Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East

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I. Introduction

A crowd of international and regional conventions has emerged to address the problems created by globalization and international commerce. States increasingly acknowledge the importance of rapid and equitable resolutions to cross-border business disputes. Although it has been said that the “Islamic Middle East has not fully embraced” the modern arbitral system, a more positive view contends that this attitude toward international arbitration is “pro-


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gressively reversing.” In recent years, Middle Eastern countries have increasingly valued foreign confidence in their domestic judicial systems. The modernization of arbitration laws in a number of Middle Eastern countries, the growing number of Arab states that have ratified the New York Convention of 1958, and the establishment of arbitration centers throughout the region demonstrate that international arbitration is gaining favor.

“Knowing the law” is only one of the necessary requirements to understanding the nature of dispute settlement in the Middle East. Failing to acknowledge the religious substructure

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6. See Christopher R. Drahozal, Regulatory Competition and the Location of International Arbitration Proceedings, 24 INT’L REV. L & ECON. 371, 371 (2004) (pointing out that the purpose behind modernizing arbitration laws was to make them more appealing to users); see also Amy J. Schmitz, Consideration of “Contracting Culture” in Enforcing Arbitration Provisions, 81 ST. JOHN’S L. REV. 123, 123 (2007) (highlighting that private dispute resolution and the technique called “partnering” have been successfully used on projects in the Middle East).

7. See Michael S. Greco & Ian Meredith, Feature, Getting to Yes Abroad: Arbitration as a Tool in Effective Commercial and Political Risk Management, BUS. L. TODAY, Apr. 16, 2007, at 23 (discussing that 138 countries, including the United Arab Emirates, have widely accepted the New York Convention); see, e.g., Roy, supra note 5, at 936–37 (noting Syria and Kuwait have acceded to the New York Convention); see also DUBAI Keen on Carrying Commercial Disputes, GULF NEWS, Sept. 25, 2006, available at 2006 WLNR 21760550 (emphasizing that after joining the New York Convention, several Middle Eastern countries established arbitration centers).

8. See Brower & Sharpe, supra note 3, at 647 (noting that Middle Eastern nations have increasingly established international and national arbitration centers); see also Anoosh Boraleva, Enforcement in the United States and United Kingdom of ICSID Awards Against the Republic of Argentina: Obstacles That Transnational Corporations May Face, 17 N.Y. INT’L L. REV. 53, 54 n.7 (2004) (recognizing that regional arbitration centers have been established in developing parts of the world); Amr A. Shalakany, Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism, 41 HARV. INT’L L.J. 419, 421 (2000) (discussing that during the 1990s, regional arbitration centers were established in the capitals of numerous developing nations, including those in the Middle East).


10. See Gemmell, supra note 3, at 169 (quoting “knowing the law” is essential to understanding dispute settlement in the Middle East); see also Doing Business in the Middle East: A Guide for U.S. Companies, 34 CAL W. INT’L L.J. 273, 273 (2004) (emphasizing the necessity of understanding Middle Eastern values to comprehend regional economic systems); Clark B. Lombardi, Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis, 8 CHI. INT’L L. 85, 85 (2007) (depicting modernist approaches to interpreting law employed by some Middle Eastern countries).
supporting commercial arbitration in that part of the world will shroud the process of dispute settlement in ambiguity and uncertainty. Despite the history and tradition of arbitration in the Arab region, the practice of international dispute resolution in the Middle East, in recent history, has been summarized as a “troubled” or a “roller coaster”-like experience.

In the Islamic Middle East, religious considerations play a principal role in the acceptance and successful functioning of international commercial arbitration. The “religious variable” may affect either substantive or procedural analyses. As arbitrators interpret public policy, calculate limitation periods, or determine interest awards, cultural particulars may influence the result.

National laws, international conventions, and institutional arbitration rules form the backbone of the legal system governing commercial arbitration. Transnational treaties function in combination with other sources of law, including the national law governing the parties’


12. See Brower & Sharpe, supra note 3, at 643 (explaining arbitration in the “Islamic world” has had a “long and often troubled history”); Kutty, supra note 4, at 591 (quoting that despite its historical acceptance, “international commercial arbitration in the Islamic world in recent history can best be summarized as a troubled, or ‘roller coaster’-like, experience”).


14. Kutty, supra note 4, at 567. See M. McCary, Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective: The Failure of a Lawyer Properly to Understand the Sense of Different Legal Concepts or to Adapt to Different Modes of Practice in Various Parts of the World Can Cause Negotiations to Collapse, Contracts to Be Drafted Incorrectly, Transactions to Go Aucry, or for that Matter Can Endanger the Long-Term Viability of a Viable Foreign Investment, 35 Tex. Int’l L. J. 289, 306–07, 319 (2000) (describing the significance of religious and cultural traditions in the practice of Islamic law); see also Roy, supra note 5, at 942, 945–46 (explaining that the civil courts of Saudi Arabia’s Islam-based legal system are required to abide by Hanbali interpretations of religious texts in their adjudication).

capacity to arbitrate, the law controlling the arbitral proceedings, the law applying to the arbitration agreement, and the law governing the substantive issues in the dispute.16 The potential for gaps and inconsistencies between the legal systems of nations and regions in both substance and procedure is therefore clearly present.17

Given the great geopolitical and economic significance of the Middle East, lawyers outside the region's borders must obtain an insight into the area's sources of law.18 Islamic law is one of the three major legal systems,19 and it is remarkable that there has been little examination of its footing in the Middle East.20 Islamic law and Shari`a are no longer fields reserved for Middle East specialists, Arabists, and comparative law experts.21

The next section of this article sets forth a brief overview of Islamic law, selected Islamic legal definitions, and a gloss on Middle Eastern legal institutions. That discussion briefly defines terms used throughout the article. Part III provides both the historical and the modern background of arbitration in the Middle East. Part IV gives a perspective on the international,


17. See Kutty, supra note 4, at 571 (highlighting the many sources of law governing commercial arbitration that can be a source of discord between nations); see also BORN, supra note 15, at 3 (stating arbitration rules exist to fill in potential gaps, strengthening the enforceability of arbitral decisions); PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 48–49 (7th ed., Routledge 1997) (suggesting that legal principles common to most nations should be applied to fill in the gaps in international law).

18. See McCary, supra note 14, at 306–19 (reminding lawyers practicing in the Middle East to mind the principles and practical implications of Shari`a). See generally MALANCZUK, supra note 17, at 48–49 (commenting that arbitrators’ use of principles drawn from their own countries’ legal system without assessing acceptance by other countries is undesirable).


20. See WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC Law 1 (Cambridge University Press 2005) (establishing that before the late 1970s and early 1980s, there was only a “peripheral scholarly interest” in Islamic law); see also John Makdisi, A Survey of AALS Law Schools Teaching Islamic Law, 55 J. LEGAL EDUC. 583, 583–86 (2005) (noting that at the time of publication only 20.8% of AALS law schools offered, or had offered within five years prior, courses on the origins and development of Islamic law).

21. See HALLAQ, supra note 20, at 1 (stating that in the late 1970s and early 1980s, Western academics started showing a renewed interest in the study of Islamic law); see also FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEMS OF SAUDI ARABIA xii (Brill 2000) (stressing that modern lawyers must study the practice of Islamic law to completely understand it); Twibell, supra note 13, at 33–34 (emphasizing that an international practitioner should be aware of the influence of Islamic law in international practice).
Western-influenced practice of international commercial arbitration. Part V compares both Islamic arbitration and Middle Eastern commercial arbitration with international commercial arbitration. Part VI discusses Middle Eastern public policy issues that arise during international arbitration and the enforcement of foreign arbitral awards.

Essentially, this article provides an overview of international commercial arbitration in the Middle East. It evaluates criticism pointed at the New York Convention, focuses on proposed solutions, and argues for greater transparency of judicial and public policies. The article puts forward a hypothesis that more accurate exposure of the underlying values that affect the recognition and enforcement of foreign decisions will allow for less uncertainty and greater foreign confidence in the practice of international law in the Middle East.

II. Islamic Legal Definitions, Schools of Law, and Middle Eastern Legal Systems

Shari`a, the body of Islamic sacred laws, is derived from Islam’s primary and secondary sources: the Quran, the Sunna, and the Hadith. Muslims view Islamic law as the study and analysis of the duty that God requires the Islamic community to observe. That duty is best described as the obligation to behave decently and to prevent others from committing outrageous offenses against fellow humans. The written analysis of the duty makes up the bulk of Islamic literature. One notable Islamic legal scholar described the details of the duty as nothing less than “the law from its beginning to its end.”


24. See Noel James Coulson, THE HISTORY OF ISLAMIC LAW 11 (Edinburgh Univ. Press 1994) (explaining several facets of this duty, such as compassion, good faith, and justness); see also Khaled Abou El Fadl, The Place of Ethical Obligations in Islamic Law, 4 UCLA J. ISLAMIC & NEAR E. L. 1, 5 (2005) (acknowledging the values the Quran urges Muslims to uphold); Moosa, supra note 23, at 193 (stating the duty protects “religion, life, progeny, intellect and wealth”).

25. See Michael Cook, FORBIDDING WRONG IN ISLAM 2 (Press Syndicate of the Univ. of Cambridge 2003) (alleging that the bulk of Islamic literature concerns the duty God gave to his people). See generally Abi Allah Baydawi & Mahmoud Isfahani, NATURE, MAN AND GOD IN MEDIEVAL ISLAM 947 (Edwin E. Calverley & James W. Pollock eds. & trans., Brill 2002) (analyzing the duty given by God to the Islamic people).

The Qur'an is the central Islamic text. Muslims believe the Qur'an is the word of God revealed directly to the Prophet Muhammad. The Sunna, the ways and traditions of the Prophet Muhammad, are normative practices Muslims seek to emulate. The Hadith is a collection of narrations and approvals of the Sunna. Scholars sometimes mistakenly interchange Hadith with Sunna. However, the Hadith are classified by their status in relation to their text and chain of transmission (isnad), while the Sunna is established by practical examples and is

27. See Koran, ENCYCLOPEDIA AMERICANA (Grolier Online 2007), http://ea.grolier.com/cgi-bin/article?assetid=0234000-000 (stating that the Koran is the highest Islamic authority).

28. See COULSON, supra note 24, at 11 (stating that the Prophet Muhammad transmitted the word of God to his community through the Qur'an); see also VOGEL, supra note 21, at xii (explaining the Muslim belief that God revealed his final laws to the Prophet Muhammad).


30. See SAMI ZUBaida, LAW AND POWER IN THE ISLAMIC WORLD 10 (I.B. Tauris 2003) (explaining that the Hadith tell the history of the Prophet Muhammad’s words and deeds—his Sunna—through stories); COULSON, supra note 24 at 42 (noting that the Hadith was a collection of traditions in the form of stories that were communicated down from the Prophet Muhammad). See generally HALLAQ, supra note 20, at 1 (tracing the development of the Hadith from encompassing only the words of the Prophet Muhammad to embracing his words, deeds, and tacit approvals).

31. See MAWIL IZZI DIEN, ISLAMIC LAW: FROM HISTORICAL FOUNDATIONS TO CONTEMPORARY PRACTICE 38, 160 (Edinburgh Univ. Press 2004) (distinguishing Sunna, which are normative customs that the Prophet Muhammad enacted for his people, from Hadith, the historical legacy of his words and actions); see also Geoffrey E. Roughton, Note, The Ancient and the Modern: Environmental Law and Governance in Islam, 32 Colum. J. Envtl. L. 99, 102 (2007) (asserting that although the terms Sunna and Hadith are sometimes used interchangeably, the proper usage of Hadith refers only to the Prophet Muhammad’s sayings).

32. See DAVID E. FORTE, STUDIES IN ISLAMIC LAW 40 (Austin & Winfield 1999) (explaining the scholarly investigation of Hadith transmitters and the process of transmittal to ensure that both were pious and reliable, and that the process of transmission—inad—was continuous back to the Prophet Muhammad); see also Bernard K. Freamon, Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence, 11 Harv. Hum. Rts. J. 1, n.168 (1998) (explaining that inad is the recitation of the chain of transmitters preceding each Hadith and by which the Hadith must pass); Ali Kahn, Islam as Intellectual Property: “My Lord! Increase Me in Knowledge,” 31 Cumb. L. Rev. 631, 657 (2001) (stressing that a Hadith is considered unimpeachable once its content has been verified against other authentic Hadith and its inad is confirmed).
not validated by isnad.\textsuperscript{33} The Sunna and Hadith clarify features of the Quran,\textsuperscript{34} and therefore are considered secondary sources of Islamic law.\textsuperscript{35} Third in merit as a source of Islamic law is ijma, a consensus-based sanctioning instrument whereby mujtahids ("creative jurists") reach agreement on a technical legal ruling.\textsuperscript{36}

There are various methodologies used to divine Shari’\textsuperscript{a}a from its sources, each patterned by a different school of Islamic law.\textsuperscript{37} Fiqh is Islamic jurisprudence,\textsuperscript{38} and the underlying method-
ology is known as *usul al-fiqh*. The four classical Sunni schools, Hanafi, Maliki, Shafi‘i, and Hanbali, together compose the generally accepted authority for Sunni Muslims. Shi‘a Islam has its own school of law, the Ja‘fari school, founded by the sixth imam, Ja‘far as-Sadiq.

Ribā is the Quranic prohibition of economic gain earned from moneylending. The prohibition seeks to prevent usurious conditions because any acquired profits would be exploitative in nature. Although the Quran clearly prohibits riba, what constitutes the forbidden practice is debated. Ibn Hanbal, the founder of the Hanbali school of Islamic law, declared...
that “pay or increase” is the only form of *riba* beyond any doubt.47 “Pay or increase” refers to the practice of deferring loan repayment in exchange for an increase in the sum owed.48 All other forms of gain in financial transactions remain subject to doubt and disagreement.49

*Gharar* is the Islamic prohibition against speculation.50 The guidelines for determining *gharar* come mostly from the *Hadith*, which depicts transactions characterized by pure speculation, uncertain outcomes, and unclear future benefits.51 Modern application of *gharar* has prohibited investment in futures and commodities options.52

46. See Seniawski, supra note 43, at 703 (stating that although *riba* is prohibited by the *Quran*, what actually constitutes *riba* is subject to disagreement); Hamoudi, supra note 43, at 111 (noting that *riba* is not clearly defined anywhere); Symposium, *Islamic Business and Commercial Law: Islamic Finance in a Global Context: Opportunities and Challenges*, 7 CHI. J. INT’L L. 379, 381 (2007) (positing that the term *riba* is subject to multiple interpretations).

47. See Seniawski, supra note 43, at 708 (identifying Ibn Hanbal’s view of *riba* as pay or increase as the only clearly prohibited practice in the *Quran*); see also Symposium, *Islamic Business and Commercial Law: From Socioeconomic Idealism to Pure Legalism*, 7 CHI. J. INT’L L. 581, 597 (2007) (promulgating the view of Ibn Hanbal by declaring other monetary practices besides pay or increase as acceptable).

48. See *Islamic Business and Commercial Law*, supra note 46, at 381 (defining *riba* as a loan that is subject to interest charges in exchange for deferral); see also Seniawski, supra note 43, at 707 (using excerpts from the *Quran* to pinpoint the derivation of the definition of *riba*). See generally Taylor, supra note 44, at 389 (stating *riba* is prohibited because of doubling of payment).


50. See Symposium, *Islamic Business and Commercial Law: Jurisprudential Schizophrenia: On Form and Function in Islamic Finance*, 7 CHI. J. INT’L L. 605, 611 (2007) (analogizing *gharar* to future sales of fish to show *gharar* is taking speculative uncertainties of commercial risk); see also Heba A. Raslan, *Shar’i’a and the Protection of Intellectual Property—The Example of Egypt*, 47 IDEA 497, 529 (2007) (stating that condemning gambling for its indefiniteness and risk spurred the prohibition of *gharar* for similar reasons); Roy, supra note 5, at 947 (defining *gharar* through contracts by voiding any terms unspecified when the contract is made).


Riba and gharar are important in the field of international arbitration because of their potential to void arbitration awards.53 If an arbitration clause contains a provision for awarding interest, it may be against public policy because of the prohibition against riba.54 Similarly, if an arbitration clause is determined to be speculative because it calls for settlement of a future dispute by an unspecified arbitrator, the clause may be void or against public policy due to the prohibition against gharar.55 Part VI of this article contains a more complete discussion on these two issues.

Shari’a has a profound impact on the psyche of many Muslim Middle Easterners.56 The impact of Shari’a on national legislation, however, varies from nation to nation,57 as do the numbers and demographics of Muslim and non-Muslim citizens.58 The legal systems in the Middle East can be grouped loosely based on the relative influence of Western and Islamic principles.59 The three groupings are: (1) countries that have adopted Western laws, including the civil law tradition60 and the common law tradition;61 (2) countries that have drawn more

53. See Natasha Affolder, Awarding Compound Interest in International Arbitration, 12 AM. REV. INT’L ARB. 45, 86–87 (2001) (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); see also Akaddaf, supra note 11, at 47–48 (pointing out that although riba may prohibit awards of commercial rates of interest, reasonable compensation for a party’s loss of money use may be permissible).

54. See Affolder, supra note 53, at 86–87 (specifying arbitral interest awards as against the concept of Islamic public policy used in some Middle Eastern states); see also Kutty, supra note 4, at 619–20 (pointing that arbitration clauses are subject to the views of the particular Muslim country that is a party to the contract). See generally Akaddaf, supra note 11, at 24–25 (touching on the public policies of several Middle Eastern countries in regard to arbitration).

55. See Susan D. Franck, The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity, 20 N.Y.L. SCH. J. INT’L & COMP. L. 1, n.47 (2001) (declaring that an arbitration agreement alone is against gharar because it assumes a future dispute, which is too speculative); see also Brower & Sharpe, supra note 3, at 645–46 n.17 (noting that Western nations are often ignorant of gharar).

56. See Kutty, supra note 4, at 594–95 (acknowledging Shari’a’s influence on the psyche of Muslim Middle Easterners); see also Chibli Mallat, From Islamic to Middle Eastern Law A Restatement of the Field (Part I), 51 AM. J. COMP. L. 699, 700 (2003) (describing the far-reaching effect of Shari’a on Middle Eastern legal systems).

57. See generally Kutty, supra note 4, at 594–95 (indicating Shari’a’s variable impact on the legislation of Middle Eastern countries); see also Symposium, Rebuilding Nation Building: On the Specificity of Middle Eastern Constitutionalism, 58 CASE W. RES. J. INT’L L. 13, 32–33 (2006) (pointing out the prominence of Shari’a in establishing the laws of a Muslim country); Raslan, supra note 50, at 498 (showing that Muslim countries utilize Shari’a in determining their laws).


60. E.g., Lebanon, Syria, Egypt, Algeria, Bahrain, Kuwait, Libya, Morocco, and Tunisia. See Kutty, supra note 4, at 595.

61. E.g., Iraq, Jordan, Sudan, and the UAE. See Kutty, supra note 4, at 595.
substantially from Shari`a; and (3) countries that have Westernized their commercial laws but are strongly influenced by Shari`a principles. Although these groups are not discrete, they do give perspective on the legal landscape.

To varying degrees, both Western legal thought and Islamic jurisprudence influence Middle Eastern national laws. Similarly, which Islamic school is authoritative or which school takes precedence varies from state to state. The weight accorded to a particular school ebbs and flows with national preferences, which likewise affect the influence of Western laws.

III. Arbitration in Islam and the Arab Middle East

A. Forms of Dispute Resolution, Points of Confusion, and Regional Practice

Options for dispute resolution in Middle Eastern Arab countries are apparently no different from those available in other parts of the world, such as proceedings before state courts,
arbitration, and conciliation. State judicial courts settle the majority of commercial disputes. Between nationals of the same country, claims are settled by conciliation, a dispute resolution mechanism synonymous with mediation.

Conciliation is a process where the parties reach an agreement either by themselves or through a third party. Because the conciliatory process is voluntary, the parties may terminate the third-party mediator’s appointment at any time before settlement. Conciliation was the Prophet Muhammad’s preferred method of dispute resolution. The Prophet Muhammad made it clear that he was skeptical of judicial proceedings, which were conceived by man and,
therefore, fallible.76 Muslims regard the use of conciliation as both a demonstration of solidarity and an observance of the religious duty to remain at peace with one another.77

Conciliation involving third parties is sometimes confused with amiable composition.78 Amiable composition is an arbitral practice where a third party, referred to as an amiable compositeur, is permitted to make a decision according to what he or she considers fair and appropriate under the circumstances, and not necessarily by reference to any substantive legal system.79 Unlike conciliation proceedings involving third parties, amiable composition is binding in nature.80 The confusion between amiable composition and conciliation may stem from the flexibility of the amiable compositeur to make a decision according to equitable principles rather than fixed legal rules.81


77. See ABDUL HAMID EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 12 (Aspen Publishers 1998) (noting that the Arabian Peninsula ended a period of tribal warfare and became unified under the Prophet Muhammad and the later Caliphs); see also COULSON, supra note 24, at 10 (remarking that in Arab culture, intratribal conflicts were usually settled through arbitration); Goitein, supra note 76, at 74 (claiming that Islamic law permits Muslim mediators to refuse non-Muslim disputants).


Arbitrators may make decisions as amiable compositors only if the parties expressly have conferred such powers on them.\textsuperscript{82} Middle Eastern countries influenced by French law, such as Lebanon and Syria, incorporate amiable composition legislatively.\textsuperscript{83} On a practical level, however, amiable composition in those countries usually proceeds as mediation conducted by a third party—evidencing the strength of other historical influences and their impact on modern legislation.\textsuperscript{84} The anticipated effect of any form of dispute resolution, whether it is binding or not, should be clear at the start of a proceeding. Different views regarding the anticipated effects of arbitral proceedings—mindsets as to the nature of arbitration—are discussed in Part V.

Middle Eastern civil disputes where one party is a foreign national typically do not utilize mediation as a settlement mechanism.\textsuperscript{86} Instead, arbitration is the norm.\textsuperscript{87} Arbitration in this context is specified contractually and not spontaneously, unlike characteristic Islamic arbitra-

\textsuperscript{82}. See \textsc{International Trade Center, Arbitration and Alternative Dispute Resolution: How to Settle International Business Disputes} 88 (2001) (stressing that arbitrators may make decisions as amiable compositors only after the agreement of the parties); \textit{see also} UNICTRAL Model Law in International Commercial Arbitration art. 28, § 3 (2006) (codifying the rule that amiable composition may be used only after the express agreement of the parties); London Court of International Arbitration, \textit{Arbitration Rules}, in \textsc{International Business Litigation \& Arbitration} 2006, at 779, 800 (PLI Litig. \& Admin. Practice, Litig. and Admin. Practice Course Handbook Series No. 8710, 2006) (noting that parties must have agreed in writing for amiable composition to apply).


\textsuperscript{84}. \textit{See} Weinberg, \textit{supra} note 83, at 238 (discussing the flexible nature of amiable composition); \textit{see also} Ichiro Kita-mura, \textit{The Judiciary in Contemporary Society: Japan}, 25 \textsc{Case W. Res. J. Int’l L.} 263, 288 (1993) (commenting on the French style of amiable composition); United Nations, \textit{supra} note 81, at 14 (likening amiable composition to mediation).

\textsuperscript{85}. \textit{See} El-Ahdab, \textit{supra} note 77, at 11 (outlining the history of mediation in Arab countries); \textit{see also} John E. Roth-enberger, \textit{The Social Dynamics of Dispute Settlement in a Sunni Muslim Village in Lebanon}, \textsc{The Disputing Process—Law in Ten Societies} 152, 164 (Laura Nader ed., 1978) (describing historical dispute resolution mechanisms in Lebanon); Saleh, \textit{supra} note 70, at 199 (confirming local traditions dominate Western-inspired law in Arab countries).

\textsuperscript{86}. \textit{See} Gemmell, \textit{supra} note 3, at 170 (maintaining foreign investors must know the role of religion in commercial arbitration in the Middle East).

\textsuperscript{87}. \textit{See} Saleh, \textit{supra} note 70, at 199 (establishing that when a party is foreign, commercial disputes in the Middle East are usually resolved through arbitration); \textit{see also} Syed Khalid Rashid, \textit{Alternative Dispute Resolution in the Context of Islamic Law}, 8 \textsc{Vindobona J. Int’l Com. L. \& Arb.} 95, 109 (2004) (noting arbitration awards are enforced in Arab nations that have accepted the Convention of Recognition and Enforcement of Foreign Arbitral Awards).
International commercial arbitration in the Middle East was once characterized as a “concession to a foreign party” causing “apprehension” typically leading the domestic party to search for alternatives. However, the growing body of legislation and case law on arbitration has facilitated the practice of international commercial arbitration in the Middle East. With greater experience and exercise of international norms, the trend may continue.

B. Arbitration During the Pre-Islamic Period

Arbitration, or *tahkim*, has a long history in the Middle East, stretching back before Islam. In the pre-Islamic Arab community, self-help tended to be the most relied upon method of dispute resolution. Arbitration was optional and left to the free choice of the parties. See David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int’l L. 194, 205 (2005) (emphasizing that states are bound to the commercial arbitration agreements they enter); see also David D. Caron, *The Nature of the Iran–United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 Am. J. Int’l L. 104, 148 n.202 (1990) (clarifying UNCITRAL Model Law regarding commercial arbitration agreements); Charles N. Brower, *Court-ordered Provisional Measures Under the New York Convention*, 80 Am. J. Int’l L. 24, 24 n.1 (asserting “the purpose of the New York Convention is to encourage the recognition and enforcement of commercial arbitration agreements”).

See Husain M. Al-Baharna, *International Commercial Arbitration in a Changing World*, 9 Arab L. Q. 144, 154 (1994) (explaining that initial efforts at international arbitration in the Gulf suffered because of foreign arbitrators’ insensitivity to local laws and the Gulf countries’ failure to fully appreciate the ramifications of international arbitration clauses); see also Kutty, *supra* note 4, at 591-92 (outlining the oil concession disputes that resulted in Middle Eastern distrust of international arbitration); Saleh, *supra* note 70, at 199 (explaining that Middle Easterners viewed arbitration negatively because it was held on foreign territory and subject to foreign rules).


See EL-AHDAB, *supra* note 77, at 11 (explaining that arbitration was used in the pre-Islamic period due to the lack of an organized judicial power); see also Joseph Schacht, *Pre-Islamic Background and Early Development of Jurisprudence*, in *THE FORMATION OF ISLAMIC LAW* 29 (Lawrence I. Conrad ed., 2004) (describing Middle Eastern arbitration in the pre-Islamic era); Kutty, *supra* note 4, at 589 (outlining the history of arbitration in the Middle East).

See JOSEPH SCHACHT, *INTRODUCTION TO ISLAMIC LAW* 7 (1964) (emphasizing that self-help was the only means of dispute resolution short of war in the pre-Islamic Middle East); see also Gemmell, *supra* note 3, at 173 (documenting the prominence of self-help in the pre-Islamic Middle East).
ties. If the parties, in the course of negotiations, failed to resolve their dispute, an arbitrator, or hakam, was appointed.

Arbitral proceedings in Arab countries during the pre-Islamic period were simple and rudimentary. A valid arbitration proceeding merely required a hearing attended by the parties and proof of each claim. Arbitral awards were not legally binding—enforcement often depended on the moral authority of the arbitrator. Priests were often chosen as hakam, though the hakam could be any male who possessed high personal qualities, who enjoyed a favorable position in the community, and whose family was regarded as competent in dispute settlement. Sometimes parties made a security deposit when the hakam agreed to arbitrate.

93. See El-AhDab, supra note 77, at 12 (asserting that arbitration was an option in the pre-Islamic Middle East); see also Kutty, supra note 4, at 590 (explaining that parties did not have to choose arbitration).

94. See Schacht, supra note 92, at 29 (stating that in the pre-Islamic Middle East, arbitration followed failed negotiations); see also Barbara J. Metzger, Revelation and Reason: A Dynamic Tension in Islamic Arbitrature, 11 J. L. & Rel. 697, 700 (1995) (noting that a hakam was appointed to arbitrate a dispute upon failed negotiations in the pre-Islamic Middle East). George Sayen, Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia, 24 U. Pa. J. Int’l Econ. L. 905, 923 (2003) (concluding that arbitration was used in the pre-Islamic Middle East to resolve disputes that otherwise would have led to war).

95. See El-AhDab, supra note 77, at 12 (describing pre-Islamic arbitral proceedings as simple); see also Kutty, supra note 4, at 596–97 (outlining arguments affirming the easy nature of pre-Islamic arbitral proceedings); Zeyad Alqurashi, Arbitration Under the Islamic Sharia, Oil Gas and Energy Law Intelligence, http://www.gasandoil.com/ogcl/samples/freearticles/article_63.htm (2003) (expounding the simplicity of pre-Islamic arbitral proceedings).

96. See El-AhDab, supra note 77, at 12 (describing the requirements of a valid arbitration in the pre-Islamic Middle East); see also Samir Saleh, Commercial Arbitration in the Middle East, 21 (1984) (describing the various elements of pre-Islamic arbitration); Alqurashi, supra note 95 (illustrating the pre-Islamic arbitration requirements).

97. See Kutty, supra note 4, at 589 (explaining that arbitral awards were not legally binding in the pre-Islamic period); see also Rashid, supra note 87, at 102 (describing the arbitral awards as unenforceable in the pre-Islamic era); Medhat Mahmoud, The Judicial System in Iraq: Facts and Prospects, Iraqi Judicial Forum (2004), http://www1.worldbank.org/publicsector/legal/iraq1.doc (affirming that parties were not bound by arbitration in the pre-Islamic era).

98. See Schacht, supra note 92, at 8 (explaining that an arbitrator’s decision was not an enforceable judgment but, rather, a statement providing answers to disputed situations); see also Schacht, supra note 93, at 30 (explaining that an arbitrator’s decisions were not enforceable judgments); Rashid, supra note 87, at 102 (explaining that arbitral awards were not enforceable unless the tribal chief had the power to procure enforcement).

99. See El-AhDab, supra note 77, at 12 (establishing that pre-Islamic arbitrators were often priests); see also Schacht, supra note 92, at 8 (remarking that pre-Islamic arbitrators were spiritual leaders); Sayen, supra note 94, at 923 (expressing that arbitrators were chosen in the pre-Islamic era because their opinions were believed to be divinely inspired, thereby compelling submission to arbitration and compliance with the award).

100. See Zubaida, supra note 30, at 16–17 (stating that pre-Islamic Middle Eastern arbitrators were typically men with special credentials); see also George Sayen, Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia, 24 U. Pa. J. Int’l Econ. L. 905, 924 (2003) (describing the unusual characteristics of pre-Islamic arbitrators).
The security deposit ensured compliance, to a certain degree, with the hakam’s final decision.102

Arbitration continued as a dispute resolution practice during and after the life of the Prophet Muhammad.103 There are many examples of the Prophet Muhammad serving as hakam,104 “a role to which he attached great importance.”105 Two notable episodes were his arbitration with the Jewish tribe of Banu Qurayza,106 and the negotiation of the Muslim community’s first treaty, the treaty of Medina.107

101. See EL-AHDAB, supra note 77, at 12 (explaining that in the pre-Islamic era, some arbitrators required parties to deposit a security to ensure enforcement of the arbitral award); see also SCHACHT, supra note 94, at 8 (noting that in pre-Islamic times, parties to an arbitration put up a security when a hakam agreed to arbitrate); Gemmell, supra note 3, at 173 (articulating the pre-Islamic practice of arbitrators refusing to arbitrate before receiving a security).

102. See EL-AHDAB, supra note 77, at 12 (emphasizing that the security is important to ensure compliance with the arbitrator’s judgment); see also Schacht, supra note 93, at 29–30 (stating that the security guaranteed execution of the arbitrator’s award in the pre-Islamic era); Gemmell, supra note 3, at 173 (noting that the security often led to compliance with the pre-Islamic arbitrators’ decisions).

103. See ZUBAIDA, supra note 30, at 17 (indicating that even the Prophet Muhammad was an arbitrator); see also Brower & Sharpe, supra note 3, at 643 (expressing the Prophet Muhammad’s support for arbitration); Gemmell, supra note 3, at 173 (stating that arbitration continued during and after the life of the Prophet Muhammad).


105. See SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: SHARĪ`A, SYRIA, LEBANON AND EGYPT 18 (2d ed. 2006) (explaining that as prophet, Muhammad attached great importance to being appointed as an arbitrator by believers); see also MUHAMMAD KHALID MASUD ET AL., DISPENSING JUSTICE IN ISLAM: QADIS AND THEIR JUDGMENTS 7 (Muhammad Khalid Masud et al. eds., 2005) (noting the Prophet Muhammad’s respect for his service as an arbitrator in the young Muslim community); MAJID KHADDURI, LAW IN THE MIDDLE EAST 30 (Herbert J. Liebesny ed., 1984) (stressing the Prophet Muhammad’s emphasis on the value of serving as an arbitrator).

106. See Libyan Am. Oil Co. v. Libyan Arab Republic, 20 I.L.M. 1, 41 (1981) (referencing the Prophet Muhammad’s arbitration with the tribe of Banu Qurayza); see also PATRICE C. BRODEUR, ISLAM AND OTHER RELIGIONS, IN ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD 361 (Richard C. Martin ed., 2004) (noting that the Prophet Muhammad was called to act as an arbitrator during the confrontation with the Banu Qurayza); HILMI M. ZAWATI, IS JIHAD A JUST WAR? WAR, PEACE, AND HUMAN RIGHTS UNDER ISLAMIC AND PUBLIC INTERNATIONAL LAW 70 (2002) (discussing the Prophet Muhammad’s role in arbitration with the tribe of Banu Qurayza).

107. See BRODEUR, supra note 106, at 361 (noting that the Prophet Muhammad was called to act as an arbitrator in Medina); see also DAVID WAINES, AN INTRODUCTION TO ISLAM 18 (2003) (discussing the Prophet Muhammad’s invitation to Medina to serve as an arbitrator); Muhammad Abu-Nimer, A Framework for Nonviolence and Peacebuilding in Islam, 15 J. L. & RELIGION 217, 247 n.62 (2000) (specifying how the Prophet Muhammad’s arbitrations ended the incident of the Aws and Khazraj tribes of Medina).
Today, the practice of arbitration remains well accepted in Islamic society.108 Arbitration is approved by the Quran, particularly in the matrimonial context, as illustrated by the following passage:109 “And if you fear a breach between the two [husband and wife], then appoint a judge from his people and a judge from her people; if they both desire agreement, Allah will effect harmony between them, surely Allah is knowing, Aware.”110 The Prophet Muhammad accepted arbitral decisions, and he advised others, including his close companions, to arbitrate.111 Ijma also confirms the use of arbitration as an Islamic dispute resolution tool.112

C. The Origins of Modern Arbitral Practice in the Middle East

During the period from the end of World War II to the 1970s, several notable international arbitral decisions concerning oil concession disputes set aside and undermined Islamic domestic laws.113 The decisive characteristics of each of these arbitrations were the negation of domestic, Islamic laws and the elevation of “general principles of law” that were firmly rooted in the jurisprudence of Western jurisdictions.114 One notable opinion questioned the adequacy of general contract law in Shari’a,115 instead applying principles of English law because they were the “common practice of the generality of civilized nations.”116
A similar ethnocentrism was evident in *Ruler of Qatar v. International Marine Oil Co. Ltd.* In that case, the arbitrator held that Qatari law, based on Islamic law, was the proper law to apply. However, rather than apply Qatari law, the arbitrator dismissed it, stating that “[he was] satisfied that the [Islamic] law does not contain any principles which would be sufficient to interpret this particular contract.” Such a statement indicated disregard of extensive Islamic legal scholarship that sets out clear principles of contract law based on the primary and secondary sources of Islamic law.

Peremptory arbitral decisions framed the historical backdrop against which much of the Middle East viewed international arbitration. For too long, various Middle Eastern states remained outside the regime of international conventions that provide for enforcement of international arbitral awards. In recent history, Middle Eastern national legislation governing international arbitration was unfavorable or even hostile to arbitration; some states discretionarily set aside international arbitral awards. The current trend is that Middle Eastern nations are increasingly standardizing the process of arbitral review, adopting new or revised arbitration laws receptive to international needs, and establishing arbitration centers as adjuncts

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117. *Int’l Marine Oil*, 20 I.L.R. at 545 (holding that Islamic law was not the proper law to apply).

118. See id. (holding that Islamic law was not sufficient for the contract in question); *see also* William M. Ballantyne, *The Second Coulson Memorial Lecture: Back to the Shari`a?*, 3 ARAB LAW Q. 317, 324 (1988) (recounting that although the arbitrator recognized Qatari law as the appropriate law, the arbitrator nevertheless declined to apply it). *See generally* Nabil Saleh, *The Law Governing Contracts in Arabia*, 58 INT’L COMP. L. Q. 761, 761–97 (1989) (discussing Qatari law as it relates to contracts).

119. See *Int’l Marine Oil Co.*, 20 I.L.R at 541 (stating that the arbitrator did not find Islamic contract law sufficient); *see also* Mark S. W. Hoyle, *The Origins of Mixed Courts in Egypt*, 1 ARAB L.Q. 220, 224 (1986) (noting the arbitrator in *Ruler of Qatar* found the Islamic law was insufficient to interpret the contract).

120. See William M. Ballantyne, *The Shari`a and Its Relevance to Modern Transactional Transactions*, First Arab Regional Conference (Feb. 15–19, 1987), 1 ARAB COMP. & COM. L. 3, 12 (1987) (discussing various forms of the Islamic law of contracts); *see also* Lombardi, *supra* note 10, at 94 (stating that in 83 opinions, the International Court of Justice only issued 2 opinions discussing Islamic law in any meaningful way).

121. See Brower & Sharpe, *supra* note 3, at 644–45 (discussing the historical background of arbitration in the Middle East from World War II to 1970); *see also* Kutty, *supra* note 4, at 591–92 (giving historical reasons for Middle Eastern national unease toward international arbitration); Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts* 59 VAND. L. REV. 609, 630–33 (2006) (suggesting that Islamic laws and Western laws are at variance because each derives legitimacy from different sources).


123. See Brower & Sharpe, *supra* note 3, at 647 (expressing that some Middle Eastern countries have been hostile or unfavorable to modern arbitration); *see also* Christopher A. Ford, *Syar-ization and Its Dicounters: International Law and Islam’s Constitutional Crisis*, 30 TEX. INT’L L.J. 499, 519–22 (1995) (suggesting that Syria’s doctrinal restraints restrict its compatibility with international norms); Roy, *supra* note 5, at 951–52 (discussing Saudi Arabian laws restricting international arbitration).

124. See Akaddaf, *supra* note 11, at 23–25 (highlighting reasons, including public policy, why some Middle Eastern countries did not enforce arbitral awards); *see also* Brower & Sharpe, *supra* note 3, at 647 (noting certain Middle Eastern countries’ interference with or hostility toward international arbitration).
to those outside the region.125 These developments demonstrate a renewed willingness to participate in the international arbitral system on a level field.

IV. International Arbitration and Selected Multilateral Conventions

Several multilateral conventions that address the enforcement of foreign arbitral awards are relevant to a discussion of international commercial arbitration in the Middle East.126 In addition to those international conventions, Middle Eastern states have also enacted bilateral agreements to recognize and mutually enforce court judgments and arbitral decisions.127 To focus the discussion, this article considers the following five multilateral conventions. The first three are regional treaties, specific to Middle Eastern countries. The remaining two are international conventions, products of the United Nations128 and the World Bank,129 respectively.

1. The Arab Convention on the Enforcement of Foreign Judgments and Arbitral Awards130 (“Arab League Convention”);

2. The Riyadh Convention on Judicial Cooperation131 (“Riyadh Convention”);

125. See Berger & Quast, supra note 3, at 206–10 (discussing Egypt's new laws and ratification of the New York Convention); see also Brower & Sharpe, supra note 3, at 646–47 (arguing that the world is closer than ever before to reaching consensus on the utility of international arbitration); Bannon & Chapple, supra note 90 (stating that Jordan, Egypt, Kuwait, and other countries adopted the New York Convention and normally enforce its laws).

126. See Akaddaf, supra note 11, at 23–25 (claiming the New York Convention and the Geneva Convention have been used to encourage enforcement of international arbitration); see also Dr. Husain M. Al-Baharna, The Enforcement of Foreign Judgments and Arbitral Awards in the GCC countries with Particular Reference to Bahrain, 4 ARAB L. Q. 332, 332–33 (1989) (stating that the Arab League Convention encourages enforcement of international arbitral awards); The Amman Arab Convention on Commercial Arbitration, 7 ARAB L. Q. 83, 83 (1992) (showing that a number of Arab countries have met to improve commercial arbitration).


130. Arab Convention for Enforcement of Judgments (and Arbitral Awards) of 1952, Sept 14, 1952; see generally Al-Baharna, supra note 126, at 332–33 (discussing the Arab League Convention's attempts to encourage enforcement).

3. The Amman Arab Convention on Commercial Arbitration132 ("Amman Arab Convention");

4. The Convention on the Recognition and Enforcement of Arbitral Awards133 ("New York Convention"); and

5. The Convention on the Settlement of Investment Disputes between States and Nationals of other States134 ("ICSID Convention").

Under the Arab League Convention, courts within contracting states are required to enforce foreign arbitral awards without adjudicating the merits of the underlying case, subject to procedural safeguards laid down within the convention's text.135 The Arab League Convention is quite similar to but more complex than the New York Convention.136 Notably, the Arab League Convention excludes from its purview those awards that seek enforcement based on international conventions or bilateral treaties.137 This means that where two states are parties to both the Arab League Convention and the New York Convention or a bilateral agreement, the latter of the two will prevail.138 The Arab League Convention therefore defers and gives precedence to international and bilateral conventions.139


135. See Habib Mohd. Sharif Al Mulla, Conventions of Enforcement of Foreign Judgments in the Arab States, 14 ARAB L.Q. 33, 55 (1999) (stating that the judicial authority cannot examine the merits of the case when enforcement is sought under the Arab League Convention). See generally Samir Saleh, The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East, 1 ARAB L. Q. 19, 24 (1985) (noting that the court petitioned for enforcement cannot review the substantive matters of the case).

136. See Al-Baharna, supra note 126, at 334 (illustrating how the Arab League Convention of 1952 is more intricate and complex than the New York Convention of 1958).

137. See Jalila Sayed Ahmed, Enforcement of Foreign Judgments in Some Arab Countries—Legal Provisions and Court Precedents: Focus on Bahrain, 14 ARAB L. Q. 169, 173 (1999) (indicating the priority of applying international conventions when they conflict with the national law of an Arab League Convention signatory).

138. See Al-Baharna, supra note 126, at 335 (stressing that either the New York Convention or a bilateral agreement trumps the Arab League Convention if a state is party to both); see also Ahmed, supra note 137, at 173 (affirming that the New York Convention takes priority over the Arab League Convention).

139. See also Ahmed, supra note 137, at 173 (maintaining that international conventions have precedence over the national laws of the Arab States under the Arab League Convention); see also Saleh, supra note 135, at 23 (describing the New York Convention as a step forward from the Arab League Convention).
The Arab League Convention was essentially superseded by the Riyadh Convention.\textsuperscript{140} The Riyadh Convention, a regional multilateral convention among Arab states, governs foreign awards made in other member states.\textsuperscript{141} Under the convention, courts are prohibited from examining the substance of disputes referred for award enforcement.\textsuperscript{142} Courts may only enforce or refuse to enforce an award.\textsuperscript{143} The Riyadh Convention was a step forward for those countries that had not yet ratified the New York Convention.\textsuperscript{144} However, with the large number of Middle Eastern states that have now acceded to the New York Convention, the Riyadh Convention is no longer as relevant as it once was.

The Amman Arab Convention, modeled after the Washington Convention,\textsuperscript{145} was concluded by 14 Arab states in 1987.\textsuperscript{146} The Amman Arab Convention established the Arab Cen-


\textsuperscript{141.} Breger & Quast, \textit{supra} note 3, at 222 (explaining how the Riyadh Convention applies only to foreign awards made in other Arab member states); see also Abdul Hamid El-Ahdab, \textit{Enforcing Foreign Awards in the Middle East}, in \textit{COMMERCIAL LAW IN THE MIDDLE EAST} 323, 331 (Hilary Lewis & Chibli Mallat eds., 1995) (stating that the Riyadh Convention applies to arbitral awards between member states); \textit{Reconstruction of Iraq Coalition Provisional Authority Issues Order Number 39 Allowing Foreign Investments in Iraq}, INT'L NEWS BRIEF (Pillsbury Winthrop, LLP), Sept. 23, 2003, at 2 (stating that Article 37 of the Riyadh Convention requires member states to recognize and enforce arbitral awards issued in other member states).


\textsuperscript{143.} Breger & Quast, \textit{supra} note 3, at 222. See Mulla, \textit{supra} note 135, at 55 (reiterating that judicial authorities under the Riyadh Convention are limited solely to examining whether a judgment satisfies the conditions of the Convention); see also General Counsel's Office of the U.S. Department of Commerce, \textit{supra} note 144 (stating that the Riyadh Convention requires courts to enforce arbitral awards of other states with few exceptions).

\textsuperscript{144.} Breger & Quast, \textit{supra} note 3, at 222 (declaring that the Riyadh Convention is a step forward from the Arab League Convention). See Saleh, \textit{supra} note 135, at 25 (claiming that the Riyadh Convention of 1983 is more comprehensive than the Arab League Convention of 1952); see also Al-Baharna, \textit{supra} note 126, 336 (concluding that the Riyadh Convention simplified procedures and updated the conditions of enforcement of foreign arbitral awards).

\textsuperscript{145.} \textit{See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States} art. 54, Mar. 18, 1965, 17 U.S.T. 1270 (showing that the Amman Arab Convention was modeled after the Washington Convention).

\textsuperscript{146.} \textit{See The Amman Arab Convention on Commercial Arbitration, supra} note 132 at 83 (listing the 14 Arab States that agreed to enter under the Amman Arab Convention on Commercial Arbitration).
However, the requirement that all proceedings be conducted in Arabic has limited the center’s appeal. To date, no Middle Eastern state has utilized the Amman Arab Convention nor has the Rabat Centre been established. The Amman Arab Convention has not referred a single case to arbitration nor settled a commercial dispute, although it has been in effect since 1992.

Of the five aforementioned conventions, the New York Convention is by far the most prominent. The New York Convention is one of the most widely accepted conventions governing international commerce. It applies to two types of arbitral awards: those rendered in foreign countries and those not deemed as domestic in the state where enforcement is sought. The Convention imposes two principal obligations on state parties: (1) to ensure that national courts, where appropriate, refer parties to arbitration and stay related judicial proceedings; and (2) to recognize and enforce foreign arbitral awards essentially as if they were domestic.

147. See id. (showing that by virtue of the Amman Arab Convention, a permanent organization called the Arab Centre for Commercial Arbitration was created); see also Chibli Mallat, Commercial Law in the Middle East: Between Classical Transactions and Modern Business, 48 AM. J. COMP. L. 81, 136 (2000) (noting that the Amman Convention of 1987 made a genuine attempt to establish Rabat as a major center of arbitration); Arbitration under the 1987 Amman Convention, LAW AND ARBITRATION CENTER (2001), http://www.lac.com.jo/news1-8.htm (highlighting as the most important provision of the Convention the establishment of the Arab Centre for Commercial Arbitration in Rabat, Morocco).

148. See The Amman Arab Convention on Commercial Arbitration, supra note 132 at 88 (announcing that the language of the Arab Centre proceedings is Arabic); see also Brower & Sharpe, supra note 3, at 654 (noting that the Arab Centre’s appeal outside of the Arab states is limited by the requirement that all proceedings be conducted in Arabic).

149. See Arbitration under the 1987 Amman Convention, supra note 147 (explaining that since the Arab Centre for Commercial Arbitration has not yet been established; the Convention is operative only in theory); see also Breger & Quast, supra note 3, at 222–23 (affirming that the Amman Convention has not become operative and the Rabat Centre has not been established).

150. Arbitration under the 1987 Amman Convention, supra note 147 (noting that no commercial dispute has been settled under the Amman Arab Convention). See Gemmell, supra note 3, at 190–91 (stating that no commercial dispute has been settled or even referred to Rabat since the Convention went into effect); see also Mallat, supra note 147, at 139 (noting the lack of any serious reported arbitration in the Rabat Centre).

151. See U.N. Comm’n on Int’l Trade Law, supra note 9 (listing the countries that are party to the New York Convention); see also Marian Nash Leich, The Inter-American Convention on International Commercial Arbitration, 75 AM. J. OF INT’L L. 982, 985 (1981) (asserting that the New York Convention is better established than the Inter-American Convention because of greater worldwide participation).

152. See Convention on the Recognition and Enforcement of Arbitral Awards, art. 1, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 530 U.N.T.S. 38, available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (declaring that the New York Convention applies to arbitral awards made in states other than the one where the recognition and enforcement of such awards are sought); see also STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS 134 (2002) (indicating that each signatory state may designate arbitral awards that are considered not domestic and may apply the Convention to awards made in another signatory state).

153. See Convention on the Recognition and Enforcement of Arbitral Awards, supra note 152 art. 2, June 10 (stating that each signatory state shall agree in writing to arbitrate any differences that arise between them that is capable of settlement by arbitration); see also BORN, supra note 15, at 21 (outlining the New York Convention’s requirements, including national courts’ referral of parties to arbitration when an agreement to arbitrate subject to the Convention exists). See generally Brower & Sharpe, supra note 3, at 648 (discussing the obligations the New York Convention imposes on state parties).
judgments. By virtue of the New York Convention, enforcement of arbitral awards has been made much easier, and jurisdictional problems have been largely eliminated.

Regional multilateral treaties in the Middle East defer to the New York Convention and give it precedence over other conventions concerning foreign arbitral award enforcement. Prior 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.

The New York Convention severely restricts the grounds upon which national courts may refuse to enforce foreign arbitral awards. A party can successfully plead for refusal of recognition or enforcement of an arbitral award only if that party can prove to the competent authority of the enforcing state that:

1. The parties to the agreement were under some incapacity or the agreement was not valid, under either the applicable law or the law of the country where the award was made;
2. Proper notice of the appointment of the arbitrator or of the arbitration proceedings was not given to the party against whom the award is invoked, or that party was otherwise unable to present his case;
3. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration;


155. See Gemmell, supra note 3, at 186 (naming the New York Convention as the document most credited with the enforcement of international arbitral awards); GORDON BLANKE, THE USE AND UTILITY OF INTERNATIONAL ARBITRATION IN EC COMMISSION MERGER REMEDIES 32 (2006) (remarking that the New York Convention guarantees the enforcement of an award in any of the contracting states).

156. See Brower & Sharpe, supra note 3, at 648 (explaining that prior to the New York Convention, the laws of many Middle Eastern states required a court order from the country in which the award was made to enforce a foreign arbitral award). See generally SALEHI, supra note 105, at 341 (noting that because Qatar had no statutory provisions or judicial precedents for the enforcement of foreign awards, they were previously unenforceable).


158. The following five exceptions are paraphrased from the Convention on the Recognition and Enforcement of Arbitral Awards, supra note 152 art. 5, ¶ 1(a)-(e).

159. See id. at art. 5, ¶ 1(a).
160. See id. at art. 5, ¶ 1(b).
161. See id. at art. 5, ¶ 1(c).
4. Either the composition of the arbitration authority or the arbitral procedure was not in accordance with the agreement of the parties or was not in accordance with the law of the county where the arbitration took place; or

5. The award has not yet become binding on the parties or has been set aside or suspended by competent authority.

In addition to these party-invoked exceptions, the New York Convention also authorizes state courts to refuse to enforce arbitral awards "not capable of settlement by arbitration" or "contrary to the public policy of that country." The public policy exception guards against enforcement of an award that offends local principles of justice and fairness in a fundamental way. An arbitral award contrary to the remedial purposes of a statute may be one type of award contrary to public policy. According to the text of the New York Convention, state courts should look to the public policy "of that country" where recognition and enforcement is sought. Though the open-textured nature of "public policy" created an initial fear that the public policy defense would be widely used by national courts to refuse enforcement of foreign

162. See id. at art. 5, ¶ 1(d).
163. See id. at art. 5, ¶ 1(e).
166. See Parsons & Whittomore Overseas Co. v. Societe General de l'Industrie du Papier, 508 F.2d 969, 973 (2d Cir. 1974) ("Enforcement of foreign arbitral awards may be denied . . . only where enforcement would violate the forum state's most basic notions of morality and justice."); see also Scherck v. Alberto-Culver Co., 417 U.S. 506, 520 n.14 (1974) (citing fraud as possible public policy grounds on which to refuse recognition of a foreign arbitral award). But see Kresimir Sajko, New York Arbitration Convention of 1958 from the Yugoslav Point of View: Selected Issues, in ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION, 199, 208 (Petar Sarcevic ed., Brill, 1989) (arguing that the New York Convention's public policy defense refers to basic notions of morality and justice of the forum state but not to all the mandatory provisions of the forum state).
168. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, supra note 128, art. 5 ¶ 2(b); cf. Sajko, supra note 166, at 199, 209 (discussing public policy reasons to deny arbitration awards enforcement in Yugoslavia); Thomas D. Halket, The Use of Technology in Arbitration: Ensuring the Future Is Available to Both Parties, 81 ST. JOHN'S L. REV. 269, 276–77 (2007) (showing circumstances in which United States public policy would prevent the enforcement of an arbitral award).
awards, subsequent practice has proven that fear to be largely unfounded. In the Middle East, however, exceptions to that generalization may remain as discussed in Part VI.

In the United States, the argument that enforcement of a foreign arbitration award should be denied because it would violate United States public policy has rarely been successful, though it is the most often invoked exception. The enforceability of both foreign arbitral awards and agreements to arbitrate is upheld strongly in the United States. Where non-U.S. parties are involved, arbitration agreements may be enforced “even assuming that a contrary result would be forthcoming in a domestic context.” In other words, a liberal federal policy favoring arbitration agreements is in place notwithstanding any state substantive or procedural policies to the contrary. This has resulted in the creation of a body of federal substantive law

169. See Kevin C. Kennedy, Invalidity of Foreign Arbitration Agreement or Arbitral Award, 31 AM. JUR. PROOF OF FACTS 3d 495 § 22; see also Waterside Ocean Nav. Co. v. Int'l Nav. Ltd., 737 F.2d 150, 152 (2d Cir. 1984) (holding that the public policy defense should be narrowly construed). See generally Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 817–18 (Del. 1990) (noting the “severe” limitations on the court in confirming or vacating arbitration awards).

170. See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9–12 (1972) (finding in favor of a forum selection clause despite being contrary to public policy because the choice of forum was negotiated at arm's length by competent parties); see also McDermott Int'l Inc. v. Lloyds Underwriters of London, 120 F.3d 585, 588 (5th Cir. 1997) (confirming an arbitral decision pursuant to the New York Convention rather than applying federal law, which may have resulted in overturning the decision); Andrew M. Campbell, Refusal to Enforce Foreign Arbitration Awards on Public Policy Grounds, 144 A.L.R. FED. 481, 481 (1998) (outlining in detail the circumstances in which arbitral agreements superseded U.S. policy).


174. See Letizia v. Prudential Bache Sec. Inc., 802 F.2d 1185, 1188 (9th Cir. 1986) (holding non-signatories to an arbitration agreement under ordinary contract and agency principles); see also Antco, 417 F. Supp. at 214 (admonishing against the failure of American courts to enforce international arbitration agreements). See generally Xiaowen Qiu, Enforcing Arbitral Awards involving Foreign Parties: A Comparison of the United States and China 11 AM. REV. INT'L' Arbitr. 607, 620 (2000) (highlighting the American jurisprudential trend toward an “international” public policy as opposed to a domestic public policy in agreements governed by the New York Convention).
of arbitrability, applicable to any arbitration agreement within the coverage of the New York Convention.175

Similarly, several Middle Eastern countries narrowly construe the public policy defense.176 Lebanon, for example, has expressly incorporated an exclusively “international public policy” exception in its arbitration laws.177 Such a move indicates that the public policy defense would be successful only if enforcement of the award is contrary to basic notions of morality and justice in the international community.178 Other countries, such as Saudi Arabia, remain unclear about the public policy standards that will be invoked upon review during enforcement proceedings.179 While some prefer the view that international rather than domestic public policy is at issue under the exception,180 the New York Convention is apparently unambiguous that the public policy applied is that of the country where arbitral enforcement is sought.181 As such, it appears that the breadth of exception is left to national interpretation.


177. Brower & Sharpe, supra note 3, at 649 (discussing Middle Eastern states’ adoption of “international public policy”). See generally Saleh, supra note 135, at 27 (describing some elements of the “Islamic concept of public policy”).


179. See EL-AHDAB, supra note 77, at 612–13 (providing examples of inarbitrable disputes under Saudi Arabian law); see also Kutty, supra note 4, at 602–03 (explaining how public order in Saudi Arabia is determined); Michael J.T. McMillen, Islamic Shari`ah-Complaint Project Finance: Collateral Security and Financing Structure Case Studies, 24 FORDHAM INT’L L.J. 1184, 1201–02 (2001) (noting the uncertainty of reviewing an award to ensure compliance with the Shari`a).

180. See SALEH, supra note 105, at 271 (2d ed. 2006) (noting that Lebanon uses international public policy when determining whether to set aside an international arbitration award); see also Brower & Sharpe, supra note 3, at 649); Kutty, supra note 4, at 602–03 (stating that some Middle Eastern national courts refuse to recognize foreign arbitral awards contrary to domestic public policy).

181. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, supra note 128, at art. 5, ¶ 2(b) (stating that “[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . the recognition or enforcement of the award would be contrary to the public policy of that country”); see also Venture Global Eng’g, LLC v. Satyam Computer Servs., Ltd., 2007 WL 1544160, at *4 (6th Cir. 2007).
Accession to the New York Convention ameliorates reciprocity problems.182 The New York Convention contains an optional reciprocity reservation that allows a state to limit the application of awards to only those other states which are parties to the New York Convention.183 Given the widespread acceptance of the New York Convention, reciprocity challenges are losing their relevance.184 However, the reciprocity requirement has created interesting situations in the past.

In the Frederick Snow arbitration,185 neither Kuwait nor the United Kingdom was party to the New York Convention at the time that a Kuwaiti arbitral award of £3.5 million was made against a British civil engineering firm.186 Upon acceding to the New York Convention in 1975, the United Kingdom invoked the reciprocity reservation.187 Enforcement of the arbitral award was therefore not possible until Kuwait acceded to the New York Convention in 1978, at which time the award was successfully enforced.188


183. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, supra note 128 art. 1, ¶ 3 (“When signing, ratifying or acceding to this Convention . . . any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State”); see also SALEH, supra note 105, at 149 (2d ed. 2006) (discussing the reciprocity reservation); Greco & Meredith, supra note 7, at 24 (noting that ratification of the New York Convention requires reciprocity between the country where enforcement will occur and the place the award was made).

184. See Brower & Sharpe, supra note 3, at 649; see also Dan. C. Hulea, Note, Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective, 29 BROOK. J. INT’L L. 313, 322 (2003) (stating that the reciprocity reservation is almost entirely moot given the widespread ratification of the New York Convention); Christine Lecuyer-Thieffry & Patrick Thieffry, Enforcement of Arbitral Awards: The New York Convention, THIEFFRY ASSOCIES ¶ 5 (March 28, 2005), available at http://www.thieffry.com/articles/new_york_convention.htm (opining that the reciprocity reservation is no longer an obstacle to the enforcement of arbitral awards given the growing number of countries that have acceded to the New York Convention).


186. See Brower & Sharpe, supra note 3, at 649; see also Kuwait v. Snow (1983) 1 LLOYD’S REP. 596, ¶ 31 (A.C.) (U.K) (noting that neither Kuwait nor the United Kingdom were parties to the New York Convention at the time of the arbitral award); Thyssen Stahl Union GMBH & ORS v. Steel Authority of India Ltd. (1999) 4 LRI 722, ¶ ¶ 88–89.

187. See Brower & Sharpe, supra note 3, at 649–50; see also Kuwait v. Snow, (1983) 1 LLOYD’S REP. 596, 600 (A.C.) (U.K) (stating that the United Kingdom acceded to the New York Convention and invoked the reciprocity provision, meaning the Convention would only apply to awards made in other contracting states).

188. See Brower & Sharpe, supra note 3, at 649 (noting that Kuwait was able to enforce the arbitral award in the United Kingdom once both states acceded to the New York Convention).
The ICSID Convention provides for the settlement of disputes between host states and foreign investors through arbitration or conciliation. The ICSID Convention established the International Center for Settlement of Investment Disputes in Washington, D.C. Numerous investment agreements between states and foreign investors contain consent clauses submitting disputes between the parties to the ICSID Center; and hundreds of bilateral investment treaties offer dispute settlement under the ICSID Convention to investors from the respective countries. A number of multilateral treaties also offer ICSID dispute settlement to investors. States party to the ICSID Convention must enforce pecuniary obligations under arbitral awards as if they were a final judgment in a domestic state court. In that the subject

189. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, supra note 134, Oct. 14, 1966 (“The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention”); see also Ibironke T. Odumosu, The Antinomies of the (Continued) Relevance of the ICSID to the Third World, 8 SAN DIEGO INT’L L.J. 345, 347–48 (2007) (explaining that the ICSID was established, in part, to “settle foreign investment disputes through arbitration and conciliation”); Wenhua Shan, Is Calvo Dead?, 55 AM. J. COMP. L. 123, 139 (2007) (noting that the ICSID Convention aims to provide an international tool to settle disputes). 


193. See SCHREUER, supra note 191, ¶ 11; see also Goodman, supra note 192, at 461–62 (stating that consent to ICSID arbitration can be accomplished pursuant to certain multilateral treaties); Lyons, supra note 191, at 528 (stating that hundreds of bilateral and multilateral investment treaties offer ICSID dispute resolution).

194. See Convention of the Settlement of Investment Disputes Between States and Nationals of Other States, supra note 134, at art. 54, Aug. 27, 1965 (stating that awards must be treated not only as if they were issued by the state’s court but also enforced through the state’s court system); see also Ronald A. Brand, Instruments Governing International Arbitration: Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, ¶ 8, 2 BASIC DOCUMENTS OF INT’L ECON. L. 947 (1991) (explaining that contracting parties to the convention must abide by an arbitral award as if it were issued by their own state court); France: Court of Appeals of Paris Judgment Concerning Recognition and Enforcement of Award in Context of ICSID Convention, ¶ 23, 20 INT’L LEGAL MATERIALS 877 (July 1981) (acknowledging that the awards promulgated under the convention are binding as final decisions issued by the court of the state).
matter is confined to “investment disputes,” the ICSID Convention is of more limited signifi-
cance than the New York Convention.195

V. Comparative Analysis of International and Islamic Arbitral Systems

Arbitration goes far back in the history of the Middle East. While the practice is certainly
an acceptable form of dispute resolution in the region, it evolved separately from the Western
model.196 Consequently, there are significant differences between Middle Eastern and Western
notions of arbitration.197 The following comparative analysis of those two views will follow five
broad headings: (1) the nature of arbitration; (2) the scope of arbitration; (3) the rules govern-
ing arbitration; (4) choice of law for the underlying dispute; and (5) scope of judicial review.
Under each heading, where relevant, the article discusses the views of different Islamic jurispru-
dential schools.

The nature of arbitration refers to the anticipated effect an arbitral decision will have on
the parties involved.198 A settled characteristic of arbitration in the West is its binding
nature;199 the parties are legally bound by the decision of the arbitrator. In Islamic jurispru-
dence, the debate surrounding the question of whether \( \text{tahkim} \) is more than simple conciliation
continues.200 The potential for misunderstanding based on the difference between Western and
Middle Eastern assumptions regarding the nature of arbitration is significant.201 Clearly, each

195. See Convention of the Settlement of Investment Disputes Between States and Nationals of Other States, supra
note 134, art. 25, Aug. 27, 1965 (stating that the jurisdiction is only to legal disputes relating to an investment
between a contracting state and a national of another contracting state); see also Al-Baharna, supra note 128, at 336
(explaining that the ICSID Convention is limited to “investment disputes,” and therefore it is more narrow
in its applicability than the New York Convention); Ramona Martinez, Comment, Recognition and Enforcement
LAW. 487, 491 (1990) (reiterating that the ICSID Convention only applies to one form of international arbitra-
tion arising out of investment disputes).

TUL. L. REV. 42, 43–45 (1982) (explaining that arbitration has long been a favored means of resolving disputes
among organized commercial groups in the West); see also Kassis, supra note 4, at 548 (stating that arbitration
evolved in the Middle East for both sociological and religious reasons); Kutty, supra note 4, at 577–90 (illustrat-
ing how arbitration in the Middle East developed from a form of tribal justice to a means of resolving disputes
influenced by Islamic principles).

197. Compare Saleh, supra note 135, at 29 (outlining the religious background to rules governing subject-matter arbi-
trability used by several Middle Eastern nations); with De Vries, supra note 196, at 43–45 (showing that Western
arbitration was traditionally considered a commercial dispute resolution mechanism, governed only by secular
arbitration institutions). See generally Brower & Sharpe, supra note 3, at 656 (recognizing “progress at every level”
in that Middle Eastern nations increasingly accept what is considered the “international” notion of arbitration).

198. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 8 (2d ed.
2001) (acknowledging that perceptions of bias in international commercial arbitration impede the enforce-
ment of arbitral awards); see also Martinez, supra note 195, at 488 (claiming that avenues for the successful enforce-
ment of arbitral awards are necessary for international arbitration to be effective).

199. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, supra note 128, art. 3 (stating
that contracting states must recognize and enforce arbitral awards as binding on the parties); see also Born, supra
note 198, at 1 (stressing that a hallmark of arbitration is a binding award that is enforceable in national courts).

200. See Sayen, supra note 94, at 934 (stating the different positions of the Sunni schools on the binding effect of \( \text{tahkim} \)); see also Ifrah Zilberman, The Future of Jerusalem: A Symposium: Palestinian Customary Law in the Jerusalem
Area, 45 CATH. U. L. REV. 795, 802 (1996) (referring to \( \text{tahkim} \) as a conciliation process). See generally
Alqurashi, supra note 95, ¶ 2 (stating that \( \text{tahkim} \) is a method for the settlement of disputes).
party bound by an arbitration clause should understand the consequences of agreeing to submit the dispute to an arbitrator.202

The nature of arbitration during the Pre-Islamic period was not uniform.203 An arbitral award during this era was not binding if either of the parties contested it, unless an outside authority—such as local government—or other means of coercion was in place.204 As stated in Part III, arbitrating parties sometimes used a security at the outset of arbitration to ensure a measure of compliance with the arbitral award. This is not to say that all arbitration during this period was nonbinding unless a security was present.205 For example, awards of arbitrators appointed in the *Ukaz*, a fair held periodically in Mecca, were binding on the parties.206 The nature of arbitration during the Pre-Islamic period therefore varied greatly and could depend on several factors.

201. See Saleh, *supra* note 135, at 29 (recognizing the differences in Middle Eastern countries relating to what subjects are arbitrable and what religious law, if any, may apply); Kassir, *supra* note 4, at 546 (citing several oil concession arbitration cases as the root of a Middle Eastern impression that international arbitration was used to fit the needs of Western nations).

202. See generally Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 128, art. 1–3 (detailing the arbitral provisions to which the signatory parties are bound under the convention); Convention of the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 134, art. 44, Aug. 27, 1965 (describing the results of a dispute arbitrated under the convention); Abby Cohen Smutny, *Arbitration Before the International Centre for Settlement of Investment Disputes*, 1 TRANSNAT’L DISP. MGMT. ¶ 3 (2004) (illustrating that arbitral disputes subject to the ICSID Convention are governed only by the convention’s provisions and law and are binding decisions).

203. See LAWRENCE I. CONRAD, THE FORMATION OF ISLAMIC LAW, 30 (2004) (explaining that during the pre-Islamic era arbitration was governed by each tribe’s customs, resulting in non-uniformity throughout the Middle East); Sayen, *supra* note 94, at 923 (stressing that pre-Islamic societies were dissociated in tribal sectors, each governed by their own system of arbitration).

204. See CONRAD, *supra* note 203, at 30–31 (stating that the decision of a tribal arbitrator was not an enforceable judgment unless a security guaranteed its execution); see also N.J. COULSON, A HISTORY OF ISLAMIC LAW 10 (1964) (illustrating that pre-Islamic arbitration not governed by an appointed official was not directly enforceable); Rashid, *supra* note 87, at 102 (explaining that during the tribal period, the arbitral award could not be enforced if one of the parties contested it unless the chief used his authority to do so).

205. See HALLAQ, *supra* note 20, at 35–36 (explaining that although arbitration verdicts during the tribal era were not binding, participants often adhered to the rulings of the arbitrator); see also Alqurashi, *supra* note 95, ¶ 5 (stating that arbitral awards of this period were not binding unless participating parties made a prior agreement). See generally W.M. BALLANTYNE, ESSAYS AND ADDRESSES ON ARAB LAWS 34 (2000) (recognizing that enforcing an arbitral award without state support fell heavily on the individual in a tribal society).

206. See Rashid, *supra* note 87, at 102 (stating that arbitral awards issued at the fair in Mecca were binding). See generally BALLANTYNE, *supra* note 205, at 34 (acknowledging that the fair in Mecca evidenced a starting point for modern commercial law with arbitration); COULSON, *supra* note 204, at 10 (illustrating that public arbitrators in Mecca worked within a basic legal system).
There is no consensus among the four leading Sunni schools on the issue of whether an arbitral decision is binding on the parties. Hanafi teachings hold that arbitration is close to compromise, but the school’s views are not easily classified into this limited category. Hanafi fiqh stresses the contractual nature of the arbitration agreement. Hanafi fiqh suggests that arbitration is closer to conciliation, though some jurists have held that an arbitrator has the same function as a judge. Arbitral awards under Hanafi-influenced legal systems are characterized by the use of subjective opinions, and arbitral awards more closely approximate conciliation than court judgments. Hanafi fiqh permits more cases to proceed under arbitration than do other schools, but arbitration in cases involving certain crimes is prohibited.

Shafi’i teachings, similar to those of the Hanafi school, hold that arbitration closely resembles compromise. Under Shafi’i fiqh, disputes may require judicial intervention where con-
flicting parties contest an arbitral award. Although the Shafi‘i view holds that an arbitral award is equally as enforceable as a judge’s judgment, the arbitrator has no authority to effect its enforcement. Furthermore, unlike a judge’s appointment, under Shafi‘i fiqh an arbitrator’s appointment is revocable. These factors suggest that Shafi‘i jurisprudence confers less authority to arbitral decisions than other schools.

Both Maliki and Hanbali schools of Islamic jurisprudence hold the view that arbitral decisions are binding unless there is a “flagrant injustice.” Hanbali jurists believe that an arbitral award has the same binding effect as a court judgment. Because the decision of an arbitrator is binding, awards have a res judicata effect on both parties. Hanbali fiqh stresses the qualifications of arbitrators; and arbitrators must have the same qualifications as a judge. Maliki fiqh displays the same confidence in arbitration, even allowing one of the disputants to serve as an arbitrator if chosen by the other party.

216. See EL-AHDAB, supra note 77, at 20 (explaining that judges have higher status than arbitrators); see also Abdul Hamid El-Ahdab, The Moslem Arbitration Law, 1 ARAB COMP. & COM. L. 342 (1987) (referring to the lesser role and status held by arbitrators compared to judges); Gemmell, supra note 3, at 176 (describing the subsidiary status of arbitrators compared to judges).

217. See Rashid, supra note 87, at 104 (discussing how the status of an arbitrator is less than that of a judge under the Shafi‘i school); Alqurashi, supra note 95, ¶ 5.5 (noting that most Shafi‘i scholars hold an arbitral award to be as enforceable as a judicial judgment).

218. See Kutty, supra note 4, at 598 (explaining that arbitrators’ appointments can be revoked); EL-AHDAB, supra note 101, at 342 (referring to the fact that an arbitrator can be removed whereas a judge can not). See generally MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW 215 (1990) (stating that under “Islamic Law” an arbitrator’s position can be revoked until it is confirmed by a judge).

219. See EL-AHDAB, supra note 77, at 21, 1990 (explaining that Maliki doctrine renders an arbitral decision binding unless it is flagrantly unjust); Rashid, supra note 87, at 104 (stating that Maliki and Hanbali jurisprudence hold an arbitrator’s decision as binding “unless it contains a flagrant injustice”).

220. See El-Ahdab, supra note 216, at 342 (describing the Hanbali view that an arbitrator’s decision is binding, just as a judge’s decision); Gemmell, supra note 3, at 176 (expressing that under the Hanbali school, an arbitrator’s decision is just as binding as a court’s judgment).

221. See EL-AHDAB, supra note 77, at 19 (referring to the binding character of arbitral decisions); see also Alqurashi, supra note 95, ¶ 4.1 (describing the similar binding nature of an arbitral ruling and a court judgment under the Hanbali school).

222. See EL-AHDAB, supra note 77, at 19 (stating that an arbitrator must have the same qualifications as a judge); Alqurashi, supra note 95 (describing the qualifications of an arbitrator as the same as those required of a judge).

223. See El-Ahdab, supra note 216, at 342 (referring to the trust held by the Maliki doctrine in arbitration); Gemmell, supra note 3, at 175 (stating that one of the disputants can be chosen as the arbitrator).
The Ottoman Turks, influenced by the civil law tradition, attempted to codify Hanafi fiqh. Those provisions confirmed the conciliatory nature of arbitration. Because judges could set aside arbitral awards, the Ottoman legal provisions gave less force to arbitral awards than court judgments. However, Ottoman laws did note that arbitral decisions would be binding on the parties just as a contract would be binding under Shari’a.

Middle Eastern perception of the nature of arbitration has clearly evolved over the span of arbitral practice in the region. Although the view equating arbitration with conciliation was once predominant in Middle Eastern legal systems, as evidenced by the codification of that appraisal by the Ottomans, the flexible nature of Shari’a has generated alternative views. In Saudi Arabia, for example, the binding character of arbitral decisions is the preferred viewpoint. The Saudi position, supported by the Hanbali school, allows for the adoption of the current international approach to arbitration. Though Shari’a influenced legal systems have historically favored approaching arbitration as conciliatory in nature, some Islamic jurisprudence—

224. See Oussama Arabi, Contract Stipulations (Sharur) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya, 30 INT’L J. OF MIDDLE EAST STUD. 29, 30 (1998) (explaining that the Majalla was essentially a codification of the traditionally favored Hanafi school of law and Ottoman civil laws); see also Enid Hill, Al-Sa`udi and Islamic Law: The Pace and Significance of Islamic Law in the Life and Work of `Abd al-Razzag Ahmad al-Sa`udi, Egyptian Jurist and Scholar, 1895–1971, 3 ARAB L.Q. 33, 34 n. 1 (1988) (noting that the Majalla drew mainly from Hanafi sources).

225. See Kutty, supra note 4, at 598 (2006); see also Sayen, supra note 94, at 932 (describing the primary attempt of conciliation as an objective of the hakam); cf. Nicholas B. Angell & Gary R. Feulner, Arbitration of Disputes in the United Arab Emirates, 3 ARAB L.Q. 19, 19 (1988) (expressing there was no distinction between conciliators and arbitrators).

226. See Kutty, supra note 4, at 598 (claiming that the Turks held court judgments to be of greater force than arbitral awards because a judge could not set them aside); see also HALLAQ, supra note 20, at 35–36 (suggesting the hakami involvement in the law to be lesser than a qadhi, or judge’s).

227. See Sayen, supra note 94, at 936 (articulating the obligation of the parties to the decision of a hakam); Timur Kuran, The Economic Ascend of the Middle East’s Religious Minorities: The Role of Islamic Legal Pluralism, 33 J. LEGAL STUD. 475, 487 (2004) (explaining that a binding decision required the court). But see HALLAQ, supra note 20, at 35–36 (establishing that a verdict by an arbitrator was not binding).

228. See Yahya Al-Samaan, The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, 9 ARAB L.Q. 217, 221 (1994) (noting that Saudi Arabia shifted its attitude toward arbitration as a means of dispute settlement); see also Brower & Sharpe, supra note 3, at 643 (positing that in relation to the “Islamic world,” international arbitration has passed through two phases and is well into a third); Saleh, supra note 70, at 200 (claiming that, in all, there is a trend in pro-arbitration legislation).

229. See Angell & Feulner, supra note 225, at 19 (finding that formally, there is no distinction among conciliators, arbitrators, and judges); see also Saleh, supra note 70, at 199 (claiming that conciliation-like compromises are commonly confused with arbitration by “amicable composition”); Sayen, supra note 94, at 929 (explaining that early arbitration resembled conciliation).

230. See DAVID F. FORTE, STUDIES IN ISLAMIC LAW 29 (1999) (stating that in states applying portions of Islamic law, Shari’a is varied in enforcement as the society requires); see also YVONNE YAZBECK HADDAD & BARBARA FRYER STOWASSER, ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 10 (2004) (establishing several differing religious views in relation to the application of Shari’a).

231. See Al-Samaan, supra note 228, at 218 (explaining that Saudi Arabia chose international arbitration as a method for dispute resolution prior to the 1950 oil concession agreements); see also Kutty, supra note 4, at 598 (claiming that Saudi Arabia views arbitration as binding).

232. See Saleh, supra note 135, at 21 (claiming that Saudi Arabia adheres to the enforcement of arbitral awards and procedure); cf. W.M. Ballantyne, The States of the GCC: Sources of Law, the Shari’a and the Extent to Which It Applies, 1 ARAB L.Q. 3, 4 (1985) (stating that Saudi Arabia applies the Hanbali school of Islamic jurisprudence).
tial schools and most, if not all, Middle Eastern national legal systems stand by international arbitral norms insofar as the nature of arbitration.233

The scope of arbitration identifies which subjects are arbitrable.234 The idea of excluding certain categories of disputes from arbitration is present in both Western and Middle Eastern legal systems.235 The New York Convention permits refusal of recognition or enforcement of a foreign arbitral award if the subject matter is not capable of settlement by arbitration under the laws of the country where enforcement is sought.236

The practice of international commercial arbitration is particularly affected when differences among jurisdictions regarding matters considered within the scope of arbitration lead to variation in enforcement of foreign arbitral awards.237 These differences surface when arbitration agreements properly reached in one jurisdiction are deemed void ab initio or excluded as contrary to public policy when the parties seek foreign enforcement.238 Part VI discusses those related public policy issues. While public policy may affect a state court’s decision on whether a matter is capable of being subject to arbitration, the scope of arbitration and public policy are nevertheless two separate issues.239

233. See Brower & Sharpe, supra note 3, at 650–51 (noting the “wave of modernization” in that Middle Eastern states now incorporate laws that “go beyond the requirements” of the New York Convention, thus making arbitral awards “even easier to enforce.”); see also Kutty, supra note 4, at 593 (explaining the current trend of growth and promotion of arbitral adjudicatory systems throughout the Middle East).

234. See Al-Samaan, supra note 228, at 223 (explaining that arbitration in Saudi Arabia is not allowed in criminal matters, personal status matters, administrative law matters, and matters explicitly prohibited by Shari’a). See generally BORN, supra note 198, at 6 (articulating that certain kinds of disputes are “non-arbitrable”).

235. See Robert Donald Fischer & Roger S. Haydock, International Commercial Disputes Drafting an Enforceable Arbitration Agreement, 21 WM. MITCHELL L. REV. 941, 957–58 (1996) (listing areas of law ineligible for arbitration, including antitrust, matrimonial, bankruptcy, and criminal); see also Angell & Feulner, supra note 225, at 19–20 (claiming that sanctioned arbitration outside of the Shari’a principles has been adopted from Western legal sources).


237. See Catherine A. Rogers, The Vocation of the International Arbitrator, 20 AM. U. INT’L L. REV. 957, 973 (2005) (explaining that courts have an “intentionally minimal role” in reviewing final arbitral awards to prevent national courts from usurping the decision making power of arbitrators).

238. See Angell & Feulner, supra note 225, at 23 (explaining that strong public policy bars certain issues from being heard by private arbitrators); see also Brower & Sharpe, supra note 3, at 651 (stating that Middle Eastern states have rejected foreign awards on domestic public policy grounds).

239. See United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 43 (1987) (announcing that courts are free to deny enforcing collective bargaining agreements where provisions in the agreement clearly violate public policy); see also Ansonia v. Stanley, 854 A.2d 101, 113 (Conn. Super. Ct. 2004) (referring to the traditional idea that an arbitrator’s authority can be challenged only where his actions or award are in direct conflict with public policy); Stephen L. Hayford, Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come, 52 BAYLOR L. REV. 781, 873 (2000) (discussing how explicit and well-defined public policies have been used to vacate arbitral awards).
There is no unanimity among the Islamic jurisprudential schools on the exact types of disputes within the scope of arbitration.\textsuperscript{240} Notably, however, the four Sunni schools share the view that arbitration is applicable primarily in financial matters.\textsuperscript{241} Islamic law excludes certain categories of crimes from being capable of settlement by arbitration.\textsuperscript{242} Those categories of exclusions have limited application in international business disputes.\textsuperscript{243} Practical concerns about the scope of arbitrability in international commercial arbitration are peripheral because disputes usually revolve around finances and property.\textsuperscript{244}

In the United States, doubts concerning the scope of arbitrable issues are generally resolved “in favor of arbitration.”\textsuperscript{245} The Supreme Court of the United States has found no reason to depart from that guideline even where a party raises claims founded on statutory rights, unless Congress “evinced an intention” to preclude a waiver of judicial remedies for the statutory rights at issue.\textsuperscript{246} Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in dispute resolution were cited as reasons for enforcement of arbitration agreements.\textsuperscript{247}

\begin{itemize}
\item \textsuperscript{240} See Kutty, supra note 4, at 598–601 (discussing the scope of arbitration within Islam).
\item \textsuperscript{241} See Gemmell, supra note 3, at 180 (noting that the four Sunni schools of Islamic jurisprudence and the Mejella hold arbitration is most appropriate in financial matters); see also Kutty, supra note 4, at 599. See generally Kuran, supra note 227, at 486 (asserting that the four Sunni schools generally agree on the applicability of arbitration in financial matters).
\item \textsuperscript{242} See Kutty, supra note 4, at 599–600 (stating that in Saudi Arabia, a category of crimes—including murder and robbery—not subject to mediation are similarly not subject to arbitration).
\item \textsuperscript{243} See Kutty, supra note 4, at 599 (explaining that matters relevant to international arbitration are generally within the scope of arbitration).
\item \textsuperscript{244} See Kutty, supra note 4, at 599 (stating that the four Sunni schools view arbitration is appropriate in matters of finance and property). See generally Al-Samaan, supra note 228, at 217 (discussing the importance of arbitration agreements for business disputes arising from foreign investment).
\item \textsuperscript{245} See 9 U.S.C.A. § 2 (1947) (requiring disputes in any maritime transaction or other commercial transaction involving an arbitration agreement to be settled according to that agreement); see also Mitsubishi v. Soler, 473 U.S. 614, 626 (1985); Krista L. Klett, A Discussion of the Proper Forum for Resolving Arbitral Clause Disputes in Dockser v. Schwartzberg, 6 J. AM. ARB. 55, 59 (2007) (recognizing the Supreme Court’s pro-arbitrability policy).
\item \textsuperscript{246} See Soler, 473 U.S. at 628; see also Mara Kent, “Forced” v. Compulsory Arbitration of Civil Rights Claims, 23 LAW & INEQ. 95, 101 (2005) (reiterating that a party to a statutory claim within the scope of an arbitral agreement will be held to it unless Congress evinced an intention to prohibit a waiver of judicial remedies for the statutory rights at issue). See generally Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (holding that arbitration agreements have been enforced in claims arising under the Sherman Act, Securities Exchange Act of 1934 and others).
\item \textsuperscript{247} See Soler, 473 U.S. at 629 (stressing the need to enforce arbitration agreements to ensure predictability in the resolution of international commercial disputes). See generally Scherk v. Alberto-Culver Co., 417 U.S. 506, 507 (1974) (holding that previously agreed-upon contractual provisions specifying the forum for litigation are essential to any international business contract); William S. Fiske, Should Small and Medium-Size Americans Businesses “Going Global” Use International Commercial Arbitration?, 18 TRANSNAT’L LAW. 455, 485 (2005) (addressing the emergence of international commercial arbitration to provide fair and predictable alternatives to national courts).
\end{itemize}
Quranic injunctions do not permit any law to be recognized except for Shari`a.248 Choice of law simply does not exist when it comes to Shari`a, according to fiqh rules.249 Shari`a categorizes both the regulations governing the arbitral proceeding and the choice of law for the underlying dispute as inapplicable foreign laws.250 In certain Middle Eastern states, arbitrating parties were limited in their ability to select the law governing their disputes, thus undermining the important principle of party autonomy.251 Examples of state-imposed legal rules, both procedural and substantive, were common in significant Middle Eastern jurisdictions.252 However, most Middle Eastern jurisdictions currently strive to give “the widest effect” to the contractual provisions agreed upon by the parties,253 and the trend is certainly in favor of less-restrictive choice of law rules.254

Public policy is uniquely influenced by religious and historical considerations in the Middle East.255 The difference between a Middle Eastern nation’s public policies and “international” norms corresponds with the spectrum described above,256 which tracks the influence of

248. See Quran 5:49 (teaching to “[j]udge between them by what God has revealed and follow not their vain desires”); see also Kutty, supra note 4, at 614 (emphasizing that Quranic injunctions urge followers to settle disputes as God has revealed).

249. See Kutty, supra note 4, at 614 (noting the flexibility of the ICC arbitration choice of law rules against fixed fiqh rules).

250. See Kutty, supra note 4, at 614 (noting dismissal of Western conflict of law principles by those courts that strictly apply Shari`a); see also Turck, supra note 70, at 3 (explaining that Saudi courts often impose their own laws even when commercial disputes necessitate the application of foreign laws).

251. See Brower & Sharpe, supra note 3, at 652 (noting the negative impact on party autonomy resulting from the inability to choose the law governing arbitration).

252. See Brower & Sharpe, supra note 3, at 652 (explaining that past arbitrations in Bahrain required the application of substantive and procedural Bahraini law to all contractual disputes unless the parties agreed unanimously that a foreign law was applicable); see also Kutty, supra note 4, at 614 (citing the Syrian and Libyan civil codes, which call for application of Shari`a in the absence of other legal provisions). But see Kassir, supra note 4 at 561 (noting Lebanon’s adherence to international arbitration norms in all circumstances).

253. See Turck, supra note 70, at 180 (highlighting the progress of Middle Eastern states in accepting various international arbitration agreements or implanting their own arbitration laws); see also Kassir supra note 4, at 549 (noting the positive trends regarding international arbitration in Middle Eastern countries).


255. See IRA SHARKANSKY, RITUALS OF CONFLICT: RELIGION, POLITICS, AND PUBLIC POLICY IN ISRAEL 101 (Lynne Rienner Publishers 1996) (revealing the inseparable nature of religious and secular issues in Israel); see also Amir H. Koury, Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks, 43 J.L. & TECH. 151, 2001 (2003) (claiming that many Middle Eastern countries do not separate religion and politics).

256. Supra Part II.
common law, civil law, and Islamic law on national legal systems. As “international” legal principles continually impress Middle Eastern national law, public policy values will similarly align.

As previously stated, according to *fiqih* rules, the freedom to choose the applicable law of a contract does not exist. Quranic injunctions urge believers to have their disputes judged by “what God has revealed.” This notion explains why Saudi Arabian courts set aside conflict of law principles and instead apply domestic law. In other Middle Eastern jurisdictions, two approaches to the choice of law are applied when disputants are faced with arbitration. The choice between the two alternatives depends on whether the state adheres to the *Shari‘a* requirement of arbitration or whether the state has bifurcated its religious and secular civil codes. For example, the Yemeni arbitration acts require the arbitrator to apply the law cho-


258. See Donboli & Kashefi, supra note 127, at 421 (stating that some Middle Eastern countries replaced Islamic laws with European codes); Elizabeth Mayer, *Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition*, 1 UCLA J. ISLAMIC & NEAR E. L. 183, 190–91 (2002) (noting that the Saudi system has adopted some Western laws); see also Kassit, supra note 4, 550 (listing efforts made by international organizations, expansion of worldwide investments, and increased liberalization of economies as reasons why arbitration has found increased favor in developing countries).


260. See Qur’an 4:60, 5:49 (encouraging Muslims to use the Quran as God’s word in deciding disputes among one another); see also JOHN BURTON, THE SOURCES OF ISLAMIC LAW: ISLAMIC THEORIES OF ABROGATION 9 (Edinburgh University Press 1990) (establishing that God directly gave his word of law to the Muslims to be treated as the sole source of all authority).


262. See W.M. Ballantyne, *The Middle East*, 3 INT’L BUS. LAW. 383, 384 (1975) (explaining that there is no one law in the Middle East given the law actually revolves around both the *Shari‘a* and the civil and commercial laws); see, e.g., Brenda Oppermann, *The Impact of Legal Pluralism on Women’s Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States*, 17 HASTINGS WOMEN’S L.J. 65, 68 (2006) (labeling Egypt as a prime example of a dual legal system that applies both the Western-inspired national law and the Islamic personal law). See generally Michael J.T. McMillen, *Contractual Enforceability Issues: Sukuk and Capital Markets Development*, 7 CHI. J. INT’L L. 427, 446 (2007) (stating that certain nations will allow a choice of law in the contract itself in order to avoid confusion).

263. See Gemmell, supra note 3, at 182 (stating that throughout the Middle East, some courts may adhere to the *Shari‘a* requirements of arbitration while others may apply secular codes); see also Justus Reid Weiner, *Palestinian Christians: Equal Citizens or Oppressed Minority in a Future Palestinian State*, 7 OR. REV. INT’L L. 26, 140 (2005) (noting that throughout the Palestinian territories, both *Shari‘a* and secular democratic law are applied in parallel).
sen by the parties,264 a notable leniency in a country reputed to be among the more religiously conservative in the Middle East.265 Whether there are ways to comply with Shari`a principles while ensuring that parties can exercise their contractual freedom in determining the choice of law for either the arbitral proceeding or the underlying dispute is an area that needs further scholarship.266 It is likely that state views on this subject depend on whether “conservative” or “progressive” positions are used with regard to Shari`a application.267

One of the advantages of international commercial arbitration is the freedom that parties have to negotiate their choice of law provisions.268 Where arbitral clauses do not specify the commercial principles governing a dispute, arbitrators are forced to evaluate foreign legal provisions and cultural differences in determining an equitable settlement.269 In cases where Islamic issues or parties are in dispute, Middle Eastern cultural differences must be considered in any interpretation of contract formation and negotiation.270

264. See Gov’t of the State of Eritrea v. Gov’t of the Republic of Yemen, 40 ILM 900 (2001) (illustrating the process of enforcing an arbitration agreement signed between two parties in Yemen). See generally Arbitration Court Used in Yemen to Settle Tribal Disputes, 9 WORLD ARB. & MEDIATION REP. 8, 8 (1998) (displaying the Yemeni government’s pro-arbitration attitude in other areas).

265. See Gemmell, supra note 3, at 169 (commenting that Yemen is affording parties to an arbitral dispute the right to choose the governing law); see also Mohamed Y. Mattar, Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will The Clash Between “Human Rights” and “Islamic Law” Be Reconciled in Future Legislative Enactments and Judicial Interpretations?, 30 FORDHAM INT’L L.J. 126, 151 (2006) (stressing the fact that Yemen is a profoundly religious nation that uses Islam as the main source of legislation).

266. See Almas Khan, The Interaction Between Shariah and International Law in Arbitration, 6 CHI. J. INT’L L. 791, 799 (2006) (proclaiming that international arbitrators proved Shari‘a can be resourcefully employed); see also Alexander Nerz, The Structuring of an Arbitration Clause in a Contract with a Saudi Party, 1 ARAB L.Q. 380, 380 (1985–86); Trumbull, supra note 121, at 641 (asserting that it will be instrumental for courts to establish an approach that satisfies both secular rights and religious beliefs).

267. The Yemeni Minister of Justice characterized his country’s efforts in passing the arbitration act as an “avant-garde experience” that cast Shari‘a provisions in a “modern mould.” See Gemmell, supra note 3, at 183 (stating that Yemen can be viewed as a somewhat progressive state that has made efforts to become more modern); see also Shaheen Sanda Ali, The Concept of Jihad in Islamic International Law, 10 J. CONFLICT & SEC. L. 321, 326 (2005) (emphasizing the stringent religious beliefs of some conservative Islamic scholars). See generally Rashid, supra note 87, at 108 (acknowledging the fact that Islamic law may not always govern, even in the most conservative states).

268. See Craig M. Gertz, The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depecage, 12 NW. J. INT’L L. & BUS. 163, 173 (1991) (stating that parties gain many benefits by negotiating a choice of law provision in transnational contracts); see also Kutty, supra note 4, at 613 (asserting that an advantage of international commercial arbitration is the freedom that parties have to negotiate their choice of law provisions); Jessica Thrope, A Question of Intent: Choice of Law and the International Arbitration Agreement, 54 DISP. RESOL. J. 16, 18 (1999) (recognizing a choice of law provision as one of the many provisions to be negotiated in an arbitration agreement between different international parties).

269. See Kutty, supra note 4, at 567 (stating that arbitrators must evaluate foreign legal provisions and cultural differences in determining an equitable settlement where arbitral clauses do not specify the commercial principles governing a dispute).

270. See McCary, supra note 14, at 319 (emphasizing that arbitrators must consider Islamic cultural differences). See generally Ebrahim Moosa, The Dilemma of Islamic Rights Schemes, 15 J. L. & RELIGION 185, 208 (2000) (reinforcing that any discussion of Islamic law must acknowledge the broader political and economic aspects of Islam).
State courts in the Middle East were not always routinely restrained in the scope of their judicial review.271 Prior to implementing the New York Convention, courts in Oman, Qatar, and Saudi Arabia reviewed the merits of disputes in their entirety before enforcing foreign arbitral awards.272 Although apprehension toward the recognition and enforcement of foreign arbitral awards may have given way to separate national interests, such as increasing attractiveness to foreign investors, this view could be too optimistic.273 At least some Middle Eastern countries continue to review the merits of arbitral decisions to ensure that they are consistent with public policy or in accordance with Shari`a.274

VI. Islamic Public Policy

For those Middle Eastern countries that connect Islam with government authority, public policy runs parallel with Shari`a.275 It would be a mistake, however, to homogenize the political values of the Middle East or equate Islam with Arabic culture.276 In Lebanon, public policy is not linked to any one religion due to the country’s age-old blend of cultures.277 In Saudi Ara-

271. See Kutty, supra note 4, at 617 (declaring that limited judicial review is uncommon in the Middle East). But see Powers, supra note 34, at 315 (arguing that courts governed by Islamic law are subject to limited judicial review). See generally SALEH, supra note 158, at 234 (outlining the different approaches to judicial review in the Middle East).
272. See Brower & Sharpe, supra note 3, at 648 (noting that prior to ratifying the New York Convention, Qatar and Oman relied on general principles of Islamic law to decide disputes); see also Kutty, supra note 4, at 617–18 (explaining that prior to acceding to the New York Convention, Oman, Qatar, and Saudi Arabia reviewed the merits of a dispute in their entirety before enforcing foreign arbitral awards); Roy, supra note 5, at 922 (announcing that before becoming party to the New York Convention, Saudi Arabia reviewed arbitral awards based on Islamic law and public policy).
273. See SAMI D. EL-FALAHI, AN INTRODUCTION TO BUSINESS LAW IN THE MIDDLE EAST: THE LEGAL ENVIRONMENT FOR NEGOTIATING COMMERCIAL AGREEMENTS IN THE MIDDLE EAST 81–82 (Brian Russel ed., Oyez Publishing 1975) (showing that foreign arbitral clauses were not fully recognized by all courts in the Middle East); Kutty supra note 4 at 592, 618 (citing “the end of colonialism, rise in nationalism, challenge to capitalism, and increasing oil wealth” as reasons for the change in attitude toward arbitration among Middle Eastern states and discussing the view that Saudi Arabia’s hostility to the recognition and enforcement of foreign arbitral awards gave way to the country’s interest in attracting foreign investors); see also Roy, supra note 5, at 953 (declaring that although foreign investors recognize the advantages of investing in Saudi Arabia, they may hesitate because of favoritism to domestic companies).
274. See MUHAMMAD JABER NADER, COMMERCIAL LAW IN THE MIDDLE EAST: ENFORCEMENT OF FOREIGN JUDGMENTS IN SAUDI ARABIA 298 (Hilary Lewis Ruttley & Chibli Mallat eds., Graham & Trotman 1995) (asserting that an essential condition to the enforcement of a foreign judgment in Saudi Arabia is that it will not violate Shari`a); see also Gemmell, supra note 3, at 188 (suggesting that a Saudi Arabian party to a contract can refuse to honor a foreign arbitral award if it is contrary to public order); Roy, supra note 5, at 953–54 (acknowledging that Saudi Arabia views arbitral awards to see if they are consistent with Saudi public policy).
275. See NADER, supra note 274, at 298 (suggesting that the Shari`a is the public order or policy of Saudi Arabia); see also Khaled Abou El Fadl, The Place of Ethical Obligation in Islamic Law, 4 UCLA J. ISLAMIC & NEAR E. L. 1, 8 (2004) (recognizing the Shari`a is the basic ethical and moral public policy of an Islamic legal system); Kutty, supra note 4, at 620 (proclaiming that an overriding objective of Shari`a is to benefit the people).
277. See Kassir supra note 4 at 557 (explaining that the Lebanese legal system is not inspired by religious law).
bia, public order is constituted by Shari’a. 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.

The Islamic criterion for public order is that of general interest. An oft-cited scholarly maxim states that “Muslims must comply with contractual provisions except for those which authorize what is forbidden or forbid what is authorized.” While such regulations of Muslim public order are clearly broad, there are specific rules as well; such as those that prohibit speculative contracts (gharar) and those that forbid usurious interest (riba). The Islamic jurisprudential schools interpret and create the methodology for identifying the specifics of what exactly is permissible and what is not. Although the positions of each school may differ on some issues, a general Islamic public policy is evident to a degree relevant to international commercial transactions.

278. Article I of the Basic Regulations of the Kingdom of Saudi Arabia states in pertinent part, “The religion of [Saudi Arabia] is Islam, its constitution is the book of God Most High and the Sunna of His Prophet, may God bless him and give peace.” Article 48 adds, “The courts shall apply in cases brought before them the rules of the Islamic Shari’a in agreement with the indications in the Book and the Sunna.” See NADER, supra note 274, at 298 (defining Shari’a as the public order or policy of the state); see also Basic Regulations of the Kingdom of Saudi Arabia, http://www.the-saudi.net/saudi-arabia/saudi-constitution.htm, (stating that courts shall apply the rules of Shari’a according to the Book and the Sunna); cf. Gemmell, supra note 3, at 188 (equating an inquiry into Shari’a with public order).


280. See Gemmell, supra note 3, at 188 (establishing public order as a main concern in the enforcement of arbitral awards); see also Kutty, supra note 4, at 603 (indicating that the public order involved in a contract dispute is reviewed in regards to the common good of humanity); cf. NADER, supra note 274, at 298 (suggesting that public order should be considered when addressing arbitral awards).

281. The Fatawa of Ibn Taymiya, III, 326; see Kutty, supra note 4, at 610 (announcing the general rule of contract law 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”). See generally Khaled Abou El Fadl, The Place of Ethical Obligation in Islamic Law, 4 UCLA J. ISLAMIC & NEAR E. L. 1, 8 (2004) (illustrating that contracts under the Quran must be free from coercion, fraud, deception, or misrepresentation and parties to it must in good faith make every effort to honor their promises).

282. See NAYLA COMAIR-OBEID, THE LAW OF BUSINESS CONTRACTS IN THE ARAB MIDDLE EAST 44, 57 (Dr. Mark S. W. Hoyle ed., Kluwer Law International 1996) (explaining that riba generally means an illicit profit or gain; and that gharar generally means risk, uncertainty, or speculation); see also NABIL A. SALEH & AHMAD AJAJ, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW 16, 63 (Dr. Mark S. W. Hoyle ed., Graham & Trotman 1992) (defining riba as usury or interest and discussing the numerous definitions of gharar); Kutty, supra note 4, at 604–06 (describing riba as essentially any unlawful or unjustified gain and defining gharar as speculation).

283. See Gemmell, supra note 3, at 173–76 (detailing the different Islamic schools of interpretation); Roy, supra note 5, at 945–46 (identifying the different Islamic jurisprudential schools).

284. See Gemmell, supra note 3, at 192 (explaining that the Quran and Shari’a provide guidance and direction toward the use of arbitration); see also Kutty, supra note 4, at 610 (asserting that an appreciation of Shari’a and Islamic policies is essential to international arbitration in the Middle East); cf. Roy, supra note 5, at 922 (highlighting that Saudi Arabian laws and public policy are relevant to international commercial arbitration).
The myth of Islamic law’s irrelevance parallels a similar myth that Islamic law is unsuitable for modern commercial transactions. A clash, purportedly created by the “impasse” between the international commercial order and Islamic prohibition of certain transactions, namely riba and gharar, was described as the classic situation of an “irresistible force against an immovable object.” The fallout generated by this collision appears in law and business. Creative solutions, reorganizations, and mere end runs have cropped up to help the flow of commerce continue despite the complications. To overcome the standoff, “expedients” were developed as workable solutions for the problems created by competing Islamic legal requirements and global transactional structure. An expedient may be viewed as a practical solution or an unprincipled shortcut, depending upon one’s opinion of the underlying issue. Arab legal systems have developed distinctions that permit the charging of interest in certain transactions, despite the prohibition against riba, or the use of option contracts despite the prohibition against speculation (gharar).

285. See Donboli & Kashefi, supra note 127, at 418 (remarking on the misperception that Islamic law is unsuitable for modern commercial transactions); see also Howard L. Stovall, Arab Commercial Laws—Into the Future, 34 INT’L LAW. 839, 839 (2000) (commenting on the myth that Islamic law does not apply to modern commercial transactions); Christopher F. Richardson, Islamic Finance Opportunities in the Oil and Gas Sector: An Introduction to an Emerging Field, 42 Tex. INT’L L.J. 119, 120 (2006) (detailing the incompatibilities of Islamic commercial law and Western financing).

286. See W.M. Ballantyne, Legal Development in Arabia, 121 (1980); see also Christopher Faille, What Went Wrong: Western Impact and Middle Eastern Response by Bernard Lewis, 52 FED. LAW., Sept. 50, 51 (2005) (book review) (comparing the prohibition of riba and gharar to “Scylla and Charybdis”). See generally Hamoudi, supra note 43, at 110 (describing both riba and gharar as “problematic”).

287. See Hilmar Krüger, The Study of Islamic Law in Germany: A Review of Recent Books on Islamic Law, 15 J.L. & RELIGION 303, 313 (2000–01) (examining recent books on the problems of riba and gharar in law and business); see also Jamil Zouaoui, Quick Guide to Negotiating and Establishing Franchises in the Region—With Examples from a Kuwaiti Experience, 21 no. 9 MIDDLE E. EXECUTIVE 9 (1998) (discussing the effects of riba and gharar on financing and insurance); Sabahi, supra note 49, at 488–89 (proclaiming that riba and gharar are impediments to law and business).

288. See Scruton, supra note 276 at 4 (identifying devices (hila) for discovering creative solutions within Islamic law); Hamoudi, supra note 52, at 612 (discussing some theoretical solutions to riba and gharar).


290. See Raslan, supra note 50, at 497–98 (illustrating that intellectual property laws must somehow conform to the Shari’a principles); see also Scruton, supra note 276, at 4 (remarking on expedients).

291. See Donboli & Kashefi, supra note 127, at 424 (discussing how Islamic systems have tackled issues surrounding riba and gharar); see also Kimberly J. Tacy, Islamic Finance: A Growing Industry in the United States, 10 N.C. BANKING INST. 355, 357 (2006) (distinguishing gharar, or unacceptable risk, from high risk). But see Sabahi, supra note 49, at 501 (suggesting that option contracts are a problem for Islamic law).
Islamic scholars have described international law as both “foreign” and a continual attempt to “reconcile” Islamic authority with Western ideas.\(^{292}\) With such an assessment, approaches vary between the adoption of Western solutions, the secularization of international legal authority, and reconsideration of traditional Islamic legal positions.\(^{293}\) Reconciliatory attempts adopted from the West are not definitive to a Muslim nor are arguments made from Islamic authority applicable on an international scale.\(^{294}\) The shortfall leads some academics to state plainly, “There is no Islamic international law.”\(^{295}\) Other scholars take the debate further by analyzing the international political theories available from within Islam and the perception of public international legal authority over Muslims.\(^{296}\) Nevertheless, such an analysis is beyond the scope of this article.

There is a statutory vacuum created between domestic laws and international conventions such as the New York Convention. This gap is produced when issues of law related to the international convention must be analyzed by the domestic legal system. The gap is especially obvious when it must be filled by something as conceptual as public policy. Variation among national interpretations has not so far been eliminated by the anticipation or proper planning of international treaties. Differences in national views on the scope of arbitration and the policies reflected through those opinions create the potential for inconsistent and nonuniform

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293. See Westbrook, supra note 261, at 829 (stating that Islamic scholars vacillate between those three positions); Moosa, supra note 270, at 186 (discussing the discrepancy between Islamic and Western thought in human rights). But see William Samuel Dickson Cravens, Note, The Future of Islamic Legal Arguments in International Boundary Disputes Between Islamic States, 55 WASH. & LEE L. REV. 529, 532 (positing that reconciliation between Islamic and Western law fails).


295. See Westbrook, supra note 261, at 843 (stating that in Islam there is no international law, only “commentary on international law”). But see An-Na’im, supra note 294, at 164 (critiquing Westbrook’s analysis defining Islamic international law).

296. See generally Cravens, supra note 293 (debating the Islamic approach to international political theories); Andrew Grossman, “Islamic Law”: Group Rights, National Identity and Law, 3 UCLA J. ISLAMIC & NEAR E. L. 53 (2003–04) (reviewing Islamic public international legal authority); Westbrook, supra note 261 (discussing both the political theories and public international legal authority).
results across jurisdictional boundaries. The idea of “international public policy” serves as a
standard to highlight the deviations of national courts from “international” norms.297

Saudi Arabia has been described as “traditionally hostile”298 to the recognition and
enforcement of nondomestic arbitral awards, finding such awards contrary to Saudi Arabian
law and public policy.299 However, the accuracy of such characterizations is now questionable if
one accounts for the 14 years that have passed since Saudi Arabia’s ratification of the New York
Convention.300 Other Middle Eastern countries, especially those like Kuwait and Syria, that
led the pack in acceding to the New York Convention, have been described as “not traditionally
hostile to international arbitration.”301 The difference lies not so much in accession to the New
York Convention, which most Middle Eastern countries have now reached, but rather with the
interpretation of the Convention’s mandates and exceptions.302 Those countries that seek to
give the New York Convention greater effect by narrowing the reading of the public policy
exception are generally viewed as “embracing” the system of international commercial arbitra-

law as treaties, laws governing the United Nations, and contractual and customary legal norms and explaining
that even though there is no overriding sovereign, this constitutes a body of law).

298. Roy, supra note 5, at 922 (stating that Saudi Arabia has been traditionally hostile to the enforcement of non-
domestic arbitral awards); see also Thomas E. Carbonneau, The Ballad of Transborder Arbitration, 56 U. MIAMI
L. REV. 773, 794 (2002) (declaring Saudi Arabia as the country with the most negative position on international
arbitration).

299. See Gemmell, supra note 3, at 189 (detailing the opinions of some writers who believe Saudi Arabian law is
opposed to the rules and laws of the New York Convention members); Kutty, supra note 4, at 602 (observing
that Saudi Arabia’s membership in the New York Convention provides no security in terms of enforcement of
foreign arbitral awards).

300. See Brower & Sharpe, supra note 3, at 649 (commenting that Saudi Arabia’s accession to the New York
Convention has permitted enforcement of foreign arbitral awards), but see Dahmane Ben Abderrahmane, Saudi Arabia’s
Ratification of the New York Convention: What Practical Effects Will It Have?, 18 NO. 3 MIDDLE E. EXECUTIVE
REP. 9, 20 (1995) (reporting that Saudi Arabia will not violate its public policy when called to recognize foreign
arbitral awards); Kent Benedict Gravelle, Islamic Law in Sudan: A Comparative Analysis, 5 ILSA J. INT’L &
COMP. L. 1, 19 (1998) (stating that Saudi Arabia has refused to enforce some foreign arbitral awards).

301. See Roy, supra note 5, at 935–36 (quoting that Kuwait and Syria are not traditionally hostile to international
arbitration); see also Brower & Sharpe, supra note 3, at 651 (announcing that Syria is contemplating the modern-
ization of its international arbitration laws). See generally Iran Progresses with Sales to Oman, Kuwait, ENERGY
INTELLIGENCE GROUP, INC. WORLD GAS INTELLIGENCE, Mar. 23, 2005, A1 (explaining how a dispute
between Kuwait and Iran may be solved through international arbitration).

302. See Clayton Utz, The Balancing Act: International Arbitrations Developing Role in the Middle East, MONDAQ BUS.
BRIEFING (Australia), May 24, 2005, A1 (stating that Middle Eastern countries have interpreted “public policy”
to mean “domestic public policy”); see also Herbert Smith, Arbitration News, MONDAQ LTD (Hong Kong), Aug.
2, 2002, A1 (explaining that Iran’s accession to the New York Convention does not prevent it from applying its
Constitution comprised of Islamic principles and morals).

2519 (1970) (indicating that several nations have given Article V defenses narrow readings to increase the New
York Convention’s effectiveness); Roy, supra note 5, at 955–56 (stating that countries have embraced the New
York Convention by giving a narrow reading to its public policy exception).
The features of Islamic public policy may be divided into two categories: those of a procedural nature and those of a substantive nature. With respect to the procedural features of Islamic public policy, three important principles emerge. These principles are not necessarily found in the Quran or Sunna; however, they historically constitute the immutable rules of Islamic judicial law. The three principles are: (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 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 defenses.

The procedural concerns of Islamic law are well addressed by the New York Convention. Article V(1)(b) of the New York Convention allows for the refusal of recognition or enforcement of an arbitral award if a party was not given proper notice of the proceedings or was otherwise unable to present his case. That provision directly addresses the second and third Islamic procedural principles listed above. Similarly, article V(1)(a), the provision of the New York Convention that deals with the capacity of the parties and the validity of their arbitration agreement, addresses the Islamic procedural principle of fair treatment and may allow for the same type of exception to exist as contemplated by the Islamic principle. Perhaps because of their appeal to universal norms of due process and fairness, Islamic arbitration procedural concerns overlap well with the New York Convention.

With respect to the substantive features of the Islamic concept of public policy, two problems most likely to arise stem from the prohibitions of *riba* and *gharar*. In contrast to the procedural concerns, the substantive concerns are deeply rooted in scriptural sources. *Riba* is

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304. See Saleh, supra note 135, at 26 (noting that there are procedural and substantive aspects to the Islamic concept of public policy); see also Richard Harding, An Introduction to Arbitration in the Middle East, MONDAQ BUS. BRIEFING (United Kingdom, Keating Chambers), June 8, 2005, A1 (explaining that the two elements of law applicable to arbitration are substantive law and procedural law).

305. See Saleh, supra note 135, at 26 (quoting the three important principles of procedure that are not necessarily found in the Quran or Sunna); see also SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: SHARI‘A, LEBANON, SYRIA, AND EGYPT 18 (Hart Publications 2006) (expressing the notion that the procedural aspect has a strong religious connotation).

306. See Saleh, supra note 135, at 26 (quoting the three principles).


308. See U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, supra note 128 (quoting Article V (1)(a), which reiterates the Islamic procedural principle of fair treatment).


310. See Hamoudi, supra note 52, at 610–12 (describing Quranic prohibitions of *riba* and *gharar*); see also Hamoudi, supra note 43, at 109–15 (addressing *riba* and *gharar* in Shari‘a).
prohibited because it is morally reprehensible for a lender to exploit a borrower.\footnote{311} Hanafi adherents have managed to circumvent the prohibition of \textit{riba} for centuries by a series of judicial rules that endow the concept of interest with a semblance of respectability (\textit{hyals}).\footnote{312} These \textit{Hanafi hyals} are of little interest because the countries in which \textit{Hanafi} teachings prevail (Syria, Jordan, and Egypt) historically have operated under laws that greatly relax the prohibition against \textit{riba} through regulation of interest rates.\footnote{313}

The prohibition of \textit{riba} is strictly applied in Hanbali and Zaydi jurisdictions.\footnote{314} Also, in Saudi Arabia, Qatar, Oman, and Yemen, the prohibition against \textit{riba} is strictly enforced.\footnote{315} According to Hanbali teaching, the prohibition extends beyond the geographical boundaries of Islam.\footnote{316} In such countries, one can expect foreign arbitral awards that incorporate interest as compensation for damages to be viewed as \textit{riba} and struck down as against public policy.\footnote{317}

\footnote{311} See Akaddaf, supra note 11, at 48–49 (explaining that the \textit{Quran} prohibits \textit{riba} because it is unjust); see also Kutty, supra note 4, at 604 (stating that \textit{riba} is prohibited because it is an unlawful or unjustified gain); Affold, supra note 53, at 87 (addressing the public policy concern regarding prohibiting \textit{riba}).

\footnote{312} See Raslan, supra note 50, at 559 (describing the \textit{Hanafi} school's wait-and-see approach, which is one way to circumvent the prohibition against \textit{riba}); see also Seniawski, supra note 43, at 711 (stating that under the \textit{Hanafi} view, a loan bearing interest is suspect but is not automatically void).

\footnote{313} See Seniawski, supra note 43, at 711–14 (illustrating that under the \textit{Hanafi} view, some forms of accrued interest are not \textit{riba}). See generally Nicholas Dylan Ray, \textit{The Medieval Islamic System of Credit and Banking: Legal and Historical Considerations}, 12 ARAB L.Q. 43, 54 (1997) (explaining that the \textit{Hanafi} definition of \textit{riba} allows for interest in certain situations); Daniel Klein, Comment, \textit{The Islamic and Jewish Laws of Usury: A Bridge to Commercial Growth and Peace in the Middle East}, 23 DENV. J. INT'L L. & POL'Y 535, 538 (1995) (stating that in Egypt, where \textit{Hanafi} jurists predominate, a Muslim may engage in \textit{riba} with a non-Muslim).

\footnote{314} See Hassanuddeen Abdul Aziz, \textit{My Say: Taking Another Look at BBA Contracts}, \textit{THE EDGE MALAYSIA}, Feb. 20, 2006, A1 (showing how the Hanbali school rejected a contract, rationalizing it was a way to cheat God and induce \textit{riba}); see also Shite, \textit{A DICTIONARY OF WORLD HISTORY} (Oxford University Press 2000) available at https://www.encyclopedia.com/doc/1048-Sunni.html (defining \textit{Zaydi} as one of the main \textit{Shite} sects). But see Walid S. Hegazy, \textit{Islamic Business and Commercial Law: Contemporary Islamic Finance: From Socioeconomic Idealism to Pure Legalism}, 7 CHI. J. INT'L ECON. L. 581, 597 (2007) (stating that \textit{answera'ah}, a strategy to circumvent the prohibition against \textit{riba}, was acceptable to the Hanbali school); Seniawski, supra note 43, at 708 (stating that the founder of the Hanbali school declared that only one form of \textit{riba} is prohibited beyond a doubt, and that all other occasions and aspects of "increase" are subject to doubt as to whether the prohibition against \textit{riba} applies).

\footnote{315} See Donboli & Kashefi, supra note 127, at 424 (noting Saudi Arabian banks provide interest-free funding). But see Ann Elizabeth Mayer, \textit{Law and Religion in the Muslim Middle East}, 35 AM. J. COMP. L. 127, 167 (1987) (stating that Saudi banks pay and charge interest and place their funds in investments where interest will be earned); Gravelle, supra note 300, at 20 (explaining that Qatar and Oman do not strictly enforce the prohibition against \textit{riba}).

\footnote{316} See SAMIR SALEH, \textit{COMMERCIAL ARBITRATION IN THE MIDDLE EAST: SHARI`A, LEBANON, SYRIA, AND EGYPT} (Hart Publishing 2006) (stating that the Hanbali school claims the prohibition against \textit{riba} extends beyond Islam's territorial boundaries). See generally Mohammed, supra note 45, at 120 (stating that Islamic societies as a whole are attempting to eliminate \textit{riba}).

\footnote{317} See Gemmell, supra note 3, at 180 (asserting that arbitration clauses are invalid if they permit the payment of \textit{riba} or interest); see also Kathryn S. Cohen, Comment, \textit{Achieving a Uniform Law Governing International Sales: Conforming the Damage Provisions of the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code}, 26 U. PA. J. INT'L ECON. L. 601, 615 (2005) (suggesting that the dispute resolution mechanism of the \textit{CISG} avoids interest rate calculations). But see Kutty, supra note 4, at 604 (claiming that there have been no court cases or arbitral awards determining whether arbitral decisions awarding interest would be enforced in states that prohibit \textit{riba}).
The doctrine 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. In one case, a defendant argued that under Saudi Arabian law, *riba* barred the plaintiff’s claim for interest on an arbitration award. The arbitral tribunal held that the prohibition of *riba* did not bar all awards of compensation for financial losses due to a party not having had the use of money it was otherwise owed. The tribunal did not award a commercial rate of interest but rather based the award on a rate that reflected the incidence of annual inflation over the period at issue.

In addition to *riba*, the Islamic prohibition against *gharar* is often addressed in arbitral proceedings in the Middle East. The question of the existence of a future dispute involves speculation and uncertainty (*gharar*). As such, contract clauses calling for the arbitration of

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318. See Akaddaf, supra note 11, at 47 (discussing an arbitral tribunal’s statement that the doctrine of *riba* did not prohibit all compensation awards); see also Sabahi, supra note 49, at 490 (commenting that certain Muslim scholars believe the prohibition against *riba* does not enjoin all forms of interest on loans); Hamoudi, supra note 52, at 612 (examining the specific *murabaha* exception that may allow interest-based transactions despite the Islamic ban on *riba*).


320. See Final Award No. 7063 (1993) (Saudi Arabia v. Saudi Arabia), 22 Y.B. COM. ARB. 87, 89 (Intl Comm. Arb. 1997) (concluding that an additional award of damages was not prohibited because the *Shari’a* prohibition against interest is subject to a number of exceptions under modern Saudi commercial practice); see also Akaddaf, supra note 11, at 47–48 (confirming that the arbitral tribunal in Final Award no. 7063 of 1993 refused to apply the *riba* doctrine’s ban on interest to all arbitral awards of compensation for financial loss).


322. See Franck, supra note 55 (asserting that arbitration clauses aimed at resolving future disputes are unenforceable “in principle” due to the prohibition against *gharar*); see also Karl, supra note 261, at 164 (stating that *gharar* should make contracts with arbitration clauses unenforceable). E.g., Roy, supra note 5, at n.248 (explaining that in Saudi Arabia a contractual provision regarding resolution of a future dispute would be void due to the prohibition against *gharar* had the government not adopted regulations making such clauses enforceable).

323. See Franck, supra note 55, at 9 (declaring that pursuant to the prohibition against *gharar*, valid arbitration agreements can only be made after a dispute has arisen); see also Karl, supra note 261, at 164 (explaining that because the existence of a future dispute is uncertain, contract clauses calling for arbitration of such disputes should be void).
future disputes are technically unenforceable.\textsuperscript{324} For an arbitration clause to be valid and enforceable, historically, the following conditions were necessary:\textsuperscript{325}

1. The dispute must have already arisen (future disputes could not be covered by anticipation);\textsuperscript{326}

2. There must be an arbitration agreement;\textsuperscript{327}

3. The arbitrator must be appointed by name (the arbitrator’s identity must be certain; if the parties agreed that the arbitrator shall be, for example, the first person encountered on the road, the agreement is void);\textsuperscript{328} and

4. The arbitrator must be mentally and physically competent (the arbitrator’s competence is determined according to the teachings of the applicable school of law).\textsuperscript{329}

The underlying idea of \textit{gharar} is that the parties to a contract must be fully aware of their obligations at the time they enter into the contract; an element of risk in a contract is the equivalent of a gamble and results in immoral gain.\textsuperscript{330} Strictly speaking, \textit{Shari`a} prohibits agreements to arbitrate future disputes or disputes not yet in existence.\textsuperscript{331} If such an agreement is included in a contract, the contract is void.\textsuperscript{332} Yet arbitration takes place in the Middle East, based on clauses calling for arbitration of future disputes.\textsuperscript{333} Attempts to clarify this seeming

\textsuperscript{324} Final Award No. 7063 (1993) reprinted in 22 Y.B. COM. ARB. 87 (1997), IADR Ref. No. 112; see Karl, supra note 261, at 164 (stating that contracts providing for solutions to a future dispute should be unenforceable under the principle of \textit{gharar}).

\textsuperscript{325} See Gemmell, supra note 5, at 180 (commenting on the four conditions that must exist for an arbitration agreement to be valid).

\textsuperscript{326} See Rushid, supra note 87, at 105.

\textsuperscript{327} Id.

\textsuperscript{328} Id.

\textsuperscript{329} Id.

\textsuperscript{330} E.g., Sabahi, supra note 49, at 501 (concluding that certain financial strategies to minimize risk are prohibited under Islamic law due to their inherent uncertainty and \textit{gharar}); see Akaddaf, supra note 11, at 26 (stating that the focus of the prohibition of \textit{gharar} is to eliminate the risk that stems from the lack of consent between contracting parties when some thing is uncertain); see also Saleh, supra note 135, at 28 (maintaining that \textit{gharar} requires parties to a contract to be fully aware of their duties under the contract at the time the contract is created).

\textsuperscript{331} See W.M. Ballantyne, \textit{Arbitration in the Gulf States: “Delocalisation”: A Short Comparative Study}, 1 ARAB L. Q. 205, 206 (1986) (suggesting that no \textit{Shari`a} provision allows for an arbitration process regarding a future dispute); see also Franck, supra note 55, at 9 (mentioning that \textit{Shari`a} does not allow arbitration clauses regarding future disputes); S. E. Rayner, \textit{THE THEORY OF CONTRACTS IN ISLAMIC LAW}, 366 (Dr. Mark S. W. Hoyle ed., Graham & Trotman 1991) (stating that \textit{Shari`a} holds that arbitration can occur only after a dispute arises).

\textsuperscript{332} See Gemmell, supra note 3, at 180–182 (listing the type of arbitration clauses that are invalid and void according to \textit{Shari`a}). See generally R.B. Serjeant, \textit{CUSTOMARY AND SHARI`AH LAW IN ARABIAN SOCIETY} 313–15 (Vaiorum 1991) (explaining a typical arbitration procedure under \textit{Shari`a}).

\textsuperscript{333} See Saleh, supra note 105, at 40, (explaining that Middle Eastern countries respect arbitration clauses in contracts that a Muslim executed in a foreign territory). See generally Trumbull, supra note 121, at 623–24 (explaining the reasons why a court may choose not to enforce an arbitration clause); Al-Samaan, supra note 228, at 217 (explaining the practical need for arbitration and arbitration clauses for foreign investments in Saudi Arabia).
paradox may incorporate notions of pragmatism, evasion, or the principle that “agreements must be observed”—a general Islamic legal precept.334

Enacted legislation in nearly all Middle Eastern countries recognizes arbitration agreements for both present and future disputes.335 In fact, the recommended standard arbitration clause for the Gulf Cooperation Council’s Arbitration Center established in Bahrain336 contains future statements about uncertain disputes.337 Valid Shari’a arbitration clauses in this direction are those “necessary to the contract, appropriate to the contract and commonly used in commercial transactions.”338 Valid arbitration clauses should not contain provisions for the payment of riba, shurut (extraneous conditions), or gharar.339 Practically, however, agreements to arbitrate future disputes are enforced, but arbitral awards upholding aleatory contracts or aleatory clauses, other than the arbitration clause itself, may be considered contrary to public policy.340

334. See BALLANTYNE, supra note 205, at 89, 1999 (explaining that Muslims must observe the doctrines of their faith when contracting); see also CARLO CALDAROLA, RELIGION AND SOCIETIES: ASIA AND THE MIDDLE EAST 473 (Mouton De Gruyter 1982) (proclaiming that while some countries enforcing Shari’a profess “freedom of thought, conscience and religion,” they allow state law to “control or restrict” religious promotion of non-Muslim religions). See generally Trumbull, supra note 121, at 631–33 (recognizing that a major obstacle in creating a set of laws that the Middle East and Western Culture can agree upon are the different views on religion’s role in the law).

335. See SALEH, supra note 105, at 93–94 (showing how many Middle Eastern countries’ modern statutory laws have shifted to more arbitration-friendly legal systems); see also William M. Ballantyne, Arbitration in the Gulf States “Delocalisation”: A Short Comparative Study, 1 ARAB L.Q. 205, 207 (1985–86) (listing the Middle Eastern states that have instituted legislation recognizing arbitration of both present and future disputes).


338. See Gemmell, supra note 3, at 180 (analyzing necessary elements to a valid contract according to Shari’a). See generally Pompeo, supra note 69, at 835 (explaining what type of clauses are inherently accepted under Islamic law); Alqurashi, supra note 95, ¶ 5.1 (explaining that Shari’a is rooted in the Quran, whose principles make arbitration clauses “necessary to the contract”).

339. See Gemmell, supra note 3, at 180–81 (explaining that the types of arbitration clauses that violate Islamic law contain riba or gharar).

340. See also CHRISTIAN CAMPBELL, LEGAL ASPECTS OF DOING BUSINESS IN THE MIDDLE EAST 181 (Lulu.com 2005) (listing public policy reasons for a Jordanian court that did not enforce an arbitration award). But see Northrop Corp. v. Triad Intern. Marketing S.A. 811 F.2d 1265, 1270–71 (9th Cir. 1987) (holding that the alleged violation of Saudi Arabian public policy would not void the arbitration clause). See generally WILLIAM MORRIS BALLANTYNE, ESSAYS AND ADDRESSES ON ARAB LAW 45–46 (Routledge Curzon 1999) (pointing out that Kuwait uses the guise of public policy to ensure that arbitration does not violate its “principal source of law,” the Shari’a).
VII. Conclusion

Critics condemn the New York Convention for allowing Saudi Arabia to accomplish the goal of “modernizing” its international dispute resolution methods while concurrently providing a “safe harbor” for the country to electively enforce foreign arbitral awards that are contrary to its public policy.341 Essentially, Saudi Arabia is having its cake and eating it too; Saudi Arabia “embraces” the international community342 without rejecting its domestic public policy. As a result, the international community loses the certainty offered by the New York Convention that international arbitral awards will be reviewed methodically.343

This criticism is flawed. While Saudi Arabia “may not be required to enforce any more nondomestic arbitral awards than it did prior to its 1994 accession to the New York Convention,”344 the New York Convention does not require any state court to enforce an arbitral award that is against national public policy.345 The interpretation of “public policy” as used in the New York Convention is neither defined nor settled law. The construction of “public policy” by national courts turns on legal interpretation as much as it does on political, sociological, and even religious matters. Signatories should choose either to accede to a convention whose limits are clearly defined or have the freedom to interpret open terms within the parameters set forth in the treaty. In the final analysis, the New York Convention’s utility lies in its ability to require national courts to enforce foreign arbitral awards that do not violate domestic public policy—an outcome that, while perhaps available without an international convention, has become more expedient and obvious.

341. See SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: SHARI`A, SYRIA, LEBANON AND EGYPT 225 (Hart Publications 1984) (examining another possible loophole in the current system for countries to determine that the law is not applicable); see also Roy, supra note 5, at 953 (expressing why Saudi Arabia’s adoption of the New York Convention has been criticized).


343. See Roy, supra note 5, at 954 (reasoning that if Saudi Arabia adopts a liberal definition of the public policy defense then it will not realize its own goals in adopting the New York Convention); Kusio, supra note 4, at 623 (reasoning that Middle Eastern nations may be less likely to follow arbitration clauses if they think that the “Shari’a is being sidelined”). But see World Intellectual Property Organization: Neutrals, http://www.wipo.int/amc/en/neutrals/ (last visited Sept. 1, 2007) (recognizing that the “general WIPO List of Neutrals” helps to ensure a fair arbitration process).

344. Roy, supra note 5, at 954 (determining that the New York Convention may not force Saudi Arabian courts to treat arbitral awards any differently then they did prior to its accession); see Giorgio Bernini, The Enforcement of Foreign Arbitral Awards by National Jurisdictions: A Trial of the New York Convention’s Ambit and Workability, in THE ART OF ARBITRATION, 51–52 (Jan C. Schulze & Albert Jan Van Den Berg eds., Kluwer Law and Taxation Publishers 1982) (explaining that some courts interpret the New York Convention to require “local law” to be applied to an arbitration clause if none other was contractually chosen).

This is not to say that all Middle Eastern jurisdictions have engaged the process of foreign arbitral award review with the necessary transparency that the various interests call for. While “progressive” jurisdictions have gone to great lengths to open the channels of commerce with reciprocity and transparency, other jurisdictions have not. The right to Islamic legal interpretation, its definition, and articulation is “arduously defend[ed]” and attempts to codify law or make it accessible to the public are frequently “resisted.”\footnote{See GCC Arbitral Rules of Procedure, Art. 29 available at http://www.gcac.biz/en/rules3.php (requiring the GCC to apply local customs when hearing arbitration disputes); see also Trumbull, supra note 121, at 632 (pointing out that Islamic scholars strongly oppose the watering down of Shari’a law); A.M. Rosenthal, On My Mind: The City and the Kingdom, N.Y. TIMES, June 17, 1991, at A21 (commenting on the Saudi Arabian government’s position on religion in the kingdom).} This state of affairs has led to both ambiguity and aversion when foreigners deal with legal systems that are strongly influenced by Shari’a principles.

International commerce cannot take place within a vacuum. Nor can any truly “global” system hope to achieve certainty through uniformity. Expressly narrowing the allowable construction of the New York Convention’s public policy defense\footnote{See Roy, supra note 5, at 955 (pointing out that many countries narrowly interpret Article V(2)(b) to give the article fuller effect).} is a viable solution. At such a time, signatories should have the opportunity to reevaluate the costs and benefits of accession to an amended convention. Cutting out the New York Convention’s public policy defense\footnote{Id. at 957 (asserting that removing Article V(2)(b) would not leave a party opposing enforcement “without a remedy”).} and instead relying on the question of an award’s validity, is an ineffectual solution based on semantics. While amending the New York Convention to allow a third party, such as the American Arbitration Association, to determine an award’s acceptability in the enforcing jurisdiction\footnote{Id. at 956–57 (claiming that nullification proceedings before a third and neutral party would provide impartiality to the arbitration process and thus ensure that Article V(2)(b) was properly used).} will undercut national sovereignty and may be open to the circumvention that it seeks to remedy, having replaced national favoritism with third-party ascendancy.

Certainty, if achievable when seeking to enforce international arbitral awards, will come about through experience, familiarity, and consistency—signals broadcast first by accession and later made more precise through continued application of the New York Convention. To require from a treaty that which cannot be guaranteed by the state is to act without foundation.

All this requires government function and public policy value judgments to be open and accessible. States should outline the methodology used in creating laws and enforcing them. Such transparency helps ensure that a degree of predictability regarding rights and obligations be present. While the law’s evolution (and perhaps revolution) is presumed, good state government helps make that possible in a legitimate manner. As Middle Eastern national systems develop alongside international authorities, it is hoped that the trends of reexamination, acceptance, and fair inclusion continue on all sides.