

ARTICLE

The Application of Sharī'ah Finance Rules in International Commercial Arbitration

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Due to its flexibility, speed and confidentiality, arbitration becomes the most attractive method for contracting parties to resolve their commercial disputes. This method of choice has developed gradually in the modern legal system of Islamic Countries (ICs) over the last three decades. Thus, many of individual countries have enacted their own arbitration regulations and ratified the relevant international arbitration conventions. They also established many qualified regional arbitration institutions. Subsequently, the referral to arbitration by professionals of these countries to settle their commercial disputes gains abundant popularity. This article provides a detailed view of Sharī'ah factor in international commercial arbitration.

Enforcement is certainly the goal for the arbitration process. Nevertheless, enforcement of foreign arbitral awards in the ICs could be challenged if these awards are contrary to Sharī'ah public policy. Therefore, by using this exception, the ICs can reject the enforcement of any foreign award that violates Sharī'ah public order.

Keywords: Sharī'ah; Islamic law; Islamic finance; international arbitration; Western arbitrators; foreign arbitral awards; public order; Islamic arbitration institutions; Islamic countries (ICs)

1. Introduction

The high volume of international trade and the assortment of transactions have led to a noticeable increase in the number and complexity of trade-related disputes. This drove parties to search for efficient means to resolve disputes. Many were the means and mechanisms of dispute settlement among the most prominent at international level is arbitration.¹

The international tendency of adopting arbitration to resolve international trade disputes have had direct impact on the development of arbitration to become a recognized dispute settlement mechanism on the national and international levels. Like legislators of other countries of the world, legislators of the Islamic world have spared no effort to establish a similar trend.² To this effect, they acknowledged arbitration as a legal means of settling disputes and ratified the international conventions on the subject, such as the *New York Arbitration Convention (NYCA)* of 1958. Legislators of the Islamic world have also recognized foreign

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¹ See in general about the principles and evolution of the international commercial arbitration, L. Bernheim van de Castele, *Les principes fondamentaux de l'arbitrage*, (1st edn, Bruylant 2012).

² On geographical level, the term 'Islamic world' is usually used to refer to the countries where Muslims make up the majority of their population. From a religious level, this term is commonly used to refer to the political areas that apply Islam 'Sharī'ah' in their legislative and jurisdictional systems.

Likewise, the term 'ICs' are commonly used to refer to political and governmental areas that use Islam as their basis for government, laws, regulation and social norms. The major ICs nowadays are KSA, Iran, Pakistan, Yemen. This term can also be used to refer to countries where Islam is the state religion, which is the case for many countries in the Middle East, Asia and Africa, such as Morocco, Algeria, Iraq, Jordan, Malaysia, Brunei. In a natural sense, the term 'Islamic countries' can be used to refer to countries where

arbitration awards and ensured their implementation, subject to their compliance with the applicable rules of Shari'ah (Islamic law).³

Nevertheless, the application of Shari'ah is easier said than done when referring Islamic finance disputes to western arbitral and jurisdictional tribunals. In its declaration issued at the conference held on 14–19 November 1998, the *International Islamic Fiqh Academy, of the Organization of Islamic Cooperation, Jeddah, KSA*, described the goal of secular regimes as:

*The separation of government institutions and persons from religious institutions and religious dignitaries by means of adopting positive laws instead of Shari'ah, despite the fact that Shari'ah is a comprehensive approach to life, which proved to be timeless and universal.*⁴

Therefore, the western arbitration and jurisdictional tribunals build their decisions on international conventions of relevance to disputes, and specific national laws. In this sense, Shari'ah is claimed by this jurisdiction not to be a state body of law or codified in a body of law, and so, no reference in many decisions is made to it, even when the contracting parties designate it directly as applicable substantive law.⁵

In return, a number of western arbitral tribunals have endeavored to implement the rules of Shari'ah in the international trade arbitration context, especially when the dispute is related to international Islamic finance. Therefore, the international arbitrator *Dr. Al-Ahdab* commented on the subject in one of the international conferences for arbitration, stating that the international arbitrators have currently agreed to apply Shari'ah to settle international trade disputes when elected by the parties to the dispute.⁶ He added that this tendency is constantly developing in the framework of international trade arbitration, which would play a central and effective role in the development and diversification of the sources of arbitration and in facilitating the recognition of foreign arbitration awards and ensuring their implementation in ICs.⁷ As such, the international arbitrator should be like a dynamic bee which makes its honey from all the flowers that it finds in its way.⁸

This paper attempts to raise the question whether it would be feasible to find a suitable mechanism to urge arbitration tribunals to apply the rules of Shari'ah as substantive law on the disputes brought, by parties, before them. In other words, what are the appropriate arrangements that contracting parties should maintain in order to promote the application of Shari'ah as substantive law by the arbitral tribunals? By doing so, the question arises as to the existence of specific Shari'ah procedural rules that these tribunals must follow, and what are the consequences in case of dismissal of the application of Shari'ah to Islamic finance contract? If it is true that these issues are not just typical to arbitration as the same apply to court judgment, its discussion in arbitration is of a particular importance, as it becomes the preferred means of contracting parties to settle their Islamic finance disputes.⁹

Based on the above, and in order for this study to achieve its objectives, it is crucial to determine the scope and importance of incorporation Shari'ah in the international commercial arbitration. It is also necessary to examine the role that the implementation of Shari'ah in international arbitration plays in the recognition and enforcement of foreign arbitral awards in the ICs. It is certain that this role forces us to establish the extent of compliance of international arbitrators with the rules of Shari'ah upon ruling on a dispute brought

Muslims are the majority of population without Islam being the state religion, which is the case for Niger, Indonesia, Djibouti; these last two categories have westernized some of their legislations but still influenced by Shari'ah.

Thus, according to the above categorization of ICs, it appears that they all have incorporated Shari'ah, totally or partially, into their legal and jurisdictional systems.

Contrariwise in secular Muslim majority countries, such as Nigeria, Turkey, Lebanon, Kosovo, Senegal, governments apply a system of separation of religion and state, in a manner that religion should not affect their civil and political norms; in this category of countries, the western laws have been adopted for area of government, laws, jurisdiction, and legal norms. See in general about the definition of ICs <<https://www.worldatlas.com/articles/islamic-countris-in-the-world.html>>, accessed on 10/2/2020; <https://en.wikipedia.org/wiki/Islamic_state>.

³ M. al-Jarba, *Commercial Arbitration in Islamic Jurisprudence: A Study of its Role in the Saudi Arabia Context*, (Thesis, University of Wales, UK 2001) 322.

⁴ F. Nammour, 'De L'applicabilité De La Charia Islamiya Dans L'arbitrage International', [2014] *Les Cahiers de la Finance Islamique*, Université de Strasbourg, No. Spécial, 81.

⁵ See in this regard, *Beximco Pharmaceuticals Ltd vs. Shamil Bank of Bahrain* [2004] EWCA Civ 19, Published in *Islamic Finance News* in two parts on 21 January 2015 and 28 January 2015.

⁶ R. Messenger, *La Prise en Consideration de la Shari'a dans L'arbitrage Commercial International*, (Université de Paris 1, Panthéon-Sorbonne, Thesis 2008) 3.

⁷ *ibid.* For general definition of this term, see note 1.

⁸ See Nammour, (n 4) 81; Messenger, (n 6).

⁹ See about the advantages of this method, Bernheim van de Castele, (n 1).

before an arbitration tribunal. Therefore, is applying the rules of Shari'ah to international arbitration practical? Is it possible to envisage a suitable mechanism for incorporating Shari'ah in international commercial arbitration? To address these questions subsequently, section two of this paper defines the general features of Shari'ah, the third section examines the main development of modern legal systems in the ICs and the compatibility of modern arbitration practices with Shari'ah rules. The fourth section traces the evolution of application of these rules in international commercial arbitration. The fifth section explores the ways that can be followed in order to promote the application of Shari'ah by the international commercial arbitration tribunals, including the role of Islamic arbitration institutions in incorporating Shari'ah in international arbitration, the legal possibility for the parties to choose Shari'ah as the governing law of a contract, and the role that the Islamic public policy exception may play in recognition or rejecting the enforcement of foreign arbitration awards in ICs.

2. The notion of Shari'ah

The origin of the term Islam in the Arabic language is the word Salaam which means peace. Al-Shari'ah al-Islamiyah is the path to achieve the submission to God.¹⁰ It is divine by source and eternal in letter and spirit.¹¹ As such, the essence of human belief is the absolute authority of God as the sole sovereign law-giver. Therefore, all legislations and activities of the followers of Islam should conform to this divine law discerned from the Qur'an, Sunnah and (fiqh) interpretation/reasoning by Islamic jurists.¹²

The Qur'an is the holy book of Islam and the primary source of guidelines and principles of Shari'ah, it is the word of God revealed through the Prophet Muhammad, while the Sunna is the sayings and traditions of the Prophet Muhammad.¹³ As for faqih, they derived the technical legal rules from the Qur'an and Sunnah. In this regard, the 'consensus' of the community of Muslim scholars is *ijmā'*, while the analogical deductions and reasoning of the Muslim scholars with respect to the modern issues called *qiyās*.¹⁴ The four (mazahib) major schools of Islamic jurisprudence and interpretation named according to the founder name of each of them are the Hanafi, the Maliki, the shafi'i, and finally the Hanbali.¹⁵ The rules derived from the Qur'an and Sunnah are sacred and eternal, whereas the opinions and decisions given by Muslim scholars are not sacred and are opened to many reinterpretations in the light of changes and developments of circumstances in social, educational, economic, and political life.¹⁶

Based on the above, Shari'ah differs from current western legal systems in its source, legitimacy and method of reform. In return, like these systems, Shari'ah is a comprehensive approach to life and social norms and not only simple religious rules.¹⁷ It contains specific provisions relevant to commercial transactions, such as the sanctity of contract (contracting parties should completely fulfill their contractual obligations), the principle of *pacta sunt servanda*,¹⁸ acting in good faith, the prohibition of interest (*ribā*) usury, the prohibition of speculation (*gharar*) uncertainty and, accordingly, gambling contracts, the adoption of alternative methods of private commercial dispute resolution including conciliation, mediation and arbitration.¹⁹

¹⁰ E. Levi-Tawil, 'East Meets West: Introducing Sharia into the Rules Governing International Arbitrations at the BCDR-AAA', [2011] 12 *Cardozo Journal of Conflict Resolution*, 617.

¹¹ E. Sisson, 'The Future of Sharia Law in American Arbitration', [2015] 1/48 *Vanderbilt Journal of Transnational Law*, 894.

¹² F. Kutty, 'The Sharia Factor in International Commercial Arbitration', [2006] 28/3 *Loyola of Los Angeles International and Comparative Law Review*, 565, <<http://digitalcommons.lmu.edu/ilr/vol28/iss3/4>>.

¹³ A. Maita, *Development of a Commercial Arbitration Hub in the Middle East: Case Study – The State of Qatar*, (Thesis, CA: University of the Pacific 2013) 39.

¹⁴ Sisson, (n 11) 895.

¹⁵ 'The great jurists of Islam – Shafi'i, Abu Hanifah, Malik and Ahmad ibn Hanbal – all understood the compound term *usul al fiqh* – not as the general principles of Islamic law, but the first principles of Islamic understanding of life and reality ... The faqih of the classical period were real encyclopedists, masters of practically all the disciplines from literature and law to astronomy and medicine. They were themselves professional men who knew Islam not only as law...', I. Faruqi, 'Islamization of Knowledge: Problems, Principles and Prospective' [1988] in *Islam: Sources and Purpose of Knowledge* (Herndon, Virginia: International Institute of Islamic Thought) 34, cited by Aseel Al-Ramahi, 'Sulh: A Crucial Part of Islamic Arbitration' [2008] <<http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-12-Al-Ramahi.pdf>>.

¹⁶ Levi-Tawil, (n 10) 618.

¹⁷ Kutty, (n 12) 578.

¹⁸ See about the implementation of this principle in Islamic law, M. Ayad, 'Harmonisation of International Commercial Arbitration Law and Sharia, The Case of Pacta Sunt Servanda vs Order Public – The Use of Ijtihad to Achieve Higher Award Enforcement', [2009] 6 *Mqjbl* 93.

¹⁹ Maita, (n 12) 40; Bessedik A., *Les Opérations de Financement et d'Investissement dans le Droit Musulman*, (Thesis, Université de Paris-Est, Paris 2014) 33.

Arbitration is a private dispute resolution system which is confidential and runs faster than courts proceedings. It provides parties more flexibility and control over procedures.²⁰ Like many Islamic financial institutions, *the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI)* defines arbitration in its *Shari'ah Standard No. 32-2/1*,²¹ as an '... agreement between two parties or more to designate an external party for resolving a dispute between them through issuance of a binding verdict'.²²

Regarding the arbitration clause, its validity under Shari'ah rules was debated as the subject matter is a future dispute, while the subject of contracts in Shari'ah must be existing. The four main Islamic schools, *Hanbalis, Malikis, Shafi'is* and *Hanafis* scholars, agreed that for the validity of arbitration agreement there must be an existing dispute, but this does not prevent parties to conclude conventional arbitration agreement by reference to the modern legal systems of the ICs.²³ Therefore, the validity of the arbitration clause and the subject contracts has been recognized by these systems, including KSA and UAE, in the absence of uncertainty.²⁴ The validity of this clause is explicitly recognized by the relevant positive laws, such as the NYAC of 1958 which states explicitly that:

*Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship....*²⁵

Therefore, Redfern and Hunter described the arbitration clause as a '*blanc cheque*' that '*may be cashed for an unknown amount at an unknown future date*'.²⁶

The contracting parties should also, under Shari'ah rules, appoint in their arbitration agreement a competent arbitrator or more by name. The appointed arbitrator may use his sense of fairness without being forced to follow any evidentiary or procedural rules.²⁷ According to these rules, all private rights in commercial or proprietary matters can be arbitrated.²⁸ The enforcement of arbitral awards will be recognized by ICs as long the Islamic public policy is respected, the reasoning for these awards are given and the parties are well heard in front of each other.²⁹

3. Adoption of modern arbitration practices by Islamic countries

The UNCITRAL Model Law on International Commercial Arbitration of 2006 as amended is designed to assist countries in enacting and developing their national arbitration laws to incorporate the main features and needs of international commercial arbitration. It organizes all the steps of arbitral process from the arbitration agreement until the issuance of valid and enforced arbitral awards.³⁰

²⁰ For the evolution and advantages of international commercial arbitration, see the research guided by Queen Marry- University of London, *International Arbitration Survey: The Evolution of International Arbitration*, [2018] <<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>> accessed on 17/2/2020; Sammartano, M. R., *International Arbitration- Law and Practice*, (3d ed Juris, 2014) 51. For general overview regarding the advantages and disadvantages of commercial arbitration, see *Redfern and Hunter on International Arbitration*, (6th ed Oxford University Press 2015) 28 and 46.

²¹ For more details about these standards, <<http://aaoifi.com/about-aaoifi/?lang=en>>.

²² For more details on the definition of arbitration in Shari'ah, see H. Yaacob., 'Shariah Arbitration in Islamic Finance Transaction: An Urgent Need for Muslim Arbitrators' [2014] 22, *Pertanika Journal of Social Sciences & Humanities*, Malaysia, 210, available also at <<http://www.pertanika.upm.edu.my/>>.

²³ P. Turner, 'Finding your path: Arbitration, Sharia, and the Modern Middle East' [September 2011] <<https://www.tamimi.com/law-update-articles/finding-your-path-arbitration-sharia-and-the-modern-middle-east/>>, accessed on 15/2/2020, 3.

²⁴ See about the validity of arbitration clause, article 1 (1) of the Saudi Arbitration Law of 2012 and article 1 of the Emirati Federal Arbitration Law N° 6 of 2018. See also Muhammad Abu Sadah, 'International Arbitration Contract Principles: Analysis of Middle East Perceptions', [2010] 9 (2) *J. Int'l Trade L. Policy*, 148, cited by Mutasim 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*, 7.

²⁵ Article II (1).

²⁶ Redfern and Hunter, (n 20) 19.

²⁷ Levi-Tawil, (n 10) 620.

²⁸ According to the Majallat established by the Ottoman Empire in 1876, the validity of arbitration agreement is subject to four conditions: 1. The dispute must be already arisen and clearly defined 2. The parties must have agreed to arbitration and notified their accord to the arbitrator 3. The arbitrator should be appointed by name 4. The arbitrator must have the capacity of a witness in Sharia. See in this regard, Ali Haidar, *Durer al Hukkam Fi Sharh Majallat Al-Ahkam*, Article 1848.

²⁹ Levi-Tawil, (n 10) 621.

³⁰ <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>.

By tracing this model law, many ICs have enacted national arbitration legislation that affirm the right of contracting parties to enter into valid and binding arbitration agreement, provide the mechanism of designation of arbitral tribunal, and determine the requested procedures for the enforcement of arbitral awards. In order to appreciate the deep impact of international arbitration practices on the reformation and modernization of the national arbitration legislations in ICs, there is a need to shed the light on their current arbitration legal systems, and verify the compatibility of modern international arbitral features with Shari'ah rules.

3.1. Adoption of current arbitration practices by the modern legal systems of Islamic countries

During the last decades, arbitration in the ICs has been vastly growing. This growth is going in line with the force of globalization, the liberalization of economic resources and the growing of oil production in the Arab Gulf region. The economic development in these countries and the extensive investments in their infrastructure projects attracted national and international investors. The success of these countries in attracting foreign investment imposed on them to conform to international requirements including the method of alternative dispute resolutions.³¹

Due to its flexibility, speed and confidentiality, arbitration became the most attractive method for resolutions of commercial disputes.³² Accordingly, the ICs, such as Jordan, Iraq, and Egypt, have changed their arbitration regulations by adopting either the *UNCITRAL Model Law* or incorporating the law of one of the European countries, such as the French law or the law of England and Wales.³³

The vast development of arbitration in ICs reflected their response to the international commercial developments and showed their readiness to embrace arbitration as a means of various disputes resolution. It also proved that arbitration can be conformed to Islamic culture and traditions.³⁴

Brower and Sharpe³⁵ identify three phases in the development of arbitration in the modern ICs in the 20th century. During the first phase, which began from the end of the World War II to the 1970s, the oil production in this region was controlled by concession agreements with western investors and arbitration was the primarily means for resolving disputes that arose between the Islamic country and investors in the oil industries. In that time, Islamic and local laws were negated by arbitrators and the western laws were applied. This position lead various states in the region to reject the reference to international arbitration in their commercial agreements as western and unfair.

During the second phase of modern international arbitration in the ICs which started from 1970s and lasted until 1980s, the world economy gained more confidence due to several factors including end of colonization, challenge to capitalism, increasing of oil production, development of industries, and, consequently, the stability of the western economies relied more on the effectiveness of arbitration in the settlement of oil concession disputes.³⁶ Nevertheless, the ICs challenged the whole international arbitration infrastructure as it was created and developed without their participation or, at least, giving any consideration to their values, culture and legal traditions.³⁷ As a result, several ICs revoked their oil concession agreements with western investors and rejected arbitration invoked by these investors. Moreover, they refused to ratify the main international arbitration conventions, including the NYAC of 1958.³⁸

During the third phase, ICs began to embrace the system of international arbitration. Therefore, several countries enacted local laws regarding arbitration,³⁹ and, subsequently, established international arbitration

³¹ Levi-Tawil, (n 10) 621.

³² United Nations Conference on Trade and Development, *Dispute Settlement: International Commercial Arbitration*, UNCTAD/EDM/Misc.232/Add.38, (New York and Geneva: United Nations 2005) 36.

³³ Michael Likosky, 'Transnational Legal Process: Globalization and Power Disparities', [2002] *Butterworths/LexisNexis*.

³⁴ Abdul Hamid El- Ahdab, *Arbitration with the Arab States*, (2d ed Beirut 1999) 13.

³⁵ Ch. Brower & J. Sharpe., 'International Arbitration and the Islamic world: The Third Phase', [2009] *American Journal of International Law* 643.

³⁶ See also A. Smolik, 'Effect of Shari'a on the Dispute Resolution Process Set Forth in the Washington Convention', [2010] 1 *Journal of Dispute Resolution*, Article 8, 160.

³⁷ See in this regard, Kutty, (n 12) 591; A. El-Kosheri, 'Is There a Growing International Arbitration Culture in the Arab-Islamic Juridical Culture?', in *International Dispute Resolution: Towards an International Arbitration Culture*, [1998] Albert Jan van den Berg ed, 47.

³⁸ For more details, see Levi-Tawil, (n 10) 623.

³⁹ The arbitration legislations in certain Arab countries are as follow: in Bahrain, the domestic arbitration legislations incorporated in 1971 by Articles 233–243 of the Civil and Commercial Procedures Law, whereas the International Arbitration Framework was established in 1994 by the International Commercial Law and the *Decree N° 30 of 2009*; in Egypt, the Law N° 27 of 1994; in Iraq, the Book III, Section 2, Articles 251–276 of *Code of Procedures of 1969*; in Jordan, *the law N° 16 of 2018*; in Kuwait, Articles 173–188

centers.⁴⁰ They also joined international arbitration conventions such as the NYAC of 1958, and incorporated the international principles relating to the recognition and enforcement of foreign arbitral awards. As a result of this fundamental gradual development, the arbitration systems in the ICs currently comprise of two kinds of rules that find their origins in the Islamic and western laws. Mr. Kutty has categorized these countries into three categories:⁴¹ countries that adopted western laws, such as Lebanon, Egypt, and countries that have drawn a substantial part of their legislations from the Sharī'ah, such as KSA, and, finally, countries which westernized some of their legislations but still influenced by Sharī'ah, such as Iraq and Jordan.⁴² This categorization gives international business entities primarily an idea about the general principles of recognition and enforcement of foreign awards in each of those countries. As an illustration, the recognition and enforcement of foreign arbitral award in the UAE would be rejected by its local competent court once it finds that this award is contrary to the Sharī'ah principles.⁴³ The right to reject such award can be based on Articles 1 and 27 of the *Civil Transactions Code* which, respectively, state that:

*In the absence of a text in this Code, the Courts shall resort to Sharī'ah and choose the most adequate solutions amongst those taught by the Ḥanbalī and Mālikī doctrines. Failing them, they shall resort to the Shāfi'ī and Ḥanaḫī doctrines. It shall not be permissible to apply the provisions of a law specified by the preceding articles if such provisions are contrary to Islamic Sharī'ah, public order, or morals in the State of the United Arab Emirates.*⁴⁴

3.2. Compatibility of modern arbitration practices with Sharī'ah rules

The *UNCITRAL Arbitration Model Law of 2006 as amended* and the *NYAC on the recognition and enforcement of foreign arbitral awards of 1958* are the main international instrument that reflects the international practices of the key features of contemporary international commercial arbitration.⁴⁵ The essential features of these are: the capacity of parties to enter into a valid and binding agreement,⁴⁶ the parties' authority to select their arbitrators,⁴⁷ the separability of arbitration clauses,⁴⁸ the parties' autonomy to designate the procedural rules,⁴⁹ and the substantial applicable law on their arisen dispute,⁵⁰ the parties' authority to agree on the language⁵¹ and place of arbitration,⁵² the arbitrators' jurisdiction,⁵³ the conventional procedures for challenging the selected arbitrators,⁵⁴ the due arbitral procedures,⁵⁵ and the validity and enforcement of arbitral awards.⁵⁶

The common practices of international commercial arbitration adopted by *UNCITRAL Arbitration Model Law* and the related international arbitration conventions, such as the NYAC, have been incorporated in the

of *Civil and Commercial Procedures Law of 1980*; in Lebanon by *Civil Procedures Code of 1983* in Articles 762–808 for the domestic Arbitration and 809–821 for the international arbitration, amended by *Law N° 440/2002*; in Libya, *Code of Civil Procedure of 1953*; in Oman, the *Law N° 47 of 1997* and *Law 36/1998* and Article 353 of the *Civil and Commercial Procedures Law of 2002*; in Qatar, Articles 190–210 of *Civil and Commercial Procedures Law of 1990*; in KSA, the *Royal Decree N° M/34 of 2012*; in Syria, the *Law N° 4 of 2008*, in UAE, *Arbitration Law N° 6 of 2018*; in Yemen, the *Law N° 22 of 1992* amended by the *Law N° 32 of 1997*. See in this regard Maita, (n 13) 45.

⁴⁰ Such as the Cairo Regional Center for International Commercial Arbitration, Egypt; the Arbitration Center at the Chamber of Commerce and Industry of Beirut, Lebanon; The Bahrain Center for International Commercial Arbitration, Bahrain; the Kuwait Center for Commercial Arbitration, Kuwait; the Abu Dhabi Center for Conciliation and Arbitration, UAE; and the Dubai Center for Arbitration and Conciliation, UAE. See Maita, (n 13) 45; Brower & Sharpe, (n 34) 653.

⁴¹ Kutty, (n 12) 593.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ According to Article V (2) of the New York Convention 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the State where recognition and enforcement is sought finds that: ... The recognition or enforcement of the award would be contrary to the public policy of that State'.

⁴⁵ <<https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>>.

⁴⁶ UNCITRAL Model Law, Article 7 (1).

⁴⁷ *ibid* Article 10.

⁴⁸ *ibid* Article 16.

⁴⁹ *ibid* Article 19.

⁵⁰ *ibid* Article 28.

⁵¹ *ibid* Article 22.

⁵² *ibid* Article 20.

⁵³ *ibid* Article 8 (1).

⁵⁴ *ibid* Article 13 (2).

⁵⁵ *ibid* Article 18.

⁵⁶ *ibid* Article 34 & 35; see also Article III & IV of the New York Convention.

legal systems of the ICs.⁵⁷ This incorporation has been also reflected by the establishment of arbitration centers in most of these Countries, such as KSA, UAE, Egypt, and Jordan where Shari'ah is the principal source of their legislations and its imperative rules should be applied, either when the parties choose to apply one of the laws of these countries to their dispute, or when a party requests the enforcement of a foreign arbitration award on their territories.⁵⁸

However, there are some differences between arbitration under Shari'ah and the modern international arbitration system regarding the arbitrability objective of disputes, especially in family issues. Therefore, while these issues are not mostly arbitrable in western countries, the Qur'an has explicitly commended the reference to arbitration for resolving the family disputes.⁵⁹ Therefore, its verse 35:4 of *Surah Al Nisa* states that: 'If you fear dissention between a married couple, send an arbitrator from his family and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them'. By application of this divine instruction, and for illustration, the *Uniform Law Commission (ULC)* in the *Islamic Republic of Pakistan* adopted in July 2016 the Uniform Family Law Arbitration Act, whereby parties may agree to submit any existing or future family dispute to a binding arbitration, including claims for spousal support, division of property, custody and child support, claims of breach of a marital agreement.⁶⁰

The Sunnah has also stressed the necessity to settle disputes quickly and discreetly, as the only means for settling dispute at a time when courts did not exist was the tribunal of arbitration. The companions of the prophet Muhammad referred also to arbitration in many occasions.⁶¹ Therefore, in an important case involved the *Caliph* Ali Ben Abi Taleb the fourth *Caliph* of Muslims and the Muslim *Caliph* Mua'wya Bin Abi Sofian, they agreed to appoint two arbitrators in written deed, in which they designated the names of arbitrators, and agreed upon the duration of arbitration, the applicable law and the place of issuing the award.⁶²

However, the limited usage of arbitration in Islamic history has been extended nowadays to include the arbitrability of all financial and economic issues, as Islam is a flexible evolutionary system that allows national legal systems of ICs to evolve and adapt to different and new circumstances.⁶³ Therefore, according to the consensus of Muslim scholars the excluded area from arbitration covers only the issues relating to Shari'ah imperative orders,⁶⁴ such as the criminal punishment, the patrimonial rights, the guardianship on orphans. These matters must mandatorily be referred to national courts, whereas all other matters relating to financial and commercial disputes are arbitrable.⁶⁵

Regarding the arbitration clause, its validity under Shari'ah was strongly debated as its subject matter is a future issue, while the subject of contracts in Shari'ah must be existent and legitimate.⁶⁶ As mentioned above, the four main Islamic schools agreed that for the validity of arbitration agreement there must be an existing dispute, but, this does not prevent parties to conclude conventional arbitration agreement by reference to the modern legal systems of the ICs.⁶⁷ Therefore, with the practical importance of contracting on future things, the validity of the arbitration clause and the subject contracts have been recognized by the positive legislations of the ICs in the absence of uncertainty.⁶⁸ This approach was adopted by the modern legal systems of the ICs, including KSA, Jordan and UAE where this clause is allowed under Article 1 (1) of

⁵⁷ Most of them are members of international arbitration agreements such as the New York Agreement. About the list of ICs which are party to the Convention, <https://en.wikipedia.org/wiki/Convention_on_the_Recognition_and_Enforcement_of_Foreign_Arbitral_Awards#Parties_to_the_Convention> accessed on 17/2/2020.

⁵⁸ KSA Arbitration Law of 2012, UAE Arbitration Law of 2018, Jordan Arbitration Law of 2018.

⁵⁹ The term arbitration in western states is known in Shari'ah as 'Tahkeem'.

⁶⁰ For more details about the scope of this Act, <<https://www.pasternakfidis.com/update-arbitration-family-law-matters-new-uniform-family-law-arbitration-act/>> accessed on 17/2/2020.

⁶¹ Hatem Al-Hajj, 'The Theory of Arbitration in Shari'a – The Arbitration System and Its Legal and Procedural Controls' [2013] 7 *Journal of Jurisprudence and Law* 4.

⁶² Zeyad Alqurashi, 'Arbitration under the Islamic Sharia', [2003], <<http://nigerianlawguru.com/articles/arbitration/ARBITRATION%20UNDER%20THE%20ISLAMIC%20SHARIA.pdf>>, 5; See also Maria Bhatti, 'The Role of Shar'a in International Commercial Arbitration', [2019] 36 *Wisconsin International Law Journal* no. 1, 55.

⁶³ See in this regard, George Khoukaz, 'Sharia Law and International Commercial Arbitration: The Need for an Intra-Islamic Arbitral Institution', [2017] 2 *Journal of Dispute Resolution*, article 14, 186.

⁶⁴ Unlike countries-based legal systems, Shari'ah rules are not codified in a formal body law. Therefore, in addition to the Qur'an and Sunnah, there are four classical Islamic schools: *Hanafi*, *Maliki*, *shafi'i*, and *Hanbali*, which together compose a common accepted authority for Sunni Muslims. Whereas the general Islamic jurisprudence authority in Shia Islam is the Ja'afari school, see in this regard, Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in The Middle East', [2008] 21 *N.Y. INT'L L. REV.* 1, 4.

⁶⁵ Alqurashi, (n 62) 7.

⁶⁶ Abu Sadah, (n 24) 148. cited by Alqudah, (n 24) 7.

⁶⁷ Turner, (n 23) 3.

⁶⁸ *ibid.*

the Saudi Arbitration Law of 2012, Article 11 of the Jordan Arbitration Law N° 16 of 2018, and Article 1 of the Emirati Federal Arbitration Law N° 6 of 2018. This clause shall however be deemed written.⁶⁹ Moreover, most of the modern legal system of ICs, including the UAE Civil Transactions Law N° 5 of 1985⁷⁰ and the Jordan Civil Law N° 43 of 1976,⁷¹ validate as a general principal contracting on future issues in the absence of uncertainty.

Practically, the arbitration clause participates positively in reducing the jurisdictional uncertainty, and in view of this functionality its future effect should not be used as a reason for its invalidity. Moreover, under Shari'ah rules a contractual clause is invalid only if it contradicts the object of the contract.⁷² Therefore, the reference in determining the validity of contractual clauses in Shari'ah is the *Hadith* of Prophet Muhammad who said, 'Muslims must respect their contractual clauses, except a clause that legitimizes (*haram*) prohibited, or forbids (*halal*) permitted'. Based on this interpretation and at the practical level, the validity of arbitration clause should not be contested by Islamic jurisdiction as long as its concept does not legitimize prohibited things or forbids those which are permitted.⁷³

Under the principle of separability of an arbitration clause, its validity can be recognized independently of the underlying contract in which it is contained. According to the Islamic jurisprudence a void clause does not lead to the voidance of the underlying contract unless it is the principal motivation for concluding this contract.⁷⁴

The disputing parties have full liberty to appoint their arbitrators either directly or by reference to a third party. Shari'ah does not put any restrictions regarding the number of the appointed arbitrators. The issue is entirely left to the disputing parties to appoint one or more arbitrators provided their number to be uneven. For illustration, Article 13 of the KSA arbitration law states that: 'The arbitration tribunal shall be composed of one arbitrator or more, provided the number of arbitrators is an odd number; otherwise, the arbitration shall be void'. Once started the arbitral procedures, the appointed arbitrator cannot be revoked in the absence of parties' mutual agreement.⁷⁵ However, any of them can submit a revocation request to the competent court to decide on the matter.⁷⁶

Regarding the qualification of the appointed arbitrators,⁷⁷ the Islamic jurisprudence requires for them the same qualification as for judges.⁷⁸ According to Articles 1792 – 1794 of *Majallat of 1877*,⁷⁹ which is still in force in some ICs such as Jordan, a judge must be a mature, wise, free, sane, fair, jurist.

The question is raised in this regard about the validity of appointment of a non-Muslim or a woman as an arbitrator. Unlike *Hanbali*, *Maliki* and *Shafi'i* scholars, the *Hanafi* scholars authorize the appointment of non-Muslim arbitrators in disputes involving non-Muslims. Current Islamic jurisprudence allows Muslims to trade and do business in non-Muslim countries and to appoint a non-Muslim arbitrator to resolve the relevant dispute.⁸⁰

Also, Unlike *Hanbali*, *Maliki* and *Shafi'i* scholars the *Hanafi* scholars allow the appointment of a woman as an arbitrator in all kinds of disputes. According to *Hanafis*, an arbitrator can be a person who have the qualifications of a witness, and a woman who has the qualification to be a witness in debts and commercial transactions as stipulated in the *Qur'an*.⁸¹ Furthermore, the *Qur'an* and *Sunnah* have not stipulated any explicit prohibition on a woman being a judge or an arbitrator, and the second *Caliph* of Muslims *Omar bin*

⁶⁹ See for example, Article 7 (2) of the UNCITRAL arbitration Model Law which states that: 'The arbitration agreement shall be in writing', and Article 9.3 of the Saudi Arbitration Law which states that: 'An arbitration agreement shall be deemed written'.

⁷⁰ Article 202 (1).

⁷¹ Article 160 (1).

⁷² Alqudah, (n 24) 7.

⁷³ *ibid*.

⁷⁴ Razali Nawawi, 'Islamic Law on Commercial Transactions', [2009] CERT Publishing, Malaysia 142, cited by Alqudah, (n 24) 8.

⁷⁵ Alqurashi, (n 62) 6.

⁷⁶ Abdul Hamid El-Ahdab & Jalal El-Ahdab, *Arbitration with Arab Countries*, (3rd ed, Kluwer Law International, Netherlands, 2011) 36.

⁷⁷ For a detailed study of the notion of arbitrator and its qualification, see Thomas Clay, *L'arbitre*, (Daloz, Paris 2001, préf. Ph. Fouchard).

⁷⁸ *ibid*.

⁷⁹ The Civil Law of the Ottoman Empire in the late 19th and early 20th centuries. It constituted the first attempt to codify a part of the Shari'ah -based law of an Islamic Country.

⁸⁰ See in this regard, Al-Haji, (n 61) 7.

⁸¹ Verse 282 Surah Al Baqara- Qur'an states that:

O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice. Let no scribe refuse to write as Allah has taught him. So let him write and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice. And bring to witness two witnesses from among your

Al Khattab appointed a woman as an inspector on *Medina Bazaar*, where she judged between merchants in commercial disputes.⁸² Currently, the majority of ICs allow the appointment of women as judges and arbitrators.⁸³ Therefore, for example, the Emirati Federal Arbitration Law N° 6 of 2018 states clearly in Article 10 (3) that '*The arbitrator need not be of a specific gender or nationality, unless otherwise agreed upon by the Parties or provided for by law*'. In KSA, while the canceled Arbitration Law of 1983 was preventing the appointment of women arbitrators, the new arbitration Law of 2012 is silent on gender and religion of the appointed arbitrators. This silence should open the door before the appointment of women arbitrators.

Where the dispute involves a non-Muslim party, according to the *Maliki*, *Shafi'i* and *Hanbali* scholars, the disputing parties can choose the application of a non-Islamic legal system, provided that the chosen law does not violate the Islamic public policy.⁸⁴ However, with the ratification of NYAC of 1958 by the majority of ICs, these countries approved the principal of delocalization of arbitration agreement and consequently the right of contracting parties to choose freely the applicable law.

As far as the recognition and enforcement of arbitral award is concerned, according to the majority of Muslim scholars an arbitrator's award is binding and enforceable as a judge's verdict.⁸⁵ However, as for the lack of the arbitrator's enforcement authority, the enforcement request of an arbitral award should be addressed to the national court where the assets are located. This court has supervisory authority to check only the formal matters, including the existence of an arbitration agreement, the validity of constitution of arbitration committee, without exceeding that to the review of the merits of the dispute or the reasoning of arbitrators.⁸⁶ This enforcement may be rejected by the national court if the arbitral award comprises an apparent error or injustice or it is contrary to Islamic public policy.⁸⁷ Article V (2) of the NYAC states explicitly that:

*Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: b) The recognition or enforcement of the award would be contrary to the public policy of that country.*⁸⁸

In fact, the ratification of the NYAC by most ICs have largely contributed in increasing the enforcement of foreign arbitral awards by their jurisdictions. It can also facilitate the enforcement of a Shari'ah award rendered under Shari'ah rules in a western country.

As recognized in modern international arbitration practices, the arbitral procedures in Shari'ah allow the disputing parties to choose the arbitral seat and the applicable procedural law. This right is also given to the appointed arbitrator whenever he is entrusted that by the parties. The priority for Shari'ah in this regard is to comply with the principle of due process that encompasses the respect of parties' right of defense, giving equal opportunities to each party to be heard and to present fairly their case.⁸⁹

In sum, the modern international arbitration practices could be consistent with the spirit of Shari'ah rules, as long the concept of binding arbitration is recognized by its different resources of *Qur'an*⁹⁰, *Sunnah* and *jurisprudence*. Also, certain Shari'ah-based legal system countries, including KSA, have issued their

men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses – so that if one of the women errs, then the other can remind her.

As translated in <<https://quran.com/2/282>>.

⁸² Mohammad Rafffa, 'Arbitration, Women Arbitrators and Sharia', [2013], L. J. Nigeria, <<https://works.bepress.com/mohamed-raffa/1/>>.

⁸³ See in this regard Alqudah, (n 24) 10.

⁸⁴ Alqurashi, (n 62) 7.

⁸⁵ *ibid* 7, 8.

⁸⁶ *ibid* 8.

⁸⁷ *ibid*.

⁸⁸ For a detailed study about the reference to the role of public order in arbitration, see Loquin, E., et Manciaux, S. (dir.), *L'ordre public et l'arbitrage*, (LexisNexis, Paris 2014).

⁸⁹ Alqudah, (n 24) 11.

⁹⁰ See in this regard, verse 35 & 58 Surah Al Nisa- Qur'an, V. 35 states that:

And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things],

and V. 58 states that: *Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing*, as translated in <<https://quran.com>>.

arbitration legislations without doing substantial changes on the spirit of arbitration as known in the relevant international practices.⁹¹

4. Evolution of application of Sharī'ah rules in international commercial arbitration

During the last century most of the cases in major international arbitrations replaced Sharī'ah as substantive law by western laws in terms of their practical application. As such, the western arbitrators seem to ignore the general rule of *pacta sunt servanda*.

The analysis of major cases provides us with a complete comprehension of their effects on the development of arbitration legislations in the ICs and justify the evolvement of their attitude towards commercial arbitration system from disfavoring it to embracing its practices.⁹²

4.1. Reluctance in the application of Sharī'ah rules

In the 1950s, several oil concessions arbitration cases have negatively affected the development of international arbitration systems the ICs.

In the petroleum case of *International Marine Oil Company Limited v the Emirate of Qatar* the arbitrator denied the application of Sharī'ah law on the concession agreement. The law of Qatar was evidently in that era a Sharī'ah law, but the arbitrator held that this law is insufficient to regulate a modern oil concession instrument as it does not contain any specific principles relating to this kind of agreements.⁹³

In another famous case of *Aramco Arbitration, the Kingdom of Saudi Arabia v Arabian American Oil Company*, the three appointed arbitrators held that the proper law governing the concession agreement was the Sharī'ah law, as applied in KSA, pursuant to the rule of *pacta sunt servanda*.⁹⁴ However, the arbitrators held that Sharī'ah law is insufficiently competent for regulating the modern regime of oil concession for the lack of specific regulation in this regard,⁹⁵ therefore, the arbitrators chose to fill the lacunae in the Saudi law by resorting to international customs and common practices in the international oil industry and general principles of jurisprudence.⁹⁶

Likewise, with the nationalization of three foreign oil companies by the Libyan government in the 1970s, these companies have initiated arbitration proceedings according to the arbitral clauses contained in the concession's agreements. However, the Libyan government refused to participate in the subsequent proceedings.⁹⁷ The Libyan local law and the relevant international law were the applicable laws according to the choice of law provisions included in these agreements. The arbitrators in the three relevant cases have denied the application of the Libyan local laws, which is considered a primitive law in a developing country and its application may affect negatively the required legal environment for the development of arbitration in international commercial relations.⁹⁸ The arbitrators based their decision in each case on deferent legal text and analysis. As a result, The Libyan government lost its three arbitral cases and ultimately reached to settlements with the different parties.⁹⁹

⁹¹ See in this regard, Alqudah, (n 24) 5.

⁹² Maita, (n 13) 23; El-Kosheri, (note 37) 47; Brower & Sharpe, (n 35) 645.

⁹³ *Emirate of Qatar v. Int'l Marine Oil Co.* [1953] 20 International Law Report 534; Maita, (n 13) 30; See also, Howard L. Stovall, 'Arbitration and the Arab Middle East', [September 2009], <http://www.stovalllaw.com/images/Arbitration_in_the_Arab_Middle_East.pdf> Maita, (n 13) 29.

⁹⁴ Ayad, (n 18) 93.

⁹⁵ Al Jarba, (n 3) 203.

⁹⁶ *Saudi Arabia v. Arabian Am. Oil Co.* [1958] 27 International Law Report 117. For a detailed development on the role of Sharia Law in the modern transactions, See W. M. Ballantyne, 'The Sharia and its Relevance to Modern Transactional Transactions' [February 1987], First Arab Regional Conference, in Loy. L.A. Int'l & Comp. L. Rev., 15.

⁹⁷ Maita (n 13) 31.

⁹⁸ *ibid.*

⁹⁹ About the Libyan arbitration cases, See *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of Libya* [1979] 53 ILR 389; *Texaco and Libyan American Oil Company v Libyan Arab Republic, Award of 12/4/1977*, [1982] 62 ILR 140; *BP Exploration Co. Ltd v Government of the Libyan Arab Republic, Award of 10/10/1973* [1979] 53 ILR 297; P. Koundes, 'International Arbitration Between States and Foreign Private Parties: The Libyan Oil Nationalization Cases', [1981] 75 AJIL 476, C. Greenwood, 'State Contracts in International Law – The Libyan Oil Arbitrations', [1981] 53 BYBIL 27; See also Maita, (n 13) 31; Smolik, (n 36) 159; P. Von Mehren & P. Kourides, 'International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases', [1981] 75 AM. J. INT'L L 483.

4.2. 'Sharī'ah risk'100 in Islamic finance contracts

Although some of the judicial decisions referred to in the cases below were rendered by national courts and not arbitration tribunals, they revealed the substantial manner of thinking of western judges, arbitrators and scholars about the difficulties that face the reference to Sharī'ah in Islamic finance contracts as a governing law.¹⁰¹ The main issues that judges or arbitrators expressed in many occasions as risks in face of the applicability of Sharī'ah law in western jurisdiction systems are as follows: Sharī'ah is a non-state law, it is not codified in a body of law, the Islamic jurisdictions are not bound by jurisdictional precedence, the existence of multiple Islamic schools of thought led to different interpretations of commercial matters, lack of specific provisions and identified standards that detailed Islamic finance transactions, and lack of particular procedures to Islamic commercial dispute resolution.¹⁰²

For illustration, in the case of the holding pharmaceutical company of Bangladesh *Beximco Ltd. v Shamil Bank of Bahrain*,¹⁰³ the Islamic bank Shamil had entered with Beximco and other borrowers into two *murābahah* agreements.¹⁰⁴ According to the clause of governing law contained within each of these agreements:

*Subject to the principles of the Glorious Sharī'ah, this Agreement shall be governed by and construed in accordance with the laws of England. Beximco defaulted on its payment and after several violations of its contractual obligations, Shamil brought the case to the competent court, and in its defense, Beximco claimed that the murabahah agreements were void and unenforceable because the transaction was in actuality disguised interest-bearing loans proscribed under Sharī'ah law.*¹⁰⁵

According to the English Court of Appeal, Sharī'ah Law could not govern an Islamic finance agreement in the UK.¹⁰⁶ The Court ruled that the reference by the parties in their Islamic finance agreements to both Sharī'ah and English laws would not lead to the application of a non-codified and a non-national system of law such as Sharī'ah.¹⁰⁷ The court held that the sentence '*subject to the principles of glorious Sharī'ah in the governing law clause demonstrated merely Shamil's intention to conduct all its transactions according to Sharī'ah principles...*', and '*...it was not meant to trump the application of English law as the governing law*'.¹⁰⁸ Furthermore, the court added that Sharī'ah law is an unrecognizable form of law that contains general principles and the governing law clauses in the said agreements did not incorporate any specific or identifiable rules of Islamic law.¹⁰⁹ Therefore, the court concluded that the simple reference to Sharī'ah was '*intended simply to reflect the Islamic religious principles according to which the Bank holds itself out as doing business*'.¹¹⁰

The English Court of Appeal had justified the dismissal of Sharī'ah as a selected governing law by relying on Articles 1 (1), 3 (1) and 5, of the *Convention of Rome of 1980* on the law applicable to contractual Obligations.¹¹¹ According to Articles 1 (1) and 3 (1), a contract shall be governed by the law of the country chosen by the contracting parties, and by virtue of Article 5 the choice of a non-state law as the governing law of the contract is implicitly excluded. Therefore, the strict application of these provisions has lead the

¹⁰⁰ 'Sharī'ah risk' means that the validity of the Islamic finance transactions could be challenged for non-conformity to Sharia principles. A. Maita, 'Arbitration of Islamic Financial Disputes', [2014] 20/1 Annual Survey of International & Comparative Law, article 7, 13.

¹⁰¹ N. Roupakia, 'L'application de la Charia dans les Contrats Internationaux sous L'égide du Règlement Rome I', [2015] Les Cahiers de la Finance Islamique, Université de Strasbourg, N° Spécial 46.

¹⁰² A. Zahid, & H. Ali, 'Sharī'ah as a Choice of Law in International Islamic Financial Contracts: Shamil Bank of Bahrain Case Revisited', [2013] 10, Us-China Law Review, 31; Maita, (n 13) 43.

¹⁰³ *Beximco Pharmaceuticals Ltd vs. Shamil Bank of Bahrain*, [2004] EWCA Civ 19, Published in Islamic Finance News in two parts on 21 January 2015 and 28 January 2015; For a detailed analysis of this case, see C. Paldi, *The Dubai World Islamic Finance Arbitration Center and the Dubai World Islamic Finance Arbitration Center Jurisprudence Office as the Dispute Resolution Center and Mechanism for the Islamic Finance Industry: Issues and a Proposed Framework*, (Thesis, Durham University, UK 2013) 11.

¹⁰⁴ Paldi, (n 103) 12.

¹⁰⁵ S. Walker & T. Childs, 'Arbitration of Islamic Finance Disputes', [2015], Islamic Finance News 3; Maita, (n 13) 43.

¹⁰⁶ Paldi, (n 103) 12.

¹⁰⁷ Zahid & Ali, (n 102) 29.

¹⁰⁸ The text of the High Court decision in the *investment Dar Co KSSC v Bloom Developments Bank Sal* [2009] All ER (D) 145, <<http://www.allenoverly.com/AOWeb/binaries/55080.PDF>>.

¹⁰⁹ Roupakia, (n 101) 46.

¹¹⁰ The text of the High Court decision in the *investment Dar Co KSSC v Bloom Developments Bank Sal* [2009] All ER (D) 145, <<http://www.allenoverly.com/AOWeb/binaries/55080.PDF>>. See also Walker & Childs, (n 105) 4.

¹¹¹ <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:I33109&from=EN>>. See also Roupakia, (n 101) 47.

court to the dismissal of the application of Shari'ah.¹¹² Although the international commercial law model gives the parties the right to choose any non-state law as the governing law of their contract.¹¹³

As a result of the preceding reasoning, the decision of the High Court was confirmed by the Supreme Court which clearly denied the application of Shari'ah Law on Islamic finance transactions, even if so stated explicitly in the agreement as long as Shari'ah is not a recognized form of law that encompasses specific identified principles able to govern an international commercial dispute in the UK.¹¹⁴

In another case involved the Kuwaiti *Investment Dar Co v the Lebanese Bloom Development Bank*,¹¹⁵ the two parties had entered into (*wakālah*) an agency investment agreement governed by the law of England.¹¹⁶ According to this agreement, Bloom had to deposit a fixed amount of money with its (*wākīl*) Dar agent to invest it in different projects. After Dar's default on payments under the signed agreement, Bloom brought the case to the High Court of England based on the default of payments of the agreed periodic profit in the contractual claim and the deposits held in the trust claim.¹¹⁷

In its defense Dar raised that the *wakālah* agreement, which was approved by its Shari'ah board, was not Shari'ah compliant, being a loan investment agreement with interest.¹¹⁸ The court ignored the binding and valid agreement and applied English law to the *wakālah* agreement, and ruled that Dar was liable to pay to Bloom only the deposit amount. By its decision, the court ignored the *wakālah* arrangements, under which Dar was obligated to pay to Bloom 5% return at the end of each *wakālah* period.¹¹⁹

According to the Standard No. 5/2,2,2 of AAOIFI¹²⁰ Shari'ah standard on guarantees:

... it is not permissible to combine agency and personal guarantees in one contract at the same time (i.e. the same party acting as agent on the one hand and acting as guarantor on the other hand), because such a combination conflicts with the nature of these contracts. In addition, a guarantee given by a party acting as an agent in respect of an investment, turns the transaction into an interest-based loan since the capital of the investment is guaranteed in addition to the proceeds of the investment (i.e. as though the investment agent had taken a loan and repaid it with an additional sum, which is tantamount to ribā).¹²¹

As such, Dar was an agent and a guarantor of payment to Bloom the deposit amount and a 5% return. Therefore, it used this argument of non-compliance of the *wakālah* agreement with Shari'ah rules to evade its agreed obligations towards Bloom.¹²² However, Bloom referred to the standard No. 21/4-2-c of AAOIFI to argue the compliance of this agreement with Shari'ah:

... the amount payable as remuneration for agency should be known, whether in lump sum or as a share of a specific amount of income. It may also be defined in terms of an amount of income to be known in the future, as when remuneration is linked to an indicator that may be quoted at the beginnings of different intervals of time. However, it is not permissible to leave remuneration for agency undetermined and allow the agent to take an unspecified share from the entitlements of principal.

¹¹² See in this regard, J. C. COLÓN, 'Choice of Law and Islamic Finance', [2011] 46 Texas International Law Journal, 414.

¹¹³ <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html>, J. Ramberg, 'International Commercial Transactions', [2011] ICC, Paris, N° 5, 17; F. Bortolotti, 'Drafting and Negotiating International Commercial Contracts: A Practical Guide', [2008], ICC, Paris, N° 5, 34.

¹¹⁴ Maita, (n 13), 44. The same reasoning was followed in 2002 in the case incorporated *Islamic Investment Company of the Gulf Ltd (Bahamas) v. Symphony Gems NV and others*, [2002] Commercial Court, All ER (D) 171.

¹¹⁵ The text of the High Court decision in the *investment Dar Co KSSC v Bloom Developments Bank Sal* [2009] All ER (D) 145, <<http://www.allenoverly.com/AOWeb/binaries/55080.PDF>>; For a detailed analysis for this case, see Paldi, (n 103) 14.

¹¹⁶ H. Zulkifli & M. Asutay, 'An analysis of the Courts decisions on Islamic Finance disputes', [2001], ISRA International Journal of Islamic Finance., 3 (2), 57.

¹¹⁷ Walker & Childs, (n 105) 6; Zulkifli & Asutay, (n 115) 57.

¹¹⁸ C. Paldi, 'Proposal for the Dubai World Islamic Finance Arbitration Tribunal (DWIFAC) and Jurisprudence Office (DWIFACJO) as the Dispute Resolution Mechanism and Center for the Islamic Finance Industry', [Dec. 2014] 2 Journal of Islamic Banking and Finance, n° 2, 15.

¹¹⁹ Paldi, (n 118) 12.

¹²⁰ The Accounting and Auditing Organization for Islamic and Financial Institutions (AAOIFI) is responsible for developing and issuing standards for international Islamic finance industry, <<http://aaoifi.com/standard/Shariah-standards/?lang=en>>.

¹²¹ Interest-based loan, which is prohibited in Shari'ah according to Verse 275 Surah Al Baqara- Qur'an, 'They said that sale is like ribā whereas Allah has allowed sale and has banned ribā'.

¹²² Paldi, (n 103) 14.

By its decision, the court ignored the above standards and, consequently, unfortunately misunderstood Shari'ah law. It adjudicated the *wakālah* agreements according to English law, and judged that Bloom was only entitled to the deposit amount without the agreed 5% return on the ground that the transaction was null and void for non-compliance with Shari'ah law.¹²³ While if the above Islamic standards were well-understood by the court, Dar was liable to pay to Bloom the deposit amount plus the agreed profit, rather than only the principal amount.¹²⁴

Similar reasoning was followed in the case *Bank Islam Malaysia Berhad* where the bank bought according to a *Bai Bithaman Ajil (BBA)* agreement a property to sell it to one of its customers at an agreed price including a profit margin,¹²⁵ which must be paid by the customer by periodic instalments. The primary perception of this transaction is that it is simply an interest disguised as a sale. Nevertheless, under Shari'ah law nothing prevents the seller from increasing the sale price according to the period of time for which installments are extended.¹²⁶ Based on this general rule, the bank contended that it had a legal right to request the payment of the total agreed sale price regardless of the early termination of the agreement. It argued that the customer had to pay the total agreed sale price as this agreement is a real sale agreement and not an interest-based loan agreement. However, the court explained that: '*the BBA contract is secured by a charge and concession as rebate or ibra' is given as a matter of practice to all premature terminations*'. It added that: '*further, it is not a simple sale because even if the bank does not make payment of the full purchase price under BBA, the bank would still be entitled to claim the amount already paid*'. It also stated that: '*whereas in a simple sale if the first leg of the transaction fails, the Bank's right to the amount paid will not ipso facto accrue since the sale was never completed*'.

The court wondered:

why a bank should insist on payment of the full sale price and thereafter as a matter of practice grant a rebate to the customer simply to show that it is a sale transaction may have its purpose, but to place the customer in such a precarious position is quite something else, particularly when such grant is at the Bank's absolute discretion.

It stressed also the point that:

from the practice of the bank it is clear that the insistence on enforcing payment of the full sale price appears to be merely an attempt to adhere to written text, but I doubt if such appearance achieves its purpose [...] This is because, despite the written term of the agreement, the bank in reality does not enforce payment of the full sale price upon a premature termination. It always grants rebate or ibra' based on unearned profit.

Consequently, the court ruled that:

*the bank should not be allowed to enrich itself with an amount, which is not due while at the same time taking cognizance of the customer's right to redeem his property. It held that: the bank must grant a rebate and such a rebate shall be the amount of unearned profit as practiced by Islamic banks [...] The legal documentation used by Islamic banks should have addressed the peculiarity of the Islamic banking transaction, instead of adopting a cut and paste approach of the conventional banking documents.*¹²⁷

Likewise, in the case involving *Sanghi Polyesters Ltd vs. The International Investor KCFC* of 2000, the *Istisna'a* contract stated that '*this dispute shall be governed by the laws of England except to the extent it may conflict with the Islamic Shari'ah which shall prevail*'.¹²⁸ The English tribunal disregarded the application of Shari'ah for the lack of a uniform regulatory framework that governs Islamic transactions, and as it is impossible to apply two different legal systems on the same substantive matter.¹²⁹

¹²³ *ibid* 15.

¹²⁴ Zulkifli & Asutay, (n 116) 59.

¹²⁵ For more details about this case, see Paldi, (n 103) 16.

¹²⁶ *ibid* 17.

¹²⁷ See Paldi, (n 103) 21.

¹²⁸ [2000] 1 Lloyd's Rep 480, cited by Aznan Hassan Kyaw Hla; J. C. COLÓN, (n 112) 414.

¹²⁹ *ibid*.

In view of the above-mentioned cases, the main asserted conclusion was the dismissal by western courts of the application of Sharī'ah rules as being incompetent or insufficient, after which they applied '*general principles of law*' in the western laws.¹³⁰ This position was largely criticized by the Islamic jurisprudence as the western courts, and by analogy the western arbitration tribunals, have not exerted enough efforts in determining the Sharī'ah mandatory rules, such as the prohibition of '*ribā*' (interest), as intended by the contracting parties at the time of the conclusion of their contracts. As a result, throughout this period of time, many ICs have manifested its hostility and distrust of international arbitration and jurisdiction as favoring the western interests.¹³¹ The arbitral cases in the next section were significant in embracing the institution and infrastructure of international arbitration by ICs.

4.3. Application of Sharī'ah rules

The international commercial law model recognized that the contracting parties can apply *non-national* system of law to their contract by mutual agreement to arbitrate their dispute governed by this system. This application might be applied directly through incorporation of this system such as the relevant Sharī'ah rules into the contract as particular provisions, or indirectly by applying a national law that itself applies these rules.¹³²

The Rome I Regulation on the Law Applicable to Contractual Obligations adopted by the EU in 2008, removed indirectly the limitation stipulated in *the Convention of Rome of 1980* with respect to the exclusion of application of a non-state law. Therefore, it allowed in paragraph 13 of the preamble of this regulation to the contracting parties to choose a non-State law: '*this Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention*'.¹³³ The implementation of such text may contribute in the development of application of Sharī'ah as a contractual governing law.

Furthermore, some of the international jurisdictional and arbitral precedents that took into account the application of Sharī'ah rules on Islamic finance contracts have played a vital role in the adoption and promotion of modern arbitration practices in ICs, for illustration:

In *Musawi v. R. E. International (UK) Ltd.*, case of 2007,¹³⁴ the England and Wales High Court of Justice was required to enforce an English arbitration award decided under Sharī'ah rules in a dispute related to a joint acquisition, development and ownership of an adjoining plot of land. The court decided that this award shall be enforced as long Sharī'ah is valid as a substantive governing law by virtue of the *English Arbitration Act of 1996*.¹³⁵

In *Al Midani v. Al Midani* case of 1999, in an arbitration agreement concluded by heirs of a wealthy Saudi regarding the division of their late father's estate by a named arbitrator, an appeal request was filed before the England CA which found that the applicable law was '*either Sharia law or such law as modified by Saudi law*'. It mentioned that Sharī'ah is a direct source of law in ICs. Therefore, if the contracting parties wish to apply Sharī'ah, to their agreement, they have the option to apply a Sharī'ah-based national law, such as the Saudi system of law which is based on the Qur'an, Sunna and *fiqh*.¹³⁶

In *Kuwait v. Sir Frederick Snow & Partners* case of 1973,¹³⁷ the British firm Sir Frederick Snow & Partners lost an arbitration award against the state of Kuwait, at a time when the UK and Kuwait were not party to the NYCA of 1958.¹³⁸ The enforcement of this award by Kuwait in the UK was not possible without ratification of the NYCA in 1978 to meet the reciprocity requirement retained by the UK at the date of its entry into the convention in 1975. The positive effect of this arbitration award proved to the countries adopting

¹³⁰ Maita, (n 13) 32; Paldi, (n 103) 21.

¹³¹ For example, after losing the Aramco arbitration, Saudi Arabia issued a Decree preventing its agencies from resorting to arbitration without the prior consent of the Council of Ministers, see in this regard, *Decree No. 58/1963*, 25 June 1963.

¹³² Rupert Reed, 'The application of Islamic finance principles under English and DIFC law', [October 2014] *Butterworths Journal of International Banking and Financial Law*, 573.

¹³³ G. Melkomian, 'Choice Of Non-State Law In International Commercial Contracts', [Winter 2010] *International Business Law Journal*, 604 <http://www.luys.am/Images/Scholars/Attachments/Gayaneh_Melkom_Melkomianibl_Paper_Final.Pdf>, Zahid & Ali, (n 102) 33, for an opposite opinion, see Roupakia, (n 101) 50.

¹³⁴ [2007] All E.R. (D) 222 (December).

¹³⁵ Hadeel Abdelhady, 'Islamic Law in Secular Courts (Again), Teachable moments from the Journey', [2009], <http://www.opalesque.com/OIFI137/Industry_Snapshot_Islamic_Law_in_Secular_Teachable197.html>, 1–3.

¹³⁶ Article 1 of the Saudi Constitution.

¹³⁷ [1984] *Kuwait v. Snow, A.C. 426 (H.L.) (U.K.)*; Brower & Sharpe, (n 35) 649.

¹³⁸ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. See in this regard Maita, (n 13) 32.

Shari'ah law the benefits of joining the NYCA and the efficiency of international arbitration as effective mechanism for resolving Islamic finance disputes.¹³⁹ It would also facilitate the enforcement of foreign arbitration awards in the ICs, and the other way around the enforcement of a Shari'ah award rendered under Shari'ah rules in a western country.

In *Aminoil v. Kuwait* case of 1982, after nationalization of the Kuwaiti oil sector by the government in 1977 and subsequently the termination of the Aminoil oil concession agreement, the two parties referred to an *ad hoc* arbitration. The arbitration tribunal was sensitive to apply the Kuwaiti local law which is derived from Shari'ah law. It applied this law to the substantive issue and gave the right to Kuwait to terminate Aminoil concession agreement against payment of fair compensation to Aminoil for its long-term benefits of this concession.¹⁴⁰ The direct outcome of this award increased the acceptance by ICs of international arbitration system as an effective mechanism for resolving international commercial disputes.¹⁴¹

In *Saudi Arabia/Netherlands v. ARAMCO arbitration* case relating to the interpretation of a concession agreement made on 29 May 1933, between *Pipeline Contractor (Saudi Arabia/Netherlands)* and *ARAMCO (Saudi Arabia/US)*, the Government of Saudi Arabia concluded an agreement with Saudi Arabian Maritime Tankers Ltd. (Mr. Onassis), under of which Articles IV and XV gave to Mr. Onassis a right of priority for the transport maritime of Saudi Arabian oil for thirty years. The focal issue in this dispute was the conflict between the right of priority given to Mr. Onassis and the concession agreement with Aramco, which gave it the exclusive right to transport the oil extracted from its concession area in Saudi Arabia. The *ad hoc* arbitrators referred to Shari'ah rules to settle the submitted dispute by stating that:

It is difficult to admit that these Agreements should be characterized as laws under the legal system of Saudi Arabia. Reference may be made here to the Fundamental Instructions of the Kingdom of the Hijaz of 31 August 1926, corresponding to 21 Safar 1345 where it is provided in Article 5 that: All the Administration of the Kingdom of the Hijaz belongs to H.M. the King who is bound by the norms of the noble Shari'ah.

Thus, the arbitrators were confronted with two concessions agreement concluded by the government of Saudi Arabia with Aramco for the first agreement in 1933, and the second one was granted to Mr. Onassis in 1954. Based on the ratification of these two agreements, an attempt was made to consider them as a law that governs the relationship between the government and the two companies. The government stressed the principle of sovereignty of the state party to the concessions in international public law and contended a restrictive interpretation of these agreement as one of its parties is a state. The arbitrators held that these arguments are not supported by Islamic law, which drew no distinction between private contracts, public contracts or treaties. These instruments have the same validity since principle of *pacta sunt servanda* is recognized by the Islamic law. Therefore, the arbitrators found that these agreements:

Have a purely contractual nature, since this is in accordance with the legal nature of concessions in Saudi Arabian law where the King's intervention is needed merely to make the contract perfect. Furthermore, the Onassis agreement does not lay down norms of a general and impersonal application, but it establishes an individual situation to the advantage of Mr. Onassis and the companies he represents.

They also state that: '*In the Hanbali school of Islamic law, respect for previously acquired private rights, and especially for contractual rights, is a principle just and fundamental*'. Therefore, a valid contract binds both Parties and should be performed; '*when one party has granted certain rights to the other contracting party, it can no longer dispose of the same rights, totally or partially, in favour of another party*'.¹⁴²

The arbitrators considered that the proved exclusive right of Aramco to transport the extracted oil by sea is beyond all question, and they hold that that its concession right is legally protected by the principle of acquired rights, and found that Aramco was justified in resisting any violation of its exclusive rights

¹³⁹ Maita, (n 13) 32.

¹⁴⁰ *ibid* 33.

¹⁴¹ [1982] *Kuwait v. Aminoil*, 21 I.L.M.976, [1984] 9Y.B. Com. Arb. 71.

¹⁴² For more details about this case, see S. M. Schwebel, 'The kingdom of Saudi Arabia and Aramco arbitrate the Onassis agreement', [November 2010] 3/3 *The Journal of World Energy Law & Business*, 245 <https://www.trans-lex.org/260800/_/aramco-award-ilr-1963-at-117-et-seq/> accessed on 18/2/2020.

as '*no one may derogate from his own grant*'. This legal principle is commonly accepted in the Islamic law and in other legal systems. It applies to all kinds of legal relationships, whether in the public or the private law.¹⁴³

Concerning the arbitration precedents issued by the *International Chamber of Commerce*, it appears that Shari'ah rules have been mostly applied as the contractual governing law.

Hence, in a dispute arose between an American construction company and an Algerian state company with respect to an infrastructure agreement to build a railway in Algeria, the American company submitted an arbitration request to the *ICC* to settle this dispute claiming that the Algerian company did not fulfil its contractual obligations.¹⁴⁴ Subsequently, an arbitration tribunal of three arbitrators was formed in the *ICC*. The tribunal chose to apply the Algerian law to both the arbitration procedures and substantive matter, since the execution of agreement and the seat of arbitration was in Algeria.¹⁴⁵ The arbitration tribunal ruled that the Algerian company is liable for non-performance of its contractual obligations and awarded to pay a fair compensation with interest. However, the Algerian company rejected the payment of interest since the applied Algerian law, which is derived from Shari'ah, prohibits, as a fundamental rule, awarding interest. In its contention, the Algerian company referred to Article 1 (2) of the *Algerian Civil Code*, which states explicitly that: '*in the absence of any legal provision, the judge should apply Islamic Law first then he or she could apply customs*'. The court did not take this rejection into consideration as the Articles 182 (2) and 186 of the same Code allow the payment of interest in case of compensatory damages.¹⁴⁶

In contrast, and in a different case of *ICC* involved *Parker Drilling Co. v Sonatrach*, the arbitration tribunal refused to award any kind of interest by application of Shari'ah law, since the general reference to Shari'ah law in the Article 1 of the Algerian civil code forbids awarding interest.¹⁴⁷

Likewise, in another case of *ICC* involved an oil company and a pipeline contractor, the arbitration tribunal refused to award interest to the claimant based on the Islamic general rule as they expressed: '*the Shari'ah expressly forbids any charging of interest because it involves usury, not chargeable in Islamic Law*'.¹⁴⁸

In settling another case, the arbitrators of *ICC* rendered their award based on their general understanding of the opinion given by experts in the applicable Saudi law, which was evidently Shari'ah based law.¹⁴⁹ Therefore, they stated in their final award that:

*In order to respect the sensitivities of Shari'ah law in this field, we do not consider that compensation should be awarded at a commercial rate of interest, but that it should rather be based on a rate which reflects the incidence of annual inflation over the period [at issue]. On this basis, we award to claimant, by way of additional compensation for financial damages, simple interest at the rate of 5% per annum over 5 years.*¹⁵⁰

5. Strengthening the role of Shari'ah in international commercial arbitration

There are many ways that can be followed in order to promote the application of Shari'ah law by the international commercial arbitration tribunals, among of these ways could be the incorporation of Shari'ah rules in the modern legal systems of ICs, promoting the role of Islamic arbitration institutions in the application of its rules and assuring the adapted solutions for the submitted disputes, respecting by the international arbitration tribunals for the party autonomy in the choice of Islamic law for settling their disputes, and retaining by the national courts of ICs the power of public policy to refuse the recognition and enforcement of the inconsistent international arbitral awards.

¹⁴³ See Schwebel, (n 142) 252.

¹⁴⁴ O. Aljazy, 'Arbitrability in Islamic Law', [2000], *The Lebanese Review of Arbitration*, N° 16, 3.

¹⁴⁵ *ibid*.

¹⁴⁶ Award rendered by the ICC Court of Arbitration on 26 June and 18 December 1985, unreported, cited by Aljazy, (n 144) 3.

¹⁴⁷ Award rendered by the ICC Court of Arbitration on 7 January 1985, unreported, cited by Aljazy, (n 144) 4.

¹⁴⁸ Award rendered by the ICC Court of Arbitration on 20 November 1987, [1989] *Yearbook Comm. Arb'n XIII*, 47, cited by Aljazy, (n 144) 4.

¹⁴⁹ See about the main sources of the Saudi law, K. Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?', [1989] 8/3 *Fordham International Law Journal*, article 9, 941, <<http://ir.lawnet.fordham.edu/ilj>>.

¹⁵⁰ Award rendered by the ICC Court of Arbitration in the case No. 7063, 1993, [1997] *Yearbook Comm. Arb'n XXII*, 87, cited by Aljazy, (n 144) 5.

5.1. Codification of Sharī'ah rules

Sharī'ah rules are not codified in an authoritative body system like that of state-based law systems. The main reason for that is the diversity of Islamic schools that apply different approaches in their interpretation of Sharī'ah rules. The four classical Islamic schools are *Hanafi*, *Maliki*, *shafi'i*, and *Hanbali*, which together constitute the Islamic *fiqh* generally accepted by *Sunni* Muslims. Whereas the *Ja'afari* school is the generally accepted authority for *Shia* Muslims.¹⁵¹ The difficulty of codification in this regard is that some ICs adopt different ranking of these schools' interpretations in varying extents, while other countries rely on some schools and exclude others.¹⁵² An interesting example is the Article 1 of the *UAE Civil Transactions Code of 1985*,¹⁵³ which states that:

Legislative provisions shall be applicable to all matters dealt therein, in letter and context. In presence of an absolutely unambiguous text, there is no room for personal interpretation. In the absence of a text in this Law, the judge shall adjudicate according to the Islamic Sharia taking into consideration the choice of the most appropriate solutions in the schools of Imam Malek and Imam Ahmad Ben Hanbal and, if not found there, then in the schools of Imam El shafi'i and Imam Abou Hanifa, as the interest so requires.

The lack of uniformity could be illustrated within these schools by different examples, such as whether an arbitral award is enforceable. Therefore, unlike the consensus of Islamic jurisprudence, *Hanafi* school considers that the arbitration system is closer to the conciliation and an arbitral award is like parties' compromise where enforcement depends on the will of contracting parties. Similarly, there is no unanimous agreement regarding the arbitrability objective of different types of disputes, even in some type of financial transactions.¹⁵⁴

Historically, the legislative policy inherited by the legal systems of the ICs throughout various periods was complex and rich of features.¹⁵⁵ One of the foremost systems influenced these countries was the *Ottoman* legislative system since their nations were under the dominance of the *Ottoman* Empire for almost seven centuries. The *Ottoman* system included the general rules of Sharī'ah and the codified Ottoman law called *Majallat* which included the most important provisions for Islamic transactions.¹⁵⁶

With the introduction of the *French Civil Code* – established under Napoleonic rule in 1804 – into the legislative of the Arab countries, their legal systems were consisted of two types of rules of Islamic and French origin. The first codified civil rules in Arab countries was in Egypt which were drafted in the *Egyptian Civil Code* by *Professor Abdul Razzaq al-Sanhouri*, a leading legal Egyptian scholar. This code opened the door for the modern reform of the Arab countries legal systems.¹⁵⁷ However, the KSA was the only country that continued to apply Sharī'ah rules as a supreme law without the establishment of civil code, and, concurrently, their codified regulations relating to specific civil transactions such as employment, agency should not contradict Sharī'ah Law.¹⁵⁸

Despite the above legislative reform in the Arab countries, their legal systems are somewhat different from each other depending on the degree of influence of Sharī'ah in each country. The attempts to wholly codify Sharī'ah at Arab countries level into a modern law, which was started in 19th century under the *Ottoman* Empire, is far from being completed or acknowledged by these countries due to the multiplicity of Islamic schools applied in their legal systems.¹⁵⁹

¹⁵¹ Regarding the enforcement of foreign international arbitral awards in ICs, see Wakim, (n 64) 4.

¹⁵² Khoukaz, (n 63) 192.

¹⁵³ <<https://legaladvice.com/legislation/126/uae-federal-law-5-of-1985-on-civil-transactions-law-of-united-arab-emirates>>.

¹⁵⁴ Khoukaz, (n 63) 192.

¹⁵⁵ For a general study about the legal systems of certain Arab countries in the Middle East, see S. Saleh., 'The countries of the Arab Middle East as defined for the present purposes are Syria, Lebanon, Jordan, Iraq, Egypt, Libya, Kuwait, Bahrain, KSA, Qatar, the UAE, Oman and the Republic of North Yemen', [February 1986], 1 Arab Law Quarterly, n^o 2.

¹⁵⁶ See in this regard, Maita, (n 13) 37; Nammour, (n 4) 85.

¹⁵⁷ The current *Egyptian Civil Code* established in 1949 is an amalgamation of the principles of Sharia and the *French Civil Code*. The Egyptian Code was the starting point for the civil transactions codification in the Arab countries, which were relied on the *Majallat* codified by the *Ottoman Empire*. Subsequently, modern Civil Codes were adopted in Syria in 1949, in Iraq 1953, in Lebanon in 1961, in Jordan in 1976, in Kuwait in 1980, in the UAE in 1985, in Qatar in 2005..., see in this regard, *GlobaLex International and Foreign Law Research*, published by the Hauser Global Law School Program at NYU School of Law, <<http://www.nyulawglobal.com/globalex/index.html?open=FLR>>. See also, Maita, (n 13) 38.

¹⁵⁸ Nammour, (n 4) 85.

¹⁵⁹ Maita, (n 13) 40; See also Kutty, (n 12) 566.

Nowadays, the ICs establish Shari'ah supervisory boards to ensure the compliance of the activities of their Islamic financial institutions with Shari'ah principles. This method of ICs is related somewhat to the diversity of opinions and multiplication of solutions provided by these boards according to the Islamic school adopted by the relevant country. On the other hand, the decisions of the Islamic supervisory boards are not binding to the courts in the jurisdictions of ICs, except for Malaysia where the courts are becoming bound by these decisions by virtue of the *amendment of Central Bank Act of 2009*.¹⁶⁰

To sum up, the success of codification of Shari'ah rules would be of great practical value given the need of investors and business entities alike to have clear principles and fixed rules in their commercial transactions and arbitration in each country.¹⁶¹

5.2. Strengthening the role of Islamic arbitration institutions

For as much as the core of the Islamic trade contracts based on Shari'ah-compliance, many legal workshops and conferences were held over the past decades to stress the importance of standardizing and codifying the principles of Islamic finance transactions.¹⁶² The establishment of a consolidated interpretation and codification of Islamic financial law can affect positively the reference to Shari'ah by contracting parties as a clause of governing law. Many initiatives and international arbitration centers worked on the establishment and development of common standards and rules such as *the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI)*, *the Islamic Financial Services Board (IFSB)*, *the Islamic International Rating Agency (IIRA)*, *the Kuala Lumpur Regional Center of Arbitration (KLRC)*, *The International Islamic Center for Reconciliation and Arbitration (IICRA)*, and *DWIFACJO Uniform Banking Law*.¹⁶³

The AAOIFI is responsible for issuance and development of universally complied standards for the Islamic finance transactions.¹⁶⁴ Since its establishment, it has issued more than 100 standards concerning a global Islamic finance industry, accounting, auditing, ethics and good governance. The organization is supported by several Islamic financial institutions, law firms, accounting and auditing offices from over 45 ICs.¹⁶⁵ Currently, many leading Islamic financial institutions worldwide apply its standards which positively contributed in the harmonization of common practices in the area of international Islamic finance.¹⁶⁶

The IFSB is an international standard-setting organization instituted in 2002 and based in Kuala Lumpur, Malaysia. It promotes the stability of the Islamic financial industry by issuing prudent universal standards consisting with Shari'ah principles with respect to the services offered by Islamic banks, insurance companies and capital markets.¹⁶⁷ Its research and regular activities aim to coordinate initiatives on Islamic finance industry.¹⁶⁸

The IIRA was founded in 2005 in the Kingdom of Bahrain as an infrastructure center for supporting Islamic trade transactions. It provides independent opinions across the world on the compliance of financial issues to Shari'ah principles. This puts this center in league with the other supporting organizations such as AAOIFI and IFSB. IIRA stresses the point that fairness, good faith and transparency are substantial pillars of Islamic finance industry. Through its training and workshops, IIRA aims to promote a deep understanding of the concepts of Islamic transactions in existing and new markets. Several international jurisdictions and international institutions, such as *the Central Bank of Bahrain*, *Central Bank of Jordan*, *the Banking Regulatory and Supervisory Agency in Turkey*, *Islamic Development Bank*, formally recognized IIRA as an approved rating institution.¹⁶⁹

¹⁶⁰ Aznan Hassan Kyaw Hla, 'The Application of Choice of Law and Choice of Forum Clauses to Islamic Banking and Financial Cross Border Transactions', [2012] Australian Journal of Basic and Applied Sciences, 6 (11), 374.

¹⁶¹ Maita, (n 13) 41.

¹⁶² *ibid* 59.

¹⁶³ For a detailed study about these Centers, see *ibid* 59.

¹⁶⁴ This institution is a non-profit international institution that was established in 1991 in Algeria and based in Bahrain, *ibid* 39, for more details about this organization, <<https://aaoifi.com/?lang=en>>.

¹⁶⁵ Bessedik, (n 19) 90.

¹⁶⁶ For more details about this Organization, <<http://aaoifi.com/about-aaoifi/?lang=en>>.

¹⁶⁷ Bessedik, (n 19) 95.

¹⁶⁸ <<http://www.ifsb.org/background.php>>. See also Maita, (n 13) 48.

¹⁶⁹ <<http://iirating.com/corprofile.aspx>>.

*The Kuala Lumpur Regional Center of Arbitration (KLRC)*¹⁷⁰ has developed new rules of i-arbitration, fast track arbitration rules and mediation and conciliation rules.¹⁷¹ The i-arbitration rules developed by this well-established center in 2012 based on the 2010 version of the *UNCITRAL arbitration rules* and was an expansion of the previous *KLRC Islamic Banking and Financial Arbitration Rules of 2007*. It provides the following model clause: 'Any dispute, controversy or claim arising out of a commercial agreement which is based on *Shari'ah* principles or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the *KLRC i-Arbitration Rules*'.

According to this *i-rules*, the appointed arbitrators shall refer an Islamic finance dispute, or any other commercial dispute premised on the *Shari'ah* principles to a *Shari'ah* expert or advisory council to be agreed between the parties.

According to the rule 8.2 of the above rules referred to above:

Whenever the arbitration relates to a dispute on a Shari'ah aspect of a commercial agreement which is based on Shari'ah principles that is beyond the purview of the relevant Council, and the arbitrator has to form an opinion on a point related to the Shari'ah principles and decide on a dispute arising from the Shari'ah aspect, the arbitrator shall refer the matter to a Shari'ah expert or council to be agreed between the parties, setting out relevant information as the Shari'ah expert may require to form its opinion including the question or issue so the Kuala Lumpur Regional Center for Arbitration referred, the relevant facts, issues, and the question to be answered by the Shari'ah expert.

Therefore, the i-arbitration rules created a good opportunity to Malaysia to become a hub for Islamic transactions disputes resolutions.¹⁷²

*IICRA*¹⁷³ issued in 2007 *the Arbitration and Reconciliation Procedures* which are mostly derived from the *UNCITRAL* arbitration rules to settle all kinds of financial and trade disputes that arise between parties who choose to apply Islamic law.¹⁷⁴ According to the model clause of Islamic arbitration provided by the *IICRA*:

*If any dispute arising between the parties out of the formation, performance, interpretation, nullification, termination or invalidation of this agreement (contract) or arising therefore or related thereto, the dispute shall be referred to an arbitration panel constituted from uneven [group] of arbitrators for a final and binding decision in accordance with the rules and procedures specified in the statute of the International Islamic Center for Reconciliation and Arbitration in Dubai.*¹⁷⁵

IICRA States also that:

*... the arbitrators must abide by the laws chosen by the parties in the dispute [...] In all cases, the panel shall exclude any provisions that contradict in the law that should be applied if such provisions are not in conformity with the rules of Islamic Shari'ah. The Arbitration Panel may invoke for the disputed issue whatever it deems appropriate from among the viewpoints of various schools of Islamic thought, rulings of Islamic Fiqh academies, and opinions of Shari'ah supervisory boards at Islamic financial institutions.*¹⁷⁶

Therefore, the well-drafted procedures make *IICRA* one of the best supporting infrastructure organizations for the Islamic trade and transactions across the world.

¹⁷⁰ This Center was established in 1978 under the auspices of the *Asian-African Legal Consultative Organization (AALCO)* and pursuant to a host country agreement with the *Government of Malaysia*. It is the first regional non-profit center in Asia to provide independent institutional support with respect to local and international arbitration proceedings. In 2012 it won the Award of the prestigious *Global Arbitration Review* for 'innovation by an individual or organization', for more details about this Center, see C. Spalton, 'KLRC to unveil Islamic arbitration rules', [September 2012] <<http://www.globalarbitrationreview.com/news/article/30822/>>.

¹⁷¹ <<https://www.klrca.org/>>. See the details of the structure of this Center, Maita, (n 13) 57.

¹⁷² *ibid* 57.

¹⁷³ It is an international independent and non-profit organization, which was established in 2005 as a result of concerted efforts of mainly the UAE, the *Islamic Development Bank*, and the *General Council of Islamic Banks and Financial Institutions*. For the structure and function of this Center, <<http://www.iicra.com/iicra/>>.

¹⁷⁴ Maita, (n 13) 59.

¹⁷⁵ Article 12 of the *IICRA*.

¹⁷⁶ Article 37 of the *IICRA*.

The Dubai World Islamic Finance Arbitration Centre (DWIFAC) and Jurisprudence Office (DWIFACJO) are a Dispute Resolution Mechanism for the Islamic finance Industry in UAE.¹⁷⁷ It provides global standard Islamic finance contracts with a built-in mechanism of dispute resolution, an arbitration center, a uniform Islamic banking law, and a central Supreme Shari'ah Council.¹⁷⁸ Regarding DWIFAC arbitration procedures and decisions, they are conducted in the English language, the awarded decision is final and binding and shall be published, Shari'ah shall prevail in case of conflict of laws as the verdict shall be conformed to Shari'ah rules.¹⁷⁹

In 1985, the UAE issued a *Federal Law No. 6 of 1985 regarding Islamic banks*,¹⁸⁰ financial institutions, and investment companies. According to its Article 5 a Supreme Shari'ah Council should be established, which is never occurred. The establishment of such council helps in overseeing the Islamic business entities. However, the implementation of Article 6 made these entities to establish their own Shari'ah supervisory board which should apply Shari'ah to the entity's commercial transactions.

To fill the shortfall, certain scholars¹⁸¹ commended DWIFACJO to establish a Shari'ah central advisory council and to issue a uniform Islamic banking law based upon the related laws issued by the local and federal authorities in the UAE and the international centers, such as *the Islamic Banking Law of 1985, the Law Regulating Islamic Financial Business DIFC Law No. 13 of 2004*,¹⁸² and *the AAOIFI standards*.¹⁸³ This law can be used as a substantive law in DWIFAC, whereas the central council will positively contribute to the harmonization and standardization of principles of Islamic finance and trade transaction.¹⁸⁴ This council shall act as the supreme Shari'ah authority for DWIFAC arbitration and DIFC.

5.3. Respect of parties' autonomy

The respect by the arbitration tribunals of the parties' autonomy to choose the governing law would certainly promote the application of Shari'ah to Islamic finance contracts when they agreed upon as the law of contract.

Therefore, in international commercial arbitration, the contracting parties have a total autonomy to designate the applicable law on their contract.¹⁸⁵ For illustration, Article 28 of the *UNCITRAL Model Law on International Commercial Arbitration*¹⁸⁶ provides that:

The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute [...] Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

The tribunal shall in all cases *take into account the usages of the trade applicable to the transaction.*

Similarly, Article 19 of the *ICC Arbitration Rules*¹⁸⁷ states that:

The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate. The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.

This choice of law finds a place in Shari'ah rules, which allow contracting parties to choose the procedural and substantive rules applicable on its contractual dispute, as long as it does not violate Shari'ah public policies. This approach has been adopted by *the Saudi Royal Decree*,¹⁸⁸ which is a model for Islamic arbitration. Therefore, Article 38 thereof provide that:

¹⁷⁷ For a detailed study about the structure of this Center, see Paldi, (n 103) 35.

¹⁷⁸ For more details about the structure of this tribunal, see *ibid* 15.

¹⁷⁹ *ibid*.

¹⁸⁰ <<https://www.centralbank.ae/pdf/LawNo6-1985-IslaminBanks.pdf>>.

¹⁸¹ Paldi, (n 103) 38.

¹⁸² <http://www.complinet.com/file_store/pdf/rulebooks/DFSA_7726.pdf>.

¹⁸³ <<http://aaoifi.com/about-aaoifi/?lang=en>>.

¹⁸⁴ Paldi, (n 103) 39.

¹⁸⁵ Levi-Tawil, (n 10) 626.

¹⁸⁶ <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>.

¹⁸⁷ <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_19>.

¹⁸⁸ Royal Decree N° M/34 of 24/5/1433H – 16/4/2012 of approving the Law of Arbitration <<http://www.idc.gov.sa/en-us/RulesandRegulations1/Arbitration%20Law.pdf>>.

Subject to provisions of Shari'ah and public policy in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following: a. Apply to the subject matter of the dispute rules agreed upon by the arbitration parties. If they agree on applying the law of a given country, then the substantive rules of that country shall apply, excluding rules relating to conflict of laws, unless agreed otherwise. b. If the arbitration parties fail to agree on the statutory rules applicable to the subject matter of the dispute, the arbitration tribunal shall apply the substantive rules of the law it deems most connected to the subject matter of the dispute. c. When deciding the dispute, the arbitration tribunal shall take into account the terms of the contract subject of the dispute, prevailing customs and practices applicable to the transaction as well as previous dealings between the two parties.

The legal trend in ICs applies Shari'ah as a substantive law rather than a procedural law for the reason that the *Qur'an* and *Sunnah* are silent on the procedures elements of arbitration process. The organization of these elements, including the procedural rules, the appointment of arbitration, the designation of the seat and language of arbitration were left to the free autonomy of the disputant parties.¹⁸⁹ In absence of this designation the applicable procedural law would be determined by the seat of arbitration. This legal principle is universally accepted, whether in Islamic or positive laws.

5.4. Retaining the power of Shari'ah public policy

The ratification of the NYCA of 1958 by the majority of ICs over the past few decades has largely contributed to increasing the recognition and enforcement of foreign arbitral awards by the jurisdictions of these states.¹⁹⁰ However, the national jurisdiction in each of these states has the right to deny the recognition and enforcement of a foreign arbitral award if this is contrary to their domestic public policy. According to Article V (2) (b) of the NYCA:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that [...] the recognition or enforcement of the award would be contrary to the public policy of that country.

By using this exception, each country has its own discretion in rejecting the recognition and enforcement of foreign arbitral awards.¹⁹¹ This power of discretion caused abundant confusion at the international trade level as the term '*public policy*' was never defined by the NYCA. As a result, countries have adopted various interpretations of the '*public policy*', certain referred to domestic public policy, whereas some of them chose the international notion, and others based their enforcement decisions on both domestic and international public policy.¹⁹² The notion of Islamic public policy is based on the '*respect to the spirit of Shari'ah and its sources*' – *Qur'an* and *sunnah*, and on the eminent Shari'ah principle that individuals must respect their clauses, unless they allow what is forbidden or prevent what is authorized.¹⁹³

As a code of life, Shari'ah law plays a vital role in the finance transactions in the ICs, and the public policy in many of these countries is determined by reference to Shari'ah principles. Therefore, the Islamic finance transactions are based on certain concepts related to (*muḍārabah*) the sharing of loss and profit, (*mushārahah*) joint venture, (*murābahah*) cost plus, (*ijārah*) financial leasing, the prohibition (*gharar*) speculation, the prohibition of (*maysir*) transactions based on chance the prohibition of trade that violate Shari'ah principles, and the prohibition of (*ribā*) interest or usury.¹⁹⁴ The incorporation of these concepts into the national public orders of certain ICs may cause a problem of enforcement of opposite arbitral awards.¹⁹⁵ In UAE, for example, Article 2 of the *UAE Civil Transactions Code of 1985*¹⁹⁶ states that: '*The rules and principles of Islamic jurisprudence (fiqh) shall be relied upon in the understanding, construction and interpretation of these provisions*'.

¹⁸⁹ Maita, (n 13) 21, Zahid & Ali, (n 102) 33.

¹⁹⁰ <<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>>.

¹⁹¹ Roy, (n 149) 954.

¹⁹² Levi-Tawil, (n 10) 625.

¹⁹³ Alqurashi, (n 62) 8.

¹⁹⁴ ibid 626; See also I. Cekeci, *Le Cadre Juridique Francais des Operations de Credit Islamique*, (Thesis, Université de Strasbourg, Strasbourg 2012) 523.

¹⁹⁵ Levi-Tawil, (n 10) 628.

¹⁹⁶ <<http://www.quantumconsult.org/wp-content/uploads/2012/01/copyUAE-Civil-Code.pdf>>.

It further provides in Article 27 that: 'It shall not be permissible to apply the provisions of a law specified by the preceding articles if such provisions are contrary to Islamic Shari'ah, public order, or morals in the State of the United Arab Emirates'.

Eventually, regarding the capacity of the appointed arbitrators, the majority of ICs, including Jordan, KSA and others, allow explicitly or implicitly the appointment of women and non-Muslims as arbitrators.¹⁹⁷ Therefore, for illustration, while the canceled *Saudi Arbitration Law of 1983* was preventing the appointment of women and non-Muslim arbitrators, the new Law of 2012 is silent on gender and religion of the chosen arbitrators. This silence should open the door before the participation of women and non-Muslims as arbitrators without causing any problem of enforcement of arbitral awards under the *NYAC*, whether in KSA or in western countries.

6. Conclusion

In international commercial contracts, parties may choose local, foreign or conventional law. They may also choose to apply general principles and non-state law acknowledged by the international trade, such as *lex mercatoria* and Shari'ah rules. Their choice should be respected by arbitration tribunals and courts unless it goes against the forum country's public policy. Some of cases assessed in this paper including *Beximco*, *Bloom Bank*, and *Bank Islam Malaysia Berhad* reveal the detrimental effects of using English or common law and litigation to adjudicate Islamic finance disputes. These cases demonstrated how the application of English law on Islamic finance disputes invalidated the selection of contracting parties of Shari'ah under the pretext that its rules are sophisticated and not recognized by western jurisdictions as a valid national law for governing international trade transactions. By doing so, arbitrators and courts denied the worldwide leading legal principle of party autonomy.

With the evolvement of western arbitrators' attitude during the last two decades by starting to incorporate Shari'ah in the international arbitration system, ICs began to embrace the infrastructure of international arbitration in their legal systems. Furthermore, the adoption by the EU of the Rome Regulation I of 2008 should also significantly enhance this evolvement and may contribute positively in promoting international commercial arbitration in the ICs. Consequently, this regulation gave in its preamble the contracting parties the possibility to choose a non-State law in international commercial contracts. This recent evolvement in addition to the traditional features of arbitration enabled it to become the preferred method for the resolution of Islamic finance disputes. These features are mainly its confidentiality, speed, cost, and flexibility in incorporating Shari'ah rules into the governing clause law and in appointing proficient arbitrators in the field of Islamic finance transactions. This flexibility certainly promotes the fulfillment of the contracting parties' intent of Shari'ah compliance.

However, the arbitration of Islamic finance transactions continues to face challenges in ICs in terms of:

1. Lack of a unified international regulatory or supervisory framework or an international Shari'ah board that harmonizes the provisions of Islamic finance amongst ICs;
2. Diversity of interpretation provided by the local Islamic supervisory boards in Shari'ah compliance issues; and,
3. Lack of enough proficient international experts and arbitrators in the domain of international Islamic finance.

Overcoming these obstacles can be possible through enhancement of the role of Islamic supervisory boards governance, publication of the '*fatawas*' decisions of Islamic financial institutions to ensure and promote transparency and predictability, regulation of Islamic law certified and appropriately qualified experts as the secular legal systems are not equipped enough to interpret the principles of Shari'ah, as well as the establishment of a regional central proficient and specialized arbitration institution in one of the ICs. This central institution should conduct intensive training sessions for Shari'ah scholars in Islamic finance to provide the global business market with proficient specialized arbitrators. Furthermore, as we demonstrated through the cases assessed in this paper, the global market is in real need for establishing a Shari'ah central advisory council and to issue a uniform Islamic banking law. These cases illustrated also the necessity for a standardized dispute resolution contract in the form of the *DWIFACJO* and *DWIFAC* dispute resolution mechanisms.

Therefore, the incorporation of Shari'ah into international commercial arbitration would facilitate the recognition and enforcement of foreign arbitral awards in the ICs. It is a determinant factor for the success

¹⁹⁷ *ibid.*

of international commercial arbitration in these countries. However, in order to achieve a global harmonized infrastructure of recognition and enforcement of arbitral awards, the exception of public policy should be narrowly interpreted. Thus, it should be implemented in a transparent and methodical manner, in accordance with the spirit of the *NYCA* and in respecting the international features of the subject dispute. Adopting this approach will demonstrate that Sharī'ah law is not an obstacle to international commercial arbitration.

Competing Interests

The authors have no competing interests to declare.

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