissertation, Golden Gate University School of Law 2013) 115-116.
\item[\textsuperscript{69}] ibid.
\item[\textsuperscript{70}] ibid.
\end{itemize}
(6) Arbitral tribunal exceeded the scope of the agreement,
(7) The arbitral award was nullified after the ruling, or
(8) The arbitral award is contrary to public order, public morals, and the Shari’a.

This thesis author believes that there is vast room for improvement in making the enforcement of foreign arbitral awards in the GCC states more consistent with the international arbitration norms while harmonising the arbitration rules with the Shari’a. This thesis author does not find the Shari’a as an obstacle towards achieving harmonisation with the international arbitration norms. Instead, what this thesis author has discovered is the revelation that the Shari’a is actually, as stated by many scholars before, a flexible legal system that can become harmonised with the needs of modern international arbitration. While there are a handful of issues where the Shari’a might be seen as strict, these limited issues should not affect the landscape of international arbitration in the GCC states. In this regard, this thesis author proposes that the GCC states ought to consider the following proposals into a Uniform GCC Arbitration Law for the improvement of the enforcement of foreign arbitral awards in the GCC states.

### 7.2.3.1. Create Specialized Courts for Enforcement of Domestic and Foreign Arbitral Awards

According to Pouget, specialized courts that are high-level, or specially designated, and with the capacity and experience to handle commercial arbitral awards have been very effective in various jurisdictions,\(^1\) and it is a growing practice in various jurisdictions.\(^2\) This thesis author agrees that GCC states ought to consider establishing such a specialized court, especially under a Uniform GCC Arbitration Law regime, even in fact requiring such a specialized enforcement court in each GCC state.

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The survey conducted in this research supports the view that many judges in the GCC states are not as knowledgeable as they ought to be with the New York Convention, the UNCITRAL Model Law, and the ICSID Convention.\textsuperscript{73} Such lack of sufficient knowledge and experience about international arbitration could be curtailed under a specialized arbitral award enforcement court.

7.2.3.2. Provide Clear Definitions for Domestic, Foreign, and International Arbitral Awards

The GCC states should enact a rule, whether or not to be incorporated into a Uniform GCC Arbitration Law such as the one proposed by the Sheta Draft and the Abu Dhabi Draft, that clearly defines domestic arbitral award, foreign arbitral award, and international arbitral award. Such definitions would eliminate any potential misconceptions and/or confusion as to the applicability of regional or international agreements in the enforcement of arbitral awards. Additionally, according to Pouget, the World Bank’s AMD indicators find that “when an economy provides for two distinct regimes for domestic and international arbitration...international arbitration laws are less restrictive than domestic arbitration laws.”\textsuperscript{74} The rule should be uniform and passed by all the GCC states, whether as part of their national legislation or as part of a Uniform GCC Arbitration Law. This thesis author proposes the following definitions:

\begin{quote}
A domestic arbitral award refers to an arbitral award not falling under the definition of a foreign arbitral award, unless otherwise expressly stated by these arbitration rules and/or any legislation. The New York Convention shall not apply to the enforcement of a domestic arbitral award.
\end{quote}

\begin{quote}
A foreign arbitral award is an arbitral award that was made in the territory of a State, such state being a signatory to the New York Convention if required by a GCC state,\textsuperscript{75} other than the State where the
\end{quote}

\textsuperscript{73} See Appendix II, Survey Report, II(2.2.2.).

\textsuperscript{74} Pouget (n 71).

\textsuperscript{75} The phrase “such state being a signatory to the New York Convention if required by a GCC state” was included since GCC states like Kuwait, KSA and Bahrain claimed the Reciprocity Reservation when acceding to the New York Convention. Therefore, foreign arbitral awards from a non-New York
recognition and enforcement of such an arbitral award is sought, and arising out of differences between persons, whether physical or legal. The New York Convention shall apply to the enforcement of all foreign arbitral awards, including the interpretation of this provision.

An arbitral award is international\(^{76}\) when

1. the parties to the arbitration have places of business in different states;
2. the location of one of the party’s places of business is in a state, other than the state where the recognition and enforcement of such arbitral awards are sought,\(^{77}\)
3. at least one of the party’s business is located in a state different from the place where a substantial part of the commercial relationship’s obligations was performed;\(^{78}\) or
4. the parties agree that the subject matter of the arbitration agreement relates to more than one state.

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\(^{76}\) Points (1) and (4) of the proposed definition are not controversial and generally covers situations where the arbitral award was rendered at the same place where it is being enforced, making it otherwise a domestic arbitral award. However, since the parties to the arbitration agreement have places of business in different states, or since the parties have agreed that the subject matter of the arbitration agreement relates to more than one state, then the arbitration is international in nature. In point (1), for example, the parties could be a UAE national with a place of business in the UAE and an Omani national with a place of business in Oman, who enter into an arbitration agreement in the UAE, arbitrate the dispute in the UAE which results in an arbitral award rendered and enforced in the UAE. Since the Omani party’s business is in Oman, then the arbitral award in this case would fall under the definition of an international arbitral award. In point (2), for example, the parties to the arbitration agreement could both be nationals of the UAE and both having a place of business in the UAE, but the parties agree that the arbitration agreement relates to a subject matter that relates to more than one country (i.e. the UAE and China). An arbitral award resulting therefrom would be international.

\(^{77}\) Point (2) could also cover the same scenario covered by point (1). However, point (2) covers additional scenarios. For example, different from the example in point (1) at footnote 76, if the arbitration was entered into in the UAE, and the arbitral award was rendered and is being enforced in the UAE, but both parties are from the KSA and have places of business in the KSA but are engaged in a tourism business requiring both parties to enter into the arbitration agreement in the UAE. Such a situation would not be covered by point (1) since the parties have places of business from the same state, but would be covered by point (2) since the arbitral award is being enforced in the state where enforcement is being sought (UAE) is different from the place of business of one or both of the parties.

\(^{78}\) Point (3) covers the scenario where a party’s place of business is different from the place where the contract is being performed. Both parties, for example, could have places of business in the UAE, but enter into an agreement regarding the harvesting and delivery of fruits from Lebanon to the UAE border. The parties’ places of business are in the same state, but a substantial portion of the contract is being performed in another state. This scenario would fall under the definition of an international arbitral award.
In the survey, the respondents were asked to consider the above three statements separately and were asked whether they agreed or disagreed with each entire statement. As to the statement relating to the definition of a domestic arbitral award, 80.65% (25 out of 31) agreed with the statement, while 19.35% (6 out of 31) disagreed with it. As to the statement relating to the definition of a foreign arbitral award, 67.74% (21 out of 31) of respondents agreed with the statement while 32.26% (10 out of 31) disagreed with it. Finally, as to the statement relating to the definition of an international arbitral award, 68% (17 out of 31) agreed with the statement while 32% (8 out of 31) disagreed with it.

7.2.3.3. Clarify the Conditions for Enforcement

The GCC states should make clear that the conditions to the enforcement of a domestic arbitral award do not apply to the enforcement of a foreign arbitral award. The GCC states like the UAE that continue to require a ratification process for both domestic and foreign arbitral awards, for example, would benefit from such a clarification. Such a clarification must be adopted uniformly by all GCC states whether under a Uniform GCC Arbitration Law or under the legislation of all the GCC states. This thesis author proposes the following rule:

*The conditions to the enforcement of a domestic arbitral award shall not apply to a foreign or international arbitral award.*

In the survey, the respondents were asked to consider the above statement and were asked whether they agreed or disagreed with the entire statement regarding conditions for enforcement. The majority of respondents agreed with the statement at 77.42% (24 out of 31) while 22.58% (7 out of 31) disagreed with the statement.

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79 Appendix II, Survey Report, II(2.7.).
80 ibid.
81 ibid.
7.2.3.4. Limit the Ability of Judges to Impose Additional Grounds for Non-Enforcement or Annulment

The GCC states must expressly state that judges cannot impose additional grounds for non-enforcement or annulment of a foreign or international arbitral award. Most GCC states are already consistent with the New York Convention on this regard. Yet, judges in the GCC states continue to refuse enforcement or to set aside a foreign arbitral award based on grounds not stated in the New York Convention.

Even if the GCC states individually or as a council passes a Uniform GCC Arbitration Law, such new law would thrive only in the hands of the judiciary and the judiciary’s ability to practice judicial restraint. An example is what happened in Syria after the passage of Syria’s Arbitration Law No. 4 of March 2008, which moved Syria away from the civil code based arbitration like that in the UAE and into a more modern arbitration regime. However, four years later, court decisions rendered with respect to the new arbitration law remained relatively limited since its enforcement, especially because of the restricted scope of the law and some ambiguities in drafting the law, caused the courts to often continue to apply the old provisions even under the regime of the new law. Judges, therefore, ought to be explicitly limited in finding sources for judicial activism. This thesis author proposes the following rule:

A court may only refuse enforcement of a foreign arbitral award or annul a foreign arbitral award on the grounds stated in the New York Convention and pursuant to the rule relating to the interpretation of public policy as a ground for non-enforcement or annulment of an arbitral award. A court that refuses to enforce a foreign arbitral award or annuls a foreign arbitral award on grounds not listed under the New York Convention or based on public policy must provide to the parties, in a written judgment, an explanation of its reasoning and decision, including the specific legislative or case law source of such grounds or public policy.

The above statement received the most agreement from respondents in the survey. The respondents were asked to consider the above statement and were asked whether they agreed or disagreed with the entire statement regarding grounds for non-enforcement or
The overwhelming majority of respondents agreed with the statement at 90.32% (8 of 31) while only 9.68% (3 out of 31) disagreed with the statement.  

7.2.3.5. Clarify the Grounds for Public Policy

The GCC states should clarify the grounds upon which courts can raise public policy as a ground for refusal to enforce a foreign arbitral award or as a ground to set aside a foreign arbitral award. The GCC states should mandate a narrow interpretation of public policy whenever the Shari’a is not invoked. GCC states could perhaps take note of the steps taken by the Higher Arbitrazh Court of the Russian Federation on April 2013, when it published Information Letter No 156, approving the Review of Arbitrazh Court in Practice in Applying the Public Policy Ground for Refusal to Recognize and Enforce Foreign Judgments and Arbitral Awards (hereinafter “Review”). The Review aligned Russian courts, where like GCC state courts the public policy defence was seen as an overused mechanism to avoid enforcement under the New York Convention standards for public policy. The Review provides a narrower definition of public policy, which is to be applied only in exceptional cases. Further, the Review clarifies that there can be no violation of public policy “merely on the basis that Russian law does not have norms identical to those of the applicable foreign law.” Though it remains to be seen whether the Review would dramatically decrease the number of foreign arbitral awards that are denied enforcement based on public policy, the Review and the adoption of it by the Russian Arbitrazh Court serve as an example of a step that GCC states can take to address the perception that courts in GCC states

82 ibid.  
83 ibid.  
84 The letter is actually dated 26 February 2013 but published on April 2013.  
86 Kurochkin and Albert (n 85) (stating that in Russia, “the public policy defence has traditionally been widely invoked when trying to resist enforcement of foreign arbitral awards” under the New York Convention).  
87 Kucher, Yadykin and Asoskov (n 85) at 4.
rely too heavily on the public policy defence for the non-enforcement of a foreign arbitral award.

Likewise, GCC states should encourage a limited or narrow application of Shari’a public policy only for those (1) that are expressly stated as haram [prohibited]; (2) that a majority of Shari’a jurists agree upon as fundamental to the Shari’a,88 and (3) that whenever there is no clear consensus among Shari’a scholars on the public policy, then to interpret public policy to be most consistent with the New York Convention. The goal, therefore, is to create a balance that interprets public policy narrowly, but harmonises the Shari’a whenever it must. Shari’a’s public policy that remains without a clear consensus should be weighed against the requirement under the Shari’a to abide by international agreements. The discretionary powers of courts in GCC states to apply the Shari’a should accordingly be limited.89 This thesis author proposes the following rule:

Courts must interpret public policy narrowly. Public policy should only be granted as a defence, ground for the non-enforcement of an arbitral awards, or ground for setting aside an arbitral award, if it concerns an essential or fundamental state interest. The Shari’a shall qualify as an essential or fundamental state interest for purposes of public policy, but only those public policy which are

(A) embodied by the Shari’a that are expressly stated in the Holy Qur’an, Sunna, Qiyas, or Ijma,
(B) haram, and
(C) stated as fundamental to the Shari’a by a majority of the Shari’a scholars.

Whenever there is no clear consensus as to a public policy under the Shari’a, the court shall weigh the determination of the existence of such public policy in favour of enforcement of a foreign arbitral award under the New York Convention.

The respondents were asked to consider the above statement and were asked whether they agreed or disagreed with the entire statement regarding public policy. The

88 Elattar (n 45) 401 (proposing that “refusing enforcement should be only limited to violations of fundamental rules of the Shari’a”); Al-Siyabi (n 15) 234 (stating that “a rule is considered fundamental, if it is absolute in the method in which it is proven and in the meaning that it purports”).
89 Elattar (n 45) 400 (suggesting that “Gulf countries, which their public policy is influenced by Islamic Shari’a, should narrowly apply this defense in a manner which does not give the domestic courts broad discretionary power.”).
majority of respondents agreed with the statement at 70.97% while 29.03% disagreed with the statement.

Overall, the survey respondents agreed with all the statements proposed in the survey as a set of rules relating to enforcement of foreign arbitral awards in a Uniform GCC Arbitration Law. While these proposed rules are by no means perfect, they can at least be a starting point for discussion as possible rules to be considered for addition to a Uniform GCC Arbitration Law.

PART III

7.3. Contribution to the Literature

This research contributes to the field of knowledge by being the first to analyse the challenges to the enforcement of foreign arbitral award in the GCC states by comparing the overlapping rules, procedures, and policies that govern arbitration in the GCC states, mainly the Shari’a, the regional and international agreements, and the national legislation of each of the GCC states. The enforcement of foreign arbitral awards is an issue that concerns to practitioners in the field of arbitration, academics, and potential clients weighing the advantages and disadvantages of arbitrating in the GCC states. This research, following the position of many scholars in the field of arbitration like Saleh, El-Ahdab, Wakim and Ayad, suggests that it is possible for the GCC states to strike a balance among these overlapping rules and to then sincerely incorporate the Shari’a into a unified set of rules and procedures for the enforcement of foreign arbitral awards in the GCC states while remaining consistent with international arbitration norms. Additionally, this research suggests that the source of the challenges to the enforcement of foreign arbitral awards in the GCC states do not necessarily come from the overlapping rules and policies on arbitration, but on the inconsistent practices and procedures that remain largely uninformed as to the obligations that all GCC states have under international agreements. Judicial interference is at the heart of the non-enforcement of foreign arbitral awards in the GCC states. Another contribution by the research into the field of knowledge is the survey conducted of those practicing in the
field of arbitration in the GCC states regarding their views on the enforcement of foreign arbitral awards in the GCC states. The survey corroborates the conclusions made by the research based on the literature review, and also highlights the need for further surveys on the matter to fully comprehend the source for the challenges to the enforcement of foreign arbitral awards in the GCC states.

Limitations to the research are time and monetary constraints in conducting a multilingual survey involving a larger population of the GCC states arbitration practitioners. It is perhaps a task that could be tackled by future academic researchers addressing the same issue, and a task that should be undertaken from the outset of the research.

A major limitation to this research is the fact that courts in all the GCC states, as well as arbitral tribunals as a whole, do not systematically publish their cases, making it hard to track the progress in terms of enforcement of foreign arbitral awards. What remains to be done is to keep track of cases and developments in the GCC states, and perhaps for the GCC states to create an online case reporting system for publishing arbitration cases as they arise among all courts and arbitration centres in GCC states. The GCC Arbitration Centre could possibly spearhead such efforts with coordination from such institutions as DIFC, which already publishes its cases, rules, and regulations online. In publishing arbitration cases, arbitration centres will be forced to balance confidentiality with the need for creating a published and readily available body of arbitration laws. In doing so, arbitration centres could request, but could not require, parties to waive confidentiality generally, except when specifically sought by a party regarding specific facts; and therefore encourage the reporting of arbitration cases and/or arbitral awards. Even going further, arbitration centres could make the waiver of confidentiality and therefore publication, the default rule instead of the exception.


91 See also Section 3.1.2.2.

92 Mechantaf (n 90).
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APPENDICES
APPENDIX I

CHART
## PRELIMINARY CONDITIONS

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<th>Country</th>
<th>Oman</th>
<th>KSA</th>
<th>Qatar</th>
<th>Bahrain</th>
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<th>Riyadh Conv.</th>
<th>NY Conv.</th>
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1. majority required
2. (parties can opt out)
3. (if in compliance)
4. refusal to sign must be noted
5. cannot write dissent opinion
6. as of date arbitration signed
7. by date of deposit
8. determines if award is foreign or domestic
9. not required except in practice, witness of judge may also be required
10. must be signed and certified

UAE draft federal arbitration law
# CONDITIONS AT THE REQUEST FOR LEAVE TO ENFORCE

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1. Invalid arbitration agreement can be refused enforcement
APPENDIX II

SURVEY ON ARBITRAL AWARD ENFORCEMENT
IN THE GCC STATES
I. SURVEY METHODOLOGY

1.0. Introduction

A survey was conducted to determine the perception of practitioners in the field of arbitration regarding arbitration and the enforcement of arbitral awards in the GCC states.

The literature review reveals that after comparing the Shari’a, international agreements and GCC domestic laws, four main reasons emerge as the major challenges to the enforcement of arbitral awards in the GCC states: (1) unclear and inconsistent definitions of a domestic, foreign, or international arbitral award, (2) additional conditions to enforcement of an arbitral award placed by GCC states through their domestic legislation, (3) judicial activism in allowing additional grounds for challenging the enforcement of arbitral awards, and (4) an overly broad interpretation of public policy. The literature review also reveals that judges often cloak their activism behind the mantle of the Shari’a when in fact the Shari’a is largely consistent with the New York Convention.

The survey, therefore, aimed to test these findings from the literature review by measuring the perception of those with experience in the field of arbitration in the GCC states regarding the definition of domestic, foreign or international award in their respective jurisdictions. The survey also aimed to measure the perception of the same group on whether courts in the GCC states apply the same or different conditions to enforcement to domestic and foreign arbitral awards. Further, the survey aimed to determine the perception of the same group on what are the most likely reasons for the non-enforcement of foreign arbitral awards in the GCC states, including the perception of the group on the extent to which judges in the GCC states are familiar with the New York Convention, the UNICTRAL Model Law, and the ICSID Convention. The survey also aimed to measure the perception of the same group as to the role of the Shari’a in determining the public policy defence. Finally, the survey aimed to measure the perception of the same groups regarding a proposed Uniform GCC Arbitration Law, and their opinion on potential language to be proposed for inclusion in the Uniform
GCC Arbitration Law. The survey generally aimed to complement the findings in the literature review, including the divergent views of Western practitioners and Arab practitioners with regards to the role and impact of the Shari’a on the enforcement of arbitral awards.

Therefore, the primary data from the survey will be used to prove and/or verify some of the conclusions of the research project to the extent such conclusions answer the research questions, more specifically to prove the following specific points:

1. the friendliness of the GCC states towards the enforcement of foreign arbitral awards;
2. reasons for the non-enforcement of a foreign arbitral award in specific jurisdictions;
3. the extent to which GCC states judges are familiar with the New York Convention, the UNCITRAL Model Law, and the ICSID Convention;
4. to determine the opinion of those in the arbitration field in the GCC states regarding the formation of a Uniform GCC Arbitration Law;
5. to determine the opinion of those in the arbitration field in the GCC states regarding the UNCITRAL Model Law;
6. to determine the opinion of those in the arbitration field in the GCC states on the status of the Shari’a in international arbitration;
7. to determine the opinion of those in the arbitration field in the GCC states as to the applicability of the Shari’a in determining a GCC state’s public policy as it pertains to the enforcement of foreign arbitral awards;
8. to determine the opinion of those in the arbitration field in the GCC states regarding the definition for domestic, foreign, and international arbitral awards;
9. to determine the opinion of those in the arbitration field in the GCC states on whether domestic and foreign arbitral awards should have the same or different conditions for enforcement; and
10. to determine the opinion of those in the arbitration field in the GCC states as to specific rules proposed by the thesis for addition into a Uniform GCC Arbitration Law.

Upon receiving ethical approval from the Portsmouth University Business School Ethics Committee, a pilot study of the survey was conducted, after which the survey was disseminated to potential participants online through Survey Monkey (www.surveymonkey.com). Below are further explanations of the survey methodology, the procedures, and the analysis of the survey data.

1.1. Ethical Consideration and Ethical Approval

Pursuant to the University of Portsmouth policy, the survey was submitted to the University Ethics Committee prior to the commencement of the survey. The Ethics Committee granted approval on December 12, 2013 and assigned the survey a reference number: E271.

Consistent with the University of Portsmouth’s policies on research, potential participants were given “An Overview and Agreement to Participate in the Research Study,” a “Participant Information Sheet and Procedures,” and a “Participant Consent Form” prior to commencing the survey. The data shows that all participants ticked all the boxes required under the Participant Consent Form prior to commencing the survey.
Potential participants were advised, among others, of the purpose of the study, the criteria used for selecting participants, that there are no known risks to the participants, that participation is voluntary and not compensated, that all the evaluation materials is anonymised, and that all data are kept confidential.
Survey on Arbitral Award Enforcement in the GCC

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Professor Dr. A.F.M. Muniruzzaman
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Ph.D. in Law Candidate
Portsmouth Business School, School of Law
E-mail: ahmed.almutawa@port.ac.uk

PARTICIPANT INFORMATION SHEET AND PROCEDURES
Title: Research Study on the Challenges to the Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States
Researcher: Ahmed Almutawa, LL.B., LL.M.
REFERENCE NUMBER: E271

We would like to invite you to take part in our research study. Before you decide we would like you to understand why the research is being done and what it would involve for you. Talk to others about the study if you wish. Ask us if there is anything that is not clear.

PURPOSE OF THE STUDY
This research is about the challenges to the enforcement of foreign arbitral award in the GCC states. It will focus on identifying the challenges to the enforcement of foreign arbitral awards in the GCC states with the ultimate aim of proposing a specific set of rules for adoption in a uniform GCC arbitration law.

RECRUITMENT
The criteria that will be used for selecting the sample are those individuals who engage in, or practice law in, the field of international arbitration in the GCC states. A legal practitioner, academic, judge, arbitrator, legal consultant, legal adviser, or corporate lawyer who engages in international arbitration in the GCC states had to be available to participate in the survey.

VOLUNTARY PARTICIPATION AND CONSENT
There is no direct benefit to you for participating in this survey, and there is no known risk or disadvantage to you for participating except for your time and inconvenience of participation. You will receive no compensation for participating. It is up to you to decide to join the research. We will describe the research and go through the information sheet. If you agree to take part, we will then ask you to fill out a consent form in the next page.

PARTICIPATION
This research survey will take approximately 10 minutes to complete. You simply need to fill in the online survey and it will automatically be sent to me once the survey is completed. You may decide to withdraw from this study without giving any reason, at any time up to the point when the data are analysed by awarding Mr. Ahmed Almutawa.

DATA COLLECTION METHOD
To obtain relevant information on the research questions, a series of survey questions will be provided to you, giving you ample time to answer the questions.

CONFIDENTIALITY
All evaluation materials will be anonymised. By agreeing to participate, you agree to be anonymously quoted. No personal identification data will be stored. Users will have a reference number that identifies their answers pre- and post-test. The data will be stored on a secure digital drive so that it is backed up. Additionally, even though I may present the study findings to Conferences and/or Journals, only my supervisors, Prof. Dr. A.F.M. Muniruzzaman and Mr. Greg Osborne, my thesis examiners and I will have access to the survey data itself.

RESEARCH REVIEW
Research in the University of Portsmouth is looked at by independent group of people, called a Research Ethics Committee, to protect your interests. This study has been reviewed and given a favourable opinion by the Portsmouth University Business School Research Ethics Committee.

PROBLEMS WITH THE SURVEY
If you have a concern about any aspect of this research, you should email my supervisor, or me and we will do our best to answer your questions. My email is ahmed.almutawa@port.ac.uk and you may contact my supervisor at munir.muniruzzaman@port.ac.uk if you remain unhappy and wish to complain formally, you can do this sending an email to the Portsmouth University’s Information Disclosure and Complaints Manager, Samantha Hill at samantha.hill@port.ac.uk. Whether or not you decide to participate in the survey, thank you in advance for taking the time to read the information sheet. If you do decide to participate in the survey, please go to the next page and fill out the Participant Consent Form.
1.2. Participants

The participants in the survey, only one survey population, consisted of individuals who engage in, or practice law in, the field of international arbitration in the Gulf Cooperation Council (GCC) states. The estimated potential size of the population ranged from 30 to 300. The estimated number of potential participants was based on the number of individuals who engage in, or practice law in, the field of international arbitration in the GCC states, and whose contact information (primarily email) is publicly available on the Internet. In the end, the survey was sent to a total of 321 potential participants. Of this number only 41 participated in the survey, 11 more than the 30 respondents originally anticipated by the researcher. A larger sample population could not be achieved by the researcher due to time and monetary constraints.

The sample size does not consist of the entire relevant population, as there are practitioners who practice international arbitration in the GCC states whose contact information are not publicly available. However, the survey was also disseminated to some groups including the International Islamic Centre for Reconciliation and Arbitration, the GCC Arbitration Centre, and DIAC, which were requested to send the survey to their mailing list. It is recognized, however, that many of the potential participants are attorneys and arbitrators with very busy schedules and may not have the time to participate in the study.

The survey assumed that five (5) individuals from each of the six GCC states would, at minimum, respond to the survey, giving the sample survey population a minimum of 30 to 40 participants. If more than five (5) individuals from each of the six GCC states responded to the survey, then the researcher expected to obtain more than 30 participants. The researcher sent an email of the survey via Survey Monkey, using the researcher’s university email address, to individuals who engage in, or practice law in, the field of international arbitration in the GCC states, and whose contact information is publicly available on the Internet.
1.3. Survey Design

The Survey Questions totaled 31 questions for a 10 minutes survey. The questions were divided into four parts. Part I asked for General Background Information. Part II asked participants to give a scaled rating with a range of zero “0” to ten “10”. Part III asked participants to provide a short answer, to choose from multiple choices and provide a short answer, and to choose from multiple choices. Finally, part IV asked participants to read a statement and to state whether they agreed or disagreed with the statement. Those who disagreed were asked to state their reasons in paragraph format why they disagreed with the statement.

1.4. Question Design

There are generally four types of survey questions: (1) open ended; (2) multiple choice; (3) ranking; and (4) scaled. An open ended question allows the participant or respondent to state a full range of answers in his or her own words, allowing for further or in-depth insight into the perceptions of the participant. An open-ended question, however, requires careful analysis of text, requires more time to complete for a participant, and complicates data summary and analysis. Its advantages, however, are to provide detail and depth, to clarify the participants’ ideas, and to generate new ideas about a topic.

A multiple choice question simply asks the participant to choose from one or more answers, and is therefore useful in gathering demographic data and/or data on a range of issues. Multiple-choice questions allow for asking many questions in a short amount of time and can assess attitudes when the issues are clear. Multiple choice questions can be either close-ended or partial open-ended. A close ended multiple choice question is fast and easy to complete for the participant and enables easy data entry and data analysis for the researcher. However, the responses lack detail and depth and are limited to the options provided. The partial open-ended multiple-choice question allows for the participant to choose an “Other” choice when the participant is not satisfied with the choices provided. So, the partial open-ended takes the advantages
of a close-ended multiple-choice question while allowing the participant to provide more in-depth or detailed answers. The disadvantage of a partial open-ended question is that it complicates data analysis.

A ranking question asks the participant to put in order or rank a series of choices or to choose from a set of ordered choices. In other words, it asks the participant to determine the relative important of various choices. A ranking question, however, can be difficult to answer and limits the response choices for the participant.

A scaled question determines the degree of a response, opinion or position by asking the participant to choose from an interval or scale of numbers. The scaled question can allow for a more precise determination of a degree rather than by asking a simple yes or no, while still remaining easy to complete for the participant and for easy data entry and data analysis for the researcher.

In this survey, the open ended question, close ended multiple choice question, partial open ended multiple choice question, and the scaled question were employed. Close ended multiple choice questions were employed for both demographic questions and for specific questions. An example of a multiple-choice question is the following:
The partial open-ended multiple-choice question was also used whenever the potential answer could result in unforeseen choices that would be important for the participant. An example of a partial open-ended multiple-choice question is the following:

The open ended question was also used to solicit additional and in-depth insight that could determine whether the conclusion the researcher found in the literature review generally matched that of the sample population. An example of an open-ended question is as follows:
Finally, the scaled question was employed to rate the degree to which participants viewed friendliness to arbitration, extent of knowledge, degree of benefit, and degree of satisfaction. A 10-point scale was used so that the data could easily be converted to a percentage. For example, an answer of 5 is equivalent to 50%. Also, a study has shown that a scale with 5-7 point scales tend to produce higher mean averages than a scale with a 9 or 10 point scale.\(^1\) An example of this question is as follows:

\(^1\) J Dawes, ‘Do Data Characteristics Change According to the Number of Scale Points Used?: An experiment using 5-point, 7-point and 10-point scales’ (2008) Int’l J of Market Research 50, 61-77.
Another question type used is a mixed version of the multiple-choice question with an open-ended question that follows. The question asked the participant to read a statement and asked whether they agreed or disagreed with the statement. The close ended multiple-choice question is easy to answer and east for data entry and data analysis. Meanwhile, whenever the answer is “Disagree”, the participant is then asked an open-ended question by asking for their reasons for disagreeing. The purpose of the follow-up open-ended question is to solicit new ideas and to gain in-depth insight into the participant’s objection to the statement. An example of this type of question is as follows:

26. Please consider the following statement(s):

A foreign arbitral award is an arbitral award that was made in the territory of a State, such state being a signatory to the New York Convention if required by a GCC state, other than the State where the recognition and enforcement of such arbitral award is sought, and arising out of differences between persons, whether physical or legal. The New York Convention shall apply to the enforcement of all foreign arbitral awards, including the interpretation of this provision.

Do you agree or disagree with the entire statement?

☐ Agree
☐ Disagree

28. If you disagree, please state why.
The researcher aimed at short and simple questions, whenever possible. Additionally, leading questions were avoided. Most of the questions were close-ended, but the researcher opted for partial-open ended and open-ended questions whenever it was necessary to solicit a more in-depth or detailed answer from the participant. The researcher also aimed at giving few or limited answer choices to make it easier for the participant to complete the survey. The scaled questions, however, could not be made short, and researcher noticed partially complete surveys that ended right before the scaled questions. The scaled questions, however, were necessary as the completed surveys yielded very valuable data from the scaled questions. Finally, the research aimed to make the survey easy to take, and so the research made sure to give a logical order to the survey and made the survey neat orderly.

1.5. Pilot Testing

The survey was pilot tested before dissemination to uncover errors in the survey design and to fine tune the questions and uncover potential flaws and potential causes of confusion, such as misleading questions. The pilot survey was sent to a few colleagues who made informal comments and suggestions about the survey. The comments from the pilot study, for example, helped in rearranging the design of the survey and to group certain questions that have similar formats or designs. The pilot testing also resulted in eliminating some answer choices in favor of a partial-open ended multiple choice to make the list of choices shorter. Finally, the pilot testing helped determine that the time to conduct the survey took approximately 10 minutes.

1.6. Online Distribution of Survey Through Survey Monkey

The survey was distributed through www.surveymonkey.com, a commonly used tool for conducting academic and non-academic online surveys. The Survey Monkey system allows for the creation of an email message, which was then sent to potential participants. The addresses of potential recipients had to be uploaded to Survey Monkey, which could then track and note if the message to a recipient had bounced.
Further, Survey Monkey allowed the message to post a link for recipients to opt-out of receiving any future solicitations from Survey Monkey.

Here is the email message sent via Survey Monkey:

Survey Monkey also allowed for dissemination of the survey via a web link or an Internet address that could be customized and then shared to potential participants via social media like Facebook and via email as a link. The web link was used to share the survey to groups of participants in a “lists serve” or an electronic list of emails with the help of groups like the DIAC, the International Islamic Centre for Reconciliation and Arbitration in Dubai, and the list serve of law firms. The web link address for the survey was as follows: http://www.surveymonkey.com/s/GCCarb/.
1.7. Data Analysis

Data analysis was facilitated with the Survey Monkey data analysis online software. The data analyzed by Survey Monkey shows the data in both summary and chart format. The data analysis also shows how many participants answered each question, and how many skipped each question. The data analysis shows the total number of respondents for each question. The questions can also be analyzed by comparison to other answer options. Therefore, those who practiced arbitration primarily in the United Kingdom could be looked at separately than those who practiced arbitration primarily in the GCC states.

The data collected from the survey were twofold: numerical and textual. The numerical data and the textual data were compared with the findings in the literature review. This process of triangulation between qualitative and quantitative data was used to confirm and validate the findings. For example, scaled question answers to questions 10-12 resulted in numerical data as to the extent to which judges were familiar with the New York Convention, the UNCITRAL Model Law, and the ICSID Convention. This numerical data was then analysed in light of the answers to the open-ended question in question 19, which asked for the most likely reasons for the non-enforcement of a foreign arbitral award. Further, the numerical data and textual data are analysed with the conclusions reached from the literature review.

The interplay between induction and deduction, in other words between data collection and interpretation, was another process of validation of findings but also part of the theory development. In what is known as a process of abduction, the interpretation of observed data to the best explanation helps to form a tentative theory, which then needs to be confirmed or disconfirmed with help of further data collections and analysis. The findings from empirical data were compared to the reviewed literature, as described in the conclusion chapter, which then led to conclusions and recommendations.
II. SURVEY RESULTS

2.0. Introduction

The overall results of the survey strengthened some of the conclusions made by the research from the literature review, while also confirming that further study need to be made with a larger survey population and with statistically significant conclusions about the relationships between variables. As stated previously, time and monetary constraints limited the size of the population sample, though the survey exceeded the expected number of participants. Additionally, the researcher made no observations regarding the statistically significant relationships between two variables. Regardless, some direct observations or conclusions can be made from the survey results. Below are the results of each question, followed by a discussion of direct observations or conclusions reached by the research based on the survey results.

2.1. BACKGROUND OF RESPONDENTS

There were a total of 41 respondents from the more than 321 survey invitations sent via email and web link. These are the breakdown of the respondents:

2.1.1. Profession of the Respondents

Those involved in arbitration could come from a variety of fields, though most come from the legal profession. Respondents were asked to choose from four types of professions most commonly found among those with experience in arbitration in the GCC states: Attorney (47.5%), Arbiterator (42.5%), Legal Consultant (35%), and Judge (0%). Respondents who did not belong to these four professions could choose the “Other” option and specify the profession (25%). Ten respondents chose the “Other” option and specified the following occupations or professions: Expert witness and ACCA, procurement and contract manager/engineer, Engineer, Architect, Quantity Surveyor, Engineering Expert, Manager/Support Services of Arbitration Centre, Vice
President of Operations, “DR”, and Teacher. Here is the breakdown by the pre-specified professions:

2.1.2. Arbitration Practice

Respondents were asked whether they practiced in the field of arbitration. There were 87.5% who practice in the field of arbitration. Here is the breakdown of the respondents:
2.1.3. Experience

About 80% of the total respondents have more than 5 years of experience in the field of arbitration. There were 60% of respondents with 10 or more years of experience in arbitration and 20% with 5-10 years of experience.

2.1.4. Language

The majority of respondents (95%) are fluent in English, almost half (45%) are fluent in Arabic, while some (20%) are fluent in French. Here is the breakdown of respondents by language:
2.1.5. Country of Practice

Respondents were also asked in what countries they primarily practiced their profession. Many respondents practiced in more than one country: regionally (in more than one GCC state) or internationally (in Europe, the Middle East, and/or the GCC). Here is the breakdown of countries:

![Chart displaying the breakdown of countries where respondents primarily practiced their profession.](Chart)

2.1.6. Experience in the GCC States

The majority of respondents (87.5%) had experience in the field of arbitration in one or more of the GCC states.

![Chart displaying the experience of respondents in the GCC states.](Chart)
2.1.7. Shari’a School of Thought or Fiqh

The literature review explained that the Islamic School of Thought impacted the interpretation of the Shari’a. To determine whether the majority of the school of thought influenced the enforcement of arbitral awards in a jurisdiction, the respondents were asked what School of Thought or Fiqh is followed by the majority of judges and lawyers in their country. Those who were not from an Islamic jurisdiction or who did not primarily practise in an Islamic jurisdiction or any of the GCC states were given the opportunity to so state with a “Not Applicable” choice.

2.2. RATING

Respondents were asked to rate a series of issues including (1) how they viewed the friendliness of each of the six GCC states towards enforcement of a foreign arbitral award; (2) the familiarity of judges in the GCC states with the New York Convention, the UNCITRAL Model Law, and the ICSID Convention; (3) whether the adoption of the UNCITRAL Model Law would benefit Qatar, Kuwait, and the UAE; and (4) how satisfied were the respondents with regards to their country’s definition of “domestic award”, “foreign award”, and “international award.”
2.2.1. Friendliness of GCC states towards foreign arbitral award enforcement

Of the six GCC states, Bahrain and the UAE were viewed as the friendliest with a similar score of 7.44 out of 10 and 7.43 out of 10, respectively. The KSA, despite the recent passage of the Saudi Arbitration Law of 2012, hailed to bring the KSA in line with international arbitration norms, was still viewed as the least friendly toward enforcement of foreign arbitral awards with the lowest score of 3.44 out of 10. Here is the breakdown of the result:

In a scale of 0-10, where 0 is “least friendly” and 10 is “very friendly,” how would you rate the friendliness of the following countries towards the enforcement of foreign arbitral awards?

Answered: 37  Skipped: 4
2.2.2. Familiarity of Judges in the GCC states with international agreements

Respondents view judges in the GCC states as having low familiarity with international agreements, and especially so with the ICSID Convention which has had very little history in the GCC states. Respondents gave GCC judges a score of 5.86 out of 10 or 58.6% familiarity with the New York Convention, 4.97 out of 10 or 49.7% familiarity with the UNCITRAL Model Law, and 3.78 out of 10 or 37.8% familiarity with the ICSID. This view confirms the conclusions based on the review of the literature that judges are deemed to have little experience with international agreements, and such limited experience may be one of the main reasons for the non-enforcement of foreign arbitral awards. Here is the breakdown of how the respondents viewed the familiarity of judges in the GCC states with the three main international agreements:
2.2.3. Benefit of adopting the UNCITRAL Model Law

The adoption of the UNCITRAL Model Law is usually seen as a positive sign, as discussed in the literature. In the GCC states, only three of six states (Bahrain, Oman, and the KSA) have adopted some version of the UNCITRAL Model Law. Qatar, Kuwait, and the UAE have not yet adopted the UNCITRAL Model Law, and the majority of respondents viewed that the adoption by these three GCC states of the UNCITRAL Model Law would be beneficial. These results confirm the conclusion and the proposal by the research that all the GCC states ought to adopt the UNCITRAL Model Law, and possibly through a Uniform GCC Arbitration Law. Here is the breakdown of the data:
2.2.4. Definition of foreign, domestic, and international award

Respondents were also asked to state their satisfaction with their country’s definition of foreign, domestic, and international arbitral award. Though the majority of respondents were generally somewhat satisfied with their country’s definition of foreign and domestic arbitral award, the majority of respondents were not as satisfied with their country’s definition of international arbitral award with a lower score of 6.16 out of 10 or a 61.6% satisfaction rating. Here is how the data breaks down:
2.3. REASONS FOR NON-ENFORCEMENT OF A FOREIGN ARBITRAL AWARD

Respondents were asked an open-ended question as to the most likely reason for the non-enforcement of a foreign arbitral award. The question aimed to solicit ideas from respondents as to the reasons for non-enforcement, identify the most common reasons for non-enforcement, and to compare whether the most common reasons for enforcement are the same or similar to those identified by the research from the literature review.

The researcher grouped together the most common responses using textual analysis. The highest number of common responses is eleven (11) responses identifying public policy as the most likely reason for non-enforcement. The second highest number of common responses had a total of six (6) responses identifying the judiciary’s lack of familiarity or knowledge with international arbitration, the New York Convention, or some form of judicial activism or hostility as the reason for non-enforcement. The third highest number of common responses had five (5) responses identifying the failure of the arbitration statute as the reason for non-enforcement. The fourth highest number of common responses had four (4) responses identifying jurisdictional issues as the reason for non-enforcement. The fifth highest number of common responses had three (3) identifying social or political reason for non-enforcement. The rest of the remaining nine (9) responses varied and included one response, which stated that the Shari’a is the most common reason for non-enforcement.
2.4. A UNIFORM GCC ARBITRATION LAW?

One of the key elements of the thesis is to propose a set of rules for the Uniform GCC Arbitration Law. The research, however, wanted to clarify whether a Uniform GCC Arbitration Law had support from arbitration practitioners and experts in the GCC States. The research reveals that the majority of respondents at 81.25% are in favour of a Uniform GCC Arbitration Law. Here is how the numbers break down:

![Pie chart showing 81.25% in favour, 18.75% against of respondents]

2.5. CONDITIONS FOR ENFORCEMENT

Chapters 2 and 3 of the study discussed the distinction between domestic and foreign arbitral awards and the conditions for enforcement, respectively. One of the common criticisms found by the research in the review of the literature is that states like the UAE continue to apply domestic arbitration rules in the enforcement of foreign arbitral awards. Courts in the GCC states may, for example, require conditions for enforcement of foreign arbitral awards that should only be applicable to domestic arbitral awards, and therefore leading to the non-enforcement of an arbitral award. Respondents were asked two sets of questions regarding the conditions for enforcement.
2.5.1. Whether domestic or foreign arbitral awards should have the same or different conditions for enforcement.

The majority of respondents at 62.50% viewed that domestic and foreign arbitral awards ought to have the same conditions for enforcement. This was not the expected answer, but perhaps respondents viewed the question to address the equal treatment of domestic and foreign awards. Here is the breakdown of the answers:

2.5.2. Whether conditions for enforcement for domestic arbitral awards equally apply in practice to foreign arbitral awards.

Consistent with their answer to the previous question, the majority of respondents at 75% viewed that the conditions for enforcement of domestic and foreign arbitral awards were not equally applied.
2.6. THE EFFECT OF THE SHARI’A

One of the central themes in the research was to determine the impact of the Shari’a on the enforcement of arbitral awards. The research concludes from the review of the literature that the Shari’a is actually more consistent with the New York Convention as viewed by Western practitioners. The survey was then used to determine how those practicing in the field of arbitration view the role of the Shari’a in the enforcement of arbitral awards, specifically with regards to public policy and whether riba [interest] ought to be allowed in arbitral awards. In this regard, three questions were asked from respondents.

2.6.1. Conflict between the New York Convention and the Shari’a

Respondents were asked about their knowledge as to the interplay between the New York Convention and the Shari’a. Answering the question is quite tricky, as it requires knowledge of both the New York Convention and the Shari’a, especially the Shari’a. After a review of the literature, the research concludes that the Shari’a and the New York Convention would not actually conflict since the New York Convention allows for the public policy defence under which the Shari’a would qualify. Further, the Shari’a requires all Muslims to honour their contract, which the majority of Islamic scholars have interpreted to mean that Muslims have an obligation to follow international agreements. Regardless, when asked whether the New York Convention or the Shari’a would prevail in a conflict, the respondents were split with 53.13% who stated that the New York Convention would prevail, while a staggering 46.88% stated that the Shari’a would prevail. There were those who explained further their choice, and only two comments correctly stated that there ought to be no conflict between the New York Convention and the Shari’a. Here is how the numbers break down:

---

2 The Holy Qur’an, Al-Ma’ida 5:1, Yusuf Ali Translation.
In a conflict between the New York Convention and the Shari’a, which prevails in your jurisdiction?

Answered: 32  Skipped: 9

- New York Convention: 53.13% (17)
- Shari’a: 46.88% (15)
2.6.2. Shari’a and public policy

One of the main issues addressed by the research was the extent to which the Shari’a ought to apply in determining public policy. A review of the literature reveals that the concerns of the Shari’a with regards to public policy were largely consistent with the New York Convention, and would only seem to deviate from international arbitration norms with regards to a few substantive Shari’a public policies that are fundamentally considered *haram* [prohibited]. Public policies under the Shari’a related to procedures were largely consistent with international arbitration norms. The research, therefore, concluded that the Shari’a ought to be applied only when the arbitral award concerned a fundamental Shari’a principle, largely limited to the prohibitions on the *riba* [interest] and *gharar* [uncertainty] and when the subject of the agreement deals with alcohol and/or pork. In this regard, the respondents were asked when the Shari’a ought to apply when determining public policy. The majority of respondents at 48.39% answered that the Shari’a ought to apply when a violation of a fundamental Shari’a principle has been established, a view that supports the conclusion reached by the research. Here is a breakdown of the numbers:

*In your opinion, when should judges or arbitrators apply the Shari’a when determining whether public policy has been violated? (Please choose one.)*

Answered: 31  Skipped: 10

48.39% (15)

3.23% (1)

3.23% (1)

9.68% (3)

35.48% (11)

- Whenever a violation of a fundamental Shari’a principle could potentially arise
- Whenever a violation of any Shari’a principle has been established
- Always
- Never

Whenever a violation of a fundamental Shari’a principle has been established
2.6.3. When should interest be allowed?

The survey also sought to determine how those in the field of arbitration in the GCC states view interests in an arbitral award. The views by respondents on the subject of interest are diverse, only finding commonality among those who do not speak Arabic and who do not primarily practise in the GCC states. Here is the breakdown of the numbers:

**Should interest be allowed in an arbitral award?**

Answered: 31  Skipped: 10

- **25.81% (8)**: Yes, according to the contract
- **16.13% (5)**: Yes, without limitations
- **3.23% (1)**: Yes, but limited to a certain percentage
- **3.23% (1)**: No, unless the parties are all non-Muslims
- **29.03% (9)**: Other (please specify)
- **No, according to the prohibition on the riba**


2.7. TESTING THE PROPOSED RULES

The survey was also used as a tool to test whether the proposed rules to the Uniform GCC Arbitration Law made by the thesis were reasonable. Therefore, the language of the six proposed rules were stated in the survey, and respondents were asked whether they agreed or disagreed with the entire statement. The majority of respondent agreed with the six statements for the proposed rules. Here are the results for each of the proposed rule:

Please consider the following statement(s):
A domestic arbitral award refers to all arbitral awards not falling under the definition of a foreign arbitral award, unless otherwise expressly stated by these arbitration rules and/or any legislation. The New York Convention shall not apply to the enforcement of a domestic arbitral award.

Answered: 31 Skipped: 10

Disagree 19.35% (6)
Agree 80.65% (25)

Please consider the following statement(s):
A foreign arbitral award is an arbitral award that was made in the territory of a State, such state being a signatory to the New York Convention if required by a GCC state, other than the State where the recognition and enforcement of such arbitral award is sought, and arising out of differences between persons, whether physical or legal. The New York Convention shall apply to the enforcement of all foreign arbitral awards, including the interpretation of this provision. Do you agree or disagree with the entire statement?

Answered: 31 Skipped: 10

Disagree 32.26% (10)
Agree 67.74% (21)
Please consider the following statement(s):

An arbitral award is international when (1) the parties to the arbitration have places of business in different states; (2) the location of one of the party’s places of business is in a state, other than the State where the recognition and enforcement of such awards are sought; (3) at least one of the party’s countries of business is different to the place where a substantial part of the commercial relationship’s obligations was performed; or (4) the parties agree that the subject matter of the arbitration agreement relates to more than one country. An international award shall be deemed as a foreign award and shall be governed by the New York Convention. Do you agree or disagree with the entire statement?

Answered: 25  Skipped: 16

Disagree 32% (8)
Agree 68% (17)

Please consider the following statement(s):
The conditions to the enforcement of a domestic arbitral award shall not apply to a foreign or international arbitral award. Do you agree or disagree with the entire statement?

Answered: 31  Skipped: 10

Disagree 22.58% (7)
Agree 77.42% (24)
Please consider the following statement(s):
A court may only refuse enforcement of a foreign arbitral award or annul a foreign arbitral award under the grounds stated in the New York Convention and pursuant to the rule relating to the interpretation of public policy as a ground for non-enforcement or annulment of an arbitral award. A court that refuses to enforce a foreign arbitral award or annuls a foreign arbitral award on grounds not listed under the New York Convention or based on public policy must provide to the parties, in a written judgment, an explanation of its reasoning and decision, including the specific legislative or case law source of such grounds or public policy. Do you agree or disagree with the entire statement?

Answered: 31  Skipped: 10

Disagree 9.68% (3)

Agree 90.32% (28)

Please consider the following statement(s):
Courts must interpret public policy narrowly, and should only be granted as a defence if the public policy concerns an essential or fundamental state interest. The Shari’a shall qualify as an essential or fundamental state interest for purposes of public policy, but only those public policy embodied by the Shari’a that are expressly stated in the Quran, Sunna, Qiyas, and Ijma, those that are haram, and those that are stated as fundamental to the Shari’a by a majority of the Shari’a scholars. Whenever there is no clear consensus as to a public policy under the Shari’a, the court shall weigh the determination of the existence of such public policy on the public policy in favour of enforcement of an arbitral award under the New York Convention. Do you agree or disagree with the entire statement?

Answered: 31  Skipped: 10

Disagree 26.03% (9)

Agree 73.97% (22)
APPENDIX IIa

SURVEY RESULTS
Q1 PARTICIPANT CONSENT FORM By ticking the boxes below, with full knowledge of all foregoing, I agree to participate in this research.

Answered: 41  Skipped: 0

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>I have read the Participant Information Sheet about a research study being conducted by Mr. Ahmed Almutawa for Ph.D. at the School of Law, University of Portsmouth.</td>
<td>100% 41</td>
</tr>
<tr>
<td>I have had the opportunity to ask any questions related to this study, and received satisfactory answers to my questions, and any additional details I wanted.</td>
<td>100% 41</td>
</tr>
<tr>
<td>I am also aware that excerpts from the survey may be included in publications to come from this research. I agree to be anonymously quoted and quotations will be kept anonymous.</td>
<td>100% 41</td>
</tr>
<tr>
<td>I was informed that I might withdraw my consent, without giving any reason, at any time up to the point when the data are analysed by advising the student researcher.</td>
<td>100% 41</td>
</tr>
<tr>
<td>I understand that relevant sections of the data collected during the study may be looked at by individuals from Portsmouth University, where it is relevant to my taking part in this research. I give permission for these individuals to have access to my response.</td>
<td>100% 41</td>
</tr>
</tbody>
</table>

Total Respondents: 41
Q2 What is your profession?

Answered: 40  Skipped: 1

Answer Choices

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorney</td>
<td>47.50%</td>
</tr>
<tr>
<td>Arbitrator</td>
<td>42.50%</td>
</tr>
<tr>
<td>Legal Consultant</td>
<td>35%</td>
</tr>
<tr>
<td>Other (please specify)</td>
<td>25%</td>
</tr>
<tr>
<td>Judge</td>
<td>0%</td>
</tr>
</tbody>
</table>

Total Respondents: 40

# Other (please specify) | Date
1  Expert witness and ACCA | 1/24/2014 7:11 AM
2  procurement & contracts manager/engineer | 1/24/2014 3:33 AM
3  Engineer | 1/22/2014 8:55 PM
4  Architect | 1/22/2014 4:59 AM
5  Quantity Surveyor | 1/22/2014 4:23 AM
6  Engineering Expert | 1/20/2014 8:46 AM
7  Manager- Support Services - Arbitration Centre | 1/15/2014 6:07 AM
8  Vice president Operations in an international EPC Oil and Gas contractor | 1/15/2014 1:57 AM
9  DR | 1/12/2014 9:28 PM
10 Teacher | 1/12/2014 5:35 PM
Q3 Do you practice in the field of arbitration?

Answered: 40  Skipped: 1

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>87.50%</td>
</tr>
<tr>
<td>No</td>
<td>12.50%</td>
</tr>
<tr>
<td>Total</td>
<td></td>
</tr>
</tbody>
</table>
**Q4 How many years have you practiced your profession?**

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
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<tbody>
<tr>
<td>0-2</td>
<td>5%</td>
</tr>
<tr>
<td>2-5</td>
<td>15%</td>
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<td>20%</td>
</tr>
<tr>
<td>10 or more</td>
<td>60%</td>
</tr>
<tr>
<td>Total</td>
<td></td>
</tr>
</tbody>
</table>
Q5 What language(s) are you fluent in? (Please choose at least one.)

Answered: 40  Skipped: 1

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>English</td>
<td>95%</td>
</tr>
<tr>
<td>Arabic</td>
<td>45%</td>
</tr>
<tr>
<td>French</td>
<td>20%</td>
</tr>
<tr>
<td>Other (please specify)</td>
<td>5%</td>
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</tbody>
</table>

Total Respondents: 40

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<tr>
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<th>Other (please specify)</th>
<th>Date</th>
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<tbody>
<tr>
<td>1</td>
<td>malayalam, tamil, hindi</td>
<td>1/24/2014 3:33 AM</td>
</tr>
<tr>
<td>2</td>
<td>German</td>
<td>1/13/2014 12:43 AM</td>
</tr>
</tbody>
</table>
Q6 In which country or countries are you primarily practising your profession? (Choose all answers that apply.)

Answered: 40  Skipped: 1

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Arab Emirates</td>
<td>28</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>11</td>
</tr>
<tr>
<td>Other (please specify)</td>
<td>11</td>
</tr>
<tr>
<td>State of Qatar</td>
<td>6</td>
</tr>
<tr>
<td>Kingdom of Saudi Arabia</td>
<td>4</td>
</tr>
<tr>
<td>Kingdom of Bahrain</td>
<td>2</td>
</tr>
<tr>
<td>State of Kuwait</td>
<td>1</td>
</tr>
<tr>
<td>Sultanate of Oman</td>
<td>1</td>
</tr>
<tr>
<td>United States</td>
<td>0</td>
</tr>
</tbody>
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Total Respondents: 40

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<th>#</th>
<th>Other (please specify)</th>
<th>Date</th>
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<tbody>
<tr>
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<td>india</td>
<td>1/24/2014 3:33 AM</td>
</tr>
<tr>
<td>2</td>
<td>Sri Lanka</td>
<td>1/23/2014 4:38 AM</td>
</tr>
<tr>
<td>3</td>
<td>To the World of Construction</td>
<td>1/20/2014 8:47 AM</td>
</tr>
<tr>
<td>4</td>
<td>France</td>
<td>1/16/2014 3:44 AM</td>
</tr>
<tr>
<td>5</td>
<td>Algeria- palestine - Egypt</td>
<td>1/15/2014 8:55 PM</td>
</tr>
<tr>
<td>6</td>
<td>Syria</td>
<td>1/15/2014 6:08 AM</td>
</tr>
<tr>
<td>7</td>
<td>before the year 2007 i practiced in the Hashimite Kingdom of Jordan</td>
<td>1/15/2014 2:49 AM</td>
</tr>
<tr>
<td>8</td>
<td>Lebanon</td>
<td>1/15/2014 2:09 AM</td>
</tr>
<tr>
<td>9</td>
<td>Internationally ( all of the above ) but primary focus on contracts in the GCC</td>
<td>1/15/2014 1:59 AM</td>
</tr>
<tr>
<td>10</td>
<td>Switzerland</td>
<td>1/13/2014 12:43 AM</td>
</tr>
<tr>
<td>11</td>
<td>Lebanon</td>
<td>1/12/2014 6:54 AM</td>
</tr>
</tbody>
</table>
Q7 Have you had experience with arbitration in the Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom of Saudi Arabia, or the United Arab Emirates?

Answered: 40  Skipped: 1

- **Yes** 87.50% (35)
- **No** 12.50% (5)
### Q8 Which Shari’a School of Thought or Fiqh is followed by the majority of judges and lawyers in your country?

Answered: 40  Skipped: 1

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Applicable (Not from a Shari’a...)</td>
<td>40%</td>
</tr>
<tr>
<td>Malik</td>
<td>30%</td>
</tr>
<tr>
<td>Hanbali</td>
<td>17.50%</td>
</tr>
<tr>
<td>Hanafi</td>
<td>15%</td>
</tr>
<tr>
<td>Other (please specify)</td>
<td>10%</td>
</tr>
<tr>
<td>Shafi'i</td>
<td>2.50%</td>
</tr>
</tbody>
</table>

Total Respondents: 40

<table>
<thead>
<tr>
<th>#</th>
<th>Other (please specify)</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Don't Know</td>
<td>1/22/2014 4:24 AM</td>
</tr>
<tr>
<td>2</td>
<td>In my understanding, the chief source of law within Qatar is the Permanent Constitution of the State of Qatar (2004), which enshrines that authority flows from the Emir. In turn, the Civil Code (Law 22 of 2004) also establishes that the law and the constitution are the primary sources of law within Qatar. The question poses that judges and lawyers “follow” a school of Shari’ah when implementing the law. To me, this is a slightly unusual way of looking at the practice of law in Qatar. Instead, lawyers follow the law and the constitution. If there is a school of the Shari’ah which they find influential, it is the Malik School - but it is only influential or persuasive, as opposed to “followed”, per se.</td>
<td>1/20/2014 1:04 AM</td>
</tr>
<tr>
<td>3</td>
<td>Not known</td>
<td>1/19/2014 5:43 AM</td>
</tr>
<tr>
<td>4</td>
<td>Not sure</td>
<td>1/15/2014 4:40 AM</td>
</tr>
</tbody>
</table>
Q9 In a scale of 0-10, where 0 is “least friendly” and 10 is “very friendly,” how would you rate the friendliness of the following countries towards the enforcement of foreign arbitral awards?

Answered: 37  Skipped: 4

<table>
<thead>
<tr>
<th>(Least Friendly) 0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>(Very Friendly) 10</th>
<th>No experience with this country.</th>
<th>Total</th>
<th>Average Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Kingdom of Bahrain</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>5.41%</td>
<td>2</td>
<td>2.70%</td>
<td>1</td>
<td>2.70%</td>
<td>4</td>
<td>10.81%</td>
<td>5</td>
<td>2.70%</td>
</tr>
<tr>
<td><strong>United Arab Emirates</strong></td>
<td>0</td>
<td>5.41%</td>
<td>2.70%</td>
<td>0%</td>
<td>10.81%</td>
<td>5.41%</td>
<td>10.81%</td>
<td>32.43%</td>
<td>13.51%</td>
<td>8.11%</td>
<td>5.41%</td>
<td>5</td>
<td>4.11%</td>
</tr>
<tr>
<td><strong>Sultanate of Oman</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2.70%</td>
<td>2.70%</td>
<td>24.32%</td>
<td>2.70%</td>
<td>10.81%</td>
<td>0%</td>
<td>0%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td><strong>State of Kuwait</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2.70%</td>
<td>5.41%</td>
<td>5.41%</td>
<td>16.22%</td>
<td>8.11%</td>
<td>5.41%</td>
<td>2.70%</td>
<td>2.70%</td>
<td>0%</td>
</tr>
<tr>
<td><strong>State of Qatar</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2.70%</td>
<td>5.41%</td>
<td>8.11%</td>
<td>21.62%</td>
<td>13.51%</td>
<td>2.70%</td>
<td>0%</td>
<td>14</td>
<td>37.84%</td>
</tr>
</tbody>
</table>

| Kingdom of Saudi Arabia | 21.62% | 13.51% | 8.11% | 8.11% | 5.41% | 2.70% | 8.11% | 2.70% | 2.70% | 0% | 0% | 0% | 0% | 0% | 0% | 0% | 0% | 0% | 27.03% | 10 | 3.44 |
Q10 In a scale of 0-10, where 0 is not knowledgeable and 10 is very knowledgeable, how would you rate the extent to which judges in the GCC are familiar with the New York Convention?

Answered: 36    Skipped: 5

<table>
<thead>
<tr>
<th>0 (Not knowledgeable)</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10 (Very knowledgeable)</th>
<th>Total</th>
<th>Average Rating</th>
</tr>
</thead>
<tbody>
<tr>
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<td>5.56%</td>
<td>5.56%</td>
<td>16.67%</td>
<td>2.78%</td>
<td>27.78%</td>
<td>19.44%</td>
<td>11.11%</td>
<td>2.78%</td>
<td>2.78%</td>
<td>2.78%</td>
<td>36</td>
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</tbody>
</table>


Q11 In a scale of 0-10, where 0 is not knowledgeable and 10 is very knowledgeable, how would you rate the extent to which judges in the GCC are familiar with the UNCITRAL Model Law?

Answered: 36  Skipped: 5

<table>
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<tr>
<th>(no label)</th>
<th>0 (Not knowledgeable)</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10 (Very knowledgeable)</th>
<th>Total</th>
<th>Average Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>(no label)</td>
<td>5.56%</td>
<td>8.33%</td>
<td>8.33%</td>
<td>30.56%</td>
<td>13.89%</td>
<td>8.33%</td>
<td>5.56%</td>
<td>5.56%</td>
<td>11.11%</td>
<td>5.56%</td>
<td>0%</td>
<td>2.78%</td>
<td>4.97</td>
</tr>
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</table>
Q12 In a scale of 0-10, where 0 is not knowledgeable and 10 is very knowledgeable, how would you rate the extent to which judges in the GCC are familiar with the ICSID Convention?

Answered: 36  Skipped: 5

<table>
<thead>
<tr>
<th>0 (Not knowledgeable)</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10 (Very knowledgeable)</th>
<th>Total</th>
<th>Average Rating</th>
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<tr>
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<td>7</td>
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<td>7</td>
<td>3</td>
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<td>1</td>
<td>0</td>
<td>0</td>
<td>2.78%</td>
<td>1</td>
<td>36</td>
</tr>
</tbody>
</table>
Q13 In a scale of 0-10, 0 being least beneficial and 10 being most beneficial, would adopting the UNCITRAL Model Law be beneficial to State of Qatar?

Answered: 33  Skipped: 8

8.42
Q14 In a scale of 0-10, 0 being least beneficial and 10 being most beneficial, would adopting the UNCITRAL Model Law be beneficial to the State of Kuwait?

Answered: 33  Skipped: 8

<table>
<thead>
<tr>
<th>0 (Least Beneficial)</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10 (Most Beneficial)</th>
<th>Total</th>
<th>Average Rating</th>
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</thead>
<tbody>
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<td>3.03%</td>
<td>0%</td>
<td>3.03%</td>
<td>12.12%</td>
<td>6.06%</td>
<td>15.15%</td>
<td>24.24%</td>
<td>12.12%</td>
<td>24.24%</td>
<td>33</td>
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</table>
Q15 In a scale of 0-10, 0 being least beneficial and 10 being most beneficial, would adopting the UNCITRAL Model Law be beneficial to the United Arab Emirates?

Answered: 33  Skipped: 8

<table>
<thead>
<tr>
<th>0 (Least Beneficial)</th>
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<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10 (Most Beneficial)</th>
<th>Total</th>
<th>Average Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>(no label)</td>
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<td>0%</td>
<td>3.03%</td>
<td>0%</td>
<td>3.03%</td>
<td>12.12%</td>
<td>0%</td>
<td>15.15%</td>
<td>27.27%</td>
<td>15.15%</td>
<td>24.24%</td>
<td>33</td>
</tr>
</tbody>
</table>
Q16 In a scale of 0-10, 0 being very unsatisfied and 10 being very satisfied, how would you rate your country’s definition of foreign award?

Answered: 33  Skipped: 8

<table>
<thead>
<tr>
<th></th>
<th>0 (Unsatisfied)</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10 (Very satisfied)</th>
<th>Total</th>
<th>Average Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>(no label)</td>
<td>3.03%</td>
<td>0%</td>
<td>6.06%</td>
<td>9.09%</td>
<td>9.09%</td>
<td>15.15%</td>
<td>15.15%</td>
<td>12.12%</td>
<td>12.12%</td>
<td>12.12%</td>
<td></td>
<td>33</td>
<td>7.06</td>
</tr>
</tbody>
</table>
Q17 In a scale of 0-10, 0 being very unsatisfied and 10 being very satisfied, how would you rate your country’s definition of domestic award?

Answered: 33  Skipped: 8

<table>
<thead>
<tr>
<th></th>
<th>0 (Unsatisfied)</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10 (Very satisfied)</th>
<th>Total</th>
<th>Average Rating</th>
</tr>
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<tbody>
<tr>
<td>(no label)</td>
<td>0%</td>
<td>3.03%</td>
<td>0%</td>
<td>6.06%</td>
<td>6.06%</td>
<td>9.09%</td>
<td>12.12%</td>
<td>9.09%</td>
<td>21.21%</td>
<td>21.21%</td>
<td>12.12%</td>
<td>33</td>
<td>8.09</td>
</tr>
</tbody>
</table>
Q18 In a scale of 0-10, 0 being very unsatisfied and 10 being very satisfied, how would you rate your country’s definition of international award?

Answered: 32  Skipped: 9

<table>
<thead>
<tr>
<th>Rating</th>
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<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10 (Very satisfied)</th>
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<tbody>
<tr>
<td>(no label)</td>
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<td>0%</td>
<td>6.25%</td>
<td>12.50%</td>
<td>21.88%</td>
<td>12.50%</td>
<td>18.75%</td>
<td>9.38%</td>
<td>6.25%</td>
<td>6.25%</td>
<td>3.13%</td>
<td>32</td>
<td>6.16</td>
</tr>
</tbody>
</table>

Q19 What is the most likely reason for the non-enforcement of a foreign arbitral award in your jurisdiction?

<table>
<thead>
<tr>
<th>#</th>
<th>Responses</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Jurisdictional issues</td>
<td>2/9/2014 1:54 AM</td>
</tr>
<tr>
<td>2</td>
<td>non compliance with Public Policy</td>
<td>1/25/2014 9:34 AM</td>
</tr>
<tr>
<td>3</td>
<td>LACK OF READILY ACCEPTED FOREIGN AWARDS</td>
<td>1/24/2014 7:18 AM</td>
</tr>
<tr>
<td>4</td>
<td>Judges lack of knowledge with the developments of enforcement practices in world and judges bias towards arbitration in general.</td>
<td>1/24/2014 6:41 AM</td>
</tr>
<tr>
<td>5</td>
<td>conflict with laws of the land</td>
<td>1/24/2014 3:37 AM</td>
</tr>
<tr>
<td>6</td>
<td>any award that does not fall under Enforcement of Foreign Arbitral Awards</td>
<td>1/23/2014 4:49 AM</td>
</tr>
<tr>
<td>7</td>
<td>Disagreement with the verdict as the one who is the losing party in the arbitration is a powerful local individual / company</td>
<td>1/22/2014 8:55 PM</td>
</tr>
<tr>
<td>8</td>
<td>Public policy &amp; non signatory to NY CONVENTION.</td>
<td>1/22/2014 12:23 PM</td>
</tr>
<tr>
<td>9</td>
<td>lack of jurisdiction</td>
<td>1/22/2014 5:02 AM</td>
</tr>
<tr>
<td>10</td>
<td>public policy</td>
<td>1/21/2014 7:54 AM</td>
</tr>
<tr>
<td>11</td>
<td>Not having a Bilateral agreement</td>
<td>1/20/2014 8:52 AM</td>
</tr>
<tr>
<td>13</td>
<td>Respondent not being domiciled in the UAE and so courts claiming not to have jurisdiction.</td>
<td>1/19/2014 5:46 AM</td>
</tr>
<tr>
<td>14</td>
<td>الشكلية في تعرف النظام المعمول به.</td>
<td>1/19/2014 5:00 AM</td>
</tr>
<tr>
<td>15</td>
<td>Competing jurisdiction clause</td>
<td>1/18/2014 11:43 PM</td>
</tr>
<tr>
<td>16</td>
<td>Violation of due process</td>
<td>1/16/2014 3:54 AM</td>
</tr>
<tr>
<td>17</td>
<td>The most likely reason for non-enforcement of a foreign arbitral award is the multiple litigation procedures are requested to enforce the arbitral award.</td>
<td>1/15/2014 9:18 PM</td>
</tr>
<tr>
<td>18</td>
<td>public policy</td>
<td>1/15/2014 5:34 AM</td>
</tr>
<tr>
<td>19</td>
<td>Challenge under local law</td>
<td>1/15/2014 5:22 AM</td>
</tr>
<tr>
<td>20</td>
<td>Contrary to public policy</td>
<td>1/15/2014 4:43 AM</td>
</tr>
<tr>
<td>21</td>
<td>AUTHORITY TO ARBITRATE</td>
<td>1/15/2014 3:38 AM</td>
</tr>
<tr>
<td>22</td>
<td>the weak of knowledge of the judges</td>
<td>1/15/2014 2:34 AM</td>
</tr>
<tr>
<td>23</td>
<td>variety of reasons; 1. contradicting the sharia law of the country. 2. Local political / social considerations particularly when the case awarded is against a governmental or semi governmental entity or establishment, where there could be influence by the entity on the verdict being against the gov interests. 3. Lack of exposure to international laws by local authorities and contractors alike.</td>
<td>1/15/2014 2:09 AM</td>
</tr>
<tr>
<td>24</td>
<td>Public policy - non reciprocity - lack of independent Arbitration legislation - lack of awareness of the terms of NY convention</td>
<td>1/13/2014 11:28 PM</td>
</tr>
<tr>
<td>25</td>
<td>Lack of clear procedural guidelines in domestic legislation and lack of understanding of New York Convention.</td>
<td>1/13/2014 4:55 AM</td>
</tr>
<tr>
<td>26</td>
<td>public policy reasons</td>
<td>1/13/2014 1:44 AM</td>
</tr>
<tr>
<td>27</td>
<td>Lack of reciprocal agreement</td>
<td>1/13/2014 1:27 AM</td>
</tr>
<tr>
<td>28</td>
<td>public policy exception</td>
<td>1/13/2014 12:47 AM</td>
</tr>
<tr>
<td>29</td>
<td>Vague reasons linked to &quot;policy&quot;</td>
<td>1/12/2014 10:17 PM</td>
</tr>
<tr>
<td>30</td>
<td>The enforcement judge allows the ambiguities of the local law to take precedence over the jurisdiction's treaty obligations.</td>
<td>1/12/2014 8:57 PM</td>
</tr>
<tr>
<td>31</td>
<td>extensive variety of grounds</td>
<td>1/12/2014 5:37 PM</td>
</tr>
<tr>
<td>32</td>
<td>Public policy.</td>
<td>1/12/2014 5:59 AM</td>
</tr>
<tr>
<td>33</td>
<td>Judicial hostility to arbitration. Judges do not want to lose their jobs to arbitrators.</td>
<td>1/27/2013 5:30 AM</td>
</tr>
</tbody>
</table>
Q20 In a conflict between the New York Convention and the Shari’a, which prevails in your jurisdiction?

Answered: 32  Skipped: 9

### Answer Choices

<table>
<thead>
<tr>
<th>Shari’a</th>
<th>New York Convention</th>
</tr>
</thead>
<tbody>
<tr>
<td>46.88%</td>
<td>53.13%</td>
</tr>
</tbody>
</table>

### Responses

<table>
<thead>
<tr>
<th>#</th>
<th>Why?</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Public policy usually wins out in the Courts regardless of the NYC.</td>
<td>2/9/2014 1:55 AM</td>
</tr>
<tr>
<td>2</td>
<td>Supreme law of the land.</td>
<td>1/24/2014 6:42 AM</td>
</tr>
<tr>
<td>3</td>
<td>It is more in line with prevailing civil laws and culture</td>
<td>1/22/2014 12:25 PM</td>
</tr>
<tr>
<td>4</td>
<td>NY Convention more widely used than Shari’a among signing states</td>
<td>1/20/2014 8:53 AM</td>
</tr>
<tr>
<td>5</td>
<td>The Convention is an international treaty to which Qatar is a signatory. It has, as a matter of law, assumed obligations to enforce arbitral awards under the Convention. The Shari’ah is of course extremely persuasive and it should not be contravened, but, unlike the Convention, it does not create binding obligations of law upon the State of Qatar and its judges.</td>
<td>1/20/2014 1:09 AM</td>
</tr>
<tr>
<td>6</td>
<td>I believe that the Shari’a prevails as it underlies the UAE law but I am uncertain on this.</td>
<td>1/19/2014 5:47 AM</td>
</tr>
<tr>
<td>7</td>
<td>املاء قانون الدعاية لا إلا من المرجح أن تحل قضايا من رد الفعل في &quot; يبدو أن القانون الفعلي لم يتجاوز عنيا من خلال تفاهم تقنية في بورك</td>
<td>1/19/2014 5:01 AM</td>
</tr>
<tr>
<td>8</td>
<td>Actually, Shari’a is not applicable in my jurisdiction.</td>
<td>1/16/2014 3:55 AM</td>
</tr>
<tr>
<td>9</td>
<td>Thought of that and in my opinion, there is no conflict between the New York Convention and Shari’a principles as specified in standard examiner of Arbitration number 31</td>
<td>1/15/2014 9:27 PM</td>
</tr>
<tr>
<td>10</td>
<td>UAE does not usually apply Shari’a in these circumstances</td>
<td>1/15/2014 5:34 AM</td>
</tr>
<tr>
<td>11</td>
<td>Because KSA is a Muslim country.</td>
<td>1/15/2014 2:37 AM</td>
</tr>
<tr>
<td>12</td>
<td>because of the nature of the courts</td>
<td>1/15/2014 2:10 AM</td>
</tr>
<tr>
<td>13</td>
<td>because Shia is the main source of legislation.</td>
<td>1/13/2014 11:28 PM</td>
</tr>
<tr>
<td>14</td>
<td>Shari’a inapplicable in Switzerland</td>
<td>1/13/2014 12:47 AM</td>
</tr>
<tr>
<td>15</td>
<td>Policy</td>
<td>1/12/2014 10:18 PM</td>
</tr>
<tr>
<td>16</td>
<td>There seldom seems to be a direct conflict between Shari’a and the NYC in this jurisdiction, as any issues offending Shari’a are generally dealt with easily in the public policy exception in the NYC.</td>
<td>1/12/2014 9:01 PM</td>
</tr>
<tr>
<td>17</td>
<td>My jurisdiction is England. Sharia law would be applied only by agreement of the Parties</td>
<td>1/12/2014 5:40 PM</td>
</tr>
<tr>
<td>18</td>
<td>The court does not apply Shari’a in commercial matters. It applies the New York Convention. If a matter related to shari’a as applied in Kuwait (and not Saudi), it would likely be non-arbital. Despite the fact that Kuwait is an Islamic country, it has a reasonably secular legal system (unlike Saudi).</td>
<td>1/12/2014 6:01 AM</td>
</tr>
<tr>
<td>19</td>
<td>Because the judges understand Shari’a better than the New York Convention as they are schooled in the former.</td>
<td>12/27/2013 5:31 AM</td>
</tr>
</tbody>
</table>
Q21 In your opinion, should domestic and foreign arbitral awards have the same or different conditions for enforcement?

Answered: 32 Skipped: 9

- **Different 37.50% (12)**
- **Same 62.50% (20)**

<table>
<thead>
<tr>
<th>#</th>
<th>Why?</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Easy of enforcement.</td>
<td>2/9/2014 1:55 AM</td>
</tr>
<tr>
<td>2</td>
<td>OFTEN THERE ARE AWARDS WHICH CAN BE CHALLENGING THE SHARIA LAWS</td>
<td>1/24/2014 7:19 AM</td>
</tr>
<tr>
<td>3</td>
<td>Equality of treatment</td>
<td>1/24/2014 6:42 AM</td>
</tr>
<tr>
<td>4</td>
<td>Nature, circumstances, laws and customs vary between local an internationl Arbitration</td>
<td>1/22/2014 12:28 PM</td>
</tr>
<tr>
<td>5</td>
<td>In foreign arbitral awards national courts should be more flexible towards understanding the notion of international public policy standards rather than applying domestic public policy to international relations</td>
<td>1/21/2014 7:56 AM</td>
</tr>
<tr>
<td>6</td>
<td>to facilitate enforcement</td>
<td>1/20/2014 8:54 AM</td>
</tr>
<tr>
<td>7</td>
<td>An arbitral award is an arbitral an award. The foreign or domestic element to it ought, as a matter of substantive law, to be irrelevant.</td>
<td>1/20/2014 1:09 AM</td>
</tr>
<tr>
<td>8</td>
<td>The sovereignty of the state requires that it controls the &quot;justice&quot; made on its territory.</td>
<td>1/19/2014 5:02 AM</td>
</tr>
<tr>
<td>9</td>
<td>Being not totally attached to domestic legal order, I consider that foreign arbitral awards should be treated in a more liberal way than domestic awards, to ensure better effectiveness of arbitration in an international context. Actually, this efficiency ensures predictability for the parties, since it is the method of dispute resolution which they have chosen to resolve their dispute. This predictability, and hence effectiveness, is the essence of justice.</td>
<td>1/16/2014 6:39 AM</td>
</tr>
<tr>
<td>10</td>
<td>Because disputes with investors can count as domestic if they invest through a local vehicle, there is no logical reason to distinguish them</td>
<td>1/15/2014 5:35 AM</td>
</tr>
<tr>
<td>11</td>
<td>The sovereign right of each country on its territory and applying its laws and regulation. Thus, I believe that the foreign award must be subject to verify by the judicial authorities in Saudi Arabia and make sure the award is final so it can be implemented.</td>
<td>1/15/2014 2:51 AM</td>
</tr>
<tr>
<td>12</td>
<td>Same as both need to be ratified by the local courts. The challenge is with international awards is that it is more difficult to enforce because it needs to be established again by the local courts. Therefore, there need to be an efficient/robust mechanism under conflict resolution clause in the local legislation in presenting these awards to the local courts by the plaintiffs so that the award effectiveness is not delayed.</td>
<td>1/15/2014 2:21 AM</td>
</tr>
<tr>
<td>13</td>
<td>To ensure that the legislation is pred Abitration.</td>
<td>1/13/2014 11:30 PM</td>
</tr>
<tr>
<td>14</td>
<td>In principle, I see no objective reason for difference in enforcement of domestic and foreign arbitral awards that originate from the New York Convention states. Indeed, New York Convention requires that foreign awards should not have more onerous conditions for enforcement than domestic awards. However, I believe that a state that wants to be arbitration friendly has to ensure not only that it does not impose more onerous conditions for enforcement of foreign awards compared to domestic awards, but also that it does not equate foreign awards to domestic awards if conditions for enforcement of domestic awards are overly onerous. After all, if the parties choose to arbitrate in a particular state, they go with their eyes open with regards to that state's procedure for enforcement of domestic awards. However, the parties do not have the same choice when it comes to enforcement of a foreign award in a particular state. In addition, a state that is a party to New York Convention has to ensure that it complies with it, even if this means that foreign awards are easier to enforce in that state than domestic awards.</td>
<td>1/13/2014 5:18 AM</td>
</tr>
<tr>
<td>15</td>
<td>Awards from different countries may not be as legit as domestic awards in the UK.</td>
<td>1/13/2014 1:28 AM</td>
</tr>
<tr>
<td>16</td>
<td>The enforcement of foreign awards is a matter of international law; different considerations may apply to the enforcement of domestic awards.</td>
<td>1/13/2014 12:49 AM</td>
</tr>
<tr>
<td>17</td>
<td>no reason for difference. often no significant difference between domestic and foreign parties in commercial arbitration - especially in GCC states where there is significant &quot;foreign&quot; investment - albeit through local companies.</td>
<td>1/12/2014 10:21 PM</td>
</tr>
<tr>
<td>18</td>
<td>I see no good reason why they should be any different. Any differences can often be circumvented as the parties can (usually) decide in their arbitration agreement whether the proceedings will be domestic or foreign, by choice of seat, thereby taking advantage of the more favourable enforcement regime.</td>
<td>1/12/2014 9:06 PM</td>
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<td></td>
<td></td>
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<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>19</td>
<td>This question too opaque. It depends of which substantive and procedural laws were applied in the seat of the arbitration</td>
<td>1/12/2014 5:45 PM</td>
</tr>
<tr>
<td>20</td>
<td>Domestic awards should not be treated more favourably as Kuwait is a NYC Convention signatory.</td>
<td>1/12/2014 6:02 AM</td>
</tr>
<tr>
<td>21</td>
<td>Because foreign awards are of different dimension to domestic awards.</td>
<td>12/27/2013 5:32 AM</td>
</tr>
</tbody>
</table>
Q22 In your experience, do conditions for enforcement of domestic arbitral awards equally apply in practice to foreign arbitral awards in your jurisdiction?

Answered: 32  Skipped: 9

- Yes 25% (8)
- No 75% (24)
Q23 Are you in FAVOUR or AGAINST a uniform GCC Arbitration Law?

Answered: 32    Skipped: 9

- Favour: 81.25% (26)
- Against: 18.75% (6)
Q24 In your opinion, when should judges or arbitrators apply the Shari’a when determining whether public policy has been violated? (Please choose one.)

Answered: 31  Skipped: 10

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Whenever a violation of any Shari’a principle could potentially arise</td>
<td>0% 0</td>
</tr>
<tr>
<td>Whenever a violation of a fundamental Shari’a principle could potentially arise</td>
<td>3.23% 1</td>
</tr>
<tr>
<td>Whenever a violation of any Shari’a principle has been established</td>
<td>3.23% 1</td>
</tr>
<tr>
<td>Always</td>
<td>9.68% 3</td>
</tr>
<tr>
<td>Never</td>
<td>35.48% 11</td>
</tr>
<tr>
<td>Whenever a violation of a fundamental Shari’a principle has been established</td>
<td>48.39% 15</td>
</tr>
<tr>
<td>Total</td>
<td>31</td>
</tr>
</tbody>
</table>
Q25 Should interest be allowed in an arbitral award?

Answered: 31  Skipped: 10

- 29.03% (9) No, according to the prohibition on the riba
- 3.23% (1) No, unless the parties are all non-Muslims
- 3.23% (1) Other (please specify)
- 16.13% (5) Yes, without limitations
- 22.58% (7) Yes, but limited to a certain percentage
- 25.81% (8) Yes, according to the contract

### Answer Choices

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>No, according to the prohibition on the riba</td>
<td>29.03%</td>
</tr>
<tr>
<td>No, unless the parties are all non-Muslims</td>
<td>3.23%</td>
</tr>
<tr>
<td>Other (please specify)</td>
<td>3.23%</td>
</tr>
<tr>
<td>Yes, without limitations</td>
<td>16.13%</td>
</tr>
<tr>
<td>Yes, but limited to a certain percentage</td>
<td>22.58%</td>
</tr>
<tr>
<td>Yes, according to the contract</td>
<td>25.81%</td>
</tr>
<tr>
<td>Total</td>
<td>29.03%</td>
</tr>
</tbody>
</table>

### Examples of Other (please specify)

1. The term of interest should be changed to loss of profit.
2. There is interest allowed in some kind of contract to cover the damage, without that it will be riba.
3. Yes - according to the contract and to law.
4. Yes, although this should be subject to the constraints of the local law.
5. Yes, as permitted by Kuwait law and/or contract.
Q26 Please consider the following statement(s): A foreign arbitral award is an arbitral award that was made in the territory of a State, such state being a signatory to the New York Convention if required by a GCC state, other than the State where the recognition and enforcement of such arbitral award is sought, and arising out of differences between persons, whether physical or legal. The New York Convention shall apply to the enforcement of all foreign arbitral awards, including the interpretation of this provision. Do you agree or disagree with the entire statement?

Answered: 31  Skipped: 10

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disagree</td>
<td>32.26%</td>
</tr>
<tr>
<td>Agree</td>
<td>67.74%</td>
</tr>
<tr>
<td>Total</td>
<td>31</td>
</tr>
</tbody>
</table>
Q27 Please consider the following statement(s): A domestic arbitral award refers to all arbitral awards not falling under the definition of a foreign arbitral award, unless otherwise expressly stated by these arbitration rules and/or any legislation. The New York Convention shall not apply to the enforcement of a domestic arbitral award.

Answered: 31  Skipped: 10
Q28 Please consider the following statement(s): An arbitral award is international when (1) the parties to the arbitration have places of business in different states; (2) the location of one of the party’s places of business is in a state, other than the State where the recognition and enforcement of such awards are sought; (3) at least one of the party’s countries of business is different to the place where a substantial part of the commercial relationship’s obligations was performed; or (4) the parties agree that the subject matter of the arbitration agreement relates to more than one country. An international award shall be deemed as a foreign award and shall be governed by the New York Convention. Do you agree or disagree with the entire statement?

Answered: 25  Skipped: 16

Agree 68% (17)

Disagree 32% (8)
Q29 Please consider the following statement(s): The conditions to the enforcement of a domestic arbitral award shall not apply to a foreign or international arbitral award. Do you agree or disagree with the entire statement?

Answered: 31   Skipped: 10

Agree 77.42% (24)

Disagree 22.58% (7)
Q30 Please consider the following statement(s): A court may only refuse enforcement of a foreign arbitral award or annul a foreign arbitral award under the grounds stated in the New York Convention and pursuant to the rule relating to the interpretation of public policy as a ground for non-enforcement or annulment of an arbitral award. A court that refuses to enforce a foreign arbitral award or annuls a foreign arbitral award on grounds not listed under the New York Convention or based on public policy must provide to the parties, in a written judgment, an explanation of its reasoning and decision, including the specific legislative or case law source of such grounds or public policy. Do you agree or disagree with the entire statement?

Answered: 31  Skipped: 10

Agree 90.32% (28)

Disagree 9.68% (3)
Q31 Please consider the following statement(s): Courts must interpret public policy narrowly, and should only be granted as a defence if the public policy concerns an essential or fundamental state interest. The Shari'a shall qualify as an essential or fundamental state interest for purposes of public policy, but only those public policy embodied by the Shari'a that are expressly stated in the Quran, Sunna, Qiyas, and Ijma, those that are haram, and those that are stated as fundamental to the Shari'a by a majority of the Shari'a scholars. Whenever there is no clear consensus as to a public policy under the Shari'a, the court shall weigh the determination of the existence of such public policy on the public policy in favour of enforcement of an arbitral award under the New York Convention. Do you agree or disagree with the entire statement?

Answered: 31  Skipped: 10

Agree 70.97% (22)
Disagree 29.03% (9)
Q32 If you disagree, please state why.
Answered: 10  Skipped: 31

<table>
<thead>
<tr>
<th>#</th>
<th>Responses</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The text does not make sense.</td>
<td>2/9/2014 1:57 AM</td>
</tr>
<tr>
<td>2</td>
<td>IF IT CONTRAVENES THE SHARIA LAW</td>
<td>1/24/2014 7:23 AM</td>
</tr>
<tr>
<td>3</td>
<td>country where enforcement of arbitral award is sought also should be signatory to NY convention.</td>
<td>1/24/2014 3:42 AM</td>
</tr>
<tr>
<td>4</td>
<td>at times this casts doubts on the jurisdiction of particular countries</td>
<td>1/23/2014 4:59 AM</td>
</tr>
<tr>
<td>5</td>
<td>Implementation of a foreign arbitral award should be limited to members of the New York convention with well known and agreed rules and principles with their contractual, legal and financial impact. Opening the door for others will not be fair or expected by the disputing parties and justice and jurisdictional issues may be compromised.</td>
<td>1/22/2014 12:41 PM</td>
</tr>
<tr>
<td>6</td>
<td>I am not convinced that a given state should be permitted to refuse to enforce a foreign arbitral award simply because the state where the award was rendered is not a signatory to the New York Convention. The seat of the award ought, broadly, to be irrelevant unless (on the facts) the procedural issues in the arbitration have been determinative of the dispute. If the award has been fully and properly considered and has reached a reasoned conclusion on the matters in dispute, in accordance with the substantive law of the dispute and within the boundaries of the tribunal’s jurisdiction, then the seat of the arbitration is and should be irrelevant. So, even if the seat is from a country who is not a signatory to the Convention, the award should nevertheless be enforced. It was the part of the statement requiring the seat also to be a Convention signatory with which I disagreed.</td>
<td>1/20/2014 1:17 AM</td>
</tr>
<tr>
<td>7</td>
<td>The provision deals with different issues at the same time. In addition it contains terms that are necessary such as &quot;physical or legal&quot;.</td>
<td>1/19/2014 5:05 AM</td>
</tr>
<tr>
<td>8</td>
<td>I do not understand the purpose of the reference to &quot;differences between persons&quot;. Is this to distinguish disputes involving a sovereign government?</td>
<td>1/13/2014 12:52 AM</td>
</tr>
<tr>
<td>9</td>
<td>Does not make sense</td>
<td>1/12/2014 10:25 PM</td>
</tr>
<tr>
<td>10</td>
<td>A foreign award depends on the seat and not necessarily the territory. Further an award may be foreign, yet the jurisdiction need not or is not capable of being a party to the NY Convention (e.g. QFC).</td>
<td>1/12/2014 6:06 AM</td>
</tr>
</tbody>
</table>
Q33 If you disagree, please state why.

Answered: 0  Skipped: 41

<table>
<thead>
<tr>
<th>#</th>
<th>Responses</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>There are no responses.</td>
<td></td>
</tr>
</tbody>
</table>
Q34 If you disagree, please state why.

<table>
<thead>
<tr>
<th>#</th>
<th>Responses</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Two statements being made and the first cannot be confirmed without question.</td>
<td>2/9/2014 1:58 AM</td>
</tr>
<tr>
<td>2</td>
<td>parties with domestic businesses also may opt for international arbitration subject to mutual agreement.</td>
<td>1/24/2014 3:45 AM</td>
</tr>
<tr>
<td>3</td>
<td>Arbitration rules should be the same all over the world in my opinion, therefore they should apply to both domestic and international arbitration.</td>
<td>1/22/2014 8:58 PM</td>
</tr>
<tr>
<td>4</td>
<td>The New York convention is applicable to foreign arbitral awards not to international awards. Also international arbitration is an arbitration that takes place in the country where its courts should have certain powers for supervising and examining arbitral awards that will be granted the nationality of that state for the purpose of enforcement of the award in foreign jurisdictions under the N.Y convention if that is needed. However, such courts should treat international awards with considerable flexibility when examining the award under the domestic public policy principles, particularly, it should not apply mandatory rules as part of public policy when examining such awards.</td>
<td>1/21/2014 8:10 AM</td>
</tr>
<tr>
<td>5</td>
<td>&quot;Place of business&quot; would need to be clearly defined to ensure that it only applies to the strict definition of a company's legal personality. Just because a company has overseas offices does not necessarily mean it can or should avail itself of a definition of international arbitration.</td>
<td>1/20/2014 1:24 AM</td>
</tr>
<tr>
<td>6</td>
<td>I would rather opt for a clearer definition of international award. The current definition would require an interpretation effort, something to be avoided as much as possible.</td>
<td>1/19/2014 5:08 AM</td>
</tr>
<tr>
<td>7</td>
<td>I agree that &quot;An international award shall be deemed as a foreign award and shall be governed by the New York Convention&quot;. However, I consider that the parties agreement (required in number 4 of the definition) should be irrelevant as to the characterization of the arbitral award. As far as the subject matter of the arbitration agreement relates to more than one country, arbitral award should be considered as international and this even if one of the parties disagree with that; the competent judge should make a factual analysis in this regard.</td>
<td>1/16/2014 6:52 AM</td>
</tr>
<tr>
<td>8</td>
<td>AWARDS NOT FALLING WITHIN THE PREVIOUS DEFINITION OF WHAT IS FOREIGN, ARE NOT NECESSARILY DOMESTIC.</td>
<td>1/15/2014 3:46 AM</td>
</tr>
<tr>
<td>9</td>
<td>In my view, best to define a domestic award as an award that has been issued within a territory of a certain state, rather than &quot;any other award...&quot;</td>
<td>1/13/2014 5:25 AM</td>
</tr>
<tr>
<td>10</td>
<td>NYC should not define or interpret domestic awards</td>
<td>1/13/2014 1:46 AM</td>
</tr>
<tr>
<td>11</td>
<td>The term &quot;country of business&quot; is unclear. Is &quot;country of incorporation&quot; what is intended? In any event, does not the New York Convention itself provide a definition of the awards falling within its scope?</td>
<td>1/13/2014 12:55 AM</td>
</tr>
<tr>
<td>12</td>
<td>There may need to be some clarification for point 2: the location of one of the party's places of business is in a state, other than the State where the recognition and enforcement of such awards are sought. Presumably, it is not intended that an otherwise purely domestic arbitration award could be turned into a foreign arbitration award in the country in which it is issued simply by one of the parties starting parallel enforcement proceedings in another country.</td>
<td>1/12/2014 9:18 PM</td>
</tr>
<tr>
<td>13</td>
<td>The definition is too vague and does not adequately capture free zone jurisdictions.</td>
<td>1/12/2014 6:07 AM</td>
</tr>
<tr>
<td>14</td>
<td>The New York Convention states in Article 1 (second sentence) that &quot;(i) it shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought&quot;. In a recent case decided by the Supreme Court of Singapore dealt with a domestic international arbitral (non-domestic) to award as discussed in Kluwer Arbitration Blog (29 November 2013). In a recent decision in the long-running Admo v. Lippo dispute, i the Singapore Court of Appeal (the &quot;Court&quot;) grappled with the question of whether an unsuccessful party to an international arbitration award rendered in Singapore (a &quot;domestic international award&quot;) can choose to wait and invoke a passive remedy only in response to enforcement proceedings at the seat.</td>
<td>12/27/2013 2:26 PM</td>
</tr>
</tbody>
</table>
### Q35 If you disagree, please state why.

Answered: 9  Skipped: 32

<table>
<thead>
<tr>
<th>#</th>
<th>Responses</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Cannot be certain that other jurisdictions (not the UAE) would not treat them in the same way.</td>
<td>2/9/2014 1:59 AM</td>
</tr>
<tr>
<td>2</td>
<td>What is the reason to distinguish against a domestic award? This is the situation in the UAE where foreign arbitral awards, falling under the NY Convention, have better chance of enforcement than domestic awards.</td>
<td>1/24/2014 6:46 AM</td>
</tr>
<tr>
<td>3</td>
<td>Endorsement of an award should be governed by the same rules and principles in order to maintain uniformity and justice.</td>
<td>1/22/2014 12:49 PM</td>
</tr>
<tr>
<td>4</td>
<td>I am not clear why there should be different standards that apply to the enforcement of domestic or foreign awards. An award should be treated as an award. The sole protection required would be to prevent against forum shopping.</td>
<td>1/20/2014 1:26 AM</td>
</tr>
<tr>
<td>5</td>
<td>No need to state the obvious. Once the law lists different enforcement conditions it means that the domestic award will be treated differently.</td>
<td>1/19/2014 5:19 AM</td>
</tr>
<tr>
<td>6</td>
<td>because there will be differences</td>
<td>1/15/2014 2:42 AM</td>
</tr>
<tr>
<td>7</td>
<td>Some conditions of domestic awards may apply to foreign/International awards as per the rights provided in Article V of the NYC</td>
<td>1/13/2014 1:47 AM</td>
</tr>
<tr>
<td>8</td>
<td>I agree to the extent that the jurisdiction may already have its own local law requirements for enforcing a domestic award. But I see no real reason for the enforcement criteria to be different for foreign and domestic awards, except with some reservations perhaps for domestic consumer disputes, etc.</td>
<td>1/12/2014 9:21 PM</td>
</tr>
<tr>
<td>9</td>
<td>See Kluwer Arbitration Blog (29 Nov. 2013) Astro v. Lippo: Singapore Court of Appeal Confirms Passive Remedies to Enforcement Available for Domestic International Awards By Ben Jolley, Herbert Smith Freehills LLP In a recent decision in the long-running Astro v. Lippo dispute, the Singapore Court of Appeal (the &quot;Court&quot;) grappled with the question of whether an unsuccessful party to an international arbitration award rendered in Singapore (a &quot;domestic international award&quot;) can choose to wait and invoke a passive remedy only in response to enforcement proceedings at the seat.</td>
<td>12/27/2013 5:56 AM</td>
</tr>
</tbody>
</table>
### Q36 If you disagree, please state why.

Answered: 3  Skipped: 38

<table>
<thead>
<tr>
<th>#</th>
<th>Responses</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Annulment should be rather treated differently.</td>
<td>1/19/2014 5:12 AM</td>
</tr>
<tr>
<td>2</td>
<td>I only agree with the first part of the statement. The second part of the statement may potentially render the first part ineffective.</td>
<td>1/13/2014 5:28 AM</td>
</tr>
<tr>
<td>3</td>
<td>There should be no annulment or refusal of exequatur on any ground not specified in the New York Convention; certainly any refusal of enforcement on a public policy ground must be clearly explained by a court.</td>
<td>1/13/2014 12:57 AM</td>
</tr>
</tbody>
</table>
### Q37 If you disagree, please state why.

<table>
<thead>
<tr>
<th>#</th>
<th>Responses</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The statement does not solve the problem of interpretation of sharia. It just describes it without finding a cutting solution.</td>
<td>1/19/2014 5:13 AM</td>
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<tr>
<td>2</td>
<td>I consider that Qiyas is not to be treated like Quran, Sunna and Ijma. Public Policy shall be viewed with a narrow interpretation to include major principals of charia, that are expressed principals in Quran, Sunna and Ijma. However, Qiyas is a broad mechanism which could lead to any interpretation by judges, hence should be prevented in the determination of public policy's scope.</td>
<td>1/16/2014 7:04 AM</td>
</tr>
<tr>
<td>3</td>
<td>PUBLIC POLICY ISSUES ARE BY NATURE VAGUE AND UP TO THE DISCRETION OF THE COURT. NO STATEMENT OR DEFINITION CAN BE EFFECTIVE IN NARROWING THE SCOPE OF WHAT IS DETERMINED TO BE A PUBLIC POLICY ISSUE.</td>
<td>1/15/2014 3:49 AM</td>
</tr>
<tr>
<td>4</td>
<td>There could be many interpretations to Sharia and that may create controversy and conflict.</td>
<td>1/15/2014 2:55 AM</td>
</tr>
<tr>
<td>5</td>
<td>It seems that Shari'a law does not always govern commercial law matters in the domestic law of GCC countries, so it would be strange if it were to be applied to foreign commercial arbitral awards. It seems to me that &quot;public policy&quot; is a better term and it means what it says - if something is acceptable in the country as a matter of public policy, then Shari'a law should not preclude enforcement.</td>
<td>1/13/2014 5:34 AM</td>
</tr>
<tr>
<td>6</td>
<td>To admit &quot;violation of a principle of Shari'a&quot; as a ground for the invocation of the public policy exception to the New York Convention exception would open the door to systematic refusals of exequatur in GCC States. It would be like providing in Western jurisdictions that exequatur could be refused by any court which considered that the award violated some precept of Judeo-Christian ecclesiastical doctrine.</td>
<td>1/13/2014 1:02 AM</td>
</tr>
<tr>
<td>7</td>
<td>Creates uncertainty as to enforcement criteria</td>
<td>1/12/2014 10:29 PM</td>
</tr>
<tr>
<td>8</td>
<td>This is perhaps too prescriptive. A good example is the application of interest, including compound interest, which seems to be permitted by local Courts in some parts of the GCC. Would a situation arise whereby a Court would enforce a domestic award in accordance with accepted norms on such issues, but deny enforcement of a foreign award on the same issue?</td>
<td>1/12/2014 9:26 PM</td>
</tr>
<tr>
<td>9</td>
<td>Shari'ah should not generally form part of the public policy considerations as this would be unusual in Kuwait.</td>
<td>1/12/2014 6:10 AM</td>
</tr>
</tbody>
</table>
APPENDIX IIb

SURVEY QUESTIONS
Survey on Arbitral Award Enforcement in the GCC

Overview and Agreement to Participate in a Research Study on the Challenges to the Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States

Principal Researcher: Ahmed Almutawa, LL.B., LL.M.

Dear Participant,

This letter is to give you information in the hope that you will participate in a study about the challenges to the enforcement of foreign arbitral awards in the GCC states. I am currently a Ph.D. candidate in International Arbitration at the Portsmouth University Business School, School of Law in Portsmouth, United Kingdom, conducting this research study as part of my Ph.D. dissertation research, which is sponsored by the Minister of the Interior-UAE, General Directorate of Residency and Foreigners Affairs-Dubai, where I am a First Lieutenant and Legal Researcher.

The purpose of this research is to identify the challenges to the enforcement of foreign arbitral awards in the GCC states. As you may already know, the GCC states continue to face criticisms regarding the enforceability of foreign arbitral awards despite that all GCC states are signatories to the New York Convention of 1958.

Ultimately, this research will propose that the GCC states ought to create a Uniform GCC Arbitration Law that makes enforcement of foreign arbitral awards consistent with international norms under the New York Convention, the UNCITRAL Model Law, the ICSID Convention, and other international law principles. The research will propose specific rules that an Uniform GCC Arbitration Law ought to adopt.

Although participating in this research may be of no direct benefit to you, your participation will help me:

- Identify, document, and evaluate the types of challenges that could be used to prevent the enforcement of arbitral awards in the GCC states;
- Compare the treatement of domestic and foreign arbitral awards;
- Determine the role of the Shari’a and the extent to which the Shari’a affects the enforcement or non-enforcement of foreign arbitral awards, specifically with regards to the conditions to enforcement, the grounds for non-enforcement, the use of the public policy defence, and the grounds for setting aside an arbitral award;
- Propose for the adoption of a uniform GCC arbitration law that would harmonise the NewYork Convention, the ICSID, the UNCITRAL Model Law, and the Shari’a;
- Propose specific rules that a uniform GCC arbitration law or any GCC state ought to promulgate to further the international principle favouring the enforcement of foreign arbitral award; and
- Benefit both the academic community and practitioners.

I believe that there is little or no risk to participating in this research. All data will be maintained in a private and confidential manner to the extent permitted by law. Your name or any other personal identifying information will not appear in the course project paper resulting from this research; neither will there be anything to identify your place of work or business. In addition, no data is being requested or maintained that will link individuals to their responses. All survey results will be reported only in the aggregate.

You may decide to withdraw from this study, without giving any reason, at any time up to the point when the data are analysed by advising Mr. Ahmed Almutawa. By agreeing to participate, you agree to be anonymously quoted.
There are no known or anticipated risks to you as a participant in this study. Participation in this research is entirely voluntary. You will receive no compensation for participating in this research. It will involve approximately 10 minutes.

Notes collected during this study will be retained for 10 years after completion of this research period (i.e. 2024/2025) in a secure location and then destroyed. The information gained from this research will only be used for the above objectives, will not be used for any other purpose and will not be recorded in excess of what is required.

Even though I may present the study findings to Conferences and/or Journals, only my supervisors, Prof. Dr. A.F.M. Maniruzzaman and Mr. Greg Osborne, my thesis examiners and I will have access to the survey data itself.
If you have any questions regarding this study or would like additional information, please feel free to ask me before, during, or after the survey. If you have any questions regarding your rights as a research participant, you should email my supervisor, or me and we will do our best to answer your questions. My email is ahmed.almutawa@port.ac.uk and you may contact my supervisor at munir.maniruzzaman@port.ac.uk

I can assure you that this study has been reviewed and approved by my course supervisors.

If you wish to participate in the study, please read the Participant Information Sheet and fill out the Consent Form in the pages that follow prior to starting the survey. Thank you in advance for your assistance in this research.

Best regards,

Ahmed Almutawa
PARTICIPANT INFORMATION SHEET AND PROCEDURES
Title: Research Study on the Challenges to the Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States
Researcher: Ahmed Almutawa, LL.B., LL.M.
REFERENCE NUMBER: E271

We would like to invite you to take part in our research study. Before you decide we would like you to understand why the research is being done and what it would involve for you. Talk to others about the study if you wish. Ask us if there is anything that is not clear.

PURPOSE OF THE STUDY
This research is about the challenges to the enforcement of foreign arbitral award in the GCC states. It will focus on identifying the challenges to the enforcement of foreign arbitral awards in the GCC states with the ultimate aim of proposing a specific set of rules for adoption in a uniform GCC arbitration law.

RECRUITMENT
The criteria that will be used for selecting the sample are those individuals who engage in, or practice law in, the field of international arbitration in the GCC states. A legal practitioner, academic, judge, arbitrator, legal consultant, legal adviser, or corporate lawyer who engages in international arbitration in the GCC states had to be available to participate in the survey.

VOLUNTARY PARTICIPATION AND CONSENT
There is no direct benefit to you for participating in this survey, and there is no known risk or disadvantage to you for participating except for your time and inconvenience of participation. You will receive no compensation for participating. It is up to you to decide to join the research. We will describe the research and go through the information sheet. If you agree to take part, we will then ask you to fill out a consent form in the next page.

PARTICIPATION
This research survey will take approximately 10 minutes to complete. You simply need to fill out the online survey and it will automatically be sent to me once the survey is completed. You may decide to withdraw from this study, without giving any reason, at any time up to the point when the data are analysed by advising Mr. Ahmed Almutawa.

DATA COLLECTION METHOD
To obtain relevant information on the research questions, a series of survey questions will be provided to you, giving you ample time to answer the questions.

CONFIDENTIALITY
All evaluation materials will be anonymised. By agreeing to participate, you agree to be anonymously quoted. No personal identification data will be stored. Users will have a reference number that identifies their answers pre- and post-test. The data will be stored on a secure digital drive so that it is backed up. Additionally, even though I may present the study findings to Conferences and/or Journals, only my supervisors, Prof. Dr. A.F.M. Maniruzzaman and Mr. Greg Osborne, my thesis examiners and I will have access to the survey data itself.

RESEARCH REVIEW
Survey on Arbitral Award Enforcement in the GCC

Research in the University of Portsmouth is looked at by independent group of people, called a Research Ethics Committee, to protect your interests. This study has been reviewed and given a favourable opinion by the Portsmouth University Business School Research Ethics Committee.

PROBLEMS WITH THE SURVEY

If you have a concern about any aspect of this research, you should email my supervisor, or me and we will do our best to answer your questions. My email is ahmed.almutawa@port.ac.uk and you may contact my supervisor at munir.maniruzzaman@port.ac.uk if you remain unhappy and wish to complain formally, you can do this sending an email to the Portsmouth University’s Information Disclosure and Complaints Manager, Samantha Hill at samantha.hill@port.ac.uk. Whether or not you decide to participate in the survey, we thank you in advance for taking the time to read the information sheet. If you do decide to participate in the survey, please go to the next page and fill out the Participant Consent Form.
1. PARTICIPANT CONSENT FORM

By ticking the boxes below, with full knowledge of all foregoing, I agree to participate in this research.

☐ I have read the Participant Information Sheet about a research study being conducted by Mr. Ahmed Almutawa for Ph.D. at the School of Law, University of Portsmouth.

☐ I have had the opportunity to ask any questions related to this study, and received satisfactory answers to my questions, and any additional details I wanted.

☐ I am also aware that excerpts from the survey may be included in publications to come from this research. I agree to be anonymously quoted and quotations will be kept anonymous.

☐ I was informed that I might withdraw my consent, without giving any reason, at any time up to the point when the data are analysed by advising the student researcher.

☐ I understand that relevant sections of the data collected during the study may be looked at by individuals from Portsmouth University, where it is relevant to my taking part in this research. I give permission for these individuals to have access to my response.
Survey on Arbitral Award Enforcement in the GCC

SURVEY QUESTIONS
ENFORCEMENT OF ARBITRATION AWARDS IN THE GCC STATES

Researcher: Ahmed Almutawa, LL.B., LL.M.
Supervisors: Prof. Dr. A.F.M. Maniruzzaman, First Supervisor; Mr. Greg Oborne, Second Supervisor

Contact: Ahmed Almutawa, ahmed.almutawa@port.ac.uk

REFERENCE NUMBER: E271 DATE: December 12, 2013

SURVEY INSTRUCTIONS: Please do not provide your name. Answer ALL the following questions to the best of your knowledge and experience. Some questions will only ask for a short answer while others will ask you for further explanation. If so, please provide the explanation to the best of your knowledge and experience. Thank you in advance for your time.
PART I. General Background Information

2. What is your profession?

☐ Attorney
☐ Arbitrator
☐ Judge
☐ Legal Consultant
☐ Other (please specify)
3. Do you practice in the field of arbitration?

☐ Yes
☐ No
4. How many years have you practiced your profession?

- 0-2
- 2-5
- 5-10
- 10 or more
5. What language(s) are you fluent in?
(Please choose at least one.)

- [ ] Arabic
- [ ] English
- [ ] French
- [ ] Other (please specify)

_________
6. In which country or countries are you primarily practising your profession? (Choose all answers that apply.)

☐ Kingdom of Bahrain
☐ State of Kuwait
☐ Sultanate of Oman
☐ State of Qatar
☐ Kingdom of Saudi Arabia
☐ United Arab Emirates
☐ United Kingdom
☐ United States
☐ Other (please specify)
7. Have you had experience with arbitration in the Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom of Saudi Arabia, or the United Arab Emirates?

☐ Yes  ☐ No
8. Which Shari’a School of Thought or Fiqh is followed by the majority of judges and lawyers in your country?

☐ Hanafi
☐ Maliki
☐ Shafi’i
☐ Hanbali
☐ Shi’a
☐ Not Applicable (Not from a Shari’a jurisdiction)
☐ Other (please specify)
Part II. Rating

9. In a scale of 0-10, where 0 is “least friendly” and 10 is “very friendly,” how would you rate the friendliness of the following countries towards the enforcement of foreign arbitral awards?

<table>
<thead>
<tr>
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</tbody>
</table>
10. In a scale of 0-10, where 0 is not knowledgeable and 10 is very knowledgeable, how would you rate the extent to which judges in the GCC are familiar with the New York Convention?

<table>
<thead>
<tr>
<th>0 (Not knowledgeable)</th>
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<th>2</th>
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<th>10 (Very knowledgeable)</th>
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11. In a scale of 0-10, where 0 is not knowledgeable and 10 is very knowledgeable, how would you rate the extent to which judges in the GCC are familiar with the UNCITRAL Model Law?

<table>
<thead>
<tr>
<th>0 (Not knowledgeable)</th>
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<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10 (Very knowledgeable)</th>
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12. In a scale of 0-10, where 0 is not knowledgeable and 10 is very knowledgeable, how would you rate the extent to which judges in the GCC are familiar with the ICSID Convention?

<table>
<thead>
<tr>
<th>0 (Not knowledgeable)</th>
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<th>10 (Very knowledgeable)</th>
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</table>
Survey on Arbitral Award Enforcement in the GCC

13. In a scale of 0-10, 0 being least beneficial and 10 being most beneficial, would adopting the UNCITRAL Model Law be beneficial to State of Qatar?

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<thead>
<tr>
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<th>10 (Most Beneficial)</th>
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</table>

14. In a scale of 0-10, 0 being least beneficial and 10 being most beneficial, would adopting the UNCITRAL Model Law be beneficial to the State of Kuwait?

<table>
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<th>10 (Most Beneficial)</th>
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</tbody>
</table>

15. In a scale of 0-10, 0 being least beneficial and 10 being most beneficial, would adopting the UNCITRAL Model Law be beneficial to the United Arab Emirates?

<table>
<thead>
<tr>
<th>0 (Least Beneficial)</th>
<th>1</th>
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<th>10 (Most Beneficial)</th>
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</tbody>
</table>
16. In a scale of 0-10, 0 being very unsatisfied and 10 being very satisfied, how would you rate your country’s definition of foreign award?

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<thead>
<tr>
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<th>0</th>
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<th>8</th>
<th>9</th>
<th>10 (Very satisfied)</th>
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<tbody>
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<td>(Unsatisfied)</td>
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</tr>
</tbody>
</table>

17. In a scale of 0-10, 0 being very unsatisfied and 10 being very satisfied, how would you rate your country’s definition of domestic award?

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<th>10 (Very satisfied)</th>
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<td>(Unsatisfied)</td>
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18. In a scale of 0-10, 0 being very unsatisfied and 10 being very satisfied, how would you rate your country’s definition of international award?

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<td>(Unsatisfied)</td>
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</tbody>
</table>
PART III. Short Answer

19. What is the most likely reason for the non-enforcement of a foreign arbitral award in your jurisdiction?
20. In a conflict between the New York Convention and the Shari’a, which prevails in your jurisdiction?

- New York Convention
- Shari’a

Why?
21. In your opinion, should domestic and foreign arbitral awards have the same or different conditions for enforcement?

- [ ] Same
- [ ] Different

Why?
22. In your experience, do conditions for enforcement of domestic arbitral awards equally apply in practice to foreign arbitral awards in your jurisdiction?

- Yes
- No
23. Are you in FAVOUR or AGAINST a uniform GCC Arbitration Law?

☐ Favour
☐ Against
24. In your opinion, when should judges or arbitrators apply the Shari’a when determining whether public policy has been violated? (Please choose one.)

- Never
- Whenever a violation of a fundamental Shari’a principle has been established
- Whenever a violation of a fundamental Shari’a principle could potentially arise
- Whenever a violation of any Shari’a principle has been established
- Whenever a violation of any Shari’a principle could potentially arise
- Always
25. Should interest be allowed in an arbitral award?

- No, according to the prohibition on the riba
- No, unless the parties are all non-Muslims
- Yes, without limitations
- Yes, according to the contract
- Yes, but limited to a certain percentage
- Other (please specify)
Part IV. Agree or Disagree

26. Please consider the following statement(s):

A foreign arbitral award is an arbitral award that was made in the territory of a State, such state being a signatory to the New York Convention if required by a GCC state, other than the State where the recognition and enforcement of such arbitral award is sought, and arising out of differences between persons, whether physical or legal. The New York Convention shall apply to the enforcement of all foreign arbitral awards, including the interpretation of this provision.

Do you agree or disagree with the entire statement?

☐ Agree
☐ Disagree
27. Please consider the following statement(s):

A domestic arbitral award refers to all arbitral awards not falling under the definition of a foreign arbitral award, unless otherwise expressly stated by these arbitration rules and/or any legislation. The New York Convention shall not apply to the enforcement of a domestic arbitral award.

- [ ] Disagree
- [ ] Agree
28. Please consider the following statement(s):

An arbitral award is international when (1) the parties to the arbitration have places of business in different states; (2) the location of one of the party's places of business is in a state, other than the State where the recognition and enforcement of such awards are sought; (3) at least one of the party's countries of business is different to the place where a substantial part of the commercial relationship's obligations was performed; or (4) the parties agree that the subject matter of the arbitration agreement relates to more than one country. An international award shall be deemed as a foreign award and shall be governed by the New York Convention.

Do you agree or disagree with the entire statement?

- [ ] Disagree
- [ ] Agree
29. Please consider the following statement(s):

The conditions to the enforcement of a domestic arbitral award shall not apply to a foreign or international arbitral award.

Do you agree or disagree with the entire statement?

☐ Disagree
☐ Agree
30. Please consider the following statement(s):

A court may only refuse enforcement of a foreign arbitral award or annul a foreign arbitral award under the grounds stated in the New York Convention and pursuant to the rule relating to the interpretation of public policy as a ground for non-enforcement or annulment of an arbitral award. A court that refuses to enforce a foreign arbitral award or annuls a foreign arbitral award on grounds not listed under the New York Convention or based on public policy must provide to the parties, in a written judgment, an explanation of its reasoning and decision, including the specific legislative or case law source of such grounds or public policy.

Do you agree or disagree with the entire statement?

☐ Disagree
☐ Agree
31. Please consider the following statement(s):

Courts must interpret public policy narrowly, and should only be granted as a defence if the public policy concerns an essential or fundamental state interest. The Shari’a shall qualify as an essential or fundamental state interest for purposes of public policy, but only those public policy embodied by the Shari’a that are expressly stated in the Quran, Sunna, Qiyas, and Ijma, those that are haram, and those that are stated as fundamental to the Shari’a by a majority of the Shari’a scholars. Whenever there is no clear consensus as to a public policy under the Shari’a, the court shall weigh the determination of the existence of such public policy on the public policy in favour of enforcement of an arbitral award under the New York Convention.

Do you agree or disagree with the entire statement?

☐ Disagree
☐ Agree
32. If you disagree, please state why.
33. If you disagree, please state why.
34. If you disagree, please state why.
35. If you disagree, please state why.
36. If you disagree, please state why.
37. If you disagree, please state why.
END OF SURVEY

Thank you for completing the survey; please return it via email to ahmed.almutawa@port.ac.uk
If you have any concerns regarding this research please contact my supervisor or me in the first instance. If you are not entirely happy with a response please contact me directly.
APPENDIX IIc

LETTER BY FIRST SUPERVISOR
IN SUPPORT OF THE SURVEY
Letter from Prof. AFM Maniruzzaman

Dear Sir/Madam,

I confirm that Mr. Ahmed Almutawa is currently studying for a PhD in International Arbitration Law under my supervision at the School of Law, University of Portsmouth, United Kingdom. He is conducting research on the challenges to the enforcement of foreign arbitral awards in the GCC states. The findings from this research will be of immense benefit to both private and public sectors in their continuous pursuit of making the practice of arbitration more effective.

It will be highly appreciated if you could kindly support Mr. Almutawa in his research work by sharing with him your valued experience / opinion / information in respect of domestic and international arbitrations in the GCC states.

Please be assured that any information gained from you will be used solely for the specific purposes of this research and will be treated with utmost respect and confidentiality, and in accordance with the appropriate ethical rules and regulations of the University of Portsmouth and ethical practices and legislation generally.

I hope that you will be able to help Mr. Almutawa, and I thank you in advance for your kind cooperation in this matter.

Kindest regards

Yours sincerely,

Prof. Dr. A.F.M. Maniruzzaman

1. Do you want to participate in the GCC Arbitration Survey?

- [ ] Yes
- [ ] No
TEXTUAL ANALYSIS AND CATEGORIZED BREAKDOWN OF RESPONSES TO SURVEY QUESTION NUMBER 19
QUESTION 19: What is the most likely reason for the non-enforcement of a foreign arbitral award in your jurisdiction?

Public Policy (11)

#2. Noncompliance with Public Policy 1/25/2014 9:34 AM
#8. Public policy & non signatory to NY CONVENTION. 1/22/2014 12:23 PM
#10. Public policy 1/21/2014 7:54 AM
#14. [the problem is in the definition of “public order”] 1/19/2014 5:00 AM
#18. Public policy 1/15/2014 5:34 AM
#20. Contrary to public policy 1/15/2014 4:43 AM
#24. Public policy - non reciprocity 1/13/2014 11:28 PM
#26. Public policy reasons 1/13/2014 1:44 AM
#28. Public policy exception 1/13/2014 12:47 AM
#29. Vague reasons linked to “policy” 1/12/2014
#32. Public policy 1/12/2014 5:59 AM

Judiciary’s Lack of Familiarity or Knowledge with International Arbitration (6)

#4. Judges lack of knowledge with the developments of enforcement practices in world and judges bias towards arbitration in general 1/24/2014 6:41 AM
#22. The weak of knowledge of the judges 1/15/2014 2:34 AM
#24. Lack of awareness of the terms of NY convention 1/13/2014 11:28 PM
#25. Lack of understanding of New York Convention 1/13/2014 4:55 AM
#30. The enforcement judge allows the ambiguities of the local law to take precedence over the jurisdiction’s treaty obligations 1/12/2014 8:57 PM
#33. Judicial hostility to arbitration. Judges do not want to lose their jobs to arbitrators 12/27/2013 5:30 AM
Failure of Arbitration Statute (5)


#17. The most likely reason for non-enforcement of a foreign arbitral award is the multiple litigation procedures are requested to enforce the arbitral award 1/15/2014 9:18 PM

#19. Challenge under local law 1/15/2014 5:22 AM

#24. Lack of independent Arbitration legislation 1/13/2014 11:28 PM

#25. Lack of clear procedural guidelines in domestic legislation 1/13/2014 4:55 AM

Jurisdictional Issue (4)

#1. Jurisdictional issues 2/9/2014 1:54 AM

#9. Lack of jurisdiction 1/22/2014 5:02 AM

#15. Competing jurisdiction clause 1/18/2014 11:43 PM

#13. Respondent not being domiciled in the UAE and so courts claiming not to have jurisdiction 1/19/2014 5:46 AM

Social/Political Reasons (3)

#7. Disagreement with the verdict as the one who is the losing party in the arbitration is a powerful local individual/company 1/22/2014 8:55 PM

#23. Variety of reasons: 1. Contradicting the Sharia Law of the country. 2. Local political/social considerations particularly when the case awarded is against a governmental or semi-governmental entity or establishment. Where there could be influence by the entity on the verdict being against the government interests. 3. Lack of exposure to international laws by local authorities and contractors alike. 1/15/2014 2:09 AM
Other Reasons (9)

#1. Contradicting the sharia law of the country 2/9/2014 1:54 AM
#3. LACK OF READILY ACCEPTED FOREIGN AWARDS 1/24/2014 7:18 AM
#5. Conflict with laws of the land 1/24/2014 3:37 AM
#6. Any award that does not fall under “Enforcement of Foreign Arbitral Awards 1/23/2014 4:49 AM
#11. Not having a Bilateral agreement 1/20/2014 8:52 AM
#16. Violation of due process 1/16/2014 3:54 AM
#21. AUTHORITY TO ARBITRATE 1/15/2014 3:38 AM
#27. Lack of reciprocal agreement 1/13/2014 1:27 AM 2014 10:17 PM
#31. Extensive variety of grounds 1/12/2014 5:37 PM
APPENDIX IV

ETHICS COMMITTEE SURVEY APPROVAL
Please complete and return the form to Research Section, Quality Management Division, Academic Registry, University House, with your thesis, prior to examination.

### Postgraduate Research Student (PGRS) Information

<table>
<thead>
<tr>
<th>Student ID:</th>
<th>507560</th>
</tr>
</thead>
<tbody>
<tr>
<td>Candidate Name:</td>
<td>AHMED MOHD KHURSHID ALMUTAWA</td>
</tr>
<tr>
<td>Department:</td>
<td>PBS / School of Law</td>
</tr>
<tr>
<td>First Supervisor:</td>
<td>Prof. M. Maniruzzaman</td>
</tr>
<tr>
<td>Start Date:</td>
<td>October, 2010</td>
</tr>
<tr>
<td>(or progression date for Prof Doc students)</td>
<td></td>
</tr>
</tbody>
</table>

#### Study Mode and Route:

- [ ] Part-time
- [x] Full-time
- [ ] MPhil
- [ ] MD
- [ ] PhD
- [ ] Integrated Doctorate (NewRoute)
- [ ] Prof Doc (PD)

#### Title of Thesis:

CHALLENGES TO THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE STATES OF THE GULF COOPERATION COUNCIL

#### Thesis Word Count:

86,419 Words

---

If you are unsure about any of the following, please contact the local representative on your Faculty Ethics Committee for advice. Please note that it is your responsibility to follow the University’s Ethics Policy and any relevant University, academic or professional guidelines in the conduct of your study.

Although the Ethics Committee may have given your study a favourable opinion, the final responsibility for the ethical conduct of this work lies with the researcher(s).

---

### UKRIO Finished Research Checklist:

(If you would like to know more about the checklist, please see your Faculty or Departmental Ethics Committee rep or see the online version of the full checklist at: http://www.ukrio.org/what-we-do/code-of-practice-for-research/)

<table>
<thead>
<tr>
<th>a) Have all of your research and findings been reported accurately, honestly and within a reasonable time frame?</th>
<th>YES</th>
</tr>
</thead>
<tbody>
<tr>
<td>b) Have all contributions to knowledge been acknowledged?</td>
<td>YES</td>
</tr>
<tr>
<td>c) Have you complied with all agreements relating to intellectual property, publication and authorship?</td>
<td>YES</td>
</tr>
<tr>
<td>d) Has your research data been retained in a secure and accessible form and will it remain so for the required duration?</td>
<td>YES</td>
</tr>
<tr>
<td>e) Does your research comply with all legal, ethical, and contractual requirements?</td>
<td>YES</td>
</tr>
</tbody>
</table>

*Delete as appropriate*
**Candidate Statement:**

I have considered the ethical dimensions of the above named research project, and have successfully obtained the necessary ethical approval(s)

<table>
<thead>
<tr>
<th>Ethical review number(s) from Faculty Ethics Committee (or from NRES/SCREC):</th>
<th>E271</th>
</tr>
</thead>
<tbody>
<tr>
<td>Signed:</td>
<td>Ahmed Almutawa (Student)</td>
</tr>
<tr>
<td></td>
<td>Date: March 28, 2014</td>
</tr>
</tbody>
</table>

If you have *not* submitted your work for ethical review, and/or you have answered ‘No’ to one or more of questions a) to e), please explain why this is so:

<table>
<thead>
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<th>Signed:</th>
<th>(Student)</th>
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<tbody>
<tr>
<td></td>
<td>Date:</td>
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</table>
Ethics Review application ref. E271 [Ahmed Almutawa]

From: Sharman Rogers (sharman.rogers@port.ac.uk) You moved this message to its current location.
Sent: Wednesday, December 11, 2013 6:04:31 PM
To: Ahmed Almutawa (a_m_almutawa@hotmail.com)
Cc: Munir Maniruzzaman (munir.maniruzzaman@port.ac.uk)

Dear Ahmed

Ethics Committee has approved Ethics Review application ref E271.

Best wishes

Sharman Rogers

Business Services & Research Office
Portsmouth Business School
Richmond Building, Portland Street
Portsmouth, Hampshire PO1 3DE UK
T: +44 (0)23 9284 4202

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Events and Open Evenings
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