

CHAPTER 8

OVERVIEW OF UNCITRAL TEXTS ON INTERNATIONAL COMMERCIAL ARBITRATION IN ISLAMIC LAW INFLUENCED JURISDICTIONS (ILIJ)

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I INTRODUCTION

One of the most successful international conventions in history is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, herein referred to as the 'New York Convention', which has 156 States party to the Convention.¹ To foster harmonization of the legislative framework of the procedure of commercial arbitration, the United Nations Commission on International Trade Law ('UNCITRAL') enacted the 'Model Law on International Commercial Arbitration' in 1985, which has been amended in 2006, herein referred to as the 'Model Law'.

The introduction of international commercial arbitration in the Islamic world was 'initially perceived negatively by many Arab States, which viewed arbitration proceedings as unfairly biased towards colonial powers and their companies'.² The majority of these disputes were a result of concession agreements, which granted

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1 'Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)' (UNCITRAL) <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 16 August 2015.

2 Cherine Foty & Lerins Jobard Chemla Avocats "The Evolution of Arbitration in the Arab World" <<http://kluwerarbitrationblog.com/blog/2015/07/01/the-evolution-of-arbitration-in-the-arab-world>> accessed 21 August 2015.

foreign oil companies largely unrestrained access to and control over the State's supplies for 50 years.³ In the *Abu Dhabi* arbitration case,⁴ it was held that the Islamic law "did not contain any principles which would be sufficient" to interpret the contract and hence English laws were applied as principles of international law. Other cases⁵ brought to international arbitral tribunals produced similar results. The *Aramco case* in particular involved Saudi Arabia, dominated by Ḥanbalī jurisprudence, which had a wealth of general rules governing contracts and concessions. The court could have reverted the matter to specialists, who would then be able to ascertain the position of Shari'ah regarding the terms in the case. However, the court refused to take such a step alleging that the Ḥanbalī jurisprudence was inadequate to deal with the matter and supplemented the law with other legal sources.⁶ The arbitral tribunal held that it was necessary to complement Saudi law with 'principles of international law and the prevailing customs in the oil industry.'⁷ Such arbitral findings fuelled the perception among many of the Islamic view to perceive international arbitration as being a "Western" system that is unfair, and this perception has persisted even to the present day.⁸

In the 1970s to early 1980s, many OPEC countries⁹ sought to alter their contractual obligations as many¹⁰ developing States felt that they could not abide by a legal system whose creation they had not participated in and whose values were seen as inconsistent with their own cultural and legal traditions.¹¹ This period saw

3 Charles N. Brower and Jeremy K. Sharpe "International Arbitration and the Islamic World: The Third Phase" (2003) 97 *The American Journal of International Law* 643 at 644.

4 *Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi* (1952) 1 INT'L. & COMP. L.Q. 247.

5 *Saudi Arabia v. Arabian Am. Oil Co. (ARAMCO)* 27 ILR 117,169 (1963); *Ruler of Qatar v. Int'l Marine Oil Co.* 20 ILR 534,545 (1957).

6 Essam A Alsheikh "Distinction between the concepts of Mediation, Conciliation, Sulh and Arbitration in Shari'ah" (2011) 25 *Arab Quarterly* 367 at 393.

7 *Ibid.*

8 Brower, above n 3, at 644.

9 The OPEC nations are: Algeria, Angola, Ecuador, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, UAE, and Venezuela. They ratified the New York Convention in; Algeria (1989), Ecuador (1962), Iran (2001), Kuwait (1978), Nigeria (1970), Qatar (2002), Saudi Arabia (1994), UAE (2006), Venezuela (1995). Only Angola, Iraq and Libya have yet to ratify the New York Convention.

10 While Algeria participated in the drafting of the Model Law (331st Meeting), Mr Boubazine of Algeria associated his delegation with those which opposed the inclusion of the UNCITRAL Rule in the Model Law. Iran was a participant as well in the drafting of the UNCITRAL Model Laws as an observer.

11 Brower, above n 3, at 646.

States repudiate contractual obligations, renegotiate or nationalise oil concessions and rejecting arbitration invoked by the Western parties.

From the early 1980s onwards, it became more common for ILIJ,¹² particularly those from the Middle East, to become capital exporters and have increasingly joined and even promote international arbitration.¹³ This period saw more than two thirds of these States becoming party to the New York Convention by 2003. Prior to the signing of the New York Convention, many of these States did not have local legislation governing the use of arbitration and parties were forced to rely on general principles of Islamic law.¹⁴ Furthermore, most of these States lacked legislation enabling parties to enforce agreements to arbitrate by compelling arbitration and staying duplicative judicial proceedings.¹⁵ In fact, the laws of many Islamic States required a petitioner to prove the finality of a foreign arbitral award, usually requiring an enforcement order of a court of the country, where the arbitration award was made.¹⁶ To date, Kuwait¹⁷ still requires proof that the foreign award is final under the laws of the State in which it was given, among four other conditions.¹⁸ This would mean that the party seeking enforcement must prove that at the time of filing for enforcement, the time provided for an appeal in the courts of the country in which the arbitration took place, has lapsed.¹⁹ Further, Kuwait also has an additional condition that the award must be capable of enforcement under the laws

12 Islamic Law Influenced Jurisdictions (ILIJ) refers to States where Shari'ah law does not represent a significant part of the legal system but has significant influence on the interpretation and/or development of the law of the State.

13 Brower, above n 3, at 646.

14 Brower, above n 3, at 648.

15 Ibid.

16 Ibid.

17 Article 200 of the Code of Civil and Commercial Procedure (CCCP) Issued by Law No.4 of 1980 and see Court of Cassation, Appeal No 39/87 Civil, Hearing 22; Also look at Article 5(1) of the Arab League Convention which requires 'An official copy of the foreign judgment, authenticated by the competent authorities in the place of issue of the judgment duly endorsed with an endorsement order made by the court of the issuing State'.

18 Rashid Hamad Al Anezi "Enforcement of Foreign Arbitral Awards in Kuwait" (2014) 1 BCDR International Arbitration Review 85 at 89; also Look at Article 5(3) of the Arab League Convention, which requires an official certificate by the competent authorities evidencing that the judgment is final and enforceable.

19 Anezi, above n 18, at 89.

of the State where it was made.²⁰ This would require the foreign arbitral award to have been 'sanctioned by an enforcement order, that the award has been properly notified and the two parties have been properly summoned to the judicial proceedings.'²¹

In July 2015, Bahrain ratified and issued a new arbitration law which in its Article 1 (1) goes as far as to say that "[T]he provisions of the UNCITRAL Model Law on International Commercial Arbitration Act attached to this law shall apply to all arbitration whatever the nature of the legal relationship of the dispute herewith, if this arbitration takes place in the Kingdom of Bahrain or abroad and that the two parties agreed to comply with the provisions of the attached law" and thus replacing the International Commercial Arbitration Act.²²

In Qatar and Oman, there are no statutory laws or regulations relating to the enforcement of foreign arbitral awards and as a result 'a retrial of the dispute has to be undergone prior to enforcing a foreign arbitral award.'²³ National courts often subjected foreign arbitral awards to the same level of scrutiny, when examining domestic arbitral awards.²⁴

It was also common for foreign arbitral awards to be refused enforcement on the grounds of domestic public policy, which usually included precepts of Islamic law.²⁵ While public policy is a ground for rejecting enforcement under the New York Convention, international public policy rather than domestic public policy is usually applied in international arbitration.²⁶ Another significant development by the States is the designation of a single court to hear annulment proceedings.²⁷ While this does

20 Husain M Al-Baharna "International Commercial Arbitration in Perspective" (1988) 3 Arab Law Quarterly 3 at 13.

21 Samir Saleh "The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East" (1985) 1 Arab Law Quarterly 19 at 23.

22 Bahrain News Agency "King Ratifies Arbitration Law" (2015) <www.bna.bh/portal/en/news/676657> accessed 21 August 2015.

23 Saad Badah "The Enforcement of Foreign Arbitral Awards in the GCC Countries: Focus on Kuwait" (2014) 3 International Law Research 24 at 26.

24 Brower, above n 3, at 648.

25 Algeria, Djibouti, Lebanon and Tunisia apply Shari'ah law and have explicitly incorporated the definition of public policy as international public policy in their international arbitral laws.

26 Brower, above n 3, at 649.

27 In Egypt, only the Cairo Court of Appeal has jurisdiction to hear petitions to set aside international arbitral awards. This has remained so even after the revolution in 2011 as confirmed in the Supreme Constitutional Court, Case No. 47 of the judicial year 31 "Conflicts", Session of 15 January 2012.

not prevent courts from interfering with foreign arbitral awards, it fosters the development of greater expertise and helps to ensure reciprocally supportive relationship between national courts and international arbitral tribunals.²⁸

The UNCITRAL Model Law on International Commercial Arbitration was drafted with inputs from arbitration experts representing legal cultures from around the world (including civil, common law and Islamic Law traditions). Islamic States basing their arbitration laws on the Model Law include Bahrain, Iran, Jordan, Oman, Tunisia, Turkey, Zambia, and Egypt. In 2005, Qatar introduced new arbitration laws considerably based on the Model Law. However, it only applies where the Qatar Financial Centre (QFC) is chosen as the seat of arbitration.²⁹ While the new arbitration laws introduced in 2005 only apply to the QFC, Qatar is currently in the process of updating and modifying its national laws regarding international commercial arbitration.

Some States that have based their International Arbitration Laws on foreign jurisdictions include Lebanon which adopted the French Law of Arbitration 1981 and Algeria that derived its 1993 arbitration law from a combination of French Arbitration Law and Swiss Private International Law.

In Iraq, the Civil Procedure Code applies to any arbitration regardless of the nationalities of the parties.³⁰ The Iraqi courts have in the past refused to enforce "foreign arbitral agreements" which has resulted in some seeking to enforce the foreign arbitral awards as foreign judgments.³¹ The Iraqi 1928 Enforcement of Foreign Judgment Act only enforces foreign awards/judgments from certain countries and allows Iraqi courts to refuse enforcement on "Public Order" grounds. In 2010, Iraq began the process of developing a draft arbitration law to replace the CPC. However, to date, the draft law has yet to replace the CPC, largely due to

Other Nations include Bahrain's Supreme Civil Appeals Court and Djibouti's Commission of Arbitration Appeals.

28 Brower, above n 3, at 649.

29 'Qatar' (Norton Rose Fulbright 2008) <www.nortonrosefulbright.com/files/qatar-25751.pdf> accessed 12 April 2015, 6.

30 N. Hansen Calamita; Adam Al-Sarraf "International Commercial Arbitration in Iraq: Commercial Law Reform in the Face of Violence" (2015) 32 *Journal of International Arbitration* 37 at 39.

31 Calamita, above n 30, at 49.

political instability.³² In 2011, a court indicated its willingness to affirm the enforceability of foreign arbitral awards by revisiting its longstanding interpretation of the CPC.³³

As for Kuwait, the arbitration legislative framework contained within the 1980 Code of Civil and Commercial Procedures treats foreign arbitral awards the same as foreign judgments and hence must not contradict a ruling in Kuwait and cannot be contrary to "public order" or "good morals". Such regulation of arbitration and foreign arbitral awards tend to stifle international investments as most commercial activities in these States often involve state-owned enterprises and investors are hesitant to engage in projects unprotected by foreign arbitral agreements.³⁴

II ARBITRATION AND SHARI'AH LAW (ISLAMIC LAW)

Arbitration has had a long history in the Islamic world (*tahkim*).³⁵ In fact, shortly after the founding of Islam, the Treaty of Medina of 662 A.D. called for the use of arbitration by the Prophet Muhammad and it was also used by the Prophet to resolve conflicts with the tribe of Banu Qurayza.³⁶ Arbitration has been the way to resolve major conflicts within the Gulf region long before it was accepted in modern countries.³⁷

Shari'ah law is based upon 'the attraction of interests and prevention of harm to human beings.'³⁸ From this perspective, the use of arbitration should be encouraged since it can end a conflict between the parties quickly and at minimal costs.³⁹ In fact, it has been provided for and recognised by 'four sources of the Shari'ah, the Qur'an, the Sunnah (Prophetic tradition), *ijma* (consensus of opinion) and *qiya* (reasoning by

32 Calamita, above n 30, at 44.

33 *Iraqi Ministry of Finance v Fincantieri-Cantieri Navali Italiani S.P.A* case. The court held that Iraqi law was outdated and relied upon the New York Convention and the UNCITRAL Model Laws in coming to its decision. Note also that under Article 260 of the Arbitration Law, an arbitrator who has an acceptable excuse may resign yet no definition of what is an acceptable excuse is provided.

34 Brower, above n 3, at 652.

35 Faisal Kutty "The Shari'a Law Factor in International Commercial Arbitration" (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 565 at 589.

36 Brower, above n 3, at 643.

37 Alsheikh, above n 6, at 394.

38 Kutty, above n 35, at 566.

39 Alsheikh, above n 6, at 368.

analogy).⁴⁰ However, while arbitration is acknowledged by Islamic Law, the rules and conditions of arbitration differs between Islamic Schools of jurisprudence.⁴¹ The legality of arbitration under Shari'ah law could be said to be arising from a specific verse⁴² in the Qur'an in which it was commanded that a husband and wife should resolve problems through arbitration.⁴³ Arbitration in Shari'ah is largely similar to international commercial arbitration and it also has concepts of conciliation (*Sulh*). Traditional Islamic arbitration requires the appointment of a third party, is binding without intervention of the court and can be used to address both existing and prospective disputes.⁴⁴ Hence, it is said that through the way of *qiyas* (reasoning by analogy), arbitration is permitted.

Shari'ah principles encourages conciliation between disputing parties and one of its traditional methods of dispute settlement is the *Sulh*, which is essentially a binding contract between two parties to agree on resolving their dispute by giving up some of their respective rights.⁴⁵ Hence, the ILIJ States might be better equipped to deal with the concept of alternative remedies than most common law countries due to the influence of Shari'ah principles and the preference for alternative dispute settlement methods within the country. The influence of Shari'ah law is particularly conducive to the introduction of the obligation of the buyer to mitigate the seller's loss in the event of lawful rescission as Shari'ah principles promote the idea of fairness in contractual dealing and intends risks in Islamic finance to be shared by both parties.⁴⁶

40 Alsheikh, above n 6, at 368.

41 Alsheikh, above n 6, at 368.

42 Qur'an verse 4:35 where it is said "If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things". Translation obtained from <www.noblequran.com/translation/> accessed 15 April 2015.

43 Ibid, Islamic Arbitration is known as *Tahkim*.

44 Aseel Al-Ramahi "Islamic Law and Law of the Muslim World" (2008) LSE Law, Society and Economy Working Papers 12/2008, New York Law School, 12 <http://eprints.lse.ac.uk/24598/1/WPS2008-12_Al-Ramahi.pdf> accessed 15 April 2015.

45 Al-Ramahi, above n 44, at 2.

46 Aisha Nadar "Islamic Finance and Dispute Resolution" (2009) 23 Arab Law Quarterly 1 at 13.

The four main jurisprudence schools Ḥanafī,⁴⁷ Mālikī,⁴⁸ Shāfi'ī⁴⁹ and Ḥanbalī⁵⁰ and some from the Shī'a⁵¹ jurisprudence hold the opinion that arbitration is fully permissible, whether or not there is a judge in the city.⁵² Yet, some jurists from the Shāfi'ī hold the view that arbitration is not permitted, where there is a judge available since arbitration is inferior to the judiciary.⁵³ A small number of scholars from the Shāfi'ī school even takes another view that arbitration is never permissible as it is the basic function of the Great Imām and anyone to whom he has delegated that function and hence the use of arbitration and the appointment of arbitrators is seen as an assault on his authority.⁵⁴ The first view on arbitration can be challenged on the basis that an arbitrator serves in place of a judge, helping him resolve the conflict and since it is not explicitly forbidden in the Shari'ah, it remains permissible because the judgments on issues, contracts and transactions are permissible unless a specific text prohibits it. The second view can be challenged on the basis that an arbitrator has no power to imprison or enforce the arbitration award. The function of the arbitrator is limited to resolving the disputes based upon justice and reasonability, which Islam does not prohibit.⁵⁵

While it is advisable to allow Shari'ah law to be taken into account when dealing with parties from the ILIJ States, it is not advisable to state Shari'ah law as the governing law of the contract. This is mainly due to the *Beximco Pharmaceuticals*⁵⁶ case, where the English Court of Appeal held that 'shari'ah law is not a recognisable form of law containing principles of law capable of governing a commercial dispute

47 Pakistan, Afghanistan, Turkey, Egypt; Sahar Amer & Martine Antle "Islamic Jurisprudence & Law" (ReOrienting the Veil): <<http://veil.unc.edu/religions/islam/law/>> accessed 10 April 2015.

48 Kuwait, Qatar, Bahrain, Dubai, Abu Dhabi, Syria, Sudan, Tunisia, Algeria, Libya, Morocco, Mali, Nigeria, Chad, Niger, Senegal, Mauritania, Yemen, *ibid*.

49 Indonesia, Malaysia, Singapore, Sri Lanka, Maldives, Palestine, Jordan, Lebanon, *ibid*.

50 Saudi Arabia, *ibid*.

51 Iran, Pakistan, India, Iraq, *ibid*.

52 Alsheikh, above n 6, at 368.

53 Al-Ramahi, above n 44. This view is due to the belief that of the Shafi School that arbitration is a legal practice yet its arbitrators can be removed by the parties up to the time of the issuance of the award.

54 In the conflict between the Jews and the Muslims, the Prophet Muhammad had appointed Sa'ad b Ma'aadh as an arbitrator and later submitted himself to the decision of the appointed arbitrator.

55 Alsheikh, above n 6, at 368.

56 *Beximco Pharmaceuticals Ltd, Bangladesh Export Import Co. Ltd., Mr. Ahmad Solail Fasiuhur Rahman, Beximco (Holdings) Ltd. v. Shamil Bank of Bahrain E.C.* [2004] EWCA Civ 19.

in the UK'.⁵⁷ However, one should be aware of the distinction between Shari'ah law and the law of a country. In that case, the court construed the governing law to mean the law of a country.⁵⁸ As such, it might be possible for Shari'ah law to be the governing law by adopting the law of a country where Shari'ah law is practised as the governing law.

III ARBITRATION IN ILIJ OF ASEAN

At present, intra-ASEAN trade only accounts for 24.2% of total trade of the region.⁵⁹ Despite this, the ASEAN regional block is a significant market as, 'of the emerging markets, only China is bigger in size'⁶⁰ and further, the annual average growth in ASEAN has been 5.1% since 2007 while the world's annual growth has been at 3.3%.⁶¹ It is projected that the Real GDP growth of ASEAN member States together with China and India would average 6.5% per year.⁶² Nonetheless, it is noted by the OECD that 'further acceleration of regional integration by 2015, in furtherance of the goal of the ASEAN Economic Community, will be necessary.'⁶³

With the growing importance of trade to consolidate economic integration within ASEAN, the need for uniform arbitral rules, and harmonized legislative framework for alternative dispute resolution, and the need for universal recognition and enforcement of arbitral awards, has only increased. Arbitration being the most common method of dispute resolution in international trade, enhances the importance of the enforceability of foreign arbitral awards. While this is important

57 Camille Paldi "Shari'Ah Law Cannot Apply to a Commercial Transaction in UK" *International Finance Magazine* (2015) <www.internationalfinancemagazine.com/article/Shariah-law-cannot-apply-to-a-commercial-transaction-in-UK.html> accessed 16 August 2015.

58 *Ibid.*

59 "External Trade Statistics" (ASEAN) <www.asean.org/resources/2012-02-10-08-47-55/asean-statistics/item/external-trade-statistics-3> accessed 16 August 2015.

60 Abe Zhao & Vinod Kallou "The ASEAN Economic Community 2015: On the road to real business impact" (Business and industry issue, KPMG Singapore, 26 June 2014), <www.kpmg.com/SG/en/IssuesAndInsights/ArticlesPublications/Documents/Tax-Itax-The-ASEAN-Economic-Community-2015.pdf> accessed 3 March 2015.

61 Asian Development Bank and International Labour Office "ASEAN Community 2015: Managing integration for better jobs and shared prosperity" (21 August 2014) <www.adb.org/sites/default/files/publication/42818/asean-community-2015-managing-integration.pdf> accessed 4 April 2015.

62 OECD "Economic Outlook for Southeast Asia, China and India 201" (23 March 2015) <www.oecd.org/dev/economic-outlook-for-southeast-asia-china-and-india-23101113.htm> accessed 4 April 2015.

63 OECD, above n 62, at 25.

globally, the issue is particularly interesting in ILIJ. Further, the lack of understanding of Shari'ah law by the majority of common law and civil law jurisdictions' lawyers presents a challenge for the enforcement of arbitral awards in these States.

Although there have been steps taken in promoting the formation of an ASEAN Economic Community, its realisation, through the harmonization and unification of trade law, still faces considerable challenges, especially when considering the existence of different legal traditions in which the member States have formulated their laws. Singapore, Malaysia, Myanmar and Brunei are common law jurisdictions, while Indonesia and Thailand are both civil law jurisdictions. Cambodia, Laos and Vietnam on the other hand are governed by a mix of socialist laws and civil law. The Philippines has a mixed jurisdiction of civil and common law.

One of the most recognisable outputs of the mandate of UNCITRAL is precisely the ability to bridge those differences by formulating multilaterally agreed legal standards. UNCITRAL first came into being in 1966, as a subsidiary to the General Assembly of the United Nations, and was commissioned to work on the advancement of harmonisation and unification of international trade laws. Since its formation, UNCITRAL has organised a wide range of conventions, prepared various model laws and other instruments to deal with the substantive law governing trade transactions or other aspects of business law, which would affect international trade. Obstacles to international trade include the lack of predictability of governing laws or outdated legislation, which is not suitable for modern international commerce.

UNCITRAL (and when we refer to UNCITRAL, we are referring to a consensus-based decision making legislative process, conducted by official representatives from 60 rotating States from all regions, with the active participation of several other international organizations) identifies these problems and creates solutions, by adopting texts with the international legitimacy of the General Assembly of the United Nations (with the vote of all of its Member States), which are deemed acceptable to States with different legal systems, different levels of economic and social development. This process of creating solutions by modifying domestic laws to enhance predictability of cross-border transactions is known as "Harmonisation". The process of "Unification" occurs when States adopt the "Harmonised" solution, resulting in a common legal standard dealing with each segment of international business transactions. Some of the "Harmonised" solutions come in the form of a model law or legislative guides intended to be adopted by domestic law. Other

solutions come in the form of a "Convention" which is an international instrument to be adopted by States for the "Unification" of international laws.⁶⁴

A *Malaysia*

Malaysia became a party to the New York Convention in 1985, and made two reservations. The first reservation being the reciprocity reservation. The second reservation made provides that only commercial matters, as defined by Malaysian Law would fall within the ambit of the Convention.⁶⁵ In 2005, Malaysia replaced the *Arbitration Act of 1952* and the *Recognition and Enforcement of Foreign Arbitral Awards Act 1985*,⁶⁶ with the new *Arbitration Act 2005*. The new Arbitration Act is largely based upon the UNCITRAL Model Law and brings Malaysia's national laws in line with its international obligations under the NY Convention. The new *Arbitration Act 2005* substantially limits the court's ability to interfere with arbitration by narrowly defining the grounds on which an arbitral award may be set aside or prevented from being enforced.

Under the *Arbitration (Amendment) Act 2011*, Section 10 (1) of the new *Arbitration Act 2005* was amended to give arbitration agreements priority over Court actions if one party has made an application before taking any other steps in the proceedings. The Court can only interfere in this case if the agreement is found to be 'null and void, inoperative or incapable of being performed'. Further, the amendment to Section 30 seems to allow parties involved in domestic arbitration in Malaysia to choose the substantive law and would only revert to substantive Malaysian law where the parties have not agreed on any other governing law. For international arbitrations that do not specify the governing law, the 'arbitral tribunal shall apply the law as determined by the conflict of law rules.'⁶⁷ An arbitration agreement shall be valid if it satisfies the conditions of Section 9 and does not contravene Section 39. Currently, only claims arising from the grounds under Section 37 can be heard by

64 "FAQ – Origin, Mandate and Composition of UNCITRAL" (UNCITRAL), <www.uncitral.org/uncitral/en/about/origin_faq.html#mandate> accessed 16 August 2015.

65 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (the "New York Convention"), reservations made were (a) and (b).

66 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985*.

67 Sunil Abraham "Arbitration Guide IBA Arbitration Committee" (Ibanet.org, 2012) <www.ibanet.org/Document/Default.aspx?DocumentUid=1B17C5AC-3A6B-4B20-9BCE-B85BD419A124> accessed 16 August 2015 at 3.

the Courts for setting aside the arbitral award. The Amended Section 39(3)⁶⁸ even provides for the ability of the Court to separate awards of matters submitted for arbitration and those which were not submitted to preserve the decision of the Arbitral Tribunal.

The most prominent arbitration centre in Malaysia is the Kuala Lumpur Regional Centre for Arbitration (KLRCA). Arbitration by the KLRCA may take the usual form of international arbitration under the rules of the Centre, which are based upon the UNCITRAL Arbitration Rules 2010 or, where the arbitration clause contains a reference to Islamic Law, arbitration according to the I-Arbitration Rules issued by the KLRCA. The KLRCA first introduced the I-Arbitration rules in 2007 and were intended to only deal with Islamic Banking and financial services arbitration domestically.⁶⁹ However, its scope was soon expanded to 'respond to the increasing number of Islamic finance parties relying on arbitration to resolve their dispute'.⁷⁰ Hence, in 2012, a new set of I-Arbitration Rules were introduced. The new I-Arbitration Rules were launched on 24 October 2013, incorporating the 2010 UNCITRAL Arbitration Rules and can be applied to all forms of commercial transactions where the arbitration clause provides for Shari'ah principles.

1 Court's attitude towards arbitration in Malaysia

The court takes a broad interpretation of matters that are arbitrable and even found that matters of fraud were within the competence of arbitrators.⁷¹ In relation to foreign arbitral awards, the courts have adopted a strict approach to the grounds for resisting enforcement. The High Court found that for the court to interfere with a foreign arbitral award would require a breach of the "most basic notions of morality and justice... grounded in the upholding of international conformity."⁷² This view is again reflected in the *EFKO* case, where the High Court adopted an approach similar to that of the New Zealand Court of Appeal in providing that the public policy exception is a narrow one. The Court stated that 'the provisions of Section 39 (of the Arbitration Act 2005) ought not to be utilised as a guise to re-open settled matters in

68 Laws of Malaysia, Arbitration Act 2005 as amended by Laws of Malaysia Act A1395, Arbitration (Amendment) Act 2011.

69 Sundra Rajoo "KLRCA's New I-Arbitration Rules: Islamic Finance in the Global Commercial Arena" (2014) 6 International Journal of Arab Arbitration 5.

70 Paula Hodges, Charles Kaplan and Peter Godwin "KLRCA'S New I-Arbitration Rules: A New Option for Islamic Finance Parties | Lexology" (Lexology.com, 2015) <www.lexology.com/library/detail.aspx?g=f95ce493-1569-4011-8a90-9d560cb13b48> accessed 19 August 2015.

71 *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83.

72 *Majlis Amanah Rakyat v Kausar Corporation Sdn Bhd* [2009] 1 LNS 1766.

the arbitration'.⁷³ The reasons for the refusal of the enforcement of arbitration award must go beyond the minimum which would justify setting aside a domestic judgment award and it should be enforced even if a domestic judgment would give a contrary result.⁷⁴

However, there are a few instances, where enforcement of an arbitral award was rejected on public policy grounds. For instance, in the *Equitas*⁷⁵ case, enforcement was refused on the basis that it was against public policy to enforce an arbitral award against a third person, who was not a party to arbitral proceeding and was held to be clear breach of natural justice. Also, in the *Sami Mousawi v Kerajaan Negeri Sarawak*⁷⁶ case, the court held that the enforcement of the arbitral award was against statutory provisions and public policy. In that case, the plaintiff held himself out as being able and capable to undertake and provide architectural and engineering advice, when it was not registered or approved to practice the disciplines covered by the statutory provisions.

2 *KLRCA taking into account Shari'ah Principles*

As pointed out above, the I-Arbitration Rules 2013 incorporate the UNCITRAL Arbitration Rules with Shari'ah principles by dividing the I-Arbitration Rules into two parts. The first part contains provisions, which deals with the Shari'ah principles by providing for a specific procedure for "reference to a Shari'ah advisory council or expert, contingent on the characteristics of the Shari'ah transaction and the will of the parties. It also introduces an optional late payment mechanism based on the principles of *ta'widh* (compensation) and *gharamah* (a fine or penalty that must be given away to charity). Part Two adopts the UNCITRAL Arbitration Rules 2010, but provides that Part One supersedes Part Two, where there is a conflict between the rules.

3 *Referral to the Shari'ah Council*

Whenever there has been a referral to the Shari'ah Council, 'the tribunal will adjourn the arbitration proceedings until a ruling has been given,'⁷⁷ however, the

73 *Infineon Technologies (M) Sdn Bhd v. Orisoft Technology Sdn Bhd* [2010] 1 LNS 889.

74 Malaysia No. 5, *Open Type Joint Stock Company Efirmoye – EFKO v. Alfa Trading Ltd, High Court of Kuala Lumpur*, D-24NCC-221-2010, 10 October 2011.

75 *Equitas Limited v Allianz General Insurance Company (Malaysia) Berhad* [2009] MLJU 1334.

76 *Sami Mousawi v Kerajaan Negeri Sarawak* [2004] 2 MLJ 414.

77 I-Arbitration Rules, KLRCA Rule 11 Paragraph 4.

proceedings shall continue on matters, which are independent of the Shari'ah issues referred to the Shari'ah Council. The Shari'ah Council or expert shall deliver the ruling within 60 days from the date of reference and this shall be viewed by the tribunal as expert evidence. However, if the Shari'ah Council or expert fails to deliver a ruling within 60 days, the arbitral tribunal may proceed to determine the dispute based on the submissions before it.

B Brunei

Brunei became a party to the New York Convention in 1996 and has made the reciprocity reservation stating that only foreign arbitral awards that were made in other contracting States would fall within the scope of the New York Convention, dealing separately with international and domestic arbitration. In 2010, Brunei promulgated the Arbitration Order 2009 and the International Arbitration Order 2009. These are the laws governing arbitration in Brunei and both are based on the UNCITRAL Model Law 2006.⁷⁸ The Arbitration Orders are intended to prevent court interference in the arbitral process and promote its role as a supporter of arbitration.⁷⁹ In December 2014, The Sultan of Brunei approved the creation of the Arbitration Centre of Brunei.⁸⁰

C Indonesia

Indonesia became a party of the New York Convention (herein "the Convention") in 1981 and made both the reciprocity and commercial reservations. The first reservation allows Indonesia to recognise and enforce only awards from a contracting State and the second reservation permits Indonesia to apply the Convention to differences that are considered commercial under domestic law. The first legislation enacted, which conforms to the Convention was the *Indonesian Arbitration Act no.30 of 1999*. The *Indonesian Arbitration Act no. 30 of 1999* (herein *Arbitration Act 1999*) makes special reference to international commercial Arbitration under Chapter VI part II of the 1999 Act. In principle, this was designed to recognise the finality and enforceability of international arbitration awards.⁸¹ The idea behind it was to limit the Court's intervention in the arbitration process, while enhancing party autonomy.

78 Albert Jan van den Berg "Recent Developments in Arbitration Law and Practice" (2010) XXXV Brunei Yearbook Commercial Arbitration 23.

79 Colin Ong *The Report: Brunei Darussalam 2013* (Oxford Business Group 2013) at 200.

80 The Brunei Times "His Majesty Approves Creation of Arbitration Centre" (25 December 2015).

81 Fifi Junita "Judicial Review of International Arbitral Awards on the Public Policy Exception in Indonesia" (2012) 29 Journal of International Arbitration 405 at 406.

The enforcement of international arbitral awards in Indonesia is also regulated by the *Supreme Court Regulation No.1 of 1990*. Although these provisions seem to support the enforcement and finality of arbitration, in practice, the non-exhaustive nature of grounds for annulment and non-enforcement under the *Arbitration Act 1999* undermines the finality of foreign arbitral awards. The main problem in seeking enforcement of an arbitral award in Indonesia is the construction of the term 'public policy' by Indonesian Courts. This wide construction of public policy is exemplified in the *Bankers Trust* case,⁸² where the court refused enforcement of the decision of the LCIA on the basis that an action for the annulment of the Derivative Swap agreements brought in the South Jakarta District Court has yet to be concluded.⁸³ Another example is the *ED and F. Man (Sugar) Ltd*⁸⁴ case, where the Indonesian buyer successfully prevented the enforcement of the foreign arbitral award for breach of contract. The reasoning of the Indonesia Court was that the enforcement of the arbitral award would result in a conflict with domestic laws passed within Indonesia for the regulation of sugar prices. These cases seem to indicate that the definition of public policy adopted by the Indonesia Courts is broader than the international norm under Article V(2)(b) of the New York Convention, which tends to be construed as 'when the core values of a legal system has been deviated from'.⁸⁵

IV ARBITRATION IN THE GULF COOPERATION COUNCIL STATES (GCC)

One of the aims of the Gulf Cooperation Council is to harmonise legislation between its members, for the facilitation of trade between the countries in hopes of achieving an integrated economy.⁸⁶ At present, all the members of the GCC are party to the New York Convention.⁸⁷ However, in practice, some GCC States legislation accommodates considerable deviations from the international practice by providing

82 *Bankers Trust International v. PT Mayora Indah; and applications for exequatur of international arbitrations* no. 001/Pdt/Arb.Int/1999 and No. 004/Pdt/Arb.Int/1999.

83 Devin Bray and Heather L Bray *International Arbitration and Public Policy* (JurisNet LLC, 2014) at 212.

84 *D. & F.A. Man (sugar) v. Yani Haryanto*, the Decision of the Indonesian Supreme Court No. 1205 K/PDT/1990.

85 "International Seminar On Indonesia Arbitration Law Nr. 30 Of 1999 Concerning Arbitration and ADR" Arbitration Law Reform (Bani Arbitration Center 2015).

86 The Cooperation Council for the Arab States of the Gulf (Secretariat General) "Foundations and Objective of the GCC", Objective 3 (A).

87 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

for additional grounds for challenging the enforcement of the arbitral awards.⁸⁸ Where deviation occurs, Shari'ah principles are often cited as the reason when 'potential challenges to enforcement in the GCC States stem from the domestic arbitration laws or practice' rather from Shari'ah.⁸⁹ The source of the problem is largely the distrust of foreign laws even when Shari'ah is largely consistent with the New York Convention.⁹⁰ Although there are admittedly some differences between arbitration under Shari'ah law and the New York Convention, the differences 'could be narrowed to a very limited set of cases which would constitute a minute portion of the arbitration cases.'⁹¹ As such, the GCC States may wish to consider further reviewing their domestic laws governing international commercial arbitration and arbitral awards and ideally adopt the UNCITRAL Model Law, which would be in line with the New York Convention, while providing for the small number of cases where Shari'ah law may be inconsistent with the New York Convention.

A United Arab Emirates (UAE)

The UAE Courts seemingly overlooked some of their obligations under the New York Convention well into 2010.⁹² Foreign arbitral awards have been rejected for reasons listed under Article 235 of the *UAE Civil Procedure Code*,⁹³ in particular the formalistic procedural grounds. This was exemplified in the *Bechtel Case*,⁹⁴ where enforcement was rejected for 'failure by arbitrators to properly follow the oath-taking procedure that is mandatory for the hearing of the witnesses under the CPC.'⁹⁵ The situation apparently changed in 2010 when the Fujairah Federal Court of First

88 AFM Maniruzzaman, AM Almutawa "Problems of Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States and the Prospect of a Uniform GCC Arbitration Law: An Empirical Study" (2015) 12 *Trans Dispute Management* 1 at 9.

89 Maniruzzaman, above n 88, at 2.

90 Maniruzzaman, above n 88, at 6.

91 Maniruzzaman, above n 88, at 11.

92 Gordon Blanke "The Role of the New York Convention in the Enforcement of Foreign Awards in the UAE: Expectations and Challenges or the Tale of the Ugly Ducking" (2015) 12 *Transnational Dispute Management* 1, at 2.

93 The UAE Civil Procedure Code, Federal Law No. (11) of 1992.

94 *International Bechtel v Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, petition No. 503/2003, ruling dated 15 May 2005.

95 Gordon Blanke "The Role of the New York Convention in the Enforcement of Foreign Awards in the UAE: Expectations and Challenges or the Tale of the Ugly Ducking" (2015) 12 *Transnational Dispute Management* 1 at 4; Article 211 of The UAE Civil Procedure Code, Federal Law No. (11) of 1992.

Instance held that 'upon review of the arbitration clause... we found that there is no impediment to the execution of the judgment'.⁹⁶

However in 2013, the Dubai Court of Cassation took a disappointing approach to the enforcement of an arbitral award in the *Canal de Jonglei* case.⁹⁷ In that case, the court rejected enforcement on the grounds that the UAE Courts lacked jurisdiction 'over cases brought against any foreigner having no domicile or place of residence within the UAE...'⁹⁸ Though, a recent judgment by the Dubai Court of Appeal⁹⁹ ignores the *Canal de Jonglei* case and stated that the UAE courts are in principle, 'firmly committed to and will ... enforce arbitral awards'.¹⁰⁰ The Court of Appeal held that the judge is to apply the provisions of the New York Convention on the recognition and enforcement of foreign arbitral awards as the UAE has ratified the Convention and it is deemed to be internal legislation of the country. The Court of Appeal in this case adopted a similar approach to that of the Court of Cassation of Dubai in *Airmech Dubai LLC v Maxtel International LLC* where the court held that UAE Courts have no jurisdiction to set aside foreign arbitral awards.¹⁰¹ The approach of Court of Cassation in *Airmech*¹⁰² was then adopted by the Court of Appeal in the *Dubai Court of Appeal Case No. 1/2013* and the Court of Cassation confirmed its 'pro-Convention approach'.¹⁰³

It is also important to note that 'the Dubai International Financial Centre (DIFC) Courts constitute an independent off-shore common law jurisdiction within the heart of Dubai'.¹⁰⁴ Arbitration in the DIFC is governed by the DIFC Arbitration Law of 2008 which is heavily based on the UNCITRAL Model Law. The DIFC judiciary

96 Case No. 35/2010.

97 Case No. 156/2013.

98 Blanke, above n 95, at 10.

99 Dubai Court of Appeal in Case No. 1/2013.

100 Gordon Blanke "The Year of the UAE arbitration in review" (2015) 81 Arbitration 71.

101 *Airmech Dubai LLC v. Maxtel International LLC*, Court of Cassation of Dubai, Appeal No.132 of 2012, 18 September 2012.

102 Ibid.

103 Gordon Blanke "Dubai Court of Cassation Further Consolidates Pro-NYC Enforcement Practice" <<http://kluwerarbitrationblog.com/blog/2015/04/14/dubai-court-of-cassation-further-consolidates-pro-nyc-enforcement-practice/>> accessed 14 August 2015.

104 Blanke, above n 95, at 13.

has been noted as generally arbitration-friendly and hence seeking recognition of arbitral awards under the New York Convention is said to be a matter of formality.¹⁰⁵ Of significant implications is that the DIFC and Dubai Courts have a Memorandum of Understanding which entered in force as of 16 June 2009 providing for mutual recognition of judgments, orders and awards between the Dubai and the DIFC Courts.¹⁰⁶

B Oman

Oman's arbitration laws, enacted in 1997 are based upon the UNCITRAL Model Law on International Commercial Arbitration (1985). It signed the New York Convention in 1999 and the enforcement of foreign arbitral awards have only recently been tested in its courts. The Court at first instance rejected in 2011 the enforcement of the foreign arbitral award and the plaintiff appealed the case. The Court of Appeal overturned the Court of First Instance and upheld the foreign arbitral award (from Denmark). The decision of the Court of Appeal was upheld in the Supreme Court. This is a landmark case as it is the first case in Oman where a foreign arbitral award was sought.

The case highlights several important features of the arbitral laws of Oman. The enforcement of foreign arbitral awards in Oman would require proof that the state in which the arbitral award was established accepts application of Omani Courts in its territories. In this case, this was evidenced by the legal provisions of Denmark; it remains unclear as to what proof is required to satisfy this requirement. Also, the court did not elaborate on how widely or narrowly the public order exception is to be construed. However, the Supreme Court seems to avoid adopting a wide interpretation of the term.¹⁰⁷

C Saudi Arabia

The Kingdom of Saudi Arabia has long recognised arbitration and has practised it legally since 1930, when the Commercial Court Act was established. Nevertheless, the *Aramco* arbitral tribunal took the view that Shari'ah law is branched into many different schools and they each hold different values and the values of one school cannot be adopted by another. Judge Essam Abdulaziz Alsheikh¹⁰⁸ contends that this

105 Blanke, above n 95, at 13.

106 Articles 20 and 21 of the UAE Civil Procedure Code, Federal Law No. (11) of 1992.

107 Parties not indicated, Supreme Court of Oman, Cassation No. 280/2010 Commercial Circuit, 27 April 2011.

108 Judge in the Ministry of Justice, Kingdom of Saudi Arabia.

indicated a lack of understanding of Shari'ah law which provided that the judge can resort to any school of Shari'ah law.¹⁰⁹ In response to the *Aramco* Case, the Saudi Government issued the Council of Ministers Resolution No. 58 of 1963 which forbids governmental bodies and agencies from accepting arbitration as a method for the resolution of their disputes with third parties.¹¹⁰

Despite the *Aramco* decision, the Kingdom continued the development of its arbitration laws and issued an independent arbitration law in 1983. This law gave the Saudi Chambers of Commerce the power to create arbitration tribunals.

The Kingdom's acceptance of arbitration is based on the fact that arbitration has been a way of resolving major conflicts in the Gulf region long before it was accepted by the modern world.¹¹¹ Furthermore, Islam holds a positive view of arbitration. As such, the first international agreement endorsed by the Kingdom was the New York Convention in 1994.

While the Kingdom of Saudi Arabia recognised arbitration, it was often difficult to enforce foreign arbitral awards in the country as the law allowed the Courts to intrude throughout the arbitration process. The Saudi Courts also regularly re-examined the merits of the arbitration awards when enforcement was sought.¹¹² As a result, foreign arbitral awards were notoriously difficult to enforce since the Saudi Court would also apply Saudi law to the substance of the dispute.¹¹³

In 2012, the Kingdom of Saudi Arabia issued a new Arbitration law.¹¹⁴ Although the new law used the UNCITRAL Model Law as its starting point, significant changes were made to it, in particular the need for the arbitration process 'to not violate Shari'ah as practiced in the kingdom' and distancing it from the Model Law.¹¹⁵ The new law covers both domestic and international arbitration and removed the

109 Alsheikh, above n 6, at 393.

110 Council of Ministers Resolution No. 58, dated 17/1/1383H (25 June, 1963).

111 Alsheikh, above n 6.

112 Saud Al-Ammari & A. Timothy Martin "Arbitration in the Kingdom of Saudi Arabia" (2014) 30 *Arbitration International* 387 at 388; see also Essam Al Tamimi *The Practitioners Guide to Arbitration in the Middle East and North Africa* (JurisNet LLC, 2009) at 371.

113 Jean-Benoît Zegers "Recognition and Enforcement of Foreign Arbitral Awards in Saudi Arabia" (2014) 1 *BCDR International Arbitration Review* 69 at 79.

114 Al-Ammari, above n 112, at 390.

115 *Ibid.*

requirement for the arbitrator to be 'a Saudi national or a Muslim foreigner'.¹¹⁶ However, it provides for a requirement that a sole arbitrator or the president in a three-member arbitral tribunal must hold a degree in Shari'ah law or legal studies.¹¹⁷ The new law still prevents government entities using arbitration except where there is approval from the Prime Minister or unless there is a special law approved by the Council of Ministers allowing it on a regular basis.¹¹⁸ The most important aspect of the new Arbitration Law is that it shifts the onus of proof during enforcement from the party seeking enforcement to the complaining party to raise any objections within 60 days. It also significantly limits the court's intervention with the arbitral award in that the court can no longer inspect 'the facts and subject matter of the dispute' when examining the validity of the arbitral award.¹¹⁹ However, there is yet to be a case decided based on the new Arbitration laws and one can only hope the Courts would adhere to the spirit of the legislation.

D Qatar

Qatar has been a member of the New York Convention since 2002 and has recently introduced new arbitration laws based on the Model Law in 2005, but only applicable in the Qatar Financial Centre (QFC) area. While it has not been a problem in the past since the Qatari Courts have traditionally been willing to enforce arbitral awards,¹²⁰ the 2012 case of *ITIIC v Dynacorp* case might indicate the reluctance of the Qatari Courts to enforce arbitral awards without reviewing the merits of the case.¹²¹ The basis of setting aside arbitral awards in those cases was largely due to the view taken by the judges that the arbitrator acts as a judge and hence it is required for awards to be rendered in the name of His Highness The Emir Of Qatar.¹²² This resulted in large numbers of arbitral awards being set aside, including those from

116 Al-Ammari, above n 112, at 391.

117 Jean-Pierre Harb & Alexander G. Leventhal "What to Expect When Arbitrating in the Kingdom of Saudi Arabia" (2015) 12 Transnational Dispute Management 1 at 7.

118 Article 10.2 of the Arbitration Law (Royal Decree No. M/34) dated 24/5/1433 AH (corresponding to 16/4/2012 AD).

119 Al-Ammari, above n 112, at 389.

120 While Qatar's Arbitration Laws does not clearly explain the grounds for interference in arbitral proceedings, the Qatari courts usually enforce an arbitration award without re-examination of the merits, as seen in the Execution Case Number 185/1995.

121 Reza Mohtashami and Merryl Lawry-White "The (Non)-Application of the New York Convention by the Qatari Courts: *ITIIC v Dynacorp*" (2012) 29 Journal of International Arbitration 429.

122 Minas Khatchadourian "A New Bump On the Qatar-New York Road" <<http://kluwerarbitrationblog.com/blog/2014/01/28/a-new-bump-on-the-qatar-new-york-road/>> accessed 20 April 2015.

QICCA.¹²³ Furthermore, such requirement is inherently contradictory since arbitrators are not allowed to do so under Qatari law. Hence, if this approach is to be taken by future courts, no foreign or domestic arbitral awards will have binding force.¹²⁴ This construction is inconsistent with the New York Convention and, in April 2014, the Supreme Court of Qatar acknowledged that there was no such procedural requirement within the New York Convention.¹²⁵

Despite the misperception caused by the June 2012 case, there are positive signs signalling a change towards international commercial arbitration. As mentioned above, while the 2005 New Arbitration law only applied to the QFC, Qatar has been drafting and is expected to introduce a new Arbitration Law by the end of 2015 which is based on the Model law.¹²⁶ The new law would repeal Articles 190 to 210 of the First Book of the Code of Civil and Commercial Proceedings.¹²⁷ Article 8 of the new draft law prevents courts from hearing a case where there is an arbitration agreement unless the arbitration agreement is found to be invalid.

The new draft of the Arbitration law is intended to apply to all arbitral awards, in Qatar or overseas 'so long as the parties agree to submit themselves to the rules and provisions of the Law.'¹²⁸ Besides this, "commercial arbitration" is defined in a similar manner to that contained within the Model Law.¹²⁹ While it allows courts to determine the 'legitimacy and enforceability' of the arbitration clause or agreement,

123 Minas Khatchadourian "A Half-tone Application of the New York Convention by the Qatari Supreme Court" <<http://kluwerarbitrationblog.com/blog/2014/04/15/a-half-tone-application-of-the-new-york-convention-by-the-qatari-supreme-court/>> accessed 20 April 2015.

124 Jassim Al-Obaidli "Concerns about the enforceability of arbitral awards in Qatar" (2014) 80(3) Arbitration 332.

125 Khatchadourian, above n 123.

126 Hazem Hussien "An Overview of the Draft Arbitration Law in Qatar" (2015) <www.tamimi.com/en/magazine/law-update/section-11/march-8/an-overview-of-the-draft-arbitration-law-in-qatar.html> accessed 24 April 2015.

127 Of particular significance is the removal of the requirement of naming the Arbitrators in the arbitration agreement as required under Article 193, where failure to do so would allow courts to appoint the arbitrators.

128 Ibid, Article 2 of Law n. XX of 2015 promulgating the Law of Arbitration in Civil and Commercial Matters (Qatar) the draft of the new Arbitration Law as of 30 January 2015.

129 Article 1(2) of the Law n. XX of 2015 promulgating the Law of Arbitration in Civil and Commercial Matters (Qatar) the draft of the new Arbitration Law as of 30 January 2015.

it does not allow to review the clause unless it is 'prima facie, null and void or ineffective.'¹³⁰

A highly significant introduction in the draft Law is the ability of the arbitral tribunal to 'rule on the objections related to its lack of jurisdiction.'¹³¹ In addition, Article 17 provides the arbitral tribunal with the ability to order temporary measures or interim awards. Finally, perhaps of utmost importance is Article 35, which limits the grounds for refusing recognition or enforcement to situations where there is a breach of procedural fairness or where the subject matter is not capable of settlement by arbitration, the award is contrary to public policy of the State, it is contrary to a final judgment previously issued by a Qatari Court on the subject matter of the dispute and it was not properly notified to the party against whom it was rendered.¹³² While there is an overall positive outlook, the draft Law defines public policy as the public policy of the State as opposed to international public policy. It remains to be seen whether the courts will take advantage of this to review arbitral awards. However, it is likely that the court would not abuse its position since 'it is the present practice of Qatari courts to enforce arbitration award issued pursuant to international arbitration rules without re-examination of the merits of the case.'¹³³

E Bahrain

Since becoming a signatory to the New York Convention, Bahrain has made significant progress in developing its arbitration laws to ensure protection for foreign investors and corporations. Bahrain first introduced international arbitration legislation in 1994. The International Commercial Arbitration Law (ICAL) introduced in 1994 was based upon the UNCITRAL Model Law of 1985.¹³⁴ The ICAL provisions were identical to those of the Model Law and the article numbers were the same.¹³⁵ Taking into consideration the amendment of the UNCITRAL Model Law in 2006, Bahrain has recently introduced the "*UNCITRAL*" Model Law

130 Article 8 (1) of the Law n. XX of 2015 promulgating the Law of Arbitration in Civil and Commercial Matters (Qatar) the draft of the new Arbitration Law as of 30 January 2015.

131 Article 16 of the Law n. XX of 2015 promulgating the Law of Arbitration in Civil and Commercial Matters (Qatar) the draft of the new Arbitration Law as of 30 January 2015.

132 Article 36 of the Law n. XX of 2015 promulgating the Law of Arbitration in Civil and Commercial Matters (Qatar).

133 Talal Abdulla Al-Emadi "Qatar Arbitration Law: Some Central Issues" (2015) 12 Transnational Dispute Management 1 at 16.

134 International Commercial Arbitration Law enacted by Legislative Decree No. 9 of 1994 (ICAL).

135 Hassan Ali Radhi "International Arbitration and Enforcement of Arbitration Awards in Bahrain" (2014) 1 BCDR International Arbitration Review 30.

on *International Commercial Arbitration Act* on the 5th of July 2015. The new law replaces the ICAL and also removes the requirement under the domestic arbitration legislation under Article 253.¹³⁶

In addition to the changes in its legislation, Bahrain also created the Bahrain Chamber for Dispute Resolution in partnership with the American Arbitration Association (BCDR-AAA). The BCDR-AAA was established in 2010 together with the world's first 'Free Arbitration Zone' through Legislative Decree No (30) of 2009. The 'Free Arbitration Zone' means that all arbitral awards that have been issued in Bahrain cannot be challenged in the Bahraini Courts. Nevertheless, this only applies if enforcement is to be sought outside of Bahrain.¹³⁷

While Bahrain has been making strides in terms of conforming to international best practice, there is still an exceptional approach in Article 251 of the CCPL. Article 251 prohibits enforcement of an arbitral award against any fund owned by the State, including those of a commercial nature.¹³⁸ In any case, as Hassan Ali Radhi well mentions, 'the Government of Bahrain or any of its institutions or companies has never refrained from adhering to an arbitral award.'¹³⁹

Even before the introduction of the new arbitration law in July 2015, a survey conducted by Ahmed M Almutawa and Maniruzzaman indicated that Bahrain was and continues to be seen by practitioners as being the friendliest among the GCC States towards the enforcement of foreign arbitral awards.¹⁴⁰ According to the authors, this is likely to be attributed to the fact that 'Bahrain follows strictly the UNCITRAL Model Law'.¹⁴¹

V CONCLUSION

Indonesia and the UAE were members of UNCITRAL from the late 1960s to the late 1970s. The Kingdom of Saudi Arabia became involved in 1992 up to 1998, while

136 Civil and Commercial Procedures Law No. 12/1971.

137 John M Townsend "The New Bahrain Arbitration Law and the Bahrain "Free Arbitration Zone" (2010) 65 *Dispute Resolution Journal* 79.

138 Radhi, above n 135, at 41.

139 Radhi, above n 135, at 42.

140 Maniruzzaman, above n 88, at 24.

141 Maniruzzaman, above n 88, at 41.

Bahrain, Kuwait, Malaysia and Qatar only became involved with UNCITRAL in the 2000s.¹⁴² Oman and Brunei are yet to become members of UNCITRAL.

Notwithstanding the significant reforms to arbitration laws in ILIJ States supporting the enforcement of foreign arbitral awards, it is important to acknowledge the fact that principles that contravene the Shari'ah principle could be unenforceable in the States that practice predominantly Shari'ah Law. In Saudi Arabia in particular, the new arbitration laws enunciate that arbitrators must take into account Shari'ah principles and failure to do so would result in the award being not recognised or unenforceable in Saudi Arabia.¹⁴³ This is problematic for the international community since Shari'ah law is not widely studied and there is a limited pool of arbitrators who are well equipped to deal with both international commercial matters and have sufficient knowledge on Shari'ah law to deal with it effectively.

To deal with the problem of a limited pool of arbitrators with such skills, the approach of KLRCA's I-Arbitration Rules seems optimal in that it provides for experienced international arbitrators, who give consideration to the Shari'ah principles. The rules provide for the use of a Shari'ah advisory council or expert that would deal with issues involving Shari'ah principles and allow the tribunal to continue on other matters. Additionally, the KLRCA rules provide for a time limit for the Shari'ah advisory council to produce their findings and should the time limit be exceeded, the arbitration tribunal may proceed to determine the dispute based on the submissions before it.

The adoption of UNCITRAL standards (because of its particular law making process and different modalities of adoption) provides for the promotion of a rule based trade system, thus promoting the rule of law and access to justice, two decisive factors for any policy aiming to improve governance, having also an important side effect of raising the capacity of the legal community of developing countries as well as raising the standards within the local judiciary.

As a political organization, the United Nations would have no interest in the harmonization and modernization of international trade law and practices, if it were not convinced that such technical work is conducted in pursuance of greater goals, such as the promotion of the rule of law and access to justice, and ultimately of peace. This is exactly what the General Assembly of the United Nations approved in December 2015:

142 Bahrain was a UNCITRAL member between 2007-2013, Kuwait (2013-2019), Malaysia (2007-2019), Qatar (2004-2007).

143 Al-Ammari, above n 114, at 404.

...the progressive modernization and harmonization of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity, common interest and respect for the rule of law, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples.

It becomes clearer every day that the harmonisation of international trade law and practices has broader policy implications than simply having a universally acceptable legislation. Adopting international trade law standards fosters cross-border trade and foreign investment which are crucial for sustainable economic growth. And sustainable economic growth is the key factor for social stability and peaceful international relations.

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