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The Impact of the *Shari'ah* on Foreign Direct Investment and Arbitration: The Case of Saudi Arabia and its Vision 2030

Submitted by: Abdulrahman Alfatta

University of Westminster

2019

Abstract

This study seeks to determine whether the government of Saudi Arabia, in promoting its Vision 2030 project, can strike a balance between safeguarding the Kingdom's Islamic heritage and protecting the interests of foreign investors in Saudi Arabia. Following a critical review of the extant literature, it establishes that the government has been unable so far to achieve that delicate balance because of the rigid interpretation of the Shari'ah by traditionalist and anti-Western (anti-international) doctrinaire scholars who became prominent after 'the closing of the gates of ijtihad' (independent reasoning). The study also establishes that the Shari'ah has been fundamentally flexible from the earliest times, and that early Muslims embraced free trade, and preferred arbitration as dispute resolution mechanism without gender bias. Thus, this study tests the hypothesis that the rigid interpretation subsequently imposed by doctrinaire conservatives explains why the use of the Shari'ah to settle disputes constitutes an obstacle to FDI in Saudi Arabia. In order to test the hypothesis and achieve the research aim, a mixed methods approach is employed that involves both doctrinal and empirical methods. The latter is used because the Shari'ah is not codified and courts are not required to comply with any precedent, making it difficult to predict outcomes either in Saudi courts or in arbitral tribunals, wherever in the world arbitrators sit. The study reveals that although the rigid interpretation and application of the Shari'ah is an obstacle to FDI, the Hanbali fiqh should be interpreted and applied in a flexible manner in regard to commercial matters, including international commercial arbitration. Moreover, other Schools of Jurisprudence, such as the Hanafi, are much more flexible than the Hanbali School of Jurisprudence. As such, it is important to determine whether judges and arbitrators in Saudi Arabia, and arbitrators sitting outside Saudi Arabia, may refer to a Sunni School of Jurisprudence other than the Hanbali School in order to invoke another interpretation of the Shari'ah that is more advantageous to trade and investment in Saudi Arabia. This is in line with the istihsan principle that enables Islamic judges to choose more equitable solutions where a literal interpretation of the Quranic verses may not promote the public good, or may cause a detriment to the general public in Saudi Arabia.

DEDICATED

To

My Mother

A strong soul and sweet heart who surrounded me with warmth and reassured me with believe and taught me to trust in Allah and entrust my affairs to Him. and who has been my first teacher

My Father

A strong parent who has dedicated his life for earning an honest living to provide us a good education and appropriate life and for supporting and encouraging me and for being always proud of me

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Declaration of Originality

This thesis, submitted for the Degree of Doctor of Philosophy, is an original work of my own and has not been submitted before for any other degree.

Abbreviations

A.ft	May Allah accelerate his Noble Manifestation (Relief)
A.H.	After Hijrah (the Migration from Makkah to Madinah)
A.S.	Peace (salam) be upon him or her
AI	Annales islamologiques
AIUON	Annali dell' Istituto Universitario Orientale di Napoli
AKM	Abhandlungen für die Kunde des Morgenlandes
AMEL	Arabic and Middle Eastern Literatures
AO Hung.	Acta orientalia (academiae scientiarum hungaricae)
AO	Acta Orientalia
ArO	Archiv orientální
AS	Asiatische studien
ASJ	Arab studies journal
ASP	Arabic Sciences and Philosophy
ASQ	Arab studies quarterly
B.H.	Before Hijrah
B	From expressions in Arabic
BASOR	Bulletin of the American Schools of Oriental Research
BEA	Bulletin des Études Arabes
BEFEO	Bulletin de…
L.H.C.	For Lunar Hijri Calendar

PBUH	"Peace be upon him or her"
PBUT	"Peace be upon them"
R.A.	May Allah be pleased with him
S.H.C.	Solar Hijri Calendar
SA	Allah's peace and blessing be upon him and his kinsfolk

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Heyman v. *Darwins Ltd.* [1942] AC 356, 374.

Islamic Investment Co. of the Gulf (Bahamas) Ltd. v Symphony Gems N.V. unreported [2002] All ER (D) 171

Jivraj v. Hashwan [2011] UKSC 40

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Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc. [1985] 473 U.S. 614

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My Lord! Increase me in Knowledge

CHAPTER 1:

Introduction

1.1 Introduction

The Kingdom of Saudi Arabia, as a key member of the Organisation of the Petroleum Exporting Countries (OPEC), is the world's largest producer and exporter of oil.[1] As such, Saudi Arabia has attracted foreign investors since the discovery of oil in its territory in early 19th century. This is evidenced by the first oil concession granted by the government of Saudi Arabia to the Standard Oil Company of California in 1933.[2] It has been asserted that Standard Oil, a company incorporated in the United States, exploited the naiveté of the government of Saudi Arabia, especially in the crucial stages during the drafting of the concession agreement between the parties, to the detriment of Saudi Arabia.[3] The concession agreement generated commercial success for Standard Oil Company and also stimulated the Saudi economy. Nonetheless, the government of Saudi Arabia terminated the concession agreement and nationalised Standard Oil Company in 1972 so as to control its own natural resources and industries.[4]

This decision further catalyzed the economy of Saudi Arabia and has made it one of the largest free markets in the Middle East and North Africa (MENA).[5] Further, its position as a critical player in the oil market has also ensured that Saudi Arabia is the largest recipient of Foreign Direct Investment (FDI) in the Arab World.[6] However, there has been a growing and

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[1] Royal Embassy of Saudi Arabia (2016) <https://www.saudiembassy.net/about/country-information/energy/oil.aspx>, accessed 23 April 2017.

[2] ARAMCO, 'Our History' (2006) <http://www.aramcoservices.com/Who-We-Are/Our-History.aspx>, accessed 23 April 2017.

[3] Andrew Stern, Who Won the Oil Wars (Conspiracy Books 2005) 35-37.

[4] See Talal Al-Emadi 'Joint Venture (JVCs) Among Current Negotiated Petroleum Contracts: A Literature Review of JVCs Development, Concept and Elements' (2010) 1 Georgetown Journal of International Law 645, 646-648.

[5] Institute of International Finance (IIF), IIF Regional Overview on Middle East and North Africa "Arab Spring Countries, Struggle, GCC Prospects Favorable (2013) <http://www.ifc.org/wps/wcm/connect/52d36d80405cc4fb93d09382455ae521/p_SIinMENAReport.pdf?MOD=AJPERES>, accessed on 20 June 2018.

[6] Santander Trade Portal, Saudi Arabia: Foreign Investment (2016) <https://en.santandertrade.com/establish-overseas/saudi-arabia/foreign-investment?&actualiser_id_banque=oui&id_banque=44&memoriser_choix=memoriser>, accessed 20 June 2018.

continuous realization by the government of Saudi Arabia that it has to diversify its economy and mitigate its country's dependence on oil.[7] This is important, especially when one considers this under two main auspices. First, the climate and environmental impact of the use of fossil fuels; and second, the variability of the price of oil. There has been a continuous trend to limit the effects of global warming. Scientific and technological searches for alternative fuels derived from resources other than petroleum are increased and the 2015 United Nations Climate Change Conference in Paris in which 195 countries adopted the first-ever universal, legally binding global climate deal; an agreement that sets out a global action to put the world on track to avoid dangerous climate change by limiting global warming well below 2 degrees C.[8] Second, the great plunge in oil prices, from a peak of USD$115 per barrel in June 2014 to under USD$35 at the end of February 2016, caused mainly by slowing growth in emerging markets, most importantly in China, has led to sharp drops in commodity prices almost across the board, which in turn has affected countries around the world, especially oil-dependent OPEC members, including Saudi Arabia.[9]

The government of Saudi Arabia seeks alternative sources of finance to diversify the economy, provide further employment opportunities, and stimulate technological developments. The Saudi Arabian government has sought to address this situation since 1970; however, their significant efforts to modernize its economy have been stalled by prevailing protectionist attitudes, fostered by the government's desire to maintain national control completely over its economic activities and its need to preserve its traditional cultural, moral and religious values.[10] This approach has failed to provide adequate solutions to address its need for economic diversification and has undermined efforts to attract even more FDI.[11]

However, at the turn of the 21st century, the attitude of the Saudi Arabian government

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[7] Ibid.

[8] See U.S. Department of Energy, Alternative Fuels (2016) <http://ec.europa.eu/clima/policies/international/negotiations/paris/index_en.htm>, accessed on 20 June 2018. See also, European Commission, Climate Action (2016) <http://ec.europa.eu/clima/policies/international/negotiations/paris/index_en.htm>, accessed on 23 April 2017.

[9] World Bank Group, 'The Great Plunge in Oil Prices: Cause, Consequences, and Policy Responses, Development Economics' (2015) Policy Research Note <http://www.worldbank.org/content/dam/Worldbank/Research/PRN01_Mar2015_Oil_Prices.pdf>, accessed on 25 April 2017; World Economic Forum, What's Behind the Drop in Oil Prices? <https://www.weforum.org/agenda/2016/03/what-s-behind-the-drop-in-oil-prices/>, accessed on 25 April 2017.

[10] World Bank Group, ibid.

[11] Supra Santander Trade Portal (n 6).

changed, leading it to subscribe to the general global trend towards encouraging more multinational companies to access Saudi markets and ensuring that the investments of foreign investors are legally protected under Saudi Arabian law. This resulted in considerable changes in the existing legal framework, including the replacement of the Foreign Capital Investment Law of 1979 with the Foreign Investment Law of 2000 and the establishment of the Saudi Arabian General Investment Authority (SAGIA)[12].

Since the turn of the 21st century, there have been more than 36 bilateral investment treaties (BITs) and several multilateral conventions that the government of Saudi Arabia has entered into.[13] Moreover, the government enacted the Arbitration Law (2012), which replaced the old Arbitration Regulation (1983) in an attempt to attract FDI and demonstrate the effectiveness of its legal system to provide legal protection for foreign investments and investors.[14] Whilst the Arbitration Law (2012) is laudable, problems continue to persist for foreign investors, especially those who are not accustomed with the role that traditional religious laws and values, especially *Shari'ah* law, plays in Saudi Arabian legal system.

1.2 The Concept of Foreign Direct Investment

Foreign Direct Investment (FDI) can be defined as capital provided by an investor to acquire ownership of a business unit in a foreign country or transfer from one country to another of material or intangible assets that will be used in that country for the purpose of producing wealth under the entire or partial management of the owner of the assets.[15] This essentially means that FDI involves capital transactions, including the transfer of the ownership of a business in the host country to a foreign investor and the relocation of intangible assets, such

[12] The Foreign Investment Law (2000) was issued by Royal Decree No. M/1, dated 5/1/1421 AH (10 April 2000). This replaced the Foreign Capital Investment Law (1979) that was issued by Royal Decree No. M/4, dated 2/2/1399 AH (1 January 1979).

[13] Saudi Arabian General Investment Authority (SAGIA) <https://www.sagia.gov.sa/Pages/PageNotFoundError.aspx?requestUrl=https://www.sagia.gov.sa/en/Investment-climate/Some-Things-You-Need-To-Know-/Laws/>, accessed on 28 July 2017.

[14] Faris Nesheiwat and Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13(2) Santa Clara Journal of International Law 443, 446.

[15] Uche B Onwe, 'Leveraging Foreign Direct Investment in Nigeria Through International Securitisation' (2015) 1(5) International Journal of Economics and Financial Research 76, 76-84. See also, M Sornarajah, The International Law on Foreign Investment (Cambridge University Press 2010) chapter 2.

as expertise and access to global market, from the foreign investor's home country to the host country, for the production of wealth.[16]

Most international institutions, however, define FDI in quite broad terms, placing emphasis on the investor's management of the business unit or asset in the host country. Thus, Article 1 of the US Model Bilateral Treaty (2004) for example, defines investment as "every asset . . . that has the characteristics of an investment." Similarly, the World Trade Organisation (WTO) Secretariat defines FDI as "when an investor based in one country (the home country) acquires an asset in another country (the host country) with the intent to manage that asset."[17] Furthermore, the Organisation for Economic Co-operation and Development (OECD) defines FDI as "a category for investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise."[18]

This management aspect is the distinguishing factor differentiating FDI from other types of foreign investment, such as portfolio investments in stocks, bonds and other financial instruments.[19] In other words, the investor is an active participator in directing the regular management of the acquired business in FDI, whereas portfolio investments attract passive investors who only earn returns without contributing to the management of the business. Additionally, portfolio investors can easily pull out of an investment and transfer their investment to another portfolio, whereas FDI investors cannot easily withdraw investments from host countries.

It is also important to stress that there are distinctions in the approaches favoured by developed and developing countries in defining FDI.[20] There is a tendency for developed,

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[16] James D Nolan, 'A Comparative Analysis of the Laotian Law in Foreign Investment, the World Bank Guidelines on the Treatment of the Foreign Direct Investment, and Normative Rules of International Law of Foreign Direct Investment' (1998) 15(2) Arizona Journal of International and Comparative Law 663, 663.

[17] WTO News "Trade and Foreign Direct Investment," News release, 9 October 1996 <https://www.wto.org/english/news_e/pres96_e/pr057_e.htm>, accessed on June 20 2018.

[18] OECD, Glossary of Foreign Direct Investment Terms and Definitions (4th edn, OECD Publishing 2008) 11.

[19] Ibid.

[20] Sornarajah (n 15) chapter 2.

capital-exporting countries to broaden the definition and scope of foreign investment, including the addition of equity capital, because such countries desire maximum legal protection for investments incurred by their nationals.[21] This is understandable when one considers the nature of FDI as a long time business involvement in the host state.[22] As such, it is imperative for foreign investors to be aware of applicable rules and regulations in the host state that may affect their business. Conversely, developing capital-importing countries tend to support a narrower definition of FDI so as to minimise their liberalisation obligations in international agreements, and to highlights their desire to retain maximum national sovereign and infrastructure control.

Various scholars and international trade organisations have therefore provided wide-ranging definitions of FDI, varying from simple definitions principally concerned with the investments of foreigners,[23] to more complex definitions encompassing activities that completely cover the value-chain of investment either by equity capital, the creation of new production entities, or controlling profitable assets.[24] These wide-ranging definitions, majority of which were provided in the aftermath of the Second World War, indicate the relationship between globalisation and FDI.

It has been asserted that globalisation was responsible for ensuring the ease of trade and movement of traders, which eventually materialised into FDI.[25] However, FDI existed even before the onset of globalisation.[26] FDI was the core of international trade and therefore a catalyst for globalisation. Thus, it is believed that as FDI played a significant role in integrating several local economies in the global open market, which in turn modernised national economies, which consequently led to economic boosts.[27] Also, FDI has assisted

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[21] Ibid.

[22] United Nations Conference on Trade and Development (UNCTAD), 'World Investment Report 2007: Transnational Corporations, Extractive Industries and Development' (2007) 245 <http://unctad.org/en/Docs/wir2007_en.pdf>, accessed on 16 January 2018.

[23] Fath EA El Shiekh, The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia (2nd edn, Cambridge, Cambridge University Press 2003) 26.

[24] UNCTAD, Series on issues of International Investment Agreements, Scope and Definition (UNCTAD 1999).

[25] OECD, Foreign Direct Investment and International Trade: Complements or Substitutes? Directorate for Science, Technology and Industry, Paris, France, 14-15 October 1993< http://dx.doi.org/10.1787/788565713012>, accessed 29 December 2017.

[26] Ibid.

[27] Petr Hlaváček and Petra Olšová, 'Impact of Globalization and Foreign Direct Investment on the Regional Economies: The Case of the Czech Republic' (2011) <http://conference.osu.eu/globalization/publ2011/70-75_Hlavacek-Olsova.pdf>, accessed on 29 December 2017. See also, John H Dunning and Phillipe Gugler, Foreign Direct Investment, Location and Competitiveness (Elsevier 2008) 17.

countries worldwide, especially developing countries, to enter into and effectively compete in the global open market.[28] However, this can negatively and positively impact host states and foreign investors, particularly Transnational Corporations (TNCs). On the one hand, FDI can positively affect national economies because it provides access to tangible and intangible assets that help liberalise and modernise national economies i.e. host state economy. On the other hand, FDI can negatively affect host state economies. For example, TNCs can abuse and exploit the rights of host states (e.g. human rights) in the pursuit of resources. Nonetheless, the negative and positive impact of FDI depends on the policy of the host state in question.

1.3 The Importance of the Study

The Kingdom of Saudi Arabia has been blessed with vast reserves of oil and gas.[29] However, there has been a realisation, especially by the Saudi government, that these reserves are not inexhaustible,[30] and as such, alternative economic sources must be pursued. For several years, Saudi Arabia has been developing an alternative economy by seeking and attracting foreign investors to the Kingdom.[31] As such, the Kingdom has become one of the most largest growing economies in the world.[32] For this process to continue, foreign investors need to be assured that there are trustworthy legal processes that secure their numerous investments in Saudi Arabia, as the host State.[33] However, it is shown here that there is uncertainty in the way in which *Shari'ah* law is implemented, as well as actual and potential conflicts between the laws in place in Saudi Arabia and multilateral treaties (MITs) that govern FDI. Saudi Arabia is as much a subject of globalisation as any other sovereign State and it must, therefore, be wise as to the ways in which it continues to attract FDI. Equally, foreign investors need to be cautious as to investing in a sovereign territory that carries with it not merely commercial, political, and secular legal risks to foreign investments but also

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[28] Sornarajah (n 15).

[29] Adne Cappelen and Robin Choudhury (2000) 'The Future of the Saudi Arabian Economy, Possible Effects on the World Oil Market' (2000) <https://www.ssb.no/a/publikasjoner/pdf/rapp_200007_en/rapp_200007_en.pdf>, accessed on 15 June 2018.

[30] Ali Al-Sadiq, 'Economic Convergence in Saudi Arabia" (2014) <http://www.brookings.edu/~/media/Research/Files/Interactives/2014/thinktank20/chapters/tt20-saudia-arabia-economic-convergence-al-sadiq.pdf?la=en>, accessed on 15 June 2018.

[31] The Saudi Arabian General Investment Authorities <https://www.sagia.gov.sa/en/Investment-climate/Some-Things-You-Need-To-Know-/Laws/>, accessed on 29 December 2017.

[32] Ibid.

[33] Hussein N Agil, Investment Law in Saudi Arabia: Restrictions and Opportunities. (Unpublished Dissertation, Victoria University 2013) 26.

theological jurisprudence risks.[34] There is, therefore, a perceived threat to foreign investors both to investment and to dispute resolution methods in and with regard to Saudi Arabia.[35] However, these threats might be reduced by comprehensive analysis of the theological and philosophical underpinnings of the rules of law applicable in the Kingdom to investment and dispute resolution, with specific focus on the role of arbitration.

As such, this thesis seeks to investigate FDI and investment arbitration issues arising from *Shari'ah* law and Arabic philosophy in the context of Saudi Arabia's future. The importance of this research is that it seeks to unveil shortcomings of the legal system in Saudi Arabia, especially its dispute resolution methods and the ambiguity of its investment law that may hinder the Saudi's government efforts to encourage FDI within its territory. This research also targets foreign investors themselves as it seeks to aid individuals and companies that aim to invest in the region by ensuring that potential risks stemming from theological jurisprudence, as well as legal risks, are investigated.

The analysis of investment in the Saudi Arabian environment is also crucial to academics, capital exporting countries, and international organisations with an interest in Saudi Arabia. This study contributes to a clearer understanding of the legal framework for conducting business by non-Saudi investors in Saudi Arabia and to a better appreciation of difficulties in pursuing such investments. It is important that the Saudi Arabian government and foreign investors are aware of the extent to which the legal framework provides protection for investments, especially foreign investments, in the country and also the extent to which such a framework is actually effectively enforceable. It is hoped that this study will encourage more foreign investors to trust the legal system in Saudi Arabia and invest further in the country.

The motive for carrying this research stems from the absence of recent and comprehensive work that address the subject. There are few legal studies that have analysed the FDI

[34] See Mohamed A Ramady, Political, Economic and Financial Country Risk: Analysis of the Gulf Cooperation Council (Springer 2014) 67-93.
[35] Faisal Alqahtani, Legal Protection of Foreign Direct Investment in Saudi Arabia. (Unpublished Dissertation, University of Newcastle 2009) 29.

environment in Saudi Arabia[36]. Thus far, most research conducted have focused on the oil industry and provided mainly descriptive findings[37]. The few studies conducted on foreign investment examined the legal framework before the enactment of the Foreign Investment Law (2000) and Arbitration Law (2012)[38]. As such, this thesis intends to fill this gap and contribute to the development of more effective regulations controlling and protecting foreign investment in the Kingdom of Saudi Arabia. It is hoped that this study will provide a greater insight into the reality of foreign investment in Saudi Arabia, which may in turn help allay apprehension felt by foreign investors seeking to invest in the country.

1.4 Rationale of the Study

Saudi Arabia is desirable for foreign investors for several reasons. The main reason stems from the fact that Saudi Arabia is a key leader in the Middle East. This is especially appealing when one considers the richness of its natural resources, including oil. As such, foreign investors and TNCs invest in Saudi Arabia to exploit the natural resources. Consequently, laws governing the application of FDI are created to provide favourable conditions that will attract more FDI to Saudi Arabia. However, the lure of the Saudi Arabian economy is often hampered by legal risks, the bureaucratic nature of the governmental bodies and public concerns of the erosion of the traditional values, its need to ensure continuation of cultural and religious (including religion and law), and control over its resources. This is especially difficult when one considers that Muslim-majority countries encounter particular problems intrinsic in relationships that attempt to incorporate FDI policies into Islamic legal and political systems while attempting to safeguard the inherent nature of the country. All

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[36] See Mohammed Al-Sewilem (2012), The Legal Framework for Foreign Direct Investment in the Kingdom of Saudi Arabi: Theory and Practice. Also, Al-Mohaidib, M (1997) Arbitration as a means of setting commercial disputes (national and international) with special reference to the Kingdom of Saudi Arabia.

[37] See HE Ali Al-Naimi (2006) Saudi Arbia Oil and Gas Investment Outlook and Strategies. Third OPEC International Seminar, Vienna). Also, Alkahtani F (2009) Legal Protection of Foreign Direct Investment In Saudi Arabia

[38] Al-Samaan Y, 'The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia', (1994) 9(3) Arab Law Quarterly 217. Also, Al-Jarba M (2001) Commercial Arbitration in Islamic Jurisprudence: A study of its role in the Saudi Arabia Context.

possibilities of reinterpreting Islamic law are dependent on the attitude of religious establishments, as well as the level of commitment and willingness on the part of the Saudi Arabian government to instigate such changes. This is especially important when one considers the status of Saudi Arabia as a leader in the MENA region. In other words, Saudi Arabia ought to be setting a precedent for other Muslim-majority hosts of FDI to integrate FDI into an Islamic legal system. In this light, the Saudi Arabian government has been forced to balance its need to amend its legal environment with the need to protect traditional values whilst ensuring that foreign investors are not deterred from initially investing or further investing in the country. Nonetheless, all these reasons can deter new investors or further investment of existing investors.

Consequently, on the 10th of April 2000, the Saudi government enacted a new Foreign Investment Law in order to encourage FDI within its territory. This sought to usher in a new era that reduced the country's excessive dependence on oil. This need to ease the country's economic dependence on oil was further fostered by the global search for alternative energy sources, especially in the context of the Paris Climate Change Summit in December 2015.[39] However, the Saudi government's desire to control its natural resources and its concern for ensuring that the Islamic heritage of the country is protected led to the amendment of existing investment law that did not affect the traditional values of the nation while it sought to encourage foreign investors at the same time. Nonetheless, the unfettered benefits of FDI (i.e. creation of jobs, enhancing technological developments, and stimulating funds for new enterprises) emphasises the need to reconcile such differences for Saudi Arabia to benefit fully from FDI.

This study investigates the environment of FDI in Saudi Arabia in the aftermath of the enactment of the Foreign Investment Law 2000 and the enactment of the new arbitration regulation in 2012. Reference to the background of the enactment of foreign investment law is made in analysing the law's effectiveness. Also, the study critically analyses whether the environment of FDI in Saudi Arabia is attracting foreign investment. This study contains an analysis of the legal framework in Saudi Arabia and determines whether the administrative prospect facilitates foreign investment or there are still barriers deterring foreign investors. Furthermore, this study addresses the nature of early Islamic law towards foreign investment

[39] See Ashok Swain and Anders Jagerskog, Emerging Security Threats in the Middle East: The Impact of Climate Change (Rowan and Littlefield 2016) 111-112.

and the potential conflicts between *Shari'ah* Law in Saudi Arabia and the modern Foreign Investment Law. Also, the recognition of arbitration as an alternative dispute resolution method is addressed with its potential conflict with the Islamic nature of the legal system in the country.

1.5 Literature Review

The first reference to *Shari'ah* law in the opinion of the International Court of Justice (ICJ) appeared in a case on the delineation of the continental shelf of the North Sea between Germany, the Netherlands, and Denmark.[40] After the ICJ's decision was issued,[41] Judge Fouad Ammoun wrote an opinion that agreed with the outcome but deplored the fact that the ICJ failed to refer to Islamic legal theory in discussing relevant equitable principles.[42] He believed that this would have provided a stronger justification of the decision and enhanced its legitimacy. Given that Germany had not ratified the Geneva Convention on the Continental Shelf of 1958, the ICJ turned to equitable principles to determine how boundaries should be drawn, and the ICJ applied the principles in a way "consistent with the legal philosophies of all the civilised nations of the world."[43] Judge Ammoun therefore took exception to the fact that Islamic legal philosophies were not considered among the 'legal philosophies of all the civilised nations of the world.' He pointed out that Islamic legal tradition is largely based on the principle of equity.[44]

Clark Lombardi however argued that it was unclear why Judge Ammoun strongly believed that modern international legal norms are compatible with Islamic legal norms.[45] He observed that the Judge's command of traditional European legal sources was more reliable than his command of Islamic sources of law. Hence, the Judge analysed the Greco-Roman origins of the concept of equity and how the concept has evolved over the centuries in the West, but regarding Islamic law, he was only able to cite a *Qur'anic* verse that was very difficult to interpret.[46] Lombardi noted further that Judge Ammoun failed to explain why the majority of Muslims do not follow the Hanafi interpretations of the *Qur'an* (which he preferred), and

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[40] Clark B Lombardi, 'Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis' (2007) 8(1) Journal of International Law 85, 96.
[41] North Sea Continental Shelf 1969 ICJ 3.
[42] Ibid, 131-143.
[43] Ibid, 40.
[44] Ibid, 141-143.
[45] Clark B Lombardi (n 37) 98-99.
[46] Ibid.

overlooked the fact that many Muslims would have rejected the ICJ's interpretation of the *Shari'ah* because the ICJ judges did not have a strong Islamic legal training.[47] Lombardi then submitted that there is hardly any compelling evidence that Islamic legal norms have contributed towards the development of international legal norms or that both sets of norms are consistent.[48]

Lombardi's conclusion failed to take into account the evidence provided by Judge Weeramantry, despite the fact that the latter was cited by Lombardi.[49] Before his appointment to the ICJ, Weeramantry had argued cogently that Islamic legal norms had a strong "potential for assisting towards a juster world in the future."[50] He noted that many international lawyers in the West were ignorant about the sophistication of the Islamic legal tradition and the ways in which the tradition might help enrich international law. He also pointed out that if international lawyers examined the *Shari'ah* closely, they would note the high degree of intercommunication between Western and Islamic legal cultures over the centuries, as well as the congruence of the two legal cultures on some key principles of international law such as fairness and justice.[51]

In the same vein, Bulliet examined the common roots of Western and Islamic cultures and observed that "their confrontation today arises not from essential differences, but from a long and wilful determination to deny their kinship."[52] The analysis focused on the congruence of historical and political ideologies. Quraishi went even further and demonstrated high levels of similarity in the legal discourses.[53] He argued that similar methods of legal interpretation have guided jurisprudential debates in Islamic and American law. These include historical understanding, literalism, and reference to ultimate goal or underlying purpose.[54] He noted that in both legal cultures, the most difficult challenge was determining how human agents could consistently interpret and apply edicts without imposing their own personal opinions.

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[47] Ibid, 118.
[48] Ibid.
[49] Ibid, 103-105.
[50] Christopher Weeramantry, Islamic Jurisprudence: An International Perspective (St Martin 1988) xv.
[51] Ibid, 166-169.
[52] Richard W Bulliet, The Case for Islamo-Christian Civilization (Columbia University Press 2004) vii.
[53] Asifa Quraishi, 'Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence' (2006) 28(1) Cardozo Law Review 67, 67-122.
[54] Ibid.

Given the above similarities, it may be important to ask why foreign lawyers and investors continue to eschew the *Shari'ah* as the relevant law to settle investment disputes.[55] Powella and Rickar note that investors are frequently advised to avoid dispute settlement under Islamic law and increasingly, contracts provide that disputes will be deferred to neutral international arbitration bodies such as the International Chamber of Commerce (ICC), International Centre for Dispute Resolution (ICDR), and London Court of International Arbitration.[56] It is only logical because these international bodies seek to minimise the uncertainties related to dispute settlement in domestic courts. However, investors from the West are more likely to avoid domestic courts in Islamic countries because contract enforcement in the latter is much weaker than in non-Islamic Western countries.[57] Is it simply a question of perception due to the fact that the *Shari'ah* as law was marginalised during the colonial period?[58] Or it is simply because Islamic and Western legal cultures are yet to interface and learn and negotiate differences in a manner removed from ignorant and hateful rhetoric.[59]

It has been established that "economic success will depend on whether the parties can create a constructive working relationship and manage the conflicts that are certain to arise."[60] It has also been established that in the first Millennium, the economy in the Middle East in general and the Arab peninsula as a part of the Middle East was graced by prosperity as the contractual parties from the region with other commercial parties from other regions were familiar with the contractual agreements due to same level of organisational development in commercial and legal institutions.[61] However, after the first Millennium, the economies of the regional countries, of which one of them is what is now Saudi Arabia, fell behind those of the

[55] See George Khoukaz, 'Shari'ah Law and International Commercial Arbitration: The Need for An Intra-Islamic Arbitral Institution' (2017) Journal of Dispute Resolution 181, 189-191.
[56] Emilia Justyna Powella and Stephanie J Rickar, 'International Trade and Domestic Legal Systems: Examining the Impact of Islamic Law' (2010) 36 International Interactions 335, 352.
[57] Ibid, 348.
[58] Muhammad Khalid Masud, 'Teaching of Islamic Law and Shari'ah: A Critical Evaluation of the Present and Prospects for the Future' (2005) 44(2) Islamic Studies 165, 165. See also, Edward Said who argued that all knowledge about what is understood in the West as the Orient was blemished with colonial aspirations. Edward Said, Orientalism (Pantheon Books 1978) 29-110.
[59] Carlo A Pedrioli, 'Constructing the Other: US Muslims, Anti-Shari'ah Law, and the Constitutional Consequences of Volatile Intercultural Rhetoric' (2012) 22 Southern California Interdisciplinary Law Journal 65, 108.
[60] Christian Buhring-Uhle, Arbitration and Mediation in International Business (Kluwer Law International, London 2006) 5.
[61] Timur Kuran, The Long Divergence, How Islamic Law Held Back the Middle East. (Princeton University Press, Princeton and Oxford 2011) 4.

developed countries because of the lack of modern economic institutions, specifically social services.[62]

However, it is argued here that the root of the problem is the interpretation of the *Shari'ah* by Islamic scholars and authorities. It is clear that the prophet Muhammed (PBUH), as a very successful trader,[63] would not have favoured doctrine or arbitrary textualism,[64] as well as policies that stagnate the economy if he was alive. Younes noted that Islamic legal theorists have over the centuries adopted a textual mode of interpretation that reduced the sacred texts of the *Qur'an* to 'unit-based' edicts that are then unilaterally described and applied.[65] He argued that this "hermeneutical innovation has made 'medieval Islamic pragmatics' not completely free from the fetters of rigidity that characterise parts of the Islamic legal theory."[66] He then stated that the flexibility of the Islamic legal system has been adversely affected to the extent that Islamic legal texts are misconstrued in the modern context. Hence, the methods of interpretation used by contemporary religious scholars simply "perpetuate an unmitigated version of *fiqh*, ignoring wittingly or otherwise – some legal doctrines such as *al-maslahah al-murslah* (public interest), *al-urf* (custom), and *al-istihsan* (juristic preference) which have contributed to investing Islamic law with universality."[67]

In the same vein, Emon argued that the contention that the *Shari'ah* is fundamentally rigid and different from the law in Western countries reflects the findings of Orientalist legal scholars of the late 19th and early 20th centuries.[68] These scholars advised governments of Western empires that to understand Muslims, Islam had to be reduced to what was expressly stated in specific authoritative texts.[69] This is supported by Said's depiction of the internal inconsistency of Orientalism's ideas about the Orient.[70] The reliance on Orientalist scholars

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[62] Ibid
[63] Yusuf Islam, The Life of The Last Prophet (Darussalam Publishers & Distributors 1995) 3.
[64] The term 'textualism' was first used by Mark Pattison in the middle of the 19th century to criticise what he saw as the "arbitrary textualism of Puritan divines." See Mark Pattison, 'Learning in the Church of England' in Henry Nettleship (ed), Essays by the Late Mark Pattison (Clarendon Press 1889) 236. The term was later on adopted in the United States especially and used interchangeably with intentionalism to describe the facets of originalism in the interpretation of the Constitution. See Caleb Nelson, 'What is Textualism?' (2005) 91(2) Virginia Law Review 347, 347-348.
[65] Soualhi Younes, 'Islamic Legal Hermeneutics: The Context and Adequacy of Interpretation in Modern Islamic Discourse' (2002) 41(4) Islamic Studies 585, 585-586.
[66] Ibid.
[67] Ibid.
[68] Anver M Emon, 'Conceiving Islamic Law in a Pluralist Society: History, Politics and Multicultural Jurisprudence' (2006) Singapore Journal of Legal Studies 331, 339-340.
[69] Ibid.
[70] Orientalism in this context implies the Western cultural investment in the East, while Orient is a constituted entity in the Western mind that may be contrasted from the empirical Orient. See Edward Said (n 79) 29-110.

therefore led to the phenomenon of textual experts who interpret the *Qur'an* and the Hadith according to the ordinary meaning of the language used. However, the description of the interpretation by Islamic scholars as textualism differs from Younes' description of the method of interpretation as "hermeneutical innovation."[71] Nonetheless, it is argued here that both descriptions are justified given that the rigid interpretation of the *Shari'ah* involves ascertaining the meaning of text on the grounds that the semantic context is fixed but then allowing the interpreter's personal views, pre-suppositions and preunderstandings (hermeneutics) to fill in the gaps. This is due to the fact that the bulk of the legal rulings in the *Qur'an* and Hadith is not definitive and requires legal reasoning in order to be applied.[72]

1.6 Hypothesis

In light of the above, the hypothesis that was tested in this study is that the *Shari'ah* is fundamentally flexible, and the rigid interpretation subsequently imposed by doctrinaire conservatives explains why the use of the *Shari'ah* to settle disputes constitutes an obstacle to FDI in Saudi Arabia.

The argument that the *Shari'ah* is fundamentally flexible is largely based on the findings of three commentators:

> Younes who argued that the hermeneutical innovation of Islamic legal theory has made medieval Islamic pragmatics not completely free from the fetters of rigidity that characterise parts of the Islamic legal theory.[73]
>
> Weeramantry who demonstrated that if international lawyers examine the *Shari'ah* closely, they would note the high degree of intercommunication between Western and Islamic legal cultures over the centuries, as well as the congruence of the two legal cultures on some key principles of international law such as fairness and justice.[74]
>
> Alwazna who argued that the importance of the interpretation of the *Shari'ah* lies in the way in which the scholar or judge interprets the law.[75] Thus, a Quarnic verse

[71] Soualhi Younes (n 62) 585.
[72] Rafat Y Alwazna, 'Islamic Law: Its Sources, Interpretation and the Translation of It into Laws Written in English' (2016) 29(2) International Journal for the Semiotics of Law 251, 253.
[73] Soualhi Younes (n 83) 585.
[74] Christopher Weeramantry (n 70) 160.
[75] Rafat Y Alwazna (n 89) 253.

cannot be interpreted in insolation. The scholar or judge must take into account the legal and linguistic contexts, as well as the events that occurred around the revelation.

The contention that the rigid interpretation of the *Shari'ah* was subsequently imposed by doctrinaire conservatives is largely based on the findings of three commentators:

> Malik who demonstrated that after the 13th century, there was a growing influential movement, led by conservative thinkers such as Al-Ghazali, that promoted Muslim insularity and shunned the rationalism of the Islamic Golden Age.[76]
>
> Rubin who demonstrated that the conservative jurists in the Ottoman Empire and Mecca who legitimised the power of the elite became powerful to the extent that many rulers were reluctant to challenge their rulings, even when the rulings negatively impacted on trade.[77]
>
> Zaman who argued that the growing conservatism and rigidity of Islamic jurists may be explained by the rise of the *Ulama* or scholars who believed God's will had been completely revealed in the *Qur'an*, but only the *Ulama* had the capacity of its interpretation.[78] Also, the *Ulama* did no use a codified system and often interpreted the *Qur'an* and the Hadith by filling the gaps with their personal views, pre-suppositions and preunderstandings.

In light of the above, the Researcher tested the idea that the legal uncertainty caused by the wide discretion enjoyed by adjudicators deters FDI in Saudi Arabia, and FDI may realise its full potential if the modernisation of the laws is combined with what the Prophet recommended or Islamic practices before the 14th century. The Researcher's inquiry was guided by five main studies. They were conducted by Sayen, Khoukaz, Alqudah, Gemmell and Rizwan and depict the challenges faced by both Islamic and non-Islamic societies when using international commercial arbitration as a cross border mechanism to apply *Shari'ah* principles to resolve disputes involving non-Islamic entities or nations.

Sayen generally argued that a more constructive approach was to develop the Saudi legal system by using procedures drawn from the rich legacy of *Shari'ah* scholarship rather than

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[76] Ken Malik, The Quest for a Moral Compass: A Global History of Ethics (Atlantic 2014) 56. Some key developments in the Islamic Golden Age are discussed in chapter 2.

[77] Jared Rubin, Rulers, Religion and Riches: Why the West Got Rich (Cambridge University Press 2009) 13.

[78] Muhammad Qasim Zaman, 'The Ulama and Contestations on Religious Authority' in Muhammad Khalid Masud, Armando Salvatore and Martin van Bruinesen (eds), Islam and Modernity: Key Issues and Debates (University of Edinburgh Press 2009) 206-207.

exert pressure on the Saudi government to adopt modern or Western models.[79] Khoukaz analysed the international arbitration system from a *Shari'ah* perspective and concluded that the "dark and pessimistic depiction" of the conflict between both mechanisms is unwarranted because the concept of dispute resolution has been recognised in the Middle East for more than a millennium, and the *Shari'ah* allows for the evolution of legal rules in light of the changing circumstances.[80] He argues further that the Prophet resisted the idea of codifying Islamic law because he wanted to preserve the system's fundamental character as an assemblage of flexible principles.[81] It follows that the *Shari'ah* ought to be suitable for all times because it has the requisite degree of flexibility.

In the same vein, Alqudah demonstrates that the *Shari'ah* is sufficiently flexible to accommodate Western or modern international arbitration practices.[82] He places emphasis on the UNCITRAL Model Law and five pillars of arbitration, namely the agreement, choice of arbitrators, conduct of the proceeding, applicable substantive law, and the recognition and enforcement of the arbitral award. He then concludes that the reluctance of many Muslim countries to adopt international practices may be explained by the negative depiction of the *Shari'ah* in Western societies as an impediment to free trade and arbitration, as well as the bad experience some Muslim countries have had with arbitral tribunals.[83] He believes arbitration in Muslim countries may realise its full potential if the modernisation of the laws is combined with a better understanding of the *Shari'ah* by the Western legal community.[84] Given that Alqudah did not develop this contention further, I believed it was a hypothesis that needed to be tested.

Gemmell raises a pertinent point which may also explain in part the negative depiction of the *Shari'ah* as an archaic system. He notes that "it is anomalous that modern commercial arbitration in the Islamic Middle East stands in stark contrast to the endorsements given to arbitration by both the Prophet and the *Shari'ah*."[85] Thus, what is presented as the current

[79] George Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (1987) 9(2) University of Pennsylvania Journal of International Business Law 211, 248.
[80] Khoukaz (n 52) 190-191.
[81] Ibid.
[82] Mutasim Ahmad Alqudah, 'The Impact of Shari'ah on the Acceptance of International Commercial Arbitration in the Countries of the Gulf Cooperation Council' (2017) 20(1) Journal of Legal, Ethical and Regulatory Issues 1, 3-6.
[83] Ibid, 12-14.
[84] Ibid.
[85] Arthur J Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2006) 5(1) Santa Clara Journal of International Law 169, 192.

Shari'ah stance is at variance with what the Prophet recommended. For instance, the Saudi Hanbali approach which has been adapted by the Saudi Judicial system forbids settle disputes by non-sharia law in any Islamic countries, also, some arbitrary conditions must be applied appointing judges and arbitrators to settle the disputes. However, Gemmell fails to justify the contention or even develop it further since he later on notes that "while the traditions of the past provide comfort to believers, it is imperative to be cognizant of the present state of the world. In the ever-shrinking commercial world, religious-civil bifurcation would be an attractive starting point to provide comfort to the commercial business world that there was legal determinacy in the Islamic Middle Eastern arbitral process."[86] The religious-civil bifurcation implies using private international law or international standards to fill in doctrinal gaps in the *Shari'ah*. Nonetheless, the fact that Gemmell recognises that there are dissimilarities between what is presented as the current *Shari'ah* stance and what the Prophet recommended, contradicts the conclusion that the *Shari'ah* simply represents "traditions of the past." It is such negative depiction of the *Shari'ah* that prevents many scholars from taking note of the fact that the *Shari'ah* is suitable for all times because it has the requisite degree of flexibility.

It is also the negative depiction of the *Shari'ah* that in part motivates Rizwan's conclusion that where an arbitration agreement requires the arbitral tribunal to apply Islamic law, the tribunal faces serious challenges because there are multiple schools of Islamic law with diverse interpretations, the concept of binding precedent is not recognised, and there is no choice-of-law rule.[87] As such, it was also important to demonstrate that the negative perception of the *Shari'ah* as an impediment to free trade and international commercial arbitration is largely due to a misunderstanding of the law. This perception may be changed if it is recognised that commercial arbitration as understood by some scholars of the Islamic Middle East, such as the Hanbali scholars in Saudi Arabia, stands in stark contrast to the endorsements given to arbitration by the Qur'an and the Sunnah, and the *Shari'ah* allows for the evolution of legal rules in light of changing circumstances. It is in light of the above findings that the Researcher formulated the hypothesis that was tested in this research.

[86] Ibid.

[87] Saad U Rizwan, 'Foreseeable Issues and Hard Questions: The Implications of US Courts Recognising and Enforcing Foreign Arbitral Awards Applying Islamic Law under the New York Convention' (2013) 98 Cornell Law Review 493, 503-504.

The hypothesis was further tested in the field. Twenty-five participants were asked questions related to the hypothesis and the Researcher explored all the meanings that the participants developed. The results were triangulated with the data derived from the primary research.

1.1 1.7 Aim and Research Questions

This study seeks to determine whether the government of Saudi Arabia has not been able to attract more FDI is because of applying Sharia law and the Sharia law is strict by its nature or that the Sharia is flexible but the rigidity of the interpretation of Sharia due to different factors such as: social, economic and political factors is the reason. That will lead also to the question that whether the government of Saudi Arabia can strike a balance between protecting the Kingdom's Islamic heritage and protecting the interests of foreign investors. The study analyses trade and the role of arbitration as a viable method of dispute resolution under the rule of Sharia law to examine its flexibility, and then assesses foreign investment environment in Saudi Arabia and demonstrates how the Saudi government might encourage more foreign investors to trust the legal system in Saudi Arabia. Also, it examines Saudi history, secular and theological laws, in the context of foreign investment and dispute resolution. Emphasis is placed on the extent to which the principles of the *Shari'ah* allow foreign investments and the recognition of arbitration as an alternative dispute settlement mechanism to litigation in *Shari'ah* courts. This study therefore assesses the legal framework for resolving disputes and shows how this framework may be enhanced to develop, foster and protect FDI in Saudi Arabia.

In order to test the above hypothesis and achieve the above aim, this study addresses the following questions:

1) *To what extent are foreign investors in Saudi law protected through relevant principles of Islamic law, international conventions and bilateral and multilateral investment treaties?*
2) *What are the legal factors deterring foreign investment in Saudi Arabia? What mechanisms can Saudi Arabia implement to eliminate the factors or mitigate their effects in order to encourage foreign investment?*
3) *How can arbitration in Saudi Arabia be rendered into a more favourable model for the settlement of disputes in the Kingdom?*

4) *Is the Shari'ah (as applied in Saudi Arabia) sufficiently flexible to accommodate modern international investment and arbitration practices?*

The first question related to the protection foreign investors in Saudi Arabia is important because of the pressure exerted on Saudi authorities to adhere closely to traditional Islamic values while applying conventional legislative standards for the protection of foreign investors. This dauting challenge that the Saudi government must confront was described by Sayen more than three decades ago:

> Give the Western business community confidence that claims can be settled (reasonably quickly and fairly, impartially and predictably) under rules at least somewhat familiar to this community, while not straying too far from the rules that historically governed arbitration, or tahkim under the Shari'a.[88]

This challenge is yet to be met. Thus, it is important to determine the extent to which Saudi authorities may enact investment and arbitration rules that are *Shari'ah*-compliant and meet the requirements of the international business community. This is achieved in chapters 5, 6, 7 and 8. These chapters also assess how foreign investors in Saudi Arabia may settle disputes with the State and local private entities. Emphasis is placed on the safeguards in the Foreign Investment Law of 2000, the Arbitration Law of 2012, and the Vision 2030 programme. With regard to the latter, it is important to determine whether its objectives are achievable under the *Shari'ah*.

The second question related to the factors deterring FDI in Saudi Arabia is important because although the government of Saudi Arabia has adopted a free trade policy and reformed its investment regime, the flow of FDI has been below expectation.[89] Beyond economic factors, there are specific legal impediments that must be addressed. It is argued here that the most important of these impediments is the misrepresentation of Islam as antithetical to free trade due to the rigid interpretation by conservative doctrinaires as well as the absence of precedents and codes.

The third question related to arbitration in Saudi Arabia is important because the local social norms that influenced the development of rules governing free trade and arbitration in Saudi Arabia may enhance the understanding and acceptance of Islam in non-Islamic legal and

[88] Sayen, (n 76) 211.
[89] See chapter 6.

investment communities. Achieving this objective involves determining how different communities in Saudi Arabia perceive arbitration and whether they prefer this form of dispute settlement to litigation in Saudi courts. In chapter 4, emphasis is placed on the different perceptions of Sunni schools of thought in order to show the internal inconsistencies and paradoxes within the Muslim society. Also, in chapter 8, the opinions of adjudicators, scholars, investors and reporters in Saudi Arabia are captured in order to determine whether there is a disconnect between locals and foreigners regarding the appreciation of the relationship between investment and arbitration laws and the *Shari'ah* in Saudi Arabia.

The fourth question related to the flexibility of the *Shari'ah* is important because the *Shari'ah* is commonly misrepresented as a system that is directly opposed to free trade. It is important to show that in the early Islamic period, there was a relatively unrestricted operation of markets for goods, labour, and capital, and the Prophet had in part developed Islam to promote trade. Thus, foreign investors are more likely to be motivated when shown that not only does the *Shari'ah* favour free trade, but also economic efficiency and private property have always been very important in Islam. The analysis of the historical context in chapter 2 also helps to explain why the *Shari'ah* principles conducive to business concerns and *Shari'ah*-based arbitration subsequently diverted from what may be described as the Western conception of arbitration.

1.2 1.8 Research Methodology

Research can be regarded as a form of science in that it enables problems of data collection to be resolved by adopting systematic techniques and steps.[90] In this sense, legal research in the academic domain is a newer phenomenon, but its methodological outputs can nevertheless be

[90] Noel Perez, 'Research Methodology: An example in a Real Project' (2009) Laboratory of Optical and Experimental Machines, Institution of Mechanical Engineering and Industrial Management <http://www.map.edu.pt/i/2008/map-i-research-methods-workshop-2009/NoelPerez.pdf/view>, accessed 24 April 2017.

considered as providing "credible research contributions."[91] In very broad terms, this research required the collection of primary and secondary data, thus, it was both empirical and doctrinal. In order to test the hypothesis, answer the research questions and achieve the aim of the study, the research methodology for this study relies initially on primary sources (the Sharia sources, Saudi legislation and regulations), and secondary data sources obtained from journal articles, textbooks and relevant international bodies and government publications pertaining to FDI and Islamic law in Saudi Arabia. It also analyses previous studies on the history and philosophy of the *Shari'ah*. In the second stage, a mixed methods approach was used to collect empirical data from some important stakeholders affected by and those affecting the direction of FDI in Saudi Arabia. Each method is discussed below, providing reasons that motivated their use for this research.

1.8.1 Doctrinal Research

The doctrinal research mainly took place in law libraries.[92] This involved locating, reading, and analysing legal materials comprising municipal law and Islamic law documents; legislation, court reports, historical and philosophical records; and secondary legal sources (books and articles) in relation to investment and dispute resolution laws of Saudi Arabia and, perhaps, even of the capital exporting States of Britain, the USA and Canada. It required the study of the sources of Sharia and its development through history and elaborating the Sharia sources such as: Qur'an, Sunnah and Ijma'a and Qiyas.[93]Also, the it is crucial to study the Islamic law principles and foundation such as Usual Al Figh and Qawaed Al Islam which provide the rulers and jurists the norms how to seek for the adequate legal rules for any problem or fatwa[94].

It also required the study of international materials such as the texts of conventions and treaties that Saudi Arabia has ratified.[95] These resources were found in several libraries and

[91] Paul Chynoweth, 'Legal Research in the Built Environment: A Methodological Framework' (2008) <http://usir.salford.ac.uk/12467/1/legal_research.pdf>, accessed 24 April 2017.

[92] Denis Pearce, Enid Campbell and Don Harding, A Discipline Assessment for the Commonwealth Tertiary Education Commission (Australian Law Schools 1987) 6. See also, Terry Hutchinson and Nigel Duncan, 'Defining What We Do: Doctrinal Legal Research' (2012) 17(1) Deakin Law Review 83, 83-119.

[93] It has been discussed in further details in Chapter 2 and 3. See page 86.

[94] Yusoff, R, Kamdari, N. 'Understanding Usual AL-FIQH and its applicationAnalysis for SUKUK (2017). (Research Gate, Conference Paper)

[95] August Reinisch, 'Necessity in Investment Arbitration' (2010) 14 Netherlands Yearbook of International Law 137, 137-158. See also, Mohammed Ismail, International Investment Arbitration: Lessons from Development in the MENA Region (Routledge 2013).

on official websites such as: Saudi Digital Library, King Fahad National Library, and the Bureau of Experts at the Council of Ministers,[96] Ministry of Justice (Judgment records),[97] Ministry of Commerce,[98] and Saudi Arabian General Investment Authority.[99] An analytical approach to the doctrinal research allowed the analysis of the FDI environment and a deep historical analysis of *Shari'ah* law, and Arab history and philosophy in regard to foreigners, investment, and dispute resolution.

Difficulties were encountered in the doctrinal phase of the research because of the unavailability and poor quality of primary sources such as ancient Arab history and Arabic philosophy documents; the shortage of reliable secondary sources (especially publications by Saudi Arabian commentators); and the unavailability of some relevant case reports such as the decisions of arbitral tribunals.

1.8.2 Empirical Research

The empirical approach is a way of gathering data by direct and non-direct observation. Direct observation was appropriate to this research because it was necessary to obtain the opinions of individuals who might be able to influence the *Shari'ah* is interpreted in Saudi Arabia in regard to the protection of flexibility nature of Sharia rules (Ahkam) of arbitration to be compatible with the international standered in order to encourage more foreign investment to the coutry as the foreign investors may feel protected (particularly from non-Muslim States) and the enforcement arbitration awards. So, this is the reason of choosing the participants to this research very carefully, as the participants mainly were from the legislative power such as Shura councils members, the council of Experts Authority members and the Coucil of Senior Ulema and Judges. The in Direct observation took the form of interviews based on pre-planned sessions in which open questions were asked to twenty-five participants.

Semi-structured interviews were also carried out with the following participants: senior executives of the Saudi Arabian General Investment Authority, *Shari'ah* scholars, Dean of a

[96] Bureau of Experts at the Council of Ministers <http://www.boe.gov.sa/MainLaws.aspx?lang=en>, accessed 20 June 2018.
[97] Previous Judgment Record, The Ministry of Justice <http://www.moj.gov.sa/ar-sa/ministry/Modonah/Pages/Versions.aspx>, accessed 20 June 2018.
[98] Ministry of Commerce, Company Law <http://www.mci.gov.sa/en/LawsRegulations/Pages/default.aspx>, accessed on 20 June 2018.
[99] SAGIA, Foreign Investment Regulation <https://www.sagia.gov.sa/>, accessed on 15 April 2018.

local faculty of law, investors, retired and current judges and journalists. Impediments to the empirical study included the difficulty in locating persons with a thorough knowledge of the investment and arbitration laws of Saudi Arabia who were willing to be interviewed. The Researcher devised a plan to locate potential participants in multinational companies that have invested in the Kingdom, lawyers in private practices, and friends of the Researcher's former lecturers in schools in Saudi Arabia. The opinions of the interviewees were captured with the objective of determining the perception of Saudi adjudicators and pundits on the rigid interpretation of the *Shari'ah* in Saudi Arabia. Given that the *Shari'ah* is not codified and courts are not required to comply with any precedent, a prophecy of how investment and arbitration laws will be applied in court or an arbitral tribunal may only have made by analysing the relevant statutes and commentaries, as well as the opinions of persons who are likely to apply these laws or analyse court decisions. The Researcher conducted face-to-face semi-structured interviews with the latter so that additional questions could be asked where the interviewees did not provide satisfactory answers. The interviewees provided meanings to key concepts relating to the interpretation and application of investment and arbitration laws in the Saudi Arabia. The meanings were decoded and conveyed in terms of categories and themes and then analysed as shown in chapter 8. The questions and the responses (translated from Arabic) are attached as Appendix I and Appendix II.

1.8.3 Research Design

The research mainly focussed on the collection and analysis of data relating to the impact of the rigid interpretation of the *Shari'ah* on the flow of FDI into Saudi Arabia. A hermeneutic phenomenological approach was taken to the empirical research so as to reveal the individual and shared opinions and experiences of the interviewees.[100] This approach was also used for analysing the data collected through interviews. The data collected was applied to the thesis through quotations of significant statements and sentences,[101] and then those statements were used to describe the participants' opinions and experiences in a "textural description."[102] The researcher was careful to mitigate any biases of his own in analysing the results. This was very important given that the interviews were conducted after the doctrinal research, and the

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[100] Max Van Manen, Researching Lived Experience: Human Science for an Action Sensitive Pedagogy (State University of New York Press 1990) 11-14.
[101] These steps are the so-called 'horizonalization' steps. See Clark Moustakas, Phenomenological Research Methods (Sage 1994) 9.
[102] Ibid.

Researcher had already formed an opinion on the link between the interpretation of the *Shari'ah* and the protection of foreign investors and adjudication or settlement of commercial disputes in Saudi Arabia.

An interpretive (constructivist) approach was taken to documentary sources. This approach revealed and illuminated the main issues associated with FDI into Saudi Arabia and enabled the Researcher to identify the flaws of current system and proposed ways in which they may be rectified without damaging the cultural and religious heritage of the Kingdom. As noted in chapter 8, the Researcher encountered many challenges in the process including the time and costs of travelling, hesitation of some interviewees to participate, and the difficult access to primary data in libraries in Saudi Arabia. Nonetheless, it was anticipated that enough data would be collected from other sources. An application was made for Ethics Approval, and it is relevant to note here that the research design was coordinated with the requirements of that application and Approval.

1.9 Structure of the Thesis

The thesis is divided into nine chapters. Following the introduction provided in this chapter, the thesis is structured as follows:

Chapter 2: The Role of Islam and Islamic Thought in Arabia and its Impact on Trade

This chapter is the first step towards answering the research question of whether investors in Saudi Arabia are protected by the principles of the *Shari'ah*. It examines the history of Islamic legal thought as shaped by a plurality of cultural influences as well as a plurality of religious opinions, both at odds with orientalist conceptions of Islamic history as endlessly defined by stagnation and intellectual sterility. It therefore shows that the Western view of Islamic legal and social histories tends to oversimply the complexities of Islamic legal thought. Early Islamic legal thought was accommodating of plurality of thought. This plurality of thought arguably enabled the Islamic world to emerge as one of the powerhouses of the global economy and Muslim merchants at the time operated on an international scale. Two factors played a crucial role in the subsequent opposition to innovation and free trade in the Islamic world. These include first, the rise of the West and increased competition from

Western businesses, and second, the increased marginalisation of Arabia as world trade routes shifted and the West began to dominate world trade.

Chapter 3: The Commercial Aspects of International Trade: How the *Shari'ah* Principles of Contract Law Have Shaped Islamic Trade and its Application in Saudi Arabia

This chapter is a first step towards answering the question of whether the *Shari'ah* is sufficiently flexible to accommodate modern practices. It explains how historical factors led to the renewed scholarship of the *Shari'ah* which has helped Islamic law to adapt to the modern economics, commercial law and globalisation. It also shows that many principles of the *Shari'ah* stem from pre-Islamic and early Islamic practices of Arab tribes. It notes that despite these pro-trade origins, elements of the *Shari'ah* became rigid and inflexible resulting in jurisprudential stagnation that lasted for many centuries. However, there are some indications that this may be changing in order to attract foreign investors. Thus, Saudi Arabia continues to embrace globalisation due to the increased interconnectedness of the global economy. It concludes that the history of Islam provides two paths, the path of innovation and the path of stagnation, and Saudi Arabia can utilise the wisdom of Allah, Muhammad and early Islamic scholars to create an innovative and diversified economy without sacrificing its Islamic privilege.

Chapter 4: Modernising the Legal System: Reconciling the *Shari'ah* and Modernity

This chapter also addresses the research question of whether the *Shari'ah* is sufficiently flexible to accommodate modern practices. It attempts to determine the extent to which the modernisation aims of the Saudi leadership are reconcilable with Islamic legal traditions in contemporary Saudi Arabia. The analysis of legal reforms also helps towards addressing the research question of what mechanisms can be implemented to attract foreign investors. It examines the development of the legal system, with emphasis on how Saudi authorities have imported foreign concepts and values to modernise the laws while protecting the Kingdom's Islamic heritage. It then analyses the current dual legal system and determines the extent to which the delicate balance is achieved. It notes that looking in, a foreign investor may struggle to grasp the most basic aspects of Saudi law and, this may be an impediment to the prospects of the Kingdom as a place to do business and settle investment disputes. This is because we are left with a paradox. On the one hand, without codification or a system of

judicial precedent, there is little certainty and transparency on how particular courts arrive to their decision. On the other hand, an attempt to codify general principles of the *Shari'ah* might further entrench certain religious legal traditions that have been historically dominant in Saudi Arabia, at the expense of creativity, innovation and adaptability in Islamic legal thought and practice. Thus, the key to adaptation may be to take the best of the *Hanbali* tradition while drawing from other sources and schools of thought from within and outside the Islamic legal tradition.

Chapter 5: The Investment Environment and Law in Saudi Arabia: A Step Forward and a Step Back?

This chapter also attempts to answer the research question of how foreign investors are protected in Saudi Arabia. It reviews the history of FDI in Saudi Arabia in order to establish why certain legal, political and religious barriers resulted in negative perceptions amongst foreign investors about the Kingdom. It considers why the perceptions are changing and illustrates how Saudi Arabia is amending its legal structures to encourage FDI. These changes form part of a broader spectrum which can be seen throughout Saudi society, including the legal, political, social and economic systems. It shows that historically, the Saudi government has failed to tackle the fundamental issues that are holding back the proposed economic progress. It also demonstrates that the *Shari'ah* is not an obstacle to the protection of foreign investments. The relevant pointer is the foreign investor's nationality rather than religion, given that the MITs and BITs ratified by Saudi Arabia require investors from other signatory states to be afforded certain rights and privileges. However, a major obstacle to all foreign investment in Saudi Arabia is dispute resolution in general, and arbitration in particular.

Chapter 6: The History of Arbitration in Saudi Arabia

This chapter continues from chapter 3 by showing that there are some indications that the rigid and inflexible approach to the interpretation of the *Shari'ah* may be changing in order to attract foreign investors. However, it focuses on the laws governing arbitration. It demonstrates that the apparent rejection by Saudi courts of international commercial arbitration had more to do with the perceived unfairness that resulted from the application of 'Western' arbitration models that highlighted the inherent differences between the Western model and the *Shari'ah* model. In addition, there was a perception in Saudi Arabia that international arbitrators were dismissive in respect of the use of *Shari'ah* law in international arbitration, which made it more difficult for the Kingdom to protect its Islamic heritage. The

chapter traces the history of arbitration in the Arabian Peninsula from the pre-Islamic period through to the enactment of the New Arbitration Law in 2012. It shows that far from being anti-arbitration, *Shari'ah* law, and the region that now makes up the Kingdom of Saudi Arabia, both have a rich history of encouraging arbitration stretching back for well over a millennium. It attempts to answer the research questions of whether the *Shari'ah* is sufficiently flexible to accommodate modern international arbitration practices; and how the Saudi Arabian model can be rendered into a more favourable model for the settlement of disputes in Saudi Arabia.

Chapter 7: The New Arbitration Law and its Effects on International Arbitration in Saudi Arabia

This chapter expands upon the previous chapters to provide more context of how Saudi Arabia, a country founded in a region that was steeped in the history of international trade and practising a religion that expressly promoted the principles of arbitration, has since struggled to incorporate international arbitration standards into its domestic law. It seeks to determine whether the New Arbitration Law may be said to mark the beginning of the final phase of the Saudi regulatory attitude towards arbitration.

It argues that the willingness of the drafters of the New Arbitration Law to adopt and enforce UNCITRAL standards suggests a change of approach by the Saudi authorities when considering international standards. The courts are taking into account the Kingdom's obligations under international treaties ratified by Saudi Arabia, such as the New York Convention and the Riyadh Convention. Furthermore, the willingness to appoint (or at least not reject the appointment of) female arbitrators is another example to support the contention that the Kingdom's often rigid adherence to a traditional interpretation of the *Hanbali* school is being reconsidered. However, it points out that there is still some uncertainty about when Saudi courts may consider it appropriate to invoke their powers to intervene or to refuse to enforce an international arbitral award.

Chapter 8: Fieldwork

This chapter reports the findings of the qualitative survey that was conducted by the Researcher. It was motivated by the fact that although the *Shari'ah* remains the highest law of the land, it is not codified, and courts are not required to follow precedents. Thus, it may be difficult for a foreign investor or arbitrator to determine with certainty whether any provision

or clause in a contract or any arbitral award will be enforceable in Saudi Arabia. In this light, the Researcher attempted to ascertain the perception of members of the Saudi legal community towards the *Shari'ah*. Emphasis was placed on the relationship between the *Shari'ah* and free trade and its appeal to foreign investors, the importance of codification, the use of the *Shari'ah* to settle investment disputes, the training and knowledge of judges in *Shari'ah* courts, and the importance of establishing precedent. The study was based on the contention that the perception of participants in the Saudi legal community may help to provide a better understanding of the flexibility of the *Shari'ah*. All the participants had in their respective capacities faced the dilemma of applying the law of the Saudi Arabia based on the strict interpretation of the *Shari'ah* or the law of another State that is more suitable for investment or arbitration. The Researcher identified causal relationships by showing that the independent variable, respondents' belief that free trade and enforcement of foreign arbitral awards are compatible with the principles of the *Shari'ah*, has a marked impact on the dependent variable, the progressive interpretation of the *Shari'ah*.

Chapter 9: Conclusion

This chapter concludes this thesis by showing how the hypothesis was tested and the research questions answered in order to achieve the aim. Also, it shows how the results of the study may be integrated with the findings of key studies and provide support to and differ from the theoretical positions of the studies. It submits that although the rigid interpretation of the *Shari'ah* is an obstacle to FDI, the *Hanbali fiqh* is flexible in regard to commercial matters. Moreover, other schools such as the *Hanafi* are much more flexible. As such, it is important to determine whether adjudicators in Saudi Arabia may refer to another school of Jurisprudence other than the *Hanbali* school in order to invoke another interpretation of the *Shari'ah* that is more advantageous to trade and commerce. This in line with the *istihsan* principle that enables Islamic judges to choose more equitable solutions where a literal application of the verses may not promote the public good or cause a detriment to the general public. The chapter concludes with recommendations for further studies.

CHAPTER 2:
The Role of Islam and Islamic Thought in Arabia and its Impact on Trade

2.1 Introduction

There is a general recognition that much of the Muslim world, and specifically the Arab world, has fallen behind other regions of the world economically.[1] There has been much debate about the reasons for this. Some claim it is the result of the interplay of cultural and religious factors in the region.[2] Others have argued that it is a common misunderstanding of Islam to believe that it discourages trade and economic progress.[3] On the other hand, some commentators have contended that Islam actually encourages trade.[4] This chapter verifies this last contention through a historical analysis. It examines the relationship between Islamic thought and trade. This is the first step towards answering the first research question of whether investors in Saudi Arabia are protected by the principles of the *Shari'ah*. It is shown here that the Golden Age of Islam was possible because of merchant capitalism, and until the 1500s, the Muslim world was per capita richer than the West. However, this was to change, because of the growing influence of the jurists who interpreted the Qur'an in inflexible ways and discouraged[5] risk-taking and innovation, which were essential for trade.

This change in the legal culture was to create an environment where traders and entrepreneurs were no longer able to take risks or rely even on the legality of the contracts that they formed.

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[1] See for example, Wasim Maziak, 'Science, Modernity, and the Muslim World' (2017) EMBO Reports 194, 194-195; Nir Kshetri and Ajami Riad, 'Institutional Reforms in the Gulf Cooperation Council Economies: A Conceptual Framework' (2008) 14(3) Journal of International Management 300, 300-302; Timur Kuran, 'Why the Middle East is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation' (2004) 18(3) Journal of Economic Perspectives 71, 71-90; Ahmad S Moussalli, 'Globalization and the Nation State in the Arab World' (1998) 32(1) Middle East Studies Association Bulletin 11, 11-12.

[2] See for example, Filipe Campante and David Yanagizawa-Drott, 'Does Religion Affect Economic Growth and Happiness? Evidence from Ramadan' (2013) Harvard Kennedy School, Faculty Research Working Paper Series RWP 13-052, 1, 5-6, 26. See also, David Bryan S Turner, Weber and Islam: A Critical Study (Routledge and Kegan Paul 1974). However, Weber also argued that China's failure to develop rational institutions was due to the absence of a universalist ethical religion such as Christianity, Islam and Judaism. See Max Weber, The Religion of China (The Free Press 1964) 237.

[3] Carlo A Pedrioli, 'Constructing the Other: US Muslims, Anti-Sharia Law, and the Constitutional Consequences of Volatile Intercultural Rhetoric' (2012) 22 Southern California Interdisciplinary Law Journal 65, 108; Richard W Bulliet, The Case for Islamo-Christian Civilization (Columbia University Press 2004) vii; Christopher Weeramantry, Islamic Jurisprudence: An International Perspective (St Martin 1988) xv.

[4] See Timur Kuran, The Long Divergence, How Islamic Law Held Back the Middle East. (Princeton University Press, Princeton and Oxford 2011) 4; Ajaz Ahmed Khan and Laura Thaut, 'Islamic Perspective on Free Trade' (2008) Secours Islamique 3, 5-11.

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[5] Ibid P. 17

This contributed to undermining trade and economic growth in the Muslim world. This is not just of historical interest given that the impact of a conservative legal culture, which is committed to the literal interpretation of the scripture, is a significant factor in the relative failure of Saudi Arabia to develop a diversified economy. The rigid legal culture means that Saudi entrepreneurs have been unable to create top-class companies and reduce the Kingdom's dependency on the energy sector.

However, it is arguable that this rigid legal culture stands in contrast with the pluralism of early Islamic thought, elements of which find their influences in non-Islamic intellectual traditions. Given its unique geographical location, Arabia has drawn influences from great civilizations and empires throughout history. Greece, Rome and the Egyptian empire lay to the west, the Persian and Babylonian empires to the north and the Indian and Chinese empires, the east. All these civilizations traded with and brought their unique ideas, philosophies and knowledge to Arabia.[6] These traditions have shaped, and continue to influence, legal and cultural practices in the Middle East, and in Saudi Arabia more particularly.[7]

For these reasons, this chapter considers the dynamic relation between Islamic societies and other civilisations in antiquity through to the modern era, stretching from Greek philosophy to its modern influence on commercial law. However, the chapter also cautions against a 'Western' or orientalist conception of the identity and origins of Islamic history. This approach to history tends to depict Arab (and early Islamic) history as excessively influenced by foreign cultures, often in ways that exclude or marginalise alternative histories developed from 'within' the Islamic world.[8] Orientalist developmental histories of Islamic civilisation, moreover, will frequently identify the 10th and 12th Centuries as a turning point in the evolution of Islamic thought and practice, whereby a once enlightened civilisation would

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[6] See Siran Liu et al, 'Copper Processing in the Oases of Northwest Arabia: Technology, Alloys and Provenance' (2015) 53 Journal of Archaeological Science 492, 492; Christopher Edens and Garth Bawden, 'History of Tayma and Hejazi Trade during the First Millennium BC' (1989) 32 Journal of Economic and Social History of the Orient 48, 48-103; Patricia Cone, Meccan Trade and the Rise of Islam (Princeton University Press 1987) 214-230; Frederick S Paxton, 'The Review of Patricia Cone "Meccan Trade and the Rise of Islam"' (1989) 48 The Journal of Asian Studies 574, 574-575.

[7] On the influence of English and French legal cultures, see Mohammed AM Ismail, International Investment Arbitration: Lessons from Developments in the MENA Region (Routledge 2016) 1-2; Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2(3) Arab Law Quarterly 272, 272-291.

[8] Lena Salaymeh, 'The Beginnings of Islamic Law: Late Antique Islamicate Legal Traditions (Cambridge University Press, 2016) 137-138; Edward Said, Culture and Imperialism, (London: Chatto and Windus, 1993) 2.

come to reject reason and innovation as 'un-Islamic'.[9] In an attempt to challenge, or qualify, these reductive and paternalistic accounts of Islamic intellectual and social histories, the second part of the chapter shifts the focus from an exterior view of Islamic civilisation to an interior view of Islamic knowledge as that which is derived from God's law. Here, the chapter will reflect on the dynamic beginnings of Islamic philosophy, focusing on the relationship between legal thought and social change. This will prepare the ground for a careful assessment of the historical relation between Islamic thought and practice, on the one hand, and the modern economic stagnation of Muslim societies from the 10th Century to Modernity, on the other. [10] From the above premises, the third part of the chapter will conclude by considering 'what went wrong', examining the disjuncture between the diverse intellectual influences on Islam and the historical factors that adversely affected the economic development of the Islamic world, focusing on Saudi Arabia.

2.2 Development of Islamic Knowledge

Saudi Arabia is not only the birthplace of Islam, but also has the holiest sites in Islam revered by over a billion Muslims. Saudi Arabia itself strives to hold itself up as an example of following Islam and implements the Shari'ah (Islamic Law) as prescribed by the Qur'an and the traditions of the Prophet Muhammad (*Hadith*).[11] Islam emerged in Saudi Arabia which is a gateway to the three continents of Europe, Asia and Africa.[12]

Islam is the world's second largest religion[13] adhered to by approximately 25% of the world's population.[14] Its followers, the Muslims, believe in one God Allah and Muhammad (PBUH) as the messenger of God who brought forth the message of Allah in the Holy book called the Qur'an. Emerging in Mecca as a new religion and socio-political order based on divine revelations in the early 7th century, the Islamic community led by the Holy prophet of Islam quickly established the city state of Medina to be the first ever modern sovereign nation state of Islam in the Arabian Peninsula. At that time, Mecca and Medina were located in the

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[9] For a discussion see Aziz Al-Azmeh, Islamic Law (RLE Politics of Islam): Social and Historical Contexts (Routledge, 2013) 78

[10] Wael Hallaq, 'Was the Gate of Ijtihâd Closed'?, (1984) International Journal of Middle East Studies 3, 28,.

[11] Imran Ahsan Khan Nyazee, Islamic Jurisprudence (UsulAI-Fiqh). (Islamic Research Institute Press 2000) 50-80.

[12] Sir Thomas Walker Arnold, The Preaching of Islam: A History of the Propagation of the Muslim Faith (Constable 1913) 212.

[13] Pew Research Center, 'The Global Religious Landscape'(Pew Forum, 18 December 2012) <http://www.pewforum.org/2012/12/18/global-religious-landscape-exec/>

[14] Michael Lipka and Conrad Hackett, 'Why Muslims are the World's Fastest-growing Religious Group'. (2015) Pew Research Center 1, 2.

middle of the Byzantine, Sassanid and Greco-Egyptian empires of East Europe, the Middle East and the West Asia which then included the territories now known as Cyprus, Egypt, Yemen, Oman, Jordan, Qatar, Kuwait, Iraq, Iran, Lebanon, Syria, Turkey, Jordan and Palestine.[15] From just these two cities within a hundred years of the beginning of Islam, the religion had spread to China in the East and Spain in the West making it the most rapidly spreading mass religion in human history.[16] The success of this new religion can be attributed more to its reverence of knowledge than anything else.

The Arabic word for knowledge is 'ilm' and this word is considerably broader in nature than the word knowledge.[17] Islam inspires its believers to acquire knowledge not only in the pursuit of spiritual uplift and scholastic enrichment but also as an act of worship which is superior even to *Ibbadat* (worship).[18] The Prophet declared that learning is the duty of every Muslim and he himself was a great educator,[19] as said of his creator, *Allah*:

> My Lord! Increase me in Knowledge (as revealed in the Qur'an)[20].

After the beginning of Islam, several streams of religious knowledge and inquiry came into existence, such as *Tafseer* (Qur'anic Commentary), *Hadith* (words said and acts done by the Prophet), *Maghazi* (battles of the Prophet), *Fiqh* (Jurisprudence), *Usul-Al-Fiqh* (Methodology of reading jurisprudence), *Usul Al Din* (Theology) and *Ilm Ul Qirat* (Linguistic Science). [21] The concept of unity of knowledge i.e. the common goal of religion and knowledge also came into existence which encouraged followers of Islam to acquire knowledge, whether religious or relating to philosophy or science.[22]

The Prophet corroborates this duty and is narrated as saying:

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[15] Ibid.
[16] Arnold (n 8) 212.
[17] Franz Rosenthal, Knowledge Triumphant: The Concept of Knowledge in Medieval Islam (Vol 2, Brill 1970) 10-40.
[18] Husam Muhi El Din Al-Alousi, The Problem of Creation in Islamic Thought, Qur'an, Hadith, Commentaries, and Kalam (National Print. and Publishing Company 1965) 209.
[19] ibid
[20] Qur'an Chapter 20, verse 114.
[21]Imran Ahsan Khan Nyazee, Islamic Jurisprudence (UsulAI-Fiqh) (Islamabad: Islamic Research Institute Press 2000) 50-80.
[22] Husam Muhi El Din Al-Alousi, The Problem of Creation in Islamic Thought, Qur'an, Hadith, Commentaries, and Kalam (National Print. and Publishing Company 1965) 58.

> Seek knowledge even if you have to go as far as China, for seeking knowledge is a duty on every Muslim. [23]

In a further contemplation of the centrality of knowledge to the development of Islamic thought, the Hanafi jurist Al-Zarnūjī produced several volumes of writing dedicated to understanding the nature of Islamic knowledge, which he delineated into two main categories.[24]The first branch of knowledge is known as *fardh al ayn.*[25] This mode of knowledge refers to the mode of spiritual awakening to which all believers must strive and without with Muslims cannot acquire the necessary knowledge to correctly discharge their duties to Allah (God) The second branch is known as *fard al*-kifaya and is more communitarian in ethic. *Fard al*-kifaya requires all Muslims, individuals and institutions, to enter into cooperative forms of learning towards the achievement of mutually beneficial outcomes.[26]Applying these two principles, Al-Zarnūjī conceived of *ilm* as the endeavour to attain and perfect the social and spiritual wellbeing of individuals *and* communities, since one could not exist without the other. [27]

Viewed through the lens of Al-Zarnūjī's concept of knowledge, in Islam, religion and reason are neither opposing nor distinct realms of enquiry but should be viewed, instead, as two sides of the same coin. Islam Huda et al elaborate on the 'dialectical' (reflexive and responsive) character of Islamic conceptions of knowledge.[28]

> The Islamization of knowledge is not simply about an intellectual attempt to 'Islamicize' the 'un-Islamic' fields of knowledge but to integrate the Islamic ethical or tawhidic principles into such fields of modern thought. It means that

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[23] Al-Albaani, Silsalah Al-aHaadeeth Al-Da'eefah wa Al-MawDoo'ah, vol. 1, pg. 600 - 609, hadeeth # 416

[24] Burhan l-Zarnuji, Ta'lim al-muta'allim: Tariq al-ta'allum (Indonesia Al Miftah, 2008)

[25] Jibrail Huda et al, 'Al-Zarnūjī's Concept of Knowledge ('Ilm)', (2014) Sage Open 1, available at < http://journals.sagepub.com/doi/pdf/10.1177/2158244016666885>

[26] ibid

[27] id

[28] On responsive law, see the classical treatise of Philippe Nonet and Philip Selznick, Law and Society in Transition: Toward Responsive Law (ed. (1978) 1. On responsive law, see the seminal work of Gunther ' 'Substantive and Reflexive Elements In Modern Law,' (1986) Law and Society Review 17. What the researcher is trying to communicate here is the idea of an objective form of knowledge that is self-referential. Islamic law, in other words, is an autonomous branch of law with its own independent validity criteria. On the other hand, Islamic models of knowledge allow for a plurality of opinion and, by "responding" to its social environment, can evolve to integrate other forms of knowledge, from within and outside Islamic intellectual discourses. For an interesting take, see Sai Bhatawadekar, 'Islam in Hegel's Triadic Philosophy of Religion', (2014) 25(2/3) Journal of World History 397. See also Safdar Ahmad, 'ProgressiveIslam and Qur'anic Hermeneutics: The Reification of Religion and Theories of Religious Experience,' Muslim Secular Democracy 76,77. However, it should be noted that deviation from epistemic principles of Islamic law and knowledge is considered to be illegitimate (bid'a). In the strict Salafist tradition, those who reject the literal word of God are believed to have excommunicated themselves from the religion (tafsir).

the outcome will be a sort of hybrid knowledge formed from a blend of the Islamic norms and rational knowledge.[29]

2.2.1 The Islamic Idea of Legal Knowledge

For Muslims, all knowledge has a divine root and 'grammar'.[30] In the above regard, the Qur'an and Sunnah constitute 'the highest primary sources of the *Shari'ah* and therefore possess supreme character and authority.'[31] The laws derived from the *Shari'ah* are both divine and temporal and, in this latter character, are constitutive of the 'moral scheme' that regulates the conduct of all Muslims in their daily lives.[32]

Given that the *Shari'ah* regulates matters of morality as well as legal doctrine, it might appear, as Reinhart suggests, that the Islamic legal ethics are indistinguishable from Islamic law and legal theory.[33] Turning this assumption on its head, Hallaq posits that Islamic legal theory is fundamentally concerned with the 'epistemic' foundations of legal authority, and not with the religious or ethical content of a particular rule of the *Shari'ah*, *per se*.[34] Put differently, legal scholars from within the Islamic world, historically and in the present era, are endlessly preoccupied the essential nature, sources and structure of authority of Islamic law. In order to understand this concept of epistemic authority, it is important to recognise that *Shari'ah* is an 'archetype'. For Muslims, in other words, *Shari'ah* is the highest embodiment of a legal system and, therefore, the authoritative standard by which all other rules and norms of Islamic law (*fiqh)* are derived.[35] The rules of Islamic law therefore prevail over all other forms of secular and civil authority.[36] All expressions of knowledge are, moreover, to be viewed as the human effort to perfect the will of God.[37]

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[29] id at 4. On Islam's capacity for legal pluralism see Wael B Hallaq Authority, Continuity and Change in the History of Islamic Law (Cambridge University Press, 4ed 2004) preface, 125-127
[30] Mohammad Hashim Kamali Principles of Islamic Jurisprudence (Islamic Legal Text society, 1989) 13
[31] Mahdi Zahraa, 'Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research', (2003) 18(3/4) Arab Law Quarterly 215, 218
[32] Kevin Reinhart, 'Islamic Law as Ethics', (1983) 11(2) Journal of Religious Ethics 186 [describing the Shari'ah as an "independent scheme of moral categorization"].id 196. See also David A. Westbrook, 'Islamic International Law and Public International Law: Separate Expressions of World Order' (1993) 33 Virginia Journal of International Law 819, 842
[33] Reinhart [n31] 186-187
[34] Wael B Hallaq Authority, Continuity and Change in the History of Islamic Law (Cambridge University Press, 4ed 2004) preface, 127-128
[35] Usul al-Bazdawi, Al-Mahsul, and the Mukhtasar al-Muntaha of the Maliki jurist. Abu Umar Uthman b. al-Hajib (d. 646). See also Mahdi Zahraa, Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research', (2003) 18(3/4) Arab Law Quarterly 215,218-219
[36] The textual authority for this principle derives from the Qur'an 3: 191 "Those who remember Allah standing, sitting, and lying down on their sides, and think deeply about the creation of the heavens and the earth, (saying):

There is, however, another aspect of Islamic philosophy which speaks to its capacity for innovation and adaptability to social change.[38] Islamic discourses, religious and legal, are in one sense conservative and literal, in so far as no ruler or juristic authority may derive *fiqh* (the substantive rules of Islamic law) from sources outside of the Qur'an and Sunnah.[39] In most practical aspects, however, Islam is no different from any other legal system in its capacity to accommodate 'processes of continuity and change.'[40] This continuity is expressed not as the 'blind or mindless acquiescence to the opinions of others, but rather as the reasoned and highly calculated insistence on abiding by a particular authoritative legal doctrine.' [41]The task of regulating the boundaries between processes of continuity and change was first taken up by the classical jurists of Islam's presumed Golden age of Reason.[42] This era, widely assumed to have spanned the 8th to 12th Centuries, is regarded as a 'formative' period and resulted in the articulation and elaboration of Islamic concepts of legal authority and general principles of law.[43] Guided by the first principles of classic Islamic legal thought – faith and reason – the jurists of the age produced an unprecedented body of norms and legal methodologies.[44] The principles produced from these practices of juristic interpretation continue to shape normative and legal discourses in the Islamic world even today.[45]

"Our Lord! You have not created this without purpose, glory to You! Give us salvation from the torment of the Fire". For an interesting discussion see Azizah Al-Hibri 'Islam, Law And Custom: Redefining Muslim Women 'S Rights', 1997 12 American University International Law Review 1, 19

[37] Zahraa, (n30) 215, 218, 220-221

[38] Hallaq (n33) ix

[39] Reinhart (n31) 193

[40] Wael B (n33) preface, x

[41] ibid

[42] In as much as this era was characterised by intense intellectual debate, innovation and creativity, there is some dispute as to when this 'Golden Age' ended. Wael espouses the view that the classical jurisprudence spans the 8th century, which was then followed by a counter reformation in the 9th and 11th and 13th Century, fostered through the revival of strict literalism in the work of Ibn Hanbal (9th Century) and his student Ibn Tamiyyah (the 13th Century); the founder of the Hanbali school of thought popularised in Arabia. See Wael Hallaq, 'The Quest for Origins and Doctrines - Islamic Legal Studies as Colonialist Discourse,'(2002-2003) 2 UCLA Journal of Islamic & Near Eastern Law 1, 3. However, El Shamsy contends that the 14th Century was equally fruitful. See Ahmed Shamsy, The Canonisation of Islamic law (Cambridge University Press, 2013) 2. The idea that Islamic jurisprudence and methods of reasoning 'closed' down, that is became less creative and more rigid, in the 12th century is pervasive in the literature. In fact, the conventional periodisation of Islam's Golden age may represent an orientalist 'historiciation' of Islamic legal history, rendering it a legal and cultural monolith which 'solidified' in the 12th Century, after which Islamic discourse either stagnated or took on a regressive character based on strict literalism. This began an era defined as the end of independent juristic reasoning, or the 'closing of the door of ijtihad'. For an example of this kind of Western take on Islamic legal and social history see Joseph Schacht, An Introduction to Islamic Law, (Oxford University Press, 1979) 62 71-72. For a critique of this view, see Shamsy, above and Lena Salaymeh, 'The Beginnings of Islamic Law: Late Antique Islamicate Legal Traditions (Cambridge University Press, 2016) 137-138

[43] Hallaq (n33) ix, 55, 61

[44] Zahraa, (n30) 220-221

[45] Hallaq (n33) preface

2.2.2 European Criticism of Islamic Knowledge

The centrality of reason to Islamic knowledge and related intellectual discourses arguably disproves the 'European criticism of Islam as an inherently backward and superstitious faith,' and therefore to be regarded as the antithesis of Western-centric 18th century Enlightenment values of reason, rationality, historical progress and plurality of thought.[46] The noted cultural critic Edward Said has explored these ideas in his work.[47] Said suggests that European literature tends to portray the East, specifically the Arab world, as weak and irrational and therefore as the opposite of the rational and energetic West.[48] This has resulted in a 'cultural hierarchy' wherein western culture, tradition and law are portrayed as inherently superior to their Eastern equivalents.[49]

Moreover, Said contends that these 'hegemonic' representations of the Eastern world by the West have been internalised by the ruling elite of the Muslim world and that this has contributed to the failure of the Middle East to democratise and to develop, economically.[50] The Arab and Muslim worlds' continuing influence on global knowledge in fields such as law, the sciences and economics is consequently trivialised, or otherwise styled as a 'Grand Narrative'. This narrative tells a story of how the Arab world, once enriched by the earlier influence of Western ideas and the traditions of the neighbouring East, abandoned its rationalist heritage in favour of cultural insularity and religious conservativism.[51] This account of the Islamic world's intellectual and social history will be dealt with below.

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[46] See generally, Sebastian Conrad, Enlightenment in Global History: A Historiographical Critique', 2014 (117) The American Historical Review 999, 201

[47] Edward Said, Culture and Imperialism, (London: Chatto and Windus, 1993) 2.

[48] Ibid 4

[49] Ibid, 3

[50] Ibid, 7 see also Nazeer Ahmed, Islam in Global History: From the Death of Prophet Muhammed to the First World War (Xlibris Corporation 2000).89-91

[51] Akbar S. Ahemed, Postmodernism and Islam: Predicament and Promise (Psychology Press, 2004) xi-xi. Contemporary and historical discourses on Islam tend to treat Islamic history in fairly unitary terms. Various epochal moments have been ascribed to the history of the religion and legal thought within it. The paradigmatic account of this history goes something like this. First, we start with the pre-enlightenment age of Jahiliyya (age of ignorance) based on tribal rule; moving through to birth of Qur'anic epistemology and renaissance of 8th Century of Islamic legal hermeneutics; through to the rise of Sunni revivalism /counter-reformation that lasted from the 13th to 19th Century, wherein a second wave of Sunni revivalism takes place with the Islamization of former Arabian colonies such as Egypt (via Shari'ah supremacy clauses), ending finally with September 2011 and rise of Islamic fundamentalism.

2.2.3 A European View of Islamic History

In the conventional 'metanarrative' of Arab social histories, the 4th to 8th Centuries[52] are generally regarded as the highpoint of scientific enlightenment in the Islamic world, which is the period directly following the death of Prophet Mohammed, the Messenger of Allah.[53] Before the Prophet Mohammed transmitted the message of the Qur'an to the people of Medina, the Islamic world was a tribal one, with a largely oral culture.[54] The last of the monotheistic religions, Islam promised to deliver the people of Medina from ignorance, the age of darkness, and through its teachings, fundamentally altered and 'civilised' the primitive practices of these tribal communities.[55]

However, even before the message of the Qur'an was revealed to the earliest followers of the faith, many great empires has already invaded parts of Arabia and extended commercial links with the Arabs.[56] The influence of the Babylonian law code on Arab law has also been established, as seen in the parallels between the Babylonian Code and Islamic tribal law.[57] Ancient Egyptian civilisation is also argued to have a formative influence on the cultural knowledge of pre-Islamic societies and there is some evidence to suggest that scientific methods in fields such as medicine were transmitted to Arabia, where it was handed down by the elders.[58] Roman culture was also important in the development of Arab culture, possibly seen in some of the Pre-Islamic law code, especially the law on contracts.[59]

2.2.4 Foreign Influences on the Islamic World

Through Islamic expansionism and conquest, the Muslim Caliphates of Iraq, Syria and Hejaz would gain access to, and imbibe, cultural and technological influences from the Egyptian, Greek, Persian-Turkish form of Roman civilisation, as well as from Christian-Judaeo

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[52] This may seem an odd statement to make as Islam was only founded in the 7th Century with the transmission of Qur'anic scripture by the Prophet Mohammed (s.a.w). However, it is not uncommon to speak of the Islamic world's cultural enrichment through its proximity to Judaeo-Christian ideas and other influences from the non-Islamic world which would influence thought and practice in centuries to come

[53] Eric Chaney, 'Religion and the Rise and Fall of Islamic Science', Occasional Paper, Harvard University, Word Press (2016) at 5 available at < https://scholar.harvard.edu/files/chaney/files/paper.pdf>

[54] Paul Lunde, Islam a Brief History (Dorling Kindersley 2003) 74181

[55] Henry Corbin, History of Islamic philosophy (Routledge, 2014), 19

[56] Ibid, 22

[57] Carol Bakhos and Michael Cook (eds) Islam and Its Past: Jahiliyya, Late Antiquity, and the Qur'an. (Oxford University Press 2017) 10-50

[58] Majid Fakhry, 'Islamic Philosophy, Theology and Mysticism a Short Introduction (2000) 67

[59] Lunde (53) 74.

traditions in the Near East.[60] The Arab conquests in the 7th century meant that the Muslims ruled over sophisticated populations in Persian and the former Byzantine eastern provinces. [61] Here, as told through an orientalist periodisation of Islamic history, the Muslims encountered societies that enjoyed long and illustrious intellectual traditions, in particular, the vast corpus of Greek philosophy. To this point, some have suggested that Muslims began to use Greek philosophy for the systematic investigation of legal methods, the universe, morality, and socially desirable or utilitarian outcomes.[62] This became known as *Falsifia*, from the Greek word for philosophy. Islamic philosophers became known as 'Hakims' (philosophers)[63] and held a higher status than 'ulema' (theocrats) and 'fuqaha' (scholars).[64] It is noteworthy that Muslim philosophers used their knowledge and skill to defend the faith (Kalam) but also speculated on secular and scientific matters.[65] These rationality based traditions were, as told through conventional 'histories' of the era, soon to be challenged with the rise of religious conservativism in the 11th Century, discussed below.

2.2.5 From Rationality to Religious Revivalism

By late Antiquity, the Islamic empire stretched from India to Spain. Schacht describes as this as 'a period of incubation' resulting in the 'integration' of methods, concepts and principles originating in the traditions of antique civilisations, including the Aramaic Jewish Talmudic traditions and the shared cultures of neighbouring Christian and pagan societies in the Near East. [66] During this period, Islamic territories were administered under the control of the Abbasid Caliphate, the epicentre of the Islamic empire. The historical rulers of the Abbasid Caliphate introduced several reforms that were seen as vital to the developmental 'progress' of the Islamic world, since Arabia was the chief beneficiary of the wealth accumulated from the region's exposure to foreign cultures through trading partnerships.[67] These commercial connections, viewed through the lens of Orientalist literature, enriched the knowledge of Arabian rulers who blended and borrowed techniques from the earlier Greek, Egyptian and

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[60] For more detail on the cross-cultural influences shared among Islamic and non-Islamic civilisations see Bernard Lewis, The Muslim Discovery of Europe (Redwood Burn Ltd. 1982) 17-21
[61] ibid
[62] Fakhry (n 57) 78
[63] Ibid, 45
[64] For a further discussion of the status of Islamic philosophers see Oliver Leaman, An Introduction to Classical Islamic Philosophy 2nd ed. (Cambridge University Press, 2002) 200
[65] Ibid, 211.
[66]See Schacht (n41) 2 and Salaymeh, (n41) at 88-89. Salaymeh offers a compelling critique of Orientalist presumption that Islamic identity of Arabia was in fact shaped by Western influences.
[67] Bradley Skeen, 'Trade and exchange in the medieval Islamic World' in Pam J. Crabtree, Encyclopedia of Society and Culture in the Medieval World (Facts on File, Inc., 2005) 345

Roman civilisations to improve their administrative systems and promote technological innovation in city infrastructure.[68] The Abbasid Caliphs in Baghdad translated all major scientific works into Arabic and sponsored scientific research in the fields of astronomy, mathematics, medicine and optics. [69] Viewed in the above light, the intellectual heritage of medieval Islamic Arabia was both built on, and vastly enriched, by previous civilisations.[70]

In these 'exterior' histories of the Arabian world in late Antiquity, the 11th Century represented the first departure point from the pluralistic influences that had earlier shaped Arabian culture and the resulting 'identity' of the Arab world. Chaney, for example, contends that the earlier system of Caliphate patronage in the arts, sciences and administrative would come under threat as 'intellectual pursuits shifted to religious institutions such as madrasas'.[71] In conventional (Western) histories of Islamic civilisation, therefore, the 11th Century began the struggle to define the 'identity' of the Arab world. In this historical account, secular (scientific-rationalist) and traditional (religious) forces within the Baghdad Caliphate each vied for political supremacy and interpretative authority.[72]

In these traditional accounts, the institutional and intellectual shifts that occurred in the early 11th Century through to the 12th Century (ending with the Mongolian invasion of the Abbasid empire) brought about an uncoupling of faith from reason.[73] As Maksidi noted: '[t]he traditionalists rel[ied] on faith and shun[ned] reason; the rationalists glorif[ied] reason and ha[d] little use for faith.[74] Viewed through the lens of Eurocentric histories, this impasse was finally overcome with the triumph of Sunni revivalism, a movement that fused political and religious authority through the state's submission to an ultra-literalist or traditional approach to Islamic rules and rule-interpretation, discussed in section 2.3.[75] As religious dogma prevailed,

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[68] Ibid. See also Majid Fahkry, 'The Theocratic Idea of the Islamic State in Recent Controversies (1954) 30(4) International Affairs (Royal Institute of International Affairs 1944-) 450. For a critique see Salaymeh see infra n72.
[69] Leaman (n63) 6
[70] Ibid 76
[71] Chaney (n52) 5. This was also a period of sectarian conflict between the descendants the first two Caliphs Abu Bakar and Umar. For more detail see Abdel Rahman Azzam, 'Sources of the Sunni Revival: Nizam u-Mulk & the Nizamiyya: An 11th Century response to Sectarianism', (2014) Muslim World 97 and Barnaby Rogerson, The Heirs of Muhammad: Islam's First Century and the Origins of the Sunni-Shia Split (New York: The Overlook Press, 2007).
[72] ibid
[73] George Makdisi, 'Miuslim Institutions of Learning in Eleventh-Century Baghdad', (1961) Bulletin of the School of Oriental and African Studies, University of London, 1, 38, cited in Chaney (n52) 6 For a critique see Salaymeh (n41)
[74] Timur Kuran 'The Rule of Law in Islamic Thought and Practice: A Historical Perspective," in Global Perspectives on the Rule of Law, (New York: Routledge, 2010) 71-89
[75] Azzam (n70)] 91-94.

the great achievements of Arab societies, in the fields of administration, science and technology, began to come undone under the imposing glare of religious fundamentalism. As a result of these developments Islamic societies, and their legal systems, are assumed to have entered into a period of relative economic decline.[76] This period of decline is presumed to have spanned several centuries, moving from the 12th to the 19th Centuries through to the modern history of statehood and the decolonisation of Arab states (section 2.4).[77]

2.2.6 The Limitations of the Orientalist View of Islamic History

If the prevailing 'metanarrative' of Islamic history is to be accepted, the 12th Century also laid waste to the tradition of juristic creativity, legal pluralism and plurality of opinion that had once characterised Islamic legal discourses in the 8th and 10th Centuries.[78] The Sunni revival, it is conventionally argued, brought an end to the tradition of independent juristic opinion, resulting in the reification and 'canonisation' of general principles of Islamic law in the 12th Century.[79] Put differently, the normative contours of Islamic legal thought are implied to have, acquired a fixed identity.[80] In the Orientalist imaginary at least, these developments stood in sharp contrast to the 'Golden Age' of reason-led religious interpretation in the classical era (section 2.3).

The above discussed ethnocentric or cultural (orientalist) representations of Islamic legal and social histories tend to suffer from two basic problems.[81] The first is that modern cultural criticisms of Islam tend to be a-historical, or otherwise offer a 'hegemonic' view of European influences on the development on Arab identity, in a way that marginalises the influence of Islamic thought, its role in 'civilising' tribal societies and its contribution to current forms of global knowledge.[82] A more pertinent criticism is that these accounts fail to fully grasp the complexities of Islamic law and theory.[83] In this regard, modern critics[84] of the religion tend to

[76] Kuran (n73) 71-89
[77] Shamsy (n41) 194-221
[78] Schacht (n41) 62 71-72
[79] Ibid and for a more nuanced perspective, Shamsy (n41) 194-221
[80] For a contrary view see Wael Hallaq, 'Was the Gate of Ijtihâd Closed'?, (1984) International Journal of Middle East Studies 3, 28. The jurist Shah Waliyullah remarks that "I am convinced for various reasons that today the door of ijtihad is completely closed; cited in Arshia Javed and Muhammad Javed, 'The Need of Ijtihad for Sustainable Development in Islam ', (2011) 8 IIUC Studies 21, 218
[81] Safdar Ahmad, 'Progressive Islam and Qur'anic Hermeneutics: The Reification of Religion and Theories of Religious Experience', Muslim Secular Democracy 76,77.
[82] For an excellent critique see May Wilson et al, 'The Religious as Political and the Political as Religious: Globalisation, Post-Secularism and the Shifting Boundaries of the Sacred', (2014) 15 Politics, Religion and Ideology 331, 332-315
[83] ibid

disregard the dialectical mode of *legal* reasoning applied to religious interpretation and exegesis as it was practiced by medieval era Islamic jurists.[85] Ahmed suggests, for instance, that classical jurists practiced a,

> [m]ethod of interpretation that places emphasis on the 'subjective nature of religious understanding ……[and] subject-centred notion of truth that is brought to the interpretation of the Qur'an or subsidiary texts…[thereby] resisting rationalization (and subsequent instrumentalization) of religion'. [86]

According to Ahmed, it is this 'subjective' mode of interpretation and reasoning that has fallen into disuse following long periods of religious revivalism, traditionalism and fundamentalism throughout various phases of Islamic legal history.[87] This account of the nature and development of Islamic methods of textual interpretation (hermeneutics) is, however, subject to criticism for, at once, overstating the role of 'subjective' reasoning in the development of Islamic law and custom, whilst also (unwittingly) privileging a 'regressionist' narrative of the developmental histories of Islamic legal thought from late Antiquity to Modernity.[88] In the above regard, Western and other non-Islamic scholars tend to portray legal and political developments in the Islamic world in linear and monolithic terms, often at some distance from how Muslims scholars understand their *own* history, identity and traditions. There is no such as thing as single or unitary conception of Islamic civilisation, identity or history, and a Muslim's appreciation of their legal traditions is invariably shaped by the contingencies of local culture, history and context.[89]

At the same, as discussed in the remaining sections of this chapter, Islamic society and thought has not remained static, but has instead experienced periods of relative innovation and relative stagnation. Nevertheless, regardless of how paternalistic or flawed European assessments of Islamic history may appear to be from those who practice and study it, there is

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[84] For a paradigmatic example of this type of cultural chauvinism see Wallace Daniels, 'Editorial: Islam and the "Clash of Civilizations," 48(3) Journal of Church and State 509
[85] Conrad (n45)
[86] Ahmed (n80) 72, 73-78
[87] Azzam (n70)] 91-94
[88] For a developmental account of the "hermeneutical turn" in Qur'anic exegesis see Angelika Neuwirth',locating the Qur'an in the Epistemic Space of Late Antiquity', in (ed Carlos Bakhos and Michael Cook) Islam and its Past: Jahiliyya, Late Antiquity, and the Qur'an (Oxford E-Book, 2017.) For an instance an example of orientalist literature supporting this 'regressionist' history of Islamic thought see, Majid Fahkry, 'The Theocratic Idea of the Islamic State in Recent Controversies (1954) 30(4) International Affairs (Royal Institute of International Affairs 1944-) 450
[89] Salaymeh, (n41)137-138

nonetheless some evidence to suggest that the character of Islamic law and method *did* acquire a certain kind of fixity in the 13th Century, at odds with the dynamic nature of Islamic legal thought two centuries before. [90] By grounding its analysis in cultural criticisms of the 'Western' or Orientalist histories of Islamic thought and practice as it is viewed 'from the outside', the next section offers a (highly stylised) version of early Islamic legal history from within its ranks. This will prepare the ground for an assessment of how leading intellectual figures in the Islamic world came to shape, and potentially fossilise, legal developments in the Muslim world for centuries to come.

2.3 Islamic Religious Histories: A View from 'The Inside'

Islamic scholars and jurists, unsurprisingly, perceive Islamic intellectual histories from a very different lens than their European (and now Anglo-American) cousins. Some accept that the intellectual history of the field was dynamic and 'open-textured' in the era of Islamic conquest and expansionism, [91] though others will argue that if, indeed, Islamic legal custom and method had solidified in the 12th Century, it had done so for good reason. [92] In other words, Islamic jurisprudence had no need to evolve as rapidly as had done in the 'formative' period of its development because most jurists had already achieved an acceptable level of consensus on principles of Islamic law and its methods of rule-interpretation. The above notwithstanding, even at the peak of Islamic theoretical and doctrinal innovation, key areas of disagreement remained. The most important of these disagreements developed around the manner, and degree to which, a jurist could exercise independent juristic reasoning (*ijtihad*) when faced with a problem not explicitly regulated by the Qur'an and Sunnah. [93] These debates were, in a deeper sense, intimately connected to broader juristic controversies on the role of fairness and equity in rule-reinterpretation, or the balance to be struck between legal tradition and social reform.[94] At the core of these disputes, however, lay a more fundamental

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[90] Wael Mohammad Hashim Kamali Principles of Islamic Jurisprudence (Islamic Legal Text society, 1989) 7-8

[91] See e.g. Wael B Hallaq, A History Of Islamic Legal Theories (CUPress 1997) 259, 260.

[92] There is a great deal of religious-juristic support for this contention among religious scholars. For instance, the jurist Bakr b. al-Alâ writing in the 10th Century) reasoned that it was not permissible to develop a new opinion or religious doctrine after the second century (Ibn Qayyum, 1955:256-257). These ideas were again echoed by Yusuf Ismail enNebhânî writing in the 20th Century, suggesting that: "Nowadays who claims that he is a mujtahid [religious jurist] has a problem either with his mind or faith," as reported in the collection of legal opinions collated by as-Salami, 1327(A.H.):I/44). These opinions were cited in Salih Kesgin 'Critical Analysis Of The Schacht's Argument And Contemporary Debates On Legal Reasoning Throughout The History Of Islamic Jurisprudence', 2011 4(19) Journal of International Social Research 157, 163

[93] Wael B Hallaq, 'Ifta' And Ijtihad In Sunni Legal Theory: A Developmental Account' In Muhammad Khalid Masud and Brinkley Messick and David S Powers (eds), Islamic Legal Interpretation: Muftis and Their Fathers Fatwas (HUP 1996) 33

[94] Hallaq, A History Of Islamic Legal Theories (n90) 259, 260.

set of 'epistemic' questions around the nature and sources of legal authority underpinning the system of the *Shari'ah*. [95]

2.3.1 The Emergence of Islamic Legal Theory

The root of Islamic law derives from the concept of *Fiqh*. [96] *Fiqh* describes the *laws* of an Islamic legal system that are derived from the supreme sources of Islamic law (the Qur'an and Sunnah).[97] In this regard, a detailed set of legal practices, rulings, norms and customs have evolved across the Muslim world on matters ranging from religious ritual, personal status law (family law) and contract regulation; the latter of which is considered the 'root' of all *Shari'ah* governed commercial laws and practices.[98] There is second branch of Islamic law, known as *Usul al-fiqh*, which includes within its scope various 'experimental' research methods of juristic deduction and inference which are used to interpret and derive rules from textual sources.[99] Conceptually, these two domains of knowledge are distinct.[100]

To those scholars immersed in Western theories of law and jurisprudence, these aspects of Islamic law and method may appear unfamiliar and obscure. Part of this confusion arises from the fact that the Qur'an and Sunnah constitute both the 'source and subject matter' of Islamic law or *fiqh*,[101] as Kamali elaborates:

> *Fiqh*, in other words, is the law itself whereas *usul al-fiqh* is the methodology of the law. The relationship between the two disciplines resembles that of the rules of grammar to a language, or of logic (mantiq) to philosophy. *Usul al-fiqh* in this sense provides standard criteria for the correct deduction of the rules of *fiqh* from the sources of *Shari'ah*. An adequate knowledge of *fiqh* necessitates close familiarity with its sources.[102]

In practice, most legal methodologies that have been developed under the rubric of *usul al-fiqh* emanate from human enquiry rather than the Qur'an and Sunnah, since both provide little guidance on how to resolve interpretative conflicts (between conflicting verses of the

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[95] Kamali (n29) 7,8
[96] See e.g. AbdullahAn Naim, 'Sharia and Positive Legislation: Is An Islamic State Possible Or Viable'? (2008) Yearbook of Islamic and Middle Eastern Law 5
[97] For a comprehensive discussion on Islamic law and its sources see Zahra (n 47) 218, 231-242
[98] Ibid at 230-242
[99] Kamali (n29) 12-14 Zahraa (n30) 230
[100] ibid
[101]Kamali (n29) 5-8, 12-14
[102] Kamali (n29) 12; Zahraa (n30) 230-242

Qur'an); the manner in which the authenticity of *Hadith* (the narration of the Prophet's rulings and practices) is discerned; or the method by which rules not expressly regulated by textual sources can be modified or applied to new circumstances.[103]

2.3.2 Jurisprudence in the First and Second Islamic Century

Formally speaking, the concept of *fiqh* developed by the relevant schools of jurisprudence (*fiqh*) emerged only in the first century of Islam, after Prophet Mohammed's death in 632 CE.[104]In the first Islamic century, there was no theological need for the development of secondary rules of deduction i.e. *Usul al-fiqh*. This is because any legal question or dispute could be referred to the Prophet himself.[105] This was a logical step because, as Kamali notes, the first principles of Islamic law and method are themselves derived from primary sources, in other words from Qur'anic revelation and the Prophet's corroborating legal judgments and customs.[106] The Prophet's teachings were then passed down through oral transmission to his companions and their descendants after the Prophet's death, still in the First Islamic century (622 CE – 719 CE).[107] Since the Prophet's companions had living memory of his rulings and practices, and therefore had direct experience of the Sunnah and knowledge of the scriptural revelations, there was little impetus to articulate general principle and methods from which to derive Islamic rules of law. [108] In fact, it is something of a misnomer to suggest that Islamic law came into existence only after Islamic jurists and scholars had put a name to it, since the Prophet himself issued several rulings, opinions and decisions, and did so by developing methods of rule-deduction.

By the next Islamic Century (the 8th Century), the jurists of the age had no direct proximity to sources of *fiqh*; in other words, the Prophet's rulings or the oral testimony of his companions. Faced with legal issues on which there was no clear solution, jurists in the classical period of Islamic thought began to rely on ever more innovative interpretative techniques and secondary legal methods.[109] These methods were systematised in a treaty (Kutub al-Usul) in

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[103] ibid
[104] Kamali (n29) 13-14
[105] On the role of the Prophet as an arbitrator of religious and civil disputes, see Aseel Al-Ramahi 'Sulh: A Crucial Part of Islamic Arbitration', LSE Law, Society and Economy Working Papers 12/2008, 1, 6
[106] Kamali (n29) 14
[107] ibid
[108] For a discussion of this see Id and Zahraa (n30) 243
[109] Ibid.

788 CE/150 A.H.[110] It was during this era that religious scholars and *ulama* (the collective noun for religious experts trained in Islamic law and methods) would emerge as powerful figures of authority. Through this authority, the *ulama* was not only able to critique and shape the prevailing socio-religious norms of the regions, but also influenced the more positivistic aspects of state-building, administered under the 2nd Umayyad Caliphate. [111]Three centres of Islamic learning would become dominant during this era: Hijaz, Iraq and Syria. Makah and Medina emerged as the intellectual powerhouses of the Hijaz region (Arabia).[112]

In the early 8th Century, the Medina *ulama* and the ruling authorities in Baghdad began to diverge on the fundamental purposes of Islamic legal method.[113] The nature of the dispute rested on the distinction between legal precepts (*Hukm*) and local customs that had developed through need and necessity (*Zaman*). [114] One area of controversy concerned the degree to which Islamic legal precepts could be reinterpreted or modified in light of social (or political) necessity, for instance to meet the welfare needs of local regions and communities administered under the historical rulers of each region.[115]

The Hizaj regions came to be associated with a strict and more literal *fiqh* (Kutub al-Usul) and in this regard the Medina jurists were the natural intellectual predecessors of the Hanbali School of jurisprudence discussed below.[116] For followers of this tradition, legal precepts deduced from the sources of *Shari'ah* and the consensus of Prophet's Companions should prevail over custom or necessity, except in certain narrow circumstances.[117]The historical rulers of the Umayyad and later Abbasid Caliphates, by opposition, came to favour the teachings of jurists who applied a more socially-orientated (purposive) mode of legal reasoning which aimed to 'bridge the gap' between the *Shari'ah* and the more positivistic aspects of rule-administration.[118] These jurists, influenced by the teachings of what would

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[110]Showkat Hussain, 'Coherence and Relativity of the Islamic Legal Theory: A Study of Methodology in Socio-legal Context', (2017) 8(1) Journal Of Humanities And Social Science 59, 68 and for detail see Salih Pay 'The Journey of Caliphate from 632 to 1924', (2015) 64 International Journal of Business and Social Science 107

[111] Daphna Ephrat, A Learned Society in Transition: The Sunni 'Ulama' of Eleventh Century Baghdad (State University of New York Press, 2000) 95-125

[112] ibid

[113] Kamali (n29) 14; Hussain (n109) 68.

[114] On these concepts see Ayman Shabana, Custom in Islamic Law and Legal Theory: The Development of the Concepts of Urf and Adah in the Islamic Legal Tradition, (Macmillian, 2010) 162 and Hallaq (n33) 191

[115] Hussain (109) 68

[116] Ibid. See also Hallaq (n33) 31 -32

[117] See Muhammad Qasim Zaman, 'The Caliphs, the 'Ulama', and the Law: Defining the Role and Function of the Caliph in the Early 'Abbasid Period' (1997) 4(1) Islamic Law and Society 1, 2-3, 10-11-12 [describing the attempt to establish religious authority as the foundation of the Abbasid Caliphate.]

[118] Ya'kov Meron, 'The Development of Legal Thought in Hanafi Texts', (1969) 30 Studia Islamica, 73.

later become the Hanafi School, would develop local customs that were more reflective of the processes of economic and legal change unfolding within societies of the time.[119]

In the midst of these clashes between political and religious authority, the visionary founder and eponym of the Shaf'i school of jurisprudence devoted his writings to resolving the juristic conflicts of the age.[120] Al Shafi, viewed by some as the architect of classical (and modern) Islamic jurisprudence, began the process of formulating general principles of Islamic law and methods of reasoning.[121] Paralleling these developments, the *Ulama* (the community of religious scholars) had also begun the long process of recording and compiling the *Hadith*, (the oral testimony of the Prophet and his Companions).[122] This, in turn, spurred the development of *usul al-fiqh* (the methods and science of Islamic law) as jurists came to rely more heavily on the Sunnah to substantiate their legal orientations and methodologies.[123] Through these and other developments, the 8th Century ushered in a new era of Islamic legal thought which culminated in the formation of the four orthodox schools of Islamic jurisprudence; Shafi, Hanafi, Maliki and Hanbali.

In pursuit of a coherent corpus juris, and in an attempt to mediate conflicts between the Medina *ulama* and state-sponsored madrassas in Baghdad, al-Shafi formulated evaluative criteria by which to assess the authoritativeness of a particular rule or method.[124] The eponym of the Hanafi School, Abu Hanifah, was equally creative and generated a substantial body of opinions on secondary methods of rule-deduction and inference such as analogy, consensus and juristic preference.[125] lmam Malik, founder of the Maliki school, developed a novel doctrine known as Madinese consensus – *Ijma' ahl*.[126] While this school espoused (a relatively) strict adherence to religious texts and tradition, the consensus of the people of

[119] Hussain (n109) and Ephrat (n110) 103, 107, 135. This history of the region is highly complicated. The Baghdadi caliphates and later rulers of Islamic states, most notably, the Oghuz Turk-Sunni Seljuq sultans began to disseminate the teachings of the more liberal Hanafi madhbab (religious schools). This was a strategic measure designed to strengthen the rulers' patronage networks. Bureaucratic authorities, for example, sought to influence social networks by establishing religious schools based on the jurisprudence of the more liberal Hanafi and Shafi Schools. In the private sphere of religious life, however, the strictly constructivist Hanbali School would often exercise direct forms of social influence through religious teachings.
[120] Shamsy (n41) 194; Kamali (n29) 13. See also See also Wael B. Hallaq, 'Was al-Shafi'i the Master Architect of Islamic Jurisprudence'? (1993) 4 International Journal of Middle East Studies, 587.
[121] Wael B. Hallaq, 'Was al-Shafi'i the Master Architect of Islamic Jurisprudence'? (1993) 4 International Journal of Middle East Studies, 587.
[122] Ibid 14 and; G. H. A. Juynboll, Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Hadith (Cambridge: Cambridge University Press, 1983) 77–95
[123] Hallaq (n33) 34
[124] Kamali (n29) 12-13. See also infra note 117.
[125] For an extensive discussion on this concept see Zahraa (n30) 238
[126] Ammad Baba al-Tinbaktc, Nayl al-Ibtihaj (tarablus, Libya,1989), 295–96. See also Hallaq (n33) 34

Medina, in other words the Prophet's companions, were used to substantiate a ruling or opinion not expressly addressed by the sources of the *Shari'ah*.[127]

In their combined writings, the four orthodox schools articulated a typology of sources and general principles from which positivistic rules could be deduced or derived. These sources were the Qur'an, Sunnah, analogy (*qiyas*), and consensus (*ijma*). In the broadest sense, the four founding schools of jurisprudence (known as *madhabs*) were engaged in the process of constructing and reconstructing the boundaries between authority, continuity and change from within the prescriptive framework of the *Shari'ah*. These jurists went on to develop a sophisticated system for determining the rank and order of jurists with authority to provide direct rulings on points of law (*fatwas*) or render judgements in respect of individual cases. [128]

A variety of secondary methods and rules of re-interpretation were also formulated in this period, including inter alia: doctrine of juristic preference; (*istihsan*); the presumption of continuity (*istishab*); *urf* (custom); *istidlal* (referring) and *masaliah al-mursalah* (the law of suitability) and related principles such as *maslahah* (public interest).[129]The jurisprudence on *usul al-fiqh* is breath-taking in its scope and has given rise to complex schemes of argumentation, hermeneutics and evidence based rules. Many elements of rule deduction practiced by Islamic jurist appear to have their lineage in Greek philosophy namely the Aristotelian method of rule deduction, though modern Islamic lawyers have generally resisted this philosophical connection.[130] Above all, the articulation of these methods was broadly

[127] Hallaq (n33) 35-36

[128] Hallaq (n33) 15-17. The rules governing the structure of legal authority, as developed by the founders of classical Islamic jurisprudence, are extremely detailed and cannot be dealt with at length. However, it should be noted that 7 ranks of legal authority are recognised, see Hallaq id. Broadly speaking, the main structure of authority is organised around four main categories. In descending order, the highest rank of jurists relates to the rule-recognition authority of mujtahids, consisting of the four founders of the four main Sunni schools known as madhab (i.e. Al Maliki, Al Shafi, Ibn Hanbal and Al Maliki). The second rank of jurists relates to the direct successors of Islamic legal thought in the 10th Century, known as mujtahids. These jurists were permitted to elaborate upon and implement the authoritative rulings of the founding schools of fiqh. A third category consists of muqallid, referring to jurists whose authority is/was limited to resolving a conflict between two or more rulings established by their predecessors. The lowliest rank was assigned to poorly trained jurists who were proscribed from engaging in independent practices of rule interpretation and inference.

[129] Zahraa (n30) 230-242

[130] For a comprehensive account of Greek influences on Islamic civilisations, see Randall R. Cloud, Aristotle's Journey to Europe: A Synthetic History of the Role Played by the Islamic Empire in the Transmission of Western Educational Philosophy Sources from the Fall of Rome through the Medieval Period (Doctoral thesis, submitted to the University of Kansas, 2007) 90, 238. However, for a contrary view, see Wael B. Hallaq, The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law', 1985-1986) 34 Cleveland Law Review.79. 'On this point Hallaq says: [T]he Islamic lawyer resists logic because he views it as an offshoot of Greek philosophy. For him the unqualified acceptance of logic entails the acceptance of metaphysical conclusions which run against the fundaments of his belief as Muslim. Id at 80.

construed to give 'fresh sanctions and definitions to a variety of socio-legal contents not reflected in the earlier phase of the Islamic history'. [131]

2.3.3 The Concept of *Ijtihad*

As outlined above, many Islamic legal principles applied today can be traced to the writings of leading authorities of the four orthodox schools. Writing in the 8th Century and 9th Century, these jurists constructed innovative methods and secondary rules for dealing with Qur'anic exegesis; the authenticity of the *Hadith*; the theory of abrogation; the interpretation of language; in addition to formulate criteria used to evaluate the administrative laws and decisions of political authorities.[132] Crucially, these processes of rule-deduction and interpretation developed under the auspices of the doctrine of *ijtihad*.

The concept of *ijtihad* is defined as follows:

> [T[he exertion of the utmost effort by a trained jurist, taking into account all the relevant texts of the Qur'an and Sunna as well as principles of jurisprudence, to discover, for a particular human situation, a rule or law. *Ijtihad* is the mechanism by which Islamic law, as revealed in the Qur'an and the Sunna, may be interpreted, developed and kept alive in line with the intellectual, political, economic, legal, technological and moral developments of a society.[133]

When unable to find unequivocal answers to legal questions in the texts of the *Qur'an* or narration of the *Sunnah*, Hanafi and Shafi scholars in the classical jurisprudential canon would rely on the legal methodologies of the consensus and analogy.[134] To the above point, El Fadl suggests that many Islamic jurists understood that the true objectives of the *Shari'ah* could not be derived from the explicit wording of religious texts alone. He noted:

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[131] Hussein (n109) 91-95

[132] Ibid at 127-128. See also Wael B Hallaq, 'Ifta' And Ijtihad In Sunni Legal Theory: A Developmental Account' In Muhammad Khalid Masud and Brinkley Messick and David S Powers (eds), Islamic Legal Interpretation: Muftis and Their Fathers Fatwas (HUP, 1996) 33, 36

[133] Abdullah Saeed, Islamic Thought: An Introduction (USA and Canada: Taylor & Francis, 2006), 52. See also Zuraidah Kamaruddin and Wan Zailan Kamaruddin, 'An Analysis Of Sis's Understanding Of Ijtihād From An Islamic Thought Perspective', (2012) 13 Afkar 33,35

[134] lnaserledinellah Mahmood Abdelwahab, Karim Daghbouche, Nadra Ahmad Shannan, 'The Algorithm of Islamic Jurisprudence (Fiqh) with Validation of an Entscheidungsproblem,' (2014) Journal Academia 1, 2-3.

> *Shari'ah* was never a simple amalgamation of positive prescriptions and rules and was not simply based on textual commands claiming to be rooted with varying degrees of credibility to divine revelation.[135]

At the same time, all four schools of Islamic jurisprudence acknowledged that the use of human reasoning did not permit a jurist or scholar to flagrantly flout the explicit meaning of a religious text.[136] The science of *usul al-fiqh* was, accordingly, developed to 'regulate *ijtihad* and to guide the jurist in his effort at deducing the law from its source and to [prevent] unqualified persons attempted to carry out *ijtihad.*'[137] Religious authorities of the highest rank (the founders of the four schools, or *madhab*) were responsible for articulating legal standards with which to approve legal methodologies or to otherwise reject them.[138] Traditional courts and religious jurists would then apply these methodologies in their judgments. [139]

In the above light, a practice emerged whereby scholars of appropriate authority were required to base their rulings on evidence or 'proofs' derived from the explicit text of the Qur'an and authentic narrations of the Sunnah. [140] A magistrate (qadi) or jurisconsult (mufti) could not, for instance, derive a ruling or opinion from a general principle of law: such as 'theft is forbidden' or that a contract containing elements of impurity (interest or gambling) should not be enforced. [141] The scholars of the age went on to delineate a sophisticated theory of textual interpretation based on the nature and sequence of the Qur'anic verses (e.g. a method for distinguishing literal verses (haqiqi) from those with a metaphorical meaning (majazi)).[142]

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[135] Khaled Abou El Fadl, Reasoning with God: Reclaiming Shari'ah in the Modern Age (Rowman and Littlefield, 2014) 298-299

[136] Ibid at 299

[137] Kamali (n28)13

[138] Fadl (n134) 298-220.

[139] See infra text [(n127) The relationship between civil and religious legal institutions in the early Caliphates is also complicated and cannot be dealt with exhaustively in this discussion due to limitations of word count. It should be noted however that a distinction was established between religious authorities and civil-judicial authorities. The mufti, or jurisconsult, was responsible for elaborating the methodology of legal interpretation and reasoning and was intimately involved in the process of constructing new norms from within the substantive boundaries of the Shari'ah. Civil magistrates known as qadis, were chiefly responsible for implementing new norms following consultation with the mufti, in effect rendering the mufti the highest 'court of appeal' and the primary body for administering justice. Accordingly all administrative and criminal laws issued by civic authorities were derived from the teachings of the four Sunni schools. For a comprehensive discussion of these issues see Hallaq (n 33), chapter 3 and 6.

[140] Kamali (n28)13; Zuraidah & Wan Zailan (n132) 35

[141] Kamali, ibid. See also infra text (n137)

[142] ibid

The above should not be taken to suggest that there were not significant differences between the four orthodox schools, Hanbali, Shaf'i, Hanafi and Maliki.[143] The classical jurists adopted different opinions on a whole range of issues, include the authoritativeness and juristic limits of applying different proofs (consensus, analogy, custom, principle of continuity, juristic preference, public interest etc.). The point of departure between these schools boiled down to the degree to which jurists could, or should, depart from a legal text in order to achieve the higher moral and regulatory purposes of the *Shari'ah*.[144]

The Qur'an is authoritative in the hierarchy of sources but the leading jurists of the classical era would invoke independent reasoning in certain circumstances to develop methods and precepts not strongly based in religious text or tradition. For instance, the Maliki jurist Ibn Rashad posited that a rule based in consensus may prevail over a rule of law sourced in ambiguous verse of the *Qur'an* or weak *Hadith*. [145]The justification for the use of these consensus-based methods stemmed from the need to reduce interpretative variation which might otherwise expose Qur'anic exegesis and *Hadith* interpretation to an unreasonable degree of uncertainty.[146]

Among the most dynamic interpretative (hermeneutical) methods developed in the formative age of classical Islamic jurisprudence is the doctrine of juristic preference, or *istihsan*.[147] This rationalist doctrine requires the jurist to apply their intellect, experience and reason for the purposes of determining the appropriate rule-recognition criteria on an issue left unregulated by the Qur'an and Sunnah.[148] The value of *istihsan* lies in the relative freedom it affords the jurist to exercise his own preference when deciding among one of many possible legal solutions to a given problem and also allows some scope for rule-reinterpretation in light of considerations of fairness and equity.[149] Itishan is recognised as a permitted 'proof' but students of the more literalist *fiqh* schools, the Hanbali school prime among them, have construed it narrowly.[150] This takes us to the crucial point. Jurists within each school of

[143] The differences between these schools are too vast to accurately reflect here. However see Zahraa (n30) 230-242.
[144] El Fadl (n134) 88-89
[145] Hallaq (n33) 3. For a discussion on the Maliki school and the key tenants of its jurisprudence see Hallaq, infra, pp 11-12. On the Hanafi school approach to these juristic controversies and the role of independent reasoning in the construction of Islamic rules see 46-47, 5 and 91-92. On the Shafi school see 52-54 and 96-98
[146] Hallaq (n33) 127
[147] Kamali (n28) 13
[148] Hallaq (n33) 13-15
[149] Zuraidah & Wan Zailan (n132) 40
[150] See John Makdisi,, 'Legal Logic and Equity in Islamic Law', (1985) 33 American Journal of Comparative Law, 63

thought or madhab will approach 'hard cases' from within their own interpretative traditions.[151]

In the above regard, Islamic legal theory has undoubtedly played a formative role in the evolution (and stagnation) of Islamic legal thought and practice. [152] The classical scholars developed a vast body of case law that allowed for general principles to be applied to new circumstances. This process of legal reasoning was dynamic and pluralistic, meaning that while weaker opinions or cases were often supplanted by new rulings from other *fiqh* schools, the principles underpinning case law and opinion remained relatively constant.[153] While this provided a safeguard against the perils of interpretative overreach, the mechanistic (and localised) application of *Ijtihad* can be argued to have generated problems of a different kind. Particular schools or madhabs would emerge as dominant in particular regions or communities. This meant that later generations of jurists were inclined to imitate the rulings and opinions of the school (mudhab) most closely aligned to the local culture and customs in which they operated.[154]

At the same time, while the founding schools had achieved a degree of consensus over the character of general principles of law, it was equally clear that each *fiqh* School expressed different views on how flexibly, or inflexibly, these general principles of law should be applied or adapted in the face of social change or need. In this regard, Ibn Hanbal, the founder of the fourth school of Hanbali school of Jurisprudence is *assumed* to have departed from the other Schools of jurisprudence in significant ways. [155]

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[151] Hallaq (n33) 131-132. [setting out the evidence based methods applied by the classical jurists].
[152] See e.g David Powers, 'On Judicial Review in Islamic Law', (1992) 26 Law and Society Review 315, 318
[153] Hallaq (n33) xi
[154] For a critique developed from within the Islamic tradition see Ahmad, (n80) For a more historical perspective, see Schacht (n41) 71-72.
[155] Ibn Hanbal worked for most of his life in Bagdad but is commonly represented as the intellectual offspring of Medina jurists such as Ibn Qudamah. In the modernist interpretation of his work, Ibn Hanbal is often credited with, along with the 13th Century reformer Ibn Tamiyah, as being the most the most notable exponent of traditionalist approach in Sunni Islam. See Livnat Holtzman 'Aḥmad b. Ḥanbal', in Encyclopaedia of Islam Three, eds. Gudrun Krämer (Brill, 2010) available at < http://brillonline.nl/subscriber/entry?entry=ei3_COM-23414>. It is arguable that the work of Ibn Hanbal is often mischaracterised as giving rise to the strict branch of Salafism that would emerge resurgent in the 20th Century. See, for example, Henri Lauzière, The Making of Salafism: Islamic Reform in the Twentieth Century (Columbia University Press, 2015). Haddad suggests that the doctrinal preoccupations of the older Hanbalite authorities bear little resemblance to the Salafists, who were concerned with emulating the practices of the Prophet and his companions. See Gibril F. Haddad, The Four Imams and Their Schools (London: Muslim Academic Trust, 2007), 301-302. The modern rise of Salafism in Arabia is often used to explain the rigidity of legal thought in parts of Arab world. However, for the purposes of this thesis, and given that modern ruling regime in Saudi Arabia has rejected the ultra-orthodox doctrine of Salafism, this chapter of Islamic history is not dealt with any detail in the thesis.

A noted theologian, Ibn Hanbal launched a theological critique of '*itjihad*' and was more generally critical of innovation in Islamic law and method. [156]The fulcrum of his critique rested on the fallacy of questioning God's law (shirk). From these premises, Ibn Hanbal appeared to refute Judeo-Christian conceptions of reason and logic on the basis that neither provided answers to the strictly theological enterprise of establishing what is permitted by scriptural revelation and what it is not.[157] The writings of Ibn Hanbal represented the first repudiation of juristic innovation (bid'a), giving rise to the second wave of Sunni revivalism as manifested in the writings of Ibn Taymiyya; a scholar noted for his firm rejection of rules derived from juristic consensus and for his narrow interpretation of secondary rules of interpretation.[158] By the 13th Century, the most influential Hanbali jurists preached near complete fidelity to the text of the Qur'an and the prophetic revelations of the Sunnah.

To what extent, then, is to true suggest, therefore, the 13th Century 'closed the door to *ijtihad*'.[159] The next sections will reflect on the veracity of these claims, before going on to assess the developmental histories of the Islamic world, specifically its respect of the Muslim's world's attitudes to, and relationship with, trade from the 10th to 19th Century.

2.3.4 The Closing of the Gate of *Ijtihad*?

In the Orientalist imaginary, though perhaps bearing some truth, the door to *ijtihad* was closed in 13th Century. One perceived example of this 'closure' to *ijtihad* is best represented to the strict constructivism of Ibn Taymiyya, a follower of the founder of the Hanbali School, Ibn Hanbal. This jurist rose to prominence after the Mongolian invasion of Baghdad, setting into a motion a series of seismic political events that would result in the virtual collapse of the Abbasid Caliphate.[160] In these shifting landscapes, a new religious polemics shaped intellectual discourses, this time in the form of a dispute between Sufi rationalists and the

[156] See note above (n155). Authority for this reading of Ibn Hanbal's work is found in the oral transmission of his conversations with another jurist. See Saud Saleh AlSarhan, Early Muslim Traditionalism: Early Muslim Traditionalism: A Critical Study of the Works and Political Theology of Ahmad Ibn Hanbal (Doctoral Thesis, University of Exeter,2011) 28

[157] See Holtzman [n154] [arguing against Orientalist representations of Ibn Hanbal work as inherently opposed to the use of logic and reasoning in scriptural interpretation, noting that 'Ibn Hanbal allow[ed] himself a certain degree of reasoning.] id.

[158] See Caterina Bori, "Ibn Taymiyya wa-Jamā'atuhu: Authority, Conflict and Consensus in Ibn Taymiyya's Circle," in (ed. Yossef Rapoport) Ibn Taymiyya and his Times (New York: Oxford University Press, 2010), 25

[159] See Schacht (n41) 71-72. For a critical perspective, see Hallaq, 'Was the Gate of Ijtihâd Closed'?, (n79) 28-33

[160] See generally, Ismail Abdullah, 'Tawhid and Trinity: A Study of Ibn Taymiyyah's al-Jawab al Sahih', (2006) (4) Intellectual Discourse 191, 192. Also discussed extensively in Al Ahmad, Faris, 'Corruptions, Imitations, and Innovations: Tropes of Ibn Taymiyya's Polemics', (Masters Dissertation, submitted to the City University of New York, awarded in 2015) 9. Available at. <https://academicworks.cuny.edu/gc_etds/831>

leaders of a second Sunni revivalist movement, now resurgent in Cairo, Damascus and the Hijaz region. Lapidus, a student of Islamic history, notes that:

> Hanbalism fused the tradition of autonomous religious activity with the heritage of political activism and rebellion… a fusion with explosive implications for the religious authority of the Caliphate and for the relations between state and religion.161

The above events provide important historical insight into the reasons why religious literalism emerged resurgent in the 13th and 14th Century, as well as the challenge it presented to political authority. On the matter of Islamic legal doctrine, however, it is arguable that the era of unconstrained *ijtihad* (independent reasoning) had already begun to 'wither' by the 10th Century. This is because successive generations of legal jurists were bound to follow the standards of the founding schools. These customs, in other words, had already begun to crystalise before the later waves of Sunni revivalism.[162] If, indeed, the gates of *ijtihad* had closed by the 10th Century, then the Islamic duty of all Muslims to enrich their ilm may also be said to have been abandoned during this period. In other words, by failing to evolve the jurisprudence, later generations could be said to have based their opinions on blind faith or imitation (taqlid).[163]

On the other hand, it is arguable that the demise of *ijtihad* has been somewhat overstated.[164] There have always been voices within the Islamic faith that have urged greater adaptation and reinterpretation of existing rules and methods. The Hanbali School is no exception. Whatever one might make of the static or fluid nature of Islamic jurisprudence in the Arab world, Saudi Arabia included, the Hanbali School is regarded as having 'produced some of the most analytically and normatively dynamic legal scholars'.[165]These include the writings of al-Tufi writing in the 14th Century who wrote extensively on the general permissibility of adapting and reinterpreting rules for the purposes of advancing the social and economic welfare of Islamic societies.[166] Legal innovation has, after the 10th Century, however been framed in less

[161] Ira Lapidus, "The Separation of State and Religion in the Development of Early Islamic Society,', 1975 (64) International Journal of Middle East Studies, 333, 370.
[162] Knut Vikor 'Inscrutable Divinity or Social Welfare: The Basis of Islam ', in ed Guttorm Fløistad Philosophy of Justice (Springer, 2015) 146
[163] Hallaq, (n33) 87-88
[164] Hallaq (n79) 28-33
[165] El Fadl (n13)]88-89
[166] For a general overview, see Felicitas Opwis, 'Maṣlaḥa in Contemporary Islamic Legal Theory',(2005) 12(2) Islamic Law and Society 182

authoritative terms through the use of doctrines such as ifta which allows for the adaptation of an existing rule in certain narrow circumstances.[167] Some secondary rules, however, afford scholars a relatively broad scope of reinterpretation. For instance, the Islamic concept of public interest (maslahah) has been applied liberally to further legal reform on the grounds of social need, local custom and necessity.[168]

Some have argued of the need to renew the tradition of *ijtihad* be renewed in the contexts of a globalising world, given that many modern Islamic countries do not appear to have kept pace with modern commercial and economic realities.[169]While there have been important attempts at legal innovation, the conditions under which such secondary rules may or may not be applied remains contentious. The above account underscores just how integral and problematic the concepts of reason and rationality are to the development of Islamic law and custom. Drawing on Islamic criticism of the limits of juristic innovation, Hallaq notes that fundamental aspects of substantive Islamic law have crystallised as 'universal' form of Islamic custom.[170] Masud takes a different view of the field and argues that, far from being the engine of social reform, *ijtihad* was further purged of its creative potential from the 15th Century onwards, thereby rendering it a 'mechanical principle that led Islamic society to fossilization and prevented it from progress.'[171]

To what extent, therefore, can it be argued that Islamic societies have historically failed to attain relatively high levels economic development *because* of the doctrinal 'closure' of *ijtihad* and its mechanistic application from the 10th Century onwards? As discussed in the next section other factors, such as colonial rule, have also contributed to the stagnation of Muslim societies. As a result, any historical analyses that lays the blame for the Muslim world's limited economic 'progress' on religious factors alone appears dubious when considering the West's involvement in the Islamic world.[172] Colonial critiques are also instructive in a theological as well as political sense. For instance, any exercise of *ijtihad* that

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[167] Hallaq, 'Ifta' And Ijtihad In Sunni Legal Theory', (n131) 33-43
[168] See Opwis (n166) 184.
[169]Frank Vogel and Samuel Hayes, Islamic Law and Finance: Religion, Risk and Return (Kluwer Law International, 2008) 4, 9.
[170] Ibid. Hallaq [n45] 227-228. Hallaq notes :[Although the notion of necessity has been used to justify a number of departures from the stringent demands of the law, it is, like custom, restricted to those areas upon which the explicit texts of revelation are silent. Abe Yesuf, for instance, was criticized when he held the opinion – which ran against the dictates of Prophetic Sunna]. Id at 227
[171] Muhammad Khalid Masud, 'Iqbal's Reconstruction of ljtihad,' (Islamic Research Institute, 1995) 7
[172] Ismael Hossein-Zadeh , 'The Muslim World And The West: The Roots Of Conflict,' (2005) 27(3) Arab Studies Quarterly 1

is solely concerned with adapting Islamic rules of law to contemporary legal norms and practices might be viewed as the Muslim world's capitulation to a Western legal paradigm.[173]

In light of the above considerations, the next section turns its attention to broader historical factors thought to have affected economic progress in the Islamic world in the post classical era of Islamic jurisprudence, focusing finally on the birth of the modern state of Saudi Arabia.

2.4 Bridging the Gap between Islamic and Western Histories: The Muslim World and Trade from the 10th To 19th Century

The next section will focus on the religious, social and factors that have shaped trade and commerce in the Islamic world, and finally Saudi Arabia, as viewed through the lens of Islamic *and* orientalist histories. In doing so, it will consider the relationship between law and economy in the Muslim world after the 10th Century; in other words, after the 'gates of ijtihad' were, according to conventional histories, already beginning to close.

Before the 10th Century, Arabia was considered a Golden Age of trade, and established Arabia as a hub of trade and commerce. The flourishing of trade was facilitated by Islamic principles of contract law (as detailed in chapter 2). Subsequent to this period, the main development of trade in the Islamic World is divided into two main periods: the 10th to the 15th century, when Islamic trade remained strong and the period from 1500 to 1900 when it is assumed to have entered into a period of stagnation and decline.[174]After the 10th century, the Islamic world underwent a series of crises. The Abbasid Caliphate continued to rule in Baghdad, but as Lewis suggests, these rulers were little more than the puppets of their Turkish guards (Ghulam).[175] The fragmentation of the Abbasid Caliphate did not, however, lead to the complete collapse of Muslim society.[176] A series of successor Empires arose in the lands that were formerly held by the Abbasids such as the Fatimids.[177]These were Muslims societies and it is estimated that these Muslim majority states were becoming increasingly Arabized. By the early 12th century, however, Turkish nomads dominated much of the

[173] See Wael Hallaq, 'The Quest for Origins and Doctrines - Islamic Legal Studies as Colonialist Discourse,'(2002-2003) 2 UCLA Journal of Islamic & Near Eastern Law 1, 3.See also section 5.5, Chapter 5 of this thesis.

[174] Azeem Ibrahi, 'The Abbasid Caliphate: The Light of the Word' in Radical Origins: Why We Are Losing the Battle Against Islamic Extremism? (Pegasus Books, 2017) 45

[175] Bernard Lewis, A History of the Middle East: 2000-year-old history from the birth of Christ (Phoenix, 2001) 13

[176] John Joseph Saunders, A History Of Medieval Islam (Routledge, 2002) 115

[177] ibid

Muslim World and various Turkic dynasties would rule much of the Muslim World until the 20th century.[178]

However, trade continued and proved to be remarkably resilient.[179] This was in part because of the high status that was accorded to traders and merchants, who often formed alliances with the new Turkish elites. The various communities in the Muslim world had become interdependent and they needed to exchange goods and products. Caravan routes that had crossed much of the Muslim world continued to be used. These and other routes of trading in intra-city commerce allowed for the free flow of merchandise across territories.[180]

The importance of these caravan routes was recognised by the Great Seljuk Empire and they established caravanserais to support the trade conducted by caravans. These were retained and expanded by later rulers such as the Ottomans.[181] Indeed, the Arab world continued to be the crossroad of world trade, for example, the Silk Road traversed the Muslim world.[182]The Arabs continued to act as the intermediaries for trade and they traded extensively with the Byzantium Empire, at least in times of peace.[183] This also spurred the development of new trade routes in the Mediterranean where Muslim merchants traded mainly with Italian merchants. Many of the trading practices developed in the Islamic world, primarily in the area of trusts and banking, were adopted by European merchants at this time and this helped to boost the European economy.[184] According to Banaj, 'Islam shaped the tradition of early capitalism both by preserving monetary economy and through its own precocious development of the partnership form'.[185]

North African merchants also expanded into Sub-Saharan Africa and the Indian Ocean trade remained in Muslim hands and this helped to spread Islam.[186] Trade and Islam were interconnected; merchants supported the growth of Islam and the faith continued to facilitate the growth of commerce as discussed further in chapter 2. The Muslim world was estimated to be wealthier than Europe until 1500.[187] This was because many of the practices that

[178] Ibid, 23
[179] Skeen (n 67) 345
[180] Saunders (n 176) 134; Lewis, (n 175) 157
[181] Skeen (n 65) 346
[182] Ibid, 347
[183] Madawi Al-Rasheed, A History of Saudi Arabia (Cambridge University Press, 2002) 19
[184] Skeen (n 73) 357
[185] Jairus Banaj, 'Islam, the Mediterranean and the Rise of Capitalism' (2007) 15 Historical Materialism 47, 48
[186] Saunders, (n 176) 156
[187] Ibid, 157

emerged during the Golden Age were maintained until this period, such as secure contracts and fair arbitration.[188]

The area that is currently contained within the Saudi Kingdom was not yet united and its economic fortunes varied. From the 10th to the 20th century, the Hejaz was dominated by the Sharif of Mecca.[189]The merchant class remained very influential in both Mecca and Medina. Many of the new Islamic Empires gave donations and gifts to the Holy Cities and an elaborate welfare state was developed in the Hejaz as a result.[190] The East of Arabia continued to play a very important role in the Indian Ocean trade. However, the East Arabian ports came under the influence of the Kingdom of Ormuz from the 11 century to the 16th Century since Arabian merchants would reap the benefits of trading with the wealth of Hormuz.[191] The interior of Arabia, such as Najd remained poor but trade was conducted to ensure the regular supply of important resources.[192]

2.4.1 A Departure Point: The Islamic World and Trade from 1500-1900

The appearance of Europeans in the Red Sea and the Indian Ocean around 1500 was a decisive turning point for global trade. Their superior ships meant that they captured much of the Indian Ocean trade and disrupted the trade on the old Silk Road.[193] The Portuguese captured the Kingdom of Ormuz and therefore secured much of the Spice Trade. As a result of these developments, the East Arabian ports began a long period of decline though they continued long-distance trade.

In 1506, the Turkish Ottoman Empire invaded the Hejaz in 1506 in part to save the Holy Sites from the Christians. The Ottoman Caliphs would later dominate the West and the east of the Arabian Peninsula in the following centuries. They closed the ports of Eastern Arabia to Safavid Persia and pilgrims by-passed the east to the detriment of trade and commerce.[194] The Hejaz continued to prosper because of the Haj and benefited from its central location on

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[188] Banaj (n 185) 49
[189] Al-Rasheed (n 183) 113; Saunders, (n 176) 189
[190] William Ochsenwald, 'Ottoman Arabia and the Holy Hijaz, 1516-1918', (2016) 6 Journal of Global Initiatives: Policy, Pedagogy, Perspective 15
[191]Al-Rasheed (n 182) 119
[192] Ibid, 145
[193] Bernard Lewis, What Went Wrong?: Western Impact And Middle Eastern Response (Oxford University Press, 2002) 189
[194] Frederick F. Anscombe, The Ottoman Gulf: The Creation of Kuwait, Saudi Arabia, and Qatar (Columbia University Press, 1997) 23

trade routes.[195] During this era, the Ottomans granted the Hejaz a great deal of autonomy and imposed low taxes.[196] In the Muslim world, trade continued to grow but not at the relatively dramatic rate as in Europe. [197]New products stimulated commerce such as the discovery of coffee from Ethiopia and tobacco from the New World. The benefits of trade were usually invested in farming and agriculture. However, the Ottomans while supportive of trade generally regulated it more tightly than previous Empires.[198]This was done to secure the welfare of the Islamic community. For example, Ottoman Sultans established as system of Islamic guilds to protect and govern trade. The trade in guilds spread to the urban centres of the Arabian Peninsula from the 16th century. [199]

The Ottoman Empire was the largest Muslim state since the Abbasids, but it was not a free trade area. The Ottomans veered between state involvement in trade and free trade policies. Locals were expected to buy from local agents and the guild system ensured that most trade was local, and this tended to restrict the development of international trade networks.[200] The expansion in trade began to slow from the 18th century as the Ottoman and the Safavid Empire declined. For these reasons, the Ottomans had no real control over the interior of the Arabian Peninsula. In the mid-eighteenth century the first Saudi state of Saudi Arabia was established.[201] This was later destroyed by the Ottomans, but a second Saudi state emerged in the nineteenth century. Commins suggests that the first Saudi and second State's 'distinctive character stems from its affiliation with the 'conservative' or 'strict' Hanbali legal school'.[202]. This was to lead to some divergence between the Saudi state and the rest of the Middle East in the nineteenth century, a state of affairs which arguably persists to this day.

The stagnation of the economy in the Muslim world became very apparent by the start of the nineteenth century.[203]Throughout the nineteenth century, Muslim powers, such as the Ottoman Empire and the Egyptian Khedivate attempted to modernise their societies by reforming the economy and commercial laws. These rulers, for instance, made a conscious

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[195] Ochsenwald (n 190) 19
[196]Al-Rasheed (n 182) 119; Saunders, (n 1176) 197
[197] Al-Rasheed, ibid
[198] Lewis (n 193) 189
[199] ibid
[200] Ibid, 178
[201] Natan DeLong-Bas, 'Islam and Power in Saudi Arabia' in John L. Esposito and Emad El-Din Shahin (eds.) The Oxford Handbook of Islam and Politics (Oxford, 2013) 115
[202] David Commins, The Wahhabi Mission and Saudi Arabia (IB Tauris, 2006) 123
[203] Al-Rasheed (n 182) 201.

effort to introduce western 'legal norms on economic regulation and private property'.[204] At first, these laws were not designed to supersede *Shari'ah*. However, by the late 19th century especially in Ottoman territories, the adoption of quasi-secular legal code by the Ottoman rulers had virtually replaced Islamic law's former influence over the empire (see Chapter 5). Minorities such as Christians were legally emancipated, and this was in part designed to boost trade and economic activity.[205] These developments were followed by a deliberate attempt in both Egypt and the Egyptian lands to industrialize. However, the efforts at modernising the Muslim economies were not successful. Increasingly minorities such as Christians and Jews dominated trade and western imports dominated local trade.[206]

Many of the Ottoman reforms were not extended to the Hejaz because of the opposition of the religious establishment.[207]This and the fragmented nature of Arabia meant that the region stagnated in terms of trade. Trade was still very important, but the region had not developed, and its trade system was much the same as it had been before. The Haj remained of crucial importance to the Hejaz. The Ottoman development of the Hejaz railways was designed to bring pilgrims to Mecca and Medina and did boost somewhat the local economy of the region. However, the rest of Arabia languished in poverty and underdevelopment.[208] External trade was dominated by Europeans and many pilgrims were carried to the Holy Shrines by British and French steamers[209].

2.4.2 Economic Factors Contributing to the Decline and Stagnation of Trade in the Islamic World

In 1000 AD the Muslim world was still preeminent in international trade[210]. However, by 1900 the Muslim world was poor and underdeveloped compared to Western nations. There were several long-term factors for the decline and the stagnation of trade in the Islamic World.

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[204] Lewis (n 193) 156
[205] Jane Hathaway and Karl Barbir, The Arab Lands under Ottoman Rule, 1516-1800 (Routledge, 2008) 114
[206] Lewis (n 193) 187
[207] Hathaway and Barbir, (n 205) 113; Lewis (n 193) 129
[208]Al- Rasheed (n 182) 204
[209] Ibid at 213
[210] Skeen (n 65) 348; Lewis (n 193) 119

The discovery of America changed the dynamics in the World Economy.[211] The opportunities created for Europeans by the discovery of the Americas allowed trade to grow rapidly. Spanish, Dutch, French and English colonies were established in the 16th and 17th century. The Europeans soon established trade networks around the world and this with the superior naval technologies allowed them to dominate global trade by 1700.[212] This has important consequences for the Islamic world. Arab traders were no longer the middlemen in international trade.[213] The old Silk Road became irrelevant and Western nations traded directly with China. The Arab maritime trade also declined because it could not compete with the Europeans.[214]

With these developments, Arabia became increasingly cut off from international maritime trade and commerce was much reduced.[215] However, the Muslim world remained quite affluent because of internal trade. By the 19th century, economic decline in the Ottoman Empire would provide the impetus for Europeans to become more influential in the internal trade of the Islamic World.[216] As the West industrialised, the Ottomans continued to outcompete products made in the Muslim world where workshops were often controlled by guild members.[217] This led to an increasing trade deficit and to pronounced economic decline. In this regard, Acemoglu, Johnson and Robinson have suggested that European interference and competition were responsible for the divergence in the 'comparative development of the West and the Middle East'.[218].

The Ottoman Empires and Egypt did not greatly benefit from the growth in international trade and both nations became indebted to European banks resulting in them becoming de-facto economic colonies of the West. [219]Western powers, especially Britain and France used their considerable military and political power to impose unfair trade agreements on Muslim rulers such as the Khedive of Egypt.[220] Local rulers' efforts to modernise their economies such as the economic plans Muhammad Ali in Egypt were unable to 'really succeed in the

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[211] Jörg Baten, A History of the Global Economy. From 1500 to the Present (Cambridge University Press, 2016) 226
[212] ibid 230
[213] Caroline Finkel, Osman's Dream: The Story of the Ottoman Empire 1300-1923 (Basic Books, 2005) 134
[214] Anscombe (n 194) 312
[215] Baten (n 211) 243
[216] Finkel (n 213) 199
[217] Lewis (n 193) 119;Baten, (n 211) 244
[218] Daron Acemoglu, Simon Johnson and James A. Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation,' 91 American Economic Review (2001) 1369-1401
[219] Lewis (n 193) 167
[220] ibid

context of colonialism'.[221] One reason for this is that Western nations benefited from any improvements in the local economy, for example the construction of the Suez Canal.[222] This ensured that local traders were increasingly disadvantaged in external trade and in internal trade. The increasing western control of the economy of the Ottoman Empire meant that Muslim trade began to further stagnate.[223] By the eighteenth-century Arabia was no longer at the crossroads of various trade networks nor was it connected to new trade networks.[224]

The Hejaz and the other regions were forced to rely on trade with Muslim states, many of which economically underdeveloped by the 19th century.[225] By this time, Islamic societies were, according to Cogel, increasingly hostile to western commercial practices which were perceived as 'Western' and therefore Christian.[226] Unlike the Golden Age of Islam, it is arguable that the Muslim community saw outsiders as a threat and became less pluralistic and more inward looking, possibly to protect their identity when they felt challenged by the power of the West. This insularity was especially evident in the adoption of western technologies. The flexibility and practicality that had been a feature of Islamic society were lost and Arabian society rejected many western innovations.[227]

Despite these trends, Cogel argues that the conservatism of Muslim societies is overstated and that 'there is mixed evidence on whether Islamic societies have been open or conservative against modern ideas, technological advancements, and legal developments'.[228] However, Cogel admits that the apparent inability of many Muslim societies to fully capitalise on technologies, with the exception of military technologies, was to have a negative impact on the Muslim world.[229] This was especially true with regard to 'how the legal community reacted to new developments'.[230]

One reason that may be used to explain the Muslim world's ambivalent approach to technological and economic innovations was that Islamic societies valued unity over

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[221] Ibid at 168
[222] Mohammad A. Chaichian, 'The Effects Of World Capitalist Economy On Urbanization In Egypt, 1800-1970' 20 International Journal of Middle East Studies,' (1988) 23-43; Lewis, (n 193) 178
[223] Baten (n 211) 278
[224] Ibid, 167
[225] Ibid, 280; Al- Rasheed (n 182) 178.
[226] Metin Cogel, Stagnation and Change in Islamic History: Department of Economics Working Paper Series (University of Connecticut, 2007) 2-4
[227] For a discussion of this see Ibid, 6-7
[228] Ibid, 8; Baten (n 211)176
[229] Cogel (n 226) 9
[230] Ibid, 7

competition. This meant that the Arab world was reluctant to adopt practices that could be disruptive.[231] This can be seen in the persistence of the guild system in Mecca and elsewhere, which was designed to regulate trade and to provide all guild members with a living, but which also had the effect of restricting the development of a dynamic free market.[232] Furthermore, the lack of Ottoman control meant that the Tanzimat reform policies were not extended to the Hejaz and other areas.[233] This was to have a negative impact on trade as seen in the inability to take advantage of opportunities offered by the Hejaz railway, for example.[234] There were not the institutions or modern rules that would have allowed local traders to develop new trade routes and to exploit the domestic market.[235]

2.4.3 The Great Divergence: An Orientalist View of Islamic History or the 'Closing of the Gate to Ijtihad'?

One of the most influential reasons offered for the relative decline and the stagnation of the economies of the Muslim world is the 'Great Divergence' theory espoused by Timur Kuran. Kuran claims that the rise of the West was not responsible for the stagnation of the Arab world, but that it was in large part the consequence of the growing inflexibility of Islamic *fiqh*.[236] On this issue, Kuran argues that Islamic legal schools which had contributed to the growth of trade and commerce in earlier periods became impediments to change. According to Kuran, 'the explanation for the Middle East historical trajectory must include reasons why the decline in the efficacy of the traditional institutions took so long to reform.'[237]One possible explanation is that religious authorities within these countries were able to resist reform for centuries. Over the centuries, jurists began to slow or block any innovations which were deemed contrary to the *Shari'ah*.[238]

[231] Ibid, 7
[232]Al- Rasheed (n 182) 201
[233] The Tanzimat reforms was an Ottoman attempt to reform its law code as part of its efforts to modernize the state. The reforms were mainly based on French models and largely approved by the Hanafi school but the Hanbali school was highly suspicious of the Ottoman reforms. See William Ochsenwald, 'Religion, Society and the State in Arabia: The Hijaz under Ottoman Control, 1840-1908' (Book Review) (2005) 39 Middle East Journal 829
[234] Ibid
[235]Al-Rasheed (n 182) 202; Cogel (n 226) 6
[236] Timur Kuran, The Long Divergence: How Islamic Law Held Back the Middle East (Princeton University Press, 2002) 14
[237] Ibid at 38
[238] Irit Bligh-Abramski, 'The Judiciary (Qàdîs) As A Governmental-Administrative Tool In Early Islam', (1992) 35 Journal of Economic History of the Orient 65

Kuran identifies key areas in which the law prevented economic growth.[239] The main areas of Islamic law that harmed trade and economic development were the laws on partnerships, inheritance, credit (riba) and trusts (waqf). These prevented the development of corporations, investment and large-scale transactions.[240] Kuran's argument would seem to have some relevance to the situation in Arabia. The increasingly conservative jurists tended to become inflexible.[241] This according to Raheem was not based on the original legal culture of Islam which was very pragmatic and flexible.[242] The Ottomans sponsored Hanafi legal scholars, who unlike their predecessors became more literal in their interpretation of Islam. In the first and second Saudi States, the Hanbali interpretation of the Qur'an meant that commercial laws prevented the accumulation of capital and its efficient application.[243] For example, much of the arable land around Mecca was owned by Waqfs and this meant that funds were tied up in land and could not be invested in trade.[244]

It should be noted that the Great Divergence argument has been widely criticised. Shatzmiller, for instance, warns against Kuran's 'sweeping generalisations about the negative roles of the Islamic state and legal institution'.[245] In the Golden Age of Islam, as outlined above, *Shari'ah* was able to support the development of trade by merchants. However, Kuran's contention that jurists became more conservative after the 13th Century is supported by scholars such as Davis and Samuels. [246] A key development in the early modern period and later was that jurists no longer passed neutral judgments on trade disputes and contracts and were more likely to reject contractual forms containing elements of uncertainty (*gharar)* or interest (*riba) were* involved, since both were prohibited under *Shari'ah*'.[247]. While the Hanafi School remained influential in Ottoman lands, the Hanbali School became very influential in much of Arabia.[248] The influence of the strict Hanbali schools, supported by the literalist ideas of Ibn Tamiyyah, became prominent in areas of Arabia, especially in the First

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[239] Kuran (n 236) 13
[240] Ibid, 123
[241] Al Rasheed (n 182) 197
[242] Abdul Ghafoor and Abdul Raheem, Text And The Immutability Of Islamic Law: A Study Of The Flexibility Evident In Dealing With Texts In Early Islam (University of Melbourne, Melbourne, 2000] 6
[243] Al-Rasheed, (n 182) 199; Baten (n 211) 199
[244] IM Shair and PP Karan, 'Geography Of The Islamic Pilgrimage', (1979) 3 Geography Journal 599-608
[245] Maya Shatzmiller, 'Economic Performance And Economic Growth In The Early Islamic World', (2011) 54 Journal Of The Economic And Social History Of The Orient 132
[246] See Warren J. Samuels, Jeff E. Biddle and John B. Davis, A Companion to the History of Economic Thought (Blackwell, 2007) 28-45
[247] Bligh-Abramski (n 238) 57
[248] Al-Rasheed (n 182) 201

and Second Saudi state, and this was arguably a factor in them falling behind other areas of the Islamic World. [249]

All the legal schools became conservative, from the Middle Ages onward. Starting from the 13th century there was evidence to suggest a movement away from the presumed or quasi rationalism of the Golden Age.[250] One possible reason for the growing conservatism and rigidity of the Islamic jurists was the rise of the *ulama.* The jurists were essential as they helped to legitimise the authority of ruling elites, argues Rubin, who refers to them as 'legitimizing agents'.[251] This was very true in the Ottoman Empire and with the Sharif of Mecca. The jurists became increasingly powerful and many rulers were reluctant to challenge their authority even if their rulings negatively impacted on trade.[252] This was a departure from the Golden era of Islamic civilisation as the religious establishment's power was to have a detrimental impact on Muslim society.[253]This is best seen in the Ottoman jurists' rejection of the printing press.[254]

In Arabia the *ulama* became very influential in the Hejaz and especially the first two Saudi states.[255].As the madhab sought to preserve their 'intellectual monopoly', the 'gate to *ijtihad*' did in fact appear now to have been resolutely closed.[256] These developments arguably deterred Arabian merchants from risk-taking because they feared the strict rules and opinions of a now powerful religious establishment.[257] In turn, entrepreneurship and innovation and the region now within the borders of Saudi Arabia stagnated in the period from the mid-eighteenth century.

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[249] The first Saudi state also known as the Emirate of Diriyah, when Muhammad ibn Abd al-Wahhab and Prince Muhammad bin Saud formed an alliance. This state was destroyed by the Ottomans. However, it was revived in the 19th century and it was ruled by members of the Saud family. This state was destroyed in 1895 but a member of the Saud family established the Kingdom of Saudi Arabia in the 1920s . Al-Rasheed, ibid at 39

[250] Kenan Malik, The Quest for a Moral Compass: A Global History Of Ethics (Atlantic, 2014) 56

[251] Jared Rubin, Rulers, Religion and Riches: Why the West got rich (Cambridge University Press, 2009) 13

[252] Ibid at 17

[253] B Guy Peters, Institutional theory in Political Science (Bloomsbury Publishing 2001) 34; Cogel, (n 226) 20

[254] It was only in the 18th century that it was accepted by many jurists see ibid

[255] Al-Rasheed, (n 182) 145.

[256] Ibid

[257] Rubin (n 251) 34

2.5 The Role of Colonialism in Impeding Trade and Commerce in the Modern Muslim World

From the late nineteenth century, Europeans increasingly dominated the Islamic World.[258] By 1900 a majority of the Muslim world was colonised by French, British and other European powers.[259] The Ottoman Empire and Qajar Iran were the only significant Muslim states that were not controlled by the Europeans, but even they were heavily influenced by powers such as Britain.[260] World War one proved to be a disaster for the Islamic world. The Ottoman Empire joined the Central Powers and was to pay a heavy price.[261] It survived repeated allied attacks but collapsed in 1918. By the end of the war the Europeans directly and indirectly dominated the Arab and the broader Muslim world. At the Sykes-Picot Agreement the Allies partitioned the Ottoman Empire and divided its Middle Eastern territories into spheres of influence.[262]The British and the French established a number of colonies, dependencies and protectorates that ensured that they retained influence and power over the Middle East.[263] This resulted in a social and economic revolution in many areas of the Middle East which had stagnated under Ottoman rule in recent centuries.[264]

The traditional view is that colonialism greatly harmed the local Muslim economies but the impact of the West on economic development was much more nuanced and complex.[265]The colonial administrators were authoritarian, but they were eager to develop the infrastructure of local economies and this benefitted trade. This was to generate tax and other revenues for the colonial power and to consolidate their power in the region.[266] However, as part of their efforts to control their colonies through a policy of divide and rule, they favoured minorities such as the Jews and Christians that were given special privileges in the commercial sector.[267] This is seen as one of the main reasons why the Syrian economy contracted during the years of French rule.[268] It has often been claimed that the colonisation of the Middle East was

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[258] Lewis, (n 193) 34; Rubin, (n 251) 114.
[259] David James Murphy, The Arab Revolt 1916-1918: Lawrence Sets Arabia Ablaze (Osprey Publishing 2008) 56.
[260] Ibid, 45
[261] Lewis, (n 60) 117; Murphy (n 259) 67
[262] Edward Peter Fitzgerald, 'France's Middle Eastern Ambitions, the Sykes-Picot Negotiations and the Oil Fields of Mosul, 1915-1918,' (1994) 66 Journal of Modern History 697, 697-725.
[263] Lewis, (n 60) 117
[264] Al-Rasheed, (n 182) 198; Murphy, (n 259) 189; Fitzgerald, (n 262) 699
[265] Anscombe, (n 194) 120; Lewis, (n 175) 112
[266] Anscombe (n 194) 119: Lewis, (n 60) 78
[267] Lewis (n 175) 113
[268] For the impact of French policies on the development of Arab national identity see Philip S. Khoury, Syria and the French Mandate: The Politics of Arab Nationalism, 1920-1945 (Princeton University Press, 2014) 134.

driven in part because of the discovery of oil, which was essential to the economies of the West. [269]. The colonial Empires granted concessions to Western oil companies and they effectively dominated the nascent oil industry. The discovery of oil did not benefit the local people. Most of the Middle East remained impoverished by colonialism.

The hold of the Europeans on the Middle East was, however, never firm and after 1945 they began a period of decolonisation.[270] This is not to suggest that the granted freedom to their former colonies, but rather that they applied a form of neo-colonialism whereby the West used its economic, financial and cultural influence to indirectly control the Muslim World. This resulted in the oil industry being effectively dominated by western companies and its revenues did not benefit the ordinary Muslim and economies stagnated.[271] America became the dominant power in the Middle East after 1945. One distinctive feature of the Middle East was that authoritarian leaders continued to dominate the region.[272] Unelected leaders could still count on the support of America or the Soviet Union (until 1989) to remain in power, especially during the Cold War.[273]

Increasingly after the 1950s, many countries such as Egypt and Syria, in reaction to neo-colonialism, adopted socialist models.[274] Several Muslim majority nations sought to become more secular and believed that nationalisation of the economy was essential for development.[275] However, the adoption of socialist policies in many countries failed to improve the situation in many economies.[276] These policies lead to increasing inefficiencies and corruption and many nations built up significant foreign debts. Government intervention in the economy became the norm in Muslim countries, even in those countries that choose not to adopt the Socialist model. The state-controlled large areas of the economy formed massive state-owned conglomerates.[277] Those states that had significant reserves of oil and used the revenues to create massive welfare states and these became a drain on the economy, raising debt and suppressing trade.[278] Despite the adoption of western models and the vast reserves

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[269] Lewis (n 60) 201.
[270] ibid
[271] Roger Owen, State, Power and Politics in the Making of the Modern Middle East (Routledge, 2013) 134.
[272] Zachary Lockman, Contending Visions of the Middle East: The History and Politics of Orientalism (Vol 3, Cambridge University Press 2009) 114; Lewis, (n 60) 178.
[273] Owen (n 271) 178; Lewis, (n 193) 117
[274] Lewis (n 193) 189
[275] Lockman, (n 272) 177; Owen (n 271) 118
[276] Lewis, (n 193) 199; Lockman, (n 272) 119; Owen, (n 267)201.
[277] Lewis, (n 175) 178.
[278] Ibid, 201; Manfred Halpern, Politics of Social Change: In the Middle East and North Africa (Princeton University Press, 2015) 302.

of oil, the economy of the Middle East and the wider Muslim world did not greatly improve.[279] While the Western world entered a dynamic period of growth from 1945 until 1973 and later between 1983 and 2008, this was not the case in the Middle East. Indeed, many Muslim nations fell further behind the Western world and even many areas of Asia.[280]

2.5.1 A Hybrid View of Factors causing lack of development in Muslim countries (1900-2010)

Recently, as we have seen, the Muslim world has been falling behind the West and the new Asian economic powers. While most of the world has progressed economically, the Muslim world has not been as successful.[281] The relative decline in much of the Muslim world can be attributed to several factors. Colonialism was an important factor in the decline of many Muslim countries such as Syria. The western powers created new states that were not related to traditional ethnic borders and this led to the establishment of fundamentally unstable countries such as Lebanon.[282]These and other factors have caused instability and this has done much to prevent the development of commerce.[283] As a result, entrepreneurs have been dissuaded from investing in new ideas and innovations and this has meant that many national economies have stagnated. Instead, companies have focused on safe investments such as the import and export business and have not developed new business models.[284] Moreover, these fundamental unstable entities have led to authoritarian regimes and this has meant that the business actor have not enjoyed a high level of certainty or trust in the government.[285]

By the same token, the impact of Islamic law has often been stated as a factor in the failure of entrepreneurs to develop businesses and the private sector in the Middle East and the wider Muslim world. This is the essence of Kuran's 'Great Divergence' thesis.[286] Some suggest that the *Shari'ah* is not always a primary consideration in how Muslim countries regulate domestic markets, many aspects of which are based conventional banking and finance practices.[287] There are, however, some who argue that the strict interpretation of rules of

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[279] Baten, (n 211) 301; Al-Rasheed, (n 182) 213.
[280] Halpern, (n 278) 178.
[281] Baten, (n 211) 228; Cogel, (n 226) 5; Kuran, (n 236) 34.
[282] Owen (n 267) 198.
[283] Baten, (n 211) 228; Cogel, (n 226) 5; Kuran, (n 236) 34.
[284] Baten, (n 211) 34; Lewis, (n 175) 213.
[285] Lewis, (n175) 201.
[286] Baten (n 211) 228; Cogel (n 226) 5; Kuran (n 236) 34.
[287] Commins (n 202) 134.

Shari'ah had dissuaded risk-taking and that this has thwarted the commercial development of many Islamic societies, especially in relation to contract law (discussed in chapter 3).[288]

Since the 2000s, even the most conservative Gulf regions such as Bahrain have become more progressive and have increasingly side-lined those who promote a conservative interpretation of business law and related practices.[289] This suggests that Kuran's theory is no longer as relevant.[290]The persistent control of the oil industry by Western interests has harmed the development of many national economies. The revenues that could have been used to develop the infrastructure and economies of societies were often diverted to western companies. [291] The neo-colonial economic relationship that was established especially by America in the 1950s and continues to this day means that the region is not able to fully capitalise on its energy resources.[292] Then there has been the extensive role of the state in the economy and this has meant that resources have been diverted from the private to the public sector. [293] The best example of this is the ubiquity of food subsidies and other subsidies. Based on the above observations, there is evidence to suggest that many Islamic societies are not free markets and there are only restricted opportunities for entrepreneurs and those engaged in commerce. [294]

2.5.2 Saudi Arabia in the Modern World:

This final section will reflect on the possible implications of the above analysis on the contemporary pathways to economic development in Saudi Arabia. Arabia had a unique history in the twentieth century and was dissimilar to other areas of the Muslim world.[295] The collapse of Ottoman control after 400 years revolutionised the situation in the region.[296] Many Arabs had participated in the Arab Revolt and had hoped to establish an independent Caliphate.[297] The second Saudi state was able to capitalise on the disorders that followed the collapse of the Ottoman Empire.[298] The West, however, appeared to show little interest in

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[288] Muhamad Kamali, 'Uncertainty and Risk-Taking (Gharar) in Islamic Law', (1999) 7 IIUM Law Journal 1, 1.
[289] Illias Bantekas, An Introduction to International Arbitration (Cambridge University Press 2015) 59-60.
[290] Hisham M. Ramadan, Understanding Islamic Law: From Classical to Contemporary (New York, Rowman Altamira, 2006) 156,158.
[291] Richard M Auty, 'The Political State and the Management of Mineral Rents in Capital-surplus Economies: Botswana and Saudi Arabia,' (2001) 27 Resources Policy 77, 77-86.
[292] Ibid 79
[293] For the Islamic view of colonialism Lewis, (n 175) 213.
[294] Ibid, 214
[295] Al-Rasheed (n 182) 104; Halpern, (n 278) 219
[296] Al-Rasheed (n 182) 176; Lewis, (n 175) 167
[297] Al-Rasheed (n 182) 201.
[298] Tim Niblock, Saudi Arabia: Power, Legitimacy and Survival (Routledge 2004) 134.

Arabia and this allowed Abdul-Aziz Al Saud to unify the area and he declared the Kingdom of Saudi Arabia. [299]

The Saudi Kingdom is a relatively new political entity. At first the country was impoverished and much of the population were nomadic Bedouin.[300] Abdul Aziz encouraged the Bedouin to settle in agricultural communities and encouraged development.[301] In the 1930s the Saudi government adopted a free trade policy and believed that this was the best way to develop the economy. [302] To develop trade Ibn Saud privileged the sedentary tribes engaged in agriculture and sought to create a stable environment for trade.[303] As a result of these developments, Ibn Saud established commercial courts based on the Ottoman model (chapter 5).

However, the country remained desperately poor and much of the population remained herders or subsistence farmers. [304]The economy of the new Kingdom was desperately poor and it remained so until the discovery of oil in the east in 1938. However, it was only in 1949 that the oil was exploited and sold on the international market. At this time an informal strategic arrangement was reached by Saudi Arabia and the United States. This meant that the Americans agreed to guarantee the security and sovereignty of the Kingdom in return for a role in the Saudi oil industry.[305]

Oil transformed the economy of Saudi Arabia. The revenues from oil exports allowed the creation of a vast social welfare state. As a result, many Saudis were able to secure jobs in the bureaucracy and in the state.[306] The living standards of Saudis increased exponentially, and they began to consume imported goods, especially luxury goods. [307] The oil revenues were used to develop the country and its infrastructure. The Saudi economy was, by the 1960s, completely dependent on oil and its only other meaningful industry was the tourism sector and this was based on pilgrims in the Haj.[308] The rapid increase in wealth created problems

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[299] ibid
[300] ibid
[301] Ibid Lewis (n 193) 135; Al-Rasheed, (n 182) 165.
[302] Commins (n 202) 189.
[303] ibid
[304] ibid
[305] Al-Rasheed, (n 182) 166; Lewis, (n 175) 178.
[306] Niblock (n 298) 178.
[307] For the problems brought about by the development of a consumer society in an Islamic society see Peter Burns, 'From Hajj to Hedonism? Paradoxes of Developing Tourism in Saudi Arabia' in R Daher (ed), Tourism in the Middle East: Continuity, Change and Transformation (Clarendon 2007) 215-236.
[308] ibid

for the Saudi economy and society. Increasingly the economy was dependent on foreign workers to maintain the oil fields and in areas such as healthcare.[309]

By the 1970s, the state of Saudi Arabia has increased its wealth as a result of the rising price of crude oil and this increased the spending power of the government.[310] However, the growing population remained a concern and it was believed that over the longer-term government spending could not keep pace with population growth.[311] The Saudis began in the 1970s to publish five-year developmental plans, which sought to develop the economy of the kingdom.[312] One of the key aims of these development plans was that the expansion of the private sector. [313]Another policy that the kingdom had developed to create a more effective economy was that of 'Saudization'[314]. While this period led to an increase in the number of Saudis that were working in the economy, the numbers employed in the public sector remained very high.[315]

Bringing us up to date, the Kingdom remains very dependent on oil, although it has diversified to an extent and as of 2015, 70% of its national wealth is not based on oil.[316] The Saudi economy needs to diversify further if it is to develop into a trading nation and reduce its dependency on its status as an 'energy superpower'.[317] This is particularly so as there is evidence to suggest that the living standards of the average Saudi are lower than those of an average person in the US. [318]Moreover, the national debt is rising and the growth rate, as measured by the GDP figures indicate that growth had slowed and this is a problem that has been identified by successive administrations since the 1990s.[319] The failure to diversify the economy and to develop a commercial sector is now a pressing issue and one that is being addressed in a series of bold measures in recent years.

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[309] Nibcock, (n 298) 201
[310] ibid
[311] Lewis, (n 175) 213.
[312] Nibcock, (n 298) 201
[313] Lewis, (n 175) 212.
[314]Al-Rasheed, (n 182) 213.
[315] For a discussion of how this has impacted on the wider economy see Ragaei el Mallakh, Saudi Arabia: Rush to Development: Profile of an Energy Economy and Investment (Routledge, 2015) 45,189
[316] ibid 201.
[317] Al-Rasheed (nc182) 199
[318] ibid
[319] For the evolution of Saudi policies on this issue see Robert Lacey, Inside the Kingdom, History of Saudi Arabia from 1979 to Date (Random House, 2009) 113.

In the broader legal practice, there is, however, some variation between Saudi legal norms and international commercial norms and usages.[320] This means that it can be difficult to form a contract and to secure agreement on issues as to arbitration. Consequently, traders do not have the certainty they need to develop a commercial undertaking. Al-Azmeh argues that these factors, above all others, have discouraged enterprise in Saudi Arabia.[321]Others argue that Saudi Arabia's system integrates the legal opinions of all schools of jurisprudence and including 'western' legal principles.[322] This thesis will aim to demonstrate that there many aspects of Hanbali jurisprudence and *Shari'ah* more generally that are entirely compatible with free trade and freedom of contract. The task of the legal scholar is to revive the best of what is associated with the Islamic tradition of *ijtihad*, thereby closing the gap between Islamic precepts and modern economic realities in Saudi Arabia.

2.6 Conclusion

This chapter has demonstrated that the Western view of Islamic legal and social histories tends to oversimply the complexities of Islamic legal thought. The chapter has shown that early Islamic legal thought was accommodating of plurality of thought. This plurality of thought arguably enabled the Islamic world to emerge as one of powerhouses of the global economy and Muslim merchants at the time operated on an international scale. Thus, the Islamic world prospered despite war and unrest until the 1500s. This was because Islam valued trade and the free market. Its legal system was flexible where jurists had discretion with regard to what was acceptable. This meant that the legal system was supportive of trade. As such, the analysis of the historical context demonstrates that the *Shari'ah* is fundamentally conducive to business concerns.

Two factors played a crucial role in the subsequent opposition to innovation and free trade in the Islamic world. These include first, the rise of the West and increased competition from western businesses, which were rapidly modernising, and second, the changing of trade routes. Arabia was increasingly marginalised as world trade routes shifted and the West

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[320] For a general account of Saudi Arabia's legal system, see Houssein Esmaeili, 'On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabia Legal System', (2009) 26(1) Arizona Journal of International and Comparative Law 1, 4-5.
[321] Aziz Al-Azmeh, Islamic Law (RLE Politics of Islam): Social and Historical Contexts (Routledge, 2013) 78
[322] Ibid.

began to dominate world trade. It is noted that by the 19th century, the Islamic world's economy was dominated by Western interests and minorities such as Jews and Christians.[323]

The analysis in this chapter therefore emphasises some degree of mutual causality between the increased poverty in the Islamic world and the increasingly conservative worldview of Islamic scholars and authorities. The literal interpretation of the Qur'an's economic principles by the latter impeded trade as they prevented merchants from innovating and having the flexibility needed to engage in risk-taking.[324] In Arabia especially, during the Ottoman period the region was marginalised and became insular and conservative.[325] This led to a rigid and inflexible legal system, thereby impeding the development of a modern commercial legal code, the absence of which intensified uncertainty over property law and contracts.[326]

The particular historical evolution of the Saudi state, has suggested inflexibility around certain aspects of trade and commerce.[327] This could be addressed by codification but this needs to be counterbalanced by a need for flexibility, especially in the area of contract law and arbitration.[328] This is needed to give business the certainty and flexibility that they need to achieve key objectives. Given that this chapter has shown that Islam was fundamentally flexible in the earliest phases of its development, the next chapter examines the development of the Islamic legal system and culture in the lands that now constitute the Kingdom of Saudi Arabia, with emphasis on how the Prophet's early practices were supportive of trade and protected entrepreneurs.

[323] Ibid, 179.
[324] Lacey (n 319) 190; Niblock (n 298) 135.
[325] Mallakh, (n 315)189; Lewis, (n 175) 167.
[326] David F Tavella, 'Are Insurance Policies Still Contracts'? (2009) 42 Creighton Law Review 157, 170; Stephen Waddams, 'Modern Notions of Commercial Reality and Justice: Justice and Contract Law', (2007) 57 University of Toronto Law Journal 331, 336.
[327] An example is the laws of certain Muslim-majority countries allowing Muslim investors to purchase interest-bearing securities or equity portfolio that is attributable to haram activities and then purify their income subsequently through dividend-cleansing. This involves giving to charity the portion of the income that is derived from haram sources. See Rodney Wilson, Legal, Regulatory and Governance Issues in Islamic Finance (Edinburgh University Press 2012) 193.
[328] Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale Law Journal 823, 841.

CHAPTER 3:
The Commercial Aspects of International Trade: How the *Shari'ah* Principles of Contract Law Have Shaped Islamic Trade and its Application in Saudi Arabia

3.1 Introduction

It is widely accepted that a legal framework that is supportive of commerce needs to be in place if trade is to thrive.[1] Without a supportive legal system, investment and trade volumes tend to decline.[2] In order to develop a strong trading economy, a country's legal system needs a number of basic principles. Firstly, it needs a legal system that provides security to parties to a contract that their agreement will be enforced. Secondly, it needs an effective dispute resolution mechanism in the event of an agreement being questioned or becoming a source of dispute.[3] Commercial law needs to provide certainty and protection for traders and foreign investors. When it does, it creates the conditions within which trade can grow and expand.[4] These principles are fundamental not just for domestic trade, but perhaps even more to develop a strong international trading economy and attract FDI.[5]

As the prophet Mohammed Hadith says: "I have been sent to uphold and complement ethical values"[6] the Sharia has confirmed the good deeds of the Arab traditions in ignorance period before the Islam message. This chapter will show how the pre-Islam people in Arabia were supportive of pro trade principles and the principle of Sharia confirmed those principles, this lay the way to answer this research question whether the government of Saudi Arabia has not been able to attract more FDI is because of applying Sharia law and the Sharia law is strict by its nature or that the Sharia is flexible but the rigidity of the interpretation of Sharia due to different factors such as: social, economic and political factors is the reason[7].

[1] Emilia J Powell and Stephanie J Rickard, 'International Trade and Domestic Legal Systems: Examining the Impact of Islamic Law (2010) 36(4) International Interactions 1, 1-2.
[2] Ibid, 1.
[3] Raj Soopramanien, Legal Aspects of International Trade: Proceedings of a World Bank Seminar (World Bank 2001) 9.
[4] See generally, Volkmar Gessner (ed.) Contractual Certainty in International Trade: Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges (Hart Publishing 2009).
[5] Soopramanien, (n 3) 9.
[6] Islamtoday.net (2014) Found at www.islamreligion.com (accessed on: 24/07/2019)

[7] See Chapter 1. the Intoduction, p17.

Although some Western commentators assume that Islam is antithetical to enlightenment ideals of the West that encourage free trade, these assumptions do not take into account the fact that *Shari'ah* facilitated international trade for many centuries.[8] Rather, they can often appear to be orientalist stereotypes or as a result of unfair comparisons between two entirely different legal systems which developed in vastly different circumstances.[9] Therefore, this chapter equally demonstrates that the *Shari'ah* is sufficiently flexible and can accommodate modern practices. It also addresses the research question of what are the legal factors that deter foreign investment in Saudi Arabia. Emphasis is placed on the factors that have shaped Islamic contract law since the pre-Islamic era.

This chapter also discusses the re-emergence of the *Shari'ah* in the financial sector. It explains how historical factors led to the renewed scholarship of the *Shari'ah* which has helped Islamic law to adapt to the modern economics, commercial law and globalisation. It also shows that many principles of the *Shari'ah* stem from pre-Islamic and early Islamic practices of Arab tribes. It equally demonstrates how these practices have influenced the modern Kingdom of Saudi Arabia, and determines whether they have had a negative impact on the development of the law and the creation of an environment that is conducive to foreign investment and trade.

3.2 Principles Of Islamic Contract Law

Under the *Shari'ah*, the meaning of the term 'contract' is given a much wider definition than its equivalent in common law.[10] However, it shares many characteristics with the contract under common law. For example, the principles of offer and acceptance are central to Islamic law contracts.[11] However, the *Shari'ah* differentiates in respect of other fundamental characteristics of Western contract law. For example, although the *Shari'ah* recognises that contracts entered into by mutual agreement may be enforceable, there is an inherent

[8] Jonathan Israel. Enlightenment contested: Philosophy, Modernity, and the Emancipation of Man 1670-1752 (Oxford University Press 2006).
[9] Chibli Mallat, 'From Islamic to Middle Eastern Law' (2003) 50 American Journal of Comparative Law 735, 736.
[10] See M Abdul Jalil and Muhammad K Rahman, 'Islamic Law of Contract is Getting Momentum' (2010) 1(2) International Journal of Business and Social Science 175, 180; Siti Salwani Razali, Islamic Law of Contract (Cengage 2010) 1-2; Hideyuki Shimizu, 'Philosophy of the Islamic Law of Contract: A Comparative Study of Contractual Justice' (1989) 15 IMES Working Paper 1, 8.
[11] See Abdul Rahman Hasbullah, 'Offer and Acceptance in Islamic Law of Contract' (2000) 8(2) Journal of Shariah 15, 23; Nabil Saleh, 'Definition and Formation of Contract under Islamic and Arab Law' (1990) 5(2) Arab Law Quarterly 101, 102-103; Noel James Coulson, Commercial Law in Gulf States: The Islamic Legal Tradition (Graham and Trotman 1984) 40.

presumption that the mutual agreement will be fair on both parties.[12] In other words, the fact that the parties have mutually agreed to enter into a contract is one of the initial steps of the contract procedure. A more important step under Islamic law is considered to be the negotiation of the terms of the contract to ensure that the exchange of goods is carried out fairly.[13] This is based on the Islamic principles of equality and fairness within the community and is intended to ensure that any party that enters into a contract respects the intentions of the other parties.[14] Furthermore, it is explicitly affirmed in the *Qur'an* that all Muslims have a religious duty to fulfil their contractual obligations in good faith.[15] Several passages of the holy text make explicit reference to these duties, including passages proclaiming *'O ye who believe fulfil the contractual obligations',*[16] *'And fulfil your covenant with me and as I fulfil my covenant with you',*[17] and *'[T]hey keep their promises whenever they promise'*.[18]

For this reason, some Western scholars have suggested that a contract under the *Shari'ah* is simply a legal undertaking to perform a religious obligation.[19] For example, Coulson suggests that:

> a contract in Islamic law is in no sense the precise equivalent of the technical term contract in Western jurisprudence, which involves, certainly at the common law, the two basic essentials of agreement and consideration.[20]

However, Jalil and Rahman note that consideration must be offered by both parties before a contract can be valid and enforceable under Islamic law.[21] They also note that there are exceptions such as where one party is under a legal duty to perform or in cases of gifts.[22] Thanwi also states that *riba* is prohibited because it is an increase without any corresponding

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[12] Shimizu (n 8) 9. See also, Jason CT Chuah, 'Islamic Principles Governing International Trade Financing Instruments: A Study of the Morabaha in English Law' (2006-2007) 27(1) Northwestern Journal of International Law and Business 137, 166; Umar F Moghul and Arsha A Ahmed, 'Contractual Forms in Islamic Finance Law and Islamic Law Inv Co of the Gulf (Bahamas) Ltd v Symphony Gens NV & Ors: A First Impression of Islamic Finance' (2003) 27 Fordham Journal of International Law 150, 165.
[13] Shimizu (n 8) 10.
[14] Abdur Rahim, The Principle of Muhammadan Jurisprudence (Hyperion Press 1981) 283.
[15] Fatima Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles'? (20011) 13 Pace International Law Review 30, 30.
[16] Qur'an 5:1.
[17] Qur'an 2:40.
[18] The Qur'an 2:177.
[19] A. Alkhenain, 'Contracts Involving Uncertainty' (2002) 13 Ministry of Justice Journal, Saudi Arabia 170, 170.
[20] Coulson (n 9) 18.
[21] Jalil and Rahman (n 8) 182-183.
[22] Ibid.

consideration in a contract of exchange.[23] Burns then points out that consideration is an essential ingredient of contracts under Islamic law, although it must be lawful and have value under the large umbrella of Islam.[24] As such, consideration operates in similar ways under Islamic law and English law. It is a necessity for simple contracts and is not required in exceptional cases such as special contracts by deed under English law.[25] Coulson's oversight may be due to the fact that continental European civil law had a strong influence on the development of many legal systems in the Middle East, and an exchange of consideration is generally not required by civil law tradition.[26]

Although, most scholars agree that although the definition of a contract under the *Shari'ah* may not be precisely equivalent to the common law contract, the notion of a contract under the *Shari'ah* should be sufficiently broad to encompass the internationally accepted norms of European-influenced contracts. For example, Ibn Taymiyya found that:

> …all contracts entered into, or conditions attached thereto, are permissible unless specifically prohibited by either the Qur'an or the Sunnah.[27]

As a result of this flexibility, the *Hanbali* school permits contracting parties to agree to any provisions within a contract:

> …unless it is either contrary to the legal nature and purpose of the contract or implies the combining of two transactions in one, which the Prophet warned was suspect as usury.[28]

According to Shimizu, this inherent flexibility is due to the fact the Islamic contract law is intended to promote efficient economic activity. He states that:

> Islam has a basic idea that private ownership should be effectively used and that exchange is a sort of productive activity. For example, the abolition of riba, which is perceived to hinder economic activity, is said to aim at greater economic efficiency, because one of the main reasons for it is to prevent hoarding by the

[23] Muhammed Ala Thanwi, Kashshaf Istilahat alfunum (Vol 3, Sharikat al-Khayyat le al-kutub 1998) 592.
[24] Jonathan G Burns, Introduction to Islamic Law: Principles of Civil, Criminal and International Law under the Sharia (JuraLaw 2014) 46.
[25] See Andrew S Burrows, A Restatement of the English Law of Contract (Oxford University Press 2016) 63; Mindy Chen-Wishart, Contract Law (2nd edn, Oxford University Press 2008) 123.
[26] See Robert W Emerson, Business Law (5th edn, Barron's 2009) 94.
[27] Shimizu (n 8) 14.
[28] Ibid.

> rich and circulate currency efficiently in a community … Moreover, the easy formation or cancellation of a contract is also a contribution to efficiency, since there is then a natural increase in the number of those people who are willing to enter into contracts if restrictions on them are decreased. The law encourages to enter into a contract by omitting formalities in the formation of a contract, or freeing contractors from the binding-force as they want.[29]

It follows that foreign investors may enter into agreements in other parts of the world and execute or enforce these agreements in Saudi Arabia, provided that they are not inconsistent with the *Shari'ah*. In this regard, classic Islamic jurisprudence has set certain conditions on the permitted form or subject matter of a contract. A contract, for instance, cannot lead to *Muhrram* (an act forbidden under the *Shari'ah*). Examples of *Muhrram* include *riba* (usury)[30] and *gharar* (speculation, deception or excessive risk).[31] Contracts that contain *facid* or *fayed* (unequal or unfair contractual) clauses may also render the entire contract invalid, unlawful, or voidable.[32] These provisions are applied at every stage of the contract: formation, performance to dispute resolution, the latter extending to the arbitration of a dispute and resulting award.[33]

However, despite these restrictions (and the fact that Islamic banking law has developed *Shari'ah*-compliant structures that avoid certain restrictions, as will be discussed), it would appear that, in theory at least, the *Shari'ah* (and in particular the *Hanbali* principles) is sufficiently flexible to allow for commercial agreements to be structured in any way that the parties to the agreement deem necessary. This inherent flexibility of *Shari'ah* is evidenced by the fact that in recent decades many Muslim-majority nations have adapted their *Shari'ah*-based laws in order to embrace European-influenced international commercial law and practices.[34]

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[29] Shimizu (n 8) 17.
[30] Qur'an 2:275-280, 3:130, 4:161, and 30:39.
[31] Qur'an 2:188.
[32] Faisal Kutty, 'The Shari 'a Law Factor in international Commercial Arbitration', (2006) 28 International and Comparative Law Review 565, 566.
[33] Al-Tammawi Soliman, General Basis of the Administrative Contracts: A Comparative Study, (5th edn, Dar Al-Fiker Al-Arabi 1991) 53.
[34] Muhammad Bilal, 'International Trade under Islamic Banking' (2016) 21 Journal of Philosophy, Culture and Religion 18, 19.

However, despite this the Saudi legal system has struggled somewhat with the harmonisation of common law principles and those of the *Shari'ah*.[35] Nonetheless, this has been achieved to a certain extent in the banking sector in Malaysia, a country with both Islamic and common law traditions.[36] The harmonisation (or *tawfiq*) has largely been limited to the application of common law principles that are not inconsistent with the *Shari'ah*. Hence, financial institutions may offer Islamic products under the Islamic Banking Act 1983 such as *Uqud Ishtirak* (contract of partnership), *Uqud Hifz* (contract of deposit) and *Uqud Tawthiqat* (contract of guarantee), but they must comply with statutes that have largely codified common law principles such as the Contracts Act 1950, the Companies Act 1965, and the Sale of Goods Act 1957.[37] What this shows is that the *Shari'ah* is sufficiently flexible to accommodate modern commercial practices and is generally not an obstacle to the freedom of association and operation of financial schemes. In this light, the next section shows that there are many contractual principles and concepts originally developed in the Arabian Peninsula that were subsequently harmonised with early Islamic teachings.

3.3 Trade In The Pre-Islamic Period

3.3.1 Trade Routes in the Arabian Peninsula

As the Arabian Peninsula is situated at the meeting point of three continents, it was part of important trade routes between Africa, Asia and Europe for many centuries.[38] According to Michalopolous, Naghavi and Prarolo, this resulted in Arab merchants being able to profit from the overland trade routes:

> First, by selling to the [foreign] merchants they could take advantage of markets outside Arabia, and second, the increased caravan traffic was equivalent to higher demand for local produce.[39]

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[35] Amr Daoud Marar, 'Saudi Arabia: The Duality of the Legal System and the Challenge of Adapting Law to Market Economies' (2004) 19(1) Arab Law Quarterly 93, 93.

[36] See Zulkifli Hasan, 'Harmonisation of Shariah and Common Law in the Implementation of Islamic Banking in Malaysia' (2008) <https://zulkiflihasan.files.wordpress.com/2008/05/jurnal-iscol-2007.pdf>, accessed 29 June 2018.

[37] See Ahmad Ibrahim, 'Legal Framework of Islamic Banking' (1997) 1(1) IKIM Law Journal 23, 23-25.

[38] For the general background, see Masudal Hassan, History of Islam, Volume I (Darussalam, 1987).

[39] Stelios Michalopolous, Alizera Naghavi and Giovanni Prarolo, 'Islam, Inequality and Pre-Industrial Comparative Development' (2014) Harvard Business School Working Paper 15-076, 4 <http://www.hbs.edu/faculty/Publication%20Files/15-076_b14722bc-ec3b-4a36-ab05-483cde9c20f3.pdf>, accessed on 19 January 2018.

The importance of trade routes through the Arabian Peninsula therefore resulted in opportunities for Arabian commerce to thrive, but also resulted in considerable risk for Arab and foreign merchants who used the trade routes that crossed the Arabian desert. The absence of unified leadership meant that merchants had to pass through numerous territories belonging to unfriendly tribes, and merchants (both Arabian and foreign) were constantly at risk of raids by the Bedouin nomads who lived in the desert.[40] Thus, these merchants sought to avoid conflict by entering into treaties with the tribes in order to ensure safe passage through their territories.[41] As a result of these early treaties, Arab tribes began to develop rudimentary commercial codes that were to become influential in the Islamic period, partly because of their success in fostering trade.[42]

3.3.2 Trade Agreements in the pre-Islamic period

Ilaf was an arrangement between merchants and tribes whereby merchants purchased the right to move caravans through neighbouring territories for the purpose of engaging in trade.[43] Under an *ilaf* arrangement, the merchants would provide the tribes with either a certain percentage of profits or would purchase commodities produced by the tribes to be sold in the markets and fairs that they would later on visit.[44] In exchange, the tribes whose lands the merchants were passing through would ensure the merchants were granted safe passage through their territories (*khafara*).[45] This meant that they were not harassed or robbed and could safely complete trade expeditions.

Ilaf was first utilised by Quraysh traders to pass through other territories to trade in markets in the Levant, allowing them to return to Mecca with their profit without fear of robbery.[46] The success of *ilaf* treaties was one of the factors that led to Mecca becoming a regional trading hub.[47] Some translations of the *Qur'an* suggest that the following passage directly

[40] Philip K. Hitti, History of the Arab: From the Earliest Times to the Present (St. Martin's Press 2002) 105.
[41] Michalopolous et al (n 39) 4.
[42] Hitti (n 40) 107.
[43] Stelios Michalopolous, Alizera Naghavi and Giovanni Prarolo, 'Trade and Geography in the Economic Origins and Spread of Islam: Theory and Evidence' (2011) Brown University Working Paper 096, Institute for Advanced Study, School of Social Science, revised May 2011), 5 < http://amsacta.unibo.it/4541/1/700.pdf> accessed on 19 January 2018.
[44] Ibid
[45] Ibid.
[46] Salamah Salih Sulayman Aladieh, 'Mecca Trade Prior to the Rise of Islam' (1991) The University of Durham 1, 44-46 < https://core.ac.uk/download/pdf/108374.pdf>, accessed on 22 January 2018.
[47] Ibid.

refers to *ilaf* (although it should also be stated that other interpretations suggests that *ilaf* in this context refers to being habituated and accustomed to be reunited):

> For the security arrangements (ilaf) of the Quraysh, their agreements of the journey of winter and summer.[48]

Along with entering into *ilaf* agreements with other Arab tribes, there is evidence that Arabian tribes entered into various treaties and agreements with the major powers in the region. For example, in the peace treaty entered into by the Byzantines and the Persians in 561 AD, the fifth clause provides that:

> It is agreed that Saracen and all other barbarian merchants of either state shall not travel by strange roads but shall go by Nisibis and Daras, and shall not cross into foreign territory without official permission. But if they dare anything contrary to the agreement (that is to say, if they engage in tax-dodging, so called) they shall be hunted down by the officers of the frontier and handed over for punishment together with the merchandise which they are carrying, whether Assyrian or Roman.[49]

According to Simon, this clause is evidence that the Arabian tribes 'actively pursued their commerce and without doubt controlled the Syrian part of the incense route'.[50] Al-Roubi suggests further that this clause was intended to organise trade between two Arab tribes (the Lakhmids and the Ghassanids) who acted as agents and buffer-states in respect of commercial activities between Persia and Byzantine respectively. He stated:

> This is evidence of [the Arabs] in the world eastern trade, and proves their major role in it. This led the two great powers to be in agreement to bind their agents, as they were incapable of handling the necessary affairs of the trade routes to facilitate the commercial caravans from the east and west of Arabia[51]

Following the decline of the Lakhmid and Ghassanid tribes in the 6th century A.D, the Quraysh, under the leadership of an ancestor of Muhammed, Hashim, were able to enter into *Ilaf* treaties (that they had previously utilised with other Arabian tribes) with kingdoms

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[48] Qur'an 106: 1-2.
[49] Irfan Shahid, Byzantium and the Arabs in the Sixth Century (Harvard University Press 1995) 268.
[50] Róbert Simon, Meccan Trade and Islam: Problems of Origin and Structure (Akademiai Kiado 1990) 5.
[51] Amaal Muhammad Al-Roubi, 'A Response to Patricia Crone's Book (Meccan Trade and the Rise of Islam)' 59 <http://www.sultan.org/books/Patricia_crone_english_reply.pdf>, accessed on 20 January 2018.

including Persia, Yemen and Syria.[52] These *Ilafs* further entrenched the *Quraysh* as the dominant tribe in the Arabian Peninsula and further enhanced Mecca's position as an regional trading hub.[53] The *Ilafs* also helped to create a legal framework that allowed the Arab tribes to flourish. It is a prime example of how laws can be made and developed to enhance the flow of trade. The development of *Ilafs* demonstrate that Arabia had a legal tradition, even before the foundation of any defined state within the territory, that facilitated and protected trade and understood the relationship between laws and trade.[54]

3.4 Islamic Legal Culture And Free Trade

3.4.1 Mohammad and Free Market Principles

As a direct descendent of Hashim, Muhammad was born into a prominent Meccan merchant family and was involved in trade from an early age.[55] He became a merchant trader himself and was active between the Indian Ocean and the Mediterranean Sea.[56] Muhammad developed a strong reputation as a just and honest man and merchant, whose reputation was such that he was invited to act as an arbitrator (*Hakam*) in a number of tribal disputes, both before and after ascending to Prophethood.[57]

The wealth achieved by the rich merchant families of Mecca troubled Muhammad. As a merchant himself he was able to witness first-hand the corruption in Mecca.[58] He saw that it exacerbated tension between tribes as well as resulted in class-conflict, as majority of the population failed to benefit from Mecca's role in trade.[59] As a result, it is perhaps unsurprising that Islam focuses so heavily on trade practices and economic equality.[60] The *Qur'an* includes many verses and traditions emphasising the need for just dealing between

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[52] Francis E. Peters, Muhammad and the Origins of Islam (State University of New York Press 1994) 58.
[53] Aladieh (n 46) 45.
[54] Ibid.
[55] Peters (n 52) 105-107. Frants Buh and Alford T Welch, 'Muhammed' in Encyclopaedia of Islam (Clifform Bosworth et al, eds) (2nd edn, Brill 1986); Andrey Korotavev, Vladimir Klimenko and Dmitry Poussakov, 'Origins of Islam: Anthoropological and Environmental Context' (1999) 53(3-4) Acta Orientalia Academie Scientarium 243, 243-260.
[56] William H. McNeill (ed), Berkshire Encyclopaedia of World History (Vol 3, Berkshire 2005).
[57] Aseel Al-Ramahi, 'Sulh: A Crucial Part of Islamic Arbitration' (2008) LSE Law, Society and Economy Working Papers 6-7 < http://eprints.lse.ac.uk/24598/1/WPS2008-12_Al-Ramahi.pdf>, accessed 22 January 2018.
[58] See Alfred Guillaume, The Life of Muhammad (A Transl. of Ibn Ishaq's Sīrat Rasūl Allāh, with introduction and notes, Oxford University Press 1970) 39. See generally Timur Kuran, The Long Divergence: How Islamic Law Held Back the Middle East (Princeton University Press 2011).
[59] Ibid.
[60] Peters, (n 42) 109.

traders.[61] However, the *Qur'an* also emphasises that free trade and commerce is vital to the overall interests of society. For example, it states that:

> O, you who believe, squander not your wealth among yourselves in vanity, but let there be trade and traffic amongst you by mutual goodwill.[62]

The *Qur'an* condemns hoarding, cheating, bribing or monopolising of trade or any other unethical practices.[63] Furthermore, the *Hadith* states that Muhammad encouraged his companions to trade, noting that 'You should trade because nine tenths of provisions come from it'.[64] He is also quoted in the *Hadith* as saying that 'An honest trader will be raised up in the Hereafter with the truthful and the martyred'.[65]

It is therefore clear that Muhammad was of the belief that fair trade was vitally important to the religion of Islam. Many of Muhammad's early followers were also merchants and it was important for the success of the religion that the new Islamic doctrine was able to appeal to the merchant class.[66] As noted by Michalopous *et al*:

> To reach out to the heterogeneous Arabian tribes, a doctrine with a political base appealing to the divergent interest groups was necessary. The Islamic economic principles were forged to align the clashing interests nurtured by the underlying unequal geography effectively acting as a state-building force. It offered a means by which tribes could be unified through a common identity under one god that transcended clan and class divisions.[67]

Islam was intended to transcend tribal loyalties, which were and are social groups based and clans which are groups of families related by a common bloodline.[68] Muhammad encouraged the population of the Arabian Peninsula to see themselves as Muslims rather than as members of a tribe or clan. This helped to unify the previously competing and divided clans and tribes.[69] Dost points out that early Islam effectively operated a form of 'free market' in the

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[61] Michalopolous et al (n 43) 6-7.
[62] Qur'an 4:29
[63] Al-Roubi (n 51).
[64] Gharib al-Hadith (Arabic translation).
[65] al-Tirmidhi (1209) (Arabic translation).
[66] Michalopous et al (n 39) 5.
[67] Ibid, 6.
[68] Philip Shukry Khoury and Joseph Kostiner, Tribes and State Formation in the Middle East (University of California Press 1991) 136
[69] Ibid, 7

region, which encouraged private entrepreneurship and the supervision and regulation of the market on morality grounds.[70] Muhammad himself took a personal interest in ensuring that trade was carried out on a free and equal basis, with Dost noting that:

> He was involved in the inspection of the marketplace to check the accuracy of the measures, he assigned particular places for different mongers in the market and he was fiercely opposed to merchants who try to tempt the producer-farmer at the entrance of the city before arriving to the marketplace lest they buy at a lower price. Indeed, the post of Muhtasib that one sees in later Islamic states was inspired both by his personal conduct in the market and by his appointment of Umar b. Hattab to Medinah marketplace.[71]

The role of the *Muhtasib* in this free market was that of a market supervisor who acted as a protector of free trade and ensured that merchants refrained from fixing market prices, confiscating private property, or investing in the market at the expense of the private sector.[72]

Initially, the wealthy merchant elite, mainly members of the *Quraysh*, were resistant to the Islamic principles due to the fear that it would undermine their monopoly of pan-Arabian trade.[73] However, Muhammad was able to influence the *Quraysh* by providing them with assurances with regard to their continued pre-eminence in Mecca and the new Islamic state.[74] In addition, the free market principles espoused by Islam meant that the new religion appealed to the *Quraysh* as merchants because it legitimised trading activity more than rival belief systems at that time[75]. According to Michalopous *et al*, the advantages of Islam to Arab merchants included that the rules governing commercial activities favoured Muslims over non-Muslims and, as a consequence, the spread of Islam resulted in extensive cooperation across the largest trading network in existence at that period in history.[76] Furthermore, the rise of Islam brought the first efforts at state-building to the Arabian Peninsula and this assisted in stabilizing the region and uniting the tribes.[77] It also helped to create a single

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[70] Suleyman Dost, ‘The Idea of Free Market in Early Islam’ < http://www.muslims4liberty.org/wp-content/uploads/2013/05/Free-Markets-in-Early-Islam-Suleyman-Dost.pdf>, accessed on 20 January 2018.
[71] Ibid. See also Muhammad Ibn Jarir Al-Tabari, The Conquest of Arabia (Fred M Donner, Transl, Suny Press 1993) 76.
[72] Khoury and Joseph Kostiner (n 68) 4.
[73] Fred M Donner, The Early Islamic Conquests (Princeton University Press 1981) 86-7. See generally, Kuran, (n 58) 857.
[74] Ibid.
[75] Michalopolous et al (n 39).
[76] Ibid, 6-7.
[77] Al-Tabari (n 71) 89

market in the Arabian Peninsula through the establishment of both a common trade area and a unified commercial legal system, as outlined in the *Shari'ah*.[78] These factors (as well as the more obvious fact that the region also shared a religious outlook) meant that the Arabian tribes were united under a single system, resulting in a more stable society than that which preceded it, a factor that was also conducive in encouraging trade.

The effect of the Islamic free market principles can be seen in the spread of Islam in the centuries following the death of Muhammad. Prior to the Islamic conquests, Arabian traders generally acted as intermediaries in surrounding trading routes, such as the role played by the Lakhmids and Ghassanids between Persia and Byzantium (as explained above).[79] Arab trade began to flourish because of the free market principles set out in the *Qur'an* as well as the opportunities offered to merchants as a result of Muslim conquests and the protection provided by the newly dominant Islamic rulers.[80] They could trade with foreigners and were generally welcomed throughout the world because of their reputation for principled and fair trading which, in turn, allowed them to spread the Islamic religion, as the respect given to them included permission to freely convert people to Islam and obtain a monopoly of import and export trade.[81] As a result, wherever Arab merchants went, Islamic communities tended to form in their aftermath.[82] Indeed, studies carried out by Michalopous *et al* illustrate clear links between the foundation of new Islamic communities and traditional trading routes used by Islamic merchants.[83] As a result of the rapid spread of Islam in the century after the prophet Muhammad's death, Muslims were in control of the western half of the Silk Road, resulting in the spread of both Islam and Arab trade into Europe and Africa.[84]

The free flow of trade was therefore inextricably linked to the growth of Islam and the promotion of trade within Islamic states was not just a practical issue but also a religious one. It also led to the development of a legal system that was supportive of free trade. In particular it meant that once a trader or merchant acted in the common interest and complied with the divine laws, they were free to trade and were protected by the law.[85]

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[78] Benedikt Koehler, Early Islam and the Birth of Capitalism (Lexington Books 2014) 3.
[79] Donner (n 73) 101.
[80] Ibid.
[81] William H Mc Neill, The Pursuit of Power, Technology, Armed Force and Society (Oxford University Press 1982) 24.
[82] Ibid.
[83] Michalopous et al (n 39).
[84] Ibid.
[85] Donner (n 73) 101.

3.4.2 Emergence of the Islamic Commercial Legal Culture

The law governing Islamic economic activities was developed from the *Shari'ah* branch of *mu'amalat* (transaction).[86] The *mu'amalat* is the standard to which all commercial transactions are held. Among the key principles of *mu'amalat* are free consent in any transaction,[87] prohibition of speculative transactions and profit from chance or luck (*Qimar*).[88] Any profits have to be earned by honest work and any profits from trade have to be accrued involving some liability on the part of the merchant.[89]

As noted above, Islamic contract law seeks to ensure that all parties meet their obligations and that any contract is fair and voluntarily entered into by all the contracting parties.[90] However, Islamic law also provides for one of the most important aspects of any legal system, namely that that it needs to function effectively as a dispute resolution mechanism. As will be considered in more detail in chapter 4, pre-Islamic Arabia had many dispute resolution mechanisms. Islam, which sought unity among the faithful, relied heavily on forms of mediation and arbitration that were adapted from the pre-Islamic period. For example, the *Qur'an* instructs Muslims:

> If you fear a breach between them (husband and wife) appoint two arbiters, one from his family, and the other from hers. If they wish for peace, Allah will cause their conciliation. For Allah hath full knowledge and is acquainted with all things.[91]

According to Al-Ramahi, the 'the duty to reconcile' is imposed on all Muslims.[92] As noted in chapter 4, *sulh* and arbitration are both legal instruments and moral injunctions in Islam and were conducive to business concerns as they provided a fair and predictable way to resolve disputes.

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[86] Mohammad Hashim Kamali Islamic Commercial Law (Islamic Texts Society 2000) 16.
[87] Nabil A Saleh, Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar, and Islamic Banking (Graham & Trotman, 1986) 78.
[88] Ibid, 23.
[89] Majid Fakhry, A History of Islamic Philosophy (Columbia University Press 2004) 20-30.
[90] Shimizu (n 8) 108.
[91] Qur'an, 4:35.
[92] Aseel Al-Ramahi, 'Sulh: A Crucial Part of Islamic Arbitration' (2008) 12/2008 LSE Law, Society and Economy Working Papers 5, 5.

3.4.3 Development of the *Shari'ah*

Defined as 'the path to the water', the *Shari'ah* is deemed to set down the total code of conduct in Islam.[93] As discussed in chapter 2, the *Shari'ah* is based on four sources in Islam; the *Qur'an* and the *Sunnah* as primary sources and *ijma* (consensus) and *qiyas* (analogical deduction) as secondary sources.[94]

The principle source is the *Qur'an*, which has approximately 500 verses that contain principles and regulations, and references to contract law.[95] However, as discussed in chapter 2, these verses, together with the *Sunnah*, are not broad enough to provide solutions to all commercial issues that emerged after the death of the Prophet in the expanding Islamic Empire. As a result, a series of secondary sources of the *Shari'ah* emerged to address the matters that were not addressed within the *Qur'an* and the *Sunnah*.

Ijma is considered to be the third source of Islamic law. It is defined as a unanimous agreement of Muslim scholars on any legal principle or rule that seeks to resolve some issue.[96] *Ijma* is considered to be somewhat different from the concept of *ijtihad* on the basis that *ijtihad* only needs the agreement of some scholars whereas *ijma* needs unanimity.[97] As a result of this difficult hurdle, there has been no new *ijma* that has been accepted throughout the Islamic world since the companions of Muhammad. This has made it difficult for Islamic industries such as finance to standardize across the Muslim world, as will be discussed in more detail later.

Qiyas is the fourth primary source of the *Shari'ah*. Since the primary sources usually do not make reference to specific issues but instead state that identical causes and identical occurrences should be judged equally, Islamic scholars use *qiyas* to draw analogies between their decisions and those made by the Prophet in the *Sunnah* or some command in the *Qur'an*.[98] An example of *qiyas* in practice would be how modern Islamic scholars refer to the *Qur'an* or the *Sunnah* in order to find whether or not any analogical sources exist in these texts that would legitimise modern financial instruments.

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[93] Amyn B Sajoo, A Companion to Muslim Ethics (IB Tauris 2010) 159.
[94] Ibid.
[95] Abdullah Saad Alarefi, 'Overview of Islamic Law' (2009) 9 International Criminal Law Review 709, 713.
[96] Ibid.
[97] See David A Jenks and John Randolph Fuller, Global Crime and Justice (Routledge 2016) chapter 9; Abdulrahman Baamir, Shari'ah Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia (Routledge, 2010).
[98] Nicholas Foster 'Islamic Commercial Law: An Overview' (2006) 364 Indret 1, 2.

The rigorous interpretation of the *Sunnah*, as well as the fact that the secondary sources resulted in a highly interpretative legal system, gave rise to the concept of *ijtihad.* The use of *qiyas*, for example, was very important in the development of *ijtihad* because it allowed that if a judgment could not be based on a scriptural source or some preference then reason or interpretation could be employed.[99] The need for reason to be employed resulted in a high level of judicial discretion and the development of Islamic legal theory and practice.[100] This judicial discretion, or *istihsan*, enabled the Islamic judge to choose a more equitable solution which he believed promoted the public good better than its alternatives, including a strict interpretation of the *Shari'ah*.[101] According to Baamir and Bantekas:

> *Istihsan* allows judges and scholars some flexibility when interpreting the law to allow for the infusion of elements deemed useful. In other words, *istihsan* constitutes a permit for the spirit of the law to prevail over its letter.[102]

The development of concepts such as *ijtihad* and *istihsan* paved the way for the development of four schools of Islamic jurisprudence (or *fiqh*), each of which claimed to give the most authentic narration of the Prophet's teachings, namely the *Hanbali*, *Shafi'i, Maliki*, and *Hanafi* schools.[103] The *Hanbali* school, for example, promoted a literal interpretation of the *Qur'an* and *Sunnah*, rejecting *ijtihad, qiwas* and *ijma*.[104]

Although the development of these four schools clarified much in respect of the interpretation of the *Qur'an* and the *Sunnah*, their prominence meant that the Islamic legal culture became less interpretive. As explained by De Jonge, the four legal schools developed 'authoritative medieval manuals' that:

> …remain the principal repository of *Shari'ahh*. The process by which they gained this status is usually explained by reference to the phenomenon known in Islamic legal history as 'the closing of the door of *itjihad*'. At the risk of oversimplification, this can be described as a stage where respect for the legal

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[99] A.A. Miftah, 'Refusal on Qiyas and Implications for Development Contemporary Islamic Law (Study on the Ibn Hazm Critics to Qiyas)'

[100] Arshia Javed and Muhammed Javed, 'The Need of Ijtihad for Sustainable Development in Islam' (2011) 8 IIUC Studies 215, 216.

[101] Khurstid Iqbal, The Right to Development in International Law: The Case of Pakistan (Routledge 2010) 175, 175.

[102] Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009 25(2) Arbitration International 266, 266.

[103] Harald Motzki (ed), Hadith: Origins and Developments (Routledge 2016) iv.

[104] Ibid.

> jurists of the past reached such a height that their ability to discern the correct expression of the divine law was considered insurpassable … The four Islamic schools have been hugely influential and 'Future jurists became bound to respect, and to imitate without restatement or reformation, the rules laid down by their classical predecessors.[105]

In practice, the fact that Islamic culture became less interpretive and more reliant on the four *fiqh* schools meant that scholars were increasingly reluctant to outlaw anything that was not expressly prohibited in the primary sources and judges were not prepared to use *istihsan* if the *Qur'an* and *Sunnah* were not clear about an issue. Although these developments are at least partly the reason why there was and remains a great deal of flexibility in Islamic legal culture (anything that fell outside the *Qur'an* and *Sunnah* were not focused on by scholars nor judges), the decline in the use of *Itjihad* had important consequences for the development of Islamic law, which did not really develop theoretical models of law but was restricted to interpreting the holy texts.[106] As a result, Islamic jurisprudence stagnated for centuries as the teachings of the four *fiqh* schools were strictly followed.[107] This had important implications for Islamic commercial regulation as it 'denied to Islamic law the opportunity to develop a general theory of contract, and caused it instead to remain crystallised as a law of contracts'.[108]

3.5 The Role Of The *Shari'ah* In Fostering Trade

As the previous section illustrates, the use of *ijtihad* to allow for a contemporary interpretation of the *Shari'ah* has allowed it to be adapted for modern circumstances and economics. However, it remains true that Islamic commercial law is not as progressive as the laws in Western countries. As noted by Ahmed:

> Given the principle of permissibility, Islamic commercial law can evolve within the boundaries set by *Shari'ah*. The development of Islamic law in response to changing environment can take place in couple of ways. The first way is to expand the already existing body of law by analogy and *ijtihad*. The second

[105] Alice De Jonge, 'Islamic law and the finance of international trade' (1996) 96/4 Working Paper (Monash University, Syme Dept. of Banking and Finance) 1, 6.
[106] Foster (n 98) 6.
[107] Habib Ahmed, 'Islamic Law, Adaptability and Financial Development' (2006) 13(2) Islamic Economic Studies 84, 84.
[108] De Jonge (n 105) 7.

> alternative is to open the law itself to transform according to changed conditions. While arriving at solutions under the first alternative using *ijtihad* based on previous *fiqh* (taqlid) is not a problem and is being practised widely, it is the second alternative that is more challenging. Under this latter option, some of the *fiqh*i rules may be modified, given the changed environment and new knowledge about the implications of these rules in the contemporary times. As a result, new rulings may be formed that were not sanctioned in *fiqh* literature of the past. This calls for not adhering strongly to taqlid.[109]

As noted in section 3.3, the rise of the *fiqh* schools led to a decline in the influence of *ijtihad*. According to Millar:

> Historically, the influence of *ijtihad* lessened in the 15th century[110], and it has been noted that this coincides with the time when Islam ceased to be the leading innovator of modern ideas and practices and the European renaissance began.[111]

Ijtihad was considered to be one of the fundamental reasons for the success of Islam and the spread of the religion across the known world.[112] However, as noted above, the increased acceptance of the principles of the four schools of jurisprudence led to a culture where the notion of questioning or re-interpreting the *Qur'an* or the *Sunnah* became less common. This stagnation lasted until the early 20th century before scholars began once again to encourage the use of *ijtihad* in order to address issues that are left unanswered in the *Qur'an* and the *Sunnah*.[113] Elshurafa notes that:

> In the field of Islamic finance, financial instruments are relatively novel and scholars have not considered their applicability or indeed legitimacy to the extent that they could be rendered established instruments. It is for this reason that the role of scholars and their ijthihad is paramount to advancing the field of Islamic finance.[114]

However, Elshurafa further notes that:

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[109] Ahmed (n 107) 90.
[110] Note: some scholars suggest that the "Gate of Ijtihad' closed as early as the 9th century AD.
[111] Roderick Millar, 'Religious Foundations of Islamic Law' in Roderick Millar and Habiba Anwar (eds.) Islamic Finance: A Guide for International Business and Development (GMB Publishing, 2008) 5.
[112] Ibid.
[113] Javed and Javed (n 100) 218.
[114] Elshurafa, (n 137) 349.

> The traditionalists, who wish to exercise their limited interference policy with Islamic principles, fail to acknowledge that no religion, ideology or indeed idea can survive through the centuries without a degree of adaptability and pragmatism.[115]

The founder of the *Hanbali* school of Islamic jurisprudence was an early traditionalist who rejected the concept of *ijtihad* and relied on a literal interpretation of the *Qur'an* and the *Sunnah*.[116] This explains why literalism became a principle of *Hanbali* jurisprudence.[117] However, when Saudi Arabia adopted the *Hanbali* school upon the foundation of the Kingdom as the source of Saudi *Shari'ah*, it accepted the validity of the concept of *ijtihad*.[118] Notwithstanding, according to Roberts, despite the recognition of *ijtihad* as a concept under Saudi law, it is regularly ignored by the *ulama* which, he suggests, is one of the primary reasons for Saudi law being one of the most literalist in Islamic countries.[119] Vogel, writing in 1975, came to a similar conclusion, noting that for the Saudi *ulama*:

> …the virtue of the scholar seems to lie less in intellectual and technical attainments or virtuosity than in pious immersion in Qur'an and *Hadith* texts and the knowing and sincere application of these texts in all concrete rulings. Novelty in itself is not then the full measure of *ijtihad* or of status as a mujtahid. To pass to modern Saudi Arabia, the *usul al-fiqh* positions [of the Saudi ulema] ... remain valid, as is confirmed on every hand.[120]

From a more modern perspective, Elshurafa notes that 'purist' scholars continue to reject the wide use of *ijtihad* as a tool for the development of Islamic finance and this has the potential to have a negative effect on how Islamic finance develops. Hence, she stated that:

> Modernists on their own cannot pioneer the use of *ijtihad*, as they do not possess the requisite religious knowledge that *Shari'ahh* scholars do. The literal interpretation of the Qur'an and *Shari'ahh* is no longer satisfactory for many and the ulema are challenged to a new '*itjihad*': rather than be content with the

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[115] Ibid.
[116] Firas Alkhateeb, Lost Islamic History: Reclaiming Muslim Civilisation from the Past (Oxford University Press 2014) 83.
[117] See Christopher Melchert, The Formation of the Sunni Schools of Law, 9th -10th Centuries CE (BRILL 1997) 137-138.
[118] Glenn L Roberts, Shariah Law and the Arab Oil Bust: PetroCurse Or Cost of Being a Muslim (Universal-Publishers 2007) 61.
[119] Ibid.
[120] Frank Vogel, Islamic Law and Legal System: Studies of Saudi Arabia (BRILL 2000) 77.

> imitation of existing models, they are asked to adopt a more innovative approach, exploring the wide array of *Shari'ahh* concepts that have not yet been tested. [121]

Elshurafa proposes a system whereby modern financial experts and *Shari'ah* scholars collaborate in order to advance the field of Islamic finance while remaining in compliance with the *Shari'ah*. This type of collaboration could, in theory, further assist in the standardisation of Islamic finance throughout the Muslim world.[122]

This internal debate within Islam about the relationship of Islamic finance and the *Shari'ah* is illustrated by the relationship between the Islamic banking system and the international banking system, particularly with respect to regulations that are primarily based on Western banking systems. In respect of certain international regulations, such as Basel III, Islamic banks find it easy to remain in compliance with capital requirements due to the Islamic finance principles being strictly applied. However, in respect of other regulations, such as those imposed by the International Monetary Fund (IMF) and the World Trade Organisation (WTO), Islamic banking systems often struggle with compliance due to the fact that the regulations of these institutions do not always comply with the *Shari'ah*. For example, these regulations are often based on principles that favour debt over equity, which is at odds with Islamic finance principles.[123] Elshurafa suggests that the solution to these fundamental differences may not require the Islamic banking system to comply with the Western dominated system (which is often the case at present) but instead to try to establish a rival banking network based on Islamic principles. She notes that:

> convergence for many [Islamic] countries seems to be the path of least resistance in order for their products to be marketable in the world economy.[124]

However, the failure to establish a banking network based on the *Shari'ah* is not just as a direct result of the attraction of the international banking network but also due to national interests within the Islamic world. For example, the fact that countries such as the UAE have applied the *Shari'ah* in a different manner (such as the permitting of simple interest) has resulted in an inability of the Islamic banking system to accept and adopt a set of standard

[121] Elshurafa, (n 137) 350.
[122] Ibid.
[123] Ibid, 355.
[124] Ibid, 356.

regulations that would be applicable across all Muslim-majority countries.[125] Furthermore, the traditionalist countries that were less willing to adopt Western standards such as Saudi Arabia were, as noted by Elshurafa 'left behind when it came to being integrated alongside western economies'.[126] However, despite this, she notes that those Muslim-majority countries that found it in their best interests to adopt Western standards may have been victims of short-termism, given that a rival banking system based on Islamic principles may have resulted in the effects of the 2008 global recession being much less severe.[127]

3.6 The Position of Saudi Arabia

As has been illustrated above, international trade and finance is continuing to evolve across Muslim-majority countries, including Saudi Arabia, as contemporary scholars attempt to reconcile the traditional principles set out in the *Shari'ah* with the modern concepts necessary to operate a successful globalised economy. In Saudi Arabia, successive Saudi kings have sought to promote a liberal trade and banking policy. For example, despite the inherent differences between Islamic law and the WTO set out in the previous section, the Kingdom still decided to join the WTO in 1999, with an agreement being reached in 2005.[128]

The desire of Saudi Arabia to accede to the WTO is indicative of the fact that the Kingdom, unlike many other resource rich countries, decided to adopt an open trade system and did not become a closed economy.[129] This was undoubtedly influenced in part by the Islamic teachings on the benefits of a free market. However, the influence of the *ulama* has meant that the Saudi government has not been able to fully open its economy or embrace concepts that are not derived from literal or traditionalist teachings.[130] This has negatively affected the Kingdom's ability to diversify its economy outside of its natural resources. As an example, the conservative and inflexible interpretation of the *Shari'ah* with regard to *riba* means that foreign lenders are not active in the Kingdom. This can be contrasted with the flexible position taken by the UAE set out above, which resulted in the formation of a large

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[125] Reuters, 'Fitch: Islamic Finance Standardisation Will be Slow' (25 October 2017) < https://www.reuters.com/article/fitch-islamic-finance-standardisation-wi/fitch-islamic-finance-standardisation-will-be-slow-idUSFitb5gH0f>, accessed on 21 August 2018.
[126] Elshurafa (n 137) 357.
[127] Ibid.
[128] Tim Niblock, Saudi Arabia: Power, Legitimacy and Survival (Routledge 2006) 165.
[129] Richard M Auty, Recourse, Abundance and Economic Development (Oxford University Press 2001) 39.
[130] For more information on Saudi Arabia's participation in the WTO, see < https://www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm>, accessed on 21 August 2018.

international banking sector in that country.[131] The lack of a relatively developed banking sector within Saudi Arabia has also had a further knock-on effect on the domestic industry as it has limited the ability of Saudi entrepreneurs to secure capital especially during times of low growth when oil prices are low.[132]

Furthermore, the legal system in Saudi Arabia may also be considered to be a barrier to trade. The legal culture of the Saudi *ulama* is one that has been deeply influenced by the Hanbali School, despite recognition that other schools are also important.[133] As noted above, the Hanbali legal school is noted for its literal interpretation of the *Qur'an* and the *Sunnah* and it privileges the text above the concepts of *ijtihad* and *istihsan.*[134] When it comes to commercial law cases, Saudi judges are less likely to be guided by consensus and deliver neutral judgments.[135] The result of this is that Saudi courts often deliver rigid decisions which do not allow businesses any flexibility and this is something that frustrates many in the commercial sector and government and stymies the functioning of a free market.[136]This rigidity further results in contracts that are incompatible with the legal systems of other nations, even in the Muslim world. Saudi traders and entrepreneurs as a result have been typically dissuaded from foreign trade and this created a business sector that was insular and inclined only to look to its home market.[137]

3.6.1 Interpretative Rigidity

Despite the fact that the *Hanbali* school is so rigidly bound to the text of the *Qur'an* and the *Sunnah*, it may be argued that any commercial activity that is not explicitly prohibited within these texts is permitted in accordance with their interpretation. It is therefore arguable that *Hanbali* scholars apply the most liberal approach to issues of contracts, affirming the sacred duty of all Muslims to honour their obligations under contract, as well as the court or arbitrator's duty to execute all agreements made in good faith.[138]

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[131] See Robert Ruminski, 'Business Ventures and Financial Sector in the United Arab Emirates' in Woodrow W Clark, II (ed), Global Sustainable Communities Handbook (Butterworth-Heinemann 2014) 405-449.
[132] Mohamed Imam Salem, 'The Role of Business Incubators in the Economic Development of Saudi Arabia' (2014) 87 International Business and Economics Review 853, 853.
[133] Joseph Nevo, 'Religion and National Identity in Saudi Arabia' (1988) 34(3) Middle Eastern Studies 34, 34-53.
[134] Joseph Kechichian, 'The Role of the Ulama in the Politics of an Islamic State: The Case of Saudi Arabia' (1986) 18 International Journal of Middle Eastern Studies 53, 53-71.
[135] Ibid, 69.
[136] David Commins, The Wahhabi Mission and Saudi Arabia (IB Taurus 2006) 123.
[137] Baamir and Bantekas (n 102) 239.
[138] Saba Habachy, 'Property, Right, and Contract in Muslim Law' (1962) Columbia Law Review 450, 450.

For a contract to be valid under the *Shari'ah*, which according to the *Hanbali fiqh*, encompasses arbitration agreements, it must adhere to certain conditions. On the whole, consequently, arbitration clauses tend to fall within two categories: those which are necessary and appropriate to the contract in addition to being commonly applied in commercial transactions, so called *lex mercatoria*, and invalid arbitration clauses that contain usury or payment of interest.[139]

Hanafi scholars differentiate between three categories of contract: valid, invalid (*fasid*) and void (*batil*). However, this categorization, according to Alqudah, finds no basis in the *Shari'ah* or in Islamic custom.[140] Under the classical *Hanafi fiqh* an invalid contract is any contract considered prejudicial to one party or which allows the possessory party to gain an advantage without fair consideration. A contract for the sale of property including a contractual stipulation preventing the buyer from reselling it would for instance be deemed to conflict with the essence of that contract.[141] Similarly, a stipulation that the property can only be used for a specified period of time, without provision for the transfer of that property to the buyer upon payment would, according to the *Hanafi* jurist be invalid ab initio because it is usurious and harmful to the buyer.[142]

The inclusion of *fasid* clauses that are in conflict with the spirit of the contract, or otherwise give one party an unfair advantage, would render the contract void, with profound implications for commercial arbitrations. A void clause, in other words, would not be separable from the main contract.[143] A local court would therefore have grounds to reopen an a Saudi award on the merits and determine the arbitration or underlying agreement null and void (though the same would not apply to an award rendered in a foreign jurisdiction, discussed in chapter 7). It should therefore be of some comfort to foreign actors entering into a contract with a Saudi element that *Hanbali* scholars diverge from *Hanafi fiqh* on these issues and take a more liberal perspective.

[139] Mutasim Ahmad Alqudah, 'The Impact of Sharia on the Acceptance of International Commercial Arbitration in the Countries of the Gulf Cooperation Council' (2017) 1 Journal of Legal, Ethical and Regulatory Issues 1, 12.
[140] Ibid, 8. See also Bada' i'al Sana'i', vol. 2, 54-55, al Hidayah and its commentary Fath al Qadir, vol. 2, 10
[141] Alqudah (n 170) 8.
[142] Ibid.
[143] Ibid.

The Prophet himself abhorred monopolies, stating: 'He who hoards (monopolizes) is a sinner'.[144] Indeed, it is precisely because *Hanbali* teachings adhere closely to the Prophet's own practices that in classical *Hanbali fiqh*, a clause found contrary to the object of the contract is nonetheless considered valid, for example, a contractual stipulation which prevents the resale of any goods which are essentially resaleable (and thus in conflict with the essence of a sale contract as per classical Hanafi jurisprudence).[145] A contract is invalid only in respect of any such clauses with the subject matter expressly prohibited by the *Shari'ah*.[146] We return to the question of how Islamic law and opinion inform Saudi investment strategy and underpinning legal architecture. Take the example of contracts with future clauses. The Prophet himself allowed Muslims to conclude contracts with speculative clauses under certain circumstances, thereby permitting an exception to the general rule.[147]

However, this interpretation has not generally been the one applied by the Saudi *ulama*.[148] As a result, the Saudi legal system has, to a certain extent, become a modern victim of the stagnation that resulted in Islamic jurisprudence following the 'closing of the gate of *ijtihad'*.[149] By only considering *ijtihad* at a last resort (and even then only utilising it in reference to the past rather than the present or the future), the *ulama* have helped to create an economy that has often struggled to diversify its economy away from its natural resources.

3.6.2 Legal Uncertainty

Another legal issue is that of transparency. Islamic law is not codified, and this has led to uncertainty because of the . The *Hanbali* school is resistant to any efforts to codify Islamic law as this is contrary to the principle of *ijtihad*, despite the fact that, as mentioned above, *ijtihad* only plays a relatively limited part in Saudi jurisprudence.[150] The failure to codify the law has resulted in a situation where there is no clarity on the contractual rights of parties, which has been shown to deter entrepreneurs from engaging in risk-taking which is essential for a dynamic commercial system.[151]

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[144] Muslim, Sahih, Book of Hadith, vol. 2, Hadith no: 3910-3912, 4956.
[145] Yossef Rapoport and Ahmed Shahab, Ibn Taymiyya and His Times (Oxford University Press 2015) 196.
[146] Abdul Hamid El Ahdab and Jalal El Ahdab, Arbitration with Arab Countries (Kluwer Law International 2011) 29.
[147] Baamir and Bantekas (n 102) 239.
[148] Elshurafa (n 137).
[149] See Chapter 2.
[150] Ibid, 189
[151] Kuran, (n 58) 23

The relative failure of the Saudi economy to develop a vibrant commercial sector would seem to conform to Kuran's theory that Islamic law had prevented the development of modern trade systems.[152] However, it is argued by this researcher that it is not Islamic law *per se* that has prevented the development of trade within Saudi Arabia, but instead the rigid interpretation of the conservative Islamic scholars who have embraced an inflexible approach to the development of commercial law in spite of historical evidence indicating that such actions in fact go against the very spirit of the *Hanbali*, namely that everything that is not forbidden is allowed.

3.6.3 A Dual System of Commercial law and Dispute Settlement

Esmaelli argues that the dual nature of the Saudi legal system is an anomaly in the new globalized world and even raises issues about the rule of law in the Kingdom.[153].As noted previously, dispute resolution mechanisms are very important to an international legal system and the risk of a refusal of the Saudi courts to enforce an arbitral award is a great concern for international companies. This may be the reason why many are reluctant to invest in the kingdom. However, the laws on investment and arbitration passed in 2007 and 2012 may reassure foreign investors on the arbitral process as shown in chapters 6 and 7.

The nature of the Saudi economy is one that has also militated against the development of a dynamic economy. Saudi Arabia may be considered a 'rentier state' (i.e. one that is content to live off the revenue of its natural resources) to the extent that the Kingdom is often referred to as suffering from the 'resource curse'.[154] This curse is the paradox that countries with an abundance of natural resources such as oil usually have less economic growth and less development than countries with fewer natural resources. While oil helped the Saudi governments to create a modern economy with world-class infrastructure, it has also led to a host of problems that hinder the development of the nation.[155] One of these is the inherent volatility of the revenues that are derived from oil. The oil price collapsed in 1986.[156] This led to severe downturns in the Saudi economy and had negative implications for many

[152] See ibid, 71-90.
[153] Hossein Esmaelli, 'On A Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System (2009) Arizona Journal of International and Comparative Law 1, 2.
[154] Ricardo Hausmann and Roberto Rigobon, An alternative interpretation of the 'resource curse': Theory and policy implications (National Bureau of Economic Research, 2003) 6; Auty (n 160) 45.
[155] Auty (n 160) 45.
[156] Ibid, 57.

businesses.[157] The severe downturns have often led many businesses to fail and dissuaded investment.

In respect of the development of financial and banking law specifically in Saudi Arabia, as noted above Saudi Arabia has acceded to the WTO, which includes regulations on banking. Furthermore, in 2015 the Saudi Arabian stock exchange was opened up to foreign investors. However, the banking industry is heavily regulated by the Saudi Arabian Monetary Agency (SAMA), which ensures that the general principles of Islamic finance set out above are upheld.[158] In respect of disputes, the Committee for the Settlement of Banking Disputes (CSBD) is a dispute settlement forum that is targeted towards contemporary commercial banking matters that is intended to be more pragmatic than the regular courts (although this suggestion has been open to debate as shown in chapter).[159]

Unlike many of its neighbouring countries, Saudi Arabia does not distinguish between its financial institutions (for example, in the UAE there are legislative distinctions between Islamic financial institutions and conventional 'Western' institutions).[160] According to Al Homoud, this is likely because SAMA does not wish to suggest that there is any bank operating within the Kingdom that is not bound by the *Shari'ah*. Financial products offered by Saudi banks must be approved by the supervisory committee to ensure that they are compliant with the *Shari'ah*.[161] Similar to the situation with the *ulama* discussed above, there is a risk that such supervisory overview from a *Shari'ah* perspective could result in the failure to advance innovation in the commercial arenas.

The prohibition of *riba* continues to apply under Saudi law, and any terms in a contract relating to the charging of interest will make the contract voidable under Saudi law. However, as noted above, such prohibitions are often bypassed through various other charges that play the same role as interest (although they are fixed rather than speculative).[162]

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[157] Niblock (n 159) 134.
[158] Oxford Business Group, 'Growth continues as Saudi Arabia's banks diversify their revenues and banking sector shifts towards increased use of technology' (2015) Oxford Business Group < https://oxfordbusinessgroup.com/overview/position-strength-growth-continues-banks-diversifying-their-revenues-while-there-has-been-shift>, accessed 20 September 2018.
[159] Zuhair S. Al-Herbish, 'Jurisdiction over Banking Disputes in Saudi Arabia (2011) 25 Arab Law Quarterly 225
[160] Hesahm Al Homoud, 'Banking Overview In Saudi Arabia' (Al Tamimi & Co, 2011) < https://www.tamimi.com/law-update-articles/banking-overview-in-saudi-arabia/>, accessed on 20 September 2018.
[161] Ibid.
[162] Rolf Meyer-Reumann, 'The Banking System in Saudi Arabia' (1995) 10(3) Arab Law Quarterly 218, 219.

One of the primary targets of the Vision 2030 programme is to develop a robust financial sector, including the introduction of sophisticated capital market products such as derivatives. However, although the programme sets out a number of mechanisms by which the financial sector can develop further, there is little indication that this involves any radical re-evaluation of the financial sector from a *Shari'ah*-compliance perspective.[163]

3.7 Conclusion

This chapter has demonstrated that many trading laws that were first developed by tribes in the Arabian Peninsula evolved from their pre-Islamic origins to become commonplace across the world. The tribes of the Arabian Peninsula were for example early advocates of the concept of free trade and this concept was given further authority by the *Qur'an* and the *Sunnah*. However, it also noted that despite these pro-trade origins, elements of the *Shari'ah* became rigid and inflexible resulting in jurisprudential stagnation that lasted for many centuries. The *Shari'ah* then staged a remarkable revival in the past two centuries. With so much to catch up on, Islamic scholars have been very busy in their attempts to apply traditional concepts to the contemporary world, especially in respect of banking and financial law. This has resulted in the rise of a financial system that could have the potential to challenge the traditional Westernised structures that have dominated the global economy for over half a millennium.

Despite the huge advances that have taken place even within the past 50 years, Islamic finance still lags behind its Western rival in terms of freedom. This is an important factor that deters foreign investment. Although the financial crash of 2008 starkly illustrated the risks when a banking system is given too much free rein, certain elements of the Islamic trade and financial systems continue to promote insularity because of the *Hanbali* approach of looking to the past to derive legitimacy and authority from the *Qur'an* and the *Sunnah*.

As one of the most conservative Muslim countries, Saudi Arabia prides itself on the fact that its laws are based on the *Shari'ah*. However, this does not come without some negatives, as Saudi Arabia's rigid interpretation by the *Hanbali* school of Islamic jurisprudence leads to a suggestion that the jurisprudential stagnation that began with the 'closing of the gate of *ijtihad*' could once again occur within the Kingdom, where the *ulama* continue to review

[163] For more information see Vision 2030's Financial Sector Development Program, available at < http://vision2030.gov.sa/en/FSDP>, accessed on 20 August 2018.

ancient texts for inspiration instead of looking to the future and laying down their own contemporary interpretations of the *Shari'ah* using discretion and reaching consensus.

However, there are some indications that this may be changing in order to attract foreign investors. Politically, Saudi Arabia continues to embrace globalisation to a greater extent and with the increased interconnectedness of the global economy, the economic and legal systems of Saudi Arabia may be unable to revert or stagnate in the way that it did in the 13th century. Furthermore, the Kingdom continues to take steps to diversify its economy away from its natural resources and in order to do so, the development of free trade is fundamental to the process. The Saudi government has introduced large volumes of landmark legislation in recent years (such as for example, the Arbitration Law 2012) that is intended to facilitate trade and promote FDI within the Kingdom.

The history of Islam provides two paths, the path of innovation and the path of stagnation. By considering its history, Saudi Arabia can utilise the wisdom of Allah, Muhammad and early Islamic scholars to create an innovative and diversified economy without sacrificing its Islamic privilege. If interpreted with a contemporary mind-set, the *Shari'ah* provides an excellent legal framework within which trade can flourish. Furthermore, if Muslim-majority countries cooperate to ensure that their financial structures provide for a free and fair system that is consistent with the principles of the *Shari'ah*, there is every possibility that the system will attract more foreign investors.

CHAPTER 4:
Modernising the Saudi Legal System: Reconciling the Shari'ah and Modernity.

4.1 Introduction: Saudi Arabia in the Modern World

This chapter brings us squarely to the modern era of the Saudi legal system. The nature of Saudi Arabia's constitutional order is somewhat distinct in that the *Shari'ah* is recognised not merely as a primary source of law but as the ultimate source of all law and authority and, hence, the constitutional embodiment of its legal system.[1] In this regard, Article 7 of the Basic System of Governance instructs that '[g]overnment in Saudi Arabia derives power from the Holy Qur'an and the Prophet's tradition'.[2] Sources of Saudi law consist of an assemblage of laws issued by Royal Decree, some of which partly codify aspects of the *Shari'ah*;[3] traditional (customary) law[4] and civil codes and procedures borrowed from 'foreign' legal systems.[5] In the hierarchy of sources, however, the *Shari'ah* is preeminent.[6] The first source of primary law derives from the literal text of the *Qur'an*. The *Sunnah* is also considered a primary source of Saudi law and consists of the oral testimony of the life and teachings of the Prophet Mohammad known as *Hadith*s.[7]

One distinction should, however, be made clear from the outset. Saudi law is not reducible to the *Shari'ah*. The former derives from the authority of the other. As Reinhart suggested, the *Shari'ah* embodies the highest ideal of a legal system and moral scheme that governs all

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[1] See Hossein Esmaeili, Irmgrad Marboe and Javaid Rehman, The Rule of Law, Freedom of Expression and Islamic Law (Hart Publishing 2017) 36; Mossa Akefi Ghazi, 'Constitutional Human Rights: Saudi Perspective' (2010) 4(3) Journal of Middle Eastern and Islamic Studies 28, 29; Herbert J Liebesny, 'Comparative Legal History: Its Role in the Analysis of Islamic and Modem Near Eastern Legal Institutions' (1972) 20(1) American Journal of Comparative Law 38, 46, 52. Al-Fahad contends that this position may have been adopted because the Basic Law (discussed below) is "a qualified rejection of many of the standard notions of constitutionalism in terms of rights and freedoms, while ratifying a powerful executive circumscribed only by historical practices and Islamic ideas of governance." See Abdulazziz H Al-Fahad, 'Ornamental Constitutionalism: The Saudi Basic Law of Governance' (2005) 30(2) Yale Journal of International Law 375, 376, 384-385.

[2] Ayoub Al-Jarbou, 'The Role of Traditionalists and Modernists on the Development of the Saudi Legal System' (2007) 21 Arab Law Quarterly 191, 197.

[3] Irshad Abdal-Haqq, 'Islamic Law: An Overview of its Origins and Elements' (2002) 7 Journal of Islamic Law and Culture 27, 58.

[4] Traditional customary practices vary significantly from one Islamic country to another. See Lawrence Rosen, The Anthropology of Justice: Law as Culture in Islamic Society (Cambridge University Press 1989) 17.

[5] Liebesny (n 1) 52.

[6] The Islamic foundation of the Saudi legal system was declared as early as 1950. See Royal Decree No. 1320 of July 19, 1950. Article 1 of the Decree stipulates that "the Board of Grievances" shall apply the "rules of the Islamic Shari'ah in accordance with the Qur'an, the Sunnah and laws not conflicting with the present Law, and their proceedings shall comply with the provisions thereof."

[7] Imam Muslism and Abdul Hamid Siddiqi, Sahih Muslim: Being Traditions of the Sayings and Doings of the Prophet Muhammad as Narrated by his Companions and Compiled under the Title Al-Jami'-Us-Sahih: With Explanatory Notes and Brief Biographical Sketches of Major Narrators (Ashraf Islamic Publishers 1990) 5.

aspects of the manner in which Muslims ought to practice faith and conduct dealings in private and public life.[8] As such, the *Shari'ah* provides its own 'moral' scheme and evaluative criteria, rooted in Godly values of morality, truth, beauty, knowledge and justice through law, which exists independently of the legal methodologies and methods through which these moral objectives are interpreted and given concrete expression in the positive laws of any given Islamic legal system (i.e. through its formal incorporation into state law).[9] This was in part a reflection of the fact that each school of Islamic jurisprudence emerged in a different part of the Islamic empire.[10] In Saudi Arabia, opinions of the scholars who follow the strict constructivism of Ibn Hanbal, the founder of the *Hanbali* School, carry great weight. This is because the *Hanbali* school of jurisprudence is the official school in Saudi Arabia and Qatar, although aspects of its jurisprudence can also be found in Palestine, Syria, and Iraq.[11]

In light of the above, this chapter addresses the research question of whether the *Shari'ah* is sufficiently flexible to accommodate modern practices. It attempts to determine the extent to which the modernisation aims of the Saudi leadership are reconcilable with Islamic legal traditions in contemporary Saudi Arabia. The analysis of legal reforms in this chapter also helps towards addressing the research question of what mechanisms Saudi Arabia can implement to attract foreign investors. In the past decades, the influx of foreign investment in the Saudi oil industry was a precipitant of modernisation and, its opposite, resistance; the latter a response to an international arbitration system that was deemed to have encroached upon the sovereign laws of the Kingdom's legal order and displaced the *Shari'ah*'s rightful place within it.[12] However, economic factors, notably the drop in oil revenues, are once again providing the impetus for a shift in the public consciousness of Saudi society which, in reciprocal relation, appear to have led to a change in political and, possibly to a lesser extent, judicial attitudes.[13] Of course, policies aimed at fostering higher levels of investment in Saudi

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[8] Kevin Reinhart, 'Islamic Law as Ethics' (1983) 11(2) Journal of Religious Ethics (1983) 186, 196 [describing the Shari'ah as an "independent scheme of moral categorization"].
[9] Khaled Abou El Fadl, Reasoning with God: Reclaiming Shari'ah in the Modern Age (Rowman and Littlefield 2014) 298-299.
[10] Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2(3) Arab Law Quarterly 272, 274.
[11] Yusuf Al-Qaradawi et al, Introduction to the Study of Islamic Shari'ah: Al-Shari`ah Al-Islamiyyah (Maktabat Wahbah 1991) 106.
[12] A good example of this is the Kingdom's hostility to international arbitration following the ARAMCO decision. Stephen M. Schwebel, 'The Kingdom of Saudi Arabia and ARAMCO arbitrate the Onassis agreement' 3(3) Journal of World Energy Law and Business (2010) 245-256. This is also discussed in chapters 4 and 7.
[13] For a general discussion of processes of change, see Jane Kinninmont, 'Vision 2030 and Saudi Arabia's Social Contract: Austerity and Transformation' (Research Paper, Chatham House, July 2017) 3, 11

Arabia cannot be achieved through policy alone; they rely on sound laws, procedures and enforcement mechanisms.[14] Furthermore, governmental policies can hinder as well as help processes of modernisation,[15] holding back the articulation of common Islamic standards that can be mobilised in favour of political and economic development aims.[16]

This chapter begins with a brief analysis of the development of the legal system, with emphasis on how Saudi authorities have imported foreign concepts and values to modernise the laws while protecting the Kingdom's Islamic heritage. It then examines the current dual legal system and determines the extent to which the delicate balance is achieved. It concludes by considering whether the modernisation project has been effective, and whether one may talk of duality or harmony.

4.2 The History of the Saudi Legal System

During his reign, King Abdul-Aziz Ibn Abdulrahman Al Saud presided over a series of modernising reforms that comprehensively overhauled the economic and governance architecture of Saudi Arabia.[17] Through investments in science, education and technology, King Abdul-Aziz fulfilled the needs of the administratively organised area of Al-Hejaz., whilst fostering social cohesion among the people of different regions.[18] A visionary leader, the founder of the modern state of Saudi Arabia, King Abdul-Aziz recognised that social bonds that held the Saudi policy were rooted not only in a common notions of nationhood, but in a shared legal heritage founded on Islamic law and custom.[19] Seeking to reconcile the civil law orientation of Saudi Arabia's administrative structure with the Islamic heritage of its people, the King passed an order obliging all judicial authorities 'to conform to the Qur'an, the Sunna of its Prophet, and to the guidance of its Companions and the first pious

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<https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2017-07-20-vision-2030-saudi-kinninmont.pdf>, accessed 29 July 2018.

[14] For a detailed explanation of the relationship between law and development, see Kevin E Davis and Michael J Trebilcock, 'Legal Reforms and Development', (2001) 22 Third World Quarterly 21, 21-36.

[15] A Al-Jarbou, 'The Role of Traditionalists and Modernists on the Development of the Saudi Legal System', (2007) 21 Arab Law Quarterly 197

[16] John O Voll, 'Islam and Democracy: Is Modernization a Barrier'? 1 (2007) Religion Compass 170, 171.

[17] Muddassir Quamar, 'Islamic Modernism and Saudi Arabia: Confluence or Conflict'? (2015) 2(1) Contemporary Review of the Middle East 71, 71-73; Hussein Esmaeili, 'On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System' (2009) 26(1) Arizona Journal of International and Comparative Law 1, 27-30. See also, George N Sfeir, 'The Saudi Approach to Law Reform' (1988) 36(4) The American Journal of Comparative Law 729, 729-759.

[18] Ouamar, ibid, 71-73.

[19] Iqal Hadari-Bedouin, 'Conflict and the Formation of the Saudi State' in Madawi AI-Rasheed and Robert Vitalis eds. Counter-Narratives: History, Contemporary Society and Politics in Saudi Arabia and Yemen (Palgrave Macmillan 2003) 35-37.

generations'.[20] Moreover, under the King's regency, all aspects of decision-making found inspiration in Islamic customs of conciliation, power-sharing and deliberation.[21] These Islamic conceptions of 'good governance' endure in the Kingdom's governance structure even today.[22]

By the time of his death in 1953, the visionary King he had established a ministerial system with centralised policy making powers.[23] Above all, the King fostered growth and development in the country, bringing order and stability to a formerly tribal and divided society, and did so by crafting a 'method of ruling in the name of Islam and modernization'.[24] It follows that the King also faced the challenge of applying modern standards while adhering closely to Islamic values. Nonetheless, all Saudi people, ruler and ruled, were governed by a common legal framework derived from the *Shari'ah* and *Hanbali fiqh*.[25] The law of procedure before the courts in Saudi Arabia stipulates:

> Courts shall apply to cases before them provisions of Shari'ah laws, in accordance with the Qur'an and Sunnah of the Prophet (peace be upon him), and laws promulgated by the State that do not conflict with the Qur'an and Sunnah, and their proceedings shall comply with the provisions of this Law.[26]

4.2.1 Civil Law Influences on the Early Formation of the State

Despite the primacy of *Shari'ah* law, the form and structure of Saudi Arabia's institutions, both political and judicial, are strongly influenced by earlier civil law influences.[27] According to Hanson, one reason that civil law, as opposed to common law, could be incorporated into countries that practice the *Shari'ah* is the similarities between the separation of public and

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[20] Al Mukhtar, History of Saudi Arabia in the Past and Present, Part 2, 283. See also, Hanson (n 765) 273.
[21] See Frank E Vogel, Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia (Harvard University Press 1994) 169-222.
[22] Nimat Hafez Barazangi, 'The Absence of Women in Shaping Islamic Thought: Foundations of Muslims' Peaceful and Just Coexistence', (2008) 24(2) Journal of Law and Religion 403, 403.
[23] Vogel (n 21). See also, Joseph A Kechichian, Legal and Political Reforms in Saudi Arabia (Routledge 2013) 110-114. For a discussion on the Council of Ministers, see Charles W Harrington, 'The Saudi Arabian Council of Ministers' (1958) 117 Middle East Journal 1, 1-19.
[24] Quamar (n 772) 71.
[25] Herbert J Liebesny, The Law of the Near East and Middle East: Readings, Cases and Materials (SUNY Press 1975) 18.
[26] Law of Procedure before Shari'ah Courts, Royal Decree No. (M/21) 20 Jumada I 1421 (19 August 2000) article 1 <http://www.wipo.int/edocs/lexdocs/laws/en/sa/sa029en.pdf> accessed 13 December 2017
[27] See Khalid Saad Al-habshan, 'The Current Rights of Minority Shareholders in Saudi Arabia' (2017) 6(1) International Law Research 185, 192-195; Ian Edge, 'Comparative Commercial Law of Egypt and the Arabian Gulf', (1985-1986) 34 Cleveland State Law Review 129, 131, 139-144.

private law in civil law systems, on one hand, and the separation of administrative functions in Islamic countries such as Saudi Arabia. She noted that:

> Although the *Shari'ah* permeates all aspects of life, it shares principles found in French jurisprudence for the rationale behind the establishment of a separate system of administrative law. It may seem surprising at first glance to discover that Saudi Arabia, a country never under the influence of European occupation and with a strong orthodox Islamic tradition, has been influenced by French jurisprudence. However, the flexibility and pragmatism of *Shari'ah* has enabled Saudi Arabia to take advantage of the legal expertise of its neighbours and fill in any voids left by Islamic law while always conforming to the *Shari'ah*.[28]

To understand the continuing influence of civil law on the current structure of the Saudi legal system, it is necessary to look back in time before the creation of the modern state of Saudi Arabia in 1932. At the beginning of the 19th century, the French legal system was going through extensive changes following the rise of Napoleon, who promoted the codification of law in France and its conquered territories.[29] This new fervour for codification spread into other areas of the world, including the Ottoman Empire, which based an array of new administrative laws on the French civil law system, including legislation based on the French Commercial Code, the Code of Civil Procedure, the Penal Code and the Code of Criminal Procedure. These codes were imported directly into the administrative structure of the Ottoman Empire with few changes to account for *Shari'ah* law.[30]

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[28] Hanson (n 10) 280. However, other writers such as Edge (ibid, 131) argue that there was no deliberate attempt to adopt European civil law. This was only incidental given that in a bid to strengthen and modern the commercial law of Saudi Arabia, King Abdul Aziz adopted the Ottoman Commercial Code of 1850 (the only Islamic code of civil and commercial law), which was applied as civil law in the empire's domain).

[29] See Frank L Kidner et al, Making Europe: The Story of the West: Since 1550 (Vol II, Cengage 2013) 582-583; Charles Sumner Lobingier, 'Napoleon and His Code' (1918) 32(2) Harvard Law Review 114, 115-119; David Mitchell Aird, The Civil Laws of France to the Present Times (Longmans, Greens and Co 1875) 21-23.

[30] See Lecture of Dr B Atallah, at University of San Diego Institute on International and Comparative Law, Alexandria, Egypt (Unpublished, July 1983). Oguz gave a more detailed account. He noted that the era of Hanifian Islamic rule began sometime in the twelfth century during Turkish Seljuk's reign. Hanifian Islamic law regulated private and public activities together with customary law that was largely written in the Sultan's orders (Kanunname). Both systems were then harmonised to prevent conflict. However, during the Pure Islamic Law period, the Shari'ah claimed complete prevalence because of its divinity and customary law was overlooked. But then shortly before the Empire collapsed, widespread reforms were implemented that included adopting Western laws and standards in order to recognise. The influential Grand Vizier Ali Pasha focused primarily on adopting the French Civil Code, although he kept Islamic law in certain areas such as family law. See Arzu Oguz, 'The Role of Comparative Law in the Development of Turkish Civil Law' (2005) 17 Pace International Law Review 373, 375-378. Mallat says it is difficult to determine the extent to which the Majalla was Islamic law and the extent to which it was received European law. Nonetheless, although, it was influenced

However, when it came to compiling a code of contractual obligations, the Ottoman reformers decided against accepting the French models and instead produced a code based on principles derived from the *Hanafi* school of *Shari'ah* law.[31] This code is referred to as the *Majalla* and it was enacted in 1876.[32] The *Majalla* was the first attempt of the codification of principles derived from the *Shari'ah* that were enacted as law by the authority of the State, which was a complete reversal from the classical Islamic position that the *Shari'ah* was divine law and should therefore remain uncodified.[33]

The *Majalla* was based on principles derived from the *Hanafi* school of Islamic law but it also allowed for sufficient flexibility in interpretation, with the Ottoman legal scholars being encouraged to consider other schools of thought, both in Islam and elsewhere, thus establishing the basis for a legal code that was suitable and appropriate for the contemporary world.[34] As a result of the dominance and popularity of the French civil law procedures at that time, the *Majalla* is considered to be 'Islamic in content but European in form'.[35] However, as noted by Hanson:

> …it was not a code in the strictest European sense because it was not a complete and exclusive statement of the law as it existed at the time of codification, but rather a non-exclusive digest of existing rules of Islamic law which, because of its religious nature, could hardly have an exclusive character.[36]

The *Majalla* remained influential after the dissolution of the Ottoman Empire in the early 20th century and was the basis on which many of the former Ottoman territories based their civil codes upon their foundation.[37] Although the *Majalla* was not directly transposed into Saudi Arabian law with the creation of the Kingdom, the concept of incorporating foreign laws and

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by European concepts, compared to the Tunisian and Moroccan codes, the Majalla was largely (Hanifian) Islamic law. See Chibli Mallat, Introduction to Middle Eastern Law (Oxford University Press 2007) 255.

[31] James Norman D Anderson, Islamic Law in the Modern World (New York University Press 1959) 42.

[32] Ibid. Oguz (n 30) 378 however noted that Ali Pahsa ensured that portions of Western law directly translated into the Empire's criminal law and commercial law.

[33] This discussion has also been developed in Abdulrahman Yahya Baamir, Saudi Law and Judicial Practice in Commercial and Banking Arbitration (Routledge 2010) 119-120. However, details on aspects of the code can also be found in Hakan Köni, 'Politics of Religion and Secularism in the Ottoman Empire; 14th to 20th Century: A Study' (2013) 2(1) International Journal of Research in Social Sciences 11, 17.

[34] Anderson (n 31) 42.

[35] Hanson (n 10) 277-288. See also, Mallat (n 30) 255.

[36] Hanson (n 10) 277.

[37] Mohamed AM Ismail, International Investment Arbitration: Lessons from Developments in the MENA Region (Routledge 2013) 1-4. See also, Abdul Basir Mohamad, 'The Influence of Turkey on the State of Johore: A Study on Majallat al-Ahkam al-Adliyyah (2013) 8(3) Journal of Applied Sciences Research 1, 1-8; Lawrence Rosen, 'Responsibility and Compensatory Justice in Arab Culture and Law' in Benjamin Lee and Greg Urban (eds), Semiotics, Self and Society (Mouton de Gruyter 1989) 113-115.

practices was influential in the formation of Saudi Arabian law, including its arbitration law.[38] The *Majalla* also largely influenced the Egyptian Civil Code which was based on an attempt to harmonise *Shari'ah* law and European practices.[39] Ismail argues that the Egyptian Code that had a greater influence on the substance of Saudi Arabian law than the laws of the Ottoman Empire.[40] However, the Egyptian system was largely based on the French.[41] Egypt was occupied by the French under Napoleon for only three years, but this brief occupation left a lasting impact on Islamic law, as civil law permeated throughout its administration.[42] As a result of the influence that first the French and then the British had in Egypt during the course of the 19th century, numerous reforms were introduced in order to regularise legal relations with these European powers and provide a more unified system for commercial transactions.[43] These reforms included the development of European-derived civil codes that were applied by European-style civil courts, including the Egyptian Commercial Law Code that was broadly based on the French Commercial Code.[44] Due to these influences, for instance, the Saudi ruling regime established the Board of Grievances (*Diwan al Mazalim*) that was one of the departments of the Council of Ministers in 1954, and by 1955 functioned as an independent ministerial body.[45]

The Grievances Board, established under the reign of Khalid bin Abdul-Aziz, was directly influenced by the Egyptian version of the *Diwan al Mazalim*, which itself was based on the French *Conseil d'Etat*, established by Napoleon for the purpose of providing advice on the drafting of laws and regulations and other matters.[46] The practice of the Board was, however, also based on principles similar to the classical Islamic Courts of Complaints (*Qada al Mazalim*) which dealt with administrative matters.[47] The authority for the establishment of the *Qada al Mazalim* in classical Islam was based on a fundamental right of the sovereign under *Shari'ah* law to rule on all litigation matters and rectify any abuse of justice.[48] The

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[38] Ismail, ibid, 4. See also Baamir (n 33) 120.

[39] Mallat (n 30) 245; Nathan J Brown, The Rule of Law in the Arab World: Courts in Egypt and the Gulf (Cambridge University Press 1997) 155.

[40] Ismail (n 37) 4-8.

[41] See Brown (n 39) 155; Edge (n 27) 131-132.

[42] Hanson (n 10) 279-280.

[43] Ibid.

[44] Ibid, 286; Edge (n 27) 131-132.

[45] Royal Decree No. 2/13/8759 dated 17 Ramadhan 1374 (10 May 1955). See Abd El-Mahdi Massadeh, 'An Analysis of the Civil Service Disciplinary System of Saudi Arabia and Kuwait: An Islamic Perspective and A Comparative Overview' (1992) 10(3) Penn State International Law Review 461, 467-468. See also, Ayoub M Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia' (2004) 19(1/4) Arab Law Quarterly 5, 8.

[46] Sfeir (n 17) 729-744. This is also discussed in Baamir (n 33) 112.

[47] Baamir, ibid, 111-112.

[48] Hanson (n 10) 286.

Qada acted both as an appeal court and was intended to rectify any cases involving a miscarriage of justice.[49]

The Egyptian *Diwan al Mazalim* evolved into an independent judiciary that was competent to render decisions in administrative disputes, and a similar evolution occurred with the Saudi *Diwan*. Although initially the latter's role was consultative rather than judicial, the powers of the *Diwan* were increased by Royal Decree in 1976 and later in 1982,[50] with the *Diwan* being transformed from an advisory board into an independent judiciary with the responsibility of dispensing justice, and the stated intention of reducing the workload of the *Shar'iah* courts.[51] The new powers provided to the *Diwan* under the 1982 Royal Decree included the power of adjudication on arbitration matters, as well as the power to settle any other commercial and investment disputes and consider applications for the execution of foreign judgments.[52]

This historical context is illuminating. It shows that each successive regent and ruling regime of Saudi Arabia has confronted the challenge of adopting modern or contemporary standards while adhering closely to Islamic law. In the process, each regime has found itself accommodating, absorbing and adapting (directly or indirectly) – perhaps capitulating – to Western standards, legal norms, practices and discourses originating from the secular legal system in order to meet the administrative and development needs of its society.[53]

4.3 Saudi Arabia As A Dual Legal System

Saudi laws fall into one of two categories: *fiqh* and *siyasa*.[54] As established in previous chapters, *fiqh* consists of juristic opinions on matters of Islamic law and jurisprudence. Given the totalising nature of Islamic law, the *fiqh* covers a sweep of legal issues, covering personal law, religious ritual to contemporary rules and principles falling under the umbrella of Islamic commercial law (based on the Islamic 'law of contracts') and dispute resolution.[55] It is also worth noting that Saudi Arabia adopts the same classification of Islamic jurisprudence in respect of the five categories of Islamic law. Subject to this classification, specific juristic

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[49] Ibid.
[50] Royal Decree No. M/51 of 1402 H (1982)
[51] Hanson (n 10).
[52] Kristin T Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non-Domestic Arbitral Awards'? (1994) 18 Fordham International Law Journal 920, 951.
[53] Ismail (n 37) 18.
[54] See also Asifa Quraishi-Landes, 'The Shari'ah Problem with Shari'ah Legislation' (2014) 41 Ohio North University Law Review 545, 546.
[55] Ibid.

opinions derived from the text of the *Qur'an* or narration of the *Sunnah* are classed as mandatory, recommended, permissible, morally repugnant or prohibited activities.[56]

Siyasa, by contrast, concerns the domain of human and temporal laws and policies enacted by the Saudi government for the benefit of the national interest.[57] Thus, *Siyasa* addresses any civil acts which are not expressly regulated in the *Qur'an* or the *Sunnah*.[58] Deeply embedded in the Islamic legal tradition, this doctrine had an 'enormous impact on the political philosophy of the Ottoman state'.[59] Arguably an iteration of an Islamic conception of the 'rule of law' principle, *Siyasa* imposes a duty on ruling authorities to enact law only after they have deliberated with religious authorities in the land, thereby ensuring that Muslims comport their lives and transactions in abidance with higher principles of the *Shari'ah*.[60]

Ordinary acts of law-making and administration in Saudi Arabia are classified therefore as a form of *Siyasa*. Following the establishment of the *Diwan al Mazalim* in Saudi Arabia, the Council of Ministers enacted several regulations including regulations governing companies and commercial agencies.[61] In the decade after the establishment of the Council of Ministers in 1958, more than 200 regulations and codes in the areas of public and private law have been issued,[62] extending to the establishment of labour and procurement law codes; banking, investment and company law.[63]

The majority of these codes and regulations were inspired by the French system and involved collaboration with legal scholars in other jurisdictions, particularly ones that were influenced by the French law model such as Egypt, Lebanon and Syria.[64] These legal codes, whether of Ottoman or European origin, were required to conform to the *Shari'ah* but were adopted through the doctrine of public interest (*al massalih al mursala*) which allows the Council to

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[56] Joseph Brand, 'Aspects of Saudi Arabian Law and Practice' (1986) 9 Boston College International and Comparative Law Review 1, 20.
[57] See Ibn Qayyim Al-Jawziyya and Muhammad Ibn Abi Bakar, Al-Turuq Al-Hukmiyyah Fi As-Siyaasah Al-Shar'iyyah (International Law Books 2000) 237.
[58] Quraishi-Landes (n 54) 564-565. See also, Amr A Shalakany, 'Islamic Legal Histories' (2008) 1(1) Berkeley Journal of Middle Eastern and Islamic Law 1, 16-21.
[59] Clark B Lombardi and Nathan J Brown, 'Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law' (2006) 21 American University International Law Review 379, 404.
[60] Ibid.
[61] Hanson (n 10) 289-290.
[62] Ibid.
[63] The Saudi company law was enacted and put in force in 1965 through the Royal Decree No. M-6 dated 22 Rabia I 1385. The law was copied from the Egyptian company code which was directly taken from the French company act.
[64] Baamir (n 33) 111-112.

draft legislation which, although not provided for in the *Shari'ah*, is for the public good.[65] This is emphasised in the principle of the *Hanbali* school that 'all things not specifically prohibited are allowed' in respect to commercial transactions with its corresponding justification in the issuance of regulations.[66] This example emphasises the profound influence of French law on the development of all areas of Saudi law (with the exception of personal family law which remains strictly *Shari'ah*).[67]

Thus while Saudi civil authorities have competence to propose legislation and adopt policies, the substance of those laws and policies must fall within the range of activities permitted under the *Shari'ah*.[68] Likewise, while Royal Decrees issued by the state sovereign prevail over ministerial regulations, civil codes and other non-*Shari'ah* related sources, they are considered subordinate to Islamic law and juristic opinion.[69]

It is in this sense that the Saudi system might be described as a dual legal system. Vogel noted as follows:

> [I]n most Islamic states other than Saudi Arabia, the legal system is bifurcated: one part is based on man-made, positive (wadi) law; the other part on Islamic law. The first part usually exists in the form of comprehensive codes similar to those of the European civil law systems, and the second in the form of Islamic law, usually codified as well. The positive legal system provides the basic or residual law, while the Islamic law is exceptional, supplementary and relatively narrow in scope. There is a similar bifurcation in the institutions that apply the law, for example, between positive law tribunals and religious law courts. Saudi Arabia also has a dual legal system, but the relative roles of the two sides are reversed. The Islamic component of the legal system is fundamental and dominant. The positive law, on the other hand, is subordinate, constitutionally and in scope.[70]

[65] Imran Ghaneum, Outline of Islamic Jurisprudence (CreateSpace Independent Publishing Platform, 2016) 12.
[66] Hanson (n 10) 289.
[67] Ibid. See also, Vogel (n 21); and Esmaeili (n 17).
[68] Bryant W Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1979) 18 Columbia Journal of Transnational Law 438, 442.
[69] Ibid.
[70] Frank Vogel, "Islamic Governance in the Gulf: A Framework for Analysis, Comparison, and Prediction" in Gary Sick and Lawrence Potter (eds), The Persian Gulf at the Millennium; Essays in Politics, Economy, Security, and Religion (Saint Martin's Press 1997) 275. For an economic take on the duality of the Saudi legal

As such, the system in which regents and ruling regimes have sought to adopt modern standards is one in which the *Shari'ah* provides for the basic or residual law, while positive law is supplementary and narrow in scope. Nonetheless, it does not follow that this is a major obstacle to modernisation. It is crucial to note that Saudi Arabia has not adopted a comprehensive code on, for instance, commercial law, albeit many of its commercial laws and regulations derive from legal codes adapted from French and Egyptian systems.[71] Moreover, the *Shari'ah* remains the primary source of law. Notwithstanding, this reinforces the dual aspects of the Kingdom whereby civil law influences coexist with Islamic 'supremacy clauses'.[72] Saudi Arabia is not the only country to recognise and apply Islamic sources of law within the relevant legislative, administrative and judicial processes.[73] Saudi Arabia is distinct, however, in so far as it establishes the *Shari'ah* as the constitutive basis of all its law.[74] As mentioned earlier, a further distinctive feature of the Kingdom's constitutional order is the primacy afforded to the *Hanbali* school which requires its followers to emulate the practices of the Prophet.[75] The next section identifies and briefly examines the main institutions and features of the contemporary Saudi legal system in order to assess the role of the *Hanbali Shari'ah* within the Kingdom's broader legal order.

4.4 Constitutional Aspects of the Saudi Legal System

4.4.1 Formal Elements of Saudi Arabia's Constitutional Order

The political structure of Saudi Arabia's constitution is overall, fairly ordinary. It is composed of three branches of government, (a sui generis) legislature, the executive and the judiciary.[76] Regulations and laws may be adopted through Royal Decree, i.e. through sovereign acts of the King; by means of legislation implemented through Ministerial

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system, see Amr Daoud Marar, 'Saudi Arabia: The Duality of the Legal System and the Challenge of Adapting Law to Market Economies' (2004) 19(1) Arab Law Quarterly 91, 112.

[71] See Nathan J Brown, 'Why Won't Saudi Arabia Write Down its Laws'? Foreign Policy (23 January 2012) <http://foreignpolicy.com/2012/01/23/why-wont-saudi-arabia-write-down-its-laws>, accessed on 12 October 2017.

[72] Ahmed and Ginsbury (n 2).

[73] See Shamsul Falaah, 'Theocratic Constitutionalism: A Discourse on the Political System, Democracy, Judiciary and Human Rights under Islamic Theocratic Constitutionalism' (2016) 2(2) Waikato Islamic Studies Review 66, 67 [describing three forms of Islamic Constitutionalism].

[74] Liebesny (n 25) 18.

[75] A Royal Decree, issued in 1349H (1930) confirmed this, stating "[i]t will be sufficient to rule by what is found in the authentic law books of the school of Imam Ahmed ibn Hanbal, which can be applied without the meeting of court members, while judgment with no basis in these text will require an obligatory meeting." Cited in Fuaad Hamza, Al -Bilad Al-Arabia Al-Saudiah (Kingdom of Saudi Arabia) (1988) 175-176. One may then question the extent of the influence of the Ottoman Code that was based on Hanafian Islamic law, not Hanbali.

[76] See Abdullah F Ansary, A Brief Overview of the Saudi Arabian Legal System (Hauser Global Law School Program, New York University School of Law 2008).

resolution in consultation with the Shura Council and through secondary law making i.e. regional laws, bylaws and administrative circulars.[77] Law produced from these sources may be considered part of Saudi law.

A constitution, as commonly understood, is a document that defines, regulates, governs and constitutes the organs of government.[78] The founders of Saudi Arabia do not provide for a written constitution, in part because of hostility to any attempts to codify God's law as discussed below.[79] In 1993, however, Saudi Arabia introduced three regulations that codified historic aspects of the Kingdom's constitutional framework. The three regulations encompass the Basic System of Governance,[80] the Consultative Council (Shura Council) Law,[81] and Regional Law. [82]

Collectively referred to as the Basic Law of Saudi Arabia, these instruments define, constitute, delineate and regulate the powers and functions of each organ of government. In this regard, the Basic Law is functionally equivalent to a constitutional document.[83] One additional legal instrument of note is the Council of Minister's Law, which defines the functions and responsibilities of the executive branch of government.[84] The Council of Ministers is composed of the heads of ministerial departments, each responsible for formulating policy on various subject matters.[85] As noted above, the creation of the Council of Minister predates the adoption of the Basic Rule of Governance. Moreover, the Basic Law codifies aspects of existing legal practice and does not establish new institutions, some of which, including the judiciary, have long been existing since the inception of the Kingdom.[86]

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[77] Ibid.

[78] The following has been argued: "To the extent that the Basic Law can be considered an 'informal' constitution, Article I establishes the Qur'an and the Sunnah as the 'formal' constitution." Kevin M. Whiteley, Brad S. Keeton, and Matthew T. Nagel, Kingdom of Saudi Arabia (Al Mamlakah Al Arabiyah As Suudiyah) (ICM Publication, 2006) <http://law.wustl.edu/GSLR/CitationManual/countries/saudiarabia.pdf>, accessed 23 February 2017.

[79] See Sebghatullah Qazi Zada and Mohd Ziaolhaq Qazi Zada, 'Codification of Islamic Law in the Muslim World: Trends and Practices' (2011) 6(12) Journal of Applied Environmental and Biological Sciences 160, 160-171.

[80] Ibid.

[81] The Shura Council Law, Royal Order No. A/91, (27/8/1412H, Mar. 1, 1992), O.G. Umm al-Qura No. 3397 (2/9/1412H, Mar. 5, 1992).

[82] The Regional Law, Royal Order No. A/91 (27/8/1412H, Mar. 1, 1992), O.G. Umm al-Qura No. 3397 (2/9/1412H, Mar. 5, 1992).

[83] Whiteley, Keaton and Nagel (n 78).

[84] Council of Ministers Law, Royal Order No. A/13, art. 29 (2/3/1414H, Aug. 21, 1993).

[85] See generally, Adel Omar Sharif, 'Separation of Powers and Judicial Independence in Constitutional Democracies: The Egyptian and American Experiences' in Eugene Cotran and Adel Omar Sharif (eds), Democracy, the Rule of Law and Islam (Kluwer Law 1999) 22-34.

[86] Ibid.

In order to better understand the dynamics between judicial and legislative processes in Saudi Arabia, it is necessary to first explain the main organs of government.

4.4.2 Institutions of Government

4.4.2.1 Executive Branch of Government

Formally a monarch, the executive branch of Saudi government is composed of the Prime Minister (and the King) and Council of Ministers, both of whom are endowed with authority to enact laws.[87] Royal orders issued by the King and Prime Minister are self-executing and become effective upon being published in the Saudi gazette.[88] The Council of Ministers is also vested with authority to promulgate ministerial resolutions with binding legal effect.[89] Under the political structure of Saudi Arabia, the King may issue Royal Orders which supplant or abrogate existing laws,[90] or resolutions passed by the Council of Ministers.[91] As a political sovereign, the Prime Minister also has the final say over the decision to ratify international treaties.[92]

The Council of Ministers consists of numerous ministerial offices which perform governance functions under the supervisory authority of the King and his deputies.[93] As to the functions, the Council of Ministers is chiefly responsible for developing and implementing administrative laws and policies which aid the development and stable functioning of the Kingdom, encompassing the sphere of education, economy and finance, and administrative matters.[94] The Council may also establish committees charged with the task of implementing policies and reviewing the work of governmental authorities.[95]

The political structure of the Saudi government is highly centralised and the executive branches of government and royal authorities have sweeping powers. The Prime Minister exercises broad power, and therefore the concept of republicanism cannot conceivably coexist with Saudi interpretation of Islamic conceptions of the source and divine nature of

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[87] Ansary (n 76).
[88] Umm Allqura is the official gazette of the government of Saudi Arabia.
[89] The Basic System of Governance, Royal Order No. A/90 (27/8/1412H, Mar. 1, 1992), Article 45
[90] Ibid, Articles 55, 56 and 57.
[91] Ibid. See also, The Council of Ministers Law, Royal Order No. A/13, (2/3/1414H, Aug. 21, 1993), Article 29.
[92] Ibid, Articles 81 and 70. Some have argued that the Law of the Council of Ministers has the character of a constitutional document. See for example, Hanson (n 10) 283-285.
[93] Ibid.
[94] The Regional Law, Royal Order No. A/91 (27/8/1412H, Mar. 1, 1992), O.G. Umm al-Qura No. 3397 (2/9/1412H, Mar. 5, 1992), Article 5.
[95] Ibid.

law and authority.[96] However, ruling authorities in Saudi Arabia are bound by the limits of the *Shari'ah*. One may ask why Saudi Arabian authorities believed that empowering the executive branches withsweeping powers to direct general policy would ensure modernisation and the protection of the Kingdom's Islamic heritage. Although there is no uncomplicated answer to this question and, also, it does not fall within the Researcher's remit, it may be important to very briefly discuss some attempts at justifying this stance.

Ayoob has noted that the *ijtihad* was incorporated within the Saudi legal system by King Abdul-Aziz despite stiff resistance from the *Ulama*, and this expanded and modernised the legal system.[97] Vietor and Forrest also noted that King Abdullah was able to use his broad powers to balance the interests of divergent constituents:[98] the clergy (*Ulama*), on whom the the Prime Minister and Council of Ministers depend for social legitimacy,[99] who are generally opposed to progressive social reforms; the growing youth population who increasingly demand justice for all and the respect of human rights; and many Muslims around the world who look towards Saudi Arabia as leader of the Muslim world to uphold Islamic principles rigorously.[100] Also, Wurm pointed to the setting up of the Shura Council by King Fahd as a major component of the basic system of government that facilitated dialogue between Islamic scholars and society; and the setting up of the Forum of National Dialogue that channelled social pressure including pressure to enhance the rights of women, youth, non-Muslims and foreigners, and organise municipal elections.[101] Nonetheless, it is logical to ask whether the best way of protecting Saudi Arabia's Islamic heritage while adopting modern standards was through a centralised system with an empowered executive.

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[96] See Frank Vogel and Samuel Hayes, Islamic Law and Finance: Religion, Risk and Return (Kluwer Law International 2008) 4, 9. See also, Article 29 of the Council of Ministers Law, Royal Order No. A/13 (2/3/1414H, Aug. 21, 1993) that provides that That provides that "the King, the President of the Council of Ministers, shall direct the general policy of the State and ensure guidance, coordination, and cooperation among the various governmental agencies. He shall ensure harmony, continuity, and unity in all functions of the Council of Ministers."

[97] Ijtihad was at variance with the Hanbalite doctrine because it was mostly used by liberal scholars and reformists to adopt practices and customs that were not specifically prohibited by the Qur'an and Sunnah. See Mohammed Ayoob, The Politics of Islamic Reassertion (Routledge 2014) 2-5. Ijtihad is also discussed in chapters 2 and 3.

[98] Richard HK Vietor and Nicole Forrest, 'Saudi Arabia: Modern Reform, Enduring Stability' (2009) Harvard Business School, 9-709-342 <https://is.muni.cz/el/1423/podzim2010/MVZ454/um/Saudi_Arabia.pdf>, accessed 28 June 2018.

[99] It has been argued that the royal families in the Middle East have relied upon allied clergy's interpretations of the Shari'ah to legitimise their rule. See Charlotte M Levins, 'The Rentier State and the Survival of Arab Absolute Monarchies' (2013) 14 Rutgers Journal of Law and Religion 388, 400; F Gregory Gause, Oil Monarchies: Domestic and Security Challenges in the Arab Gulf States (Council of Foreign Relations 1994) 10.

[100] Vietor and Forrest (n 98) 3-4.

[101] Iris Wurm, In Doubt for the Monarchy: Autocratic Modernisation in Saudi Arabia (Peace Research Institute 2008) 4, 22.

4.4.2.2 Legislature

Viewed through the lens of modern constitutional theory,[102] the legislature has three primary functions. It is responsible for enacting laws in accordance with the prescribed legislative (i.e. parliamentary) process; it acts as a 'check' on executive power and, finally, enacts laws on behalf of the will of 'the people'.[103] In common with other Muslim countries, the Saudi Arabian concept of the role and function of the legislature is markedly different from Western liberal democracies.[104] Under social contract theories of law, the legislature traces its authority back to 'the people', the ultimate sovereign, through periodic elections and plebiscites.[105] By way of contrast, the Saudi legislature derive their power and authority from religious legitimacy, whereby all human laws are understood to be subordinate to, or derive directly from, God's law as the ultimate source of all law and authority.[106]

It is commonly assumed Saudi Arabia lacks an independent legislature with authority to enact laws and policies. Even the use of the word 'law' is considered a secular construct.[107] As a result, the word 'Nizam' which means regulation is used instead.[108] In reality, Saudi Arabia has a unicameral legislature, which consists of two authorities, collectively referred to as the *Malik al Shura*. The first of these authorities is the Council of Ministers which functions in the dual capacity of a legislative and executive organ of state, [109] while the second takes the form of the Council of Senior Scholars (the *Shura*).[110] Created in 1992, the *Shura* Council is composed of members of civil society, including professionals and *Hanbali* jurists. The composition of the Council reflects the vaguely democratic ideal that that any person who claims to represent Saudi citizens should be fully acquainted with the country's legal traditions and be an active participant of Islamic society.[111] As part of its consultative

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[102] See Hans K Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Martin FLoughlin and Neil Walker (eds), The Paradox of Constitutionalism: Constituent Power and Constitutional Form (Oxford University Press 2008) 9.
[103] See Maurits Berger and Nadia Sonneveld, Shari'ah and National Law in Egypt in Jan Michiel Otto (ed), Shari'ah Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present (Leiden University Press 2010) 51, 62.
[104] Hanson (n 10) 289.
[105] Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009) 20(2) Arbitration International 230, 265.
[106] Baudouin Dupret, 'What is Islamic Law? A Praxiological Answer and an Egyptian Case Study' 24(2) Theory, Culture and Society (2007)
[107] Hanson (n 10) 289.
[108] Ibid.
[109] The Council of Ministers Law, Article 7.
[110] The Shura Council Law, Article 1.
[111] Muhammad Al-Atawneh, 'Religion and State in Contemporary Middle East: The Case of Saudi Arabia' (2006) 2 Journal of Islamic Practice of International Law 28, 34.

functions, the Council advises the government on any proposed regulations and Islamic aspects of government policy, thereby ensuring that all 'regulations and motions meet the interests of the state or remove what is bad'.[112]

The sui generis nature of Saudi Arabia's political organs is the best expression of its mixed legal traditions. On the one hand, the Council is empowered to enact policies or *siyasa* in the interest of furthering the social and economic welfare of its citizenry. On the other hand, the *Shura* is charged with the task of recommending laws or regulations aimed at bringing Saudi Arabia's law, and society, into greater abidance with *Shari'ah*.[113]

4.4.2.3 The Judiciary

Many instruments establishing the basic structure of the Saudi judiciary precede its formation as a unified state. King Abdul-Aziz adopted the first regulation establishing *Shari'ah* courts[114] as the King of the al-Hejaz and Sultan of Najed,[115] in 1926, before the Kingdom was consolidated in 1932. In the following year, a subsequent royal order was issued to expand the number of courts by establishing two additional summary courts in both Jeddah and Al Medina alongside *Shari'ah* courts, and brought under the supervisory authority of the Supreme court in Mecca, known as the *Almahkamah Alshriyah Alkobra*.[116] The *Hay'at Altadqeqat Alshar'iyah* was established for the purposes of supervising all court decisions as a court of appeal.[117] Further amendments to the Court of Appeal's powers were adopted in 1962.[118] These new judicial provisions were later codified by Royal Decree.[119]

Bringing us up to date with the modern structure of the Saudi judiciary, the country's court system is divided into general courts of jurisdiction, the administrative courts, and specialised tribunals. The first are the *Shari'ah* courts, which are in effect courts of general jurisdiction. These courts have been comprehensively restructured under a new judicial hierarchy following recent judicial reforms, discussed below.[120] The second judicial branch is the Saudi

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[112] Ibid.
[113] Jon Mahoney and Kamel Alboaouh, 'Religious and Political Authority in the Kingdom of Saudi Arabia' 6(2) Manas Journal of Social Science (2017) <https://philarchive.org/archive/MAHRAP-2>, accessed 14 October 2017.
[114] Ibid.
[115] Ibid. Al-Hejaz and Najed are both the largest parts of Saudi Arabia.
[116] Ibid. Al-Medina Al-Monawara is the other holy city of Islam besides Makkah Al-Mukaramah.
[117] Umm Alqura Gazette, No. 140 21/02/1346 A.H (1927).
[118] Ibid.
[119] Al-Qaradawi et al (n 11) 106.
[120] Ansary (n 76).

Administrative court known as the Board of Grievances or *Diwan*.[121] Thirdly, and operating in parallel to the administrative and *Shari'ah* courts are a number of ad hoc and quasi-judicial committees with subject matter jurisdiction over labour and banking disputes such as the Settlement of Labour Disputes and the Committee for Settlement of Banking Disputes.[122] The independence of the courts from political authorities is affirmed in Article 46 of the Basic Law, and further articles of the same law endow all citizens with the right to pursue justice through the courts.[123] The Prime Minister and King retain final authority to overturn the decisions of the highest courts of the land under Article 50 of the Basic Law.[124]

All courts in Saudi Arabia are required to render judgments, both penal and administrative, in accordance with the requirements of the *Shari'ah*.[125] A noteworthy feature of the *Shari'ah* rules of judicial procedure is their apparent informality and emphasis on oral testimony.[126] Many aspects of Islamic judicial procedure remain touched under the Saudi legal system. For instance, Saudi courts do observe pre-trial procedures and the country's civil and criminal procedure laws do not stipulate a time bar for bringing actions, though parties may provide stipulations in contractual arrangements.[127] In an important development, the New Arbitration law of 2012 prescribes timelines within which a jurisdictional challenge must be made, although an arbitral tribunal may accept a late plea if satisfied with the reasons for the delay.[128] Saudi citizens may also avail of other ADR procedures and, in this regard, refer any disputes for mediation before a religious judge known as a *mufti*.[129] A *mufti* or qualified expert in religious law brokers disputes by relying on Islamic principles and may provide his ruling on a given dispute, most commonly in the area of family law.[130] While these

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[121] Brand (n 56) 28.
[122] Royal Embassy of Saudi Arabia, 'Legal and Judicial Structure' <https://www.saudiembassy.net/legal-and-judicial-structure-0>, accessed 19 October 2017.
[123] The Basic System of Governance, Articles 36 and 38. See also Abdullah Mari Qahtani. Tatawwur Al-Ijraat Al-Jinaiyah Fi Al-Mamlakah Al-Arabiyah Al-Saudiyah [The Development of the Law of Criminal Procedure in Saudi Arabia] (1998) 363, 528.
[124] Baamir and Bantekas (n 105) 265.
[125] See Law of Procedure before Sharia Courts - Saudi Arabia Royal Decree No. M/21, 20 Jumada I, 1421 (19 August 2000), (20/5/1421H, Aug. 19, 2000), O.G. Umm al-Qura No. 3811 (17/6/1421H, Sept. 15, 2000), Articles 187 - 191.
[126] Brand (n 56) 1, 9-10.
[127] Ibid, 29.
[128] New Saudi Arbitration Law ('SAL 2012') issued by Royal Decree No. M/32 dated 24/05/1433 H. (corresponding to 16/04/2012) art 20(2), Kingdom of Saudi Arabia Bureau of Experts at the Council of Ministers.
[129] On the historic role of the Grand Mufti in Saudi Arabia, see Seaman (n 68).
[130] Hirschl, [n 138]

procedures operate outside formal court procedures, any decision may be binding on both parties with their consent.[131]

Prior to the 2007 reforms to the judicial system, general courts exercised jurisdiction over civil and commercial matters, leading to potential conflicts of jurisdiction and a court system over-burdened by cases.[132] In the broader sense, the overall structure of the judiciary was highly fragmented, disorganised and inefficient.[133] These dysfunctions were further underscored by the absence of a system of a judicial precedent.[134] Cases were, furthermore, only published 5 years after decisions had been rendered.

Following recommendations by the Supreme Judicial Council (SJC), the main body with supervisory authority over the entire court structure, the judicial system of Saudi Arabia was comprehensively overhauled.[135] The New Judiciary Law was adopted by Royal Order in 2007.[136] Implementing proposals put forth by the SJC, the new law aimed to improve the general order, transparency and efficiency of Saudi Arabia's sluggish court structure and system. The newly reorganised Saudi court system consists of: higher courts, appeal courts, and lower district courts known as first instance courts. The latter are further divided into summary courts[137] and general courts.[138] These reforms are to be celebrated, given that they streamline and unify courts under a logically ordered court hierarchy.[139] Under the newly restructured court system, separate Courts of Appeal have also been established in each region and province.[140] These Appellate Courts are entrusted with the task of reviewing petitions in accordance with the *Shari'ah* procedure.[141] The Board of Grievances retains its jurisdiction as the highest administrative court of the land.[142]

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[131] Vogel (n 21).
[132] Brand (n 56) 29.
[133] See Faisal Al-Fadhel, 'The New Judicial System of Saudi Arabia' (2009) 75(1) Arbitration Journal 91, 94.
[134] Soliman A Solaim, 'Saudi Arabia's Judicial System' (!971) 25(3) Middle East Journal 403, 403-408; Mohammad Hashim Kamali, Shari'ah Law: An introduction (Oneworld Publications 2008) 179; and Vogel (n 21).
[135] See the Implementation Mechanism of the Judiciary Law and the Board of Grievances Law, Royal Decree No. M/78, (19/9/1428H, 1 Oct. 2007), O.G. Umm al-Qura No. 4170 (30/9/1428H, 12 Oct. 2007).
[136] Article 26 of the Law of the Judiciary, Royal Decree No. M/64, (14/7/1395H/23 Jul. 1975). See also Al-Fadhel (n 134) 94.
[137] The Law of the Judiciary, Article 25.
[138] Ibid, Article 22.
[139] Al-Fadhel (n 134) 94.
[140] Articles 2 and 194 of the Law of Criminal Procedure, Royal Decree No. M/39, (16 Oct. 2001).
[141] The Law of the Judiciary, Article 8.
[142] See Ayoub M Al-Jarbou, 'Saudi Board of Grievances: Developments and New Reforms' (2011) 25(2) Arab Law Quarterly 177, 178. Under the new reforms, the Board only has jurisdiction over administrative actions, whereas in the past it has competence to consider actions of a criminal or commercial nature.

4.4.2.4 Review of Foreign Judgments

Created by ministerial decree,[143] the Board of Grievances (*Diwan al-Mazalem*) is best described as an administrative court and performs similar functions to the Supreme Court of Administrative Justice in France known as the *Conseil d'Etat*.[144] In the past, the Board lacked authority to issue binding judgments and could only issue recommendations for approval by the ministers.[145] Following the adoption of the 2007 Judiciary law, the Board was reconstituted as a central judicial authority and afforded jurisdiction to render binding judgments on matters relating to state or administrative acts.[146] A further Royal Order known as the Procedural Law of the Grievances Board affirms that that the Court will apply 'rules of the Islamic *Shari'ah* in accordance with the *Qur'an*, the *Sunnah* and laws not conflicting with the present Law'.[147] The power to settle commercial matters was vested in the Board until 2007, at which time it was transferred to the new courts of first instance. With regard to arbitration proceedings, the Board remained the competent authority for the supervision of such proceedings until the enactment of the New Enforcement Law in 2012, which transferred the competence to the specially constituted enforcement (execution) court.[148]

The new Enforcement (execution) Law adopted in 2012 has coverage over the execution of all local and foreign court judgements, including any requests to enforce arbitral awards rendered outside the Kingdom.[149] Since this law has coverage over the execution of all judgements in Saudi Arabia, it will directly affect all individuals or companies operating in the Kingdom or conducting business with a Saudi company.[150] Under the new law, the execution judge is empowered with jurisdiction to enforce all local and foreign judgments or awards issued in the form of an execution deed.[151] If a claimant seeks to execute an agreement not on the list, or arbitral that is not final, the competent Execution Judge will

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[143] The Saudi Board of Grievances (the "Grievance Board"), was established pursuant to Royal Decree No. M/51, 17 Rajab 1402 (10 May 1982) (the "1982 Decree").
[144] Ibid.
[145] Ansary (n 76). For a discussion in a parallel jurisdiction, see Jean-Marie Auby, 'The Abuse of Power in French Administrative Law' (1970) 18 American Journal of Comparative Law 148.
[146] Article 46 of the Law of the Board of Grievances, Royal Decree No. M/78 of 18 Ramadan 1428H (October 1, 2007).
[147] Board of Grievances Procedural Rules Council of Ministers Resolution No. 190, 16 Dhu al-Qa'dah 1409 (19 June 1989) < https://www.saudiembassy.net/board-grievances-procedural-rules>, accessed 23 December 2011.
[148] Enforcement (Execution) Law issued by Royal Decree No. M/34 (2012)
[149] Ibid, Article 1.
[150] Amer Abdulaziz Al-Amr, 'Qualitative Shift: Saudi Arabia's New Enforcement Law' International Arbitration Newsletter <https://www.dlapiper.com/en/uk/insights/publications/2013/06/qualitative-shift-saudi-arabias-new-enforcement-__>, accessed on 26 June 2013.
[151] Enforcement (Execution) Law, Article 9.

refuse enforcement. Subject to Article 11, the Execution Judge may only enforce a foreign arbitral award on the basis of reciprocity as discussed in chapter 7. The new enforcement law significantly improves on the previous law, subject to which enforcement of foreign arbitral awards remained within the jurisdiction of the Board of Grievances.[152] This resulted in lengthy and expensive procedures.[153] Parties seeking speedy enforcement met with delays in the execution of judgements and the absence of sophisticated administrative support.[154] More problematic still, the Board of Grievance would on occasion reopen the dispute on the merits on grounds of public policy or *Shari'ah* compliance.[155] As discussed in chapter 7, the new arbitration law requires the awards to comply with the *Shari'ah* and public policy but the Board of Grievance (and the enforcement court and Court of Appeal) is no more empowered to review the merits of awards.

The SJC exercises supervisory authority over the restructured court system. In conjunction with the High Court, the SJC assumes new powers to develop general principles of law and precedent which may bind the lower courts,[156] though some doubt remains as to how, given religious resistance, these reforms will be implemented in practice. The Council also has the responsibility of appointing judges, establishing ad hoc tribunals and creating any other specialised courts for the purposes of implementing the recommendations of the Prime Minster, King and Council of Ministers.[157]

While a step in the right direction, the new judiciary law has not entirely addressed the dysfunctions of the previous system. Key provisions of existing law create potential for conflicts of jurisdiction.[158] Moreover, a restructured judiciary does not deal with the problem of unruly jurisprudence of local courts given the absence of a developed body of general principles of law and the *Shari'ah*. There is another dimension to judicial competences under the current court system that may be said to present something of a constitutional dilemma, as discussed below.

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[152] Article 13(g) of the Law of the Board of Grievances, Royal Decree No. M/78 of 18 Ramadan 1428H (October 1st, 2007).
[153] See George Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (1987) 9(2) University of Pennsylvania Journal of International Business Law 211, 214.
[154] Ibid.
[155] See for example, Board of Grievances Case No. 235/2/Qhaf/1416 H Saudi Arabia.
[156] Ansary (n 76).
[157] The Law of the Judiciary, Article .58
[158] On this issue, Article 12 of the 2013 Law of Criminal Procedures states, "[i]f the Supreme Judicial Council does not affirm the relevant sentence in implementation… said sentence shall be reversed and the case shall be remanded for reconsideration by other judges."

The new judiciary law transfers jurisdiction on specialised subject matters from the first instance courts to tribunals with particular expertise on these issues.[159] Accordingly, the Committee for the Settlement of Banking and the Insurance Dispute Committees have jurisdiction on the preponderance of commercial cases.[160]

Article A of the Royal Decree establishing the Committee for the Settlement of Banking Disputes provides for the creation of a specialised sub-committee with exceptional powers and functions.[161] The Committee has exclusive competence to resolve banking disputes in accordance with the contract signed by the parties.[162] The effect of this provision is to remove jurisdiction from the *Shari'ah* courts (and the Commission for the Settlement of Commercial Disputes) which are no longer able to hear disputes on the subject matters listed in the Decree establishing the Committee. The Decree itself vests the Committee with broad discretionary powers to determine its competence and laws applicable to the dispute and recommend remedies such as asset freezing.[163] Given its wide powers, it is notable that the Committee's power is obstructed by the absence of clarity on which body has final authority to enforce its decisions.[164] A more contentious issue concerns the Committee's authority to enforce any contractual terms which might otherwise be prescribed under the *Shari'ah* or Hanbali *fiqh* as it has traditionally been applied in Saudi Arabia. The Committee may for instance elect to enforce contractual terms with elements of *riba* or *gharar* and apply general (Western) principles of contract law.[165]

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[159] Ansary (n 76).
[160] Ibid.
[161] Royal Decree No. 729/8 of 10/07/1407 H (1987). The Committee for Settlement of Banking Disputes in SAMA which was issued, formed of three competent members from SAMA under a Royal Order on 1/3/1987.
[271] Ibid.
[162] Baamir and Bantekas (n 105) 265.
[163] Implementing Rules, Articles 6.
[164] Subject to SAMA implementing rules, the Saudi Arabian and Monetary Authority and the Banking Disputes Resolution Committee are empowered to decide disputes relating to traditional areas of banking law such as repayment of loans and other credit-based agreements but they cannot hear disputes classes as "banking business", as defined under Article 1(b) of the Banking Control Law (BCL). In effect, this means that SAMA and the Committee will mainly be responsible for deciding disputes involving a foreign or national bank. Since "banking business" is nowhere defined it is unclear whether non-Shari'ah finance agreements and contracts accordingly fall mainly under the jurisdiction of the Committee and not Shari'ah courts. In doing so a back channel has been created whereby non-Shari'ah compliant products or credit arrangements can be litigated without infringing the Shari'ah compliance provision that is inserted into most pieces of regulation. See Marar, (n 70) 112; Baamir and Bantekas (n 105); and Hatem Abbas Ghazzawi and Co, 'Saudi Arabian Law Overview - Dispute Resolution' (Saudilegal, 2016) <http://www.saudilegal.com/saudilaw/19_law.html>, accessed on 23 February 2017.
[165] Abdul-Rahim Al-Saati, 'The Permissible Gharar in Classical Islamic Jurisprudence' (2003) 16 Journal of King Abdulaziz University: Islamic Economics 3, 5-7.

As suggested above, the Saudi religious jurists have some latitude to favour a purposive interpretation of a particular legal issue against more technically (formally) correct alternatives. By invoking the doctrine of *al-slyasa alifdi'ivva*, for instance, religious authorities can render an opinion or ruling on how law should be applied in the best interests of the public.[166] This doctrine allows for the spirit of law to prevail over the letter of the law, whereby a given ruling (*fatwa*) can be adjusted in accordance with the 'ruler's expectations of rendering religious legitimacy to political decisions in order to maintain political stability and acceptability by the society'.[167]A fine example of this is the recent relaxation of the guardianship of women law in 2017.[168] The ruling authorities in Saudi Arabia relied on the supporting *fatwas* before introducing policy changes on matters of personal status law, which are primarily governed by the Hanbali *fiqh*.[169]

More broadly, however, interpretative challenges remain. The concept of stare decisis is not an accepted part of the classic Islamic legal tradition, in part because of the flexibility built into Islamic methods of interpretation.[170] This presents significant difficulties since jurists will often disagree on points of law, and these different opinions may, in certain situations, affect legal outcomes quite dramatically.

One might very well argue that there is no unified body of law called the 'the *Shari'ah*', but that in fact different versions of the *Shari'ah* apply variously from school to school, jurisdiction to jurisdiction, one social context to another.[171] This brings us back to the critical distinction between Islamic law and jurisprudence. As an expression of divine law, the *Shari'ah* cannot, by its nature, be the sole preserve of one country, nor does there exists a global authoritative body or supreme court of law that can develop unified standards on the

[166] Ibid.
[167] Ibid.
[168] B Shanee, 'The Saudi Royal Decree Easing Guardianship Requirements for Women, and Responses to It in Saudi Arabia' The Middle East Media Research Institute (2 June 2017) <https://www.memri.org/reports/saudi-royal-decree-easing-guardianship-requirements-women-and-responses-it-saudi-arabia>, accessed 20 December 2017.
[169] Arab News, 'Letting Women Drive in Saudi Arabia Does not Conflict with Shari'ah Say Senior Scholars' (28 September 2017) <http://www.arabnews.com/node/1168781/saudi-arabia> , accessed 20 December 2017.
[170] See Jonathan G Burns, Introduction to Islamic Law: Principles of Civil, Criminal, and International Law under the Sharia (JuraLaw 2014) 30; Glen L Roberts, Islamic Human Rights and International Law (Boca Raton 2003) 18. The doctrine is however observed in the Muslim-majority country of Pakistan. See Muhammad Munir, 'Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan' (2008) 47(4) Islamic Studies 445, 445-482.
[171] See Nicholas Foster, 'Islamic Commercial Law: An Overview (I)' (2006) School of Law and School of Oriental and African Studies, University of London, Working Paper 4/2006 5-6.

Shar'iah.[172] In principle, this may lead, perversely, to a kind of *fatwa*-shopping, as has been the case in some Islamic finance disputes, whereby disputing parties seek rulings that are more flexible on issues prohibited under the *Shari'ah*.[173]

As noted above, King Abdul-Aziz issued the first Royal order establishing regional courts in 1926.[174] In this order, the King instructed that no court or jurist is bound by any one school of Islamic jurisprudence.[175] In principle, this would have enabled jurists and other religious authorities in the Kingdom to 'shop' among different *fiqhs*. However, in doing so, the King had sought to revive the pluralistic ethic of early Islam, ensuring that fidelity to one particular interpretation would not abrogate the usefulness of another's school *fiqh* on a separate legal question.[176] Other than custom, therefore, which undoubtedly carries significant weight, there are no clear rules within the secular dimensions of Saudi law that would prevent Saudi judges from exercising their judicial autonomy including invoking the doctrine of *istihaan* or juristic preference.[177] Historically, Saudi judges have almost exclusively relied on the legal commentaries and narrow set of rulings, inspired by the teachings of the late Scholar Ibn Taymiyyah who wrote in the 13th Century.[178] Reflecting on the historical practice of the judiciary in Najd, it is noted that:

> One of the most prominent features of that period was the reliance on the Hanbali School, ease of judicial procedure and simplicity. The judges were to meet people at home and in the market and might invite them to meetings in Riyadh to discuss some of the general affairs when presented to them. Nomination of a person to hold a judicial office would take place when they attended lessons in mosques and studying the books of Al-Hanbali *fiqh* [i.e. jurisprudence]. At the same time there was a need for judges even if they could not finish that study.[179]

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[172] Ibid.
[173] For a critical analysis, see Habib Ahmed, 'Islamic Banking and Shari'ah Compliance: A Product Development Perspective' (2014) 3(2) Journal of Islamic Finance 15, 16; and Alexey Arakcheev, Viktoria Baklanova and Joseph Tanega, 'Islamic Money Management: A Western View' (2011) 6(2) Capital Markets Law Journal 238, 248.
[174] 05/09/1344 A.H 18/03/1926.
[175] Baamir and Bantekas (n 105) 265.
[176] Sfeir (n 17) 730.
[177] On the root of this doctrine and its role in legal reform, see Mohammad Hashim Kamali, 'Istiḥsān and the Renewal of Islamic Law' (2004) 43(4) Islamic Studies 561, 562-563.
[178] Baamir and Bantekas (n 105) 265.
[179] Abulla Al-Khunain, Judicial System in Saudi Arabia (Centre of Global Thought on Saudi Arabia 2015) 96.

Resistance to codification reflected a suspicion widely held among religious groups and authorities that governments have no place in legislating on delicate matters of religious law.[180] This reflected the consensus of jurists that the meaning of the *Qur'an*'s textual verses and narration of the *Sunnah* can only be fully comprehended by jurists trained in the Islamic sciences, known as *mujtahid*.[181] Others feared the 'closing of the gate of *ijtihad*', thereby preventing the articulation of new norms and principles more responsive to modern realities, particular in the sphere of commercial law.[182] In this sense too, codification is anathema to the notion of a 'living law' or 'law of the body politic'.[183] This reasoning is persuasive on its own terms where it not for the fact that, as Foster suggests, in historical context, Islamic law that emerged was 'almost entirely managed and interpreted, by jurists working within madhahib (singular madhhab, rendered in English as 'school')'.[184]

4.5 Reconciling *Shari'ah* And Modernity

Islamic governments appear to be caught in an endless struggle; striving on one hand to modernize their laws through 'legal transplants' whilst courts and religious authorities stand guard, armed with Islamic 'supremacy' clauses that compel the former to select policy options consistent with mandatory aspects of the *Shari'ah*. Notably, it is political authorities who are leading the modernisation agenda, specifically by transposing ever more Western style rules and provisions into commercial laws.[185]

On occasion, governments express unbridled optimism. Gemmell for example notes that the Yemen's Minister of Justice agreed to the country's new arbitration law as a reflection of future Islamic legislation.[186] Reflecting on the need to reconcile Islamic *fiqh* with modern commercial norms and practices, the Minister described the newly modernized arbitration law as, 'an avant-garde experience [that] cast the provisions of the *Shari'ah* in a modern

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[180] For a broader discussion, see Najmaldeen K. Kareem Zanki, 'Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars' (2014) 9(4) International Journal of Humanities and Social Science 127, 127-134. See especially the discussion on the reasons given by Saudi jurist Abdullāh Abū Zaīd against codification.

[181] Ibid. An example of a scholar who supports this view is Joseph Schacht, An Introduction to Islamic Law (Oxford University Press 1979) 71-72. For a contrary view, see Wael Hallaq, 'On the Origin of the Controversy about the Existence of Mujtahid and the Gate of Ijtihad' (1986) 63(24) Journal of Studies Islamica 129, 129-130.

[182] Foster (n 172) 6.

[183] Ibid.

[184] Ibid.

[185] Baamir and Bantekas (n 105) 265.

[186] Arthur Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2006) 5 Santa Clara Journal of International Law 169, 183.

mould . . . and taking the doctrinal treasure of the '*Fiqh*' . . . [created] a model of codification and the nucleus of a unified Moslem legislation which can be applied throughout the entire Moslem world'.[187] Can Saudi Arabia also achieve the same aims with respect to its legal and economic modernisation agenda?

Commercial codes in Islamic countries in the Gulf are being modified to accommodate Western principles of commercial law, and contracts concluded between private parties will frequently incorporate foreign-choice of law arbitration clauses.[188] Should these attempts be regarded as encouraging signs of the Islamic world's willingness to open up lines of dialogue with the non-Islamic world, whether through reciprocity in the enforcement of foreign judgments and awards or through greater receptiveness to Western legal influences and comparative jurisprudence more generally?[189] If this is the case, this would suggest a turning point in the attitude of many Middle Eastern countries who might have turned away from what they perceived as the cultural chauvinism of courts and tribunals who depicted Islamic law as a primitive creation of the 'orient' and consequently vastly inferior to international commercial norms and practices.[190]

If the above is true, international commercial law, to the extent that such a thing exists, is only nominally international. It may be argued that what is called 'international' is revealed as a historically and culturally contingent expression of European legal traditions (and now Anglo-American) 'made universal'.[191] The regime and institutions of international investment, trade and arbitration law are, according to Anghie, inescapably bound up with a colonial past. [192] To what extent then are ongoing attempts to integrate Western elements into 'Moslem legislation' the latest iteration of the legal form by which the 'orient's is made to submit to Western economic powers? If this logic is to be accepted, Muslim countries have little choice to 'accommodate' Western legal influences or to rebuild their laws around them

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[187] Ibid.

[188] Baamir and Bantekas (n 105) 265.

[189] On the idea of dialogue, accommodation and reciprocity as "legal pluralism" values, see Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law (Oxford University Press 2010) 41, 42, 47, 235.

[190] See Said (n 196).

[191] See Ignacio de la Rasilla, 'The Shifting Origins of International Law' (2015) 28 Leiden Journal of International Law 3, 3-4; Alexander Orakhelashvili, 'The Idea of European International Law' (2006) 17(2) European Journal of International Law 315, 315-316. See also, Kinji Akashi, '(Re-)Examination of "the Eurocentric Story of International Law" Through the Japanese Experience" (2013) 107 Proceedings of the ASIL Annual Meeting 379, 379-382.

[192] Antony Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge University Press 2004) 199, 204.

as a condition of their participation in the modern international economic order. Law becomes the mere instrument of a new empire built on commerce, fuelled by the flow of investment from developed capital exporting economies to developing resource-producer countries.[193] Then economic hegemony allegedly maintained through international law and its institutions may transform into a mode of cultural hegemony. On this view, the sovereignty of Islamic states and legitimate diversity of their inherited traditions are casually set aside or 'civilised' by an international 'juristocracy' masquerading as a 'neutral' mechanism of international arbitration.[194]

The ideas of Edward Said are once again thrown into relief, who described the manifold ways in which subaltern non-Western societies have been denied legitimate autonomy not merely through colonial-era direct rule but through subversion of traditional (legal) practices by means of hegemonic European discourses on law and culture. On this Said says:

> The Orient is an integral part of the European material civilization and culture. Orientalism expresses and represents that part culturally and even ideologically as a mode of discourse with supporting institutions, vocabulary, scholarship, imagery, doctrines even colonial bureaucracies and colonial styles.[195]

Shifting the focus away from influences, malign or otherwise, that have shaped the contemporary Arab world, Gemmell considers the motivations of ruling authorities from *within* Islamic countries in the Gulf, asking the question of whether current efforts to reform and revise aspects of the *Shari'ah* to 'fit' modern economic realities ought be treated as evidence of 'pragmatism or sophistry' on the part of the framers of new legislation?[196]

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[193] For a less strident view, see Amr Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias under the Spectre of Neoliberalism' (2000) 41 Harvard International Law 419, 448. However, see the case of Islamic Investment Co. of the Gulf (Bahamas) Ltd. v Symphony Gems NV [2002] All ER (D) 171 where it was argued that a contract was contrary to the Shari'ah and should not be enforced. Nonetheless, the governing clause was clear and unequivocal but it provided that, "This Agreement and each Purchase Agreement shall be governed by, and shall be construed in accordance with, English law." Tomlinson J therefore rejected the above argument saying, 'In my judgment, it is absolutely critical to note that the contract with which I am concerned is governed not by Shariah law but by English law." See also to similar effect, Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC [2004] EWCA Civ 19.

[194] Abdullah An-Na'im, 'Islam and Human Rights: Beyond the Universality Debate' (2000) 94 American Society of Law and Procedure 95, 98.

[195] Edward Said, Culture and Imperialism, (Chatto and Windus 1993) 2.

[196] Gemmell (n 187) 183. See also, Nikki R Keddie, An Islamic Response to Imperialism: Political and Religious Writings of Sayyid Jamal Ad-Din "Ai-Afghani" (Vol 21, University of California Press 1983) 107.

Many Islamic nations have erred on the side of those aspects of Islamic jurisprudence which may be likened to the Western tradition of legal pragmatism.[197] Through the device of *ijtihad* (dialectical reasoning), *maslahah* (public interest exceptions to the general rule) and *itishaan* (juristic preferences), ruling authorities in Islamic nations appear to apply a mode of contextual reasoning that allows for innovations in classic jurisprudence if they can be defended as necessary tools for the social and economic advancement of their people.[198] But how far should the pendulum swing before modernisation becomes an agent of transformation, fundamentally altering the identity of Islamic society, for bad as well as good. In this regard, Ballantyne[199] and Gemmell[200] remark on growing aspects of commercial practice in Islamic countries that appear to directly contravene the text and spirit of the *Shari'ah*. Some banks in nominally Muslim countries apply interest or devise ever more innovative ways by which to charge or receive interest.[201] A debate now flourishes on the permissibility of debt-based instruments or insurance contracts based on speculative losses, each highly contentious from the standpoint of classic Islamic jurisprudence.[202] The next section will close the discussion by considering the extent to which the above discussed cultural and legal criticisms hold water in the Kingdom of Saudi Arabia, a historically conservative nation and torchbearer of the Islamic faith.

4.6 *Shari'ah* and Modernisation in Saudi Arabia: Harmony or Duality?

As will be seen in chapters 5 and 7, Saudi Arabia has introduced significant reforms to its investment policy and arbitration laws. Many of these reforms are designed to encourage foreign companies to do business in Saudi Arabia or enter into commercial agreements with Saudi entities, encouraged by the prospect that, contracts with a Saudi element may not constitute a deterrent, and Saudi Arabia may yet emerge as a desirable place in which to settle disputes and enforce foreign awards. It is certainly the case in regard to Saudi Arbitration

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[197] For an overview of this tradition of legal thought, see Jerome Frank, 'Modern and Ancient Legal Pragmatism - John Dewey and Co. v. Aristotle: I' (1950) Faculty Scholarship Series, paper 4095.
[198] William Ballantyne, 'The Challenge of Islamic Commercial Law in the Middle East' in William Ballantyne and Howard L Stovall (eds), Arab Commercial Law (American Bar Association 2002) 20.
[199] Gemmell (187) 184.
[200] Abdullah Abdullatef, A Al Elsheikh and Joseph Tanega, 'Sukuk Structure and its Regulatory Environment in the Kingdom of Saudi Arabia' (2011) 5(3) Law and Financial Markets Review 183, 184.
[201] Zaid Ahmad Ansari, 'Analysis of the Impact of Reforms on the Insurance Industry of Saudi Arabia' (2011) 1 Interdisciplinary Journal of Research in Business 28.
[202] Mahmoud A El-Gamal, 'Limits and Dangers of Shari`a Arbitrage' (Proceedings of the Sixth Harvard University Forum on Islamic Finance 2004) 9. Some Islamic scholars have argued that not all interest is riba. For instance, interest charged on bank deposits may not necessarily violate Saudi or Shari'ah law, per se, providing it is proportionate to the risk assumed by the bank or capital providers and not excessive (5-15%).

laws and investment related reforms as shown in chapters 6 and 7. Contractual and arbitration agreements drafted in the Islamic Middle East are increasingly peppered with references to standard contractual terms and usages, suggesting that the business actors established in the region are increasingly looking outside their legal system to the contractual regimes of others countries that can offer them more certainty around aspects of contract construction and dispute settlement outcomes.[203]

As noted in chapter 2, the experience of Saudi Arabia has been one of ebbs and flows, oscillating between earlier periods of commercial (and religious) openness to periods of 'closure' to the non-Islamic world.[204] And yet, this closure to the outside world was evidence of the strong social, religious and cultural ties that bind Saudi people as a nation, long before being formally recognised as state in 1932.[205] In this regard, the Basic Law states in its preamble as follows:

> The reform mission, upon which the Saudi state was founded, represents the main core of the government. This mission is based on the realization of Islamic rules, implementation of Shari'ah, and enjoining good and forbidding evil, as well as to reform the Islamic creed and purify it from heterodoxies. Therefore, it adopts its doctrine from the true Islamic principles that were prevailing at the very beginning of Islam.[206]

In Saudi Arabia, religious authorities continue to resist proposals that call for the codification of the *Shari'ah*.[207] As noted above, for the legal pragmatist, codification quashes creativity in development of rules and opinions, while others express theological concerns of a more profound nature. Thus, it has been argued that only God has authority to legislate on aspects of the *Shari'ah*, and it is not for any man or country to make authoritative pronouncements on God's will or law: God alone is sovereign, the final arbitrator of justice, and only He may rule over his creations.[208] Erring on the side of pragmatism, attitudes of Saudi institutions

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[203] Julio Colon, 'Choice of Law and Islamic Finance' (2011) 46 Texas International Law Journal 411, 416.
[204] See Richard Potz, 'Islamic Law and the Transfer of European Law' (2011) European History Online 1, 8-9; Hallaq (n 182) 130-132; Wael B Hallaq, 'Was the Gate of Ijtihad Closed'? (1984) 16(1) International Journal of Middle East Studies 3, 4. See also, Ziba Mir-Hosseini, 'How the Door of Ijtihad Was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco' (2007) 64 Washington and Lee Law Review 1499, 1509-1510.
[205] Brand (n 56) 20.
[206] Ibid.
[207] See Zanki (n 181) 127-134.
[208] The concept of abrogation (Tanseekh), derives from this verse of the Qur'an: "God Repeals What He Wills, Or Confirms." Qur'an 13:39.

appear to be shifting on this issue. Following recommendations issued by the King, the SJC has established an official website to publish Islamic legal rulings, or *fatwas* in the hopes of creating more transparency around judicial decisions so that similar facts may yield similar and more predictable outcomes.[209]

Saudi society, however, may look dimly on attempts to model Islamic legal orders on Western legal concepts,[210] such as judicial precedent or Anglo-American conceptions of separated powers. Some of these fears are well founded because of the need to first and foremost comply with the principles of the *Shari'ah*. Saudi Arabia is taking on more and more features of a dual legal system, whereby Saudi traditional law shares an (uneasy) coexistence with pieces of legislation based on secular legal regimes, such as UNICTRAL model legislation on arbitral procedure. As noted above, these influences have been present from the moment the Kingdom was founded, through the influence of Ottoman civil codes, French administrative law and the Egyptian constitutional experience. In recent eras, the separation between civil and religious aspects of the Saudi legal order appear to be widening ever further. In this light, it may be important to once again consider Vogel's description of Saudi Law:

> Saudi Arabia [also] has a dual legal system, but the relative roles of the two sides are reversed. The Islamic component of the legal system is fundamental and dominant. The positive law, on the other hand, is subordinate, constitutionally and in scope.[211]

The task of the Saudi lawyer is therefore to consider whether the hierarchy in which Islamic law stands to Saudi law is beginning to disintegrate or is at the very at least being profoundly undermined in some areas, while being rigidly clung to in other areas – in rhetoric as well as in practice. Take for example the Banking Control Law which regulates some financial activities, including interest-based banking – a practice incontrovertibly prohibited by the *Shari'ah*.[212] The financial authorities in Saudi Arabia have turned a blind eye to various foreign banks that offer conventional banking (non-*Shari'ah*) products to Saudi consumers. On this the Muhammed Al-Jasser, Governor of the Saudi Arabian Monetary Agency

[209] Joseph Kéchichian, Legal and Political Reforms in Saudi Arabia (Routledge 2012) 31.
[210] Naeem Rahman, Attitudes of Muslims towards Islamic Banking and Finance (Unpublished PhD thesis Durham University, 2012) 93.
[211] Vogel (n 21) 118.
[212] Ibid, 118-120.

(SAMA) notes as follows:

> We have richness in diversity . . . Everything is permissible unless it is shown to contravene Islamic tenets. Someone has to tell me if and how it contravenes explicitly. In fact, most conventional financial products are fine . . . Regulators and supervisors are not religious scholars. They are in charge of financial stability. The safety of the institution is paramount.[213]

In this practical and yet unprincipled way, the *Shari'ah* is preserved as the official 'law on the books', even if regulatory authorities do not always observe *riba* and other Islamic principles in practice.[214] Yet, it is also possible to argue that the banking settlement dispute committee and other non-*Shari'ah* compliant practices are the inevitable consequences of a legal culture that has ossified over time; in which certain doctrinal orthodoxies remain fixed and inflexible, and where ruling authorities have, in recent history, turned inwards, unwilling to recognise or learn from other legal systems and traditions. In other words, if the government is not able to legislate on commercial law issues for fear that the laws will be met with popular or religious resistance, it is likely that informal, non-*Shari'ah* compliant practices and procedures will continue to evolve through the back door.

4.7 Conclusion

This chapter has reflected on the relationship between legal and political authority in Saudi Arabia, and at a conceptual level, the flexible relationship between secular and Islamic law within the Kingdom's modern constitutional order. It shows that there are many reasons to be positive. King Abdullah's initiative to reform the judicial system in the country was a step forward. The court has been reorganized in new commercial and enforcement courts, removing some of the jurisdictional powers of the Board of Grievance.

However, many Islamic practices, encompassing *fatwas* of the *Ulama* and legal commentaries of *Mudhahib* - on which local courts rely - have yet to be formally codified under Saudi law.[215] Though key pieces of regulation on banking, capital markets, investment and arbitration have been adopted, clarifying aspects of Saudi law which had until then remained opaque, a preponderance of legal issues, including those impacting on investment

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[213] Colon (n 205) 416.
[214] Ballantyne (n 199) 20.
[215] See Mai Yamani, 'Some Observations in Women in Saudi Arabia' in Mai Yamani and Andrew Allen (eds), Feminism and Islam: Legal and Literary Perspectives (New York University Press 1996) 263, 274.

or arbitration, appear to be regulated by the *Shari'ah* and supplementary opinions of Islamic jurists. Looking in, a foreign investor may struggle to grasp the most basic aspects of Saudi law and this can only be an impediment to the future economic prospects of the Kingdom as a place to do business and settle investment disputes.

We are left with a paradox. On the one hand, without codification or a system of judicial precedent, there is little certainty and transparency on how particular courts arrive to their decision. Without a system widely adhered to in the Saudi legal system, it might appear to the Western lawyer that judges decide individual cases based on their own interpretation of the *Shari'ah* and the circumstances surrounding each case.[216] This defeats any concept of legitimate expectations of a party subject to legal proceedings since there is no reliable way of predicting whether one court will follow the decision of another.

On the other hand, one might argue that interpretative openness is in fact the subtle secret of success behind Islamic economic modernisation. For instance, were there to be an attempt to codify general principles of the *Shari'ah*, the result might be to further entrench certain religious legal traditions that have been historically dominant in Saudi Arabia, at the expense of creativity, innovation and adaptability in Islamic legal thought and practice. The prevalence of the *Hanbali fiqh* has, arguably, made Saudi judges less likely to draw from *fiqh* that is better adapted to modern legal realities, particularly in the sphere of investment law and dispute resolution. The key to adaptation may therefore to be to take the best of the *Hanbali* tradition while drawing from other sources and schools of thought from within and outside the Islamic legal tradition.

This can be done without sacrificing Islamic legal traditions on the altar of legal and economic reform, nor does it require that a Western notion of progress be accepted as the *only* baseline of development. These ideals can be balanced. The analysis of legal influences and interpretative practices that have shaped the Saudi Arabia's legal system shows that the *Shari'ah* is sufficiently flexible and does not pose an obstacle in the process of accommodating modern practices. The next chapter will apply theoretical and historical insights gleaned from the foregoing analysis to a discussion of the concrete aspects of the Kingdom's investment environment. This will prepare the ground for an analysis of how the country's FDI prospects may be hindered or encouraged by changes in Saudi investment and related to the *Shari'ah*.

[216] Kamali (n 135) 179; and Vogel (n 70) 275.

One step forward may be to develop a loose system of judicial precedent, based on the recommendations of the SJC discussed above. Furthermore, there should be some movement towards the codification of legal commentaries relied upon by judges. As well as publishing the reasons motivating dicta, the Saudi government should train commercial law judges to strengthen their understanding of Islamic and Western commercial law. This may eliminate some of the uncertainty in the legal system, and thereby encourage the right forms of investment into the country in line with the Saudi vision 2030.

CHAPTER 5:
The Investment Environment and Law in Saudi Arabia: A Step Forward and a Step Back?

5.1 Introduction

Much of Saudi Arabia's prosperity is based on the oil industry, which began in the 1930s, not long after the Kingdom was founded.[1] The success of the commercial production of oil in Saudi Arabia has resulted in an increasingly prosperous nation and has contributed to rapid economic development in the Kingdom, especially since the 1970s.[2] Today, Saudi Arabia has the largest economy in the Middle East and is the world's largest exporter of petroleum.[3] This sector accounts for 87% of Saudi budget revenues, 90% of its export earnings and 42% of Gross Domestic Product (GDP).[4]

However, in recent years the unsteady price of oil has illustrated the need for Saudi Arabia to diversify its economy.[5] In 2016, the Kingdom had a budget deficit of an estimated 12.3% of GDP, much of which can be accounted for as being the result of lower oil prices.[6] In 2017, the International Monetary Fund (IMF) predicted that although non-oil GDP would grow in the Kingdom, oil GDP would decline resulting in a real GDP growth rate of close to zero.[7] This budget deficit and lack of growth in GDP has resulted in cuts to capital spending and the introduction of VAT and reduced subsidies on certain products, including electricity and water.[8]

Despite the importance of the public sector elements of the petroleum industry to the Saudi[9] economy, the private sector in Saudi Arabia (including the oil private sector) makes an

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[1] Daniel Yergin, The Prize: The Epic Quest for Oil, Money and Power (Free Press, 2003) 283-292
[2] Ibid.
[3] OPEC, 'Saudi Arabia facts and figures' <https://www.opec.org/opec_web/en/about_us/169.htm> accessed on 27 August 2018
[4] Forbes, 'Best Countries for Business (2017 Edition): Saudi Arabia' (December 2017) <https://www.forbes.com/places/saudi-arabia> accessed on 1 June 2018
[5] Ben Hubbard and Kate Kelly, 'Saudi Arabia's Grand Plan to Move Beyond Oil: Big Goals, Bigger Hurdles' (New York Times, 25 October 2018); see also Jessica Obeid, 'Saudi Arabia is in a Double Bind on Oil Prices' (Chatham House, 31 July 2018)
[6] Elena Holodny, 'Saudi Arabia's national debt has exploded since the oil crash' (Business Insider, 22 December 2016) <http://uk.businessinsider.com/saudi-arabia-national-debt-budget-2017-report-2016-12?r=US&IR=T> accessed on 1 June 2018
[7] International Monetary Fund, Saudi Arabia: 2017 Article IV Consultation (IMF Country Report No. 17/316)
[8] Ibid.
[9]

estimated contribution of 48% to the state's GDP.[10] The Saudi government's Vision 2030 plan aims to increase this contribution to 65%.[11] However, State funded investment accounts for 47.4% of all capital investment in Saudi Arabia,[12] with the private sector continuing to be heavily dependent on government contracts.[13] To counteract this domination of the state, the Vision 2030 programme also intends to promote foreign direct investment (FDI), with an expected increase in FDI from 3.8% to 5.7%, as the State also attempts to increase non-oil exports from 16% to 50% of the export economy.[14] The Vision 2030 programme also promotes the concept of Saudization, which is an attempt to reduce the unemployment rate within the Kingdom (as well as promote more employment among female Saudis) by offering incentives to companies that employ a certain percentage of Saudi employees.[15] These incentives include lower processing fees and a number of other administrative benefits, such as sponsorship and immigration benefits.[16]

There is an understanding in Saudi Arabia that the natural resources upon which its economy is built will not last forever.[17] Furthermore, the increased globalisation of the world economy as a result of technology has resulted in an increased level of interdependence among different countries in the world.[18] In order to compete globally, it has been recognised that the Saudi Arabian economy needed to reform.[19] As a result, over the past two decades, the Kingdom's government has focused on economic reforms that are intended to achieve sustainable growth.[20] In order to do so, the government has been attempting to lay down the

[10] Clyde & Co., 'Doing business in the Kingdom of Saudi Arabia' <http://www.sbjbc.org/wp-content/uploads/2014/09/J401093Doing-Business-in-Saudi-Arabia-Brochure-Updat_final-RES.pdf> accessed on 1 July 2018

[11] Saudi Arabia Vision 2030 <http://vision2030.gov.sa/download/file/fid/417>

[12] United Nations Conference on Trade and Development, World Investment Report 2015: Reforming International Investment Governance (UNCTAD, 2016) <http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf> accessed on 27 August 2018

[13] Jane Kinninmont, 'Vision 2030 and Saudi Arabia's Social Contract: Austerity and Transformation' (Chatham House, 2017)

[14] Ibid.

[15] Areej Azhar, Peter Duncan and David Edgar, 'The Implementation of Saudization in the Hotel Industry' (2018) Journal of Human Resources in Hospitality and Tourism

[16] Mohsin Khan, 'Working Toward Vision 2030: Key Employment Considerations in Saudi Arabia' (Society for Human Resource Management, 20 April 2018) <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/global-vision-2030-saudi-arabia.aspx> accessed on 28 August 2018

[17] Bassam Fattouh and Amrita Sen, 'Saudi Arabia's Vision 2030, Oil Policy and the Evolution of the Energy Sector' (July 2016) Oxford Institute for Energy Studies 1

[18] Trilogue Salzburg, A Closer Look at Globalization: The Positive Facets and the Dark Faces of a Complex Notion (2017) 13

[19] Colin McKinnon, 'Saudi Arabia: Major Change in Investment Climate (2000) 19 The Washington Report on Middle East Affairs 72

[20] Adel Abdel Ghafar, 'A New Kingdom of Saud'? (Winter 2018) Cairo Review of Global Affairs

foundations of a market economy based on private ownership.[21] These foundations are intended to ensure that the Saudi economy is comparable to other global economies. In order to achieve these goals, the Saudi government has proposed privatising much of the public sector.[22] As far back as 1997, the Council of Ministers in Decision No. 60 stated that it was expected that privatisation would:

> Improve the efficiency of the national economy and enhance its competitive ability to meet the challenges of regional and international competition.[23]

Pertinently, the Resolution also sought to encourage private investment from both Saudi Arabia and abroad while retaining some state oversight to avoid unregulated industries.[24] The privatisation of Saudi public companies is considered to have been relatively successful in several industries, such as electricity, communications, mineral resources, air transportation and insurance.[25] One of the objectives of this Decision was also to encourage foreign capital to invest locally.[26] However, these measures did not bring about the anticipated levels of FDI as a result of limitations on the rights of foreign entities to buy or own shares in a privatised Saudi company.[27] As a result, foreign entities could only contribute in the as a partner in a privatised company.[28] Despite these restrictions, other reforms have resulted in a steady increase in FDI in Saudi Arabia in the past two decades.[29] These reforms include the Foreign Investment Law 2000, allowing foreign investors access to the same incentives that are available to local investors, including the right to own property directly.[30] The Vision 2030 plan includes further incentives for foreign entities, for example the creation of a new transnational city called Neom, which would aim to compete for multinational technology companies by providing incentives through preferential regulation.[31]

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[21] Bader Abdulaziz Alkhaldi, 'The Road towards Globalisation and Stability in the Saudi Arabia's economy' (2015) European Journal of Economics and Management Sciences

[22] Simeon Kerr, 'Saudi Arabia looks to raise $10bn in privatisation scheme' (Financial Times, 25 April 2018) <https://www.ft.com/content/9edcae6c-4878-11e8-8ae9-4b5ddcca99b3> accessed on 28 August 2018

[23] Council of Ministers Decision No. 60 dated 1/4/1418 (6 August 1997)

[24] Ibid (See second, fifth and sixth objectives).

[25] Alkhaldi, [n 20]

[26] Ibid, [n 22]

[27] Alkhaldi, [n 20]

[28] Ibid.

[29] Anthony Shoult, Doing Business with Saudi Arabia (Global Market Briefings, 2003) 15

[30] Foreign Investment Law 2000, Royal Decree No M/1, article 8

[31] Elizabeth Dickinson, 'Saudi Arabia is Betting Its Future on a Desert Megacity' (Foreign Policy, 2017) <https://foreignpolicy.com/2017/11/03/saudi-arabia-is-betting-its-future-on-a-desert-megacity-neom-qaddiya-vision-2030/>

This chapter will review the history of FDI in Saudi Arabia in order to establish why certain legal, political and religious barriers resulted in some negative perceptions amongst foreign investors about the Kingdom. This chapter will consider why that perception is changing and illustrate how Saudi Arabia is amending its legal structures in order to encourage FDI. These changes form part of a broader spectrum which can be seen throughout Saudi society, including the legal, political, social and economic systems. This chapter will also consider where further improvements can be made and where there remain certain limitations which discourage foreign entities from investing in Saudi Arabia. It will analyse where further liberalisation and privatisation is necessary if Saudi Arabia is to realise the aims of the Vision 2030 plan.

5.2 Historical Issues Preventing Or Restraining FDI In Saudi Arabia

The history of foreign investment in Saudi Arabia is closely linked to the oil and gas industry. As noted previously, oil was first found in Saudi Arabia shortly after the Kingdom was founded and, once it had been established that there were significant reserves of oil in the Kingdom, the Saudi government required the expertise of foreign companies to begin extraction and to train locals in the industry.[32] As a result, early FDI in Saudi Arabia took the form of concession agreements between the Saudi government and international oil companies, which eventually resulted in the foundation of ARAMCO, a wholly-owned subsidiary of Standard Oil of California.[33] Although the concession agreements entered into by Saudi Arabia were considered to be mutually beneficial at that time as it provided Saudi Arabia with industry expertise that it did not have domestically at that time, once the oil industry had been established successfully in the Kingdom there was widespread opinion that the concession agreements entered into by Saudi Arabia were entered into on an unequal basis.[34] The ARAMCO case, which has been considered in depth in Chapter 7 of this Thesis, may be considered to be one of the catalysts of this opinion as it resulted in a perception within Saudi Arabia that the concession agreements were a form of colonisation by American and British oil companies.[35]

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[32] Arthur J. Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2006) 5(1) Santa Clara Journal of International Law 169, 179

[33] Charles W. Hamilton, Americans and Oil in the Middle East (Gulf Publishing Company, 1962)

[34] Yahya Abdullah Al-Samaan, The Evolution of Contractual Relationship between the Government of Saudi Arabia and ARAMCO (University of Dundee, Centre for Petroleum and Mineral Law Studies, 1990)

[35] Hossein Askari, Collaborative Colonialism: The Political Economy of Oil in the Persian Gulf (Palgrave MacMillan US, 2013)

This perception, as well as an increased demand by OPEC countries for government participation in resource exploitation in the aftermath of Libya's nationalisation of its oil industry, the fall of oil prices and the Arab-Israeli war and the oil embargo that followed it, led to a reassessment of the concession agreements. The Saudi government began a program of renegotiating concession agreements and gaining control of state assets from private foreign companies, starting with ARAMCO.[36] As noted by Anderson, in the aftermath of the nationalisation of the Libyan and Mexican oil industries, foreign companies were willing to renegotiate these concession agreements as they feared that the entire industry would be nationalised without any compensation being paid to the companies.[37] In 1974, the Saudi Arabian agreement with ARAMCO was revised to raise the government's participatory interest to 60%.[38] By 1980, the Saudi government had acquired 100% ownership of ARAMCO, and in 1988 ARAMCO was converted into the national oil company of Saudi Arabia and renamed Saudi ARAMCO.[39]

Notwithstanding the nationalisation of the Saudi oil industry in the 1980s, that same period saw the introduction of legislation to regulate foreign investment in Saudi Arabia for the first time.[40] In 1974, the Saudi government first introduced legislation intended to encourage foreign investment through the Basic Principles of Industrial Policy.[41] This policy was intended to allow for the transfer of technical know-how from foreign partners, with an incentive to foreign partners exempting them from any restrictions on entry and repatriation of foreign capital.[42] Furthermore, in 1979 the Foreign Capital Investment Code (the Code) was introduced with the aim of providing a set of guarantees and incentives for foreign investors that wished to invest in Saudi Arabia.[43] According to Zerfas:

> The benefits [of the FCIC] are being given with the expectation that the foreign firm will conduct itself with its Saudi partners so as to enhance their experience and their capabilities, and with the expectation that ultimately, the joint venture company will create a genuine, independent, self-reliant, economic enterprise. ... That is the real result which the existing legal requirements are attempting to

[36] Ibid, 137.
[37] Robert O. Anderson, Fundamentals of the Petroleum Industry (University of Oklahoma Press, 1984) 47
[38] Ibid, 47.
[39] Saudi ARAMCO <http://www.saudiaramco.com/en/home/about/history/1980s.html>
[40] Wahib Abdulfattah Soufi and Richard T. Mayer, Saudi Arabian Industrial Investment: An Analysis of Government-Business Relationships (Quorum Books, 1991) 36
[41] Ibid.
[42] Saudi Consulting House, Guide to Industrial Investment (1986) 53-63
[43] Foreign Capital Investment Code 1979, Royal Decree No. M/4

> achieve. To the extent these results are not achieved, [it can be expected] that further regulations will follow designed to more effectively guarantee that result…[44]

The Code established the Foreign Capital Investment Committee (the Committee) to oversee all FDI in Saudi Arabia.[45] According to Weber:

> This Committee [had] the powers to recommend projects it deem[ed] to be economically developmental, to review applications for foreign capital investment, to consider both complaints made by foreign investors and disputes arising from application of the code, to make recommendations for penalties to be imposed on those who violate the code and to provide for implementation of the [Code]. Through such discretionary authority, the Committee wield[ed] immense power over foreign capital investment policy and over the choice of companies permitted to operate in the Kingdom.[46]

The Committee could determine the desirability of a project based on the number of Saudi nationals employed, what type of, and how much technology would be imparted into the Kingdom, and the potential for expansion of manufacturing capabilities within the Kingdom.[47] The Committee's power of discretion to determine whether a joint venture was appropriate meant that foreign investors entering into joint ventures with Saudi companies could not look to a definite set of rules to decide whether or not it could validly enter into such arrangements.[48]

However, despite the Code having been introduced to encourage FDI, research has suggested that it had the opposite effect.[49] According to Khyeda, the Committee gave priority to Saudi Arabian firms and to joint ventures with Saudi participation.[50] Article 3 of the Code also prohibited foreign investment in a wide range of sectors (including publishing, education, health, insurance, electric power generation and more) as well as preventing foreign investors

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[44] Zerfas, 'Legal and Practical Issues in Forming and Operating Joint Ventures (Part I)' 2 Middle East Executive Reports (1979) 3, 17
[45] FCIC, [n 42] article 5
[46] Diane T. Weber, 'Joint Venture Regulation in Saudi Arabia: A Legal Labyrinth? 11 University of Pennsylvania Journal of International Business Law (1990) 826
[47] Ibid, 826.
[48] Ibid.
[49] Svitlana Khyeda, 'Foreign Direct Investment in the Middle East: Major regulatory restrictions' 9(2) International Law Centre (2007) 73-104
[50] Ibid, 82.

from obtaining a licence unless it was accompanied by appropriate technical expertise.[51] Further criticisms directed at the Code and the Committee included arguments that they failed to: (i) protect foreign investors from potential arbitrary measures taken by the government; (ii) assure foreign investors that they could freely transfer their investment capital to their home countries; and (iii) define a standard of treatment of foreign investments and a means of resolving investment -related disputes.[52] Furthermore, as Weber goes on to suggest, the increase in joint ventures between Saudi companies and foreign companies in the aftermath of the implementation of the Code was in spite of the Code, and not because of it.[53] For example, one challenge faced by foreign companies to establish themselves in Saudi Arabia under the Code appeared to be governmental attempts to curtail foreign investment. Weber expanded on this point:

> It [was] not clear exactly why the Saudi government appear[ed] to be stepping back from its policy of encouraging foreign investment as embodied in the Foreign Capital Investment Code of 1979. Perhaps the Saudi markets [had] become overcrowded and the government [was] attempting to protect Saudi local business. More importantly though, perhaps the Saudis [had] gained the technological and economic development the foreign capital was designed to stimulate, and the Saudis … now want[ed] to become major [] investors themselves.[54]

The Code was replaced in 2000 by the Foreign Investment Act which was implemented at the same time as the establishment of the Saudi Arabian General Investment Authority (SAGIA).[55] The purpose of SAGIA was to replace the Committee and to establish a 'one-stop shop' authorised to issue licences and incorporate foreign and joint venture companies.[56] This Act is considered to be a turning point in Saudi Arabia in respect of FDI and will be considered in the next section.

Other challenges faced by foreign companies seeking to conduct business in Saudi Arabia involve barriers to ownership of companies. Although the 2000 Act allows for foreign

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[51] Ibid.
[52] Alenazi Khaled Jadea and Salawati Mat Basir, 'Legal Regime of Foreign Direct Investment in Saudi Arabia within 2008-2015' 3(10) Imperial Journal of Interdisciplinary Research (2017) 482
[53] Weber, [n 45] 811
[54] Ibid, 840.
[55] Council of Ministers Resolution No. 2 (9 April, 2000)
[56] Ahmed Al Omran and Nikhil Lohade, 'Saudi Arabia to Open Stock Market to Foreigners in First Half 2015; Some Restrictions On Foreign Investment Are Expected' (Wall Street Journal, 16 April 2015)

investors to own Saudi companies there are some limitations to this, especially in respect of companies that are considered to relate to national sovereignty values, Islamic traditions or other customary traditions.[57] As a result, Article 3 of the Basic Law of Governance states that the *Shari'ah* Council 'has the authority to issue a list of activities excluded from foreign investment'.[58] This so-called 'Negative List' includes companies involved in 10 different industries, including the oil industry[59] or other natural resources or the ownership of real estate in Mecca or Medina.[60] Furthermore, because of the particular nature of the financial sector in Saudi Arabia as a result of *Shari'ah* restrictions on lending and *riba*, there are relatively few foreign banking institutions operating in the Kingdom, with most of those that are operating there being joint ventures between the foreign bank and the Saudi government.[61] The Saudi Arabian government has stated that it is intending to continue to reduce the industries on the Negative List and eventually abolish the list entirely.[62]

This section has provided some background on the history of FDI in Saudi Arabia, including legal and practical issues that have arisen. Some of these issues have resulted in a perception amongst foreign companies that it is difficult to invest in and own property in Saudi Arabia or to obtain shares in Saudi Arabian companies. In this researcher's opinion, this perception may stem from the high-profile nationalisations of Saudi industries such as ARAMCO in the 70s and 80s. However, as noted at the outset of this Chapter 6 there has been increased focus in Saudi Arabia on establishing a sustainable private sector, and there is a realisation among Saudi Government Ministers that foreign direct investment will be required to do so. Changing this perception will involve the changing of legal structures, providing certainty to foreign investors that their assets will be protected and that there is no risk of the loss of an investment as a result of issues that are outside of their control (such as nationalisation or *Shari'ah*-based policies). The next section will consider the changes that the Saudi Arabian government has implemented in the last two decades and whether or not they should be seen to be a turning point for foreign direct investment in Saudi Arabia.

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[57] Jonathan Reardon, 'The New Saudi Companies Law: What You Need to Know' (Al Tamimi & Co., August 2016) <https://www.tamimi.com/law-update-articles/the-new-saudi-companies-law-what-you-need-to-know-1> accessed on 14 June 2018

[58] Basic Law of Governance, article 3

[59] Saudi Mining investment law art 3, Royal Decree M/47 (20 Sha'ban 1425 / 4th October 2004)

[60] Real Estate Regulation for Non-Saudis, Royal Decree 2340 (21/7/1390 AH)

[61] Hussain Naser Agil, 'Investment Laws in Saudi Arabia: Restrictions and Opportunities' Victoria University School of Law (2013) 113

[62] Khyeda, [n 48] 80

5.3 Recent Reforms And Remaining Challenges In Respect Of Attracting FDI

5.3.1 Foreign Investment Law 2000

The Foreign Investment Act 2000 marked a new dawn in Saudi Arabian FDI law. According to El Sheikh, the 2000 Act is considered to be a genuine attempt by the Saudi government to encourage foreign investment into Saudi Arabia by removing much of the red tape that existed under the FCIC.[63] According to the OECD, the 2000 Act is also considered to be an attempt to make the process of investing in Saudi Arabian companies more transparent to foreign investors.[64]

The changes made by the Foreign Investment Law include enhanced rights for foreign investors to broadly be entitled to the same rights as are available to Saudi nationals. In addition, foreign companies no longer need to enter into joint venture agreements with local companies nor, as discussed above, are there any restrictions on property ownership or investment other than those that appear on the Negative List.[65] Indeed, the number of industries that have been restricted through the Negative List has also decreased in recent years. In September 2015, the Saudi government stated that 100% foreign ownership of companies in the wholesale and retail trade sectors was permitted (effective from July 2016), while in August 2017 foreign ownership of engineering companies was also removed from the Negative List.[66] Furthermore, greater incentives are available to foreign companies that invest in certain sectors that are not on the Negative List, such as in the energy, education, transportation, health, life sciences and knowledge-based industries.[67] In addition, there has been significant reform in other areas of Saudi law, including Company Law[68], Insurance Law[69] and, as discussed in the later chapter from this Thesis, Arbitration Law.[70]

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[63] Fath El Rahman and Abdalla El Sheikh, The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia (Cambidge University Press, 2003) 65

[64] OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Review Saudi Arabia 2014 (OECD, April 2014) 13

[65] Saudi Arabian General Investment Authority (SAGIA) negative list for activities excluded from foreign investment at <www.sagia.gov.sa>

[66] SAGIA Press Release dated 6 September 2015

[67] Ali Saeed Alshamrani, 'The Merger of commercial companies in the Saudi Arabian Stock Exchange (Tadawul) and its impact on the rights of Foreign Direct Investment (FDI) in the Saudi system' 4(1) Academic Journal of Business, Administration, Law and Social Sciences (2018) 40

[68] E.g. Companies Law, Royal Decree No. M3/1437

[69] E.g.. Law on Supervision of Co-operative Insurance Companies, Royal Decree No. M32/1424

[70] Royal Decree No. M34/1433

In practice, the Foreign Investment Law and the related changes create a more transparent and open legal structure that encourages FDI by providing clarity to foreign companies that wish to invest in the Kingdom.[71] For example, Article 2 of the Foreign Investment Law makes it clear how foreign companies may obtain a licence for capital investment in the Kingdom. It states that:

> The authority shall act on the investor's application within thirty days of the submission of all the documents required by the regulations. If the specified period lapses without the authority acting on the application, it shall issue the required licence to the investor. If the authority rejects the application within the prescribed period, the decision must be justified, and the party whose application has been rejected shall have the right to appeal such decision according to laws.[72]

The speed at which an application is processed is at odds with many government agencies in Saudi Arabia and elsewhere where delays are common. Furthermore, as noted by Alkhaldi:

> To enhance transparency and create a willingness to invest, SAGIA must provide all interested investors with required information, clarifications and statistics, as well as all services and procedures needed to facilitate and complete all investment transactions.[73]

Once an application for a licence has been accepted, Article 5 of the Foreign Investment Law provides that foreign companies will be eligible for one of two categories of licence: firstly, companies owned jointly by a Saudi and foreign investor and, secondly, companies wholly-owned by a foreign investor, thereby confirming that foreign investors may own 100% of companies in Saudi Arabia.[74] Furthermore the Foreign Investment Law provides that foreign investors can obtain more than one licence for different activities and may apply for more than one licence at any given time.[75]

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[71] Foreign Investment Advisory Service (FIAS), a joint service of the International Finance Corporation and the World Bank, "Saudi Arabia: Administrative Barriers to Investment" (Unpublished Report, March 2002) 153 section 675

[72] Foreign Investment Law, article 2 (2000) <https://www.wto.org/english/thewto_e/acc_e/sau_e/WTACCSAU59_LEG_3.pdf> accessed on 29 August 2018

[73] Alkhaldi, [n 20] 55

[74] Foreign Investment Law 2000, article 5

[75] Foreign Investment Law 2000, article 4

Article 9 of the Foreign Investment Law provides that all foreign investors need a local legal sponsor in order to work in country.[76] However, once a licence application has been accepted, the investor and its employees shall be entitled to apply for sponsorship through the licenced investment company (provided that Saudization quotas are met.[77]

Article 14 of the Foreign Investment Law provides that foreign investors are subject to corporate income tax which is 20% of net profit.[78] According to the World Bank, this level of corporation tax is among the lowest in the world (although it should be noted that the *zakat* tax rate for Saudi investors is much lower[79]). Furthermore, the procedural rules of the Foreign Investment Law state that foreign investors can benefit from any Double Taxation agreements to which the Kingdom is a signatory.[80]

The implementation of the Foreign Investment Law helped to create a legal infrastructure that was more transparent to foreign companies considering investing in Saudi Arabia. However, by itself it was unable to encourage investment and other reforms were necessary, as will be considered in the next section.

5.3.2 Further Reforms

As noted previously there was a certain level of reluctance among foreign investors to work in Saudi Arabia due to the lack of transparency, and the introduction of new legislation (including the Foreign Investment Law and new Company Law, Insurance Law and Arbitration Law) alone was not sufficient to promote Saudi Arabia as a Kingdom open to FDI. Instead, in order to do so, subsequent to the implementation of the Foreign Investment Law the Saudi government began to sign a wide range of bilateral and multilateral investment (and investment related) treaties with other countries, especially other Middle Eastern and Arab League nations.[81]

Once such agreements were in force, the King, by Royal Decree, requested that government agencies revise their existing laws in order to be able to successfully implement the changes set out in these bilateral and multilateral agreements in order 'to enhance the ease of access to

[76] Foreign Investment Law 2000, article 9
[77] Foreign Investment Law 2000, article 9
[78] Foreign Investment Law 2000, article 14
[79] Zakat is a form of tithe paid by Saudi individuals and companies at an annual flat rate of 2.5% as laid down in Royal Decree No. 17/2/28/8634 dated 29/6/1370H (1950).
[80] Procedural Rules of the Foreign Investment Law (2002), article 5
[81] Hussain Agil and Bruno Zeller, 'Foreign Investments in Saudi Arabia' 15 International Trade and Business Law Review (2012) 60

investment opportunities for both Saudi and non-Saudi investors…'[82] The government also created a number of new state agencies following the implementation of the Foreign Investment Kaw. Along with SAGIA, other important state agencies that have been instrumental in improving the level of FDI in Saudi Arabia include the Saudi Arabian Monetary Agency (SAMA), the Royal Commission for Jubail and Yanbu[83], the Saudi Arabian Basic Industries Corporation (SABIC), the Saudi Industrial Development Fund (SIDF), and the Capital Markets Authority (CMA). According to Cityscape Intelligence, the foundation of these agencies resulted in:

> …rapid and sustainable economic growth by creating a pro-business environment, providing comprehensive services to investors and fostering investment opportunities in key sectors of the economy, including energy, transportation, information and communication technology (ICT) and knowledge-based industries.[84]

This pro-business environment provided reassurance to foreign investors that the Saudi authorities were putting in place the necessary infrastructure to create an economic environment that appealed to foreign investors. However, outside of the economic sphere there were other areas where reform was needed to encourage FDI.

5.3.3 Social Liberalisation

Another factor encouraging FDI in Saudi Arabia has been the increased social liberalisation within the Kingdom in recent decades. The Vision 2030 programme is not just an economic programme, but also includes a degree of social liberalisation and education reform.[85] The social liberalisation reforms suggested in the Vision 2030 programme included expansion of the entertainment industry, increased focus on the tourist sector (outside of religious pilgrimage) and related social reforms such as permitting women to drive and encouraging more women to enter the workforce.[86] These reforms are reflective of a nation where younger people are becoming more significant, both in politics (such as the inspiration behind the

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[82] Ibid, 61.
[83] Founded by Royal Decree No. M/75, the mission of the Royal Commission for Jubail and Yanbu is to "plan, promote, develop and manage Petrochemicals and Energy intensive industrial cities through successful customer focus and partnerships with investors, employees, communities and other stakeholders".
[84] Cityscape Intelligence, Saudi Arabia Investment Guide 2009/2010 (16 September 2010) <http://www.cityscapeintelligence.com/saudi-arabia-investment-guide-200912010? > 3, 4
[85] Kinninmont, [n 12]
[86] Saudi Arabia Vision, [n 10]

Vision 2030 programme). Approximately half of the population, including Prince Mohammed bin Salman and much of the workforce, are under the age of 30.[87] The reforms are indicative that young Saudis are willing to embrace a more liberal and modern society compared to their forebears.[88] However, in order to achieve such a society, young Saudis will inevitably clash with the clerical establishment and the older generation, as opinions suggest that the younger generation are less content with central government and that they want increased input in government decision-making.[89] The Vision 2030 programme can therefore be seen as a challenge to the status of the Ulema, as many of the policies proposed in this programme (such as educational reform, expansion of the entertainment industry and encouraging women to enter the workplace) have been traditionally opposed by religious clerics.[90] However, it has been noted that, thus far, the opposition to the social liberalisation plans set out in the Vision 2030 programme has been less than expected.[91]

5.3.4 Educational Reform

Educational reform also forms part of the Vision 2030 programme. In order to achieve its economic goals, the Saudi government has recognised the importance of education, especially in respect of the education and employment of women.[92] According to Pennington, the education system in Saudi Arabia has consistently ranked near the bottom of international assessment rankings.[93] According to the Saudi Minister of Education, the Vision 2030 programme is an attempt to 'rethink education from preschool through graduate schools'.[94] According to some commentators such as Courington and Alyami, there has been a failure of the education system (despite considerable investment by the government) as a result of a curriculum that is focused on rote-learning and religious education as opposed to preparing

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[87] Ibid.
[88] James Russell, 'Saudi Arabia: The Strategic Dimensions of Environmental Insecurity' 23(2) Middle East Policy (2016) 44-58
[89] Caroline Montagu, 'Civil Society in Saudi Arabia: The Power and Challenges of Association' (Chatham House, March 2015) 14
[90] William van den Berg, 'Saudi Arabia's strategic stalemate - what next'? Clingendael - Netherlands Institute of International Relations (2017)
[91] Kinninmont, [n 12]
[92] Saudi Arabia Vision, [n 10]
[93] Roberta Pennington, 'Saudi plans major overhaul to poorly performing education system' (The National, 11 December 2017) < https://www.thenational.ae/uae/saudi-plans-major-overhaul-to-poorly-performing-education-system-1.683557> accessed on 11 June 2018
[94] Ibid (quote from speech given by Dr Ahmed bin Mohammed Al-Issa at Yidan Prize Summit, Hong Kong, 11 December 2017)

individuals for the labour market.[95] Furthermore, the promise of jobs in the public sector has done little to encourage students to focus on their education. Again, such reforms may result in confrontations with the religious establishment. As noted by Wrey:

> Therein lies the dilemma facing Prince Mohammed. He knows that only a change in the ethos and structure of the education system, with much improved provision of science- and technology-based curricula, can prepare young Saudis for jobs in the new industries he envisages. But he is well aware that this will inevitably lead to tensions with the clerics whose support for the House of Saud is predicated on their control of the judiciary and education.[96]

These tensions have led to some other commentators suggesting that the educational reforms contained in the Vision 2030 programme are nowhere near as ambitious as the economic reforms, with Tuvey suggesting that the Vision 2030 program 'has shied away from a much-needed overhaul'.[97]

5.3.5 Stopping corruption

A further issue that has been dealt with in recent years by the Saudi government is that of corruption. According to the Transparency International's annual Corruption Perception Index, Saudi Arabia ranks as the 57th least corrupt country in the world, with a rating of 49 out of 100 (for comparison, the least corrupt country on the index was New Zealand, which finished on 89 points out of 100. The highest ranking Middle Eastern country was the UAE, which was 21st in the ranking with a score of 71. The global average was 43 out of 100).[98]

In 2011, King Abdullah established a National Anti-Corruption Commission by Royal Decree which was aimed at 'fighting administrative and financial corruption' in the

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[95] Max Wrey, 'Saudi education set to hamper reform goals' (Financial Times, 29 June 2016) <https://www.ft.com/content/febb3cfb-85be-32d7-aa75-e92d25d570b2> accessed on 11 June 2018; Karen Courington and Vanessa Zuabi, 'Calls for Reform: Challenges to Saudi Arabia's Education System' 12(2) Georgetown Journal of International Affairs (2011) 137-144; Rfah Hadi Alyami, 'Educational Reform in the Kingdom of Saudi Arabia: Tatweer Schools as a Unit of Development' 5(2) Literacy Information and Computer Education Journal (2014) 1515-1524

[96] Wrey, [n 94]

[97] Jason Tuvey of Capital Economics, quoted in Gavin O'Toole, 'Can Saudi Arabia's economic reforms succeed'? (Al Jazeera, 2017) < https://www.aljazeera.com/news/2017/11/saudi-arabia-economic-reforms-succeed-171125070840859.html> accessed on 11 June 2018

[98] Transparency International Corruption Perceptions 2017 <https://www.transparency.org/news/feature/corruption_perceptions_index_2017 > accessed on 2 June 2018

Kingdom.[99] According to the Commission, it aims to achieve these goals in order to 'maintain integrity, promote transparency and combat financial and administrative corruption in all forms, manifestations and means'.[100] In order to achieve its goals, the Commission has, amongst other things, the powers to create orders and directives relating to matters of public concern, detect financial administrative corruption in public works, refer violations and irregularities relating to financial administrative corruption to the relevant agencies and to propose laws and policies necessary to prevent and combat corruption.[101]

In 2017, the National Anti-Corruption Commission carried out a number of high-profile investigations into corruption in Saudi Arabia which led to the removal of two prominent ministers from their posts, along with the detention of dozens of Saudi government officials who had been alleged to have been involved in corrupt practices.[102] The detentions were based on a Royal Decree, which stated that the decision to carry out these detentions:

> …was made in view of what we have noticed of exploitation by some of the weak souls who have put their own interests above the public interest, in order to, illicitly, accrue money.[103]

Although these detentions may suggest that the anti-corruption methods in Saudi Arabia are being effectively implemented, some commentators have questioned the reasoning for, and the methods used in, the crackdown.[104] Furthermore, some commentators have suggested that the detentions may in fact destabilise the economy and may, in the short term, actually reduce FDI in Saudi Arabia due to the perception of instability and potentially arbitrary risks of detention.[105] The fact that such perceptions exist does not, in this researcher's opinion, mean that the crackdown was not a genuine attempt by the Saudi government to tackle corruption in the Kingdom. However, in this researcher's opinion, these perceptions have been allowed

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[99] Asharq Alawsat, 'New Saudi National Anti-Corruption Commission to Report Directly to King' (March 19, 2011) <http://www.asharq-e. com/news.asp?id=24563> accessed on 2 June 2018

[100] Royal Decree No. A65/1432

[101] Performance Summary Report of the National Anti-corruption Commission 2011-2014 <https://www.ethic-intelligence.com/images/Resources/Performance_Summary_Report_Of_The_National_Anti-Corruption_Commission_2011-2014.pdf> accessed on 12 June 2018

[102] The National, 'New Saudi committee to investigate public corruption opens new era of transparency' (The National, 2017) < https://www.thenational.ae/world/gcc/new-saudi-committee-to-investigate-public-corruption-opens-new-era-of-transparency-1.673068> accessed on 12 June 2018

[103] Ibid.

[104] Ben Smith, 'Saudi Purge' (2017) UK House of Commons Briefing Paper Number CBP 8134

[105] Ibid.

to flourish as a result of another issue - a lack of transparency. This takes us to the next major factor encouraging investment.

5.3.6 Encouraging transparency and legal certainty

As has been noted in other chapters of this Thesis, issues relating to a lack of transparency and lack of certainty in the legal system in Saudi Arabia are commonplace. According to the Heritage Foundation's 2018 index of economic freedom, Saudi Arabia obtained a score of 50% on the 'government integrity' sub-indicator, which is the indicator considered to be of the utmost important to foreign investors.[106] According to the Foundation's 2018 report:

> Corruption remains a significant problem, and there is both low transparency in the functioning of government and opacity with respect to state budgets and financial practices.[107]

When unveiling Vision 2030, Prince Mohammed acknowledged the importance of improving the transparency of the government in order to ensure that the Saudi economy becomes more competitive.[108] According to Spitler, corruption is allowed to infiltrate Saudi governance as a result of this lack of transparency, which means that government agencies are not in regular and efficient contact with each other, allowing for fraud and corruption to occur without being detected.[109] According to the IMF, since the announcement of the Vision 2030 plan, the Saudi authorities have made considerable progress in initiating the reform agenda, including the implementation of a framework to increase transparency and accountability within the government.[110]

This lack of transparency and inter-governmental communication could be dealt with throughout the public sector by implementing certain measures without resorting to widespread prosecution. For example, the privatisation of many of the State's institutions means that the operations of companies such as ARAMCO are open to scrutiny by private shareholders, meaning that the improvement of political, economic and social conditions may

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[106] Heritage Foundation, 2018 Index of Economic Freedom: Saudi Arabia <https://www.heritage.org/index/country/saudiarabia> accessed on 31 August 2018

[107] Ibid.

[108] Full Transcript of Prince Mohammed bin Salman's Al Arabiya interview (Al Arabiya, 25 April 2016) <https://english.alarabiya.net/en/media/inside-the-newsroom/2016/04/25/Full-Transcript-of-PrinceMohammed-bin-Salman-s-Al-Arabiya-interview.html> accessed on 12 June 2018

[109] Russell H. Spitler, Blurry Vision: Institutional Impediments to Reform in Saudi Arabia (September 2017) International Archive of the Naval Postgraduate School 12

[110] IMF, [n 7]

in fact be a by-product of the Vision 2030 programme.[111] However, in other sections, transparency may require a more fundamental change of approach by the Saudi government. For example, although there are a number of reforms aimed at promoting transparency under the Vision 2030 program, there are still significant legal reforms necessary to ensure a level of transparency comparable to many Western nations or other GCC countries such as the UAE.[112] According to the Heritage Foundation's 2018 report:

> The slow and non-transparent judiciary is not independent, and there is significant collusion between the executive branch and judges.[113]

Traditionally, the judicial system has been quite reticent in relation to transparency, with few judicial decisions being published and with legislation being issued without warning or consultation. As noted in previous chapters, there has been an increase in the publication of court proceedings.[114] However, such publications are intermittent events, whereas there must be a wider programme to ensure that justice is carried out in public in order to provide foreign investors with the requisite degree of comfort. Until precedents are available and international investors can observe how they are being applied to cases coming before the Saudi courts, there will remain some scepticism about any attempts to claim transparency within the Saudi legal system. However, as this Thesis will explain in the next chapter, the implementation of the Arbitration Law has resulted in a decrease in the level of court interference in the arbitration process, suggesting that the ongoing reforms are having a positive effect on reforming the legal system.

5.3.7 Corporate Governance Regulations

Another part of the continued effort to attract foreign investment by promoting transparency and tackle corruption has been the development of corporate governance standards in Saudi Arabia.[115] According to the World Bank in 2009, it was reported that the Saudi Arabian

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[111] Prince Mohammed bin Salman, [n 107]
[112] Kininmont, [n 12] 41
[113] Heritage Foundation, 'Country Ranking: Saudi Arabia' <https://www.heritage.org/index/country/saudiarabia> accessed on 1 June 2018
[114] Courtney Trenwith, 'Saudi Arabian courts publish judgments for first time' (Arabian Business, 2013) <http://www.arabianbusiness.com/saudi-arabian-courts-publish-judgements-for-first-time-509514.html> accessed on 8 June 2018
[115] For more information, see Felix I. Lessambo, 'Corporate Governance in Saudi Arabia' in Felix I. Lessambo, The International Corporate Governance System (Palgrave Macmillan, 2014)

corporate governance practices were largely in line with international standards.[116] However, the World Bank's report also noted that there was a relatively low level of compliance with the corporate governance rules in Saudi Arabia at that time, with more recent studies suggesting that no more than 12.5% of the companies listed on the Saudi stock exchange recognise self-regulatory corporate governance.[117]

Legislation relating to corporate governance in Saudi Arabia began in 2003 with the creation of the Capital Markets Authority (CMA) (a government authority that holds considerable financial and administrative autonomy) and culminating in the implementation of the new Corporate Governance Regulations in respect of listed companies in 2017.[118] In the introduction to the draft Regulations, the Ministry of Commerce of Investment and the CMA stated that reform to the corporate governance system:

> …not only benefits the companies, but it does affect the national economy directly, taking into consideration the continuity and growth of the companies.[119]

The purpose of these Regulations was to consolidate the rules of the CMA and the new Companies Law that came into effect in May 2016. The Regulations provide shareholders and board members with improved rights, and provide greater clarity and transparency to the responsibilities of shareholders and board members.[120]

According to practitioners, it is expected that the 2017 Regulations will have a significant impact on the corporate governance regime in Saudi Arabia. Sioufi *et al* state that the 2017 Regulations:

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[116] World Bank, 'Corporate Governance Country Assessment: Kingdom of Saudi Arabia' (February 2009) Report on the Observance of Standards and Codes 1

[117] Abdullah Wahtan Alkahtani, 'Corporate Governance Standards in Saudi Financial Sector: Achievements and Challenges' 7(12) International Journal of Business and Social Science (2016) 129

[118] Saudi Arabia New Corporate Governance Regulation 2017 <https://www.meira.me/system/files/member_only_private_files/Saudi%20Arabia%20New%20Corp%20Gov%20Regulations_2017.pdf> accessed on 12 June 2018

[119] MCOI/CMA, 'MCI and The Capital Market Authority Would Like To Request The Opinions Of The Public And Those Interested On The Draft Regulations Of Corporate Governance, And The Draft Of Controls and Regulatory Procedures For Corporate Law' <https://mci.gov.sa/en/MediaCenter/News/Pages/26-04-16-03.aspx> accessed on 12 June 2018

[120] Corporate Governance Regulations 2017, part 2 and part 3

> …should serve, in equal parts, to give comfort to international investors and to encourage sponsors to support the local listings regime, both of which will be equally necessary in order for the domestic market to grow as intended.[121]

However, it is suggested that the most significant level of comfort that could be made available to foreign investors would be to make such corporate governance rules compulsory for Saudi companies, thereby ensuring that any failure to comply is actionable in the Saudi courts.

5.3.8 Shift from protectionism to state-controlled liberalisation

The shift of Saudi (and Arab) society from the protectionist state to a liberalised state is an issue that goes beyond the matter of FDI. In this researcher's opinion, it is a matter that is at the very root of many of the problems associated with transitioning a traditionally rural and community-based collection of tribes into a thriving economic powerhouse in less than a century. Economically, Saudi Arabia has proven that this is possible up to a point, with the government being assisted in this transition by the vast amount of natural resource available in the Kingdom. However, as is illustrated by the transitions in the arbitral procedure outlined in other chapter, a similar shift in tribal, cultural, religious and political norms in the same timeframe has proven be more difficult, with many recent economic reforms directly confronting the traditional religious and societal structure of Saudi Arabia. This view finds support in the work of Biygautane *et al*, who note that for hundreds of years before the foundation of the Kingdom, the tribal structure in the region was ruled by Sheikhs who acted as both the political and moral leaders of the tribes, as well as the 'figurative' father (or patriarch) of the tribe. They contend that:

> To fulfil their 'paternal' obligations, the sheikhs were expected to achieve justice and provide safety, unity, and protection against external threats in return for the financial tributes and political submission of their subjects.[122]

This researcher would suggest that this form of 'paternal' state protectionism is therefore instilled in the very fabric of Saudi society and is at odds with many of the social

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[121] Chris Sioufi, Saber Farooqi and Husan El-Khatib, 'Saudi Arabia approves new Corporate Governance Regulations' (Lexology, March 2017) <https://www.lexology.com/library/detail.aspx?g=4a549212-743b-407c-bb29-de2a883d8afe> accessed on 12 June 2018

[122] Muhamed Biygautane, Paula Gerber and Graeme Hodge, 'The Evolution of Administrative Systems in Kuwait, Saudi Arabia and Qatar: The Challenge of Implementing Market Based Reforms' 26(1) Digest of Middle East Studies (2016) 102

liberalisation measures that have been introduced in Western economies since the beginning of the twentieth century and which are being adapted for Saudi Arabia for the twenty-first century and beyond. However, the discovery of oil resulted in vast amounts of wealth that belonged, in effect, exclusively to the ruling Saudi Royal Family. At least partly in order to ensure that their legitimacy was not questioned, their 'parental' obligations were reversed and instead of requiring financial tributes they were instead required to share their wealth with the merchant classes and citizens through government contracts.[123] This 'rentier state' model, whereby unearned wealth is distributed to citizens lies in contrast to the Western model and requires citizens to contribute to society through entrepreneurship, employment and the resulting taxes applied to these endeavours.[124] The protection against external threats included the threat of foreign investment, such as the American oil companies in the 1930s to 1950s.[125] The transformation of Saudi Arabia into a capitalist economy was therefore led by the monarchy itself rather than the citizens.

In order to change this tribal structure, the Kingdom has, as noted earlier in this chapter, begun to roll out a range of privatisations of public sector enterprises in order to encourage a form of economic liberalism that enhances the role of the private sector, thereby reducing the requirement of the King to act as 'parent' of the Kingdom.[126] The goal of this is to create a free economy and a free market for all goods and services within the Kingdom, thereby encouraging FDI.[127] However, it should be noted that it remains to be seen what effect such privatisation will have on the relationship between the monarchy and its citizens. If a 'parent' is no longer necessary, what becomes of the role of the monarchy?

The importance of privatisation is illustrated by the role of the public sector in Saudi Arabia. As noted, the 'rentier state' model employed by Saudi Arabia in recent decades has resulted in a bloated and ineffective public service where employees are underutilised and underperforming and generally operate without any clear objectives.[128] As a result of the rentier state model, the public sector companies received large amounts of government money but returned little to the economy, with heavy financial losses common within state-

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[123] Ibid, 102.
[124] Robert E. Looney, 'Development Strategies for Saudi Arabia: Escaping the Rentier State Syndrome' 3(3) Strategic Insights (2004)
[125] Ibid, 103.
[126] Rodney Wilson, Economic Development in Saudi Arabia (Routledge Curzon, 2004) 126
[127] U.S. Energy Information Administration, "Saudi Arabia Energy Oil Information" EIA (June 2002) <http://www.unitedstatesaction.com/eia-june-2001-oil.html>
[128] Nicolas De Walle, 'Privatization in Developing Countries: A Review of the Issues' 17(5) World Development (1989) 601

run companies and a lack of expertise resulting in an inability of public sector companies to compete with foreign competitors.[129] As a result, privatisation became increasingly common from the 1970s. However, economic freedom comes with a risk, especially in a feudal Kingdom such as Saudi Arabia.[130] As noted by Muchlinski:

> Given that publicly owned enterprises have predominated in strategic industries such as transport, public utilities, natural resources, energy, financial services, and defence, the unregulated sale of such enterprises to the private sector raises the possibility of their falling under foreign ownership and control, thereby threatening existing national control over vital economic interests. Consequently, privatizations of publicly owned companies have often involved restrictions on foreign ownership.[131]

The advent of the Vision 2030 programme can be considered to be a leap forward in economic liberalisation. With a focus being placed on the development of the private sector, the ambitious reforms set out in the plan will, if successful, have the potential to complete the transition from protectionism to free market economy.[132]

However, there are suggestions that the Saudi government has not fully embraced the fact that privatisation means losing control of assets, with reports indicating that the government itself has purchased shares in institutions targeted for privatisation, suggesting that the State wishes to retain a certain level of control.[133] How much this form of privatisation appeals to foreign investors remains to be seen.

Many of the factors set out above including legal, economic and social reforms resulted in a rapid increase in the level of FDI in Saudi Arabia in the 1990's and 2000's, with the World Bank reporting in 2009 that the Kingdom was the 13th most competitive economy in the world.[134] However, a more recent report from the World Bank illustrates that there is still much work to do in Saudi Arabia to encourage FDI, with a 2017 report stating that Saudi Arabia ranks only 94th on a list of countries ranked by the ease with which investors can do

[129] Ibid, 603.
[130] Peter Muchlinski, Multinational Enterprises and the Law (Oxford University Press, 2007) 189
[131] Ibid, 189.
[132] Karen E. Young, 'The Coming Economic Disorder: The Political Perils of Economic Liberalization in the Gulf (14 September 2017) Arab Gulf States Institute in Washington <http://www.agsiw.org/coming-economic-disorder-political-perils-economic-liberalization-gulf> accessed on 12 June 2018
[133] Ibid.
[134] Embassy of Saudi Arabia Press Release (10 September 2009) <https://www.saudiembassy.net/press-release/saudi-arabia-ranked-13th-most-competitive-economy-world-bank-report> accessed on 1 June 2018

business there, including a ranking of 147th when it came to starting a business in the Kingdom and 169th when it came to resolving insolvency issues.[135] In addition, the level of foreign investment has stagnated somewhat in recent years, starting with the global recession of 2008. Market indicators point to a consistent decrease in FDI flows between 2012 and 2017 – resulting in estimated future revenues of around USD$7.45 billion in 2018 - that investment in Saudi Arabia is becoming increasingly risky for foreign investors, at least partly because the drop in sovereign reserves has made the Saudi government less willing to guarantee against losses resulting from failed investments.[136] Furthermore, in the short term, the Vision 2030 programme may have had a negative effect on FDI in Saudi Arabia due to uncertainty about the direction which the reforms will take. As noted by Kinninmont, the Vision 2030 programme:

> …represents a profound disruption to the status quo in Saudi Arabia which may well be necessary as the business and economic status quo was unsustainable, but there is now significant uncertainty. The risk-reward ratio isn't attractive to many foreign companies just now.[137]

The above quote illustrates that although the Vision 2030 programme includes much that is to be admired, the scope of the changes may be so ambitious that it could result in significant upheaval which could negatively affect FDI.

This chapter will now consider some of the remaining prevalent issues (other than those dealt with within the Vision 2030 programme) within Saudi Arabia that discourages FDI.

5.4 Remaining Limitations - What Saudi Arabia Is Doing to Discourage Investment

Although the Foreign Investment Law only distinguishes between Saudi and non-Saudi investors, the reality is that different categories of foreign investors are also treated differently, with special provisions and preferential treatment available to investors from countries in the Gulf Cooperation Council and the Arab League (although it should be noted that this preferential treatment is based on nationality as opposed to religion i.e. non-Muslims

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[135] World Bank, 'Doing Business 2017' <http://documents.worldbank.org/curated/en/431421478609226753/pdf/WP-DB17-PUBLIC-Saudi-Arabia.pdf> accessed on 13 June 2018; Jadea, [n 51]

[136] See The Official Website Of Lloyds Bank, available at <https://Www.Lloydsbanktrade.Com/En/Market-Potential/Saudi Arabia/Investment?&Accepter_Cookies=Oui>

[137] Middle East Monitor, 'Foreign investment in Saudi Arabia lowest in a decade' (23 March 2018) <https://www.middleeastmonitor.com/20180323-foreign-investment-in-saudi-arabia-lowest-in-a-decade> accessed on 12 June 2018

in GCC or Arab League countries will also be eligible for this preferential treatment).[138] As a result of this preferential treatment, individuals from GCC and Arab League countries are treated the same as Saudi citizens under the Foreign Investment Law.[139] Preferential treatment for these categories of individuals includes the right to invest in opportunities listed in the Negative List.[140] Furthermore, investors from these countries are exempted from paying income tax. For investors from other countries, Article 14 of the Foreign Investment Law states that:

> All foreign investments licensed under this Law shall be treated in accordance with applicable tax provisions and amendments thereto in the Kingdom of Saudi Arabia.[141]

Other differences between Saudi (and deemed Saudi) investors and all other investors include the amount of capital required to invest in certain sectors and industries. For example, to incorporate and operate a limited liability company, foreign investors from non-GCC / Arab League countries require a minimum capital of USD 140,000 (this minimum may increase for certain industries such as agriculture or may be reduced for other industries, such as the technology industry), whereas limited liability companies operated by GCC / Arab League investors does not set any minimum amount of capital.[142] As a result of the preferential treatment accorded to investors from these countries, a common method of GCC / Arab League investors to invest in Saudi Arabia is to establish offshore business entities in GCC / Arab League countries such as Bahrain, which are then used to acquire investments in Saudi Arabia without any minimum level of capital.[143]

In respect of foreign ownership, as noted previously, provided that capitalisation requirements are complied with, the Foreign Investment Law provides that foreign investors can own 100% of Saudi limited liability companies or joint-stock entities, provided that such companies / investments do not fall within the Negative List. Further examples include investment restrictions in the financial industry, where Saudi law requires that no more than

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[138] Agil and Zeller, [n 80] 65
[139] Economic Agreement of the Gulf Cooperation Council States, Adopted by the GCC Supreme Council (22nd Session, 31 December 2001)
[140] Ibid, 68.
[141] Foreign Investment Law 2014, article 14
[142] Agil and Zeller, [n 80] 72
[143] Ibid, 68.

40% of the shares/capital in a banking institution may be owned by non-GCC / Arab League foreign investors.[144]

As noted earlier, the World Bank stated that Saudi Arabia was only 147th in a list of countries ranked on how easy it was to open a business. Since June 2016, full foreign ownership by foreigners of Saudi businesses has been allowed, thereby removing the previous requirement that local partners must own at least 25% of the business.[145] However, most practitioners recommend that foreign investors setting up companies in Saudi Arabia appoint local partners or professionals to assist them with navigating the local laws and regulations; and they also note that 100% foreign-owned companies do not have the same tax treatment, funding and other incentives available to joint venture companies.[146]

Furthermore, many of the difficulties experienced by foreign investors opening a business in Saudi Arabia are not related to any shortfalls in the legislation but instead are the result of obstacles arising from administrative procedures and technicalities.[147] Although there has been an increase in efficiency in recent years, there is still a high level of bureaucracy which can result in unanticipated delays and requests for additional documentation.[148] However, as recently as April 2018, SAGIA has attempted to cut the processing time for business licenses from 53 hours to 4 hours, as well as reducing the number of documents that are required for submission.[149] Although this is a promising step towards improving efficiency, once a licence is obtained from SAGIA there are still further registration steps which must be completed by licensed foreign investors.[150] This procedure can be even more complex than the licensing procedure as this involves dealing with a number of different government ministries, including the Ministry of Commerce and any other Ministry whose approval may be required (such as, depending on the nature of the investment, the Ministries for Agriculture and Higher

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[144] Ibid, 74.

[145] Export, 'Saudi Arabia - using an agent to sell US products and services' (25 July 2017) <https://www.export.gov/article?id=Saudi-Arabia-using-agent> accessed on 14 June 2018

[146] Deloitte, 'Doing Business: Understanding Saudi Arabia's tax position' <https://www2.deloitte.com/content/dam/Deloitte/xe/Documents/tax/me_tax_doing-business-guide-ksa-2017.pdf> accessed on 14 June 2018

[147] Ibid.

[148] Clifford Chance, 'A Guide to Doing Business in the Kingdom of Saudi Arabia' (Clifford Chance, 2014) <https://financialmarketstoolkit.cliffordchance.com/content/micro-facm/en/financial-markets-resources/resources-by-type/guides/doing-business-in-the-kingdom-of-saudi-arabia/_jcr_content/parsys/download/file.res/A%20guide%20to%20doing%20business%20in%20the%20Kingdom%20of%20Saudi%20Arabia.pdf> accessed on 14 June 2018

[149] Richard Wachman, 'How to start a business in Saudi Arabia' (Arab News, 6 April 2018) <http://www.arabnews.com/node/1279746/business-economy> accessed on 14 June 2018

[150] Ibid.

Education).[151] This can involve requiring foreign investors to provide extensive notarised documentation.[152]

In respect of real estate investment in Saudi Arabia, foreign investors are entitled to own land in the Kingdom under the Foreign Investment Law. However, there remains certain limitation on foreign ownership of real estate. For example, foreign investors / companies may only own real estates in Saudi Arabia where they have a legal presence within the Kingdom (for an individual, this requires them to have legal residency status, for a foreign company they require the requisite licence from SAGIA).[153] Furthermore, the ownership of real estate by foreign companies is only permitted to the extent that it is linked to a particular project (and that the project is not related to an industry on the Negative List). It is therefore not a general right to property ownership. Such projects have to be above a certain threshold in terms of value and duration, with the total cost of the project required to be greater than USD 8 million; and the projects must commence within five years of the purchase of the real estate.[154] This means that foreign companies are not entitled to own real estate in Saudi Arabia purely for real estate investment purposes (other than property development).[155]

5.5 Limitations of The Vision 2030 Programme And What Needs To Be Done In Order For It To Succeed

Unsurprisingly, efforts to make great economic changes in a short space of time can have unintended effects as the relevant parties begin to understand and apply new provisions in practice. Although the Vision 2030 programme has ambitious targets, these targets may require reassessment as the Kingdom's businesses adopt the wide-ranging legal reforms (such as the Companies Law 2016, Bankruptcy Law 2018, and Arbitration Law 2016) into its business operations. An example of an area of the Vision 2030 programme which may require reassessment is illustrated by the plans for the Neom mega-city, a planned semi-autonomous transnational city that would operate independently from the existing governmental and administrative framework, offering its own tax and labour laws as well as

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[151] FIAS World Bank (n 70).
[152] Rahman (n 62) 52.
[153] Jonathan Reardon, 'Real Estate Ownership and Investment in Saudi Arabia' (Al Tamimi and Co., March 2017) <https://www.tamimi.com/law-update-articles/real-estate-ownership-and-investment-in-saudi-arabia> accessed on 14 June 2018
[154] Ibid.
[155] Ibid.

an independent judicial system.[156] The plans for the city are central to the vision set out by Prince Mohammed to encourage FDI and diversify the economy.[157] However, doubt remains amongst commentators about whether the Neom project can ever be realised.[158] Although the project stands as a testament to the ambition of Prince Mohammed, this researcher suggests that the project's success or failure illustrates the contrast between, on the one hand, the ambitions of the government of Saudi Arabia in the Vision 2030 programme and, on the other hand, the practical reality of implementing such dramatic change in such a short space of time. From an FDI perspective the stated ambition is not as important as the practical reality (such as whether financial resources or the labour force is available to make the vision a reality), a fact that is not necessarily acknowledged with the Vision 2030 programme.

A similar argument can be made about some of the other targeted reforms under the Vision 2030 programme. Many of them are considered by commentators to be excessively ambitious, with Freer noting that previous reform programmes have consistently failed to reach their targets as they have failed to amend the rentier-driven social contract.[159] She notes that:

> Progress has been hindered … [by] the fact that almost everything in the Saudi economy has been directly or indirectly fed by state spending.[160]

Freer notes that the Vision 2030 programme 'enforces and even expands the rentier bargain, rather than undermining it' on the grounds that it would result in the Saudi government playing an even greater role in the lives of its citizens.[161] Kinninmont acknowledges the potential effect of the Vision 2030 programme on the implicit social contract between the Saudi government and other key constituencies including influential clerics and the general

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[156] Reuters/CNBC, 'Saudis set $500 billion plan to develop zone linked with Jordan and Egypt' (CNBC, 24 October 2017) <https://www.cnbc.com/2017/10/24/saudis-500-billion-plan-to-neom-business-city.html> accessed on 1 July 2018.

[157] Daniel Wagner, Saudi Arabia's NEOM: A Bold Vision for a Pipe Dream? (International Policy Digests, 5 November 2017) <https://intpolicydigest.org/2017/11/05/saudi-arabia-s-neom-bold-vision-pipe-dream> accessed on 14 June 2018.

[158] Ibid.

[159] Courtney Freer, 'Concerts, Cinemas and Comics in the Kingdom: Revising the Social Contract after Saudi Vision 2030' (London School of Economics: Middle East Centre, 26 May 2017).

[160] Ibid.

[161] Ibid.

public.[162] She notes that the delicate nature of the balance between these constituencies often means that reform efforts 'are often diluted or deferred, or reversed when oil prices rise'.[163]

This delicate balance is illustrated in the attempts by the Saudi government to balance Saudi economic nationalism with the requirements to liberalise the economy (and the wider society) and the attempts at privatisation. As noted previously, the Foreign Investment Law 2000 applies a rate of income tax on non GCC / Arab League investors and companies that is considerably higher than the *zakat*[164] payable by Saudi companies. Furthermore, the Saudi government has introduced the Saudization scheme, which is an attempt to increase the number of Saudi nationals in the workforce and to reduce the reliance on foreign workers.[165] However, it is suggested that this scheme is dependent on the Saudi workforce having the skills necessary to replace their foreign equivalents which, as noted above, is not currently happening as a result of failures in the education system to prepare graduates for the demands of roles in the private sector.[166]

As noted previously, rumours about the proposed introduction of various taxes on foreign investors and employees have continued to swirl, with the suggestion being that the foreign workers are an easier target for taxes than Saudi nationals as they do not have any political capital. In July 2017, foreign workers were required to start paying taxes for any of their dependents living in Saudi Arabia while Saudi companies whose foreign workers exceed the number of local workers are required to pay levies to the government.[167] This has resulted in significant job cuts of foreign nationals in the private sector, with reports suggesting that the Bin Laden Group were required to lay off 70,000 foreign workers as a result of imposed levies.[168] According to Abdullah Al-Maghlouth a member of the Riyadh Chamber of Commerce and Industry (RCCI), these taxes will have the effect of driving out foreigners who pay a significant amount into the Saudi economy.[169] Furthermore, Al-Maghlouth stated

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[162] Kinninmont (n 12) 4.
[163] Ibid.
[164] See (n 78).
[165] Republic of the Philippines, Department of Labour and Employment, 'Q&A on Saudi Nationalization (Saudization) Policy'
[166] See Section 6.3.4.
[167] The New Arab, 'Tax Axe Falls on Expatriates in Saudi Arabia' (The New Arab, 6 July 2017) <https://www.alaraby.co.uk/english/news/2017/7/6/tax-axe-falls-on-foreigners-in-saudi-arabia> accessed on 17 June 2018.
[168] Firstpost, 'Saudi Arabia's Family Tax from 1 July could be the last straw for many Indians' (Firstpost, 1 July 2017) <https://www.firstpost.com/world/saudi-arabias-family-tax-from-1-july-could-be-the-last-straw-for-many-indians-3733687.html> accessed on 17 June 2018.
[169] Abdullah Al-Maghlouth, member of the Riyadh Chamber of Commerce, quoted by Al-Watan, see [n 182]

that it would likely have an adverse impact on private sector firms.[170] These taxes can be contrasted with austerity measures that were introduced by the government from 2014, including pay cuts for public sector employees.[171] These pay cuts were later revoked in April 2017 and the original pay conditions were not only restored, but were also backdated to the date of the pay cuts, meaning that there were effectively no cuts.[172] According to Kinninmont:

> The reversal of cuts follows a classic pattern of pro-cyclical fiscal policy in Saudi Arabia whereby apparently 'structural' fiscal reforms are introduced when money is tight, but are then often cancelled when government revenues go up again. However, the episode underlined the need, in the interest of avoiding the old pattern of public pushback and policy reversal, for economic and fiscal reforms to be devised with an awareness of social and political impact built in from the very beginning.[173]

Furthermore, as noted by Feteha & Nereim, the increased spending on wages exceeded the income accrued from the higher taxes placed on foreign workers and companies employing them, with the suggestion also being made that the governmental reform was not as aggressive as it had been predicted.[174]

Another example of the balancing act between the ambitions of the Vision 2030 plan and the social realities can be found within the existing Saudi legal framework. As noted above, there have been significant amounts of legislation introduced within the Kingdom that are intended to establish a market based monetary policy. However, in this researcher's view, much of these new legislative provisions have been introduced without a backdrop of laws that define the scope of financial activities nor clear precedents or actions on how they will operate in practice. In the absence of such laws, much of the economic reform falls under the remit of the Saudi Arabian Monetary Authority (SAMA), which has been tasked with filling this legislative gap with non-binding regulations and circulars containing rules or instructions.[175]

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[170] Ibid.
[171] Kinninmont (n 12) 4.
[172] Ibid, 5.
[173] Ibid, 5.
[174] Ahmed Feteha and Vivan Nereim, 'Saudi Arabia's Safety-Net Spending Wipes Out New Tax Gains' (Bloomberg, 9 May 2018) <https://www.bloomberg.com/news/articles/2018-05-09/saudi-arabia-s-safety-net-spending-wipes-out-new-tax-gains> accessed on 17 June 2018.
[175] 'Secondary' Regulations And Circulars Include But Are Not Limited To: (I) Regulation For Money Changing Business, Ministerial Decision No 3/920 Of The Minister Of Finance And National Economy Of

The lack of fundamental legislation therefore undermines attempts to promote investor confidence and to reach the Vision 2030 targets of FDI. Furthermore, there is some uncertainty about the interpretation of *Shari'ah* law by the Saudi judiciary, with judges and arbitrators entitled to decide in accordance with a particular doctrine of Islamic jurisprudence. According to Alshamrani:

> …[this] leads to the justification that the legal environment for foreign investment in Saudi Arabia needs to be codified, especially in matters of commercial transactions … in order to avoid judgments that are issued by judges and arbitrators according to their personal readings of Muslim texts.[176]

Again, in this case, it is suggested by this researcher that what is necessary is not a high-level introduction of legislation that sets out the ambitions of the government, but rather a fundamental root-and-branch review of the Saudi legal system and the functions of the judiciary and the legislature within that system. By creating a strong legal system, it will become much easier for Saudi reform plans, such as the Vision 2030 programme, to achieve their targets and ambitions. It is suggested that this may be achieved through codification by the legislature or through the establishment of precedents by the judiciary that sets out certain legal standards and norms that are universally applicable.

The effect of the taxes and levies imposed on foreign workers and their employers, and issues surrounding legal reforms, illustrate a major internal conflict with the Vision 2030 plan. On the one hand, the programme is intended to promote privatisation and diversify the economy and encourage FDI. However, on the other hand, the programme wishes to deal with the high unemployment rates among young Saudis by imposing levies that force companies to employ local workers without providing the requisite education to young Saudis that is necessary to become part of the workforce. The programme also wants to introduce legal reforms that, although broadly intended to provide comfort to foreign investors, will only be effective if combined with more fundamental reforms to the Saudi legal system. This researcher suggests that the Vision 2030 plan does not ensure that the social and political reforms needed to fully implement the programme are built in from the very beginning.

1981; (Ii) Rules For Enforcing The Provisions Of The Banking Control Regulation, Ministerial Decision No 3/2149 Of The Minister Of Finance And National Economy Of 1986; (Iii) Rules For Bank Service Charges, Sama Circular No M/A/1/291 Of 1979; (Iv) Sama Clarifying Memorandum On Powers And Responsibilities Of Members Of The Board Of Directors Of Saudi Commercial Banks; And (V) Sama Instructions Concerning Compensation For Mutilated Banknotes.

[176] Alshamrani, (n 66) 46-47.

The Vision 2030 plan could be, in some instances, considered to be an advertisement or propaganda material being used to promote FDI in Saudi Arabia. However, without a substantial change of attitude (or alternatively a push-through of reform by the government without regard to the other key constituents, which would likely be unstable) then many of the targets set out in the programme are destined to be missed. This was recognised to a certain extent by Prince Mohammed when, in September 2017, some features of the Vision 2030 plan were scaled back, with Gardner noting that the implementation of certain projects was given an extended timeline or removed entirely.[177] However, the Vision 2030 programme still fails fully to appreciate the internal conflict outlined above and it remains unclear how Saudi Arabia intends to diversify an economy and promote FDI while simultaneously requiring companies to hire untrained Saudi workers and attempt to discourage appropriately qualified foreign workers from migrating to the Kingdom. It is this dilemma that the Saudi government will be required to solve in order to ensure that the Vision 2030 plan succeeds in its aims of diversifying its economy and encouraging FDI.

It is noted above that the change in the ethos and structure of the education system to better prepare young Saudis for jobs may inevitably lead to tensions with the clerics. Kinninmont is also cited above as observing that the attempt to balance the interests and expectations of different constituencies including influential clerics and the general public often results in the deferral or dilution of reform efforts.[178]

It is suggested here that reforms aimed at liberalising the economy and adopting new technology may be fully implemented with the support of constituencies such as influential clerics where they are convinced that science and technology are ultimately religious subjects.[179] Professor Nasr argued that ‘In the same way that in mathematics the central Islamic doctrine of unity (al-tawhid) and its application accorded with the Pythagorean philosophy of numbers and made the integration of Greek mathematics into the Islamic perspective possible, another basic Islamic doctrine, namely that of harmony and balance, made the philosophy underlying the Hippocratic and Galenic traditions easily digestible by

[177] David Gardner, ‘Saudi Arabia’s crown prince scales back his ambitions’ (Financial Times, 19 September 2017) <https://www.ft.com/content/068b21a0-9d2b-11e7-9a86-4d5a475ba4c5> accessed on 17 June 2018.
[178] Kinninmont, [n 12] 174-177
[179] See Seyyed H Nasr, Islamic Science: An Illustrated Study (World of Islam Festival Publishing Co., 1976) 9. See also, Peter Moore, ‘Science and Technology in Traditional Islam and in the Modern World Reflections on a Recent Book’ 11(1) Studies in Comparative Religion (1977) 1-13

Muslims'.[180] The latter statement is even more reflective of the contemporary Islamic society, where there is a disconnect between the ideas of religious leaders/scholars and secular scholars, each drawing different conclusions about what is required under the *Shari'ah*. It is noted in chapters 2 and 3 that the Prophet declared that learning is the duty of every Muslim, and he himself was a great educator. Moreover, it is shown that the methodology of rational reasoning and logic played an important role in the development of the *Fiqh* and, the latter can foster compatibility between Islamic law and the current revolution in knowledge and technology around the world.

As such, the fact that secular scholarship is committed to liberal thinking does not imply that it is antithetical to Islam. In the same vein, the fact that social and educational reform will result in a more educated and liberal society does not imply that the society will abandon Islamic principles. This misconception is borne out of the description of Islam as a religion anchored in traditionalism and isolationism. Blame may also be laid on the government which has failed to educate the international community on the *Shari'ah* and the common principles it shares with the *lex mercatoria*.[181] Thus, potential foreign investors do not have a good grasp of the extent to which their investments will be protected in Saudi Arabia. The most reliable pointer is the treaty establishing the terms and conditions for investments by certain nationals.

5.6 Protection under Investment Treaties

It is noted above that the Foreign Investment Law allows existing persons of other nationalities ('foreign investors' as per Article 1(e)) to invest in all sectors of the economy, except those contained in the 'negative list'. It is also noted that SAGIA maintains and reviews the list at regularly occurring intervals. It is however uncertain whether a joint venture with foreign minority ownership may be allowed to invest in sectors on the negative list given that Article 1(f) of the Foreign Investment Law further defines foreign investment as any form of capital investment owned by foreign nationals, jointly or wholly.

Notwithstanding, it must be noted that foreign investment restriction is neither unique to Saudi Arabia nor Muslim countries. International law principles generally recognise the

[180] Ibid, 153.
[181] See the analysis of the ARAMCO case and the ensuing Resolution No. 58 of 1963 in chapter 7.

sovereign powers of states to exclude foreign persons and property.[182] States often restrict foreign investment because of the fear that the unrestricted invitation of alien investors may increase the amount of capital in the economy but lead to forms of unbalanced development.[183] However, the treaty-based investment regime has in turn limited the powers of states to restrict foreign investment and reallocated powers of adjudication from domestic courts to the private arbitration industry. In this light, foreign investors may receive more protection in states that have ratified more investment treaties. Van Harten demonstrates that despite sustained pressure for reform, the investment treaty system generally encourages foreign investment because it minimises the bias and unreliability of domestic courts, advances fairness and the rule of law in the settlement of disputes, affirms the sovereignty and bargaining strategies of states and foreign investors, and the treaties are endorsed by the democratic process.[184]

Many international treaties therefore contain elements that guarantee the protection of investors' rights by authorising investors to initiate proceedings against states in relation to any aspect of the treaties, and without exhausting local remedies in the host state.[185] Some treaties may also enable international investors to forum-shop and establish holding companies in states that have ratified the treaties in order to acquire the status of foreign investor.[186] The latter privilege is important because not all foreign investors may enforce rights protected under an investment treaty. Only nationals of the state that has ratified that treaty may be entitled to the rights and privileges provided by the treaty. As such, it is surprising that the Foreign Investment Law does not distinguish between different categories of foreign investors in Saudi Arabia. Given the large number of bilateral investment treaties (BITs) and multilateral investment treaties (MITs) that has been ratified by Saudi Arabia, different categories of foreign investors receive different treatments depending on their nationalities.

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[182] See Samuel KB Asante, 'International Law and Foreign Investment: A Reappraisal' 37(3) The International and Comparative Law Quarterly (1988) 588, 589
[183] See Howard B Berke, 'Host Countries' Attitude toward Foreign Investment' 3(2) Brooklyn Journal of International Law (1977) 243, 244
[184] Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' 2(1) Trade, Law and Development (2010) 19-58
[185] See Rudolph Dolzder, 'The Impact of International Investment Treaties on Domestic Administrative Law' 37 International Law and Policy (2005) 953-954
[186] Gus Van Harten, [n 199] 23

Foreign investors from states that have ratified the Unified Agreement for the Investment of Arab Capital in Arab States of 1980 (as amended) are granted distinct privileges.[187] Article 1 of the Agreement for example guarantees these investors freedom of personal and capital mobility in Saudi Arabia, freedom of residence, work, and exercise of economic activities, right of possession and inheritance, and freedom of the use of transport, ports and civil airports. Also, Article 2(5) provides that the contracting state should streamline all 'policies related to agriculture, industry, and internal trade; and unification of economic legislation in a manner that would guarantee equivalent conditions for all nationals of the contracting countries working in agriculture, industry and other professions'. This implies that nationals of contracting states are afforded the same protections as Saudi nationals as regards agriculture, industry, and internal trade. It is interesting that the rights and privileges enjoyed by foreign investors under the Agreement are based on their nationality rather than religion. Thus, a Muslim from a country that has not ratified the treaty will not be offered the same protection as a Christian from a country that is a contracting state.

Saudi Arabia is also a member of the Gulf Cooperation Council (GCC) which comprises five other states (all members of the Arab League). Article 31 of the Economic Agreement signed by all GCC member provides that 'No Member State may grant to a non-Member State any preferential treatment exceeding that granted herein to Member States … [or] conclude any agreement that violates provisions of this agreement'. Furthermore, Article 3 requires all GCC member states to grant the same privileges to investors from the signatory states as those granted to local investors. In other words, they are required to treat investors from other GCC states like they were Saudi investors. It follows that foreign investors from GCC states are not required to comply with the provisions of the Foreign Investment Law. Also, they are not restricted by the negative list. Thus, they may own real estate in the two Holy Cities, carry out oil exploration, drilling and production, manufacture military equipment and devices, and provide tourist orientation and guidance services, amongst other services.

However, neither the GCC Agreement nor the Foreign Investment Law addresses the question whether a joint venture between a (non-Saudi) GCC national and a non-GCC national may be considered a foreign investor. Also, the rights and privileges enjoyed by foreign investors under the Agreement are based on their nationality rather than religion. Thus, all investors from outside of the GCC are treated the same (depending on whether there

[187] This Agreement is hereinafter referred to as the Arab Investment Agreement.

are other relevant treaties) regardless of their religion. Nonetheless, it is uncertain whether a investor from a non-GCC state would have opportunities to forum-shop, for instance by establishing a holding company in a GCC state in order to acquire the status of GCC foreign investor.

Saudi Arabia has also ratified the Agreement on the Promotion, Protection and Guarantee of Investments amongst the Member States of the Organisation of the Islamic Conference (OIC Agreement). Article 1(6) of the Agreement defines the 'investor' as 'the Government of any contracting party or natural or corporate person, who is a national of a contracting party and who owns capital and invests it in the territory of another contracting party'. This minimises the possibility of forum-shopping since the fact of establishing a holding company in a contracting state is not sufficient to qualify as an investor. The latter must have invested capital in the contracting state.

However, the Agreement places fewer restrictions on the powers of contracting states to limit foreign investment. Article 3 states that 'The contracting parties shall endeavour to open up various fields and investment opportunities to the capital on the widest possible scale, in such a way that may suit their economic conditions'. This implies that Saudi Arabia may open up various sectors to investors from other contracting states only in regard to its economic conditions and whether this will foster its economic and social development. Nonetheless, the Agreement contains a Most-Favoured Nation (MFN) clause in Article 8(1) that requires the contracting state to grant investors of other contracting states 'a treatment not less favourable than the treatment accorded to investors belonging to another State not party to this Agreement'. However, this must be within the context the investors' economic activity. Hence, since Saudi Arabia may restrict foreign participation in sectors on the negative list by invoking Article 3, it may grant favourable treatment to investors from GCC states in these sectors without violating the OIC Agreement. Moreover, Article 8(2) states that the provisions of Article 8(1) shall not apply to rights and privileges granted under an international agreement or any special preferential agreement. Thus, they do not apply to rights and privileges granted under the GGC Economic Agreement.

Also, foreign investors receive less protection under the OIC Agreement given that Article 10(2) recognises the right of the host state to expropriate investment 'in the public interest, without discrimination and on prompt payment of adequate and effective compensation to the investor in accordance with the laws of the host state'. Thus, although the rights and

privileges enjoyed by foreign investors under the Agreement are based on their nationality rather than religion, foreign investors relying on the Agreement must be well-versed in the *Shari'ah*. This is because the *Shari'ah* will determine whether their investment in Saudi Arabia can be expropriated in the 'public interest' and what constitutes 'adequate and effective compensation'. The importance of the *Shari'ah* is even more accentuated where none of the available MITs, as well as no relevant BIT is available to an investor. Such an investor may rely on the *Shari'ah*. As noted in chapter three, Article 81 of the Basic Law of Saudi Arabia requires all decrees, legislation and regulations to reflect the principles of the *Shari'ah*. As such, the decrees, legislation and regulations governing foreign investment in Saudi Arabia must promote free trade and liberalisation given that the *Shari'ah*, as shown in chapter 2 and 3, developed on the basis that Islamic societies were open to free trade.

However, reliance on the *Shari'ah* may require the foreign investor to go through several tribunals. Aspects of the disputes related to bills of exchange, cheques and promissory are decided by the Negotiate Instruments Committee; aspects related to banking and the use of financial instruments are decided by the SAMA Committee; aspects related to the change of commercial agents by foreign companies are resolved by the Conciliation Committee at the Chamber of Commerce; and aspects related to labour and employee relations are decided by the Preliminary Committee for the Settlement of Labour Disputes. Foreign investors may therefore be confused regarding the appropriate forum from which to seek local remedies.

Furthermore, it is uncertain which specific areas of Islamic law have been developed by local courts to protect foreign investment. This is because of the absence of precedents. Nonetheless, governments are required to protect foreign nationals due to *Dhimmi* which is a duty imposed on all Muslims to protect and secure non-Muslims. Also, private property rights are sacred under the *Shari'ah*.[188] However, the local remedies that foreign investors may seek are limited. Contracts containing the payment of *riba* will not be enforced under the *Shari'ah*. Also, foreign investors must exploit natural resources on behalf of the Islamic community that holds the ultimate right of property.[189] It must be noted that this is the Hanbali interpretation of the Qur'an and it applies in Saudi Arabia. It may be distinguished from the interpretations of other schools such as the Hanafi and Shafi which hold that mineral

[188] See Saba Habachy, 'Property, Right and Contract in Muslim Law' 62 Columbia Law Review (1962) 450, 458

[189] See Walied MH El-Malik, Mineral Investment under Shari 'a Law (Graham and Tortman, 1993) 54

ownership depends on land ownership.[190] The latter interpretation is more progressive and closer to what obtains in Western states. Thus, foreign investors are likely to receive better protection in Islamic societies that apply the opinions of all schools or those of the Hanafi and Shafi schools rather than those that apply only the opinions of the Hanbali school.

The foreign investor may also rely on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. This Convention provides a means of settling investment disputes between signatory states such as Saudi Arabia and nationals of other signatory States: the International Centre for the Settlement of Investment Disputes (ICSID). Saudi Arabia acceded the Convention in 1980.[191] Article 25(1) requires the disputing parties to consent in writing to submit disputes to ICSID. This may be done in the investment contract between the foreign investor and signatory state or in the investment treaty under which the foreign investment is made. Also, Article 25(4) provides that the contracting state is entitled to notify ICSID of any categories of disputes that it may not submit to ICSID. Thus, at the time of ratification, Saudi Arabia notified ICSID that it will not submit disputes pertaining to oil exploration and production, and acts of sovereignty.[192] It has been contended that Article 25(4) of the Convention is based on the 'act of state' doctrine which prevents the adjudication of claims or enforcement of awards that result from acts of a governmental nature carried out by a sovereign power within its territory.[193] The doctrine requires acts of a governmental nature to be distinguished from acts of a commercial nature. In reality, such distinction may be difficult in instances where the sovereign power enacts legislation nationalising the property of a foreign investor.

Nonetheless, there have been three claims submitted to ICSID against Saudi Arabia. The first claim was brought under the Germany and Saudi Arabia BIT of 1996.[194] The BIT provided for the submission of disputes to ICSID. The dispute arose from disagreements on payment for the construction of university facilities in Saudi Arabia. The dispute was settled by the parties and the proceeding was discontinued at the claimant's request. No information was provided on the terms agreed by the parties.

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[190] See Mike Bunter, 'The Islamic Sharia Law and Petroleum Developments in the Countries of North Africa and the Arabian Gulf' 1(2) Transnational Dispute Management (2004)

[191] Anthony Shoult, 'Privatisation and Economic Reforms' in Anthony Shoult ed, Doing Business with Saudi Arabia (3rd edn, GMB Publishing 2006) 111

[192] Ibid, 112.

[193] Laurence W Craig, William Park and Jan Paulsson, International Chamber of Commerce Arbitration (3rd edn, 2000) 671

[194] Ed Zublin AG v Saudi Arabia (ICSID Case No. ARAB/03/01)

The second claim was based on the BIT between South Korea and Saudi Arabia of 2002.[195] The dispute arose from the termination of an electric power plant and seawater desalinisation plant construction contract between the claimant and the government of Saudi Arabia. The claimant states that it received notice of the termination of the contract while negotiating an increase in the construction cost and an extension of the contract following the respondent's change of technical specifications. The decision is pending.

The third claim was brought under the BIT between France and Saudi Arabia of 2002.[196] The claim arose out of the alleged systematic harassment of the claimant by the government of Saudi Arabia and the destruction of the claimant's fashion retail business in Saudi Arabia allegedly caused by the harassment. The decision is pending.

What the above treaties and cases show is that the *Shari'ah* is neither an obstacle to free trade and liberalisation nor the protection of foreign investments in Saudi Arabia. Foreign investors are protected under the various MITs and BITs on the basis of their nationalities rather than religion. They are able to bring claims against the government of Saudi Arabia without regard to the *Shari'ah*. It is true that in the absence of a civil code in Saudi Arabia, the *Shari'ah* governs all transactions and foreign investors ought to have a good grasp of the relevant *Shari'ah* principles in order to gauge the extent to which their investments will be protected.

Nonetheless, parties may submit disputes against the government of Saudi Arabia to international tribunals depending on whether the former's investments are protected by a MIT or BIT. Also, foreign investors from GCC countries receive the same treatment as Saudi citizens, while investors from countries that have ratified the OIC Agreement and Arab Investment Agreement are afforded the same protections as Saudi nationals as regards agriculture, industry, and internal trade. Foreign investors from many other countries are also protected given that Saudi Arabia has signed 16 BITs and ratified 9 over the past two decades.[197] Also, the GCC is currently working on free trade agreements with the European Union and eleven countries in Asia.[198]

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[195] Samsung Engineering Co Ltd v Saudi Arabia (ICSID Case No. ARAB/17/43)
[196] MAKAE Europe SARL v Saudi Arabia (ICSID Case No. ARAB/17/42)
[197] See Jean Benoit Zegers, 'Kingdom of Saudi Arabia' (2018) Arbitration Guide: International Bar Association 1, 26
[198] Ibid.

5.7 Conclusion

This chapter has been intended to illustrate that, in order to prosper, the Saudi economy needs to diversify and encourage FDI. This has been clearly acknowledged by the Saudi government and, through the Vision 2030 plan, the government has attempted to tackle these issues. However, as this chapter also illustrates, historically (and debatably Vision 2030 itself) the Saudi government has failed successfully to tackle the fundamental issues that are holding back the proposed economic progress.

As far as FDI is concerned, the issues that the Saudi government is attempting to tackle in the short-term include privatisation of state-owned entities, social liberalization, stopping corruption, encouraging transparency and legal certainty and attempting to move away from state protectionism. However, all of these reform policies are subject to certain provisos. For example, the Kingdom is only willing to privatize certain industries and, although it is reduced in size, the Negative List continues to exclude certain industries from foreign investment. Another example can be an attempt to discourage state protectionism. The Monarchy's duties to its citizens include a duty to protect and without that the King's legitimacy is subject to debate. Protection includes a duty to provide gainful employment and to uphold individual rights, but this has to be balanced somewhat with the needs of the State. The example in the previous section is a perfect illustration of the failure of the Saudi government successfully to balance these two objectives, whereby austerity-based pay cuts to public sector employees was entirely revoked and backdated so that those employees were effectively not subject to any austerity measures. Although these measures are clearly beneficial to the public sector employee in the short-term, the fact that these high rates of wages are resulting in a budget deficit (not to mention that the output of the public sector is not in line with the investment, as evidenced by the failures within the highly-funded educational system) means that the Kingdom is not sufficiently protecting its citizens in the long-term as it is gambling on the price of oil and the success of the Vision 2030 plan in order to pay for these under-educated and under-skilled employees.

Some of the other issues being dealt with by the Saudi government in implementing the Vision 2030 plan are similar to the problems seen in other areas of Saudi law. For example, many of the issues in implementing effective foreign investment legislation are similar to the issues surrounding the successful implementation of dispute resolution and arbitration legislation. In both cases, it is arguable that the current legislation in Saudi Arabia is, in and

of itself, effective and comparable to the legislation in other GCC nations such as the UAE. However, it is in the application, implementation and enforcement of the legislation where the two Kingdoms differ. The UAE ranks 21st in the World Bank's Ease of Doing Business 2018 report, including 12th in the world for the ease of enforcing contracts (Saudi Arabia ranks 83rd) and 10th for registering property (Saudi Arabia ranks 24th).[199] As a result, the UAE is seen by foreign investors as a safer and easier destination within which to do business, as foreign investors have fewer reservations that excessive bureaucracy or a lack of administrative or legal transparency will limit their rights or prevent the foreign investors from enforcing them.

It remains to be seen whether the Vision 2030 plan will succeed in transforming the Saudi Arabian economy into the diversified and FDI-driven economy foreseen by its drafters. However, if it does succeed, it will not be because of the ambitious targets or the proposed Neom mega-city that are set out in the programme, but rather it will be as a result of evidence that the Saudi government are willing to provide the same rights to foreign investors and workers as are applicable to Saudi citizens and that the application and enforcement of these rights are transparent and that all business actors are able to compete with equal rights and standing before the law. It will require the government to ensure that legislation is enforced and not diluted once it is subject to review by the courts and that a transparent court process that provides the rationale for judicial decisions is prevalent. It will require that government ministries are efficient and transparent when dealing with foreign investors and that the requirements for investors wishing to set up companies and employ staff (whether Saudi or foreign national) are clear and available to all investors before any such investment takes place. It will also require an acceptance that change is gradual and cannot be completed overnight (or even by 2030).

The Saudi society of today is younger and more highly educated than its predecessors. It is consciously or unconsciously being shaped by the effects of globalisation and liberalisation. It is less likely to accept compromises. This youthful society has the power to shape Saudi society and its economy as it sees fit and it needs to be given the political, religious and economic freedom to do so without being subject to the mistakes of previous generations. It is important to note that the above reforms may be implemented within the Islamic legal framework. It is shown above that *Shari'ah* is not an obstacle to the protection of foreign

[199] World Bank, 'Doing Business in UAE' <http://www.doingbusiness.org/data/exploreeconomies/united-arab-emirates> accessed on 17 June 2018

investments in Saudi Arabia. The relevant pointer is the foreign investor's nationality rather than religion, given that the MITs and BITs ratified by Saudi Arabia require investors from other signatory states to be afforded certain rights and privileges. However, a major obstacle to the foreign investment in Saudi Arabia which concerns all foreign investors, is dispute resolution in general, and arbitration in particular. This will be discussed in more detail in the following chapters.

CHAPTER 6:
History of Arbitration in Saudi Arabia

6.1 Introduction

The law in Saudi Arabia in respect of international commercial arbitration has been steadily evolving since the modern Kingdom was founded. The discovery of oil in Saudi Arabia and the subsequent expansion of the associated commercial elements of the oil industry meant that the concept of international arbitration became increasingly prevalent as foreign businesses began to operate in the Kingdom.[1] Although early Muslims endorsed and practised arbitration, a number of high-profile arbitration decisions in the 1950s and 1960s that applied 'Western' arbitration principles in the Arab World resulted in international commercial arbitration becoming increasingly unpopular as a means of dispute resolution within the Kingdom.[2] As a result of this distrust towards arbitration, Saudi courts increasingly began to intervene in the arbitral process to consider the merits of cases, or to consider awards on public policy grounds.[3]

However, as this chapter sets out, the apparent rejection by the Saudi courts of international commercial arbitration had more to do with the perceived unfairness that resulted from the application of 'Western' arbitration models that highlighted the inherent differences between the Western model and the *Shari'ah* model. In addition, there was a perception in Saudi Arabia that international arbitrators were dismissive in respect of the use of *Shari'ah* law in international arbitration, which made it more difficult for the Kingdom to protect its rights.

In fact, as this chapter illustrates, the concept of commercial arbitration has long been a part of the culture of the Arabian Peninsula, stretching back beyond the birth of Muhammed to the pre-Islamic period.[4] This chapter traces the history of arbitration in the Arabian Peninsula from the pre-Islamic period through to the enactment of the New Arbitration Laws in 2012. It shows that far from being anti-arbitration, *Shari'ah* law, and the region that now makes up

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[1] George Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (2003) 24 University of Pennsylvania Journal of International Economic Law 905, 909.
[2] Ibid.
[3] For example, see Jadawel International v. Emaar Properties PJSC (2008) where the Board of Grievances effectively reversed an arbitration award made by the International Chamber of Commerce.
[4] Arthur Gemmell, 'Commercial Arbitration in the Islamic Middle East (2006) 5(1) Santa Clara Journal of International Law 173, 173.

the Kingdom of Saudi Arabia, both have a rich history of encouraging arbitration stretching back for well over a millennium.

This chapter then discusses the evolution of modern arbitration law in Saudi Arabia, by considering first the influence of civil law on the Saudi Arabian legal system and then the effects of international arbitration on Saudi Arabia, and especially the landmark ARAMCO case. This chapter discusses the fallout from the case and the restrictions it placed on the use of international commercial arbitration. This is followed by an analysis of the subsequent steps taken by Saudi Arabia to reintegrate commercial arbitration into domestic law as an effective dispute resolution mechanism through the enactment of legislation and the acceptance of some key international conventions. This allows the reader to have a greater background into the evolution of commercial arbitration in Saudi Arabia that has ultimately led to the passing of the New Arbitration Law in 2012. The provisions of this law are critically examined in chapter 7.

This chapter therefore attempts to answer the research question of whether the *Shari'ah* is sufficiently flexible to accommodate modern international arbitration practices. It is also a first step towards addressing the question of how the Saudi Arabian model can be rendered into a more favourable model for the settlement of disputes between foreign investors and the government of Saudi Arabia.

6.2 Arbitration In The Pre-Islamic Period (The Age Of *Jahiliyya)*

Disputes in Arabia before Islam were predominantly resolved through revenge. Ja'far ibn Abi Talib, who was the head of the Muslim delegation sent by the Prophet Mohammed to the King of Abyssinia Negus, declared '*O King! We were a people of ignorance…the strong among us would devour the weak*'[5]. It is believed that the reason of this ignorance (*Jahiliyyah)* resulted from the lack of formal dispute settlement mechanisms.In the pre-Islamic period, the Arabian Peninsula was predominantly made up of small communities and various tribal groups, each of whom had its own territory.[6] The tribes were bound together by

[5] Attributed to the eponym of the Maliki school, Abd al-Malik b, cited in Hish┐m, Al-Srah al-Nabawiyyah, 1: 448–49. The following is reported in a Hadith of the Prophet s.a.w:: "Perhaps you should go to the land of Abyssinia, for there is a king there under whom no injustice is done to anyone and it is a land of truth and righteousness, remain there until Allah provides you a relief from your present circumstances." For an account of this period see Mohammed Shukri Hanapi, 'From Jahiliyyah To Islamic Worldview: In A Search Of An Islamic Educational Philosophy', (2013) 3(2) International Journal of Humanities and Social Science 213

[6] Sadir Kiralzi, Conflict and Conflict Resolution in the pre-Islamic Arab Society (Islamic Studies 2011) 32.

common interests and unwritten rules, with enforcement of the law typically at the behest of the injured party.[7]

According to Al-Ramahi, tribal law was built on two basic principles:

> the principle of collective responsibility; and (2) the principle of retribution or compensation. The objective of tribal law is not merely to punish the offender but to restore the equilibrium between the offending and the offended families and tribes.[8]

Collective responsibility in this context means that the tribe was responsible for the actions of the individual, and contrastingly, any attack on an individual was an attack on the tribe.[9] As a result, disagreements between individuals could quickly escalate into an inter-tribal war if a dispute was not resolved quickly, and in a manner acceptable to both parties.[10]

6.2.1 Tahkim

The preferred method of resolving disputes between individuals and between tribes in the pre-Islamic period was through the use of a form of arbitration known as *tahkim*, illustrating that arbitration was already a concept that was familiar to Arabs before the emergence of Islam.[11] In pre-Islamic Arabic culture, tradition provided that societies should try and resolve disputes internally before having to turn to litigation as a last resort.[12] As a result, it is perhaps unsurprising that arbitration became a fundamental mechanism of pre-Islamic society as it allowed disputes to be resolved privately within the collective nature of the society.[13]

Although the structures are different, the pre-Islamic concept of *tahkim* shares many of the same qualities as modern international arbitration practices, including the following:

a) Freedom to submit disputes to arbitration;
b) Requirement to identify the issue at the time the dispute arises;

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[7] Aseel Al-Ramahi, 'Sulh: A Crucial Part of Islamic Arbitration' (2008) LSE Law, Society and Economy Working Papers 1, 3.
[8] Ibid
[9] Ibid.
[10] Ibid, 5
[11] Torki Al-Shubaiki, The Saudi Arabian Arbitration Law in the International Business Community: A Saudi Perspective (London School of Economics 2008) 2-3.
[12] Abdulrahman Yahya Baamir, Saudi Law and Judicial Practice in Commercial and Banking Arbitration (Brunel University 2008) 45.
[13] Ibid.

c) Freedom to agree on the time and location of the arbitration; and
d) Freedom to nominate an arbitrator of their choice.[14]

However, there were also a number of fundamental differences between *tahkim* and Western arbitration practices. For example, *tahkim* was considered to be a conciliatory practice and therefore encouraged free will between the parties in order to enforce the award, which contrasts with the Western practice of arbitrators being permitted to issue and enforce binding awards on parties.[15]

6.2.2 The Concept of *Hakam*

Each tribe had its own ruler (the sheikh) who was responsible for matters relating to his own tribe, including arbitrating in the event of internal disputes within his tribe.[16] However, the sheikh did not always enforce his powers of arbitration and, in the event of a dispute, the parties could also mutually agree to the appointment of an individual to settle a dispute, who would be a member of the tribe who was considered to be worthy of arbitrating based on his favourable reputation and high personal qualities such as his tribal knowledge or reputation for impartiality.[17] This individual, who was generally a volunteer and had no judicial authority per se, was referred to as the *Hakam* – a ruler or judge.[18] Arab historian Al-Ya'quobi described the concept as follows:

> As a result of not having religions or laws to govern their lives, pagan Arabs used to have arbitrators to settle their disputes. So when they have a conflict regarding blood, water, grazing or inheritance they used to appoint an arbitrator who carries the characters of honour, honest, older age and wisdom.[19]

Often, a *kahin* (soothsayer) would be designated as the arbitrator within a tribe (which was as a result of a belief that the decisions of *Hakams* were based on divine relation, which was an important factor in ensuring enforcement),[20] but it was also common that certain families would gain a reputation for impartiality, and the role of *Hakam* would pass down through

[14] Ibid, 47
[15] George Khoukaz, 'Sharia Law and International Commercial Arbitration: The Need for an Intra-Islamic Arbitral Institution' (2017) 1 Journal of Dispute Resolution 181, 188.
[16] Kiralzi (n 6) 32.
[17] Nathalie Najjar, Arbitration and International Trade in the Arab Countries (Brill's Arab and Islamic Laws 2017) 41, 45
[18] Gemmell (n 4) 173.
[19] Baamir (n 12) 45.
[20] Majid Khadduri and Herbert Liebesny, Law in the Middle East (Middle East Institute 1955) 236–278.

family members as a type of honorary title.[21] Although generally male, there is evidence to suggest that a number of women also acted as arbitrators at the1 time.[22]

The role of the *Hakam* was to administer justice through conciliation or peacemaking (known as *sulh*). Schact refers to a *Hakam* as 'a lawmaker, an authoritative expounder of the normative legal custom or sunna'.[23] The *Hakam* had the freedom to choose whether to arbitrate or not.[24] However, as the *Hakam* was not a judge or an official appointee, he was not in a position to enforce his pronouncements. For that reason, if the *Hakam* agreed to arbitrate, the parties would be required to provide a type of security or guarantee to ensure that they would abide by the decision of the arbitrator (which often took the form of property or hostages).[25] If they refused to abide by the decision of the arbitrator, the guarantee would be forfeited to the other party, who also may have been put under a 'curse' by the *kahin* for their failure to abide by the ruling.[26] Al-Shubaiki suggests that:

> …there were several reasons for making the losing party accept judgment and carry it out. For example, the fact of not executing the award would affect his reputation which might lead, if it became known, to the refusal of other arbitrators from the settlement of any dispute to which he was party. Consequently, we can say that the losing party was subject to the ruling of arbitration under the authority of tribal influence and customs, or the authority of public opinion, or fear of fighting, which could take place if the judgment was not accepted.[27]

There is evidence that some arbitrators would even agree to make the necessary payments themselves in order to ensure that disputants agreed to *sulh*.[28] Arbitrators tended to attempt to convince the offender that he had wronged the other party, as well as ensuring that any awards made were easy to follow.[29]

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[21] Najjar (n 17) 41.
[22] See Mohammed R Othman, Judicial Regulation in Islamic Jurisprudence (Al Obekan 1989) 47-48.
[23] Joseph Schacht, An Introduction to Islamic law (Clarendon Press 1964) 7.
[24] Najjar (n 17) 45.
[25] Gemmell (n 4) 173.
[26] Najjar (n 17) 41.
[27] Al-Shubaiki (n 11) 4.
[28] El-Tayib, 'The Ode (Qasidah)', in The Cambridge History of Arabic Literature: Arabic literature to the End of the Umayyad Period (Cambridge University Press, 1983).
[29] Al-Ramahi (n 6) 5.

As it was an informal and voluntary role, there were no specific rules or regulations applicable to *tahkim* at that time. In addition, there was no specific place or court in which arbitrations would take place; often the parties would be required to travel to the *Hakam*'s home to obtain his services. In addition, there is no evidence of whether a *Hakam* received any payment for his role, with the literature appearing to suggest that being appointed as a *Hakam* was considered to be an honour and, as *Hakams* tended to come from noble and wealthy families, there were no requirements to pay them for their services.[30]

6.2.3 Procedure of arbitration

Under the customs of *tahkim*, the claimant was required to prove his case, with the respondent basing any defence on his oath, which meant that if the claimant was unable to prove his case the respondent would be asked to swear an oath denying the claim.[31] If the respondent successfully swore his oath the claim would fail.[32] This practice continues to form a base of the arbitration procedure in all Muslim countries today.[33]

As there was no specific legislation on the role of a *Hakam*, Al Afgani suggests that *Hakams* in pre-Islamic Arabia adjudicated on a wide array of matters, including 'inheritance, possession, or criminal matters such as murder, robbery or adultery'.[34] Furthermore, the arbitrators had powers beyond the traditional legal sphere, but extended to disputes about ranks of nobility within a tribe or family.[35]

In terms of commercial arbitration, evidence would suggest that pre-Islamic Arabian society utilised the services of '*souk* judges' or marketplace arbitrators, who would arbitrate on commercial matters.[36] The *Okaz* market, the largest market in the pre-Islamic Arabian Peninsula, had *Hakams* that settled trade disputes as well as larger disputes between noble families who travelled to the market solely to obtain the services of the *Hakam*.[37]

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[30] Othman (n 22).
[31] Noel J Coulson, A History of Islamic Law (Edinburgh University Press 1964) 10.
[32] Al-Ramahi (n 6) 6.
[33] Baamir (n 12) 54.
[34] See, S Al-Afgani, The Arab Souks (Al Maktabat Al Arabia Publications 1996), cited in Al-Shubaiki, (n 10) 4.
[35] Al-Shubaiki (n 11) 4.
[36] ibid
[37] Ibid.

Muhammed himself acted as a *Hakam* on a number of occasions before and after his ascent to Prophethood.[38] Also, the *Qur'an* designated Muhammed as an adjudicator:

> We sent down to thee the book of truth, that thou mightiest judge between men, as guided by Allah: so be not used as an advocate by those who betray their trust. (Qur'an 4: 105).

Tradition tells the story of a flood in Mecca that resulted in the *Al-Kabh*[39] being destroyed and the revered Black Stone being displaced.[40] Following this displacement, a dispute arose between the two tribes of Kuraesh, both of whom wished to have the honour of replacing the Black Stone to its original position.[41] With no agreement forthcoming, there was a risk of a tribal war breaking out. However, before war could begin, it was suggested that *tahkim* could be utilised in order to resolve this dispute. As Muhammed already had a reputation for being a trustworthy individual, the two tribes agreed to appoint him as *Hakam*.[42] Muhammed was able to successfully resolve the dispute by suggesting that a piece of fabric (some sources suggest that it was his own robe)[43] be used to carry the Black Stone to the correct position, with each corner of the fabric being held by a member of each tribe meaning that both tribes were able to say that they had replaced the stone. Furthermore, Abu-Nimer provides examples of Muhammed submitting to *tahkim* when he himself was involved in a dispute with a Jewish tribe called Banu Qurayza.[44] These examples, according to Schacht, suggest that Muhammed's commitment to the arbitration procedure provided him with additional authority when he subsequently became a political and military leader.[45]

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[38] See Coeli Fitzpatrick and Adam H Walker, Muhammed in History, Thought and Culture: An Encyclopedia of the Prophet of God (Vol 1, ABC-CLIO 2014) 281; Joseph Schacht, 'Pre-Islamic Background and Early Development of Jurisprudence' in Majid Khadduri and Herbert J Liebesny (eds), Origin and Development of Islamic Law (Lawbook Exchange 2008) 30.

[39] According to Islamic tradition, Al-Kabh is the most sacred site in Islam, considered to be the House of God.

[40] See Reyadh Mohamed Seyadi, The Effect of the 1958 New York on Foreign Arbitral Awards in the Arab Gulf States (Cambridge Scholars Publishing 2017) 51.

[41] Al-Ramahi (n 6) 6.

[42] Naajar (n 16) 41-42.

[43] Ibn Hisham, Seerat Ibn Hisham (Ministry of Islamic Affairs, Saudi Arabia) <http://www.al- islam.com>, accessed 28 June 2018.

[44] Muhammed Abu-Nimer, 'A Framework for Nonviolence and Peacebuilding in Islam' (2000-01) Journal of Law & Religion 217, 247.

[45] Schacht (n 38) 10-11.

The concepts of arbitration from the pre-Islamic period, as set out above, were adopted by Muhammed based on the assimilation of local customs and practices through *Urf* and formed an integral part of Islamic law, which this chapter will consider next.[46]

6.3 Arbitration Under Islamic Law

6.3.1 Qur'anic Authority for Arbitration

Perhaps unsurprisingly given its importance in pre-Islamic society, *tahkim* continued to be practised in the Arabian Peninsula in a manner similar to its tribal roots subsequent to the foundation of Islam. It is cited in the *Qur'an* on a number of occasions. Although the *Qur'an* does not provide for specific rules on arbitration, it does appear to guide and direct followers towards the use of it.[47] For example, in respect of marriage the *Qur'an* provides:

> If ye fear a breach between them twain (i.e. husband and wife) then appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their conciliations, for God hath full knowledge and is acquainted with all things.[48]

The appointment of two arbitrators was common practice in early Islamic community (and is still encouraged by the *Shafi* school of interpretation), with the proviso that any such arbitrations would now be required to be based on the laws set out in the *Qur'an* and the *Sunnah*.[49] Indeed, the schism between Shi'a and Sunni occurred only after attempts at arbitration which are said to have failed as a result of one of the *Hakams* not relying on the *Qur'an* and the *Sunnah* and therefore making their decision to depose Ali Ibn Abi Talib as Caliph invalid, which indirectly resulted in Ali's assassination and the subsequent split between the followers of Sunni and the followers of Shi'a.[50]

Another example from the *Qur'an* also cited as promoting arbitration is the following:

> You should always refer disputes to God and to his Prophet. And obey Allah and his messenger; And Fall into no disputes, lest you lose heart and your power to

[46]Baamir (n 12) 1.
[47] Gemmell (n 4) 174.
[48] Qur'an 4:35.
[49] Majid Khadduri, War and Peace in the Law of Islam (John Hopkins Press 1955) 231-238.
[50] Sayen (n 1) 927.

> depart; and be patient and persevering, for Allah is with those who patiently persevere.[51]

This passage indicates that in the event of a dispute, it would be *Allah*, and Muhammed as his Prophet, that would act as arbitrators. In practicality, the *Sunnah* indicates that Muhammed continued to act as a *Hakam* himself after becoming the Prophet. The reasons for this were in some sense practical, as in order to create a unified nation, Muhammed required that there be only one recipient of divine revelation, who was Muhammed himself.[52] By appointing himself as a *Hakam*, Muhammed was able to position himself as a decisive and honest leader.[53] This positioning of himself as a *Hakam* suggests that there was no intent on behalf of Muhammed to develop a dispute resolution mechanism that was beyond political power.[54] Indeed, the traditional power of *Hakams* was a threat to Muhammed after he became the Prophet and began to administrate the Caliphate. The reason for this was that *Hakams* continued to rely on customary law which, despite being the source of much of the arbitration principles in classical Islam, was in many ways contrary to the Islamic reforms being set out by Muhammed.[55] In addition, the *Hakams*, especially the soothsayers, relied on divine revelation as part of making their judgments, which was at odds with the teachings of Muhammed that Allah was the one true God.[56]

Although Islam changed the nature of arbitration in Arab society, it still contained many concepts that would have been familiar to pre-Islamic *Hakams*.[57] For example, under *Shari'ah* law, arbitration continued to be a voluntary process and Muhammed was reluctant to impose judgments when it came to disputes, preferring to first request that the parties mediate in order to resolve their disputes and, in the event that the mediation was unsuccessful, he would generally propose *sulh*, with a judgment only being imposed as a last resort.[58] The concept of *sulh* is discussed in the next subsection.

[51] Qur'an 4:59.
[52] Sayen (n 1) 924.
[53] Khoukaz (n 15) 187.
[54] Sayen (n 1) 924.
[55] Khadduri and Liebesny (n 38)
[56] Ibid.
[57] Sayen (n 1) 924-925.
[58] Baamir (n 12) 53.

6.3.2 The Concept of Sulh

The concept of *sulh* under Islamic was also a remnant from pre-Islamic arbitration customs, and indeed is considered to be an important factor in all dispute resolution mechanisms within Islam, with the *Qur'an* encouraging parties to use *sulh* in dispute resolution.[59] The *Qur'an* states that:

> If two parties among the Believers fall into a quarrel, make ye peace between them…make peace between them with justice, and be fair: For God loves those who are fair and just.[60]

As previously noted, the Prophet implemented *sulh* when acting as a *Hakam*, on the basis that legal proceedings were not won by the party who was best able to state his claim, but the party who was the most honest. According to al-Ramahi, Muhammed believed that the trial process 'can be tainted and subverted by the imperfect nature of man therefore, it should be avoided when possible'.[61] This was expanded upon by Al-Shafi, who stated his preference for judges allowing parties to have a number of days to attempt to conciliate before making any judgments.[62]

Although under *Shari'ah* law, *sulh* and *tahkim* are separate concepts, the *Qur'anic* authority for both stem from similar sources and they are generally quite similar, with the following differences:

a) Sulh is a settlement between parties that does not necessarily require the intervention of third parties (although the parties have the option to do so), whereas tahkim requires the appointment of a third party;

b) Sulh is an agreement reached before the court, whereas tahkim may bind the parties without any court intervention;

c) Sulh can only be used in respect of existing disputes whereas tahkim can be used in respect of both existing and prospective disagreements.[63]

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[59] Khoukaz (n 15) 187.
[60] Qur'an 49:9.
[61] Al-Ramahi (n 7) 11.
[62] Muhammad ibn al-Shafi, al-Umm (Dār al-Kutub al-ʾIlmiyya 1993) 6:312.
[63] Al-Ramahi (n 7) 12.

The *Qur'an* allows for both *sulh* and *tahkim*, with the parties being entitled to agree on their preferred approach. According to Al-Ramahi:

> This shows the flexible and evolutionary nature of *Shari'ah* which allows the parties to choose and adapt the process to suit them and their dispute.[64]

Today, *sulh* continues to be influential in Saudi Arabia. The principle of amicable settlement was promoted by early Islamic scholars on the basis that it was more likely to produce a settlement of a dispute, rather than a judgment.[65] According to Sayen:

> …the possibility of judgment, whether by the *Hakam* or a qadi, or both, was left open mainly to spur the parties to reach an agreed settlement. It may have been considered desirable for a *Hakam*'s judgment to be difficult to enforce, because this would constitute added incentive for the parties to settle.[66]

However, it is accepted that in certain instances *sulh* would not be appropriate, such as where the contract has not been performed by one party, or where one party has not acted in good faith.[67] Similarly, *sulh* would not be appropriate where the two parties are entirely at odds with each other's position, as there would unlikely be any common ground on which all the arbitrators can agree.[68]

6.4 Four Schools Of Interpretation

Despite Muhammed's and the *Qur'an*'s approval of the dispute resolution mechanisms of *tahkim* and *sulh*, it did not result in the smooth transition of these concepts into *Shari'ah* law.[69] Although the four major schools of *fiqh* all accepted the concept of *tahkim*, it was classified under the laws of agency rather than the laws of contract (an approach still accepted by the *Hanafi* school).[70] The reason for this is that *takhim* began with attempts at *sulh*.[71] As the arbitration procedure was conciliation rather than judgment, it was important

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[64]Ibid, 13.
[65] Sayen (n 1) 947.
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Gemmell (n 4) 174.
[70] Sayen (n 1) 927.
[71] Sulh is a settlement that is based on compromise negotiated by the parties with the help of an independent third party. See Al-Ramahi (n 7) 2-3; Khoukaz (n 15) 187-188.

under *Shari'ah* law that the *Hakam* was considered to be an agent of the parties rather than as an individual that would impose judgment.[72] As stated by Sayen, the *Hakam's* role was:

> …to persuade rather that coerce the parties and generally to maintain a cooperative and friendly atmosphere conducive to an amicable settlement, the same atmosphere that ought to be maintained between principal and agent.[73]

However, although the *Hakam*'s role was persuasive rather than coercive, the decision of a *Hakam* was still required to provide the same standards to their role as that of a judge.[74] This resulted in an arbitration system which, from a Western point of view, may be interpreted as resembling conciliation up to a certain point, but also bearing a resemblance to litigation.[75] This interpretation of *tahkim* lies in stark contrast to the Western concept of arbitration in respect of enforceability, and is perhaps unsurprisingly an area that traditionally has led to conflict arising between the Eastern and Western schools of thought.[76] This is largely because *tahkim* does not result in a binding award as it is the case with Western arbitral awards.[77] *Tahkim* diverged from the Western concept of arbitration when Muawiya, a long-time opponent of the Prophet's, became Caliph of the Umayyad Dynasty.[78] Muawiya required the approval of a judge (*qadi*) before an arbitrator's decision could be enforced. However, the enforceability of the *tahkim* award often depended on the arbitrators' credibility.[79] Also, the process relies on the willingness of the parties to submit disputes when they arise rather than at the time of concluding the contract.[80] It must be noted that the Prophet favoured *tahkim* (although a pre-Islamic concept), abided by the decision of an arbitrator and in some cases acted as a *Hakam*.[81]

Nonetheless, each of the four schools of interpretation emphasised different aspects of the system, especially regarding the disputes that fall within the scope of arbitration and the binding nature of the arbitral award.[82] As such, it is important to refer to each of the schools

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[72] Sayen (n 1) 927.
[73] Ibid, 932
[74] Baamir (n 12) 49.
[75] Sayen (n 1) 923.
[76] Sayen (n 1).
[77] Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 Loyola International and Comparative Law Review 565, 589-590.
[78] Khoukaz (n 15) 188.
[79] Ibid.
[80] Sayen (n 1) 930-931.
[81] Khouhaz (n 14) 188.
[82] Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21 New York International Law Review 1, 20-36., 32-34

in order to obtain a fuller understanding of *tahkim*.[83] Although the interpretation of the *Hanbali* school is of the most relevance to this thesis, it is important to note that legislators and judges in Saudi Arabia are allow to apply legal principles or opinions of any of the other schools if it is deemed appropriate in contemporary circumstances (which is advantageous for parties being arbitrated under *Shari'ah* law as any opinion can be applied without violation of the law) and where the opinion of the *Hanbali* school would 'cause strain and incompatibility with the public interest [maslahat al-umum]'.[84] For these reasons, a brief overview of the approach taken by each of the four schools of interpretation is set out below.

6.4.1 Hanafi School

The *Hanafi* school legitimises arbitration as a dispute resolution mechanism on the basis that it 'serves an important social need and it simplifies disputes'.[85] When considering arbitration, the *Hanafi* school tends to emphasise the importance of the contractual nature of arbitration, and promotes the view that arbitration should be considered to be conciliation between the parties as opposed to a judgment against one party.[86] *Hanafi* scholars tend to promote reason and equitable principles, with decisions being enforced through the binding nature of a contractual agreement to accept the decision of the arbitrator.[87] Thus, the arbitral award is similar to the parties reaching a compromise, implying that the enforcement of the award depends on the willingness of the parties to abide by the arbitrator's decision.[88] This is because they contend that the awards are 'characterised by the use of subjective opinions (*ra' y*)'.[89] Recourse is made to *ra' y* in the absence of direct guidance from the *Qur'an*.[90] As such, it is logical that a decision that is based on *ra' y* has lesser force than the decision of a judge who applies rules enshrined in the *Qur'an*. A party may only be bound by the arbitral decision in the same way as a party is required to fulfil a promise in a contract.[91] This school also holds that the arbitrator should be known to the disputants to increase the likelihood of conciliation.[92] It has been noted that they are the most likely of all the schools to recognise an

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[83] Samir Saleh, Commercial Arbitration in the Arab Middle East (Hart Publishing 1984) 452.
[84] Soliman A Solaim, Constitutional Organization in Saudi Arabia (University Microfilms 1970) 96., cited in Sayen (n 1) 938.
[85] Al-Ramahi (n 7) 15
[86] Gemmell (n 4) 175.
[87] Zayed Alqurashi, 'Arbitration under the Islamic Sharia' (2004) 1 Transnational Dispute Management. <https://www.transnational-dispute-management.com/article.asp?key=43>, accessed 28 June 2018.
[88] Wakim (n 82) 32.
[89] Saleh (n 83) 8.
[90] Schacht (n 23) 37.
[91] Gemmell (n 4) 175.
[92] Saleh (n 83) 167.

award granted by a non-Muslim arbitrator, since the *Hanafi fiqh* does not regard arbitration by non-Muslims as contrary to Divine law.[93]

6.4.2 Maliki School

The *Maliki* school suggests that arbitration is one of the highest forms of dispute resolution.[94] The *Maliki* school relies on the use of consensus (*Ijma*) between scholars, customs, the *Qur'an*, the *Sunnah* and *Qiyas* (i.e. reasoning by analogy).[95] It also relies on the customary practices of the people of Medina as evidence of how the *Shari'ah* should be applied.[96] The *Maliki* scholars also permit one party to the dispute to act as arbitrator on the basis that cases are decided by an arbitrator based on his conscience.[97] Although this diverges from international ethical standards that require arbitrators to be independent and free from bias, it shows that the Maliki school prioritises the resumption of harmonious relations.[98] However, they also diverge from international ethical standards by maintaining that an arbitrator may not be removed once arbitration proceedings have commenced.[99] This implies that a disputant cannot apply to the court or institution vested with the appropriate authority to remove an arbitrator without waiting for the arbitral award, even where there are justifiable doubts as to the arbitrator's impartiality or the arbitrator does not possess the requisite qualifications or is physically or mentally incapable of conducting the proceedings.[100] However, arbitration awards under this school can be overturned by a judge if the latter considers the award to be 'flagrantly unjust'.[101]

It must be noted that arbitration, for this school is the highest form of dispute resolution and thus preferable to court rulings. This is because it is seen as a more pragmatic way of establishing harmonious relations than litigation.[102] Also, their faith in the integrity of the arbitrator, who is ruled by his conscience, is so strong that they recommend that even a party

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[93] Bamir (n 12) 35, 84.
[94] Al-Ramahi (n 6) 15
[95] Gemmell (n 4) 175.
[96] Irshad Abdal-Haqq, 'Islamic Law: An Overview of Its Origin and Elements' in Hisham M Ramadan (ed), Understanding Islamic Law: From Classical to Contemporary (AltaMira Press 2006) 27.
[97] Abdul Hamid El-Ahdab, Arbitration with the Arab Countries (Springer Netherlands, 1999).
[98] Andrew Smolik, 'Effect of Shari'a on the Dispute Resolution Process Set Forth in the Washington Convention' (2010) 1 Journal of Dispute Resolution 151, 156.
[99] Alquarashi (n 87).
[100] See for example, the power of the court to remove an arbitrator under section 24 of the Arbitration Act 1996 of the UK.
[101] Al-Ramahi (n 7) 15.
[102] Gemmell (n 4) 111.

to a dispute may be designated as an arbitrator.[103] The school is also likely to recognise arbitral awards from non-Muslim courts unless they are contrary to *Shari'ah* law.[104]

6.4.3 Shafi School

Arbitration under the *Shafi* school is based on the methodology developed by Muhammad ash-Shafi.[105] He stated that it was preferable for the judge to extricate himself from the case and order the parties to attempt *sulh* for one or two days in order to determine whether the dispute may be settled through negotiation or conciliation. Where the parties continue to disagree, the judge may then adjudicate between them.[106] The school shares elements with both the *Hanafi* and *Maliki* schools, and provides for a balance between logic and tradition. Just like the *Maliki* school, they rely on traditional practices such as that of referring disputes to Caliphate Umar ibn al-Khatt'ab who arbitrated in many disputes.[107] Hence, it is described as eclectic.[108] *Shafi s*cholars interpret principles from both the *Qur'an* and the *Sunnah*, but do not consider *Qiyas* when it comes to arbitration.[109] In addition, the *Shafi* school allows the parties the freedom to choose any ordinary person to act as arbitrator, regardless of whether they have any experience.[110] However, as a result of the view that an arbitrator is inferior to a judge, arbitrators under the *Shafi* school may be removed by the disputants at any time up to the point that the award is made.[111]

Moreover, the arbitrator is not a conciliator as in the *Hanafi* School but an adjudicator who assesses the facts.[112] The arbitrator must be an impartial judge of the evidence and how it relates to *Shari'ah* law. However, the fact that arbitrators are inferior to judges implies that their findings are liable to be overturned if they are found to be not compliant to *Shari'ah* law. In this school, the arbitration process is secondary to the legal process. The arbitrator must not substitute himself for the judge. Also, there is less emphasis on conciliation[113] and there is no agreement on the scope arbitration. Some state that arbitration should not deal

[103] AM Al-Kenain, Altahkeem fee asshari'a Alislamiya; Altahkeem Al'am wa Altahkeem ind Asshiqaq Alzaouji (Dar Al Asima Lelnashr wa Altaouze' Publishers, 2000) 61.
[104] Bamir (n 12) 85.
[105] Irshad Abdal-Haqq (n 96) 27.
[106] Al-Ramahi (n7) 11-12.
[107] Ibid, 15.
[108] Gemmell (n 4) 175-176.
[109] Saleh (n 82).
[110] Al-Ramahi (n 7) 15.
[111] Gemmell (n 4) 176.
[112] Ibid.
[113] Bamir (n 12) 82.

with criminal matters.[114] However, all members of the *Shafi* school agree that arbitration is important in commercial disputes.[115] Despite the fact that the *Hanbali* school is the most conservative, the *Shafi* school is perhaps the most inflexible as regards the enforcement of contracts made in non-Muslim legal countries and awards granted by non-Muslim arbitrators.[116]

6.4.4 Hanbali School

The *Hanbali* school is generally the most conservative as regards the enforcement of the principles of the *Shari'ah*.[117] Saudi Arabian law is based on the school's exegesis of the *Qur'an* and the *Sunnah*. Thus, it is the most relevant in this study. The school accepts that the *Sunnah* is fully authentic, which is unique among the four schools.[118] As it relies on the *Qur'an* in full, it does not require any references to reasoning or logic when reaching decisions.[119] However, the *Hanbali* school is also considered to be very flexible in relation to commercial matters, with *Hanbali* scholars suggesting that contractual clauses are valid so long as they do not contradict the overall purpose of the contract.[120] According to the influential classical *Hanbali* scholar Ibn Taymiyah, any contractual clause entered into does not even have to be relevant to the contract in order for it to be enforceable.[121] Also, Al-Sanhury contended that Ibn Taymiyah's interpretation of contract law may be understood as follows:

> …the Hanbali doctrine has come quite close to the Western doctrines: any clause which accompanies the contract is valid unless it is impossible or contrary to public order or good morals. Said clause is then set aside but the contract remains valid unless this clause condition is the determining motive of the contract. In this case, the contract is also set aside.[122]

[114] See Mutasim Ahmad Alquda, 'The Impact of Shariah on the Acceptance of International Commercial Arbitration in the Countries of the Gulf Cooperation Council' (2017) Journal of Legal, Ethical and Regulatory Issues 1, 1-17.
[115] Ibid.
[116] Gemmell (n 4) 174.
[117] Smolik (n 98) 156.
[118] Saleh (n 83).
[119] Ibid.
[120] Baamir (n 12) 17.
[121] Ibid.
[122] A. Al-Sanhury, The Sources of Trust in the Muslim Fiqh (Maktabat Alhalabi Alhoquoqiyah 1998) 102.

Under the *Hanbali* school, arbitration is considered to be litigation, meaning that an arbitrator must have the same qualifications as a judge and, as a result, any award granted by the arbitrator is binding upon both parties, and any award made by an arbitrator may not be appealed by either party (*res judicata*).[123] In practice, prior to the enactment of the New Arbitration Laws in 2012, Saudi Arabia provided the parties to arbitration with a list of arbitrators, the use of which was encouraged but not required.[124] Nonetheless, given that the parties are required to appoint as arbitrator a person that has the same qualifications as a judge, disputants could hardly find other qualified persons not mentioned in the list.[125]

The *Hanbali* school is the strictest school with regard to compliance with the *Shari'ah* since it emphasises uncompromising literalism, requiring arbitrators to adhere to the wording of the *Qur'an* and the *Sunnah* and avoid analogies.[126] Also, although the arbitration award is binding to the same extent as a judge's decision, it still requires ratification by the court. As such, the court must investigate the validity of the arbitration process, since without judicial review, the arbitral award may be unenforceable.[127] The court ensures that the arbitration proceedings were in compliance with the *Shari'ah* and the arbitrator is a Muslim man.[128] It must be noted that the *Hanbali* school is not a monolith. This is especially the case with regard to the scope of arbitration.[129] There are some who believe that arbitration should only be restricted to commercial and family matters. However, Ibn Taimyiah believed that it could be applied to all areas including criminal law.[130] However, some scholars argue that an arbitrator should not be involved in commercial disputes.[131]

The *Hanbali* school is flexible when it comes to arbitrating a dispute where one of the disputants is a non-Muslim.[132] Also, awards granted in non-Islamic jurisdictions are recognised as long as they are not inconsistent with the *Shari'ah*.[133] Recourse to a non-Muslim court, in contractual disputes is allowed only as long as there are no non-Islamic

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[123] Gemmell (n 4) 176.
[124] El-Ahdab (n 98).
[125] Ibid.
[126] Muhammad Alzali Sirat Alimam Ahmad bin Hanbal (1st edn, Almaktab Alislami Lel Tiba'a wa Annashr 1997) 76.
[127] Ibid.
[128] Ibid.
[129] Baamir (n 12) 84.
[130] Al-Ramahi (n 7) 78.
[131] G. Sfeir, 'The Saudi Approach to Law Reform',, (1988) 36American Journal of Comparative Law, 729, 734
[132] Baamir (n 12) 87.
[133] See generally, Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' 2 Arab Law Quarterly (1987) 271, 277-288

clauses such as *riba*.[134] Furthermore, there are decisions of *Hanbali* judges that recognise the right of non-Muslims to arbitrate at least in commercial matters, outside Muslim territories.[135] It may therefore be argued that the *Hanbali* stance on the arbitration process is pragmatic.[136]

Although the four schools of interpretation set out above illustrate the range of interpretation that Muslim scholars have had in respect of arbitration, there is uniform and unequivocal agreement that the principle of arbitration itself exists under *Shari'ah* law, whether it is to be viewed as a form of conciliation or as a form of judgment.[137] This has implications for the role of the *Hakam*, with the modern interpretation of a *Hakam* having obtained different meanings, depending on the school being applied. In one sense, it refers to a person that is authorised to settle differences between parties by making suggestions and assisting parties in reconciling, while in another sense it can refer to an individual with authority to bind parties to a decision.[138] Also, all four schools agree on the importance of arbitration and that it is necessary for the good of the community and the growth of individuals.[139] Furthermore, they all believe that arbitration should be confined to practical matters and disputes involving humans and not God.[140] As to the actual process of arbitration, they all regard it as a legal process that requires oath taking and verbal testimony.[141] One of the contentious issues at the heart of the ongoing debate on *Shari'ah*-compliant arbitration is the appointment of female arbitrators.

6.4.5 Female Arbitrators

The issue of female arbitrators is very contentious in many Muslim-majority countries.[142] Traditionally, the participation of women in Islamic law has been very limited. The usual interpretation of *Shari'ah* law is that women cannot be appointed as judges or arbitrators.[143] Thus, if a woman is appointed as an arbitrator her judgements are not binding, even if her

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[134] Saleh (n 83) 111.
[135] Al-Ramahi (n 7) 78.
[136] S. H Amin, Commercial Arbitration In Islamic Law & Iranian Law, (Vahid Publications,1984), 78.
[137] Al-Ramahi (n 7) 15.
[138] Ibid.
[139] Baamir (n 12) 80.
[140]Amin (n136) 111, 123
[141] Baamir (n 12) 83.
[142] See Saad U Rizwa, 'Foreseeable Issues and Hard Questions: The Implications of US Courts Recognizing and Enforcing Foreign Arbitral Awards Applying Islamic Law under the New York Convention' (2013) 98 Cornell Law Review 493, 498; Thomas E Carbonneau, Carbonneau on International Arbitration: Collected Essays (JurisNet 2011) 422; Thomas E Carbonneau, Cases and Materials on Arbitration Law and Practice (Aspen 2007) 1199.
[143] Rizwa, Ibid.

ruling is in accordance with the *Shari'ah*. The prohibition of female judges is often based on the question whether women are eligible to be judges. The *Shafi*, *Maliki* and *Hanbali* schools hold that they are ineligible. This is largely based on verse 4:34 of the *Qur'an* which ordains that 'men are qawwamuna (protectors) over women'. It is also based on the statement made by the Prophet, with regard to the coronation of a woman as Queen of Persia: 'people will not prosper if they appoint a woman in charge of them'.[144]

In light of the above, many scholars then contended that this meant that women could not be public officials.[145] Only the *Hanafi* scholars argue that women can be appointed as judges given that any person who is qualified to be a witness could validly become a judge.[146] Thus, since verse 2:282 of the *Qur'an* allows women to act as witnesses in commercial disputes, they ought to be eligible to act as judges in commercial cases. However, they could not be judges with regard to *Hudud* (sanctions for violating the rights of God) and *Qisas* (retaliation).[147] Thus, women could not adjudicate criminal matters. It must however be noted that there is no express prohibition of women from becoming judges in the *Qur'an* or *Sunnah*. Thus, a woman was appointed bazaar-inspector of Medina by Caliph.[148] This inspector arbitrated disputes of merchants.[149]

Nonetheless, the *Hanbali* scholars maintain that women should not assume important roles, for the good of the wider community. They interpret the *Hadith* as prohibiting the appointment of female arbitrators because they are not suitable for such important public roles.[150] This also explains their inferior legal standing in the Islamic legal system. As noted above, *Hanbali* scholars believe that rules should only be based on what is stated in the Qur'an. Therefore, since there is no statement excluding women from the position of a judge, then it may be argued that they should be allowed to become judges. More pertinently, the argument that their appointment would not benefit the community is no longer valid as female judges in several countries such as Egypt have proven to be as effective as their male counterparts.[151]

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[144] Hadith, Albukhari, vol. 9, Chapter 88, 219.
[145] Alqudah (n 114) 10-11.
[146] Ibid.
[147] Rawya Al-Zahhar, 'Women under Saudi Legal System' in Abdulla Al-Khunain et al (eds), Judicial System in Saudi Arabia (Center for Global Thought on Saudi Arabia 2015) 339.
[148] Alqudah (n 114) 10.
[149] Baamir (n 12) 117.
[150] Ibid.
[151] Alqudah (n 114) 5.

6.5 Differentiating Between Arbitration Under Islamic Law And Western Models

Antaki suggests that there are two models of dispute resolution mechanisms in the world. The first is an informal and innate model, whereas the latter is a more formal model.[152] According to Antaki, the Arab world subscribes to the former model while the West applies the latter.[153] Al-Ramahi suggests that, in addition, the Western model focuses on the individual whereas in the Middle East it remains the collective towards which the dispute resolution is aimed.[154] Islamic law is not solely concerned with business relations, but also with relations within their own social circle and society as a whole.[155] According to Al-Ramahi, this diverging outlook has resulted in a fundamental difference in how the Middle East and the West approach business relations:

> The differences are not just in the general landscape but in the detail and perceptions in relation to specific matters…conflict from a western perspective is considered to have a positive dimension 'acting as a catharsis to redefine relationships between individuals, groups and nations and makes it easier to find adequate settlement of possible solutions. Whereas conflict in the East is considered to be negative, threatening and destructive to the normative order and needs to be settled quickly or be avoided. These two views of conflict are sufficiently dissimilar to substantiate the argument that each side has a very different starting point when it comes to understanding conflict and consequently, conflict resolution.[156]

However, despite contrasting views between the two models of arbitration, there is a positive outlook for the future. As will be set out in the next section, the innate flexibility of *Shari'ah* law allows it to incorporate elements of other legal systems without being in conflict with the *Qur'an* and the *Sunnah*. The next section will consider the influence that civil law, a predominantly European model of law, has had both on *Shari'ah* law in general, and more particularly on Saudi law.

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[152] Nabil Antaki, 'Cultural Diversity and ADR Practices in the World' in Goldsmith, Ingen-Housz and Pointon (eds), ADR in Business: Practice and Issues Across Countries and Cultures (Kluwer Law International 2006) 266.
[153] Ibid.
[154] Aseel Al-Ramahi 'Sulh: A Crucial Part of Islamic Arbitration', LSE Law, Society and Economy Working Papers 12/2008, 1, 6, 18.
[155] Ibid.
[156] Ibid, 18.

6.6 Civil Law Influences On Arbitration

The Ottoman Empire greatly influenced arbitral practices in the Middle East.[157] The Ottoman Empire, moreover, produced a code based on principles derived from the *Hanafi* school of *Shari'ah* law.[158] This code is referred to as the *Majalla* and it was enacted in 1876.[159]

The *Majalla* dedicated a full section to arbitration, which emphasised the contractual nature of arbitration under the *Hanafi* principles.[160] Accordingly, the *Majalla* set out the following conditions that would be required to be met in order for an arbitration clause or agreement to be valid:

a) The dispute must already have arisen;
b) The parties must agree to the arbitration through offer and acceptance;
c) The arbitrator must be appointed by reference to their name; and
d) The arbitrator must have the capacity to be a witness.[161]

The requirement that the dispute must have already arisen has traditionally been one of the contentious issues between Western and Middle Eastern arbitration principles, as on its face it would appear to forbid the concept of entering arbitration clauses or agreements while concluding a contract.[162] On the one hand, the very existence of an arbitration clause in the contract tends to refer to the potential for future disputes. However, as noted previously, the *Shari'ah* allows parties to include any term in a contract that does not conflict with the principles of the *Shari'ah*, such as in respect to the payment of interest.[163] According to Baamir, this apparent conflict is solved by the fact that:

> …arbitration clauses are recognised as valid…as long as they are not contrary to public order and do not permit a prohibited action under *Shari'ah*. Risk and uncertainty make a transaction void and it is obvious that an arbitration clause does not involve any risk.[164]

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[157] See Niall Ferguson, 'The European Economy, 1815-1914' in Blanning (ed), The Nineteenth Century: Europe 1789-1914 (Oxford University Press 2000) 232.
[158] Hanson (n 133) 289-290. For an overview see JND Anderson, Islamic Law in the Modern World (New York University Press 1959).
[159] Hanson, ibid.
[160] Ibid.
[161] A Alahdab, Altahkeem Ahkamouh wa Masaderouh (Naoufal Publications 1990).
[162] Baamir (n 12) 66-67.
[163] Ibid.
[164] Ibid, 75.

The *Majalla* emphasised that an arbitral award was inferior to a court judgment and could therefore be appealed to court.[165] However, parties were expected to accept any awards made under arbitration on the basis that, as it was a conciliatory process, any award was based on an agreement being reached between the parties.[166]

The *Majalla* remained influential after the dissolution of the Ottoman Empire in the early 20th century and was the basis on which many of the former Ottoman territories based their civil codes upon their foundation.[167] Although the *Majalla* was not directly transposed into Saudi Arabian law upon the foundation of the Kingdom, the concept of incorporating foreign laws and practices has been influential in the formation of Saudi Arabian arbitration law.[168]

6.7 Evolution Of Arbitration In The Saudi Legal System

The evolution of arbitration law in Saudi Arabia may be divided into four phases. The regulatory attitude towards arbitration in Saudi Arabia entered its fourth phase with the passing of the Arbitration Law in 2012. The first phase began shortly after the foundation of Saudi Arabia whereby international commercial arbitration was allowed within the Kingdom, although in practice little commercial arbitration actually took place in Saudi Arabia during this phase.[169] This phase was continued from the foundation of Saudi Arabia until the ARAMCO case in 1958, when the Saudi government began to view international arbitration as a threat to its national sovereignty. This marked the beginning of the second phase, under which commercial arbitration was greatly restricted in Saudi Arabia.[170] The second phase lasted until the oil boom and the related Islamic revival period in the 1970s. This phase saw the implementation of significant new reforms as well as the membership of Saudi Arabia in a major international arbitration organisation.[171] This phase lasted until the implementation of the New Arbitration Law in 2012 which will be discussed in greater detail in chapter 7.

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[165] Al-Ramahi (n 7) 16.
[166] Gemmell (n 4) 176.
[167] Hanson (n 133) 283
[168] Baamir (n 12) 30.
[169] Ibid.
[170] Ibid.
[171] Ibid.

6.7.1 Commercial Arbitration in its Early Phase: 1931-1958

Commercial arbitration has been part of Saudi Arabian law since the foundation of Saudi Arabia, under the Code of Commercial Courts in 1931.[172] Due to a lack of legal experience available to the new Kingdom on the matter of *Shari'ah* commercial law at that time, this Code was based on the Ottoman Code of Commercial Law of 1850 (which was in turn influenced by the French codification system).[173] The 1931 Code provides a number of articles that regulate arbitration proceedings, which broadly followed the *Hanbali* school of interpretation as set out in section 2 above.[174] Arbitration under the 1931 Code was institutional, with the proceedings held under the supervision of the Commercial Court.[175] The 1931 Code provided that an arbitral award was not enforceable unless it was reviewed by the Commercial Court, which would either approve it for enforcement or repudiate it.[176]

Despite the arbitration provisions in the 1931 Code, in actual fact few arbitration proceedings followed the provisions.[177] The reasons for this included the fact that the Commercial Court did not recognise arbitration agreements (due to the principle of *Shari'ah* law that arbitration could only occur in relation to existing disputes).[178] Accordingly, the reference to arbitration was very limited, with the conflict between the civil-law inspired Commercial Court and the *Shari'ah* courts, leading arbitration to become ineffective, time consuming and in many cases harmful to some parties.[179] This conflict grew and became one between the *Shari'ah* courts and international forums in the second phase.

6.7.2 ARAMCO and Saudi Arabia's Response: 1958-1980

From early in the history of oil exploration in Saudi Arabia until the ARAMCO case in 1958 arbitration clauses were generally included in agreements between Saudi and foreign companies.[180] Despite some reservations about the Western model of arbitration that provides for the enforcement of awards on terms that are not acceptable to the parties, the Saudi Arabian government was willing to make such concessions when entering into agreements

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[172] Code of Commercial Court ratified by Royal Decree No. 32 dated 15/01/1350 H (1931).

[173] Baamir (n 12) 30. As noted in chapter 5, the influence of the Ottoman Code of Commercial Law was however limited, and the Saudi drafters were also influenced by the laws in Egypt.

[174] Baamir (n 12) 30.

[175] Ibid.

[176] Ibid, 96.

[177] N Albejad, Arbitration in Saudi Arabia (Institute of Public Administration 1999).

[178] See Baamir (n 12) 96.

[179] Ibid.

[180] Sayen (n 1) 909.

with US oil companies not long after the foundation of the Kingdom in the 1930s. However, there was a feeling of distrust in the Middle East towards international commercial arbitration even before the ARAMCO decision. This may be attributed to the ruling in *Petroleum Development Ltd. v The Sheikh of Abu Dhabi* (1952) the arbitrator. Lord Asquith described Abu Dhabi law as 'primitive', stating that:

> …it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.[181]

Instead, he applied English law, which he described as being rooted in the 'good sense and common practice of civilized nations'.[182]

Unsurprisingly, sentiments such as these expressed by European arbitrators about the validity of *Shari'ah* commercial law reinforced an opinion in Saudi Arabia and other Middle Eastern countries that international commercial arbitration was solely a vehicle to allow Western companies to impose their own laws on contracts in Arab countries and as a vehicle to avoid *Shari'ah* law.[183]

The ARAMCO case arose as a result of concessions given by Saudi Arabia to the Standard Oil Company in 1933. Standard Oil later sold a 50% stake in these concessions to the Texas Oil Company and together, these companies formed the Arabian American Oil Company (or ARAMCO).[184] An arbitration clause was included in the concession agreement, which stated that any disputes would be settled by a three-person arbitration panel and would be based on the interpretation of arbitration applied by the *Hanbali* school.[185] However, when a dispute arose between the parties, it was submitted to arbitration, but the arbitration tribunal refused to apply the *Shari'ah* on the basis that:

> …the regime of…concessions has remained embryonic in Muslim law and is not the same in different schools. The principles of one school cannot be introduced

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181 Petroleum Development (Trucial Coast) Ltd. v. The Sheikh of Abu Dhabi (1952) 1 ICQ 247, 149.

182 Cherine Foty, 'The Evolution of Arbitration in the Arab World' (Kluwer Arbitration Blog 2015) <http://arbitrationblog.kluwerarbitration.com/2015/07/01/the-evolution-of-arbitration-in-the-arab-world/>, accessed on 25 July 2018.

183 Ibid.

184 Baamir (n 12) 97-98.

185 Ibid.

> from another, unless this is done by the act of authority. Hanbali law contains no precise rule about mining concession and a fortiori about oil concessions.[186]

This passage was highlighted by Baamir as an illustration of the ignorance that the arbitrators had towards *Shari'ah* law.[187] For instance, as previously noted, the arbitrators failed to understand that the *Hanbali* school of interpretation provided for sufficient flexibility to be able to incorporate any type of agreement and any type of clause that the parties agreed to enter into.[188] In addition, the arbitrators were incorrect to state that the principles of other schools could not be incorporated into a ruling based on the *Hanbali* school. Reference to other schools can be made without any resort to official authority provided that the arbitrator had 'adequate knowledge of the nature of both situations and an accurate reasoning'.[189]

In addition, the arbitrators found that ARAMCO's rights would be unable to be:

> …secured in an unquestionable manner by the law of force in Saudi Arabia…[and that Saudi laws] must be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence.[190]

In his analysis of their decision, Baamir concluded that:

> …when the tribunal denied the application of the Saudi law and applied British and Swiss practices, it implied that Saudi Arabia is not a civilisation, which was a discrimination against not just Saudi Arabia alone, but an unfair judgment of the Islamic law as a whole.[191]

As a result of their dissatisfaction with the ARAMCO decision, the Saudi government effectively restricted all international commercial arbitration from 1963 by forbidding all government agencies from resorting to arbitration without prior approval from the Council of

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[186] Saudi Arabia v. Arabian American Oil Company (1963) 27 LLR 117, 162-163.
[187] Baamir (n 12) 103.
[188] Ibid. See also Nicholas Foster, 'Islamic Commercial Law: An Overview (I)' School of Law and School of Oriental and African Studies, University of London, Working Paper 4/2006) 9-10.
[189] Baamir (n 12) 103.
[190] See Gemmell (n 4) 179.
[191] Baamir (n 12) 104.

Ministers.[192] This policy remained in effect despite the 1980 Saudi ratification of the ICSID Convention.[193]

According to Gemmell, these cases unsurprisingly did not endear the Western model of arbitration to the governments of the Middle East. He states that:

> In these cases, the arbitrators concocted a unique arbitral stew consisting of one part cynicism for local law and one part disdain for the Islamic parties' ability to enforce rights…The profound and lasting impact of these arbitrations on the region's arbitral psyche should not be underestimated.[194]

6.8 Commercial Arbitration In Saudi Arabia After ARAMCO

Following the ARAMCO case, Saudi Arabia took a number of steps to protect their interests in oil, including the formation of OPEC.[195] In the aftermath of the oil boom in the 1970s, Saudi Arabia accumulated enormous wealth and, as a result, began to seek additional foreign investment to diversify its economy from its dependence on oil. In order to attract such foreign investment, a fair and impartial dispute settlement mechanism was required.[196]

As a result, Saudi Arabia entered the third phase, which resulted in comprehensive reform. As noted above, Saudi Arabia ratified the International Centre for Settlement of Investment Disputes (ICSID) Convention in 1980. The ICSID Convention, which was enacted in 1966, aims to provide facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries.[197] The ratification of ICSID was seen at the time as the first positive step that Saudi Arabia had taken in respect of reconsidering its position on arbitration and was viewed domestically as an important means of attracting foreign investment by providing for investor confidence.[198] However, it was not until 1983 that a comprehensive set of rules to govern arbitration was introduced. The lack of clear procedures and judicial support, as well as the restrictions laid

[192] Council of Ministers Resolution No. 58 of 1963.
[193] Sayen (n 1) 910.
[194] Gemmell (n 4) 179-180.
[195] Leonardo Maugeri, The Age of Oil: The Methodology, History, and Future of the World's Most Controversial Resource (Greenwood Publishing Group, 2006).
[196] F. El Sheikh, The Legal Regime of Foreign Private Investment in the Sudan and Saudi Arabia, A Case Study of Developing Countries (Cambridge University Press 1984).
[197] International Centre for Settlement of Investment Disputes (ICSID)< https://icsid.worldbank.org/en/>, accessed 20 December 2017.
[198] Abdulrahman Yahya Baamir, Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia (Routledge 2016) 110

down by the Council of Ministers, meant that arbitration between private parties in Saudi Arabia was infrequent.[199] The Board of Grievances (*Diwan)* (chapter 5) was unwilling to enforce arbitration rules agreed by the parties and, therefore, there was much uncertainty about how awards were to be enforced, especially if they were rendered outside of Saudi Arabia.[200] However, despite these obstacles, there was still great support for the concept of arbitration in the Saudi business community, with most companies voluntarily complying with any awards handed down against them in order to ensure that their international reputation was not damaged.[201] Nonetheless, the uncertainty in the legal status under Saudi law led to much confusion and therefore many foreign companies preferred to rely on foreign arbitration rules when dealing with Saudi companies, a concept that was still viewed with distrust by the Saudi government.[202]

The Arbitration Regulations of 1983 was the first measure taken by Saudi Arabia to implement comprehensive arbitration regulations and they governed the practice of commercial arbitration until the implementation of the New Arbitration Laws of 2012, as discussed in chapter 7.[203] Based on the *Hanbali* school of thought, the 1983 Regulations constituted a set of rules that was accessible to foreign companies and ensured that there were provisions not only governing the arbitration procedure in general, but also the actual arbitration proceedings by requiring supervision by governmental agencies or courts.[204] Most importantly, the Arbitration Act recognised the validity of an arbitration clause or agreement.[205] The 1983 Act were later complemented by the Implementing Rules in 1985. However, the Arbitration Regulations also allowed the Saudi courts to intervene throughout the arbitration process, resulting in arbitration proceedings being obstructed on numerous occasions.[206] The Arbitration Regulations also retained the restrictions on the use of arbitration by government entities without permission from the Council of Ministers.[207]

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[199] Gemmell (n 4) 177.
[200] Baamir (n 12) 137.
[201] Albejad (n 176).
[202] Sayen (n 1).
[203] Henry Quinlan, Amer Abdulazis Al-Amr, Adam Peters and Abdulrahman Alayoni, 'Arbitration procedures and practice in Saudi Arabia: overview (Practical Law, 2017
[204] Royal Decree No. M/46 on April 25, 1983.
[205] Ibid, Article 6.
[206] Saud Al-Ammari and A Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30(2) The Journal of the London Court of International Arbitration 389, 389.
[207] Ibid.

By the same token, foreign parties were concerned that Saudi Arabia arbitration law of 1983 was simply the codification of the *Hanbali fiqh*.[208] This had adverse implications on the attractiveness of the country as a place to do business and settle disputes. Some of the elements that motivated the fear by some foreign parties are outlined below.

6.8.1 Arbitration Clauses and Formality Requirements

Prior to adoption of the 1983 Arbitration law, competent authorities, in this case the *Shari'ah* courts, retained broad discretion to reject arbitration clauses on the grounds that these did not constitute valid contracts under Islamic law.[209] Under previous judicial practice, and before the adoption of the arbitration laws of 1983, arbitration clauses were, deemed invalid ab intio. [210]Pursuant to Islamic rules governing the formal requirements of a valid contract, a binding covenant between two or more parties rests on some mutual undertaking between the parties. For example, the immediate transfer of possession of goods. Since an arbitration clause sets rules that apply to future, rather than actually-existing events, the consensus among scholars was that these clauses amount to a speculative condition and therefore violate the *Shari'ah* injunction on speculation and uncertainty.[211]

A non-Muslim Western lawyer might, quite understandably, have regarded this feature of Saudi Arabian arbitration law as entirely anomalous with Western judicial practice. [212]The widespread judicial rejection of arbitration clauses would strike a seemingly fatal blow to the autonomy and integrity of arbitration as an alternative to *Shari'ah* court-centered litigation.[213] Moreover, the silence of previous Saudi law on the form and degree of uncertainty disallowed in respect of a dispute under the *Shari'ah* had the effect of further emboldening the courts.[214]In the absence of an objective test, there was simply no way of determining

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[208] See Joseph L Brand, 'Aspects of Saudi Arabian Law and Practice' (1986) 9 International and Comparative Law Review 1, 15.
[209] Noel J Coulson, Commercial Law in Gulf States: The Islamic Legal Tradition (Springer 1984) 44.
[210] Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' 20(2) Arbitration International (2009) 230, 251. See also Alqudah (n132) 8, 12
[211] The Commercial Court Regulation issued under Royal Decree M/32 of 1931 for example allowed courts to confirm the appointment of arbitrators and review the latter's awards prior to enforcement but did not recognise agreements to submit future disputes to arbitration. See Sayen (n 1) 910-911.
[212] Abdul Hamid El Ahdab and Jalal El Ahdab, Arbitration with Arab Countries (Kluwer Law International, 2011) 29
[213] Baamir and Bantekas (n210) 252
[214] It should be noted that this section deals primarily with situation in Saudi Arabia prior to the adoption of the 2012 which resolves some of these issues, as discussed in chapter 7. It should be noted that in 1993, the Board of Grievance recognised that an arbitration clause constitutes a binding agreement. See decision 29/T/4 of 1413 H (1993).(cited in Baamir and Bantekas (n210) 252). However, applying Hanbali fiqh, the Board, only one year

whether a particular clause violated Islamic Shari'ah' related formality requirements or the injunction against contractual uncertainty and should be consequently rendered null and void before the relevant Saudi court.[215]

This outcome would appear to be an affront to the spirit of the *Shari'ah*. The *Qu'ran* is explicit on the sacred nature of the covenant.[216] All contractual undertakings entered into with good faith should be faithfully observed and enforced by the presiding judge, providing that elements of the contract do not contravene requirements of the *Shari'ah*. On the other hand, one could argue that judicial rejection of arbitration clauses is an entirely legitimate exercise of a court's supervisory powers, since Saudi courts are constitutionally required to apply the *Shari'ah* as part of the mandatory law of its legal system, as discussed in chapter 5. [217]

On the question of contractual requirements, as discussed in chapter 3, the *Hanbali* school may, paradoxically, prove to be the flexible and most favourable to the parties involved, since it 'has always considered arbitration clauses as possessing a valid contractual nature, insofar as they are not in conflict with the purpose of the contract and not prohibited under the Shari'a'.[218] It follows that arbitration agreements should be treated as any contract would be under Islamic law, and its terms of reference applied in good faith. [219]In this regard, it is arguable that Saudi Arabia's competent authorities, in this case the general courts of jurisdiction or *Shari'ah* courts, fundamentally misunderstood the nature of an arbitration agreement as essentially contractual in nature. [220]In other words, the previous practice of Saudi *Shari'ah* courts can be said to be based on custom, rather than a faithful application of

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later, nullified an arbitral award rendered with supervision and approval of the competent authority. See decision 53/T/4 of 1414 H (1994)(cited in Baamir and Bantekas (n209) 247).

[215] Baamir and Bantekas , ibid. For an insight to the Saudi authorities' interpretation of Shari'ah requirements, see decision 155/T/4 of 1415 H (1995). This decision concerned a request by a foreign party that the arbitration be held outside Saudi Arabia. The Commercial Committee ruled against the request and reiterated the position of Saudi law on the matter. All arbitrations involving a Saudi element were to be governed by Saudi substantive law, and this extended to a merits based review of the underlying contract applying Hanbali fiqh. The Board subsequently ordered that the arbitral tribunal be seated in Saudi Arabia (cited in Baamir and Bantekas (n 210) 255) . For a relevant discussion see Maurits Berger, 'Public Policy and Islamic Law: The Modern Dhimmī in Contemporary Egyptian Family Law', (2001) 8(1) Islamic Law and Society 88, 104

[216] See 3.2 of Chapter 3.

[217] See on the absence of an objective test, see Berger, ibid at 107 107

[218] Baamir and Bantekas (n 210) 252

[219] Mahmoud Fayyad, 'Measures of the Principle of Good Faith in European Consumer Protection and Islamic Law, A Comparative Analysis' (2014) 28(3) Arab Law Quarterly 205, 206

[220] This point is made by Baamir and Bantekas (n 210) 251

the *Hanbali fiqh*.[221]The result is a gap between religious text and judicial practice at the municipal level.

6.8.2 Public Policy in Saudi Arabia

In 1983 Saudi Arabia also signed the Riyadh Convention for Judicial Co-Operation, a Convention between Arab League states.[222] The Riyadh Convention was enacted in an attempt to reconcile the differences between the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and *Shari'ah* law arbitration principles.[223] It contained certain principles borrowed from the New York Convention, including a limitation on the power of the courts, when enforcing awards, to look beyond arbitration agreements to consider the merits of the dispute by preventing local courts from examining the substance of the dispute and by limiting the court's role to either enforcing or rejecting the award'.[224] The implementation of the Riyadh Convention in Saudi Arabia had the effect of extending the remit of the Board of Grievance (*Diwan)* to enforce both foreign and domestic arbitral awards.[225]

However, despite the recognition of the Riyadh Convention, in 1994 Saudi Arabia eventually agreed to ratify the New York Convention. The New York Convention's aim is 'to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards'.[226] Although, the Convention came into place in 1958 and had been ratified by many Muslim nations since its

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[221] On custom see see Noel Coulson, A History of Islamic Law (Oxford, 1964) 143-145. However, see contrary view in Mahdi Zahraa, 'Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research' 18(3) Arab Law Quarterly (2003) 215, 241.

[222] League of Arab States, Riyadh Arab Agreement for Judicial Cooperation, 6 April 1983, available at http://www.refworld.org/docid/3ae6b38d8.html (accessed 21 December 2017).

[223] New York Convention 1958, <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>, accessed 21 December 2017. See also K.T. Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non-Domestic Arbitral Awards'?, (1995) 18 Fordham International Law Journal 920 , 922.

[224] Khoukaz (n 15) 193.

[225] Riyadh Convention 1983, art 37 (n 229). Article 25 of the Riyadh Convention states that, subject to certain provisos: 'each contracting party shall recognise the judgments made by the courts of any other contracting party in civil cases including judgments related to civil rights made by penal courts and in commercial, administrative and personal statute judgments having the force of res judicata and shall implement them in its territory in accordance with the procedures stipulated."

[226] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, preamble <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>, accessed on 16 December 2017.

enactment, the inherent distrust that Saudi Arabia had towards international commercial arbitration resulted in the delay in ratification until 1994.[227]

The New York Convention has provided some level of uniformity in the world of international commercial arbitration, although there remains a number of elements of it that conflict with *Shari'ah* law.[228] The Convention provides for a number of means by which signatories may exempt themselves from its provisions, including for public policy reasons.[229] However, the concept of 'public policy' is not defined in the Convention and therefore is subject to a wide range of interpretations.[230]

All states exercise legitimate autonomy in this regard and national courts are entitled to uphold the sovereign laws of the state in the national and public interest. And yet, public policy is an exceedingly slippery term and one that eludes careful definition, not least in the case of the Saudi legal system where concepts such as public morals and customs are not clearly explicitly outlined or delineated. The Kingdom's public policies takes on a heightened importance in arbitration, particularly in respect of the enforcement of an arbitral award, regardless of whether a domestic or a foreign award. Subject to Article V(2)(b) of the New York Convention' safe harbor clause, an arbitral award is unenforceable if it violates the public policy of the country where enforcement is sought.[231] Prior to the reform and restructuring of the judicial system, the Board of Grievance had final authority to review an award thereby ensuring it did not violate the *Shari'ah* or conflict with the public policies or municipal law of Saudi Arabia. [232]

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[227] Baamir (n 12) 147
[228] Khoukaz (n 15) 193.
[229] Ibid.
[230] Baamir (n 12) 183.
[231] New York Convention, art V(2)(b), (n 230).
[232] See decision 155/T/4 of 1415 H (1995), discussed infra note (n214). The Board reached its decision on public policy grounds. A similar decision was also reached in respect of case 143/T/4 of 1412 H (1992). The facts of this case concerned an arbitration clause which identified the ICC's Rules of Procedure as the applicable curial law. The arbitration clause was deemed void on the basis that it constituted an attempt to 'eliminate the jurisdiction of the Saudi judiciary over the dispute, which is against the public policy of Saudi Arabia'. (cited in Baamir and Bantekas (n209) 255-256). The main difficulty with the previous law has been the variable way in which public policy has been defined and applied as a ground for invalidating clauses or refusing recognition. For instance, the Board reached a different decision in 43/T/4 of 1416 H (1996). This case related to an arbitration agreement whose terms of reference allowed for the dispute to be referred to a US Court in Iowa. The Board recognised the jurisdiction of the US court and affirmed that foreign laws had applicability to the dispute, in addition to Saudi law and Shari'ah. The Board also held that the parties could also seek enforcement of remedies in their "chosen contractual forum," (cited and discussed in Cited in cited in Baamir and Bantekas (n209) 255).

Thus, the public policy exemption has been frequently used by Saudi Arabia. According to Khoukaz, the lack of a definition of public policy in the Convention:

> …has resulted in a situation where *Shari'ah*-based countries were put at a disadvantage at the international stage. This disadvantage led to a widening gap between what will be called the '*Shari'ah*-based system' and the 'international system.[233]

According to Mallet, this has resulted in a 'duality between form and substance' in terms of how Middle Eastern states apply the Convention.[234] Mallet noted that since the ARAMCO decision, at least prior to the 2012 New Arbitration Law, the legislative position in Saudi Arabia:

> …tends to create all kinds of typically procedural problems to arbitration. This is done either for special contracts of some commercial significance, like those related to agency and distribution, or in a more general manner.[235]

As a result, as noted by Ballantyne:

> …even where the *Shari'ah* is not applied in current practice, there could be a reversion to it in any particular case.[236]

The reason for this is that the law was silent with regard to foreign arbitral awards, with Bakhashab noting that this silence indicated that 'foreign arbitral awards or judgments are of no effect unless approved by the *Diwan*.[237]

The state of the law in Saudi Arabia before the implementation of the New Arbitration Law in 2012 was summed up by Baamir as follows:

> …Saudi arbitration law does not seem to differ much from its western contemporaries. Why, then, is it deemed problematic? The primary reason is obvious; where a Saudi

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[233] Khoukaz (n 15) 189.
[234] Ibid.
[235] Chibli Mallat , Introduction to Middle Eastern Law (Oxford Press, 2007) xcvii. See also Chibli Mallat, 'A Comparative Critique of the Arbitration Process in the Arab World' (1996) 1(3) Lebanese Review of Arab Arbitration 5, 5-7.
[236] M. Ballantyne, 'Book Review of Commercial Arbitration in the Middle East: A Study in Shari'ah and Statute Law (1989) 4(3) Arbitration International 269, 269, cited in Al-Ramahi (n 7) 20-21.
[237] Omar Bakhashab, 'The Concept of Extraterritoriality in the Saudi Arbitration Act', (2000) 14(1) King Abdul-Aziz University Journal 152, 152-164.

> element is involved, the parties cannot escape being subjected to Saudi lex arbitri…As a result, arbitration remains a very speculative business since the parties and their lawyers navigate through legal uncertainty…the Hanbali corpus of law is in fact more flexible than Saudi law, particularly on the grounds of interpretative technique.[238]

As such, local courts were provided with ample opportunity to refuse recognition and enforcement of foreign arbitral awards on public policy grounds, and to do so under the pretext of religious duty. One could see how, for instance, a provision requiring interest on the principal amount of damages awarded would violate the *Shari'ah* and consequently breach acceptable public policy constraints. But what is the correct response to such a determination: should all portions of the award be treated as unenforceable? At the same time, the *Shari'ah* itself demands fairness in the resolution of disputes, as in the treatment of contracts. It may therefore incumbent on courts to apply the Islamic concept of *istihsan* which may is loosely described above as the process by which the judge selects the more normatively acceptable or desirable rule-interpretation in the wider public interest. In the context of enforcement proceedings, the 'public interest' may be broadly construed to include the interest of both parties, the stable functioning of dispute settlement mechanism or future social and economic development of the country.

In chapter 7, an attempt is made to determine the extent to which the reforms implemented in the fourth phase (under the 2012 Arbitration Law) have resolved the above problems. It also determines whether they allow for greater reconciliation of the *Shari'ah* and modern international arbitral and judicial norms and practices, whilst also achieving greater certainty and transparency in respect of recognition and enforcement practices. These reforms are necessary if Saudi Arabia is to establish itself as desirable place to do business and settle disputes.

6.9 Conclusion

This chapter has traced the history of arbitration in the Arabian Peninsula for over two millennia. It has illustrated that the practice of arbitration in this area existed long before the Kingdom of Saudi Arabia and even before the advent of Islam. It has also shown that the concept of arbitration as set out under *Shari'ah* law was influenced by customs of the pre-

[238] Baamir (n 12) 148.

Islamic era and that some of these customs such as the use of a *Hakam* have survived to this day.

The *Shari'ah* allows for the evolution of law to deal with contemporary situations. It also allows for legal models to evolve and adapt to changing circumstances. In fact, one of the reasons that Muhammed resisted any attempts to codify the *Shari'ah* was as a result of a fear that it would prevent the system from evolving. *Shari'ah* law, and especially the *Hanbali* school practised in Saudi Arabia, provides for sufficient flexibility when it comes to applying dispute resolution mechanisms, including international commercial arbitration laws. Saudi Arabia has successfully incorporated the *Hanbali* exegesis of the *Qur'an* and the *Sunnah* into its domestic law, as well as elements of other legal systems, including the French civil law system. The civil law system has greatly influenced the modern law of Saudi Arabia, and such is the flexibility of the *Shari'ah* that the enactment such foreign-inspired regulations has not prevented from Saudi law complying with the *Shari'ah*.

However, for most of its history, Saudi Arabia has failed to properly recognise and implement the principles of the *Shari'ah* that provide for arbitration. Much of this failure can be traced back to the founding of the Kingdom coinciding with international commercial arbitration models becoming more widespread, as globalisation continued its spread. The discovery of oil in the Kingdom was financially beneficial to the new Kingdom, but it also resulted in an increase in foreign investment which brought with it new legal practices. The lack of established principles for arbitration in the new Kingdom led to foreign companies attempting to use the arbitration laws of more 'established' states in order to enforce their laws, with such laws often being at odds with the purpose of conciliation which runs through the entirety of Islamic arbitration law. The ARAMCO case in particular led to mutual distrust between Saudi Arabia and foreign businesses: Saudi Arabia did not trust the foreign companies and lawyers to apply *Shari'ah* principles, while the foreign companies did not trust the Saudi Arabian courts to refrain from interfering with arbitration procedures and awards.

As a result, something of an impasse arose between the parties, one which was not broken until the 1980s when attempts to diversify its economy began with Saudi Arabia taking steps to expand upon its arbitration laws. This has been a gradual process that is perhaps not yet finished, but it has resulted in the enactment of new arbitrations laws that align the Kingdom more closely with international arbitration practices. It is suggested that international

arbitration practices may also benefit in terms of legitimacy in different legal systems if they align with the flexibility provided by *Shari'ah* arbitration principles. Nonetheless, this chapter has demonstrated that the *Shari'ah* is sufficiently flexible to accommodate modern international arbitration practices.

Furthermore, this chapter has shown that the Saudi Arabian model can be rendered into a more favourable model for the settlement of disputes by clarifying formality requirements, providing a concise definition to the public policy exemption, and clear guidelines on the standards for the recognition and enforcement of foreign and non-domestic arbitral awards. The New Arbitration Law of 2012 is an attempt by the Saudi government to further minimise legal uncertainty and adopt international standards in order to attract and protect foreign investors, amongst other goals[239]. Chapter 7 determines whether this objective has been achieved.

[239] New legislation in Saudi Arabia to attract foreign investment (2019). Found at; https://oxfordbusinessgroup.com/overview/regulatory-updates-new-legislation-geared-towards-attracting-foreign-investment-and-enhancing-job (Oxford Business Group) (accessed in; 31/07/2019)

CHAPTER 7:
Analysis of the Arbitration Act 2012 & its Effects on International Arbitration in Saudi Arabia

7.1 Introduction

In a landmark piece of legislation, the government of Saudi Arabia introduced ground-breaking reforms to the practice of international arbitration in Saudi Arabia. The Arbitration Law of 2012 (the 'New Arbitration Law' or 'New Law')[1] replaced the Arbitration Regulation of 1983[2] and the parallel Rules for the Implementation of the Arbitration Regulation of 1985[3] (together, the 'Old Arbitration Law' or 'Old Law'). In addition to the New Arbitration Law, a supplementary law was also implemented in the form of the Enforcement Law 2012 (the 'Enforcement Law').[4]

The New Arbitration Law and the Enforcement Law together form one part of a larger reform of the Saudi judiciary that began in 2007 through a series of royal decrees issued to ensure that all decisions, judgment and arbitral awards rendered in Saudi Arabia are enforced in a timely and judicious fashion.[5] The National Transformation Program (NTP) 2020 of the kingdom has provided a new impetus to judicial reform, with the initiatives of the Ministry of Justice envisioning key performance indicators such as reducing the average timeframe to conclude cases, increasing the percentage of concluded cases, increasing the percentage of those stakeholders in court cases who are satisfied with the process, reducing the average number of incoming cases per judge in the main courts; and improving Saudi Arabia's World Bank institution ranking.[6] This is seen as important as making the kingdom more attractive to

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[1] Saudi Arbitration Law ('SAL 2012') issued by Royal Decree No. (34/m) dated 24/05/1433 H. (corresponding to 16/04/2012), Kingdom of Saudi Arabia Bureau of Experts at the Council of Ministers.
[2] Promulgated by Royal Decree No. (M/46) dated 12/7/1403H.
[3] Ministerial Resolution No. 7/2021/M.
[4] Issued through Royal Decree M/53/1433H corresponding to July 3, 2012.
[5] With King Abdullah's issue of a number of royal decrees aimed at reorganizing the Saudi judicial system, the Law of the Judiciary issued by Royal Decree No. M/78 on 19 Ramadan 1428H (October 1st, 2007) established the Supreme Court as the highest judicial authority in the Kingdom. This law also established new Courts of Appeals in the Saudi Arabian provinces as well as courts of first instance for general, criminal, personal status (family), commercial and labour matters in each city. The Board of Grievances Law (also issued through Royal Decree No. M/78) established a Board of Grievances (BOG) to oversee the Administrative Court system.
[6] Rimi Bhati Assessment of the National transformation Program 2020 (London, 2016) chapter 1 < https://www.gib.com/sites/default/files/ntp_ebook_-_final_12_-_low-res_0_0_4.pdf>, accessed 14 May 2018.

investors through the development of a legal framework that supports business and entrepreneurship and reduces the country's dependence on oil.[7].

As noted in chapter 6,[8] the New Arbitration Law may be said to mark the beginning of the fourth phase of the Saudi regulatory attitude towards arbitration.[9] The New Arbitration Law and the Enforcement Law are aimed at vastly improving the rights of the parties to international arbitration proceedings in respect of conduct of arbitral hearings (including before the commencement of and after the conclusion of the arbitration) and enforcement of arbitral awards in the Kingdom, providing evidence of the Kingdom's broad, ongoing legal reform designed to improve the Saudi business environment.[10]

This chapter expands upon the previous chapters to provide more context of how Saudi Arabia, a country founded in a region that was steeped in the history of international trade and practising a religion that expressly promoted the principles of arbitration, has since struggled to incorporate international arbitration standards into its domestic law.[11] The chapter attempts to explain how the New Arbitration Law is a fundamental step on the road towards embracing international best practices and towards creating an arbitration-friendly culture within the Kingdom.

This chapter then investigates a number of potential gaps that continue to persist between the New Arbitration Law and international arbitration standards despite the many positives of the New Law. Many of these gaps are demonstrative of a broader conflict between the traditionalists and the modernists within the Kingdom - where the traditionalist element of society preaches adherence to the pronouncements of the Hanbali school while the liberal or modern approach focuses on attracting investment to the Kingdom.[12] However, this chapter broadly finds that the New Arbitration Law and the Enforcement Law have been relatively

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[7] Ibid. See also section 6.1 of chapter 5.
[8] See concluding section, chapter 6
[9] See Abdulrahman Yahya Baamir, Saudi Law and Judicial Practice in Commercial and Banking Arbitration (Brunel University, 2008) 120. The author describes the first three phases as: (i) the Buraimi Oasis case in 1955, arguably the government's one of the most formative attempts at arbitration, (ii) the ARAMCO award of 1958 which caused the government to take a protectionist stance, seeing international arbitration as a threat to its national sovereignty, and (iii) triggered by the 1970 oil boom causing Saudi Arabia to relax its attitude towards international arbitration.
[10] Saud Al-Ammari and A Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30(2) The Journal of the London Court of International Arbitration 390, 390.
[11] For an overview of the history of Saudi Arbitration law chapter 4 and Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' 20(2) Arbitration International (2009) 230, 251, 255.
[12] For an overview of these issues, see Yvonne Y Haddad and Barbara F Stowasser (eds), Islamic Law and the Challenges of Modernity (AltaMira Press 2004).

successful in closing the gap between Saudi arbitration law and international arbitration norms and provide a strong roadmap that can be used by the Saudi government to continue its drive to modernise domestic laws without having to derogate from the principles of *Shari'ah*. This chapter therefore addresses the research question of how arbitration in Saudi Arabia can be rendered into a more favourable model for the settlement of disputes involving foreign investors. Given that the New Law applies together with the principles of the *Shari'ah*, this chapter also addresses the research question of whether the *Shari'ah* is sufficiently flexible to accommodate modern international arbitration practices.

7.2 Pre-Reform: The Perception of Arbitration In Saudi Arabia Before The New Arbitration Law

As shown in chapter 2, since its foundation, Saudi Arabia has been precariously balanced between the traditional values and the modern, with conservative interpretations of Islamic law coming into conflict with the economic needs of a Kingdom. It became an important member of the global economy partly due to its natural resources. This required a change in both laws and well as the attitude of all stakeholders in order to modernise and diversify its economy and attract more foreign investors.[13] The Government's oscillating approach to modernity points towards an internal struggle at the administrative level. It has to embrace international standards of commercial law needed to compete in the global marketplace whilst maintaining a strict adherence to the *Hanbali* interpretation of *Shari'ah*.[14] Tension also exists between legislative and the judicial approaches. On the one hand, the government has acceded to various international treaties, while on the other hand, an interventionist (rather than supportive) judiciary has limited the principles enshrined the country's municipal arbitration laws by adopting an ambiguous stance on public policy.[15]

However, it is shown in chapters 2 and 3 that the application of a flexible and pragmatic form of *Shari'ah* has existed since the earliest Islamic jurisprudence,[16] where the eschatological

[13] See also, Killian Clarke, 'A Modernization Paradox' (Harvard International Review 2007) <http://hir.harvard.edu/article/?a=1676>, accessed 14 May 2018.

[14] See Felicitis Opwis, 'Islamic Law and Legal Change: The Concept of Maslaha in Classical and Contemporary Islamic Legal Theory', in Abbas Amanat and Frank Griffel (eds), Shari'a Islamic Law in the Contemporary Context(Stanford University Press, 2007) 62-82.

[15] Dina Elshufara, 'The 2012 Saudi Arbitration Law and the Shar'ia Factor: A Friend or Foe in Construction' (2012) 15 International Arbitration Law Review 138, 138-140.

[16] See chapter 2 and 3 but for an overview of the early history see Banaj Islam, The Mediterranean and the Rise of Capitalism, (2007) 15 Historical Materialism, 47–74

debate was not confined to the four recognised schools of jurisprudence.[17] Outside the Muslim world, Islamic scholars influenced, and were influenced, by the theological, philosophical and economic insights of earlier or contemporaneous civilisations.[18] These interactions provided fertile grounds for the development of trade relations between Muslim and non-Muslim merchants. As outlined in chapter 2, these relations were formalised through trade treaties, further strengthening the foundations of mercantile law in the region.[19] Trust between trading partners was furnished through the customary law principles of reciprocity, freedom of contract and good faith.[20]

Despite a history of embracing foreign legal and commercial concepts, it was not until 1983, and then 2012 that the Saudi government implemented a set of comprehensive rules to govern arbitration.[21] After many years in the 'wilderness' of international arbitration, the New Arbitration Laws were drafted with the intention of providing a level of comfort to international companies from outside the Kingdom who were trading with or looking to trade with Saudi counterparts, and to ensure that there were provisions governing both the arbitration procedure and the actual proceedings themselves.[22] However, the Old Arbitration Law was also based on *Hanbali*, thereby ensuring that international arbitration standards as perceived in Saudi Arabia would not inherently contradict the *Shari'ah*.[23] However, incongruences between the *Shari'ah* and international law are not insurmountable obstacles, though there remain issues around public policy. By identifying common areas, it is possible to align Saudi courts with international norms. This has at least been partially successful when it comes to western construction companies seeking arbitration in Saudi courts.[24]

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[17] Abdul Ghafoor Abdul Raheem, Text and the Immutability of Islamic Law: A Study of the Flexibility Evident in Dealing with Texts in Early Islam (University of Melbourne 2000) 7.

[18] Robert Haug and Michael Bonner, 'The Local and Global Commerce of Arabia before Islam' (2002) Pacific Neighborhood Consortium < http://pnclink.org/annual/annual2002/pdf/0922/11/s221102.pdf>, accessed 02 September 2018.

[19] See chapter 2, sections 2 and 3. See generally Salamah Salih Sulayman Aladieh, Mecca Trade Prior to the Rise of Islam (University of Durham 1991).

[20] Hideyuki Shimizu, 'Philosophy of the Islamic Law of Contract: A Comparative Study of Contractual Justice' (1989) 15 IMES Working Paper Series 112, 112.

[21] Arbitration Law (issued by Royal Decree No. M/46 of 12/07/1403H (April 24, 1983).

[22] See Royal Decree No. M/46 on April 25, 1983.

[23] Faris Nesheiwat and Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13(2) Santa Clara Journal of International Law 443 ,445.

[24] See Tim Taylor 'The Confluence of Civil and Common Law and the Influence of Shariah Law on Middle East Construction' (2017) 1 BCDR International Arbitration Review 217, 217-244.

7.3 The ARAMCO Decision

The reluctance to embrace international arbitration standards was not exclusive to Saudi Arabia, but was a trend that prevailed throughout the Middle East in the 1950s and 1960s.[25] Western European and US companies had begun to expand into the growing Saudi oil industry at the time as a global hegemony of capitalist trade regimes and international standards became increasingly common.[26] Unlike other Middle Eastern countries,[27] the concept of international law was seen by influential Saudi scholars as a threat to the foundational principles of the Kingdom (and by extension, the sovereignty of the King)[28] and, as a result, a literal and rigid juristic interpretation of *Hanbali* jurisprudence was promoted in an attempt to ensure that the Kingdom's sovereignty was maintained.[29]

This approach resulted in an increasingly insular and archaic stance, with *Hanbali* principles being applied by the Saudi judiciary to the exclusion of not just international law, but also the other *Shari'ah* schools of interpretation.[30] According Vogel, this meant that the courts failed to address new developments in international law '*because of the notion of the law subsisting in scholarly opinions*'.[31] They were therefore incapable of providing judgments that are flexible and suited to modern conditions. This conflict between *Shari'ah* and international law came to a head in the context of ARAMCO arbitration.

The ARAMCO arbitration of *State of Saudi Arabia v. Arabian American Oil Co* concerned a dispute between Onassis, a Greek transport company and Saudi Arabia.[32] Onassis claimed exclusive rights to transport oil from the country. Saudi Arabia counterclaimed, arguing that it exercised the final right to choose the applicable method of transportation. Subsequently, the dispute went to arbitration in Geneva, where the tribunal decided in favour of the foreign company, on the basis that contract was not a public concession.[33] The tribunal arrived at its

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[25] Arthur J Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2006) 5(1) Santa Clara Journal of International Law 169, 179.
[26] Ibid.
[27] See Francis A Boyle, 'Upholding International Law in the Middle East' (1982) 4(4) Arab Studies Quarterly 336, 336-349.
[28] Nesheiwat and Al-Khasawneh (n 23) 445.
[29] Ibid.
[30] Gemmell (n 25) 179.
[31] Frank E. Vogel and Samuel L. Hayes, Islamic Law and Finance, Religion, Risk, and Return. (Kluwer law International, 1983).14.
[32] Saudi Arabia v. Arabian Am. Oil Co. (ARAMCO), reprinted in 27 I.L.R. 117, 169 (1958).
[33] Julio Colon, 'Choice of Law and Islamic Finance', (2011) 46 Texas International Law Journal 411, 423.

decision by subjecting 'the law of Saudi Arabia to the general principles of jurisprudence as it knew them'.[34]

In many respects, the dispute raised important questions around the exclusivity of the legal system to apply its own laws to a contract, with Schwebel noting that the ARAMCO tribunal rejected the Kingdom's contention that its own laws applied to contracts over which it exercised full control and sovereignty.[35] By doing so, the Tribunal disregarded the presumption against extraterritoriality. The doctrine of exterritorialy precludes the extraterritorial application of local laws to disputes involving foreign jurisdictions, particularly when the subject matter of the case falls within the ambit of a State's public policy or other regulatory purposes, unless the legislature's contrary intent can be inferred.[36] In respect of the ARAMCO arbitration, the Kingdom clearly expressed its intent in a ministerial resolution that stipulated that all contractual matters relating to natural resources were to be governed by Saudi law.[37] Colon notes that the Tribunal effectively refused to apply Saudi law to the contract in dispute, despite the clear mandate, on the basis that ARAMCO's rights could not be 'secured in an unquestionable manner by the law in force in Saudi Arabia . . . [and that Saudi laws] must be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence'.[38] In effect, the Tribunal found that state sovereignty over the subject matter of a contract did not preclude, ab initio, it from arbitration. After determining that *Shari'ah* lacked sufficient provisions or settled standards to be effective in governing complex commercial instruments,[39] the ARAMCO panel went on to apply general principles of lex

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[34] Ibid.

[35] Stephen M Schwebel, 'The Kingdom of Saudi Arabia and Aramco Arbitrate the Onassis Agreement' (2010) 3(3) Journal of World Energy Law and Business 245, 251.

[36] See Erez Reuveni, 'Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws' (2010) 43 University of California Davis Law Review 1071, 1071-1072. See also, SD Sharma, 'Applicability of the Doctrine of Extra-Territoriality to Legislation by the Indian Legislature' (1946) 28(3/4) Journal of Comparative Legislation and International Law 91, 91-92; Susan Lorde Martin, 'The Extraterritoriality Doctrine of the Dormant Commerce Clause is Not Dead' (2016) 100(2) Marquette Law Review 497, 502-505.

[37] Council of Ministers Resolution No. 58 dated 17/1/1383H (25 June 1963). The choice of law governing any dispute to which a government authority is party is to be determined 'in accordance with the established general principles of private international law', the most important of which … is the principle of the application of the law pertaining to the place of execution [execution meaning place of performance]…Government authorities are not permitted to choose a foreign law to govern their relationship with individuals, companies or private organisations… No government authority is permitted to conclude a contract that contains any clause subjecting such authority to the jurisdiction of any foreign court or other adjudicatory body…"

[38] Julio Colon (n 33) 423.

[39] Baamir (n 9) 130.

mercatoria (e.g. pacta sunt servanda) applied to international oil and petroleum contracts.[40] It is should be stressed, however, that the Tribunal considered the pronouncements of the Hanbali school of Islamic law as the governing law of the arbitration/the Concession Agreement, but simply disqualified its applicability in favour of 'general principles of law'.[41] With regard to the concession's compatibility with Islamic law, the Tribunal ruled as follows:

> The concession is compatible with two fundamental principles of Islamic law: The principle of liberty to contract and the principle of respect for contracts. But it was not a public service concession, because there were no users[42].

The approach adopted by the Tribunal in ARAMCO may be described as 'shopping' between laws otherwise expressly held to be inapplicable, in order to nit-pick and choose an otherwise inapplicable law on the basis of what appears to that tribunal to satisfy its own standard of 'reasonableness' or sensibilities. This neither appears to be technically sound in law nor was it heard of in practice.[43] It is doubtful that it was ever intended that the arbitrators should, in the first place, have the power to assume discretion to render an applicable law inapplicable, or an inapplicable law applicable, based on an improvised test of common sense, against all practice and norms and stipulations of the parties. However, Saudi Arabia complied with the award and honoured its Agreement with ARAMCO.[44]

It is perhaps unsurprising that the Saudi Arabian authorities reacted negatively to the decision of the tribunal in ARAMCO. If the old imperialism was forged through territorial control and annexation, there was now a justifiable concern in Saudi Arabia that economic control would instead be enforced through international law.[45] From a Middle Eastern perspective, international trade and investment agreements appeared to protect the rights of foreign investors and corporations, enabling them to exploit the natural resources of sovereign states, with the international tribunals consistently disqualifying applicability national laws such as

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[40] Mert Elcin, Lex Mercatoria in International Arbitration Theory and Practice (European University Institute 2012) 343

[41] Maxi Scherer, International Arbitration in the Energy Sector (Oxford University Press 2018) para 14.17.

[42] Schwebel (n 35) 251. The Tribunal seemed to argue that the Saudis were interpreting Islamic law in a manner that suited their national interests only.

[43] It must however be noted that the award was of declaratory effect only. Neither party wanted to jeopardise their continuous trading relationship, so they agreed to limit the scope of the arbitration to the question of what their legal position was. See Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (4th edn, Sweet and Maxwell 2004) 361. It is uncertain whether the Tribunal would have been as dismissive of the Shari'ah if it was called upon to impose the execution of obligations.

[44] Maxi Scherer (n 41) para 14.18.

[45] Michael E Dickstein, 'Revitalizing the International Law Governing Concession Agreements' (1988) 6(1) Berkeley Journal of International Law 54, 54.

those of Qatar, Libya and Kuwait, for lacking 'notions of pure jurisprudence' or simply, for being 'primitive'.[46] The customs and laws of Arab society, and the sovereign powers of its rulers, were dismissed in favour of Western legal doctrine, often with no equivalent in Islamic law.[47] Thus, the autonomy of Middle Eastern States, and the exclusivity of their own national laws, was at risk of being cast aside.[48]

The importance of the ARAMCO case in the history of arbitration is not solely due to the approach taken by the Tribunal but stems equally from the reaction of the Kingdom to the decision.[49] The ruling was used by the traditionalist members of the Saudi government as an example of the negative effects of embracing international law. This conservative approach resulted in Resolution No. 58 in 1963 that effectively restricted all arbitration clauses and agreements in contracts entered into by the Saudi government by subjecting any such clauses to public policy reviews.[50] The power to enact public policy measures or issue ad hoc decisions in the public interest was construed broadly by Saudi officials to cover an ever-expanding category of 'state contracts' and often, seemingly, without a proportionate legal justification or published reasons.[51]

Although the restrictions on arbitration set down by the Saudi government in the aftermath of ARAMCO were applicable only to the government or its instrumentalities, there were generally very few arbitration proceedings in Saudi Arabia.[52] The lack of clear procedures and judicial support meant that arbitration proceedings between international and domestic companies operating in Saudi Arabia were infrequent while there were several attempts by local courts to declare null and void arbitration agreements or clauses between international

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[46] See Sanghi Polyesters Ltd. (India) v. The International Investor KCFC (Kuwait) and Texas Overseas Petroleum Co. v The Gov't of the Libyan Arab Republic, 53 ILR 389. The case is analysed in Gemmel (n 25) 177.

[47] Steven P Ladas, Patents, Trademarks and Related Rights: National and International Protection (Harvard University Press 1975) 14. See also, Katherine L Lynch, The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration (Kluwer Law International 2003) 265.

[48] See Petroleum Development Ltd v. Sheikh of Abu Dhabi (1951) 18 International and Comparative Law Quarterly 247. In this dispute, the arbitrator, Lord Asquith, was highly critical of Dubai's legal system which he declared an 'absolute, feudal monarch' and 'primitive region' which 'administers a purely discretionary justice with the assistance of the Holy Qur'an'. Ibid, 252-253. For a broad analysis of the decision, see Amr A Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism' (200) 41 Harvard Journal of International Law 419, 448-57.

[49] Saud Al-Ammari, 'Saudi Arabia and the Onassis Arbitration – A Commentary' (2010) 3(3) The Journal of World Energy and Business Law 257, 257-259.

[50] Resolution No. 58 of 1963.

[51] Baamir (n 9) 183; and Schwebel (n 35) 251.

[52] Baamir (n 9) 146.

companies.[53] The Board of Grievances, which was given increased responsibility to oversee international arbitration disputes in the aftermath of ARAMCO,[54] was unwilling to enforce the internal procedural rules agreed by parties to govern the day-to-day workings of the arbitration. Hence, there was much uncertainty about how arbitral awards were to be enforced, and whether they were granted inside Saudi Arabia (being the seat of arbitration) or in a foreign jurisdiction.[55]

The uncertainty of the rules governing the enforcement of all arbitral awards inside the Kingdom was aggravated by the operation of more than one system of law (*Shari'ah* and civil law systems) and multiple reviews by local *Shari'ah* courts and administrative bodies such as the Board of Grievances that dealt with complaints against the government. Courts generally adopted a cautionary approach to ensure that 'foreign elements' do not abrogate from Islamic principles.[56] Hence, awards with a Saudi element were potentially subject to *de novo* review by the courts applying Saudi law to the substance of the dispute.[57] However, despite these obstacles, there was still considerable support for the concept of international arbitration in the Saudi business community, with most domestic companies voluntarily complying with any awards rendered against them in order to ensure that their international reputation was not damaged.[58] Foreign companies also tended to comply, because they feared the repercussions for their business, although they had concerns about the partiality of the Saudi system.[59]

7.4 The Old Arbitration Law & The New York Convention

Against this backdrop, the Old Arbitration Law was therefore intended to improve commercial relations between foreign and domestic companies and ensure that there were legislative provisions that covered procedural, curial and enforcement issues.[60] For the first

[53] See Samir A Saleh, 'The Settlement of Disputes in the Arab World: Arbitration and Other Methods (1986) Berkeley Journal of International Law 280, 282.
[54] See section 4.8, Chapter 4.
[55] Al-Ammari (n 49) 259.
[56] See J Saba, 'Saudi Arabia Investment Climate: Its Risks and Returns' (1986) 19 Middle East Executive Reports 9, 16-19.
[57] Ibid.
[58] George Sayen, 'Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia' (2014) 9(2) University of Pennsylvania Journal of International Law 211, 216.
[59] See chapter 6 that discusses the history and determinants of FDI in Saudi Arabia.
[60] Al-Ammari and Martin (n 10) 389.

time in the Kingdom's history, the Old Arbitration Law expressly recognised the validity of arbitration clauses or agreements.[61]

However, the effect of the Old Arbitration Law was restricted by a number of limitations that allowed the Saudi courts to continue to intervene throughout the arbitration process, resulting in arbitration proceedings being obstructed on numerous occasions.[62] The very limited number of cases in which Saudi public entities were involved in disputes with foreign investors did not usually reach the stage of arbitration.[63] The Old Arbitration Law retained the restrictions on the use of arbitration by government entities without permission from the Council of Ministers.[64] These restrictions were such that, in practice, Saudi public entities could not enter into arbitration agreements, thereby limiting the Old Arbitration Law's effectiveness in a country where much commerce is carried out through public entities.[65]

Under the Old Arbitration Law, the Board of Grievances was entitled to exercise exclusive jurisdiction over matters relating to the enforcement of international arbitral awards rendered in foreign jurisdictions.[66] Furthermore, as a result of the requirement that the arbitral awards had to satisfy the *Shari'ah* and other public policy considerations peculiar to the Saudi legal system, there was little comfort or assurance available to international companies that any arbitration agreements or clauses entered into with Saudi companies would even be validated by the Board of Grievances, let alone that arbitral awards rendered outside Saudi Arabia would be recognized and enforced.[67]

Furthermore, even if a party were successful in submitting a complaint to a non-Saudi arbitrator or tribunal, the enforcement of such the tribunal's award remained within the remit of the Board of Grievances, and there was a very real possibility that an award rendered by an international tribunal would be declared unenforceable by the Board on the basis that the parties had attempted to avoid the jurisdiction of the Saudi courts.[68] Confronted with this reality, international companies had strong reasons to bypass the Saudi legal system, for instance through the incorporation of 'stabilisation' clauses in investment arbitration

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[61] Royal Decree No. M/46, Article 1.
[62] Al-Ammari and Martin (n 10) 389.
[63] See Ed. Züblin AG v. Kingdom of Saudi Arabia, ICSID Case No. ARB/03/1.
[64] Royal Decree No. M/46, Article 3.
[65] Baamir (n 9) 159.
[66] Michael O'Kane, Doing Business in Saudi Arabia (Al-Andalus Publishing 2010) 29.
[67] For more on this see section 4.10 in chapter 4.
[68] Baamir (n 9) 216.

agreements.[69] The purpose of such clauses was to ensure that any future dispute be resolved in accordance with a non-Saudi choice of law.[70] While this did not resolve the problem of a foreign award being denied enforcement by the Board of Grievances, it certainly reduced Saudi court intervention from two counts to one. This problem could be resolved by foreign parties choosing not to enforce awards in Saudi Arabia (such as when only part of the assets to be recovered was located in Saudi). [71]

Among the most glaring deficiencies of the Old Arbitration Law was the uncertainty that surrounded the matter of which courts had competence to hear arbitral award challenges or indeed the grounds on which challenges to the validity of an award, or the contract underlying it, could be initiated. The assumption was that national law and public policy prevailed over treaty obligation, including the Saudi government's ratification of the New York Convention.[72] According to Roy, the Saudi government used national security as an excuse 'to refuse enforcement of non-domestic arbitral awards'[73].

The Old Arbitration Law was also silent on the question of refusal of enforcement, and failed to enumerate exhaustive grounds on which a competent court was required to refuse the enforcement of an award.[74] There was little certainty over whether a court had competence to hear enforcement petitions in the first place. Moreover, Saudi courts exercised a wide margin of discretion to strike down awards (granted in Saudi Arabia) or refused recognition or enforcement of foreign awards.[75]

An example of this discretion is evidenced by the Saudi courts interpretation of the New York Convention after the Kingdom acceded to the Convention in 2007. The New York Convention allows for Contracting States to make reservations to the effect that:

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[69] It should be mentioned that stabilization clauses, commonly used in investment agreements are meant to freeze the law of the state party as on the date of the investment in order to protect a foreign investment being subject to instability or constant changes in law which may diminish or destroy its value. It is meant to embody legitimate expectations of the investor in a more tangible form of a specific clause. See Piero Bernardini, 'Stabilization and Adaptation in Oil and Gas Investments' (2008) 1(1) The Journal of World Energy Law and Business 98, 98-99. See also, SK Chatterjee, 'The Stabilisation Clause Myth in Investment Agreements' (1998) 5 Journal of International Arbitration 97, 97-98.

[70] Shapur Farhangpur, Analytical Study of Arbitration under International Oil and Gas Agreements Disputes Under the Indian, Iranian and International Trade Law: Problems and Prospects (University of Pune 2011) 226.

[71] Ibid.

[72] Ibid, 217.

[73] Kristen Roy, The New York Convention and Saudi Arabia: Can a Country Use Public Defence Policy to Refuse Enforcement of Non-domestic Arbitral Awards' (1994) 19 The Fordham International Journal 920, 920.

[74] Farhangpur (n 70) 219.

[75] Frank E Vogel, 'Saudi Arabia Decision No. 822 on Banking Deposits: An Analysis' (1986) Middle East Executive Reports 21, 21.

> 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.[76]

Upon becoming a signatory of the New York Convention, Saudi Arabia made such a reservation. As a combined result of this reservation as well as a failure to publish decisions, it was unclear under the Old Arbitration Law whether the Board of Grievances even accepted whether accession to the New York Convention by other signatories was sufficient evidence of reciprocity between the member states, or whether the Board of Grievances required factual evidence of Saudi Arabian awards being enforced in the relevant jurisdiction.[77]

Examples of the Saudi courts considering reciprocity can be seen in a number of cases that occurred subsequently to Saudi Arabia acceding to the New York Convention in 1994. The Board of Grievances recognised a judgement of the US District Court for the District of Columbia[78] where it held that, as the US District Court judge had a sworn statement providing that Saudi judgments would be enforced in the District of Columbia; reciprocity had been established.[79] However, a separate ruling from 2004 involved the Board of Grievances demanding a specific example of an enforcement of a Saudi judgment in a US court, and refusing a legal opinion from the US State Department that the US Courts would recognise and enforce Saudi judgments.[80] These two rulings both suggest that the Board of Grievances would look at the individual country in each case as opposed to relying on reciprocity under a treaty such as the New York Convention.

However, perhaps even more importantly, the rulings in these two cases illustrate the lack of clarity available to parties seeking enforcement in Saudi Arabia. Despite having ostensibly similar facts, the Board of Grievances took two different approaches to considering reciprocity, thereby highlighting the uncertainty of the Saudi position. The Board of Grievances' approach of taking each application for enforcement on a case-by-case basis and

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[76] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Article 1.
[77] Roy (n 73) 938.
[78] Judgement was not published. For discussion of the Board of Grievances' recognition of a non-domestic rulings, see Muddassir Siddiqui, 'Arbitration under the Shari'ah: With Case Study of Saudi Arabia' (2004) International Dispute Resolution Committee of District of Columbia Bar 1, paras 65-72.
[79] Nicolas Bremer, 'Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries' (2016-17) 3 McGill Journal of Dispute Resolution 37, 57.
[80] Siddiqui (n 78) para 72.

considering it on a *de novo* basis, may be said to have further muddied the waters for parties on what precedent was applicable when considering reciprocity.

As a consequence of these issues, the practical result of the Old Arbitration Law was that it was no more advantageous to enter into international arbitration proceedings than it was prior to the implementation of that new legislation. Although the Old Arbitration Law supported the concept of international arbitration on its surface, by establishing (and failing to discourage) the power of the judiciary to intervene in an arbitration, the legislation was ineffective in persuading international companies that the legislative support for international arbitration in Saudi Arabia was anything more than superficial.[81] Doubts as to the effectiveness of the Old Arbitration Law were such that legal practitioners often recommended to their clients not to pursue arbitration as a dispute resolution mechanism when entering into agreements with Saudi companies, since the dispute would likely end up in the Saudi court system with a full re-trial ordered by the Board of Grievances, thus making the arbitration procedure an expensive waste of time and money.[82]

The crucial point being argued by this researcher is that there was no effective mechanism available under the Old Law for a foreign party seeking to enforce an award against a Saudi party, apart from (1) arbitrating, which under the Old Law was toothless and resulted in effectively being prolonged in an over-burdened court system, and (2) the Saudi courts themselves. This called for an alternative which would, at the very least, ensure that the arbitration process itself was followed with respect towards party autonomy and in a time-bound and predictable manner, which would minimise (if not eliminate) the frustrations of a foreign investor in dealing with the Saudi courts. In the face of the uncertainties and inefficiencies of the old arbitral framework, the Saudi Arbitration Law enacted in 2012 promised an expeditious arbitral process. The next section determines whether this goal has been achieved.

7.5 The Arbitration Act 2012

As set out above, the lack of effectiveness of the Old Arbitration Law eventually resulted in the introduction of the New Arbitration Law in 2012,[83] with the intention of reducing much

[81] Sayen (n 58) 217.
[82] Baamir (n 9) 179.
[83] Saudi Arbitration Law ('SAL 2012') issued by Royal Decree No. (34/m) dated 24/05/1433 H. (corresponding to 16/04/2012), Kingdom of Saudi Arabia Bureau of Experts at the Council of Ministers.

of the unpredictability involved in arbitration and the enforcement of arbitral awards in Saudi Arabia.[84] The New Arbitration Law would appear to be part of wider reforms being introduced with a view to modernising the laws of the Kingdom, beginning with judicial reforms in 2007 (which resulted in a reorganisation of the hierarchy of the Saudi court system and the establishment of a Supreme Court and regional appellate courts) and including amendments to foreign investment law and company law.[85]

The New Arbitration Law distinguishes between international and domestic arbitration under Saudi law for the first time, as well as arbitration proceedings that take place in Saudi Arabia and proceedings held elsewhere.[86] The legislation sets forth a comprehensive set of provisions that is intended to encourage parties to embrace arbitration in Saudi Arabia and ensure that Saudi Arabian arbitration law is more in line with international standards. This section will consider some of these provisions in greater detail in order to highlight how the drafters have attempted to reconcile *Hanbali* principles with international arbitration standards.

The New Arbitration Law is based on the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), 2006.[87] The Model Law is the basis for arbitration law in 94 countries,[88] with many countries incorporating the Model Law into their legal systems *verbatim*.[89] It should be noted that although practices of arbitrators have not been harmonised, the widespread adoption of the Model Law has brought about a certain level of international consensus around procedures and primary rules governing arbitration proceedings. This has significantly impacted court practice and reduced variance between domestic laws.[90]

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[84] See John Balouziyeh and Amgad T. Husein, 'Saudi Arabia's New Arbitration Law Sees More Investors Opting for Arbitration in Saudi Arabia' (Kluwer Arbitration Blog 2013) < http://arbitrationblog.kluwerarbitration.com/2013/05/29/saudi-arabias-new-arbitration-law-sees-more-investors-opting-for-arbitration-in-saudi-arabia/>, accessed 2 September 2018.
[85] Rahul Goswami and Yousef Al-Husiki, 'The International Arbitration Review: Saudi Arabia', (The Law Reviews 2016) < https://thelawreviews.co.uk/edition/the-international-arbitration-review-edition-7/1136486/saudi-arabia>, accessed 2 April 2018.
[86] Jean-Pierre N Harb and Alexander G Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shar'ia' (2013) 30 Journal of International Arbitration 113,113-114.
[87] See the United Nation Commission on International Trade Law (UNCITRAL) <http://www.uncitral.org>, accessed 2 April 2018.
[88] Al-Ammari and Martin (n 10) 390.
[89]UNCITRAL. Model Law (1985) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>, accessed 02 April 2018.
[90] Al-Ammari and Martin (n 10) 390.

However, as a result of Saudi Basic Law requiring that all its laws must comply with the *Shari'ah*, the New Arbitration Law does include some modifications to the Model Law.[91] As a result of these modifications, the New Arbitration Law may be considered to be somewhat of a hybrid between the international standards set out in the Model Law and *Shari'ah* principles that are based on the *Hanbali* school of Islamic jurisprudence. It is worth noting that despite the wide recognition and acceptance that the Model Law has come to receive, it remains ultimately a standard or model, a guiding document which states can use as reference, making it ultimately the state's decision to carve out its own arbitration policy and legislation. Thus, the Saudi government has with the 2012 law, integrated parts of the Model Law into local law as long as 'it does not violate public policy or *Shari'ahh*'.[92]

The New Arbitration Law broadly consists of eight chapters and has 58 articles. The Implementing Rules to the Law, issued in May 2017, provide a number of clarifications.[93] Some of the clarifications include the statement that the Court of Appeal is the competent court as regards the supervision of Saudi-seated arbitration.[94] If the Court of Appeal recognises an award it will order its enforcement and its decision will be final and non-appealable. Furthermore, the Implementing Rules provide that if the Court of Appeal decides to set aside an award, its decision can be appealed within 30 days following the date of notification of the decision.[95]

This section will consider the key issues arising as a result of the implementation of the New Arbitration Law, with particular focus on the substantive scope of the legislation, the procedural rules contained in it and, in conjunction with the Enforcement Law of 2012, the provisions relating to the finality and enforcement of international arbitral awards.

7.5.1 Scope of the New Arbitration Law

The first point worth noting is that Article 2 of the New Arbitration Law provides that the legislation is subject to '…international conventions to which the Kingdom is a party', thereby establishing, for example, the New York and Riyadh Conventions as overarching

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[91]Ibid, 387.
[92] Joseph Chedrawe and Sami Tannous 'The European, Middle Eastern and African' (2016) Arbitration Review 2016 <https://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2016/1036936/middle-east>, accessed 02 April 2018. See also Saudi Royal Decree No. M/34.
[93] Saudi Cabinet Decision No. 541/1438.
[94] New Arbitration Law (2012) - Royal Decree No. M/34, Article 2.
[95] Ibid, Article 51.

international regimes that Saudi Arabia is subject to.[96] Where parties have not expressly provided for the preferred choice of *lex arbitri*, the New Law will apply as a default to any Saudi-seated arbitration, in other words to any arbitration proceedings commenced in the Kingdom's territories or otherwise commenced outside the Kingdom but where the parties have specifically agreed to apply the New Arbitration Law.[97] As Harb and Leventhal note, the New Law provides for a definition of international arbitration which is broadly equivalent to similar provisions in the 2006 UNICTRAL Model Law.[98]

In effect, this suggests that the New Law has coverage over disputes of an international commercial nature seated in Saudi Arabia; disputes involving international parties; and disputes in which parties, have designated the rules of non-Saudi international arbitration regimes such as ICC and LCIA as internal rules of procedure, but are nonetheless subject the arbitration to a Saudi seat / arbitration law / *lex arbitri*.[99] As Harb and Leventhal note, this provision has far reaching implications, since the use of these rules will automatically exclude application of the non-mandatory procedural rules provided for under the 2012 New Law, to the extent that these are in conflict with the rules of any international arbitration institution that the parties may choose to apply.[100] Moreover, parties to an international dispute involving Saudi Arabia may, in theory at least, agree to apply the New Law to arbitral

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[96] Royal Decree No. M/34, Article 2. Note that the Kingdom is a party to the following treaties:
The Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards of 1952 which deals with the enforcement of judgments and arbitral awards in the Kingdom.

The Kingdom is also a signatory to the 1983 Riyadh Convention which it ratified on 11 May 2000. The Riyadh Convention deals with the recognition and enforcement of foreign judgments and arbitral awards. This Convention upholds the finality of foreign awards and judgments, and states that local enforcement courts have no jurisdiction to review the subject matter of the underlying dispute, provided that such arbitral awards do not violate public order, morality or the constitution of the State in which enforcement is being sought, or the overriding principles of Shariah law.

Finally, the Kingdom acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The Kingdom entered a reciprocity reservation to this treaty, stating that its recognition and enforcement of awards rendered in the territory of another contracting State is subject to reciprocal recognition of Saudi arbitral awards and judgments by the relevant courts of the contracting state. The Saudi government also entered a reservation reiterating its right to refuse recognition and enforcement of any arbitral awards or judgment found to contravene public policy or Shari'ah.

[97] See Royal Decree No. M/34, Article 2 and 3. See also UNCITRAL Model Law, supra note 64 art. 1(3). The Old Arbitration Law did not have a similar provision.
[98] See U.N. Commission on International Trade Law (UNCITRAL) Res. 40/72, Model Law on International Commercial Arbitration of the UNCITRAL, 18th Sess., Dec. 11, 1985, A/40/17. See Harb and Leventhal (n 86) 117.
[99] Ibid. See also Nesheiwat and Al-Khasawneh (n 23) 449.
[100] Harb and Leventhal (n 86). See also Royal Decree No. M/34, Arts 3 and 4.

proceedings, thereby significantly improving their chances for successful enforcement of an arbitral award in Saudi Arabia.

It is worth noting, however, that Article 2 of the New Law states that the provisions of the New Arbitration Law apply 'without prejudice to provisions of Islamic *Shari'ah*', thereby reinstating *Shari'ah* as the highest law of the Kingdom. In other words, mandatory principles of *Shari'ah*, as distinct from *fiqh* (which relates to juristic interpretation of Islamic legal sources), must be taken into consideration when applying the legislation and ensuring the following hierarchy of applicable laws: (i) *Shari'ah* law; (ii) international conventions; and (iii) domestic law.[101] The relationship between domestic law, international law and the role of the *fiqh* in the implementation of the *New* law has not yet been fully worked out according to Chedrawe and Tannous.[102] However, the hierarchy of laws has a profound effect on the fundamental principles and interpretation of the legislation, as one must consider *Shari'ah* principles when interpreting every provision of the legislation, much like the position under the Old Arbitration Law.[103]

In the Saudi context, it is incumbent upon parties, particularly private parties to an arbitration agreement, to ensure that an arbitration clause satisfies the formality requirements, as specified under Saudi regulations and the *Shari'ah*.[104] While the New Law affirms the right of parties to arbitrate future disputes and to have the award enforced on its conclusion, any 'arbitral award supporting an aleatory contract or aleatory clauses,[105] other than the arbitration clause itself considered contrary to public policy' may be subject to enforcement challenges.[106] In the above regard, Article 49 of the New Arbitration Law provides that

> Arbitration awards rendered in accordance with the provisions of this Law are not subject to appeal, except for an action to nullify an arbitration award filed in accordance with the provisions of this Law.[107]

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[101] Ibid.
[102] Chedrawe and Tannous (n 92).
[103] Ibid. See also Saudi Royal Decree No. M/46.
[104] Mark Ballantyne, 'Book Review of Commercial Arbitration in the Arab Middle East: A Study in Shari'a and Statute Law', (1989) 4(3) Arbitration International 269, 269.
[105] Traditionally, aleatory contracts or clauses, which provide for rights and obligations to be determined by future or uncertain events, are deemed to be inconsistent with the Shari'ah. See abd Al-Hamid Ahdab and Jalal El-Ahdab, Arbitration with the Arab Countries (3rd edn, Wolters Kluwer 2011) 540.
[106] Faisal Kutty, 'The Shari 'a Law Factor in international Commercial Arbitration', (2006) 28 Loyola Law Association of International Comparative Law Review 565, 605.
[107] Royal Decree No. M/34, Article 49.

Article 50(2) specifies that the competent court must, on its on motion, nullify an arbitral award which is not compliant with the *Shari'ah* or public policy.[108] This general ground for setting aside the arbitral award is in furtherance of the grounds stated in Article 50(1). Another example can be found in Article 8, which allows for arbitral awards to be reviewed by the Court of Appeal.[109] However, unlike the Old Arbitration Law, under which the Board of Grievances frequently heard appeals of arbitral awards, Article 8(2) provides that, in international arbitration proceedings,

> …within the Kingdom or abroad, the court of appeal originally deciding the dispute in the city of Riyadh shall have jurisdiction, unless the two parties to arbitration agree on another court of appeal within the Kingdom.

This is designed to introduce a degree of flexibility into the arrangement for arbitrating a dispute.

7.5.2 Reforms Introduced By the New Arbitration Law

7.5.2.1 Arbitrability of disputes not yet arisen

Article 9 of the New Arbitration Law provides that parties may agree to arbitration either prior to the occurrence of a dispute or after.[110] This is a helpful clarification as one of the perceived issues concerning arbitration under the Old Law was that in order for an arbitration clause or agreement to be valid, the dispute must already have arisen.[111] The arbitration agreement must be submitted for approval to the competent authority responsible for the subject matter of the dispute.[112] According to Baamir, this apparent conflict is solved by the fact that:

> …arbitration clauses are recognised as valid…as long as they are not contrary to public order and do not permit a prohibited action under *Shari'ah*. Risk and uncertainty make a transaction void and it is obvious that an arbitration clause does not involve any risk.[113]

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[108] Abdullah Mohammed Al-Abdullah, An Examination of the Role of Shari'ah in the Recognition and Enforcement of Arbitral Awards in Saudi Arabia (University of Exeter 2016) 98.
[109] Royal Decree No. M/34, Article 8.
[110] Royal Decree No. M/34, Article 9.
[111] See n. 25.
[112] See Diwan Almazalim, Decision No. 59/T/4 of 1412 H (1992).
[113] Baamir (n 9) 195.

7.5.2.2 Appointment of Arbitrators

Under the Old Law, refusal to arbitrate by a party after concluding a binding and approved arbitration clause allowed the other party to compose the compromise unilaterally, under the supervision of the competent authority.[114] Article 13 of the New Arbitration Law provides that the parties are also free to agree to the arbitrators of their choice, although there must be an uneven number of arbitrators; for the failure to have an odd number of arbitrators will result in the arbitration being void. [115] The rule is based on plain logic, and is widespread across many jurisdictions, to avoid deadlocks in adjudication, due to conflicting decisions of an even number of arbitrations and to ensure that an award can still be made based on the decision of the majority.[116]

The New Arbitration Law requires that at least one arbitrator (or the chair of a multi-arbitrator tribunal) must hold a degree in either *Shari'ah* or Islamic law (*fiqh*).[117] Under the Old Law, all arbitrators had to be Muslims [118] However, this was not seen as discriminatory, indicating that it was not completely at variance with international standards.[119]

The importance of the adjudicator's qualifications in *Shari'ah* has always been present in the Saudi legal system. Even prior to this being legislated for, commentators have recommended that tribunals include members qualified in *Shari'ah* or *fiqh*, based on the fact that by failing to do so, it is more likely that an award may be rendered that is not compliant with Islamic law, and therefore awards rendered by non-Muslim arbitrators might draw a larger number of *Shari'ah* or Court of Appeal interventions.[120] Whilst arbitrators must be qualified in *Shari'ah* law, real life considerations may motivate the parties to an international arbitration proceeding to select arbitrators that are moderate in their application of *Shari'ah*. Thus,

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[114] See Diwan Almazalim, Decision No. 184/T/4 of 1412 H (1992).

[115]The distinction between domestic or international arbitration does not matter here. Article 13 is agnostic towards this nature of the arbitration, even in international arbitrations seated in Saudi, where the New Arbitration Law (along with Sharia) is applicable, Article 13 applies in no different manner than it would in the case of a purely domestic arbitration.

[116] Baamir (n 9) 102.

[117] Royal Decree No. M/34, Article 14.

[118] Nancy B Turck, 'Arbitration in Saudi Arabia', (1990) 6(3) Arbitration International 281, 281-291. This is in contrast with Old Law, which required the arbitrators to be either Saudi citizens or non-Saudi Muslims with a professional designation; the non-Saudi Muslim arbitrators were in turn required to have the same qualifications as Saudi judges which effectively meant that the arbitrators had to be male and Muslim'.

[119] In the case of Jivraj v. Hashwan [2011] UKSC 40, the UK court stated that arbitrators can be selected solely on the basis of their religion and this was not discriminatory. See also Maysa Bydoon, 'Reservations on the "Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): Based on Islam and its Practical Application in Jordan: Legal Perspectives', (2011) 25 Arab Law Quarterly 51, 51-69.

[120] See generally, Henry Quinlan et al, Arbitration Procedures and Practice in Saudi Arabia: Overview (Practical Law 2017) 11.

although a requirement to ensure an arbitrator is proficient in *Shari'ah* may appear at first glance to be more restrictive than the previous legislation, in practice it is suggested that by ensuring that an arbitrator is qualified in *Shari'ah*, there would be a lesser need for the Saudi courts to ensure that arbitral awards are in compliance with the *Shari'ah*.[121]

7.5.2.3 Choice of governing law

Arbitrations, by their nature, require application of a set of multiple laws governing the conduct of arbitration. While the substantive law relates to the law applicable to the underlying contract, the procedural rules applicable in an arbitration are further divided into two kinds: the law governing the procedure of the arbitration (including procedural public policy such as due process or substantive public policy such as public morality), and the law governing the procedure in the arbitration. The latter are rules that are subject to party autonomy and tribunal's decision,[122] while the former are not.

The main contract may be subject to the application of mandatory aspects of the *Shari'ah*, mostly notable the injunction on interest related clauses. Mayer defines mandatory law as follows:

> [a]n imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship. To put it another way: mandatory rules of law are a matter of public policy (ordre public) and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.[123]

Article 38 of the New Arbitration Law permits parties to choose the governing law of the arbitration agreement (i.e. the applicable substantive law).[124] Nonetheless, the choice of law

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[121] ibid

[122] See generally Robert AJ Barry, 'Application of Public Policy Exception to the Enforcement of Foreign Arbitral Awards Under the New York Convention, A Modest Proposal', (1978) 51 Templeton Law Quarterly 843, 843.

[123] Pierre Mayer, 'Mandatory Rules of Law in International Arbitration', (1986) 2 Arbitration International 274, 274-75.

[124] Royal Decree No. M/34, Article 38 which stipulates:
"After ensuring that the rules of Islamic Shariah and the laws of the Kingdom are not contravened, the arbitral tribunal shall, in the course of hearing the dispute, proceed as follows: (a) It shall apply the rules agreed upon by the parties to the subject matter of the dispute; if the parties to the dispute have agreed to the implementation of the laws of a particular country, the substantive rules of that law, excluding the rules related to conflict of laws, shall be implemented, unless agreed otherwise."

rules of a different legal system, including rules of private international law will not have automatic effect or applicability, save in those instances where parties' have agreed to be bound by those relevant conflict of law rules in their selection of the applicable substantive law.[125] In a sense, this requirement can be seen to enhance certainty of legal outcomes, compared with equivalent provisions under the UNICTRAL model law under which tribunals are given authority to determine the applicable conflict rules.[126] The legal position of the parties is less clear cut in disputes involving a conflict between the choice of law referred to in an arbitration clause or agreement and mandatory norms of Saudi law or the *Shari'ah*, since the latter must necessarily be construed as the mandatory law of the Saudi legal order.[127]

Private international law refers to the body of rules used to decide the laws applicable to arbitration.[128] Concerning the application of these rules, a tribunal may apply foreign or host state's conflict rules in order to determine the applicable substantive law of the arbitration. The governing law of the contractual relationship and the basis on which the substantive rights and obligations of both parties will be construed and decided is known as the *lex causae*.[129] Under accepted principles of private international law, the law of the contract is typically the legal system in which the contract is being performed, a principle known as the 'closest connection' rule.[130]

In the above light, a Saudi arbitrator may determine that mandatory provisions of Saudi law are applicable to contractual disputes, even where the parties have chosen the rules of another legal system as the law governing their contractual relationship. [131]

An arbitral award enforced on its conclusion may be subject to a challenge should the 'aleatory contract or aleatory clauses, other than the arbitration clause itself be considered contrary to Saudi Arabia's public policy', extending to rules and rule-interpretations of Islamic legal sources or the *Shari'ah*.[132] To take one example, while the New Arbitration Law

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[125] Ibid.
[126] UNCITRAL Model Law, Article 28.
[127] Chapter 5, section 5.6
[128] See generally Lord Collins and Jonathan Harris, Dicey, Morris and Collins on Conflict of Laws (15th edn, Sweet and Maxwell 2017) chapter 6.
[129] Mark Huleatt-James and Nicholas Gould, International Commercial Arbitration: A Handbook (2 edn, LLP 1999) 62.
[130] Ibid.
[131] Ahmed El Kosheri and Fatek Riad, 'The Law Governing a New Generation of Petroleum Agreements: Changes in the Arbitration Process', (1986) Foreign Investment Law Journal 257, 274.
[132] Kutty (n 106) 618.

allows for parties to choose a governing law that is not *Shari'ah* law, where one party to the dispute is Muslim, any provisions of the chosen governing law which are contrary to public policy or the *Shari'ah* are, in theory, unenforceable.[133]

As previous chapters have demonstrated, arbitration has been long practiced in the pre-and Islamic era and theological justification for the practice in verses of the *Qur'an*. Looking to the rulings of the *Hanbali* School, parties to a covenant – which would include both the main contract, any aleatory and arbitration agreement – are free to select the terms of their choosing, providing that these terms do not transgress established Islamic legal principles of the *Shari'ah* read with Saudi's *lex arbitri*, when the arbitration is seated in Saudi Arabia. The *Hanbali* Islamic position on 'freedom to contract' principle mirrors the Western concept of 'freedom to contract' and its doctrinal derivatives - the principles of arbitral finality[134] and party autonomy.[135]

The most cited example of aspects of the *Shari'ah* that influence contract law or public policy include the prohibition of *riba* in relation to arbitral awards rendered in Saudi Arabia. The position of the Saudi government was set out as follows:

> The Shari'ah's Islamic law forbids usury in any form or manner whatsoever, whether or not it is gained or in secret. The defendant asserted that a position of the amount claimed by the claimant [….] is illegal. If the defendant's contention properly invokes Shari'ah provision, then the Arbitral Tribunal must apply it since it relates to the public order of the Kingdom.[136]

Wakim elaborates further:

> [i]t is a must for all Muslims to comply with contractual provisions except for those which authorize what is forbidden or forbid what is authorized, for example

[133] Al-Ammari and Martin (n 10) 395.

[134] The principle of finality of the award and authority of a tribunal to determine their own competence to decide issues is partially codified in Article 19 of the 1975 ICC Rules, Article 25(1) of the 1998 ICC Rules, and Article 16(2) LCIA Rules.

[135] Harb and Leventhal (n 86). For a historical overview, see Charles H Brower and Jeremy K Sharpe, 'International Arbitration and the Islamic World: The Third Phase', (2003) 97 American Journal of International Law 643, 643-647.

[136] Cited in Nayla Comair-Obeid, 'Salient Issues in Arbitration from an Arab Middle Eastern Perspective', (2004) 1 Arbitration 52, 72. See also, Yahya Al-Samaan, 'The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia', (1994) 9(3) Arab Law Quarterly 217, 231.

> those which prohibit speculative contracts (Gharar) and those that forbid usurious interest (Riba).[137]

Taken together, one can easily see why a foreign party, outside of the Muslim world, would look to bypass the local laws and disputes resolution mechanisms of Saudi Arabia. Not only have such parties historically faced the risks of being subject to unfamiliar contract rules as well as uncertain conflict of law rules, they have also been prone to have their foreign arbitral awards (secured outside the Kingdom) denied recognition enforcement on grounds unknown to the rest of the world. Subsequent sections of this chapter will attempt to apply these theoretical insights to study how the new arbitration and enforcement regime has dealt with these issues in the context of award enforcement and challenge, in order to prepare the ground for discussion of judicial and religious perspectives on the above mentioned conflicts, theoretical and doctrinal, in modern day Saudi Arabia.

7.5.2.4 Choice of procedural rules

In what has been described as a welcome development, the New Law adopts the principles of finality, party autonomy and freedom of contract.[138] Parties are afforded considerable freedom, including the freedom to choose the applicable substantive law of the arbitration,[139] the seat of arbitration,[140] and the procedural rules, subject to the proviso that such rules are in substantial compliance with mandatory aspects of Saudi law and the *Shari'ah.*[141]

As stated earlier, international arbitrations are subject to more than one system of law or legal rules applicable at the same time. Modernity of arbitration law-making allows party autonomy to the extent where parties and arbitrators may themselves decide on their own detailed rules of procedure to be followed in the arbitration. These detailed rules are however subject to the law of the seat of arbitration, also often referred to as 'curial law',[142] an example of which is the New Arbitration Law.

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[137] Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards In The Middle East', (2008) 21(1) New York International Law Review 1, 40-42.
[138] Marc Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration', (1997) 14 Journal of International Arbitration 23, 23–24.
[139] Royal Decree No. M/34, Article 38(1)(a).
[140] Ibid, Article 28
[141] Ibid, Article 25,
[142] See Lord Mustill in Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] AC 334, 357-358. See also, Alan Tsang, 'Determining the Law Applicable to Arbitration Agreements: The Common Law Approach', (2014) 21(5) Mealey's International Law Report 1, 1, 4.

The law of the seat of the arbitration or *lex arbitri* lays down a body of rules which sets a standard external to the arbitration agreement, which is beyond the wishes of the parties, in relation to the conduct of the arbitration. This is the law governing the arbitration, and extends to matters such as the definition and form of an agreement to arbitrate, arbitrability of a dispute, constitution of tribunal and grounds for challenge, competence of tribunal to rule on its jurisdiction, equal treatment of parties and due process, court assistance, form and validity of arbitral award, and challenge to the arbitral award.[143] This law of the seat of arbitration, should be distinguished from governing law or law applicable to the substance (*lex causa*), as well as from the procedural rules employed in the arbitration based on the parties' wishes (substantiating the principle of party autonomy) or by adoption of institutional rules such as those of LCIA, ICC or SIAC. [144]

In order to align the Saudi arbitration legislation with international standards of practice, expansion of party autonomy and minimal judicial intervention are important objectives, which the New Law has attempted to meet by streamlining and vastly improving parties' rights under the New Law. For instance, the Old Arbitration Law was restricted to domestic arbitrations, while the New Law expanded the scope of the legislation to domestic as well as international commercial disputes.[145] One key advantage that this provides to the parties is the choice of forum; parties in an international arbitration may now choose not to initiate proceedings in Saudi Arabia by agreeing to a certain foreign seat or *lex arbitri*,[146] where the parties have not designated a choice of forum (or other relevant terms of reference) or the seat of arbitration (or if the applicable seat is a disputed fact). Tribunals are also empowered to determine the seat of the arbitration.[147]

Another example of increased party autonomy is Article 29 of the New Law, which allows the parties or the tribunal to decide the language of the arbitration. Although the default language applicable to all arbitral proceedings involving Saudi Arabia is Arabic, the tribunal

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[143] Nigel Blackaby et al, Redfern and Hunter on International Arbitration (Oxford University Press 2009) 17, 179.

[144] Jan Paullson, 'Arbitration in Three Dimensions', (2011) 60 International and Comparative Law Quarterly 291, 291; Alastair Henderson, 'Lex Arbitri, Procedural Law and the Seat of Arbitration', (2014) 26 Singapore Academy of Law Journal 888, 889.

[145] Royal Decree No. M/34, Article 2.

[146] Al-Ammari and Martin (n 10) 390.

[147] Royal Decree No. M/34, Art 28. Also see, Goswami Al-Husiki (n 85); White & Case, Reform of the Saudi Arbitration Law, Insight: International Arbitration (September 2014) 1, <https://www.whitecase.com/sites/whitecase/files/files/download/publications/alert-Reform-Saudi%20-Arbitration-%20Law.PDF>, accessed 08 April 2018.

or parties may decide that the proceedings should be conducted in an alternative language or languages.[148]

By granting parties and tribunals greater freedom to determine the language, venue and seat of arbitration, the new law is landmark on the road to modernising Saudi Arabia's arbitral process. Foreign parties, for instance, are more likely to participate in arbitral processes if they are able to shape those processes by choosing appropriate procedural rules and with higher decision-making during the conduct of the arbitration, and if the relevant national laws respect established principles and customs of international commercial laws, including freedom of contract and party autonomy.[149] These principles are fundamental to the success of international and domestic arbitral processes, giving force and effect to the legitimate expectations and intent of contracting parties, whilst reducing uncertainty of outcomes from one legal system to another.[150] After all, parties will seek to arbitrate their dispute in forums that apply rules and procedures with which they are familiar. This, in turn, will enable parties to anticipate how legal points will be decided, and plan for any damages that may be awarded against them.[151]

The New Arbitration Law allows for parties to select their own internal rules of procedure to govern the conduct of the arbitral proceedings. Parties may also nominate the rules of any organisation, agency or arbitration centre in Saudi Arabia or abroad such as the International Chamber of Commerce of the London Court of International Arbitration.[152] As mentioned above, if there is any inconsistency between the procedural rules agreed by the parties and the New Arbitration Law, the procedural rules agreed by the parties will only take precedence so long as they do not contravene the *Shari'ah* and Saudi public policy.[153] Neisheiwat and Al-Khasawneh give the example of such a contravention where the procedural rules 'deprive a party of the opportunity to set out its case in full, or to cross-examine a witness, or if a tribunal permits a witness to testify without taking a solemn oath'.[154]

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[148] Royal Decree No. M/34, Article 29.
[149] Balouziyeh and Husein (n 84).
[150] Susan Frank, 'Development and Outcomes of Investment Treaty Arbitration', (2009) 50 Harvard International Law Journal 435, 437.
[151] Ibid.
[152] Royal Decree No. M/34, Article 5.
[153] Nesheiwat anf Al-Khasawneh (n 23) 447.
[154] Ibid.

7.5.2.5 Default applicable rules

If no procedural rules are chosen by the parties to an arbitration, the tribunal is empowered to apply default conflict rules (of private international law), which may apply the applicable law most closely connected to the subject matter of the dispute but will remain subject to the *Shari'ah* and public policy where relevant (such as when enforcing an award).[155]

As is common international practice, in the absence of any particular substantive law specified by the parties, the arbitration tribunal applies what is known as the 'closest connection test' to ascertain the parties' intention (at the time of entering into the contract) as to their preferred choice of substantive law.[156] The evolution of this test can be traced back to the 2012 English Court of Appeal decision in *Sulamerica*,[157] where the Court formulated a three-stage test to determine the governing law of the arbitration agreement. In the first instance, it checked whether there was an express of governing law. If not, whether a choice of law could be ascertained by implication from the contract terms, failing the courts determined which country's law the arbitration agreement has the closest and most real connection with.[158] A similar test is enshrined in Article 38(2) of the New Arbitration Law.

In the event the parties have also not specified the internal *procedural* rules applicable to the conduct of the arbitration, the arbitration tribunals apply the same test, through which the non-mandatory aspects of the abovementioned substantive law (as ascertained to be the most closely connected) are held to be the applicable procedural rules to govern the arbitration.

Quinlan et al note that even if parties exclude *Shari'ah* law from their arbitration agreements, at least one arbitrator (or member of the arbitral tribunal) should have *Shari'ah* law expertise in order to inform tribunals whether any such procedural rules might be in conflict with the *Shari'ah*.[159]

7.5.2.6 Minimisation of judicial intervention

Departing from the Old Law, the 2012 Arbitration Law limits the circumstances under which local courts may set aside or annul an award (in case of a Saudi-seated arbitration) and goes

[155] Royal Decree No. M/34, Article 25.
[156] See Trevor Cooke and Alejandro I Garcia, International Intellectual Property Arbitration (Wolters Kluwer 2010) 106-108; Peter Machin North, Essays in Private International Law (Clarendon Press 1993) 51-52.
[157]Sulamérica Cia Nacional De Seguros SA & Ors v Enesa Engenheria SA & Ors [2012] EWCA Civ 638.
[158] ibid
[159] Quinlan et al (n 120) 11.

further to exclude judicial review on the merits or subject matter of foreign arbitral award at the enforcement stages. While this will be discussed in more detail below, it is noteworthy that this change in Saudi arbitration law brings greater harmonisation between Saudi Arabia's arbitration and the UNCITRAL Model Law provisions governing grounds of review of domestic / foreign award.[160] The New Law also brings Saudi Arabia in line with Western legal systems and institutionalised international commercial arbitration frameworks.[161]

The New Law attempts to implement this broad policy of ring-fencing the arbitral process from excessive judicial administration through various provisions. For instance, under the previous law, parties were required to submit the arbitration agreement with a competent Saudi court, and obtain that court's approval before any arbitral proceedings could be commenced.[162] The New Law explicitly provides that Saudi courts must decline jurisdiction to hear a dispute relating to an arbitration clause, except when some manifest evidence of procedural impropriety or irregularity can be demonstrated or, more contentiously, when any formality or public policy requirements have been breached, discussed below.[163] Thus, while on the one hand (under the Old Law) the onus was on the party to first successfully plead the validity of arbitration agreement in a court of law before the arbitration could be commenced, the duty on the other hand now rests with the court to adjudicate the issue *suo motu*, and decline to interfere if it satisfied with the validity of arbitration agreement on a preliminary review.[164]

However, the New Law deviates from the UNCITRAL Model Law in one crucial respect. Under the Model Law, tribunals are vested with broad powers to issues interim or provisional measures, such as injunctions.[165] Pursuant to Saudi law, this power is reserved for the competent Court whom retains jurisdiction to issue interim measures, subject to the proviso that any measures requested by parties were made prior to the commencement of arbitral proceedings, or otherwise issued on direct request of the tribunal with the consent of all

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[160] See Nesheiwat and Al-Khasawneh (n 23) 450 (discussing the New Law, Royal Decree No. M/34, Article 11).
[161] UNCITRAL Model Law, Article 8. For an example of national arbitration law, Belgium amended its Uniform Law of 1972 in 1985, thereby drastically narrowing any scope or possibility for an arbitral award to be set aside (which were limited to those procedures where a party with a connection to Belgium was party to the dispute).
[162] Saudi Arbitration Law of 1983 (the "Old Law"), Art. 9.
[163] Royal Decree No. M/34, Article 11. See Saudi Arbitration Law of 1983 (the "Old Law"), Articles 5, 6, 7, 9, 17 and 22.
[164] Muhammad Raheem Awan, 'Judicial Activism In Pakistan In Commercial And Constitutional Matters: Let Justice Be Done Though The Heavens Fall', (2014) 1 Journal of International Criminal Justice Research 1,8
[165] UNCITRAL Model Law, Article. 17.

parties.[166] Nonetheless, it is worth noting that even though the New Law grants power to the arbitral tribunal to issue interim measures *during* the arbitration proceedings, provided such power is envisaged in the arbitration agreement, parties would be required to move the appropriate court to enforce such an order of the tribunal.[167]

7.5.2.7 Tribunal to determine its own jurisdiction (kompetenz – kompetenz)

Another point of departure from the Old Law relates to the tribunal's competence to determine its own jurisdiction (or lack thereof), commonly referred to as the *kompetenz – kompetenz* principle.[168] Whereas the Old Law remained silent on the subject, Article 20 (3) of the New Law permits the arbitrator the power to hear different grounds / pleas of objection to his own jurisdiction. Any challenge raised to a tribunal's jurisdiction, moreover, must be raised with certain time limits, thus safeguarding the stability of arbitral processes from undue interference or delay.[169]

Similar to the Old Law, Saudi Arabia's New Law precludes certain disputes from being arbitrated on account of their subject matter or because such disputes are, for reasons of public policy or sovereignty, regarded as falling with the exclusive jurisdiction of Saudi law or its national courts.[170] In the ARAMCO decision, one of the (arbitrability and public policy) defences invoked by the Saudi government was that the concept of national sovereignty under international law is beyond the jurisdiction of the arbitrator.171 By vesting arbitral tribunals with authority to determine their own jurisdiction, Article 20 demonstrates a dramatic shift in the Saudi position since the ARAMCO decision. As with much of the New Arbitration Law, however, this shift must be viewed within the prism of the fact that the enforcement of arbitral awards is subject to an increased margin of review by the Saudi

[166] New Law, Royal Decree No. M/34 Article. 22.
[167] Al-Ghazzawi Professional Association, Guide to Dispute Resolution in the Middle East – Saudi Arabia, 81, <http://ghazzawilawfirm.com/files/Guide_to_dispute_resolution_in_the_Middle_East.pdf> accessed on 08 April 2018; Mohamed Fahmi Ghazwi, Ahmad Masum and Nurli Bt Yaacob, 'Issuing Interim Measures in Arbitration in the Kingdom of Saudi Arabia' (2014) (4/2) International Journal of Accounting and Financial Reporting 536, 536.
[168] For an analysis of the principle, see Amokura Kawharu, 'Arbitral Jurisdiction', (2008) 23 New Zealand Universities Law Review 238, 238-243,
[169] Royal Decree No. M/34, Article 16(2). There are various possible issues which have arisen in jurisdictions which have implemented similar clauses targeted to make arbitrations time-bound. A simple example would be that of the retrospective / prospective applicability of this provision on inter alia arbitrations initiated before the date when the 2012 Law was enacted.
[170] See Royal Decree No. M/34 Articles 28, 29 and 37. For a comparison with the Old Law, see Implementing Regulations of the Arbitration Law, Royal Decree No. 7/2021/M (1985), Articles 2 and 3.
[171] Schwebel (n 35) 249.

judiciary, compared to non-Islamic nation states that are not bound by the additional overarching restrictions of compliance with *Shari'ah* law.

7.5.2.8 Time-bound arbitrations

In a welcome development, Article 40 of the New Arbitration Law provides that awards must be rendered within 12 months of the commencement of the arbitration proceedings, with there being some discretion to extend proceedings if necessary.[172] This discretion rests, first, with the parties who can decide the amount the period within the final award should be rendered, or by agreeing to a period of extension after termination of the prescribed period. The discretion also lies with the arbitral tribunal which can extend the period of arbitration by not more than six months, unless the parties have agreed to a longer period. The discretion also lies with the competent court which, upon application, extends the time period or otherwise terminates the proceedings.[173] Although this is a longer time period than that provided under the Old Arbitration Law, the duration of proceedings, in practice, was much longer than what the legislation provided for (often due to the high workload of the Board of Grievances),[174] with the significant delays discouraging parties who might otherwise have initiated arbitration proceedings in Saudi Arabia.[175]

7.5.2.9 Disqualification of arbitrators

Consistent with equivalent provisions of the UNICTRAL Model Law,[176] the new law stipulates that an arbitrator may be disqualified only when the impartiality and independence of the arbitrator is in doubt, or if the arbitrator does not possess the required qualifications.[177]

7.5.2.10 Non-Arbitrable Subject Matter

Another change is brought by Article 37 which specifically addresses matters which fall outside of the jurisdiction of the tribunal, including challenges to probity of documents due to forgery or other criminal proceedings or any point of law or contractual issue deemed *ultra*

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[172] Royal Decree No. M/34, Article 40.
[173] Nesheiwat and Al-Khasawneh (n 23) 456. Also see, Sultan Almasoud et al, 'Saudi Arabia: Arbitration In The Kingdom of Saudi Arabia' < http://www.mondaq.com/saudiarabia/x/560888/Arbitration+Dispute+Resolution/Arbitration+In+The+Kingdom+Of+Saudi+Arabia>, accessed 28 April 2018.
[174] Sayen (n 58) 214.
[175] Al-Ammari and Martin (n 10) 397.
[176] UNCITRAL Model Law, Article 12(1).
[177] Ibid, Article 16(1).

vires or non-arbitrable under the relevant provisions of Saudi law, code or ministerial decree. If such issues are non-material to the dispute, the tribunal may persist with the arbitral proceedings, excluding consideration of any issues that lie beyond the scope of its jurisdiction. If determination of the *ultra vires* issue is considered necessary for the issuance of its award, the tribunal is obliged to suspend the arbitration and refer the matter to the competent court pending resolution of the matter.[178]

One notable instance in which formality requirements may be brought to bear on the jurisdiction of a tribunal concerns arbitral agreement(s), or underlying contract(s), entered into with the Saudi government, or its representatives. Pertinently, any issues relating to aspects of public concession agreement or state contract, for instance, fall beyond the scope of a tribunal's jurisdiction, except with the prior and express consent of the Saudi government.[179] In this instance the proceedings are governed by Saudi law, and cannot be contracted out of, which in accordance with Resolution No. 58 passed by the Saudi government in the aftermath of the ARAMCO case.[180] It should be noted that the effect of Resolution No. 58 has been somewhat diminished by Article 10 of the New Arbitration Law which provides that public entities may enter into arbitrations with private entities providing that they have obtained the prior approval of the Prime Minister.[181] Notably, no equivalent rule is provided for under UNCITRAL Model Law.

7.5.3 Annulment of arbitral awards

The provisions of the New Arbitration Law appear to affirm arbitral awards as *res judicata;* in other words as having an equivalent force to binding court judgement. Article 11 of the New Arbitration Law limits the rights of the Saudi courts to interfere with arbitration

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[178] Nesheiwat and Al-Khasawneh, (n 23) 452.

[179] Article 3 of the Saudi Arabian Arbitration Act 1983 provides "Government bodies may not resort to arbitration for settlement of their disputes with third parties except after approval of the President of the Council of Ministers. This Provision might be amended by resolution of the Council of Ministers." See generally, Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009) 25(2) Arbitration International 239, 240.

[180] Council of Ministers Resolution No. 58 dated 17/1/1383H (25 June 1963). It states:

The choice of law governing any dispute to which a government authority is party is to be determined 'in accordance with the established general principles of private international law', the most important of which … is the principle of the application of the law pertaining to the place of execution [execution meaning place of performance]…Government authorities are not permitted to choose a foreign law to govern their relationship with individuals, companies or private organisations… No government authority is permitted to conclude a contract that contains any clause subjecting such authority to the jurisdiction of any foreign court or other adjudicatory body…

[181] See Royal Decree No. M/34, Article 10.

proceedings.[182] As a result of this provision, if both parties agree to arbitration, the Saudi courts are obliged to decline jurisdiction over the dispute. Commentators have noted that this provision has been effective, with Goswami and Al-Husiki stating that:

> In contrast to previous practice, Saudi courts have recently shown a systematic refusal to take jurisdiction over matters where parties have opted for arbitration in a contract.[183]

Moreover, recent judgments (discussed below) suggest that courts are willing to accept arbitration as a legitimate alternative to formal court-based litigation, and to respect the wishes of parties who have chosen to arbitrate their disputes in a non-Saudi seated forum, using a non-Saudi choice of law. However, as has been noted previously on numerous occasions, any uncertainty over legal outcomes is somewhat lessened by the fact that the new law allows for *de minimis* review into the validity of arbitral awards.

Article 49 of the new 2012 Saudi Arbitration legislation provides as follows:

> Arbitration awards rendered in accordance with the provisions of this Law are not subject to appeal, except for an action to nullify an arbitration award filed in accordance with the provisions of this Law.[184]

As noted previously, this provision effectively affirms that awards will be treated as final and non-appealable, subject to the proviso that they are substantially and procedurally in compliance with requirements of the *Shari'ah*. It is worth noting, however, that Article 50 (1)(a-g) of the new laws enumerates an (presumptively) exhaustive set of grounds which may trigger review of an otherwise unappealable award. The following circumstances may warrant nullification of an award before a competent court of proper jurisdiction: invalidity of arbitration agreement, incapacity of the parties, breach of due process, beyond scope of submission, irregularities of tribunal's composition, and totality of the circumstances. [185]

However, the drafting of the New Arbitration Law suggests that there was an intention amongst the drafters to narrow the remit of the domestic courts to review the underlying dispute. Article 52 of the New Arbitration Law provides that awards issued subject to the

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[182] Royal Decree No. M/34, Article 11.
[183] Goswami and Al-Husiki (n 85).
[184] Royal Decree No. M/34, Article 49.
[185] Al-Ammari and Martin (n 10) 397.

New Arbitration Law would have an effect equivalent to a judicial ruling and would therefore be enforceable and not subject to appeal to the Court of Appeal.[186] Furthermore, the New Arbitration Law states that an application for setting aside an agreement would only be allowed on certain limited grounds,[187] and the Implementing Rules confirm that it is a matter for the Court of Appeal to hear those grounds (a more expedient court than the Board of Grievances).[188] However, Article 55 continues to apply the pre-existing position that no part of the arbitral award shall violate *Shari'ah* principles or public policy.[189]

7.5.4 Recognition and Enforcement of Arbitral Awards

As noted earlier, one of the primary conflicts between the Old Arbitration Law and international arbitration standards related to the recognition and enforcement of arbitral awards made outside Saudi Arabia. Under the Old Arbitration Law, Saudi courts had the authority to reconsider or re-litigate an arbitral award subsequent to an award being made, regularly resulting in the Board of Grievances setting aside awards on the basis that they did not comply with the *Shari'ah*.[190] As a result of these powers, parties were wary of committing to arbitration proceedings in Saudi Arabia, notwithstanding Saudi Arabia's accession to a number of international arbitration treaties, including the New York Convention in 1994.[191]

The risk of a refusal by Saudi courts to enforce an arbitral award is one of the greatest concerns of parties to international arbitration proceedings with Saudi Arabian companies.[192] For example, in *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE)*, the Board of Grievances refused to enforce an award against the Saudi Arabian company Jadawel following a re-examination of the case and, furthermore, reversed the award entirely, resulting in the awardee (Emaar) being ordered to pay damages to Jadawel.[193] This begs the question of whether the Court of Appeal's reversal of an arbitration award, whereby the judgment reverses a claim to award a counterclaim, is enforceable. Parties only agree to arbitration (by contract) and that the award be set aside (by application of *lex arbitri*); they do

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[186] Royal Decree No. M/34, Article 52.
[187] Royal Decree No. M/34, Article 55.
[188] Saudi Cabinet Decision No. 541/1438, Article 2.
[189] Royal Decree No. M/34, Article 55.
[190] Ibid.
[191] See George Khoukaz, 'Sharia Law and International Commercial Arbitration: The Need for an Intra-Islamic Arbitral Institution', (2017) 1 Journal of Dispute Resolution 1, 9.
[192] Dina Elshufara, 'The 2012 Saudi Arbitration Law and the Shar'ia Factor: A Friend or Foe in Construction', (2012) 15 International Arbitration Law Review at 138 140.
[193] Decision No. 131/D/T/2 in 1430 (2009).

not agree to be bound by a money decree, for instance, awarded by a court of law sitting in challenge. In any case, a court order would also need to be enforced in the foreign party's state, where the latter's court may find an irregularity with the way Saudi courts have awarded a counter-claim in appeal after reversing an award on the appreciation of merits? These issues have yet to be fully tested in the courts.

Although the New Arbitration Law does not make all international arbitral awards enforceable, it does provide much-needed clarity on the requirements and the process of enforceability.[194] Under the New Arbitration Law, the Saudi courts are required to recognise and enforce awards made outside of the Kingdom.

Article 50(4) of the New Arbitration Law provides that if a Saudi court with appropriate jurisdiction to determine whether or not an award is enforceable under the *Shari'ah* is not empowered to re-examine the case itself, with Article 50(2) providing that the Courts may only carry out such an examination if it considers that the decision itself violated the *Shari'ah* or public policy or if the subject matter of the dispute is considered to fall outside the remit of the New Arbitration Law.[195]

As noted in Section 1 of this chapter, the Old Arbitration Law failed to establish a clear and transparent procedure for the enforcement of arbitral awards. This was problematic since awards would most often fail at the enforcement stage of judicial proceedings in Saudi Arabia. Furthermore, the fact that most enforcements were appealed to the Board of Grievances resulted in an effective 'clogging' of the system and a backlog of cases, causing significant delays in the enforcement process.[196]

As a result of the issues relating to the enforcement of awards under the Old Arbitration Law, the Enforcement Law was also enacted in 2012 to supplement the New Arbitration Law by establishing a procedure for enforcement.[197] Although much attention has been directed to reforms introduced by way of the New Arbitration Law, the effects of the Enforcement Law may prove equally significant due to its attempts to modernise the Saudi judiciary thereby

[194] Nesheiwat and Al-Khasawneh (n 23) 460.
[195] Royal Decree No. M/34, Article 50.
[196] Al-Ammari and Martin (n 10) 397.
[197] Royal Decree M/53/1433H.

ensuring that all decisions, judgements and arbitral awards rendered in Saudi Arabia are enforced in a timely and judicious fashion.[198]

Article 9(2) of the Enforcement Law stipulates that all awards, and accompanying enforcement orders, be executed in accordance with the process set forth in the New Arbitration Law.[199] In perhaps the most institutional reform to Saudi Arabia's judicial system, the Enforcement Law establishes a dedicated enforcement circuit court structure that has exclusive and final jurisdiction to deal with all matters related to the enforcement of arbitral awards.[200] This stands in contrast with the previous system, under which jurisdiction of enforcement of awards and decisions was shared, with the Board of Grievances having jurisdiction to hear challenges relating to state contracts and commercial disputes,[201] and the *Shari'ah* courts exercising general jurisdiction to determine issues of contractual validity, capacity, finality and enforcement.[202]

As a result, a combination of the provisions set out in the New Arbitration Law and the Enforcement Law results in a system whereby, in practice, once an arbitral award is approved in the Court of Appeal, an enforcement order shall then be issued by the competent court under the Enforcement Law 2012. That court will then submit the arbitration award to the Enforcement Court for overseeing the enforcement of awards issued by arbitration tribunals.[203] Under Article 11 and 12 of the Enforcement Law, a party seeking enforcement of foreign arbitral awards issued outside Saudi Arabia must also satisfy the requirements under the Enforcement Law in addition to the requirements under the New Arbitration Law.[204]

In order to enforce a foreign arbitral award, the Enforcement Court must verify a number of matters:

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[198] Mohammed I. AlEisa, 'A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problem,'? (University of Essex 2016) 138.
[199] Royal Decree M/53/1433H, Article 9.
[200] Ahmed A. Altawyan, 'Arbitral Awards under the Saudi Laws: Challenges and Possible Improvements', (2017) 3(1) International Journal of Law and Interdisciplinary Legal Studies 15, 16.
[201] Nesheiwat and Al-Khasawneh (n 23) 450.
[202] Abdülkadir Güzeloğlu, 'The Role of Shari'a Law on the Enforcement of Arbitral Awards in the Kingdom of Saudi Arabia' (Mondaq 2016) < http://www.mondaq.com/saudiarabia/x/532270/Arbitration+Dispute+Resolution/The+Role+Of+Sharia+Law+On+The+Enforcement+Of+Arbitral+Awards+In+The+Kingdom+Of+Saudi+Arabia>, accessed 28 April 2018.
[203] Royal Decree No. M/34, Article 52; Royal Decree M/53/1433H, Article 14.
[204] Royal Decree M/53/1433H, Articles 11 and 12.

- that the Saudi courts did not have competency to hear the matter and that the court that issued the award was competent in accordance with the international rules of jurisdiction set down in the laws of said court;
- that the parties to the case were afforded due process in the foreign proceedings;
- that the arbitral award is final in the country where it was issued and was issued in accordance with the laws of that country;
- that the award is in compliance with the *Shari'ah* and Saudi public policy; and
- that the award is not in conflict with a judgement previously issued by a Saudi court, committee or commission which had jurisdiction to decide the dispute.[205]

According to Goswani and Al-Husiki, the effect of the New Arbitration Law and the Enforcement Law has been that judges are unwilling to consider the merits of an award unless there is a clear violation of Saudi law.[206] They quote the Board of Grievances in Jeddah as stating:

> …the role of the judiciary when hearing the suit by the Arbitration Tribunal shall be overseeing whether the legal procedures are taken and no violation to the definite provisions of the Holy Qur'an, Sunnah, applicable laws or public morals, without touching the factual aspects of the motives (or the judgment) or process…it is normal not to touch such issues from the part of the judiciary, otherwise arbitration should have no effect for quick settlements of disputes.[207]

This quote suggests that the Saudi courts should have been reluctant to interfere in the arbitration process, even at the enforcement stage. Enforcement courts have discretion to refer a challenge to an enforcement petition to the competent courts, normally the Court of Appeal. The enforcement judge may still execute an award if an Appeal court's ruling is deemed unpersuasive or if the court is judged to have exceeded the bounds of the review powers. This suggests that the New Arbitration Law has been effective in reducing the level of judicial interference in the arbitration procedure. However, the above quote also suggests that the courts may still interfere in the event of a perceived violation of the *Shari'ah* and

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[205] Royal Decree M/34/1433H, Article 11.

[206] Rahul Goswani and Yousef Al Huisiki, 'Legal note- Saudi Arabia', (2016) 7 International Arbitration Review available at < https://thelawreviews.co.uk/edition/the-international-arbitration-review-edition-7/1136486/saudi-arabia>

[207] Ibid.

public policy and it is this continuing *Shari'ah* and public policy primacy that the next section considers.

7.6 'Gaps' in the New Arbitration Law: Two Steps Forward and One Step Back?

By basing the New Arbitration Law on the principles of the UNCITRAL Model Law, there is a clear indication that the New Arbitration Law is an attempt to bring Saudi arbitration law in line with international standards.[208] Given that the New Law applies together with the *Shari'ah*, it may be contended that any unqualified claim that international arbitration practices are inconsistent with the *Shari'ah* is unjustified.[209] It has also been suggested that *Shari'ah* law, and the *Hanbali* interpretation especially, is eminently flexible when it comes to incorporating new laws. As section one of this chapter outlines, this inherent flexibility was subjugated in the aftermath of the ARAMCO case or perhaps correctly to ensure the supremacy of Saudi law where Saudi Arabia is the selected forum or seat of arbitration or Saudi law is the applicable law.[210] As discussed earlier, in response to the perceived interference by the international tribunal, the Saudis prohibited its ministries and agencies from seeking international arbitration for many years and 'imposed strict requirements, founded in Islamic law, for the appointment of arbitrators'.[211] There were also tighter rules for the appointment of arbitrators, and women were excluded from domestic arbitrations.[212] Therefore, Saudi arbitration law could be said to have regressed and became less flexible.[213]

Whatever the merits of Saudi Arabia's somewhat understandable reaction to international arbitration and its dismissive view of *Shari'ah*, the consequences of the decision did lead to a resurgent judiciary.[214] Taking into account the fact that government entities in Saudi Arabia were willing to enter into concession agreements prior to the ARAMCO decision, it would appear clear that the catalyst for a clampdown on international arbitration in its aftermath was politically rather than religiously motivated.[215]

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[208] See Ahmed A Altawyan, 'The Legal System of the Saudi Judiciary and the Possible Effects on Reinforcement and Enforcement of Commercial Arbitration', (2017) 10 Canadian International Journal of Social Science and Education 269, 269-288.
[209] Roy (n 73) 954.
[210] David A Westbrook, 'Islamic International Law and Public International Law: Separate Expressions of World Order' (1993) 33 Virginia Journal of International Law 819, 860.
[211] Chedrawe and Tannous (n 92).
[212] Ibid.
[213] Chapter 4, 4.8.2
[214] Roy (n 73) 922.
[215] El-Ahdab (n 105) 598-601.

For a number of decades after ARAMCO, international awards were effectively not enforceable by international companies dealing with Saudi state entities and private companies, meaning that parties had to rely on the good faith of their counterparties to abide by any such rulings. However, in recent decades, and especially since 1980, gradual steps have been taken by the Kingdom to remove the restrictions on international arbitration in order to attract foreign investment. These steps culminated in the New Arbitration Law.[216]

Nonetheless, any attempts at modernisation of Saudi law, including arbitration law, are bound to be fraught with difficulties due to the rigid application of juristic perspectives on, for instance, contractual uncertainty, sale of debt or interest based clauses which have long been endorsed or implemented in Saudi Arabia.[217] The four Sunnah schools have issued numerous opinions on the range of contract forms permitted by religious law, and conditions which apply to the formation or performance of a contract.[218] As suggested above, a central tenet of Islamic contract law is the elimination of contractual uncertainty or future clauses (i.e. no future payment or sale of an unowned thing can be the subject-matter of a contract).[219] This is linked to the principle of *Gharar*, which can be understood as any uncertainty in wording or with regard to liability.[220] In order to promote certainty in contracts, they should contain elements such as offer and acceptance and capacity of contractors.[221] Yet, it is impossible to envision many situations in which all kinds of uncertainty, whether in respect of an arbitration agreement or main contract, can be truly averted or eliminated.

In recognition of practical limitations of this principle, a number of Islamic jurists, across all schools, have looked to chasten the application of the *gharar* (material uncertainty) in favour of a more flexible approach.[222] Accordingly, any future clauses incorporated in a contract are treated as valid or severable, providing that the material clauses of the contract or entirety of the contract are not predicated on uncertainty, risk or speculation.[223] It is clear, however, that

[216] Baamir (n. 9) 139.
[217] Mahmud A. Faksh, The Future of Islam in the Middle East: Fundamentalism in Egypt, Algeria and Saudi Arabia (Praeger Publishing, 1997) 90.
[218] Nesheiwat and Al-Khasawneh (n 23).
[219] Frank E Vogel and Samuel L Hayes, Islamic Law and Finance, Religion, Risk, and Return (Kluwer Law International 1983) 10, 15.
[220] Ibid.
[221] Ibid, 19.
[222] See Nabil A Saleh, 'Financial Transactions And The Islamic Theory Of Obligations And Contracts', in Chibli Mallat (ed), Islamic Law and Finance (Graham & Trotman 1988) 10-14.
[223] For an example of how other courts in Islamic countries have dealt with severable clauses, see the Egyptian cases of National Cement Company requesting the annulment of International Chamber of Commerce (ICC) arbitral award CKl9928 rendered on December 21,1999; and Court of Appeal, Cairo, Commercial Circuit No.

there is no definitive '*Shari'ah* position' on issues of validity and enforcement. While parties always enjoy the choice of setting out their respective cases based on a large number of juristic opinions and schools of thought, that choice must not be unbridled. In an arbitration friendly legal system, the grounds to challenge enforcement must have a pre-specified body of rules in order that parties may have legitimate expectations before entering into an arbitration agreement with a Saudi party, or in relation to an arbitration seated in Saudi Arabia.[224] The non-provision of these matters in *Shari'ah* or in the codified law leaves the door open for parties (or authorities) to contest enforcement of arbitral awards by appealing to whatever juristic opinion is most advantageous to their interests.

Let us then consider the practical effects of the strict enforcement of Islamic juristic perspectives on a range of contract law issues, covering, for instance, injunctions on contractual uncertainty, debt-based financing in concession contracts or, relevantly, the *Hanbali* position on the ineligibility of female arbitrators. These rulings do not only offend Western liberal sensibilities, they render Saudi arbitration processes unattractive or inaccessible to foreign parties.[225] Attempts by Saudi authorities to adhere to international standards, either through legislation or accession to international conventions, are moreover undermined by way of reservations, vetoes or expansive judicial discretion.[226]

In the above light, one must also have regard to the idea that Islam aspires to provide rules for all times and places. Gradualism is a principle inherent to Islamic interpretative tradition, and allows for new rules to be developed, and old ones phased out, in certain cases.[227] Nonetheless, it is uncertain whether the New Arbitration Law was enacted in order to fully implement the principle of gradualism or Saudi Arabia is simply renewing and reviving the trade and dispute resolution practices of Early Islam.

63, 19 March 1997, No. 64/113(j). See also, Antiquities Organization v. Silver Night Company, Yearbook XXIII 169-174 (1998).

[224] Georgios C Petrochilos, 'Procedural Detachment in International Commercial Arbitration', University of Oxford, 2000, 4, 29 <https://ora.ox.ac.uk/objects/uuid:41c82c4d-d708-4cfe-b853-d50e41ea0773/download_file?file_format=application/pdf&safe_filename=N12423327.pdf&type_of_work=Thesis>, accessed 05 June 2018.

[225] Umar F Moghul and Arshad A Ahmed, 'Contractual Forms in Islamic Finance Law and Islamic Inv. Co. of the Gulf (Bahamas) Ltd. v. Symphony Gems N.V. & Ors.: A First Impression of Islamic Finance' (2003) 27 Fordham International Law Journal 150, 150.

[226] Baamir and Bantekas (n 11) 269.

[227] See Mashooda Baderin (ed), International Law and Islamic Law (Routledge 2008) 149-150. See also, Karina Benoune, 'As-Salamu 'Alaykum? Humanitarian Law in Islamic Jurisprudence', (1994) 15 Michigan Journal of International Law 605, 606.

7.7 Limitations of the New Arbitration Law

Despite being an attempt to ensure that Saudi arbitration law reaches international standards, the first flaw in the New Arbitration Law is the failure to define a number of basic principles contained in the Law, such as 'commercial', 'arbitration' and 'public policy'.[228] Al-Eisa notes that although Article 2 of the New Arbitration Law states that the Law shall apply to an 'international commercial arbitration…' but the failure to define the terms 'commercial' and 'arbitration' leaves an element of doubt on the scope of the Law.[229] It should be noted that the UNCITRAL Model Law provides for a definition of 'arbitration'[230] as well delineates the scope of the term 'commercial'.[231] While 'commercial', for instance, may be a term with (arguably) general and commonly accepted meanings, ambiguity as to what constitutes commercial and what does not may have far reaching consequences on the fate of an arbitration. Are all disputes involving profit-making and trade commercial in nature, regardless of the nature of parties involved? Are investments made in public or private entities that involve larger public interests or public policy still understood to be commercial in nature, and therefore covered by the New Law? These are questions which decide the arbitrability of the underlying dispute and go to the root of the matter. They are the very issues that have yet to be precisely defined under the existing provisions of the 2012 Arbitration legislation.

The failure to clearly define 'public policy' is perhaps even more fundamental an issue. Although this will be considered in further detail below, the authorities have, by not defining 'public policy' in the legislation, failed to draft a legislation that can operate transparently and independently, leaving open the possibility that the Saudi courts may continue to indiscriminately refuse to apply arbitration clauses or decline to enforce tribunal rulings on indeterminate public policy grounds.

[228] Mohammed I. AlEisa, A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problem? (University of Essex, 2016).93-94.
[229] Ibid.
[230] UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended), Article 2 defines "arbitration" as any arbitration whether or not administered by a permanent arbitral institution.
[231] Ibid. The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

7.7.1 Procedural Gaps in the New Arbitration Law

As noted above, the Old Arbitration Law did not legislate on restrictions to be placed on the powers of the Saudi judiciary to supervise arbitral proceedings and review the merits of arbitral awards.[232] These broad powers have been somewhat limited by the New Arbitration Law.[233] According to Article 52 of the Law, an award issued under the legislation is considered to be 'final' and 'non-appealable',[234] which brings the legislation broadly into line with international standards in that the role of the courts in procedures is reserved to when arbitral proceedings require the support of the courts.[235] In other words, the role of the courts has been watered down from proper judicial examination to providing supervisory or administrative assistance to the arbitral process.

However, there is still some uncertainty about exactly how much discretion the Saudi courts are empowered with to intervene in international arbitration proceedings under the New Arbitration Law. For example, although Article 38 of the New Arbitration Law allows parties the right to agree on the substantive law that should be applied to their case. This provision is subject to the consistency of the relevant elements of the chosen law with the *Shari'ah*, meaning that Saudi courts may continue to interfere in arbitration proceedings where the parties have agreed not to apply Saudi law on the grounds that the agreed substantive law is not in compliance with the *Shari'ah*.[236]

By failing to clarify these issues under the new arbitration law, including through codification of the *Shari'ah* or defining the limits of public policy, there remains a risk that the courts may not continue to narrowly interpret the grounds under which they may review arbitral proceedings. This potential 'gap in the law' may deter investors for dealings with Saudi nationals or from choosing Saudi Arabia as their seat of arbitration, even though there may be evidence to suggest that the judicial intervention of the post-ARAMCO period is being restrained, as will be discussed in greater detail below.

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[232] Al-Ammari and Martin (n 10) 393.
[233] Al-Eisa (n 228) 101.
[234] Royal Decree M/34/1433H, Article 52.
[235] Al-Eisa (n 228) 101.
[236] Royal Decree M/34/1433H, Article 38.

7.7.2 Applicability of the *Lex Arbitri* under the New Arbitration Law

Under *Shari'ah* law, one of the perceived advantages of the *Hanbali* school of interpretation is its flexibility. According to Al-Sanhury:

> [T]he Hanbali doctrine has come quite close to the Western doctrines: any clause which accompanies the contract is valid unless it is impossible or contrary to public order or good morals.[237]

Article 28 of the New Arbitration Law provides that disputing parties are entitled to agree on the seat of arbitration, whether it is domestic or abroad.[238] However, it may be argued that such a provision may be unenforceable. According to Salah, *lex arbitri* is considered to be immaterial under the *Shari'ah* given that the resolution of disputes under Islamic Law is exclusively subject to the *Shari'ah*, which must be applied to Muslims (including non-Saudi citizens) regardless of where they live.[239] Taken to its logical conclusion, this suggests that any agreement on *lex arbitri* could be overturned on *Shari'ah* grounds, which would appear to be a limitation on the flexibility of the *Hanbali* pronouncements.

However, a conventional reading would suggest that *lex arbitri* is not immaterial when the *Shari'ah* comes into play. It is only subject to the *Shari'ah* and therefore should be completely valid and enforceable as long as it is within the tenets of the *Shari'ah.* This researcher supports this conclusion. In this regard, the notion that the resolution of disputes under Islamic law is exclusively subject to *Shari'ah* would seem to conflict with the Kingdom's obligations under the New York Convention. Furthermore, *Shari'ah* as a set of general principles derived from the revelations of the *Qur'an* or narration of the *Sunnah* does not provide specific provisions on governance of arbitration beyond formality-based requirements for a valid arbitration agreement.[240] It does not provide concrete legal guidance on the number of arbitrators and power to issue interim measures. [241]

In the absence of a clear rule derived from the *Qur'an* or narration of *Sunnah*, or consensual position of the schools on these issues, it seems reasonable that the *lex arbitri* would continue

[237] A Al-Sunhary, The Sources of Truth in the Muslim Faith (1st Edition, Maktabat Alhalibi, 1998) 102, Cited by Abdulrahman Baamir, Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia (Routledge 2010) 75.

[238] Royal Decree M/34/1433H, Article 28.

[239] Nabil A. Saleh, Financial Transactions And The Islamic Theory Of Obligations And Contracts, in Chibli Mallat, Islamic Law And Finance (Graham & Trotman. London) 46.

[240] See generally Baamir, (n 237) 76, 120 and chapter 6

[241] ibid

to regulate all these aspects, with an overarching restriction that all mandatory procedural rules must be in congruence with *Shari'ah* law. It would then also be incorrect to state that a provision allowing parties to contract out of Saudi Arbitration Law in favour of a foreign arbitration law (*lex arbitri*) would be unenforceable because of the applicability of *Shari'ah*.[242] This question would only become material at the time of the enforceability of the award by Saudi courts, where (in any event) a party may challenge the award on the grounds that the *lex arbitri* was not in compliance with the *Shari'ah*.

According to Al Eisa:

> The question that may be raised now is whether or not the [New Arbitration Law] will resolve the conflicting decisions in Saudi courts due to it expressly providing for the disputing parties to agree on the seat of arbitration within Saudi Arabia or abroad.[243]

The most striking limitations of the New Arbitration Law relate to the finality and enforceability of international arbitral awards, as will be considered in later detail below. Although anecdotal evidence appears to suggest that the courts are restraining from re-litigating arbitration proceedings or overturning *lex arbitri* agreements,[244] both the Court of Appeal and the Enforcement Court continue to have sufficient power to review proceedings or refuse to enforce awards based on public policy and the *Shari'ah*. As a result, it is suggested that at least one arbitrator should be knowledgeable in *Shari'ah* law in order to ensure that the award, although it may have been rendered in a non-*Shari'ah* state, does not contravene the *Shari'ah,* or alternatively that any proceedings not held in Saudi Arabia situate the arbitration seat in another Arab GCC country.[245] All of the Gulf countries' legal systems have been influenced by the Hanbali School. However, because of Saudi's unique history, the Hanbali School is exceptionally influential.[246] The Hanbali School and its recommendations are both reasonable and not unduly demanding, but on a practical level, its influence does not make Saudi Arabia more attractive to international companies, which remain reluctant to trade with Saudi counterparts due to the uncertainty about the arbitration procedure under the New Arbitration Law.

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[242] Al-Eisa (n.228) 104
[243] Al-Eisa (n.228) 106.
[244] Quinlan et al (n 120) 11
[245] Ibid; Al-Eisa (n.228) 106
[246] See Chapter 5, section 5.2 and chapter 1 and chapter 2 generally.

7.7.3 Reciprocity – Does The New Arbitration Law Succeed Where The New York Convention Failed?

Recall that the New York Convention requires the reciprocal recognition of arbitral awards issued by member nations, subject to a number of reservations.[247] These requirements are mirrored by the Riyadh Convention and are set out in Article 11 of the Enforcement Law.[248]

Some commentators have suggested that Saudi Arabia's membership to such international conventions is sufficient to establish the necessary reciprocity.[249] The above notwithstanding, since Saudi Arabia's accession to the New York Convention in 1994, there have been a number of cases that appeared to suggest that the Kingdom would not solely rely on conventions to establish reciprocity but that the Saudi judiciary may also require factual evidence of reciprocity on behalf of the other jurisdiction. In 2008, the Board of Grievances (*Diwan*) found that there was no reciprocity between the US and Saudi Arabia, despite that fact that the US is also a signatory of the New York Convention.[250] It should be kept in mind, however, as will be considered in more detail below,[251] that the Court of Appeal held in 2016 that reciprocity did exist between the UK and Saudi Arabia as a result of the two countries' membership of New York Convention.[252] The latter case would suggest that, under the Enforcement Law, membership of international conventions is not *ipso facto* sufficient evidence to establish reciprocity between the states in question. Tellingly, the Saudi courts have not yet clarified whether there are any instances in which they would refuse to apply this principle.[253] In the absence of settled law on the matter of any permitted exceptions to Article 11, the New Law leaves it open to Saudi courts to determine whether reciprocity has been established, and to do so moreover on a case-by-case basis.

A whole other set of issues are presented when considering whether a foreign court or arbitrator would take mandatory aspects of Saudi statutory law or the *Shari'ah* into consideration in the resolution of contractual disputes, thus fulfilling its own reciprocity

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[247] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Article III.
[248] Royal Decree M/53/1433H, Article 11.
[249] Blackaby et al (n 143) 636.
[250] Case No. 115/D/A/15, 2008.
[251] Section 7.7.3 and 7.8.2
[252] Hosam ibn Ghaith, 'Saudi Enforcement Court Confirms that It would Enforce a London ICC Award' (Kluwer Arbitration Blog, July 2016) < http://arbitrationblog.kluwerarbitration.com/2016/07/13/saudi-enforcement-court-confirms-that-it-would-enforce-a-london-icc-award/>, accessed 28 June 2018.
[253] Ibid.

obligations.[254] These reciprocity obligations also extend to recognition and enforceability in a reciprocating state but do not mandate the foreign tribunal to apply *Shari'ah* law. If the *lex arbitri* is foreign, the tribunal has no obligation to (nor should it) apply *Shari'ah* law since it is not the law of the seat. No conflict occurs when any mandatory rules applied form part of the chosen substantive law since an arbitrator is bound to apply such law in its entirety, even if this runs counter to the contractual stipulations and the terms of references chosen by the parties.[255] The only exception to this rule is when the very act of giving effect to the relevant mandatory rules would in of itself lead to a violation of international public policy, including the principle of *pact sunt servanda* or sanctity of contract.[256] Good faith is an essential part of Islamic contract law.[257] This is seen in the fact that all contracts are concluded with a word or act. There is less formalism in Islamic law as a simple valid expression of an offer (*ijab)* and its acceptance (*qabul*) is seen as sufficient from a legal perspective.[258] Establishing trust is very important in Saudi business culture and this can have implications for the arbitration of disputes. Acting in good faith can be more important than conforming to the legal formalities. This is an important distinction between Saudi and western models of arbitration.[259]

Respect for the sanctity of the contract, as discussed in chapter 4, finds theological support in several verses in the Qur'an and therefore constitutes an obligatory rule of the *Shari'ah*.[260] Indeed, the Saudi courts have ruled that the duty to perform contractual undertakings in good

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[254] See Hassan Hussein, 'Contracts in Islamic Law: The Principles of Commutative Justice and Liberality' (2002) 13(3) Journal of Islamic Studies 257, 257-297.

[255] For a relevant case, see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc. 473 U.S. 614 (1985).

[256] In Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co. (1963) 35 ILR 136, para 51, the tribunal held as follows:

[a] fundamental principle of law which is constantly being proclaimed by international courts, that contractual obligation undertaken must be respected. The rule 'pacta sunt servanda' is the basis of every contractual relationship.

For a general discussion, see also, Bernard Hanotiau and Olivier Caprasse, 'Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention: Belgian and French Perspectives,' (2008) 25(6) Journal of International Arbitration 730, 730-755. On the sanctity of contracts, see Nagla Nasser, Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-term International Commercial Transactions (Nijhoff, Dordrecht Oxford 1995) 31.

[257] See Noor Mohammed, 'Principles of Islamic Contract Law', (1988) 6(1) Journal of Law and Religion 115, 115-116; Mahmoud Fayyad, 'Measures of the Principle of Good Faith in European Consumer Protection and Islamic Law, A Comparative Analysis' (2014) 28(3) Arab Law Quarterly 205, 206.

[258] See Aron Zysow, 'The Problem of Offer and Acceptance: A Study of Implied-in-Fact Contracts in Islamic Law and the Common Law', (1985-1986) 34 Cleveland State Law Review 69, 69-70.

[259] Mohamad Al- Enazhi, Grounds for Refusal of Enforcement of Foreign Commercial Arbitral Awards in GCC States Law With References to Bahrain and UAE (Unpublished Dissertation, West London University 2013), 87-88.

[260] The Qur'an 5:1; The Qur'an 2:40; The Qur'an 2:177; The Qur'an 2:282. See Hunt Hanin and Andre Kahlmeyer, 'The Sharia from Muhammad's Time to the Present Chapter: Tradition Sharia Law: Obligations to God and to Fellow Human Beings' (2007) Islamic Law 28, 28.

faith as specific requirement of Islamic law prevail over other mandatory rules of Saudi law, including sovereignty-related defences to the enforcement of foreign or domestic arbitral awards or judgements.[261] Recognition of the choice and intent of contracting parties leads to would seek to enforce a principle-based understanding of Islamic law. In other words, religious authorities should seek to interpret Islamic rules of law flexibly, unless some fundamental or mandatory principle of *Shari'ah* has been violated.[262] This would seem to indicate that questions of good faith can occasionally take precedence over formalities, and according to Al Enazhi, allow parties to 'push the boundaries of arbitration law and practice'.[263] This indicates that the Saudi arbitral process is less rigid and even more flexible, than often supposed.

Contrary to popular conceptions, accordingly, there is no conflict to be found between mandatory Islamic principles of contract (which an arbitrator may be forced to apply in its entirety, even if this runs contrary to contractual stipulations of the parties) and other mandatory rules of international law and public policy (such as the international legal principle of *pacta sunt servanda*).[264] As noted in chapter 3 and 6, the Prophet himself practised reciprocity in respect of any obligations concluded under treaty, including those formed in partnership with non-Muslim nations or powers.[265] The assumption that all obligations made under covenants, whether by treaty or by contract, are binding is, therefore, entirely consistent with the early history of Islam. Nonetheless, *Shari'ah* implementation in Saudi Arabia remains an incomplete and sometimes discretionary model of justice.[266] Indeed, this was one of the reasons why international arbitrators in the ARAMCO case favoured

[261] In a relevant case, the Board of Grievance enforced an arbitral award in which one of the arbitrators was a non-Muslim. The Saudi government raised a challenge against the enforcement of the award on public policy and Shari'ah grounds, citing the international arbitrator's insufficient knowledge of Islamic law, general issues of public morality, and the failure of the governmental authority to obtain prior approval for arbitration. The court held as follows:

[I]t stands to reason that justice entails the following; first, the subject matter of the dispute requires arbitrators to be experts in the subject matter of the dispute. Second, the Board of Grievances should subject the tribunal's decision to general principles, these principles are the sanctity of contract and that the general consensus among Muslim scholars that an arbitral tribunal's decision is binding. Id Board of Grievances Case No. 235/2/Qhaf/1416 H Saudi Arabia.

[262] Mohamad Al- Enazhi,Grounds For Refusal Of Enforcement Of Foreign Commercial Arbitral Awards In GCC States Law With References To Bahrain And UAE PhD(West London University, 2013), 16. See also pp 87-88.

[263] Ibid, 16.

[264] See Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co. (n 253) para 51.

[265] Robert Hunt, 'The Covenants of the Prophet Muhammad' Patheos, 13 December 2013, <http://www.patheos.com/blogs/roberthunt/2013/12/the-covenants-of-the-prophet-muhammad/>, accessed 25 July 2018.

[266] Hassan Mahassni and Neal Grenely, 'Public Sector Dispute Resolution in Saudi Arabia: Procedures and Practices of Saudi Arabia's Administrative Court', (1987) 21(3) The International Lawyer 836, 838.

'modern' principles of international commercial law.[267] It is incumbent upon Saudi courts and legislators to continue efforts in the direction of clarifying applicable rules of the *Shari'ah,* and scope of these rules, in the context of commercial and investment treaty arbitration.

Despite the relatively slow progress after the New Law's adoption, which may have raised concerns that the New Law had not engendered the expected change, recent cases and legal reform discussed above would suggest that the arbitration law may now be taking root. The next section will consider some salient issues with bearing on the potential reach and legal effects of the New Law in the coming decades.

7.7.3 Severability of Interest-Based Clauses From Main Contract

It is an open question whether Saudi arbitrators will treat interest-based clauses as severable from the main contract, except for those portions of an award found to contravene explicit requirements of the *Shari'ah*.[268] Since interest-related transactions are in direct contravention of Islamic religious law, should we also assume that an arbitrator is obliged to invalidate the offending terms of a contract, and that this obligation would apply equally to any foreign-seated tribunal bound by Saudi's reciprocity reservations under the New York Convention?[269] Moreover, a tribunal's decision upholding the validity of interest-based claims or related contractual provisions may provide sufficient grounds to Saudi courts on which to annul a domestic award or refuse enforcement of a domestic or international award on constitutional or public policy grounds, respectively. Under the Old Law, any contract, or any clauses contained therein, with 'impurities' were at risk of bring rendered void and unenforceable under a strict application of the *Shari'ah*.[270] It remains to be seen whether such remedies will be recoverable under Saudi arbitral processes as governed by the New Law. Most jurisdictions do not prohibit such speculative damages.[271] They only set a default rule where

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[267] Saudi Arabia vs. Saudi Arabian- American Oil Company [1963] 27 ILR 117. The Arbitration Tribunal referred to the fact that 'Moslem law does not distinguish between a treaty, a contract of public or administrative law and a contract of civil, commercial law' as one reason which deterred it from applying Saudi law in the construction of the contract.

[268] Moghul and Ahmed (n 225) 150.

[269] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Article III.

[270] Mohammed. Abu-Nimer, 'Conflict Resolution in an Islamic Context: Some Conceptual Questions', (1996) 21(1) Peace and Change 22, 22.

[271] For the US and UK, see Roger LeRoy Miller and Frank B Cross, Business Law (12th edn, Cengage 2013) 307-308; Paul S Turner, 'Consequential Damages: Hadley v Baxendale under the Uniform Commercial Code' (2001) 54 SMU Law Review 655, 656-665.

special damages (which are not foreseeable or are too remote) cannot be claimed unless a contrary agreement exists. Claims arising out of indemnity clauses are classic examples.

7.7.4 Separability of the Arbitration Agreement

Although an arbitration agreement may be contained within a contract, Article 21 of the New Law provides that any such clauses will be interpreted separately to any contract within which it is contained.[272] This is to ensure that the arbitration element of an agreement is valid even if the contract within which it is contained is nullified or otherwise rendered invalid. The need for treating arbitration clauses as separable from the main contract is crucial; it would be self-defeating if a breach of contract or a claim of voidability of the contract was sufficient to invalidate the arbitration clause as well. A fundamental reason of allowing arbitration clauses to be treated separately, is that while the purposes of the main contract may be said to have failed by an invalidation of the contract, the arbitration clause must persist since it is not a purpose of the contract[273] (although it should be noted that some commentators have suggested that when a contract is declared void under *Shari'ah* law, it applies to all of the clauses in the contract).[274] It has not been clarified how Article 21 will apply in practice and there have been no reported cases thus far. Harb and Leventhal noted that:

> It has yet to be seen whether a Saudi judge would view as separable and valid an arbitration agreement found in a contract that would be invalid due to its violation of Islamic law.[275]

7.8 Gaps in the Substantive Law

7.8.1 The Applicability of *Shari'ah*

Despite the clear intentions of the drafter of the New Arbitration Law to create an arbitration-friendly environment, the significance of the legislation is potentially diminished by the rigid enforcement of the *Shari'ah* by Saudi authorities.[276] However, as previous chapters have

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[272] Royal Decree M/34/1433H, Article 21.
[273] Per Lord Macmillan in Heyman v. Darwins Ltd. [1942] AC 356, 374.
[274] Mohamed Al-Hoshan, 'The New Saudi Law on Arbitration: Presentation and Commentary', (2012) 4(3) International Journal of Arab Arbitration 9, 9.
[275] Jean-Pierre N Harb and Alexander G Leventhal, 'What to Expect When Arbitrating in the Kingdom of Saudi Arabia' (2015) 12(2) Transnational Dispute Management 1, 7.
[276] Nayla Comair-Obeid, 'Salient Issues in Arbitration from an Arab Middle Eastern Perspective' (2014) 4 The Arbitration Brief 52, 58.

illustrated, the Hanbali school of interpretation is considered to be the most flexible in terms of commercial trade, with an emphasis on the Islamic principle that 'all things not specifically prohibited are allowed'.[277] Furthermore, Hanbali jurist Ibn Taymiya averred that 'all contracts entered into, or conditions attached thereto, are permissible unless specifically prohibited by either the Qur'an or the Sunnah'.[278]

The Hanbali School is regarded and often vilified for being too inflexible, however, as we have seen earlier the foundational texts of Islam are very practical when it comes to trade, and traditionally, the school is flexible with regard to commercial laws.[279] While the Hanbali School has resisted reasoning by analogy, they have accepted new ideas and practices that may be necessary for the development of trade and commerce as enjoined by the *Qur'an*.[280] The above notwithstanding, however, this thesis has contended that the particular history of the Hanbali fiqh as it has developed in the Saudi legal system suggest some resistance to innovation and change. [281]It became associated with the reform efforts of the first Saudi state, and this led to the Hanbali School becoming more rigid, despite it being originally a very practical and even flexible school of jurisprudence.[282]

As set out in Chapter 6, the Saudi position subsequent to the ARAMCO arbitral decision until the Old Arbitration Law was that, as arbitration is dealt with in the *Qur'an*, *siyasa* (secular law) was not applicable when it was inconsistent with the *Shari'ah*.[283] However, as previously noted, the Saudi government's changing position on international arbitration would appear to be based on political, as opposed to religious, concerns. By subjecting the New Arbitration Law to the Hanbali interpretation of the *Shari'ah*, the Saudi legislator effectively privileges judicial autonomy (to determine the limits of the jurisdiction) over party autonomy.[284] Although the New Arbitration Law has limited the court's discretion to review arbitral proceedings, it has left with the judiciary the ultimate power of review by having the

[277] Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2(3) Arab Law Quarterly 272.
[278] Ibn Taymiya, cited in Bryant W Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1980) 18 Columbia Journal of Transnational Law 413, 422.
[279] Ibid.
[280] See sections 2.3 and 2.4 of chapter 2.
[281] See for instance, the Saudi Ulama's position on the receipt and taking of interest, Fatwa of "Majma' Albohouth Al Islamiya Bil Azhar" the Islamic Research Committee of Alazhar concerning banking interest dated 23/09/1423 H. 28/11/2002.
[282] Seaman (n 275) 422.
[283] Chapter 4, section 4.7.2
[284] Al-Abdullah (n 112) 204.

right to overturn arbitral awards due to non-compliance with the *Shari'ah*. As noted by Al-Eisa:

> …the circumstances under which courts could reject decisions under the [New Arbitration Law] can just as easily be rejected on the grounds that they are against *Shari'ah* law, which is highly unspecific.[285]

This need not be taken as a criticism of Islamic law per se but the inconsistent manner in which it has been invoked, for instance to deny recognition of foreign courts. After all, why would domestic courts not utilize the power to overturn awards when they are against the *Shar'iah*? This is not a privilege or a power but a duty to see that compliance with the *Sha'riah* is ultimately preserved. This is also clear from the fact that the judiciary is to take *suo motu* cognizance of non-compliance with the *Shar'iah*. Nonetheless, while courts have a duty to uphold the laws of the local legal system - an entirely legitimate exercise - judicial discretion must be delimited by legislation and other forms of judicial precedent, without which foreign parties may fear the consequences of a judiciary run amok.[286] In this sense, the silence of the new arbitration law is symptomatic of the uncertainty regarding the scope of Saudi arbitration law. The underlying principles of the *Shar'iah* are neither codified nor fleshed out through judicial principles. There is no body of Hanbali jurisprudence on which a foreign party engaged in a dispute can rely, nor the possibility that the same party might 'shop' for a particular school of Islamic jurisprudence which specifies the party's preferred interpretation of Islamic legal sources.[287]

These broader constitutional challenges generate uncertainties at the level of practical outcomes. For example, the *Shari'ah* must also be taken into account when calculating awards. Hence, arbitral awards that contain any consequential, indirect, punitive and speculative damages will not be enforced by Saudi courts. In addition, the charging of interest (*riba*) continues to be prohibited under Saudi law, unlike other Middle Eastern countries whose laws provide for certain level of flexibility when considering commercial interest.[288]

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[285] Al-Eisa (n 232) 104.
[286] Awan (n 164) 8
[287] Richard Kreindler, 'Arbitral Forum Shopping', in Bernardo M. Cremades and Julian D M Lew (eds.), "Parallel State and Arbitral Procedures in International Arbitration', (ICC Publishing 2005), 159,166 and Nabil Saleh, 'The Role of Intention (Niyya) Under Saudi Arabian Hanbali Law', (2009) 23 Arab Law Quarterly 347, 349-350
[288] See for example, Articles 76 and 77 of the United Arab Emirates Federal Commercial Transaction Law, No 18 of 1993; and Articles 76 and 275 of the Bahraini Commercial Code. This can be contrasted with the much tighter restrictions placed on interest taking by religious authorities in Saudi Arabia see Saudi Ulama position on

Under the Old Arbitration Law, the inclusion of such pre-estimated damages was considered by the Board of Grievances to be a ground for refusing the enforcement of an award. The New Arbitration Law has clarified the Saudi position meaning that any elements of awards that are not in compliance with the *Shari'ah* are severable from the award, meaning that the award can still be enforced without the elements that are considered to be in breach of the *Shari'ah*.[289] However, as noted by Nesheiwat and Al-Khasawneh:

> There is a risk…that where an element of an award cannot be severed, such as if the award for interest is completely imbedded within the award for damages, then the entire award could be opened up by the courts at the enforcement stage.[290]

It should be reiterated that an international tribunal is expected to apply the law of the seat. Where it is not Saudi law, the tribunal will have no need to concern itself with the questions of what is and what is not severeable under the *Shar'iah*. The question of enforceability is a separate question where this becomes relevant, whereby the reviewing authority, in other words the local Saudi court, may need to consider which elements of an award would be severable under the *Shari'ah.* This would require an understanding of the above factors, which is a further reason why at least one expert on the *Shari'ah* should be recommended when dealing with an international arbitration involving a Saudi disputant or Saudi-based assets.[291] The fact that these issues are unique to Saudi Arabia illustrates why there may continue to be some reluctance amongst some international companies to trade with Saudi companies. Al-Ammari and Martin therefore concluded that 'An award that cannot rely upon the muscle of the local courts where the assets of the losing party are located is of little or no value'.[292]

7.8.2 Public Policy

Article V(2)(b) of the New York Convention provides that a member state to the Convention is not required to recognise non-domestic arbitral awards that are contrary to that country's public policy.[293] Article 37(2) of the Riyadh Convention includes similar provisions, although it extends the public policy exemption to distinguish public policy and Islamic public policy,

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the receipt and taking of interest, Fatwa of "Majma' Albohouth Al Islamiya Bil Azhar" the Islamic Research Committee of Alazhar concerning banking interest dated

[289] Royal Decree M/34/1433H, Article 55(2).

[290] Nesheiwat and Al-Khasawneh (n 23) 448.

[291] Baamir and Bantekas (n 11) 243-244

[292] Al-Ammari and Martin (n 10) 405-406.

[293] New York Convention, Article V(2)(b).

which is 'the provisions of the Islamic *Shari'ah* [and] the public order or the rules of conduct…'[294]

What amounts to public policy under these international conventions is not clear. However, it is generally accepted[295] that international public policy is narrower than domestic public policy, since domestic public policies of the respective states adopting the conventions would vary and would, put together, take in its fold a larger scope than those public policy notions that are internationally and universally accepted by all state parties to the respective convention. Furthermore, the general pro-enforcement bias informing the New York Convention points towards a narrow reading of the ground of public policy. [296]A broad reading of the public policy defence would also vitiate the New York Convention's basic effort to remove pre-existing obstacles to enforcement.

There is then the question of whether local courts should apply the public policy ground to reject enforcement differentially to domestic awards vis-à-vis foreign awards. As noted by Born:

> …it is well-settled that a narrower concept of public policy should apply to foreign awards than to domestic awards.[297]

However, some commentators have suggested that Saudi Arabia's utilisation of the exemption is contrary to the spirit of the New York Convention.[298] According to Roy, writing prior to the implementation of the New Arbitration Law:

> Saudi Arabia's adoption of the New York Convention is intended to give the international community security in commercial contracts with Saudi Arabia… Article V(2) (b) of the New York Convention, however, appears to nullify this assurance by permitting Saudi Arabia to reject all arbitral awards that are against its public policy. As Saudi Arabian law and policy is diametrically opposed to the rules and laws of many member nations, Saudi Arabian courts may find it easy to

[294] Riyadh Convention on Judicial Co-Operation, Article 37(e).
[295] See generally, Herbert Kronke, 'The New York Convention Fifty Years On: Overview and Assessment' in Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Kluwer Law International 2010) 1-19.
[296] Dimitri Santoro, 'Forum Non Conveniens: A Valid Defense under the New York Convention,' (2003) 21 ASA Bulletin 713, 721 . However, for a interpretation of transnational public policy see Millicom and Sentel v Republic of Senegal, ICSID Case No. ARB-08-20, Decision on Jurisdiction dated 16 July 2010, para. 103(b).
[297] Gary Born, International Arbitration: Law and Practice (Kluwer Law International 2012) 403.
[298] Roy (n 77) 954.

> reject non-domestic arbitral awards pursuant to the New York Convention. In essence, Saudi Arabia may not be required to enforce any more non-domestic arbitral awards than it did prior to its 1994 accession to the New York Convention.[299]

One of the reasons that commentators believe that Saudi Arabia is exploiting the drafting of the New York Convention is because what falls within public policy in Saudi Arabia is also unclear. As noted by Harb and Leventhal, the inextricable link between religion and government makes it hard to differentiate between the *Shari'ah* and public policy.[300] However, it is considered that public policy in Saudi Arabia goes beyond the *Shari'ah* to also consider concepts such as royal prerogative, public morals, interests and customs.[301] According to Baamir and Bantekas:

> …refusals to enforce are more common when setting aside foreign arbitral awards [than domestic awards], because public policy in Saudi Arabia covers a vast area of practice that might be unknown to foreign arbitrators sitting abroad and applying non-Saudi lex arbitri.[302]

According to Wakim:

> 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 public policy.[303]

Moreover, Alqudah contends that public policy issues relating to the *Shari'ah* should be limited based on 'what is allowed and what is prohibited in the *Qur'an* and the *Sunnah*' or where is a 'flagrant injustice'.[304] He argues that there is no religious reason why the public

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[299] Ibid.
[300] Harb and Leventhal (n 275) 7.
[301] Abdullah F. Ansary, 'A Brief Overview of the Saudi Arabian Legal System' (New York University 2015) <http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html>, accessed 25 July 2018.
[302] Baamir and Bantekas (n 11) 263.
[303] Mark Wakim (n 137) 50.
[304] Mutasim A Alqudah, 'The Impact of Sharia on the Acceptance of International Commercial Arbitration in the Countries of the Gulf Cooperation Council', (2017) 20(1) Journal of Legal, Ethical and Regulatory Issues 14, 15.

policy exception needs to be interpreted broadly by the Kingdom, and that this has stemmed from decisions by arbitral tribunals such as ARAMCO.[305]

Güzeloğlu states that, in order to comply with the narrow interpretation of the New York Convention preferred by other member states, Saudi Arabia is required to:

> …implement a more transparent case law and codify the established Shari'ah rules categorically in order to avoid any arbitrary practice, encourage consistent rulings and secure legal certainty. If the rules are persistently applied in this transparent manner, necessary precautions may be taken by the arbitrators, such as rendering an award that is separable in its parts which may potentially be considered to be in violation of Saudi Arabian public policy rules so that the rest of the award remains executable.[306]

However, the question that is being considered here is whether there is sufficient appetite within the Kingdom to implement any changes such as those recommended by practitioners such as Güzeloğlu.[307] By refusing to clarify what amounts to public policy in Saudi Arabia, the Saudi government is effectively empowering itself with the ultimate authority to review the enforcement of arbitral awards beyond *Shari'ah* requirements. Although the decisions considered in the next section suggest that the Saudi courts are respecting the wishes of the parties in international arbitration proceedings, the fact that such powers remain available to the Saudi courts would mean that it may not be surprising if there was a continued reluctance in the international business community to deal with Saudi companies or apply Saudi law to foreign-seated proceedings due to the risk of excessive judicial interference at the time of enforcement.[308]

7.9 Finality and Enforcement of Arbitral Awards

As noted previously, Article 49 of the New Arbitration Law provides that parties seeking to challenge an arbitral award can only do so through a nullification process, which, compared to the Old Arbitration Law, greatly diminishes the extent to which a supervising court can

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[305] Ibid.

306 Abdülkadir Güzeloglu, 'The Role of Shari'a Law on the Enforcement of Arbitral Awards in the Kingdom of Saudi Arabia (Lexology Blog) < https://www.lexology.com/library/detail.aspx?g=71e501f7-8552-45fd-8797-077fa25e88a3>, accessed on 29 July 2018.

[307] Ibid.

[308] ibid

reconsider or re-try the substance of an arbitral case. However, the New Law allows a certain level of discretion to the local courts to refuse enforcement.

Enforcement of international arbitral awards therefore remains complicated in Saudi Arabia. Although the New Arbitration Law and the Enforcement Law (and the accession of the Kingdom to the New York Convention and the Riyadh Convention) appear to confirm that the Saudi government seeks to put in place the infrastructure to recognise and enforce foreign arbitral awards, there appears to be much difficulty in ensuring that this occurs in practice, with Kutty noting that:

> …all indications are that Saudi courts will continue to review the merits of arbitral decisions to ensure that decisions are consistent with Saudi public policy as determined in accordance with the Shari'ah.[309]

However, the New Arbitration Law distinguishes between the power of the court to review the merits of arbitral decisions versus the merits of arbitral disputes. While Article 50(1) limits the grounds of review to certain generally accepted and internationally recognized grounds on which a local court may annul the award, this limitation may be rendered ineffective by a somewhat umbrella provision contained in Article 50(1). It provides *inter alia* that the Enforcement Court has the power to review an arbitral award if it is deemed that the award violates the *Shari'ah* or public policy.[310] Article 50(4) provides that such a review should not assess the facts and subject matter of the dispute.[311]

This progress brings Saudi arbitration law more into line with international standards. However, the question remains as to the level of interference that Saudi courts under the New Arbitration Law.[312] As set out above, under the Law, the *Shari'ah* and public policy provide the Saudi courts with ample grounds to interfere with the enforcement of an award, even without having to consider the merits of the dispute. Although there is commentary from Hanbali commentators that an arbitrator's ruling should be final,[313] there remains a fear that the Saudi courts may continue to interfere in arbitral proceedings on a case by case basis. A review of the decisions that were published prior to the enactment of the New Arbitration

[309] Faisal Kutty, 'The Shari 'a Law Factor in international Commercial Arbitration', (2006) 28 Loyola Law Association of International Comparative Law Review 565, 618-619.
[310] Royal Decree M/34/1433H, Article 50(2).
[311] Royal Decree M/34/1433H, Article 50(4).
[312] Mohammed Al-Bjad, Arbitration in the Kingdom of Saudi Arabia (Institute of Public Administration Publications, 1999) 236-238.
[313] Ibn Kudama, Al-Mughni, volume 10, issue 8221, 137.

Law indicated that there were contradictory verdicts issued in respect of the position of the judiciary.[314] This shows that either (i) there is no uniform approach to the enforcement of arbitral awards, which means that the judge's opinion and discretion are fundamental to the proceedings, or (ii) judges may be influenced by social, economic and political interests, such as issues related to Saudi public policy that fall outside the remits of the *Shari'ah*, when considering the enforcement of awards.[315]

Neither of these approaches are ideal from an international party's perspective as they result in a lack of clarity and transparency. By the same token, one can easily anticipate instances wherein a party, and one especially not confident of its claims might insist on a Saudi seat as this unbridled scope of interference may well work in its favour. This de-facto prejudices the rights and legitimate expectations of the non-Saudi party. It is hopeful that the implementation of the New Arbitration Law will provide a level of certainty for parties. However, the situation remains that the risk of an arbitral award not being enforced in Saudi Arabia is potentially higher than in other jurisdictions, in spite of the New Arbitration Law and the Enforcement Law.[316]

Furthermore, since parties are entitled to agree that the *Shari'ah* is not applicable to international proceedings under Article 8 of the legislation, the re-introduction of a form of judicial review based on a broad interpretation of Article V(2)(b) of the New York Convention at the enforcement stage may result in parties having to endure a potentially arduous and expensive arbitration process only to see the enforcement of their award fail on the basis of the application of undefined principles of the *Shari'ah* or public policy.[317] Depending on the level of interference demonstrated by the courts, it is debatable whether such an outcome is any preferable than the outcomes when the Old Arbitration Law was in force. This ultimately will be a matter taken into account by international entities when considering whether to apply Saudi law or whether to trade with or invest in Saudi companies.[318]

This section illustrates a major theme running through arbitration law in Saudi Arabia (and Saudi law in general), namely that Saudi judges are still empowered with a level of discretion

[314] Baamir (n 9).
[315] Al-Eisa (n 232) 193.
[316] Alqudah (n 304) 17-18.
[317] See section 4.8.3, Chapter 6
[318]Ibid.

to interfere with the arbitral process on the grounds of uncodified principles based on the *Shari'ah* and Saudi public policy. In order to effectively engage with unfettered discretion, it would be useful to provide a body of case law that illustrates that the Saudi courts are in fact complying with the spirit of the legislation (against its form), which is to provide a seat of international dispute resolution that reflects international standards. The next section will consider a number of cases to this effect that have been reported by the Saudi courts subsequent to the implementation of the New Arbitration Law.

7.10 Effect of the New Arbitration Law: A Qualified Success?

Subsequent to the implementation of the New Arbitration Law and the Enforcement Law, further steps were taken to promote arbitration in Saudi Arabia in 2016, with the opening of the Saudi Center for Commercial Arbitration (SCCA).[319] The SCCA comprises of a permanent committee, including representatives qualified in both the *Shari'ah* and *fiqh* and other representatives nominated by the Council of Saudi Chambers. The SCCA was set up with the intention of providing for efficient, transparent and flexible dispute resolution procedures and is intended to ensure that any arbitration proceedings carried out through the SCCA are enforceable pursuant to both domestic arbitration laws and international treaties such as the New York Convention.[320] It has been suggested by some commentators that the SCCA was necessary in order to ensure confidence in the New Arbitration Law, with Elshufara noting that:

> …the absence of a recognised arbitral institution and the uncertain intervention of the state courts in arbitration proceedings can leave skeptics weary of the New Arbitration Law.[321]

An issue which on its surface may appear irrelevant to the arbitration procedure but is telling when viewed within the prism of a broader liberal attitude being exhibited by the drafters, is that Article 14 of the New Arbitration Law is silent on the issue of the gender of the arbitrator(s). Although the *Qur'an* and the *Sunnah* do not explicitly prohibit female arbitrators, as noted previously, the Hanbali school of interpretation espoused by Saudi

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[319] Saudi Center for Commercial Arbitration, < https://www.sadr.org/ADRServices-arbitration-arbitration-rules?lang=en> accessed on 8 April 2018

[320] Ibid.

[321] Dina Elshufara, 'The 2012 Saudi Arbitration Law and the Shar'ia Factor: A Friend or Foe in Construction' (2012) 15 International Arbitration Law Review,138.

Arabia has generally enforced such a restriction.[322] However, female arbitrators may arbitrate on international disputes under Saudi law and this means that there may be some way for women to become more involved in the arbitration process, especially with regard to foreign companies[323]. This has been perceived by some to be an important step both in Saudi Arabia, which has a history and outside perception about gender-inequality within the Kingdom, and in the arbitration field in general, which has been criticised due to the underrepresentation of female arbitrators.[324] The above notwithstanding, some legal scholars noted that, despite the drafters framing the New Arbitration Law in a gender-neutral manner, there remained an assumption that women were prohibited from being arbitrators in Saudi Arabia.[325] Baamir noted as follows:

> In accordance with *Shari'ah* ruling, women cannot be appointed as judges or arbitrators. This is not a matter for discussion in Saudi Arabia.[326]

Arguably, these fears may appear to be unfounded as in May 2016 the Court of Appeal recognised an arbitral tribunal comprising of a female arbitrator.[327] This was a case before the Administrative Court under Section 15(1) of the Arbitration Law, wherein the Court was required to rule on the appointment of the arbitral tribunal. In reaching its decision, the Court of Appeal implicitly approved the appointment of a female arbitrator on the panel. This decision achieved finality in view of Section 15(4) of the Law which states that a decision on the appointment of arbitrator in accordance with its provisions is a final determination and not subject to appeal.

By reaching this decision, the Court of Appeal indicated that the gender of the arbitrator was immaterial when considering the legitimacy of the award.[328] This decision appears to be somewhat of a departure from the Hanbali position on female arbitrators (or at least the Saudi interpretation of it), which may imply that the Saudi courts are becoming more open to

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[322] Alqudah, (n 304) 14
[323] Chedrawe and Tannouis (n 96).
[324] Muhlim Hamad Almulhim, 'The First Female Arbitrator in Saudi Arabia' (Kluwer Arbitration Blog, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/>, accessed on 28 July 2018.
[325] See Alqudah (n 304) 10; Nesheiwat and Ali Al-Khasawneh (n 23) 451-452; Albara Abdullah Abulaban, The Saudi Arabian Arbitration Regulations: A Comparative Study with the English Act of 1996 and the Arbitration Scotland Act of 2010 (Unpublished Dissertation, University of Sterling 2015) 75-76.
[326] Ibid. See Abdulrahman Baamir, Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia (Routledge 2010) 72-74
[327] Almulhim (n 324).
[328] Ibid.

applying the Hanbali approach in a more flexible way[329] – rooted in freedom of contract and sanctity of contract - as opposed to the rigid post-ARAMCO approach.[330] However, the Hanbali School is not flexible with regard to some issues such as family law and gender equality in general.[331] Regarding the issue of female arbitrators, there are sufficient historical precedents in the holy texts to indicate that the Hanbali School's attitude to women in arbitration is rooted in expedience and not on precedent. For instance, there were female arbitrators in the early years of Islam.[332] There is no explicit prohibition of female arbitration in the holy texts and this could mean that the rules on women's participation in arbitral processes could be enhanced. It may also imply that Saudi courts are more open to considering the position of the other Islamic schools, such as the Hanafi School, which allows female arbitrators, given that this is not explicitly set out in the *Qur'an*.[333]

It is striking, therefore, that the court in question (the Saudi Court of Appeal) refused to accept an interim challenge to the validity of a final award based on the identity of the arbitrator, presumptively on the basis that: i) Article 50(1) provides for exhaustive procedural grounds on which an award may be challenged, thus imposing statutory limits on the scope of judicial review, and the ground of invalidating an award based on the identity of an arbitrator is beyond the scope of Article 50(1); and ii) any challenges raised in respect of the validity of an arbitral award should be interpreted in a manner consistent with the broader policy aims of the new arbitration law, including the need to ensure certainty and stability in arbitral outcomes for the benefit of both foreign and Saudi parties.[334] However, it must be noted that the Law of 2012 reiterates the primacy of *Shari'ah* law. The Law circumscribes the supervisory power of the local courts but does not clarify the relationship between the Arbitration law and the *Shari'ah*.[335] This means that there could be difficulties ahead with the

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[329] N Mohammed, 'Principles of Islamic Contract Law', in Hisham M Ramadan, Understanding Islamic Law, From Classical to Contemporary (AltaMira 2006) 98.
[330] For example, the ARAMCO tribunal averred that "[A] Regime of mining Concessions based on contract is a solution not contrary to Islamic law. The Concession is compatible with two fundamental principles of Islamic law: the principle of liberty to contract and the principle of respect for contracts." See Schwebel (n 35) 248. For the historical context on the wider constitutional changes introduced in the Saudi legal system, see Rashed Aba-Namay, 'The Recent Constitutional Reforms in Saudi Arabia' International and Comparative Law Quarterly (1993) 42(2) 295, 300. For a discussion on how Islamic sources are interpreted and applied, see Cherif Bassiouni, 'The Shari'ah: Sources, Interpretation, and Rule Making', (2002) 1 UCLA Journal of Islamic and Near Eastern Law 135, 135-145.
[331] See section 4.4.5, Chapter 4
[332] ibid
[333] Shaheer Tarin, 'An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices' (2015) 26(1) ARIA 131, 131-54.
[334]Tarin (n 333) 135
[335] See Chedrawe and Tannous (n 92) and Tarin, ibid at 149-154.

arbitration laws. This analysis is supported by interviews with Saudi court professionals as shown in chapter 8.

Although the Court of Appeal's decision recognising (albeit indirectly) a female arbitrator represents something of a turning point.[336] Given that the decision is not binding, it should not, however, be simply presumed that challenges against the appointment of female arbitrators may not succeed in the future.[337] Furthermore, with the statistics indicating that parties in international arbitration cases appoint a very small percentage of female arbitrators, Almulhim cautions reading too much in the decision, noting that:

> While this remarkable case shows that the path for women to participate in arbitration is not blocked by any legal hurdles, time will tell whether parties will commit to appointing female arbitrators, particularly given the possibility that another court might reach a different conclusion.[338]

However, regardless of whether this decision is reflective of the future approach of Saudi courts, it is important in illustrating that the often-rigid interpretation of the pronouncements of the Hanbali school may be changing. It is also worth noting that the acceptability of female arbitrators in Islamic law is itself contested among the various schools.[339] This is to say, that it has not yet been affirmed as an obligatory requirement of Islam but is instead a matter of competing interpretations. Thus, while the Hanbali school posits that women cannot arbitrate disputes based on an interpretation of Islamic legal scholars, the Hanafi schools reject this position, thereby taking a more flexible position on the validity of arbitral awards issued by female arbitrators.[340] The growing number of female judges in the majority of Muslim countries means that the prohibition of female arbitrators in Saudi Arabia could be seen as a requirement which is no longer a necessity, as defined with the framework of *Shari'ah*.[341] In other Muslim countries, the courts may be *de facto* engaged in *ijtihad;* the dynamic process of evolving rules and customs derived from Islamic sources to more accurately reflect the needs and demands of Islamic societies. In support of this idea, Ayad argues as follows:

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[336] ibid

[337] Muhlim Hamad Almulhim, 'The First Female Arbitrator in Saudi Arabia' (Kluwer Arbitration Blog, 2016) < http://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/> Last visted 19 September 2018

[338]Ibid.

[339] See section 4.4.5, Chapter 4 of this thesis.

340 For a recent discussion on the "modernising effects" of the new law, see Altawyan (n 208) 269-288.

[341] Engy Abdelkader, 'To Judge or Not to Judge: A Comparative Analysis of Islamic Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia, Egypt, and Iran)' (2013) 37(2) Fordham International Law Journal 309, 310-311, 325.

> The realities of globalisation cannot be ignored and though they did not exist at the time of the founding of Islam, Islam, if interpreted properly, can provide tools applicable to a modern age to allow appropriate jurisprudence to address modern problems. One of the themes within classical Islamic jurisprudence in terms of adjudication and discretion is that Shari'ah law is divinely inspired, and as such, its interpretation is not left to the personal opinion of the jurist or the arbitral tribunal, but rather to discovery of the intent behind the divine law and its appropriate application…. Discovery of the intent of the law is more important than a literal interpretation.[342]

In the aforementioned dispute, the challenge centred on legal points on which there is no clear Islamic scholarly consensus is one reason why Saudi courts may have felt justified in rejecting one interpretation of Islamic sources (the Hanbali position on female arbitrators) in favour of a different interpretation that is more consistent with emerging norms and expectations of Saudi society and the wider international community, without also having to reject *Shari'ah*-related considerations as a permitted ground of challenge *per se*.[343] Hanbali is the preeminent legal school but the Saudi government recognizes other schools and is sometimes prepared to recognise their legitimacy. The different hierarchy of sources means that every school has a different interpretation of the *Shari'ah* and even Saudi courts can be flexible with regard to decisions.[344] For example, while the pronouncements of the Hanbali School may take precedence in most matters, the courts may adopt Hanafi principles with regard to commercial law. This could introduce a greater degree of flexibility into the arbitral system without apparently abandoning many of the principles of Islamic courts, which are important in a Saudi context. It could open up the possibility of female arbitrators for example. This flexibility is in line with traditional Islamic teaching in the Golden Age.[345]

The implication is that Saudi courts may be becoming more open to embracing a more pluralistic approach to Islamic scholarly positions or *Fiqh*, as part of the Vision 2030 plan to modernise the Kingdom. Indeed, it is established that judges, Islamic or otherwise, will apply

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[342] Mary B Ayad, 'Harmonisation of International Commercial Arbitration Law and Sharia The Case of Pacta Sunt Servanda vs Ordre Public: The Use Of Ijtihad to Achieve Higher Award Enforcement' (2009) 5 Macquarie Journal of Business Law 93, 102-103.

[343] Harb and Leventhal (n 275) 7.

[344] Ibid.

[345] See section 2.3.2 of chapter 2.

rules in accordance with established customs and usages.[346] This is immanent in the Islamic tradition and method of rule construction. The 13th Century Hanafi jurist, AH Abid countenanced that a widely adhered to custom, or emergent norm derived from juristic consensus (*ijima*), may indeed crystalise into a general rule over time.[347]

As such, international contract and commercial arbitration can and must be reconciled with the *Shari'ah*. Indeed, some kind of rapprochement between modern commercial realities and Islamic jurisprudence will be increasingly vital if Saudi Arabia is to emerge a regional leader in this area. Deeper awareness of Islamic jurisprudence, both of its flexibility as embodied by *itijhad* and of hardened rules or customs qua *urf*[348]will further facilitate arbitral award enforcement particularly in the arena of international commercial and investment law.[349] Saudi courts may yet play a crucial role, bridging the gap between the Saudi government's new willingness to participate in the international legal order and past assertions of the exclusivity of its sovereign laws and authority.[350] This could be resolved by more transparency in the legal system and applying Hanafi principles in relation to commercial law cases, including arbitration, in recognition of factors such as globalisation.

One practical example of the more modern approach being taken by the Saudi authorities is in respect of efforts to improve transparency within the legal system (including in respect of arbitration) through the publication of hundreds of Saudi court judgements.[351] Previously, because Saudi legal cases were not published in the public domain, there was uncertainty about the rationale behind decisions made by the Board of Grievances. Although these cases are not recent cases, a number of cases have since been published indicating that the Enforcement Court is not excessively interfering in arbitral awards. The cases reported in this section appear to indicate a more liberal approach of the Saudi courts under the New Arbitration Law.[352]

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[346] Ayad (n 331) 111.
[347] Aziz Al-Azmeh, Islamic Law, Social and Historical Contexts (Routledge 1988) 171.
[348] Urf has been defined as "what is accepted by the people and is compatible to their way of thinking and is normally adopted by those considered to be of good character." See Besim Hakin, 'The Role of 'Urf in Shaping the Traditional Islamic City' in Chibli Mallat (ed), Islamic Law and Finance (Graham and Trotman 1998) 142.
[349] Ayad (n 342) 110, 111.
[350] A Garnuszek, 'The Law Applicable to the Contractual Assignment of an Arbitration Agreement' (2016) 82(4) Arbitration 348, 348-55.
[351] Courtney Trenwith, 'Saudi Arabian courts publish judgments for first time' (Arabian Business, July 2013) < http://www.arabianbusiness.com/saudi-arabian-courts-publish-judgements-for-first-time-509514.html> accessed on 8 April 2018.
[352] For a parallel analysis see Nima M Tabari, Lex Petrolea and International Investment Law (Routledge 2017) 234-238.

7.11 Recent Case Law

In a decision rendered in December 2016, the Enforcement Court confirmed that an award rendered to International Transit S. A., an overseas company, would be enforced against the Saudi Al-Nashmi Company.[353] The parties had agreed to be bound by the ICC Rules in Geneva. However, the defendant Saudi company claimed that, among other things, the arbitral ruling did not comply with the *Shari'ah* on the basis that it included elements of *riba* and usury.[354] Relying on Article 9 of the Enforcement Law, the Enforcement Court found that that the award could be partially rendered, less the parts of the award that were not in compliance with the *Shari'ah*.

The defendant appealed the decision of the Enforcement Court to the Court of Appeal who requested that the Enforcement Court reconsider the case on the basis that it may have contradicted the *Shari'ah*.[355] Upon remand to the Enforcement Court, the latter Court clarified that their decision was based on the New Arbitration Law and Article 32 of the Riyadh Convention and emphasised that they were obliged to enforce any valid international arbitral awards that do not conflict with public policy, including the *Shari'ah*. The court further clarified that its jurisdiction was limited to ensuring that the award was valid and that they were not empowered to review the substance of the decision but limited only to testing the award against the *Shari'ah*.[356]

This decision touched upon a number of matters that have been discussed in this chapter. First of all, the Enforcement Court was willing to uphold international arbitral awards handed down under non-Saudi rules. Second, the Enforcement Court allowed the award to be rendered despite elements of the award being contrary to the *Shari'ah*, thus indicating that the concept of severability provided for under Article 55 of the New Arbitration Law is being successfully applied by the Courts.[357] Third, the Court of Appeal clarified that the decision itself was not contrary to the *Shari'ah* or public policy, thereby implying that the concept of

[353] Decision Number 38158742 dated 02/03/1438H (2 December 2016).
[354] Ibid.
[355] Ibid.
[356] Ibid.
[357] Ibid.

public policy could be subject to a narrower interpretation in the aftermath of the New Arbitration Law.[358]

Of perhaps even greater significance was that the Court of Appeal confirmed that it was not entitled to re-try the case on the basis of the claims of the Saudi company that the proceedings did not comply with the *Shari'ah*. This indicates that the Saudi judiciary is willing to refrain from considering the merits of international arbitration proceedings and accepting that their sole remit is to review awards and consider whether any elements of such awards are enforceable.

Also in 2016, an $18.5 million arbitral award rendered by the ICC against a Saudi Arabian party was enforced by the Enforcement Court in Saudi Arabia within three months of the grant of the award. This was the first example of the recognition of a foreign award in Saudi Arabia under the New Arbitration Law. Although the reasoning of the decision is not publicly available, this case indicates that Saudi courts are willing to accept the merits of international arbitration proceedings, regardless of Saudi's local law. This case is also important in that the Enforcement Court confirmed that reciprocity was established by reference to the UK's membership of the New York Convention, which implies that reciprocity may now be established by treaty.[359] It is also illustrative of an increasingly efficient enforcement of awards under the newly-established Enforcement Court. However, it should also be noted that the reports did not indicate whether any award had actually been paid under the order or whether the respondent had entered an 'enforcement dispute' i.e. an argument relating to the conditions of enforceability of the award (as opposed to an appeal).

Further reported arbitral awards include two awards rendered in 2016 and January 2018, the former requiring a Saudi company to pay an award to a Chinese company,[360] while the latter required a Saudi company to pay more than $74m to two Japanese companies.[361] Again, although the reasoning of the Enforcement Court was not published for these decisions, they are further examples of the Enforcement Court's willingness to enforce awards against Saudi companies without resorting to considering the merits of the decision. Furthermore, with both China and Japan being members of the New York Convention, the enforcement of these

[358] Under the Old Arbitration Law, elements of usury in the arbitral award were often sufficient evidence for that the Board of Grievances to find that the award itself was contrary to the Shari'ah. See ibid.
[359]Ghaith (n 252).
[360] Decision Number 38352986 dated 18/05/1438 (15 February 2017).
[361] Arab News, 'Court orders Saudi firm to pay SR280m to two Japanese companies' (Arab News, January 2018) < http://www.arabnews.com/node/1230081/saudi-arabia> accessed on 8 April 2018.

awards may provide further evidence that Saudi courts are willing to accept that reciprocity is established by treaty.

Thus far, the case law appears to suggest that the New Arbitration Law has had the intended effect in modernising the arbitration procedure in Saudi Arabia and providing more certainty regarding the enforceability of arbitral awards against Saudi Arabian companies, and that courts will no longer intervene or effectively re-try the decisions of international arbitral tribunals.

Furthermore, the case law appears to suggest that Saudi courts are willing to accept that parties to an international arbitration are free to agree to their own procedural rules, which will not be challenged by Saudi courts when considering whether to enforce the award. This is more reflective of early Islamic practices that are discussed chapters 2 and 3. Rules that obtained at the time were sufficiently flexible to allow parties to invoke the principle of 'freedom of contract',[362] a principle that is shared with the principle of the right of party autonomy under international arbitration norms.[363]

It is stated above that potential 'gaps' exist in the New Arbitration Law, but much of these depend on the exercise of the powers of the judiciary to interfere in arbitration procedures. The case law thus far indicates that the judiciary appears to be willing to accept its limited role in arbitration proceedings, which is more in line with the spirit of international conventions such as the New York Convention. As noted previously, the fact that the decisions of these courts are not binding means that some doubts still exist as to whether the courts will continue to apply this narrow interpretation. However, these doubts can be assuaged by a more transparent court process that provides the rationale for court decisions and an element of precedent being applied to court decisions. Although there does appear to be some appetite for this level of transparency, it may take several years before international companies are generally happy to accept that the New Arbitration Law has truly resulted in a turning of the corner in terms of international arbitration. However, it is clear that it is a positive step towards reviving historic trade practices in the Arabian Peninsula and embracing the 'true Islam' envisaged by the Kingdom under the Vision 2030 programme.

[362] See generally, Ernest J Weinrib, The Idea of Private Law (Oxford University Press 2012) 10.
[363] Harb and Leventhal (n 275) 5-7.

7.12 Conclusion

This chapter illustrates that the Saudi courts appear willing to adopt a more flexible approach to interpretation of arbitration under *Shari'ah* law. This supports the contention that the distrust of the international regime has diminished and the attitude towards international arbitration is 'progressively reversing'.[364] The willingness of the drafters of the New Arbitration Law to adopt and enforce UNCITRAL standards suggests a change of approach by the Saudi authorities when considering international standards, evidenced by a number of judgments between 2012 and 2018. The courts are taking into account the Kingdom's obligations under international treaty law, such as the New York Convention and the Riyadh Convention. Furthermore, the willingness to appoint (or at least not reject the appointment of) female arbitrators is another example to support the contention that the Kingdom's often rigid adherence to a traditional interpretation of the Hanbali school is being reconsidered in the face of increased requirements to modernise and reconstruct the Saudi economy under the Vision 2030 Programme.

However, as this chapter demonstrates, there is still some uncertainty about when Saudi courts may consider it appropriate to invoke their powers to intervene or to refuse to enforce an international arbitral award. The few reported cases thus far appear to suggest that the courts require real and compelling reasons to do so but they constitute only a small sample. Thus, it is difficult to establish the boundaries at which Saudi courts may choose to intervene.

Previous chapters have shown how early Islam both adapted and encouraged international trade and the use of arbitration as an effective dispute resolution mechanism.[365] Whilst it is accurate to state that early Islamic scholars could not have envisaged the globalised commercial environment that exists in the modern world, they arguably incorporated sufficient level of flexibility into their interpretations of the *Qur'an* to ensure that future societies could adapt the *Shari'ah* to changing economic conditions. It is open to Islamic nations to embrace or reject this flexibility. Historically, it has appeared to be the position of Saudi authorities rejected the flexibility in favour of a rigid interpretation in an attempt to adhere to a classical interpretation of the *Qur'an*. However, in the face of economic realities and developments, it has gradually become clear that elements of the Saudi legal system need to develop and adapt in order to reflect the globalised trading system. Although intended to

[364] Wakim (n 137).
[365] Harb and Leventhal (n 86) 114.

protect its citizens, the strict enforcement of the *Shari'ah* has the potential to harm Saudi businesses from trading with international companies that are not subject to the *Shari'ah*.

To some, the gap between the literalist and the modernist interpretation of the *Shari'ah* in Saudi Arabia may appear to be impossible to reconcile. However, this chapter shows that the bridge to this gap in terms of embracing international arbitration standards can be found within the principles of Islamic law itself. By ensuring that basic principles of the *Shari'ah*, such as party autonomy and the good faith enforcement of contractual undertakings are enforced as mandatory law, and allowing for the flexible interpretation of *Shari'ah* law through *ijtihad*,[366] Saudi Arabia may place itself in a position within which it can embrace modern arbitration practices and protect foreign investors without having to abandon its founding principles.

[366] At present part autonomy is respected in the Saudi arbitration process and this can help it to become more aligned to international norms. See Faisal M. Al-Fadhel, 'Respect for Party Autonomy under Current Saudi Arbitration Law' (2009) 20(2) Arab Law Quarterly 31, 31-57.

Chapter 8:
Fieldwork Chapter

8.1 Introduction

As stated in chapter 1, this study examines the implications of the *Shari'ah* in commercial law by considering the extent to which it constitutes an obstacle to foreign investment and the use of arbitration to settle commercial disputes in Saudi Arabia. Also, it is shown in chapters 2 and 3 that the disconnect between Islamic law and 'free market' principles in Saudi Arabia may be traced to the rigid interpretations by *Hanbali* scholars. Hence, the argument that Islam is antithetical to free trade and competition is misguided. Then, it is suggested in chapters 5 and 6 that the government of Saudi Arabia should codify Islamic commercial rules and train judges in the use of the *Shari'ah* to resolve complex commercial disputes. It is noted that despite King Abdul Aziz's decision to prioritise the *Hanbali* jurisprudence, the *Shari'ah* is still largely discursive and scholastic. This explains why it is difficult to determine how the *Shari'ah* may be used to fill the gaps in the New Arbitration Law and Enforcement Law as shown in chapter 7. Lastly, it was argued in chapter 6 that a transparent court process that provides the rationale for judicial decisions is also required.

Thus, despite the absence of a *Shari'ah* authority invested with the power to create juridical norms, the previous chapters show that the *Shari'ah* remains the highest law of the land, and any provision in a treaty or clause in an agreement or any arbitral award that is inconsistent with the *Shari'ah* will be unenforceable in Saudi Arabia. An attempt was therefore made to ascertain the perception of members of the Saudi legal community toward the *Shari'ah*. Emphasis was placed on the relationship between the *Shari'ah* and free trade and its appeal to foreign investors, the importance of codification, the use of the *Shari'ah* to settle investment disputes, the training and knowledge of judges in *Shari'ah* courts, and the importance of establishing precedent. The meanings given by a convenience sample to key terms related to these issues were captured. The qualitative study was based on the contention that the perception of participants in the Saudi legal community may help to provide a better understanding of the flexibility of the *Shari'ah*.

8.2 Research Journey

The process for conducting the study involved planning, developing the interview guide and drafting the questions, sampling, collecting the data, analysing the data and determining the findings. The planning lasted for more than six months because the University had to be sure that the research met the ethical standards. Given that the study involved human participants and personal data, the researcher applied for ethical approval from the University's Ethics Committee. The application form and guidance helped the researcher to understand what was required. The researcher was required to demonstrate that he intended to respect the autonomy of the participants. This was achieved by the researcher undertaking to provide the participants with information that was sufficient to obtain informed consent. Thus, the participants made informed decisions regarding their participation in the project. The researcher also undertook to ensure that the participants knew that they were free to withdraw from the study at any time without prejudice and without explanation. Lastly, the researcher undertook to protect the personal data volunteered by the participants through appropriate procedures for anonymisation and confidentiality.

The researcher also demonstrated to the Committee that the study would have benefits that outweighed any risks. It was stated to the Committee that Saudi legal scholars, judges, arbitrators, members of the public, government officials and drafters of policy would benefit from the results of the interviews and the study. In this light, the researcher undertook to design and conduct the study in such manner as to maximise the likelihood of obtaining benefits and disseminating the findings appropriately. The researcher demonstrated that the research aim, hypothesis and questions are transparent, and the methodology employed would be appropriate for achieving the aim and testing the hypothesis. The researcher also demonstrated that he had considered the potential for harm to come to the participants, especially those who decided to criticise government policy or the principles of the *Shari'ah*. The researcher also kept in mind that harm may sometimes be subjective and hard to predict. The risk of such harm was avoided by the anonymisation of the responses of the participants. Lastly, the researcher had no potential conflict of interests to declare.

The perceptions and beliefs of judges, arbitrators, legal scholars and members of the public including journalists and investors, were captured and examined within structures of meaning. A convenience sample of fifty-five potential participants was prepared for the

purpose of obtaining meanings of key concepts relating to the interpretation and application of investment and arbitration laws in the Saudi Arabia. Twenty-five of the fifty-five potential participants consented to participate in the study and were interviewed. Each individual who agreed to participate was invited to participate in an interview to discuss their perceptions of the investment and arbitration laws, and policy implications of the Vision 2030 programme. In general, the interviewees had adjudicated on and resolved disputes as judges or arbitrators or analysed statutes and dicta as scholars and investors or reported on laws and court dicta as journalists. The journalists and investors represented the members of the public in the sample. All the participants had in their respective capacities faced the dilemma of applying the law of the Saudi Arabia based on the strict interpretation of the *Shari'ah* or the law of another Muslim-majority State that is more suitable for investment or arbitration.

In conducting the research, random sampling was not used to recruit the participants. This is because randomisation was not possible due to the large size of the target population, judges, arbitrators, legal scholars and members of the public. Moreover, time and resources were limited, and there was no intention to create generalisations that relate to the entire population. It follows that non-probability sampling, whereby all the members of the target population were not given an equal chance to be selected, was used together with subjective methods to determine which members of the target population met specific criteria.[1] The criteria used to select participants include knowledge of the investment and arbitration laws of the Saudi Arabia, willingness to participate and assess government policies objectively, availability at the time of the study, and easy accessibility. Potential participants who were not willing objectively to assess the policies endorsed by the King and the interpretation of the *Qur'an* and *Hadiths* by the *Hanbali* school were excluded before arriving at fifty-five potential participants. The sampling was therefore affordable since the subjects were readily available. Non-probability convenience sampling was adopted on the ground that the members of the target population constitute a homogenous group.[2] As noted above, it was not possible to determine whether the convenience sample was representative of the target

[1] Mike P Battaglia, 'Non-Probability Sampling' in Encyclopedia of Survey Research Methods (SAGE 2008) 1-4.
[2] Ilker Etikan et al (n 1) 1, 2.

population. Nonetheless, the homogeneity of the group helped to overcome the problem of generalising findings based on convenience sampling.[3]

Notwithstanding, in conducting this research it was uncertain how well the convenience sample would represent the target population given that apart from knowledge of the investment and arbitration laws, skill and experience, the most influential factors in recruiting the participants were availability and convenience. Hence, recruitment and retention were optimised by using a large sampling frame including hundreds of men and women who had knowledge of the investment and arbitration laws and were willing to critically assess government policies objectively. Material was provided in Arabic and English, and reminders were sent. Effective recruitment techniques for non-intervention or observational studies generally target specific demographic groups such as minority groups[4] or adolescent mothers.[5] Nonetheless, it was difficult to use recruitment and retention techniques that are relevant to specific demographic groups. Also, this was not necessary because the criteria used for selection were knowledge of the law and ability to critical assess policies.

The interviews were semi-structured. Thus, they had an explicit structure in regard to theory and method, but they were not structured. In other words, open-ended questions were used and they varied according to participants' responses and developed according to the direction the conversation took. Hence, the perspectives and opinions of the participants led the interviews and emerged from the interviews. This method is appropriate because it facilitated the process of extracting information from participants using guided conversations.[6] The researcher was therefore the main data gathering instrument[7] and was able to obtain personal and insightful access to data on the perceptions and experiences of the adjudicators, scholars and members of the public in Saudi Arabia.

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[3] On the generalisability of homogenous convenience samples, see Justin Jager, Diane L Putnick and Marc H Bornstein, 'More than Just Convenient: The Scientific Methods of Homogenous Convenience Samples' (2017) 82(2) Monographs of the Society for Research in Child Development 13, 13-30.

[4] See Antronette K Yancey et al, 'Effective Recruitment and Retention of Minority Research Participants' (2006) 27 Annual Review of Public Health 1, 10-15.

[5] See Mary Seed et al, 'Improving Recruitment and Retention Rates in Preventive Longitudinal Research with Adolescent Mothers' (2009) 22 Journal of Child and Adolescent Psychiatric Nursing 150, 150-153.

[6] Maryam Diko, 'Establishing Construct Validity and Reliability: Pilot Testing of a Qualitative Interview for Research in Takaful (Islamic Insurance)' (2016) 21 The Qualitative Report 521, 523-524.

[7] Daniel W Turner, 'Qualitative Interview Design: A Practical Guide for Novice Investigators' (2010) 15 The Qualitative Report 754, 754-760.

The interviews were conducted within a period of six months divided into two fieldwork trips. A sequence of open-ended questions was used that required the respondents to provide information that was both factual and conjectural.[8] The use of open-ended questions is also important because they enabled the researcher to ask follow-up questions, change the time allocated to each question and sequence on the basis of the needs of each session. The questions are also appropriate for cases where the analysis is geared towards ascertaining the nature of a concept from the respondent's unique perspective.[9]

With regard to the setting, Jacob and Ferguson note that it is better to use a setting that is comfortable for the participants and makes recording data easy.[10] Thus, the respondents were allowed to choose the settings. The interviews were conducted in board rooms and offices based on the participants' choice. Signed permissions were obtained from the participants, and in some cases their employers, to taking part in the interviews. They were all conducted face-to-face, most of them were recorded, transcribed verbatim, and translated from Arabic to English. The translation was done by the researcher. Transcribed interviews in the original Arabic version were sent to the respondents for their approval before the interviews were analysed.

8.2.1 The Interviews

The guidelines that were used to conduct the interviews are contained in the interview guide shown in Table 8.1 below. The set of questions asked are shown in Appendix I. The interviews lasted between 45 minutes and 1 hour; the open-ended questions enabled the researcher to probe and obtain more information from the respondents in order to minimise the impact of any potential biases. The responses are discussed below.

Table 8.I Interview Guide

Topic Guide	**Subject of Discussion**
Respondent characteristics	Reasons for working as a judge, adjudicator, scholar or journalist

[8] Barbara DiCicco-Bloom and Benjamin Crabtree, 'The Qualitative Research Interview: Medical Education' (2006) 40 Medical Education 314, 315-320.
[9] Ronald J Chenail, 'Interviewing the Investigator: Strategies for Addressing Instrumentation and Researcher Bias Concerns in Qualitative Research' (2011) 16 The Qualitative Report 255, 256-261.
[10] Stacy A Jacob S and Paige S Furgerson, 'Writing Interview Protocols and Conducting Interviews: Tips for Students New to the Field of Qualitative Research' (2012) 17 The Qualitative Report 1, 2-9.

	Decision-making model used (logic, statutory interpretation rule, ideology)
	Importance of a participant's religion
Theory guiding decision-making by legislators and judges	Realism vs formalism
	Duty as a Muslim
	Importance of free trade
	Importance of recognising foreign awards
	Why laws should protect local trade
Thoughts on free trade and foreign arbitration	The role of Islam
	The goals of Vision 2030
	How does the law promote trade responsibly

The above table shows the structures of meanings[11] that the researcher sought to identify. This was followed by capturing the various perspectives on the rule of interpretation favoured by judges and arbitrators, the way they interpreted or applied the law, the decision-making model and theory often used, and their perspectives on the role of the *Shari'ah*, and the importance of free trade and the recognition and enforcement of foreign awards. The perspectives of pundits (scholars, journalists and investors) were also captured in relation to the role of the *Shari'ah*, the importance of free trade and recognition and enforcement of foreign awards. The relations of the different and similar perspectives all depict the social meanings that guide the actions of the participants.

However, it was important to distinguish between the perceptions of adjudicators who apply the meanings of texts to actual cases in a legally binding manner and the pundits who simply act out their lives on their understandings of the meanings of texts. The perspectives of the latter are akin to public perception (informed members of the public), and it has been

[11] The term 'meanings' is used interchangeably with 'social meanings'. The term is defined in section 8.2.1 above.

demonstrated that this perception is essential to judicial reform efforts.[12] Hence, legal culture is not only affected by the historical context and the structure of the judiciary but also by public perception. This is because public perception of the justice system is a proxy for court users' perception of quality.[13] It is also important to ascertain the perception of adjudicators on the other hand. They are rational decision-makers who apply the law, as well as policy preferences.[14] They may choose between the policy of the law formulated by the government, the policy received from the *Shari'ah*, and the policy reflected in the statute. As such, ascertaining the driving forces behind judicial decisions may ensure certainty and stability of the rule of law.[15] Thus, the interaction between the structures of meaning and the actions of adjudicators and pundits produce the dynamic transformation of the field of meaning. In other words, the way these structures of meaning interact with each other determine whether an international instrument or arbitral award is accepted or rejected under the *Shari'ah*.

Each interview was conducted as a meeting between an expert or consultant and the Researcher. The participant and the researcher exchanged ideas and viewpoints, and, in the process, the participant constructed meanings that are contextually grounded. This is what Elliot Mishler described as the 'discussing joint construction of interview discourse'.[16] Hence, the social meanings of free trade and international arbitration are like separate component parts that the interviewees put together with the researcher's help. After the interviews, the meanings put together by each participant were then synthesised.

The interviews began with the use of the free association narrative method or relational experimental technique.[17] The association in this study was that judges, arbitrators, scholars and members of the public that favour foreign investment and the enforcement of foreign arbitral awards are more likely to interpret the *Shari'ah* in a progressive manner. For example, as shown below, the participants who favoured increased foreign investment stated

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[12] John M Scheb II and William Lyons, 'Public Perception of the Supreme Court in the 1990s' (1998) Judicature 66, 67; Maria Dakolias, 'Court Performance Around the World: A Comparative Perspective' (1999) 2(1) Yale Human Rights and Development Journal 87, 92.

[13] Edgardo Buscaglia and Maria Dakiouas, Judicial Reform in Latin American Courts (World Bank 1996) 4.

[14] Brian Leiter, 'Positivism, Formalism, Realism' (1999) 99 Columbia Law Review 1136, 1145- 1146. See also Holmes' quote that 'the life of law has not been logic; it has been experience'. Oliver Wendel Holmes, The Common Law (Dover Publications 1991) 1.

[15] Vitalius Tumonis, 'Legal Realism and Judicial Decision-Making' (2012) 19(4) Jurisprudence 1361, 1378-1379.

[16] Elliot G Mishler, Research Interviewing: Context and Narrative (Harvard University Press 1986) 526.

[17] This is defined in section 8.2 above.

that foreign arbitral awards granted by female arbitrators should be reviewed on their merits, while participants that were concerned about the impact of external impulses on the development of the *Shari'ah* adopted a formalist approach by stating the *Hanbali* position, which is the applicable law. The use of the relational experimental technique involved beginning with short questions relating to the history of the institution that employed the interviewee, marital status and job description. The interviewees were then asked whether they had heard and read about the vision of the Custodian of the Two Holy Mosques. This was followed by relational prompts about whether the government of the King or Custodian of the Two Holy Mosques should encourage foreign investment in order to achieve the outcomes of Vision 2030. The relational questions allowed the respondents to discuss their understanding of Vision 2030, their support or concerns about the Vision 2030 programme, and the meanings they associate with trade liberalisation. This study shows that the relational technique offers commendable insight into the viewpoints and concerns of adjudicators, legal scholars, and members of the public. Respondents were encouraged to lead the discourse while the Researcher focused on the nexus of meanings that the respondents associated with free trade and the recognition and enforcement of foreign arbitral awards.[18]

After the free relational prompts, the respondents were asked about the efficiency of the Saudi Economic and Development Council and Saudi Commercial Arbitration Centre, and the reliability of the judicial system in comparison to the judicial systems of other countries. They were also asked about the constraints on judicial decision-making: whether judges in Saudi Arabia have decisional freedom: whether they are obliged to rely on precedent set by previous judges: what margin of discretion (if any) judges in Saudi Arabia enjoy regarding the application and interpretation of foreign investment law and law of arbitration? Are they guided by realist or formalist objectives? In the same vein, the respondents were asked whether they believe the new arbitration system sufficiently empowers arbitrators.

[18] Wendy Hollway and Tony Jefferson, Doing Qualitative Research Differently: Free Association, Narrative and the Interview Method (Sage 2000) 36-37, 152. The genesis of the method may be traced to Anton O Kris, Free Association: Method and Process (Karnac Books 1982).

8.3 Theory and Design

Contemporary legal scholarship increasingly focuses on extracting the social meanings of institutions and practices in order to better understand the role of law and policy in society.[19] Researchers seek to determine how law and policy interact and how the interaction regulates the behaviour of individuals in society.[20] Thus, certain regulatory techniques are effective because they change social meaning and encourage obedience to the law.[21] This follows from the interpretive turn in the social sciences and the law in the middle of the twentieth century, and the interpretive turn in law and economics, and law and sociology a few decades later.[22] It has, for example, been established that one of the main reasons why the public is less interested with the experimentation of a replacement of imprisonment is that the social meaning of prison is linked to the categorical denunciation of crime.[23] Nonetheless, measuring interpretive variables is still very challenging given that variables such as meanings are not readily quantifiable.

One of the earliest researchers who attempted to measure the variables within the scope of symbolic interactionism,[24] Herbert Blumer, favoured a naturalistic approach.[25] He noted that the validity of interactionist premises cannot be tested in a laboratory setting but by observing actual human group life or social life. However, he did not recommend the testing of a hypothesis and ensuring that the premises fit a protocol of research procedure.[26] He simply observed actual human group life and determined how the meanings of things that guided human action are derived from social interaction and are handled in an interpretive process.[27] However, symbolic interactionism now relies on the testing of hypotheses, protocols of research procedures, and schemes of operationalising concepts in order to implement multiple

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[19] Bernard E Harcourt, 'After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis' (2000) 34 Law & Society 179-212; Bernard E Harcourt, Illusion of Order: The False Promise of Broken Windows Policing (Harvard University Press 2001) 112-116.
[20] Ibid.
[21] Dan M Kahan, 'Social Influence, Social Meaning, and Deterrence' (1997) 83 Virginia Law Review 349, 349-393. See also, Julien Etienne, 'The Impact of Regulatory Policy on Individual Behaviour: A Goal Framing Theory Approach' (2010) Discussion Paper No 5, Centre for Risk Analysis and Regulation 1, 7-9. <http://eprints.lse.ac.uk/36541/1/Disspaper59.pdf>, accessed 05 September 2018.
[22]For an analysis of the interpretive turns, see Dan M Kahan, 'Between Economics and Sociology: The New Path of Deterrence' (1997) 95 Michigan Law Review 2477
[23] William A Bogart (n 3) 109.
[24] This is defined in section 8.2 above.
[25] Herbert Blumer, Symbolic Interactionism: Perspective and Method (University of California Press 1969) 49-50.
[26] Ibid.
[27] Ibid.

method designs and expand the understanding of human behaviour.[28] In the same vein, testing of hypotheses, protocols of research procedures, and schemes of operationalising concepts are important in applying a mixed methods model with the aim of demonstrating that a group of related persons involved in social interactions and social justice may be viewed as part of one cohort.[29] In the present study, the cohort under consideration is Saudi Arabia's adjudicators. However, adjudicators operate in a context where their decisions impact on the social interactions and sense of social justice of others, namely, the general population of Saudi Arabia and important elite members of society. Laws and policies must therefore, in the first instance, reflect the social meanings of the judicial cohort in order to be effective when perceived by others in Saudi Arabia. In other words, the law is based on the 'plurality of equally valid perspectives'.[30] This is important because laws and the policies behind the laws retain an important place in social life. This aligns with the contention above that legal culture is affected by the historical context, the structure of the judiciary, and public perception.[31] It also aligns with Holmes' quote that 'the life of law has not been logic; it has been experience'. [32]

It is important for this researcher to determine whether the study will yield significantly original findings with important policy implications. That should be the objective of exploring social meaning. The interpretive variables (participants' perception of the law) must be measured and assessed in regard to how they relate to relevant legal institutions and practices. In this light, the qualitative responses of the participants are integrated with an experimental association or relational component, and then the responses and the experiment are analysed using a multivariate approach to mapping relations between variables in different categories. The Researcher set out to identify a causal relationship by showing that the independent variable, the respondent's appreciation of free trade and foreign investment, has an important impact on the dependent progressive interpretation of the *Shari'ah*. Thus, the progressive interpretation of the *Shari'ah* may be explained by respondents' belief that free trade and the enforcement of foreign arbitral awards have a beneficial effect on Saudi Arabia.

[28] See Joseph A Kotarba, 'Symbolic Interaction and Applied Social Research: A Focus on Translational Science Research' (2014) 37 Symbolic Interaction 412, 412-423.
[29] See Clarence St Hilaire, 'What is the Role of Reflective Equilibrium and Symbolic Interactionism in a Society in a Quest for Justice? A Mixed Methods Analysis' (2014) 4 Journal of Social Justice 1, 13-18.
[30] Eugene McLaughlin and John Muncie (eds), The SAGE Dictionary of Criminology (3rd edn, SAGE 2013) 288.
[31] See Edgardo Buscaglia and Maria Dakiouas (n 19).
[32] Ibid.

In order to establish causality, the researcher demonstrated association between the independent variable (appreciation of free trade and foreign investment) and dependent variable (perception of the *Shari'ah*) using the experimental relational component. Illias Bantekas notes that many Gulf States, such as Bahrain and the United Arab Emirates (UAE), that have adopted the UNCITRAL Model Law on International Commercial Arbitration (after placing credence on free trade),[33] had previously removed the obstacles imposed by conservative Islamic law.[34] The Supreme Court of Abu Dhabi held, in a judgment in 2000, that the current international business environment, involving fast and voluminous transactions, may sometimes necessitate the imposition of interest.[35] Also, Ali Kadri promotes free trade in the Islamic world by arguing that Islamic free-trade precepts are grounded in the *Hadith* or declarations of the Prophet.[36] He notes that the *Hadith* emphasises that profits are the primary concern of commerce, and many schools of the *Shari'ah* encouraged merchants to travel and exchange commodities without constraints.[37] On the other hand, regional Conventions such as the Riyadh Convention on Judicial Cooperation between States of the Arab League were unable to remove barriers to the enforcement of foreign awards because of their (the League's) obsession with particular Shari'ah-inspired rules.[38] Article 37(e) of the Convention for example states that foreign arbitral awards that conflict with the principles of the *Shari'ah* or with the public order or rules of conduct of the forum State shall neither be recognised nor enforceable.[39]

Once an association has been established between the independent and dependent variables by observing that the progressive interpretation of the *Shari'ah* may be explained by

[33] The Model Law was prepared and adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985 and amended in 2006. States may adopt the Law by incorporating it into their national law. Bahrain and the UAE (Dubai, specifically) adopted the 1985 version, and the UAE has recently adopted the 2006 version. See Hasan Ali Radhi, Judiciary and Arbitration in Bahrain: A Historical and Analytical Study (Kluwer Law International 2003) 198; Gordon Blonke and Kohl Mechantaf, 'United Arab Emirates' in Lawrence W Newma and Colin Ong (eds), Interim Measures in International Arbitration (Juris 2014) 796.

[34] Ilias Bantekas, An Introduction to International Arbitration (Cambridge University Press 2015) 59-60. The obstacles mostly relate to the charging of interest. For example, the Federal Law No. 18/1993 of the UAE (Commercial Code) allows interest on delayed payment and states that Article 714 of the Civil Code that prohibits the charging of interest does not apply to matters that fall within the scope of the Commercial Code.

[35] See Case no. 245/2000, Supreme Court of Abu Dhabi, Judgment of 7 May 2000. See also, the Federal Supreme Court Decision No. 14/9 on 28 June 1981 where the Federal Supreme Court held that allowing the charging of simple interest was crucial for the country's economic survival and the wellbeing of its people.

[36] Ali Kadri, 'Islam and Capitalism: Military Routs, Not Formal Institution' in Erik S Reinert, Ghosh J and Kattel R (eds), Handbook of Alternative Theories of Economic Development (Edward Elgar 2016) 161.

[37] Ibid. See also, chapters 2, 3 and 4. However, making profit in this context does not include profiting from earning interest. It is limited to the excess of the selling price over cost.

[38] Ilias Bantekas (n 40) 60.

[39] Although the Convention does not define the terms 'rule of conduct' and 'public order', it is suggested that they refer to public policy.

respondents' belief that free trade and enforcement of foreign arbitral awards are beneficial to society, the time order (sequence) of the variables can be established. The independent variable (appreciation of free trade and foreign investment) ought to occur first in time in order to cause the dependent variable (perception of the *Shari'ah*). Thus, respondents must have adopted a favourable view of free trade and foreign investment before holding that the *Shari'ah* should be interpreted in a progressive manner. This finding aligns with the UAE Federal Supreme Court Decision No. 14/9 on 28 June 1981 cited above[40] to the effect that allowing the charging of simple interest was crucial for the country's economic survival and the wellbeing of its people. Thus, the UAE Federal Supreme Court adopted a realist or pragmatic approach in adapting the *Shari'ah* to the circumstances, since it held that that allowing the charging of simple interest was not inconsistent with the *Shari'ah* because it was crucial for the country's economic survival and the wellbeing of its people. Hence, although the outcome is derived from authoritative premises, the court ensures that it best promotes public welfare.[41] This approach is somewhere between formalism[42] and attitudinalism.[43] Thus, judicial outcomes are determined by both judicial doctrine and the judges' attitude.

It is assumed that the above competing theories of judicial decision-making also apply to the pundits, persons who are not adjudicators as noted above. Their interpretation of the law is also based on formalist assessments of the provisions of statutes and court decisions and attempts to adapt the law to the circumstances. In order to operationalise concepts about how the law is related to human behaviour, many legal theorists have borrowed from Kahneman and Tversky.[44] The latter observed that humans use two things to assess the world around them: heuristic reasoning (System 1 or fast thinking) and conscious reasoning (System 2, slow thinking, including beliefs).[45] The heuristic involves speeding up the process of making

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[40] See (n 41).
[41] Richard A Posner, 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' (1986) 37 Case Western Reserve Law Review 179, 181.
[42] This may be defined as deductive reasoning based on legal prescription or strong formal assumptions. See Victoria Frances Nourse and Gregory C Schafer, 'Empiricism, Experimentalism, and Conditional Theory' (2014) 67 SMU Law Review 141, 142-143.
[43] This is a strand of legal realism that borrows from political science literature where it has been argued that ideology is an important determinant of whether a judge will decide for or against a right holder. See Mathew Sag et al, 'Ideology and Exceptionalism in Intellectual Property: An Empirical Study' (2009) 97 California Law Review 801, 847. Thus, judges 'should be viewed as promoters of their personal policy preferences rather than as interpreters of the law'. Frank Cross, 'The Ideology of Supreme Court Opinions and Citations' (2012) 97 Iowa Law Review 693, 697.
[44] See for example, Russell Korobkin, 'Daniel Kahneman's Influence on Legal Theory' (2013) 44 Loyola University Chicago Law Journal 1349, 1351-1356; Jeremy A Blumenthal, 'Emotional Paternalism' (2007) 35 Florida State University Law Review 1, 35-36.
[45] See Daniel Kahneman, Thinking, Fast and Slow (Farrar, Straus and Giroux 2011) 20-21. See also, Daniel Kahneman and Amos Tversky, 'Judgment Under Uncertainty: Heuristics and Biases' (1974) 185 Science 1124.

a decision because of the absence of an optimal solution. Thus, people faced with difficult questions sometimes substitute easier questions. For example, when faced with the difficult question of whether insurance is prohibited under the principles of *gharar* (speculation),[46] the government official, journalist or scholar may instead answer the easier question of whether he or she thinks insurance companies play an important role in modern commerce and can be of great benefit to policyholders.[47]

Conscious reasoning or System 2 involves making decisions on the basis of existing contextual features. The latter represent preferences based on individual circumstances or subjective assessments of social needs, and a choice must be made between the known preferences.[48] This explains why different people will make different recommendations regarding the preference function that the law should seek to maximise. It also explains why the participants in this study made different recommendations regarding the application of the *Shari'ah* to investment and arbitration issues. Kahneman and Tversky said that the 'prospect theory' predicts that people will elect to retain an entitlement rather than lose it and gain another one in uncertain terms.[49] Hence, the judges that were interviewed by the Researcher expressed preference for judicial review of arbitration awards (with the power to vacate awards based on their substance) over the conceptualisation of arbitration as an independent extra-judicial proceeding that requires very limited judicial supervision.

Given that the association or relational component was experimental, exposure to the independent variable before measuring the dependent variable was controlled. In other words, the Researcher first ascertained whether the respondent favoured free trade and increased foreign investment. That is why the first and second questions asked were concerned with what the respondent thought about the Vision 2030 programme[50] that seeks to liberalise trade and attract foreign investment. Those questions sought to ensure that there was no third,

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[46] See Peter D Sloane, 'The Status of Islamic Law in the Modern Commercial World' (1988) 22 The International Lawyer 743, 749-750.

[47] See Kristin T Roy, 'The New York Convention and Saudi Arabia: Can A Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards'? (1994) 18(3) Fordham International Law Journal 920, 948, who pointed out that the Saudi Arabian government relaxed its restrictive policies on insurance on realising that insurance companies play a crucial role in modern commerce and industry.

[48] See also, Sarah Lichtenstein and Paul Slovic, 'The Construction of Preference: An Overview' in Sarah Lichtenstein and Paul Slovic (eds), The Construction of Preference (Cambridge University Press 2006) 1.

[49] Daniel Kahneman and Amos Tversky, 'Prospect Theory: Analysis of Decision Under Risk' (1979) 47 Econometrica 263. 264-265. See also, a treatise on the layperson's behavioural approach to law: Richard H Thaler and Cass R Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness (Yale University Press 2008).

[50] See Appendix I.

extraneous variable that would otherwise cause the association between the independent and dependent variables, thereby creating a spurious or false relationship. In this case, a possible third extraneous variable was the fear of criticising policies endorsed and promoted by the King. Hence, follow-up questions were asked about specific aspects of the Vision 2030 programme that respondents liked in order to attempt to ensure that the respondents did not simply declare their support because the programme represented the vision of the Custodian of the Two Holy Mosques.

The responses of the participants were then integrated with an analysis of the responses. The latter enabled the Researcher to decode the messages relayed by the respondents by tabulating the various structures of meanings and their intricate relations to the legal contexts in which the meanings are embedded. This draws upon a technique that is generally referred to as 'correspondence analysis'. It is used to assess data such as social meaning variables that have been cross-tabulated or systematised.[51] The variables are represented in a table[52] and the Researcher was able to interpret the relationships between the social meaning variables within different institutional settings.[53] The analysis therefore enabled the Researcher to capture and compare social meanings in different contexts. For example, the meaning given by a Dean of a Faculty of Law to the concept of judicial discretion was captured and compared with meaning given to the same concept by an employee of the legal department of an investment authority, as well as the meaning given to that concept by a member of the Shura Council. The Researcher then identified the interpretative repertoire that emerged from the analysis of the various responses.[54]

The main unit of analysis is neither the response nor the behaviour of a single participant but the interpretative repertoire of the responses of all the participants.[55] In using these methods, the Researcher sought to identify whether there was a systematised and common interpretation or perspective. Given that the relations among the social meanings ought to be measured and analysed in a correspondence analysis, different methodological techniques

[51] Michael J Greenacre, 'Correspondence Analysis and Its Interpretation' in Michael J Greenacre and Jorg Blasuis (eds), Correspondence Analysis in the Social Sciences (Elsevier 1994) 3-8.
[52] See Table 8.II below.
[53] Bernard E Harcourt, 'Measured Interpretation: Introducing the Method of Correspondence Analysis to Legal Studies' (2002) University of Illinois Law Review 979, 983.
[54] Talja S, 'Analyzing Qualitative Interview Data: The Discourse Analytic Method' (1999) 21 Library & Information Science Research 1, 3. <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.471.9910&rep=rep1&type=pdf>, accessed on 08 June 2018.
[55] Margaret Wetherell and Jonathan Potter, 'Discourse Analysis and the Identification of Interpretive Repertoires' in Charles Antaki, Analysing Everyday Explanation: A Casebook of Methods (SAGE 1988) 169.

may be used. This enhances the process of validating the data through cross-verification.[56] This approach also has the benefit of minimising the impact of false or spurious relationships between the independent and dependent variables. The theory and design of this enquiry, as well as the techniques employed, have delineated the frame in which the correspondence analysis was used as shown in the next section.

8.3.1 Exploring Social Meanings

As noted above, the study was designed for implementation in the real world. The aim was to identify causal relationships by showing that the independent variable, respondents' belief that free trade and enforcement of foreign arbitral awards are beneficial to the economy, has a marked impact on the dependent variable, the progressive interpretation of the *Shari'ah*. As noted in chapters 2 and 3, the shortcomings of the secular law in Saudi Arabia governing investment and arbitration may be explained by the unremitting battle between attempts to modernise Saudi Arabia's legal system whilst also ensuring respect for *Shari'ah.* It is shown in chapters 2 and 3 that conservative forces within the country who favour literalism are hostile towards any standards of rules that are contrary to their strict or literal interpretation of the *Qur'an* and other sacred texts such as the *Hadiths*. It was noted that the application of the principles of the *Shari'ah* in Saudi Arabia is largely based on the interpretation of the *Hanbali* School or the fourth orthodox school in Sunni Islam. This is largely due to the Decree issued by King Abdul-Aziz in 1345H (1926) that designated the School that was under Imam Ahmed ibn Hanbal as the official orthodox School for Islamic courts in Saudi Arabia.[57] The objective was to prevent the inconsistent interpretation and application of the *Qur'an* and *Hadith* and delineate the process by which Islamic courts apply the Shari'ah.[58] As such, judges are required to defer to the *Hanbali* School's interpretation, although it has also been argued that judges have a certain margin of discretion given that they have a duty to make decisions that in good conscience represent the will of God.[59] Hence, judges in Saudi Arabia believe they are morally guided and ought to place emphasis not on the *fiqh* of the *Hanbali* School but on the *Qur'an* and *Hadiths*.[60] This comforts them with the thought that

[56] Bernard E Harcourt, note 59 above, 983.
[57] Abdullah F Ansary, 'A Brief Overview of the Saudi Arabian Legal System' (2008) Hausa Global Law School Program, para 3.2. <http://www.nyulawglobal.org/globalex/Saudi_Arabia.html#_ednref88>, accessed on 04 June 2018).
[58] Ibid.
[59] Charles P Trumbull, 'Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts' (2006) 59 Vanderbilt Law Review 609, 629-630.
[60] Frank E Vogel, Islamic Law and Legal System: Studies of Saudi Arabia (Brill 2000) 142-143, 370-373.

their judgments are based on what is written in the *Qur'an* and *Hadiths* rather than in the *fiqh*. It will be argued that Trumbull's[61] conception of the role of judges may persuade the latter to interpret the *Qur'an* and *Hadiths* in a manner that exegeses of other schools (other than the *Hanbali* school) are taken into account.

Beyond the argument that Islamic courts enjoy a wide margin of discretion in interpreting the *Qur'an* and *Hadiths*, Islamic legal jurists, whether classical or liberal, combine belief and reason to hold that the *Shari'ah* is an interpretive jurisprudence that clarifies or explains the rules as stated in the *Qur'an* and other sacred texts.[62] In some instances, moderation and value judgements are required. Muqtedar Khan notes as follows:

> The Qur'an does not invite blind followers; it demands and exhorts us to reflect and use our reason to read God's signs in nature, history and text (12:109). In all its presentations, the Qur'an presents evidence and proofs, and indeed, demands arguments and proofs from those who disbelieve its message. There is no suggestion or explanation in the Qur'an that the human being ceases to be the best of creations and becomes an ape (reversing evolution!).[63]

Hence, the *Qur'an* states that it is the bearer of the truth and *Furqan*. The latter describes the criterion for judgement or the ability to distinguish between right and wrong, and good and evil.[64] In this light, the *Qur'an* also provides as follows:

> O ye who believe! If ye fear Allah, He will grant you a criterion (to judge between right and wrong), remove from you (all) evil (that may afflict) you, and forgive you: for Allah is the Lord of grace unbounded. (Qur'an 8.29).

As such, the interpretation of the *Shari'ah* is a legal fiction; which is to say that it is open to challenge by other equally valid interpretations of Islamic legal sources (by both Muslims and non-Muslims), including those which rely on consensus and reasoning by analogy. By extension, a specific interpretation of the *Shari'ah* (*tatbiq al-Shari'ah*, which conflicts with trade-friendly verses of the *Qur'an*) ought to be open to challenge, even if that interpretative

[61] Trumbull (n 65) 629.
[62] Roy Jackson, Nietzsche and Islam (Routledge 2007) 135.
[63] A Muqtedar Khan, 'What is Enlightenment? An Islamic Perspective' (2014) 16 Journal of Religion & Society 1, 4 Khan AM, 'What is Enlightenment? An Islamic Perspective' (2014) 16 Journal of Religion & Society 1, 4.
[64] Ibid.

position has crystallised as a norm under a particular Islamic School of law.[65] The interpretation of the *Hanbali* School is often assumed to justify the decisions of judges or other arbiters who adopt a strictly formalist approach. It follows that the shortcomings of the law in the Saudi Arabia governing investment and arbitration may be explained by the incidence of rigid interpretations of Islamic legal sources.

8.4 Analysis

The analysis enabled the Researcher to decode the meanings given by the participants and place them within the proper context.[66] The meanings were then conveyed in terms of categories and themes.[67] Categories constitute the primary product of the analysis.[68] They were used at the beginning of the analytical process to develop themes and classify the results. Since the Researcher was the point of origination, the categories were developed on the basis of the Researcher's review of the extant literature.[69] Hence, they were developed from existing theories in the literature reviewed in chapter 1, as well as the assessment of the evolution and implementation of investment and arbitration laws in the other chapters. Themes, on the other hand, are concepts or descriptors that organise repeating ideas and enable the Researcher to answer the research questions.[70] Each theme may be said to be a thread of meanings that the Researcher discovers at the interpretative level.[71] Thus, the themes represent the participants' subjective understandings.[72]

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[65] Bassam Tibi, The Challenge of Fundamentalism: Political Islam and the New World Disorder (University of California Press 2002) 189.

[66] Hence, the research report conveys the subjective meanings and social reality of the participants. See Dorothy Horsburgh, 'Evaluation of Qualitative Research' (2003) 12(2) Journal of Clinical Nursing 307, 307-3012.

[67] There are variations in the use of both terms. See Patricia Bazeley, 'Analysing Qualitative Data: More than "Identifying Themes"' (2009) 2(2) The Malaysian Journal of Qualitative Research 6, 6-22.

[68] Diana M Bailey and Jeanne M Jackson, 'Qualitative Data Analysis: Challenges and Dilemmas Related to Theory and Method' (2003) 57(1) The American Journal of Occupational Therapy 57, 58.

[69] For details of the categorisation process, see Mojtaba Vaismoradi et al, 'Theme Development in Qualitative Content Analysis and Thematic Analysis' (2016) 6(5) Journal of Nursing Education and Practice 100, 102.

[70] Ayres L, Kavanaugh K and Knafl KA, 'Within-case and Across-case Approaches to Qualitative Data Analysis' (2003) 13(6) Qualitative Health Research 871, 872-873.

[71] Gerry W Ryan and Russell H Bernard, 'Techniques to Identify Themes' (2003) 15(1) Field Methods 85, 86.

[72] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 78.

8.4.1 Categories

The categories shown in Table 8.II below were developed from theories and arguments in the literature rather than from the data.[73] In other words, they were developed by the Researcher as broad guidelines for the semi-structured interviews and analysis of the data. The theories and arguments are discussed in chapters 2, 3, 4, 5 and 6.

Table 8.II: Categories

Categories	**Associated Definitions/Explanations from the Literature**
Judicial discretion and independence	There is no such thing contemplated by Islamic law as the absolute freedom of judges. Judges must comply with the law, as well as principles established by the Supreme Judicial Council.
Hierarchy of sources of law	The main source of law is the *Shari'ah*. However, this is based on the interpretation of the *Shari'ah* by the Shura Council or Council of Experts which is tasked with proposing laws to the monarch.
Codification of Islamic law	Although codification may provide a suitable level of predictability for local and foreign investors, Islamic law cannot be codified since this will stall the development of the law.
Free Trade	This is crucial for foreign investment. However, the law should prioritise the protection of the local industry and capacity building.
Compatibility with the *Shari'ah*	The Islamic legal system is integrated and hierarchical and comprises elements of capitalism and socialism. Hence, most principles of the *Shari'ah* are compatible with international law and promote trade liberalisation.
Enforcement of foreign awards	Foreign awards should be enforced in Saudi Arabia in accordance with the MITs and BITs ratified by the Saudi Arabian government unless the awards conflict with the *Shari'ah* or public policy

[73] Hsiu-Fang Hsieh and Sarah E Shannon, 'Three Approaches to Qualitative Content Analysis' (2005) 15 Qualitative Health Research 1277, 1277-1287.

8.4.2 Themes

The above categories enabled the Researcher to classify meanings and develop themes.[74] This went through three phases, namely initialisation, construction, and finalisation. Initialisation involved careful reading of the transcripts, highlighting meaningful recurrent ideas and concepts, considering possible meanings and identifying links between ideas. The latter part involved coding, whereby the Researcher converted the participants' responses into incidents or segments and examined the similarities and differences of the segments.[75] The coding process therefore revealed meanings, both explicit and implicit.[76] Then, in order to find the appropriate answers to the hypothesis and research questions discussed in chapter 1, the Researcher addressed important codes for further consideration.[77] Open coding was used to establish the relationship between the data (participants' responses) and theory (categories shown in Table 8.II above). The technique used for coding was conventional content analysis.[78]

8.4.3 Coding

Some of the responses given by the participants were in conflict with each other. Thus, the participants' range of responses were fractured, and the underlying patterns of indicators or ideas within the responses were conceptualised as a theory (in light of the guidelines shown in Table 8.II) in order to explain what the participants generally suggested.

8.4.3.1 Judicial Discretion and Independence

With regard to the category of judicial discretion and independence, many of the respondents did not agree with the proposition that there is no such thing contemplated by Islamic law as the absolute freedom of judges. A majority of them noted that what is important is that judges cannot rule without justification and must comply with the law, as well as principles

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[74] Green J et al, 'Generating Best Evidence from Qualitative Research: The Role of Data Analysis' (2007) 31(6) Australian and New Zealand Journal of Public Health 545, 545-550.

[75] For qualitative data management and coding, see Mojtaba Vaismoradi et al (n 80) 103-105.

[76] Ibid.

[77] See Zane R Wolf, 'Exploring the Audit Trail for Qualitative Investigations' (2003) 28(4) Nurse Educator 175, 175-178.

[78] This is a method where the coding categories are derived directly from the data. See Hsiu Fang Hsieh and Sarah E Shannon, 'Three Approaches to Qualitative Content Analysis' (2005) 15(9) Qualitative Health Research 1277, 1277-1279.

established by the Supreme Judicial Council. Also, they generally noted that the broad interpretation of the *Shari'ah* largely depends on the power of judges to make decisions according to their discretion. Thus, despite the fact that courts are required to comply with the interpretations of the *Hanbali* scholars, many respondents held that judges still exercised a reasonable margin of discretion:

> Some judges see ijtihad [independent reasoning or exertion of mental faculty] as one of the sources of the law. So, if a business does not exercise due diligence, the judge may hold that this is against Islamic law. (Dean).
>
> Judges do not need anything except the principles established by the Supreme Judicial Council if they have been established. It is true that the judge is obliged to check previous decisions of the Cassation courts. If the judge has another point of view, he is free to write and justify the position. If the judge has violated the principle established by the Supreme Judicial Council, both the principle and the judge's new principle will be examined on appeal. So, the judge is free to identify new legal classifications independently of previous categorisations. (Legal Scholar #1).
>
> There are four doctrines from the different schools of Islamic law and they all vary. Taking into account the fact that King Abdul Aziz selected some books such as Migdami and others, judges are bound by the Hanbali doctrine. It is permissible to take from the other doctrines if it is in the interest of the public. This is good, but it is left to the judge who is the investigator seeking to protect the interests of the people. (Member, Shura Council).
>
> All judicial systems in the world with inequality give the judge discretionary power … In the law, the notion of expectation is reinforced by practices. In all countries of the world, there will be one court that issues a judgement by applying a law and another court issues a different ruling applying the same law. The role of the Supreme Judicial Council is to unify and promote expectation. This is reinforced by training of judges and continuous consultation. (Director, Saudi Arbitration Centre).

> The decisions of King Abdul Aziz still stand. They are part of the Islamic jurisprudence. Some judges may rely on them. Of course, many scholars oppose the idea of judges exercising wide discretion. They have stopped the ijtihad. Some judges have also closed the door of ijtihad. The difference of opinion is due to training and educational level. (Judge #2).

However, despite the consensus on the fact that judges exercise a reasonable margin of discretion, it was uncertain whether such discretion extended to the recognition and enforcement of foreign arbitral awards:

> The Kingdom is one of the members that signed and implemented a number of foreign enforcement provisions. But if you take a closer look, you will find that there are problems regarding implementation because of the fact that the foreign arbitration must not conflict with Islamic law or public order in the Kingdom. (Member, Shura Council).

> The arbitration law is for local arbitration, although it deals with foreign arbitration in certain parts. But Islamic law does not prohibit the enforcement of foreign arbitral awards because they were granted by a non-Muslim or a woman. They are enforced out of necessity in order to meet obligations under international covenants … I find the Kingdom more flexible than many countries. (Judge #1).

> The Kingdom in the field of arbitration is still taking steps forward and the best proof is that the Kingdom has recently introduced a new arbitration law. I believe the Kingdom of Saudi Arabia is still in the process of attracting investors. However, in the current arbitration system, we need to develop to be the most up-to-date and most attractive system for all types of investment. I believe the problems of Article 24 and Article 42 of the Arbitration Law have to be remedied. (Member, Shura Council).

The conceptual code extracted from the above data is as follows: although the *Qur'an* promotes the principle of independence and impartiality of adjudicators and empowers them

to make decisions according to their discretion, they must justify their decisions and comply with the the law, as well as principles established by the Supreme Judicial Council.

8.4.3.2 Hierarchy of the Sources of Law

With regard to the category of the hierarchy of the sources of law, all the participants agreed that the main source of law is the *Shari'ah*.

> The Kingdom is based on *Shari'ahh* and Shari'ah depends on the status of stability and flexibility on the fixed evidence and the change is governed by objective judgments, and the procedures that are in the best procedures are in flexible legislations. (Member of the Senior Council of Ulema)
>
> *Shari'ah* cannot be overridden. It can be applied differently or reinterpreted in line with a set of rules and principles (Judge #2)
>
> The second Islamic Imam did not overrule the *Shari'ah* principles when he did not apply the Hudud of theft and burglary in that time because of famine. His decision could be said to be based on an interpretation of the punishment prescribed by the *Shari'ah*: Hudud being the upper limit rather than the automatic punishment. This is evident from many sources looking at how the punishment can be imposed, and to what amounts and so on. (Official, Saudi Arbitration Centre).
>
> There is no such thing as the Islamic *Shari'ah* system, which is the Islamic *Shari'ah*. It is a complete system of life. It is not only a judicial system that is valid for all times and ages, it is a general rule that governs all aspects of life, both in terms of transactions and investments. It promotes the interests of individuals and the community in general. (Former Judge/Lawyer)

However, one participant noted that despite the primacy of the *Shari'ah*, judges must consider whether an act that is inconsistent with the principles of the *Shari'ah* promotes public welfare. Where it does, the *Shari'ah* should not be applied rigorously:

> If my action is contrary to *Shari'ah* law but will improve the commercial environment and the economy of the country, the rigour of the *Shari'ah* will be disadvantageous. That is why the *Shari'ah* is not codified. It gives judges the flexibility to consider such things. (Legal Scholar #2)

It is noted in chapter 3 that the rise of more rigid interpretations of the *Shari'ah* led to closures of commercial markets in Saudi Arabia. The respondents echoed the same view, although they maintained that Islamic law may be interpreted broadly to protect diverse interests:

> Foreign investment has been adversely affected by conservative interpretations of the Qur'an. So economic liberalisation policies cannot be effective with the same conservative interpretations holding sway. (Legal Scholar #2).
>
> Judicial and administrative authorities may always interpret the *Shari'ah* in a different light if they want to promote those policies that encourage investment. (Arbitrator #2).
>
> The rules of Islamic jurisprudence are broad, and judges may dismiss most of what is presented to them. We may need to codify these provisions in such a way as to make them accessible to others, whether in the judicial system, the allies, or the investors … There is codification now of the legal provisions of the Hanbali regime, and there is also a committee that is studying the process. It was formed under the Sami Order. (Dean).
>
> It is time to codify the Islamic *Shari'ah* law, especially the rules governing commercial matters such as in the pre-state era of the Ottoman Empire … Codification will prevent ambiguity and close potential loopholes. (Member, Investment Authority).
>
> The *Shari'ah* may be interpreted broadly. Although the interpretation may be constrained by the Hanbali doctrine, the ideas of other schools are sometimes considered to promote the best interests of the people. (Legal Scholar #1).
>
> Islamic law comprises principles that lead to justice and equity. They are valid for all times and places. Legislation must keep pace with developments in the

> commercial world provided it does not violate the general principles of the *Shari'ah*. But we must remember that there are several interpretations of the principles. Some activities that were haram in the past are now legal and acceptable. This shows that Islamic law is flexible. If there was only one interpretation, then it may have become outdated over time. (Member, Shura Council).

The conceptual code extracted from the above data is as follows: the *Shari'ah* comprises the basic principles and laws of Saudi Arabia. However, it is not just religious law. It regulates all aspects of life, including personal life and commercial activities. Also, some amount of flexible interpretation is necessary in order for the judge to apply *Shari'ah* principles to the situation before him.

8.4.3.3 Codification of Islamic Law

With regard to the category of the codification of Islamic law, many of the respondents stated that it was feasible and would be beneficial to the Kingdom's judiciary:

> I think the rationale for codification is simple. When you are codified, you can amend the laws after two years to suit the times. I think that supporters of the idea of non-standardisation are afraid that their interpretations will not be favoured in the process of codification. (Member of the Shura Council).
>
> There is no doubt that codification will enhance the administration of justice and dissemination of key principles of the *Shari'ah*. It will also enable non-Muslims who have been fed falsehoods to have better understanding of the *Shari'ah*. The codification of the *Shari'ah* and publication of the code will highlight the flexibility of principles of the *Shari'ah* and enable judges to use their knowledge to establish precedents. (Judge #1).
>
> Any formal or informal codification is useful for the judicial system, whether this entails elaborating on the legal provisions of the Qur'an and reconsidering some existing decisions. But the people involved in the process must be respected and qualified to do so. This will prevent the judiciary from being subject to legislators who are not jurists and have no knowledge of the *Shari'ah*. (Judge #2).

> There is nothing preventing the codification of the principles of the *Shari'ah*. Many Muslim countries have done so. I do not know of any sources that prohibit codification in accordance with the development of the community'. (Legal Scholar #2).

> Codification will essentially provide two benefits. First, it will provide a good level of predictability for all parties or stakeholders. Second, codification, it is hoped, will provide some truer reflection of the realities of the time, as Islamic law must always take into account current practice. (Legal Advisor)

However, eleven of the twenty-five participants disapproved of codification because they believed the principles of the *Shari'ah* had already been systematised in different forms, or they thought codification defeated *ijtihad,* which is the independent reasoning by jurists geared towards finding solutions to incidental legal questions.[79] Among the eleven dissenters, the five most pertinent responses are provided below:

> The interpretations by Hanbali scholars have been published. That is codification. The Saudi judicial system has a system of pleadings governed by more than two hundred Articles. The Articles have been fully catalogued. It is a codified system. Lawyers can learn about the nature of *Shari'ah* contracts and requirements of Islamic law by reviewing the commercial rules published by the Board of Grievances. (Legal Scholar #2).

> Those looking to codify any rules are motivated by the benefits of predictability and clarity. I would like to mention here an example of a legal system that is very influential. That of Britain. It has no written constitution but is more influential than the systems of countries that rely on codes such as France. Judgments are made without codes and they are effective … Codification may eliminate differences of opinion and reduce the margin of inconsistency in judgment. But it does not eliminate uncertainty because the codes themselves must be interpreted. (Official, Saudi Arbitration Centre).

> The Hanbali doctrine is well archived. I was a member of the scientific committee at the Ministry of Justice that assessed the doctrine. There are

[79] See Wael B Hallaq, 'On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad' (1986) 63 Studia Islamica 129, 129-139.

> approximately three thousand Articles that govern the sale of goods, warranties, criminal punishment, tenancy agreements. (Legal Scholar #1)

The most cogent dissent was as follows:

> In the absence of codification, there will be different interpretations of the same principle. The judgment of one court may be inconsistent with the judgment of another court. But codification is inconsistent with ijtihad because it prevents independent reasoning. Codification is unnecessary. Ijtihad is allowed where the provisions of the Qur'an and *Hadith* are ambiguous. But where they are unambiguous or there is consensus (Ijma) [among scholars], Ijtihad is important because scholars have an obligation to perform it. Codification is like taqlid.[80] (Retired Judge/Lawyer)

The conceptual code extracted from the above data is as follows: the principles of the *Shari'ah* are broad and sometimes ambiguous. Hence, codification is important because it will require the adoption of interpretations that simplify and modernise the system and enable non-Muslim communities to have a better understanding of the *Shari'ah*. However, it must be done in such a way that it does not defeat *ijtihad*.

8.4.3.4 Trade Liberalisation

As regards the category of free trade, all of the respondents agreed with the contention that free trade was important for foreign investment. The respondents were surprisingly very optimistic about the liberalisation of trade in the Saudi Arabia and strongly believed that the new laws and regulations governing foreign investment and arbitration have laid the groundwork for achieving the objectives of the Vision 2030 programme. Following the free relational prompt, 'What do you think about the vision of the Custodian of the Two Holy Mosques or Vision 2030'? all of the respondents stated that it is a realistic and auspicious project. Hence, they all expressed support for the programme and its objectives. Some of the responses are:

[80] Taqlid may be defined as one person's conformity to the teachings or interpretations of another person. It was traditionally obligatory for persons who are not people of knowledge or qualified to interpret the Qur'an and Hadith. See Peter Rudolph, 'Ijtihad and Taqlid in 18th and 19th Century Islam' (1980) 20(3/4) Die Welt des Islam 131, 139.

The programme will support the Kingdom in the competition with the big countries, especially in the field of investment. (Judge #1).

The programme is active in the process of modification and development of systems and activation, and there is also a study conducted by the Riyadh Economic Forum on the relationship of the legislative system to economic development in the country. It is supported by several ministers and government departments. (Legal Scholar #1).

The 2030 Vision is a good programme for the future. It is a good approach taken by the government and I think any country in the world should have such a long-term plan. In 2030, the programme will achieve economic strength and solve the existing problems, unemployment, housing and economic prosperity. (Member of the Shura Council).

Yes. I think it sets a great example of a national initiative, which, regardless whether it delivers or not, does present a nationally shared will to transform the economy across all sectors and classes. (Legal Advisor)

Saudi Vision 2030 represents new hope for Saudis to move them to advanced levels in education, leisure, industry and the services economy. All the idle wealth will be invested. There is a thirst for entertainment and science for the Saudis, and for tourists from all over the world. (Journalist).

It's a step forward from the government of Saudi Arabia to diversify the economy. (Arbitrator #2).

It has a great ambition and blessed plans that return to the country and its projects with development, blessing, service and well-being. (Legal Scholar #2).

It is a step that will strengthen the market in Saudi Arabia and make it competitive internationally. We are opening up the opportunity to enter value-added projects to serve the country as a general direction for the General Investment Authority, which is interested in mega-investments. (Member, Investment Authority).

Although their responses were generally vague, the enthusiasm for trade liberalisation and foreign investment was strong. Thus, they supported the Vision 2030 programme because they believed it would modernise and liberalise the economy of Saudi Arabia and facilitate foreign investment without compromising on Islamic principles.

The conceptual code extracted from the above data is as follows: trade liberalisation may be problematic for adjudicators, legal scholars and members of the public given the need to balance liberalisation against the need for *Shari'ah*-compliant projects that enhance economic development and promote public welfare.[81]

8.4.3.5 Compatibility with the Shari'ah

The respondents generally agreed with the contention that the Islamic legal system is integrated and hierarchical and comprises elements of capitalism and socialism. They also agreed with the contention that the principles of the *Shari'ah* are generally compatible with international law and promote trade liberalization. However, they did not show how the *Shari'ah* is compatible with specific international instruments despite several attempts by the Researcher to get specific examples:

> Absolutely. The Islamic legal system is a disciplined system. It has compliance requirements that apply to trade and commerce. Foreign investors should know these requirements. Islamic law is easy to understand. The requirements are compatible with many international laws and laws of the countries of investors. (Official, Saudi Arbitration Centre).
>
> Anyone who knows Islamic jurisprudence or Islamic law has no doubt that the law is firmly established. We have a lot of jurisprudential wealth. There are many opinions that reflect international norms and standards. Investors can easily find the opinions. (Member of the Shura Council).

[81] Similar concerns were raised in some previous studies. See Kholoud T Hilall et al, 'The Political, Socio-economic and Sociocultural Impacts of the King Abdullah Scholarship Program (KASP) on Saudi Arabia' (2015) 4 International Journal of Higher Education 254, 254; Steffen Hertog, 'Two-level Negotiations in a Fragmented System: Saudi Arabia's WTO Accession' (2008) 15 Review of International Political Economy 650, 665.

> The Islamic *Shari'ah* is a complete system of life. It is a judicial system that is valid for all times and ages. Its rules apply to all transactions and investments and prioritise the interests of the community in general. The rules protect individual interests. What is important is fairness and justice. These are the same objectives of all important international conventions. (Legal Scholar #2)

> I believe that the *Shari'ah* is good and compatible with the laws of most countries. Some changes are needed in arbitration such as fixing the dates for the adjudication of disputes at certain times in order to ensure rapid resolution and conform with practices in many countries. These are compatible with the *Shari'ah*. Rapid resolution enhances justice, which is good for society. (Legal Scholar #3).

The most pertinent statement was as follows:

> I think the *Shari'ah* is already appropriate for use. However, one could say, that in the context of an international global financial and economic system that is based on certain tenets and practices, that, the *Shari'ah* is not suitable. It is not so much a problem with the *Shari'ah* which is deemed unsuitable. It is a problem with the international systems that prioritise unequal wealth distribution and opportunism. (Legal Advisor).

The conceptual code extracted from the above data is as follows: the *Shari'ah* is a complete way of life. It is an ethical system that contains remedies for all difficulties and requires routine changes in the interpretation of its principles to meet contemporary needs. Hence, foreign or international laws may only be deemed incompatible with the *Shari'ah* where they promote unethical goals and methods or inadvertently serve as a vehicle for inequality.

8.4.3.6 The Enforcement of Foreign Arbitral Awards

All twenty-five respondents agreed with the contention that foreign awards should be enforced in Saudi Arabia in accordance with the MITs and BITs ratified by the Saudi Arabian government. However, only one respondent stated his opinion in detail despite several prompts to other participants by the Researcher:

> The Kingdom's judicial system is a modern system but is still being developed. I know of many foreign judgements that have been implemented. But we face many issues because the judgments may include the use of foreign bonds and interest. Also, there are problems in the implementation that are present in all systems and can only be resolved through treaties. I expect the continuous modernisation of the judicial system and the implementation of more foreign decisions. The system is more flexible than many others and God knows … Also, Islamic law does not require the refusal to implement only foreign arbitral judgements issued by Muslims or men. They are implemented in order to fulfil covenants or treaties in good faith. There is no obstacle on the part of the *Shari'ah* if we realise that the implementation of the foreign judgment is a duty under a treaty. The requirement of a male arbitrator or Muslim judge applies only in the Kingdom. Here we have a foreign judgment with a foreign rule. We have to implement the judgment because we trust the foreign country with which we have a covenant or treaty that ensures reciprocity. (Judge #1)

The respondents did not raise the public policy exception in the enforcement of foreign arbitral awards. They generally held that the award should be enforced in Saudi Arabia if there is a treaty to that effect.

The conceptual code extracted from the above data is as follows: foreign awards should be enforced in Saudi Arabia in accordance with the MITs and BITs ratified internationally by the Saudi Arabian government. The *Shari'ah* requires parties to abide by the terms of their agreement in good faith.

8.4.4 Construction and Finalisation

After the interviews, the Researcher proceeded with transcribing, translating and coding the responses as shown above. Some challenges confronted by all researchers in qualitative studies include accessing the thoughts of participants, developing an understanding of the meanings that the latter ascribe to their experiences, and interpreting these meanings in the context of the study. Hence, the Researcher did not simply relay the participants' responses but actually ascertained the intention of the participants and interpreted their responses from

their unique perspectives.[82] Also, the Researcher's own bias was reviewed in order to ensure that the meanings that were captured emerged from the respondents, rather from my analysis. In his seminal work addressing the complex relationship between truth and methodology, Hans-Georg Gadamer noted as follows:

> We find that meanings cannot be understood in an arbitrary way. Just as we cannot continually misunderstand the use of a word without affecting the meaning of the whole, so we cannot stick blindly to our own fore-meaning about the thing if we want to understand the meaning of another …But this kind of sensitivity involves neither 'neutrality' with respect to content nor the extinction of one's self, but the foregrounding and appropriation of one's own fore-meanings and prejudices.[83]

Following the review of literature in chapter 1 and the analysis of the historical development of the laws governing investment and arbitration in chapters 2, 3, 4 and 6, the Researcher was biased towards the progressive interpretation of the *Shari'ah*. This is because it is demonstrated in the previous chapters that early Muslims were generally progressive towards free trade and arbitration. Thus, the Researcher ensured that the respondents who favoured the progressive interpretation of the *Shari'ah* or shift from the literal or strict interpretation of the *Qur'an* imposed by the *Hanbali fiqh* had to justify their stance. As such, any prejudice of the participant against fundamentalism or progressivism had to come from the respondent rather than the Researcher.

The codes were compared in terms of similarities and differences as shown in Table 8.III below. Each code was then assigned a place with regard to the research hypothesis. A label was also assigned to the code. The themes were then created by the descriptions of the labels. In other words, the themes were recurrent unifying ideas that characterised the respondents' experiences

[82] See Michael Larkin et al, 'Giving Voice and Making Sense in Interpretative Phenomenological Analysis' (2006) 3 Qualitative Research in Psychology 102, 118.
[83] Hans-Georg Gadamer, Truth and Method (Continuum 2006) 271

Table 8.III: Codes, Labels and Themes

Categories	**Codes**	**Labels**	**Themes**
Judicial discretion and independence	The *Qur'an* promotes the principle of independence and impartiality of adjudicators, but they must justify their decisions	*Shari'ah* compliance and justification of decision	Justification
Hierarchy of sources of law	*Shari'ah* regulates all aspects of life but interpretation is necessary	Judges must find rather than create *Shari'ah* principles	Uniform interpretation
Codification of Islamic Law	Codification is important but must not defeat ijtihad	Unpredictability is resolved by codification, but ambiguity is resolved by ijtihad	Flexibility and certainty
Trade liberalisation	It is important to balance liberalisation against *Shari'ah* requirements	The *Shari'ah* is flexible enough to accommodate new commercial realities	Economic development and public welfare
Compatibility with	The *Shari'ah* is an ethical system with	The *Shari'ah* is a universal equitable	Flexibility and

Categories	Codes	Labels	Themes
the *Shari'ah*	remedies for all difficulties but requires	system	adaptation
The enforcement of foreign arbitral awards	Foreign awards should be enforced in accordance with treaties	Agreements must be kept	Good faith, trust and reciprocity

As noted in chapter 1, the hypothesis that is being tested in this study is as follows:

> The *Shari'ah* is fundamentally flexible, and the rigid interpretation subsequently imposed by doctrinaire conservatives explains why the use of the *Shari'ah* to settle disputes constitutes an obstacle to FDI in Saudi Arabia.

The above themes fit into the whole data in relation to this hypothesis. They suggest that the reforms should expand judicial discretion but require judges to justify their decisions. Hence, most of the participants believed that judges should be required to give reasoned judgments showing how they addressed the arguments of the parties and explaining whether the latter have a basis for appeal. This will enable non-Muslim legal communities to understand why Islamic courts reach decisions, eliminate suspicion of arbitrary conclusions, and promote confidence in the integrity of courts that apply the *Shari'ah*. The themes also suggest that investment and arbitration laws may become more efficient where the reforms affirm the primacy of the *Shari'ah* under all circumstances and ensure uniform interpretation by courts. This is because the *Shari'ah* is fundamentally flexible, although its rigid interpretation may be detrimental to trade given its overarching role.

The themes also suggest that unpredictability may be resolved by codification, but the *ijtihad* must not be eliminated or closed since it is the best way of resolving ambiguity. The participants also frequently referred to the flexibility of the *Shari'ah* and argued that non-Muslim legal communities do not appreciate how the *Shari'ah* can be adapted to changing conditions in positive manner. Thus, trade liberalisation and international legal rules that seek to promote economic development and public welfare are consistent with the *Shari'ah*. The participants also generally used the terms good faith, trust and reciprocity to explain when foreign arbitral awards are enforced in Saudi Arabia.

It must also be noted that it was uncertain whether the participants were reluctant to criticise a programme endorsed by the King. The Researcher observed that some reactions were not visceral. In other words, they related to the intellect rather than any deep inward feelings. These responses reflected what the participants thought was appropriate to say rather than what they seemed to feel. Notwithstanding, the respondents generally observed that the Vision 2030, a major progressive initiative,[84] shows that the *Shari'ah* can coexist with free trade and a limited form of secularism. One respondent (a legal scholar) also noted that the *Shari'ah* has always promoted free trade:

> The Islamic *Shari'ah* is a set of guiding moral principles that prevent deceitfulness, dishonesty and exploitation. If the trader is honest, the Islamic *Shari'ah* will not stop him from trading but will encourage others to do business with him. That is how it has always been. (Legal Scholar #1).

8.4.5 Relational Levels of Meaning

Relational analysis enabled the Researcher to determine the relations between the categories and themes.[85] In this light, the Researcher identified three relational levels of meaning.

The primary level comprised meanings that the participants easily volunteered after they were prompted by free association such as when they were asked what they thought about Vision 2030. They repeated and laid stress on their support of free trade and foreign investment within the ambit of the Vision 2030 programme. No participant repeated or emphasized any criticism of the programme.

The secondary level comprised meanings that the participants were cognisant of but did not have a good grasp of the underlying concept or purpose. Thus, they mentioned the terms when prompted but could not explain further whether it represented progressive development of Islamic law or a fundamentalist conception or had no direct relationship with Islamic law. A good example is the recognition and enforcement of foreign arbitral awards. The participants mostly supported the recognition and enforcement of foreign arbitral awards

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[84] Progressive from an economic perspective. See chapter 6.

[85] Kathleen Carley, 'Coding Choices for Textual Analysis: A Comparison of Content Analysis and Map Analysis' (1993) 23 Sociological Methodology 75, 78.

insofar as it complied with the principles of the *Shari'ah*. However, they did not discuss questions of capacity or coercion, fraud, and misrepresentation that may also affect the enforceability of a foreign award. Also, they did not discuss specific reservations that should apply in Saudi Arabia to ensure that awards that conflict with the *Shari'ah* are not enforced in the Saudi Arabia. Thus, they merely restated certain Articles from the new arbitration law: Article 2 of the Arbitration Law that requires all arbitrations conducted in Saudi Arabia to comply with the principles of the *Shari'ah;* Article 25(1) that requires the set of procedural rules chosen by the parties to be compatible with the principles of the *Shari'ah*; and Article 38(1) that requires any finding or determination made by a foreign arbitral tribunal to be compatible with the principles of the *Shari'ah* and public policy in Saudi Arabia.

The participants were reluctant to discuss whether they believed the procedural rules chosen by the parties or findings of foreign arbitral tribunals must be assessed only in light of the interpretation of the *Qur'an* and *Hadiths* by the *Hanbali* School. They were also reluctant to state whether a foreign arbitral award should be enforceable in the Saudi Arabia if it is shown to comply with the interpretation of the *Qur'an* by a School of Islamic jurisprudence other than the *Hanbali* School, say for example, the *Maliki* that has a more moderate approach to how *ribawi* commodities may be traded. In the same vein, they were reluctant to state whether an award granted by a female arbitrator sitting in a foreign country should be enforceable in Saudi Arabia. It is stated in chapter 6 that although Article 14 of the Arbitration Law is silent on the issue of gender, and the *Qur'an* and the *Sunnah* do not expressly prohibit female arbitrators, the *Hanbali* School is opposed to the idea of female adjudicators. Also, some commentators such as Baamir are cited in chapter 7 as stating that it may still be assumed that female arbitrators are not accepted in Saudi Arabia. The respondents were reluctant to engage in the debate. Judge #1 simply stated as follows:

> Yes, there is no problem with this, but the decision will be reviewed if there is a defect or if it is in violation of the public order or the provisions of the *Shari'ah*.

The other respondents give similarly terse answers. As such, the meanings given by the respondents regarding the content of foreign arbitral awards and the identity of the arbitrator that did not comply with the *Shari'ah* were therefore categorised at the secondary level. However, it is uncertain whether the participants did not have a good grasp of the underlying purpose of the restrictions imposed by Islamic law or they were simply reluctant to criticise the prescriptions made by the *Hanbali* School.

At the tertiary level are meanings that the participants attributed to other people or organs such as the judge in a particular case, the Council of Ministers, or the Supreme Judicial Council. One participant for example stated that Sheikh Abdul Aziz bin Baz had held that there is nothing preventing the codification of Islamic law where the codification is not innovative.[86] The participant was therefore aware of the importance of legal innovation but attributed the idea to Sheikh Abdul Aziz bin Baz. It was uncertain whether the participant was reluctant to discuss his own ideas about the importance of legal innovation and how Islamic law that applies in the Saudi Arabia ought to be innovated.

In light of the above, the Researcher placed emphasis on the meanings at the primary level given that they were volunteered by the participants when prompted and the participants were able to provide details to support their answers. The most common primary meanings observed are commercial matters/transactions, arbitration, and the *Shari'ah*. The participants spoke about commercial transactions and the arbitration of disputes as being crucial for the liberalisation of the market in the Saudi Arabia and the increase of foreign investment. However, they noted that the transactions and awards must comply with the *Shari'ah*. Hence, free trade is important and the concept of buying and selling of goods without quotas and other restrictions does not conflict with the *Shari'ah* per se, unless *haram* elements such as risk and speculation are introduced in the process of liberalisation. This is in line with the provisions of the Arbitration Law cited above which are to the effect that foreign arbitral awards are enforceable in Saudi Arabia unless they conflict with the principles of the *Shari'ah*. It follows that parts of the *Shari'ah* as shown in chapters 2 and 3 support trade, and problems relating to commercial transactions and the settlement of commercial disputes arise from the disregard or wrongful interpretation and application of the *Shari'ah*. One participant noted as follows:

> Islamic *Shari'ah* is in the best interests of the people and the achievement of justice. If you rely on this principle of justice, which is sought by the investor, there will be no problem. But if you introduce new interpretations, then the problem is not with Islamic law but with you who take a different view and apply the law in a flawed manner. (Member of the Shura Council #1).

[86] In 1727, King Abdul Aziz stated his intention to establish a codified system of Islamic law. See Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2(3) Arab Law Quarterly 272, 273.

It must however be noted that one of the problems in the implementation of the *Shari'ah* (as shown in the previous chapters) is that of uncertainty. This stems from the fact that the *Shari'ah* is not codified, and courts are not required to follow precedents. Thus, on the one hand, adjudicators are given too much interpretive liberty, while on the other hand, it may be difficult to determine in advance whether a new interpretation is flawed.

8.5 Limitations

Biases[87] and the probability of biases (of the Researcher and respondents) were not quantified despite the fact that convenience samples may be vulnerable to important hidden biases.[88] The most obvious bias as shown above is the participants' prejudice in favour of the policies endorsed by the Supreme Judicial Council and King. There was also a risk of social desirability bias whereby participants behave obsequiously in order to present themselves in the best possible light. Also, it is uncertain whether the enthusiasm was not due to the respondents' visceral fear of confuting the vision of the Custodian of the Two Holy Mosques. This may explain why they were all reluctant in suggesting any shortcomings of the Vision 2030 programme. Where the Researcher suspected such bias, the Researcher asked more questions in order to minimise the impact of the bias.[89] The participants did not change their approach but provided more information to justify their stance.

Also, it was agreed that the identities of the respondents will not be disclosed. Hence, they were more likely to assess laws and policies objectively if they knew that their identities would remain confidential. That is why they are referred to in this study as respondents, interviewees or participants. Nevertheless, many participants refused to be more forthcoming.

Given that the questions were open-ended, the Researcher asked follow-up questions to elicit additional information. This was important because it is sometimes difficult for the interpreter to determine whether the respondent is honest or has an important hidden bias. Thus, the follow-up questions ensured that the respondents reiterated their ideas and perceptions, and also strengthened my faith in their interpretation, given that as they

[87] The term 'bias' here refers to the systematic error that is introduced into sampling or responding by selecting or focusing duly on one outcome or answer over others. See Nigel Norris, 'Error, Bias and Validity in Qualitative Research' (1997) 5(1) Educational Action Research 172, 173-175. See also, Malcolm Williams, Philosophical Foundations of Social Research Methods (SAGE 2005) 180.

[88] Marc H Bornstein, Justin Jager and Diane L Putnick, 'Sampling in Developmental Science: Situations, Shortcomings, Solutions and Standards' (2017) 33(4) Developmental Review 357, 358.

[89] Donna M Randall and Maria F Fernandes, 'The Social Desirability Response Bias in Ethics Research' (1991) 10 Journal of Business Ethics 805, 805-806.

volunteered more information I became confident about their stated convictions. The fact that the respondent was made to reiterate an idea confirmed that the idea could be ascribed to the respondent.

8.6 Conclusion

Andrew Abbott in his seminal essay on ambiguity stated as follows:

> Proclamations against positivism often mask an arbitrary unwillingness to think formally about the social world. One asserts that the world is constructed of ambiguous networks of meaning, argues for the complexity of interpretations and representations, and then simply assumes that formal discussion of the ensuing complexity is impossible. But this is obviously untrue. Many people have thought formally about ambiguity, representation, and interpretation. Nothing in those phenomena militates against thinking in a rigorous, even disciplined fashion as we see in the work of Empson, Barthes and many others.[90]

The above statement by Andrew Abbott describes succinctly the stance of conservative adjudicators and pundits in Saudi Arabia as shown in previous chapters. They reject positivism and are unwilling to think formally about the diverse representations and interpretations of the *Shari'ah* in the Muslim world. This chapter attempts a formal discussion of the complexity between networks of meaning related to investment and arbitration laws in Saudi Arabia. It identifies key terms and meanings that are associated with investment and arbitration. A sample of twenty-five participants provided meanings to key terms related to the interpretation and application of investment and arbitration laws. Potential participants who were not willing to assess objectively the policies endorsed by the King and Government and the interpretation of the *Qur'an* and *Hadiths* by the *Hanbali* School were excluded. All the participants had in their respective capacities faced the dilemma of applying the law of the Saudi Arabia based on the strict interpretation of the *Shari'ah* or the law of another State that is more suitable for investment or arbitration. The Researcher identified causal relationships by showing that the independent variable,

[90] Andrew Abbott, 'Seven Types of Ambiguity' (1997) 26 Theory and Society 357, 358.

respondents' belief that free trade and enforcement of foreign arbitral awards are compatible with the principles of the *Shari'ah*, has a marked impact on the dependent variable, the progressive interpretation of the *Shari'ah*.

The Researcher measured the social meanings of the terms used by the participants to discuss the enforcement provisions of the investment and arbitration laws in Saudi Arabia. It has been revealed that the following categories of meanings determine whether a transborder transaction or foreign arbitral award is compatible with the principles of the *Shari'ah*: (1) the judge's discretion, (2) the source of the law (accepted interpretation of the *Qur'an* and *Hadith*s), and (3) certainty as regards how Islamic law ought to apply.

It has also been revealed that reforms that seek to enhance the efficiency of investment and arbitration laws should expand judicial discretion but require judges to justify their decisions. This will enable non-Muslim legal communities to understand why Islamic courts reach decisions, eliminate suspicion of arbitrary conclusions, and promote confidence in the courts' integrity. Also, although the reforms should affirm the primacy of the *Shari'ah* under all circumstances, they should ensure uniform interpretation by courts. It was equally revealed that although unpredictability may be resolved by codification, the ijtihad must not be eliminated since it is the best way of resolving ambiguity. Lastly, it was noted that trade liberalisation and international legal rules that seek to promote economic development and public welfare are consistent with the *Shari'ah* where they focus on concepts such as good faith, trust and reciprocity.

Also, there is a disconnect between the perception of, on the one hand, adjudicators, legal scholars and reporters in Saudi Arabia and, on the other hand, foreign investors and analysts regarding the effectiveness of the *Shari'ah*.[91] The qualitative responses of adjudicators and pundits in Saudi Arabia reflect an optimistic and almost idealistic perception of the *Shari'ah*, while the latter generally view the *Hanbali* fiqh as commercially disadvantageous.

In this light, it may be important to determine whether adjudicators in Saudi Arabia may refer to another School of Islamic Jurisprudence other than the *Hanbali* School in order to invoke another interpretation of the *Shari'ah* that is more advantageous to trade and commerce. Although the Decree issued by King Abdul-Aziz in 1345H (1926), that designated the

[91] The perceptions of foreign investors and scholars are discussed in chapter 7.

Hanbali School as the official orthodox school for Islamic courts in Saudi Arabia, sought to prevent the inconsistent interpretation and application of the *Qur'an* and *Hadith* and delineate the process by which Islamic courts apply the *Shari'ah*, it has led to a limited kind of legal formalism that is disadvantageous to investment and arbitration. It may then be argued that codification is important since it will provide greater predictability and certainty in law. Nonetheless, the codification of the *Hanbali* jurisprudence may not be helpful since, as shown in chapter 7, it is considered by many non-Muslim legal communities as commercially disadvantageous.

The fact that the *Shari'ah* is still subject to variable interpretations may therefore better ensure that it is used to settle commercial disputes efficiently.[92] In this regard, it may be suggested that the Royal Decree of 1930 and the Judicial Board Decision no. 3 of 1928 give a margin of discretion to judges and arbitrators regarding the interpretations of the *Shari'ah* by other Schools of Islamic Jurisprudence. Hence, to the extent that this contention is justified, Saudi Arabian judges and arbitrators may be able to defer to the opinion of another School of Islamic Jurisprudence other than the *Hanbali* School where the former is more advantageous to trade and commerce.

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[92] However, the fact that there is no clear body of texts for interpretation also means that it is difficult to predict outcomes, which may constitute a deterrent to foreign investors.

Chapter 9:

Conclusion

9.1 Introduction

This chapter concludes this thesis by showing how the hypothesis was tested and the research questions answered in order to achieve the aim. Also, it shows how the results of the study may be integrated with the findings of key studies and provides support to and differ from the theoretical positions of the studies. It concludes with recommendations for further studies.

9.2 Background

It is shown in chapters 1 and 2 that previous studies have investigated the Saudi government's response when confronted with the dilemma of applying parochial *Shari'ah* principles or international law that aligns to business interests.[1] It was noted that some studies have argued that the parochial or rigid approach to the interpretation of the verses of the *Qur'an* may be explained by the designation of the *Hanbali* school of (Sunni) Islamic jurisprudence as the official *fiqh*,[2] while other studies observed that this may be explained by the rise of the *Ulama* or scholars who believed God's will had been completely revealed in the *Qur'an*, but only they (the *Ulama*) had the capacity to interpret the holy book.[3] Since, the

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[1] The studies that most influenced the Researcher in this regard include, George Khoukaz, 'Sharia Law and International Commercial Arbitration: The Need for An Intra-Islamic Arbitral Institution' (2017) Journal of Dispute Resolution 181; Arthur J Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2006) 5(1) Santa Clara Journal of International Law 169; George Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (1987) 9(2) University of Pennsylvania Journal of International Business Law 211; Saad U Rizwan, 'Foreseeable Issues and Hard Questions: The Implications of US Courts Recognising and Enforcing Foreign Arbitral Awards Applying Islamic Law under the New York Convention' (2013) 98 Cornell Law Review 493.

[2] See Nayla Comair-Obeid, 'Salient Issues in Arbitration from an Arab Middle Eastern Perspective' (2014) 4 The Arbitration Brief 52, 58; Bryant W Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1980) 18 Columbia Journal of Transnational Law 413, 422.

[3] Muhammad Qasim Zaman, 'The Ulama and Contestations on Religious Authority' in Muhammad Khalid Masud, Armando Salvatore and Martin van Bruinesen (eds), Islam and Modernity: Key Issues and Debates (University of Edinburgh Press 2009) 206-207. See also, Jared Rubin, Rulers, Religion and Riches: Why the West Got Rich (Cambridge University Press 2009) 13 [Rubin blames the conservative jurists in both Mecca and the Ottoman Empire]; and Ken Malik, The Quest for a Moral Compass: A Global History of Ethics (Atlantic 2014) 56 [Malik blames the influence of conservative thinkers in the thirteenth century such as Al-Ghazali].

Ulama did no use a codified system, they often interpreted the *Qur'an* by filling the gaps with their strictly conservative views, pre-suppositions and preunderstandings.[4]

With regard to the *Hanbali* school, it was founded by students of Ibn Hanbal as a conservative alternative to other Sunni schools that were deemed to engage in speculative theological innovations.[5] Thus, it is a strict traditionalist school that derives the *Shari'ah* essentially from the *Qur'an* and the *Hadiths*, with exceptions made with the views of the Prophet's companions or early Muslims.[6] Unlike, the other schools, the Hanbalites do not accept that a judge may use his discretion or refer to the local customs to fill in gaps in the sacred texts.[7] It follows that since the *Hanbali* is the official *fiqh* in Saudi Arabia, and the *Qur'an* is the constitution as per Article 1 of the Basic Law, all laws and regulations must comply with the *Hanbali* interpretation of the specific legal prescriptions of the *Qur'an* and *Hadiths* (and the consensus of the Prophet's companions). This leaves little room for reforms based on changing social and economic circumstances.

However, Ayab has argued that it would be unrealistic to overlook the realities of globalisation since they did not exist at the time of founding of Islam.[8] She notes further that, if interpreted properly, Islam, may provide sufficient tools that allow the suitable jurisprudence to address the problems of the modern age.[9] This argument is based on the contention that classical Islamic jurisprudence did not favour deference to the personal opinion of certain jurists (such as the *Ulama* and Hanbalites) to interpret the divinely-inspired *Shari'ah*, but emphasised the importance of discovering the intent behind the divine law and the appropriate way of applying the intent. Thus, "Discovery of the intent of the law is more important than a literal interpretation."[10]

Many commentators have focused on the classical Islamic jurisprudence or the practices of early Muslims to demonstrate that the rigid and literal interpretation of the *Qur'an* is a more recent phenomenon than the progressive interpretation of the book's verses. Younes for

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[4] Zaman, ibid, 206-207.
[5] See Christopher Melchert, The Formation of the Sunni Schools of Law: 9th-10th Centuries CE (Brill 1997) 182; Francis Robinson, Atlas of the Islamic World Since 1500 (Facts on File 1984) 29.
[6] See Hisham M Ramadan, Understanding Islamic Law: From Classical to Contemporary (Rowman Altamira 2006) 24-29.
[7] See Chiragh Ali, 'The Proposed Political, Legal and Social Reforms' in Charles Kurzman (ed), Modernist Islam 1840-1940: A Sourcebook (Oxford University Press 2002) 281-282.
[8] Mary B Ayad, 'Harmonisation of International Commercial Arbitration Law and Sharia The Case of Pacta Sunt Servanda vs Ordre Public: The Use Of Ijtihad to Achieve Higher Award Enforcement' (2009) 5 Macquarie Journal of Business Law 93, 102-103.
[9] Ibid.
[10] Ibid.

example demonstrated that the medieval Islamic pragmatics became bound with the fetters of rigidity due to subsequent hermeneutical innovations.[11] Weeramantry argued that a closer examination of the *Shari'ah* reveals the high degree of intercommunication between Western and Islamic legal cultures over the centuries, as well as the congruence of the two legal cultures on some key principles of international law such as fairness and justice.[12]

Notwithstanding, the *Shari'ah* as practised in Saudi Arabia (in accordance with the *Hanbali* pronouncements) has proved to be at odds with international (Western) standards. Opwis argued that this is because of the Saudi government's oscillating approach to modernity.[13] She contended that there was an internal struggle at the administrative level requiring the government to embrace international standards of commercial law needed to compete in the global marketplace whilst maintaining a strict adherence to the *Hanbali* interpretation of the *Shari'ah*.[14] Also, Elshufara maintains that the rigidity of the (*Hanbali* version of) the *Shari'ah* creates tension between the legislative and the judicial approaches.[15] Thus, the government has acceded to various international treaties, while on the other hand, an interventionist (rather than supportive) judiciary has limited the principles enshrined in the country's municipal arbitration laws by adopting an ambiguous stance on public policy.[16] In the same light, Mahassni and Grenely concluded that *Shari'ah* implementation in Saudi Arabia remained an incomplete and sometimes discretionary model of justice.[17]

The *Hanbali* school requires adjudicators (whether judges or arbitrators) to be fully trained in Islamic law. Thus, they are less likely to recognise judgements or arbitral awards granted by non-Muslim adjudicators. However, the Board of Grievances rejected the argument made by the Saudi government that an award granted by a non-Muslim was inconsistent with the *Shari'ah* since the arbitrator had insufficient knowledge of Islamic law.[18] The Board held that since there is a general consensus among Muslim scholars on the sanctity of contract, an

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[11] Soualhi Younes, 'Islamic Legal Hermeneutics: The Context and Adequacy of Interpretation in Modern Islamic Discourse' (2002) 41(4) Islamic Studies 585, 585.
[12] Christopher Weeramantry, Islamic Jurisprudence: An International Perspective (St Martin 1988) xv, 160.
[13] See Felicitis Opwis, 'Islamic Law and Legal Change: The Concept of Maslaha in Classical and Contemporary Islamic Legal Theory', in Abbas Amanat and Frank Griffel (eds), Shari'a Islamic Law in the Contemporary Context (Stanford University Press 2007) 62-82.
[14] Ibid.
[15] Dina Elshufara, 'The 2012 Saudi Arbitration Law and the Shar'ia Factor: A Friend or Foe in Construction' (2012) 15 International Arbitration Law Review 138, 138.
[16] Ibid.
[17] Hassan Mahassni and Neal Grenely, 'Public Sector Dispute Resolution in Saudi Arabia: Procedures and Practices of Saudi Arabia's Administrative Court' (1987) 21(3) The International Lawyer 836, 838.
[18] See Board of Grievances Case No. 235/2/Qhaf/1416 H Saudi Arabia.

arbitral decision based on a contract should bind the parties.[19] It is argued here that the decision failed to clarify the ambiguous *Hanbali* stance on judgements and awards granted by non-Muslims. Moreover, unlike the government, the Board seemed to have suggested that the *Hanbali* doctrine recognises the consensus of later generations as valid. The Researcher was unable to find evidence supporting this stance. Hence, it remains uncertain whether the Board acted with unfettered discretion in this case.

Nonetheless, Al-Ramahi intimates that there are decisions of *Hanbali* judges that recognise the right of non-Muslims to arbitrate at least in commercial matters, outside Muslim territories.[20] Also, Hanson noted that the flexibility of the *Hanbali* school extends only to awards granted in non-Islamic jurisdictions that are not inconsistent with the *Shari'ah*.[21] Then, Saleh pointed out that recourse to a non-Muslim court, in contractual disputes is allowed only as long as there are no non-Islamic clauses such as *riba*.[22] Although this demonstrates flexibility, it excludes most commercial contracts concluded in Western countries. Coulson on his part observed that *Shari'ah* courts in Saudi Arabia retained a broad discretion to reject arbitration clauses on the grounds that these did not constitute valid contracts under (the *Hanbali* interpretation of) Islamic law.[23] This shows the *Hanbali* doctrine may be more ambiguous than rigid. *Hanbali* scholars generally hold that women are ineligible to become judges and arbitrators or hold any public office because the Prophet said "people will not prosper if they appoint a woman in charge of them."[24] It is uncertain whether the latter verse may be interpreted in such categorical manner.

The incomplete and discretionary *Hanbali* model may therefore, logically, constitute an obstacle to FDI given the emphasis on literalism. The rejection of arbitration clauses because the contract contains non-Islamic elements such as *riba*, the failure to recognise arbitration agreements because they are not based on an existing dispute, the rejection of arbitral awards granted by women, and the silence on the form and degree of uncertainty disallowed in respect of a dispute under the *Shari'ah* have all adversely impacted upon the autonomy and

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[19] Ibid.

[20] [20] Aseel Al-Ramahi, 'Sulh: A Crucial Part of Islamic Arbitration' (2008) LSE Law, Society and Economy Working Papers 1, 78.

[21] Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2(3) Arab Law Quarterly 271, 273.

[22] Samir Saleh, Commercial Arbitration in the Arab Middle East (Hart Publishing 1984) 111.

[23] Noel J Coulson, Commercial Law in Gulf States: The Islamic Legal Tradition (Springer 1984) 44.

[24] Rawya Al-Zahhar, 'Women under Saudi Legal System' in Abdulla Al-Khunain et al (eds), Judicial System in Saudi Arabia (Center for Global Thought on Saudi Arabia 2015) 339.

integrity of arbitration as an alternative to *Shari'ah* court-centered litigation, and constitute a strong disincentive to FDI.

9.3 Testing the Hypothesis

In light of the above, the hypothesis tested in this study is that the *Shari'ah* is fundamentally flexible, and the rigid interpretation subsequently imposed by Hanbali doctrinaire conservatives explains why the use of the *Shari'ah* to adjudicate on or settle disputes constitutes an obstacle to FDI in Saudi Arabia.

It is shown in chapters 2 and 3 that the parochial or rigid approach to the interpretation of the verses of the *Qur'an* may not be fully explained by the designation of the *Hanbali* school as the official *fiqh* or the rise of the *Ulama*. It is suggested that they are both related by mutual causality given that the rise of the conservative *Ulama* who prioritise the literal interpretation of the *Shari'ah* may be attributed to the prevalence of dogmatism; and the latter became prevalent because of strict traditionalists such as the Hanbalites. Notwithstanding, it is shown in chapter 2 that both factors became operative due to the economic decline of the Islamic empire after the 16th century and the growing influence of jurists who interpreted the *Qur'an* in inflexible ways and discouraged innovation. In fact, this rigid (*Hanbali*) legal culture stands in sharp contrast to the pluralism of early Islamic thought. This affirms the findings of researchers such as Hallaq,[25] as well as Younes, Elshufara, and Weeramantry cited above. Also, other commentators such as Kuran and Cooper and Yue have demonstrated that the rise of a more rigid interpretation of Islamic legal sources, and corresponding 'closure' to market-orientated policies only gained traction at the end of the nineteenth century and beginning of the twentieth century.[26] Cook on his part noted that following the rise of political Islam in seventeenth century in Western Arabia, rigid literalism came to dominate religious-legal discourse and that continued well into the next centuries.[27] Abdullah states that religious

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[25] Wael B Hallaq Authority, Continuity and Change in the History of Islamic Law (Cambridge University Press, 4ed 2004), 127-128. See also,

[26] See Timur Kuran, The Long Divergence: How Islam Held Back the Middle East (Princeton University Press, 2012) 3-24; William Wager Cooper and Piyu Yue, Challenges of the Muslim World: Present, Future and Past (Emerald Group Publishing 2008) 272. See also, Mohamed A. Moustafa, 'Upholding God's Essence: Ibn Taymiyya on the Createdness of the Spirit,' Journal of the History of (2017) 3 Islamic Philosophy and Sciences 1.

[27] Michael Cook, 'The Expansion of the First Saudi State: The Case of Wahabishm, in (edited by Bosworth, C. E. et al) Islamic World from Classical to Modern Times: Essays in Honor of Bernard Lewis (Princeton: Darwin Press, 1989), 661–700.

literalism actually emerged sometime between the thirteenth and fourteenth centuries with the 'closing of the gates of i*jtihad*.'[28]

While many societies, and then countries, would abandon the *Hanbali* school as being excessively prescriptive, the Al-Saud rulers of Saudi Arabia (beginning with King Abdul Aziz) entered into a pact with the Hanbali in the nineteenth century, and the *Hanbali* was designated as the official school of law of the Kingdom. However, it is shown in chapters 6 and 7 that *Saudi Arabia v Arabian American Oil Company* (*Aramco* Case) equally strengthened the conservative (and anti-Western) model. In fact, it is argued here that this is an even stronger cause of the rigid interpretation of the *Shari'ah*. This is because the ruling was used by the traditionalist members of the Saudi government as an example of the negative effects of embracing international law.[29] This led to the enactment of Resolution No. 58 in 1963 which effectively restricted all arbitration clauses and agreements in contracts entered into by the Saudi government and subjected any such clauses to public policy reviews. The power to enact public policy measures or issue ad hoc decisions in the public interest was then construed broadly by Saudi officials to cover an ever-expanding category of "state contracts" and often, seemingly, without a proportionate legal justification or published reasons.[30]

As such, the use of the *Shari'ah* to adjudicate on or settle disputes constitutes an obstacle to FDI because of the rise of the conservative movement after the closing of the gates of *ijtihad*, and the prominence of anti-Western (international) doctrinaire scholars in early twentieth century who imposed a rigid interpretation. This study has demonstrated in light of previous studies that the application of a flexible and pragmatic form of the *Shari'ah* has existed since the earliest Islamic jurisprudence, where the eschatological debate was not confined to the four recognised schools of jurisprudence. Also, it has been shown that outside the Muslim world, Islamic scholars influenced, and were influenced, by the theological, philosophical and economic insights of earlier or contemporaneous civilisations. These interactions provided fertile grounds for the development of trade relations between Muslim and non-

[28] Ismail Abdullah, 'Tawhid and Trinity: A Study of Ibn Taymiyyah's al-Jawab al Sahih', (2006) (4) Intellectual Discourse 191, 192. See also, Vikor who contends that the gates of ijhitad had been closed by the tenth century because jurists were already bound to follow the edicts of the schools of jurisprudence. Knut Vikor 'Inscrutable Divinity or Social Welfare: The Basis of Islam' in Guttorm Fløistad (ed), Philosophy of Justice (Springer 2015) 146.
[29] Saud Al-Ammari, 'Saudi Arabia and the Onassis Arbitration – A Commentary' (2010) 3(3) The Journal of World Energy and Business Law 257, 257-259.
[30] Abdulrahman Yahya Baamir, Saudi Law and Judicial Practice in Commercial and Banking Arbitration (Brunel University 2008) 183.

Muslim merchants. They were formalised through trade treaties, further strengthening the foundations of mercantile law in the region. Trust between trading partners was furnished through the customary law principles of reciprocity, freedom of contract and good faith.[31]

However, despite the fact that the *Shari'ah* is fundamentally flexible, it was not until 1983, and then 2007 and 2012 that the Saudi government implemented a set of comprehensive rules to attract FDI and govern arbitration. The investment and arbitration regulations were drafted with the intention of providing a level of comfort to international companies from outside the Kingdom who were trading with or looking to trade with Saudi counterparts, and to ensure that there were provisions governing both the arbitration procedure and the actual proceedings themselves. This is evidence that incongruences between the *Shari'ah* and international law are not insurmountable obstacles, though there remain issues around the meaning and scope of public policy and the lack of precedent. Nonetheless, this study has shown that by identifying common areas, it is possible to align Saudi courts with international norms. Chapter 2 cites Skeen to the effect that many of the trading practices developed in the Islamic world about trusts, banking and dispute resolution were later on adopted by European merchants.[32] Banaj is also cited demonstrating how Islam shaped the tradition of early capitalism both by preserving the monetary economy and through the use of arbitration.[33] As such, early Islamic law shared many similarities with the modern Western arbitration. As shown in chapter 4, some of the similarities include:

The *Qur'an* promotes arbitration:

You should always refer disputes to God and to his Prophet. And obey Allah and his messenger; And Fall into no disputes, lest you lose heart and your power to depart; and be patient and persevering, for Allah is with those who patiently persevere.[34]

The *Qur'an* also requires judges (and arbitrators) to apply justice:

[31] See Hideyuki Shimizu, 'Philosophy of the Islamic Law of Contract: A Comparative Study of Contractual Justice' (1989) 15 IMES Working Paper Series 112, 112.
[32] Bradley Skeen, 'Trade and exchange in the medieval Islamic World' in Pam J. Crabtree, Encyclopedia of Society and Culture in the Medieval World (Facts on File, Inc., 2005) 345.
[33] Jairus Banaj, 'Islam, the Mediterranean and the Rise of Capitalism' (2007) 15 Historical Materialism 47, 47-74.
[34] Qur'an 4:59.

Surely Allah commands you to make over trusts to their owners and that when you judge between people you judge with justice; surely Allah admonishes you with what is excellent; surely Allah is Seeing, Hearing."[35]

The *Qur'an* empowers judges (and arbitrators) to make decisions according to their discretion:

"*If they come to you, judge between them or turn away from them. If you turn away from them, they can do you no harm. But if you judge, judge between them with justice. Surely, Allah loves those who do justice."*[36]

The *Qur'an* promotes the principle of independence and impartiality of judges (and arbitrators)*:*

"And when you pronounce judgment, pronounce it with justice even if a near relation is concerned, and fulfil the covenant of Allah."[37]

9.4 Achieving the Research Aim

This study has examined the nature and significance of the legal framework for FDI in Saudi Arabia by analysing the history of Saudi Arabian secular and theological laws, and the Arab philosophy outside of the *Shari'ah* in the context of foreign investment and dispute resolution. This enabled the Researcher to achieve the aim of showing how the government of Saudi Arabia can effectively strike a balance between protecting the Kingdom's Islamic heritage and attracting FDI.

Despite the shift towards extremism over the past five centuries and the designation of the *Hanbali* jurisprudence as the *ius commune* or secure point of reference in the Saudi legal system, there are many instruments (that are consistent with the *Shari'ah*) that protect the investments of foreign businesses and guarantee their access to international arbitration.

[35] Qur'an 4: 58. This is similar to Article 18 of the UNCITRAL Model Law (1994) which requires the arbitrator to treat all parties with equality, and Article 1.7 of the Principles published by the International Institute for the Unification of Private Law (UNIDROIT) that requires fairness in arbitration proceedings.

[36] Qur'an Surah 5: 42. This is similar to section 34 of the Arbitration Act 1996 of the UK that recognises the importance of arbitrator decision in procedural matters. Many arbitral rules also give the arbitrator wide discretion where the parties have not agreed on procedural rules. See for example, Article 44 of the ICSID Convention, Article 14.2 of the LCIA Rules, Article 20 of the ICC Arbitration Rules, and Article 18 of the UNCITRAL Arbitration Rules.

[37] Qur'an 6: 152. This is similar to Articles 6 and 11 of the 2010 UNCITRAL Arbitration Rules; Article 14(1) of the ICSID Convention; Article 6(2) of the ICSID Arbitration Rules and Articles 7(1) and 11(1) of the ICC Arbitration Rules.

These instruments are critically analysed in chapters 5 and 7. It is noted that foreign investors may rely on the New York Convention and Riyadh Convention which require Saudi Arabian courts to recognise private agreements to arbitrate and enforce the awards granted by arbitrators in other signatory states. Also, two important MITs protect investors from MENA countries in Saudi Arabia. These include the OIC Agreement and the Arab Investment Agreement. They provide protection against expropriation and contain an MFN clause, whereby Saudi Arabia is required to accord foreign investors treatment no less favourable than that accorded to investors of any third state.

Where a BIT is not available to a foreign investor and the Arab Investment Agreement or OIC Agreement do not constitute an important source of right, the investor may rely on the protections in the New Arbitration Law. Article 25(1) of the Law, in accordance with the *Shari'ah*, recognises the autonomy of parties in choosing the procedure to be followed by the arbitral tribunal. They may agree that the proceedings are subject to the rules of any arbitration centre, whether in Saudi Arabia or abroad.

However, awards granted under the above MITs shall be enforced in accordance with the *Shari'ah*. Equally, the enforcement of arbitral awards under the New York Convention remains unpredictable. This is because section V(2)(b) of the Convention provides a "public policy" exemption that allows Saudi Arabia to refuse to recognise or enforce arbitral awards that conflict with public policy. As such, an award granted in a non-Muslim jurisdiction must take into account *Shari'ah* concerns where the host or source country is Saudi Arabia, else the award may not be enforced in Saudi Arabia. Nonetheless, the primacy of the *Shari'ah* ensures that the government protects the Kingdom's Islamic heritage.

Foreign investors may be protected with the the *Shari'ah* as the highest law of the land because the *Shari'ah* is fundamentally flexible. However, the long history of the negative depiction of the *Shari'ah* may be attributed to the rigid interpretation imposed by the doctrinaire conservative and the lack of knowledge in the non-Muslim community about the *Shari'ah*'s flexible nature. In *Petroleum Development (Trucial Coasts) Ltd v Sheikh of Abu Dhabi*, Lord Asquith recognised the applicability of the *Shari'ah* but refused to apply it because, in his opinion, the primitive region of Abu Dhabi could not possess any settled body of law that could be applied to the construction of modern commercial instruments. In the *Aramco Case*, the arbitration panel were reluctant to apply the *Shari'a*h as interpreted by the *Hanbali* school because the panel believed that the *Hanbali* law contained no provisions

governing mining and oil concessions. Thus, Aramco's rights could not be secured in an unquestionable manner by *Shari'ah* law. Ironically, the panel turned to a variant of *lex mercatoria*, placing emphasis on accepted principles and contractual usages in the West. As such, the local laws of Saudi Arabia were disregarded because of their ambiguity but general principles of law derived broadly from precedent and legislation in different Western jurisdictions were deemed to be sufficiently unambiguous to govern the subject matter of the dispute.

In *Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain E.C.,* the contract provided that English Law would be the governing law "subject to the glorious principles of Shari'ah Law." This raised a choice-of-law problem that the English Court resolved by turning to the Rome Convention on the Law Applicable to Contractual Obligations that requires the parties to choose the law of a specific country. The Court then held that *Shari'ah* law was not a law of any specific country and was repugnant to English law. Thus, the *Shari'ah* could not apply together with English law. In the Court's misguided opinion, the *Shari'ah* represented a religious code, and where it was included in the arbitration clause as the parties' choice of law, the clause had to be interpreted as one that did not have a choice-of-law provision.

The above decisions may however be contrasted with that in *Musawi v. RE International (UK) Ltd*, where a more knowledgeable English Court maintained that the choice-of-law clause that identified the Shia *Shari'ah* law as the applicable law is valid under the UK Arbitration Act 1996. Nonetheless, the Court did not state whether the decision would have been different if the clause had identified the Sunni *Shari'ah* law rather than Shia *Shari'ah* law as the applicable law. Despite the fact that these cases have been cited in many studies analysed in chapters 5 and 7, they did not provide any clear directions regarding the shortcomings of the *Shari'ah* that impede arbitration. Answering the research questions enabled the Researcher to identify the shortcomings of the *Shari'ah* that impede FDI and arbitration and proposed ways in which they may be rectified.

9.4.1 Answering the Research Questions

This study examined the implications of the *Shari'ah* in commercial law in Saudi Arabia in order to determine whether the primacy of the *Shari'ah* constitutes an obstacle to FDI, and whether the government is able to achieve a balance between attracting foreign investment

and protecting the Kingdom's Islamic heritage. In order to achieve this aim, four questions were answered as shown below.

The Protection of Foreign Investors in Saudi Arabia

It was noted that the Prophet himself practised reciprocity in respect of obligations concluded under treaty, including those formed in partnership with non-Muslim nations or powers.[38] Thus, the binding nature of obligations made under covenants, whether by treaty or by contract, are entirely consistent with the early history of Islam. Also, governments are required to protect foreign nationals due to the legal protection of *Dhimmis* which is a duty imposed on all Muslims to protect and secure non-Muslims living in Islamic state. Accordingly, private property rights are sacred under the *Shari'ah*.[39] In light of these imperatives, the government of Saudi Arabia has since the early 1980s revised the existing laws in order to be able to successfully implement the changes set out in the BITs and MITs that they have ratified for the purposes of enhancing the access to investment opportunities for non-Saudi investors.[40]

Although the Foreign Investment Law distinguishes between Saudi and non-Saudi investors, different categories of foreign investors are treated differently, with special provisions and preferential treatment available to investors from countries in the GCC and the Arab League. Thus, the preferential treatment is based on nationality as opposed to religion. As a result of the preferential treatment, investors from GCC and Arab League countries are treated the same as Saudi citizens under the Foreign Investment Law. Preferential treatment for these categories of investors includes the right to invest in opportunities listed in the Negative List. Furthermore, investors from these countries are exempted from paying income tax. Nonetheless, it is uncertain whether an investor from a non-GCC state may forum-shop and establish a holding company in a GCC state in order to acquire the status of GCC foreign investor. Also, neither the GCC Agreement nor the Foreign Investment Law addresses the question whether a joint venture between a (non-Saudi) GCC national and a non-GCC national may be considered a foreign investor.

[38] See Robert Hunt, 'The Covenants of the Prophet Muhammad' Patheos, 13 December 2013, <http://www.patheos.com/blogs/roberthunt/2013/12/the-covenants-of-the-prophet-muhammad/>, accessed 25 July 2018.
[39] See Saba Habachy, 'Property, Right and Contract in Muslim Law' (1962) 62 Columbia Law Review 450, 458.
[40] Hussain Agil and Bruno Zeller, 'Foreign Investments in Saudi Arabia (2012) 15 International Trade & Business Law Review 60, 61.

It must also be noted that the local remedies that foreign investors in general may seek are limited. Contracts containing the payment of *riba* will not be enforced under the *Shari'ah*. Also, foreign investors must exploit natural resources on behalf of the Islamic community that holds the ultimate right of property.[41] It is noted in chapter 5 that this is the *Hanbali* interpretation of the *Qur'an*. It may be distinguished from the interpretations of other schools such as the *Hanafi* and *Shafi* which hold that mineral ownership depends on land ownership.[42] The latter interpretation is more progressive and closer to what obtains in Western states. Thus, foreign investors are likely to receive better protection in Islamic societies that apply the opinions of all schools such as the *Hanafi* and *Shafi* schools rather than those that apply only the opinions of the *Hanbali* school.

In order to protect its investment, the non-GCC and non-Arab League investor may rely on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. This Convention provides a means of settling investment disputes between signatory states such as Saudi Arabia and nationals of other signatory States: ICSID. Saudi Arabia acceded the Convention in 1980.[43] Article 25(1) requires the disputing parties to consent in writing to submit disputes to ICSID. This may be done in the investment contract between the foreign investor and signatory state or in the investment treaty under which the foreign investment is made. Also, Article 25(4) provides that the contracting state is entitled to notify ICSID of any categories of disputes that it may not submit to ICSID. Thus, at the time of ratification, Saudi Arabia notified ICSID that it will not submit disputes pertaining to oil exploration and production, and acts of sovereignty.[44] Thus, the claims of foreign investors (whose state has ratified the Convention) may be submitted to ICSID, unless they result from acts of a governmental nature carried out within Saudi Arabia.[45] Nonetheless, it is uncertain how acts of a governmental nature may be distinguished from acts of a commercial nature.

Notwithstanding, what the above treaties and cases show is that the *Shari'ah* is neither an obstacle to free trade and liberalisation nor the protection of foreign investments in Saudi

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[41] See El Walied W El-Malik, Mineral Investment under Shari 'a Law (Graham and Tortman 1993) 54.
[42] See Mike Bunter, 'The Islamic Sharia Law and Petroleum Developments in the Countries of North Africa and the Arabian Gulf' (2004) 1(2) Transnational Dispute Management. < www.ogel.org/article.asp?key=526>.
[43] Anthony Shoult, 'Privatisation and Economic Reforms' in Anthony Shoult (ed), Doing Business with Saudi Arabia (3rd edn, GMB Publishing 2006) 111.
[44] Ibid, 112. These are also categories on the Negative List of areas in which non-GCC and non-Arab League investors cannot invest.
[45] Laurence W Craig, William Park and Jan Paulsson, International Chamber of Commerce Arbitration (3rd edn, 2000) 671.

Arabia. Foreign investors are protected under the various MITs and BITs on the basis of their nationalities rather than religion. They are able to agree on future arbitration although there is no existing dispute, and they can bring claims against the government of Saudi Arabia without regard to the *Shari'ah*. It is true that in the absence of a civil code or specific statute in Saudi Arabia, foreign investors ought to have a good grasp of the relevant *Shari'ah* principles in order to gauge the extent to which their investments will be protected. In this regard, it may be argued that the government has failed to educate the international community on the *Shari'ah* and the common principles it shares with the *lex mercatoria* as shown in chapters 2, 3 and 6. However, what is important is that parties may submit disputes against the government of Saudi Arabia to international tribunals depending on whether the former's investments are protected by a MIT or BIT. It is shown in chapter 7 that although the awards must be consistent with the *Shari'ah*, where the part that is inconsistent with the *Shari'ah* can be severed from the award, it may be enforced in Saudi Arabia.

The Legal Factors Deterring Foreign Investment

Chapter 2 examines the history of Islamic legal thought as shaped a plurality of cultural influences as well as a plurality of religious opinions, both at odds with orientalist conceptions of Islamic history as endlessly defined by stagnation and intellectual sterility. Chapter 3 outlines the rules governing trade from the time of the Prophet Mohammed. Chapter 6 identifies the roots of arbitration in Saudi Arbitration as having a basis in pre-Islamic and Islamic practices. As such, disputes between people from the same tribe in the pre-Islamic and early Islamic periods were often referred to the head of the clan or tribe (*sulh*) to pass judgment. It is then argued that the *Shari'ah* is commonly misrepresented as a system that is directly opposed to free trade. This may be explained by the rise of the power and influence of empires in the West and the corresponding increasing poverty and diminishing power of Islamic empires. This motivated insularity and the rigid interpretation of the Islamic rules governing trade.

Similarly, although the Saudi government adopted a free trade policy in the 1930s, the *Ulama* became dominant in the legal sphere and asserted their authority in commercial courts. This explains the conservative approach adopted in Saudi Arabia in interpreting the *Shari'ah*. The *Ulama* undermined the autonomy of contractual parties and were suspicious of commercial arbitration. The application of the *Shari'ah* in commercial courts became unpredictable. This discouraged enterprise since innovation was presented as un-Islamic. Also, the discretion of

judges was reduced, and the interpretation of the law did not take into account the reality faced by traders.

It is therefore submitted that the 'disconnect' between Islamic law and free trade is the main factor deterring foreign investment. However, as mentioned above, this is a phenomenon that developed between the late tenth and early twentieth centuries and is at odds with early Islamic teachings. This is when the *Ulama* and Hanbali jurists ensured that the Saudi legal system was not pluralistic. It remains that traditional Islamic teachings recognise the importance of free trade and arbitration. The *Qur'an* prohibits monopolies and emphasises the role of the entrepreneur. It condemns hoarding, cheating, bribing or any other unethical trading practices.

Rizwan's study was important in devising mechanisms that Saudi Arabia can implement to eliminate or mitigate the effects of the rigid interpretation of the *Shari'ah* by the Hanbalites and *Ulama*.[46] Rizwan noted that the shortcomings of the *Shari'ah* include: the existence of multiple schools of Islamic law with diverse interpretations, the fact that the concept of binding precedent is not recognised under Islamic law, and the absence of a clear choice-of-law rule.[47] This implies that the reform of investment and arbitration laws in Saudi Arabia ought to codify the law or at least designate one school as more important than others, establish a system that enhances predictability by requiring judicial adherence to rules established in previous cases, and set out rules governing the choice of law by the parties.

With regard to multiple schools of Islamic law, courts in Saudi Arabia are required to adopt the interpretations of the *Hanbali* School. Thus, this is not a problem in Saudi Arabia. Moreover, the *Hanbali* School recognises the finality of arbitral awards and its position on the party autonomy principle mirrors the Western concept of freedom to contract.

Regarding the rules of precedent and choice of law, the New Arbitration Law of 2012 has largely met these requirements. It is noted in chapter 7 that the New Arbitration Law is part of wider reforms that were introduced with a view to modernising the laws of the Kingdom. They began with judicial reforms in 2007 that resulted in a reorganisation of the hierarchy of the Saudi court system, the establishment of a Supreme Court and regional appellate courts, and amendments to the Foreign Investment Law and company law. Also, Article 2 of the

[46] See Rizwan (n 1).
[47] Ibid, 503-504.

Implementing Rules to the New Arbitration Law provides that the Court of Appeal is the competent court referred to in the New Arbitration Law, and if the Court of Appeal recognises an award, it will order its enforcement and its decision will be final and non-appealable. Although it does not specifically introduce the doctrine of binding precedent, it may be argued that adjudicators in or outside Saudi Arabia may refer to the decisions of the Court of Appeal (regarding awards recognised and enforced) in order to decide similar cases.

Also, parties are free to choose the institutions and rules governing their arbitration. These may include UNCITRAL Rules, ICC Rules or LCIA Rules that are widely used in the international community. The rules governing the SCCA suggest a model arbitration clause that includes the law governing the contract, the number of arbitrators, seat of the arbitration, language of the arbitration, and applicable institutional rules. Parties may choose the governing law. Article 25(1) of the New Arbitration Law recognises the autonomy of parties in choosing the procedure to be followed by the arbitral tribunal. They may agree that the proceedings are subject to the rules of any arbitration centre, whether in Saudi Arabia or abroad. Moreover, where the rules agreed by the parties are inconsistent with the procedural rules in the New Arbitration Law, the former will prevail.

In light of the above, it is suggested that the modernisation of the law in Saudi Arabia will logically enhance the understanding and acceptance of Saudi law by non-Islamic legal communities. More so, the New Arbitration Law is largely based on the UNCITRAL Model Law (2006 version), which (together with the older version) is the basis for arbitration law in many countries.[48] Also, the SCCA Arbitration Rules are largely based on the UNCITRAL Arbitration Rules. It is also important to note that under Article 38 of the New Arbitration Law, the choice of law rules of a different legal system, including rules of private international law do not have automatic effect or applicability, save in those instances where parties have agreed to be bound by these relevant conflict of law rules in their selection of the applicable substantive law. This requirement enhances certainty of legal outcomes, compared with equivalent provisions under Article 28 of the UNICTRAL Model Law that requires tribunals to assert authority to determine the applicable conflict of law rules.

[48] See Dana Renee Bucy, 'How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration under the Amended UNCITRAL Model Law' (2010) 25 American University International Law Review 579, 591-603.

Nonetheless, these reforms are not perfect. Although the New Arbitration Law recognises the right of parties to choose the governing law (which may be the law of another country), Article 38(1) provides that the findings or determinations of the arbitral award must be consistent with the principles of the *Shari'a*h. Thus, an award that recognises the charging of interests (*riba*) or investment in *gharar* products would not be enforced in Saudi Arabia, unless the *riba* or *gharar* elements can be severed from the award. Also, in recognising an award, the enforcement judge must satisfy himself in light of Article 11 of the Enforcement Law of 2012 that the country in which the award was granted would reciprocate in enforcing the awards that are granted in Saudi Arabia. In other words, it must be shown that the courts of that country must enforce awards based on the *Shari'ah*.

As such, the reforms do not change the underlying *Shari'ah* law, which remains the highest law of the land. However, they demonstrate the flexibility of the *Shari'ah* in accommodating changes in light of the circumstances. They show that the system by which cases are decided according to consistent principles or rules is compatible with the *Shari'ah*, as well as the principle of party autonomy. The fact that these changes were made in Saudi Arabia implies that they are compatible with the *Shari'ah*. Regarding the question of reciprocal enforcement of arbitral awards, it may be fair to submit that countries that have ratified the New York Convention will generally enforce awards granted in Saudi Arabia, unless findings or determinations in the awards are inconsistent with their public policy.

The modernisation of the laws of Saudi Arabia is not limited to arbitration. In chapter 5, it is noted that other reforms have resulted in a steady increase in FDI in Saudi Arabia in the past two decades. These reforms include the Foreign Investment Law that allows foreign investors access to the same incentives that are available to local investors, including the right to own property directly. Also, Saudi Arabia has signed 24 BITs (19 are currently in force) and 13 other treaties that provide protection to foreign investors in Saudi Arabia.[49] Amongst these treaties are the OIC and Arab Investment Agreement that provide protection against expropriation and contain an MFN clause, whereby Saudi Arabia is required to promote the investments by investors of other signatory states and accord such investments treatment no less favourable than that accorded to investors of any third state.

[49] See Jean Benoit Zegers, 'Kingdom of Saudi Arabia' (2018) Arbitration Guide: International Bar Association 1, 26.

It is noted in chapter 5 that the Saudi government's Vision 2030 plan also aims to increase the contribution of the private sector to 65% of capital investments, promote foreign direct investment, with an expected increase in FDI from 3.8% to 5.7% as it attempts to increase non-oil exports from 16% to 50% of the export economy. The Vision 2030 plans include further incentives for foreign entities through preferential regulation. The above changes have been introduced to achieve this goal. This further demonstrates that the increased protection of foreign investors and enhancement of access to international arbitration are not incompatible with the *Shari'ah*. Thus, the *Shari'ah* is fundamentally flexible and does not constitute an obstacle to FDI unless it is interpreted rigidly with the objective of holding to traditional (and non-Western) values.

Enhancing the Arbitration Model in Saudi Arabia

It is noted in chapters 2, 3 and 6 that Islamic law adopted many customary practices of the pre-Islamic period. The *Shari'ah* was used to regulate these practices, enhancing the good social norms and undermining the bad ones. Also, the practices reinforced the strength of the *Shari'ah* as a means of social control.[50] The system of dispute resolution in the pre-Islamic and early Islamic eras was based on a customary practice known as *tahkim*. This practice shares many similarities with the modern Western arbitration. For example, *tahkim* was considered to be a conciliatory practice whereby the disputants were free to choose an independent third party to help settle their dispute through negotiation. This is comparable to the UNCITRAL Conciliation Rules and the ICC Conciliation Rules that provide that the conciliator appointed by the parties may assist them in an independent and impartial manner to reach an amicable settlement.[51] In the early Islamic society, the disputants could mutually agree to appoint as conciliator a reputable member of a revered tribe. This individual was generally referred to as the *hakam* – a ruler or judge. The *hakam* administered justice through conciliation or peace making known as *sulh*. Given that the *hakam* was not a judge or an official appointment, he was not in a position to enforce his pronouncements.

However, Gemmell[52] is cited in chapter 6 as intimating that the parties were required to provide a type of security or guarantee to ensure that they would abide by the decision of the conciliator. As such, Sayen stated that incentives to negotiate a settlement rather than litigate

[50] For the complementary strengths of the law and social norms, see Robert D Cooter, 'Three Effects of Social Norms on Law: Expression, Deterrence, and Internationalization' (2000) 79(1) Oregon Law Review 1, 21-22.
[51] See Article 7(1) of the UNCITRAL Conciliation Rules. See also, Article 1(2) of the ICC Mediation Rules.
[52] See Gemmell (n 1).

was built in the *hakam* system.[53] This shows that the *Shari'ah* can accommodate the concept of party autonomy. Nonetheless, as noted in chapter 6, although the four major schools of *fiqh* all accepted the concept of *tahkim*, it was classified under the laws of agency rather than the laws of contract; only the *Hanafi* School favours the latter approach. Hence, conciliation is now mostly used for disputes arising from agency agreements. Also, the prevalence of the *Hanbali fiqh* in Saudi Arabia culminated in an increasingly dogmatic interpretation of Islamic law administered by informal religious authorities who exercise power without accountability. As such, although a decision or award was binding on the parties, they required the intervention of the court to be enforced. The supervisory power of the court implied that a judge may set aside a decision if in his opinion it conflicts with the Shari'ah.[54]

The problem of judicial interference has been rectified by Article 2 of the New Arbitration Law that provides that that the Court of Appeal is the competent court as regards the supervision of Saudi-seated arbitration, and Article 55 that states that an application for setting aside an agreement would only be allowed on certain limited grounds. The Implementing Rules confirm that it is a matter for the Court of Appeal to hear those grounds. The Court of Appeal is a more expedient court than the Board of Grievances that was the competent court under the Old Arbitration Law. Also, the Implementing Rules provide that if the Court of Appeal decides to set aside an award, its decision can be appealed within 30 days following the date of notification of the decision. Furthermore, the Enforcement Court has discretion to refer a challenge to an enforcement petition to the Court of Appeal, and the enforcement judge may still execute an award if the Court of Appeal is judged to have exceeded the bounds of the review powers. Although the Court of Appeal and the Enforcement Court continue to have sufficient power to review proceedings or refuse to enforce awards based on public policy and the *Shari'ah*, in a decision rendered in 2016,[55] the Court of Appeal agreed with the Enforcement Court's judgment upholding an international arbitral award handed down under non-Saudi rules, despite the fact that elements of the award (usury) were inconsistent with the *Shari'ah*. This indicates that the concept of severability provided for under Article 55 of the New Arbitration Law is being successfully applied by the Courts and may help to mitigate the rigour of the *Shari'ah* in certain cases.

The Flexibility of the Shari'ah

[53] Sayen (n 1) 224.
[54] Abdul Hamid El-Ahdab, Arbitration with the Arab Countries (Kluwer Law International 1999) 16.
[55] Decision Number 38158742 dated 02/03/1438H (2 December 2016).

It has been demonstrated in this study that whilst it is accurate to state that early Islamic scholars could not have envisaged the globalised commercial environment that exists in the modern world, they arguably incorporated a sufficient level of flexibility into their interpretations of the *Qur'an* to ensure that future societies could adapt the *Shari'ah* to changing economic conditions. It is open to Islamic nations to embrace or reject this flexibility. Historically, it has appeared that Saudi authorities have rejected the flexibility in favour of a rigid interpretation in an attempt to adhere to a classical or post-tenth century interpretation of the *Qur'an* (after the closing of the gate of *ijtihad*). However, there are some indications that this may be changing. As the Kingdom continues to embrace globalisation with the increased interconnectedness of the global economy, its economic and legal systems of Saudi Arabia may be unable to revert or stagnate in the way that its predecessor after the Golden Age. Thus, over the past three decades, the government has introduced large volumes of landmark legislation (such as the Foreign Investment Law and the New Arbitration Law and Enforcement Law) with the objective of facilitating trade and promoting FDI within the Kingdom. Given that these statutes apply together with the principles of the *Shari'ah*, it may be suggested that the *Shari'ah* is sufficiently flexible to accommodate modern international practices.

Despite the literalism and conservative approach favoured by the *Hanbali* school, it is shown in this thesis that it upholds flexible principles governing commercial trade. For example, the principle that "all things not specifically prohibited are allowed,"[56] enabled the renowned *Hanbali* jurist, Ibn Taymiya, to hold that "all contracts entered into, or conditions attached thereto, are permissible unless specifically prohibited by either the Qur'an or the Sunnah."[57] Also, it is noted in chapter three that the *Hanbali* doctrine comes quite close to the Western doctrines on the validity of contractual clause, given that under the *Hanbali* doctrine, any clause which accompanies the contract is valid unless it is impossible or contrary to public order or good morals. Equally, questions of good faith may occasionally take precedence over formalities, allowing parties to extend the boundaries of arbitration law and practice. This is because their contract may still be enforced where the party in breach acted in good faith.[58]

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[56] Hanson (n 21) 271.
[57] Ibn Taymiya, cited in Bryant W Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1980) 18 Columbia Journal of Transnational Law 413, 422.
[58] Hideyuki Shimizu, 'Philosophy of the Islamic Law of Contract: A Comparative Study of Contractual Justice' (1989) 15 IMES Working Paper 1, 17.

The *Shari'ah* is also flexible where judicial discretion, or *istihsan* is recognised. This enables Islamic judges to choose more equitable solutions where a literal application of the verses may not promote the public good or cause a detriment to the general public.[59] *Istihsan* therefore allows judges and scholars some flexibility when interpreting the law to integrate elements deemed useful in order for the spirit of the law to prevail over its letter.[60] It may be contended that the inherent flexibility is due to the fact the Islamic contract law is intended to promote efficient economic activity. Thus, *riba* and hoarding are prohibited because they are deemed to hinder economic activity. Also, the easy formation and cancellation of contracts contribute to efficiency because more people may be willing to enter into contracts where restrictions on them are minimal.

The *Shari'ah* (and in particular the *Hanbali* principles) is also flexible because it allows commercial agreements to be structured in any way that the parties to the agreement deem necessary. This inherent flexibility is evidenced by the fact that in recent decades many Muslim-majority nations have adapted their *Shari'ah*-based laws in order to embrace European-influenced international commercial law and practices.[61]

As such, by ensuring that basic principles of the *Shari'ah*, such as party autonomy and the good faith enforcement of contractual undertakings are enforced as mandatory law and allowing for the flexible interpretation of *Shari'ah* law through *ijtihad*,[62] Saudi Arabia may place itself in a position within which it can embrace modern practices and protect foreign investors without having to abandon its founding Islamic principles.

9.5 The Meaning of the Results

The results discussed above demonstrate that the *Shari'ah* is more than just a religious law because it regulates personal life, as well as commercial and political activities. Also, it is neither representative of a homogenous society nor exclusive to a geographic location or national origin. Thus, it is fundamentally an evolutionary system.

[59] Khurstid Iqbal, The Right to Development in International Law: The Case of Pakistan (Routledge, 2010) 175
[60] Abdulrahman Baamir & Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009 25(2) Arbitration International 266.
[61] Muhammad Bilal, 'International Trade under Islamic Banking' (2016) 21 Journal of Philosophy, Culture and Religion 18, 19.
[62] At present part autonomy is respected in the Saudi arbitration process and this can help it to become more aligned to international norms. See Faisal M. Al-Fadhel, 'Respect for Party Autonomy under Current Saudi Arbitration Law' (2009) 20(2) Arab Law Quarterly 31, 31-57.

The results are also to the effect that the land of Arabia which is now mainly Saudi Arabia has a long history of open trade with different empires. Thus, the advent of Islam was characterised by free trade and economic prosperity with many successful Islamic traders engaging in arbitration and conciliation to settle disputes, one of them the Prophet Muhammad, peace be upon him. After the sixteenth century, many Islamic empires became increasingly poor and underdeveloped while Western empires rose in prominence across the world. This resulted in the rise of extremism in Islamic societies marked by insularity and a literal interpretation of the *Shari'ah*. Islamic governments then became heavily involved in regulating trade and directing dispute resolutions. Although the *Hanbali* jurisprudence became the secure point of reference in the Saudi legal system, the *Shari'ah* rules governing commerce were not codified and the principle of binding precedent was not recognised, making it difficult to predict the procedures and outcomes of cases. These are the major flaws of the *Shari'ah* that impede FDI in Saudi Arabia.

However, the flaws are not beyond repairs. With regard to precedent, it is shown foreign investors and arbitrators may refer to the decisions of the Court of Appeal to determine which awards are enforceable in Saudi Arabia and which are not. Despite the lack of codification, important reforms have been implemented over the past two decades, with important MITs and BITs providing protections to investors and guaranteeing access to international arbitration. Equally, the Foreign Investment Law, Vision 2030 programme, New Arbitration Law and Enforcement Law ensure that foreign investors are adequately protected in Saudi Arabia. Despite the fact that the *Shari'ah* remains the highest law of the land and the conservative *Hanbali* jurisprudence remains the point of reference, these laws enable foreign investors to choose the laws of any other country to govern their disputes or submit claims to tribunals outside of the Kingdom.

In chapter 8, it is shown that the qualitative responses of adjudicators, scholars and reporters in Saudi Arabia reflect an optimistic and almost idealistic perception of the *Shari'ah*, although the literature review shown in chapter 1 reveals that non-Saudi legal communities generally view the *Hanbali fiqh* as antithetical to free trade. Also, it is noted above that although the *Hanbali* fiqh is flexible in regard to commercial matters, other schools such as the *Hanafi* are much more flexible. As such, it is important to determine whether adjudicators in Saudi Arabia may refer to another school of Islamic Jurisprudence other than the *Hanbali* school in order to invoke another interpretation of the *Shari'ah* that is more advantageous to

trade and commerce. The Judicial Board's decision[63] approved by the Royal Decree of September 8, 1928, provided that Islamic courts could apply the opinions of schools other than the *Hanbali* school where the courts determined that applying the opinions was fair and served the public welfare best. This is in line with the *Istihsan* that allows judges and scholars some flexibility when interpreting the law to integrate elements deemed useful in order for the spirit of the law to prevail over its letter. As such, it is suggested here that judges in Saudi Arabia have a margin of discretion as regards adopting the interpretations of the *Shari'ah* by other schools of Islamic Jurisprudence. Also, it is noted in chapter 8 that theoretically, judges in Saudi Arabia have a duty to make decisions that in good conscience represent the will of God. They believe that they are morally guided and ought to place emphasis not on the *Hanbali fiqh* but on the spirit of the *Qur'an* and *Hadiths*. Hence, giving the Islamic judge a wider margin of discretion to apply opinions of other schools may ensure that decisions are more equitable. This shows that there is more to adjudication under the *Shari'ah* than the mechanical application of *Hanbali* principles. This may enable judges to avoid the rigour of the *Hanbali fiqh* in order to protect foreign investments that benefit the society as a whole.

9.6 Recommendations for Further Research

It has been shown that the land of Arabia which is now mainly Saudi Arabia has a long history of open trade with different empires. Even early Muslims were influenced by previous civilizations and thoughts and conveyed these to different parts of the world. Thus, it may be important to conduct further studies on the historical trade links between Arabs and other parts of the world and show how these were affected by the advent of Islam.

It was also demonstrated that in the beginning of Islam, the Islamic country was economically prosperous and there were many successful Muslim traders, one of them the Prophet Muhammad, peace be upon him. It may therefore be important to test the hypothesis that economic stagnation in some Islamic countries is the result of the approach that the government of the country has adopted as regards the interpretation of the *Shari'ah* and interaction with the non-Muslim world. This will involve determining how such an approach impacts on the procedures of investment and dispute resolution.

[63] Decision no. 3 (17/1/1347/ June 25, 1928).

It was also argued that the codification of the *Shari'ah* is imperative, especially the principles of commercial, contract and corporate law. In order to facilitate the process, it has been suggested that the Kingdom should adopt the principle by which judges of *Shari'ah* courts are required to abide by precedent. The latter should be on equal footing with legislation and regulations. However, in the interim, it is suggested that judges should be given the requisite flexibility to apply the principles of other Sunni schools. It is therefore important to determine the extent to which judges may exercise discretion to look beyond the *Hanbali* jurisprudence.

It was noted that objectively, the New Arbitration Law is much better on its face than its predecessor. However, there is still a need to clarify its articles in order to minimise uncertainty and arbitrary ruling. It is important to provide concise definitions of key terms such as public policy and religion, and also address the question of the gender of arbitrators.

This study has also provided evidence that the Saudi government has sufficiently reformed its investment and arbitration laws over the past two decades to attract foreign investment on a larger scale than in the past. In light of the ongoing reforms within the Vision 2030 plan, it may be important to determine whether the decision prohibiting governmental bodies from arbitration without permission from the President of Council of Ministers may be repealed and how this may be achieved. It may also be important to determine whether SAGIA may simply be exempt from the decision or an impartial arbitration committee may be set up within SAGIA to resolve disputes between the SAGIA and investors. In the same vein, further research is required to determine how new commercial law modules may be developed in the Higher Judicial Institute to enhance the training of law graduates in regard to working as judges in *Shari'ah* commercial courts. It is especially important for judges of these courts to appreciate the link between the *Shar'iah* and free trade. The hypothesis that should be tested in this regard is that the effective application of the *Shari'ah* to complex commercial transactions is a function of the adjudicator's margin of discretion. Lastly, it is important to critically analyse the Enforcement Law to determine why and when foreign awards are enforced and whether like cases are treated alike.

Glossary

Islamic Legal Terms:

Al-Mutaqaddimun	Habit of the ancient jurists to remain silent.
Fatwa	Interpretations of Islamic religious opinions.
Fiqh	Collective body of Islamic jurisprudence literature.
Gharar	Uncertainty
Haad	Fixed punishment
Hadith	The practices and teachings of Islam by the Prophet Muhammad (also known as Sunna'h).
Hakam	Third-party arbitrator
Hanbali	Hanbali School of religious thought. The most popular in Saudi Arabian law.
Harbi	Non-Muslim.
Hasan	Morally right action.
Ijima	Islamic legal scholars
Ijma	Secondary religious sources.
Isharat Al-Nass	Alluded, contextual meaning
Jahallah	The unknown facts of a case.
Maslaha	Public interest.
Qabih	Morally wrong action.
Qiyas	The process of analytical reasoning by a group of scholars based

on the primary sources of *Shari'ahh* law.

Riba Charged interest.

Siyasa Shar'iyya Governance in accordance with divine law.

Takhim Negotiated self-help resolution mirroring mediation.

Methodology Definitions:

Convenience sample: this is a type of non-probability sample that is drawn from a part of the study population that is easy to reach or close to hand. The only criterion was that the respondents agreed to participate. It is also known as an 'availability or grab sample' and it is not important that a simple random sample is generated.[64]

Free association narrative method: this is a relational technique by which the researcher allows the participant to set the agenda. The participant chooses the subjects and the researcher follows the association between the various subjects. This is based on the contention that the participant's free association of subjects is more revealing than meaning that the researcher introduces.[65]

Social meaning: the meaning attributed to the phenomenon that is studied by the participants based on their subjective knowledge and experiences.[66] This also include their understandings of the propriety of acting on the basis of the meanings.

Structure of meanings: the arrangement of interrelated expressions and meanings that constitute practices and institutions.[67]

Symbolic interactionism: this is based on the contention that the actions of individuals are motivated by the meaning that things have for the individuals.[68] It examines how individuals interact with each other and create symbolic worlds which then shape their behaviours.

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[64] Ilker Etikan et al, 'A Comparison of Convenience Sampling and Purposive Sampling' (2016) 5 American Journal of Theoretical and Applied Statistics 1, 2.

[65] Wendy Holloway and Tony Jefferson, Doing Qualitative Research Differently: A Free Association, Narrative and the Interview Method (Sage 2000) 309-310.

[66] Kaya Yilmaz, 'Comparison of Quantitative and Qualitative Research Traditions: Epistemological, Theoretical, and Methodological Differences' (2013) 48(2) European Journal of Education 311, 312-313; William A Bogart, Permit but Discharge: Regulating Excessive Consumption (Oxford University Press 2011) 109.

[67] See Jaroslav Peregrin, 'Structure and Meaning' (1997) 113(1/2) Semiotica 71, 73-75.

[68] See Benzies KM and Allen MN, 'Symbolic Interactionism as a Theoretical Perspective for Multiple Method Research' (2001) 33 Journal of Advanced Nursing 541, 541-541; Fusun Alver and Sebnem Caglar, 'The Impact of Symbolic Interactionism on Research Studies about Communication Science' (2015) 8 International Journal of Arts and Sciences 479, 479-480.

Target population: the theoretical population or entire group of individuals for which the data was used to make inferences.[69] The group is as follows: judges, arbitrators, legal scholars and members of the public including journalists and investors in Saudi Arabia. The results of this study therefore apply as a pointer to further research on this group from which the sample was taken.

[69] Amitay Banerjee and Suprakash Chaudhury, 'Statistics without Tears: Populations and Samples' (2010) 19(1) Industrial Psychiatry Journal 60, 61.

Appendix I: Interview Questions

Translated from Arabic

1. Have you heard about the vision of the Custodian of the Two Holy Mosques?
2. How do you see the success of the vision in light of the development of the Saudi legal regimes?
3. How should foreign investment in the Kingdom be protected?
4. Do you think that the government of the Custodian of the Two Holy Mosques should stimulate more foreign investors to achieve the vision?
5. Do you think that the Saudi Economic and Development Council will increase the efficiency of government departments and ministries?
6. Do you think that the Saudi justice system is qualified to keep pace with the era and the first flag countries?
7. Do you think that the Islamic *Shari'ah* law in force in the Saudi Arabia may be an obstacle and not compatible with the modern world?
8. Do you think that regulations should be enacted to protect and promote investment?
9. What are the advantages of regulation of systems?
10. Will this remove any ambiguity in the current laws?
11. Do you think that use of the *Shari'ah* in commercial matters is generally acceptable, as was the case in the magazine or the journal of legal rulings obtained before?
12. Why do you think that Saudi Arabia is not a popular seat of arbitration?

13. Do you think that it is time to repeal the decision of the Saudi government to stop government agencies from submitting disputes to international arbitration without prior approval by the Council of Ministers?

14. Do you think that the current judicial system is committed to the NYC Convention for the recognition and enforcement of judgments issued by foreign and non-Muslim judges and arbitrators?

15. Do you think judgments made by non-Muslims or women can be enforced in Saudi Arabia?

16. Do you think the religious authority represented by the senior scholars has a direct influence or influence in the enactment of laws and regulations in Saudi Arabia?

17. Can you identify any laws or regulations in the Kingdom that are in conflict with Islamic law?

18. Do you think that the regulations of SAMA violate the principles of Islamic law?

19. Do you think that the Kingdom is an attractive environment for foreign investors? Why?

20. How do you assess the government's policy on investment in general?

21. In general, what are the legal barriers to attracting foreign investors and are we still suffering from administrative bureaucracy?

Appendix II: Responses

Translated from Arabic

Dean of the Faculty of Law

1. **Have you heard about the vision of the Custodian of the Two Holy Mosques?**

Yes

2. **How do you see the success of the vision in light of the development in the Saudi regimes?**

I think there will be progress in this area, because the movement is active in the process of modification and development of systems and activation, and there is also a study from the Riyadh Economic Forum on the relationship of the legislative system to economic development in the country, such studies and initiatives by several ministries and government departments support these Vision These systems undoubtedly constitute a cornerstone in achieving this vision, and the vision has indicated this.

3. **How should foreign investment in the Kingdom be protected?**

It should be expanded in this area and should activate bilateral agreements and activate collective agreements that support and facilitate the investment process. Also, attention should be given to infrastructure and services to facilitate investors, whether citizens or foreigners.

4. **Do you think that the government of the Custodian of the Two Holy Mosques should stimulate more foreign investors to achieve the vision?**

I think there should be facilities and tax cuts and support for transportation and energy sources so that these investors have the ability to compete with the regional environment because there are countries that offer them better advantages, if there are no better benefits there will be (Hijab?) 2:24

5. **Do you think that the Saudi Economic and Development Council will increase the efficiency of government departments and ministries?**

There is effective oversight from the Council for Economic Affairs and Development and there is a continuous presentation of the initiative of the parties and their plans and therefore the control will be effective and I think there is progress required from each ministry in its area of competence and this makes the process continuous and monitoring and follow-up and therefore expect better results.

6. **Do you think that the Saudi justice system is qualified to keep pace with the era and the first flag countries?**

There is a development, the Custodian of the Two Holy Mosques program to develop the judiciary the latest kind of development and there are attempts to support the judiciary. We still need to expedite the dissolution of disputes and there is slow in the adjudication of disputes, the sessions apart, the judge can study the case means needs to be reconsidered there must be a time limit for the settlement of disputes and obligate the judiciary in a certain period to arbitrate the case if there are shortcomings He should ask the litigants if there is no deficiency in it.

7. **Do you think that the Islamic *Shari'ah* law in force in the Saudi Arabia may be an obstacle and not compatible with the modern world?**

No, the rules of Islamic jurisprudence are broad and judges are able to dismiss much of what is being offered to them. We may need to codify these provisions in such a way as to make them accessible to others, whether in the judicial system, the allies, or the investors. The provisions of Islamic law and the jurisprudence of Islamic jurisprudence is broad and it is of scientific abundance and jurisprudence, which is much, which offers many solutions to the economic realities emerging in the world today.

8. **Do you think that regulations should be enacted to protect and promote investment?**

I think that is needed

9. **What are the advantages of regulation of systems?**

Pros of limiting the judiciary in a specific area, informing the public about the application of their issues, supporting scientific research and jurisprudence in the field of blogging also prevent differences in provisions, there are many advantages in this area!

10. **Will this remove any ambiguity in the current laws?**

Yes I think so

11. **Do you think that use of the *Shari'ah* in commercial matters is generally acceptable, as was the case in the magazine or the journal of legal rulings obtained before?**

There is a codification now in the magazine of the legal provisions of the Hambali range, and there is also a committee that is studying and has come a long way in blogging which was formed by Sami order. I think that we are in this directon and will achieve many benefits from the codification process. Including interdiction by a number of judges, including the unification of sentences in similar cases.

12. **As you know, commercial arbitration is the preferred means of resolving disputes for foreign investors. Why do you think that Saudi Arabia is not a popular seat of arbitration?**

The Kingdom was interested in arbitration. The previous arbitration system was issued. It was one of the applications and texts of many problems. It did not benefit from arbitration as an adjunct to adjudicating disputes for the judiciary. Thus, the new arbitration system was issued. It facilitated many obstacles and removed many of the previous obstacles. With the issuance of the executive regulations recently that there will be better application and better speed in the process of separation of disputes and arbitration will be one of the effective means to resolve disputes between investors and those who deal with them, and I think that the system should be published and the text of the texts to be recourse to contracts with the parties or investor relationship with national parties and it could be an alternative to spend and is characterized by an appropriate speed. Then it is uncertain whether judges have discretion. Some judges see ijtihad [independent reasoning or exertion of mental faculty] as one of the sources of the law. So, if a business does not exercise due diligence, the judge may hold that this is against Islamic law.

13. **Do you think that it is time to repeal the decision of the Saudi government to stop government agencies from submitting disputes to international arbitration without prior approval?**

I think that first of all this should be studied carefully. Of course, there was a condition to prevent government entities from resorting to arbitration without the approval of the Council of Ministers. This is still in place, but it may be reconsidered, which will bring justice to the government agencies. With these organs to enter into a relationship that benefits the national economy and support investment to the possibility of resolving the dispute easily in this aspect However, we can say that "administrative issues" can be better separated than they were to shorten the duration.

14. **Do you think that the current judicial system is committed to the NYC Convention for the recognition and enforcement of judgments issued by foreign and non-Muslim judges and arbitrators?**

Yes, after the jurisdiction of the implementation of foreign judgments from the judiciary and implementation, I think there is a kind of speed and rapid separation in this subject, but we may need more awareness on the implementation of foreign judgments in the Kingdom.

15. **Do you think judgments made by non-Muslims or women can be enforced in Saudi Arabia?**

Yes, with the current situation there is no problematic, it is important that the foreign referee fulfills his ribbons under the law that was issued under him and therefore does not conflict with the public order or the system of arbitration of Islamic law and therefore my issuers are not considered in this aspect on the border as far as I know.

16. **Do you think the religious authority represented by the senior scholars has a direct influence or influence in the enactment of laws and regulations in Saudi Arabia?**

Is limited only if there are aspects requiring a fatwa.

17. **Can you identify any laws or regulations in the Kingdom that are in conflict with Islamic law?**

Under the Basic Law of Governance, if it is found to be contrary to the Basic Law of Government, and therefore should be amended but not there, there may be some applications and interpretations but not a clear text containing explicit opposition.

18. **Do you think that the regulations of SAMA violate the principles of Islamic law?**

There is no explicit violation while there are explanations in this aspect but there are some applications regarding commission and interest rates maybe these points but not a specific legal text while regulated by instructions and so on. The government and Islamic law are characterized by the existence of rules that deal with such situations, and therefore "necessity is always appreciated".

19. **Do you think that the Kingdom is an attractive environment for foreign investors? Why?**

Yes, it is an attractive environment, huge economic opportunities, double profits, an early environment to create a lot of business, good cash money, reasonable taxes on investors, and a very good legislative system. Therefore, the Kingdom is taking a place there, but in practical applications and administrative bureaucracy we may face some difficulties, but with the vision of 2030, I think the situation might improve.

20. **How do you assess the government's policy on investment in general?**

Of course, there are good attempts by the Ministry of Trade and Investment to try to reduce the steps to complete the investment procedures and therefore I think we need to support this area and attract companies. Now we have noticed that some foreign companies have been attracted to the Kingdom of Saudi Arabia for investment; the transfer of military industries, the establishment of joint ventures and the city of entertainment. These initiatives will generate investment opportunities in the Kingdom. We believe that the legislative structure is capable of fulfilling but does not prevent improvement and development. Such an area.

21. **In general, what are the legal barriers to attracting foreign investors and are we still suffering from administrative bureaucracy?**

Administrative bureaucracy Yes, there is still suffering, but we can limit this through training and guide development through effective oversight by developing a complaint mechanism and responding to it and finding the immediate situation.

Legal Advisor

1. **Have you heard about the vision of the Custodian of the Two Holy Mosques?**

Yes. I think it sets a great example of a national initiative, which, regardless whether it delivers or not, does present a nationally shared will to transform the economy across all sectors and classes. It is a step that will support Saudi Arabia in the competition of the big countries, especially in the field of investment. We are opening up the opportunity to enter value-added projects to serve the country as a general direction for the General Investment Authority, which is interested in mega-activities. Like what we have talked about the fear of coming to Saudi Arabia for fear of the regime does not support. The opening of the field, including the "Cardine Card", supports small and medium enterprises that support the state, and I believe that the national transition serves this idea very much.

2. **How do you see the success of the vision in light of the development of the Saudi legal regimes?**

I think it is the government link, instead of the investor coming here and continuing, we are serving him in the same place, and completing his treatment in all relevant sectors, whether the Ministry of Labor or the Ministry of Commerce, the authority of the cities, a unified portal for government services in general so that the service is provided at the same time, Complete to the investor that the environment attractive and easier solutions.

3. **How should foreign investment in the Kingdom be protected? Do you think that the current judicial system is suitable?**

As for the judicial system we have a problem prolonging the duration of the dispute. Any problem facing investors in general terms is that the lawsuit is possible today and remains in the court for a period of two years. Three years are not decided upon, so the investor asks for what follows the Kingdom and is afraid of these procedures. Therefore there must be a mechanism Short and the translation then in all countries of the world is for arbitration, we in the judicial system must apply the system of arbitration.

4. **Do you think that Islamic *Shari'ah* is consistent with the modern age in regard to the protection of foreign investors?**

The regulations of legislation are consistent with every age, but we need to apply them. Their application is the problem, not the existing ones. The systems are all good and effective. They go beyond external systems, but it is the method of application that distinguishes.

I mentioned that these systems are appropriate, but who applies them or how they are suitable for the application. How do you think they are suitable for implementation and by whom?

The people implementing them must have an internal culture and not just a foreign culture. There must be knowledge of external systems so that they can benefit quickly from the procedures and how they are implemented. We have distinct systems, but when applying this system, Foreign culture and benefit from the experiences of others also and these systems are competitive as Singapore's leading investment, but to what we apply to reality, where the convergence of common teams attract and achievement and investors stay longer in the market. When the systems are not fast and their application is fast and appropriate and flexible, we will not reach the required point.

5. **Do you think that the Islamic *Shari'ah* law in force in the Saudi Arabia may be an obstacle and not compatible with the modern world?**

The ease of deriving judgment in the case before you, rather than subject to interpretation and different doctrines of jurisprudence such as some commercial cases in the sale and purchase, the transfer of quotas, however, if it is written will not be subject to the field of diligence, it is possible to meet a legal case applies the same rule and thus the same ruling in the end , The same reality has a different judgment and therefore you will have double judgments, so as a reader I will have a conception of judgment and this frightening aspect of jurisprudence, an unexpected judicial judgment comes an unpredictable answer but if you are comfortable you will be aware of what will happen in your judgment.

I think the Shari'ah is already appropriate for use. However, one could say, that in the context of an international global financial and economic system that is based on certain tenets and practices, that, the Shari'ah is not suitable. It is not so much a problem with the Shari'ah which is deemed unsuitable. It is a problem with the international systems that prioritise unequal wealth distribution and opportunism

6. **What are the shortcomings of codifying the *Shari'ah*?**

It is possible to show a case of cases that do not have a case law. You will find that this situation has no treatment for you and its gap in the system is not clear interpretation, especially because, for example, some heirs in some cases will enter into many things and whether this article will serve them or will not serve them Details you need to enter. Regulation may create a state of inertia that cannot be decided. Consequently, there will be inflexibility and close all potential areas.

7. **Do you think that the Islamic *Shari'ah* law in force in the Saudi Arabia may be an obstacle and not compatible with the modern world? Is it possible for some judges to overlook the *Shari'ah*?**

It is possible because the judges always see that the field of ijtihad is one of the sources of the law, so if they say that you have closed the door of diligence and will reflect negatively thinking that Islamic law did not address all cases.

8. **Is it possible to refer to civil law dicta and regulations in the Kingdom that are good for investors and the economy but contradict the principles of Islamic law?**

No, this is a basic rule of government, any system that violates the Shari'ah is null.

9. **Do you think that the regulations of SAMA violate the principles of Islamic law?**

It does not contradict, but it can be in practice inconsistent but as systems that do not conflict specifically with the interest of interest, such as the loan system applied that it takes a commodity, but reality will not take a commodity like the system (Tawarruq?) From the point of view of legitimacy there are systems that do not conflict with Islamic law, Conflicts but is processed in form.

10. **Do you know any of the Islamic countries that have laws that do not conflict with the *Shari'ah* and have proved to be successful in stimulating foreign investment?**

The Turkish investment law, the Egyptian investment law which is in conflict with Islamic law has prohibitions, also Kuwaiti and Qatari investment law, but success is not a measure once the system does not conflict.

11. **Do you think that the current judicial system is committed to the NYC Convention for the recognition and enforcement of judgments issued by foreign and non-Muslim judges and arbitrators?**

Arbitration in the foreign investment, in which the law of the Council of the Ministry do not resort to arbitration only with the approval of the arbitration system for us is not effective but in the next phase will be activated by God willing There will be a committee to resolve disputes during arbitration in the body and this is our proposal and we will submit to amend the foreign investment system issued in 21 Thus, the arbitration system is one of the essentials for resolving disputes that arise between the foreign investor and his partners and the government or the body in particular.

12. **Do you think that it is time to repeal the decision of the Saudi government to stop government agencies from submitting disputes to international arbitration without prior approval by the Council of Ministers?**

For the current stage, the transformation of the country and the vision of the Kingdom must be reconsidered, we are dealing with foreign investors, investors came from systems almost entirely approved arbitration, so it does not benefit that we have as investment systems in which the arbitration must be modified and make this decision Investors resort to arbitrage from the outset as a primary solution. In my opinion, when this decision was made, I feared that there would be duplication in the judiciary. I think that the decision was aimed at a stage where there was no approved arbitration center in the arbitration system. The decision was appropriate in a previous period.

13. **Do you think that the Kingdom is an attractive environment for foreign investors? Why?**

The Kingdom has several investment opportunities but lacks how to market them externally. We lack how we know the investor with the advantages and the investment climate in the Kingdom and there are some regulations that have to be amended so that we attract investors to the Kingdom. If it is an attractive environment, but lacks some simple fringes for marketing and nothing more.

14. **How do you assess the government's policy of issuing licenses and allowing companies to enter the field of investment in general?**

It is an instant license in minutes. We have taken several procedures in line with the vision of the Kingdom, including the issuance of an immediate license after answering some questions and some older women. A flexible and flexible license is issued for one year and then the claim is made. In return for the material as well as the link between the government agencies so that the investor does not take time to extract the necessary licenses we are in the stage of linking between us and other parties to change the conviction of previous investors to the difficulty of procedures and conditions, we try to open investment activities, unless Zaretha.

As you expedited the issuance of licenses, speeding up administrative procedures, this is very stimulating to the foreign investor, but there are statements from some legislators in the state that we still suffer from the administrative bureaucracy, do we still suffer from the Authority and the field of investment? I think we have gone a long way, but 100 percent is being worked on according to the national transition. I think the bureaucracy is the manual work that creates them, but if we adopt all the services, I do not think there will be bureaucracy. We are now going to the auto mission, not the work of hand. In the past we were providing files, now there is only soft copy, and we do not need paperwork and there are not many requests basically.

15. **In general, what are the legal barriers to attracting foreign investors and are we still suffering from administrative bureaucracy?**

Activities related to public security Petroleum ... We have a number of exempted activities, which activity can enter the foreign investor and does not harm the public security in the country. There are things that the Saudi society does not accept in general, such as wines, and because of our nature as Muslims we do not accept.

Do we lack awareness of the activation of alternative systems such as arbitration in local companies that may contract with foreign companies and thus may deprive foreign companies of the ease of communication within the country of the ease of asylum and dispute resolution, we can find that there are companies that have no successor to arbitration always resort to the judiciary. The foreigner wishes to arbitrate, so there is no dispute. A lot of awareness in awareness is still needed.

16. **Why do you think that Saudi Arabia is not a popular seat of arbitration?**

Parties may agree to arbitrate in the event that the arbitration took a real picture in Saudi Arabia that it is certified and available to deal with it, it is referred to in the contract of incorporation of this foreign company and this is a Saudi company wishing to resort to arbitration in the event of a dispute or dispute.

It may be a subsequent order to sign the agreement between them, this is due to their flexibility with each other. Arbitration is often optional and may lead to litigation in case of conflict and one of the parties refuses to arbitrate. For consciousness in this stage exists but we need to change some systems that allow us to take serious steps in the application of the arbitration system, but awareness at the current stage on the contrary I see there is awareness and awareness and acceptance from all parties.

17. What are the biggest legal barriers to dealing with foreign investors?

Such as owning land there is no system of ownership for non-Saudis ability to own land as a foreign investor subject to the regime there are other systems that allow the foreign investor to own land, these are long procedures and the complexities also subject to the sponsorship of the foreign investor on the facility, "we still suffer from administrative bureaucracy," but we At this stage we are working on it and soon the national transition will be eliminated.

Legal Scholar #1

1. **The Vision of the Kingdom 2030, what do you think about it?**

It has a great ambition and blessed plans that return to the country and its projects with development, blessing, service and well-being. The programme is active in the process of modification and development of systems and activation, and there is also a study conducted by the Riyadh Economic Forum on the relationship of the legislative system to economic development in the country. It is supported by several ministers and government departments

2. **Do you think the government of the Custodian of the Two Holy Mosques in supporting the vision can stimulate foreign investment?**

Yes, foreign investment has many advantages and the government has directed it in recent years. We call for controlling this with programs, regulations and legislations that will benefit the citizen and the local investor with the foreign investor and give everyone who has the right to the right and the matter will be fair and mutual interests with other countries and reciprocity. Those foreign investments, which will eliminate high unemployment and take the necessary expertise from foreign investors.

3. **Do you think that the Saudi Economic and Development Council will increase the efficiency of government departments and ministries?**

It is possible to improve it through the control of legislation, regulations and laws which include compatibility, non-conflict and facilitate the procedures and does not complicate through the development of a legislative system and harmonized systems and the rapid access through the computer and sites and authorized entities such as the Investment Commission or the Supreme Council of the economy so that things directly people end quickly and take the answer Reply or approve very quickly.

4. **Do you think that the Saudi justice system is qualified to keep pace with the era and the first flag countries?**

The fact is that what we are proud of in this benevolent country is that the Saudi judicial system, which is the reference of Islamic law, has a system of pleadings in more than two hundred articles. It is in fact a legal organization and a draft of articles of paragraphs. It is a codified system. Books of

jurisprudence studied by the judges and seized. The judicial system in Saudi Arabia, God willing, conforms and harmonizes with the trading system and solves all its problems in the widest way and best practices. However, lawyers need to know the nature of Shari'ah contracts and the provisions of Islamic jurisprudence by reviewing the codes in the commercial provisions issued by the Board of Grievances. Very show the persistence of the provisions and the difference does not find that the difference does not exceed 3% as evidenced by some studies must vary some of the provisions because the facts are different and different do not find two realities the same circumstances circumstances vary as much as there is no disparity as we hear in some media. The Saudi judicial system is also considered one of the best systems for the achievement of cases due to its number. If you look at the relative view and compare the achievement of the issues with many countries with the Kingdom, you will find that the Kingdom is at the top of the list.

5. **By virtue of the fact that you mentioned the completion of the issues for me, how many do you need to increase the number?**

Yes, the judiciary needs to increase the qualification of judges with the increase in the number of judges with the increase of the specialization of judges and determine the scope of the substantive judiciary and this is what the state went through in the new system. The cases were divided into five sections: financial, commercial, penal, general and personal status, with a financial and monetary judiciary In the institution of criticism, and insurance in the institution of insurance, and some of the judicial committees that are working and are still working are serving specialization and this gives them quality in the commercial judiciary. Yes, so it was in the Office of Grievances now in the Ministry of Justice harmonious consistent with all commercial systems and in accordance with Islamic law and there is no conflict between them and no difference, but the nature of the judiciary that he needs the concentration of listening to statements, preparing witnesses, studying contracts, it is natural to delay and normal to set dates Between the Phineas and the other this would be the elimination of all the world.

6. **Does the existence of such committees, such as committees of the money in insurance disputes, challenge the authority of *Shari'ah* courts?**

This is not an exception. The original is that the judiciary is independent of all government departments. The government is executive. When the dispute is going to the judicial authority, these committees and specialized courts are supposed to be under the jurisdiction of the judiciary. Even the royal order issued was so suggestive that it must be addressed. But the existence of specialization is very important in understanding the nature of companies and ruling systems and commercial knowledge and understanding the facts The existence of specialist in the commercial judiciary is very important, because the specialization is accurate and needs to experience and needs to know and the facts are repeated if the specialization of a judge and the most beautiful sector will serve a very large service.

7. **Is there now a qualification for judges and arbitrators?**

Yes, there is a qualification and there is a commercial department at the Higher Institute of Judiciary. This section qualifies the judges in general in all disciplines and increases in relation to the commercial system and related regulations. Graduated from this department is qualified to take up the position of commercial judiciary, the original in the judiciary is indivisible studying in the Faculty of Shari'ah stage of public study, and then comes to the Institute of Higher Judicial Research is the general study in some disciplines to increase, What is related to the commercial judiciary so that the general specialization and exact specialization are well done. In fact, for all his face, we see that the law does not compete with legal articles that may overwhelm the legal specialization, the judge must first come out legitimately and then feed the law so that the law will be increased and the capacity and experience will not contradict. But if a student takes a school out of law, schools differ and premises differ, so I see that he does not study law until he finishes the law. He specializes in a year that teaches him principles in law and then he has brought the two things together. I see that there is no contradiction between Shari'ah. In the second law.

8. **Is it true that previous court decisions are binding on judges?**

The original is that the judges do not need anything except the principles established by the Supreme Court if there is a principle based on the Supreme Court as the text of the system, it is true that the judge is obliged to even the Court of Appeal so check it if the judge has another point of view, the freedom of writing and to be judged and raised to appeal and justify Why did he contravene the principle and when the two principles conflict, he is brought before the Supreme Court for examination and adjudication in any two principles. The old principle or principle proposed by the judge. He is free to choose, write and justify. He is not afraid, but is contrary to justification, study and proof, and then he is brought before the Supreme Court, which approves any of the two previous principles or decides on cases and this development. However, he must follow the Hanbali doctrine. The Hanbali doctrine is well archived. I was a member of the scientific committee at the Ministry of Justice that assessed the doctrine. There are approximately three thousand articles that govern the sale of goods, warranties, criminal punishment, tenancy agreements

9. **So, do you think judges should enjoy a wide discretion?**

This talk is not precise, there is no absolute freedom judge in its provisions. The judge cannot contravene the general principles of Islamic law and the general judicial principles that have been established and acted only with strong justification, and often he does not dare this strong but distinguished justification of judges. The judiciary here gives freedom of expression to the judge with evidence, proofs and persuasion, if he can convince his face and his appeal to the Supreme Court and a group of judges, this is a creative judge in his criticism and criticism of the previous provisions with evidence and legitimate premises that he learned. He has no freedom to rule without justification, causing, persuasion, and above him an appeal, and above him a Supreme Court, we see that on the contrary this right to change the principles of new persuasion.

Judges do not need anything except the principles established by the Supreme Judicial Council if they have been established. It is true that the judge is obliged to check previous decisions of the Cassation courts. If the judge has another point of view, he is free to write and justify the position. If the judge has violated the principle established by the Supreme Judicial Council, both the principle and the judge's new principle will be examined on appeal. So, the judge is free to identify new legal classifications independently of previous categorisations.

10. **Are you satisfied with the qualification of judges, especially in commercial and commercial courts?**

The relative satisfaction and experience of his speech, is not enough theoretical study must be practical. As a student when he graduated from the law and study without the application is far from the judicial scientific side. I am not satisfied with the practical experience that I give them from the institute, but the scientific experience I am satisfied with, but the practical experience is not satisfied with them. Do not take many experiences entrenched in them. Practical experience is important and I see that after the College of Shari'ah asks him to keep up with his age and this year opens his horizons and comes to study and has news of what is in the courts and the information comes to address the problems that he had previously seen in his environment. Therefore, taking the experience before entering the Institute or passing through it for a certain month makes the candidate of the Judiciary benefit greatly from the valuable information he studies at the Higher Institute. He can criticize and discuss, and we have seen some of those who have been prosecuted and then studied more comprehensively and more frequently on scientific subjects than those who study and keep and test. To the working environment.

11. **Can you identify any laws or regulations in the Kingdom that are in conflict with Islamic law?**

I cannot identify any this except in some contracts of companies and banks that indulge in delay penalties in some interest contracts. This is contrary, and often is not apparent and frank, but worn for another bulb and this is one of the reasons for the existence of these committees in fact, the fear that the contracts of banks face some direct response from the judges resort to something like this so as to ease the differences and be resolved and reform. I do not know many of the infractions. The Shari'ah has wide meanings. They constrain it with the Hanbalis doctrine by the majority and expand the other sects in order to achieve the interests of the people, and they are not closed to the doctrine.

12. **How much authority does the senior scholars have in influencing the enactment or amendment of a law or reforming a system?**

The body of senior scientists are diligent scientists and diligent is the one who has the ability to make it easier to know the legitimacy of the evidence. The authority of senior scholars is revealed by the rule of God and has no right to change the rule of God, but provide us the rule of God Almighty according to their diligence in the texts before them and they decide and strive based on the texts and not based on the whims. They decide in a question such as, divorce three how fall is said three are considered three or one time, here differ because he did not utter only once and said three, this is a question in which the difference between scientists and so whether the sale is affirmative and acceptance or must be emptied at the point of order The origin of the jurisprudence of sale in acceptance and affirmation, but the judiciary now says it must be a formal document, does this rationing has an impact on the sale of sales or do not consider sales only here is the jurisprudence of scientists based on evidence and review of the statements here are fatwas and fatwa is not binding to the judge but May be raped and ruled but may be violated because it does not oblige. The judge is hardworking if he has diligence and the ability to diligence and strengthen his words by causing the strengthening of the saying in the body of senior scientists have the authority to strive according to the evidence and does not come with the acceptance of the best without evidence.

13. Do you think that the current judicial system is committed to the NYC Convention for the recognition and enforcement of judgments issued by foreign and non-Muslim judges and arbitrators?

This agreement has not been fully understood, but I know that the arbitration decisions are originally in force only if they are contrary to the legitimate rule.

14. Do you think judgments made by non-Muslims or women can be enforced in Saudi Arabia?

Yes, being a window is considered a window provided that it does not violate the legitimate principle. If the ruling is invalid, contrary to the texts, it is not binding. If it were approved by the Shari'ahh, it would not oppose it. If it was issued by a non-Muslim, and the two litigants are arbitrators in their arbitration. In some schools of thought, the ruling of a woman if she judges it is carried out like the doctrine of Abu Hanifa, but we differentiate between the optional judiciary and the obligatory judiciary. If we find a ruling issued by foreign countries, we are not looking at the origin of the ruling, but we are looking at its implementation, although its implementation does not violate the law and we do not agree with him originally, but what is an explicit statement of the law, we spend it as a rule and accept it. Islamic law has known arbitration for hundreds of years and the Prophet may be arbitrated by the Companions and Companions, it is stable in our Shari'ah and the optional judiciary has its legal assets and controls and requires what is required in the judge in bulk, but it is not a state tempered its impact, so God knows that people may agree to an arbitrator, This is a great thing. And the advantages of arbitration it is a way to go away from the embarrassment of the prosecution without God, for example, if I wanted to hold a contract with a non-Muslim company stipulated that the arbitration in the Islamic law and may support the doctrine of Hanbali and may be restricted to the law or the book is so and so the lawyer to the parties know and know what These are

the provisions of such and such as the contract. The Muslim does not hesitate to be tried if he is in another country and does not resort to courts do not judge except God revealed, arbitration is very important and encourage arbitration in accordance with the discipline of Islamic law.

15. **Do you think that the Saudi environment is attractive to the foreign investor and why?**

The fact that Saudi Arabia has ambitions and expectations and I expect that the subject of arbitration is one of the most serious subjects that make foreign investors come or not come to Saudi Arabia. If the foreign investor knows the laws and knows how to solve things and he believes that the arbitration will give him a lot of problems and get into the mazes of the courts, it will come next because it will impose the system that he wants and the items and principles that he wants to intervene on the basis of the existence of arbitration and acceptance and adoption and the existence of good arbitration environments In the Chamber of Commerce and in the Saudi Commercial Arbitration Center. I expect that it will be a stimulating environment from this angle. I expect that these legislative environments will remove any obstacle that may come because most foreign investors think about the system and the law and protection and how to exit as entered and when the dispute is how to be liquidated And resolve differences if it was quick to spend and an arbitration alternative to spend does not enter the courts and the pleadings and either if it was a lock and arbitration is not final, and the rigidity to eliminate and prolonged duration will be chased and the environment so we say this, see legislation binding considered. The country has great opportunities to attract investors to invest in the country, but with such judicial guarantees and alternatives, God willing, will be an attractive environment.

Member of the Shura Council

1. **Have you heard about the vision of the Custodian of the Two Holy Mosques?**

Of course, I heard about King 2030's vision. Excellent vision gives strategy, lead to clear goals No doubt vision is very important to give the ingredients of your success and the strengths of your country as the factors of competition that make you progress, also weaknesses know and deal with the obstacles. Vision is very important and coincided with the international program for the year 2030 which is the new millennium goals emphasizes the importance that there are goals and vision of the Kingdom's economic vision in the first place focuses on development I see that development is not only economic development, but is the development of social and cultural education policy on all aspects of development and process All of which should be supported by education, meeting, politics, culture, security, justice and development. The vision is good but focused mainly on the economic aspect. The reason for this is that I came out from under the umbrella of the Development and Economic Affairs Council Relation to conservation of development. The former state, this is one of the disadvantages must be greater development. What does the Kingdom want to be in 2030? To be one of the best hundred cities! We have a strong economy and we have a strong JDP and we have two laws that need legislative development. The legal structure of the Kingdom, although the basis of Islamic law has a common law, but we need to be known as legislation because it is broad, on the doctrine of the year there are four doctrines and all vary within the same doctrine in the schools of Islamic law is broad for us in the Kingdom, taking into account what was issued by King Saud select Some books, such as Miqdami and others, are bound by the Hanbali doctrine. It is permissible to take from this other doctrine if it is in the interest of the public. This is good, but it is left to the jurisprudence of the judge and every judge who takes what he sees as an investigator for the interest. The 2030 Vision is a good programme for the future. It is a good approach taken by the government and I think any country in the world should have such a long-term plan. In 2030, the programme will achieve economic strength and solve the existing problems, unemployment, housing and economic prosperity

2. **How do you see the success of the vision in light of the development of the Saudi legal regimes?**

We need to deal with international standards such as how to open the work of the state in the factors decided by the United Nations to open commercial investments within the taxes dealing with intellectual property implementation of the judiciary enforcing contract implementation of the provisions of clarity of legislation. This should be dealt with and we put in place the legislation that makes these standards achieved and the procedures such as enforcing contract. This Kingdom started to develop steps to facilitate the implementation process. Facilitates and encourages foreign investment and all through legislation and applications.

3. **Do you think that the Saudi justice system is qualified to keep pace with the era and the first flag countries?**

Of course, the development is better now than before, but we still have a long way. We have been promised last year and we promised next year, when this is done, I am sure it will have an impact because the specialized judiciary represents the developmental stage of any judiciary. Implementation has not been implemented before and we have had the execution of this implementation also considered development. Therefore, there is a possibility that there will be a development, but the journey still has great requirements, the most important of which is the activation of the reform decisions that have been made and developing and keeping abreast with the developments that are accompanied by judicial developments especially at the level of judicial cadres. It is difficult to attend the best judge in personal cases and put it in the commercial or vice versa must be familiar with the latest theories in the field.

4. **Can you integrate the faculties of science and *Shari'ah* so that the output will be judges who can apply both secular and Islamic law?**

The option of integration is available, but there is a lot of difficulty. As long as we have colleges of law and law faculties, and specializations for *Shari'ah*, which are not specialized in the law, for example, a graduate of personal law specialization, the law graduate can not look into personal cases or criminal penalties. Of course, there is still a duality between the Shari'ah and the law. I see the possibility of their survival, but a graduate of *Shari'ah* is directed to areas where there is a law such as personal status issues, and his face to magazines such as trade should qualify in commercial laws and regulations. Therefore, there is a proposal submitted with three members of the Shura Council to open a diploma program at the Higher Institute of the Judiciary and to accept graduates of law, law and law. After the diploma they become qualified to become judges. E Of course, this is legal as a bridge to become unified colleges instead of duplication.

5. **Do you think that the Islamic *Shari'ah* law in force in the Saudi Arabia may be an obstacle and not compatible with the modern world?**

Islamic law is the principles and these principles exist in most countries, to achieve justice and equity and left the methodology and equations to be valid for all time and place of the various times (you know the things of your world) Commercial matters must have legislation to keep pace with developments and changes provided they do not violate the general principles in the Shari'ah. There are several interpretations of the same doctrine, such as usury, to find some doctrines that permit it and some of them prohibit all kinds. In a period of time, all of these types were haraam and after a period, some of them became legal in some schools. This shows you that the Islamic law is broad, but if one interpretation is taken, it may be hindered in a period of time according to the view that needs time. impediment. Anyone who knows Islamic jurisprudence or Islamic law has no doubt that the law is firmly established. We have a lot of jurisprudential wealth. There are many opinions that reflect international norms and standards. Investors can easily find the opinions.

6. **Do you think that Islamic law should be codified?**

I think that rationing is very important for a reason, when you are codified and after a year and two years retreat your judgments and adjust them according to the needs of the times. Vtqnin very important and I think that the owners of the idea of non-standardization are afraid that we have the sockets as contrary to the general principles. This in itself is the interpretation of a certain opinion can develop and take the view of another doctrine of the fittest. This is a stage of development.

7. **Would this attract more investors and facilitate trade?**

Of course, because the investor always likes to invest in something that is clear. One of the reasons why investors are reluctant to invest, uncertainty and ignorance. So they prefer to choose laws they know and arbitrators know what the provisions are clear and not ambiguous On the contrary this encourages investment.

8. **You mentioned some of the advantages of codification, in your opinion what are the disadvantages?**

The stalemate may be a rule, and in order to amend this judgment takes a long time, the decision-maker may prefer a particular point of view or interpretation and apply it and may not be the one who achieves interest. I see that Islamic law is oppressed that it carries more than it is innocent. Islamic Shari'a is broad if its principles are taken and understood, the necessities allow for things, so the Islamic Shari'ah is in the interests of the people and their people and the achievement of justice. If you rely on this principle of justice, which is sought by the investor, but if you interpret other interpretations, the problem is not in Islamic law or in the global principles, the problem that you take a particular look and apply flawlessly.

9. **Can you identify any laws or regulations in the Kingdom that are in conflict with Islamic law?**

If you take a specific doctrine you will find that it is not permissible, but if you take it with another doctrine you will find it permissible. Benefits Some Islamic scholars find it permissible to benefit as long as they are in a business and do not exploit the need of people. But if you look at Islamic law as a Hanbali doctrine or a particular doctrine, then I say to you that it is a violation of Islamic law. If you take this interpretation, it depends on the angle you are considering.

10. **How much influence do the senior scholars have in enacting or amending a law, text, regulation?**

Is the authority interpreted is then the fatwa, but not binding no doubt because it is the most influential interpretation of the Hanbali doctrine applied in the Kingdom, but from the perspective does not interfere in the commercial aspects. It interferes with the citizen and the personal aspects of

the situation is undoubtedly influential and whenever issued from them is taken such as the system of taxes on land and this is one of the regulations if applied the Hanbali doctrine a large number of those who see it is not permissible.

11. **By virtue of experience in your area of work in the Shura Council, what is the hierarchy of legislation in a new law?**

The process of making our systems has several paths. The proposal is from the ministry and the concerned authority, for example if the tourist is the tourist body, the health system and the ministry of health, and so the ministry proposes it and then it is submitted to the cabinet and he studies and enters the Shura Council and studies and then returns to the Council of Ministers if two points of view are issued The regime, if it is different, returns to the Shura Council, and this mechanism exists in the system of the Council of Ministers and the Shura Council. This is the first and usual course. The other track according to article 23 allowed the member of the Shura Council to propose a system or amendment of the article in the system and presents it and if approved by the Shura Council in the majority go to the Council of Ministers and issued. In the past, only the Council of Ministers issued the legislation, but after the formation of the Shura Council, the Shura Council participated in it and became involved with citizens and involved civil society associations and institutions in the stages of studying the system. This is almost the preparation of regulations. There are few exceptions that a royal order is issued to amend the system of these unique cases issued individually after the formation of a special committee without.

Concerning the judges, there are four doctrines from the different schools of Islamic law and they all vary. Taking into account the fact that King Abdul Aziz selected some books such as Migdami and others, judges are bound by the Hanbali doctrine. It is permissible to take from the other doctrines if it is in the interest of the public. This is good, but it is left to the judge who is the investigator seeking to protect the interests of the people. The Kingdom is one of the members that signed and implemented a number of foreign enforcement provisions. But if you take a closer look, you will find that there are problems regarding implementation because of the fact that the foreign arbitration must not conflict with Islamic law or public order in the Kingdom. The Kingdom in the field of arbitration is still taking steps forward and the best proof is that the Kingdom has recently introduced a new arbitration law. I believe the Kingdom of Saudi Arabia is still in the process of attracting investors. However, in the current arbitration system, we need to develop to be the most up-to-date and most attractive system for all types of investment. I believe the problems of Article 24 and Article 42 of the Arbitration Law have to be remedied.

12. **Do you think that the current judicial system is committed to the NYC Convention for the recognition and enforcement of judgments issued by foreign and non-Muslim judges and arbitrators?**

If we take it in its broad sense, the Kingdom is one of the members that signed and implemented a number of foreign enforcement provisions, but if we take it deeper, you find that there are problems in the Kingdom of implementation, because it linked to the fact that the foreign arbitration and arbitration does not conflict with Islamic law or public order in the Kingdom of course this text exists In all states so that the New York Convention recognizes that it does not conflict with the general order of the terms of implementation, its interpretation and so broad that it does not conflict with the provisions or the narrow view so that it takes a particular doctrine or school to narrow the scope of Islamic law. For example, the religion of the arbitrator at a certain stage had to be Muslim as well as sex courts. The Kingdom is committed in principle, but on the ground implementation requires the development of laws to be clearer in the interpretation of Islamic law, such as the benefits now the competent court and the banking committees apply, but in the implementation will not apply the part of usury, therefore did not implement this because it is contrary to Islamic law. This is one of the points that must be dealt with in clear texts, otherwise the Kingdom will not be implemented. And the issue of testimony witnesses sometimes Islamic law is involved in the subject of application Do you accept the testimony of women as one or not? The details show you some problems so you need to have more clarity.

13. **Do you think that it is time to repeal the decision of the Saudi government to stop government agencies from submitting disputes to international arbitration without prior approval by the Council of Ministers?**

I understand the disappointment with Aramco in 1403, but after that there were developments in the mineral investment system, the electricity system, the arbitration system was approved regarding mineral investment and electricity. This is a relaxation or departure from the condition in the approval of the Council of Ministers. I think in fact, even helping foreign investment to open the way at this time now to eliminate this condition, but in the end this arbitration clause is considered foreign investment as a hindrance to take a step forward I see that this condition must be canceled because most of the world does not require this condition.

14. **How do you see how you assess the new arbitration system?**

I think the system is a step forward but there are still other steps. The system has standards and standards that make the system friendly, unfriendly still in the Kingdom we restrict the part of the autonomy with many restrictions, including what is contrary to Islamic law and what contravenes the public order in large restrictions. In the process of choosing an arbitrator, he must have legal or legal qualifications, especially if he is one arbitrator or the chairman of the arbitral tribunal. These are all the restrictions of arbitration. One of its criteria and advantages is that it gives greater freedom to arbitrators and chooses arbitrators to choose the language. Still respect part of the autonomy. Also its role courts evolve but still require significant roles especially in the practical development of arbitration, there are still steps.

15. Do you think judgments made by non-Muslims or women can be enforced in Saudi Arabia?

I have heard that a number of verdicts have been implemented. As for the mirror, I have seen a final judgment from the Eastern Court in the Office of Grievances. I have not confirmed the acceptance of a court, but for the level of religion there were issues other than the Saudis. As for the religion, we need to see new judgments and we need a clear text in the executive regulations, but the ambiguity is still there, we need things to explain. In your view, one of the members of the Shura Council and the legislative authority and one of the founders of this vision Is the Kingdom an attractive environment for the foreign investor and why? Depending on the type of activity, some activities have facilities but some activities have limitations. Before considering the investment, we see the activity that you consider and the advantages given to it activity, whether financing loans, the Kingdom in some areas to encourage investment in them, such as industrial tourism health investments. The industrial sector provides wage services, industrial land and financing is considered an attractive environment for certain activities, either in some activities where there are restrictions and tax fees, banks have restrictions, but there are certain areas will remain attractive environment for investment.

16. How do you assess the government's policy on investment in general?

The real but problematic efforts facing the cooperation of other government agencies. Efforts are made to reduce the period of time for granting the license to be electronic, but the licensing problem is linked to the civil defense, the Ministry of Health, Education and the Ministry of Education, and thus the obstacles come from the process of balancing the interests of the licensed entity. The Investment Authority is also trying to speed up the licensing process. There are efforts from the Investment Authority but need to be combined by other parties. What are the biggest barriers to the success of investment from your personal face and do we still suffer from administrative bureaucracy? The investment is facing obstacles, indicating that we find some Saudi investors investing outside the Kingdom. There are bureaucratic obstacles, obstacles to government agencies and their requirements that can be achieved in easier and more efficient ways. But there are some requirements that understand the reasons, such as quality, consumer protection. So I see that there are obstacles, but some requirements exist and we want to survive such as protecting consumers from phantom investments. So there must be a balanced view of foreign investment.

Judge #1

1. **Do you think that the Saudi justice system is qualified to keep pace with the era and the first flag countries?**

Of course, the judicial systems that affect the foreign arbitral judgments are the bulk of the implementation system in the first instance as well as some articles in the system of pleadings and the arbitration system, although the arbitration system is for local arbitration, but may deal with foreign arbitration in certain parts. What he believes is that the judicial systems in the Kingdom are modern systems and are still subject to development and even now the system of pleadings is now a review of its executive regulations as well as the system of pleadings. I have noticed through my work in the implementation of foreign judgments that there are many particles not exposed to the system of implementation because it includes all foreign bonds and provisions are considered a bond of these bonds perhaps with practice and work and continuous modernization system to address the full of these issues and the particles we face in the implementation of foreign judgments. And also there are some problems in the implementation of foreign judgments may not be the Saudi judicial systems is the solution or the reason for this because it is reviewed by some of the problems suffered by the entire judicial system in the world may be resolved by international law or some treaties. I expect that the continuous modernization of the judicial systems will lead to being in the ranks of countries and the investigator of vision and foreign investment in full, and I see that in fact the current reality is encouraging and that the judicial systems are more flexible than exists in others and God knows.

You know of the Vision 2030 – the future of the Kingdom is that. The programme will support the Kingdom in the competition of the big countries, especially in the field of investment

2. **Do you think that the Islamic *Shari'ah* law in force in the Saudi Arabia may be an obstacle and not compatible with the modern world?**

Of course, the Islamic Shari'ah of its advantages and characteristics of flexibility and comprehensiveness such as what is known and no one doubts the validity of this all time and place. It is more flexible than the statutes that are in stalemate, which, as we mentioned, need constant updating. Islamic law is one of its advantages. It does not need to be updated or modified for its flexibility in every age, every time and every situation. Through my work and the legal and jurisprudential specialist I have touched on the provisions of the Islamic Shari'ahh, even in the implementation of foreign judgments, much more flexible than the regulations, even our regulations with regard to implementation and in matters related to the provisions of Shari'ah. As is known, the advantages of implementation in the Kingdom is called partial implementation, Only in a few countries is this unique to the Kingdom. The presence of irregularities does not prevent the implementation of foreign judgments because it can be implemented except for the offending part. Also, Islamic law does not impose on foreign arbitral judgments to be issued by a Muslim or a man, because they are implemented out of the necessity of exception and in order to fulfill the covenants and covenants, and therefore many of the restrictions and conditions that some of them are lost by

falling under consideration of these two things. There is no obstacle on the part of the Islamic Shari'ah in the implementation of foreign judgments if we realize that Islamic law believes that the fulfillment of the covenants and agreements with Muslims and non-Muslims duty. And that the requirement of masculinity or the requirement of Islam in the judge if the judiciary will be in the Kingdom, but here we are in front of the implementation of foreign rule or foreign arbitration rule do not look at this aspect of this aspect, but look at the fulfillment of the covenants as an exception to these conditions of necessity and it is known that the arbitral award Whether it is male or not.

3. **Do you believe that the codification of Islamic law is necessary?**

There is no doubt that the codification of judicial rulings will be a propagation of justice and dissemination of even the principles in the Shari'ah and the provisions of legitimacy and remove something from the stupidity of non-Muslims or those who have no legal background or fancy the existence of obstacles. The publication of such provisions will make the vision clearer and shows and highlights what we have talked about the flexibility and inclusion in the provisions of Islamic law. The judges themselves and the advocates from each side will also use their knowledge of precedents, their knowledge of the nature of the judicial work and the use of case law on each subject.

4. **What are the most important disadvantages?**

Of course, the most important shortcomings of codification stalemate and lack of flexibility in dealing with issues in different circumstances and some aspects, but this can be treated that the rationing is not restricted to private particles, but it is a kind of flexibility so that the rules of the kidney does not prevent the existence of some exceptions when there are different circumstances.

5. **Can you identify any laws or regulations in the Kingdom that are in conflict with Islamic law?**

Of course, the regulations in Islamic law do not recognize only after the verification of the absence of a statement between the rules and Islamic law. Most systems are issued in accordance with "Islamic Shari'ah". Therefore, I do not know that there is a system approved in the Kingdom that is contrary to Islamic law. The system does not have a system or approval from the Shura Council until after verifying that there is no such thing. If the existence of a statement in a system is imposed, the system will find in the same system what is restricted to it according to the Shari'ah. Therefore, the Shari'ah governs all systems as stipulated in the Basic Law of the Judiciary and the Judiciary in the Kingdom.

6. **Is the establishment of a constitutional court necessary?**

This means that whether a constitutional court has been established or dealt with in another way, there is no doubt that some systems may be located between them. This exists now, such as the system of companies and the implementation system. Some of them are opposed to certain elements. This is possible. The system of penal procedures may conflict with other systems. Commercial papers may be between him and the implementation system some conflict because of the lack of modernization or non-compatibility, this thing exists and must be resolved whether established a constitutional or dealt with what is less than this is the existence of some procedures in the treatment of regulations and review in the Shura Council and reissue So that this conflict is resolved and if it is There is something related to a particular case in which the judiciary is separated.

7. **Do you think that the current judicial system is committed to the NYC Convention for the recognition and enforcement of judgments issued by foreign and non-Muslim judges and arbitrators?**

The NYC Treaty, the Riyadh Treaty and the Arab League Treaty are the three most important treaties that the judge should not implement foreign judgments without being fully informed of the details. The NYC Treaty is characterized by special arbitration provisions and it has already passed a number of judgments and we have had to review them more than once in order to verify some of the particles and provide some conditions for the conditions of implementation of foreign arbitration provisions in the Kingdom's implementation system in Article XI, Has been reformulated and added to certain conditions as is the case in most countries. Therefore, if compared to the implementation system, it found itself the same conditions agreed upon by all and added the Kingdom's special judicial systems.

8. **Do you think the Kingdom is committed to the NYC Treaty regarding the recognition and enforcement of foreign arbitral awards?**

There is no doubt that from the reality of my work I tell you that the Kingdom recognizes the word and deed because we carried out in this department in Riyadh is the first department specialized in foreign judgments We have implemented a number of foreign arbitrations in accordance with the institutes of NYC after the conditions are met and if there are foreign provisions not implemented, NYC and its commitment to it because it stipulated the requirement of certain conditions by the agreement of all the signatory states and ratified them and mentioned the conditions and they said that the arbitration provisions are only implemented if these conditions are met. If a foreign arbitral award is not implemented in the Kingdom, The Implementation of foreign judgments and non-implementation does not depart from the treaty because it is a commitment to the conditions mentioned therein.

The Kingdom’s judicial system is a modern system but is still being developed. I know of many foreign judgements that have been implemented. But we face many issues because the judgements may include the use of foreign bonds and interest. Also, there are problems in the implementation that

are present in all systems and can only be resolved through treaties. I expect the continuous modernisation of the judicial system and the implementation of more foreign decisions. The system is more flexible than many others and God knows that is the case. Also, Islamic law does not require the refusal to implement only foreign arbitral judgements issued by Muslims or men. They are implemented in order to fulfil covenants or treaties in good faith. There is no obstacle on the part of the Shari'ah if we realise that the implementation of the foreign judgment is a duty under a treaty. The requirement of a male arbitrator or Muslim judge applies only in the Kingdom. Here we have a foreign judgment with a foreign rule. We have to implement the judgement because we trust the foreign country with which we have a covenant or treaty that ensures reciprocity.

9. **Do you think judgments made by non-Muslims or women can be enforced in Saudi Arabia?**

The question of a non-Muslim arbitrator or a woman is a controversial issue in Islamic jurisprudence. Arbitration is a lesser degree than the judiciary, but the judge in the terms of the dispute occurred in the fact that the judge is a woman and also non-Muslim, arbitration is less than if the degree of the dispute occurred in the condition provided in the judge to be a man and a Muslim also signed the dispute in arbitration and dispute the strongest question of being male masculinity Arbitration and also Islam. In my opinion, it is permissible to arbitrate a non-Muslim as well as to arbitrate a woman if they are experienced and knowledgeable, and the conditions are met by what is stipulated by the scholars, and this is not a detailed citizen. Rulings of arbitration If we are received by a woman or a non-Muslim, I implement it because the requirement of masculinity and the requirement of Islam originally a dispute and then that the implementation of being non-Muslim, this is necessary, and we know that the necessity permissible prohibitions take into account the extent. And the other is also implemented in fulfillment of the covenants and conventions and this does not consider it being issued by a woman or non-Muslim free that the issue within the framework of the fulfillment of the covenants and covenants, and if these three things met, we realized with them that the implementation of these provisions in the country of Islam there is no objection to this. This aspect. Even if one of his executioners has been obstructed, he sees that he does not enforce the sentence for the reason that he was issued by a woman. There is a so-called objection or dispute of execution and he is brought before the court of appeal.

10. **Is this your personal opinion regarding the enforcement of decisions rendered by a non-Muslim and a woman, or there is a law governing their validity?**

All the universal regulations stipulate that the judge in the execution has no authority to consider the invitation and does not consider the call again and this is also applicable to us. The enforcement judge does not consider the subject of the dispute is not a source of government, but the executor and this issue also in disagreement with Islamic jurisprudence. Is the arbitration judge considered a governor or only the executor of the enforcement judge is not a judge in the case, but is an executor. The system stipulates that the executive judge does not consider the case, but considers the availability of the conditions stipulated by the treaty. His view of the foreign rule is that his comprehensiveness in terms of the conditions is available, that the parties got them a pleading, that the regular articles and

the applicable law are available and that the judgment has passed the degrees of litigation and that it is complete and valid for implementation and final and eliminates the executive formula and that it does not violate public order. General includes Islamic law and others. The consideration of these conditions is not to look at the subject, but to look at the whole, and consequently the enforcement judge has the power to restrict him not reconsider the case again. Is not a judge and a ruler, but is just an outlet and implements foreign judgments in order to fulfill the covenants and covenants and the necessity of not having a legal liability agreed upon.

11. Is there any Islamic legal guidelines or edicts that prevent women from being arbitrators?

This matter has a difference in the Islamic jurisprudence. I see arbitration as less of a matter than jurisprudence and jurisprudence. It is one of the four schools of jurisprudence. They see that a woman may be a judge if the difference is in the requirement of masculinity in the judiciary. Women are arbitrators if they have the experience and know-how to do so.

12. So, is it forbidden by Islamic law to have a non-Muslim settle disputes between Muslims or a party?

Islamic law forbade Muslims to be prosecuted other than Islamic law. (And not your Lord do not believe until you rule among them). Then it is permissible to resort to non-Islamic law, but arbitration. If it is in a technical aspect that does not have the provisions of the *Shari'ahh*, it requires the opinion of the people of experience. It is not considered arbitration without Shari'ah. What is the matter of the world? In matters that are far from the *Shari'ah* and related to technical matters and matters of experience, there is no objection to the dismissal of an expert person, even if he is a non-Muslim. Here, he separates experience and knowledge from him, not from the rulings of the *Shari'ah*. Those who reject him among them.

13. Does the law forbid non-Muslims from settling disputes between non-Muslim parties within the Islamic jurisdictions?

It is not permissible for the arbitration to take place except in the Shari'ahh. Whoever is the arbitrator should be a representative of the Shari'ah. He must be a Muslim. On them in the matter of arbitration. How do you describe the establishment of a court of execution in the development of the judiciary in Saudi Arabia, which supports the vision that we know that the Court of Implementation established in 1434 is considered young? In the implementation of foreign judgments is not new was the jurisdiction of the Board of Grievances previously and they have been doing this for many years and then the work moved to the jurisdiction of the enforcement judge and the formation of a competent department in the implementation of foreign judgments. There is no doubt as well as the court of execution. The establishment of a new system of implementation. The regulations under review have been amended

for the first time and now in the second amendment, and there is no objection to their revision and modification. The new work requires practice and application to modify some gaps and increase some details and so on. I believe that continuous updating and constant review will be the key to development and executive work in the Kingdom. There is no doubt that we suffer from the large number of requests for implementation, the number of judges, the diversity of implementation bonds and the increase in the number of years of implementation. However, this can be remedied by the technical development which we witnessed at the beginning of our work in the court of execution. The work was more paperwork. In the evolution of work in the past on the work now. And contributes to achievement shorten the human number and shorten the time and effort and connect with other bodies that carry out implementation. If the work continues at this pace with the increase in development, I expect the execution court the first place among the courts of the Kingdom, because it is the fruit because the fruit always be when the fulfillment, if they get their rights quickly has to eliminate the fruit and around the judiciary from my perspective to my work scenes and concrete.

14. **How do you assess the procedures for the enforcement of arbitral decisions in the Saudi courts? Are they flexible and encourage the foreign investor to invest and settle disputes in the Kingdom?**

The provisions of foreign arbitration conditions of implementation are many and not a few in fact and not this is specific to the Kingdom, but in the place of agreement between the countries of the world through the institutes of NYC and others have set conditions in which a kind of difficulty and this is due to the keenness of each country on sovereignty because the implementation of the state to the provisions of other countries, Therefore, you will find a kind of reserve and hardness in this country and other countries of the world, whether judicial or arbitration. The solution in dealing with this for the foreign investor is to ensure that the arbitration is in accordance with international laws and regulations in which the arbitration or the country in which the implementation will take place. There must be a keenness of the foreign investor after the arbitration to complete the necessary conditions for implementation, in terms of being final in the executive formula does not exist between him and the implementing state is opposed if the executor to complete the conditions in consideration and apply for implementation we find that many lawyers and agents provide We do not know the terms of implementation, although it can be found through the NYC or through the Saudi implementation system, which is published in all media and in the means of communication. If the agent or the execution applicant is keen to complete the applications and see the conditions, this will help to avoid delay. I found the Kingdom more flexible than many countries, and I found that foreign arbitration judgments were rejected by other countries with things that we cannot reject in the Kingdom, such as requiring some of them to formulate a specific foreign arbitration judgment. Therefore, the Kingdom is more flexible than many countries only. The delay is due to many conditions, and the implementation student neglects to complete them and shorten their collection before submitting them to the court of execution.

The arbitration law is for local arbitration, although it deals with foreign arbitration in certain parts. But Islamic law does not prohibit the enforcement of foreign arbitral awards because they were granted by a non-Muslim or a woman. They are enforced out of necessity in order to meet obligations

under international covenants like New York and Riyadh and others that I cannot recall. I find the Kingdom more flexible than many countries

15. **By virtue of experience, can you give an estimate of the number of foreign judgments and awards that have been recognized and enforced?**

Our number of foreign judgments is few and rare and this is because we have created a new. Applications for the past year do not exceed 30 to 40 foreign arbitral judgments, but do not have accurate statistics may be at the level of the Kingdom and not only this court. The verdicts presented to me in this court may not exceed 20 foreign arbitral judgments, which were implemented within the limits of 7 to 8. The rest is not a refusal, but some of them did not see the conditions, leaving the application to continue and other ratios in which the dispute took place. The availability of conditions, some conditions may be replaced by forms in being verified or not achieved but most are not implemented.

16. **When do *Shari'ah* courts intervene in arbitration proceedings and when do you refrain from intervening?**

The executive judge does not intervene in the foreign arbitral award in terms of the subject in two parts and a very narrow framework, which is the question of *Shari'ah*. If the questioner said that the executive judge refrains from implementing the infringing part and not completely with giving the applicant the right to object and appeal and show what he has Not different. In other words, the legal violation that prevents implementation is limited to the peremptory violation. A royal decree was issued stating that the legal offense is the total violation of the rules of Islamic law. In the implementation system, the public order is interpreted by Islamic law. These are general interpretations. The rulings of the jurisprudential in the Islamic *Shari'ah* As for the matters of jurisprudence in which there is difference of jurisprudence, this is not considered a legal liability, such as commercial insurance is subject to disagreement does not consider the issuance of a ruling in the commercial insurance is contrary to Islamic law as long as there is disagreement but the issuance of a ruling or an explicit rib It is contrary to Islamic law, because *riba*, which is agreed upon, is *haram*, and it is considered a categorical statement of Islamic law, as well as gambling and fraud. Therefore, we say that the legal violation that prevents the implementation is the peremptory violation of Islamic law in matters that do not accept difference and there is no diligent prevailing and also refrain is partial, not total.

Official, Saudi Arbitration Centre

1. **Have you heard about the vision of the Custodian of the Two Holy Mosques?**

I have not seen all the details of the vision, I have seen elements that intersect with the work of the center, I see it as positive and the objectives of the center strategy that supports many of the goals and programs in the vision.

2. **You have a good understanding of the concept of foreign direct investment. What do you think of what the government should go towards promoting foreign investment in general?**

From a legal point of view, the promotion of investment is positive. Legally, this encouragement requires a specific environment with regulatory controls, dispute settlement and contract enforcement controls. It is a step that will strengthen the market in Saudi Arabia and make it competitive internationally. We are opening up the opportunity to enter value-added projects to serve the country as a general direction for the General Investment Authority, which is interested in mega-investments.

3. **Do you think that the government of the Custodian of the Two Holy Mosques should stimulate more foreign investors to achieve the vision?**

The existence of a clear and encouraging investment environment that includes means of settlement is effective and the results can be expected. The judicial system has made great strides in its development. Perhaps the most important of which is the adoption of legal proceedings, the development of the arbitration system, and the development of the system of implementation if there are steps that combine to build a good judicial environment based on its practice.

4. **Do you think that the Islamic *Shari'ah* law in force in the Saudi Arabia may be an obstacle and not compatible with the modern world?**

Absolutely. Islamic legal system is a disciplined system. It has compliance requirements that apply to trade and commerce. Foreign investors should know these requirements. Islamic law is easy to understand. The requirements are compatible with many international laws and laws of the countries of investors. Islamic law is an integrated legal system, like any legal system, in which "expectation" is available. *Shari'ah* is a disciplined legal system and anyone who expects it can deal with compliance requirements means that if I am a foreign investor in any country in the world, Investors should know the requirements for compliance with this country. Islamic law is an integrated system that is easy to read. It is not difficult to read when I enter a country. I must strive to know the requirements of

compatibility in this country and this is not difficult. The second Islamic Imam did not overrule the Shari'ah principles when he did not apply the Hudud of theft and burglary in that time because of famine. His decision could be said to be based on an interpretation of the punishment prescribed by the Shari'ah: Hudud being the upper limit rather than the automatic punishment. This is evident from many sources looking at how the punishment can be imposed, and to what amounts and so on.

5. **Do you think that the current situation, as I mentioned, is likely to be expected, that the judge has discretionary power to assess the merits of arbitral awards? Can this be a hindrance to the foreign investor?**

All judicial systems in the world with inequality give the judge discretionary power, and there is no judicial system in common law or civil law, where common law is less in discretion, and while civil law is broader in discretion, In the law, this notion of "expectation" is reinforced by practice and practice in tracking practices. In all countries of the world, there will be courts that issue judgments that apply a legal text, a court and a second district in the same city. A different ruling is issued. The role of the idea of unification and promotion of expectation. This is the role of the Supreme Courts. It attempts to eliminate the great differences. This is reinforced by practice, training and continuous consultation. Jurisprudence.

6. **Do you think that codifying Islamic law in commercial law is important?**

Those looking to codify any rules are motivated by the benefits of predictability and clarity. I would like to mention here an example of a legal system that is very influential. That of Britain. It has no written constitution but is more influential than the systems of countries that rely on codes such as France. Judgements are made without codes and they are effective as they can be in such situations. Codification may eliminate differences of opinion and reduce the margin of inconsistency in judgement. But it does not eliminate uncertainty because the codes themselves must be interpreted.

7. **What are the greatest benefits of codification?**

Greater predictability, clarity of legal vision, and requirements for compliance with the legal system, reduce or eliminate divergence of interpretations. If codification adopts a certain opinion and suggests a number of views, it eliminates differences and reduces the margin of difference. Regulation will avoid uncertainty and uncertainty but does not completely eliminate interpretations and this in all countries of the world.

8. **What are the biggest disadvantages?**

You need to have a clear vision to study the impact of legislation because one of the flaws in one country that you are issuing is codified and amended at close intervals, successive amendments without relative stability.

9. **Do you agree that one of the shortcomings of codification is the rigidity of the *Shari'ah* to some extent?**

Never, because it is easy to modify according to time and place.

10. **Do you think that more regulations will help the Kingdom's economy?**

Every step taken in the development of the system has a definite positive dimension. The use of discretionary judge is very required, I do not categorize the use of discretionary power as a stressor but I consider it more flexible. The existing regime is Islamic law and this is stipulated in the Constitution and the Saudi courts take Islamic law as a law in its courts and adjudicating disputes.

11. **Can you identify any laws or regulations in the Kingdom that are in conflict with Islamic law?**

As far as I know there is nothing, but I have not studied it deeply. I know the second Islamic Imam did not overrule the Shari'ah principles when he did not apply the Hudud of theft and burglary in that time because of famine. His decision could be said to be based on an interpretation of the punishment prescribed by the Shari'ah: Hudud being the upper limit rather than the automatic punishment. This is evident from many sources looking at how the punishment can be imposed, and to what amounts and so on.

12. **Do you think that the current judicial system is committed to the NYC Convention for the recognition and enforcement of judgments issued by foreign and non-Muslim judges and arbitrators?**

I do not have a complete picture of court practice and its response to the treaty. But what is contrary to public order (public policy)) is not specific to Islamic law is not implemented. Often, some applicants ask for partial implementation.

13. **Do you think the Kingdom is considered investment-friendly?**

I think there are many articles written about the modern system.

It places Saudi Arabia in the ranks of countries, and there are positive elements that are not found in many regimes in the region. The Saudi regime is the most supportive system for institutional arbitration. There are many texts in the system that give greater powers to arbitration institutions in the administration. And a survey in all the Arab countries, there is a study did not find an impact on this approach and the Saudi regime and the penal system in its support for institutional arbitration. Article 4 of the arbitration system states that if the parties agree that the system allows for the agreement of the parties to choose parts of the provision of this agreement, assign the arbitration center or institution to this agreement and this is a positive point in the Saudi regime.

The attractive environment for investment depends on many interrelated factors. Administrative organization of licenses and visas is not aware of the economic situation as well. The dispute settlement environment in Saudi Arabia has developed significantly even in courts where there are courts that implement and support the effectiveness and support specialization.

14. Do you think judgments made by non-Muslims or women can be enforced in Saudi Arabia?

From my information, the sentences are executed if they are issued by a woman or a non-Muslim.

15. What are the main barriers to foreign investment?

To invest in general how can he agree with things and what are the risks he fears. Whenever the procedural system, the law and the procedures are clear, declared and transparent, whatever is an attractive environment, in the settlement of disputes, I think there is a great deal of development.

16. What are the shortcomings of alternative dispute settlement mechanisms in Saudi Arabia?

In the area of dispute settlement, steps have been taken in the judicial system. Steps are still to be taken, but additional steps must be taken in the field of arbitration and other alternatives. The regulatory environment exists but training and awareness capacities and competencies are required. The foreign investor may ask for the foreign option in the settlement to question him or if it is not clear to him. The national option I think that if the business field supports the national option, it will achieve a good relationship. To support the business sector and raise awareness of the importance of this subject and the importance of the conditions of settlement of disputes and there are alternatives and conditions to achieve the interests of the parties.

All judicial systems in the world with inequality give the judge discretionary power. That is also the case here. That is why the courts are reliable. In the law, the notion of expectation is reinforced by practices. In all countries of the world, there will be one court that issues a judgement by applying a law and another court issues a different ruling applying the same law. The role of the Supreme Judicial Council is to unify and promote expectation. This is reinforced by training of judges and continuous consultation.

17. Do you think that we have arbitrators who are capable of applying foreign laws in the same way?

Arbitration has no nationality and no homeland, and therefore arbitration in Saudi Arabia or in Saudi centers belongs to more than legal systems in different nationalities and national capacities.

18. As you know that there is a decision of the Council of Ministers that government agencies should not resort to arbitration without the approval of the Council of Ministers. Do you think it needed to reconsider this decision?

This is an article in the arbitration system, some regulations allow entities such as the mining sector and cutting electricity. The ban does not include state-owned enterprises. I believe that the idea of resorting to the national option must be expanded. The new principle of 2015, if the foreign investor chose another national or international arbitration option in accordance with his contract with the state and said I will prosecute in the Saudi Center, and resort to this option drops his right to benefit from the agreements and this aims to provide a cheaper environment and easier and closer This is a positive option for all parties.

Member of the Shura Council #2

1. **What do you think about Vision 2030 and reflect on its results?**

It is a good vision for the future. This is a benign approach taken by the government and I think any country in the world should have a long-term plan. In 2030, there will be goals that will achieve economic strength and solve the existing problems, unemployment, housing and economic prosperity. It is useful for humanity.

2. **What do you think the Kingdom's government should do to attract foreign investment?**

The Royal Decree issued the Kingdom's Investment Law and established the General Authority for Investment in order to achieve the objective. The reality is that the major objectives of this system should be attractive to investments of economic value that the Kingdom needs and seeks to transfer technology and its existence to achieve economic support, but there are some systems where there are some shortcomings that need the legislative authority to follow and develop. The foreign investment system There were problems that did not specify the financial value of the size of the targeted projects, it does not make the fact that the existence of investors with small amounts of money and instead of adding value to the national economy, they are causing obstacles in the Saudi economy and this is not hidden in the competent authorities. I realized that there are projects faltering, projects and subjects small and the General Authority for Investment to develop requirements to raise the level of investors and I think it has achieved something of achievement and I oversaw a number of issues when I was Vice-Chairman of the Committee for consideration of investment violations We considered cases involving financial fines or revocation of license and at other times to support the investor if legally established properly.

3. **Do you think that the Saudi Economic and Development Council will increase the efficiency of government departments and ministries?**

The Council of Affairs and Development since its inception has been working on preparing the Kingdom's vision and defining the plan to achieve the goals. Answering your question through the hard work of the ministries and the concerned authorities to achieve the vision of the Kingdom 2030 will achieve more economic development as well as the quality of performance which will affect the social and economic life and the general welfare in the Kingdom.

4. **Do you think that the Saudi justice system is qualified to keep pace with the era and the first flag countries?**

In the Kingdom everyone agrees on the arbitration of Islamic law. The Basic Law of the Judgment states in Article 1 and Article 6 that Islamic law is the system which governs regulations. The Ministry of Justice, the Supreme Judicial Council and the courts have exerted considerable efforts in solving judicial problems. With the rapid economic development witnessed by the Kingdom, the need to establish a number of quasi-judicial committees has been reduced to a temporary view, including the Banking Committee and the Capital Market Committee, In which the appeal and the destination that one day will return to the competent courts and the judiciary, but life needs to develop continuously and who does not develop himself will find himself outside the circle of the march this subject has a depth I still see the importance of teaching systems in Shari'ah colleges so that we do not have Sections of Shari'ah systems and sections, but I request that the College of Shari'ah be 6-7 years so that the graduate is aware of both law and Shari'ah and this is what we want. The judiciary is now in good shape, but we are talking about the best. The best must be to review the qualifications of judges and the rehabilitation of schools and scientific curricula that graduate judges. I have spoken in more than one place and I said that the colleges of Shari'ah should be reviewed in the Kingdom so that we know the director from the college so that the judge. As for the teacher or the preacher, this is the matter of the fundamentals of religion in other universities. This requires a re-examination of the faculties of Shari'a so that the alleviation and elimination of educational materials according to my knowledge constitute 20% of the curriculum and replace it with legal legal materials and increase the content in terms of Shari'a and law which is of interest to the four disciplines so that we have the judges Advocates are knowledgeable about Shari'ah and the law. Vision 2030.

5. **Do you think that the *Shari'ah* system is sufficiently flexible to accommodate modern practices?**

Anyone who knows Islamic jurisprudence or Islamic law has no doubt that Islamic law is firmly established, and its branches are valid for all times and places. We are through the jurisprudential wealth. There are no forms in the application of Islamic law. It is very rich in jurisprudential opinions. Jurisprudence to materials so that there is no disturbance in the choice of jurisprudential views, I call for the codification of laws and the codification of the civil order and the penal system, but from the net source of Islamic law.

6. **Do you think that the codification of Islamic law is important?**

Of course it is useful, the issue of codification and codification of the judgments there are two doctrinal opinions are considered there are those who believe that the codification of jurisprudence there are jurisprudence is not afraid of the provisions of the law because the codification derived from

the provisions of Islamic law, which is an Islamic law, but by diligent scholars identified and this opinion is considered and I tend However, we cannot ignore the point of view that in the codification provisions of the jurisprudence of the Queen of Jurisprudence and diligence of the judges through previous experiences did not codify the provisions except the magazine legal provisions on the doctrine of Imam Abu Hanifa in the late Ottoman Empire is a good jurisprudence experience, but they say owners The second view is that this restricts the ownership of jurisprudence and reasoning among the judges and so on, and I think that this opinion is taken into account, but the need of people needs this opinion.

I have touched on the subject of the Journal of Legal Judgments. Can the current situation in the Kingdom legitimize Shari'ah rulings as was the case in the Code of Judicial Judgments?

The magazine of the Islamic jurisprudence was prepared on the doctrine of Imam Abu Hanifa. There is another magazine called Al-Ahdat Al-Shari'ahh, which was prepared by one of the scholars and is based on the doctrine of Imam Ahmad. There are efforts in the Ministry of Justice and orders and instructions to prepare the judicial code, we are now talking about something normal work on its preparation, which I think is not restricted to a particular doctrine, but a set of doctrines and schools of jurisprudence and the search for the right opinion and correct.

I would like to add a point, I found that the document prepared for arbitration on the time of the Prophet peace be upon him in Medina is not very different from what reached the human diligence in positive law agree in its entirety with Islamic law and its provisions. The realization that the Islamic rules in the Shari'ahh is not very different from what the human mind reached by the laws of status, but they are consistent in its entirety, except some provisions in the criminal law that relate to him in relation to riba and alcohol and so on.

7. **Are specialised commercial courts important for the adjudication of trade disputes?**

Courts now and work under it to be specialized courts, but there will be labor, real estate and commercial courts and there is no doubt that specialization in the courts is necessary because the judge himself has experience in the field of the department in which he works. The teaching process we have referred to enables the judge to absorb specialization, whether administrative, commercial, etc.

8. **Can you identify any laws or regulations in the Kingdom that are in conflict with Islamic law?**

The Book and the Sunnah govern all systems according to the provisions of the Constitution. Any molecule that violates Islamic law is void and can be considered. Through my experience in the Council of Ministers there is keenness before issuing any draft law to make sure that it does not violate Islamic law. The legislative authority in the Kingdom is keen to ensure that the regulations are in accordance with Islamic law and do not violate them.

9. Do you think that the regulations of SAMA violate the principles of Islamic law?

Never read the SAMA system does not find any material contrary to the law, but some banks may have some applications may be contrary and may have images need to be adjusted and keep pace with the Islamic economy.

10. By virtue of your experience, are the recent reforms important?

It is important to start two methods of legislation in the Kingdom, the first through the ministries and the competent authorities, the second method members of the Council can propose a project as provided for in Article 23 of the new system and then Approved by the Council and referred to the Council of Ministers and then issued a decent approach. But the most important way is that the ministries concerned raise the High Commissioner a draft system for his specific needs and after meeting the conditions and controls that were received from the Council of Ministers that there be a comprehensive legal study of the need of the system and then be submitted to the General Committee of the Council of Ministers and then the Committee of Experts and then form a committee of the Ministry concerned and ministries concerned. The relationship is taught by the General Body of Consultants in the Panel of Experts careful careful examination, the system changes and may develop better which is often. The draft law shall then be referred to the Consultative Council for its consideration and study, and if approved by the Consultative Council and the Council of Ministers, issued by Royal Decree.

11. What is the influence of senior scholars in the enactment or amendment of legislation in Saudi Arabia?

In rare cases, the expert body is raised after realizing that this is contrary to the Shari'ah, if there is some kind of legal difference such as Zakat and income. The opinion of the senior scholars is considered because the council, the legislative authority, the expert body and everyone wants the right opinion which does not violate Islamic law.

Opinions submitted are legitimate views and may not represent the Islamic Shari'a Council of senior scholars do not represent the only opinion of Islam Foley sees the interest may take the opinion of the minority because they are accredited scientists and the question is left to those who matter.

12. Do you think that the current judicial system is committed to the NYC Convention for the recognition and enforcement of judgments issued by foreign and non-Muslim judges and arbitrators?

The Kingdom is bound by this Convention. Saudi Arabia respects the international conventions in which it enters and respects treaties and international law. Saudi Arabia is committed to any agreement and when it reserves, it reserves a clear reservation in accordance with Islamic law and this is the best evidence that the Kingdom is committed to its agreements. Yes, the Kingdom is committed to implementing the provisions of the provisions and operates and implements foreign judgments with a requirement in accordance with Islamic law. If the foreign provision is in two parts, the Shari'ah-compliant part that is implemented and that contravenes the Shari'ah is not enforced.

The Kingdom in the field of arbitration is still taking steps forward and the best proof is that the Kingdom has recently issued a new arbitration system for arbitration in 31 AH. 28:36). I think that the Kingdom of Saudi Arabia is still in the footsteps of attracting countries. However, in the present arbitration situation, we need to develop to be the most up-to-date and most attractive to Ali. I refer to the problem of Article 24 and article 42 of the arbitration system, Things and modify them.

13. Do you think the arbitral award rendered by a non-Muslim or his wife is enforceable in Saudi Arabia?

Yes, the proof is that the meditator in the previous arbitration system found the text to be a Muslim arbitrator and the new arbitration system did not provide for the requirement that the arbitrator be Muslim. In the past, the Board of Grievances had carried out the sentences without considering the arbitrator's religion. The verdicts were exhausted without regard to the sex or religion of the arbitrator.

14. Is there any source or any *Qur'anic* verse that requires the codification of the *Shari'ah*?

According to my knowledge, not through my research and my question to some scholars who do not see the codification in the Shari'ah there is nothing to prevent the codification of the provisions and said Sheikh Abdul Aziz bin Baz, "The codification of the provisions in the law does not violate the law is not innovative," but that there are books of scholars to mention the doors. The codification of the permissible jurisprudence is permissible and there is nothing wrong with it.

15. Do you know any Shari'ah law that prevents women from going to court?

Arbitration and those who have prevented arbitration have confused arbitration with the judiciary. The judiciary resorted to the parties against their will so bound to a number of jurists prevented the mirror be a judge and some confused between the judiciary and the judiciary of arbitration and the arbitrators choose arbitrators when the women choose a court here the will of the parties decided to choose a woman court here the will of the parties decided to choose women as a court may be disputed It is a matter that concerns women in their own right, and is competent and knowledgeable, so that they are the best to judge them. There is nothing to prevent women from being arbitrators. Shaykh Ibn

'Uthaymeen has a letter in the woman's passport that confirms this several months ago, issued from the appeal phase of the Eastern Province.

16. Do you think the Kingdom's legal environment is attractive to foreign investors?

The Kingdom is attractive in terms of economic strength, and the Kingdom is an economic force and a political force and represents stability in the region and I think many of the giant partnerships have created partnerships with the Kingdom, whether through Aramco, SABIC and others. The vision continues to attract serious companies with strong investment. The Kingdom has economic power and political stability. It is an attractive environment for investment. But legally, you need to regulate some systems such as the arbitration system. I think the text of Article 24 if the deletion of the registration of the contract between the arbitrator and the competent authority. I think this is a condition that should be omitted and an excessive measure of arbitration and therefore reflected on investment. Deletion of the text to deal with the arbitrators at the core of the provision in Article 42 because it does not attract investors to resolve their issues in the Kingdom.

17. How do you assess the government's policy on investment in general?

I think that the foreign investors in this part dissolved them and worked in the General Authority for Investment so-called basket of government agencies all the parties are in one place there are no obstacles in terms of procedures in government agencies.

Former Judge/Lawyer

1. **Have you heard about the vision of the Custodian of the Two Holy Mosques?**

The vision of the future has wide ranging dimensions, and a great ambition and I expect an institution on the basis that Saudi Arabia enter the global arena in general and open investments and apply the international agreements signed by Saudi Arabia such as the Riyadh Convention and other international conventions to keep pace with economic growth and the protection of human rights and others.

2. **How do you see the success of the vision in light of the development of the Saudi legal regimes?**

Coordination between the regulations established in the world and the regulations in Saudi Arabia does not contravene the basic rule of governance, this is one of the most important points so that he briefed on the regulations in countries, especially the countries that need to invest in Saudi Arabia, European countries, America, China and other investors and coordinate with the existing basic rules In Saudi Arabia and these rules are all explained by the provisions of Islamic law, the book is the ruling on all systems as stipulated in the Basic Law of Governance.

3. **Do you think the Saudi Economic and Development Council can improve the performance of government departments?**

Investments in Saudi Arabia, licenses and legislation in general are varied and different. Each system and every mechanism carried out by a government entity may occur in a kind of duplication with other parties, which causes the disruption of investment and development and therefore the investor's disobedience because he is facing different and different organizations.

The existence of one party that regulates this relationship from government agencies in general and coordination between them to achieve this vision and investments in the Kingdom from the external parties makes in the process of harmony and harmony of the person when he enters the investment in Saudi Arabia achieved several meanings, the meaning of supervision of government agencies in general and also easy access to Permits and statutory licenses that allow the investor to enter the Saudi market with the investigation of the safety of citizens and government supervision of these investments and the investor's freedom to access his rights and investment gains.

4. **Do you think that the current judiciary system is appropriate and keeps pace with the times and helps the government to achieve to the vision?**

The system in Saudi Arabia has an advantage that does not exist in any other system that is free and will not be found in any country in the free world. Elimination of this feature in the Saudi system The basic advantage, the systems in general and especially the judicial systems are developing rapidly in the current period during this year issued more than In addition, the Ministry of Justice, the Board of Grievances and the judiciary, in general, and development projects such as the King Abdullah Development of the Judiciary Project, as well as in the Board of Grievances, Very seen from the electronic and hand judicial competencies exceptional manner and also the rapid development carried out by the Ministry of Justice and the Office of the Ombudsman.

5. **Do you think that the Islamic *Shari'ah* law in force in the Saudi Arabia may be an obstacle and not compatible with the modern world?**

There is no such thing as the Islamic Shari'ah system, which is the Islamic Shari'ah. It is a complete system of life. It is not only a judicial system that is valid for all times and ages. It is a general rule that complies with all aspects of life, both in terms of transactions and investments. But rather in the interests of the Community in general, taking into account the interests of individuals.

It combines between individual capitalism and socialism has achieved balance between them and this does not exist only by Islamic law is an existing system. There is a code from King Abdullah to form judicial scientific committees and to establish the so-called judicial code. They are regular articles similar to the legal journal. They are similar to civil regulations in general, civil laws or personal status. The jurisprudence is determined by specific texts and jurisprudential differences. . This is considered an advanced picture to control the judicial work in general so that the judicial verdicts are stable. The Court of Grievances has also sought the judicial codes and is now widely published on the Internet. These judicial codes benefit litigants and judges in the stability of judicial decisions in a certain way.

6. **Is the codification of Islamic law necessary?**

The Ministry of Justice and the Supreme Council of Idem have completed the codification of the judicial rulings and are now the final review and is a reference to all judges, litigants, lawyers and others in the knowledge of the provisions of Shari'ah in all matters and will be initially indicative. The Hanbali doctrine has the same division and the same method. As mentioned above, the senior scientists and the Ministry of Justice presented them with the subject. I participated in a scientific committee in the same code. The final issue is considered as a martyrdom for the judges and others. This is a fact in the form of regular articles. The text of the article comes in a specific text, in which different doors such as the doors of sale, rent and warranty and other doors are divided in the form of regular doors. Article No. 1 Article No. 2 Approximately three thousand articles This is what I am reminded of personal circumstances and criminal and criminal aspects of 2000 articles, all based on the Hanbali doctrine.

7. **What are the main advantages of codification?**

Advantages: The best advantage of rationing is the stability of work in general, it is a complete system of society and individuals of personalities, civil and governmental figures and others and all are subject to different problems and conflicts are characterized by the succession of people and the inevitable, but the facts one of the requirements of individuals one and rights in one. In the absence of codification, there will be different interpretations of the same principle. The judgement of one court may be inconsistent with the judgement of another court. But codification is inconsistent with ijtihad because it prevents independent reasoning. Codification is unnecessary. Ijtihad is allowed where the provisions of the Qur'an and Hadith are ambiguous. But where they are unambiguous or there is consensus (Ijma) [among scholars], Ijtihad is important because scholars have an obligation to perform it. Codification is like taqlid. There are very few cases but the ad that all cases are equal if we give the public interest to the special and most rarely the standardization will be the best in this area. The speed of the most important points is the slow decisions or delay in them because of the lack of jurisprudence in this clear text leads to the slow issuance of judicial decisions and sentences, the existence of codification controls these decisions and also if there is a clear legalization directly before the lawyer to whom he is asked to advise that the system in this way. The client falling into the violation and opposition to the regime or clear the risks to him and this of the things that I found in many cases provide for the absence of a clear regulation in the Kingdom and consider the risks that the fact that the judge may strive diligence not found in the law.

8. **Do you think there will be any objections to the codification of Shari'ah?**

The verdicts in the era of King Abdul Aziz are still present. It is the magazine of Islamic jurisprudence. It is present, and it has many conditions. Some judges rely on it, of course, the reason for stopping it is the opposition of many scholars. This magazine has stopped the ijtihad. The judges have closed the door of ijtihad. Has a large number of parties or other members of society in general and the change of judges in terms of educational level and diligence. Most of the respondents need reliable references based on which they can rely on existing case law or two or three books as references, although if there is a clear law and regulation on financial transactions, a large crop will be achieved in the so-called justice interest, which is an essential objective of the Ministry of Justice and Justice. On the strength of rapid development and the large number of financial transactions, unlike the former now the number of contracts not named much more than Named. Ownership, financing record, mortgages, investment units, and a large number of contracts, many and varied, need to be devised to achieve the interests of justice and equity, and not to infringe one party on the other or to bypass one of the parties on the other by misuse of power or fraud. These are basic principles stipulated by Shaykh Ibn 'Uthaymeen in the past so that it is based on any contract based on lifting injustice, error and riba and this is the main document in it.

9. **Can you identify any laws or regulations in the Kingdom that are in conflict with Islamic law?**

There is no constitutional court in the Kingdom and the existence of this court is necessary because the regimes go through a number of phases of the first stage of legitimacy and then move on to the Shura Council or the Council of Ministers and then apply to the reality some laws need to filter this filter called "constitutional immunity" and this exists in all the world except Saudi Arabia. Saudi Arabia their way if there is a mistake in a particular system This body supervising the system or responsible for its application to submit its views to the Council and then issue a decision to amend the text of article and others. The Constitutional Court will amend any statutory text regardless of the text because it applies the official constitution of the government in Saudi Arabia and any system that violates this Basic Law sues the Constitutional Court to amend this system in order to produce a decision of the Constitutional Court and thus I achieve the regular session by creating a fair system. Saudi regimes in general have a compromise path and take a lengthy form of establishment, establishment and review in several quarters. I have a system of two main treatment but personal treatment is not public I have a system of judicial and legal pleadings in terms of the courts and the system of the Board of Grievances and the Administrative Court in terms of administrative justice all provide the first or second article that any system contrary to Islamic law and contrary to the Koran and the year is considered false and incorrect Fay The adoption or the text of any of the systems in Saudi Arabia, the court considers them incorrect material.

10. **Do you think SAMA's laws may conflict with some Shari'ah principles?**

The system of the monetary institution may be problematic. There are texts found in sub-organizations and sub-regulations, but they are subject to diligence. The question of ijtihad is broad. If there is diligence in the text, it is considered a matter of reference to the guardian, although the guardian explicitly states that any system, regulation or regulation Contrary to Islamic law or one of these systems invalidate, but as I mentioned earlier the need for a constitutional court is a treatment of any regulation or regulation in violation of the Constitution and thus achieve the main purpose of discipline.

11. **What authority does the Supreme Council of Scholars possess in influencing the enactment and amendment of laws in Saudi Arabia?**

The Council of Senior Scholars only retracted and did not review everything but it retracted its mandate from the Cabinet, but did not legislate the text directly, since it is not a legislative body, but it offers a legitimate consultation and does not change the course of procedures in the Kingdom. A specific decision.

12. **Is the role of the senior scholars consultative? Do you think that the government Saudi Arabia may ignore their recommendations?**

I have never heard of anything

13. Can that be done if it is necessary for the promotion of public interest?

The fundamentals and principles are firm and the foundations of the Saudi people, such as confusion and social cohesion, etc. These are the origin of things that individuals and societies cannot change because they are rooted in the society since the establishment of the Saudi state and it is difficult to stop or change these things in general and I do not think there is anything necessary to change in the basic principles that Saudi Arabia.

14. Are you familiar with the NYC convention?

Yeah

15. Do you think that the current judicial system is committed to the NYC Convention for the recognition and enforcement of judgments issued by foreign and non-Muslim judges and arbitrators?

All arbitral decisions in the Kingdom implement only those decisions that included a violation of legitimacy not implemented by it and have dedicated departments and the observance of two main principles of reciprocity and application of the certificate. The ruling is carried out directly and the non-violation of Islamic law is taken into consideration. This is the main point in it. If there is a part of it, then the rest of the judgment is implemented, such as the principles of benefits and privileges.

16. You referred to another side to consider in this matter?

The side that refuses to consider them. They refuse to implement fully in accordance with the Islamic shari'ah law. The text in which there is a violation of this is taken into account in the arbitration agreements, especially with the parties to provide in the arbitration clause to be in accordance with Islamic law

17. Do you think judgments made by non-Muslims or women can be enforced in Saudi Arabia?

Yes

There are opinions in the Hanbali doctrine that the arbitrator is considered in the place of the judge and therefore does not have to be a woman. The days of King Abdul Aziz are based on a collection of books, all of which were written in the life of the arbitration system in the previous text on Islam and stipulated that the male but the current system did not provide for this

18. **Is it possible for judges to exercise discretion?**

I do not think that this is necessary in case the judiciary fails to enforce many foreign judgments because it was issued by a court or issued by a non-Muslim, but not a previous custom.

19. **By virtue of your job as a judge in the Diwan of Grievances, are you aware of any verse in the Holy *Qur'an* prohibiting the codification of Islamic Shari'ah?**

As far as I know

20. **How do you assess the government's policy on investment in general?**

The general rule for each reaction is the first of the foreign investment, because a negative image in the governmental and supervisory bodies, the income of many foreigners who do not enrich the country nor real investments, but fake investments enter in disguise and they distort the reputation of foreign investment both inside and outside Saudi Arabia. The establishment of controls where there were a lot of foreign investors stopped their licenses and their work because their investments do not have the development of the state is then the process of tensile tightening on the license, and has become a process of investment verification of the CV to investors And that this person is achieving the development of the country and that their investments are real and not fake or cause damage to internal investment, I see now that they are much better than the former where the former there is random.

21. **In general, what are the legal barriers to attracting foreign investors and are we still suffering from administrative bureaucracy?**

Investment obstacles Investors do not enter the Investment Authority in a proper manner or through persons who are not experienced or fully disabled. The foreign investor must approach the experienced lawyers and others to save time and effort.

Judge #2

1. **Do you think that the Saudi justice system is qualified to keep pace with the era and the first flag countries?**

The judicial system in the Kingdom of Saudi Arabia as a whole is very suitable for the requirements of the modern world and achieves what the judiciary is intended to achieve both in the field of development and general development. There are problems and mistakes that are not related to the system itself but to the application of some of its fields and the human side. Does not attach to the system as much as it relates to the administrative and professional development of its employees.

2. **Do you think that the Islamic *Shari'ah* law in force in the Saudi Arabia may be an obstacle and not compatible with the modern world?**

There is no difference between the work of Islamic law and any judicial system anywhere and in any form in the modern world, they are rules and principles that determine the cases of health and corruption, prevention and permitting, impact and conditions, and ethical, professional and objective controls, and so on, (In the substantive aspect), which is contrary to many contemporary judicial systems, such as the prohibition of usury, the facilitator and the conditions of transactions, are not related to the procedural aspect of litigation, nor does it prevent the modern world from being kept up to two things: the first is that he dealt with the existence of these irregularities and how to deal with them, and did not leave them in the legislative vacuum. Second, it is like any objective disparity in the various legislations, so there are many examples in the world. No one can claim that the legislation of the modern world is united, and that there is no difference between them and may vary in one state between its states and regions.

The decisions of King Saud still stand. They are part of the Islamic jurisprudence here. Some judges may rely on them. Of course, many senior scholars oppose the idea of judges exercising wide discretion. They have stopped the ijtihad. Some judges have also closed the door of ijtihad. The difference of opinion is due to training and educational level.

3. **Is the codification of Islamic law necessary?**

Any formal or informal codification is useful and developed for the judicial field, whether by rewriting the provisions of Islamic law in the manner of the law or in any other way, or by

reconsidering the existing decisions, but on the one hand it is respected and qualified to do so, because In the field of justice, in which it is concerned about its attachment to the rights of the people.

4. **What are the benefits and what are its disadvantages?**

Codification has several advantages:

1- Developing judicial skill by presenting it in different ways or ways.

2 - facilitate dealing with the judicial system for those who have no knowledge other than this method.

3 - Clarifying the truth of the opinion associated with Islamic law for all who wish without being subject to misuse of indirect sources.

4 - Adjust the judicial process by reducing the area of discretion and discretion of the judge in the not provided.

Regarding the disadvantages:

1. Preventing judicial development that is parallel to the development of transactions and social change.

2. The judiciary shall be subject to the authority of a non-jurist and not of the Shari'a, since by adopting the method of codification, it shall be subject to the methods of legislation and its assemblies, whose members have no knowledge of Shari'a or law.

3 - the possibility of amending the provisions stipulated therein by sovereign political decisions that remove the judiciary from the status of independence from the executive authority.

5. **Are arbitral awards enforceable in Saudi courts if they are issued by non-Muslim arbitrators or female arbitrators?**

Yes, there is no problem with this, but the review is due to a defect in the arbitrators regarding their safety, or because there is a defect in the arbitral decision itself in violation of the public order or the provisions of the Shari'ah.

6. **Are there any legal provisions from any of the legitimate sources that prohibit the codification of the Shari'ahh? What are the sources?**

I do not know about it. But I think the opposite, which is generally both when the inhibitor of the rationing and discretionary issue of discretion is related to the interest, and is not a matter of peremptory and unbearable debate.

7. **Do you think judgments made by non-Muslims or women can be enforced in Saudi Arabia?**

I do not think so, but I think the opposite is very clear.

8. **Does the Shari'ah prohibit non-Muslims from settling disputes involving Muslims?**

No. But it prevents jurists from appointing a non-Muslim judge in the Muslim state, because the judiciary is an act of sovereignty. The Muslim is required to prosecute according to the system of the state, and the non-Muslim is supposed not to rule by Islamic law because he is not Muslim. But you must know that the Shari'a cannot be overridden. It can be applied differently or reinterpreted in line with a set of rules and principles

Legal Scholar #2

1. **What do you think about the Vision 2030 programme?**

It has a great ambition and blessed plans that return to the country and its projects with development, blessing, service and well-being.

2. **How much authority does the Council of Senior Scholars have in influencing the enactment or amendment of a new law in the Kingdom of Saudi Arabia?**

They have no power to do so, and the functions of the Supreme Council of Jurists, according to their system, are not related to the judicial sphere, nor to the legislation, except as required by the king, for any consideration he sees. The government is not merely a decision by the senior scientists.

3. **Do you think that the government can ignore the opinion of the Council of Senior Scholars?**

They can do this, and indeed, the reality is very much. In their opinion, it is not obligatory for governmental authority, it is merely a view to be used by it, and the authority can take it or leave it. If it is good for the Kingdom, then yes. But that cannot happen with foreign investment. Foreign investment has been adversely affected by conservative interpretations of the Qu'ran. So economic liberalisation policies cannot be effective with the same conservative interpretations holding sway.

4. **Do you think that the regulations of SAMA violate the principles of Islamic law?**

I did not review the regulations of that institution so that I could give my opinion.

5. **Do you think that government overlook the principles of the Shari'ah in the interest of the public?**

If the real possibility of application and the possibility of legislation is not a problem that the government can do so, it is the authority, and the theoretical judgment without regard to reality, governments such as individuals to commit prohibitions or leave duties to the existence of necessity, ruling on prohibition, and general necessity is first to rule. But if my action is contrary to Shari'ah law but will improve the commercial environment and the economy of the country, the rigour of the

Shari'ah will be disadvantageous. That is why the Shari'ah is not codified. It gives judges the flexibility to consider such things. The Islamic Shari'ah is a complete system of life. It is a judicial system that is valid for all times and ages. Its rules apply to all transactions and investments and prioritise the interests of the community in general. The rules protect individual interests. What is important is fairness and justice. These are the same objectives of all important international conventions

Arbitrator #1

1. **Have you heard about the vision of the Custodian of the Two Holy Mosques?**

The objectives of Vision 2030 must be defined to answer the question.

2. **Do you think that the Saudi justice system is qualified to keep pace with the era and the first flag countries?**

The judicial system is appropriate, but there is a problem with the disparity of judicial rulings and the qualification of the judge to hear commercial cases.

3. **Do you think that the Islamic *Shari'ah* law in force in the Saudi Arabia may be an obstacle and not compatible with the modern world?**

Yes, because Shari'ah is valid for all times and places, and is the origin of human beings, but the weakness of the legitimate background of jurists has led to their ambiguity for them and the foreign investor.

4. **Is the codification of Islamic necessary?**

Yes, it would be useful to reduce the multiplicity of jurisprudence in financial transactions.

5. **What are the advantages and disadvantages of codification?**

Advantages: Unification of jurisprudence in matters of dispute.

Disadvantages: the entry of the administrative authority to change jurisprudence jurisprudence.

6. **Do you think that the current judicial system is committed to the NYC Convention for the recognition and enforcement of judgments issued by foreign and non-Muslim judges and arbitrators?**

It is fully committed, unless the arbitral award violates Islamic law or local regulations.

7. **Do you think that it is time to repeal the decision of the Saudi government to stop government agencies from submitting disputes to international arbitration without prior approval by the Council of Ministers?**

The administrative contracts have a specificity that has different advantages than ordinary contracts for the public interest of the community. Therefore, for the administration of the courts (the Board of Grievances) is different from the ordinary commercial judiciary.

8. **Do you see the importance of allowing the General Authority for Investment to resort to arbitration to resolve administrative disputes with foreign investors?**

No, for the reasons just given

9. **Are arbitral awards enforceable in Saudi courts if they are rendered by non-Muslim arbitrators or female arbitrators?**

Yes.

10. **How do you assess the new arbitration system?**

Better than the previous system but needs more detail in the procedures.

11. **How do you assess the work of the Saudi Commercial Arbitration Center?**

I do not see any experience in it, but through his visit it is a distinguished center of regulations, regulations and facilities. And the most important proposals to be marketed better, many traders do not know about.

Arbitrator #2

1. **What do you think about the Vision 2030 progamme?**

   It’s a step forward from the government of Saudi Arabia to diversify the economy.

2. **Are there any legal provisions that prohibit the codification of the Shari’ahh?**

Yes, there is fatwa for the senior scholars.

3. **Is there any document of Islamic law that prevents women from being arbitrators?**

Arbitration is a judiciary, and the majority of jurists are not women.

4. **Does the Shari’ah prohibit non-Muslims from settling disputes involving Muslims?**

Friendly settlement like a reconciliation, I do not know who to prevent it. Arbitration is like a judiciary, and the judge must be a Muslim.

5. **How much authority does the Council of Senior Scholars have in influencing the enactment or amendment of laws in the Kingdom of Saudi Arabia?**

Their name: the senior scholars, not the Council of Senior Scholars.

They have no authority whatsoever.

6. **Do you think that the government can overlook the opinion of the Senior Scholars?**

Yes, because the decisions of the Senior Scholars are instructive.

7. **Do you think that some regulations (SAMA) are contrary to Islamic law and principles?**

In terms of regulations, no. But there are some acts that are contrary to the Shari'a, rather than regulations. Judicial and administrative authorities may always interpret the Shari'ah in a different light if they want to promote those policies that encourage investment

8. **Do you think that the government can overlook the principles of the Shari'a in the interest of the public?**

Yes, it is part of the policy if it sees it as the trusted scholars do.

Member of the Ulama

1. **How should the government of the Custodian of the Two Holy Mosques stimulate more foreign investors to achieve the vision?**

Facilitate the obstacles of procedures for obtaining permits and allowing the investor to innovate within the limits of the country's system. Give the investor a safer place in the event of a dispute such as to refuse to resort to arbitration even if one of the parties.

2. **Do you think the Saudi government should encourage more foreign direct investment to achieve the goal of Vision 2030? why?**

Yes. Because most of the experiences in other countries proved that investors are competing for the best if they have the opportunity.

3. **Do you think that the Saudi justice system is qualified to keep pace with the era and the first flag countries?**

- Of course. The judicial system as in other countries and what we see now the continuous development and address some of the obstacles, but the new vision to establish specialized arbitration centers give more confidence to judicial development. The Kingdom is based on Shari'ahh and Shari'ah depends on the status of stability and flexibility on the fixed evidence and the change is governed by objective judgments, and the procedures that are in the best procedures are in flexible legislations

4. **Do you think that the Shari'ah system in place is suitable for the modern world? Why?**

The Shari'ahh system is not an obstacle, and most of it is compatible with international law, for example in contracts and in the view of the Shari'ahh (Contract of the Law of Contractors), which is part of international law and many more.

5. Do you think it should be suitable for use?

Yes, even for non-Muslims

6. Is the codification of Islamic law necessary?

Yes, it leaves no room for different application.

7. **What are the benefits and what are its disadvantages?**

- Shortens a lot of time trying to make judgments to apply.

- I do not think there is anything wrong if it does not agree with the Shari'ahh and is not contradictory with it.

8. **Do you think that the current judicial system is committed to the NYC Convention for the recognition and enforcement of judgments issued by foreign and non-Muslim judges and arbitrators?**

- Signed the Convention and committed to the provisions of the same as other countries.

9. **Do you think that it is time to repeal the decision of the Saudi government to stop government agencies from submitting disputes to international arbitration without prior approval by the Council of Ministers?**

- Yes and we suggest that

Journalist

1. **What do you think about the Vision 2030 programme?**

Saudi Vision 2030 represents new hope for Saudis to move them to advanced levels in education, leisure, industry and the services economy. All the idle wealth will be invested. There is a thirst for entertainment and science for the Saudis, and for tourists from all over the world.

2. Are there any legal provisions from any of the legitimate sources that prohibit the codification of the Shari'ahh? What are the sources?

- I do not remember anything like that.

3. Is there any document of Islamic law that prevents women from being arbitrators?

- I did not search legitimately for that.

4. Does the Shari'ah prohibit non-Muslims to settle disputes between Muslims?

- You need a legitimate search and did not touch it.

5. Does the Shari'ah prohibit non-Muslims from settling disputes between non-Muslim parties within the Islamic lands?

- As previously said you need a search.

6. Do you think that the government authority can bypass or reject the opinion of the Council of Senior Scholars if it is necessary for the public interest?

- I do not remember reading or researching about it.

Legal Scholar #3

1. **How do you see the success of the vision in light of the development of the Saudi legal regimes?**

Different facilities and benefits should be offered to the investors targeted by the Saudi government so that the climate becomes attractive for investment such as tax exemption at the beginning of continuous activity within the Kingdom

2. **Do you think the Saudi government should encourage more foreign direct investment to achieve the goal of Vision 2030? why?**

Yes, there should be encouragement because it will benefit and benefit the Saudi national economy while encouraging the export sector of the Kingdom to all local goods and products

3. **Do you think that the current judicial system in the Kingdom is appropriate to the requirements of the modern world?**

Yes, suitable and good and needs to accelerate the process of activating and developing specialized courts such as labor and traffic and the abolition of all judicial and quasi-judicial bodies and give their final work to the courts and specialized departments. Yes, it is appropriate because Islamic law is valid and applicable at all times and places. I believe that the Shari'ah is good and compatible with the laws of most countries. Some changes are needed in arbitration such as fixing the dates for the adjudication of disputes at certain times in order to ensure rapid resolution and conform with practices in many countries. These are compatible with the Shari'ah. Rapid resolution enhances justice, which is good for society.

4. **Do you think it is suitable for use?**

Yes, it must be kept in line with the latest developments of the current era

5. **Is the codification of Islamic law necessary?**

Yes, provided that the application is appropriate to the contemporary dilemmas of dilemmas and issues and modern developments that did not exist in the past.

6. What are the benefits and what are its disadvantages?

The advantages are to establish appropriate command bases that can be applied to each new situation or event

Its disadvantages are inaccuracies in the description of each incident and incident in a clear manner simplifies the order of the system to apply its provisions to the registration and description specified by the competent authority.

7. Do you think that the current judicial system is committed to the NYC Convention for the recognition and enforcement of judgments issued by foreign and non-Muslim judges and arbitrators?

The Kingdom is a country that is open to the world, especially in the economic sphere and is a member of many international and regional organizations. Since the wise leadership was keen to provide and create an environment conducive to commercial activities and enhancing the investment environment, Several agreements and international treaties on investment, including the implementation of the provisions issued by the League of Arab States in 1952 as well as the New York Convention for the implementation of the provisions of foreign arbitrators in 1958, which was joined by the Kingdom in 1994 and the inclusion of that denies Foreign judgments within the Kingdom as internationally recognized.

8. Do you think that it is time to repeal the decision of the Saudi government to stop government agencies from submitting disputes to international arbitration without prior approval by the Council of Ministers?

I do not think that the government will repeal the Cabinet Resolution No. 58 dated 1383. The decision will not exclude arbitration in disputes of administrative contracts without the rest of the other administrative disputes, especially concession contracts that include vital interests of the state.

Legal Director (Investor)

1- What is the reason behind choosing the kingdom of Saudi Arabia to invest?

We have started out investment in Saudi Arabia from 22 years, I personally came here 4 years ago. With the globalization Saudi Arabia become open market and it has a lot of business opportunities for investors therefore we have chosen Saudi to extend our company.

2- How would you describe your experience investing in Saudi Arabia? is it worth doing? And why?

I think yes. It worth it because its lucrative and the government efficiency is improving so much

3- Did you have any concerns before you decided to invest in Saudi Arabia? What are those concerns?

Yes before the company decided to invest in Saudi Arabia, we expected lots of challenges and we have had to come across new cultures barriers and differences.

4- Do these concerns still exists after you have started investing in Saudi Arabia? and how did you overcome them?

No After the improvement of the governmental bodies, it become compatible with the international standards. There is a huge shift and improvement and I like the adea of the new vision 2030

5- How would you describe the administrative procedure in the country?

Before it was a nightmare here with the complexity of the administrative procedure but new its much better and huge development.

6- How would you describe the administrative procedures in the country? did you sever from bureaucracy?

7- How do you describe the legal system in Saudi Arabia?

The legal system here is not comparable. There is no contract law, we need a contract law to be the base of businesses and there must be codification in order to anticipate the judgments.

8- Have you ever faced any problems with the judicial system in Saudi Arabia?

Yes, the most annoying thing is that the delay of cases and if the judge does not show up the trail get postponed for 3 to 6 months and that could cause a delay of finishing the cases

9- What is your preferable mechanism of dispute resolutions if dispute arises? Why?

I prefer arbitration, because its faster and more efficient and flexible.

10- Have you ever settled your disputes through arbitration in Saudi Arabia? How do you describe the experience?

No, there is a new arbitration center here in Saudi but it is quite new and need a time to be appropriate and ready to handle cases.

11- Do you still prefer to settle any disputes through arbitration in Saudi Arabia? Why?

I always prefer to resort to arbitration in Dubai because I do not like to have a Saudi's party in the dispute and we settle the dispute in Saudi as well

12 What are the main differences between arbitration in Saudi Arabia and elsewhere?

13- Have you faced any difficulties enforcing any arbitration awards in the Saudi's courts?

No but I think we are forbidden to include an arbitration clause in our contracts with the governmental bodies, due to this restriction the government is not encouraging more investors to the country.

14- What impact has the culture had in your performance in Saudi Arabia?

We have not faced any problems with the cultures here. At the first beginning it had been stranges when shops close at the time of prayers but in terms of people Saudis are welcoming society and the youth of them are very good in technology and open to the other part of the world and as far as I know that the fast majority of the Saudis population are youth.

#Legal Advisor.

1- **Have you heard about the Saudi New Vision 2030? What do you think about it?**

Yes. I think it sets a great example of a national initiative, which, regardless whether it delivers or not, does present a nationally shared will to transform the economy across all sectors and classes.

2- **Do you have a clear understanding of the concept of FDI?**

Yes

3- **What do you think the Saudi's Government's approach to FDI should be in general?**

I think the Saudi government's approach to FDI should prioritise the domestic market and local capacity initially, before liberalizing FDI controls completely. The Saudi market is somewhat nascent across all sectors. Uncontrolled FDI will not allow the market to develop a true domestic capacity however way we measure that capacity to be.

4- **How do you think the Saudi Government's should engage with FDI if they are to achieve their goal of Vision 2030?**

The Saudi government should prioritize sectors needed for basic public services, addressing shortages in the domestic market and domestic delivery in such services, while enforcing elements of localization and local capacity building.

5- **Do you think the Saudi's government should encourage more FDI in order to achieve the goal of Vision 2030? Why?**

More FDI is not necessarily needed to achieve Vision 2030. More FDI, is in fact, only one way Vision 2030 may be achieved. There can be many number of ways or theories on how the Vision may be achieved. It is a question of choice and analyses, rather than one of fact.

1- **Do you think the current legal system is suitable for the modern world and helps the government to toward the success of the new vision? And why**?

Suitability for the modern world and achieving the Vision are not neccessaeily intrinsic, or mutually or necessarily accompanying. I think the current legal system, like any legal

system, may have elements that may be deemed different, rather than unsuitable to the modern world. Suitability, is not necessarily what is sought, but one may rather have a different ideal on how a legal system could be. Overall, one could say that the legal system in Saudi Arabia lacks sufficient input from the domestic and international market allowing it to comprehend market realities in some instances. This, however, is not always the case.

2- **Do you think sharia law is appropriate for the modern world?**

I think Shari'a law is the most appropriate system for a modern world.

3- **Do you think it should be made appropriate for use? How?**

I think Shari'a is already appropriate for use. However, one could say, that, in the context of an international globl financial and economic system that is based on certain tenets and practices, that, Shari'a is not suitable, for such a system, through fault of the fact that priorities differ. It is not so much a fault of Shari'a that deems it unsuitable for today's world, but rather, the fault of an international system that prioritises unequal opportunities and wealth distribution.

4- **Would the codification of the Islamic law in commercial be a useful thing**?

It would indeed would be useful, provided that it remains open to evolve, and "alive", meaning, constantly open to change and adaptation.

5- **What advantages would codification bring?**

Codification would essentially provide two main benefits. First, it provides a good level of legal predictability for all parties and stakeholders. Secondly, codification, it is hoped, would provide some truer reflection of the realities of one's time, as it should take into account current practice.

6- **Is not it better to codify the Sharia to avoid uncertainty and ambiguity and rigid interpretations?**

Not necessarily. Codification, in principle, provides certainty and clear interpretations. Deeming this assumption necessary, however, can show a level of ignorance of Islamic jurisprudence. Islamic jurisprudence, could be deemed to have achieved a great level of "self-codification". Many scholars and jurists, throughout Islamic history, have already written volumes, covering different scenarios, derived from real scenarios, and, delivering judgments and rulings on such cases. In essence, this is a form of codification.

7- What do you think the disadvantages of codification might be?

There are no disadvantages to codification itself. The only disadvantages are where codification is deemed final, and where it defeats "ijtihad" and Islamic jurisprudence development.

8- Do you think a secular commercial system could help the economy of the country and can be used in Saudi Arabia? why?

Only an Islamic commercial system will help the economy of Saudi Arabia. However, a secular commercial system derived from codified Shari'a will absolutely help Saud Arabia. As mentioned earlier, codification provides a good level of legal predictability that is better for the administration of justice overall, and the commercial and investment climate.

9- **How about if the secular laws do not contradict the sharia principles**?

See answer above

10- How do you think Saudi Arabia is Arbitration friendly country?

???

11- Do you think that it is essential, in order to achieve the goals from the vision 2030, for the government of Saudi Arabia to revoke the Minister Council decision No. 58 dated 1383H to prevent any governmental body from resorting to arbitration to settle their dispute without the full agreement from the council?

NO. In fact, the stated law above is pretty revolutionary and ahead of its time. While it may have mainly been concerned with negative outcomes of any such arbitration, it has foreseen the potential of abusing arbitration by private corporations against governments and public entities. This is evident in the global movement currently seen, and increased awareness, on the dangers of state-investor dispute settlement clauses found in different international agreements (See for example TTIP).

12- Do you think the Saudi Arabian General Investment Authority (SAGIA) should be given an exemption to resort to arbitration with Investors if they have any administrative disputes?

NO.

13- How do you think Saudi Arabia is sticking to the New York Convention 1958 in Recognition and Enforcement of the Foreign Arbitral Award?

In my limited understanding, arbitral awards are enforced reciprocally.

14- Are the arbitration awards enforceable in the Saudis courts if issued by non-Muslim

arbitrator or a woman?

In my uninformed view, they are, provided a right in claim is demonstrated.

1- **Is there any sharia clause from any of sharia sources forbid the codification of the sharia? What is the sources?**

No.

2- **Is there anything from the Sharia'a forbidding a woman from being an arbitrator?**

Only in the case of a judge, or, mandatory arbitrator

3- **Is it forbidden by the Sharia'a for Non-Muslim to settle disputes among Muslims?**

Only in the case of a judge, or, mandatory arbitrator

4- **Is it forbidden by the Sharia'a for Non-Muslim to settle disputes between non-Muslim parties within the Islamic territories?**

Only in the case of a judge, or, mandatory arbitrator

1- **How much power does the Council of Senior Ulema have in enacting a new act, regulation or law in Saudi Arabia?**

In theory, great power.

2- **Do you think the governmental authority can override or dismiss the opinion of the Council of Senior Ulema if it is necessary for the public interest?**

Yes. In theory, an opinion of the Council will have to be fully informed in the public interest and fully accounting of it.

3- **Do you think the authority has dismissed the Council in the Saudi Arabian Monetary Authority's (SAMA) regulations?**

In theory, banks and interest regulation perhaps.

4- **How do you think some of (SAMA)'s regulations contradict with Sharia and Islamic principles?**

4- **Do you think the governmental authority can override some of sharia principle in case**

of necessity of the society?

No. suspending or misapplying in certain cases, in fact, is in itself regulated (Example: Umar misapplying the punishment of theft during famine). Such "overriding" is only a false view of how Shari'a works. Shari'a cannot be overridden. It can be misapplied or applied differently, or reinterpreted, in line with a set of rules and principles.

6**- Do not you think the second Islamic Imam had overridden the Sharia principles when he did not apply the Hudud of theft and burglary in that time because of famine (public interest and necessity)?**

See above. However, NO! Umar had not overridden the Shari'a principles. Umar's view could be seen as an interpretation on the punishment and hudud, in being an "upper limit" to such acts, rather than the automatic punishment. This is evident from many sources looking at how the punishment can apply, and to wheat amounts and so on.

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