

THE IMPACT OF SHARIA ON THE ACCEPTANCE OF INTERNATIONAL COMMERCIAL ARBITRATION IN THE COUNTRIES OF THE GULF COOPERATION COUNCIL

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ABSTRACT

Members of the Gulf Cooperation Council (GCC) have been slow in accepting modern arbitration practices. Some of the GCC countries have only recently started to modernize their arbitration laws to bring them in line with these modern practices. Sharia has always been viewed as an obstacle to the development of arbitration in this part of the world, and many still see it as an impediment to the enforcement of foreign arbitral awards in the GCC countries. In this article, the author argues that there is enough flexibility within sharia to accommodate modern international arbitration practices, and the delay in accepting these practices is attributed to other factors, mainly the negative experience the GCC countries have had with arbitration. This paper concludes that arbitration in the GCC will realise its fullest potential only if the modernization of arbitration laws is combined with a greater understanding and acceptance, by the western legal community, of sharia as a legal system.

Keywords: Sharia, Arbitration, GCC, Arbitration Agreement, Choice of Law, Enforcement, Public Policy

INTRODUCTION

With almost half of the world's oil reserves lying underneath their territories, countries of the Gulf Co-operation Council (hereinafter GCC) are strongly represented on the international business map. Enterprises of all sizes and forms are keen to enter the GCC region, particularly countries like the United Arab Emirates (hereinafter UAE), which have become a major business hub, not only for GCC countries but also for a large part of the Middle East and North Africa (hereinafter MENA). However, this interest in trading with the GCC has long been accompanied by complaints about the lack of modern arbitration laws in many of its member states (Arthur J. Gemmill, 2006).

Oman, in 1997, passed legislation implementing the UNCITRAL Model Law on International Commercial Arbitration of 1985 (as amended in 2006) (hereinafter the Model Law). However, other GCC countries have been slow in modernizing their national arbitration laws. Saudi Arabia adopted a new arbitration law in 2012, which is partially based on the Model Law (Faris Nesheiwat, Ali Al-Khasawneh, Santa Clara, 2015). Bahrain recently adopted a new arbitration law in 2015, also based on the Model Law¹. The UAE and Qatar recently established arbitration centres affiliated with key arbitral institutions in the world², although draft arbitration laws in both of these countries are still pending. The Kuwaiti arbitration law issued in 1995 has been subject to heavy criticism and it is often described as not being in line with "modern arbitration practices" (Dalal Al Houti, 2016). The fact that GCC countries are parties to

international legal instruments regulating international arbitration, such as the New York Convention 1958, has definitely mitigated the problem of bringing arbitration practices in the region in line with accepted international practice, but not fully solved it. There is still ambiguity about the relationship between the New York Convention of 1958 and national arbitration laws as evident from some court decisions in the GCC (Elana Levi-Tawil, 2011).

The fact that the legal systems in these countries are either entirely based on sharia, like Saudi Arabia or partially, like the rest of GCC countries, is seen by many western scholars and lawyers as being responsible for the incompleteness of some of these countries' arbitration systems (Steven Finizio and Christopher Howitt, 2016 and Gemmell, 2008). This article focuses on the question of whether sharia has hindered the acceptance of modern arbitration practices in GCC countries. It argues that modern practices of international commercial arbitration are compatible with sharia and the delay in accepting these practices in some of the GCC countries results from previous frustrating experiences with arbitration, especially arbitration cases over oil concession agreements with western companies.

The main focus in this article will be on the rules of sharia concerning arbitration, and reference to the local law of GCC countries will be made when necessary. The analysis will be according to the four *Sunni* schools of Islamic jurisprudence (*Hanafi*, *Shaifi*, *Maliki* and *Hanbali*), as these schools are the dominant ones in the legal systems of the GCC countries. What should be mentioned here is that not all issues considered in this article are necessarily dealt with by every school of Islamic jurisprudence. It should also be noted that a complete analysis of all points of intersection between sharia and international commercial arbitration is outside the scope of this article. This article will therefore focus on some key issues in the debate over the compatibility of sharia with modern practices of international commercial arbitration.

The first part of this article explains the sources of sharia law. The second part briefly describes modern practices of international commercial arbitration. The third part introduces an analysis of the main rules of sharia governing arbitration, in order to show that sharia can accommodate modern international arbitration practices. The fourth part discusses the impact of early arbitration cases on the development of arbitration in the region and their impact on courts' approaches toward enforcement of foreign arbitral awards within this region.

DEFINITION AND SOURCES OF SHARIA LAW

From a linguistic perspective, sharia is an Arabic word that means 'the straight path'. From the perspective of jurisprudence, sharia is the rules and provisions that govern all aspects of a Muslim's individual life, mainly creed, worship, and transactions (Abu Ameenah Bilal). In other words, sharia is a comprehensive way of living to achieve submission to God, which is the essence of Islam. There are four main sources of sharia. The first is the *Quran*, which is the revealed words of God to the Prophet Mohammad. The *Quran* is the most important and highest source of sharia and other sources cannot clash with it (Tarek Badawy, 2012). The second source is the *Sunnah*

"Which is the collection of prophetic actions and statements, together with facts to which Prophet Mohamed acquiesced" (Badawy, 2012)

The *Sunnah*'s validity as a source of sharia law originates from the *Quran*, which orders Muslims to follow the Prophet Mohammad. Evidence for this obligation can be seen in verse 59:7 of the *Quran* which states that

“...Whatever the Messenger has given you - take; and what he has forbidden you - refrain from...”

As well as, verse 8:46 which states that all Muslims must

“Obey Allah and his Apostle”

The *Sunnah* is not limited to particular topics or issues; it covers a wide range of matters including creedal and non-creedal aspects of human life. It also includes elucidation of some verses of the *Quran*. The third source is *Ijma* which means consensus of the Muslim’s community (Fasil Kutty, 2006). The fourth source is *Qiyas* which contains the Analogical deductions and reasoning done by Islamic scholars through analysis and interpretation of the three sources mentioned above (Aseel Al-Ramahi, 2008). Analogy is classified as a jurisprudential source that forms part of the *Ijtihad*, which reflects the intellectual effort exerted by jurists to find or design a rule to apply in new situations (Al-Ramahi, 2008). The *Ijtihad* therefore guarantees that Islamic law can develop and adapt to changing situations in a given society.

MODERN PRACTICES OF INTERNATIONAL COMMERCIAL ARBITRATION

Description of modern arbitration practices requires a summary of the five main pillars of arbitration. These pillars are:

1. The arbitration agreement.
2. The choice of arbitrators.
3. The conduct of the arbitral proceeding.
4. Applicable substantive law.
5. And the arbitral award and its enforcement.

As the Model Law is the most popular legal instruments that many countries rely on to modernize their arbitration laws, the author will focus on the Model Law rules to conduct the description.

Article 7(1) of the Model Law defines an arbitration agreement as “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”. So, an agreement to arbitrate is a binding agreement that takes the form of either a contractual clause or a separate agreement. The latter can be concluded either before or after the dispute arises. According to Article 8(1) of the Model Law the court is under the obligation to refer parties to arbitration when the subject matter of the dispute is arbitrable and covered by a valid arbitration agreement. The separability of an arbitration clause is a key principle of modern arbitration. It means that an arbitration clause is independent from the rest of contract (Article 16).

The parties’ authority to either select arbitrators or to authorize a third party to do so is a well-established practice of modern arbitration. Article 11(3) of the Model Law states that “the parties are free to agree on a procedure for appointing the arbitrator or arbitrators”. Article 13(2) allows the parties to agree on a procedure for challenging an arbitrator and paragraph 2 of the same article allows revoking the appointment of the arbitrator by parties’ agreement.

Concerning the conduct of the arbitral proceeding, there is a set of key principles in this regard. The tribunal shall treat parties equally (Article 18), and the parties are free to choose the rules to be followed by the arbitral tribunal. Failing such an agreement, the tribunal shall conduct the proceeding according to the rules that it finds appropriate³. The parties have the right to agree on the place of arbitration, and if they do not do that the tribunal shall decide the arbitral seat,

with the right to meet at any other places for the conduct of the proceeding if it finds that appropriate (Article 20). Regarding oral hearings, the parties have the right to agree on whether to have an oral hearing. In the absence of such an agreement, the arbitral tribunal decides whether to conduct either an oral hearing or document based arbitration. However, if one of the parties requests an oral hearing, the tribunal should hold it at an appropriate stage of the proceedings (Article 24).

Another important feature of modern arbitration is the parties' right to agree on the law applicable to the substance of the dispute. In the absence of such an agreement the arbitrators shall apply the law according to the conflict of laws rules that the tribunal considers applicable (Article 28). Regarding the award making process, the arbitral award must be in writing and signed by the arbitrators. It should also be reasoned, unless the parties agree no reasoning needs to be made (Article 31). The arbitral award is binding and final and its enforcement can only be refused according to a limited number of grounds determined by the law (Articles 34 & 35).

These grounds are invalidity of the:

1. Arbitration agreement.
2. Lack of procedural due process.
3. The award dealing with matters that are not covered by the arbitration agreement.
4. The composition of the arbitral tribunal or the arbitral procedures not being in accordance with the parties agreement, and failing such an agreement, not being in accordance with the law where the arbitration took place.
5. The dispute-not being arbitrable.
6. The award violating public policy.

COMPATIBILITY OF MODERN ARBITRATION PRACTICES WITH SHARIA

It has long been argued that sharia is obstructing the development and acceptance of modern international arbitration practices in the GCC. This section presents a critical analysis of the rules governing arbitration under sharia. It will argue that Sharia is not as incompatible with modern arbitration law as some have suggested and is not the most important factor in GCC countries' failure to reform their arbitration laws.

1. Binding Arbitration under Sharia Law

Arbitration is recognised in the two primary sources of sharia, the *Quran* and the *Sunnah*. Verse 4:35 of the *Quran* calls for arbitration of family disputes. It states that:

"... If you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever knowing and acquainted with all things."

Evidence from the *Sunnah* shows that the prophet Mohammad made use of arbitration. The treaty of Medina, which was a pact between the city's inhabitants (Muslims, Jews, and non-Muslim Arabs), called for arbitration of any dispute arising between them before the prophet (Mohammed Abu-Nimer 2000, Charles N. Brower and Jeremy K. Sharpe, 2003). The prophet himself was a party to an arbitral proceeding in his conflict with the tribe *Banu Qurazya* (Qadri Mohammad Mahmoud, 2009).

Arbitration is also recognised by consensus (Ijma) (Zeyad Alqurashi, 2003). However, early Muslim scholars debated the concept of arbitration in sharia. In other words, there was a

disagreement on whether arbitration is just a form of conciliation or is a separate method of dispute resolution that leads to a binding settlement (Abdul Hamid El-Ahdab & Jalal El-Ahdab, 2011). The main justification for the first view is based on Verse 4:35 quoted above, which indicates that the role of arbitrators is to help spouses solve their differences. Proponents of the second view base their contention on verse 4:58 of the *Quran* which imposes a duty to act fairly on anyone entrusted to judge between people. Verse 4:58 states that

“*Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice.*”

The proponents of this second view argue that according to this verse, if a person is entrusted with the task of judging, then this person has the power to make judgements of a binding nature. Therefore, an arbitral award issued by an arbitrator chosen by the parties to the dispute should be binding upon them. The scholars of the four *Sunni* schools of Islamic jurisprudence (*Fiqh*) are divided between these two opinions. *Hanafi* scholars recognise arbitration as an effective alternative to court and some of them observe that the arbitrator has the role of a judge with the parties of the dispute but the status of a conciliator against third parties. The majority of *Hanafi* scholars recognise a model of arbitration that closely resembles conciliation. Arbitration is authorized under the *Shafi'i* school of jurisprudence. Scholars of this doctrine stated that arbitration is allowed regardless of the availability of state courts in the place where the dispute occurred. However, the role of an arbitrator is viewed to be lesser than a judge as the parties can discharge the arbitrator (Gemmell, 2006).

The *Maliki* and *Hanbali* view arbitration as a binding method of dispute resolution. Arbitration has a high credibility with *Maliki* scholars. They even accept one of the parties to be an arbitrator if the other party allows that. Under the *Maliki* School, an arbitral award is binding and final (El-Ahdab, 2011). According to the *Hanbali* School, which is known for being the strictest school of Islamic jurisprudence, the binding nature of an arbitral award is similar to the binding nature of a court judgment, and for this reason an arbitrator must have the same qualifications as a judge.

The Code of Legal Provisions (*Medjella*) was the first codification of sharia made in pursuant to the order of *Sultan Abed Al Majeed* after the end of the first Crimean War in 1856. The Ottoman Empire requested clarification of the law applying to Muslims living in the regions that had just come under Russian control. The Russians replied by asking the Ottomans to provide them with a particular set of rules to regulate the affairs of these Muslims. The *Sultan* formed a committee of *Hanafi* scholars, together with observers from other schools of Islamic jurisprudence, to lay down an Islamic civil code. The product was the *Medjella*, the latest version of which was issued in 1876. After the collapse of the Ottoman Empire, the *Medjella* continued to apply for a long time in many Muslim and Arab countries, and many current civil codes in these countries are heavily based on it. The last section of the *Medjella* regulates arbitration and it emphasizes the contractual nature of arbitration which makes it closer to conciliation than trial in court. The arbitral award is contractually binding to the parties involved (*Medjella*, Article 1848). However, it does not have the judicial features of arbitral awards in modern arbitration paradigms. The *Medjella* position in this regard is based on the *Hanafi* School, which is the main source for the provisions of the *Medjella*.

Professor El-Ahdab observed that disagreement amongst Muslims scholars regarding the nature of arbitration is similar to the “controversy accompanied the evolution of arbitration in several western law systems” (El-Ahdab, 2011). However, the view calling for adopting the

binding nature of arbitration has prevailed over time. This disagreement is a natural reaction to the evolution of new commercial and economic activities that need facilitation and regulation. One of the most fundamental rules of sharia is that “any difficulty must be made easier”, with the provision that any solution does not clash with mandatory principles of sharia. This is why most countries that apply Islamic law, even those who are the strictest in this regard, have long recognised and protected the binding nature of arbitration. For example, the new Saudi arbitration law issued in 2012 did not introduce any changes regarding the concept of arbitration, because binding arbitration was allowed under the previous laws⁴.

2. Arbitration Agreements under Sharia

Although arbitration is recognised as a method of dispute resolution, under sharia law arbitration agreements have been subject to a great deal of scholarly debate. The debate relates mainly to the contractual validity of an agreement to arbitrate and to the permissibility of arbitration clauses.

2.1 Validity of Parties’ Agreement to Arbitrate

Since sharia law does not have a general theory of contract, it has been argued that the only binding contracts are the contracts studied by early sharia scholars, usually called nominate contracts (Abdel Razzak Sanhury, 1954). As an arbitration agreement is not a type of nominate contract under sharia, some writers claim that an arbitration agreement is not a binding contract under rules of sharia and therefore it does not waive the parties right to litigation (El-Ahdab, 2011). However, this argument has been rejected by newer trends of Islamic jurisprudence. Ibn Taimiyya, a prominent *Hanbali* scholar explained that the “rule in contract is tolerance and validity” and one must not forbid or set aside a contract unless it is forbidden by virtue of a text or of *Qiyas* analogy (El-Ahdab, 2011).

Dr. Abdel Razzak Sanhury, one of the leading legal scholars in the Arab world observed that the distinction between binding and non-binding contracts, based on whether the contract is nominate or not, is quite cursory. He based his opinion on an important rule derived from the *Quran* which places all Muslims under the obligation to respect their undertakings. This rule is embodied in Verse 5:1 of the *Quran* and states that

“O you who believe, Fulfil all contracts”

Dr. Sanhury also explained that nominate contracts under sharia were the only contracts known to ancient Islamic scholars and it is normal that new kinds of contracts emerge with time. He contended that these new contracts are binding as long as they do not violate public policy or the law. Actually, the mere fact arbitration agreement was not studied by early scholars should not make it an invalid contract, especially as arbitration is recognized in the primary sources of sharia, the *Quran* and the *Sunna*.

2.2 Permissibility of Arbitration Clauses

Although the *Sunnah* includes reference to clauses that serve a similar function to arbitration clauses (Abu-Nimer, 2000-2001), arbitration clauses were not studied by early Muslim scholars. The reason is probably that arbitration clauses were not common at that time and the volume of international trade was not so high. So, examining the legality of an arbitration

clause under sharia requires looking at two things, the validity of contracting on future things and the validity of special contractual clauses under sharia.

2.2.1 Validity of Contracting on Future Things

Many writers claim that arbitration clauses are invalid under the rules of sharia because sharia does not allow contracting on future things (Gemmell, 2006). While the existence of the subject matter of the contract is essential for its validity under all Sharia schools of jurisprudence, the practical importance of contracting on future things has been recognised. *Ibn Rushd* (Averroes) who was a *Maliki* scholar, explained that contracting on future things is valid in “the case of necessity and when the future inception of the subject matter of the contract is certain” (Muhammad Abu Sadah, 2010), for example contracting on the sale of the whole harvest of a particular fruit when the product is produced in connected succession. *Ibn Qayyim Al-Jawziyya* drew a deep distinction between non-existence of the subject matter of the contract and uncertainties leading to doubts about the existence of the subject-matter in the future. He concluded that what is rejected under sharia is uncertainty and not the non-existence of the subject-matter (Muhammad Abu Sadah, 2010). This view found its way to most Arab laws on contracts. For example, Article 202(1) of the UAE Civil Transactions Act 1985 and Article 149(1) of the Qatari Civil Code 2004 allow contracting on future things as long as there is no uncertainty (*gharar*). Similar provisions can be found in Article 104 of the Bahraini Civil Code 2001 and Article 168 of the Kuwaiti Civil Code 1980. Both laws state that

“The subject-matter of the contract may be a thing in the future unless its existence depends on pure chance”.

An arbitration clause is a contractual clause with future effect that aims to reduce uncertainty arising from the possibility to litigate an international commercial dispute in multiple jurisdictions (Mutasim Ahmad Alqudah, 2016). When parties incorporate an arbitration clause into their contract, they actually do so to avoid such uncertainty. An arbitration clause therefore does not face the threat of invalidity just because it is a type of future contractual clauses.

2.2.2. Validity of Special Contractual Clauses

Under the rules of sharia, a special clause is a contractual clause that is different from the usual clauses of a nominate contract as defined by early sharia scholars. An arbitration clause is a type of special contractual clause. Although the rules of sharia on nominate contracts are strict with regard to the terms that comprise each type of these contracts, there is still room for the parties to agree on special terms.

No one can examine the validity of special contractual clauses without referring to the Prophet’s Mohammad saying regarding the degree to which Muslims must respect their contractual terms (Sunan Al-Termethi). He said that

“Muslims on their terms except what forbids halal (allowed) or legitimize haram (forbidden)”.

The *Hanbali*’s approach is the closest amongst Islamic schools to what the Prophet said. The *Hanbalis* will only invalidate a contractual clause if it is “contrary to the object of the contract” for example when the seller of chattels stipulates that the buyer cannot resell them even though they are saleable by nature, or “if the clause is prohibited by a special text or by the sharia because it authorizes what is forbidden” such as usurious terms (El-Ahdab, 2011). The *Hanafi* approach towards the validity of special contractual clauses is different.

For a special contractual clause to be valid it must satisfy one of the following criteria;

1. The clause must be necessary.
2. The clause is appropriate to the contract.
3. The clause is “commonly used in transactions”.

The validity of an arbitration clause as a type of special contractual clause does not seem to be problematic, either under the *Hanbali* School or under the *Hanafi* School. An arbitration clause does not authorize what is forbidden and also does not forbid what is allowed. An arbitration clause serves an important function in reducing jurisdictional uncertainty. Arbitration also provides parties with other advantages, such as speed and confidentiality, which means there is an element of necessity and appropriateness in incorporating such a clause into business transactions, especially the ones concluded on a cross-border level. The use of arbitration clauses is widely popular, which means it is accepted by custom as well.

2.3 Separability

Separability means that an arbitration clause is entirely separate from the underlying contract in which it is incorporated. The notion of the separability of an arbitration clause is new, even to contemporary sharia scholars, as the examination of the legality of arbitration clauses under sharia has only recently started. However, the doctrine of severance exists under rules of sharia (Dr. Razali HJ Nawawi, 2009). The *Hanafi* scholars were the first to deal with this question. In their analysis of sale transactions, they explained that contractual clauses are classified into three categories - valid, invalid (*Fasid*), and void (*Batil*). Invalid clauses neither underpin nor clash with the essence of the contract. Such clauses are neither provided by sharia nor accepted by custom. In fact, they are designed to grant an extra advantage for one of the parties without consideration (Nawawi, 2009). For example, A sells an apartment to B on a condition that he is allowed to use it for one year. Such a clause is invalid because it is usurious. Void clauses are the terms that contradict the essence of the contract and are prejudicial to one of the parties, for instance, a sale of property with a stipulation on the buyer not to resell it. Such a condition severely contradicts the essence of the contract and may harm the buyer. Under the *Hanafi* School, an invalid clause makes the whole contract invalid, whereas void clauses do not affect the validity of the contract unless the void clause represents the main motivation for concluding the contract. The rest of the schools only distinguish between valid and void clauses. The impact of a void clause on the whole contract is best explained by the *Malikis*. They noted that if the void clause restrains the authority of the buyer with regard to the subject-matter of the contract then the contract is void. However, if it relates to the price, then the sale is valid and the clause is void (Nawawi, 2009). It is clear that there is considerable support for severance of contractual clauses under sharia. Separability of an arbitration clause does not seem to contradict sharia, particularly if it leads to the survival of an arbitration to serve an important function that sharia seeks to achieve, which is certainty in transactions.

3. Arbitrability

The term arbitrability is usually split into ‘subjective arbitrability’ and ‘objective arbitrability’. The question of whether the state or any of its organs can be a party to an arbitration agreement, or to a dispute that has been submitted to arbitration, is usually referred to as ‘subjective arbitrability’. Whereas, ‘objective arbitrability’ means whether or not the subject matter of the dispute can be submitted to arbitration (L. Yves Fortier and Loukas A. Mistelis,

2005). Restrictions on the capacity of public entities to go to arbitration has been relaxed, and limitations on types of disputes that can be referred to arbitration have been reduced. However, the issue of arbitrability in its two types is not dead. Many countries still impose limitations on the capacity of public bodies to agree on arbitration and on types of disputes that can be referred to arbitration (Karim Abou Youssef, 2005). What is surprising in this regard is that sharia adopts a wide concept of subjective and objective arbitrability. Regarding subjective arbitrability, sovereign immunity is not recognised under rules of sharia (Badawy, 2012). This can be derived from the *Quran*, which makes it clear that there is no difference between the governor and those he governs in terms of rights. Verse 49:13 of the *Quran* states that:

“O you men! surely We have created you of a male and a female, and made you tribes and families that you may know each other; surely the most honorable of you with Allah is the one among you most careful (of his duty); surely Allah is Knowing, Aware”.

Sharia places governors under the obligation to sustain the prosperity and interests of the state and of their citizens. What is more, they also have a duty to uphold the rule of justice amongst the public, whatever their religious beliefs. Governors do not enjoy any immunity from these obligations (Badawy, 2012). For instance, sharia scholars view a breach of contract by the governor as a more gruesome act than any that is committed by a governed subject. Al-Qurtubi noted that “there is no one who breaks faith more guilty than he who commands the common people” (Abu Abdullah Al-Qurtubi, *Tafsir al Jami’ li-ahkam*, 1958). In fact, this is not only because of the governors’ status in the Muslim community, and their duty to be a model of religious excellence and morality to their subjects, but also because breaking an agreement or a contract concluded with another state or a private contractor may cause harmful ramifications for the Muslim state as a whole. Based on the foregoing, sharia does not prevent government bodies and entities from concluding arbitration agreements or referring disputes with foreign contractors and investors to arbitration.

Regarding objective arbitrability, arbitration is widely allowed over monetary disputes, including matters related to real estates and chattels (Wakim, 2008). There are a limited number of disputes that cannot be referred to arbitration, mainly criminal offences and disputes that involve violation of public policy (Wakim, 2008). The borders of public policy under sharia law are demarcated according to what is allowed and what is prohibited in the *Quran* and the *Sunnah*. For example, disputes over a usurious contract are not arbitrable, because usury, (*Riba*) is prohibited under sharia (El-Ahdab, 2011). What should be mentioned here is that the *Malikis* do not allow arbitration in some family law disputes, for example a dispute over children’s’ guardianship (Gemmell, 2006).

4. Selection of Arbitrators

Sharia has no restriction on the number of arbitrators allowed in a dispute (Alqurashi, 2003). It is left for the parties to decide and it is for them to choose the arbitrators or to leave that to a third party, as in the case of institutional arbitration (Md.Shahadat Hossain, 2013). The important question in this regard is who can be an arbitrator?

There is a trend in Islamic jurisprudence for an arbitrator to require the same qualification as a judge. According to the *Majdella*, a judge “must be a mature Muslim male, wise, free, sane, just and jurist” (as translated in El-Ahdab, 2011). Applying these requirements to arbitrators raises three critical questions. These are; whether a non-Muslim can be appointed as an

arbitrator; whether a woman can be appointed as an arbitrator; and whether the arbitrator must always have a legal background.

Regarding religion, the *Majdella* provision that requires a judge to be a Muslim conforms to the views of the *Malakis*, *Shafi'is*, and *Hanbalis* scholars. However, the *Hanafis* have a different view. Under the *Hanafi* School, those who are allowed to be witnesses can also be judges, and as non-Muslims can testify against each other, it is permissible to appoint a non-Muslim judge in a dispute involving non-Muslims. Many scholars also rely on verse 4:35 of the *Quran* as evidence for allowing the appointment of a non-Muslim arbitrator. This verse is quoted above and deals with matrimonial disputes. It stipulates the appointment of an arbitrator from the family of each one of the spouses, and as the wife can be a non-Muslim, the arbitrator from her family can be a non-Muslim as well. So, if the dispute arises between Muslims residing in a Muslim country, then the arbitrator has to be a Muslim. If one of the parties is a non-Muslim, then a non-Muslim arbitrator from that party's religion can be appointed (El-Ahdab, 2011). Contemporary Islamic jurisprudence recognizes the inevitability of interaction between Muslims and non-Muslims in the modern paradigm of international trade. Some scholars allow Muslims doing business in non-Muslim countries to refer disputes to non-Muslims judges (Kalel Abedalkarim Konang, 2010). This gives more flexibility with regard to the religion of the arbitrator. In the case of a dispute between non-Muslims, they have the freedom to choose and they can select a Muslim or a non-Muslim arbitrator (El-Ahdab, 2011).

Revoking the appointment of an arbitrator under sharia does not seem to be problematic when compared to modern practices. All schools of Islamic jurisprudence allow the parties to agree on revoking the appointment of an arbitrator. In the absence of such agreement, some schools allow the party who appointed the arbitrator to revoke his appointment. The sharia also allows the right to challenge an arbitrator before a court (El-Ahdab, 2011).

The answer to the second question, which concerns the validity of having a female arbitrator, can be derived from the debate on whether a woman can be a judge. *Malakis*, *Shafis*, and *Hanbalis* view women as ineligible to be judges. They rely mainly on verse 4:34 of the *Quran* which states that "men are qawwamuna (protectors) over women". Many scholars also refer to Prophet Mohammad saying "people will not prosper if they appoint a woman in charge of them". He made this statement after his companions had informed him that the Persian emperor had been succeeded by his daughter. Many Muslim scholars expanded the interpretation and application of this saying to prevent women from occupying all public positions, including judicial posts. The *Hanafis* adopted a different view on this matter. Most of the *Hanafi* scholars view the appointment of women as judges as permissible. According to *Abu Hanifah*, anyone possessing the qualifications of a witness can validly be a judge. As verse 2:282 allows women to be witnesses in commercial transactions, they are eligible to be judges, but not in *Hudud* (punishment stipulated by sharia for violation of rights of God) and *Qisas* (retaliation) cases (Rawya Al Zahhar, 2015). In other words, the *Hanafis* allow women to be judges, but not in criminal cases. *Al-Tabari* and *Ibn-Hazm* have also expressed the opinion that a woman can be a judge in any type of case (Dr. Md Yousuf Ali, 2011). In fact, there is no explicit prohibition, either in the *Quran* or in the *Sunnah* on women being judges. This lack of a clear prohibition, coupled with the views of the *Hanafis* and other individual scholars have encouraged many Muslim countries to allow female judges. What should be mentioned here is that *Caliph Omar* appointed a woman as a bazaar-inspector of the *Medina* (Dr.Mohammad Rafffa, 2013). One of the tasks of the bazaar-inspector was to judge between merchants in commercial disputes. Nowadays, many Muslim countries such as Jordan, Egypt, and UAE allow women to hold

judicial posts. Accordingly, as sharia requires arbitrators to have the qualifications of judges, and as there is considerable support under sharia for the appointment of women as judges, appointment of women arbitrators is possible.

Although sharia requires the judge to be a jurist, this requirement, when applied on an arbitrator, should not be a serious problem, even in cases that need arbitrators with special expertise, such as arbitration in construction, health, and insurance disputes. Sharia stipulates such a condition in order to ensure that justice is achieved. Most arbitrators come from legal backgrounds, and those who come from other backgrounds, such as engineers in construction arbitration, usually have training before they start their arbitration career.

5. Choice of Law

Most writers who have addressed arbitration under sharia have addressed the issue of applicable substantive law, with the view that sharia has to always apply in the dispute, and no reference to other legal systems can be made (Tawil, 2011). This matter is considered as a deficiency in the arbitration system under sharia. In fact, the reality is quite different from this view. Firstly, coming across cases that involves the application of sharia is not limited to arbitration. It can happen in a court of law, even those in western jurisdictions. An example of this is when conflict of laws rules leads to the application of laws of a country that applies sharia, or if the contract includes a clause stipulating the application of sharia. Secondly, according to the *Maliki*, *Shafi* and *Hanbali* Schools, when one of the parties is not a Muslim, the application of other legal systems is permissible if the parties choose to do so, as long as these rules do not contradict the mandatory principles of sharia (Alqurashi, 2003). The scope of contradiction between the mandatory principles of sharia and other legal systems in relation to transactions is quite narrow. It mainly involves usurious contracts (*Riba*)⁵, contracts that involve the sale of prohibited material to a Muslim, like pork or alcohol as a beverage, and contracts that involve uncertainty (*gharar*). Apart from that, sharia has flexible rules on transactions.

6. Key Procedural Aspects

The sharia rules relating to arbitral procedures do not seem to clash with modern arbitration practices. Sharia allows either the parties or the arbitrator, if he is entrusted by the parties, to choose the arbitral seat, and also to choose the procedural law, which does not have to be the law of the seat (Saad U. Rizwan, 2013). Sharia mainly focus on compliance with the principle of due process. It stipulates that all parties to the dispute should be heard. This is normally taken to mean that equal opportunities should be given to all parties to present their case. However, some scholars interpret this as stipulating a mandatory oral hearing (El-Ahdab, 2011). Neither interpretation seems to be in contradiction with modern arbitration practices. Sharia also allows the tribunal to issue an award either in the arbitral seat or in any other place, if it finds that suitable.

7. Enforcement of International Arbitral Awards

The binding nature of an arbitral award is a key feature of modern arbitration. As explained in part one, the view supporting the binding nature of arbitration prevailed over time as a response to new economic developments.

Under the *Maliki* and *Hanbali* schools, an arbitral award has a jurisdictional nature and it is final and binding, subject to limited grounds for refusing recognition and enforcement. These grounds do not seem to clash with non-enforcement grounds recognized in modern arbitration laws. Under doctrines of sharia, an arbitral award cannot be enforced if there is no valid arbitration agreement; if the award is not made by all arbitrators; if the dispute falls outside the scope of the arbitration agreement; if there is a flagrant mistake or injustice; or if it violates Islamic public policy (El-Ahdab, 2011). The authority of the court to set aside or refuse the enforcement of an award becomes even narrower when the award is classified as foreign. Scholars have adopted different standards to distinguish a foreign award from a domestic award. These standards rely on the religion of the parties to the award and their place of residence. The majority deem an arbitral award foreign if the parties are not Muslims, regardless of whether they are foreigners or citizens. Some scholars expand the definition of a foreign arbitral award to include an award between Muslims who are not residing in a Muslim country. If the award is foreign, the court can only refuse enforcement on grounds of violation of Islamic public policy (El-Ahdab, 2011).

The notion of Islamic public policy is based on “respect to the spirit of sharia and its sources” and on the famous sharia principle that

“Individuals must respect their clauses, unless they forbid what is authorized or authorize what is forbidden”.

This means that the court will only set aside or refuse the enforcement of an arbitral award if it involves a “flagrant injustice” or if it clashes with the prohibitions of sharia. As explained above, there are few prohibited transactions under sharia that would violate public policy. This leads to a very important issue, which is the role of sharia in the demarcation of modern day public policy in GCC countries. As explained above, the legal systems in these countries are either entirely or partially based on sharia. Many writers link sharia with the intensive use of public policy, by courts in the Middle East, to refuse the enforcement of foreign arbitral awards under the New York Convention 1958 (Tawil, 2011). It is true that sharia principles constituting a part of public policy can be used as a defense to non-enforcement under Article V (2) (b) of the New York Convention 1958 (Mutasim Ahmad Alqudah, 2011). However, the impact of this on enforcement of arbitral awards, and thus on effectiveness of international arbitration in the GCC, has been exaggerated, because, as mentioned earlier, there are few prohibitions under sharia in relation to transactions. What should be mentioned here is that, apart from Saudi Arabia, all GCC countries have legalized interest in banking and in contracts as well.

FACTORS SLOWING DOWN THE ACCEPTANCE OF MODERN INTERNATIONAL ARBITRATION PRACTICES IN GCC COUNTRIES

No one can safely presume that foreign arbitral awards are treated as *prima facie* valid in the GCC, especially in countries that have not modernized their arbitration laws. The UAE has been a party to the New York Convention of 1958 since 2006. Article I (1) of the Convention places contracting states under the obligation to enforce an arbitral award made in the territory of a state other than the state where the enforcement is sought. It also applies to the enforcement of an arbitral award that is not considered domestic in the state where the enforcement is sought. However, the UAE cassation court confirmed the rulings of two lower courts that ignored Article I (1) of the New York Convention 1958 and applied Article 21 of the UAE Civil Procedures

Code 1992, to decline jurisdiction over the enforcement of an arbitral award made by the International Court of Arbitration of the International Chamber of Commerce in Paris (hereinafter ICC) (Appeal No. 156 of 2013). Likewise, Qatar has been a party to the New York Convention since 2003. The Qatari Supreme Court in 2014 revoked a judgment of the Doha Court of Appeal upholding the decision issued by a Court of first Instance refusing to enforce an arbitral award made by the ICC in Paris, because the award was not issued in the name of His Highness the *Emir* (Prince) of Qatar (Decision No. 2216, 2013). The court of first instance ignored the provisions of the New York Convention 1958, which Qatar acceded to in 2002. The court justified its decision by stating that the award violated the mandatory provisions of Article 69 of the Qatari Civil Procedures Code, which states that

“judgments should be rendered and enforced in the name of the highest authority in the country”.

The peculiarity of some GCC courts approach toward the enforcement of foreign arbitral awards does not result from a major contradiction between modern arbitration practices and sharia. It results from a distrust of international arbitration, which spread amongst all GCC countries and many other Arab states, after a series of hotly disputed arbitration cases. This started with the much-commented on case of *Petroleum Development (Trucial Coast) Ltd. V. The Sheikh of Abu Dhabi*. In this case, the dispute was over the geographic scope of an oil concession granted by the *Sheikh* of Abu Dhabi. In his analysis of the law governing the concession agreement, Lord Asquith observed that:

“This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.”

Lord Asquith refused to apply the local law of Abu Dhabi on the base that “no such law can reasonably be said to exist”. He instead applied common law principles to resolve the dispute. In doing so, Lord Asquith did not recognise the sharia as a legal system that could be applied in such a dispute. This case was followed by a series of infamous arbitration cases between Arab Gulf States and western investors, including *Ruler of Qatar v. International Marine Oil Company, Ltd (1953).*, and *Saudi Arabia v. Arabian American Oil Company*, known as the *Aramco case* (1958). The common element in these cases was the arbitrators’ disregard of the local laws of the countries involved. The tribunals applied “general principles of law”, derived from the laws of western jurisdictions, to the subject matter of the dispute. This made the whole region apprehensive about the fairness of arbitration, “perceiving it as biased to western interest”(Stovall, 2009).

The period between the early 1960s and the late 1970s witnessed great hostility toward international arbitration from the Arab States of the Gulf. In 1963, the Saudi Council of Ministers issued a decree preventing public bodies from referring disputes to arbitration except in special cases. This negative perception toward the fairness of arbitration changed slightly after the case of *Kuwait Minister of Public Works v. Sir Frederick Snow & Partners*. In 1973, an arbitral award was rendered in favour of the government of Kuwait resolving the dispute over the construction of the Kuwaiti airport. At the time the award was made, neither the UK nor Kuwait was a signatory to the New York Convention of 1958. The UK acceded in 1975, and the award was not implemented until 1978 after Kuwait also acceded to the Convention.

International arbitration has become more acceptable in some GCC countries in recent times. As aforementioned, three of the six GCC countries have modernized their arbitration laws

and many arbitration centres have been established. However, it seems that the distrust of international arbitration caused by early arbitration cases is still influencing some of the GCC courts approach toward the enforcement of foreign arbitral awards, especially in the countries which have not modernized their arbitration laws.

Another side of the problem is the western lawyers' and jurists' perception of sharia as being an old, unsophisticated and inadequate legal system (Kutty, 2006). This perception can be easily deducted from the words of Lord Asquith in *The Sheikh of Abu Dhabi* case. Western lawyers and jurists nowadays know more about sharia, and sharia-based arbitration is practiced in some western countries by some institutions, for example the Muslims Arbitration Tribunal in the UK. There are also calls for creating similar institutions in the U.S. by some jurists like Michael J. Broyde, who believes that religious arbitration, including sharia, can preserve rights and values (Michael J. Broyde, 2015). However, the view that sharia is inappropriate to be used in arbitration is still widespread (Richard Jonathan Halmo, 2013). The existence of different schools of Islamic jurisprudence and different opinions on a particular matter is viewed as a weakness, whereas Muslims look at it as a source of flexibility that allows sharia to evolve with new solutions being developed by scholars. Moreover, those who deem sharia inappropriate rarely distinguish between rules of sharia relating to transactions, and other rules relating to matters such as family disputes, which sharia largely handles in a different way from most western legal systems.

CONCLUSION

No one can safely presume that sharia has limited the acceptance of modern international arbitration practices in the GCC. The scope of contradiction between sharia and these practices is narrow. Arbitration is recognized by the *Quran* and the *Sunnah*, although both lack a manifest description of its nature. Acceptance of the binding nature of arbitration has evolved over time and through scholarly dispute. Debate over the validity of an arbitration agreement because it is not one of the nominate contracts recognized by early sharia scholars eventually led to a recognition of its validity. It is a pivotal precept of sharia that the "rule in contract is tolerance and validity". Scholars only recently started to examine the validity of an arbitration clause under sharia, in line with validity requirements of special contractual clauses. The notion of separability of an arbitration clause is not peculiar to sharia, since it recognises severance of contractual clauses. Sharia adopts a flexible approach toward subjective and objective arbitrability. Sovereign immunity is not recognized under rules of sharia, and few dispute are not arbitrable. Those that are not considered arbitrable include criminal disputes and disputes over child guardianship. All monetary disputes are arbitrable, unless the contract violates public policy.

There is no explicit prohibition, either in the *Quran* or in the *Sunnah* on appointing women arbitrators. Unlike other schools, it is possible to have a woman arbitrator under the *Hanafi* School, but not in criminal cases which are already non-arbitrable under sharia, and in many western legal systems. Sharia only forbids the appointment of non-Muslims as an arbitrator in limited situations. Sharia does not prevent the parties from choosing other laws. However, mandatory rules of sharia must be respected, and there are few prohibitions in sharia with regard to transactions. Prohibitions cover certain types of contracts such as the sale of pork and the sale of alcohol as a drink. Contracts that involve uncertainty (*gharar*) or interest are also prohibited. With regard to the enforcement of an arbitral award under sharia, grounds upon which the

enforcement of an arbitral award may be rejected do not contradict non-enforcement grounds recognized in modern arbitration laws.

The outcomes of early arbitration cases between some of the GCC countries and western companies, such as *The Sheikh of Abu Dhabi, Ruler of Qatar*, and *Aramco* constitute the main driving force behind the delay in accepting modern arbitration practices. Excluding the local laws of the countries involved in these cases from application is the common problem amongst them, and this has created a state of distrust towards international arbitration in the region. This state of distrust has not totally vanished as some courts in the GCC still do not treat an arbitral award as *prima facie* valid. These cases and the case of *The Sheikh of Abu Dhabi* in particular, triggered a debate over the adequacy and sophistication of sharia as a legal system. Some western scholars and lawyers have shown some openness toward the application of sharia in disputes submitted to arbitration. However, the perception that sharia is unsophisticated and inadequate is still widespread in the western legal community.

GCC countries should continue modernizing their arbitration laws, and the western legal community should show more openness toward the use of sharia in arbitration for disputes arising from business transactions. Sharia is a primary source of law in the GCC and many other countries around the world. Deeper understanding of the way sharia operates as a legal system, especially in the transactional side, will help to reduce the controversy about the appropriateness and sophistication of sharia.

ENDNOTES

- 1 In 2010, the Bahrain Chamber for Dispute Resolution (BCDR) and American Arbitration Association (AAA) launched BCDR-AAA to conduct arbitrations according to the AAA rules.
- 2 Dubai International Financial Center (DIFC) has a court and an arbitration center and both apply common law rules, nevertheless, outside the DIFC the laws of the UAE apply and arbitration is regulated by the Civil Code of Procedures 1992 which has limitations on powers of the arbitral tribunal and allows for wide intervention of the court. Likewise, Qatar Financial Center (QFC) has an independent jurisdiction that applies common law rules. However, outside the QFC the local laws of Qatar apply and arbitration is governed by the 1990 Civil and Commercial Code of Procedures which is not in line with modern paradigm of arbitration.
- 3 Taking the mandatory rules of the arbitral seat governing the procedures of arbitration inconsideration is important to avoid the annulment of the arbitral award. See Article 34(2) of the UNCITRAL Model Law.
- 4 All arbitration rules in GCC countries allow binding arbitration with different rules regarding the finality and enforcement. For example under Article 215 of the UAE Civil Procedures Code 1992 an arbitral award may not be enforced unless it is approved by the court.
- 5 Usury (*Riba*) is forbidden by the virtue of verse 2:275 of the Quran which states that “Allah has permitted trade and has forbidden usury”.
- 6 Restriction on the capacity of public bodies to refer disputes to arbitration still exists under the new Saudi Arbitration Law 2012. Article 10(2) of the said law stipulates the approval of the Cabinet before public bodies can agree on arbitration.

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