Critical Study of the Role of Sharia Public Policy in the Recognition and Enforcement of Foreign Arbitral Awards in UAE

Mahmood Hussain Ali Ahmad

Thesis submitted for the degree of Doctor of Philosophy

University of East Anglia

UEA Law School

October 2020

This copy of the thesis has been supplied on condition that anyone who consults it is understood to recognise that its copyright rests with the author and that use of any information derived there from must be in accordance with current UK Copyright Law. In addition, any quotation or extract must include full attribution.

Acknowledgement

Bishmillah Ar-Rahman Ar-Rahim. In the name of Allah, the most gracious, the most merciful, who has given me this opportunity to learn and progress. I must also thank my family for their tolerance and support at this time, and to my supervisors, Dr Youseph Farah and Dr Hakeem Seriki for their constructive criticism and advice.

Contents

Acknowledgement 2
Glossary of Arabic Terms 10
Abstract 12
Chapter 1 Introduction 13
1.1 Research Problem 18
1.2 Contribution of Thesis and Gap in the Current Research 20
1.3 Research Methodology 21
1.4 Scope of Thesis and Limitations 23
1.5 Thesis Structure 25
Chapter 2 Evolution of the Concept of Public Policy 27
2.1 Introduction 27
2.2 Historical Development: Tracking the Unruly Horse 28
2.2.1 Joseph Story 31
2.2.2 Freidrich Karl Von Savigny 33
2.2.3 Pasquale Stanislao Mancini 34
2.3 Assessing the Offensive Impact of the Forum's Fundamental Principle 35
2.4 Analysis 37
2.5 Historical Development of Public Policy in Civil Law Legal System 39
2.6 Historical Development of Public Policy in the English Common Law Legal System 40
2.6.1 Analysis 47
2.7 The Factors that Influence Public Policy Across the Legal Systems 49
2.7.1 Religion and Public Policy 52
2.8 Historical Development of Public Policy in International Arbitration 56
2.8.1 New York Convention 59
2.9 Scope of Public Policy in International Arbitration 60
2.9.1 Domestic Public Policy 64
2.9.2 International Public Policy 67
2.9.3 Regional and Religious Application of Public Policy 70
2.9.4 Transnational Public Policy 72
2.9.5 Substantive and Procedural Aspects of Public Policy 75
2.9.5.1 Procedural Public Policy 76
2.9.5.2 Substantive Public Policy 78
2.9.6 *Sharia* Public Policy 79

2.9.6.1 Procedural Public Policy under *Sharia* Law 83
2.9.6.2 Substantive Public Policy under *Sharia* Law 84
2.10 Conclusion 84
Chapter 3 The Concept of Public Policy Doctrine in the UAE Legal System 87
3.1 Introduction 87
3.2 The Position of *Sharia* Law within UAE Legal System 88
3.3 Methodology and Sources of Islamic Law 92
3.3.1 Islamic Jurisprudence or *Fiqh* 94
3.3.2 The Primary Sources 95
3.3.2.1 The *Quran* 95
3.3.2.2 The *Hadith* 96
3.3.3 The Secondary Sources 98
3.3.3.1 *Qiyas* (Analogy) 99
3.3.3.2 Juristic Consensus or *Ijma* 100
3.3.3.3 Ijtihad 101
3.3.4 Disputed Sources 104
3.3.4.1 *Urf* or Local Custom 105
3.3.4.2 *Al-Maslah* 105
3.4 Equation of *Sharia* Law to Public Policy 106
3.5 *Sharia* Mandatory Rules and Public Policy 110
3.6 How can a UAE Judge Set Aside a Foreign Arbitral Awards Conflicting with *Sharia*? 113
3.6.1 Ruling of Dubai Court of Cassation No. 146/2008 117
3.6.2 Ruling of Dubai Court of Cassation No. 53/1991 119
3.6.3 Ruling of Federal Supreme Court No. 331/1996 120
3.6.4 Ruling of Abu Dhabi Court of Cassation No. 26/Judicial Year 18. 121
3.6.5 Ruling of Dubai Court of Cassation No. 41/1988. 121
3.7 Conclusion 122
Chapter 4 The Conceptual Foundation of *Riba* and Practice 124
4.1 Introduction 124
4.2 History of *Riba* 125
4.3 Linguistic Usage of *Riba* 127
4.4 Sources of Prohibition 130
4.5 Reasons for the Prohibition of *Riba* 134
4.6 *Riba* under *Sharia* Jurisprudence 135

4.6.1 *Riba Al-Fadil* (*Riba* in Sale) ... 135
4.6.2 *Riba Al-Nasiah* (*Riba* in Loan) ... 137
4.7 Definition of *Riba* ... 139
4.8 General Theories Governing *Riba* ... 142
4.8.1 The Orthodox *Riba* School ... 142
4.8.2 The Permissive *Riba* School ... 148
4.9 UAE Laws and the Practice of Awarding *Riba* ... 158
4.9.1 *Riba* and Commercial Loans ... 159
4.9.2 *Riba* and Commercial Contracts ... 159
4.9.3 Simple and Compound Interest ... 161
4.9.4 *Riba* and Arbitration ... 163
4.10 Conclusion ... 166
Chapter 5 Conceptual Foundation of *Gharar* ... 168
5.1 Introduction ... 168
5.2 *Gharar* in its Linguistic Usage ... 169
5.3 The Prohibition of *Gharar* in the *Quran* and *Hadith* ... 171
5.4 Reason for the Prohibition of *Gharar* ... 173
5.5 The Juristic Definitions of *Gharar* ... 175
5.5.1 The Classic Era Scholars ... 176
5.5.2 The Medieval and Modern Era Scholars ... 179
5.5.3 The First Stream: The Subject Matter of the Contract ... 182
5.5.4 The Second Stream: The Subject Matter and Characteristic of Subject Matter ... 184
5.6 Grave and Trivial *Gharar* ... 185
5.7 Analysis ... 186
5.8 UAE Laws and Practice of *Gharar* ... 188
5.8.1 The Subject Matter and the Future Condition of the Underline Contract and *Gharar* ... 191
5.8.2 Arbitration Agreement and *Gharar* ... 194
5.8.3 Damages in International Arbitration and *Gharar* ... 198
5.9 Conclusion ... 203
Chapter 6 Conclusions and Recommendations ... 205
6.1 Concludions and Recommendations ... 205
Bibliography ... 211
Table of Cases ... 211
Abu Dhabi Court Judgments ... 211

Dubai Court Judgments 211
Fujairah Federal Court Judgment 212
UAE Federal Court Judgments 212
Egyptian Court Judgments 213
Saudi Court Judgments 213
French Court Judgments 213
Lebanese Court Judgments 214
Indian Court Judgments 214
English Court judgments 214
USA Court Judgments 215
Australian Court Judgments 215
Netherlands Court Judgments 216
Turkish court Judgments 216
Hong Kong Court Judgments 216
Italian Court Judgments 216
German Court Judgments 216
Swiss Court Judgments 216
Mexican Court Judgments 216
Pakistani Court Judgments 216
European Court of Justice 217
The International Court of Justice Judgments 217
Domestic Legislations 217
International Treaties 218
Secondary Source 219
Books 219
Aghnides N, *Mohammedan Theories of Finance with an Introduction to Mohammedan Law and a Bibliography* (1st (2005 reprint) edn Columbia Univ, New York 1916). 219
Contribution to Edited Books 229
Journal Articles 230
Websites, Blogs, and Electronic Sources 242
Magazines and Newsletters 237
PhD Theses 240
Conferences, Symposiums and Workshops 242
Reports and Official Publications 243
Appendix A: Overview of the UAE legal system 244

Source of Law 244
UAE Constitution 244
Laws and regulations 246
Sharia Law 248
International treaties 248
Court Structure 248
Arbitration Institution 250

Access Condition and Agreement

Each deposit in UEA Digital Repository is protected by copyright and other intellectual property rights, and duplication or sale of all or part of any of the Data Collections is not permitted, except that material may be duplicated by you for your research use or for educational purposes in electronic or print form. You must obtain permission from the copyright holder, usually the author, for any other use. Exceptions only apply where a deposit may be explicitly provided under a stated licence, such as a Creative Commons licence or Open Government licence.

Electronic or print copies may not be offered, whether for sale or otherwise to anyone, unless explicitly stated under a Creative Commons or Open Government license. Unauthorised reproduction, editing or reformatting for resale purposes is explicitly prohibited (except where approved by the copyright holder themselves) and UEA reserves the right to take immediate 'take down' action on behalf of the copyright and/or rights holder if this Access condition of the UEA Digital Repository is breached. Any material in this database has been supplied on the understanding that it is copyright material and that no quotation from the material may be published without proper acknowledgement.

Abbreviations list

A.D.	After Jesus was born (Literally *Anno Domini* – the Year of the Lord)
B.C.	Before Christ (Also BCE – Before Common Era)
EU	European Union.
FDI	Foreign Direct Investment
FNC	Federal National Council
FSC	Federal Supreme Council
GCC Convention	GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications
GCC	Gulf Corporation Council of the States of the Arabian Gulf
ICC	The International Chamber of Commerce
ICJ	International Court of Justice
ICSID	The International Centre for Settlement of Investment Disputes
ILA Final Report	Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Award 2002
ILA	International Law Association
NYC	New York Convention the Recognition and Enforcement of Foreign Arbitral Awards in 1958
The Cabinet Decision of 2018	The Cabinet Decision No. (57) of 2018 Concerning the UAE Civil Procure Law
UAE Civil Code	UAE Federal Law No. 5 of 1985 regarding Civil Transaction as amended by Federal Law No. 1 of 1987
UAE CPC	UAE Federal Law No.11 of 1992 regarding Civil Procedures
UAE	United Arab Emirates
UFAL 2018	UAE Federal Arbitration Law No.6 of 2018
UNCITRAL	United Nations Commission on International Trade Law

UNCITRAL Model law	UNICITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006)

Glossary of Arabic Terms

Al-Darura	Necessity
Al-Maslah	Public interest
Fiqh	Collective body of Islamic jurisprudence literature
Furu al Fiqh	The second branch of Fiqh
Gharar	Uncertainty, Risk, Hazardous
Hadith	The practices and teachings of Islam by the Prophet Mohammed (also known as Sunnah)
Hanafi	Sunni Islam school of thought founded by Imam Abu Hanifa Alnouman
Hanbali	Sunni Islam school of thought founded by Ahmad Ibn Hanbal
Ijma	Islamic legal scholars' consensus on an issue and considered as a Secondary sharia sources.
Ijtihad	Independent reasoning and judgment
Istihsan	To consider something good
Jahallah	The unknown facts of a subject matter
Maliki	Sunni Islam school of thought founded by Imam Malik bin Ana
Maqasid Al-Sharia	The attainment of good, welfare and benefits
Mejalah	The Civil Code of Ottoman Empire in the late 19th and 20th century
Qiyas	The process of analytical reasoning by a scholar based on the primary sources of Sharia
Quran	The sacred book in Islam that contains the words of God
Riba	Charging illegal interest
Riba Al-Fadil	Fadil means increasing or excess
Riba Al-Nasiah	Al-Nasiah means delay, rescheduling or defer for an addition
Shafie	Sunni Islam school of thought founded by Mohmmad ibn Idris Al-Shafie
Sharia	A law based on the Islamic sources

Sunni	One of the major denominations of Islam
Taqlid	Imitation of Islamic legal precedents issued by qualified Mujtahid
Urf	Local custom that is not in conflict with the purposes of Islamic law
Usul al Fiqh	The first branch of Fiqh
Zakat	payment made annually by Muslims for charitable and religious purposes. It is one of the five pillars of Islam

Abstract

The UAE concept of public policy is still problematic in the context of the newly established arbitration framework, namely the UAE arbitration law (UFAL 2018) and The Cabinet Decision No. (57) of 2018 Concerning the UAE Civil Procedure Law (The Cabinet Decision of 2018). The UAE's concept of public policy consists of public interest and Islamic law (*Sharia*). Public interest is largely driven from national laws and social, political, economic norms and values of the country, while *Sharia* generally derives from the interpretation and thought of the Islamic *Sunni* schools of jurisprudence.

Public policy in the context of *Sharia* law raises more complex and significant challenges than those relating to public interest. The complexity is exacerbated by the fact that *Sharia* law is not a codified system of law, which has led to various interpretations, sometimes conflicting interpretations, of *Sharia* law by scholars and judges. This divergence on the interpretation of certain aspects of *Sharia* law relevant to the conceptualisation of public policy affects the position of courts on the enforcement of foreign arbitral awards. Therefore, the aim of this research is to investigate how *Sharia* law manifests as a public policy ground for refusal of a foreign arbitral award within the recognition and enforcement framework of the NYC. *Sharia* law may appear on the face of it as an unduly heavy-handed restriction on the enforcement of foreign arbitral awards and thus, a threat to the smooth functioning of international arbitration. However, despite this complex interaction between *Sharia* law and international arbitration, I demonstrate for the first time in academic writing that *Sharia* law does harmonise with modern business practices and international arbitration. The ultimate goal of the research is to suggest executable reforms to further develop and further redefine or limit the scope of public policy under the newly established UAE arbitral framework and build on the modernisation efforts initiated through the UFAL 2018 and The Cabinet Decision of 2018.

Chapter 1 Introduction

The UAE has been the highest recipient of Foreign Direct Investment (FDI) in the Middle East region in 2018 and 2019. It has received approximately $10.3 billion of FDI in 2018 and $10.4 Billion FDI in 2019[1]. This unprecedented scale of FDI growth is due to the fact that the UAE has a liberal economic climate and modern dispute resolution systems that can accommodate complex litigation and arbitration[2]. In an effort to assert the current position as a major hub of FDI in the region and to further liberalise the economy, a significant milestone was achieved by issuance of the UAE Federal Law by Decree No. (19) of 2018 regarding FDI, which aims to promote and liberalise the current business environment by allowing foreign investors to acquire 100% of business shares in specific business sectors in the UAE.

According to recently published research, the UAE's arbitration framework and joining the NYC has had a positive effect on FDI by reducing dependence on the national courts system which suffers from various drawbacks as compared to other legal systems. By eliminating the inefficiency of national courts, the cost and time of enforcing the contracts of business will be reduced[3]. Thus, there is no doubt that the international business community considers arbitration to be the most suitable and normal platform to settle disputes arising out of international business transactions[4].

In order for UAE to sustain the current growth, substantive reform needs to be made to the UAE arbitration framework to bring it in line with international arbitration practice. In other words, aligning the UAE arbitration regime with international arbitration norms and practices should help the UAE to sustain the current growth and may help to attract more FDI. Moreover, this reform made to the arbitration framework should help in dispelling the notion that the UAE is incapable of becoming a favourable venue or seat of international arbitration.

---

[1] UNCTAD, 'World Investment Report 2018 and 2019' UN (Geneva) <https://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Country-Fact-Sheets.aspx> accessed on March 12, 2020.

[2] Blanke, Gordon, *Commentary on the UAE Arbitration Chapter* (Law Commentaries, 1st edn, Sweet & Maxwell/Thompson Reuters, London 2017).p. 4.

[3] Myburgh, Andrew and Jordi Paniagua, 'Does International Commercial Arbitration Promote Foreign Direct Investment?' (2016) 59(3) The Journal of Law & Economics 597.

[4] Berg, Albert Jan van den, 'Recent Enforcement Problems under the New York and ICSID Conventions' (1989) 5(1) Arbitration international 2.

Consequently, the UAE government has taken major steps towards reforming its arbitration framework in accordance with best international practice. In July 2006, the UAE acceded to the United National Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) to improve its arbitration system and to conform and harmonise the UAE arbitral system with prevailing international best practice and norms. Further back in 1982, the UAE had become one of signatories to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 (ICSID Convention)[5].

Most importantly, in May 3rd of 2018, the UAE adopted a new arbitration law, which is based on UNICITRAL Model Law[6] being "UFAL 2018". As well, the UAE issued The Cabinet Decision of 2018. UFAL 2018 repealed Articles 203 to 218 of the UAE Federal Law No. 11 of 1992 regarding Civil Procedures (UAE CPC) that previously governed arbitration proceedings and enforcement in the UAE, which was also known to practitioners as the UAE Arbitration Chapter. The Cabinet Decision of 2018 regulates the recognition and enforcement of foreign arbitral awards.

NYC is considered as the most influential international instrument governing the international commercial arbitration regime globally. The main objective of the NYC is to facilitate the international business transaction by promoting efficient mechanisms for enforcement of international arbitral awards[7]. However, the NYC, which helped in creating these global advantages for international arbitration, has also created legal challenges in the context of enforcement of international commercial arbitration awards. Article V of NYC, for example, provides limited grounds for the refusal of the enforcement of a foreign arbitral award. These limited grounds enable the court of the enforcing states to refuse the recognition and enforcement of an award. Accordingly, Article V(2)(b) of NYC permits the enforcing state to refuse the enforcement when it finds that such recognition or enforcement would be contrary to the state's public

[5] World Bank, 'Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature 18 March 1965 ' <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx> accessed on March 14, 2020; Almutawa, Ahmed M. and A. F. M. Maniruzzaman, 'The UAE's Pilgrimage to International Arbitration Stardom' (2014) 15(1-2) The Journal of World Investment & Trade 193.

[6] The UNCITRAL Model Law is designed to assist States in reforming their arbitration laws.

[7] Almutawa, Ahmed M. and A. F. M. Maniruzzaman, 'The UAE's Pilgrimage to International Arbitration Stardom' (2014) 15(1-2) The Journal of World Investment & Trade 193; Shaleva, Vesselina, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 67.

policy, which is known as *“the public policy exception to the enforcement of arbitral awards”*[8].

Whilst it is difficult to define public policy, this notion often includes fundamental values, ideology and standards of the enforcing states, and the underlying policies objectives which form the supreme interest of society at large[9]. It is embedded and enshrined in the heart of every legal system in the world to safeguard the state’s values and cultural identity[10]. Thus, the public policy principle is founded on a state’s cultural and moral values, religious beliefs, International conventions, some principles of public international law and universally shared norms and values[11]. The concept of public policy is one of the landmarks and ever-vexing concepts that played and will continue to play a fundamental role in the context of international commercial arbitration as it could arise during different stages of the arbitral process and proceedings[12]:

1. Before arbitral proceedings begin when the existence and validity of an arbitration agreement or clause is challenged by the parties before domestic courts;
2. During arbitral proceedings before the arbitral tribunal or domestic courts; and
3. During the recognition and enforcement of the arbitral award before the enforcing state’s court[13].

Accordingly, Public policy is a truly dynamic flexible concept that is understood differently among the NYC members’ states and assumes economic, social, and politically changing dimensions. It is understood differently because public policy is not

[8] Almutawa, Ahmed M. ,and A. F. M. Maniruzzaman, 'The UAE’s Pilgrimage to International Arbitration Stardom' (2014) 15(1-2) The Journal of World Investment & Trade 193; Shaleva, Vesselina, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 67.
[9] Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004); Trakman, Leon, 'Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection' (2018) 6(2) The Chinese Journal of Comparative Law 174.
[10] Juenger, Friedrich K., *Choice of Law and Multistate Justice* (Transnational Classics in International Law (Book 2), Special edition. edn Transnational Publishers, Ardsley, NY 2005).p.129.
[11] Ibid. See also Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).
[12] Ibid.
[13] Ibid.

a visible or tangible set of defined rules and regulations nor it is listed in clear provisions of law. Another reason for this difference of understanding is the variable nature of the concept, since it is in constant change and evolution, which makes the concept different from one state to another and even within the same state the concept may differ in scope and the nature[14]. Therefore, the intrinsically subjective nature of the concept has made the concept vague and ambiguous to a great extent, which has challenged most, if not all, jurists, scholars, judges, and legislators for centuries[15]. Judge Sir Percy Spender in the *Boil* case[16] has explained and provided insightful opinion on the intrinsic relativity of the concept of public policy when he stated:

> *"Public policy in every country is in a constant state of flux. It is always evolving. It is impossible to ascertain any absolute criterion. It cannot be determined within a formula. It is a conception. The varying legal approaches made by the different domestic or municipal courts of different countries in the cases on which they have been called to adjudicate, and the wide differences of views on various and important aspects of public policy (ordre public) expressed by learned authorities are fairly evident"[17].*

All such ambiguities surrounding the concept of public policy and the discretionary powers of courts have negatively prejudiced the predictability and efficiency of International Arbitration[18]. Thus, the concept of public policy becomes one of most complex, significant, and controversial grounds for refusal to enforce an international arbitral award by the enforcing state's courts[19] causing judicial inconsistency among the contracting states of NYC. In other words, if the enforcement of international

---

[14] Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).p. 33; Juenger, Friedrich K., *Choice of Law and Multistate Justice* (Transnational Classics in International Law (Book 2), Special edn, Transnational Publishers, Ardsley, NY 2005).p.129; Trakman, Leon, 'Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection' (2018) 6(2) The Chinese Journal of Comparative Law 174.

[15] Ibid.

[16] 'Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)' <https://www.icj-cij.org/en/case/33> accessed on January 15, 2020.

[17] Judge Sir Percy Spender, '1958 Separate Opinion of Sir Percy Spender ICJ Reports' (Opinion, The Hague November 28). pp. 122-123.

[18] Gibson, Christopher S., 'Arbitration, Civilization and Public Policy: Seeking Counterpoise Between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law' (2009) 113(4) Penn State Law Review 1227.

[19] Ayad, Mary B., 'The Doctrines of Public Policy and Competence in Investor–State Arbitration' (2013) 27(4) Arab Law Quarterly 297.pp. 300-301.

arbitration awards becomes increasingly tenuous on the grounds of domestic or broad scope of public policy, the international commercial Arbitration as an alternative method of dispute resolution might lose its advantage and may create more costs on international business and investments[20].

As a result of the promotion of FDI, the desirability of predictability and certainty, and the growing awareness of States of the benefits and advantages of having an arbitral regime that is compatible with international best practice has led to the development of a narrower concept of public policy as applied to international commercial arbitration[21]. Professor Klaus Peter Berger states:

> *"As more and more countries, whether industrialised or from the third World become interested in attracting arbitrations, the use of the restricted notion of ordre public international either in the legislative text itself or in the case law of the courts sends an important signal to the international legal community indicating that the principle of finality of international arbitral awards will be handled by the domestic judiciary according to internationally accepted standards"*[22].

In acknowledging the importance of finality of international arbitral awards and a fundamental role of the public policy in the context of international commercial arbitration, the International Law Association's Resolution on Public Policy as a Bar to Enforcement of International Arbitral Awards 2002 (ILA Final Report)[23] endorses a narrow approach to the public policy exception where the refusal should be under exceptional circumstances only. As per the ILA Final Report, the narrow approach is in line with the NYC's primary goal and objective, which is facilitating the enforcement of arbitral awards globally. The courts of many countries refer to this as the NYC's *"pro-enforcement bias"*[24]. Therefore, the key issue is how public policy is construed and interpreted by different signatories to the NYC and how to harmonise and standardise a definition of public policy in order to provide guidance to the enforcing

---

[20] Supra note 19.
[21] Supra note 3.
[22] Berger, Klaus Peter, *International Economic Arbitration* (Studies in Transnational Economic Law, Kluwer Law and Taxation Publishers, Deventer, Boston 1993).p.672.
[23] 'Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration International 213.
[24] Junita, Fifi, 'Pro Enforcement Bias under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview' (2015) 5(2) Indonesia Law Review140.pp. 141-142.

courts on how to exercise fair and prudent restraint in rejecting the enforcement of a foreign arbitral award[25].

1.1 Research Problem

The UAE's enforcement framework of non-domestic or foreign arbitral award and practices have generally been described by international practitioners as unpredictable and inefficient[26]. This view is largely due to a range of factors including the judicial application of the concept of public policy and parochial interpretation of principles of *Sharia* law that amounts to public policy by the courts, as shown in this study. Accordingly, the UAE's notion of public policy continues to be problematic in the context of the UAE arbitral framework, since the scope of public policy has not been changed by newly established arbitral framework, so the approach employed by the courts under the old arbitral regime will continue.

The challenge is that the notion of UAE public policy is very broad since it consists of the public interest and *Sharia*. The public interest is largely driven from national laws and social, political, economic norms and values of the country, while *Sharia* is generally driven by the interpretation and application of the four *Sunni* schools of jurisprudence or *Fiqh*. Thus, there is interplay between *Sharia* and public policy.

This thesis provides, for the first time in academic writing, an in-depth critical analysis of the role that *Sharia* law has in framing the UAE's concept of public policy during the enforcement of foreign arbitral awards. This thesis acknowledges the need for a greater understanding and tolerance of the implications of the UAE's laws, precisely the application of *Sharia* law, in the enforcement of foreign arbitral award proceedings before the domestic courts. Such comprehension of the role that Sharia law play is a crucial step on the path toward encouraging international investors to accept the UAE's arbitration regime and consider its novelties and limitations when enforcing foreign arbitral awards before domestic courts.

It is in this context that there is no shortage of theories as to the limits of the UAE's law and the interplay between *Sharia* law and public policy during the enforcement of foreign arbitral awards before domestic courts. Nevertheless, there has been a shortage of practical solutions and recommendations as to how to harmonise Islamic

[25] Supra note 24.
[26] Supra note 2.

Sharia principles with international best practice and norms. This thesis will attempt to suggest some recommendations as the basis on how to make further improvements to the new UAE arbitration regime, which will tend to an increase the in effectiveness of the recognition and enforcement of arbitral awards in the UAE.

Generally speaking, *Sharia* law's mandatory rules in the context of public policy are classified into two categories: the first category is *Sharia* procedural public policy which includes the right to equal treatment of the parties, the right to be heard, and the right to present a case or defence[27]. The second category is *Sharia* substantive public policy which is concerned mainly with two prohibitions: *Riba* and *Gharar*[28]. This research will focus on *Sharia*'s substantive public policy (*Riba* and *Gharar),* which are regularly used by parties to dispute the enforcement of foreign arbitral awards. The theory and practice suggest that the latter is more likely to clash with international arbitration practice than procedural *Sharia* public policy, which seems to be consistent with international notions of due process and fairness that is embedded and enshrined in the NYC and other domestic laws[29]. Moreover, these two prohibitions under *Sharia* substantive public policy are deeply rooted in the primary source of *Sharia* law, being the *Quran* and *Hadith*, in contrast to *Sharia* procedural public policy, which are not mentioned in the primary sources of *Sharia*[30].

Furthermore, the concept of *Riba* is influenced by religious beliefs, economic structure, political and cultural foundation of each society and therefore, the concept differs from one Islamic country to another. *Riba* in the context of *Sharia* public policy is one of the significant issues in the UAE and other Islamic countries as it can lead to refusal of enforcement of a foreign arbitral award by the court.

---

[27] Saleh, Samir, *Commercial Arbitration in the Arab Middle East: a Study in Shari'a and Statute Law* (Graham & Trotman, London 1984); Kutty, Faisal, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28(3) Loyola of Los Angeles International & Comparative Law Review 565.

[28] Wakim, Mark, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21(1) New York International Law Review 1; Otto, Dirk and Omaia Elwan, 'Article V(2)' in Kronke, Herbert and others (ed), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International B.V, Netherlands 2010.

[29] Jemielniak, Joanna, *Legal Interpretation in International Commercial Arbitration* (1st edn, Ashgate Publishing Limited, Surrey 2014).p.119; Alqudah, Mutasim Ahmad, '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 1.

[30] Saleh, Samir, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 1(1) Arab Law Quarterly 19.

1.2 Contribution of Thesis and Gap in the Current Research

Arbitration is the normal means of settling disputes arising from international transactions[31]. Therefore, the UAE should undertake a major step to harmonise its notion of public policy in order to align its enforcement framework with the prevailing international practices and norms. The reform will reduce unnecessary costs of enforcing a contract on business and international investors and will dispel the notion that the UAE is incapable of becoming one of most favoured venues or seats for international arbitration and will make the UAE more attractive for international investors.

This thesis will critically examine in depth the role that *Sharia* law plays in defining and framing the underlying notion of public policy, which enables the domestic UAE courts to refuse recognition and enforcement of arbitral awards. The thesis addresses the normative issues of associating *Sharia* law with the UAE's public policy for enforcement purposes and the practical difficulties parties may face given that the scope of *Sharia* public policy is very broad. *Sharia* law, in the context of the UAE's notion of public policy, is very broad due to fact that *Sharia* law largely depends on independent judicial assessments and legal reasoning, which differs from judge to judge and from time to time, except in limited circumstances where there is *Ijma* or consent among *Sharia* law scholars.

Thus, through a comprehensive literature review, this study fills the gaps in legal research on the UAE's legal system by addressing, for first time in academic writing, the normative issues of associating the UAE's public policy with *Sharia* law and the practical difficulties regarding the unrestricted and broad scope of public policy under *Sharia* law applicable at the time of recognition and enforcement of a foreign arbitral award. From the standpoint of relevant works, it can be said that there is a gap and to the best of author's knowledge, no academic study exists so far that addresses this issue.

In sum, this study can be seen to be original and differs from other cited academic research on the UAE's notion of public policy in general and specifically in relation to its role under the NYC. This is because it is the first study that has critically analysed and investigated legal problems of associating *Sharia* law with the UAE's notion of

[31] Supra note 2.

public policy during the enforcement of foreign arbitral awards in light of the new arbitral framework established by the UAE. Additionally, what increases the value of this study and its contribution to the field of arbitration is that it deals with the newly established arbitral framework, which came into operation in 2019.

Furthermore, this study provides practical recommendations that can be further studied and implemented to reduce the potential for an enforcement court refusing to recognise and enforce an arbitral award on *Sharia* public policy grounds. By considering this analysis and implementing these recommendations, the UAE government can sustain and attract more FDI and create more commercial opportunities for UAE business. By creating a more predictable recognition and enforcement regime, the UAE can provide the necessary confidence of both domestic and international contracting parties in the UAE's legal, judicial, and arbitral systems when it comes to resolving business disputes. Furthermore, the thesis will serve as a platform for international investors that want to establish a plan prior to investing in the UAE market or other Islamic countries markets founded on *Sharia* law traditions and jurisprudence.

1.3 Research Methodology

The UAE legal system is a combination of traditional *Sharia* jurisprudence, modern interpretation of *Sharia* law and Civil Law and, therefore, it is imperative to deploy a combination of methodologies to different aspects of the research, since the research issue requires a full investigation of various legal sources, including primary and secondary *Sharia* law sources, statutory law, domestic and international case law and international instruments. Thus, the thesis will primarily deploy the doctrinal methodology. As well, to some extent, the thesis will use historical and semi-comparative methodologies where particular issues need to be addressed in a specific manner.

The doctrinal methodology is the most suitable method for reaching conclusions based on primary and secondary sources that requires conducting focused and thorough, scholarly analysis that are library-based[32]. Accordingly, this methodology will be used in investigating legislation, case law, primary treaties and *Sharia* jurisprudence to

[32] McKerchar, Margaret, 'Philosophical Paradigms, Inquiry Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation' (2008) 6(1) eJournal of Tax Research 5.

identify legal issues and reach tentative conclusions on whether the association of *Sharia* law with the notion of public policy is thwarting the smooth enforcement of foreign arbitral awards in the UAE. In this context, it worth noting that the researcher used the libraries of the Universities of East Anglia and University of Portsmouth and also used and accessed electronic legal databases such as Kluwer Arbitration, UNCITRAL Web Site, Westlaw, LexisNexis and Hein Online for cases, articles and legislation.

Given that the nature of the UAE legal system, which combines *Sharia* tradition with modern legal traditions of the Civil Law legal system, this study requires some investigation to the historical background of some principles of *Sharia* jurisprudence and the notion of public policy internationally. By tracking the historical evolution of *Sharia* jurisprudence and notion of public policy, the thesis will provide a clear understanding of the legal gaps in history that affect the current legal practices internationally and in the UAE's context.

Consequently, this thesis will use historical methodology to examine classic *Sharia* jurisprudence and some theories relating to the notion of public policy in different jurisdictions to discover some essential information that may assist this thesis in analysing the current legal issues and to answer the research question presented. The importance of the historical methodology to this research is to explore the circumstances that contributed to the current position of the UAE's law on the meaning of public policy. Therefore, this method will be used to form a solid historical basis and to assist in reaching rational conclusions regarding the development of some principles of *Sharia* public policy and to understand the effect of the evolution of the notion of public policy on the UAE legal system. This analysis is essential for this thesis since the underlying *Sharia* jurisprudence has evolved over 14 centuries and the notion of public policy has evolved over 5 centuries or more[33] and, thus, must be accurately investigated and examined from a historical perspective.

The ultimate objective of this study is to further develop the international commercial arbitration environment in UAE and therefore, a semi-comparative legal methodology must be deployed to understand the similarities and differences between the UAE's

[33] Kain, Brandon and Douglas T. Yoshida, 'The doctrine of Public Policy in Canadian Contract Law' in Hon. Todd L. Archibald and Hon. Randall Scott Echlin (eds), *Annual Review of Civil Litigation* (Thomson Carswell, a division of Thomson Reuters Canada Limited, Toronto 2007).

application of the notion of public policy and other leading jurisdictions with different legal environments to understand the challenges and opportunities to improve the enforcement regime. Furthermore, the semi-comparative methodology will assist the researcher to propose workable recommendations to overcome the identified legal challenges.

The semi-comparative methodology is one of most accepted academic research methods in legal studies that will help the thesis to illustrate that similar issues exist in different legal systems and each legal system may adopt the same or different approaches, which renders the result or the outcome unpredictable[34]. Therefore, a semi-comparative methodology will be employed whereby a particular issue in the UAE's legal system will be compared to Egypt, the Kingdom of Saudi Arabia, and the Common Law of England to discover similarities, dissimilarities, strengths and weaknesses. Egyptian Law is used because there are certain similarities in the legal framework of the Egyptian and UAE legal systems, since the UAE's legal system is founded upon Civil Law principles, most of which are heavily influenced by Egyptian law, which in turn is influenced by French law. The Kingdom of Saudi Arabia is presented to compare the application of *Sharia* law by the relevant courts to examine the difference and similarity to the UAE's application of *Sharia* public policy. Furthermore, the Common Law of England is used as a point for comparison in terms of certain solutions due to the fact that England is one of most favourable jurisdictions for international arbitration and that the UAE has a unique dual legal system of Civil and Common Law. The Common Law system is practiced in some specific free zones, namely Dubai International Financial Centre Courts (DIFC) and Abu Dhabi Global Market (ADGM).

1.4 Scope of Thesis and Limitations

The primary line of inquiry for this research is the impact of *Sharia* public policy on the recognition and enforcement of foreign arbitral awards in the UAE. However, there are

---

[34] Bhat, P. Ishwara, 'Comparative Method of Legal Resarch: Nature, Process and Potentiality' (2015) 57(2) Journal of the Indian Law Institute 147.pp. 157- 159; Alsaif, Bander, 'Two Sides of the Saudi Public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards' (PhD Thesis, University of New South Wales 2018).p. 10.

a number of notable limitations and obstacles that require mentioning at the beginning of this thesis.

The first limitation is that the current UAE arbitration framework is relatively new. Thus, this framework has yet to find its footing and achieve a notable level of operational efficiency or best practices and, therefore, there is a relative dearth of studies and literature on this subject. Much has been written about the UAE's arbitration framework in the past and the issues arising under the old arbitration regime; however, minimal consideration has been given to how *Sharia* law frames the concept of the UAE's public policy during the enforcement of foreign arbitral awards, and how that interacts with the enforcement regime of the NYC.

The second limitation of this study is that *Sharia* law is not a codified legal system, but a system of principles derived from primary and secondary sources of Islamic law. These sources are then interpreted by judges and scholars from the various schools of Islamic jurisprudence. This may create conundrum for the correct determination of the applicable *Sharia* law principles in defining the scope of UAE public policy as there may be conflicting understanding and interpretation of *Sharia* law and its application between different schools of *Sharia* jurisprudence. Thus, it is crucial that those involved in international arbitration have a clear understanding of the way in which *Sharia* law is interpreted and applied by the courts, an issue which is thoroughly addressed by chapters three, four and five in this thesis, and in Appendix A: Overview of the UAE legal system.

The third obstacle that faced this research is the lack of judicial publication of decisions of the court by the relevant authority such as Dubai Judicial authority and Ministry of Justice, which affects both the primary and secondary resources of the research. There are two main reasons behind the lack of publication of court decisions. Firstly, the UFAL 2018 and The Cabinet Decision of 2018, which are the subject of the research, came to force in 2019 and therefore are relatively new laws. Accordingly, the number of court decisions relevant to the research question in the context of new law are limited. The second reason is that few decisions of the courts are published every year.

As well, It is important to note that the newly enacted law does not apply to financial free zones such as the Dubai International Financial Centre (DIFC) and the Abu Dhabi

Global Market (ADGM) by virtue of law No.8 of 2004 regarding the financial Free Zones, which exempts the Financial Free Zones all Federal civil and commercial laws including UFAL 2018. Thus, the study will not cover the two free zones and will not cover the enforcement of domestic arbitral awards in such free zones.

1.5 Thesis Structure

With a view to analyse this topic critically, the researcher divided the thesis into six main chapters, which commence with this introductory chapter. The introductory chapter presents the research problem, contribution of thesis and gap in the current research, research methodology, scope of thesis and limitation and thesis structure.

Chapter two provides a comprehensive historical development of the concept of public policy and its boundaries. This chapter then addresses the evolution of the concept of public policy in key treaties relating to the enforcement of a foreign arbitration award. This chapter also includes the key factors that influence public policy across the legal systems and the types of public policy. Moreover, this chapter illustrates that the concept of public policy is not static; rather, it is a changeable and variable concept that is influenced by various factors such as economic, social, historical, religious, and cultural factors. In Muslim countries *Sharia* law or Islamic rule specifically form an essential part of the country's social, economic, political, and legal culture and therefore, *Sharia* law plays an essential role in defining the scope of public policy.

Chapter three comprehensively explores several areas of Islamic *Sharia* in general and specifically discusses how the interplay between *Sharia* law and UAE public policy has provided the UAE domestic courts with ample opportunity to refuse the recognition and enforcement of foreign arbitral awards on public policy grounds, and to do so under the pretext of religious duty and obligation. This chapter also includes a discussion of the enduring role of *Sharia* law in the interpretation of the UAE's Law. This chapter seeks to identify the ways in which *Sharia* law impacts the enforcement of foreign arbitral awards and how UAE judges use Islamic *Sharia* to make decisions either to enforce or refuse to enforce foreign arbitral award on grounds of a violation of *Sharia* law, which constitutes the UAE's concept of public policy.

Chapter four addresses the issue of *Riba* that is considered part of *Sharia* law's mandatory rules that constitute UAE public policy in the context of enforcement of

foreign awards. The chapter will demonstrate that *Riba* is a controversial issue in Islamic jurisprudence and each Muslim State has developed its own definition and *modus operandi* of the concept of *Riba*. Not only that, but within one country, it is left for each court to interpret the scope of application of *Riba* on a case-by-case basis. The discussion in this chapter aims to investigate the legal implications of the prohibition of *Riba* under UAE law on the enforcement of foreign arbitral awards and how the court's attitude toward curbing the scope of application of the concept during the enforcement of foreign arbitral awards.

Chapter five examines another *Sharia* mandatory rule that constitutes public policy in the context of enforcement of foreign awards under UAE legal system, which is the Islamic concept of *Gharar*. This chapter illustrates that the UAE's courts adopt a very broad and vague definition of *Gharar,* which has led to broadening the scope of the UAE's concept of public policy during the enforcement of foreign arbitral awards. Hence, the wide scope of *Gharar* may provide a great risk to the smooth enforcement of foreign arbitral awards.

Chapter six consists of the conclusion with a summary of the problems and the researcher's recommendations and suggestions to overcome the problems of public policy in context of *Sharia* law. The suggestions presented in this chapter aim to help the UAE make the most significant impact toward developing a more harmonised arbitral enforcement regime within the UAE, both in the short and long term.

Chapter 2 Evolution of the Concept of Public Policy

2.1 Introduction

In the history of law, the concept of public policy is considered one of the most ancient and ambiguous concepts[35]. It can be found in various fields of law such as contracts, torts, trusts, conflict of laws[36] and in Islamic law. According to some sources, the origins of public policy have been traced back to the fifteenth century. However, it is highly probable that public policy is as old as the law itselfl[37].

Public policy is a perplexing concept that is embedded in the heart of every legal system in the world to safeguard the cultural identity of the State[38]. It is the fundamental values, standards and ideology enshrined in the enforcing state's constitution and its policy objectives that underlies some legislative rules and decisions of the courts, and which form the supreme interest of the whole society[39].

Public policy is a truly a dynamic and flexible concept that is not a visible or tangible set of defined rules and regulations in clear provisions of laws[40]. It is constantly changing which made the concept different from one State to another and sometimes even within the same State[41]. Therefore, every attempt to define and determine the

---

[35] Ehrenzweig, Albert A., 'The Lex Fori-Basic Rule in the Conflict of Laws' (1960) 58(5) Michigan Law Review 637; Garcia de Enterria, Javier, 'The Role of Public Policy in International Commercial Arbitration' (1990) 21(3) Law and Policy in International Business 389; Kain, Brandon and Douglas T. Yoshida, 'The Doctrine of Public Policy in Canadian Contract Law' in Hon. Todd L. Archibald and Hon. Randall Scott Echlin (eds), *Annual Review of Civil Litigation* (Thomson Carswell, a division of Thomson Reuters Canada Limited, Toronto 2007).
[36] Ibid.
[37] Nussbaum, Arthur, 'Public Policy and the Political Crisis in the Conflict of Laws' (1940) 49(6) The Yale Law Journal 1027.
[38] Baron Lloyd of Hampstead, Dennis Lloyd, *Public Policy: A Comparative Study of English and French Law* (University of London Legal Series, Athlone Press, London 1953); Yelpaala, Kojo, 'Restraining the Unruly Horse: the Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California' (1989) 2(2) The Transnational Lawyer 379.
[39] Paulsen, Monrad G., and Michael I. Sovern, ' "Public Policy" in the Conflict of Laws' (1956) 56(7) Columbia Law Review 969; Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004); Ghodoosi, Farshad, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2016) 94(3) Nebraska Law Review 685.
[40] Ibid.
[41] Carter, P. B., 'The Role of Public Policy in English Private International Law' (1993) 42(1) The International and Comparative Law Quarterly 1; Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004); Mills, Alex, 'The Dimensions of Public Policy in Private International law' (2008) 4(2) Journal of Private International Law 201.

boundaries and scope of the concept by the jurist and judges has failed and has given rise to other related challenging vexing issues and matters[42].

This chapter argues that public policy is a variable notion that constantly changes according to the social and cultural development of the society. Public policy considerations vary from State to State and the scope of public policy is entirely dependent on the cultural, legal, and economic considerations of each respective State. Time is a crucial factor in the development of the concept of public policy in any society because societies evolve culturally, legally, politically, and economically over time to reflect the evolution of society. Furthermore, this chapter demonstrates that in religiously oriented societies, especially States governed by Islamic Law such as the UAE, principles of public policy are derived from fundamental religious beliefs of society along with other fundamental social, economic, cultural and legal priorities of the State.

In order to tackle this challenging subject, it is imperative for this thesis to first address the notion of public policy in legal history and legal theory. Thus, this chapter will begin with a brief history of public policy in private international law, as well as the historical paradigm shifts of the concept. This will lay out the economic, social, political and religious justification for the notion of public policy in order to discover the best interperation of public policy under *Sharia* and UAE law.

2.2 Historical Development: Tracking the Unruly Horse

Understanding the historical development of public policy is essential in order to grasp the evolutionary path of public policy from the field of private international law to the field of international commercial arbitration. The concept of public policy under international arbitration enjoys a flourishing presence and plays a fundamental role, particularly during the enforcement of foreign arbitral awards. However, it is considered a special application of the concept in field of private international law, also known as the conflict of laws[43].

---

[42] Supran note 41.

[43] Stempel, Jeffrey W., 'Pitfalls of Public Policy: The Case of Arbitration Agreements' (1990) 22 St. Mary's Law Journal 259; Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).

Prior to the twelfth century, the courts rarely applied the concept of public policy. In Italy, the courts used to apply the law of the forum, which is based on Roman law[44], to solve the disputes involving the conflict of laws and in the absence of domestic laws. From the twelfth century, various doctrines began to evolve to deal with the normative standards for choosing foreign substantive law that can be applied by the forum court in a fair and acceptable manner[45].

Toward the end of the twelfth century, Magister Aldricus who is considered to be the founder of the science of private international law, provided an insightful representation of the conflict of laws and which law or rules should be applied when there is a conflict between forum laws and foreign law[46]. He stated that,

> *"a judge confronted with two opposing customary laws should select the law whose application would be best and most useful in relation to the facts in dispute"*[47]*.*

In the fourteenth century, the concept of the conflict of laws developed further in Italy through the works of leading jurists such as Professor Bartolus de Saxoferrato[48] and Guillaume de Cuneo[49]. They classified foreign laws into favourable foreign laws and obnoxious foreign laws. The favourable foreign law is the one that does not go against the forum's national conceptions of justice and is not repugnant to the forum's interests and policies. The obnoxious foreign law, in contrast, is the one that is considered repugnant to the forum's national conceptions of justice and its interests and policies[50].

---

[44] Lorenzen, Ernest G., 'Story's Commentaries on the Conflict of Laws: One Hundred Years After' (1934) 48(1) Harvard Law Review 15; Chng, Kenny, 'A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws' (2018) 14(1) Journal of Private International Law 130.

[45] Alexander, Gregory S., 'The Application and Avoidance of Foreign Law in the Law of Conflicts: Variations on a Theme of Alexander Nekam' (1975) 70(4) Northwestern University Law Review 602; Pavlova, Irina Getman, 'The History of Private International Law: the Theory of Belgian Realism in the 16th Century' (2018) 2(5) Sociology International Journal 431; Ferrari, Franco and Diego Fernandez Arroyo, *Private International Law: Contemporary Challenges and Continuing Relevance* (Elgar Monographs in Private International Law, 1st edn, Edward Elgar Publishing, London 2019).

[46] Supra note 54.

[47] Cited by Lagarde, Paul, *International Encyclopedia of Comparative Law (*Chapter II, Volume III, 1st edn Mohr Siebeck, Tubingen, and Martinus Nijhoff Publishers, Netherlands 1994).p. 28.

[48] Italian jurist Bartolus de Saxoferrato (1314-1357) has been widely regarded as foundational to the conflict of laws.

[49] Cuneo, Gilbert A., 'Some Practical Applications of International Law to Government Contracts' (1974) 50(5) Notre Dame Law Review 843; Lagarde, Paul, *International Encyclopedia of Comparative Law* (Chapter II, Volume III, 1st edn Mohr Siebeck, Tubingen, and Martinus Nijhoff Publishers, Netherlands 1994).

[50] Supran note 45. See also Morgenstern, Felice, 'Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts Which Are contrary to International Law' (1951) 4(3) The International Law Quarterly 326.

Accordingly, the favourable foreign law should be applied by the forum's courts and the obnoxious one should be excluded. However, there were disagreements amongst scholars on what constitutes an obnoxious foreign law and what criteria qualify a foreign law to be either favourable or obnoxious[51].

In France, the problem of the conflict of laws was triggered between the inhabitants of different French provinces. The questions regarding the conflict of laws was raised before the Parliament of Paris and Exchequer of Normandy, in decisions as early as thirteenth century[52]. In the sixteenth century, Charles Dumoulin further developed the subject of conflict of laws[53]. Charles Dumoulin argued that when examining the substantive elements of the contract, the contract is valid if it complied with the law of the place of its execution[54]. He indicated that the will of the parties, expressed or implied, is the ultimate factor that should determine the applicable law. If the will of parties is not clear, then the court has to determine the governing law by examining the surrounding circumstances[55]. In arguing in favour of his conclusion, he gave an example of a foreigner who sold his real property located in Germany to another foreigner during his journey to Italy. He argued that it is unreasonable to apply the Italian law to this sale. Accordingly, it was held that the German law should govern the sale and purchase of the property and the sale contract should be recognised by the Italian Court if the contract is valid under German law[56]. However, he pointed out the law of a country which is in war with France should not be applied and should be exempted from application[57]. According to Paul Lagarde this amounts to public policy exception of political character and nature[58].

---

[51] Supran not 45. See also Dolinger, Jacob, 'World Public Policy: Real International Public Policy in the Conflict of Laws' (1982) 17(2) Texas international law journal 167.
[52] Ibid.
[53] Supran note 45. See alos Ehrenzweig, Albert A., 'The Lex Fori-Basic Rule in the Conflict of Laws' (1960) 58(5) Michigan Law Review 637; Lagarde, Paul, *International Encyclopedia of Comparative Law (*Chapter II, Volume III, 1st edn Mohr Siebeck, Tubingen, and Martinus Nijhoff Publishers, Netherlands 1994).
[54] Lorenzen, Ernest G., 'Validity and Effects of Contracts in the Conflict of Laws' (1921) 30(6) The Yale Law Journal 565; Zhang, Mo, 'Party Autonomy and Beyond: an International Perspective of Contractual Choice of Law' (2006) 20(2) Emory International Law Review 511.
[55] Ibid.
[56] Ehrenzweig, Albert A., 'The Lex Fori-Basic Rule in the Conflict of Laws' (1960) 58(5) Michigan Law Review 637.
[57] Supra note 57.
[58] Lagarde, Paul, *International Encyclopedia of Comparative Law* (Chapter II, Volume III, 1st edn Mohr Siebeck, Tubingen, and Martinus Nijhoff Publishers, Netherlands 1994).

In the seventeenth century, Dutch scholars such as Ulrich Huber, who is associated with the comity doctrine, stated that the sovereign nation voluntarily enforces the laws of another sovereign nation out of respect and mutuality. However, he pointed out that the comity doctrine does not oblige the forum court to recognise and apply the foreign law that would prejudice the power and authority of the State in its jurisdiction[59].

It is understood that from the twelfth century to the eighteenth century, scholars of different schools in Italy, France, Germany, and Denmark played an important role in the development of the theories on the conflict of laws. However, the courts had no role regarding this development until the middle of the eighteenth century[60]. Nevertheless, at the beginning of the nineteenth century, there was an expansion in trade and commercial activities between nations, which resulted in an increase of problems relating to the conflict of laws and the application of foreign law by the forum's court [61]. The new era dealing with the subject of conflict of laws began in the nineteenth century when scholars like Joseph Story, Friedrich Carl von Savigny, and Pasquale Stanislao Mancini attempted to clarify the question of conflict of laws in private international law. The modern basis for the principle of public policy in private international law has emerged from works and theories of the aforementioned scholars[62]. The next section will present a critical appraisal of each of these scholars' opinion and theory.

2.2.1 Joseph Story

Joseph Story, an American Jurist who published his *Commentaries on Conflicts of Laws* (1st edition) in the year 1834, which marked the beginning of the modern analysis of conflict of laws[63]. In his preface to the first edition, Story stressed the importance of

---

[59] Supra note 45. See also Morgenstern, Felice, 'Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts Which Are contrary to International Law' (1951) 4(3) The International Law Quarterly 326; Juenger, Friedrich K., *Choice of Law and Multistate Justice* (Transnational Classics in International Law (Book 2), Special edn, Transnational Publishers, Ardsley, NY 2005).
[60] Ibid.
[61] Mills, Alex, 'The Private History of International Law' (2006) 55(1) The International and Comparative Law Quarterly 1.pp. 10-11; Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).
[62] Dolinger, Jacob, 'World Public Policy: Real International Public Policy in the Conflict of Laws' (1982) 17(2) Texas International Law Journal 167; Lagarde, Paul, *International Encyclopedia of Comparative Law* (Chapter II, Volume III, 1st edn Mohr Siebeck, Tubingen, and Martinus Nijhoff Publishers, Netherlands 1994).
[63] Ehrenzweig, Alberi A., 'American Private International Law and the Restatement' (1958) 28(1) Nordic Journal of International Law 229; Nadelmann, Kurt H., 'Joseph Story's Contribution to American

the conflict of laws internationally and domestically for the States[64]. He pointed out that there are various materials available on the subject of the conflict of laws containing the theories of renowned European jurists and scholars. However, it is challenging to compile all the materials as they are contained in numerous sources and literatures, which in turn, adds to the difficulty to untangle and analyse the concept of the conflict of laws[65].

According to Story, there was no serious attempt to establish a *“familiar maxim of common law”* for the conflict of laws in any general order[66]. He pointed out that the Common Law courts never cited these continental European authors and scholars in the courtrooms, and it seems that the field did not appear to English lawyers and judges as a branch of international jurisprudence that needs to be intensively explored and studied[67]. He followed the comity doctrine of the seventeenth century, which was developed by Dutch professor Ulrich Huber[68]. According to Story, the principle of international comity could be a unifying force to overcome the issue of sovereignty of State in conflict of law[69]. To add further, a point particularly apposite for this research,

---

Conflicts Law: A Comment' (1961) 5(3) The American Journal of Legal History 230; Kegel, Gerhard, 'Story and Savigny' (1989) 37(1) The American Journal of Comparative Law 39; Story, Joseph, *Commentaries on the Conflict of Laws : Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Lawbook Exchange, NJ 2008 edn, First edn by Little, Brown, Massachusetts 1834).

[64] Dolinger, Jacob, 'World Public Policy: Real International Public Policy in the Conflict of Laws' (1982) 17(2) Texas International Law Journal 167; Story, Joseph, *Commentaries on the Conflict of Laws: Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Lawbook Exchange, NJ 2008 edn, First edn by Little, Brown, Massachusetts 1834).pp. 1-18.

[65] Lorenzen, Ernest G., 'Story’s Commentaries on the Conflict of Laws: One Hundred Years After' (1934) 48(1) Harvard Law Review 15; Kegel, Gerhard, 'Story and Savigny' (1989) 37(1) The American Journal of Comparative Law 39; Roosevelt III, Kermit, 'Brainerd Currie’s Contribution to Choice of Law: Looking Back, Looking Forward' (2014) 65(2) Mercer Law Review 501; Story, Joseph, *Commentaries on the Conflict of Laws : Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Lawbook Exchange, NJ 2008 edn, First edn by Little, Brown, Massachusetts 1834).pp.9-14.

[66] Dolinger, Jacob, 'World Public Policy: Real International Public Policy in the Conflict of Laws' (1982) 17(2) Texas International Law journal 167; Collier, J. G., *Conflict of Law* (3rd edn, Cambridge University Press, Cambridge 2001); Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).pp. 44-45.

[67] Ibid.

[68] Nadelmann, Kurt H., 'The Comity Doctrine: Introduction' (1966) 65(1) Michigan Law Review 1; Maier, Harold G., 'Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law' (1982) 76(2) The American Journal of International Law 280; Riad, Fouad Abdul-Moniem and Samia Rashed, *Tanazie Alqwanien wa Aliktisas Alqadie Aldowalie wa Athar Alahkam Alajnabiah* (Dar al-Nahda, Cairo 1994).

[69] Stevenson, John R., 'The Relationship of Private International Law to Public International Law' (1952) 52(5) Columbia Law Review 561; Murphy, Kent, 'Traditional View of Public Policy and Ordre Public in the Private International Law' (1981) 11(3) Georgian Journal of International and Comparative Law 591;

he pointed out some exceptions to his application of the principle of comity that would allow the sovereign to apply its own law when there is a conflict of laws issue. One such exception is when the application of foreign laws or rules is repugnant to the sovereign national supreme interests and policies. The nation, therefore, is not obliged to yield its own interest to enforce foreign laws that are morally, politically, and economically incompatible with the State's interest and policy objectives[70].

2.2.2 Freidrich Karl Von Savigny

Unlike Story, German Jurist Savigny argued that every legal relationship or transaction has a centre of gravity that would connect the issue either with the forum's legal system or with a foreign country's legal system. Savigny suggested that judges should apply the law of the State or the country to which the legal relationship or transaction before the court belongs and is significantly connected with, which he referred it to as the *"seat of obligation"*[71].

Savigny attempted to establish universal rules of conflict of laws which could not be limited by local or municipal laws and which were to be scientifically based on the interdependence of sovereign States in the modern world[72]. He concluded that the foreign law should be applied except in exceptional circumstances. He further attempted to analyse and examine those exceptional circumstances in a comprehensive and cohesive manner[73]. He pointed out that there are two classes of laws which are exceptions to his universal theory and these classes of laws will exclude and restrict the application of foreign law by the forum and require the forum to apply its own law[74]. The first class comprises of laws resting on moral and public interest grounds that relate to the legal, social, and economic interest and value of the

---

Childress III, Donald Earl, 'Comity as Conflict: Resituating International Comity as Conflict of Laws' (2010) 44(1) U.C. Davis Law Review 11; Dodge, William S., 'International Comity in American Law' (2015) 115(8) Columbia Law Review 2071.

[70] Ibid. See also Maier, Harold G., 'Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law' (1982) 76(2) The American Journal of International Law 280; Collier, J. G., *Conflict of Law* (3rd edn, Cambridge University Press, Cambridge 2001).

[71] Lorenzen, Ernest G., 'Story's Commentaries on the Conflict of Laws: One Hundred Years After' (1934) 48(1) Harvard Law Review 15; Kegel, Gerhard, 'Story and Savigny' (1989) 37(1) The American Journal of Comparative Law 39; Nwagbara, Chigozie, 'Re-Examining the Theory of Savigny, the Theory of Acquired Rights and the Local Law Theory under Private International Law' (2014) 27 Journal of Law, Policy and Globalization 12.

[72] Ibid.

[73] Ibid. See also Peari, Sagi, 'Savigny's Theory of Choice-of-Law as a Principle of 'Voluntary Submission' '' (2014) 64(1) The University of Toronto Law Journal 106.

[74] Supra note 72.

forum, which take away and restrict the application of foreign law. The second class constitutes certain principles of law within a legal system that has an inherent feature or nature to take away and limit the application of foreign law by the forum[75]. These two classes of exceptions pointed out by Savigny amount to public policy exception[76]. However, Savigny's view is based on a broad definition of public policy that encompasses both public laws and mandatory laws[77].

2.2.3 Pasquale Stanislao Mancini

Pasquale Stanislao Mancini, an Italian political theorist, opposed the views of Story and Savigny regarding the role of public policy in private international law. He delivered a lecture at the University of Turin on 22nd January 1851 on the topic *"Nationality as the Basis of International Law"*[78]. He pointed out that in order to protect the public order of a State, there are certain rules of the State that should be applied to anyone within the territory of the State, including the foreigners[79]. These rules are police laws that are intended to safeguard the State's moral and economic interest and should be regarded as having an exclusive application over the sovereign State's territory. He did not regard the police law as exception[80]. In exceptional cases relating to status, capacity, family relations and succession, the national law of the foreigner must be applied unless it conflicts with forum law[81]. Pasquale Stanislao Mancini's theory is

[75] Supra note 72.
[76] Nwagbara, Chigozie, 'Re-Examining the Theory of Savigny, the Theory of Acquired Rights and the Local Law Theory under Private International Law' (2014) 27 Journal of Law, Policy and Globalization 12.
[77] Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004); Juenger, Friedrich K., *Choice of Law and Multistate Justice* (Transnational Classics in International Law (Book 2), Special edn, Transnational Publishers, Ardsley, NY 2005).
[78] Kosters, J., 'Public Policy in Private International Law' (1920) 29(7) The Yale Law Journal 745; Messineo, Francesco, 'Is There an Italian Conception of International Law?' (2013) 2(4) Cambridge International Law Journal 879.
[79] Nadelmann, Kurt H., 'Mancini's Nationality Rule and Non-Unified Legal Systems: Nationality Versus Domicile' (1969) 17(3) The American Journal of Comparative Law 418; Castel, Jean-Gabriel, 'Back to the future! Is the 'new' rigid choice of law rule for interprovincial torts constitutionally mandated?' (1995) 33(1) Osgoode Hall Law Journal 35; Mills, Alex, 'The Private History of International Law' (2006) 55(1) The International and Comparative Law Quarterly 1; Banu, Roxana, *Nineteenth Century Perspectives on Private International Law* (The History and Theory of International Law, 1st edn, Oxford University Press, Oxford 2018).
[80] Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004); Juenger, Friedrich K., *Choice of Law and Multistate Justice* (Transnational Classics in International Law (Book 2), Special edn, Transnational Publishers, Ardsley, NY 2005).
[81] Schmidt, Folke and G. C. Cheshire, 'Nationality and Domicile in Swedish Private International Law' (1951) 4(1) The International Law Quarterly 39; Nadelmann, Kurt H., 'Joseph Story's Contribution to American Conflicts Law: A Comment' (1961) 5(3) The American Journal of Legal History 230; Saumier,

today regarded as the most orthodox and was abandoned by many States and scholars[82].

2.3 Assessing the Offensive Impact of the Forum's Fundamental Principle

Determining the proximity of the dispute to the forum legal system is important, because invoking domestic public policy of State needs to be justified and based on fair and objective assessment of the connection between the dispute and the forum legal system. It is, therefore, submitted that one of the prerequisites for the operation and application of public policy and exclusion of application of foreign law under private international law is the proximity and connection between the dispute and the forum legal system, its public policy, and the consequences of the application of foreign law[83]. In other words, it is the determination of which legal system has the greatest proximity and most significant connection to the dispute.

Thus, an assessment of the offensive impact of a foreign law on the forum's public policy principles involves careful consideration of proximity and existence of sufficient connections with the forum. This will require the forum court to conduct an objective and fair assessment of the repugnant consequences of the application of the foreign law, which requires evaluating various factors involved to justify a sufficient connection and link with the forum legal system that would trigger its public policy. This is called Theory of Proximity, which simply means that the intervention of public policy is dependent upon the existence of sufficient connections and links with the forum legal system that justifies and triggers the application of public policy exception[84].

In order to illustrate the relative importance of connections, a very important German case could demonstrate the concept of proximity in clearer manner. In a case before the German Court of Appeal, a suit for maintenance was filed by an Iranian wife, acting in her own name and on behalf of her son against her husband from whom she lived

---

Genevieve, 'Public Policy, Mandatory Rules and Uniform Choice-of-Law Rules in Contract: the Impact of European Harmonisation on English Private International Law' (PhD Thesis, University of Cambridge 1997).

[82] Kegel, Gerhard, 'Fundamental Approach' in Drobngi, U., R. David and others (eds), *International Encyclopedia of Comparative Law* (Chapter 3 edn Martinus Nijhoff, Netherlands 1986); Mills, Alex, 'The Private History of International Law' (2006) 55(1) The International and Comparative Law Quarterly 1.

[83] Lagarde, Paul, *International Encyclopedia of Comparative Law* (Chapter II, Volume III, 1st edn Mohr Siebeck, Tubingen, and Martinus Nijhoff Publishers, Netherlands 1994); Riad, Fouad Abdul-Moniem and Samia Rashed, *Tanazie Alqwanien wa Aliktisas Alqadie Aldowalie wa Athar Alahkam Alajnabiah* (Dar al-Nahda, Cairo 1994).

[84] Supra note 85.

apart. According to Iranian law, the wife who is living separately from her husband cannot claim for maintenance except in cases where any danger to her personal integrity, her property and her honour will result from the cohabitation[85]. Based on German Private International law, Iranian law had to be applied in this case and the wife's claim for maintenance had to be denied by the German Court as the wife was living separately from her husband and there was no proof that there was a danger to the wife's personal integrity, her property or her honour that resulted from the cohabitation[86].

The Court indicated that there was a sufficient and strong connection and link between the German law and the case since the common domicile of the parties was in Osnabruck, Germany. The court further highlighted some essential facts including that the Claimant was without any resources and was unable to work as she had a young infant to look after. Thus, if her claim were dismissed as per the Iranian law, her livelihood would be dependent on German social security services, a result which was not acceptable and repugnant to German public policy[87]. Accordingly, it is the set of strong connections and links that justified the exclusion of Iranian law on the basis of public policy and application of German law to the case.

The case raises two essential questions to determine the proximity with the forum; firstly, what is the nature of the connections that are adequate to instigate or trigger the application of public policy exception? And secondly, whose task is it to determine if the links are adequate and sufficient to invoke and trigger the forum public policy exception?

Concerning the nature of connections that are sufficient to instigate or triggers the operation of public policy in private international law, these links or conncections may take the form of territorial links or connections (such as residence, domicile, place of

---

[85] OLG Oldenburg, September 16th, 1980; cited by Lagarde, Paul, *International Encyclopedia of Comparative Law* (Chapter II, Volume III, 1st edn Mohr Siebeck, Tubingen, and Martinus Nijhoff Publishers, Netherlands 1994); Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).p. 39.
[86] OLG Oldenburg, September 16th, 1980; cited by Lagarde, Paul, *International Encyclopedia of Comparative Law* (Chapter II, Volume III, 1st edn Mohr Siebeck, Tubingen, and Martinus Nijhoff Publishers, Netherlands 1994); Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).p. 39.
[87] Supra note 88.

execution, etc.), personal links or connections (such as nationality) or mixture of both links or connections [88]. With reference to the second essential question, it is usually the forum court's task to determine whether there are sufficient and adequate links or connections to trigger the application of public policy. The court is more suitable than any other legal institution to determine the existence of a link or connections and the extent of infringement or violation of public policy as the test must to be carried out case-by-case basis[89].

The German and Swiss legislators intervened and introduced provisions in their laws to determine the level and degree of tolerance towards some foreign laws and rules. They also determined the connections required for the operation of their domestic public policy in specific cases and determined the application of German or Swiss law in the case of exclusion of foreign law[90]. These provisions are called *"special public policy clauses"*[91]. For example, under Swiss Code of Private International Law, Article 61(3) states,

> *"If the law of the State of common citizenship does not permit the dissolution of the marriage or imposes extraordinary severe conditions, Swiss law shall be applicable if one of the spouses is also a Swiss citizen or one of the spouses has resided in Switzerland for the two years immediately preceding"*[92].

The Swiss Article 61(3) determined the connections required for the operation of Swiss public policy and exclusion of application of foreign law is either one of spouse is Swiss or one of them resided in Switzerland for two years at least and dissolution of marriage is subject to extraordinary sever condition that invoke Swiss public policy.

2.4 Analysis

Story analysed the concept of public policy in a limited manner. In his view, it was an unusual concept in private international law and would be replaced, once the States gradually adopt a universal standard in order to resolve the conflict of laws issues. However, Savigny had given a more detailed explanation to the concept of public

---

[88] Supra note 88.
[89] Supra note 37.
[90] Supra note 88.
[91] Supra note 88.
[92] Article 61(3) of Switzerland's Federal Code on Private International Law of December 18, 1987.

policy or *“exceptions”* as he called it. He was against any theory which gives a permanent status to the exceptions or public policy. He argued that the exclusion of foreign law based on public policy exception is to be discouraged[93]. It should be noted that neither Story nor Savigny made express reference to the term *“*public policy*”*, but the notion they expounded was clearly that of rejecting the application of foreign law that conflicts with the forum’s fundamental social, political, economic, and moral standards, which amount to public policy in modern days[94].

Pasquale Stanislao Mancini’s view, unlike Story and Savigny, was that the concept of public policy could be applied as a justification for excluding any foreign law, which is contrary to forum fundamental social, political, economic, and moral standards. He did not regard public policy as an exception. However, Savigny’s and Pasquale Stanislao Mancini’s views are based on a broad definition of public policy that includes public laws and mandatory rules of the forum *(lois de police)*[95].

We can conclude that the public policy in the field of the conflict of laws or private international law is exceptional and it is applied narrowly to determine the choice of law applicable to the legal relationship[96]. It is a defence against the application of foreign laws or acts that is deemed inconsistent with the fundamental values and minimum standard of justice and morality of the forum’s legal system. Judge Cardozo in *Lucks v. Standard Oil Co,*[97] explained the narrow interpretation of the public policy concept in private international law when he stated that the public policy defence is invoked when application of foreign law *“would violate some fundamental principle of*

---

[93] Lalive, Pierre, 'The New Swiss Law on International Arbitration' (1988) 4(1) Arbitration International 2; Al Hadawie, Hassan, *Tanazie Alqawanien, wa Alhuloul Alwadiea fi Alqanoun Alairduni, Dirasah Muqaranah* (1st edn, lil Nashier was Al-Tawziea, Dar Althaqafaq lil Nasher wa Altwzie, Jordan 1997).

[94] Dolinger, Jacob, 'World Public Policy: Real International Public Policy in the Conflict of Laws' (1982) 17(2) Texas International Law Journal 167; Lalive, Pierre, 'The New Swiss Law on International Arbitration' (1988) 4(1) Arbitration International 2; Al Hadawie, Hassan, *Tanazie Alqawanien, wa Alhuloul Alwadiea fi Alqanoun Alairduni, Dirasah Muqaranah* (1st edn, lil Nashier was Al-Tawziea, Dar Althaqafaq lil Nasher wa Altwzie, Jordan 1997); Gaillard, Emmanuel, and John Savage(eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (International Law, 1st edn, Kluwer Law International, The Hague, Netherlands 1999).

[95] Al Hadawie, Dr Hassan, Al Qanoun Aldowali Alkas, *Tanazie Alqawanien, wa alhuloul Alwadiea fi Alqanoun Alairduni, Dirasah Muqaranah* (1st edn, lil Nashier was Al-Tawziea, Dar Althaqafaq lil Nasher wa Altwzie, Jordan 1997); Riad, Fouad Abdul-Moniem and Samia Rashed, *Tanazie Alqwanien wa Aliktisas Alqadie Aldowalie wa Athar Alahkam Alajnabiah* (Dar al-Nahda, Cairo 1994).

[96] Paulsen, Monrad G., and Michael I. Sovern, ' “Public Policy” in the Conflict of Laws' (1956) 56(7) Columbia Law Review 969; Garcia de Enterria, Javier, 'The Role of Public Policy in International Commercial Arbitration' (1990) 21(3) Law and Policy in International Business 389.

[97] 'Loucks v. Standard Oil Co. of N. Y' (1915) 3 Virginia Law Review 397.

justice, some prevalent concept of good morals, some deep-rooted tradition of the common weal"[98].

2.5 Historical Development of Public Policy in Civil Law Legal System

From the thirteenth century to the eighteenth century, continental writers have played a significant role in the development of public policy. However, the courts in Civil law jurisdictions had only a limited or non-existent role in its development. The Civil law system adopted a statutory method in dealing with the problem of the conflict of laws. In the Civil law system, the term *"ordre public"* is used rather than the term "public policy" that is used in Common Law system. The first European code to adopt the expression *"ordre public"* was the French Civil Code under Article 6. Article 6 of French Civil Code states that a *"private agreements must not contravene the laws which concern public order and good morals"*[99].

However, *ordre public* in Civil law jurisdictions has a broader meaning and application than the term public policy in the Common Law jurisdictions. *Ordre public* is similar to public policy in that it rejects the application or recognition of foreign laws that are inconsistent with the State's fundamental conceptions of justice and morality[100]. However, *ordre public* also refers to the domestic rules and the statutory requirements which are peremptory in nature and which cannot be contracted away by the parties[101].

Furthermore, in the Civil law jurisdiction, the concept of morality is enshrined in the statutory provisions that allow Civil law judges to invalidate a contract if it contravenes good morals. Since the Civil law system lacks the doctrine of binding precedents and the Civil law statutes do not define the term "good morals", Civil law judges generally have wide discretion in interpreting the concept of good morals. Furthermore, in the Common Law system, moral consideration is not enshrined in the concept of public

[98] Supra note 97.
[99] The French Civil Code or *Code Napoleon* or officially Code civil des Français, referred to as (le) Code Civil. It came into force on 21 March 1804.
[100] Husserl, Gerhart, 'Public Policy and Ordre Public' (1938) 25(1) Virginia Law Review 37; Forde, M., 'The "Ordre Public" Exception and Adjudicative Jurisdiction Conventions' (1980) 29(2-3) The International and Comparative Law Quarterly 259; Murphy, Kent, 'Traditional View of Public Policy and Ordre Public in the Private International Law' (1981) 11(3) Georgian Journal of International and Comparative Law 591.
[101] Ibid.

policy itself and is not used as a test to determine the application of the notion but is used to justify the development of a public policy rules[102].

Having provided a brief historical overview of public policy in private international law and the influence of continental jurists on the development of public policy within the Civil Law jurisdiction, it is necessary to investigate further how the concept has evolved within the English Common Law jurisdiction and how it was subsequently introduced to international arbitration, since this is a critical part of the development of the arbitration laws in the GCC countries.

2.6 Historical Development of Public Policy in the English Common Law Legal System

The English Common Law courts did not apply the concept of public policy in the manner it is applied today until the nineteenth century[103]. Before the nineteenth century, the concept of public policy could be seen as associated with the principles of equity, natural law, and the law of reason[104]. In the early fifteenth and sixteenth century and in the absence of a clear statutes or written laws during that period, the Common Law courts applied the concept of public policy through similar terms but under a wider generalisation. Occasionally, the terms used would go against the statutes or the Magna Carta[105]. For example, the English court refused the enforcement of certain contractual terms on the basis that they are either *"encounter le necessity del commonwealth"* ("against the needs of the commonwealth")[106] or

---

[102] Brekoulakis, Stavros, 'The Evolution of Public Policy and Judicial Function in English Law' (2019) 10(3) Journal of International Dispute Settlement 472.
[103] Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).
[104] Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207; Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76; Baron Lloyd of Hampstead, Dennis Lloyd, *Public Policy: A Comparative Study of English and French Law* (University of London Legal Series, Athlone Press, London 1953); Roy, Kristin T., 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1995) 18(3) Fordham International Law Journal 920; Mansoor, Zeeshan, 'Contracts Contrary to Public Policy Under English and Dutch Law' (2014) 1(4) European Journal of Comparative Law and Governance 297.
[105] Nygh, P. E., 'Foreign Status, Public Policy and Discretion' (1964) 13(1) The International and Comparative Law Quarterly 39; Carter, P. B., 'The Role of Public Policy in English Private International Law' (1993) 42(1) The International and Comparative Law Quarterly 1.
[106] Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207; Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76; Baron Lloyd of Hampstead, Dennis Lloyd, *Public Policy: A Comparative Study of English and French Law* (University of London Legal Series, Athlone Press, London 1953); Brekoulakis, Stavros, 'The Evolution of Public

"encounter de ley de Dieu" ("against the law of God")[107]. For example, the English courts in the Dyer's case[108], declared that a condition in a suit was against the "*Common ley*" (Common Law) and therefore the court refused to enforce these contractual conditions[109]. During that period, the English courts also, in *Prat v. Phanner,* declared a covenant as against *"encounter de ley de Die"* ("against the law of God")[110]. In *Colgate v. Bacheler*[111], it was declared that a covenant is against the "*benefit of commonwealth*"[112].

At the end of the sixteenth and seventeenth centuries, the concept of public policy continued to be used under concealed general terms that allowed the English judges to fill gaps in the law on the basis of what is good for the community[113]. However, in the early eighteenth century, England became one of the major trading hubs and a number of precedents and statutes emerged to cover more ground in English law, which was previously occupied by abstract legal concepts[114]. Although the Statutory law and case law endorsed freedom of contract, any contract which was contrary to or prejudicial to the social and economic interest of the community was declared void by the court[115].

Policy and Judicial Function in English Law' (2019) 10(3) Journal of International Dispute Settlement 472.

[107] Cited in Brekoulakis, Stavros, 'The Evolution of Public Policy and Judicial Function in English Law' (2019) 10(3) Journal of International Dispute Settlement 472.

[108] Dyer's case (1414) 2 Hen. V, fol. 5, pl. 26; cited by Brekoulakis, Stavros, 'The Evolution of Public Policy and Judicial Function in English Law' (2019) 10(3) Journal of International Dispute Settlement 472.

[109] Ibid.

[110] *Prat* v. *Phanner* (1586) *Mo.* No. 683; cited by Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207.

[111] *Colgate v. Bacheler* (1602) Cro. Eliz.872, Owen, 143.

[112] Ibid.

[113] Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207; Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76; Baron Lloyd of Hampstead, Dennis Lloyd, *Public Policy: A Comparative Study of English and French Law* (University of London Legal Series, Athlone Press, London 1953); Shand, John, 'Unblinkering the Unruly Horse: Public Policy in the Law of Contract' (1972) 30(1) Cambridge Law Journal 144; Mansoor, Zeeshan, 'Contracts Contrary to Public Policy Under English and Dutch Law' (2014) 1(4) European Journal of Comparative Law and Governance 297.

[114] Supra note 115.

[115] Supra note 115.

At this stage, Common Law judges refused to enforce contracts that were considered to be *"a general mischief to the public"*[116] or *"against the public good"*[117]. However, the terms demonstrated that the concept is still vague[118], but it begins to acquire clearer meaning and more technical shape than before[119]. For example, in *Mitchel v. Reynolds*[120]*,* the court through Judge Lord Macclesfield declared a contract to be "a general mischief to the public" and therefore non-enforceable and void. The case provided one of the general principles of the public policy doctrine. However, in this case, the court did not attempt to clarify the meaning of a *"*general mischief to the public*"*[121].

In the second half of the eighteenth century, in the case of *Earl Chesterfield v. Janssen*[122]*,* Judge Lord Hardwick declared that certain contracts including marriage brokerage bonds and secret arrangements with creditors to be a *"general mischief"* to the interests of the public[123]. In the *Holman v. Johnson*[124] case, a buyer intended to smuggle products into England with the seller's full knowledge[125]. Judge Lord Mansfield observed that,

[116] Mitchel v Reynolds [1711] EngR 38; for further information, see Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207 and Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76.
[117] Collins v Blantern [1767] 2 Wilson K.B. 347 at 350; for further information, see Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207 and Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76.
[118] Furmston, Michael P., *Cheshire, Fifoot and Furmston's Law of Contract* (17th edn, Oxford University Press, Oxford 2017).
[119] For further information, see Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207; Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76; Baron Lloyd of Hampstead, Dennis Lloyd, *Public Policy: A Comparative Study of English and French Law* (University of London Legal Series, Athlone Press, London 1953); Brekoulakis, Stavros, 'The Evolution of Public Policy and Judicial Function in English Law' (2019) 10(3) Journal of International Dispute Settlement 472.
[120] *Mitchel v Reynolds* [1711] EngR 38, (1711) 1 P Wms 181, (1711) 24 ER 347; for further information, see Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207; Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76.
[121] Ibid.
[122] *Chesterfield v. Janssen,* [1751] 2 Ves. Sen. 125, 28 Eng. Rep. 82 (Ch. 1750); for further information, see Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207; Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76.
[123] Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207; Baron Lloyd of Hampstead, Dennis Lloyd, *Public Policy: A Comparative Study of English and French Law* (University of London Legal Series, Athlone Press, London 1953).
[124] *Holman v Johnson (1775) 1 Cowp 341*, P. 343 (Cited in Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207); *Holman v Johnson (1775) 1 Cowp 341*, P. 343 (Cited in Leslie, Robert, 'The relevance of public policy in legal issues involving other countries and their laws' (1995)(6) Juridical Review 477).
[125] Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 20; Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76; Mansoor,

"The principle of public policy is this; ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise* ex turpi causa *or the transgression of a positive law of this country, there the Court says he has no right to be assisted"*[126].

It is accepted that the term *"public policy"* was used for the first time in the above case. Judge Lord Mansfield's view was subsequently adopted by various judges in Common Law courts in deciding cases[127].

From the nineteenth century, English statutory and case law evolved by further defining the broad concept of public policy. The court started to realise that the concept of public policy is fluid in nature[128], and it is intended to safeguard the fundamental values, ideologies, and objectives of the State. The courts used various terminology and terms to refuse enforcement of contract such as contrary to "*public welfare or interests*", "*public decency*" and "*sound policy and good morals*"[129]. At that time, the famous "unruly horse" was born in English law to describe the fluid and vexing nature of the concept with the assistance of Judge Burrough in 1824[130], when he precisely described the fluid nature of the doctrine in the following terms:

"If it be illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. I, for one, protest [...] against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail"[131].

In *Coke v. Turner*[132], Judge Rolfe attempted to describe the nature and the scope of the doctrine of public policy. He considered the phrase 'policy of law" synonymous with the phrase "public policy". He stated further that a contractual condition might be void

---

Zeeshan, 'Contracts Contrary to Public Policy Under English and Dutch Law' (2014) 1(4) European Journal of Comparative Law and Governance 297.

[126] Supra note 126.

[127] Supra note 126.

[128] Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76); Juenger, Friedrich K., *Choice of Law and Multistate Justice* (Transnational Classics in International Law (Book 2), Special edn, Transnational Publishers, Ardsley, NY 2005).

[129] Ibid.

[130] Ibid.

[131] *Richardson v. Mellish* [1824] 2 Bing 229, 252.

[132] *Cooke v. Turner* (1846) 15 M & W.735 (Cited by Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207).

based on public policy grounds if it restricts the party from performing a duty that is important to the State's interests and objectives[133].

In the middle of the nineteenth century, in the *Egerton v. Brownlow* case[134], the Earl of Bridgewater had developed extensive real estate in favour of Lord Alford with the condition that if he died without having acquired the title of Duke or Marquis of Bridgewater, the gift would be void[135]. Although the legal issue was whether the condition should be enforced or not, the broader and more complex questions were raised and debated by Judges concerning the nature of public policy. Judges had to consider the appropriate boundaries of judicial function, whether the court jurisdiction is to determine the scope of public policy and whether or not the doctrine of public policy is different from other principles of Common Law[136].

In this case, we can conclude that there were conflicting views and ideas between Judge Baron Parke and Judge Sir Jonathan Pollaock. Judge Baron Parke favoured the restrictive approach to the concept of public policy, whereas Judge Pollock J favoured a broad approach to the concept of public policy[137]. The vast majority of judges opined that it is the power of the legislature to determine the scope of public policy and to determine what is good for the public by enacting laws. Therefore, a contract would be illegal and against the public policy only when it would be against established statutory law or precedent[138]. Judge Baron Parke expressed this view and stated that:

> *"Public policy is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights. It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and*

---

[133] Supra note 132.
[134] *Egerton vs. Earl Brownlow*, [1853] 4 HLC 484, [1853] 4 HLC 1, [1853] EngR 885, (1853) 10 ER 359 (Cited by Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207); Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76).pp. 76–102.
[135] Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207; Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76; Baron Lloyd of Hampstead, Dennis Lloyd, *Public Policy: A Comparative Study of English and French Law* (University of London Legal Series, Athlone Press, London 1953); Brekoulakis, Stavros, 'The Evolution of Public Policy and Judicial Function in English Law' (2019) 10(3) Journal of International Dispute Settlement 472.
[136] Ibid.
[137] Ibid.
[138] Ibid.

to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be clearly deducted from them by sound reason and just inference; not to speculate upon what is best, in his opinion, for the advantages of the community"[139].

However, Judge Sir Jonathan Pollaock argued that it is within the power of the court to determine the scope and extent of the application of the concept of public policy. He pointed out that public policy amounted to an open-ended principle of law where the judge has a wider discretion to decide what is good for the public[140]. Furthermore, he explained that a judge might not be in better position than other members of community to decide what is good for the public. However, the judge can decide and determine this question on the basis of general principles derived from former decisions and opinion of courts[141]. He expressed this view forcefully, stating that:

"*It may be that Judges are no better able to discern what is for the public good than other experienced and enlightened member of the community; but that is no reason for their refusing to entertain the question and declining to decide upon it. Is it, or is it not, a part of our common law, that in a new and unprecedented case, where the mere caprice of the testator is to be weighed against the public good, the public good should prevail? In my judgment it is*"[142].

Although the majority of the Judges (eight judges) supported the view of Judge Baron Parke, the House of Lords favoured the opinion delivered by Judge Sir Jonathan

---

[139] *Park J in Egerton vs. Earl Brownlow*, 4 H. of L. C 1 (1853).; Further information, see Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76; Brekoulakis, Stavros, 'The Evolution of Public Policy and Judicial Function in English Law' (2019) 10(3) Journal of International Dispute Settlement 472.
[140] Ibid.
[141] Ibid.
[142] Supra note 141.

Pollaock. Thus, this case marked the beginning of the modern conception of public policy in Common Law[143].

Even though the House of Lords decision in *Egerton v. Brownlow* explained the scope and nature of the public policy concept, there were doubts in the minds of some judges regarding the nature and scope of public policy. This doubt was evident in the case of *Evanturel v. Evanturel*[144]*,* where the Privy Council referred to public policy to as *"*so-called policy of law and the supposed policy of law*"*[145]*.* Additionally, Judge George Jessel in *Besant v. Wood*[146] stated:

> *"You cannot lay down any definition to the term 'public policy', or say it comprises such and such a proposition, does not comprises such and such another. Public policy, to a certain extent, a matter of individual opinion, because what one man, or one judge, and perhaps I ought to say one woman on this case, might think against public policy, another might altogether excellent public policy. Consequently, it is impossible to say what the opinion of a man or a judge might be as to what public policy is"*[147].

Judge George Jessel's view was criticised due to fact that such a view will likely render public policy completely indefinable and supporting this view might undermine any judicial effort to define the boundary of the principle or undermine any attempt to define a rule of law since these can be overruled by unrestricted personal discretion[148]. However, by the beginning of the twentieth century, the concept of public policy had evolved to a more structured doctrine with exceptional character. The court has taken

---

[143] Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76; Brekoulakis, Stavros, 'The Evolution of Public Policy and Judicial Function in English Law' (2019) 10(3) Journal of International Dispute Settlement 472.
[144] *Evanturel v. Evanturel* (1874) L. R. 6. P.C.1, p.29 (Cited in Brekoulakis, Stavros, 'The Evolution of Public Policy and Judicial Function in English Law' (2019) 10(3) Journal of International Dispute settlement 472.
[145] Ibid.
[146] *Besant v. Wood* [1879] 12 Ch 605 at 620.
[147] Ibid.
[148] Nygh, P. E., 'Foreign Status, Public Policy and Discretion' (1964) 13(1) The International and Comparative Law Quarterly 39.

a more restrictive approach to public policy which is evidence in *Bowman v. Secular Society*[149].

The English Court in *Vervaeke v Smith* asserted that *"the court will be even slower to invoke public policy in the field of conflict of laws than when a purely municipal legal issue is involved"*[150]*.* As well, the English Court in *Cheni v Cheni* has accepted the need for *"common sense, good manners, and a reasonable tolerance"* toward application of foreign laws[151]. Accordingly, the English Court will apply foreign law and recognise and enforce a foreign judgment even if the outcome of the case is different from that which would be expected under English law.[152] Mills pointed out that although the tolerance shown by the English court toward application of foreign law, the English court did not formulate any guidelines for when it is appropriate and sufficient to invoke the public policy and refuse an application of foreign law or recognition and enforcement of a foreign judgment[153].

2.6.1 Analysis

The term public policy is relatively modern term in Common Law jurisdictions and is not considered a very old concept in comparison to other well-established terms in Common Law[154]. Arguably, there are a few reasons why the term has not been widely used by the courts. The first reason according to Story, is that the Common Law courts never cited continental European authors, who intensively examined the concept of public policy in a comprehensive and detailed manner in the courtrooms. As well, the private international law field did not appear to English lawyers and to judges as a branch of international law jurisprudence[155] and therefore the role of public policy was

---

[149] *Bowman v Secular Society* [1917] AC 427–28 (cited in Brekoulakis, Stavros, 'The Evolution of Public Policy and Judicial Function in English Law' (2019) 10(3) Journal of International Dispute Settlement 472).

[150] *Vervaeke v Smith* [1983] 1 AC 145 at 164.

[151] *Cheni v Cheni* [1965] P 85 at 99.

[152] Anderson, Winston, 'Enforcement of Foreign Judgments Founded upon a Cause of Action Unknown in the Forum' (1993) 42(3) The International and Comparative Law Quarterly 697; Mills, Alex, 'The Dimensions of Public Policy in Private International law' (2008) 4(2) Journal of Private International Law 201.

[153] Ibid.

[154] Knight, W. S. M., 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207.

[155] Kegel, Gerhard, 'Story and Savigny' (1989) 37(1) The American Journal of Comparative Law 39; Story, Joseph, *Commentaries on the Conflict of Laws : Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Lawbook Exchange, NJ 2008 edn, First edn by Little, Brown, Massachusetts 1834).p.9-14.

not debated in Common Law courtrooms as a part of private international law[156]. Additionally, the concept of "public policy" has been seen in Common Law to be associated with principles such as equity and natural justice[157]. Therefore, if a Common Law Judge intended to moderate existing rules that were too harsh or against the public interest, he would solely do it on under the principle to benefit the public or under equity[158].

Although Common Law courts have supported freedom of contract and party autonomy, and have granted broad power to individuals to enter into binding agreements and enforced the contractual conditions without passing on their substance in order to facilitate the trade activities[159], the courts occasionally determine that certain types of contracts or contract conditions as against the public policy and that it should not be enforced on grounds of public policy. The term public policy was used in two different ways in the Common Law jurisdiction. Previously, when statutory and case laws were limited, public policy was initially referred to as against the needs of the commonwealth and against the law of God. At this stage, the definition of public policy primarily focused on the rejection of acts or actions deemed to be *"immoral or illegal", "injurious to the interests of the public",* or *"productive of evil to the church and the community"*[160]. Although public policy finds its roots at this time, it has been impossible to find a court's judgment or principle comparable to that which is invoked today[161]. Another interesting question that was debated by the Common Law courts

[156] Supra notes 162.
[157] Lalive, Pierre, 'The New Swiss Law on International Arbitration' (1988) 4(1) Arbitration International 2; Garcia de Enterria, Javier, 'The Role of Public Policy in International Commercial Arbitration' (1990) 21(3) Law and Policy in International Business 389; Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004); Brekoulakis, Stavros, 'The Evolution of Public Policy and Judicial Function in English Law' (2019) 10(3) Journal of International Dispute Settlement 472.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76; Lalive, Pierre, 'The New Swiss Law on International Arbitration' (1988) 4(1) Arbitration International 2; Garcia de Enterria, Javier, 'The Role of Public Policy in International Commercial Arbitration' (1990) 21(3) Law and Policy in International Business 389; Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).

was whether public policy should consider the interest of the public as a whole, or whether it should be segregated to a certain section or group of society[162].

Another observation worth noting is that the Common Law courts have been reluctant to define the notion of public policy. The court has recognised the social, economic, and cultural change in defining what the interest of the public is. Therefore, the term public policy in Common Law covers variety of social, economic, and cultural considerations, and the court has accepted the fact that the social change may require constant review of what the public interest is[163].

2.7 The Factors that Influence Public Policy Across the Legal Systems

Having examined the historical development and evolution of the concept of public policy in private international law, the next step is to consider factors that influence the concept of public policy across legal systems globally.

The concept of public policy relates to the prevailing moral and sociocultural values and norms that are enshrined in every legal system in the world[164]. It is undeniable that the prevailing moral and sociocultural values and norms change over time and differ from one society to another. As well, various factors play a role in shaping and influencing the evolution of moral and sociocultural values and norms of the society over time such as historical, political, economic, religious, and cultural factors[165].Thus, the public policy consideration of a State is a dynamic and flexible concept assuming social, economic, religious and political dimensions[166].

---

[162] Winfield, Percy H., 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76; Baron Lloyd of Hampstead, Dennis Lloyd, *Public Policy: A Comparative Study of English and French Law* (University of London Legal Series, Athlone Press, London 1953); Mansoor, Zeeshan, 'Contracts Contrary to Public Policy Under English and Dutch Law' (2014) 1(4) European Journal of Comparative Law and Governance 297.

[163] Ibid.

[164] Guedj, Thomas G., 'The Theory of the Lois de Police, A Functional Trend in Continental Private International Law-A Comparative Analysis with Modern American Theories' (1991) 39(4) American Journal of Comparative Law 661; Renteln, Alison Dundes, 'Cultural Bias in International Law' (1998) 92 Proceedings of the Annual Meeting - American Society of International Law 232; Nelken, D., 'Changing Legal Cultures' in Likosky, Michael (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths, London 2002); Shaffer, Gregory, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229; Chen, Haoqian, Hailin Bao and Tianyi Zhang, 'Piercing the Veil of Public Policy in the Recognition and Enforcement of Foreign-Related Awards in China' (2016) 7(1) Beijing Law Review 23.

[165] Ibid.

[166] Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).

Globalisation is a new factor that influences the concept of public policy as it is one of the most powerful forces shaping our modem life where it has intensified economic, political, legal, social, and cultural cross-border exchange, interactions and transfusion between societies and nations[167]. This constant complex cultural exchange and transfusion between nations has led to the development of transnational values, standards, norms and customs that exist in every modern society and legal system. This has resulted in successful harmonisation and unification of legal concepts regionally and globally by introducing various international conventions, treaties, and model laws to facilitate international commercial activities, which have contributed to narrowing the scope of public policy[168]. Accordingly, the scope and application of public policy is constantly changing and becoming narrower since globalisation has softened the State's response towards the application of foreign law, enforcement of foreign judgments and awards. For instance, the United Nations Convention on Contracts for the International Sale of Goods (CISG) which provided a uniform international regime for contracts for the international sale of goods has contributed positively and harmonised international contract law and practice[169].

Also, prior to World War II, people were governed by empires and colonies, which aimed to control the world[170]. Furthermore, following the massive death toll and human rights violations that occurred due to World War II[171], these tragedies' led the nations of the world to reconsider their ways of thinking and understanding of the importance of world peace and order, including the importance of protecting human rights. As a result of this change, the Universal Declaration of Human Rights was adopted that led to the development of various legal principles connected to human rights and reshaped modern public policy globally and domestically[172]. However, post the

---

[167] Supra note 168.
[168] Basedow, Jurgen, 'The Effects of Globalization on Private International Law' in Basedow, Jurgen and Toshiyuki Kono (eds), *Legal Aspects of Globalization Conflict of Laws, Internet, Capital Markets and Insolvency in a Global Economy* (1st edn, Kluwer Law International, The Hague 2000).pp. 6-8.
[169] United Nations Convention on Contracts for the International Sale of Goods adopted in 11th April 1980 in Vienna (CISG).
[170] Dupuy, Pierre-Marie, Francesco Francioni and Ernst-Ulrich Petersmann(eds), *Human Rights in International Investment Law and Arbitration* (International Economic Law Series, Oxford University Press, NY 2009).
[171] Guedj, Thomas G., 'The Theory of the Lois de Police, A Functional Trend in Continental Private International Law-A Comparative Analysis with Modern American Theories' (1991) 39(4) American Journal of Comparative Law 661.
[172] Chen, Haoqian, Hailin Bao and Tianyi Zhang, 'Piercing the Veil of Public Policy in the Recognition and Enforcement of Foreign-Related Awards in China' (2016) 7(1) Beijing Law Review 23.

9/11/2001 terror attacks, a range of counter terrorism measures were introduced by many nations to protect their citizens from future terrorist attacks and to increase domestic security. The balance has shifted in many jurisdictions in favour of security over human rights[173].

These international events have undoubtedly affected human life and society as a whole. As public policy is a concept that fluctuates with human society, it is no surprise that it has evolved in response to these events. To cite an example, the publication of the Communist Philosophy by Karl Marx in the eighteenth century eventually led to the development of the socialism ideology. Consequently, the Russian Revolution in 1917 that led to creation of the Soviet Union brought the communist ideology to the international stage[174]. The Soviet Union influence helped in the evolution of communist parties in various countries including China, North Korea, Vietnam, Laos, and Cuba[175]. Moreover, socialism and the Marxist ideology have affected the nature and scope of public policy in communist countries[176] and has affected Muslim countries which have had economic and political relationships with the communist regimes such as Egypt under the leadership of Gamal Abdel Nasser, the second President of Egypt. However, following the dissolution of the Soviet Union, the capitalist economic policies have affected governments in Russia and Eastern Europe. However, China, Cuba, Laos, North Korea, and Vietnam[177] remain under communist governments[178]. Furthermore, the economic and political nature of public policy in various nations of the world has accordingly shaped by this history and ideology.

---

[173] Dragu, Tiberiu and Mattias Polborn, 'The Rule of Law in the Fight Against Terrorism' (2014) 58(2) American Journal of Political Science 511.
[174] Boyer, George R., 'The Historical Background of the Communist Manifesto' (1998) 12(4) The Journal of Economic Perspectives 151; Hirsch, Francine, *Empire of Nations: Ethnographic Knowledge and the Making of the Soviet Union* (1st edn, Cornell University Press, Ithaca 2014); Brown, Archie, *The rise and Fall of Communism* (HarperCollins Publishers LLC, NY 2009).
[175] Ibid.
[176] Ibid.
[177] Ibid. See also Alsaif, Bander, 'Two Sides of the Saudi Public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards' (PhD Thesis, University of New South Wales 2018).
[178] Ibid. See also Brown, Archie, *The Rise and Fall of Communism* (HarperCollins Publishers LLC, NY 2009).

2.7.1 Religion and Public Policy

Religion has played a fundamental role in defining the identity of European nations since before the medieval times.[179] While many European nations have become more secular, religion still plays an important role in the development of public policy in some European nations. To cite an example, the House of Lords, which can influence decisions relating to the entire United Kingdom, has seats for two Archbishops and 24 senior diocesan Bishops of the Church of England[180]. This is also true in the Middle East; however, the scenario diverges. To note further, after the death of the Prophet Mohammed, the companions and followers of the Prophet continued to spread the message of Islam in the Arabian Peninsula and surrounding areas[181]. Furthermore, the Islamic philosophy spread across the entire Middle East and different Islamic empires across Asia and Europe due to the effort of the Prophet Mohammed's companions and followers. The conversion to Islam from non-Arab nations also played a paramount role in propagating the Islamic faith and value as can be perceived from the fact that after the decline of the Abbasid Caliphate, other non-Arab empires were known to propagate and spread Islamic faith and value, notably the Ottoman Empire[182.]

The *Sunni* schools of jurisprudence was the official jurisprudence of the Islamic empires and the *Hanafi* school of jurisprudence was dominant among other Islamic *Sunni* schools[183]. In the case of Iran, it clearly shows how history has influenced the notion of public policy. Moreover, Iran did not officially follow the Shi'a school of

---

[179] For more discussion on the religion in the medieval times, see Ozment, Steven, *The Age of Reform, 1250-1550: an Intellectual and Religious History of Late Medieval and Reformation Europe (*1st edn, Yale University Press, New Haven 1980).pp. 73-134.

[180] Forrester, Duncan B., *Christian Justice and Public Policy* (Cambridge University Press, Cambridge 1997); Backman, Clifford R., *The Worlds of Medieval Europe* (Oxford University Press, New York, NY 2003)

[181] Lapidus, Ira M., *A History of Islamic Societies* (2. ed., 1. publ. edn Cambridge University Press, Cambridge 2002); Jabali, Fuad, *Companions of the Prophet: A Study of Geographical Distribution and Political Alignments* (Wadad Kadi and Rotraud Wielandt (eds), Vol 47, Brill Academic Publishing, Leiden 2003); Alsaif, Bander, 'Two Sides of the Saudi Public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards' (PhD Thesis, University of New South Wales 2018).

[182] Esposito, John L., *The Oxford History of Islam* (1st edn, Oxford University Press, Oxford 1999); Lapidus, Ira M., *A History of Islamic Societies* (2nd edn, Cambridge University Press, Cambridge 2002); Bennison, Amira K., *The Great Caliphs: The Golden Age of the 'Abbasid Empire* (1st edn, Yale University Press, New Haven 2009); Alsaif, Bander, 'Two Sides of the Saudi Public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards' (PhD Thesis, University of New South Wales 2018).

[183] Ibid.

jurisprudence until the country was ruled by the Safavwie dynasty in the 16th–18th centuries, considered to be one of the major turning points in Muslim modern history. Furthermore, the political and legal system of the Islamic Republic of Iran depends greatly on Shi'a school jurisprudence, particularly since after the Iranian Revolution in 1979[184] when *Sharia* was declared to be an important part to the Islamic Republic of Iran notion of public policy[185].

Turkey was the heart of the Ottoman Empire and codified the *Sharia* law provision of *Mejalah* and *Sharia* was the applicable law of the empire for centuries[186]. To add further, the collapse of the Ottoman Empire after the First World War and the emergence of new secular Turkish Republic led to the introduction of secularism in the 1928 amendment of the Turkish republic constitution. Furthermore, the provision declaring that the *"*Religion of the State is Islam*"* was removed and *Mejalah* was abandoned[187]. Secularism began to play a bigger role in Turkish society which influenced the Turkish conception and understanding of modern public policy that is not influenced by Islam[188].

All GCC States, including the UAE, were ruled directly or indirectly by the Ottoman Empire during the eighteenth and early nineteenth centuries[189]. After that, all of them were subject to British Government protection through many different treaties.

---

[184] Supra note 184. See also Inafuku, Eric, 'How Does the 1979 Iranian Revolution Affect Current Iranian Fundamentalism and International Politics?' (2010) 5(3) Journal of Applied Security Research 414; Sheikhzadegan, Amir and Astrid Meier (eds), *Beyond the Islamic Revolution: Perceptions of Modernity and Tradition in Iran Before and After 1979* (World of Islam, Vol 8, de Gruyter Mouton, Berlin 2017).

[185] Lapidus, Ira M., *A History of Islamic Societies* (2nd ed, Cambridge University Press, Cambridge 2002); Brumberg, Daniel and Farideh Farhi (eds), *Power and Change in Iran: Politics of Contention and Conciliation* (Indiana University Press, Bloomington; Indianapolis 2016); Banakar, Reza and Keyvan Ziaee, 'The Life of the Law in the Islamic Republic of Iran' (2018) 51(5) Iranian Studies 717.

[186] Riedler, Florian, *Opposition and Legitimacy in the Ottoman Empire: Conspiracies and Political Cultures* (SOAS/Routledge Studies on the Middle East, 1st edn, Taylor and Francis, Chichester 2010); Avedian, Vahagn, 'State Identity, Continuity, and Responsibility: The Ottoman Empire, the Republic of Turkey and the Armenian Genocide' (2012) 23(3) European Journal of International Law 797; Alsaif, Bander, 'Two sides of the Saudi public policy Coin: Reconciling domestic and transnational values in recognition and enforcement of international commercial arbitration awards' (PhD Thesis, University of New South Wales 2018).

[187] Ibid.

[188] Grote, Rainer and Tilmann Röder, *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, US 2012).

[189] Al-Moqatei, Mohammad, 'Introducing Islamic Law in the Arab Gulf States: a Case Study of Kuwait' (1989) 4(2) Arab Law Quarterly 138; Abdelkarim, Abbas, 'Oil, Population Change and Social Development in the Gulf: Some Major Trends and Indicators' in Abdelkarim, Abbas (ed), *Change and Development in the Gulf* (Macmillan Press, London 1999).pp. 25-48; Bradshaw, Tancred, *The End of Empire in the Gulf: From Trucial States and the Origins of the United Arab Emirates* (1st edn, I.B.Tauris, London 2019).

However, despite these historical ties with the Turkish and British Empire, the internal affairs of each State lay in the hands of nomadic Bedouin tribal families which originally settled in these areas during a large-scale immigration from central region of the Arabian Peninsula. Additionally, the law that dominated all these States during the early nineteenth century up until the early nineteen fifties was a mixture of the Islamic *Sharia* law and old tribal customs and norms[190].

By the time of World War II, the economic resources of the GCC States started to change dramatically from dependence upon sea resources such as pearls and fishing, to dependence on a large lump sum revenue generated from the export of oil and gas. The economic factors in these States played crucial role in changing the social and cultural norms and values[191]. It should be noted that due to massive oil and gas production, these countries witnessed fast growth in urban communities and lifestyle. The State introduced State funded and subsidised education, health services, utilities, and public and private employment. The State provided its citizens with these services as guaranteed constitutional rights.

The guaranteed job concept is an Islamic social model that was implemented by all the GCC States[192]. Moreover, at the beginning of the 1970's, the GCC States had seen an intellectual and cultural movement and debate that attempted to promote Islamification of society. Further, the full implementation of Islamic *Sharia* law became one of the most essential and debated issues amongst intellectuals and scholars. Moreover, it became a priority for almost every citizen in the GCC and was considered to be the most popular issue of the eighties[193]. Due to this social, and cultural movement, *Sharia* law or Islamic rule became an essential part of modern GCC State's social, economic, political, and legal culture. Thus, the strong relation between *Sharia* law and public policy in the GCC States is understandable as the *Sharia* or Islamic

---

[190] Pillai, R. V. and Mahendra Kumar, 'The Political and Legal Status of Kuwait' (1962) 11(1) The International and Comparative Law Quarterly 108; Al-Moqatei, Mohammad, 'Introducing Islamic Law in the Arab Gulf States: a Case Study of Kuwait' (1989) 4(2) Arab Law Quarterly 138; Bradshaw, Tancred, *The End of Empire in the Gulf: From Trucial States and the Origins of the United Arab Emirates* (1st edn, I.B.Tauris, London 2019).

[191] Ibid.

[192] Ibid. See also AL-Muhairi, Butti Sultan Ali, 'The Position of Shari'a Within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause Concerning Shari'a' (1996) 11(3) Arab Law Quarterly 219.p.350; Abdelkarim, Abbas, 'Oil, Population Change and Social Development in the Gulf: Some Major Trends and Indicators' in Abdelkarim, Abbas (ed), *Change and Development in the Gulf* (Macmillan Press, London 1999).pp. 25-48.

[193] Supra note 199.

rule is not merely a mechanical set of rules but is the expression of prevailing sociocultural values and norms[194].

Therefore, it comes as no surprise that the majority of GCC countries proclaim in their constitutions that *Sharia* is at the heart of the legal system and public policy[195]. For example, in 1978, the UAE a council of Ministers issued Resolution No. 50/1978 establishing a High Committee to review and ensure the compliance of all legislation issued by UAE government or the ones that will be issued by UAE government with *Sharia* law principles and doctrines[196]. Accordingly, various UAE laws such as the UAE Civil Code, Commercial Code and Criminal Code have been influenced by *Sharia* law principles and doctrines. As a result of this complex interaction between *Sharia* law and UAE legal system, *Sharia* law became a main source of UAE public policy and plays a big role in defining and framing the notion of UAE public policy.

However, these countries have divergent interpretations and understandings of *Sharia* law sources[197] and the scope of public policy. Moreover, public policy can be contested and interpreted differently within the same country in the GCC or the region. To cite an example, the percentage of *Riba* is fixed at different levels in the UAE[198], Kuwait[199], Jordan[200], and other Islamic countries, while, in the Kingdom of Saudi Arabia, *Riba* is legally prohibited and considered repugnant to Kingdom of Saudi Arabia notion of public policy. Further, commercial activity regarding alcoholic beverages is a matter of criminal law in Kuwait[201], while accepted in many Islamic countries such as Egypt and

---

[194] Berg, Herbert, 'The Divine Sources' in Peters, Rudolph Peri Bearman (eds), *The Ashgate Research Companion to Islamic Law* (Ashgate Publishing Limited, Farnham 2014).pp.27-40; Berger, Maurits, 'Sharia and the Nation State' in Peters, Rudolph Peri Bearman (eds), *The Ashgate Research Companion to Islamic Law* (Ashgate Publishing Limited, Farnham 2014).pp.223-230.

[195] See for example, Art 37 of Convention of the Arab League on Judicial Cooperation between the League of Arab States; article seven of UAE Constitution, first article of Qatar Constitution, second article of Oman Constitution, second article of new Egypt Constitution, second article of Jordan Constitution, first article of new Tunisia Constitution, first article of Saudi Arabia Basic Law of Governance and second article of Kuwait Constitution.

[196] AL-Muhairi, Butti Sultan Ali, 'The Islamisation of Laws in the UAE: the Case of the Penal Code' (1996) 11(4) Arab Law Quarterly 350.

[197] For example, in regard to Civil Law, the UAE adopted *Al-Maliki* Islamic Jurisprudence, Palestine and Egypt have generally adopted the *Hanafi* Islamic Jurisprudence, while Saudi Arabia and Qatar have generally adopted the *Hanbali* Islamic Jurisprudence.

[198] Article 76 of the UAE Federal Law No. 18 of 1993 on Commercial Transactions Law.

[199] See Art 102 of Kuwait commercial Code No. 68 of 1980.

[200] Article167 of the Jordanian Civil Procedures Law No 24 of 1988 caps interest rates at 9% per annum.

[201] Article 206 of the Penal Code of Kuwait No. 16 of 1960.

the UAE to some extent[202]. Prostitution is legally prohibited in all Arab countries, but Tunisia has regulated prostitution to some extent[203]. Moreover, the contested concept of public policy consideration exists in the UAE with reference to Emirate of Sharjah, the only Emirate in the country that, in accordance with *Sharia* law, strictly prohibits and forbids the sale and purchase of alcohol. In the other States, the sale and purchase of alcohol is allowed with varying restrictions[204].

We can conclude that the concept of public policy is not static; rather, it is a changeable and variable concept which is influenced by various factors including economic, social, historical, religious, and cultural factors. In Muslim countries, *Sharia* law or Islamic rules specifically form an essential part of the country's social, economic, political, and legal culture and therefore *Sharia* law plays an essential role in defining the scope of public policy. Furthermore, the complex interactions and transfusion between political, economic, religious, and cultural factors in domestic and international levels have affected the inception of the concept of public policy and has given a global dimension and application to the concept which will be demonstrated in application of the concept in international arbitration.

2.8 Historical Development of Public Policy in International Arbitration

At the beginning of the twentieth century, due to the expansion of international commercial activities, there was an increasing demand for establishing an international framework to govern international trade disputes. Consequently, in 1899 and in 1907, two Hague Conventions were concluded[205], which in turn resulted in the establishment of the Permanent Court of Arbitration. In 1919, the ICC was established, which created the Court of International Arbitration. The Court of International Arbitration's objective was to resolve commercial disputes between parties from

[202] Alsaif, Bander, 'Two Sides of the Saudi Public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards' (PhD Thesis, University of New South Wales 2018).pp. 67-68.
[203] Voorhoeve, Maaike, 'Formalising the Informal Through Legal Practice. The Case of Prostitution in Authoritarian Tunisia ' (2018) 4(2) Interdisciplinary Political Studies 21.
[204] See, Article 313 of the Penal Code of Sharjah.
[205] The Convention for the Pacific Settlement of Disputes adopted on 29 July 1899 which is resulted from the First International Peace Conference conducted in Hague in 1899.

different countries and promote arbitration as an alternative method to resolve international trade disputes[206].

However, the effort was not enough to facilitate international arbitration since the enforcement of international commercial arbitration relied solely on domestic arbitration laws that differed from one State to another[207]. The main problem of international arbitration was the non-enforceability of arbitral clauses that would refer future disputes to arbitration. In response to this need, the Geneva Protocol on Arbitration Clauses of 1923 (Geneva Protocol)[208] and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (Geneva Convention)[209] were adopted to establish a mechanism to recognise and enforce arbitral awards internationally and to remove many of the difficulties facing the growth and development of international arbitration. This was the first attempt internationally to unify and harmonise international commercial arbitration.

The Geneva Protocol was designed to assure the validity and enforceability of arbitration clauses of future disputes[210]. It provided that the contracting States' court should decline to adjudicate any dispute that is governed by a valid arbitration clause and should refer the parties to arbitration[211]. Although the Protocol helped in ensuring that the arbitration clause or agreement is respected and enforced by the signatory States' court, it did not help in enforcing the award internationally. The successful party lacked the power to enforce the award beyond the jurisdiction where the award was made. This limitation defeated the fundamental purpose of the Geneva Protocol which is to enforce arbitration awards across international borders. In other words, the Geneva Protocol only provided enforcement for domestic awards[212].

Thus, the Geneva Convention was adopted to expand the force of the Geneva Protocol by providing for enforcement of arbitration awards outside the nation in which

[206] Craig, W. Laurence, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (2016) 50(4) Texas International Law Journal 699.p. 700.
[207] Quigley, Leonard V., 'Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards'' (1961) 70(7) The Yale Law Journal 1049; Lew, Julian D. M., Loukas A. Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague 2003).
[208] Protocol on Arbitration Clauses issued on 24th of September 1923.
[209] Convention on the Execution of Foreign Arbitral Awards issued on 26th of September 1927.
[210] Supra note 208, p. 708.
[211] Supra note 208.
[212] Blackaby, Nigel and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, Oxford 2015).

the award was made, provided that the enforcing State or where the award is sought to be enforced is party to Geneva Convention. The drawback of the Geneva Convention was the Double Exequatur requirement that required the party seeking to enforce his award to produce evidence that award is final in the country which it has been made. Article 1(d) of the convention States that the award should *"... become final in the country in which it has been made"*[213]. What "final" meant was left to the discretion of the enforcing State and nations could have varying interpretations on what was "final" as per their domestic laws[214]. Furthermore, Article 1(e) of the convention introduced the concept of public policy to the enforcement of international arbitration. Article 1(e) stated that in order for arbitral award to be enforceable, the award should *"…not [to be] contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon"*[215]. The Geneva Convention did not provide any guideline on the definition and scope of "public policy" and the "Principles of the Law" mentioned in Article 1(e). Enforcing States' Courts had difficulty in determining what is the definition and the scope of the term *"Principle of the Law"* and whether the term is equivalent to public policy or if it is different and distinctive in meaning and scope[216.]

However, the Geneva Protocol and the Geneva Convention had substantial problems. The ICC created an initiative to replace the Geneva Protocol and the Geneva Convention by issuing a Preliminary Draft Convention in 1953. The United Nations Economic and Social Council ("ECOSOC") took over the ICC's initiative and produced an amended Draft Convention in 1955. The 1955 Draft was the topic of discussion during the 1958 May-June conference at the United Nations Headquarters. Following this conference, the NYC was established[217].

---

[213] Geneva Convention of 1927 Geneva Article I(d).

[214] Gaillard, Emmanuel, and John Savage(eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (International Law, 1st edn, Kluwer Law International, The Hague, Netherlands 1999); Paulsson, Marike, *The 1958 New York Convention in Action* (Kluwer Law International B.V, Alphen aan den Rijn, The Netherlands 2016).

[215] Article 1(e) of Convention on the Execution of Foreign Arbitral Awards of1927.

[216] Blackaby, Nigel and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, Oxford 2015).

[217] Supra note 223.

2.8.1 New York Convention

The NYC replaced the Geneva Convention of 1927 as the latter suffered from some major drawbacks. In 1953, a report was submitted by the ICC to the Secretary of the United Nations Economic and Social Council to rectify the deficiencies and shortages in the Geneva Convention. As a result, in 1956 the United Nations Economic and Social Council drafted a multilateral convention and held a conference at the United Nations headquarters and subsequently submitted the Convention on Recognition and Enforcement of Foreign Arbitral Awards in 1958, commonly known as the New York Convention ("NYC").

Article V (2) b of the NYC provides for the refusal of recognition and enforcement of arbitral awards based on the public policy exception. According to the provision,

> *"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 and enforcement of award would be contrary to public policy of that country"*[218]*.*

The only difference between the Geneva Convention of 1927 and the NYC is that the Geneva Convention referred to the phrase *"principle of law of the country"* along with the public policy of the country, which the enforcing State has to rely on while dealing with the recognition and enforcement of foreign arbitral awards. The draft of the Convention, 1955[219] incorporated such a reference, but it was later abandoned by the Conference[220]. Subsequently, a proposal was made in the Conference to reintroduce *"principle of law"* into Art. V (2) (b) of the NYC, but it was rejected and excluded by the Committee[221]. According to the drafting committee,

> *"The omission of 'principle of law' is intended to limit the application of the clause (on the public policy exception) to cases in which the*

[218] Article V(2)(B) of NYC.
[219] Report of the Committee on the Enforcement of International Arbitral Awards, (UN DOC E/2704, E/AC.42/Rev.1 (March. 28, 1955) < http://newyorkconvention1958.org/index.php?lvl=notice_display&id=3423> accessed on January 4, 2020.
[220] Supra note 105.
[221] Otto, Dirk and Omaia Elwan, 'Article V(2)' in Kronke, Herbert and others (ed), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International B.V, Netherlands 2010).

> *recognition and enforcement of a foreign arbitral award would be distinctly contrary to the basic principles of the legal system of the country where the award is invoked"*[222].

The intention of the Conference by omitting and excluding *"principle of law"* from Art V (2)(b) is to give a narrow interpretation and scope to the public policy exception stipulated in this Article and to follow the purpose and spirit of NYC which is to facilitate the recognition and enforcement of foreign arbitral awards.

2.9 Scope of Public Policy in International Arbitration

Having identified references to public policy in the international instruments relevant to the UAE and before attempting to scrutinise the UAE notion of public policy in the next chapter, it is necessary to examine the scope of public policy principles in international commercial arbitration. The autonomous nature of arbitration allows the parties to agree on the specific rules that are applicable to the merits of the dispute and the procedural aspect of the arbitral process. The affirmation of party autonomy applies in the appointment of the tribunals, choosing the venue, the seat, the governing law, selecting the experts and witness, and determining suitable timetable for proceeding and choosing the language of arbitration.

Nevertheless, the parties' autonomy is not absolute, as arbitral tribunals exist within the jurisdiction of a State and every State has the right to exercise full sovereignty over its territory, and the awards rendered require the assistance of a State's court for potential appointment and removal or the tribunal, interim measures, enforcement and recognition of the interim or final award[223]. Hence, a degree of judicial control is exercised by the relevant courts depending on the extent of connections and associations between the arbitration or the award and the concerned States. Judicial control may be exercised during the arbitration proceeding on a substantive or procedural aspect of the dispute or during the enforcement of the award stage by the enforcing State court.

---

[222] Supra note 221.

[223] Hong, Yu and Peter Molife, 'The Impact of National Law Elements on International Commercial Arbitration' (2001) 4(2) International Arbitration Law Review 17; Ma, Winnie (Jo-Mei), 'Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia' (SJD Thesis, Bond University 2005).

Public policy, as a judicial control device, plays a fundamental role in the context of international commercial arbitration; it may suffice to say that public policy could arise during different stages of arbitral process and proceedings:

1. Before arbitral proceedings begin when the existence and validity of an arbitration agreement or clause is challenged by the parties before domestic courts;

2. During arbitral proceedings before the arbitral tribunal or domestic courts; and

3. During the recognition and enforcement of the arbitral award before the enforcing State's court[224].

Thus, the essential question that arises in this context is: has the concept of public policy been softened in the context of enforcement and recognition of international arbitral awards, or it has been harmonised to some extent during the enforcement and recognition of international arbitral awards?

Globalisation has rendered the international arbitration to intensive regulation and harmonisation through the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (NYC) and the UNCITRAL Model Law on International Commercial Arbitration 1985 (Model Law)[225]. Unfortunately, the intensive regulation and harmonisation through international instruments has not provided guidance on the scope or type of public policy applicable during enforcement of international arbitration since the public policy exception in the NYC is brief and unqualified.

The text of article V(2)(b) of NYC permits the enforcing State to refuse to enforce an international arbitration award in accordance with *"the public policy of that country"*[226], without elaborating on the nature and the scope of that "public policy"[227]. Neither NYC

---

[224] Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004); Darwish, Hassan Mohammed Arab, 'Critical Study on the Concept of International Arbitration in the UAE: Identifying Problems Affecting the Recognition and Enforcement of Foreign Arbitral Award' (PhD Thesis, University of Essex 2017); Trakman, Leon, 'Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection' (2018) 6(2) The Chinese Journal of Comparative Law 174.
[225] Wetter, J. Gillis, 'The Internationalization of International Arbitration: Looking Ahead to the Next Ten Years' (1995) 11(2) Arbitration International 117.
[226] Article V(2)(b) of NYC.
[227] Lalive, Pierre, 'Transnational (or Truly International) Public Policy and International Arbitration' in Sanders, Pieter (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series No 3 edn, Kluwer International Law, The Hague 1987); Lew, Julian D. M., Loukas A. Mistelis and

text nor the travaux preparatoires of the NYC have resolved this uncertainty on the meaning and scope of public policy[228]. Accordingly, reference should be made to individual national laws and jurisprudence to ascertain the scope of the concept public policy during the enforcement of international arbitration award.

A brief survey of concept of public policy in some domestic arbitration laws reveal that the statutory wording of many domestic arbitration laws fall into two categories with respect to the refusal of enforcement on the basis of public policy: (a) States adopt a broad statutory wording by referring to *"public policy"* in the abstract[229], *"public policy and good morals"*[230], *"incompatibility with the basic notions of the legal system and/or social coexistence"*[231], *"national public policy"*[232], or provide an clear reference to religious principles such as *"public policy and Islamic Sharia"*[233]. (b) States adopt a

Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague 2003).p.187; Hunter, Martin, and Gui Conde e Silva, 'Transnational Public Policy and its Application in Investment Arbitrations' (2003) 4(3) The Journal of World Investment & Trade 367.

[228] Ibid.

[229] See, for example, Article. 48 (l)(b)(ii) of the Arbitration Act 2001 of Singapore; Article 1704 (2)(a) of the Judicial Code 1998 of Belgium; Article 839 and 840 Book IV of the Italian Code of Civil Procedure incorporating the Law No.25/1994 of Italy; Article 1059(2)(2)(b) of the German Code of Civil procedure incorporating the Arbitral Proceedings Reform Act 1998 of Germany; Article 36(2) of the Law of the Russian Federation on International Commercial Arbitration 1993 of Russian Federation; for further information, Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).p. 284.

[230] See, for example, Article 36(2)(b) of the Arbitration Act 1999 of the Republic of Korea; article 2(1), 37(1), 37(2) and 53(2) Federal Law No. (6) of 2018 on Arbitration of UAE; for further information, see Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004). 284.

[231] See, for example, Article 55(2) of the Arbitration Act 1999 of Sweden; article 595(1)(6) of the Code of Civil Procedure 1983 of Austria; article 712(1)(4), 1146 and 1150 of the Code of Civil Procedure 1964 of Poland; for further information, see Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).p. 284.

[232] See, for example, Article 58(2)(b) of the Law No. 27/1994 of Egypt; article 39(ii) of the Law No.9.307/1996 of Brazil, and Chapter 7 (2)(b)(ii) of the Arbitration and Conciliation Act 1996 of India; for further information, see Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004). p.284.

[233] Article 285 of the Code of Civil Procedure 1992 of Yemen; article 50(2) of Royal Decree No. M/34 of Kingdom of Saudi Arabia.

narrower statutory wording by referring to *"principles of international public policy"*,[234] or *"public policy in private international law"*[235].

The uncertainty of public policy under the NYC has raised an important issue and debate amongst scholars and jurists on how the public policy exception to the recognition and enforcement of arbitral awards under article V(2)(b) of the NYC should be construed and interpreted[236]. Some scholars and jurists argued that the public policy exception under article V(2)(b) of the NYC should be construed broadly to encompass the enforcing State's domestic interest and values. Other scholars and jurists have argued that the exception should be construed narrowly by encompassing only the transnational values and interest of the international community[237]. Four important and controversial categories of the concept of public policy in international arbitration identified by scholars and jurists: domestic, international, regional and religious public policy and transnational public policy. Cairns explained these categories as follows:

> *"The public policy of individual states is divided into domestic public policy and international public policy, with the latter being the (more restricted) public policy of the state as applied to international transactions. By contrast, transnational public policy is the common*

[234] See, for example, Article 1502(5) Book N of the French Code of Civil Procedure 1981; article 1096 (t) of the Portuguese Code of Civil Procedure 1986; article 817(5) of the Lebanese Law No. 90/1983; Article 1058; para.1 of the new Algerian Code of Civil and administrative Procedure of 2009; for further information, see Wahab., Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).p.284; El-Aḥdab, Abd al-Hamid and Jalal El-Ahdab, *Arbitration With the Arab Countries* (3rd revised and expanded edn, Kluwer Law International, Netherlands 2011).p. 97; Ziade, Nassib G., 'Lebanon: International Arbitration Provisions of the Code of Civil Procedure' (1988) 27(4) International Legal Materials 1022.

[235] See for example Articles 81(n) of the Tunisian Arbitration Act 1993; and article 168(2) and 174 of the Romanian Private International Law Relations Act 1992; for further information, see Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004). 284; Ziade, Nassib G., 'Lebanon: International Arbitration Provisions of the Code of Civil Procedure' (1988) 27(4) International Legal Materials 1022; Silva, Gui Conde e, 'Transnational Public Policy in International Arbitration' (PhD Thesis, Queen Mary, University of London 2007).

[236] Trakman, Leon E., 'Aligning State Sovereignty with Transnational Public Policy' (2018) 93(2) Tulane Law Review 207.

[237] Cole, Richard A., 'The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards' (1986) 1(2) Ohio State Journal on Dispute Resolution 365; Shaleva, Vesselina, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 67; Trakman, Leon E., 'Aligning State Sovereignty with Transnational Public Policy' (2018) 93(2) Tulane Law Review 207.

core the international public policy of many states, which by its very nature also reflects fundamental principles of public international law. It is the amalgam of the public policy of multiple forums but is the public policy of no individual forum. It embodies the transnational consciousness and solidarity of international commercial arbitration'[238].

Therefore, it is important for this research to draw a clear line of distinction between the different categories of public policy that may arise during the enforcement of in an international arbitration.

2.9.1 Domestic Public Policy

Domestic public policy is a significant instrument that permits enforcing States' courts to refuse enforcement of an international arbitration award on the grounds of violation of prevailing domestic norms and values[239]. Accordingly, domestic public policy has the widest scope of application and it is referred to as the State's mandatory rules that is embodied and enshrined in the State' legislation, constitutional or judicial jurisprudence and policy and procedure that the State can apply in the State's jurisdiction to regulate the internal affairs of the State[240]. As well, in some Muslim nations, such as the UAE, Islamic *Sharia* has been incorporated and embodied and enshrined in the conception of domestic public policy consideration, which requires evaluating the incompatibility of an international arbitral award or any aspect thereof with the fundamental principles of *Sharia* law. The domestic public policy relates to many legal areas including moral issues, public health, the environment, sovereignty, national security, corruption, and procedural unfairness[241]. According to Fry:

---

[238] Cairns, David J. A., 'Transnational Public Policy and the Internal Law of State Parties' (2009) 1 Transnational Dispute Management 1.p. 2.
[239] Hunter, Martin, and Gui Conde e Silva, 'Transnational Public Policy and its Application in Investment Arbitrations' (2003) 4(3) The Journal of World Investment & Trade 367; Junita, Fifi, 'Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia' (2008) 5 Macquarie Journal of Business Law 369; Trakman, Leon E., 'Aligning State Sovereignty with Transnational Public Policy' (2018) 93(2) Tulane Law Review 207.
[240] Lew, Julian D. M., Loukas A. Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague 2003).
187; Ma, Winnie (Jo-Mei), 'Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia' (SJD Thesis, Bond University 2005).
[241] Anderson, James E., *Public Policymaking: An Introduction* (8the edn, Cengage Learning, Boston 2014); Alsaif, Bander, 'Two Sides of the Saudi Public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards' (PhD Thesis, University of New South Wales 2018).

"Domestic public policy generally is seen as being the fundamental notions of morality and justice determined by a national government (either a legislature or court) to apply to purely domestic disputes within their jurisdiction. These mandatory rules of public policy are found in a State's laws and are designed to protect the public interests of that State, not of any particular private individual or entity"[242].

A growing number of controversial domestic courts decisions in recent years revealed the inclination of some domestic or national courts to apply domestic public policy during the enforcement of a foreign arbitral award.[243] Among these cases are the recent judgement by Appellate Division of the New York Supreme Court decision in 2017, in *Fiorilla v. Citigroup Global Markets, Inc.*[244] The court refused to enforce FINRA arbitration award on the grounds that the arbitrator had *"manifestly disregarded the law in failing to enforce a prior settlement agreement between the parties"*[245]. The Court went further by ordering the award creditor from enforcing the annulled arbitral award in France or any other NYC signatory State[246]. The case raised interesting issue which is the ability of the NYC signatory State court to impose orders with extra-territorial States, prohibiting the parties from enforcing the award on other international jurisdiction based on a violation of domestic public policy and not on international or transnational public policy grounds[247].

Another example is *Osuuskunta Matex V.S. v. T.K.K. General Directorate*[248] where a Turkish court in Ankara refused the enforcement of foreign arbitral award issued in

---

[242] Fry, James D., 'Desordre Public International under the New York Convention: Wither Truly International Public Policy' (2009) 8(1) Chinese Journal of International Law 81.pp. 81- 86.

[243] Hunter, Martin and Gui Conde e Silva, 'Transnational Public Policy and its Application in Investment Arbitrations' (2003) 4(3) The Journal of World Investment & Trade 367; LaLive, Pierre, 'Transnational (or Truly International) Public Policy and International Arbitration' in Sanders, Pieter (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series No 3 edn, Kluwer International Law, The Hague 1987); Lew, Julian D. M., Loukas A. Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague 2003).p.187; Ma, Winnie (Jo-Mei), 'Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia' (SJD Thesis, Bond University 2005).

[244] *Fiorilla v. Citigroup Global Markets, Inc, 54* N.Y.S.3d 586, 586 (N.Y. App. Div. 2017).

[245] Ibid.

[246] Cole, Richard A., 'The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards' (1986) 1(2) Ohio State journal on dispute resolution 365; Trakman, Leon E., 'Aligning State Sovereignty with Transnational Public Policy' (2018) 93(2) Tulane Law Review 207.

[247] Ibid.

[248] *Osuuskunta Matex VS v TKK General Directorate*, File Nr 94/662, Decision Nr 95/140, unreported 4th Commercial Court of Ankara; for further information, see Almutawa, Ahmed Mohd Khurshid.,

Switzerland because the award violated Turkish domestic public policy when it applied Swiss procedural law[249]. Kristin Roy pointed out that the GCC State's court have rejected many foreign arbitral awards on domestic public policy ground, including violation of *Sharia* law, which is part of the GCC State's conception of domestic public policy[250]. For example, the Dubai Court of Cassation ruling No. 146/2008[251] confirmed during the enforcement of an international arbitral award that the court shall apply the domestic conception of public policy. The court stated that,

> *"Whenever the arbitrator issues his award in violation of the rules of public policy, the court should thoroughly examine this violation in light of the public policy rules in the judge's State and not in other States"*[252].

In the absence of any guidelines on how to construe and interpret the public policy exception under the NYC, many signatory States, as highlighted in the forgoing cases, may continue to construe and interpret this exception purely from its domestic public policy prescriptive. This may lead to conflicting and unsatisfactory outcomes of the NYC[253]. In order to facilitate the smooth enforcement of international arbitration awards and to achieve the NYC's objective and purpose, the International Law Association (ILA) formulated a universally accepted guideline on how to construe and interpret the public policy exception under the NYC. The ILA guidelines distinguished between domestic and international public policy[254]. The ILA's guideline is that domestic public policy should be only limited to purely domestic disputes where there is no involvement of any foreign element[255]. It should be applicable to domestic arbitration[256]and, in exceptional circumstances, can be applied to international

---

'Challenges to the Enforcement of Foreign Arbitral award in States of The Gulf Cooperation Council' (PhD Thesis, University of Portsmouth 2014).

[249] Supra note 250.

[250] Roy, Kristin T., 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1995) 18(3) Fordham International Law Journal 920.pp. 923-924.

[251] Ruling of Dubai Court of Cassation No. 146/2008 issued on 9 November 2008.

[252] Ibid.

[253] Moses, Margaret L., *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press, Cambridge 2017).

[254] Mayer, Pierre and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration International 249; Moses, Margaret L., *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press, Cambridge 2017); Alsaif, Bander, 'Two Sides of the Saudi Public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards' (PhD Thesis, University of New South Wales 2018).

[255] Ibid.

[256] Ibid.

arbitration where such public policy consideration are part of the *lex cuasae* or *lex contractus*[257]. If foreign elements are involved or the arbitration is considered international by nature, then the court should implement and apply international public policy concept. The next section will illustrate the scope and content of international public policy.

2.9.2 International Public Policy

The international dimension of State public policy has been recognised by scholars and jurists, some national laws, and some domestic courts[258]. It is usually applied where there is a foreign element either in the form of the nature of business or commerce, or the nationality of the parties involved in the dispute or both. However, the word 'international' in the context of international public policy means that this category of public policy applies when there are one or more foreign elements that exist in the legal relationship or transaction[259]. Fry pointed out correctly that the international public policy is applied:

> *"… to disputes that have an international element, either from the underlying transaction's nature or from the nationality of the parties, though those disputes still are within that State's jurisdiction. This international public policy is the notion of public policy that is applied in the area of private international law"*[260].

International public policy is less stringent and more liberal than the domestic notion of public policy and it reflects the fundamental principles of justice prevailing in the society[261]. In this context, Albert Jan van den Berg indicates that the international

---

[257] Supra note 256.
[258] Lew, Julian D. M., Loukas A. Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague 2003)p. 187.
[259] Houtte, van Hans, 'From a National to a European Public Policy' in Nafziger, James and Symeon Symeonides (eds), *Law & Justice in a Multistate World – Essays in Honour of Arthur T Von Mehren* (Brill, NY 2002).pp. 881-884; Blom, Joost, 'Public Policy in Private International Law and Its Evolution in Time' (2003) 50(3) Netherlands International Law Review 373; Hunter, Martin and Gui Conde e Silva, 'Transnational Public Policy and its Application in Investment Arbitrations' (2003) 4(3) The Journal of World Investment & Trade vii. 367.
[260] Supra note 244, pp. 86–87.
[261] Hunter, Martin and Gui Conde e Silva, 'Transnational Public Policy and its Application in Investment Arbitrations' (2003) 4(3) The Journal of World Investment & Trade 367; Mantilla-Serrano, Fernando, 'Towards a Transnational Procedural Public Policy' (2004) 20(4) Arbitration International 333; Ma, Winnie (Jo-Mei), 'Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia' (SJD Thesis, Bond University 2005).

public policy exception is the less stringent regime than its domestic counterpart and it is limited to the violation of extreme fundamental conceptions of legal order and the justice of the enforcing State[262].

The ILA suggested that international public policy should encompass the following:

(1) Fundamental social, economic and politic interest and values of the enforcing State;

(2) Fundamental principles of justice and morality that the enforcing State aims to protect and safeguard, even if the State is not directly involved and;

(3) The State's duty and obligation towards international bodies and organisations and other States which the enforcing State has a duty to respect[263].

Some NYC signatory States have recognised this category of public policy and made a distinction between domestic and international public policy[264]. For example, Article 814 of Chapter 2 of the Lebanese Code of Civil Procedure, enacted by Decree Law 90/83, with amendments resulting from Law No.440 dated 29 July 2002 States that international arbitration can be set aside by the court if it has manifestly violated the Lebanese international public policy exception[265]. In 2013, the Ninth Commercial Chamber of Beirut Court of Appeal held that refusal of recognition and enforcement of international arbitral awards can only be possible in a case of a clear violation of Lebanese international public policy[266].

Additionally, in France, where Article 1502 of the French Code of Civil Procedure provided that an international arbitration award could only be refused its recognition

---

[262] Berg, Albert Jan van den, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law and Taxation Publication, Deventer 1981).

[263] Mayer, Pierre, and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration international 249; Alsaif, Bander, 'Two sides of the Saudi public policy Coin: Reconciling domestic and transnational values in recognition and enforcement of international commercial arbitration awards' (PhD Thesis, University of New South Wales 2018); Dubey, Yash, 'Analysis of Public Policy and Enforcement of Domestic and Foreign Arbitral Awards in India' (2018) 7(2) Christ University Law Journal 63.

[264] For example, Article 458 bis 23(h) of Decree No. 83.09 (1993) of Algeria and Article 1096(f) of the Code of Civil Procedure (1986) of Portugal; for further information, see Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).

[265]Article 814 of Chapter 2 of the Lebanese Code of Civil Procedure; for more information, see Ziade, Nassib G., 'Lebanon: International Arbitration Provisions of the Code of Civil Procedure' (1988) 27(4) International legal materials 1022.

[266] DecisionNo.773 dated 28 May 2013, Beirut Court of Appeal, Ninth Commercial Chamber.

and enforcement if the award violated French international public policy[267]. Accordingly, the Paris Court of Appeal in *Intrafor Cofor v. Gagnant*[268] held that the violation of French domestic public policy by an international arbitral award does not justify refusal of recognition or enforcement of the international arbitral award. The violation should be directed to French international public policy. The court states that:

> *"A breach of domestic public policy, assuming that it has been established, does not provide the grounds of which appeal against a ruling granting enforcement in France of a foreign arbitral award"*[269].

The French Court De Cassation confirmed again this approach in a decision of March 23, 1994[270]. The French court used French International public policy to justify the enforcement of international arbitral award that has been set aside in another country. The French Court De Cassation held that:

> *"… The award rendered in Switzerland is an international award which is not integrated in the legal system of that state, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy"*[271].

Gaillard and Savage pointed out that the term "*public policy*" under Article V (2)(b) of the NYC only refers to International public policy and not domestic public policy[272].

---

[267] Article 1502 of the Nouveau Code De Procedure Civile, Book IV issued on 14 May 1981.
[268] *Intrafor Cofor v Gagnant,* (1985) Rev Arb 299 (Paris Court of Appeals 1985).
[269] As cited by Sibon, Amaury, 'Enforcing Punitive Damages Awards in France: Facing Proportionality within International Public Policy' (2013) SSRN Electronic Journal < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2382817> accessed on April 4, 2020.
[270] *Societe Hilmarton v Societe Omnium de traitement et de valorisation, Cour de justice de canton de Geneve, judgment of 17 Novembre 1989, (1993) Revue de l'Arbitrage 315 at 316, translated in (1994) 19 YB Com Arb 214; Societe Hilmarton v Societe Omnium de traitement et de valorisation, Tribunale Fédéral Suisse, judgment of 17 April 1990, (1993) Revue de l'Arbitrage, 315 at 322, translated in (1994) 19 YB Com Arb 220; Societe Hilmarton v Societe Omnium de traitement et de valorisation, judgment of 19 December 1991, CA Paris, 1st Ch. supplément, 19 December 1991, (1993) Revue de l'Arbitrage, 300 at 301; Societe Hilmarton v Societe Omnium de traitement et de valorisation, judgment of 22 Septembre 1993, Tribunale Gr Inst de Nanterre 1st Ch.; Societe Hilmarton v Societe Omnium de traitement et de valorisation, Cass civ 1st, judgment of 23 March 1994, (1994) Revue de l'Arbitrage, 327-328, translated in (1995) 20 YB Com Arb 663; Societe Hilmarton v Societe Omnium de traitement et de valorisation, CA Versailles, judgment of 29 June 1995, (1995) Revue de l'Arbitrage 639; Cour de cassation, judgment of 10 June 1997*; Gharavi, Hamid, 'A Nightmare Called Hilmarton' (1997) 12(9) Mealey's International Arbitration Report 20.
[271] As cited by Gaillard, Emmanuel, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) 14(1) ICSID Review - Foreign Investment Law Journal 16.
[272] Gaillard, Emmanuel, and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (International Law, 1st edn, Kluwer Law International, The Hague, Netherlands 1999).

Levi-Tawil also argues that *"the courts of most nations have chosen not to use their domestic public policies to refuse to recognise and enforce a foreign arbitral award and will enforce the arbitral award as long as it is not contrary to international public policy"*[273]. However, many legal systems around the world have rejected this argument and pointed out that the concept of international public policy is still not clear, and it is wider than the domestic public policy[274]. The Supreme Court of India in *Renusagar Power Electric co v. General Electric Co*[275] has rejected the concept due to lack of a *"workable definition"*[276]. The court stated that:

> *"In view of the absence of a workable definition of "international public policy" we find it difficult to construe the expression "public policy" in Article V(2)(b) of the New York Convention to mean international public policy. In our opinion the said expression must be construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced. Consequently, the expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act means the doctrine of public policy as applied by the courts in India"*[277].

2.9.3 Regional and Religious Application of Public Policy

Regional public policy[278] refers to the jointly shared interest of a group of nations or on the basis of other forms of connections such as commonly shared religious beliefs. Examples include the 'European public policy' of the EU and the public policy of the GCC[279].

---

[273] Levi-Tawil, Elana, 'East Meets West: Introducing Shari'a Into the Rules Governing International Arbitrations at the BCDR-AAA' (2011) 12 Cardozo Journal of Conflict Resolution 609.
[274] Supra note 204.
[275] *Renusagar Power Co. Ltd v. General Electric Co*. reported in (1995) XX Y.B. Comm. Arb. 681, par 63. See Dubey, Yash, 'Analysis of Public Policy and Enforcement of Domestic and Foreign Arbitral Awards in India' (2018) 7(2) Christ University Law Journal 63.
[276] Supra note 282.
[277] Supra note 282, par 63
[278] 'Regional public policy' is also known as 'Multinational public policy', 'community public policy' and the civil law terminology, 'ordre public communautaire'.
[279] Mistelis, Loukas, 'International Law Association – London Conference (2000) Committee on International Commercial Arbitration "Keeping the Unruly Horse in Control" or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards' (2000) 2(4) International Law Forum du droit international 248.

Houtte pointed out that this type of public policy manifests some features of other types of public policy[280]. For example, it is 'national' because it is part of the national public policy of the member States and it is 'international' and 'transnational' because it has extra-territorial or cross-border function and power[281]. For example, the Treaty of Rome establishing the EEC (European Economic Community) declares in Article 2 that it will attain its objectives by establishing a common market and progressively approximating the economic policies of the Member States. Accordingly, example of some fundamental European public policy principles includes: the freedom of transnational trade, freedom to provide services and free movement of capital and workers[282]. For instance, in the *ECO Swiss* case[283], the European Court of Justice (ECJ) delivered its first decision on 'European public policy' as a ground for annulling arbitral awards. The Dutch Supreme Court referred to the ECJ for a preliminary ruling on whether non-compliance with provision against anti-competition under Article 81 of the Treaty Establishing the European Community (the EC Treaty)[284] would constitute a ground for setting aside an arbitral award. The ECJ confirmed that due to the mandatory and fundamental nature of Article 81 of the EC Treaty, Article 81 *"may be considered as a matter of public policy within the meaning of the New York Convention"*'[285]. As well, the French Court has explicitly affirmed this in the case of *Sté Grands Moulins de Strasbourg v Cie Continentale France*[286], where the Court held that certain rules of European law pertain to international public policy and are to be taken into account when granting or refusing enforcement of international arbitration award seeking enforcement EU members States[287].

---

[280] Lew, Julian D. M., *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (International Commercial Arbitration, 1st edn, Oceana Publications, Dobbs Ferry, NY 1978).pp. 533-534; Houtte, van Hans, 'From a National to a European Public Policy' in Nafziger, James and Symeon Symeonides (eds), *Law & Justice in a Multistate World – Essays in Honour of Arthur T Von Mehren* (Brill, NY 2002).pp. 841-844; Lew, Julian D. M., Loukas A. Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague 2003).p. 723.
[281] Ibid.
[282] Sattar, Sameer, 'Enforcement of Arbitral Awards and Public policy: Same Concept, Different Approach' (2011) 5 Transnational Dispute Management 1.pp. 7-8.
[283] *Eco Swiss China Ltd v Benetton International NV*, C-126/97, [1997] OJC 166/9.
[284] Treaty Establishing the European Community 1957 (Rome, 25 March 1957).
[285] Supra note 290.
[286] *Sté Grands Moulins de Strasbourg v Cie Continentale France Cass*. Civ. 1ère, 19 November 1991, Rev. Arb. 1992 p.61.
[287] Ibid.

Similarly, international arbitral awards seeking enforcement in GCC countries may be denied enforcement on the basis of violating a fundamental religious principle shared by the community of Islamic GCC countries. This was affirmed by Article 2 of GCC Convention. It declared that any enforcement of foreign arbitral award could be contested if the award violates *Sharia* law and public policy of the State where the award is sought to be enforced.

However, it should be noted that the intensity of this religious dimension varies depending on the extent of integration of Islamic *Sharia* in the relevant GCC country's legal system[288]. For example, in a commercial context, of a fundamental *Sharia* law principle is the prohibition of *Riba*. Foreign arbitral awards condemning one party to pay interest or *Riba* to the other may not be enforced at least regarding this part of the award, in some GCC countries such as Saudi Arabia, Oman and Kuwait. Nevertheless, a foreign arbitral award may not encounter the same risk and challenge in the UAE and Egypt[289].

2.9.4 Transnational Public Policy

The concept of transnational public policy[290] refers to the fundamental rules of natural law, universal justice, peremptory norms in public international law or *jus cogens*[291], and the general principles of morality accepted and recognised by civilised nations[292]. Those rules have a universal application and are based on international customs and international law[293]. Accordingly, the transnational public policy differs from

---

[288] AL-Baharna, Husain M., 'The Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain' (1989) 4(4) Arab Law Quarterly 332.

[289] Saleh, Samir, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 1(1) Arab Law Quarterly 19; Lew, Julian D., *Contemporary Problems in International Arbitration* (1st edn, Nijhoff, Dordrecht 1987).p. 348.

[290] The terms `truly international' and `transnational' public policy are used interchangeably by LaLive, Pierre, 'Transnational (or Truly International) Public Policy and International Arbitration' in Sanders, Pieter (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series No 3 edn, Kluwer International Law, The Hague 1987).p. 295'

[291] Article 53 of the Vienna Convention on the Law of Treaties of 1969 defines '*jus cogens*' as "… a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

[292] Lew, Julian D. M., *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (International Commercial Arbitration, 1st edn, Oceana Publications, Dobbs Ferry, NY 1978); LaLive, Pierre, 'Transnational (or Truly International) Public Policy and International Arbitration' in Sanders, Pieter (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series No 3 edn, Kluwer International Law, The Hague 1987).

[293] Lew, Julian D. M., *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (International Commercial Arbitration, 1st edn, Oceana Publications, Dobbs Ferry, NY 1978).

international public policy since it involves the application of principles that are commonly accepted and recognised by all civilised nations around the world such as prohibitions against slavery, terrorism, money laundering, and violations of fundamental human rights[294].

The Swiss Federal Tribunal has referred to the universal conception of public policy that is understood and recognised by the civilised nations[295]. Additionally, the ICJ judgment for the *Barcelona Traction case* (Belgium v Spain)[296], confirmed this type of public policy when it declared that all countries in the world must protect all legal interests and obligations that stem from the outlawing of acts of aggression and genocide or from principles and rules governing the fundamental rights of human beings, including protection from slavery and discrimination[297].

One doctrine of International law that has originated from transnational public policy is the Internal Law Doctrine. The Internal Law Doctrine prohibits a State party to an arbitration agreement to invoke its own domestic law to avoid arbitration or to avoid its contractual obligations by relying on *"pre-existing mandatory provisions of its domestic law, or the ex post facto use of its legislative, executive or judicial powers for this purpose"*[298]. The Cairo Court of Appeals in *Organisme des Antiquitiés v. G. Silver Night Company*[299] stated that *"public entities may not reject an arbitration clause contained in their contracts by invoking legislative restrictions, even if they are genuine"*[300]. The Swiss Federal Tribunal in *Société des Grands Travaux de Marseille v. Republique Populaire du Bangladesh*[301] used the Internal Law Doctrine and

[294] Supra not 294. See also Ma, Winnie (Jo-Mei), 'Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia' (SJD Thesis, Bond University 2005).
[295] *Swiss Federal Tribunal W v F and V* (Switzerland Supreme Court 30 Dec 1994).
[296] *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3.
[297] LaLive, Pierre, 'Transnational (or Truly International) Public Policy and International Arbitration' in Sanders, Pieter (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series No 3 edn, Kluwer International Law, The Hague 1987); Hunter, Martin and Gui Conde e Silva, 'Transnational Public Policy and its Application in Investment Arbitrations' (2003) 4(3) The Journal of World Investment & Trade 367.
[298] Cairns, David J. A., 'Transnational Public Policy and the Internal Law of State Parties' (2009) 1 Transnational Dispute Management 1.
[299] *Organisme des Antiquitiés v G Silver Night Company,* (1998) 23 ICCA Yearbook of Commercial Arbitration 22 (CA Cairo, 19 March 1997.
[300] Ibid.
[301] *Société des Grandes Travauz de Marseille v Republique Populaire des Bangladesh*, (1980) 5 ICCA Yearbook of Commercial Arbitration 129 (Award) and 217 (decision of Swiss Tribunal Federal, 5 May 1976); Delaume, Georges R., 'State Contracts and Transnational Arbitration' (1981) 75(4) American Journal of International Law 784.pp. 789-790; Almutawa, Ahmed Mohd Khurshid., 'Challenges to the Enforcement of Foreign Arbitral award in States of The Gulf Cooperation Council' (PhD Thesis, University of Portsmouth 2014).pp.221-222.

concluded that decree number 39 issued by the government of Bangladesh, which dissolves the State entity that is subject to the arbitration, is aimed to avoid the government contractual obligation that was a breach of Bangladesh's obligations under international law and, therefore, a violation of transnational public policy[302].

However, the concept still has not been fully developed and defined, although some courts have accepted this concept[303]. Fry argued that the concept of transnational public policy is not well construed and defined in the literature[304]. As well, by qualifying the term public policy in Article V(2)(b) with the phrase *"of that country"* means that the NYC did not intend for a transnational meaning of public policy but instead it intended that the State's public policy that could be domestic or international public policy[305]. In this regard, some courts have been reluctant to rely on transnational public policy during the enforcement of an international arbitration award due to the uncertainty and ambiguity of its definition, content, and source. For instance, the Court of Final Appeal of Hong Kong in the *Polytek case* stated that:

> *"Does (Transnational public policy) mean some standard common to all civilised nations? Or does it mean those elements of a State's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected? I think that it should be taken to mean the latter. If it were the former, it would become so difficult of ascertainment that a court may well feel obliged - as the Supreme Court of India did in Renusagar Power Co Ltd v General Electric Co to abandon the search for it"*[306].

Further, it is very challenging to create a universal application representing the international consensus on accepted norms and international customs, while the source of law, legal culture is completely different across the world. A society's legal culture is complex product that has resulted from the fundamental values and norms

---

302 Supra note 302.
303 Supra note 244, p. 81.
304 Supra note, pp. 87-89.
305 Maurer, Anton G., *The Public Policy Exception Under the New York Convention: History, Interpretation and Application* (Revised edn, Juris Publishing, Huntington, N.Y 2013).
306 HKSAR, Court of Final Appeal, 9 February 1999, Hebei Imp & Exp Corp v Polytek Engineering Comp Ltd, (1999) 14(2) Mealey's IAR G-1 - G-15, [1999] XXIVa YBCA 652 - 677, at p. 676, para 85.

of society, which is reflected in its history, language, religion and the society's unique views about social justice, liberty and equality. Western legal traditions and cultures have been influenced by various legal theories and philosophies, including the theory of natural law[307]. However, Muslim countries' legal culture and tradition is heavily influenced by *Sharia* jurisprudence and philosophies, which fundamentally clash with Western legal philosophy of natural law, as the *Sharia* jurisprudence belief that the *Sharia* law has been handed down by God[308]. Thus, it is difficult to create a universal application representing international consensus on accepted norms of conduct while the legal culture is different in many aspects.

In conclusion, all the above-mentioned categories of public policy principles tend to overlap. For example, terrorism, money laundering and violations of fundamental human rights may be classified as principles of international public policy in one country, however, another country may consider them as a part of the transnational conception of public policy. These categories of public policy represent classification of principles on the basis of their origin, scope and application[309].

2.9.5 Substantive and Procedural Aspects of Public Policy

Having discussed the various possible categories of public policy, there remain some important questions that merit further consideration, namely: Does public policy have a procedural dimension? And what is the substantive content of public policy principles and do they include mandatory norms and religious principles?

Since the essence of this thesis is focusing on substantive *Sharia* public policy in the UAE, the researcher, therefore, will attempt to adhere with such core objective of this thesis and summarise the issue of procedural and substantive public policy in a brief manner.

---

[307] Kelly, John M., *A short history of Western legal theory (Clarendon Press, Oxford 1993);* Alsaif, Bander., 'Two sides of the Saudi public policy Coin: Reconciling domestic and transnational values in recognition and enforcement of international commercial arbitration awards' (PhD Thesis, University of New South Wales 2018).

[308] Supra note 204.

[309] Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).p.307.

2.9.5.1 Procedural Public Policy

Although the distinction between the substantive and the procedural aspects of public policy can be vague, most domestic courts have recognised procedural public policy as a valid basis for applying the public policy defence to the enforcement of foreign arbitral awards under Article V(2) b of New York Convention[310]. Mantilla-Serrano pointed out that the procedural public policy consideration is concerned mainly with the procedural rule adopted by the arbitral tribunal during the arbitral process, while the substantive public policy consideration is concerned mainly with the merits of the award[311].

Thus, the procedural public policy ground of refusal arises in cases of serious irregularities in the arbitral procedure and proceedings and, therefore, this ground of refusal overlaps with the due process defence under Article V(1)(b) of the New York Convention[312]. Thus, the refusal to enforce on grounds of violation of due process may fall either under Article V(l)(b) or Article V(2)(b) of New York Convention. This overlap is significant in practice, since the grounds set forth in Article V(1) b can only be raised by the respondent, who bears the burden of proof, whereas the grounds under Article V(2)b can be raised by the court of its own motion and even if it was not raised by the respondent[313]. Some commentators argue that the gross violations of due process that could deprive one party of its fundamental rights can rise to a violation of procedural public policy under Article V(2)(b) of the New York Convention[314]. For example, in *G.W.L. Kersten & Co. BV v. Société Commerciale Raoul-Duval et Cie*[315] the Amsterdam Court of Appeal refused to enforce a foreign arbitral award because

---

[310] Yang, Inae, 'Procedural Public Policy Cases in International Commercial Arbitration' (2014) 69(4) Dispute Resolution Journal 59. p.60.
[311] Mantilla-Serrano, Fernando, 'Towards a Transnational Procedural Public Policy' (2004) 20(4) Arbitration International 333.p. 335.
[312] Berg, Albert Jan van den, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law and Taxation Publication, Deventer 1981).pp. 299-30; Mantilla-Serrano, Fernando, 'Towards a Transnational Procedural Public Policy' (2004) 20(4) Arbitration International 333; Yang, Inae, 'Procedural Public Policy Cases in International Commercial Arbitration' (2014) 69(4) Dispute Resolution Journal 59. p.60;
[313] Otto, Dirk and Omaia Elwan, 'Article V(2)' in Kronke, Herbert and others (ed), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International B.V, Netherlands 2010).p.389; Yang, Inae, 'Procedural Public Policy Cases in International Commercial Arbitration' (2014) 69(4) Dispute Resolution Journal 59. p.60.
[314] Ibid.
[315] *G.W.L. Kersten & Co. BV v. Société Commerciale Raoul-Duval et Cie.*, XIX Y.B. COM. ARB 708-09 (1994); Yang, Inae, 'Procedural Public Policy Cases in International Commercial Arbitration' (2014) 69(4) Dispute Resolution Journal 59.p.63.

the claimant submitted a statement of claim to the arbitral tribunal, but failed to forward a copy of the statement of claim to the respondent[316]. The Court held that the failure to disclose the statement of claim to the other party constituted a gross violation of a fundamental procedural right of the respondent, and, therefore, denied the enforcement of the award for violation of procedural public policy[317]. Furthermore, in *Siemens AG/BKMI Industrienanlagen GmbH v. Dutco Construction Company*[318]*,* the French Supreme Court ruled that the constitution of the tribunal had been unfair to the respondents and therefore violated the due process requirement of equal treatment of the parties by giving one side more influence on the composition of the arbitral tribunal, which constituted a violation of procedural public policy consideration[319]. The French Supreme Court stated that *"the principle of the equality of the parties in the appointment of arbitrators is a matter of public policy (ordre public) and can be waived only after a dispute has arisen"*[320]*.*

In practice, respondents usually base their objection to the enforcement of international arbitral awards on violation of due process upon both Article V(l)(b) and Article V(2)(b), as they probably believe that the invocation of procedural public policy defence under Article V(2)(b) is more effective and does not need proof rather than the invocation of lack of due process under Article V(l)(b), which requires the resisting party to bear its proof[321]. For example, the defendant in *Rice Trading Ltd. v. Nidera Handelscompagnie BV, Gerechtshof*[322]*,* objected the enforcement of a foreign award on the ground that Article V(l)(b) and Article V(2)(b) of the NYC was violated, as the defendant was not given an opportunity discuss and reply to evidence submitted to the tribunal, which constitutes a gross breach of the due process that amounts to a

[316] Supra note 317.
[317] Yang, Inae, 'Procedural Public Policy Cases in International Commercial Arbitration' (2014) 69(4) Dispute Resolution Journal 59.p.63.
[318] *Siemens AG/BKMI Industrienanlagen GmbH v. Dutco Construction Company* (1993) XVII Y. B. Com. Arb. 140-142 (1993); see also Schwartz, Eric A., 'Multiparty Arbitration and the ICC: In the Wake of Dutco' (1993) 10(3) Journal of International Arbitration 5.
[319] Al-Tuwaigri, Waleed Suulaiman A., 'Ground for Refusal of Enforcement of Foreign Arbitration awards under The New York Convention of 1958: With Special Reference to the Kingdom of Saudi Arabia' (PhD Thesis, University of Glasgow 2006).p. 137; Yang, Inae, 'Procedural Public Policy Cases in International Commercial Arbitration' (2014) 69(4) Dispute Resolution Journal 59. p.65.
[320] Supra note 325.
[321] See for example, Tribunal Superior de Justicia, Court of Appeals (Fifth Chamber) for the Federal District of Mexico, 1 August 1977, Malden Mills Inc. v. Hilaturas Lourdes S.A., YCA, Vol. 4 (1979). P. 303.
[322] *Rice Trading (Guyana) Ltd. v. Nidera Handelscompagnie BV,* Court of Appeal, The Hague, Netherlands, 28 April 1998, XXIII Y. B. COM. ARB. 731 (1998).

violation of procedural public policy. The Dutch Court of Appeal upheld the objection and refused the enforcement of the foreign award under Article V(2)(b) of the New York Convention[323].

We can conclude that the prevailing judicial trend seems to be that the enforcing court will naturally have its own understanding of what constitutes a gross violation of due process that amounts to procedural public policy, so that the Courts will judge a gross violation of due process according to their own national laws[324]. However, this does not mean that all of the requirements of procedural public policy under national law will automatically apply to international arbitration. For instance, the US court of appeals in *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*[325] confirmed the court should not apply the complete set of procedural rights and due process guaranteed to the litigant by the US Federal Rules of Civil law[326].

Furthermore, many courts have given weight, besides their own procedural public policy, to the law governing the arbitration in deciding whether there has been gross violation of due process that amounts to a violation of procedural public policy. For instance, in *Hebei Import & Export Corp v Polytek Engineering Co Ltd*,[327] the Hong Kong Court of Final Appeal examined the laws chosen by the parties to govern the arbitration and found that there was no breach of these provisions with regard to the requirements of due process similar to Hong Kong law[328].

2.9.5.2 Substantive Public Policy

Substantive public policy is directed at the merits and contents of arbitral awards, and it *"goes to the recognition of rights and obligations by a tribunal or enforcement court in connection with the subject matter of the award"*[329]. Accordingly, the substantive content of the enforcing State's public policy includes:

---

[323] Supra note 324.
[324] Berg, Albert Jan van den, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law and Taxation Publication, Deventer 1981).p. 298.
[325] Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 264 F. Supp. 2d 470 (S.D. Tex. 2002).pp.299-300.
[326] Ibid.
[327] HKSAR, Court of Final Appeal, 9 February 1999, Hebei Imp & Exp Corp v Polytek Engineering Comp Ltd, (1999) 14(2) Mealey's IAR G-1 - G-15, [1999] XXIVa YBCA 652 – 677.
[328] Ibid.
[329] Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards, adopted at the International Law Association's 70th Conference held in New Delhi, India, 2-6 April 2002, p.230.

(a) Fundamental social, cultural, economic and political bases of the enforcing States and;

(b) Fundamental conception of justice and moral values of the enforcing States[330];

(c) Mandatory rules of the enforcing States[331].

It is worth stating that the ILA Committee on International Commercial Arbitration in its prominent Interim and Final Reports as well as its Resolution (2/2002) has considered mandatory norms (*lois de police*) to be a subcategory of public policy principles[332]. The mandatory rules are rules which cannot be excluded by the parties' agreement, and which may apply additionally to the parties' chosen law. These rules are so important that they are applicable in spite of, and even independent of, any choice of law process[333] some examples of substantive public policy include excessive interest or costs, violations of *Sharia* principles, violations of competition laws, violations of bankruptcy rules, violations of consumer protection laws, foreign exchange controls, illegal contracts and foreign policy[334].

2.9.6 *Sharia* Public Policy

This section does not aim at examining Islamic law in the abstract, but it aims at analysing the impact of *Sharia* law over principles of public policy in the context of the enforcement of international arbitral awards. As one of the particularities of Islam is that it associates socially valued norms, customs and ethics with the legal domain, and both ethics and law are engrossed in the territory of the sacred[335]. Muslims view Islam both a religion and a way of life, rich with rules, guidelines and principles that should govern and regulate all aspects of their lives, whether related to spiritual relations or legal transactions. Accordingly, Muslims consider *Sharia* law, with its

---

[330] Supra note 330, p. 261.

[331] Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).p.312.

[332] Supra note 330, p. 261

[333] Zhilsov, A. N., 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1995) 42(1) Netherlands International Law Review 81.pp. 90-91; Ma, Winnie (Jo-Mei), 'Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia' (SJD Thesis, Bond University 2005).p.124.

[334] Yang, Inae, 'Procedural Public Policy Cases in International Commercial Arbitration' (2014) 69(4) Dispute Resolution Journal 59.p.60.

[335] Arabi, Oussama, *Studies in Modem Islamic Law and Jurisprudence* (1st edn, Kluwer Law International, Den Haag 2001).p. 206.

resources of the *Quran* and *Hadith*, as a fountain of endless rules and principles that are capable governing all aspects of their personal and legal affairs[336]. The *Quran* and *Hadith* establish precise rules and laws (such as prescribed punishments, inheritance rules, marriage and divorce rules, etc.), general principles and guidelines (such as faith, etc.), norms (such as prohibition of drinking alcohol and prohibition of eating pigs, etc.), and procedures (such as arbitration procedures in disputes, rules of evidence and witnesses, etc.)[337].

Nowadays, many Muslim countries possesses a mixed system of law amongst which is the UAE. The UAE legal system could be seen as an alloy of French Civil Law, imported rules principles and doctrines, and Islamic rules, principles and doctrines. The constitutions of Kuwait, Bahrain, the UAE, and Qatar establish *Sharia* law as a source of legislation[338]. For example, Article 7 of UAE constitution states that, *"Islam shall be the official religion of the Union. The Islamic Sharia shall be a principal source or legislation in the Union"*[339]. Accordingly, in domestic law, legislation should be in conformity with principles of *Sharia* law as it is a part of the UAE conception of public policy. As correctly pointed out by Otto and Elwan that,

> *"In countries that strictly apply certain Islamic legal principles, the concept of what violates basic principles as well as public morals may differ substantially from such concepts in other parts of the world"*[340].

This does not mean whenever an arbitral award is governed by different substantive and procedural rules from *Sharia* law that it would not be excluded *prima facie*. Only in cases where it is repugnant to those fundamental *Sharia* principles, which are considered by the UAE society and legal system as pertaining to the conscience and fundamental basis of the country[341]. Thus, the key question is whether all mandatory

---

[336] Supra note 336.
[337] Zahraa, Mahdi, 'Characteristic Features of Islamic Law: Perceptions and Misconceptions' (2000) 15(2) Arab Law Quarterly 168. p.192; Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).
[338] Ayad, Mary B., 'International Commercial Arbitration Award Enforcement at the Crossroads of Sharia law and Ordre Public in the MENA' (2009) 10(5) Journal of World Investment & Trade 723.p. 727.
[339] Article 7 of United Arab Emirates' Constitution of 1971.
[340] Otto, Dirk and Omaia Elwan, 'Article V(2)' in Kronke, Herbert and others (ed), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International B.V, Netherlands 2010).p. 389.
[341] Supra note 344.

rules of *Sharia* constitute public policy in the context of enforcement of foreign awards under the NYC.

As regards to the definition of *Sharia* public policy, it seems that there is no precise definition of the *Sharia* law mandatory rules, which constitute public policy. Nonetheless, there are some attempts to give a general explanation of public policy in *Sharia* law and in context of the enforcement of an international arbitration award. For example, El-Ahdab pointed out that the notion of Islamic public policy is based on the *"respect to the spirit of Sharia and its sources"*[342] and on the famous *Sharia* legal principle, which states that '*'Individuals must respect their clauses, unless they forbid what is authorised or authorise what is forbidden''*[343]. This means that the court will only set aside or refuse the enforcement of an arbitral award if it involves a *''flagrant injustice''* or if it clashes with the prohibitions of *Sharia* law.

Saleh's[344] article, which was published in 1985, is considered one of the few limited articles that discussed the issue of *Sharia* public policy for the purpose of enforcing foreign arbitral awards[345] This article has been relied upon by many scholars such as Wakim[346], Kutty[347], and Almutawa[348] to analyse public policy in Muslim countries, in the context of the enforcement of a foreign arbitral award. The question raised by those scholars was whether all mandatory rules of *Sharia* law constitute public policy in the context of the enforcement of foreign awards under the NYC. These scholars agreed that although the notion of public policy is similar to all Middle Eastern countries, however, the scope of public policy in context of enforcement of foreign arbitral award should be assessed and investigated at the national level of each country due to that

---

342 El-Ahdab, Abdul Hamid, 'General Introduction on Arbitration in Arab Countries' in Sanders, Pieter and Albert Jan van den Berg (eds), *International Handbook on Commercial Arbitration* (Suppl. II, edn Kluwer, The Hague 1998).p. 14.

343 Ibid.

344 Saleh, Samir, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 1(1) Arab Law Quarterly 19.p.26 (one of the earliest discussions of Islamic public policy); see also Saleh, Samir, *Commercial Arbitration in the Arab Middle East: a Study in Shari'a and Statute Law* (Graham & Trotman, London 1984).

345 Almutawa, Ahmed Mohd Khurshid., 'Challenges to the Enforcement of Foreign Arbitral award in States of The Gulf Cooperation Council' (PhD Thesis, University of Portsmouth 2014).

346 Wakim, Mark, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21(1) New York international Law Review 1.

347 Kutty, Faisal, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28(3) Loyola of Los Angeles International & Comparative Law Review 565.

348 Almutawa, Ahmed Mohd Khurshid., 'Challenges to the Enforcement of Foreign Arbitral award in States of The Gulf Cooperation Council' (PhD Thesis, University of Portsmouth 2014).

fact there are variety of factors that influence each of Middle Eastern government systems, and each have a different understanding of *Sharia* Jurisprudence[349].

Those scholars pointed out that *Sharia* law has a well-established legal maxim providing that Muslims are obliged by God to comply with all contractual provisions, except for those that are forbidden by God[350]. This maxim was emphasised by the Abu Dhabi Court of appeal[351]. According to those scholars, Muslim judges can set aside foreign arbitration awards in limited situations where the award is clearly conflicting with a specific *Sharia* prohibition or the arbitral award contains an obvious injustice,[352] since Islam obliges Muslims to avoid matters that are forbidden by God (haram)[353].

Although, there are there are countless controversies and subtle distinctions between *Sharia* schools on prohibited matters that constitute *Sharia* public policy, *"a general Islamic public policy is evident to a degree relevant to international commercial transactions"*[354]. According to Saleh, Wakim, Kutty and Almutawa, *Sharia* public policy can be classified into two categories: procedural and substantive[355]. They pointed out that the concept of public policy only covers the right to equal treatment, the right to be heard, and the right to present a case and defence[356]. They deemed substantive

[349] Wakim, Mark, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21(1) New York International Law Review 1; Almutawa, Ahmed Mohd Khurshid., 'Challenges to the Enforcement of Foreign Arbitral award in States of The Gulf Cooperation Council' (PhD Thesis, University of Portsmouth 2014).
[350] Gemmell, Arthur, 'Commercial Arbitration in the Islamic Middle East' (2006) 5(1) Santa Clara Journal of International Law 169; Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006)28 Loyola International and Comparative Law Review 565; Al-Jerafi, Wasim Yahya, 'Yemen's ratification of the New York Convention: an Analysis of Compatibility and the Uniform Interpretation of Articles V (1) (a) and V (2) (b)' (PhD Thesis, University of Leicester 2013).
[351] *AA Commercial Co v S Motors Ltd Co and D Industrial Ltd Co*, ruling of Abu Dhabi Court of appeal No 10007 of1981.
[352] El-Aḥdab, Abd al-Hamid and Jalal El-Ahdab, *Arbitration With the Arab Countries* (3rd revised and expanded edn, Kluwer Law International, Netherlands 2011).
[353] Ibid.
[354] Supra note 348, p. 41.
[355] Wakim, Mark, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21(1) New York International Law Review 1.p. 45,stating that "the features of Islamic public policy may be divided into two categories: those of a procedural nature and those of a substantive nature").
[356] Saleh, Samir, *Commercial Arbitration in the Arab Middle East: a Study in Shari'a and Statute Law* (Graham & Trotman, London 1984); Saleh, Samir, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 1(1) Arab Law Quarterly 19; Wakim, Mark, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21(1) New York International Law Review 1; Kutty, Faisal, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28(3) Loyola of Los Angeles International & Comparative Law Review 565; Almutawa, Ahmed Mohd Khurshid., 'Challenges to the Enforcement of Foreign Arbitral award in States of The Gulf Cooperation Council' (PhD Thesis, University of Portsmouth 2014).

public policy to arise only in two scenarios: *Riba*, known as interest and *Gharar* known as uncertainty[357].

2.9.6.1 Procedural Public Policy under *Sharia* Law

It should be noted that *Sharia* law requires that people must give respect to procedural matters. To cite an example, judges and arbitrators should give respect to the standard of equal treatment. Also, both parties should be granted the opportunity to present their claims and evidences in any legal proceedings[358].

Saleh and Wakim discuss three fundamental rights covered by *Sharia* procedural public policy during enforcement of international arbitral award: the right to equal treatment of the parties, the right to be heard, and the right to present a case or defence. These three fundamental principles are not necessarily found in the *Quran* or *Hadith* but constitute the essential immutable rules of Islamic judicial law, which broadly correspond to the principles of natural justice enshrined in other systems of law.

These *Sharia* procedural principles are consistent with the NYC's *"universal norms of due process and fairness"*[359]. According to Wakim, the procedural concerns of *Sharia* law are well addressed by the NYC[360]. *Sharia* procedural public policy requiring the right to be heard, and the right to present a case or defence, is consistent with Article V (1) (b) of the NYC. The article requires that proper notice be given to the respondent and to give the claimant and defendant a proper opportunity to fairly present their case[361]. Furthermore, Wakim goes further to point out that the *Sharia* law procedural principle of strict equal treatment of the parties may be consistent with Article V(1)(a)

---

[357] Saleh, Samir, *Commercial Arbitration in the Arab Middle East: a Study in Shari'a and Statute Law* (Graham & Trotman, London 1984); Saleh, Samir, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 1(1) Arab Law Quarterly 19; Wakim, Mark, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21(1) New York International Law Review 1.

[358] Al-Mun'am, Jhirah Abd, *Nizam Al-Qada & Fial-Mamlaka Al- Arabiyyah Al-Saudia (*Public Administration Institute Press, 1988).

[359] Ibid.

[360] Wakim, Mark, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21(1) New York International Law Review 1.p. 45.

[361] Gaitis, James M., 'International and Domestic Arbitration Procedure: the Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards' (2004) 15(1) The American Review of International Arbitration 9.p. 65; Jana, Andrés and others, 'Article V (1) (b)' in Kronke, Herbert and others (ed), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International B.V, Netherlands 2010).pp. 231-256.

of the New York Convention[362], and may be applied to other matters such as capacity of the parties and the validity of an arbitration agreement[363]. He pointed out that Article V (1) (a) has the same type of exceptions that are contemplated by *Sharia* law[364].

Generally speaking, what *Sharia* law requires in terms of procedural public policy seems to be consistent with international notions of due process and fairness; and there does not seem to be a substantial difference in the procedural public policy required under NYC and in *Sharia* law.

2.9.6.2 Substantive Public Policy under *Sharia* Law

Sharia substantive public policy concerns mainly with two prohibitions that will likely affect the enforcement of foreign arbitral awards[365]. The prohibition on *Riba* and the prohibition on *Gharar*. The two prohibitions under substantive public policy differ from procedural public policy because they are deeply rooted in the text of the Holy *Quran* and *Hadith*[366]. The application of substantive public policy should be assessed and investigated by each Muslim country separately. Thus, this thesis discusses *Riba* and *Gharar* in chapter 4 and 5.

2.10 Conclusion

The main finding of this chapter is that public policy in the field of the conflict of laws or private international law is exceptional as it is applied narrowly to determine the choice of law applicable to the legal relationship[367]. It is a defence against the application of foreign laws or acts that is deemed inconsistent with the fundamental values and minimum standards of justice and morality of the forum's legal system. In contrast, the public policy exceptions invoked during the enforcement of International

---

[362] Supra note 348, p. 45.
[363] Supra note 348, p. 45.
[364] Supra note 348, p. 45.
[365] Saleh, Samir, *Commercial Arbitration in the Arab Middle East: a Study in Shari'a and Statute Law* (Graham & Trotman, London 1984); Saleh, Samir, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 1(1) Arab Law Quarterly 19'
[366] Saleh, Samir, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 1(1) Arab Law Quarterly 19.p. 2.
[367] Paulsen, Monrad G. and Michael I. Sovern, 'Public Policy" in the Conflict of Laws' (1956) 56(7) Columbia Law Review 969; Garcia de Enterria, Javier, 'The Role of Public policy in International Commercial Arbitration' (1990) 21(3) Law and Policy in International Business 389.

arbitration are broadly interpreted and construed, it encompasses the substantive and the procedural dimension[368].

The second finding of this chapter is that the public policy is a flexible notion that changes over time and it is considered as a manifestation of the fundamental social, economic, and legal principles of the society. The highly flexible nature of public policy is directly linked and connected to the cultural, legal, and economic differences between societies and legal systems. Time is a crucial factor in the development of the public policy concept in any State because societies evolve culturally, legally, politically, and economically over time and public policy must change to reflect the evolution of the society. In religiously oriented societies, especially Islamic States such as the UAE, principles of public policy are driven from the fundamental religious beliefs of the State. In the UAE in particular, Islam has remained intact over the centuries and has remained as a fundamental source for the UAE's cultural and economic foundation.

The third finding of this chapter is that public policy can burden a forum court with great responsibility and accountability to exercise fair and reasonable restraint and prudence in rejecting the enforcement of a foreign arbitral award[369]. The enforcement of a foreign arbitral award should only be rejected based on an objective assessment of the prevailing fundamental socio-cultural, economic, and legal principles of the society in order to ascertain whether the consequences of the enforcement of an international arbitral award invokes these sacrosanct principles of public policy[370]. Thus, the mere difference between the enforcing States' substantive and procedural law and some substantive or procedural aspect of the arbitral proceedings or arbitral award does not justify the intervention of public policy to set aside a foreign arbitral award. The system of international arbitration works by depending on faith and commitment to the fair and

[368] LaLive, Pierre, 'The New Swiss Law on International Arbitration' (1988) 4(1) Arbitration International 2; Garcia de Enterria, Javier, 'The Role of Public Policy in International Commercial Arbitration' (1990) 21(3) Law and Policy in International Business 389; Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).
[369] Murphy, Kent, ' The Traditional View of Public Policy and Order Public in Private International Law'(1981) 11 Georgia Journal of International and Comparative Law 591.
[370] Ibid.

reasonable consideration and balance between party autonomy and the public policy of the enforcing State[371].

[371] Supra note 370.

Chapter 3 The Concept of Public Policy Doctrine in the UAE Legal System

3.1 Introduction

This chapter expands upon the previous chapters to provide more context on the scope and application of the UAE's concept of public policy and the interplay between *Sharia* law and public policy that has affected the enforcement of an international arbitration award. Accordingly, the broader scope of the UAE's concept of public policy has provided the domestic courts with ample opportunity to refuse the recognition and enforcement of foreign arbitral awards on public policy grounds, and to do so under the pretext of religious duty and obligation.

This chapter will shed light on the ways in which *Sharia* law impacts the enforcement of foreign arbitral awards and how UAE judges use Islamic *Sharia* to make decisions either to enforce or refuse to enforce foreign arbitral award on grounds of a violation of a fundamental principle of *Sharia* law, which constitutes the UAE's concept of public policy.

This chapter is separated into five parts that lay the foundations for Chapters 4 and 5. Following this introduction, the researcher will attempt to identify the position of *Sharia* law in the UAE legal system. In the second part, the researcher will attempt to examine the origins, sources, and hierarchy of *Sharia* law, which are crucial to note as *Sharia* law has such a fundamental role UAE public policy. In the third part of this chapter, the researcher will demonstrate the interplay between *Sharia* law and public policy in the UAE legal system. In the fourth part, the researcher will demonstrate that not all mandatory rules of *Sharia* law constitute public policy in the context of the enforcement of a foreign arbitral award under the NYC. In the last part of this chapter, the researcher will shed light on the ways and processes by which a UAE judge can set aside an arbitration award by applying *Sharia* public policy.

It should be noted that the theoretical considerations and analysis provided for in this chapter are supported by a practical examination of cases that raise *Sharia* public policy questions and are drawn mainly from the UAE legal system. These cases provide an insightful overview of the UAE Judiciary's decisions and policies with respect to the application of *Sharia* public policy.

3.2 The Position of *Sharia* Law within UAE Legal System

The influences of secular European statutory laws like Roman, French, or English Common Law have added another layer of challenge to understanding the actual function and contribution of *Sharia* law in the development of the UAE legal system and how *Sharia* law frames and defines the concept of public policy. This interaction between *Sharia* law and European legal principles, in the UAE legal system, has resulted in new legal paradigms that are inherently based on *Sharia* law principles. Accordingly, the nature of *Sharia* law gives rise to a totally different experience of law than that understood by subjects of a Civil Law system and/or a Common Law system[372]. Thus, it is essential to define clearly in which *"source of law"* or category that *Sharia* law stands in the UAE legal system before examining the origins, source, and hierarchy of *Sharia* law.

The UAE constitution under article 7[373] states that *Sharia* law is a source of law, rather than the primary source, yet article 75 of law of 1973[374] establishing the UAE's Union Supreme Court considers *Sharia* law as the primary source of law. It further stipulated that other laws and statues that are issued by the UAE government should not conflict with the principles of *Sharia* law[375]. Furthermore, Article 8 of Law 6 of 1978, which set up the Union Supreme Courts of First Instance and Appeal provided that, *"The Union Courts shall apply the provisions of the Islamic Sharia, and other laws in force just as they shall apply those rules of custom and general legal principles which do not conflict with the provisions of the Sharia"*[376]. Accordingly, the law setting up the Supreme Court of the UAE appears to be providing that *Sharia* law shall be the principal source of law in the UAE, because by its terms any measures which are contrary to *Sharia* law would seem by express provision to be invalid. The constitution, in contrast, recognises *Sharia* law as a source of law amongst other sources of law[377].

---

[372] Berg, Herbert, 'The Divine Sources' in Peters, Rudolph Peri Bearman (eds), *The Ashgate Research Companion to Islamic Law* (Ashgate Publishing Limited, Farnham 2014).pp. 27-40; Berger, Maurits, 'Sharia and the Nation State' in Peters, Rudolph Peri Bearman (eds), *The Ashgate Research Companion to Islamic Law* (Ashgate Publishing Limited, Farnham 2014).pp.223-230.
[373] Article 7 of the UAE Federal Constitution of 1971.
[374] Article 75 of UAE Federal Law No. 10 of 1973 concerning the Supreme Federal Court.
[375] Ibid.
[376] Article 8 of the UAE Federal Law No. 6 of 1978 Regulating the Conditions and Procedure for Appeal Before the Union Supreme Court.
[377] Ballantyne, W. M., 'The States of the GCC: Sources of Law, the Shari'a and the Extent to Which It Applies' (1985) 1(1) Arab Law Quarterly 3. p. 12; AL-Muhairi, Butti Sultan Butti Ali, 'The Development

The UAE Civil Code in Article 1[378], like the Constitution and the Union Supreme Court, refers to *Sharia* law as the first source of law in the instance that there is no legislative provision. The Civil Code[379] in Article 3 has also codified that public policy rules are those that are not contrary to the basic principles of *Sharia* law. Furthermore, Article 27 of the UAE Civil Code[380] further highlights the importance and principal nature of *Sharia* law as it provides that in case of conflict of laws, no law contrary to *Sharia* law can be applied. These provisions clearly demonstrates the complexity of the issue and the importance of first assessing the *Sharia* law position and function in UAE legal system, and then to examine the equation of *Sharia* law and Public Policy.

Concerning the interpretation of the UAE constitution and application of *Sharia* law in the UAE legal system, Arab jurists and scholars fall into two different camps. The first camp construed and interpreted these articles as being that the intention of the legislator is to place *Sharia* law above all other sources of law since in the Arabic language of article 7 of UAE constitution states that *Sharia* is *"masdar raisi lil tashrie"*, which can be translated into English as *"the chief source of the legislation"* or *"the principle source of legislation"*. The world chief or "*raisi"* in Arabic means as a leader of something of the highest position and status[381]. Thus, the legislative authority when enacting any regulation should have recourse to Islamic *Sharia* and frame its laws according to its principles[382]. This interpretation means that the *Sharia* law is considered as a basic source for any new legislation. Accordingly, any law that conflicts with *Sharia* law should be considered unconstitutional.

The second camp construed these articles as meaning that the legislator's intent is to place *Sharia* law on an equal footing with other sources of law[383]. Therefore, *Sharia*

---

of the UAE Legal System and Unification with the Judicial System' (1996) 11(2) Arab Law Quarterly 116.

[378] Article 1 of the UAE Civil Code.

[379] Article 3 of the UAE Civil Code.

[380] Article 27 of the UAE Civil Code.

[381] Lombardi, Clark B., *State law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law* (Ruud Peters and Bernard Weiss(eds),Studies in Islamic Law and Society, Vol 19, 1st edn, Brill, Leiden 2006).p. 34-42.

[382] Al-Attar, Abdannaser, *Madkel le Derasat Al-Qanoon: wa Tatbeeq Al-Shariah Al-Islamiah* (1st edn, Matbaat al-Saadah, Cairo 1994). p. 154.

[383] AL-Muhairi, Butti Sultan Ali, 'The Position of Shari'a Within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause Concerning Shari'a' (1996) 11(3) Arab Law Quarterly 219; Luttrell, S. R., 'The Changing Lex Arbitri of the UAE' (2009) 23(2) Arab Law Quarterly 139.

law does not have any higher authority and position than other sources of law[384]. According to this view, any law that conflicts with the *Sharia* law should still be considered constitutional and enforceable[385]. According to this camp, considering *Sharia* law as a source of UAE's law will allow the UAE to better integrate international norms and treaty obligations into the UAE legal system[386]. In contrast, considering *Sharia* law as the primary source or the chief source of the nation's laws may lead to creation of legal pluralism. This would require the courts to define those laws that apply to domestic parties and those laws that apply to international parties as a single regime. However, in practice, this is proving insufficient to be effective for both[387]. This debate concerning the application, function and scope of *Sharia* law has created uncertainty and confusion in the UAE legal systems and has raised a number of cases in the highest courts of appeal of the nation.

For example, Junatta Bank appealed against the Abu Dhabi First Instance Court's decision, arguing that the First Instance Court wrongly applied the law by considering *Riba* on loan against *Sharia* law principles and subsequently violating article 7 of the UAE Constitution. The Federal Appeal Court of Abu Dhabi rejected the appeal and ruled that:

> *"According to Islamic Sharia, banking interest constitutes "Riba", a grave sin forbidden by the Holy Quran; the religion of the State is Islam, as declared and supported by the Constitution in making the Sharia a main source of legislation.... Even the Constitution itself should follow such legal rules and should not violate them'*[388]*.*

The ruling of the Federal Appeal Court of Abu Dhabi implies that Islamic *Sharia* is higher in authority and position than the UAE Constitution itself. It is difficult to agree with this ruling because *Sharia* law cannot be sovereign over the UAE Constitution,

---

384 Supra note 383.
385 Supra note 384.
386 Al-abdullah, Abdullah Mohammed, 'An Examination of the Role of Shariah in the Recognition and Enforcement of Arbitral Awards in Saudi' (PhD Thesis, University of Exeter 2016).p.29.
387 Ibid.
388 Ruling of Abu Dhabi Federal Appeal No.102/1980 issued on 29 October 1980; cited by AL-Muhairi, Butti Sultan Ali, 'The Position of Shari'a Within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause Concerning Shari'a' (1996) 11(3) Arab Law Quarterly 219.p. 234.

which itself provides for *Sharia* law's existence and preserves its position within the UAE legal system[389].

The Junatta Bank challenged the ruling of the Federal Appeal Court of Abu Dhabi by application of cassation to the constitutional division of UAE Union Supreme Court. The constitution division of UAE Federal Supreme Court reviewed and examined article 7 of UAE constitution and declared that the UAE legislator's intention is to consider *Sharia* law to be the principle source and of UAE law and paramount source of law for the Union[390]. However, it is for the legislator to decide when to fully implement *Sharia* by enacting laws and statutes that are fully based on *Sharia* principles[391].

The Dubai cassation court judgment No. 1/2005[392], in contrast, declared that *Sharia* law is source of law and not the principle source of law. The judge, therefore, should adjudicate the dispute as per the provision of laws and statutes issued by the government. However, in the absence of legislative provisions, the judge should adjudicate the dispute according to the Islamic *Sharia*[393]. Furthermore, the court ruling classifies the law into the primary and supplementary sources available to the judge. The primary sources to be used by the judge consist of the codified law and statues that issued by government. The supplementary sources are those that are consulted to find the actual text of a legal rule, in cases where the primary sources do not contain a rule. The court, further, arranged the supplementary sources according to their authority as follows: firstly, Islamic *Sharia*, followed by the jurisprudence of the Imam Malik and Imam Ahmad bin Hanbal schools, the jurisprudence of the Imam *Al-Shafie* and Imam Abu Hanifa schools, and finally custom which should not conflict with public policy and *Sharia* law[394].

Furthermore, the ruling pointed out that whenever legislation exists in a particular area of law, the role of *Sharia* law is basically to provide a source of guidance for the courts

---

389 AL-Muhairi, Butti Sultan Ali, 'The Position of Shari'a Within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause Concerning Shari'a' (1996) 11(3) Arab Law Quarterly 219.
390 Supra note,pp. 241-243.
391 Ibid.
392 Ruling of Dubai Court of Cassation No. 1/2005 issued on 25 April 2005.
393 Ibid.
394 AL-Muhairi, Butti Sultan Ali, 'The Position of Shari'a within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause Concerning Shari'a' (1996) 11(3) Arab Law Quarterly 219. p. 227.

to interpret legislation and to render a decision accordingly[395]. Therefore, *Sharia* law should be used to interpret and construe the text of laws[396]. It seems that *Sharia* law fulfils another important role in UAE legal system by providing a source of guidance for the courts on how to interpret legislation and to render a decision accordingly. This undoubtedly created challenges for modern jurists and judges to develop Islamic jurisprudence to interpret modern laws and statutes[397].

The main points to be drawn from this complicated legal issue are that there is uncertainty in the scope of application of *Sharia* law in the UAE legal system. However, *Sharia* law is an essential source and pillar for the UAE legal system whether we consider it as the principle source of legislation or as a source of legislation. Also, *Sharia* is a supplementary source that is consulted upon in order to find and understand the actual text of a legal rule and how to apply such rule, further, all other sources of law must not go against *Sharia* principles. Accordingly, the UAE legal system depends on two fundamental pillars: Statutory law and *Sharia* law[398].

Having seen that the *Sharia* law constitutes an essential source of UAE legal system, it may be helpful to examine the origins, source, and hierarchy of the sources of *Sharia* law as it has a fundamental and prominent role in the UAE public policy. Additionally, this part will act as a platform to guide the reader to understand part five of this chapter, which will examine the processes by which a UAE judge can set aside an international arbitration award by extracting and inducing judicial rules from the primary and secondary sources of *Sharia* law. Thus, the following section will explore the primary sources of *Sharia* law, namely the *Quran* and the *Hadith*, the main secondary sources, namely an analogy called *Qiyas*, independent critical reasoning by the scholar (called *Ijtihad*), and the consensus of scholars on a controversial matter (called *Ijma*).

3.3 Methodology and Sources of Islamic Law

Speaking generally, Muslims believe that Islam regulates broad areas of human activities and life in accordance with an ideal paradigm of what constitutes right and wrong as per God’s instruction. Dien pointed out that *Sharia* law covers all aspects of

---

[395] Supra note 395.
[396] Supra note 395.
[397] Al-abdullah, Abdullah Mohammed, 'An Examination of the Role of Shariah in the Recognition and Enforcement of Arbitral Awards in Saudi' (PhD Thesis, University of Exeter 2016).
[398] Supra note 401.

the life of the individual Muslim, whether it is related to his social, political, or economic affairs. Its provisions are derived from the *Quran* and the sayings of the Prophet Mohammed[399], and therefore it is believed to be divine law that does not rely on positive enactment to obtain the force of law[400].

During the Prophet Mohammed's life, he illustrated the meaning and implications of God's revelation[401]. The challenging questions always has been for Islamic scholars how Islamic law could regulates all human affairs and activities and how it can be developed to cover emerging new issues and disputes with limited sources and absence of the Prophet's explanations[402].

This challenge compelled Muslim jurists to make recourse to the prophetic tradition, personal opinion and certain pre-Islamic concepts to supplement the divine legislation and thereby address the demands of legal solutions and decisions to emerging issues for the culturally evolving Muslim society[403]. Although, there is debate between Muslim Jurists on the number of acceptable source of *Sharia* or Islamic law, there is consensus among the scholars that only five sources can be used to extract legal solutions or judgment[404], which are the *Quran*, the *Hadith*, *Qiyas*, *Ijma*, and *Ijtihad*.

Therefore, there is a demand for a general examination of the origins, source, and hierarchy of *Sharia* source in order to understand processes by which a UAE judge can set aside an arbitration award by using *Sharia* primary and secondary sources. The following section will explore the primary sources of *Sharia*, namely the *Quran* and *Hadith*, the main secondary sources, namely independent critical reasoning by the scholar called *"Ijtihad"* and consensus of scholars on a controversial matter *"Ijma"*.

---

[399] Dien, Mawil Izzi, *Islamic Law: From Historical Foundations to Contemporary Practice* (1st edn, Edinburgh Univ. Press, Edinburgh 2004). p. 35; El-Aḥdab, Abd al-Hamid and Jalal El-Ahdab, *Arbitration with the Arab Countries* (3rd revised and expanded edn, Kluwer Law International, Netherlands 2011).
[400] Luttrell, S. R., 'The Changing Lex Arbitri of the UAE' (2009) 23(2) Arab Law Quarterly 139. p.143.
[401] Watt, William Montgomery, *Islam and Christianity Today: A Contribution to Dialogue* (Vol 11, Routledge, London 2013).p. 125; Lewis, Bernard, *The Political Language of Islam* (1st edn, The University of Chicago Press, Chicago, IL 1988).p. 78.
[402] Ibid.
[403] Berkey, Jonathan P., *The Formation of Islam: Religion and Society in the Near East, 600-1800* (Cambridge University Press, Cambridge 2003).p. 48.
[404] Esposito, John L., *The Oxford History of Islam* (1st edn, Oxford University Press, Oxford 1999).

3.3.1 Islamic Jurisprudence or *Fiqh*

Fiqh is defined in the Arabic language as deep understanding or full comprehension[405]. In the legal sense, it is the deep understanding and extraction of Islamic judgments and provisions from Islamic primary and secondary sources[406]. In other words, it refers to the interpretation and reasoning of the broad principles of *sharia* law by Islamic Jurists, scholars and judges which allowed them to regulate new incidents and circumstances that were raised in different times and places[407].

The *Fiqh* is the result of human intellectual activities and therefore it is dependent on and subject to the time, place and culture of the Jurist, scholar, and judge. Usually, the social, economic, and political factors have an impact and play a role on the conclusions of the Jurist, scholar, and judge[408]. The *Fiqh* was established after *Sharia* law and the two concepts are different. *Sharia* is broader than the jurisprudence or *Fiqh*, however, the jurisprudence or *Fiqh* is part of *Sharia* law. *Sharia* law, therefore, refers to the process of extracting provisions from detailed evidence or Islamic sources. This process is called *Fiqh*. *Fiqh* can be divided into two parts, which are based on understanding *"Usul al Fiqh"* and *"Furu al Fiqh"*[409].

The *Usul al Fiqh* or Source of *Sharia* law means *"root or foundation of law"*[410] and it consists of Islamic primary sources such as the *Quran* and *Hadith* and the means and the processes which lead to the understanding of the secondary sources which are *Qiyas*, *Ijtihad* and *Ijma*. *Usul al Fiqh* has not changed for decades since the rise of

---

[405] Shalabi, Muhammad Mustafa, *Usul Al-Fiqh Al-Islami* (Vol 1, Dar al-Nahdah al-Arabiyah, Cairo 1986); Baamir, Abdulrahman Yahya, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (1st edn, Routledge Ltd, London 2016).
[406] Shalabi, Muhammad Mustafa, *Usul al-Fiqh al-Islami* (Vol 1, Dar al-Nahdah al-Arabiyah, Cairo 1986); Lewis, Bernard, *The political Language of Islam* (1st edn, The University of Chicago Press, Chicago, IL 1988).p. 78; Berkey, Jonathan P., *The Formation of Islam: Religion and Society in the Near East, 600-1800* (Cambridge University Press, Cambridge 2003).p. 48; Watt, William Montgomery, *Islam and Christianity Today: A Contribution to Dialogue* (Vol 11, Routledge, London 2013).p. 125; Baamir, Abdulrahman Yahya, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (1st edn, Routledge Ltd, London 2016).
[407] Shalabi, Muhammad Mustafa, *Usul al-Fiqh al-Islami* (Vol 1, Dar al-Nahdah al-Arabiyah, Cairo 1986); Berkey, Jonathan P., *The Formation of Islam: Religion and Society in the Near East, 600-1800* (Cambridge University Press, Cambridge 2003).p. 48.
[408] Motzki, Herald, *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools* (Marion H. Katz(trs), Islamic History and Civilization: Studies and Texts, Vol 41, Bril Publications, Leiden 2002).p. 4.
[409] Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).pp. 45-46.
[410] Baderin, Mashood A., *Islamic Legal Theory* (Islamic law, Vol I, Taylor & Francis Ltd, Oxfordshire 2014).pp. 44-46.

Islamic schools[411] and it explores the four sources of the law the *Quran*, *Hadith*, *Ijma*, and *Qiyas* to provide structures for interpreting the revelation of God. The second branch is *Furu al Fiqh* that means the branches of *Fiqh*. It resulted from application of the methodology of *Usul al Fiqh*. Compared to the previous branch, it is constantly changing and develops from time to time[412].

Generally speaking, *Sharia* law sources are hierarchical in nature and they can be divided into two categories: primary sources such as the *Quran* and *Hadith* and a variety of secondary sources. The secondary sources can be divided into two categories; agreed sources such as *Ijma*, *Qiyas* and *Ijtihad*, and disputed sources such as *Urf* and *Al-Maslah*. These sources were identified by the great Islamic scholar *Al-Shafie*, who established the *Al-Shafie* Islamic school of jurisprudence and they have been agreed upon up to now by most if not all *Sunni* Scholars and Jurists. The primary sources include *Quran* and *Hadith*[413].

3.3.2 The Primary Sources

3.3.2.1 The *Quran*

Quran is the Holy book of Islam. Muslims believe that the *Quran* is the words of God, as revealed to the Prophet Mohammed through God's messenger Jibril. The *Quran* is the primary and most authoritative source of *Sharia* law and provides the fundamental substance of *Sharia* law and it imposes a set of legal, moral, and ethical obligations on Muslims. Further, the *Quran* includes timeless moral and spiritual injunctions in response to the significant socio-political and socio-economic issues that faced the Muslim society during the prophet's time[414].

Scholars have divided the *Quran* into three main categories of legal injunction. The first pertains to the belief of God and the Prophet Mohammed; the second category pertains to ethical conduct; and the third category pertains to the daily activities of

[411] Supra note, pp. 45-47.

[412] Al-Zuhayli, Wahbah, *Al-Wajiz fi Usul Al-Fiqh* (Dar Alfiker Almuaser, Beirut 1999); Al-Zahiri, Abu Muhammad, *Al-Ihkam Fi Usul al- Ahkam* (Vol 1, 1 edn, Dar al-Kutub al-Ilmiyyah, Beirut 2004).

[413] Al-Shafie, Mohmmad ibn Idris, *Al-Shafie's Risala: Treatise on the Foundations of Islamic Jurisprudence* (Majid Kbaddurib (trs), 2nd edn, The Islamic Texts Society, Cambridge 1997).

[414] Esposito, John L., *The Oxford History of Islam* (1st edn, Oxford University Press, Oxford 1999). p. 7; Cook, Michael, *The Koran: A Very Short Introduction* (1st edn, University Press, Oxford 2000).p. 5; Berkey, Jonathan P., *The Formation of Islam: Religion and Society in the Near East, 600-1800* (Cambridge University Press, Cambridge 2003).p. 48.

Muslims[415]. These three categories are divided into sub-categories related to issues that are not covered in the main categories such as business transactions, private and public matters, and domestic and foreign policy. Although the *Quran* provided a set of practical legal and moral rules, the meaning of some rules might be obscure, or sometimes the *Quran* might be silent on a particular matter or issue. Therefore, other sources of *Sharia* law will be explored in this section in order to interpret the meaning or regulate those matters that the *Quran* is silent on or its terms are ambiguous[416]. In another words, the *Quran* plays the role of a detailed constitution that provides key legal, economic, social, and moral principles that all legal systems are built upon and should adhere to. Then it is the role of Islamic scholars to flesh out the legal, social, and economic rules required by society based on the letter and spirit of the main text of the *Quran* in order to address the newly raised issues[417].

3.3.2.2 The *Hadith*

Hadith is one of the primary sources of *Sharia* law and is the second most important source after the *Quran*. *Hadith* are the practices of the Prophet Mohammed, entailing those spoken words, actions, the silent approval, and rulings or judgments passed by the Prophet Mohammed on various matters and occasions. Usually, the *Hadith* explains and interprets text of the *Quran*[418]. As Esposito points out correctly, Prophet Mohammed has over the centuries *"served as the ideal model for Muslim life, providing the pattern that all believers are to emulate"*[419]. *Hadiths* were not written down by the Prophet Mohammed himself or his companions but instead were written several generations after the prophet's death when they were collected, collated and compiled into a group[420]. Some of *Hadiths* that were collected and compiled were questionable and even had contradictory statements with the *Quran* and other *Hadiths*; the authenticity of *Hadiths* became a major field of study in *Sharia* law and called since of *Hadith*[421].

---

[415] Dien, Mawil Izzi, *Islamic Law: From Historical Foundations to Contemporary Practice* (1st edn, Edinburgh Univ. Press, Edinburgh 2004).p. 37.
[416] Ibid.
[417] Supra note 421.
[418] Burton, John, *An Introduction to the Hadith Tradition* (The New Edinburgh Islamic Surveys, 1st edn, Edinburgh University Press, Edinburgh 1994).p. 19.
[419] Esposito, John L., *Islam: The Straight Path* (5th edn, Oxford University Press, NY 2016).p. 13.
[420] Siddiqi, Muḥammad Zubair, *Hadith Literature: Its Origin, Development & Special Features* (2nd Revised edn, Islamic Texts Society, Cambridge 1996).p. 125.
[421] Supra note 415.

Islamic jurists reached consensus that every *Hadith* has two essential parts. The first part is "*Sand*" which comprises a list of reporters that handed down accounts of the actions, sayings, teachings, decisions, overt or tacit views of the Prophet Mohammed or his immediate companions[422], for example:

> *"It has been related to me by A on the authority of B on the authority of C on the authority of D that Prophet Muḥammad said […]"*[423].

The second essential part of *Hadith* is the actual content or text "*Maten*" that states what the Prophet Mohammed had reportedly said or done[424]. The authenticity of *Hadiths* usually depends largely on the reliability of the chain of reporters transmitting the *Hadith* from the Prophet Mohammed, the *Sand.* The issue of *Sand* raised controversy amongst the scholars about the extent to which the reported traditions could be trusted and accepted. Generally, there is no objective measurement to evaluate the credibility of the reports. It is a merely subjective view of the scholar or personal view on the reliability and credibility of the reporter transmitting the *Hadith*. Another significant factor leading to the doubt in methodology of determining the authenticity and reliability of reporters, was the fact that *Hadiths* were collected and recorded in the second and third centuries of Islam. Muslim Scholars were concerned solely with the validity of the chain of transmission and not with the content[425].

However, the focus of the scholar was to determine the authenticity of *Hadith* from a reporting or *Sand* perspective, but the content of *Hadith* was not observed properly and sufficiently by scholars. In this context, Goldziher, one of the most prominent critics of the *Hadith*, argued that

> *"each point of view, each party, each proponent of a doctrine gave the form of Hadith to his theses, and that consequently the most contradictory tenets had come to wear the garb of such documentation. There is no school in the areas of ritual, theology, or jurisprudence,*

[422] Supra note, p. 19.
[423] Supra note, p. 19.
[424] Graham, William A., *Divine Word and Prophetic Word in Early Islam: a Reconsideration of the Sources, with Special Reference to the Divine Saying or Ḥadith Qudsi* (Religion and Society, Walter De Gruyter, Berlin/Boston 1977).
[425] Al-Azami, Muhammad Muṣṭafa, *On Schacht's origins of Muhammadan Jurisprudence* (Islamic Texts Society, King Saud University 2004).p. 2; Siddiqi, Muḥammad Zubair, *Hadith Literature: Its Origin, Development & Special Features* (2nd Revised edn Islamic Texts Soc, Cambridge 1996).p. 125.

there is not even any party to political contention that would lack a Hadith or a whole family of Hadith in its favour, exhibiting all the external signs of correct transmission"[426]*.*

However, the *Sunni* Muslim School depends largely on record of *Hadith* by two credible sources such as Book Al-Bukhari and Book Muslim Ibn Al-Hajjaj[427].

3.3.3 The Secondary Sources

Despite the absence of continuous prophetic guidance, Muslim scholars were able to develop new tools to meet the demands of a rapidly changing society. These tools are known as the non-revealed sources or the secondary source of *Sharia* law[428]. Islamic scholars reached a consensus that secondary norms must be derived from the primary sources, being the *Quran* and *Hadith*. The secondary source of *Sharia* law are the method of analogical reasoning or *Qiyas*, the general consensus of scholars on a moot point of law or *Ijma*, and the application of critical personal reasoning in the interpretation of *Sharia* law, *Ijtihad*[429]. These sources are crucial in providing solutions and answers to emerging issues and are crucial in providing answers to questions of law when the primary sources are silent or vague. Although Islamic law owes its origins to the primary sources, the secondary sources have provided a degree of flexibility in the development of *Sharia* law and in the Islamic system in general and have helped the system to thrive and flourish[430]. The norms springing from the primary sources cannot be changed but they can be interpreted using the secondary sources. The following section will examine these sources[431].

---

[426] Goldziher, Ignac, *Introduction to Islamic Theology and Law* (1st edn, Princeton University Press, Princeton, N.J 1981).p. 39.

[427] An-Na'im, Abdullahi Ahmed, 'The Rights of Women and International law in the Muslim Context' (1987) 9(3) Whittier Law Review 491; Mahmoud, Mahgoub El-Tigani, *Muhammad - the Hadith Jurisprudence: The Development of Islamic Law After the Qur'an* (1st edn, Edwin Mellen Press, London 2018).

[428] Kamali, Mohammad Hashim, 'Methodological Issues in Islamic Jurisprudence' (1996) 11(1) Arab Law Quarterly 3.p. 3.

[429] Ibid.

[430] Jackson, Sherman A., 'Jihad and the Modern World' (2002) 7(1) Journal of Islamic Law and Culture 9; Ayoub, Mahmoud (ed), *Contemporary Approaches to the Quran and Sunnah* (International Institute of Islamic Thought, VA 2012).

[431] Makdisi, John, 'Legal Logic and Equity in Islamic Law' (1985) 33(1) The American Journal of Comparative Law 63.pp. 63-78; Burton, John, The Sources of Islamic Law: Islamic Theories of Abrogation (Edinburgh University Press, Edinburgh 2003); Levi, Scott Cameron and Ron Sela (eds), *Islamic Central Asia: An Anthology of Historical Sources* (Indiana University Press, Bloomington 2010); Renard, John (ed), *Islamic Theological Themes: A Primary Source Reader* (1st edn, Univirsity of California Press, California,Oakland 2014).

3.3.3.1 *Qiyas* (Analogy)

Qiyas is application of a rule or law on the analogy of another rule or law if the bases of the two laws are the same. It is analogical assimilation and application of a principle established in one case to subsequent cases involving similar issues or dispute. Therefore, *Qiyas* does not mean to bring a new ruling, but it is about the implementation of an existing ruling or precedent to new issues or matters. It is a tool used by jurists to compare cases and achieve a ruling by resorting to analogical methodology[432], in issues that are not covered by the *Quran* or *Hadith* without relying on an unsystematic opinion or *Ray*[433]*.* Accordingly, the Scholar extends the ruling of *Quran* or *Hadith* to a new problem provided that the precedent (*Asl*) and the new problem share the same Cause (*Ila*)[434].

For example, alcoholic beverages are prohibited as it intoxicates the mind (*Ila*). Therefore, any substance, such as narcotics, that intoxicates the mind, is also prohibited by the use of analogy. Therefore, an explicit mention or an exhaustative list of every substance that is forbidden is not necessary. Instead, similar principles are applied to forbid any substance that would have the same intoxicating effect as alcohol[435].

Another example is the cause of the prohibition against usury or *Riba* in the *Quran* and Hadith is that it is unjust enrichment. Therefore, any modern financial transactions that did not exist in the pre-Islamic era, but which has unjust enrichment, has the same cause. Accordingly, the prohibition will be extended to this modern financial

---

[432] Aghnides, Nicolas Prodromou, *Mohammedan Theories of Finance With an Introduction to Mohammedan Law and a Bibliography* (1st (2005 reprint) edn Columbia Univ, New York 1916).p. 71; Dien, Mawil Izzi, *Islamic Law: From Historical Foundations to Contemporary Practice* (1st edn, Edinburgh Univ. Press, Edinburgh 2004).p. 37; Farahat, Omar, *The Foundation of Norms in Islamic Jurisprudence and Theology* (1st edn, Cambridge University Press, New York 2019).

[433] Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).pp.44-46; Calder, Norman, *Islamic Jurisprudence in the Classical Era* (Colin Imber (ed), Cambridge University Press, NY 2010).

[434] Aghnides, Nicolas Prodromou, *Mohammedan Theories of Finance with an Introduction to Mohammedan Law and a Bibliography* (1st (2005 reprint) edn Columbia Univ, New York 1916).p.71; Aldohni, Abdul Karim, *The Legal and Regulatory Aspects of Islamic Banking: A Comparative Look at the United Kingdom and Malaysia* (1st edn, Routledge, London 2011); Baamir, Abdulrahman Yahya, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (1st edn, Routledge Ltd, London 2016).p. 24.

[435] Dien, Mawil Izzi, *Islamic Law: From Historical Foundations to Contemporary Practice* (1st edn, Edinburgh Univ. Press, Edinburgh 2004).p. 37; Baamir, Abdulrahman Yahya, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (1st edn, Routledge Ltd, London 2016).p. 24; Farahat, Omar, *The Foundation of Norms in Islamic Jurisprudence and Theology* (1st edn Cambridge University Press, New York 2019).

transaction due to the existence of unjust enrichment. Further, it should be noted that reasoning through *Qiyas* was wide enough to allow for certain development in the law and permitted restrictions and extensions of pre-existing rules by all its techniques.

3.3.3.2 Juristic Consensus or *Ijma*

The concept of juristic consensus or *Ijma* as an authoritative, binding source of Islamic law was originally conceived through the exercise of *Ijtihad* undertaken by the Prophet Mohammed's companions[436]. *Ijma* relates to the consensus of qualified Islamic Scholars in a particular time on specific points of Islamic law. The scholar Kamali defined it as, "*the unanimous agreement of the mujtahidun [scholars] of the Muslim community on any period following the demise of the Prophet Mohammed on any matter*"[437].

Ijma should be done by qualified Muslim scholars or jurists in a specific period of time. Those scholars are called scholars who are qualified to undertake *Ijtihad*. *Ijma* of non-qualified scholars is not considered as *Ijtihad*[438]. However, scholars such as Imam Al-Ghazali, and al-Amidi concur that *Ijma* is the agreement of the entire Muslim community in certain points of time or period, not only the qualified scholars during that specific period of time[439]. This comes into existence at certain points where the *Quran* and *Hadith* do not give specific guidance, then the scholars come into certain agreement or consensus on the legal issue[440].

Ijma enabled jurists to formulate widely shared principles in *Sharia* law and helped in standardizing the legal position on issues that faced the Muslim society[441]. The

[436] Waardenburg, Jacques, 'The Early Period: 610–650 ' in Waardenburg, Jacques (ed), *Muslim Perceptions of Other Religions: A Historical Survey* (Oxford University Press, Oxford 1999).p. 4; Weiss, Bernard G., *The spirit of Islamic Law* (University of Georgia Press, Athens 2006).p. 86.
[437] Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence* (3rd revised edn, Islamic Texts Society, Cambridge 2011).
[438] Al-Zuhayli, Wahbah, *Al-Wajiz fi Usul al-Fiqh* (Dar Alfiker Almuaser, Beirut 1999); Al-Zahiri, Abu Muhammad, *Al-Ihkam fi Usul Al- Ahkam* (Vol 1, 1 edn, Dar al-Kutub al-Ilmiyyah, Beirut 2004).
[439] Hallaq, Wael B., 'On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad' (1986) 63 Studia Islamica 129; Amanullah, Muhammad, 'Possibility of Conducting Ijma' in the Contemporary World' (2010) 6 Journal of Islamic Law 109.p. 110.
[440] Abdal-Haqq, Irshad, 'Islamic Law: An Overview of Its Origin and Elements' (1996) 1(1) The Journal of Islamic Law 1; AL-Muhairi, Butti Sultan Ali, 'The Position of Shari'a Within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause Concerning Shari'a' (1996) 11(3) Arab Law Quarterly 219.p. 228.
[441] Waardenburg, Jacques, 'The Early Period: 610–650 ' in Waardenburg, Jacques (ed), *Muslim Perceptions of Other Religions: A Historical Survey* (Oxford University Press, Oxford 1999).p. 4; Weiss, Bernard G., *The spirit of Islamic Law* (University of Georgia Press, Athens 2006).p. 86; Kamali,

theological basis of *Ijma* is not found in the *Quran*, it is found in tradition attributed to the Prophet: *"My community will not agree on error"*[442]. *Ijma* involved lengthy debates and arguments among credible Islamic scholars over legal, moral, and commercial issues or matters. When such scholars have reached an agreement on the issue under examination, *Ijma* will be declared to have transpired, settling the matter until and unless it is revoked by further *Ijma* is declared[443]. The norm created through *Ijma* is considered binding under *Sharia* law.

Furthermore, it should be noted that *Ijma* is ranked higher than *Qiyas* in the order of *Fiqh* methodology. In addition, to involve in *Ijma* includes a matter and the scholars must have a deep understanding of the *Quran* and the *Hadith* and their related sciences, preferably the Arabic language[444].

3.3.3.3 Ijtihad

Islam as a faith imposes a duty on every Muslim to study and learn everything that is important for their spiritual development and the material wellbeing of the Muslim community. However, this obligation is of the category, which is known as *"wajib kifai"*, means that it is an obligation on every member of the Muslim society as long as it is unfulfilled by some individuals. It is no longer obligation if it has been fulfilled by some other individual[445]. Therefore, *Ijtihad* is considered as *Wajib Kifai* under *Sharia* law.

The term *Ijtihad* in the Arabic language means hardship and difficulty, self-exertion, and human activities[446]. In the legal sense, it is defined as *"the process of making a legal decision by independent interpretation and examination of the primary source of*

Mohammad Hashim, *Principles of Islamic Jurisprudence* (3rd revised edn, Islamic Texts Society, Cambridge 2011).

[442] Bello, Iysa A., *The Medieval Islamic Controversy Between Philosophy and Orthodoxy: Ijma and Tawil in the Conflict between Al-Ghazali and Ibn Rushd* (Islamic Philosophy and Theology, Brill Academic Pubishing, Leiden 1989).p. 35.

[443] Waardenburg, Jacques, 'The Early Period: 610–650 ' in Waardenburg, Jacques (ed), *Muslim Perceptions of Other Religions: A Historical Survey* (Oxford University Press, Oxford 1999).p. 4; Weiss, Bernard G., *The spirit of Islamic Law* (University of Georgia Press, Athens 2006).p. 86.

[443] Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence* (3rd revised edn, Islamic Texts Society, Cambridge 2011).

[444] An-Na'im, Abdullahi Ahmed, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Contemporary issues in the Middle East, Revised edn, Syracuse University Press, NY 1996).p. 27.

[445] AL-Muhairi, Butti Sultan Butti Ali, 'Islamisation and Modernisation Within the UAE Penal Law: Shari'a in the Pre-Modern Period' (1995) 10(4) Arab Law Quarterly 287; Weiss, Bernard G., *The Spirit of Islamic Law* (University of Georgia Press, Athens 2006); Turner, Colin, *Islam: The Basics* (2nd edn Routledge Ltd, London 2011).p. 72.

[446] Manzur, Muhammad Ibn, *Lisanul Arab* (3rd edn, Dar al-Kutub al-Ilmiya, Bairut 2000).p. 133.

Sharia law, Quran, and Hadith"[447]. To note further, the result of *Ijtihad* is the formulation of a new legal rule through the interpretation of the *Sharia* primary texts and the application of the *Qiyas*. As a result of the interpretation of the *Sharia* primary texts, a Muslim scholar can look through the reason for an expressed legal rule, and by analogical deduction, he extends a given rule to cases of a similar nature[448]. Reportedly, the permissibility of deducing secondary rulings through critical thinking had been encouraged by the Prophet Mohammed when the Prophet has appointed his companion Muadh Ibn Jabal as a judge in Yemen, he questioned Muadh on the methodology he will use to extract solutions from primarily source. The Prophet asked Muadh,

> *"Through which will you judge?,*
> *He replied through the book of God*
> *Prophet asked, and if you find nothing in the Book of God?*
> *Muadh replied, I shall judge according to the tradition of God's Messenger,*
> *Prophet then asked Muadh, and if you find nothing in the Messenger's tradition?,*
> *Muadh replied, I shall not fail to make an effort Ijtihad to reach an opinion.*
> *It is reported that the answer pleased the Prophet"* [449].

Therefore, *Ijtihad* is often described as independent or critical reasoning because its use requires analytical and intellectual thinking, and not the blind emulation or *Taqlid* of past judgments of authoritative jurists. Therefore, *Ijtihad* may be considered as the most significant source of *Sharia* law, after the *Quran* and *Hadith*[450]. It should be noted

---

[447] Turner, Colin, *Islam: The Basics* (2nd edn, Routledge Ltd, London 2011).p. 24.
[448] AL-Muhairi, Butti Sultan Butti Ali, 'Islamisation and Modernisation within the UAE Penal Law: Shari'a in the Pre-Modern Period' (1995) 10(4) Arab Law Quarterly 287; An-Na'im, Abdullahi Ahmed, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Contemporary issues in the Middle East, Revised edn, Syracuse University Press, NY 1996).p. 27; Ramadan, Tariq, *The Messenger: The Meanings of the Life of Muhammad* (Penguin edn Allen Lane, London 2007).p.199.
[449] Cited from, Ramadan, Tariq, *The Messenger: The Meanings of the Life of Muhammad* (Penguin edn Allen Lane, London 2007).p. 199.
[450] An-Na'im, Abdullahi Ahmed, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Contemporary issues in the Middle East, Revised edn, Syracuse University Press, NY 1996).p. 27; Bernard G. Weiss, *The Spirit of Islamic Law* (University of Georgia Press, Athens 2006).p. 86; Ramadan, Tariq, *The Messenger: The Meanings of the Life of Muhammad* (Penguin edn Allen Lane, London 2007).p. 199.

that for the *Ijtihad* to be accepted, it is important that the jurist fully to adheres to the letter of the texts of the primarily sources and to extend to which consonance is achieved between the primary source of *Sharia* and the secondary source. Kamali pointed out that, *"since Ijtihad derives its validity from divine revelation, its propriety is measured by its harmony with the Quran and the Hadith"*[451].

From the ninth century, independent *Ijtihad* and *Ijma* based doctrines led to the growth of a sizeable *Sharia* law corpus of rulings and precedents. From this point onwards most *Sunni* Islamic scholars argued that all key questions of law had been resolved by major schools, and hence personal *Ijtihad* is no longer needed[452]. Therefore, the future role of the scholars needed to be confined to the clarification of the existing law or doctrine and expounding them because all solutions and rulings that have already been laid down by scholars before the ninth century. Simply put, the task of the new generation of scholar is to emulate *Taqlid* or to follow the existent precedents or principles[453]. Imam Al-Ghazali explains *Taqlid* as acting upon the word of another without proof or evidence and without knowledge of the authority for such opinion[454]. In other words, it means accepting the opinion or the decision of the scholar without asking him what the basis of his opinion is in the *Quran*, *Hadith*, and *Ijma*[455]. Thus, *Taqlid* does not examine the scriptural basis of the scholar's opinion or the decision in

[451] Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence* (3rd revised edn, Islamic Texts Society, Cambridge 2011).

[452] Hallaq, Wael B., 'On the Origins of the Controversy about the Existence of Mujtahids and the Gate of *Ijtihad*' (1986) 63 Studia Islamica 129.p.136; Lewis, Bernard, *The Middle East: 2000 Years of History from the Rise of Christianity to the Present Day* (4th edn, Phoenix Press, Phoenix 2004).p. 225.

[453] Makdisi, John, 'Legal Logic and Equity in Islamic Law' (1985) 33(1) The American Journal of Comparative Law 63; Bennoune, Karima, 'As-Salmu Alaykum? Humanitarian Law in Islamic Jurisprudence' (1994) 15(2) Michigan Journal of International Law 605.p. 613; Khan, Hamid M., 'Nothing is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law' (2002) 24(1) Michigan Journal of International Law 273.p. 295; Lewis, Bernard and Buntzie Ellis Churchill, *Islam: The Religion and the People* (1st edn, Pearson Education, Publishing as Prentice HallWharton School Publishing, NJ 2009).p. 29; Abdelaal, Mohamed A., 'Taqlid V. Ijtihad: the Rise of Taqlid as the Secondary Judicial Approach in Islamic Jurisprudence' (2012) 14 The Journal Jurisprudence 151; Alsaif, Bander, 'Two Sides of the Saudi Public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards' (PhD Thesis, University of New South Wales 2018).

[454] Al-Ghazali, Abu Hamid Muhammad ibn Muhammad, *Al-Mustasfa Min Ilm Usoul Alfiqh (*1st edn, Hamza Bin Zihair (ed), Al-Madina Al-Munwara Printing & Publishing Co, Beirut 2008).p. 387.

[455] An-Na'im, Abdullahi Ahmed, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Contemporary issues in the Middle East, Revised edn, Syracuse University Prss, NY 1996).p. 27; Ramadan, Tariq, *The Messenger: The Meanings of the Life of Muhammad* (Penguin edn Allen Lane, London 2007).p. 199.

detail nor does it examine the reasoning by which the judgment was formed[456]. Moreover, it should be noted that *Taqlid* is widely accepted by Islamic jurists[457].

Nevertheless, it should be noted that *Ijtihad* and *Ijma* are intertwined. *Ijtihad* could provoke conflicting views over a moot point, but *Ijma* could produce an authoritative response that has the advantage of achieving definitive knowledge unless it is revoked by a new *Ijma*. This relationship has been examined by Esposito who viewed this relation of the relationship between *Ijtihad* and *Ijma* as an on-going process, moving from individual opinion to a community opinion[458].

3.3.4 Disputed Sources

There is a consensus among scholars regarding the previous five sources of *Fiqh*. However, there are sources which have not been agreed upon and are disputed by scholars such as, *Istihsan*, *Istidlal*, *Istishab* and *Urf* and *Al-Maslah*[459]. They are often based on the discretion of a scholar or judge and these sources are open to wider interpretation and application because these terms are subjective and not objective. The application of these sources may differ from place to place and depend on the particular scholar or judge's cultural values and norms[460]. However, these disputed sources are used by scholars and judges in cases where there is no clear evidence[461]. Scholars of different schools of *Sharia* Jurisprudence may give different names to the disputed sources and they may give different applications.

Furthermore, *Istihsan* decisions are based on the personal opinion of a judge to achieve justice or equity[462]. Istislah means the desire to get a good or beneficial result

---

[456] Nyazee, Imran Ahsan, 'The Scope of Taqlid in Islamic Law' (1983) 22(4) Islamic Studies 1.pp.3-6.
[457] An-Na'im, Abdullahi Ahmed, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Contemporary issues in the Middle East, Revised edn, Syracuse University Press, NY 1996).p. 27; Ramadan, Tariq, *The Messenger: The Meanings of the Life of Muhammad* (Penguin edn Allen Lane, London 2007).p. 199.
[458] Esposito, John L. and Natana J. DeLong-Bas, *Women in Muslim Family law* (2nd edn, Syracuse University Press, Syracuse, NY 2004).p. 148; Ramadan, Tariq, *The Messenger: The Meanings of the Life of Muhammad* (Penguin edn Allen Lane, London 2007).p. 199.
[459] Ibid.
[460] Supra note 465.
[461] Fadel, Hossam E., 'The Islamic Viewpoint on New Assisted Reproductive Technologies' (2002) 30(1) The Fordham Urban Law Journal 147.pp. 148-150; Ashraf, Shahid, *Judicial Culture in Islam* (Encyclopaedia of Islamic Culture and Civilization, Vol 21, Anmol Publications, New Delh 2006).pp. 97–199.
[462] Kayadibi, Saim, *Istihsan: The Doctrine of Juristic Preference in Islamic Law* (1st edn, Islamic Book Trust, Kuala Lumpur 2010).pp. 12–13.

and outcome in order to avoid a harsh judgment or consequence[463]. *Istidlal* or *Istishab* are pronouncements on public policy based on legal discretion. *Urf* and *Al-Maslah* are in line with some of the principles of the modern legal concept and they are commonly used by the UAE Courts, and therefore it is important to examine these two concepts in more details in the next section.

3.3.4.1 *Urf* or Local Custom

Urf can be defined as the standard in which common people maintain order, social conduct, and local business[464]. *Sharia* jurisprudence recognises *Urf* as an essential source of law when such practices do not conflict with the text and spirit of the *Quran* and *Hadith*. When a judge or scholar is unable to find an applicable text from the *Quran* or *Hadith* or cannot find an *Ijma* of scholars or an accurate *Qiyas* on a case, he will, then, turn to the local *Urf* to decide the case[465]. The local customs tend to vary and therefore, Islamic scholars have instituted different guidelines and standards on valid custom and how to use *Urf* to decide the case[466].

3.3.4.2 *Al-Maslah*

When a novel situation occurs and there is no definitive text of *Quran*, *Hadith*, *Qiyas*, *Ijma*, or *Urf*, scholars can refer to *Al-Maslah*, provided that it does not conflict with the text and spirit of the *Quran* and *Hadith*. It is similar to equity in some respects, but it is much broader in scope than equity because it extends beyond the parties to a given conflict to the common good of humanity[467]. The Scholar Al-Shatibi pointed out that *Al-Maslah* is *"the only overriding objective of the Shari'a which encompasses all measures beneficial to people"*[468]. Furthermore, Al-Ghazali defined *Al-Maslah* *"considerations which secure a benefit or prevent harm, but which are, simultaneously,*

---

[463] Boroujerdi, Mehzrad (ed), *Mirror For the Muslim Prince: Islam and the Theory of Statecraft* (Modern intellectual and political history of the Middle East, 1st edn Syracuse University Press, NY 2013).p. 16.
[464] Supra note 406.
[465] Heyneman, Stephen P. (ed), *Islam and Social Policy* (1st edn, Vanderbilt University Press, Nashville 2004).p. 102.
[466] Brand, Joseph L., 'Aspects of Saudi Arabian Law and Practice' (1986) 9(1) Boston College International and Comparative Law Review 1; Esposito, John L., *The Oxford History of Islam* (1st edn, Oxford University Press, Oxford 1999).p. 195; Shabana, Ayman, *Custom in Islamic Law and Legal Theory: The Development of the Concepts of `Urf and `Adah in the Islamic Legal Tradition* (Palgrave Macmillan, NY 2011); Ghani, Hafiz Abdul, 'Conditions of a Valid Custom in Islamic and Common Laws' (2012) 3 International Journal of Business and Social Science 306.
[467] Supra note 473.
[468] Supra note, p. 602.

harmonious with the general objectives of the Sharia"[469]. These objectives, according to Al-Ghazali, consist of protecting the five essential principles specifically religion, life, intellect, lineage, and Property. Any measure that secures these values falls within the scope of *Al-Maslah*, and anything that conflicts with them is considered as evil and preventing this is also for the public welfare or *Al-Maslah*[470]. In other words. *Al-Maslah* aims to promote the social good and the avoidance of harm and corruption. Accordingly, *Al-Maslah* allows a scholar to refer to his personal analysis and reasoning in order to introduce juridical decisions by considering the historical, social, economic, and geographical consideration and benefits. For example, Omar Ibn al-Khattab, the second Khalifa in Islam, used *Al-Maslah* to conclude that it is important for the Muslim state to establish prison to detain criminals, although the concept of prison for criminals did not exist during the period of the Prophet Mohammed[471].

We can conclude that it can be seen that there are multiple sources of Islamic *Sharia* law and whilst the *Quran* and the *Hadith* form the primary base for *Sharia* law, there are multiple secondary and disputed sources that can be drawn upon to assist, where there is ambiguity or there is no previous *Sharia* law ruling. These sources can offer a degree of flexibility that is necessary for the legal system, but it can also establish ambiguity, which may lead to contradicting rulings by judges. Furthermore, one of the unique features of *Sharia* is that it is *"an extreme case of jurists law; it was created and developed by private specialists; legal science, and not the state, plays the part of a legislator, and scholarly handbooks have the force of law. Islamic law is therefore neither common nor civil law but is juristic law"*[472].

3.4 Equation of *Sharia* Law to Public Policy

In order to properly understand the scope of public policy and equation of *Sharia* to public policy under the UAE laws, reasonable consideration must be given to a number of provisions such as Article 2, 3 and 27 of the UAE Civil Code. Article 2 of UAE Civil

---

469 Al-Ghazali, Abu Hamid Muhammad ibn Muhammad, *Al-Mustasfa Min Ilm Usoul Alfiqh (*1st edn, Hamza Bin Zihair (ed), Al-Madina Al-Munwara Printing & Publishing Co, Beirut 2008).
470 Ibid. See also Kutty, Faisal, 'The Shari'a factor in International Commercial Arbitration' (2006) 28(3) Loyola of Los Angeles International & Comparative Law Review 565.p. 602.
471 Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence* (3rd revised edn, Islamic Texts Society, Cambridge 2011).pp. 291-295; Dien, Mawil Izzi, *Islamic law: From Historical Foundations to Contemporary Practice* (1st edn, Edinburgh Univ. Press, Edinburgh 2004); Shabana, Ayman, *Custom in Islamic law and Legal Theory: The Development of the Concepts of Urf and Adah in the Islamic Legal Tradition* (Palgrave Macmillan, NY 2011).p. 49.
472 Schacht, Joseph, *An Introduction to Islamic Law* (Oxford: Clarendon Press, Oxford 1964). p.5.

Code stipulates that the *"rules and principles of Islamic Jurisprudence (Fiqh) shall be relied upon in the understanding, construction and interpretation"*[473]. Article 3 of the UAE Civil Cod sets out a broad scope of UAE public policy so that it

> *"include[s] matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to systems of government, freedom of trade, the circulation of wealth, rules of individuals ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Sharia"*[474].

Article 27 of the UAE Civil Code stipulates that

> *"the provisions of the law indicated by the foregoing provisions may not be applied in case they are contrary to the Islamic Sharia, public policy or morals in the United Arab Emirates"*[475].

A striking feature of the definition of public policy is that it is wide enough to encompass almost anything that goes into *"trading in wealth"* and *"foundations on which the society is based"*[476]. It is clear that *Sharia* constitutes UAE public policy. Accordingly, a foreign arbitral award would not be enforceable if it is contrary to *Sharia* law. Compared with the grounds for refusal of recognition and enforcement of awards listed in Article V of the NYC, the UAE puts an extra requirement on the NYC 1958; the requirement for compatibility of all foreign arbitral award seeking to be enforced in UAE with fundamental principle of *Sharia* law. However, neither Article 3 of UAE Civil Code nor the UAE Civil Code or the UAE constitution specifies these *Sharia* principles that are considered as a bar for the enforcement of a foreign arbitral award. This means that the decision to accept or refuse the enforcement of a foreign arbitral award is based on the judge's interpretation of what constitutes a principle of *Sharia* and there is no set of guidelines or set of procedural rules to be followed by the judge.

In practice, this means that the judicial review of a foreign arbitral award by the competent court of the UAE will lead to an indirect application of *Sharia* law, even if

[473] Article 2 of the UAE Civil Code.
[474] Article 3 of the UAE Civil Code.
[475] Article 27 of the UAE Civil Code.
[476] Article 3 of the UAE Civil Code.

the merits of the dispute is governed by a law other than *Sharia*, when such an award is contrary to *Sharia*. Furthermore, in cases where there is a conflict between principles of Islamic *Sharia* law and public policy, it is entirely possible that two different judges may interpret the same case in two different ways – one in favour of *Sharia* and the other in favour of public policy and come to two different conclusions.

The ruling of Abu Dhabi Court of First Instance No. 2847/2013[477] explained article 3 of UAE Civil Code and pointed out the legislator's intent is to associate and link the concept of the UAE public policy with principles of *Sharia* law during the enforcement of an arbitral award. The ruling stated that:

> *"It appears from the wording of this article[3] and from its place at the beginning of the Civil Transaction Law that the legislator wanted to link the idea of public order[478] to the provisions of the Islamic Sharia. In fact, they required that the provisions observe the principal and fundamental basis of the Islamic Sharia and gave some examples of the circulation of wealth and individual ownership laws amongst others"[479].*

In the Dubai Court of Cassation's ruling number 51/2008, the court stated that an arbitral award that entitles one of the parties to perform any unacceptable act under *Sharia* law or apply a foreign law which contradicts *Sharia* law will be set aside and the court will not enforce the parts of the award or the foreign judgment contradicting *Sharia* law. The Court held that

> *"…It shall not be permissible to apply foreign law [and arbitral award] whenever its provisions are inconsistent with Islamic law, public order or morals in the State"*[480].

Additionally, the court in another ruling in the Dubai Cassation Court, in ruling number 56/2013 and 58/2013, confirmed that *Sharia* law is part of UAE public policy and it is fair restraint and prudence for UAE judges to reject the application of foreign law if the

---

[477] Ruling of Abu Dhabi Court of First Instance No. 2847/2013 issued on 12 February 2014, cited in International Journal of Arab Arbitration (Volume 6, Issue 4, 2014).pp. 49 – 56.
[478] In the UAE, the term "Public Order" is synonymous with what Western jurisdictions refer to as "Public Policy".
[479] Ruling of Abu Dhabi Court of First Instance No. 2847/2013 issued on 12 February 2014, cited in International Journal of Arab Arbitration (Volume 6, Issue 4, 2014).pp. 49 – 56.
[480] Ruling of Dubai Court of Cassation No. 51/2008 (Personal Status) issued on 21 October 2008.

foreign law violates of the UAE's fundamental social, political, economic, religious values and/or *Sharia* law. From the courts perspective, the violation of *Sharia* law is a sufficient and serious threat to the deep-rooted traditions and norms prevailing in the UAE. The ruling stipulated that:

> *"The provisions of Articles 3 and 27 of the Civil Transactions Law indicate that the UAE legislator has obliged the national judge to apply the provisions of the foreign law as applied by national attribution rules, regardless of the source of this law, unless it is contrary to the provisions of Sharia provisions, public order or morals"*[481].

In Cassation Case No, 146/2008[482] the Dubai Court of Cassation illustrated the meaning of the principles of *Sharia* law when the court pointed out that the prohibition of *Riba* in Islamic *Sharia* falls within the scope of Article 3[483] and Article 27[484] of the UAE Civil Code and, therefore, *Riba* is considered as a part of the *Sharia* that invoke UAE public policy under Article 3 of UAE Civil Code. The Court stated that:

> *"…. any arbitral award that awards Riba [interest] should be set aside by the courts due to violation of Sharia law… public order or morals in the UAE, including the legally prohibited Riba are rules of public order to be enforced by the Court when considering the ratification or nullification of the arbitral award"*[485].

In *AA Commercial Co v S Motors Ltd Co and D Industrial Ltd Co*, Abu-Dhabi Court of Appeal[486] held that applying a foreign law or international treaty does not automatically violate UAE public policy and that there should be tangible evidence that the foreign law violates the principles of *Sharia* law. Further, the court's ruling presented a very important understanding of the nature of *Sharia* law when the Court stated that *Sharia* law is not static in nature, *"Sharia has the capacity to accommodate the arbitration*

---

[481] Ruling of Dubai Court of Cassation No. 56/2013 and 58/2013 issued on 8 October 2013.

[482] Ruling of Dubai Court of Cassation No. 146/2008 issued on 9 November 2008.

[483] Article 3 of the UAE Civil Code.

[484] Article 27 of of the UAE Civil Code.

[485] Ruling of Dubai Court of Cassation No. 146/2008 issued on 9 Novebmer 2008; also, see ruling of the Abu Dhabi Court of Cassation No. 209/Judicial Year 15 issued on 22 January 1995, cited by Blanke, Gordon, *Commentary on the UAE Arbitration Chapter* (Law Commentaries, 1st edn, Sweet & Maxwell/Thompson Reuters, London 2017).p. 92.

[486] *AA Commercial Co v S Motors Ltd Co and D Industrial Ltd Co*, ruling of Abu-Dhabi Court of Appeal No. 10007/1981 unpublished; also, in *International Steel & Contractors Co V. G. Steel Industry Co*, ruling of Federal Supreme Court No. 138/10.

rules, because of its ability to develop to satisfy the needs of the developing society"[487]. This ruling shows that *Sharia* can co-exist with other legal systems, in conditions where such opinions are not in conflict with *Sharia*. Therefore, *Sharia* is dynamic and flexible in nature and in practice, but by definition *Sharia* law principles must be upheld in the law's interpretation and application. This means that there is broad scope for interpretation between these the two poles of flexibility and adherence to *Sharia* law[488].

Hence, we can infer from article 3 and 27 of the UAE Civil Code and various court rulings that the courts are required to confirm that a foreign arbitral award does not conflict with *Sharia* law and public policy and the violation of fundamental principle of *Sharia* constitutes a ground for refusing the recognition of a foreign arbitral award.

3.5 *Sharia* Mandatory Rules and Public Policy

Having seen that the fundamental principles of the Islamic *Sharia* law is a pillar in the UAE's public policy, the key question is whether all mandatory rules of *Sharia* law constitute public policy in the context of the enforcement of foreign awards under the New York Convention. As regards to precise definition of *Sharia* law's mandatory rules that constitute public policy, it seems that there is no precise definition[489]. However, there are some attempts to give a general explanation of *Sharia* public policy during enforcement of foreign arbitral award by some scholars such as El-Ahdab. El-Ahdab pointed out that, in Muslim Law, the concept of public policy is based on the respect of the general spirit of the Shari'a and its sources (the *Quran* and the *Hadith*, etc.) and on the principle that *"individuals must respect their clauses, unless they forbid what is authorised and authorise what is forbidden"*[490].

El-Ahdab further argued in this context that the Prophet Mohammed says: *"Muslims have to abide by their conditions except those that make the unlawful lawful or the lawful unlawful"*[491]. Additionally, Imam Ibn Taymiyya explained that all conditions of

[487] Supra note 486.
[488] Supra note 204.
[489] Al-Tuwaigri, Waleed Suulaiman A., 'Ground for Refusal of Enforcement of Foreign Arbitration awards under The New York Convention of 1958: With Special Reference to the Kingdom of Saudi Arabia' (PhD Thesis, University of Glasgow 2006).p. 296.
[490] El-Ahdab, Abdul Hamid, 'General Introduction on Arbitration in Arab Countries' in Sanders, Pieter and Albert Jan van den Berg (eds), *International Handbook on Commercial Arbitration* (Suppl. II, edn Kluwer, The Hague 1998).p. 12.
[491] Ibid. See also Al-Haythami, Nur al-Din, *Majmau Al-Zawaid wa Manba Al-Fawaid* (Vol 4, 1st edn, Dar Al-Kutub Al-Elmia, Beirut 2001).p. 205.

contract are valid and permitted, except those forbidden by a text of *Quran* or *Hadith* or by *Qiyas*[492].

The researcher disagrees with El-Ahdab's definition of *Sharia* public policy for various reasons. Firstly, the definition suggests a very wide scope for *Sharia* public policy by including every rule in *Sharia* law as a part of *Sharia* law's mandatory rules that constitute *Sharia* public policy during the enforcement of an arbitral award. Secondly, *Sharia* law comprise rules that are not mandatory, such as moral values and good character, while some rules are mandatory in nature, such as prohibition of *Riba* and *Gharar*. Thirdly, from a *Sharia* jurisprudence perspective, public policy should relate to the *Maqasid Al-Sharia* (the objectives of *Sharia*), which are centred on five concerns: preservation of faith, preservation of life, preservation of lineage or family, preservation of rational knowledge and preservation of property and wealth. Public policy should further one of these *Maqasid Al-Sharia*, which justifies a restriction on party autonomy to choose the contractual conditions.

However, *Sharia* law does not differentiate between the contracts, whether in form of Conventions, Treaties and any other agreement, whether between individuals or governments[493]. Accordingly, Muslim countries have to fulfil their international obligations and follow the text and sprit of the New York Convection by narrowly defining the scope of the public policy exception to recognition and enforcement of international arbitral awards under article V(2)(b) of the New York Convention. Lastly, although the notion of *Sharia* public policy is similar to all Middle Eastern countries, the scope of *Sharia* public policy in context of enforcement of foreign arbitral award should be assessed and investigated at the national level of each country, due to that fact there are a variety of factors that influence each of Middle Eastern government systems, and each has a different understanding of *Sharia* Jurisprudence[494].

---

[492] Taymiyah, Taqie Aldein Ahmad Ibn, *Al-Fattawa Al-Kubra* (1st edn, Dar al-Kutub Al-Elmiah, Beirut 1987); El-Ahdab, Abdul Hamid, 'General Introduction on Arbitration in Arab Countries' in Sanders, Pieter and , Albert Jan van den Berg (eds), *International Handbook on Commercial Arbitration* (Suppl. II, edn Kluwer, The Hague 1998).p. 14.

[493] Mansuri, Muḥammad Tahir, *Islamic Law of Contracts and Business Transactions* (Adam Publishers & Distributors, New Delhi 2006).p. 4.

[494] Wakim, Mark, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21 New York International Law Review 1; Almutawa, Ahmed Mohd Khurshid., 'Challenges to the Enforcement of Foreign Arbitral award in States of The Gulf Cooperation Council' (PhD Thesis, University of Portsmouth 2014).

I, therefore, assert that, in the UAE legal system, *Sharia* public policy as a ground for refusing the enforcement of foreign awards should be limited to the fundamental principles of *Sharia* law. This suggestion may be supported by the text of Article 3 of the UAE Civil Code, which states that the fundamental principles of Islamic *Sharia* is considered as a matter of public policy[495]. Therefore, according to Article 3, not every breach of mandatory rules of *Sharia* law would constitute a violation of the UAE's public policy, but only a breach of the fundamental principles of *Sharia* law would do so, such as questions of *Riba*[496] and *Gharar*. The two prohibitions, which constitute *Sharia* public policy, have been addressed comprehensively by the UAE's Civil Code[497] and various court judgments[498] as will be demonstrated in chapters 4 and 5 of this thesis.

Various scholars such as Saleh[499], Wakim[500], Kutty[501] and Almutawa[502] agreed that the mandatory rules of *Sharia* law, which constitute public policy in the context of the enforcement of foreign awards under the New York Convention, are two substantive prohibitions, *Riba* and *Gharar*[503]. Beside the two substantive prohibitions, the scholars pointed out that the mandatory rules of *Sharia* law during the enforcement have a procedural dimension. The three fundamental rights covered by *Sharia* law's mandatory procedural rules that consist public policy during enforcement of an international arbitral award are the right to equal treatment of the parties, the right to be heard, and the right to present a case or defence. They argued that three fundamental principles are not necessarily found in the *Quran* or *Hadith* but constitute the essential immutable rules of Islamic judicial law, which broadly correspond to the principles of natural justice enshrined in other systems of law[504].

---

[495] Article 3 of the UAE Civil Code.

[496] See for example, ruling of Abu Dhabi Court of Cassation No. 26/18 issued on 31 December 1996.

[497] See for example, Article 714 of the UAE Civil Code; and Article 490 of the UAE Civil Code.

[498] For example, ruling of Abu Dhabi Court of Cassation No. 26/18 issued on 31of December 1996 stated that "… Sharia principles are considered to be a major source of law, and law cannot be applied in the UAE that violates these principles. The charging of compound interest is one of those areas which is not tolerated by Islamic principles".

[499] Saleh, Samir, *Commercial Arbitration in the Arab Middle East: a Study in Shari'a and Statute Law* (Graham & Trotman, London 1984); Saleh, Samir, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 1(1) Arab Law Quarterly 19.

[500] Supra note 348, p. 45

[501] Supra note 349.

[502] Almutawa, Ahmed Mohd Khurshid., 'Challenges to the Enforcement of Foreign Arbitral Award in States of the Gulf Cooperation Council' (PhD Thesis, University of Portsmouth 2014).

[503] Ibid.

[504] Supra note 503.

However, the researcher disagrees with the scholars regarding *Sharia* law's procedural mandatory rules that constitute public policy since there is no substantive evidence from a primary source or a secondary source of *Sharia* law to support the existence of such type of mandatory rules and the four schools of Islamic *Sharia* jurisprudence are silent. *Sharia* law *"emphasizes substantive justice, leaving the procedure for its realisation to the authorities of state to decide in accordance with the best interests of society"*[505]. Furthermore, the *Maliki* scholar, Abu Baker Ibn Al-Arabi, pointed out that the rules of obligation of Islamic commercial law are three: first, the prohibition of *Batil*; second, the prohibition of *Riba*; and finally, the prohibition of *Gharar*[506]. According to Abu Baker Ibn Al-Arabi, an Islamic contract is permissible only where it is free from *Gharar* and *Riba*.

As far as the UAE's legal system is concerned, finding a violation of a party's right to equal treatment, to be heard and to present a case or defence can give rise to a violation of procedural public policy under Articles 25, 28 and 44 of the UAE constitution[507] and the UAE CPC[508]. However, these violations of due process do not invoke *Sharia* law in the UAE legal system, as per judicial jurisprudence and practices[509]. We can conclude that the mandatory *Sharia* law rules that constitute UAE conception of public policy during the enforcement of an international arbitral award are namely related to prohibition of *Riba* and *Gharar*.

3.6 How can a UAE Judge Set Aside a Foreign Arbitral Awards Conflicting with *Sharia*?

Generally speaking, the UAE courts are not allowed to perform a full review on the merits of the international arbitral award. The prohibition of such review has been expressly confirmed by the ruling of the UAE Federal Supreme Court No. 165/Judicial

---

505 Baderin, Mashood A., 'A Comparative Analysis of the Right to a Fair Trial and due Process Under International Human Rights Law and Saudi Arabian Domestic Law' (2006) 10(3) The International Journal of Human Rights 241.p.245.
506 Al-Arabi, Abu Baker Ibn, *Ahkam Al-Quran* (Vol 1, 3rd edn, Dar Alkutub Alilmiah, Beirut 2003).p. 324; Hindou, Dr Muhammad, *Alkuliat Altashriehia wa Atharuha fi Alijtihad Wa Alfatwa* (1st edn, Almahad Alalami lil Fikr Alislami, VA 2016).p. 99.
507 Articles 25, 28 and 44 of the UAE Federal Constitution of 1971.
508 Federal Law No. (11) of 1992 Concerning Issuance of the Civil Procedures Code; see for example, ruling of Dubai Cassation Court No. 249/2014 issued on 15 Feburary 2015.
509 For example, ruling of Dubai Court of Cassation No. 248 / 2014 issued on 19 April 2015; ruling of Dubai Court of Cassation No. 496 / 2013 issued on 23 November 2014; ruling of Dubai Court of Cassation ruling No. 371 of 2013 issued on 12 Feburary 2015.

Year 18 issued on 30 November 1996[510]. The court declared that the arbitration award becomes *res judicata* upon its issuance[511] so parties may not present any arguments based on facts and/or laws which have previously been raised during the arbitration proceedings, this also applies to any new arguments which were not raised during arbitration proceedings.

However, in exceptional cases, a full review may be conducted on the merits of the foreign arbitral award by the court if the issue is purported to be a violation of UAE public policy or principles of *Sharia*, even *ex officio*[512]. In such exceptional cases, the competent court may raise issues of public policy on their own motion[513]. The Abu Dhabi Court of First Instance in the Case No. 2847/2013 held that the court's authority does not extend to discussing the arbitral award nor its conformity with the law, unless it is proved that the *"arbitrator exceeded the limits of his authority and discussed a matter of public order which cannot be subject to settlement. In this case, the court shall intervene and examine this violation in light of the applicable law"*[514].

It is understood that same standard of public policy is applied to both domestic and international arbitration. In the enforcement of an international arbitration award, the court does not address the concept of public policy within the meaning of Article V(2)(b) of the NYC[515]. This is clear in Dhabi Court of cassation ruling No. 146/2008[516], whereby the court stated that *"whenever the arbitrator issues his award in violation of the rules of public policy, the court should thoroughly examine this violation in light of the public order rules in the judge's State and not in other States"*[517].

---

[510] Ruling of the Federal Supreme Court No. 165/Judicial Year 18 issued on 30 November 1996 cited by AL-Tamimi, Essam, 'Enforcement of Foreign Arbitration Awards in the Middle East' (2014) 1(1) BCDR International Arbitration Review 95; see also, ruling of the Federal Supreme Court No. 176/Judicial Yaear 17 issued on 21 November 1995; ruling of Dubai Court of Cassation No. 186/1996 issued on 5 January 1997; ruling of Federal Supreme Court No. 263/Judicial Year 18 issued on 8 December 1996.

[511] Ruling of Federal Supreme Court No. 236/Judicial Year 27 issued on 13 December 2005; ruling of Abu Dhabi Court of Cassation No. 65/2012 issued on 15 April 2012; ruling of Dubai Court of Cassation No. 199/2014 issued on 21 August 2016 (*res judicata* effect ceased upon nullification of the subject award).

[512] Supra note 2.

[513] For example, see ruling of Federal Supreme Court No. 449 of Judicial Year 21 issued on 11 April 2001; ruling of Federal Supreme Court No. 371 of Judicial Year 18 issued on 30 June 1998.

[514] Ruling of Abu Dhabi Court of First Instance No. 2847/2013 issued on 12 February 2014, cited in International Journal of Arab Arbitration (Volume 6, Issue 4, 2014).pp. 49 – 56.

[515] Supra note 515.

[516] Ruling of Dubai Court of Cassation No.146/2008 issued on 9 November 2008.

[517] Ibid.

It is clear that the court should examine the arbitral award on the merits whenever the arbitrator issues his award in violation of the rules of domestic public policy and not international conception of public policy[518]. Therefore, it is clear that foreign arbitral awards are governed by a stringent domestic public policy regime which comprises of rules that cannot be derogated from by contract or by party's agreement such as domestic mandatory rules[519] and fundamental principles of *Sharia* law. They are largely derived from legislative provisions[520] and *Sharia* Jurisprudence and are applicable to a domestic and to an international arbitration award. Accordingly, during the enforcement of a foreign arbitral award, the courts are required to confirm that the award does not conflict with fundamental principles of *Sharia*.

In principle, the UAE law requires that international commercial arbitration awards must comply with the provisions of *Sharia* law as a part of the concept of public policy. Thus, during the enforcement stage, the primary role of UAE judges is to examine the primary and secondary Islamic sources and apply his/her own independent reasoning to decide whether the award is compatible with *Sharia* public policy or not; this process is called *Ijtihad*. Nevertheless, if a similar case has originally been discussed in a *Sunni* school of Jurisprudence, then, the UAE judges may adopt a previous precedent to decide whether the award could be enforced or set aside, this process is called *Taqlid*. *Taqlid* is dependent upon the fact that the judge does not examine the scriptural basis of the opinion in detail or examine the reasoning by which the judgment was formed[521].

We have seen in part of the chapter that *Sharia* is subject to numerous schools of thoughts. The application of *Ijtihad* and *Taqlid* may lead to great degree of uncertainty with the UAE legal system and the Arbitration framework and process. To give an example, the enforcement of two foreign arbitral awards with similar facts may yield different outcomes depending on the Islamic school of jurisprudence that the judge opted to apply, except in cases, where there is *Ijma* among accepted schools of Islamic *Sharia* jurisprudence. Even within the same school of jurisprudence, there are different

---

[518] Blanke, Gordon, ''On Recent Developments of 'Public Policy' and Their Potential Implications for the Enforcement of New York Convention Awards in the UAE: Is It a 'Camel' or a 'Trojan Horse'?' (2013) 18(1) Newsletter of the International Bar Association Legal Practice Division 48.pp. 48-51.
[519] Lalive, Pierre, 'Transnational (or Truly International) Public Policy and International Arbitration' in Sanders, Pieter (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series No 3 edn, Kluwer International Law, The Hague 1987).p. 227.
[520] Ibid.
[521] Supra note 204.

views and opinions on same issues. However, out of the total body of Islamic law, cases based on *Ijma* make up approximately one per cent of total *Sharia* jurisprudence[522].

There are no legal restrictions on the use of the public policy defence under the New York Convention, if the judge claims that the international commercial arbitration award was in conflict with *Sharia* law. However, it is very challenging for the court to do this task of conformity with *Sharia* law as it is not a codified system of law, therefore, the fundamental question is how will the UAE judge will be able to set aside arbitration awards by reference to a non-codified system of law such as *Sharia* law.

The next section will provide detailed evidence from some cases where judges used *Ijtihad* and *Taqlid*. Since the UAE case law is underdeveloped and the cases that are published are sparse, the next section will attempt to examine the judicial application of *Sharia* public policy in the enforcement of foreign arbitral awards and in domestic cases where this public policy was invoked by the courts. *Sharia* law principles applied to foreign arbitral awards are no different to the ones applied to domestic cases. As domestic cases set out these *Sharia* law principles, which would be used in the enforcement of foreign arbitral awards, it is important to analyse these cases to understand the methodology of *Ijtihad* and *Taqlid*. Further, for the application of *Sharia* law, there is no universal distinction between the domestic concept of public policy and the international concept. The public policy considerations that are addressed by the UAE courts during the enforcement of both foreign and domestic cases are in reference to the content of Article 3 and Article 27 of UAE Civil Code, which has been previously discussed.

Therefore, two propositions emerge from the next portion of this chapter; the first proposition is that there is no clear standard for judges to determine the scope of *Sharia* law and the second proposition is that the discretionary power granted to UAE judges in context of public policy is unregulated and unrestricted to large degree[523].

---

[522] Hallaq, Wael B., *An Introduction to Islamic Law* (1st edn, Cambridge University Press, Cambridge 2009).
[523] Supra note 204.

3.6.1 Ruling of Dubai Court of Cassation No. 146/2008[524].

The appellant filled the case number 424/2015 before the Dubai First Court of Instance requesting the appointment of arbitrators to resolve the dispute between the appellant (husband) and defendant (Insurance company), based on the fact that under an insurance policy No. 18131, the appellant's wife had insured her life from the period from 16th of March 1981 until the 15th of March 1982 with the insurance company with an amount of 3.500,000 AED. On the 2nd of July 1981, she was found dead, and since her husband was the sole beneficiary of the insurance, he demanded the insurance company to pay the required amount under insurance policy to him as he is the only heir of his wife. However, the insurance company rejected the husband's claim on the basis that he was the instigator of the murder of his wife, which led him to file a lawsuit No. 30 of 1997 as a full civil claim to appoint an arbitrator. On the 6th of February 2006, the court ruled and appointed a sole arbitrator since the insurance policy provided that any dispute should to be referred to a single arbitrator, as per provisions of insurance policy No. 18131 dated the 16th of March 1981. Afterwards, the appointed arbitrator ruled in favour of the husband and awarded him of AED 3,500,000 and interest of 9% from the due date on the 2nd of July 1981 until full payment.

The husband then went to ratify and enforce the judgment before the Dubai courts. However, the insurance company challenged ratification and enforcement and requested the court to render the award as a null and void due to the fact that the arbitral award violated *Sharia* law, since it awarded the husband the full insurance amount, which is violation fundamental principle *Sharia* inheritance rules. Additionally, the husband was awarded an interest amounting to 9%, which they considered as prohibited in *Sharia* law as it is *Riba*.

On the 9th of April 2007, the court of first instance nullified the award on ground of violation of *Sharia* public policy. The appeal court on appeal No. 305 of 2007 on the 30th of March 2008 confirmed the first instance ruling of setting aside the award and confirmed that the arbitral award violated fundamental principle of *Sharia*. The husband challenged the court ruling before the Dubai court of cassation and the court of cassation ruled that although the court should not review the merits of an arbitral award during the enforcement or ratification, provided that there is no violation of

[524] Ruling of Dubai Court of Cassation No. 146/2008 Issued on 9 November 2008.

Sharia and public policy, the court should take a full review of the merits if there is violation of the public policy in the UAE as per the interpretation of Article 3[525] and Article 27[526] of UAE Civil Code.

The Dubai Cassation Court conducted a full review of the merits of the arbitral award and concluded that the rules of inheritance are a part of *Sharia* law as per article 3 of the UAE Civil Code and therefore any violation of the *Sharia* inheritance rules should be fully reviewed by the court. However, the court of cassation pointed out there is not sufficient evidence for the violation of *Sharia* inheritance rules by the arbitrator and the first instance court. The appeal court did not properly extract the evidence of a violation from the Lebanese endowment/waqf Inheritance certificate and they did not provide any reasoning or justification as per *Sharia* Jurisprudence and *Sharia* sources. The Cassation Court therefore ratified and enforced the arbitral award.

We can conclude from this case that the first and appeal judgment ruled to sit aside arbitral award without detailing the method of the court's reasoning and its conclusion. This was evident from Dubai Court of Cassation ruling which has a provided criticism to the lower court for not specifying which *Sharia* inheritance rule was violated and which *Sharia* jurisprudence they based the reasoning on. Additionally, the Dubai Cassation Court ruling illustrates that the lower court did not exercise a proper *Ijtihad* in the primary or secondary sources of *Sharia* law, which are the most relevant to UAE public policy in order to refuse the enforcement arbitral award. Further, the lower courts did not provide any detailed reasoning or justification for their decision to set aside an arbitral award. The court's reasoning is essential in building a coherent understanding and consensus on the principles and rules that regulate public policy in the UAE[527]. Furthermore, it illustrates that the judge has the ultimate discretion to use *Ijtihad* as per his understanding of *Sharia* law on what complies with *Sharia* and what does not.

---

[525] Article 3 of the UAE Civil Code.
[526] Article 27 of the UAE Civil Code.
[527] Mechantaf, Khalil., 'Public Policy in the UAE as a Ground for Refusing Recognition and Enforcement of Awards' (Kluwer Arbitration Blog, 6 July 2012) <http://arbitrationblog.kluwerarbitration.com/2012/07/06/public-policy-in-the-UAE-as-a-ground-for-refusing-recognition-and-enforcement-of-awards/> accessed on April 20, 2020.

3.6.2 Ruling of Dubai Court of Cassation No. 53/1991[528].

The court found in this case that there was no written binding arbitration agreement between the parties as it has been agreed verbally. However, there were witnesses to this verbal arbitration agreement. Despite the fact that there was no written arbitration agreement, the Dubai cassation court ruled that as per *Ijma* of the *Sunni* school of jurisprudence, there is no formal requirement of arbitration agreement to be in a specific format. The cassation court stated that,

> *"There is no article in the laws enforceable in Dubai to indicate the requirement of writing to prove the agreement on arbitration – consequently, the first article of the Civil Transactions Law for the year 1985 stipulates that if the judge does not find a provision in this law, he rules under Islamic law, taking into consideration to choose most suitable Solutions of the doctrines of Imam Malik and Imam Ahmad bin Hanbal, if he does not find in the previous doctrines then to search in the doctrines of Imam Malik and Imam Abu Hanifa, as required by the interest, therefore, the law that should be applied to this incident is decided by the Imams of Islamic jurisprudence, and since the jurists did not stipulate in the agreement on arbitration to be Written, on the contrary they allowed proof that agreement by the testimony of witnesses and to withdraw or revoke the oath, and since the verdict contested has deviated from that, then it is to be contrary to the law"* [529].

It is clear from this judgment that the court has used one of the *Sharia* supplementary sources, *Ijma*, which is unanimous agreement among accepted *Sunni* school of Jurisprudence to conclude that *Sharia* law does not require a specific format for arbitration agreements. Professor Al-Zaid argued that *Ijma* is an original source of *Sharia* law that is important for the administration of justice and the judge is obliged to apply *Ijma* and he cannot override *Ijma* by his own *Ijtihad*[530]. The scholar Hamoud

[528] Ruling of Dubai Court of Cassation No. 53/1991 issued on 26 October 1991.
[529] Supra note 530.
[530] Cited in Alsaif, Bander, 'Two Sides of the Saudi Public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards' (PhD Thesis, University of New South Wales 2018).p. 105.

pointed out that the judge cannot exercise discretion or *Ijtihad* if it is contradictory to *Ijma*. However, if a new situation arises which has not been previously examined, then the judge is permitted to exercise his discretion in accordance with *Sharia* law's primary and secondary sources as a form of *Ijtihad*[531]. *Ijma* is a secondary source *Sharia* law but it has a decisive authority when it comes to *Sharia* public policy[532].

3.6.3 Ruling of Federal Supreme Court No. 331/1996[533] .

The facts of this case were that the appellant was a non-financial institution who filed a civil case before Abu Dhabi Federal court of first instance[534] requesting the court to order the respondent to pay a sum of thirty million dirhams and the agreed interest amount of AED 498,784.72 from the date of the deposit. The court delegated to the then expert to calculate the amount and the relevant interest, who submitted his report to the court. However, on the 31st of May 1994, the court rejected to award the appellant the interest but ordered the respondent to only pay the principle amount of the loan.

The appellant challenged this ruling of the appeal court before UAE Federal Supreme court, which declared,

> *"… that has become a need of the commercial public institutions whose interests shall not be fulfilled without [interest]... it is in accordance with the rule of Sharia that necessitates permits prohibitions and that everything that contributes to the completion of the living shall not be prohibited and goes against the Sharia, ... Since the contested judgment violated this aspect, it shall be defective as a result of the violation of the law, the error in its application and being substantially insufficient. Therefore, it necessitates cassation"*[535].

Analysing this ruling we can conclude that Federal Supreme Court used *Ijtihad* by applying the *Sharia* Jurisprudence of theory of necessity on the issue of prohibition of *Riba* on a non-financial institution in the UAE. The court declared that the commercial

[531] Supra note 537.
[532] Supra note 537.
[533] Ruling of Federal Supreme Court No. 331/ 1996 issued on 14 January 1996.
[534] Ruling of Abud Dhabi Federal Court of First Instance No. 3148/1991 issued on 31 May 1994.
[535] Supra note 540.

interest is the backbone of the modern economy and Islam, being a practical religion, recognises the principle of necessity and permits eating pork in extreme situations for survival. Thus, the same principle of necessity should be applied to interest-based transactions of non-financial institutions and permitting interest or *Riba* should not be declared repugnant to Islamic injunctions. Furthermore, classical Muslim scholars have never tackled the necessity principle as a supplementary source of *Sharia* law, but it was dealt under the heading of necessity and public interest or *Al-Maslah*[536]. Bernard Lewis pointed out correctly that the principle of necessity *"… is a principle often invoked by Muslim jurists to justify the acceptance of situations which are in themselves unacceptable"*[537]*.*

Another finding of this case is that each judge may hold a different Islamic legal view of the case, even within same court. The first instance and appellate judges had different opinion on what constitutes *Sharia* public policy than the Federal Supreme judges. Thus, similar facts may yield different and unpredictable results or conclusions.

3.6.4 Ruling of Abu Dhabi Court of Cassation No. 26/Judicial Year 18[538].

The court confirmed that the financial institution, a Mortgage Company, cannot charge compound interest since it is contrary to *Sharia* law, the court stated that,

> *"… Sharia principles are considered to be a major source of law, and law cannot be applied in the UAE that violates these principles. The charging of compound interest is one of those areas which is not tolerated by Islamic principles"*[539].

3.6.5 Ruling of Dubai Court of Cassation No. 41/1988[540].

This judgment has declared that,

> *"One of the principles prescribed in Islamic Sharia, which is a source of Dubai law, is the permissibility of imprisonment of the solvent debtor in order to force him pay his owed debt, and this principle is established*

[536] Al-Mutairi, Mansour Z., 'Necessity in Islamic law' (PhD Thesis, University of Edinburgh 1997).
[537] Lewis, Bernard, *The Political Language of Islam* (1st edn, The University of Chicago Press, Chicago, IL 1988).p. 106.
[538] Ruling of Abu Dhabi Court of Cassation No. 26/ 18 issued on 31 December 1996.
[539] Supra note 539.
[540] Ruling of Dubai Court of Cassation No. 41/1988 issued on 1989.

> *by purified Hadith and narrated by Bukhari in his book in the authentic sayings of the Prophet peace be upon him said: "The solvent debtor is Halal to be penalised " and the penalty here means imprisonment, also narrated in another Hadith about the Prophet that he said "procrastination of riches is injustice" and whereas the Hadith has prescribed a rich procrastinator as unjust, then the judge has the mandate to lift injustice from pain oppressed person by any means possible, including imprisonment"*[541]*.*

The finding from this case demonstrates that judges are authorised to use *Ijtihad* on their own independent reasoning based on reference to primary or secondary Islamic sources to make legal decisions. In this case in particular, the judge used the primary source, *Hadith*, to conclude the debtor should be jailed in order to lift the injustice from the creditor, even in commercial cases. The judges' ruling is accepted as long as it is properly derived from the sources of *Sharia* law and it becomes part of the corpus of Islamic jurisprudence.

We can conclude from above rulings that UAE judges can apply independent reasoning, *Ijtihad*, and legal reasoning based on imitation, *Taqlid*, to investigate whether or not foreign judgments and international commercial arbitration awards are following *Sharia*. In relation to any legal issue, UAE judges are authorised to follow a precedent from many of Islamic cases discussed in the *Sharia* jurisprudence.

The review of UAE court decisions in this chapter has shown that there are many contradictions between court decisions on precisely the same legal issues in regard to *Sharia* public policy. The legal freedom to apply *Ijtihad* and *Taqlid* leads to a fundamental issue in the legal environment being that similar facts yield conflicting and unpredictable outcomes. Accordingly, the power to use the weapon of public policy on the grounds that the award violates *Sharia* law is unregulated in the UAE legal system.

3.7 Conclusion

The main finding of this chapter is that *Sharia* defines and frames the UAE concept of public policy and there is an interplay between *Sharia* and public policy. *Sharia*, in context of UAE public policy, is derived from the interpretation and thought of *Sunni*

---

[541] Supra note 540.

schools of Islam. Thus, international commercial arbitration must comply with fundamental principle of *Sharia*.

The second finding of this chapter is that the UAE judges are empowered to use *Ijtihad* to interpret and construe *Sharia* law's materials to formulate an appropriate ruling that is based on the judge's own independent reasoning with reference to primary and secondary Islamic sources. In dealing with the foreign arbitral award, as shown in this chapter, the most important role of the judges is to examine primary and secondary Islamic sources and apply their own independent reasoning to make a decision to determine whether the award is compatible with *Sharia* law and in line with Islamic jurisprudence.

The third finding is that the discretionary power granted to UAE judges in the context of *Sharia* public policy is unregulated and unrestricted to large degree. Further, there is no standard or procedural guideline for judges to follow in determining the scope of *Sharia* law's applicability during the enforcement of an international arbitral award.

Another important finding of this chapter is that, although the notion of public policy is similar to all Middle Eastern countries, the scope of public policy should be assessed and examined at the national level of each country, due to that fact that there are a variety of factors that influence each government systems and their priorities[542]. As far as the UAE is concerned, *Sharia* public policy as a ground for refusing enforcement of foreign arbitral awards is limited to the fundamental principles of *Sharia* law. The *Sharia* public policy under the UAE legal system refers to two prohibitions, *Riba* and *Gharar*. Therefore, chapter 4 and 5 aims to provide an overview of the concept of *Riba* and *Gharar*, its scope and application in the UAE legal system and to examine how the controversies in *Sharia* jurisprudence have led to conflicting rulings by the courts, either through the enforcement of, or the refusal to enforce, a foreign arbitral award on the grounds of public policy.

[542] Supra note 348.

Chapter 4 The Conceptual Foundation of *Riba* and Practice

4.1 Introduction

The previous chapter has demonstrated that Islamic *Sharia* is at the core of the UAE's conception of public policy and, thus, a violation of a fundamental principle of *Sharia* law will constitute a violation of the UAE's public policy. Accordingly, UAE Judges apply *Ijtihad* and *Taqlid* to examine whether or not international commercial arbitration awards are following the principles of *Sharia* law. Also, the previous chapter established that *Sharia* law's mandatory rules that constitute public policy in the context of enforcement of foreign awards under UAE legal system are limited to two prohibitions namely *Riba*[543] and *Gharar*. Therefore, this chapter aims to provide an overview of the concept of *Riba* and its scope and application in the UAE legal system.

The concept of *Riba* is influenced by religious beliefs, economic structure, and the political and cultural foundation of each society, therefore, the concept differs from one country to another[544]. Thus, it is a complex area of law, and it becomes even more complex when it is applied to the field of international arbitration[545]. The complexity of the issue is due to the fact that *Riba* can be considered either as a substantive or a procedural issue in international arbitration. Further, there are several overlapping legal systems and laws that govern *Riba*. *Riba*, as well, can manifest in the arbitration agreement, the underlying agreement governing the merits of the dispute, and even in the final award[546]. Further, the arbitral tribunal typically measures late payment and compensation for damages by reference to *Riba*[547]*.* Therefore, *Riba* poses a significant risk that the award could be set aside by the courts of the enforcing state due to the application of *Riba* laws[548].

---

[543] *Riba*, Usury and Interest are used interchangeably throughout this chapter.
[544] Saleh, Samir, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 1(1) Arab Law Quarterly 19.p. 26; Wakim, Mark, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21(1) New York International Law Review 1.p. 51.
[545] Ibid. See also Almutawa, Ahmed Mohd Khurshid., 'Challenges to the Enforcement of Foreign Arbitral award in States of The Gulf Cooperation Council' (PhD Thesis, University of Portsmouth 2014).
[546] Ibid
[547] Supra note 551.
[548] Saleh, Samir, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 1(1) Arab Law Quarterly 19.p. 26; Wakim, Mark, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21(1) New York international Law Review 1.p. 51.

Despite a general consensus on the prohibition of *Riba* amongst Islamic jurists and scholars, the conceptual framework, and the scope of *Riba* have been among the most contentious issues in *Sharia* jurisprudence[549]. Hence, this chapter attempts to analyse the controversy surrounding the scope and application of *Riba* in *Sharia* jurisprudence by addressing the conceptual foundation, meaning and the modern theories that govern the concept of *Riba* in *Sharia* jurisprudence. The researcher shall also attempt to show how the controversies in *Sharia* jurisprudence have led to conflicting rulings by the courts, either through the enforcement of, or the refusal to enforce, a foreign arbitral award on the grounds of public policy. This is because each judge can have a different interpretation of the scope and application of *Riba* in *Sharia* law, and this has resulted in mutually contradictory interpretations of the scope of UAE public policy during enforcement of a foreign arbitral award.

4.2 History of *Riba*

Historically for the past four thousand years, there has been some prohibition of usury or *Riba*[550]. Since its earliest incarnations, usury was prohibited on ground of moral, ethical, religious, social justice and economic instability[551]. For example, the Greek philosophers Plato and Aristotle condemned the practice of *Riba* and argued that the objective of economic activity is to satisfy society's requirements of goods, and that money should only function as a medium of exchange to facilitate the transfer of goods between the parties. As per the Greek Philosophers *Riba* is an unnatural type of

---

[549] Nur, Elmi Mahmoud, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999); Iqbal, Zamir and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice Practice* (2nd edn, John Wiley & Sons (Asia) Pte. Ltd, Singapore 2011).p. 70.

[550] Iqbal, Zamir and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice Practice* (2nd edn, John Wiley & Sons (Asia) Pte. Ltd, Singapore 2011).p. 70; Mews, Constant J. and Ibrahim Abraham, 'Usury and Just Compensation: Religious and Financial Ethics in Historical Perspective' (2007) 72(1) J Bus Ethics 1.pp. 2-3.

[551] Meislin, Bernard J. and Morris L. Cohen, 'Backgrounds of the Biblical Law Against Usury' (1964) 6(3) Comparative Studies in Society and History 250; Iqbal, Zamir and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice* (2nd edn, John Wiley & Sons (Asia) Pte. Ltd, Singapore 2011).p. 70; Labat, Alyssa and Walter E. Block, 'Money Does Not Grow on Trees: An Argument for Usury' (2012) 106(3) Journal of Business Ethics 383.p. 384.

economic activity and it is, therefore, an unjust, and immoral practice[552]. As well, *"Kusidin"* or usurer was used in ancient Vedic Hindu texts between 2000- 1400 BC[553].

All the Abrahamic religions forbade usury and had serious restrictions in relation to usury, which have been in force for over 1400 years[554]. Historically, *Riba* or usury was defined as a practice of charging a premium or fees for the use of money[555]. However, over time, only excessive rates were deemed unlawful. Precisely, between the sixteenth and seventeenth centuries[556], usury was redefined as an excessive interest rate. It has been defined by the Oxford dictionary as *"the practice of lending money to people at unfairly high rates of interest"*[557]*.* Further, the modern definition of usury is still in force in most Western countries[558].

Islam is still the only main religion that forbids any sort of interest and/or usury until today[559]. Furthermore, there are certain similarities in the spirit of Judaism, Christianity and Islam on economic matters relating to *Riba* or usury. The three religions focus on justice and equality and endorse moral behaviour in commerce to build fair and equal societies and a stable economic model[560]. Moreover, reference to such prohibited

---

[552] Maloney, Robert P., 'Usury in Greek, Roman And Rabbinic Thought' (1971) 27 Traditio 79.p. 85; Iqbal, Zamir and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice Practice* (2nd edn, John Wiley & Sons (Asia) Pte. Ltd, Singapore 2011).p. 70; Aristotle, *The Basic Works of Aristotle* (McKeon, Richard (ed), 1st edn, Random House Publishing Group, NY 2009).pp. 927-1001.

[553] Iqbal, Zamir and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice Practice* (2nd edn, John Wiley & Sons (Asia) Pte. Ltd, Singapore 2011).p. 70.

[554] Ibid. See also Lewis, Mervyn and Ahmad Kaleem, *Religion and Finance: Comparing the Approaches of Judaism, Christianity and Islam* (Edward Elgar, Cheltenham, UK, Northampton 2019).pp. 40-75.

[555] Cavalier, Georges, 'Is the Economic Crisis Driving Western Laws Closer to Islamic laws on Interest Rate Prohibition?' (2013) 7(2) International Journal of Economic Perspectives 47.p. 51; Lewis, Mervyn and Ahmad Kaleem, *Religion and Finance: Comparing the Approaches of Judaism, Christianity and Islam* (Edward Elgar, Cheltenham, UK, Northampton 2019).pp. 40-75.

[556] Iqbal, Zamir and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice Practice* (2nd edn, John Wiley & Sons (Asia) Pte. Ltd, Singapore 2011).p. 70; Persky, Joseph, 'Retrospectives: From Usury to Interest' (2007) 21(1) The Journal of Economic Perspectives 227.pp. 227-229; Kirschenbaum, Aaron, 'Jewish and Christian Theories of Usury in the Middle Ages' (1985) 75(3) The Jewish Quarterly Review 270.p. 275.

[557] Warren, Helen and others (ed), *Oxford Learner's Dictionary of English Idioms* (2nd Revised edn, Oxford University Press, Oxford 1994).

[558] Lewis, Mervyn K., 'Comparing Islamic and Christian Attitudes to Usury' in Hassan, M. Kabir and Mervyn K. Lewis (eds), *Handbook of Islamic Banking* (Edward Elgar Publishing, Cheltenham 2007); Althabity, Mohammad Motlg., 'Enforceability of Arbitral Awards Containing Interest: a Comparative Study Between Sharia law and Positive Laws' (PhD Thesis, University of Stirling 2016).

[559] Iqbal, Zamir and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice Practice* (2nd edn, John Wiley & Sons (Asia) Pte. Ltd, Singapore 2011).p. 70; Warde, Ibrahim, *Islamic Finance in the Global Economy* (2nd edn, Revised and Updated edn, Edinburgh University Press, Edinburgh 2010); Althabity, Mohammad Motlg., 'Enforceability of Arbitral Awards Containing Interest: a Comparative Study Between Sharia law and Positive Laws' (PhD Thesis, University of Stirling 2016).

[560] Warde, Ibrahim, *Islamic Finance in the Global Economy* (2nd edn, Revised and Updated edn, Edinburgh University Press, Edinburgh 2010).p. 61; Lewis, Mervyn and Ahmad Kaleem, *Religion and*

practices can be seen both in the Old Testament[561] of the Bible, wherein the prohibition on *Riba* is controversial and involves the abuse of the weak [562].The 21st Century King James version of the bible states that, "*thou shalt not lend upon interest to thy brother, interest of money, interest of victuals, interest of any thing that is lent upon interest*"[563].

Judaism considered charging *Riba* as unethical and unlawful by Talmud. Further, Mishnah forbade any Jew to participate in any usurious transaction or to act as an intermediary, such as a witness or advocate, of such transactions between Jews[564].

4.3 Linguistic Usage of *Riba*

To correctly understand the essence of any concept, the research should first begin with the clarification of the linguistic usage of the terminology and how it is applied to the subject matter.

The linguistic meaning of *Riba* in the Arabic language goes beyond the linguistic meaning of interest or usury in the English language[565]. Broadly speaking *Riba* is translated into English as usury or interest. However, Professor El-Gamal stated that there is no specific or precise meaning in the English dictionary equivalent to *Riba* and therefore its prohibition should be interpreted carefully in the context of economic efficiency and social justice in society[566].

Finance: Comparing the Approaches of Judaism, Christianity and Islam (Edward Elgar, Cheltenham, UK, Northampton 2019).pp. 75-101.

[561] Meislin, Bernard J. and Morris L. Cohen, 'Backgrounds of the Biblical Law Against Usury' (1964) 6(3) Comparative Studies in Society and History 250.pp. 250-251; Borhan, Joni Tamkin and Che Zarrina Saari, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.pp. 56-58.

[562] Lewison, Martin, 'Conflicts of Interest? The Ethics of Usury' (1999) 22(4) Journal of Business Ethics 327.pp. 330-334; Mews, Constant J. and Ibrahim Abraham, 'Usury and Just Compensation: Religious and Financial Ethics in Historical Perspective' (2007) 72(1) Journal of Business Ethics 1; Warde, Ibrahim, *Islamic Finance in the Global Economy* (2nd edn, Revised and Updated edn, Edinburgh University Press, Edinburgh 2010).p. 6.

[563] Deuteronomy 23:18-20, 21st Century King James Version.

[564] Kirschenbaum, Aaron, 'Jewish and Christian Theories of Usury in the Middle Ages' (1985) 75(3) The Jewish Quarterly Review 270; Visser, Wayne A. M. and Alastair Macintosh, 'A Short Review of the Historical Critique of Usury' (1998) 8(2) Accounting, Business & Financial History 175; Lewison, Martin, 'Conflicts of Interest? The Ethics of Usury' (1999) 22(4) Journal of Business Ethics 327.p. 330.

[565] Thomas, Abdulkader (ed), *Interest in Islamic Economics* (Islamic Studies Series, Routledge Ltd, Florence 2006).p. 56; Haqqi, Abdurrahman Raden Aji, *The Philosophy of Islamic Law of Transactions* (Cert Publications, Kuala Lumpur 2009).pp. 123-124.

[566] El-Gamal, Mahmoud A., *Islamic Finance: Law, Economics and Practice* (Cambridge University Press, Cambridge 2006).

A precise understanding of *Riba* depends largely on its literal interpretation and meaning in the Arabic language. *Riba* is derived from the word *"Raba-Wa"*[567]. Referring to its linguistic usage, *Riba* means to increase, to grow, to exceed and to expand[568]. According to Ibn Manzur in the Lisanularab Arabic dictionary, the root of the word *Riba* is the increase of financial assets[569]. Al-Imam Ali Ibn Ahmad Al-Wahidi had pointed out some examples contained in various verses of the Holy *Quran* to illustrate the different linguistic usages of the term[570]. The first verse, contained in Surah Hajj,

> *"Would not you see the lifeless land but when we make water fall on it, it shakes and grows (Rabat)"*[571].

In second verse, contained in Surah Baqara,

> *"Allah deprives Riba of all blessing, whereas He blesses charity with growth"*[572].

In third verse, contained in Surah Al-Nahl,

> *"Lest one party should be more numerous (Arba) than another"*[573].

Al-Imam Ali Ibn Ahmad Al-Wahidi highlighted that the word *"Rabat"* in the first verse means something that expands when rain falls on it, and it increases and grows on its own accord. In the second verse, while God increases the blessings when a person donates to charity, if a person engages in *Riba*, there is no blessing in it for that person. The two verses mean an increase or addition to the thing itself. However, in the third verse, the word "*Arba*" has a different meaning, as it implies superiority of one nation

---

[567] Alobaidi, Khaled Faeq, *Aliqtisad was Alijtima* (Vol 14, 1st edn, Dar Alkutub Alilmiah, Beirut 2004).p.18; Zaid, Abdu Azeim Jalal Abu, *Fiqh Al-Riba: Dirasa Muqaranah wa Shamilah lil Tatbiqat Almuaserah* (1st edn, Aresala Publishing, Beirut 2004).pp. 33-35.

[568] Alobaidi, Khaled Faeq, *Aliqtisad was Alijtima* (Vol 14, 1st edn, Dar Alkutub Alilmiah, Beirut 2004).p. 18; Zaid, Abdu Azeim Jalal Abu, *Fiqh Al-Riba Dirasa Muqaranah wa Shamilah lil Tatbiqat Almuaserah* (1st edn, Aresala Publishing, Beirut 2004).pp. 33-35; Haqqi, Abdurrahman Raden Aji, *The Philosophy of Islamic Law of Transactions* (Cert Publications, Kuala Lumpur 2009).pp. 123-124.

[569] Manzur, Muhammad Ibn, *Lisanul Arab* (Vol. 5, 1st edn Dar Al-Maref, Cairo 2009).pp. 1797-1798.

[570] Nur, Elmi Mahmoud, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999).p. 21; Al-Wahidi, Abu Al-Hassan Ali Ibn Ahmad, *Reasons and Occasions of Revelations of the Holy Quran* (Mokrane Guezzo(trs), New edn, Royal Aal Al-Bayt Institute for Islamic Thought, Amman 2008); Alfasfous, Fouad, *Albnouk Alislamiha (*Dar knouz Almarifah Alelmiah lilnashir was Altowzie, Amman 2010).pp. 25-26.

[571] Holy Quran, Surat Al Hajj, 5.

[572] Holy Quran, Suraht Al-Baqara, 276.

[573] Holy Quran, Surah Al-Nahl, 92.

over another one[574]. One can conclude that the term *Riba* can refer to quantity, quality, strength, and automatic growth. These peculiar characteristics of *Riba* help expose its real nature and how it operates in *Sharia* jurisprudence[575].

It appears that the *Quran* used the term *Riba* and its grammatical derivatives to mean increase, growth, and strength. These derivatives in the *Quran* were considered to be incompatible with the restrictive meaning in the application of the term during the pre-Islamic era[576]. The word *Riba* was used in the pre-Islamic era to describe any loan that draws interest. Al-Imam Al-Fakhru Din Al-Razi, in this context, illustrated the term *Riba* in the pre-Islamic period as a practice used by the trader when the borrower used to pay the money on loans to the creditor. The creditor used to receive a certain sum of payment each month from the debtor leaving the principal sum intact. When the debt matures, the creditor will receive the principal loan amount of loan from the borrower. If the borrower failed to repay all or part of debt to the creditor, the creditor used to charge interest and extend the time period[577]. One may conclude that the pre-Islamic usage of the term *Riba* implies only the meaning of a predetermined interest, which a lender receives over and above the principle amount of debt or loan. In another words, it is the incremental growth of the original debt or the principle amount over time, by comparing the initial amount to the final repayment[578].

We can conclude that the *Quran* did not define the term *Riba* and that there is some difference in the linguistic usage of the derivative of term of *Riba* in *Quran* that are

---

[574] Alnaisabouri, Abu Alhassan Alwahdi, *Alwasiet Fi Tafseer AlQuran Almajieed* (Adel Ahmad Almowjoud and others (eds), Vol 3, 1st edn, Dar Alkutoub Alelmiah, Beirut 1995).p. 80; Nur, Elmi Mahmoud, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999).p. 22-23; Al-Wahidi, Abu Al-Hassan Ali Ibn Ahmad, *Reasons and Occasions of Revelations of the Holy Quran* (Mokrane Guezzo(trs), New edn, Royal Aal Al-Bayt Institute for Islamic Thought, Amman 2008); Alfasfous, Fouad, *Albnouk Alislamiha* (Dar knouz Almarifah Alelmiah lilnashir was altowzie, Amman 2010).pp. 25-26.

[575] Ibid.

[576] Nur, Elmi Mahmoud, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999).p. 23; Alfasfous, Fouad, *Albnouk Alislamiha* (Dar knouz Almarifah Alelmiah lilnashir was altowzie, Amman 2010).pp. 25-26.

[577] Al-Razi, Al-Fakhru Din, *Al-Tafsir Al Kabir* (Vol 7, 1st edn, Dar al-Fikr, Damascus 1981).p. 91; Dawoud, Haiel Abdullahfez Youseph, *Taguier Alquimah Alshraeiha Ilinqoud Alwaraquiah* (Vol 35, International Institute of Islamic Thought, VA 1999).p. 107; Nur, Elmi Mahmoud, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999).p. 23; Alamad, Samir, *Financial and Accounting Principles in Islamic Finance* (1st edn, Springer Publishing, 2019).p. 334.

[578] Ibid. See also Alfasfous, Fouad, *Albnouk Alislamiha (*Dar knouz Almarifah Alelmiah lilnashir was altowzie, Amman 2010).pp. 25-26.

different from the definition of interest or usury in modern days[579]. Thus, to understand the exact nature of the subject, we have to examine *Sharia* law injunctions related to the prohibition of *Riba* in order to grasp its essence, the scope of its prohibition and its legal implications. This chapter will examine the concept on three levels, in the context of *Quranic* verses, the *Hadith* and the view of the modern *Sharia* law scholars and jurists.

4.4 Sources of Prohibition

To understand the prohibition of *Riba*, it is essential to refer to the *Quranic* verses in a systematic approach in order to understand the effect of these verses on the prohibition of *Riba*[580]*.* When reviewing the legal basis of the prohibition of *Riba* under *Sharia* law, it is clear that it went through four stages until it became fully prohibited. It started with the first stage whereby it was recommended for Muslims to avoid *Riba* if they can and the fourth stage was a complete ban and prohibition on Muslims to engage in *Riba*[581]*.* The first stage of prohibition started with discouraging Muslims and recommending them to avoid charging *Riba* over loans if possible. This discouragement is understood through verse 39 of Surah al-Rum[582], which states that,

> *"That which you give the Riba to increase the wealth of people does not increases in the sight of Allah; but that which you give in charity, seeking the goodwill of Allah, multiplies manifold"*[583]*.*

It can be observed that this verse established a comparison between *Riba* and *Zakat*. The verse praised *Zakat* but did not praise *Riba* and also declared that *Riba* can never derive any benefit from God, while *Zakat* grows and multiply blessings. However, the Islamic scholar Ibn Jarir Al-Tabari, had a different understanding of this verse. He pointed out that the verse does not mean *Riba*, which is forbidden by *Sharia* law, but it implies that Islam prohibits giving a gift to others with the intention that the recipient

---

[579] Nur, Elmi Mahmoud, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999).p. 24.
[580] Al-Wahidi, Abu Al-Hassan Ali Ibn Ahmad, *Reasons and Occasions of Revelations of the Holy Quran* (Mokrane Guezzo(trs), New edn, Royal Aal Al-Bayt Institute for Islamic Thought, Amman 2008).
[581] Ahmad, Ashfaq and others, 'Islamic Banking and Prohibition of Riba/Interest' (2011) 5 African Journal of Business Management 1763.pp. 1765-1766; Baamir, Abdulrahman Yahya, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (1st edn, Routledge Ltd, London 2016).p. 203.
[582] Ibid.
[583] Quran; Surah al-Rum; verse 30:39

will return it redoubled[584]. Ibn Jarir Al-Tabari's view was supported by some of leading Muslim scholars such as Ibn Abbas, Mujahid and Qatadah[585]. Furthermore, Ibn Kathir argued that the verse only covers specific practices in the pre-Islamic era for people who used to extend a gift to another person, with the intention of getting from him more gifts as a reward or a return for his gift that is analogous to that of *Riba*[586].

The second stage of the prohibition took form when Muslims were given examples of previous nations that had practiced *Riba* demonstrating that it was not good practice. This could be understood from verse 4 of Surah al-Nisa[587], which states that,

> *"And for their taking Riba even though it is forbidden for them, and their wrongful appropriation of other peoples' property, we have prepared for those among them who reject faith, a grievous punishment"[588].*

The second verse discusses how Jews would practice *Riba* and lays down that *Riba* is an inequitable practice. This verse used stronger words than the first revelation to condemn the practice of *Riba* amongst Jews[589], and indicated that some Jews

---

[584] Alawadi, Rifat AlSayed, *Almathoumah Almaerifiah laiat Al Riba fe Alquran (*Almahad Alalami llil Fikar Alislami, Amman 1997).pp. 25-39; Nur, Elmi Mahmoud, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999).p. 25; Al-Tabari, Ibn Jarir, *Jami ul Bayan fi Tafseer al-Quran (*Vol 8, Part 20. 1st edn, Darul Fikr, Beirut 1988).p. 20; Ahmad, Ashfaq and others, 'Islamic Banking and Prohibition of Riba/Interest' (2011) 5 African Journal of Business Management 1763.pp. 1765-1766.

[585] Al-Tabari, Ibn Jarir, *Jami ul Bayan fi Tafseer al-Quran* (Vol 8, Part 20, 1st edn, Darul Fikr, Beirut 1988).p. 20; Alawadi, Rifat AlSayed, *Almathoumah Almaerifiah laiat Al Riba fe Alquran* (Almahad Alalami llil Fikar Alislami, Amman 1997).pp. 25-39; Nur, Elmi Mahmoud, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999).p. 25; Ahmad, Ashfaq and others, 'Islamic Banking and Prohibition of Riba/Interest' (2011) 5 African Journal of Business Management 1763.pp. 1765-1766.

[586] Ibid. See also Katheir, Emad Aldien Ibn, *Tafseer Al Quran Al-Azeem* (Vol 14, 1st edn, Dar Ibn Hazem, Beirut 2000).p. 584.

[587] Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).p. 203; Ahmad, Ashfaq and others, 'Islamic Banking and Prohibition of Riba/Interest' (2011) 5 African Journal of Business Management 1763.pp. 1765-1766. Alawadi, Rifat AlSayed, *Almathoumah Almaerifiah laiat Al Riba fe Alquran (*Almahad Alalami llil Fikar Alislami, Amman 1997).p. 21.

[588] Quran; Surah al-Nisa; verse 4:161.

[589] Alawadi, Rifat AlSayed, *Almathoumah Almaerifiah laiat Al Riba fe Alquran* (Almahad Alalami llil Fikar Alislami, Amman 1997).pp. 55-77; Nur, Elmi Mahmoud, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999).pp. 25-26; Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).pp. 203-204; Ahmad, Ashfaq and others, 'Islamic Banking and Prohibition of Riba/Interest' (2011) 5 African Journal of Business Management 1763.pp. 1765-1766.

intentionally misinterpreted the prohibition for their own benefit and considered usury permissible if it was charged to people who were not Jews[590].

The third stage demonstrated that *Riba* is prohibited and it is a sin. However, at this stage the *Riba* did not reach the level of being the major sin by God[591]. Surah al Imran, verse 130-132 stated that

> *"O you who have believe, do not consume Riba doubled and multiplied, but fear Allah that you may be successful. Fear the fire which has been prepared for those who reject faith and obey Allah and the Messenger so you may receive mercy"[592].*

At this stage, the practice of charging in excess is considered as prohibited *Riba*. The phrase of *"doubles and multiple"* had caused disagreement between Islamic scholars and jurists, as some viewed the prohibition is only for excessive and compound *Riba*, not simple interest[593]. Islamic Scholar Muhammad Jamal al-Din al-Qasimi wrote that the verse is meant that *Riba* of any kind and at any level is prohibited whether it is simple or excessive[594]. Sheikh Mahmoud Shaltout, the grand Imam of the Al-Azhar, disagreed with Muhammad Jamal al-Din al-Qasimi's interpretation of the verses and stated that *"doubles and multiple"* means only one type of *Riba,* which is excessive interest and not the simple interest[595].

---

[590] Alawadi, Rifat AlSayed, *Almathoumah Almaerifiah laiat Al Riba fe Alquran (*Almahad Alalami Ilil Fikar Alislami, Amman 1997).pp. 55-77; Nur, Elmi Mahmoud, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999).p. 25-26; Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009). 203-204;

[591] Ibid.

[592] Quran; Surah al Imran; verse 130-132.

[593] Ibid. See also Nur, Elmi Mahmoud, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999).p. 27.

[594] Al-Qasimi, Muhammad Jamal al-Din, *Tafsir Al Qasim: Mahasin Al Tawil* (1st edn, Darul Ehia Alkutub Alarabi, Cairo 1957); Saeed, Abdullah, 'The Moral Context of the Prohibition of Riba in Islam Revisited' (1995) 12(4) American Journal of Islamic Studies 496.pp. 497-499; Alawadi, Rifat AlSayed, *Almathoumah Almaerifiah laiat Al Riba fe Alquran (*Almahad Alalami Ilil Fikar Alislami, Amman 1997).pp. 25-39; Nur, Elmi Mahmoud, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999).p. 27; Baamir, Abdulrahman Yahya, 'Saudi law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).pp. 203-204.

[595] Saeed, Abdullah, 'The Moral Context of the Prohibition of Riba in Islam Revisited' (1995) 12(4) American Journal of Islamic Studies 496.pp. 497-499; Alawadi, Rifat AlSayed, *Almathoumah Almaerifiah laiat Al Riba fe Alquran (*Almahad Alalami Ilil Fikar Alislami, Amman 1997).pp. 55-77; Nur, Elmi Mahmoud, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999).p. 27; Iqbal, Zamir and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice Practice* (2nd edn, John Wiley &

In the fourth and final stage of prohibition, the *Quran* considered *Riba* to be as one of the major sins and is considered to be in the proximity of murder and a greater sin than adultery[596]. The *Quranic* verse of Surah al-Baqarah states that,

> *"Those who benefit from Riba shall be raised like those who have been driven to madness by the touch of the Devil; this is because they say: 'Trade is like Riba' while God has permitted trade and forbidden Riba"[597].*

The fourth stage of the prohibition conveys the meaning that God prohibits all forms of *Riba* and any excess over capital is disallowed and emphasises that *Riba* is completely prohibited[598].

To conclude, the *Quranic* jurists are generally of the view that the definitive terms used to describe *Riba* were based on the types of transactions that were prevalent in the pre-Islamic era. The Scholar Abu Bakr Aḥmad Al-Jassass pointed out that it was a common fact that *Riba Al-Jahiliya*[599] was an increase only on loans in a fixed term[600]. Moreover, the prohibition of transactions that result in *Riba* has been clearly expounded by the *Hadith*. For example, the prophet Mohammad had cursed the one who accepts *Riba*, the one who paid it, the one who recorded it and the two witness of it, stating that they were all akin to each other and equally cursed by God[601]. It should be noted that Prophet Mohammad stated that,

> *"(Exchange) gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, measure for measure and hand to hand. If the (exchanged) articles belong to different genera, the*

Sons (Asia) Pte. Ltd, Singapore 2011).pp. 60-61; Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).pp. 203-204.

[596] Ibid.

[597] Quran; Surahal-Baqarah; verse 275-281.

[598] Al-Qasimi, Muhammad Jamal al-Din, *Tafsir Al Qasim: Mahasin Al Tawil* (1st edn, Darul Ehia Alkutub Alarabi, Cairo 1957); Naqvi, Safeer Reza, *History of Banking and Islamic Laws* (1st edn, Hayat Academy, Karachi 1993).p. 42; Saeed, Abdullah, 'The Moral Context of the Prohibition of Riba in Islam Revisited' (1995) 12(4) American Journal of Islamic Studies 496.pp. 497-499.

[599] Riba Al-Jahiliya is Riba that was prevalent in Arabian Peninsula in the pre-Islamic days.

[600] Saeed, Abdullah, 'The Moral Context of the Prohibition of Riba in Islam Revisited' (1995) 12(4) American Journal of Islamic Studies 496.pp. 506-510; Farooq, Mohammad Omar, 'Stipulation of Excess in Understanding and Misunderstanding Riba: The Al-Jassas Link' (2007) 21(4) Arab Law Quarterly 285.

[601] Hajaj, Muslim Ibn, *Sahih Muslim* (Vol 3. Hadith No 1597, 1st edn Dar Al-Kutub Alilmiah, Beirut 1991).p. 1218; for further information, see Saeed, Abdullah, 'The Moral Context of the Prohibition of Riba in Islam Revisited' (1995) 12(4) American Journal of Islamic Studies 496.pp. 506-510.

exchange is without restraint provided it takes place in a hand to hand transaction"[602].

Hence, it can be concluded that *Riba* is prohibited in both the Holy *Quran* and practices of the Prophet Mohammed[603]. Having examined the legal basis for the prohibition of *Riba*, it is important to investigate the reason for its prohibition. There are many social, ethical, and economic factors that support the prohibition of *Riba*, which will be examined in next section.

4.5 Reasons for the Prohibition of *Riba*

Most arguments of the scholars for the prohibition of *Riba* are based on social justice and equality. They argue that *Riba* creates and contributes to an excess of debt in the economy, which in turn, leads to the risk of damaging the society and the economy at large[604]. Furthermore, Islam aims to establish an economic system from which all types of injustice and exploitation of disadvantaged people are completely eliminated. The injustice from the Islamic perspective means financiers being assured of a positive return without putting in any effort or taking any risk[605]. Hence, it can be said that the role of Islam by prohibiting *Riba* is not only to secure society's interest at large, but also to ensure justice and fairness between the lenders and borrowers[606]. The Islamic

---

[602] Hajaj, Muslim ibn, *Sahih Muslim* (Vol 3. Hadith No 1597, 1st edn Dar Al-Kutub Alilmiah, Beirut 1991).p. 1211; for further information, see Saeed, Abdullah, 'The Moral Context of the Prohibition of Riba in Islam Revisited' (1995) 12(4) American journal of Islamic studies 496.pp. 506-510.

[603] Uddin, Md Akther, 'Principles of Islamic Finance: Prohibition of Riba, Gharar and Maysir' (MPRA Paper 67711, University Library of Munich, Germany 2015) <https://ideas.repec.org/p/pra/mprapa/67711.html> accessed on March 23, 2020.

[604] Samiullah, Muhammad, 'Prohibition of Riba (Interest) & Insurance in the Light of Islam' (1982) 21(2) Islamic Studies 53.p. 54; Chapra, M. Umer, 'Islam and the International Debt Problem' (1992) 3(2) Journal of Islamic Studies (Oxford, England) 214.pp. 222-224; Farooq, Mohammad Omar, 'Stipulation of Excess in Understanding and Misunderstanding Riba: The Al-Jassas Link' (2007) 21(4) Arab Law Quarterly 285; Iqbal, Zamir and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice Practice* (2nd edn, John Wiley & Sons (Asia) Pte. Ltd, Singapore 2011).pp. 63-65; Rudnyckyj, Daromir, *Beyond Debt: Islamic Experiments in Global Finance* (University Of Chicago Press, Chicago 2019).

[605] Ibid.

[606] Samiullah, Muhammad, 'Prohibition of Riba (Interest) & Insurance in the Light of Islam' (1982) 21(2) Islamic Studies 53.p. 55; Gotanda, John Y., 'Awarding Interest in International Arbitration' (1996) 90(1) American Journal of International law 40.p. 47; El-Gamal, Mahmoud A., *Islamic Finance: Law, Economics and Practice* (Cambridge University Press, Cambridge 2006).p. 221; Farooq, Mohammad Omar, 'Stipulation of Excess in Understanding and Misunderstanding Riba: The Al-Jassas Link' (2007) 21(4) Arab Law Quarterly 285; Iqbal, Zamir and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice Practice* (2nd edn, John Wiley & Sons (Asia) Pte. Ltd, Singapore 2011).pp. 63-65; Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009); Rudnyckyj, Daromir, *Beyond Debt: Islamic Experiments in Global Finance* (University Of Chicago Press, Chicago 2019).

economic model supports the idea of entrepreneurship, the creation of additional wealth, jobs and opportunities, whereas *Riba* can be accrued irrespective of the outcome of the business losses[607]. In contrast, the Islamic model encourages both parties to take risks and share the rewards and losses of their business or partnership[608]. According to Islamic scholars, the Islamic economic model helps in the proper distribution of wealth and business in the Islamic economy. It also helps in establishing a fair and productive economic system at large[609]. Furthermore, some scholars such as Al-Imam Al-Razi and Ibn Qayyim[610], who argued that the prohibition is primarily for the elimination of injustice and the exploitation of the disadvantaged, rather than the *Riba* itself[611]. Thus, it is important to examine the term Riba from *Sharia* injunctions and jurisprudence in order to understand the exact nature, prohibition, and scope of *Riba* and its implication on business transactions. The next section will investigate the conceptual foundation of the term Riba in the context of *Sharia* Jurisprudence.

4.6 *Riba* under *Sharia* Jurisprudence

According to the Muslim scholar Al-Imam Fakur Aldien Al Razi, *Riba* could be classified under *Sharia* Jurisprudence into two categories, the first category is *Riba Al-Fadil,* which is *Riba* in Sale and the second category is *Riba Al-Nasiah,* which is *Riba* in loan[612].

4.6.1 *Riba Al-Fadil* (*Riba* in Sale)

The first category of *Riba* is *Riba Al-Fadil* which happens only when there is a sale or exchange transaction of a commodity. This type of *Riba* applies only to commodities,

---

[607] Supra note 607.
[608] Supra note 607.
[609]Supra note 607.
[610] Al-Qayyim, Muhammad Ibn, *Ilam Al-Muwaqqiin an Rabb Al-Aalamin (*Vol 2, 1st edn, Dar Al-Kutub Alilmiah, Beirut 1998).p. 157.
[611] Samiullah, Muhammad, 'Prohibition of Riba (Interest) & Insurance in the Light of Islam' (1982) 21(2) Islamic Studies 53.p. 55; Saleh, Nabil Ahmed, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking* (2nd edn, Graham & Trotman, London 1992).p. 34; Al-Nabahani, Tag Al-Deer, *Al-Nazam Al-Egtsadi fi Al-Islam* (1st edn, Dar El-Umma Publishing, Abu Dhabi 2004).pp. 253-255; Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009); Rudnyckyj, Daromir, *Beyond Debt: Islamic Experiments in Global Finance* (University Of Chicago Press, Chicago 2019).
[612] Borhan, Joni Tamkin and Che Zarrina Saari, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.p. 48; Al-Razi, Fakur Aldien, *Al Mahsul Fi Ilm Usul Alfiqh* (Dr Taha Jabir AlAlwani (ed), Vol 1, 1st edn, Dar Alrisalah Publishing, Beirut 1992).pp. 93-104.

such as dates, gold, silver and barley[613]. The prohibition is derived from the sayings of the Prophet, where he stated that,

> *"(Exchange) gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, measure for measure and hand to hand. If the (exchanged) articles belong to different genera, the exchange is without restraint provided it takes place in a hand to hand transaction"[614].*

The *Hadith* establishes two important principles; the first principle is that certain goods or products of different types can be exchanged for each other on the condition that it is purely barter[615]. The second principle is that all sales of same type of goods or products, with or without delay, are considered as a *Riba Al-Fadil*[616]*.* Nevertheless, the exchanges of goods and or products of same or different type with delay is considered *Riba Al-Nasiah*, which will be discussed in the next section[617]. The *Sharia* law rationale behind prohibition of such barter transactions and the requirement that goods and products for sale to be exchanged against cash is to establish justice and remove all forms of exploitation in commercial transactions[618].

By using the principle of *Qiyas*, *Sharia* scholars expanded the restriction to other types of goods, although the *Hadith* only mentions six kinds of goods (gold, silver, wheat, barley, dates, and salt)[619]. *Hanafi* and *Hanbali* School of jurisprudence believe that the

---

[613] Borhan, Joni Tamkin and Che Zarrina Saari, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.pp. 53-56; Thomas, Abdulkader (ed), *Interest in Islamic Economics* (Islamic Studies Series, 1st edn, Routledge Ltd, Florence 2006).pp. 126-129; Iqbal, Zamir and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice Practice* (2nd edn, John Wiley & Sons (Asia) Pte. Ltd, Singapore 2011).p. 53.

[614] Al-Nasaie, Abu Abdullrahman, *Alsunan Al-kubra* (The Book of Financial Transactions, Vol 6, Hadith 6109, Resalah Publishing 2001)p. 42; see also Borhan, Joni Tamkin and Che Zarrina Saari, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.p. 54.

[615] Saeed, Abdullah, *Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation* (Studies in Islamic Law and Society, Vol 2, 2nd edn, Brill, Leiden 1999).p. 35; Borhan, Joni Tamkin and Che Zarrina Saari, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.p. 54; Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).p. 205.

[616] Ibid.

[617] Vogel, Frank E. and Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (Arab and Islamic laws Series, Kluwer Law International, The Hauge 1998); Borhan, Joni Tamkin and Che Zarrina Saari, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.pp. 53-56.

[617] Ibid.

[618] Ibid.

[619] Borhan, Joni Tamkin and Che Zarrina Saari, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.p. 54; El-Gamal, Mahmoud A., *Islamic Finance: Law, Economics and*

prohibition is extended to all fungible goods measured by weight or volume, whereas *Al-Shafie*, *Al-Maliki* and *Al-Zahri* jurists restricted it to monetary commodities such as gold and silver and storable food products[620]. For example, in modern life, *Riba Al-Fadil* arises in transactions when there is an increase in the terms of exchange where the subject matter of the transaction and the consideration are identical. For example, the exchange of a specific amount of UK pounds for a higher amount of UK pounds can be considered as *Riba Al-Fadil*[621]*.* However, if the consideration is different from the subject matter of the transaction, such as exchanging UK pounds for UAE dirhams, there is no *Riba* as long as the transaction is completed at the same time[622].

4.6.2 *Riba Al-Nasiah* (*Riba* in Loan)

The second category is *Riba Al-Nasiah* that was used in the Arab pre-Islamic era whereby they used to give loans on the condition that every month the lender will receive a specific amount or premium from the borrower. The principal amount would remain outstanding and would be paid after a specific time when the debt has matured. If the debtor was not able to pay the amount on the agreed time or maturity, when the loan matured and the borrower was unable to pay the principle amount, the period will be extended with an extra premium[623]. In other words, this type of situation occurs when there is a specified increase in return for the waiting period for the payment of the principle amount[624]. This type of *Riba* was referred to as *Riba Al-Jahiliya* or the

Practice (Cambridge University Press, Cambridge 2006).p. 221; Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).p. 205.

[620] Ibid. See also Althabity, Mohammad Motlg., 'Enforceability of Arbitral Awards Containing Interest: a Comparative Study Between Sharia Law and Positive Laws' (PhD Thesis, University of Stirling 2016).pp. 73-75.

[621] Ramadan, Hisham M (ed), *Understanding Islamic Law from Classical to Contemporary* (1st edn, Altamira Press, Lanham, MD 2006).p. 117; Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).p. 205; Althabity, Mohammad Motlg., 'Enforceability of Arbitral Awards Containing Interest: a Comparative Study Between Sharia Law and Positive Laws' (PhD Thesis, University of Stirling 2016).pp. 73-75.

[622] Ibid.

[623] Al-Razi, Al-Fakhru Din, *Al-Tafsir Al Kabir* (Vol 7, 1st edn, Dar al-Fikr, Damascus 1981).p. 85; Borhan, Joni Tamkin and Che Zarrina Saari, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.pp. 49-53; Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).p. 205; Farooq, Mohammad Omar, 'Ribā, Interest and Six Hadiths: Do We Have a Definition or a Conundrum?' (2009) 13(1) Review of Islamic Economics 105.p. 107; Alandalousi, Abdullmalik Ibn Habib, *Kitab Alriba (*Dr Nathir Wahab (ed), 1st edn, Juma Almajid Centre for Culture and Heritage, Dubai 2012).

[624] Noorzoy, M. Siddieq, 'Islamic Laws on Riba (Interest) and Their Economic Implications' (1982) 14(1) International Journal of Middle East Studies 3; Borhan, Joni Tamkin and Che Zarrina Saari, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.pp. 49-53; Althabity,

Riba which was prevalent in Arabian Peninsula in the pre-Islamic days[625]. The Prophet Mohammed said in a *Hadith* that,

> *"All contracts of Riba of the pre-Islamic period are null and void. The first contract of Riba I am cancelling is that of Abbas bin Abdulmottalib"[626].*

Moreover, the Prophet Mohammed nullified the *Riba* accrued on the Christians of Najran for their debts that were accumulated in the pre-Islamic period[627].

Although there is a consensus amongst the *Sharia* scholars that *Riba* is prohibited, scholars have differed on what constitutes *Riba* and which type of *Riba* is prohibited. The consensus of *Sharia* scholars is that *Riba Al-Nasiah* is prohibited. However, there is no consensus among *Sharia* scholars of the prohibition of *Riba Al-Fadil*[628]. The majority of scholars believe that *Riba Al-Fadil* is prohibited but the minority of Islamic scholars, including the Prophet's companion Ibn Abbas, argued that there is no such thing called *Riba Al-Fadil* in Islam and that the only category of *Riba* that is recognised under *Sharia* law is *Riba Al-Nasiah*. Ibn Abbas pointed out that as long as two people exchange gold and make the payment at the same time, the transaction is not prohibited[629]. The minority group of scholars based their argument on the Prophet Mohammed's *Hadith* where he pointed out that, *"there is no Riba except in Riba Al-*

Mohammad Motlg., 'Enforceability of Arbitral Awards Containing Interest: a Comparative Study Between Sharia Law and Positive Laws' (PhD Thesis, University of Stirling 2016).pp. 73-75.

[625] Ibid.

[626] Cited by Tahir, Ibrahim Nuhu, 'The Reason Why the Companion Ibn Abbas Changed His Opinion on Riba Al-fadhl' (2016) 6(6) International Journal of Social Science and Humanity 475.p. 476.

[627] Saeed, Abdullah, *Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation* (Studies in Islamic Law and Society, Vol 2, 2nd edn, Brill, Leiden 1999); Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).p. 205.

[628] Borhan, Joni Tamkin and Che Zarrina Saari, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.pp. 49-53; Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).p. 205; Farooq, Mohammad Omar, 'Riba, Interest and Six Hadiths: Do We Have a Definition or a Conundrum?' (2009) 13(1) Review of Islamic Economics 105; Tahir, Ibrahim Nuhu, 'The Reason Why the Companion Ibn Abbas Changed his Opinion on Riba Al-fadhl' (2016) 6(6) International Journal of Social Science and Humanity 475.

[629] Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).p. 205; Farooq, Mohammad Omar, 'Rib, Interest and Six Hadiths: Do We Have a Definition or a Conundrum?' (2009) 13(1) Review of Islamic Economics 105.pp. 107-112; Tahir, Ibrahim Nuhu, 'The Reason Why the Companion Ibn Abbas Changed his Opinion on Riba Al-fadhl' (2016) 6(6) International Journal of Social Science and Humanity 475.

Nasiah or deferment'[630]. Ibn Hanbal, the founder of the *Hanbali* School of jurisprudence, concurred with this minority view[631] and pointed out that without doubt that the practice of pay or increase is the only form of *Riba*[632]*.* Some modern-day *Sharia* scholars have adopted the narrowest scope of *Riba* and concurred with the view of Ibn Hanbal that the only category of *Riba* is *Riba Al-Nasiah*[633].

4.7 Definition of *Riba*

The classifications of *Riba* under *Sharia* jurisprudence was not a straightforward process and subsequently led to scholars being unable to properly define *Riba*. However, *Sharia* scholars failed in providing a single unified definition for the term *Riba*[634]*.* When it comes to the definition of *Riba* and its analysis from a *Sharia* jurisprudence perspective, *Sharia* jurists and scholars found it cumbersome to define *Riba*. Even the great *Sharia* scholar Ibn Khathir pointed out that the concept of *Riba* was the most challenging chapter in his book[635]. Modern scholars have provided interesting definitions for *Riba*, for example Abdul Rahman Al Jaziri defined *Riba* as the *"increase in one of two homogeneous equivalents being exchanged without this increase being accompanied by a return'*[636]. This definition is incomplete since it reflects the usual and typical understanding concerning the definition of *Riba*. Additionally, not all increases, or excesses are prohibited in *Sharia* law, such as profit

---

[630] Zahra, Mohammad Abu, *Buhouth fi Al-Riba* (Dar Al Fikhar Alarabi, Cairo, undated).p. 21; Farooq, Mohammad Omar, 'Riba, Interest and Six Hadiths: Do We Have a Definition or a Conundrum?' (2009) 13(1) Review of Islamic Economics 105.p. 129.

[631] Vogel, Frank E. and Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (Arab and Islamic Laws Series, Kluwer Law International, The Hauge 1998); Farooq, Mohammad Omar, 'Riba, Interest and Six Hadiths: Do We Have a Definition or a Conundrum?' (2009) 13(1) Review of Islamic Economics 105.pp. 107-112.

[632] El-Gamal, Mahmoud A., *Islamic Finance: Law, Economics and Practice* (Cambridge University Press, Cambridge 2006).p. 46; Almezeini, Abdulaziz A., *The Negotiability of Debt in Islamic Finance: An Analytical and Critical Study* (Brill, Leiden; Boston 2017).p. 20.

[633] Saeed, Abdullah, *Islamic banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation* (Studies in Islamic Law and Society, Vol 2, 2nd edn, Brill, Leiden 1999); Baamir, Abdulrahman Yahya, 'Saudi law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).p. 206; Almezeini, Abdulaziz A., *The Negotiability of Debt in Islamic Finance: An Analytical and Critical Study* (Brill, Leiden; Boston 2017).p. 23.

[634] Balala, Maha-Hanaan, *Islamic Finance and Law: Theory and Practice in a Globalized World* International Library of Economics, 1st edn, I.B. Tauris & Company Publishing, London 2011); Al-Sarakhsi, Abu Bakr Muhammad, *Money Exchange, Loans and Riba: A Translation of Kitab Al-Sarf from Kitab al-Mabsut* (Imran Ahsan Khan Nyazee (trs), 1st edn, The Advanced Legal Studies Institute, Islamabad 2018).pp. 21-30.

[635] Katheir, Emad Aldien Ibn, *Tafseer Al Quran Al-Azeem* (Vol. 1, 1st edn Dar Ibn Hazem, Beirut 2000).p. 247.

[636] Al Jaziri, Abdul Rahman, *Al-Fiqh ala al-Madhahib al-Arbaah* (Vol 2, Dar Alkutub Alilmiah, Beirut 2003).p. 221.

obtained from buying and selling stocks and property would not be considered *Riba*. The definition applies only to loans, but it does not apply equally to all transactions of sales or exchange of commodities[637]. Zamir and Hiroshi provided a more accurate definition for the term *Riba*. They pointed out that *Riba* is defined as

> *"Any unjustifiable increase of capital whether through loans or sales. More precisely, any positive, fixed, predetermined rate tied to the maturity and the amount of principal (i.e., guaranteed regardless of the performance of the investment)"*[638].

Abu Baker Ibn Al-Arabi, the great scholar of the 16th century, had defined *Riba* as *"all excess over what is justified by the countervalue"*[639]. The definition of Abu Baker Ibn Al-Arabi is vague and unsatisfactory as it can be argued that the giveaway, gift contract or deed will fall under this definition where there is no justifiable reason or return for the gift[640]. He went further to explain the mandatory requirement for any contract of sale. He pointed out that every contract should have equal counter value or compensation "*Iwadh"* in order for the contract to not fall into *Riba*. In another words, every increase, which is without an equal counter value will be considered *Riba*[641]. His opinion was in line with the well-established *Sharia* legal maxim, which is no reward without risk, *"Al-Gonmu Bil Ghorm"* and in any benefit lies liability, *"Al-kharaj Bil Daman"*[642].Therefore, for a contract to be valid according to Abu Baker Ibn Al-Arabi there should be counter value present. Three elements of counter value are mandatory

---

637 Chapra, M. Umer, 'The Nature of Riba In Islam' (2006) 2(1) The Journal of Islamic Economics and Finance 7.p. 14; Iqbal, Zamir and Hiroshi Tsubota, *Emerging Islamic Capital Markets: A Quickening Pace and New Potential* (The Euromoney International Debt Capital Markets Handbook 2006, London 2006).p. 6; Balala, Maha-Hanaan, *Islamic Finance and Law: Theory and Practice in a Globalized World* (International Library of Economics, 1st edn, I.B. Tauris & Company Publishing, London 2011).

638 Iqbal, Zamir and Hiroshi Tsubota, *Emerging Islamic Capital Markets: A Quickening Pace and New potential* (The Euromoney International Debt Capital Markets Handbook 2006, London 2006).p. 6.

639 Al-Arabi, Abu Baker Ibn, *Ahkam al-Quran* (Vol 1, 3rd edn, Dar Alkutub Alilmiah, Beirut 2003).p. 242; Borhan, Joni Tamkin and Che Zarrina Saari, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.p. 55.

640 Ibid.

641 Ibid. See also Borhan, Joni Tamkin and Che Zarrina Saari, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.p. 55; Rosly, Saiful Azhar, 'Iwad as a Requirement of Lawful Sale: A Critical Analysis' (2001) 9(2) IIUM Journal of Economics and Management 187.pp. 192-194.

642 Rosly, Saiful Azhar, 'Iwad as a Requirement of Lawful Sale: A Critical Analysis' (2001) 9(2) IIUM Journal of Economics and Management 187.pp. 192-194; Al-Arabi, Abu Baker Ibn, *Ahkam Al-Quran* (Vol 1, 3rd edn, Dar Alkutub Alilmiah, Beirut 2003).p. 242; Borhan, Joni Tamkin and Che Zarrina Saari, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.p. 55; Chapra, M. Umer, 'The Nature of Riba In Islam' (2006) 2(1) The Journal of Islamic Economics and Finance 7.

and should be manifest or included in any transaction or contract in order to be considered legitimate under *Sharia* law. According to Dusuki and Bouheraoua, there are four, not three, essential elements of counter value that should exist in any contract or transaction to avoid *Riba.* These are risk, value-addition, work and effort and liability[643]. If there is risk, effort or liability, then such a contract cannot be considered to contain an element of injustice and would instead be considered a more balanced contract with fair value[644]. Under *Sharia* law, the contract must show that the creditor or the financier assumes some risk and liability. According to Dusuki and Bouheraoua, most debt-financing contracts lack one or more elements of counter value and therefore *Riba* manifests in those contracts or transactions. If there is no real risk, real effort, and liability, then such a contract cannot be considered to contain any element of justice and will be considered *Riba*[645]*.*

Iqbal and Mirakhor argued that *Riba* has four characteristics, it is a fixed positive, it is linked to time period of the loan amount, the payment is granted regardless what happened to the amount borrowed and finally the State imposes sanctions on the borrower for non-payment of the principle amount and the premium or increase[646].

The failure of *Sharia* scholars to provide a single unified definition for term *Riba* and the contradictions amongst scholars on the scope of its prohibition has led to confusion on whether some modern transactions are *Riba* or not[647]. This issue has raised various issues based on what exactly is prohibited, for example is the prohibition limited to consumer loans or compound interest or perhaps is the adjustment for inflation in any form considered *Riba*[648]*.* In view of the fact that the meaning of *Riba* is a controversial

---

643 Rosly, Saiful Azhar, 'Iwad as a Requirement of Lawful Sale: A Critical Analysis' (2001) 9(2) IIUM Journal of Economics and Management 187.pp. 192-194; Dusuki, Asyraf Wajdi and Said Bouheraoua, 'The Framework of Maqasid Al-shari'ah and its Implication for Islamic Finance' (2011) 2(2) Islam and Civilisational Renewal 316; Paldi, Camille, 'Understanding Riba and Gharar in Islamic Finance' (2014) 31(3) Journal of Islamic Banking and Finance 35.
644 Ibid.
645 Supra note 651.
646 Zahra, Mohammad Abu, *Tahreem Al-Riba Tanzeem Igtisadt* (2nd edn,Dar Al Saudiah Lilnasher, Jeddah 1985).pp. 53-61; El-Malik, El-Walied M. H., 'Aspects of Natural Resources Contracts, Investment & Finance at Sharia and Arab Secular Laws: a Comparative Study' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee 1997).pp. 165-166; Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).pp. 166-170.
647 Ibid. See also Al-Nabahani, Tag Al-Deer, *Al-Nazam Al-Egtsadi fi Al-Islam* (1st edn Dar El-Umma Publishing, Abu Dhabi 2004).pp. 253-55.
648 Supra note 655.

issue, each Muslim State has developed its own definition and *modus operandi* of the concept of *Riba*. Not only that, but it is left for the courts to construe and define the scope and application of the concept on a case by case basis[649]. Some of these questions will be addressed by this research as it directly influences the enforcement of foreign arbitral awards.

4.8 General Theories Governing *Riba*

Broadly speaking and according to contemporary Muslim scholars, there are two main schools with regard to *Riba* and its definition and application. The first school is the Orthodox school, which believes that all types of *Riba* are prohibited without qualification and provides that *Sharia* law does not allow the value of money to be calculated on the basis of a predetermined rate[650]. The second school is the permissive school, which believes that *Riba* is permissible, subject to certain qualifications[651].

4.8.1 The Orthodox *Riba* School

Advocates of this school include modern *Sharia* law scholars such as Sheikh Abu Zahrah, Sheikh Mufti Taqi Usmani, Sheikh Saleh Al-Hussayen, Sheikh Saleh Al-Fozan and Sheikh Abdul Aziz Bin Baz[652]. The advocates of this school argue that *Sharia* law does not permit the time-value of money that is based on a predetermined rate.

---

[649] El-Malik, El-Walied M. H., 'Aspects of Natural Resources Contracts, Investment & Finance at Sharia and Arab Secular Laws: a Comparative Study' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee 1997).p. 165.

[650] El-Malik, El-Walied M. H., 'Aspects of Natural Resources Contracts, Investment & Finance at Sharia and Arab Secular Laws: a Comparative Study' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee 1997).p. 166. See also Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).pp. 166-170; Zahra, Mohammad Abu, *Tahreem Al-Riba Tanzeem Igtisadt* (2nd edn,Dar Al Saudiah Lilnasher, Jeddah 1985).pp. 53-56.

[651] Ibid.

[652] Al-Fozan, Saleh, 'The Difference Between Selling and Riba in the Islamic Sharia, on Contrast to the Customs of Al-jahlya' (1983)(Issue 10) Islamic Research Magazine 86; Bin Baz, Abdul-Aziz, 'The Response of Sheikh Abdul-Aziz bin Baz on Ibrahim Al-Nasser Article on The Stand of The Islamic Sharia in Regard to The Banking Transactions' (1986)(Issue 18) Islamic Research Magazine 121; Al-Hussayen, Saleh, 'The Response of Sheikh Saleh Al-Hussayen on Ibrahim Al-Nasser Article on the stand of the Islamic; Al-Hussayen, Saleh, 'Commentary on The Difference Between the Banks Interest Rate and Riba' (1991)(Issue 31) Islamic Research Magazine 123; Zahra, Mohammad Abu, *Tahreem Al-Riba Tanzeem Igtisadt* (2nd edn,Dar Al Saudiah Lilnasher, Jeddah 1985).pp. 53-61; Usmani, Mufti Muhammad Taqi, *Fiqh Al-Buyu* (Vol 1, 1st edn, Maktaba Ma'ariful Quran, Karachi 2015); Abdulla, Mohammad Ibrahim Abdulrahim, 'Assessing the United Arab Emirates Decisional Law on Arbitration' (SJD Thesis, Penn State University 2017).pp. 83-85.

Moreover, pre-determined rates constitute *Riba*[653]*.* They claim that the prohibition of *Riba* is definitive in the *Quran* and that the prohibition is general and not to a specific type of transaction or *Riba* classification. Therefore, simple and compound interest are both equally prohibited by the Quran[654]. Moreover, the advocates of this school claim that it is very important to comprehend all the *Quranic* provisions governing the issue of *Riba*. Furthermore, if one needs to understand to what extent that the *Quran* goes into with regards to the prohibition of interest, it is suggested to place the *Riba* verses together then read them as one set piece of legislation. Henceforth, this would lead to a clear conclusion that the *Quran* prohibits any additional or promised value above borrowed capital[655].

They propose that the *Quran* verses do not differentiate between commercial and consumer transactions and between *Riba Al-Fadil* or *Riba Al-Nasiah*. To add further, even if commercial transactions were not exploitative, the prohibition of *Riba* would still be valid considering that the main principle behind its prohibition would have been beyond the intellectual ability of human beings to identify at the current time[656]. In this context, Abdullah Saeed argues that the prohibition of *Riba* is due to the conflict with the will of God (Allah). Islam means submission to God and any attempt by Muslims

---

[653] Fahim, Khan M., *Essays in Islamic Economics* (Islamic Economics Series, Islamic Foundation, UK 1995).pp. 59-70; Zahra, Mohammad Abu, *Tahreem Al-Riba Tanzeem Igtisadt* (2nd edn,Dar Al Saudiah Lilnasher, Jeddah 1985).pp. 53-61; El-Malik, El-Walied M. H., 'Aspects of Natural Resources Contracts, Investment & Finance at Sharia and Arab Secular Laws: a Comparative Study' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee 1997).p. 166; Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).pp. 166-170; Ahmad, Abu Umar Faruq and M. Kabir Hassan, 'The Time Value of Money Concept in Islamic Finance' (2006) 23(1) The American Journal of Islamic Social Sciences 66.p. 73.

[654] Ibid.

[655] Zahra, Mohammad Abu, *Tahreem Al-Riba Tanzeem Igtisadt* (2nd edn,Dar Al Saudiah Lilnasher, Jeddah 1985).pp. 53-61; Zahra, Mohammad Abu, *Buhouth fi Al-Riba* (Dar Al Fikhar Alarabi, Cairo, undated).pp. 20-21; Zaid, Abdu Azeim Jalal Abu, *Fiqh Al-Riba Dirasa Muqaranah wa Shamilah lil Tatbiqat Almuaserah* (1st edn, Aresala Publishing, Beirut 2004).pp. 69-86.

[656] Zahra, Mohammad Abu, *Tahreem Al-Riba Tanzeem Igtisadt* (2nd edn,Dar Al Saudiah Lilnasher, Jeddah 1985).pp. 53-61; Chapra, Muhammad Umar, *Objectives of the Islamic Economic Order* (Islamic Foundation, Leicester 2007).pp. 24-21; El-Malik, El-Walied M. H., 'Aspects of Natural Resources Contracts, Investment & Finance at Sharia and Arab Secular Laws: a Comparative Study' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee 1997).p. 166; Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).pp. 166-170; Zahra, Mohammad Abu, *Buhouth fi Al-Riba* (Dar Al Fikhar Alarabi, Cairo, undated).p. 35; Zaid, Abdu Azeim Jalal Abu, *Fiqh Al-Riba Dirasa Muqaranah wa Shamilah lil Tatbiqat Almuaserah* (1st edn, Aresala Publishing, Beirut 2004).pp. 69-73.

to predict the will of God is considered as *"blasphemous"*[657]. Sheikh Abu Zahrah, one of the most prominent contemporary *Sharia* law scholars, has argued that there is hardly any room even for arguing that the prohibition applies only to consumption loans and not to business loans. This is because borrowing and lending during the Prophet Mohammad's era was not for consumption purposes, but rather it was for financing long distance trade and commercial activities[658]. He stated that there is absolutely no evidence from the *Quran* and *Hadith* to support that the *Riba Al-Jahiliya* on a consumption basis and not on a business basis[659].

Further, Professor Udovitch pointed out that it is untenable to assume that the medieval Near East credit and loan system was only for consumption and not for production[660]. Additionally, the prohibition of *Riba* in the Prophet's *Hadith* followed the doctrine of extended prohibition to cover all activities related to *Riba* and all individuals involved in such transactions[661]. In this context, the Prophet Mohammed stated that all people are equal in sin, "… Receiver and the payer of Riba, the one who records it and the witnesses to the transaction and said: they are all alike"[662].

The advocates of this school argued further that from an Islamic economic perspective, Islam does not recognise the time value of money since time cannot justify an excess amount claimed in an exchange. In contrast, the excess amount should always be claimed against a real asset or commodity and not against time[663]. Islamic scholar Usmani argues that the Islamic economic model is based on the fact that, *"time of payment may act as an ancillary factor to determine the price of a*

---

[657] Supra note 664.
[658] Zahra, Mohammad Abu, *Tahreem Al-Riba Tanzeem Igtisadt* (2nd edn,Dar Al Saudiah Lilnasher, Jeddah 1985).pp. 53-61; Zahra, Mohammad Abu, *Buhouth fi Al-Riba* (Dar Al Fikhar Alarabi, Cairo, undated).pp. 33-36.
[659] Ibid.
[660] Udovitch, Abraham L., *Partnership and Profit in Medieval Islam* (Princeton University Press, NJ 1970).p. 86.
[661] Zahra, Mohammad Abu, *Tahreem Al-Riba Tanzeem Igtisadt* (2nd edn,Dar Al Saudiah Lilnasher, Jeddah 1985).pp. 53-61; Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).p. 204.
[662] Zahra, Mohammad Abu, *Tahreem Al-Riba Tanzeem Igtisadt* (2nd edn,Dar Al Saudiah Lilnasher, Jeddah 1985).pp. 53-61; Alzaylaie, Ossman Ibn Ali, *Tabeen Alhaqaiq Sharh Kanz Aldaqaiq* (Vol 1, 1st edn Dar Alkotoub Alilmiyah, Beirut 2000).p. 84.
[663] Zahra, Mohammad Abu, *Tahreem Al-Riba Tanzeem Igtisadt* (2nd edn,Dar Al Saudiah Lilnasher, Jeddah 1985).pp. 53-61; Zahra, Mohammad Abu, *Buhouth fi Al-Riba* (Dar Al Fikhar Alarabi, Cairo, undated).pp. 35; Ahmad, Abu Umar Faruq and M. Kabir Hassan, 'The Time Value of Money Concept in Islamic Finance' (2006) 23(1) The American Journal of Islamic Social Sciences 66.p. 76.

commodity, but it cannot act as an exclusive basis for and the sole consideration of an excess claimed in exchange of money for money'[664].

Furthermore, the advocates of this school suggest that there is an economic reason for the prohibition of *Riba*. *Riba* will lead to an unbalanced and unstable economy. The economy that is based on *Riba* will create instability, inflation, and unemployment, in contrast to the Islamic economic model, which is based on assets that create stable and sufficient markets and economies that promotes real assets, inventories and business partnership. Therefore, *Riba* is prohibited to safeguard the Islamic society and there is no economic justification to override this prohibition[665]. As well, from the socio-economic Islamic model, *Riba* conflicts with the clear and unequivocal Islamic emphasis on socio-economic justice and fairness[666]. In relation to the doctrine of necessity *"Al-Darura"* is valid and accepted grounds for a person under obligation to set aside an established *Sharia* rule, it should be noted that the application of doctrine of necessity is not absolute but require a real understanding of how necessity applied under *Sharia* to avoid any abuse of the application of the principle[667].

Accordingly, the doctrine has to be interpreted narrowly and in special circumstances in light of *Sharia* law's ultimate aims and objectives *"Magasid"*. In other words, it should be noted that the application of the doctrine is permitted when there is a threat against a person's religion (Islam), life, property and wealth, mind or offspring[668]. Furthermore, there are strict criteria expounded by Muslim scholars, in light of the Holy *Quran* and *Hadith*, to determine the magnitude of necessity, and to determine to what extent a *Quranic* injunction can be relaxed on the basis of a new situation. This ensures that the necessity is legitimate and not exaggerated**.** Thus, the principle of necessity has a high threshold that must be achieved for its application; this threshold also acts as a safeguard against people abusing this principle. Accordingly, the elimination of *Riba*

---

[664] Cited by Paldi, Camille, 'Understanding Riba and Gharar in Islamic Finance' (2014) 31(3) Journal of Islamic Banking and Finance 35.
[665] Habachy, Saba, 'The System of Nullities in Muslim Law' (1964) 13(1) The American Journal of Comparative Law 61; Saadallah, Ridha, 'Concept of Time in Islamic Economies' (1994) 2(1) Islamic Economic Studies 81; Zahra, Mohammad Abu, *Tahreem Al-Riba Tanzeem Igtisadt* (2nd edn,Dar Al Saudiah Lilnasher, Jeddah 1995).pp. 53-61; Al-Zuhayli, Wahbah, 'The Juridical Meaning of Riba' in Thomas, Abdulkader (ed), *Interest in Islamic Economics* (Islamic Studies Series, 1st edn Routledge Ltd, London 2006).pp. 25-52.
[666] Ibid.
[667] Ibid. See also Afanah, Husaam Aldin Bin Mousa, *Yassanlounk an Almuamalat Almuasserah (*Vol 1, 1st edn, Dar Altaiub Liltibah was Alnasher, Ramallah 2009).p. 21.
[668] Ibid.

in a Muslim state will not lead the economy to collapse, and alternative solutions may be available for Muslim state to adopt and implement**.** Hence, a proper understanding of the rule governing the principle of necessity is imperative in order to ensure it is correctly applied to *Sharia* law standards[669].

In this context, the scholar Abdul Nasser Al-Attar argued that the *Sharia* legal jurisprudence of necessity does not allow the court or the scholars to replace the *Sharia* law ruling with a new one. Instead, it simply permits recourse to *Sharia* law in necessary situations to deduce legal rules in dealing with changed circumstances[670]. Accordingly, necessity is merely an exception to the rule, and not a new rule.

Therefore, it should only be utilised until the necessity is eliminated and people no longer require *Riba,* and the government establishes an alternative economic system. Therefore, the Islamic State may be exempted for a short period of time from the requirement of establishing an economy that is free from *Riba* and this exemption is not permanent[671].

This line of thought has been upheld by Supreme Court of Islamic Republic of Pakistan. The Supreme Court, in December 1999, delivered a key ruling stating that any simple or compound interest is considered *Riba,* which is prohibited by the *Quran* and *Hadith*, regardless of whether the loan is for a consumptive or productive purpose[672]. As a result, the court declared a number of interest-related statutes and laws to be against *Sharia* law and, therefore, unconstitutional. The court's conclusion was based on closely examining the relevant verses of the *Quran*, the *Hadith* and *Sharia* jurisprudence. Additionally, the court regarded that the Islamic economic model is not only feasible but is also beneficial in helping to bring about a balanced, sufficient, and stable economy[673].

---

[669] Supra note 675.
[670] Supra note 384, p. 157.
[671] Supra note 384. See also Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).p. 167.
[672] Order of the Supreme Court of Pakistan dated 24th June 2002 on the Civil Shariat Review Petition No. 1 of 2000 and Civil Shariat Petition No. 1 of 2001.
[673] Usmani, Muḥammad Taqi, *The Text of the Historic Judgement on Riba (Interest) by Supreme Court Pakistan* (The Other Press, Petaling Jaya, Malaysia 2001); Stovall, Howard L., 'Doubts Persist Arab Commercial Law into the Future in Ballantyne, William M. and Howard L. Stovall (eds), *Arab Commercial Law: Principles and Perspectives* (Section of International Law & Practice, American Bar Association, Chicago, IL 2002).pp. 9-10.

As well, between 1979 and 1980, several cases were brought to the UAE courts, including the Abu Dhabi Federal Appeal Case No. 102/1980[674]. The bank argued that Articles 61 and 62 of the Abu Dhabi Law of Civil Procedures (Local Law No. 3/1970) permitted the court to impose interest until the full payment of the principle amount and the interest is paid, thus allowing the bank to claim the interest as per the applicable law. However, the Abu Dhabi First Instance Court granted the bank the principle amount of the loan and refused to grant the requested payment of interest. The court's decision was based on the fact that article 7 of UAE Constitution[675] and Article 75 of the Federal Law No. (10) of 1973[676] concerning the Federal Supreme Court states that the Federal Supreme Court shall apply the provisions of the *Sharia* law, laws of the Union and other laws in force in the member Emirates of the Union conforming to the *Sharia* law. The Abu Dhabi appellate court followed the first instance court and stated that,

> *"According to Sharia law, banking interest constitutes "Riba", a grave sin forbidden by the Holy Quran; the religion of the State is Islam, as declared and supported by the Constitution in making the Sharia law a main source of legislation. Legal rules, in general, differ in types and rank, some being higher in authority than the Constitution's provisions (here the court refers to Sharia law), others lower. All legislation, regulations, orders and other measures in force are of the second, lower type, and as such their constitutionality is subject to examination only by the Supreme Court. The constitutionality of the first, higher type of law, including the illegalisation of banking interest, is not subject to such examination.... Even the Constitution itself should follow such legal rules and should not violate them. This is evidenced by the provision of Article 75, which insists on the application of Sharia law"[677].*

It appears that the court viewed all types of *Riba* as a sin and prohibited by *Sharia* jurisprudence and therefore, awarding *Riba* is unconstitutional as it violates article 7

[674] Abu Dhabi Federal Appeal Case No. 102/1980 issued on 29 October 1980 unpublished, cited from AL-Muhairi, Butti Sultan Butti Ali, 'Islamisation and Modernisation Within the UAE Penal Law: Shari'a in the Pre-Modern Period' (1995) 10(4) Arab Law Quarterly 287.p. 229.
[675] Article 7 of the UAE Federal Constitution of 1971.
[676] Article 75 of the UAE Federal Law No. 10 concerning the Supreme Federal Court.
[677] Cited in AL-Muhairi, Butti Sultan Butti Ali, 'Islamisation and Modernisation within the UAE Penal Law: Shari'a in the Pre-Modern Period' (1995) 10(4) Arab Law Quarterly 287.pp. 219-244.

of the UAE Constitution, which stipulates that *“Sharia law is the main source of legislation”.* Additionally, the position of the court clearly indicates that enhancement of foreign investment and streamlining economic activities of the state does not justify permitting *Riba* and that the threshold of necessity is not met. Hence, the doctrine of necessity should not apply to this situation as the whole interest of the UAE is not at stake and alternative solutions may be available.

The appeal court adopted a strict definition of *Riba* established by the Orthodox school which believes that any type of *Riba* is a sin and therefore, completely prohibited. The Appeal Court argued that it was not for the Federal Supreme Court of UAE to decide on the illegality of levying interest, as it was an issue that was clearly settled according to *Sharia* Jurisprudence. Moreover, the UAE courts should only be able to enforce the principal amount of an award and refuse to enforce the award of interest[678].

4.8.2 The Permissive *Riba* School

The permissive *Riba* school was established by Imam Mohammed Abdo[679]and supported by Mohammed Sayed Tantawi, Sheikh Mohammad Rasheed Rida, Professor Maroof al-Dwaleibi and Professor Al-Sanhury[680]. It should be noted that this school is focused on alternative theoretical economic models. Thus, this school considers *Sharia* law’s ultimate aim is to enhance a Muslim state’s socio-economic status and remove all economic hinderance and barrier to prosperity. Therefore, it is important permit certain types of *Riba* in order to achieve this goal[681]. The advocates of the school also argued that advocates of Orthodox *Riba* school opine on the *Sharia*

[678] Buchanan, Mark A., 'Public Policy and International Commercial Arbitration' (1988) 26(3) American Business Law Journal 511.p.525.

[679] El-Fishawy, Saad, 'Contracts and Litigation in Islamic Law' (1982) 76 Proceedings of the Annual Meeting - American Society of International Law 62.p. 64; El-Malik, Walied M., *Minerals Investment Under the Shari’a law* (International Energy and Resources Law and Policy Series, 1st edn, Graham & Trotman for Kluwer Law, London 1993).p. 166; Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).pp. 166-170.

[680] El-Fishawy, Saad, 'Contracts and Litigation in Islamic Law' (1984) 76 Proceedings of the Annual Meeting - American Society of International Law 62.p. 64; El-Malik, El-Walied M. H., 'Aspects of Natural Resources Contracts, Investment & Finance at Sharia and Arab Secular Laws: a Comparative Study' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee 1997).p.177; Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).pp. 166-170.

[681] Humphreys, R. Stephen, 'Islam and Political Values in Saudi Arabia, Egypt and Syria' (1979) 33(1) Middle East journal 1.pp. 4-5 and 7

law rules from just a theological and dogmatic point of view, without giving them due consideration to the welfare of people and the state[682]. Dr Ibrahim Shihata argued that the prohibition of *Riba* by the advocates of the Orthodox school is based solely on *Taqleed* or Imitating of the views of earlier *Sharia* law scholars by the contemporary *Sharia* law scholars, without considering society's economic needs and the well-established *Sharia* law maxim of necessity, which permits prohibited matters such as *Riba* to remove hardship. However, the modern scholars did not employ *Ijtihad* or reasoning to extract novel or alternative solutions to overcome the prohibition of *Riba*[683]. Instead, these scholars restricted themselves to classical views introduced at the classical period of the Islamic legal system, which is not comparable to modern life. He pointed out that the prohibited *Riba* should be restricted to obvious cases of exploitation and unjust enrichment of lenders[684].

I, therefore, assert that the *Quran* did not include a prohibition on the charging of market-based rates of *Riba* for the deposit or utilisation of money, but rather prohibited the exploitation of people. The historical prohibition of *Riba* was based on an exceptional situation. The prohibition was against practices of the people of Taif, who exploited a needy people by lending them money with an obligation to pay double the amount[685]. This argument is based on the *Quran*, which states that,

> *"You who believe! Eat not Riba (usury) doubled and multiplied but fear Allah that you may be successful"[686].*

The interpretation of this verse is clear that *Riba* is prohibited only in the circumstance where the interest is doubled or multiplied or when it equates to prohibited usury or

---

[682] El-Fishawy, Saad, 'Contracts and Litigation in Islamic Law' (1982) 76 Proceedings of the Annual Meeting - American Society of International Law 62.p. 64; El-Malik, Walied M., *Minerals Investment Under the Shari'a law* (International Energy and Resources Law and Policy Series, 1st edn, Graham & Trotman for Kluwer Law, London 1993).p. 166; El-Malik, El-Walied M. H., 'Aspects of Natural Resources Contracts, Investment & Finance at Sharia and Arab Secular Laws: a Comparative Study' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee 1997).p. 177; Shihata, Ibrahim F. I., 'Some Observations on the Question of RIBA and the Challenges Facing Islamic Banking' (2000-2001) 5(1) Yearbook of International Financial and Economic Law 23.

[683] Shihata, Ibrahim F. I., 'Some Observations on the Question of RIBA and the Challenges Facing Islamic Banking' (2000- 2001) 5(1) Yearbook of International Financial and Economic Law 23.

[684] Ibid.

[685] Saeed, Abdullah, *Islamic banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation* (Studies in Islamic law and society, Vol 2, 2nd edn, Brill, Leiden 1999); El-Gamal, Mahmoud A., *Islamic Finance: Law, Economics and Practice* (Cambridge University Press, Cambridge 2006); Ramadan, Hisham M.(ed), *Understanding Islamic Law from Classical to Contemporary* (1st edn, Altamira Press, Lanham, MD 2006).p. 117.

[686] Quran verse 3:130

excessive *Riba*[687]. Only usurious transactions *i.e.* overcharging rates of interest and compound interest are subject to the *Quranic* prohibition. Interest, as a whole, is not absolutely interdicted, instead, the interdiction of *Riba* arises as a preventive measure to not indulge into usurious transactions[688]. Furthermore, the permissive *Riba* school distinguishes between production transactions and consumer transactions. To note further, *Riba* was permitted in the former but prohibited in the latter[689]. Additionally, it should be noted that when the aim of a transaction is to finance a commercial scheme intended to make a profit, *Riba* would be considered legal, subject to the condition that it does not exceed the usual rate[690]. The Islamic scholar, Professor Maroof al-Dwaleibi, pointed out in his paper at the 1951 Islamic law conference in Paris that *Riba* is limited to consumption loans (*i.e.* personal loans) and does not apply to production loans (*i.e.* commercial and business loans)[691].

It can be also contended that *Riba* could be permitted on the basis of the well-established *Sharia* law doctrine of necessity. This is based on the ability of *Sharia* law to adjust to socio-economic changes in relation to its basic principles[692]. This *Sharia* jurisprudence is based on interpretation of Holy *Quran* verses that emphasis that Allah or God will not put any human in hardship and difficulties. The verses below indicate that Allah or God will not impose difficulties on an individual:

> *"Allah intends every facility for you; He does not want to put to difficulties"*[693].
>
> *"On no soul does Allah place a burden greater than it can bear"*[694].

---

687 Ramadan, Hisham M.(ed), *Understanding Islamic Law from Classical to Contemporary* (1st edn, Altamira Press, Lanham, MD 2006).p. 117.
688 Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).pp.166-170; Al-Hammam, Kamal ibn, *Fath Alqadir* (Vol 17, 1st edn, Dar al kotob al ilmiyah, Beirut 2003).p. 168.
689 Abidin, Mohammad Ibn, *Radd Al-Muhtar Ala Al-Mukhtar* (Vol 5. 1st edn Daar al-Fikr, Beirut 2000).p. 78.
690 Waines, David, *An introduction to Islam* (2nd edn, Cambridge University Press, Cambridge 2003).pp. 83- 84.
691 Al-Hussayen, Saleh, 'Commentary on The Difference Between the Banks Interest Rate and Riba' (1991)(Issue 31) Islamic Research Magazine 123; Al-Mutairi, Mansour Z., 'Necessity in Islamic law' (PhD Thesis, University of Edinburgh 1997).
692 Ibid.See also Mahfuz, Atif Ahmad, *Mahfuz A, Rafa Al-Haraj fi Altashrie Al-Islami: Dirasah Usuliah wa Fiqhia* (Matbat Jamiat Al- Mansoura, Al-Mansoura 1996); Al-Zuhayli, Wahbah, *Nadariyat al-Al-darura al-Shariah* (Dar al-Fikr, Jeddah 1997).
693 Quran 2/185.
694 Quran2/286.

"Allah has imposed no difficulties on you"[695].

"Allah does not burden a person beyond his capacity"[696].

The above verses from the *Quran* explain that God does not put any individual or society under hardship, beyond their capacity. This is consistent with the spirit of *Sharia* Law and with Islamic concept of justice and fairness. *Sharia* Law encourages scholars and judges to adopt easier ways for people when they apply Islamic injunctions[697]. In this context, Ayesha, the Prophet's wife explained this Islamic principle by reporting a *Hadith* about the Prophet:

> *"Whenever Allah's Messenger was given the choice of one of two matters, he would choose the easier of the two, as long as it was not sinful to do so, but if it was sinful to do so, he would not approach it"[698].*

Necessity is a state of danger and severe hardship that causes fear and injury to individual's life, his organs, his offspring, his reason, or his property[699]. Therefore, individuals in such a critical situation can commit a prohibited act or delay an obligation in order to safeguard his life[700]. This is a very important Islamic legal maxim, which obliges a person to ease an unusual tribulation that has occurred. The legal maxim states that *"Necessity permits prohibited things"*. Necessity, therefore, is recognized as the exception to the rule of the right to avoid serious harm or hardship. The necessity in Islamic Law makes unlawful lawful[701]. For example, necessity allows eating the meat of a dead animal in the instance that someone cannot find food[702].

---

695 Quran22/78.
696 Quran7/42
697 Rayner, Susan E., *The Theory of Contracts in Islamic Law: a Comparative Analysis With Particular Reference to the Modern Legislation in Kuwait, Bahrain, and the United Arab Emirates* (1 st edn, Graham & Trotman, London 1991).p. 260; Mahfuz, Atif Ahmad, *Mahfuz A, Rafa Al-Haraj fi Altashrie Al-Islami: Dirasah Usuliah wa Fiqhia* (Matbat Jamiat Al- Mansoura, Al-Mansoura 1996); Al-Zuhayli, Wahbah, *Nadariyat Al-Adarura Al-Shariah* (Dar al-Fikr, Vol 2, 1st edn, Daar al-Alfikr, Damascus 1987).
698 Alkhouli, Mohmmad Abdul Aziz, *Aladab Alnabouie (*Dar Alktoub AlIlmiah, Beirut 2012).p. 116.
699 Al-Zuhayli, Wahabah, *Al-Fiqh al-Islami wa Adilatuh* (Vol 2, 1st edn Daar al-Alfikr, Damascus 1987).p. 67; Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).pp. 166-170.
700 Ibid.
701 Al-Zuhayli, Wahabah, *Al-Fiqh al-Islami wa Adilatuh* (Vol 2, 1st edn, Daar al-Alfikr, Damascus 1987).p. 67; Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).pp. 166-170.
702 Al-Zuhayli, Wahabah, *Al-Fiqh al-Islami wa Adilatuh* (Vol 2, 1st edn, Daar al-Alfikr, Damascus 1987).p. 67.

The traditional *Sharia* law scholars applied necessity in a very limited fashion and not as comprehensively as in personal cases, while the modern scholars extend the scope of application of the principle to broader issues, since modern life is more complicated than that in the early Islamic period. For example, the modern *Sharia* law scholar Atif Mahfouz had given a very broad definition to the *Sharia* doctrine of necessity[703]. He pointed out that necessity is, *"a rule used to preserve the benefits of individual necessities and the necessities of all human beings and the community"*[704]. To note further as applicable, necessity's application depends on the demands of social and economic conditions. Moreover, necessity is not confined to worship but can also involve transactions[705].

I, therefore, assert that it is important to examine the prohibition of *Riba* and the usage of principle of necessity in light of objective of *Sharia or Maqasid Al-Sharia* since *Sharia* law principles should be examined from the angle of what they are intended for and what their ultimate objectives and purposes are[706]. *Maqasid Al-Sharia* is the key to better understanding the revelation, *Sharia* philosophy and *Sharia* injunctions. Generally speaking, the objective of revelation is to accomplish benefits to uphold justice for mankind and protect the society at large from destruction and threat for its survival and wellbeing[707].

---

[703] Mahfuz, Atif Ahmad, *Rafa al-Haraj fi Altashrie Al-Islami* (Matbat Jamiat Al- Mansoura, Al-Mansoura 1996).p. 65.
[704] Ibid.
[705] Al-Hussayen, Saleh, 'The Response of Sheikh Saleh Al-Hussayen on Ibrahim Al-Nasser Article on the Stand of the Islamic Sharia in Regard to the Banking Transactions' (1988)(Issue 23) Islamic Research Magazine 121; Zarqa, Muhammad and Muhammad Elgari, 'Compensation for Delinquency in Debt Repayment: A Comparative Islamic Juristic and Economic Study' (1991) 3(1) Journal of King Abdulaziz University: Islamic Economics 25.p. 36.
[706] Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).pp. 166-170; Rosly, Saiful Azhar, 'Iwad as a Requirement of Lawful Sale: A Critical Analysis' (2001) 9(2) IIUM Journal of Economics and Management 187; Dusuki, Asyraf Wajdi and Said Bouheraoua, 'The Framework of Maqasid Al-shari'ah and its Implication for Islamic Finance' (2011) 2(2) Islam and Civilisational Renewal 316; Nordin, Nadhirah and others, 'Commodity Futures: A Maqasid Al-Shariah Based Analysis' (2017) 7(8) International Journal of Academic Research in Business and Social Sciences 602.
[707] El-Malik, Walied M., *Minerals Investment Under the Shari'a law* (International Energy and Resources Law and Policy Series, 1st edn, Graham & Trotman for Kluwer Law, London 1993).p. 166; El-Malik, El-Walied M. H., 'Aspects of Natural Resources Contracts, Investment & Finance at Sharia and Arab Secular Laws: a Comparative Study' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee 1997).p. 177; Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).pp. 166-170; Al-Ghazali, Abu Hamid Muhammad Ibn Muhammad, *Al Mustasfa min ilm Al Usul:*

Therefore, the *Sharia* law scholars pointed out that *Maqasid Al-Sharia* has four attributes or characteristics. Firstly, they are the basis of legislation since any legislation has to ultimately seek the benefit of the society and repeal any potential harm to the society. Secondly, *Maqasid Al-Sharia* principles are universal in nature and aims to protect the wellbeing of human beings. Thirdly, they encompass all human acts whether it is to do with a person's relationship with God or that person's day-to-day life. Lastly, it is definitive which means that it has been extracted from text and evidence[708]. The scholar Al-Fasi defined the *Masqsid Al- Sharia* as

> *"The overall objective of Islamic Law is to populate and civilize the earth and preserve the order of peaceful coexistence therein; to ensure the earth's ongoing well-being and usefulness through the piety of those who have been placed there as God's vicegerents; to ensure that people conduct themselves justly, with moral probity and with integrity in thought and action, and that they reform that which needs reform on earth, tap its resources, and plan for the good of all"[709].*

The definition emphasises that the objective and philosophy of Islam is to eliminate prejudice and hardship to mankind. This ultimate objective of Islam is manifested in the realisation of juristic device called *Al-Maslah* or public interest. *Al-Maslah* is used by scholars to promote public benefit or *"Jalb Al-Maslah"*[710] and repeal harm or *"Dafa Al-Mafsadh"*[711]*.* The Arabic lexicographer Ibn Manzur defined *Al-Maslah* as seeking the benefit and welfare of the public and repelling harm to the public. Therefore, the

---

on Legal Theory of Muslim Jurisprudence (Ahmad Zaki Mansur Hammad (trs), Vol 1,1st edn, Dar Ul Thaqafah Publishing 2018).

[708] Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).pp. 166-170; Dusuki, Asyraf Wajdi and Said Bouheraoua, 'The Framework of Maqasid Al-shari'ah and its Implication for Islamic Finance' (2011) 2(2) Islam and Civilisational Renewal 316; Qoyum, Abdul, '*Maqasid Ash-Shari'ah* Framework and the Development of Islamic Finance Products: The Case of Indonesia' (2018) 12(2) Tazkia Islamic Finance and Business Review 169.

[709] Al-Raysuni, Ahmad, *Imam Al Shatibi's Theory of the Higher Objectives and Intents of Islamic Law* (1st edn, International Institute of Islamic Thought, VA 2005).p. xxiii.

[710] Ibid. See also Dusuki, Asyraf Wajdi and Said Bouheraoua, 'The Framework of Maqasid Al-shari'ah and its Implication for Islamic Finance' (2011) 2(2) Islam and Civilisational Renewal 316; Laldin, Mohamad Akram and Hafas Furqani, 'Developing Islamic Finance in the Framework of Maqasid Al-Shari'ah Understanding the Ends (Maqasid) and the Means (wasa'il)' (2013) 6(4) International Journal of Islamic and Middle Eastern Finance and Management 278; Al Ghazali, Abu Hamid Muhammad Ibn Muhammad, *Al Mustasfa min ilm Al Usul: On Legal Theory of Muslim Jurisprudence* (Ahmad Zaki Mansur Hammad (trs), Vol 1, 1st edn, Dar Ul Thaqafah Publishing 2018).

[711] Supra note 712.

realisation of *Al-Maslah* is considered to be the all-pervasive value and objective of *Sharia* law[712]. *Sharia* law scholars have classified *Al-Maslah* into three categories, depending to levels of interest destined for,

1. *Al-Daruriyyah* (essentials or necessity) are those considered vital to human and societies' survival and without it, the society at large may be affected and destroyed and the normal order of the state likewise[713]. The scholar Imam Al-Ghazali pointed out *Al-Daruriyyah* relates to five essential objectives of *Sharia* law, which are preservation of faith, preservation of life, preservation of lineage or family, preservation of rational knowledge and preservation of property and wealth[714]. If these objectives are not preserved then it may lead to the disruption of world order[715].

2. *Hajiyah* (needs) are those are supplementary to *Al-Daruriyyah*. This category refers to benefit, which if we neglect it may cause hardship, but does not lead to serious threats to the wellbeing of society at large[716]. For example, the approval of *hawalah* or transfer of debt contract by scholars, which provide benefit for the society, but the prohibition of this contract will not be considered a serious threat to the society's wellbeing and survival[717].

---

[712] Manzur, Muhammad Ibn, *Lisanul Arab* (Vol. 5, 1st edn Dar Al-Maref, Cairo 2009).pp. 1797-1798; Dusuki, Asyraf Wajdi and Said Bouheraoua, 'The Framework of Maqasid Al-shari'ah and its Implication for Islamic Finance' (2011) 2(2) Islam and Civilisational Renewal 316.pp. 320-321; Laldin, Mohamad Akram and Hafas Furqani, 'Developing Islamic Finance in the Framework of Maqasid Al-Shari'ah Understanding the Ends (Maqasid) and the Means (Wasa'il)' (2013) 6(4) International Journal of Islamic and Middle Eastern Finance and Management 278.p.279.
[713] Hassan, Aznan, *Fundamentals of Shari'ah in Islamic Finance* (IBFIM Publishing, Kuala Lumpur 2011).pp. 18-23; Dusuki, Asyraf Wajdi and Said Bouheraoua, 'The Framework of Maqasid Al-shari'ah and its Implication for Islamic Finance' (2011) 2(2) Islam and Civilisational Renewal 316.pp.320-321;Nordin, Nadhirah and others, 'Commodity Futures: A Maqasid Al-Shariah Based Analysis' (2017) 7(8) International Journal of Academic Research in Business and Social Sciences 602.pp. 604-605.
[714] Dusuki, Asyraf Wajdi and Said Bouheraoua, 'The Framework of Maqasid Al-shari'ah and its Implication for Islamic Finance' (2011) 2(2) Islam and Civilisational Renewal 316.pp. 320-32; Hassan, Aznan, *Fundamentals of Shari'ah in Islamic Finance* (IBFIM Publishing, Kuala Lumpur 2011).pp. 18-23; Nordin, Nadhirah and others, 'Commodity Futures: A Maqasid Al-Shariah Based Analysis' (2017) 7(8) International Journal of Academic Research in Business and Social Sciences 602.pp. 604-605; Al Ghazali, Abu Hamid Muhammad ibn Muhammad, *Al Mustasfa min ilm Al Usul: On Legal Theory of Muslim Jurisprudence* (Ahmad Zaki Mansur Hammad (trs), Vol 1, 1st edn, Dar Ul Thaqafah Publishing 2018).
[715] Ibid.
[716] Supra note 717.
[717] Supra note 717.

3. *Al-Tahsiniyyah* (embellishments) refers to interests that lead to perfection, better utilisation, and beautification[718]. For example, *Sharia* law encourages gentleness, pleasant speech and manner, and fair dealing.

In light of above discussion, *Riba* falls within the boundary of *Al-Daruriyah* since, in modern times, it is essential for the countries to be part of the world's financial and economic system. Participating and engaging economically and financially with other economies is vital for the society's survival and without it, the society at large may be affected, and normal order of the state will be destroyed[719]. For example, most countries, including Muslim countries, issue Sovereign debt in the form of a bond which pays *Riba* to international investors to sustain the country's economic growth and basic needs of goods and services such as education, health, and nutrition. International investors and financial markets will not consent to finance a debt where there is no *Riba* paid by the government. This example illustrates that the economic condition and wellbeing of the society at large will be under jeopardy if the government did not reach out to international financial markets to finance its need of basic goods and services. Therefore, in order to protect the five essential objectives of *Sharia* law, the country has to finance its debt by *Riba* to sustain its basic needs of goods and services. Therefore, there is necessity and *Maqasid Al-Sharia* permits using *Riba* to restore the wellbeing and basic need of the society[720].

In light of the principle of necessity and overall *Maqasid Al-Sharia*, in 1980 Article 2 of the Constitution of the Arab Republic of Egypt was amended to provide that the *Sharia* law should be the principal source of Egyptian legislation[721]. Accordingly, Al-Azhar University filed a case before the Egyptian Supreme Constitutional Court, challenging the lower court ruling that obliged Al-Azhar University to pay the principal amount of a claim plus *Riba* at the rate of 4 per cent up to the date of full payment. The university of Al-Azhar challenged the lower court ruling before the Constitutional Court of Egypt on the grounds that Article 226 of the Egyptian Civil Code[722], allowing interest or *Riba*

---

[718] Supra note 717.
[719] Nordin, Nadhirah and others, 'Commodity Futures: A Maqasid Al-Shariah Based Analysis' (2017) 7(8) International Journal of Academic Research in Business and Social Sciences 602.pp. 604-605.
[720] Ibid.
[721] The Egyptian Constitution of 1971 amended in of the Egyptian Constitution was amended on 22 May 1980 stated that "Islam is the Religion of the State. Arabic is its official language, and the principal source of legislation is Islamic Jurisprudence (Sharia)".
[722] The Egyptian Civil Code, promulgated by Law No. 131, 1948 became effective from 15 October 1949.

in the event of delay in payment is contrary to Article 2 of the Egyptian Constitution, which declares *Sharia* law as a main source of legislation in the Arab Republic of Egypt. The implications of the Constitutional Court of Egypt decision on declaring the unconstitutionality of Article 226 would have far-reaching effects on the entire Egyptian economy. On the 4th of May 1985, the Constitutional Court of Egypt held that Article 2 of the Egyptian Constitution afforded no retroactive power and rejected Al-Azhar's claim[723]. The Court pointed out that Article 2 of the Egyptian Constitution has set a limit on the legislators for application of *Sharia* law in regard to any future legislation, and Article 226 of the Civil Code, passed before the amendment of Article 2 of constitution, and therefore, Article 266 will not be affected and even if it opposes Article 2 of constitution[724]. It appears that the Egyptian court preferred a practical economic and social solution to the problem, even if that solution proved to be unconstitutional. This demonstrates that the Egyptian courts are influenced by the permissive *Riba* theory established by Professor Sanhury, who argued that *Riba* in all of its forms is considered prohibited under *Sharia* law. However, the simple interest, while prohibited under *Sharia* law, is allowed because there is a need for it. However, the compound of interest still remains to be prohibited as per Professor Sanhury[725].

It is observed that the UAE Federal Supreme Court invoked the *Sharia* law doctrine of necessity to accommodate the pressing demands of the public and the state to utilise *Riba* based banking. The Court[726] pointed out that,

---

723 Habachy, Saba, 'Commentary On the Decision of the Supreme Court of Egypt Given On 4 May 1985 Concerning the Legitimacy of Interest and the Constitutionality of Article 226 of the New Egyptian Civil Code of 1948' (1986) 1(2) Arab Law Quarterly 239; Saleh, Nabil Ahmed, Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking (2nd edn, Graham & Trotman, London 1992).p. 36.

724 Supreme Constitutional Court Decision No. 20 of Judicial Year No. 1, cited in Habachy, Saba, 'Commentary On the Decision of the Supreme Court of Egypt Given On 4 May 1985 Concerning the Legitimacy of Interest and the Constitutionality of Article 226 of the New Egyptian Civil Code of 1948' (1986) 1(2) Arab Law Quarterly 239.

725 El-Fishawy, Saad, 'Contracts and Litigation in Islamic Law' (1982) 76 Proceedings of the Annual Meeting - American Society of International Law 62.p.64; El-Malik, Walied M., *Minerals Investment Under the Shari'a law* (International Energy and Resources Law and Policy Series, 1st edn, Graham & Trotman for Kluwer Law, London 1993).p. 166; El-Malik, El-Walied M. H., 'Aspects of Natural Resources Contracts, Investment & Finance at Sharia and Arab Secular Laws: a Comparative Study' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee 1997).pp.177; Al-Shareef, Naif S., 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).pp.166-170; Tetley, William, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (2000) 60(3) Louisiana Law Review 677.

726 Ruling of Federal Supreme Court No. 73 of 1996 issued on 15 July 1996.

"… According to the general regulation of the state, banks are essential components in order to straighten up the state's economic life. The banking dealings also became a requirement for people to smoothly perform their life. Although the interest is forbidden by Sharia, it shall exceptionally be permissible when a preponderant benefit would fail if the prohibition remained as it is. In the general rules of Sharia, the necessity (Al-Darura) knows no law and prohibiting all the aspects without which the life cannot be straighten up is something so critical and nullified by Sharia and not conflicting therewith. Therefore, the interest receive by banks within the limits allowed by law shall not be prohibited until the necessity (Al-Darura) vanishes and people are no longer need thereof by finding the alternative"[727].

The judgment reveals that the Supreme Federal court was extremely cautious in invoking the doctrine of necessity to accommodate the pressing demands of public and state to utilise interest-based banking. The examination of the judgment reveals that court examined *Sharia* prohibition in light of *Maqasid Al-Sharia* and in order to accomplish benefit for the society and the stated aims.

The Court viewed the banking system as the core of any modern economy and an efficient economy cannot exist without a sound banking and financial system[728]. From this fact, the Supreme Federal court view that it is necessary and part of *Maqasid Al-Sharia*. Therefore *Al-Maslah* permits the UAE government to allow the establishment of commercial banking system that charges *Riba* to streamline the economic activities of states and people. Without permitting such banking system the society at large may be negatively affected and the normal order of the state would be challenged.

Additionally, the wording of the ruling indicates that the necessity is not a free license to change the law, as the permission is only given temporarily. Once the temporary cause is no longer applicable, the established rule must once again be complied with. Thus, necessity is merely an exception to the rule and not a new rule and should only be utilised until the necessity is vanished and people no longer need *Riba* and the

[727] Ruling of Federal Supreme Court No. 73 of 1996 issued on 15 July 1996.
[728] Sylla, Richard, 'Financial Systems and Economic Modernization' (2002) 62(2) The Journal of Economic History 277.

government establishes an alternative economic system[729]. Furthermore, the Federal Supreme court established that judiciary could utilise, not only primary and secondary source of *Sharia* law, but also the disputed source such as the law of necessity.

In the same vein, the Abu Dhabi Cassation court in case No. 26/18 of 1996[730] held that simple interest does not conflict with *Sharia*. However, the compound interest is against *Sharia* law and therefore against the UAE's public policy. The court stated that,

> *"… under the UAE Constitution, the Civil Code, and the Judicial Authority Law, Sharia principles are considered to be a major source of law, and law cannot be applied in the UAE which violates these principles. The charging of compound interest is one of those areas that is not tolerated by Islamic principles"[731].*

4.9 UAE Laws and the Practice of Awarding *Riba*

The right to charge *Riba*, whether simple or compound, has always been an area of uncertainty in the UAE legal system. For example, Article 714 of UAE Civil Code acknowledged the prohibition of *Riba* under *Sharia* jurisprudence and declares that any provision in a loan contract, providing for a benefit more than the essence of the contract and other than securing the lender's rights, is null and avoid[732]. As well, any civil contracts between natural persons that provide for *Riba* are unlawful and considered as a criminal offence, with the penalty being possible imprisonment or a fine[733].

However, due to economic necessity, in 1993 the UAE issued Federal Law No. (18) Of 1993 Commercial Transactions (Commercial Code), which expressly permits *Riba* to be charged in a number of commercial transactions, such as commercial loans and interest for a delay in payment under a commercial contact. However, the Commercial Code differentiates between debts due to commercial loans from interest for a delay in payment under a commercial contact.

---

729 Ruling of UAE Federal Supreme Court No. 73 of 1996 issued on 15 July 1996.
730 Ruling of Abu Dhabi Court of Cassation No. 26/18 issued on 31 of December 1996.
731 Ruling of Abu Dhabi Court of Cassation No. 26/18 issued on 31 of December 1996.
732 Article 714 of the UAE Civil Code.
733 Article 409 of the UAE Federal Law No. 3 of 1987 promulgating the Penal Code.

4.9.1 *Riba* and Commercial Loans

With regards to a commercial loan, Article 76 of the UAE Commercial Code[734] permits a creditor to charge interest, as per the rate of interest specified in the contract. In a case, the Court found that the rate of 15% per annum was acceptable in the context of Articles 76, 77 and 88, provided that such rate was agreed between the parties in the loan contract and such interest rate has not exceeded the main sum or the principle amount of a loan[735].In the event that a commercial loan agreement has not stipulated or specified the interest rate, then the UAE Commercial Code provides that the interest rate will be calculated according to the present market rate at the time of transaction, provided that the market rate does not surpass 12% per annum[736]. Additionally, if the debtor has delayed payment, the creditor is entitled to receive interest as compensation for delay.

Accordingly, the interest in delay of payment of a commercial loan agreement shall accrue on maturity of such debts or loan[737]. The ruling in the Dubai Court of First Instance No. 674/2014 has confirmed these principles of the UAE Commercial Code and further clarified that the creditor will bear the burden of proof to demonstrate the prevailing market rates of interest rate at the time of dealing[738].

4.9.2 *Riba* and Commercial Contracts

With regards to a debt arising from a commercial obligation in the context of compensation for a delay in payment, Article 88 of the UAE Commercial Code[739] states that the creditor is entitled to receive interest as compensation for delay of payment by the debtor as per the rate of interest agreed between both parties, provided it does not exceed the 12% per annum limit. Article 89 of the Commercial Code[740] confirms that the creditor does not bear the burden of proof to demonstrate that he has sustained damages as a result of such delay[741]. The UAE Federal

[734] Article 76 of Federal Law No.18 of 1993 on Commercial Transactions Law.
[735] Ruling of Federal Supreme Court No.321/1999 issued on 25 April 1999.
[736] Article 76 of Federal Law No.18 of 1993 on Commercial Transactions Law.
[737] Article 77 of Federal Law No.18 of 1993 on Commercial Transactions Law.
[738] Ruling of the Dubai Court of First Instance No. 674/2014 issued on 24 November 2014.
[739] Article 88 of Federal Law No.18 of 1993 on Commercial Transactions Law.
[740] Article 89 of Federal Law No.18 of 1993 on Commercial Transactions Law.
[741] See for example, ruling of the Dubai Court of First Instance No. 674/2014 issued on 24 November 2014.

Supreme Court[742] declared that this category of compensation for damage is a derogation from the general rule relating to compensation of damage under *Sharia* law and the UAE's law and, therefore, the creditor has to establish that *"the debt is identified and the debt is due at the time of the claim, unlike compensation for damage, which is subject to the court's estimation"*[743].

The current courts practice in the UAE reveals some inconsistencies when dealing with the issue of *Riba* between different courts. For instance, the Abu Dhabi courts apply a 9% interest rate to the civil contract and 12% to a commercial contract, unless the parties agreed otherwise[744]. In contrast, the practice of the Dubai courts is to add a 9% interest rate as a delay on commercial contracts, unless the parties agreed otherwise[745]. Thus, if the agreement did not indicate the rate, then the Dubai courts generally tend to award 9% interest rate, either from the date of default or from date of filling the claim before the competent court[746]. Additionally, the court practice indicates that there is an inconsistency in determining the "due" date for interest and the same court can arrive at various conclusions. It is intriguing how the various tiers of the UAE courts have had different approaches and interpretations of the "due" dates while calculation of applicable *Riba.* For example, the Dubai Court of Cassation in case No. 266/2008[747], in a matter involving a developer and a contractor under a building contract. The court of First Instance delivered a judgment in favour of the contractor for the outstanding entitlements for the work that has been completed under the agreement. Furthermore, the Court awarded the contractor a 9% interest rate from the date of the commencement of the legal proceedings. However, the Court of Appeal revised the interest aspect of the previous court judgment and awarded a separate interest on the part from the date of completion of the project and awarded a separate interest on the balance from the expiry of the contractual maintenance period. The Court of Appeal also provided a judgment for a further sum that represented compensation for delay, together with a 9% interest rate as from the date of judgment.

---

[742] Ruling of Federal Supreme Court No. 831 of Judicial Year 25 and ruling No. 67 of Judicial Year 26 issued on 23 May 2004.
[743] Ruling of Federal Supreme Court No. 831 of Judicial Year 25 and ruling No. 67 of Judicial Year 26 issued on 23 May 2004.
[744] Article 62 (2) of Abu Dhabi Procedural Code by Law 3 of 1970.
[745] Article 76 and 77 of the UAE Federal Law No.18 of 1993 on Commercial Transactions Law.
[746] AL-Muhairi, Butti Sultan Butti Ali, 'Islamisation and Modernisation within the UAE Penal Law: Shari'a in the Pre-Modern Period' (1995) 10(4) Arab Law Quarterly 287.
[747] Ruling of Dubai Court of Cassation No. 266/2008 issued on 17 March 2009.

The Court of Cassation's judgment on the 17th of March 2009 dismissed the developer's further petition and upheld the Court of Appeal decision and stated that,

> *"The provisions of Articles 76, 88 and 90 of the Commercial Transaction Law stipulate that if the subject of the commercial obligation is an amount of cash which is known upon the time of the originating of the obligation and if the debtor delayed in the payment of such amount, the debtor shall be required to pay to the creditor the interest by the rate agreed upon by the contract providing not exceeding 12% and if there shall be no indication in the agreement to the interest rate, it is established by judicial custom in the Emirate of Dubai to calculate interest by the rate of 9% per annum provided it be calculated as of the date of maturity and it shall be deemed as compensation for the creditor for the delay of the debtor in the settlement of the obligation on the agreed date or the date on which the obligation should have been executed"*[748] .

4.9.3 Simple and Compound Interest

However, the UAE Commercial Code does not clearly specify whether the permitted interest is simple or compound interest, and whether any provisions of a loan or commercial agreement containing compound interest will be permitted. The Constitutional Department of the Federal Supreme Court of Abu Dhabi in its interpretation Decision No. 14/9 issued on 28 June 1981 stated that the Islamic doctrine of necessity, which aim to eliminate all harms, permits charging of simple interest in connection with banking operations since banking system is the backbone of the UAE economy and essential for the wellbeing of the society[749]. Therefore, to eliminate the harm on the society and people, the Court declared the constitutionality of Articles 61 and 62 of the Civil Courts Procedures Law No. 3 of 1970 of Abu Dhabi as amended by Law No. 3 and Law No. 4 of 1987, which grants simple interest on

[748] Ruling of Dubai Court of Cassation No. 266/2008 issued on 17 March 2009.
[749] Tamimi, Hind, 'Interest Under the UAE Law and as Applied by the Courts of Abu Dhabi' (2002) 17(1) Arab Law Quarterly 50.p. 50.

loans. In line with the Constitutional Department of the Federal Supreme Court, the Federal Supreme Court[750] in 2004 pointed out that

> *''The Court's jurisprudence regarding interest is that interest, either compound or simple, is considered by Shari'a law to be prohibited. However, the Constitutional panel of the Supreme Court in its explanation for decision no. 14/19 allowed simple interest in banking transactions, although compound interest continued to be considered to be prohibited''[751].*

Furthermore, Abu Dhabi Court of Cassation ruling No. 494/2013,[752] declared that compound interest is prohibited under *Sharia* jurisprudence and, therefore, compound interest is against UAE public policy. In addition to this, another ruling of Abu Dhabi Court of Cassation No. 1376/2009[753] declared, *"no compound interest may be charged regardless of the means of the same because it is in breach of public order"*[754].

Likewise, the situations in Egypt are similar to the UAE in some respects with regards to the practice, laws, and their interpretations of law. Article 226 of the Civil Code provides that, *"[w]hen the object of an obligation is the payment of a sum of money of which the amount is known at the time when the claim is made, the debtor shall be bound, in case of delay in payment, to pay the claimant, as damages for the delay, interest ..."*[755]. The Code also provides that interest begins to accumulate from the date the claim is filed, unless the parties agree otherwise, or commercial usage fixes another date. The Egyptian Civil Code permits charging a simple interest on commercial and civil matters. In case the party delays payment, such party should pay 4% on civil matters and a 5% interest rate in commercial cases as compensation for this delay[756]. Moreover, the parties to the agreement are free to determine the interest rate on a condition that it does not exceed a 7% interest rate, as per article of 227 of

[750] Ruling of Federal Supreme Court No. 831 of Judicial Year 25 and ruling No. 67 of Judicial Year 26 issued on 23 May 2004.
[751] Ruling of Federal Supreme Court No. 831 of Judicial Year 25 and ruling No. 67 of Judicial Year 26 issued on 23 May 2004.
[752] Ruling of the Abu Dhabi Court of Cassation No. 494/2013 issued on 13 March 2013, the court stated that "It is established that it is not admissible to calculate compound interest whatever is the method of calculation. This prohibition is related to the public order considering such interest as usury which is forbidden by Sharia and even if it has been obtained after the consent of the debtor".
[753] Ruling of Abu Dhabi Court of Cassation No. 1376/2009 issued on 25 February 2010.
[754] Ruling of Abu Dhabi Court of Cassation No. 1376/2009 issued on 25 February 2010.
[755] Article 266 of the Civil Code of the Arab Republic of Egypt 1948.
[756] Article 226 of the Civil Code of the Arab Republic of Egypt 1948.

the Egyptian Civil Law[757]. However, charging interest above the legal interest rate or charging a compound interest is contrary to Egyptian public policy[758].

In contrast to the UAE and Egypt, the Kingdom of Saudi Arabia's constitutional provisions state that *Sharia* law is the only source of law[759].Therefore, in the Kingdom of Saudi Arabia, *Sharia* law governs both civil and commercial matters. There are no Civil Codes but there are commercial regulations[760]. Since the Kingdom of Saudi Arabia applies the *Hanbali* jurisprudence, which strictly prohibits *Riba* without qualification and therefore the Orthodox school view is applied[761]. Accordingly, all types of interest are prohibited, irrespective of whether it is simple or compound interest.

4.9.4 *Riba* and Arbitration

With regards to Arbitration, arbitral tribunal will usually grant interest at the rate of 5 - 12% per annum on the total amount awarded and as well the tribunals may award compound interest rather than just simple interest[762]. Usually, the interest will accrue from

a) The date the initial action was filed until full settlement of the amount awarded, on condition that the original claim was for a specified amount, or

b) The date on which the award becomes final, on the condition that the original claim did not specify the amount of the claim.

The UAE Federal Supreme Court[763] confirmed,

> *"that it is permissible for the parties to apply for an order nullifying the award of arbitrators when the court considers an application for ratification thereof if there is a nullity in the award. It is settled law that*

---

[757] Article 227 of the Civil Code of the Arab Republic of Egypt 1948.
[758] Gotanda, John Y., 'Awarding Interest in International Arbitration' (1996) 90(1) American Journal of International Law 40.
[759] Article 7 of the Basic Law of Government 1991.
[760] Althabity, Mohammad Motlg., 'Enforceability of Arbitral Awards Containing Interest: a Comparative Study Between Sharia Law and Positive Laws' (PhD Thesis, University of Stirling 2016); Alsaif, Bander, 'Two Sides of the Saudi public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards' (PhD Thesis, University of New South Wales 2018).
[761] Supra note 348, p. 51.
[762] Supra note 2.
[763] Ruling of the Federal Supreme Court No. 11 of Judicial Year 23 issued on 19 May 2002; see also ruling of the Federal Court of Cassation No. 831 of Judicial Year 25 issued on 23 May 2004.

it is not permissible for an arbitral tribunal to award compound interest and any award making such will be void and null"[764].

However, court practice reveals that the arbitral award granting simple interest to compensate a creditor for delay in payment by a debtor has been found to be compatible with UAE law and does not violate fundamental principles of *Sharia* law and, as such award, is enforceable by the courts[765]. In this context, the Federal Supreme Court[766] confirmed that *"the arbitral award did not breach public policy by awarding simple interest"*[767]. In this case, the Federal Supreme Court established some requirements to enforce an arbitral award that awards simple interest as a form of compensation on delayed payment of debt and confirmed that the claimant must establish that there is a delay on payment and the debt should be matured at the time of the claim.

Unlike the rulings of the Supreme Court, the Dubai Court of Cassation ruling number 146/2008[768] did not distinguish between compound interest and simple interest and considered all type of interest prohibited. As well, the court did not require the claimant to establish that there is a delay on payment and the debt should be matured at the time of the claim. Ironically, while admitting that the arbitral award examined by the court awarded an interest that falls under the scope of prohibited *Riba*, the Dubai Court of Cassation enforced the arbitral award and did not nullify the part of the award that awarded such prohibited *Riba*. The court stated that,

''Riba is prohibited under UAE law because it constitutes part of UAE public policy which the court should adhere to when deciding to enforce or nullify an arbitral award… Riba is grounds for nullifying an arbitral award, and the court is obliged to uphold this principle and to rule on the matter, as demonstrated by the decision in this case''[769].

---

[764] Ruling of the Federal Supreme Court No. 11 of Judicial Year 23 issued on 19 May 2002; see also ruling of the Federal Court of Cassation No. 831 of Judicial Year 25 issued on 23 May 2004.
[765] Ruling of Federal Supreme Court No. 831 of Judicial Year 25 and ruling No. 67 of Judicial Year 26 issued on 23 May 2004; ruling of Federal Supreme Court No. 371 of Judicial Year 18 issued on 30 June 1998; ruling of Dubai of Cassation No. 268/2007 issued on 19 February 2008; ruling of the Abu Dhabi Court of Cassation No. 494/2013 issued on 13 March 2013.
[766] Ruling of Federal Supreme Court No. 831 of Judicial Year 25 and ruling No. 67 of Judicial Year 26 issued on 23 May 2004.
[767] Ibid.
[768] Ruling of the Dubai Court of Cassation No.146/2008 issued on 9 November 2008.
[769] Ruling of the Dubai Court of Cassation No.146/2008 issued on 9 November 2008.

It is important to note that the UAE's court practice reveals that the courts will only set aside the compound interest element of the arbitral award and enforce the other element of the award that does not contain compound interest[770]. We can conclude that the current practice reveals that there is no consistency in court rulings relating to arbitral awards providing for interest or *Riba.*

The UAE court interpretation of the scope of *Riba* during the enforcement of a foreign arbitral award can be traced to the Egyptian court's rulings on this matter; Egyptian legislation and legal practices have been a form of foreign influence on the UAE courts practice for many years[771].For example, the Cairo Court of Appeal ruled that a foreign arbitral award rendered in London awarding the claimant an amount of money as indemnity for breach of contract, in addition to interest from the date of breach at the rate of 8% per annum is against Egyptian public policy principle, which imposes a ceiling of 5% as the maximum rate. Consequently, the court enforced the principal amount of damages but refused to allow enforcement of the interest aspect of the award[772].

In another more recent judgement issued by the Court of Cassation of Egypt[773], the Court granted an exequatur for the principal amount of foreign arbitral award issued on 10th May 2017 rendered under rules of London Court of Arbitration and refused to allow enforcement of the interest aspect of the award. The arbitral award condemning an Egyptian company to pay certain amount of money and interest from the date of breach at the rate of 8% per annum and 4% compound interest from the date of breach. The court set aside the interest portion of the award on the grounds that this part violated Egyptian public policy principle, which imposes a 5% maximum rate and prohibits compound interest[774].

Foreign arbitral awards that award interest or *Riba* may not be enforced by the Kingdom of Saudi Arabia's competent courts. For example, the Fifteenth Sub-Circuit

[770] Ruling of the Federal Supreme Court No. 57 of Judicial Year 25 issued on of 21 March 2006.
[771] Tetley, William, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (2000) 60(3) Louisiana Law Review 677.
[772] Egyptian Court of Appeal Judgment No.37SS of Judicial Year 97 issued on 21st January 1982, cited by Wahab, Mohamed Salah Eldin Abdel., 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Thesis, University of Manchester 2004).
[773] Ruling of Court of Cassation of Egypt 282 of the Judicial Year 89 issued on 9 January 2020.
[774] Ruling of Court of Cassation of Egypt 282 of the Judicial Year 89 issued on 9 January 2020.

of the Grievance board[775], declined to enforce a foreign arbitral award on the grounds that the contract included *Riba* whether simple or compound, which violates the principles of *Sharia* law. The Fifteenth Sub-Circuit cited the Decision of the President of the Grievances Board indicating that no foreign provision is to be implemented in the Kingdom of Saudi Arabia that is contrary to *Sharia* law principles[776].

Another interesting ruling is Ruling No. Q/1/2496 of 1425 AH–(2004) of Saudi Grievance Board, whereby the Grievance Board refused to enforce part of foreign judgment issued by the First Instance Court in South Cairo. The Court of Appeal then ratified it in the Arab Republic of Egypt on the grounds that the judgment awarded 4% annual interest, which constitutes *Riba* and contrary to Saudi public policy[777].

4.10 Conclusion

The main finding of this chapter is that the meaning of *Riba* is a controversial issue in Islamic jurisprudence and each Muslim State has developed its own definition and *modus operandi* of the concept of *Riba*. Not only that, but within one country, it is left for each court to interpret the scope of application of *Riba* on a case by case basis. Accordingly, the following conclusions could be drawn from main finding of this this chapter:

Firstly, the approach to *Riba* may differ from one Islamic state to another due to various reasons such as status of *Sharia* law in the countries' constitution, the influence of other legal systems and the Islamic school of jurisprudence followed by the country[778]. For example, one Islamic country considers *Sharia* law as the main source of legislation and other consider *Sharia* law just as a source of legislation. For example, Saudi Arabia's constitutional provision indicates that that *Sharia* law is the only source

[775] Ruling No. 269/ES/4 of 1431 AH–(2010) related to enforcement of a foreign arbitral award that was issued by the International Court of Arbitration in London in award No. 10142 of January 2004, cited by Alsaif, Bander, 'Two Sides of the Saudi Public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards' (PhD Thesis, University of New South Wales 2018).p. 78.

[776] Cited by Alsaif, Bander, 'Two Sides of the Saudi Public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards' (PhD Thesis, University of New South Wales 2018).p. 107.

[777] Supra note 204, p. 107.

[778] Althabity, Mohammad Motlg, 'Enforceability of Arbitral Awards Containing Interest: a Comparative Study Between Sharia Law and Positive Laws' (PhD Thesis, University of Stirling 2016).

of law[779]. However, the Egyptian[780] and UAE[781] constitutional provisions indicates that *Sharia* law is the main source of law.

Another reason is to what extent one legal system is influenced by another legal system. In some Islamic countries there are Civil Transaction codes that are influenced by *Sharia* and other laws and legal systems to varying degrees[782]. For instance, Egypt adopted the Civil Legal system, which has been influenced by the French legal system and Napoleonic Civil Code. Additionally, the current law reveals an influence of the principles of Convention on Contracts for the International Sale of Goods (CISG)[783]. In the UAE, the Civil Code is one of the codified Arab Civil Laws, which is based on Egyptian and Kuwaiti laws and is strongly influenced by *Sharia* law[784]. A third reason is which school of *Sharia* jurisprudence is followed by the country since some school of *Sharia* law tend to be more flexible than others[785].

Secondly, the UAE and Egyptian courts adopted the permissive *Riba* school view and permitted *Riba* with certain qualification. However, the Saudi court adopted the Orthodox *Riba* school view and strictly prohibited *Riba* without any qualification. Thirdly, it is important to analyse the prohibition of *Riba* in light of *Maqasid Al-Sharia* framework which may permit some form of *Riba* to restore the wellbeing and basic need of the society. Finally, the issue of *Riba* or interest will remain one of the most complex issues in international arbitration due to several overlapping legal systems and laws, to the extent that some arbitral awards providing for interest may not be enforced by some Islamic countries and at the same time it may be enforced by other Islamic countries depending on the nature of *Sharia* Jurisprudence followed by that country. The next chapter will examine another *Sharia* law mandatory rule that constitutes public policy in the context of enforcement of foreign awards under UAE legal system, which is the Islamic concept of *Gharar*.

---

[779] Article 7 of the Basic Law of Government of Saudi of 1991.
[780] Article 2 of Constitution of the Arab Republic of Egypt of 2014.
[781] Article 7 of the UAE Federal Constitution of 1971.
[782] Supra note 349.
[783] Akaddaf, Fatima, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?' (2001) 13 Pace International Law Review 1.
[784] Supra note 411.
[785] AL-Muhairi, Butti Sultan Butti Ali, 'Islamisation and Modernisation within the UAE Penal Law: Shari'a in the Pre-Modern Period' (1995) 10(4) Arab Law Quarterly 287.

Chapter 5 Conceptual Foundation of *Gharar*

5.1 Introduction

The previous chapters established that *Sharia* law's mandatory rules that constitute public policy in the context of the enforcement of foreign arbitral awards under the UAE legal system are limited to two prohibitions, namely *Riba* and *Gharar*. Therefore, this chapter aims to provide an overview on the scope of application of the second prohibition, *Gharar*.

The underlying principle of *Gharar* is that the parties to the agreement must be fully aware of their rights and obligations at the time of entering into the agreement. Further, if there are elements of risk, hazard, and uncertainty in the agreement, then the agreement may be considered as gambling, which leads to immoral profit. Such contracts are not permitted in *Sharia* law. The concept of *Gharar* is very close to some modern legal concepts such as misrepresentation and fraud.

Accordingly*, Gharar*[786] is one of the frequently addressed issues in Middle Eastern countries, such as the UAE, where *Sharia* law constitutes an essential component of their public policy. *Gharar* is one of the major Islamic constraints on contracts that render a contract and arbitral award invalid and void. Therefore, if an underlying agreement or arbitration agreement contains a clause that is not certain then the whole contract might be void and the court may refuse to enforce a foreign arbitral award.

It is, therefore, important for the study to examine the concept of *Gharar* under *Sharia* jurisprudence and analyse the case law to examine the scope of application of the concept and the attitudes of the UAE court towards the strict consideration of the *Gharar* as a ground for refusal of the enforcement of an arbitral award. Hence, the discussion of this chapter is divided into four parts. Part one discusses the word *Gharar* and its usages in the Arabic language and will also observe how the word and its derivatives are used by the *Quran* and the *Hadith*. Part two investigates the provisions of the *Quran* and the *Hadith* relating to contracts and commerce, which are thought to relate to the prohibition of *Gharar*. Part three will examine the reason for prohibition of *Gharar* by Islam. Part four will explore definition of *Gharar* developed by *Sharia* law's

[786] The Arabic term *Gharar* will be left untranslated throughout this study in order to distinguish it from contemporary notions of risk, uncertainty and hazards.

school of jurisprudence; and lastly, part five will investigate the legal implications of the prohibition of *Gharar* under the UAE's law and the courts attitude toward curbing the scope of application of the concept during the enforcement of an arbitral award.

5.2 *Gharar* in its Linguistic Usage

The aim of this part is to investigate the linguistic usage and origins of the word *Gharar* in the Arabic language, which is frequently used in texts of law and various judgments by the court. Although there was an unfounded claim that the word *Gharar* has Persian origin and root, many Arabic lexicographers argued that origin of the word is Arabic[787].

The word *Gharar* comes from the verb *"Gharara or Gharra"*[788]which comes from the root verb *"Ightarra"*[789], meaning to defraud or deceive[790]. For example, when one says *"Ightarra bi shay"*[791], it means that one has been deceived by a thing or a person[792]. The Arabic lexicographer Ibn Manzur tended to view the word *Gharar* as similar to *"khatar"*[793], which broadly means danger, jeopardy, hazard, or risk[794]. He also explained the meaning by giving the example of any sale that contains an element of danger, hazard and risk, such as the of sale of a bird in the air and the sale of a fish in the sea before catching them, both examples represent a sale involving *Gharar* in the

[787] Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996); Razali, Siti Salwani, 'The Dominance Entry of the Principles of Gharar in Electronic Contracts' (2009) 23(2) Arab Law Quarterly 207.p. 208; Saiti, Buerhan and Adam Abdullah, 'Prohibited Elements in Islamic Financial Transactions: A Comprehensive Review' (2016) 21 Al-Shajarah: Journal of the International Institute of Islamic Thought and Civilization (ISTAC) 139.pp. 148-149.
[788] Aljawhari, Ismaiel Ibn Hamad, *Taj Al-Lughah wa Sihah Al-Arabiyya* (Vol 2, 1st edn, Dar Alilm Lilmalien, Beirut 1987).pp. 768-770; Al-Saati, Abduirahim, 'The Permissible Gharar (Risk) in Classical Islamic Jurisprudence' (2003) 16(2) Journal of King Abdulaziz University-Islamic Economics 3.pp. 6-7.
[789] Ibid.
[790] Ibid.
[791] Ibid.
[792] Ibid.
[793] Al-Saati, Abduirahim, 'The Permissible Gharar (Risk) in Classical Islamic Jurisprudence' (2003) 16(2) Journal of King Abdulaziz University-Islamic Economics 3. 6-7; Manzur, Muhammad Ibn, *Lisanul Arab* (Vol. 5, 1st edn Dar Al-Maref, Cairo 2009).pp. 3234; Visser, Hans, *Islamic Finance: Principles and Practice* (3rd edn, Edward Elgar Publishing, Cheltenham 2019).pp. 45-46.
[794] Al-Saati, Abduirahim, 'The Permissible Gharar (Risk) in Classical Islamic Jurisprudence' (2003) 16(2) Journal of King Abdulaziz University-Islamic Economics 3.pp. 6-7; Manzur, Muhammad Ibn, *Lisanul Arab* (Vol. 5, 1st edn Dar Al-Maref, Cairo AH 1431).pp. 1797-1798; Surdam, David George, *Business Ethics from Antiquity to the 19th Century: An Economist's View* (1st edn, Palgrave Macmillan US, Cham 2020).pp. 169-170.

subject matter of the contract. In this context, the scholar Al-Siddiq Al-Dharir pointed out that, literally, *Gharar* means risk or hazard[795].

Furthermore, the verbal noun of *Gharar* is *"Tagreer"*, which means deception, fraud and misrepresentation. Ibn Manzur further pointed out that a sale that contains *Gharar* is the kind of sale in which the outward appearance of it is considered *"Zahir"*[796]*,* which means to mislead or deceive the purchaser[797]. Also, the word *Gharar*, as per Ibn Manzur, means an act of deception and feeding the purchaser with false information and statements[798]. This meaning was found in the *Al-Mejalah* that defines *"Tagreer"* as fraud *"Khidaa"*[799]. The medieval Islamic scholar Abu al-Walid Ibn Rushd begins his discussion of *Gharar* in his famous book Bidayat Al-Mujtahid by stating that the following sales and transactions are prohibited due to fraud, which amounts to *Gharar*[800]*.* This statement is then followed by a (non-definitive) list of transactions.

From the above dissuasion we can conclude that the meaning of *Gharar* in the Arabic language has a variety of negative meanings relating to danger, hazard, speculation, risk, misrepresentation, deceit, fraud and cheating which may lead to destruction, loss and an inequitable agreement from one part due to the lack of true information. Thus, we can conclude that the Arabic word *Gharar* has a fairly broad linguistic usage in the Arabic language[801]. Having discussed the origins of the word *Gharar* in the Arabic

---

795 Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, 'The Amount of Gharar that Prevents Transactions From Being Valid' (4th conference of the Shariah Boards of Islamic Financial Institutions, Kingdom of Bahrain, 3rd – 4th October 2004).
796 Manzur, Muhammad Ibn, *Lisanul Arab* (Vol. 5, 1st edn Dar Sader, Beirut 2009).pp. 11-21. See also Elfakhani, Said and Yusuf M. Sidani, 'Uncertainty or 'Gharar' in Contracts Under the Islamic Ethical Code' in Ali, Abbas J. (ed), *Handbook of Research on Islamic Business Ethics* (Edward Elgar Publishing, Cheltenham 2015).p. 128.
797 Ibid.
798 Ibid.
799 Adil, Mohamed Azam Mohamed and others, 'Tadlis in Islamic Transactions' (2010) 9 Malaysian Accounting Review 44.p. 45; Nehad, A and A. Knanfar , 'A Critical Analysis of the Concept of Gharar in Islamic Financial Contracts' (2016) 37(1) Journal of Economic Cooperation & Development 1.pp. 2-3; Mowla, Muhammad Masrurul, 'Identifying the Presence of Gharar in Buying and Selling Mechanism Under Different Kinds of the Market Structure Global' (2019) 19(1) Journal of Human-Social Science: E Economic 37.p. 38.
800 Rushd, Abu al-Walid Muhammad Ibn Ahmad Ibn, *Bidayat Al-Mujtahid wa-Nihayat Almuqtaṣid* (Majid al-Hamawi (ed),Vol 3, 1st edn Dar Ibn Ḥazm, Beirut 1995).p. 1198.
801 Khanfar, Nehad A. A., 'A Comparative Critical Analysis of the Concepts of Error and Misrepresentation in English, Scottish, Islamic, International Contract Law, and Palestinian Draft Civil Law' (PhD Thesis, University of Abertay Dundee 2010).pp. 57-114; Nehad, A and A. Knanfar, 'A Critical Analysis of the Concept of Gharar in Islamic Financial Contracts' (2016) 37(1) Journal of Economic Cooperation & Development 1.p. 2.

language, it is necessary to examine *Gharar* prohibition in the primary sources of *Sharia* law - the *Quran* and the *Hadith*.

5.3 The Prohibition of *Gharar* in the *Quran* and *Hadith*

Although the derivatives of the word *Gharar* are generously used in *Quran* on theological and religious themes, the term does not appear in *Quran* in the context of Islamic contracts and practices[802]. What does appear in the *Quran* is the term *"Batil"* or vanity[803]. The *Quran* states in *Surat Al-Baqarah*,

> *"And eat not up your property among yourselves in vanity"*[804].

As well, in *Surat Al-Nissa*, the *Quran* states that,

> *"O, ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily God hath been to you Most Merciful"*[805].

There is a consensus amongst scholars that in the two verses the meaning of *"Batil"* or vanity includes *Gharar*. The great scholar Abu Baker Ibn Al-Arabi indicated that *Batil* means *Riba* and *Gharar*[806], while the Islamic scholar, Mahmoud Al-Zamakhshari, considers *Batil* to mean theft and dishonesty and not *Gharar*[807]. The Taqi Al-Dien Ibn Taymiyah was more specific in interpreting the word *Batil*. He pointed out that *Batil* or vanity means *Riba* and Gambling. He then illustrated that *Gharar* falls under the

---

[802] Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).p. 129; Elfakhani, Said and Yusuf M. Sidani, 'Uncertainty or 'Gharar' in Contracts Under the Islamic Ethical Code' in Ali, Abbas J. (ed), *Handbook of Research on Islamic Business Ethics* (Edward Elgar Publishing, Cheltenham 2015).pp. 127-129.

[803] Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).pp. 135-136; Al-Arabi, Abu Baker Ibn, *Ahkam Al-Quran* (Vol 1, 3rd edn, Dar Alkutub Alilmiah, Beirut 2003).pp. 137-139; Al-Saati, Abduirahim, 'The Permissible Gharar (Risk) in Classical Islamic Jurisprudence' (2003) 16(2) Journal of King Abdulaziz University-Islamic Economics 3.p. 7; Elfakhani, Said and Yusuf M. Sidani, 'Uncertainty or 'Gharar' in Contracts Under the Islamic Ethical Code' in Ali, Abbas J. (ed), *Handbook of Research on Islamic Business Ethics* (Edward Elgar Publishing, Cheltenham 2015).p. 127.

[804] Quran Chapter 2, Surat Al-Baqarah verses 188.

[805] Quran Chapter 5, Surat 4, Alnissa, verse 29.

[806] Al-Arabi, Abu Baker Ibn, *Ahkam Al-Quran* (Vol 1, 3rd edn, Dar Alkutub Alilmiah, Beirut 2003).pp. 137-139.

[807] Al-Zamakhshari, Mahmoud, *Al-Kashshaf (*3rd edn, Dar Almarifah, Beirut 2009).pp. 115-116.

general prohibition of gambling[808]. The modern *Sharia* law scholar Al-Siddiq Al- Dharir defines *Batil* as eating up other's wealth and property in a manner that is not permitted by *Sharia* law. The *Quran* explicitly forbids gambling and *Riba*, while the *Hadith* forbids *Gharar* sales[809].

We can conclude from the above that in respect to the prohibition of *Gharar* in the *Quran*, the majority of *Sharia* scholars maintained that *Gharar* comes under the general prohibition of *Batil* or vanity. As far as commercial practice goes, the *Quran* prohibit two elements in commercial transactions, which are *Batil* and *Riba*. However, the *Quran* does not explain in detail the meaning and nature of these two prohibitions. The nature and element of these two prohibitions is understood in Islamic jurisprudence, through the work of the jurists while interpreting the *Hadith*, which explicitly mentions *Gharar* in context of commercial transactions[810].

The word *Batil* was elaborated and expounded by Prophet Mohammed in various *Hadiths* during his life in context of commercial transactions. The Prophet pointed out that the *Batil* can take various forms including *Gharar*. Imam Muslim ibn al-Hajjaj Al-Naysaburi reported in his book Sahih Muslim that Abu Hurayrah[811] reported that the Prophet prohibits any sale, which is determined by throwing stones (like a throw of dice)[812]. Additionally, the great companion Abdullah Ibn Masoud reported that the Prophet said do not sell fish in the water before catching them, as it constitutes *Gharar*[813]. Furthermore, the Prophet Mohammed's companion Jabir Ibn Abdullah

---

808 Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996). pp. 201-202; Taymiyah, Taqui Al-Dien Ibn, *Majmou Fatawi Ibn Taymiyah* (Vol 29, 1st edn, Wizarak alshoun Alislamiah wa Alawqaf wa Aldawa wal Ershad of KSA, Riyadh 2004).pp. 22-29.

809 Al-Dharir, Al-Siddiq Muhammad al-Amein, 'The Amount of Gharar that Prevents Transactions From Being Valid' (4th conference of the Shariah Boards of Islamic Financial Institutions, Kingdom of Bahrain, 3rd – 4th October 2004).

810 Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).pp. 134-139; Paldi, Camille, 'Understanding Riba and Gharar in Islamic Finance' (2014) 31(3) Journal of Islamic Banking and Finance 35.pp. 41-46.

811 He is Abdul-Rahman Ibn Saqer al-Dawsi, one of the Companions of the Prophet Muhammad. He converted to Islam in the seven years after hijra and accompanied the Prophet most of this time.

812 Hassan, Abdullah Alwi Haji, *Sales and Contracts in Early Islamic Commercial Law* (Islamic Research Institute of Pakistan, Islamabad 1994).pp. 79-80; Albukhari, Abu Altaiab, *Al-Siraj Al-Wahaj fi kashf Mtalb Muslim ibn al-Hajjaj Sharha Mkhtsar Sahayha Muslim Ilhaafz almndhry* (Vol 4, 1st edn, Dar Akutub Al-Ilmiah, Baghdad 2004).p. 122.

813 Hassan, Abdullah Alwi Haji, *Sales and Contracts in Early Islamic Commercial Law* (Islamic Research Institute of Pakistan, Islamabad 1994).pp. 79-80; Albukhari, Abu Altaiab, *Al-Siraj Al-Wahaj fi kashf Mtalb*

reported that the Prophet Mohammed stated that the sale of a heap of dates where the weight is unknown in accordance with the known weight of dates is forbidden[814]. The companion Ibn Umar reported that

> *"Allah's Messenger (May peace be upon him) forbade the sale of fruits until they were clearly in good condition, he forbade it both to the seller and to the buyer"[815].*

To sum up, the *Hadith* directly prohibits *Gharar* in contracts and for this reason it can be argued that *Hadith* is the real authority which prohibits *Gharar* and *Hadith* and elaborates the general provisions of the *Quran* on *Batil*. Abu Baker Ibn Al-Arabi in this respect concluded that the rules of obligation in Islamic commercial law are three: first, the prohibition of *Batil*; second, the prohibition of *Riba*; and finally, the prohibition of *Gharar*[816]. However, the *Hadith* did not explain in detail the meaning and nature of the prohibition. Furthermore, the reliability and authenticity of the *Hadith* source is questionable and disputed by scholars. As far as to the authenticity and reliability of *Hadith* relating to *Gharar*, this research will not investigate this aspect as it is out of the scope and objective of this research.

Having discussed *Gharar* prohibition in the primary sources of *Sharia* law - the *Quran* and the *Hadith*, it is important to examine the reason for the prohibition of *Gharar* and the definition of *Gharar* under the Islamic school of jurisprudence to fully understand the meaning and the scope of its prohibition, since the *Hadith* does not give a detailed elaboration to the meaning and scope of *Gharar*.

5.4 Reason for the Prohibition of *Gharar*

Sharia law scholars pointed out that *Gharar* may lead to a dispute between contracting parties and it is, therefore, the root cause of disputes between contracting parties and should be eliminated. They argued that *Gharar* may lead to the counter value paid for product or service that does not match the real value of the product or service

---

Muslim ibn al-Hajjaj Sharha Mkhtsar Sahayha Muslim llhaafz almndhry (Vol 4, 1st edn, Dar Akutub Al-Ilmiah, Baghdad 2004).p. 122.

[814] Albukhari, Abu Altaiab, *Al-Siraj Al-Wahaj Fi kashf Mtalb Muslim ibn al-Hajjaj Sharha Mkhtsar Sahayha Muslim llhaafz almndhry* (Vol 4, 1st edn, Dar Akutub Al-Ilmiah, Baghdad 2004).p. 343.

[815] Ibid.p. 98.

[816] Al-Arabi, Abu Baker Ibn, *Ahkam Al-Quran* (Vol 1, 3rd edn, Dar Alkutub Alilmiah, Beirut 2003).p. 324; Hindou, Dr Muhammad, *Alkuliat Altashriehia wa Atharuha fi Alijtihad wa Alfatwa* (1st edn, Almahad Alalami lil Fikr Alislami, VA 2016).p. 99.

provided. Therefore, the anticipated profit will not be materialised for one party and the other contracting party will gain an excessive profit on expense of the other party[817].

The excessive profit gained by one party and excessive loss by the other party will make the disadvantaged party feel that he was cheated and will lead to a dispute[818]. Imam Malik and Ibn Taymiyah pointed out that characterisation of a *Gharar* is a sale where one party obtains something while the other is at risk, causing regret and dispute[819]. For this reason, *Sharia* law scholars considered *Gharar* as the root cause for a dispute between the contacting parties and should be eliminated[820].

As per *Sharia* law, the basis upon which the legal relationship is created between the parties are their respective obligations and rights. They have to be fairly and clearly balanced to avoid any exploitation or enrichment of one party at the expense of the other. The contract must clearly determine the obligations and rights that may potentially arise from the contract to prevent future dispute[821]. This cannot be achieved if the obligations are not clear and there is an excessive profit gained through speculation and uncertainties which is regarded by some scholars as is analogous to prohibited *Maysir* or gambling[822]. Ibn Al-Qayyim Al-Jawziyyah[823] suggested that the reason for the prohibition of *Gharar* is that

---

[817] Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *Al Gharar wa Atharuhu Fi Al Uqud* (2nd edn, Silsilat Saleh Kamel fi Al-Eqtisad Al-Islami, Jeddah 1995).pp. 21-24; Comair-Obeid, Nayla, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Law Series, Kluwer Law International, London 1996).p. 55; Al-Saati, Abduirahim, 'The Permissible Gharar (Risk) in Classical Islamic Jurisprudence' (2003) 16(2) Journal of King Abdulaziz University-Islamic Economics 3.p. 10; Ercanbrack, Jonathan, *The Transformation of Islamic Law in Global Financial Markets* (Cambridge University Press, Cambridge 2015).pp. 62-63.

[818] Ibid.

[819] Ibid. See also Al-Suwailem, Sami Ibrahim, 'Towards and Objective Measure of Gharar in Exchange' (2000) 7(1) Journal of Islamic Economic Studies 61; Al-Saati, Abduirahim, 'The Permissible Gharar (Risk) in Classical Islamic Jurisprudence' (2003) 16(2) Journal of King Abdulaziz University-Islamic Economics 3.p. 10; Ercanbrack, Jonathan, *The Transformation of Islamic Law in Global Financial Markets* (Cambridge University Press, Cambridge 2015).pp 62-63.

[820] Ibid.

[821] Rayner, Susan E., *The Theory of Contracts in Islamic Law: a Comparative Analysis With Particular Reference to the Modern Legislation in Kuwait, Bahrain, and the United Arab Emirates* (1st edn, Graham & Trotman, London 1991).; Saleh, Nabil Ahmed, Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking (2nd edn, Graham & Trotman, London 1992).p. 64; Vogel, Frank E. and Samuel L. Hayes, Islamic Law and Finance: Religion, Risk, and Return (Arab and Islamic Laws Series, Kluwer Law International, The Hauge 1998).p. 88.

[822] Supran note 820. See also Ercanbrack, Jonathan, *The Transformation of Islamic Law in Global Financial Markets* (Cambridge University Press, Cambridge 2015).pp. 62-63.

[823] Ibn Al-Qayyim Al-Jawziyyah is a renowned scholar of the Hanbali School of jurisprudence founded by Ahmad ibn Hanbal.

"It is a sort of gambling, which is prohibited Maysir. Allah forbade it because of eating other's wealth for nothing, and this is injustice that Allah has forbidden"[824].

For example, if the parties to a contract agreed that price of product should be the prevailing market price of a similar product at specific time in the future, this is considered as gambling in *Sharia* law due to the uncertainty of the price of the contractual subject matter at the time the contract is executed. Therefore, any contract in which an obligation is conditional on the occurrence of an event that might not occur would invoke prohibited *Gharar* such as insurance contract[825].

5.5 The Juristic Definitions of *Gharar*

The Islamic jurists have examined the subject comprehensively in light of *Quranic* interjections and the elaboration of the *Hadith*. While there is *Ijma* among *Sharia* law scholars regarding the prohibition of *Gharar*[826], there are clear disagreements amongst scholars on what constitutes prohibited grave *Gharar* and what constitutes permitted trivial *Gharar*[827].

In the classical era of Islamic jurisprudence, *Sharia* law scholars tended to define the concept of *Gharar* through the example of events that involved the element of *Gharar*[828]. The Medieval and Modern era scholars, however, attempted to formulate a

---

[824] Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *Al Gharar wa Atharuhu Fi Al Uqud* (2nd edn, Silsilat Saleh Kamel fi Al-Eqtisad Al-Islami, Jeddah 1995).p. 52; Al-Suwailem, Sami Ibrahim, 'Towards an Objective Measure of Gharar in Exchange' (2000) 7(1) Journal of Islamic Economic Studies 61.p. 65; Dayan, Fazli and Mian Muhammad Sheraz, 'The Concept of Uncertainty in Islamic law: Its Reasons and Related Terms' (2016) 6(12) Journal of Basic and Applied Scientific Research 21.p. 24; Al-Qayyim, Muhammad Ibn, *Ilam Al-Muwaqqiin an Rabb Al-Aalamin* (Vol 2. 1st edn Dar Al-Kutub Alilmiah, Beirut 1998).pp. 357-358.

[825] Supra note 834.

[826] Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996); Al-Saati, Abduirahim, 'The Permissible Gharar (Risk) in Classical Islamic Jurisprudence' (2003) 16(2) Journal of King Abdulaziz University-Islamic Economics 3.pp. 9-10; Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009); Nadar, Aisha, 'Islamic Finance and Dispute Resolution: Part 1' (2009) 23(1) Arab Law Quarterly 1.

[827] Ibid.

[828] Al-Sarakhsi, Abu Bakr Muhammad, *Kitab Al-Mabsuṭ* (Vol 13, Dar Almarifah, Beirut 1989).pp. 2-13; Alansari, Abu Yousuf Yaqoub, *Iktilaf Abu Hanifa Wa Abu Laila* (Ridwan Muhammad Ridwan (ed), Al-Wafa Publishing, Cairo 1938).pp. 22-27; Alshirazi, Abu Ishaq Ibrahim Ibn Ali, *Al-Muhathab Fi Fiqh al-Shafie* (Vol 3, 1st edn, Dar Alqalam, Dubai 1992); Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).pp. 171-214; Al-Jaburr, Abdullah Muhammad (ed.), *Fiqh Al-Imam*

phrasal definition on the meaning *Gharar* for the concept of *Gharar* and provided some lists of examples of transactions that they believed contained an element of *Gharar*[829]. The modern scholars followed the steps of the medieval scholars, however, they attempted to apply the definition to modern business and financial transactions[830].

Therefore, this part will examine the definition of *Gharar* by classic, medieval, and modern scholars. The last part of this section will attempt to classify the phrasal definition on the meaning *Gharar* provided by medieval and modern scholars to two streams for a better understanding of *Gharar*.

5.5.1 The Classic Era Scholars

The commercial life during the life of the Prophet Mohammed, his companions and their successors was very simple and, therefore, there was no need to examine and develop a theory to govern contracts and commercial transactions or to provide a phrasal definition on the meaning of *Gharar*[831]. The examples provided by the Prophet

---

Awzaie (Vol 2, 1st edn, Dar Alfikr Alislami, Beirut 2000).p. 171; Ibn-Anas, Malik, *Al Muwatta of Imam Malik ibn Anas: The First Formulation of Islamic Law* (Aisha Abdurrahman Bewley and Yaqub Johnson (trs), 3rd edn, Diwan Press Ltd, Norwich 2014); Rittenberg, Ryan M., 'Gharar in Post-Formative Islamic Commercial Law: A Study of the Representation of Uncertainty in Islamic Legal Thought' (PhD Thesis, University of Pennsylvania 2014).pp. 63-65.

[829] Ibid. See also Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *Al Gharar wa Atharuhu Fi Al Uqud* (2nd edn, Silsilat Saleh Kamel fi Al-Eqtisad Al-Islami, Jeddah 1995).p. 52; Al-Arabi, Abu Baker Ibn, *Ahkam Al-Quran* (Vol 1, 3rd edn, Dar Alkutub Alilmiah, Beirut 2003); Al-Zahri, Ali Ibn Hazim, *Al-Muahalla Bil Athar* (Abdullqafar Albanari (ed), Vol.7, 1st edn Dar Alkutub Alilmiah Publishing, Beirut 2003).p. 301; Dayan, Fazli and Mian Muhammad Sheraz, 'The Concept of Uncertainty in Islamic law: Its Reasons and Related Terms' (2016) 6(12) Journal of Basic and Applied Scientific Research 21.p. 24; Taymiyah, Taqie Aldein Ahmad Ibn, *Al Quwaed Al-Nouraniah Al-Fiqhia* (Ahmad Bin Muhmmad Alkhalil (ed), 1st edn, Dar Ibn Al-Jawziyah, KSA 2001).p. 169.

[830] Al-Zuhayli, Wahabah, *Al-Fiqh al-Islami wa Adilatuh* (Vol 2, 1st edn, Daar al-Alfikr, Damascus 1987).p. 2408; Buang, Ahmad Hidayat Bin., 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996); Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998); Rittenberg, Ryan M., 'Gharar in Post-Formative Islamic Commercial Law: A Study of the Representation of Uncertainty in Islamic Legal Thought' (PhD Thesis, University of Pennsylvania 2014).pp. 63-65; Dayan, Fazli and Mian Muhammad Sheraz, 'The Concept of Uncertainty in Islamic law: Its Reasons and Related Terms' (2016) 6(12) Journal of Basic and Applied Scientific Research 21.p. 22.

[831] Alansari, Abu Yousuf Yaqoub, *Iktilaf Abu Hanifa Wa Abu Laila* (Ridwan Muhammad Ridwan (ed), Al-Wafa Publishing, Cairo 1938).pp. 22-27; Alshirazi, Abu Ishaq Ibrahim Ibn Ali, *Al-Muhathab Fi Fiqh Al-Shafie* (Vol 3, 1st edn, Dar Alqalam, Dubai 1992); Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).p. 101; Al-Sarakhsi, Abu Bakr Muhammad, *Kitab Al-Mabsut* (Vol 13, Dar Almarifah, Beirut 1989).pp. 2-13; Al-Jaburr, Abdullah Muhammad (ed.), *Fiqh Al-Imam Awzaie* (Vol. 2, 1st edn, Dar Alfikr Alislami, Beirut 2000).p. 171; Ibn-Anas, Malik, *Al Muwatta of Imam Malik ibn Anas: The First Formulation of Islamic Law* (Aisha Abdurrahman Bewley and Yaqub Johnson (trs), 3rd edn, Diwan Press Ltd, Norwich 2014); Abdullah, Atikullah, 'Islamic Law on Gambling and Some Modern

for certain transactions were sufficient to govern and set a guideline for business transactions and contracts that existed during that period[832]. Accordingly, the classic Islamic jurists and scholars did not see the need to examine *Gharar* and its application in commercial life beyond the general principle of the concept that already existed in the *Quran* and the *Hadith*[833].

The classical era scholars such as Imam Malik Ibn Anas, Judge Abu Yousuf Yaqoub Ibn Ibrahim[834], Mohmmad Bin Hassan Alshaibani, *Al-Shafie*, have identified the meaning of the concept of *Gharar* by developing long lists of examples of commercial transactions that may include *Gharar* or have an element of *Gharar*[835]. For example, Imam Malik, the founder of *Al-Maliki* School of *Fiqh*, dedicated a chapter in his book, Al-Muwatta, to examine and discuss some business transactions that may include element of *Gharar*[836]. However, the chapter did not give any phrasal definition of the meaning of the concept of *Gharar*[837] .For example, Imam Malik had given an example of a business transaction that included *Gharar* as the sale of raw olives for olive oil. He pointed out that *Gharar* is involved in this case due to the fact that the buyer purchases the raw product but he does not know at all the amount of oil that he is going to extract from the raw olive[838]. Imam Malik clearly did not give any phrasal definition on the meaning *Gharar* or a precise legal explanation of the meaning of

---

Business Practices' (2017) 7(11) International Journal of Academic Research in Business and Social Sciences 738.

832 Ibid.

833 Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).p. 173; Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).p. 101.

834 Ibrahim, Judge Abu Yousuf Yaqoub Ibn, *Kitab Alkharaj (*Dar Almarifa, Beirut 1979).

835 Ibid. See also Al-Shafie, Mohmmad Ibn Idris, *Kitab Al-Umm* (Dar Al-Marifa, Beirut 1990); Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).pp. 176-180; AlShaibani, Mohmmad Bin Hassan, *Aljamie Alkhabier* (Dar Alkutub Al-Elmiah, Beirut 2000); Ibn-Anas, Malik, *Al Muwatta of Imam Malik ibn Anas: The First Formulation of Islamic Law* (Aisha Abdurrahman Bewley and Yaqub Johnson (trs), 3rd edn, Diwan Press Ltd, Norwich 2014).

836 Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).p. 188; Ibn-Anas, Malik, *Al Muwatta of Imam Malik ibn Anas: The First Formulation of Islamic Law* (Aisha Abdurrahman Bewley and Yaqub Johnson (trs), 3rd edn, Diwan Press Ltd, Norwich 2014).

837 Ibid. See also Alzarqani, Abi Abdullah, *Sharh Alzarqani Ala Mouta AlImam Malik (*Vol 3, 1st edn, Dar Alkutub Al-Ilmiah, Beirut 1990).pp. 397-408.

838 Ibid. See also Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).p. 176.

Gharar. There are also a few medieval jurists who followed the steps of classic era *Sharia* law scholars and applied similar methods, such as the *Maliki* scholar Mohmmad Ibn Juzy AlQurnati who has defined *Gharar* by giving examples of ten cases, which in his view constituted *Gharar*[839]. He pointed out *Gharar* can manifest in the following ten circumstances:

1. The sale where it is impossible for the seller to deliver the subject matter of the contract to the buyer, such as the sale of a stray camel.
2. Uncertainty with regard to the price or the subject matter of the contract, such as the seller telling the buyer that *"I sell you what is in my sleeve or pocket".*
3. Uncertainty about the characteristics of the subject-matter, such as the seller telling the buyer that *"I sell you a piece of cloth which is in my home"*.
4. Uncertainty about the price or the quantity of the subject-matter, such as the seller offer to sell his product at the market price.
5. Uncertainty about the date of future performance of the obligation, such as a seller offers to sell the subject matter of the contract when the stated person dies or falls ill.
6. Two sales in one transaction, such as selling one product at two different prices.
7. The sale of what is not expected to survive, such as the sale of a sick camel.
8. The sale whose outcome is determined by the seller or the buyer throwing of stones or the dice.
9. The sale whose outcome is determined by the seller throwing a cloth at the buyer and without giving the buyer the opportunity to fully examine the subject matter of the contract.
10. The sale whose outcome is determined by the buyer touching the object of the sale without examining the object of the sale[840].

Mohmmad Ibn Juzy AlQurnati's examples are a fairly broad sample that refers to risk, uncertainty, speculation, inadequacy of information, misspecification and inaccuracy of information shared between parties to a transaction owing to fraud or deceit[841]. It

[839] Saleh, Nabil Ahmed, Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking (2nd edn, Graham & Trotman, London 1992).pp. 64-65; Obaidullah, Mohammed, *Introduction to Islamic Microfinance* (1st edn, IBF Net (P) Limited, India 2008).p. 21; AlQurnati, Mohmmad Ibn Juzy, *Al-Qawanin Al-Fighiyyah (*Majid Alhamaoy (ed), 1st edn, Dar Ibn Hazim, Beirut 2013).pp 432-434.
[840] Supra note 851.
[841] Alzarqani, Abi Abdullah, *Sharh Alzarqani Ala Mouta AlImam Malik* (Vol 3, 1st edn, Dar Alkutub Al-Ilmiah, Beirut 1990).pp. 397-408; Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial

may also be noted that the prevalence of *Gharar* poses a great challenge on Islamic scholars in the context of establishing Islamic contract theory and practice[842]. Nevertheless, the study of examples has helped classical era, medieval and modern Islamic scholars to understand the scope, nature, and application of the concept[843].

5.5.2 The Medieval and Modern Era Scholars

Since the medieval period, the Islamic state has expanded geographically, culturally and economically. The business transactions have evolved and become more complex and complicated. Medieval scholars attempted to explain the meaning of *Gharar* through formulating phrasal definitions that can be applied on any new business practice or transaction[844]. The modern era *Sharia* law scholars, then, provided a more cohesive and systematic definition of *Gharar* and distinguished the term from other closely related terms[845].

The medieval area renowned scholar Ahmad Ibn Taymiyah scholar of *Hanbali* School of jurisprudence defines *Gharar* in two different ways. He defined it as a sale that is uncertain in result[846]. The second definition was a sale that is concealed in its value and its real nature[847]. His student Ibn Al-Qayyim Al-Jawziyyah defined *Gharar* as a sale of *"an object which is uncertain in its acquisition or cannot be delivered or is unknown in its quantity"*[848].

Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).p. 176; Obaidullah, Mohammed, *Introduction to Islamic Microfinance* (1st edn, IBF Net (P) Limited, India 2008).p. 21.

842 Ibid.

843 Ibid.

844 Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).pp. 103-110; Çizakça, Murat, 'History of Islamic Public Finance: Gharar and Risk Aversion' in Ariff, Mohamed, Munawar Iqbal and Shamsher Mohamad (eds), *The Islamic Debt Market for Sukuk Securities: The Theory and Practice of Profit-Sharing Investment* (1st edn, Edward Elgar Publishing, Cheltenham 2014).pp. 86-87.

845 Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).pp. 103-110

846 Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *Al Gharar wa Atharuhu Fi Al Uqud* (2nd edn, Silsilat Saleh Kamel fi Al-Eqtisad Al-Islami, Jeddah 1995).p. 52; Taymiyah, Taqie Aldein Ahmad Ibn, *Al Quwaed Al-Nouraniah Al-Fiqhia* (Ahmad Bin Muhmmad Alkhalil (ed), 1st edn, Dar Ibn Al-Jawziyah, KSA 2001).p. 169; Dayan, Fazli and Mian Muhammad Sheraz, 'The Concept of Uncertainty in Islamic law: Its Reasons and Related Terms' (2016) 6(12) Journal of Basic and Applied Scientific Research 21.p. 24.

847 Ibid.

848 Ibid. See also Al-Qayyim, Muhammad Ibn, *Ilam Al-Muwaqqiin an Rabb Al-Aalamin* (Vol 2, 1st edn, Dar Al-Kutub Alilmiah, Beirut 1998).pp. 357-358; Crawley, Shaun, 'Does an Extension of Time Clause Prevent a Construction Contract Being Infected by Gharar?' (2012) 26(2) Arab Law Quarterly 155.156-157.

The scholar Al-Sarakhsi, the medieval *Hanafi* school scholar of *Fiqh*, defined *Gharar* as a sale where the consequences are hidden or invisible[849]. Abu Ishaq Al-Shiraazi, medieval *Al-Shafie* school scholar of *Fiqh*, pointed out that *Gharar* is a sale where its nature and consequences are hidden[850]. In contrast, Al-Isnawi, who was one of the medieval *Al-Shafie* school scholars, pointed out that *Gharar* is a sale that admits more than one possibility or prospect[851]. Ibn-Hazim, the founder of Zahri School of *Fiqh*, pointed out that *Gharar* can manifest in a sale when the subject matter is uncertain and unknown at the time of the sale[852].

The modern scholar Al-Zuhayli, in his book *Al-Fiqh Al-Islami*, defined *Gharar* in a more complex phrasal definition than the previous medieval scholars[853]. He pointed out that *Gharar* is the sale where the subject matter of the sale is uncertain or unknown, or its quantity and quality is unknown, or the sale where the delivery of the subject matter is not guaranteed[854].

Another modern scholar Mustafa Ahmad Al- Zarqa, in his book Al-Madkhal Al-Fighi Al-Amm, defined *Gharar* as the sale where there is uncertainty about either the existence or the characteristics (*i.e.* if there are any limitations) of the subject matter[855]. In contrast, Al-Zarqa, in another book, Nizam Al-Tamin[856], has defined *Gharar* in a

---

849 Al-Sarakhsi, Abu Bakr Muhammad, *Kitab Al-Mabsuṭ* (Vol 13, Dar Almarifah, Beirut 1989).pp. 2-13; Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *Al Gharar wa Atharuhu Fi Al Uqud (*2nd edn, Silsilat Saleh Kamel Fi Al-Eqtisad Al-Islami, Jeddah 1995).p. 48; Crawley, Shaun, 'Does an Extension of Time Clause Prevent a Construction Contract Being Infected by Gharar?' (2012) 26(2) Arab Law Quarterly 155.pp. 156-157; Dayan, Fazli and Mian Muhammad Sheraz, 'The Concept of Uncertainty in Islamic law: Its Reasons and Related Terms' (2016) 6(12) Journal of Basic and Applied Scientific Research 21.p. 24

850 Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *Al Gharar wa Atharuhu Fi Al Uqud (*2nd edn, Silsilat Saleh Kamel fi Al-Eqtisad Al-Islami, Jeddah 1995).p. 48; Dayan, Fazli and Mian Muhammad Sheraz, 'The Concept of Uncertainty in Islamic law: Its Reasons and Related Terms' (2016) 6(12) Journal of Basic and Applied Scientific Research 21.p. 23.

851 Ibid.

852 Supra note 862.

853 Al-Zuhayli, Wahabah, *Al-Fiqh al-Islami wa Adilatuh* (Vol 2, 1st edn, Daar al-Alfikr, Damascus 1987); Mahmoud El-Gamal, ' An Economic Explication of the Prohibition of Gharar in Classical Islamic Jurisprudence'(2001)8 Islamic Economic Studies 29; Dayan, Fazli and Mian Muhammad Sheraz, 'The Concept of Uncertainty in Islamic law: Its Reasons and Related Terms' (2016) 6(12) Journal of Basic and Applied Scientific Research 21.p. 22.

854 Ibid.

855 Al-Zarqa, Mustafa Ahmad, *Al Fiqah Alislami fi Thawbih Al Jaded (*Vol 1, 1st edn, University Press, Amman 1959).pp. 697-698; Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).p. 111; Al-Zarqa, Mustafa Ahmad, *Al-Madkhal Al-Fighi Al-Amm* (Vol 2, 2nd edn, Dar Al-Qalam, Damascus 2004).pp.744-746; Dayan, Fazli and Mian Muhammad Sheraz, 'The Concept of Uncertainty in Islamic law: Its Reasons and Related Terms' (2016) 6(12) Journal of Basic and Applied Scientific Research 21.p. 22;

856 Al-Zarqa, Mustafa Ahmed, *Nizam Al Tamin Haquiatuh wa Alraie Al Sharie fih* (1st edn, Dar Alrisalah Publishing, Beirut 1984).pp. 161-169; Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of

different way. He defined it as a contract where the products or goods are unknown on its existence[857]. The difference between the two definitions provided by Al-Zarqa is understandable since the second definition was during Al-Zarqa's discussions of permissibility of modern insurance contract under *Sharia* jurisprudence. He held the opposite view of the majority of *Sharia* law scholars and he argued that the element of *Gharar* does not exist in the insurance contract or if it does exist, it is so minimal and trivial to the extent that it could not invalidate the contract from a *Sharia* law perspective[858]. He pointed out that the subject matter or the essence of an insurance contract is a peace of mind and not entirely based on the occurrence of unknown insured event. Therefore, the amount of indemnity paid if the insured event occurred is not *Gharar* since it is not the essence of insurance contract[859].

The modern *Sharia* scholar Abdul Hakim Al-Afghani defines *Gharar* as a contract where there is uncertainty in the existence of the subject matter[860]. He further gives an example of *Gharar* in modern transactions of the sale of pearl in the shell. He pointed out the existence of the subject matter of the transaction that is the pearl is uncertain and unknown and therefore *Gharar* is manifest in this contract[861].

Abu Zahra, in his famous book *Al-Milkiah wa Nazariyyat Al-Aqid*[862], pointed out that *Gharar* is either ignorance or uncertainty of the existence of the subject matter of the contract or is it the ignorance or uncertainty of the characteristics of the subject matter[863]. Another modern scholar Siddiqi pointed out that *Gharar* is the transaction that is based on ignorance, uncertainties and the unknown. He further explained his

---

Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).p. 111; Dayan, Fazli and Mian Muhammad Sheraz, 'The Concept of Uncertainty in Islamic law: Its Reasons and Related Terms' (2016) 6(12) Journal of Basic and Applied Scientific Research 21.p. 24.

[857] Ibid.

[858] Ibid.

[859] Supra note 868. See also Çizakça, Murat, 'History of Islamic Public Finance: Gharar and Risk Aversion' in Ariff, Mohamed, Munawar Iqbal and Shamsher Mohamad (eds), *The Islamic Debt Market for SUKUK Securities: The Theory and Practice of Profit-Sharing Investment* (1st edn, Edward Elgar Publishing, Cheltenham 2014).pp. 86-87.

[860] Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).p. 187; Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).p. 112.

[861] Ibid.

[862] Zahra, Muhmmad Abu, *Al-Milkiah wa Nazariyyat Al-Aqid* (Dar Al-Fikir Alarabi, Cairo 1996).p. 395; Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).pp. 112-113.

[863] Ibid.

point of view by an example of a transaction for the sale of fruits in an orchard at the initial stage of fruition. He argued that this transaction is considered *Gharar* because there is uncertainty due to the fact that the quality and the quantity of the subject matter is unknown[864]. The modern scholar Al-Dharir pointed out that the medieval scholar Al-Sarakhsi's definition of *Gharar* is the one favoured by the majority of scholars including himself. Al-Sarakhsi defined *Gharar* as sale where the consequences are concealed or unknown[865].

From all these definitions of *Gharar* provided by the Islamic Scholars, in the past and of the present, we can classify the phrasal definitions of the meaning of *Gharar* into two streams. The first stream of scholars believes that the lack of knowledge of the characteristics of the subject matter of the contract does not amount to *Gharar*. The second stream of scholars believe the opposite, whereby the lack of knowledge of the characteristics of the subject matter does amount to *Gharar*[866].

5.5.3 The First Stream: The Subject Matter of the Contract

The first stream is where scholars confine the contract that has element of *Gharar* to the case where the ability of the vendor to deliver the subject matter to the buyer is unknown or uncertain. This definition was provided by some leading *Sharia* law scholars such as Shihab Al-Din Al-Qarafi and Mohmmad Ibn Arafah from the *Maliki* School of jurisprudence, Mohmmad Amine Abidin and Ala Al-Din Al-Kasani from the *Hanafi* school of jurisprudence and Ibn Taymiyah and Ibn Al-Qayyim Al-Jawziyyah in one of their definitions from *Hanbali* School of jurisprudence[867].

---

[864] Siddiqi, Muhammad Nejatullah, *Insurance in an Islamic Economy* (Islamic Economics Series, Islamic Foundation, London 2007).pp. 14-15 and 40-41.

[865] Al-Sarakhsi, Abu Bakr Muhammad, *Kitab Al-Mabsut* (Vol 13, Dar Almarifah, Beirut 1989).pp.2-13.

[866] Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).p. 224; Mohammed, Noor, 'Principles of Islamic Contract Law' in Ramadan, Hisham M. (ed), *Understanding Islamic law From Classical to Contemporary* (1st edn, Altamira Press, Lanham, MD 2006).pp. 99-102; Nordin, Nadhirah and others, 'Contracting with Gharar (Uncertainty) in Forward Contract: What Does Islam Says?' (2014) 10(15) Asian Social Science 37.p. 38

[867] Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *Al Gharar wa Atharuhu Fi Al Uqud* (2nd edn, Silsilat Saleh Kamel fi Al-Eqtisad Al-Islami, Jeddah 1995).p. 52; Al-Qayyim, Muhammad Ibn, *Ilam Al-Muwaqqiin an Rabb Al-Aalamin* (Vol 2, 1st edn, Dar Al-Kutub Alilmiah, Beirut 1998).pp. 357-358; Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).p. 224; Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).p. 114; Dayan, Fazli and Mian Muhammad Sheraz, 'The

As per those scholars, the lack of knowledge of the characteristics of the subject matter does not amount to *Gharar* as long as the subject matter of the contract could be acquired or delivered[868]. Therefore, uncertainty in the characteristic of the subject matter such as substance, the genus, the type, the quantum, the date of delivery of the subject matter is not essential and does not amount to *Gharar*. As per this stream, the characterisation of the subject matter is generally subjective and inevitably influences various factors such as the technology used, time, societies, and individual taste and preferences[869]. Therefore, as long as the vendor is capable in delivering the subject matter, there is no *Gharar*, even if the characteristic of the subject matter is unknown to the contracting parties.

Although the scholar Ibn-Hazim Al-Zahri the founder of Al-Zahiri school of jurisprudence agreed with this stream that uncertainty in the characteristic of subject matter is not essential and does not lead to *Gharar*, he pointed out *Gharar* should not be linked to the capability of delivery of the subject matter by the vendor. Instead, it should be linked to the ownership of the subject matter. He pointed out that the delivery of the subject matter is not a condition for valid contract as per the *Quran* and the *Hadith*. Therefore, in order to avoid uncertainty or *Gharar*, the vendor should be the owner of the subject matter at the time of execution of the contract[870].

We can conclude that this group did not regard the characteristic and nature of the subject matter such as substance, the genus, the type, the quantum, the date of delivery of the subject matter as essential element of contract and, therefore, as long

Concept of Uncertainty in Islamic Law: Its Reasons and Related Terms' (2016) 6(12) Journal of Basic and Applied Scientific Research 21.p. 24.

[868] Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).pp. 149-150; Iqbal, Munawar and Philip Molyneux, *Thirty Years of Islamic Banking: History, Performance, and Prospects* (1st edn, Palgrave Macmillan, London 2005).pp. 12-15.

[869] Supra note 880. See also Çizakça, Murat, 'History of Islamic Public Finance: Gharar and Risk Aversion' in Ariff, Mohamed, Munawar Iqbal and Shamsher Mohamad (eds), *The Islamic Debt Market for Sukuk Securities: The Theory and Practice of Profit-Sharing Investment* (1st edn, Edward Elgar Publishing, Cheltenham 2014).p. 70.

[870] Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).pp. 205-206; Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).pp. 109-110; Al-Zahri, Ali Ibn Hazim, *Al-Muahalla Bil Athar* (Abdullqafar Albanari (ed), Vol 7, 1st edn, Dar Alkutub Alilmiah Publishing, Beirut 2003).p. 301.

seller or the vender is capable of delivering the subject matter, then *Gharar* does not exist[871].

The researcher disagrees with this group, as neither the *Quran* nor the *Hadith* required the ability to deliver or legally to own the subject matter as a necessary condition for a valid contract[872]. As well, the reason for the prohibition of *Gharar* is to avoid situations where there is a potential of excessive gain by one of the contracting parties, which does not correspond or match the true value of the service or product he provided[873]. This situation will occur if the contracting parties are uncertain about the characteristic of the subject matter and therefore one of contracting parties may potentially make excessive gain at the expense of the other contracting party.

5.5.4 The Second Stream: The Subject Matter and Characteristic of Subject Matter

The second stream of scholars has broadened the scope of the *Gharar* to cover all aspects of uncertainties related to the subject matter and the characteristics of the subject matter of the contract. This includes uncertainty over the ability to deliver or to acquire the subject matter of the contract, uncertainty over the existence of the subject matter of the contract, uncertainty on the legal ownership of the subject matter, uncertainty over the nature and specification of the subject matter of the contract such as substance, the genus, the type, the quantum, the date of delivery and the price of the subject matter[874]. This stream is led by Islamic scholars such as Mohmmad Al-Sarakhsi from the *Hanafi* school of jurisprudence, Imam Malik Ibn Anas founder of *Al-Maliki* school of jurisprudence, all jurists in the *Al-Shafie* school of jurisprudence and

---

[871] Ibid. See also Hascall, Susan C., 'Islamic Commercial Law and Social Justice: Shari'ah-Compliant Companies, Workers' Rights, and the Living Wage' (2014) 88(2) St. John’s Law Review 291.pp. 312-319.

[872] Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).pp. 116-117.

[873] Ibid. See also Hascall, Susan C., 'Islamic Commercial Law and Social Justice: Shari'ah-Compliant Companies, Workers' Rights, and the Living Wage' (2014) 88(2) St. John's Law Review 291.pp. 312-319.

[874] Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).p. 224; Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).pp. 111-114; Mohammed, Noor, 'Principles of Islamic Contract Law' in Ramadan, Hisham M. (ed), *Understanding Islamic Law From Classical to Contemporary* (1st edn, Altamira Press, Lanham, MD 2006).pp. 99-102.

Ibn Taymiyah and Ibn Al-Qayyim Al-Jawziyyah from *Hanbali* school of jurisprudence[875].

Thus, this stream requires a valid contract to be free from excessive uncertainty the following element should exist:

1. the subject matter of the contract is clearly known.
2. The counter value must be known.
3. The characteristic of the subject matter that should be known.

Therefore, if one of these three elements does not exist in the contract, the contract will be invalid, and it will contain an element of prohibited *Gharar*[876].

5.6 Grave and Trivial *Gharar*

Ibrahim Ibn Mousa Al-Shatibi pointed out that it is difficult to completely remove *Gharar* from contracts and therefore, trivial or insignificant *Gharar* should be permissible (termed as *Gharar Al-Yasir*) since it does not affect the essence or the intrinsic nature of the contract and it is hard to find a contract that is free from this trivial *Gharar* [877]. However, the grave *Gharar* (termed as *Gharar Al-Fahish*) is prohibited by *Sharia* and it invalidates a contract due to its clear uncertainty. According to Abu al-Walid Al-Baji, grave *Gharar* manifests when the uncertainty is intrinsic to the object of the contract[878].

---

[875] Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *Al Gharar wa Atharuhu Fi Al Uqud* (2nd edn, Silsilat Saleh Kamel fi Al-Eqtisad Al-Islami, Jeddah 1995).p. 52; Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).pp. 117-118; Al-Qayyim, Muhammad Ibn, *Ilam Al-Muwaqqiin an Rabb Al-Aalamin* (Vol 2, 1st edn, Dar Al-Kutub Alilmiah, Beirut 1998).pp. 357-358.
[876] Cited by Paldi, Camille, 'Understanding Riba and Gharar in Islamic Finance' (2014) 31(3) Journal of Islamic Banking and Finance 35.pp. 41-46; See also Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).p. 224; Mohammed, Noor, 'Principles of Islamic Contract Law' in Ramadan, Hisham M. (ed), *Understanding Islamic law from Classical to Contemporary* (1st edn, Altamira Press, Lanham, MD 2006).pp. 99-102;
[877] Alrousaini, Ahmad, *Nazriat Almuqasd End Alimam AL-Shatabi* (4th edn,The International Institute of Islamic Thought, VA 1990).pp. 238-284; Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *Al Gharar wa Atharuhu Fi Al Uqud* (2nd edn, Silsilat Saleh Kamel fi Al-Eqtisad Al-Islami, Jeddah 1995).pp. 583-593; Al-Baji, Abu sulaiman, *Al-Muntaqa Sharh Al-Muwatta Al-Muntaqa Sharh al-Muwatta Imam Malik* (Dar Alkoutub Alilmiah, Beirut 1999); Al-Saati, Abduirahim, 'The Permissible Gharar (Risk) in Classical Islamic Jurisprudence' (2003) 16(2) Journal of King Abdulaziz University-Islamic Economics 3.p. 14; Alsousi, Abu Altub Mouloud Alsariri, *Sharah Nail Almuna Alguranti fi Nuthem Almowafaqat Lal Shatabi* (Vol 1, 2 edn Dar Alkutub Alilmiah, Beirut 2015).pp.167-170.
[878] Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *Al Gharar wa Atharuhu Fi Al Uqud* (2nd edn, Silsilat Saleh Kamel fi Al-Eqtisad Al-Islami, Jeddah 1995).pp. 591-592; Hassan, Samir Abdullahmid Rudwan, *Almushtafat Almaliah wa Douruha Fi Idarat Almukater wa Dour Alhandasah Almaliah fi Sinat Adwatuha* (1st edn Dar, Alnashir Liljamat, Cairo 2005).p. 438.

The Islamic scholars, as well, have distinguished between *Gharar* and *jahalla* in a contract. While *Gharar* is the uncertainty in the availability of the subject matter of the contract, *Jahallah* is the lack of knowledge regarding the characteristic, nature and specification of the subject matter[879]. For example, the sale of a bird in the air is *Gharar* due to the fact that the availability of the bird or the capacity of the vendor to deliver the bird to the buyer is uncertain and unknown. However, the sale of a bird while under the cloak of the vendor is *Jahallah* but it does not constitute *Gharar* since the vender is able to deliver the subject matter of the contract[880]. Additionally, Professor Al-Sanhury pointed out *Gharar* arises when selling something with unknow existence, while *Jahallah* occurs when the subject matter of the commercial transaction is something that exists but there is uncertainty on the quantity or quality of the subject matter[881] . Accordingly, there is a fine line between the two concepts of *Jahallah* and *Gharar*[882].

5.7 Analysis

A critical analysis of the phrasal definition of meaning of *Gharar*, we can conclude that many Muslim scholars have approached *Gharar* from various perspectives and angles. Therefore, the modern Islamic scholar, Zaki Badawi described *Gharar* as an unstable concept with no clear or unified understanding or precise meaning[883]. This has led Muslim scholars and jurists to deal with every case separately, thereby generating different meanings and definitions for the term *Gharar*. Frank Vogel agreed with Zaki Badawi and he further pointed out *Sharia* law scholars do not provide an exact scope for *Gharar*[884].

[879] Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *Al Gharar wa Atharuhu Fi Al Uqud* (2nd edn, Silsilat Saleh Kamel fi Al-Eqtisad Al-Islami, Jeddah 1995).pp. 587-593; Buang, Ahmad Hidayat Bin, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).pp. 306-308; Abdullah, Atikullah Bin Haji, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998). 192-196.
[880] Taymiyah, Taqie Aldein Ahmad Ibn, *Nazrial Al-Aqid* (1st edn, Al-Sunnah Al-Muhamadiah Publishing, Cairo 1949); Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *Al Gharar wa Atharuhu Fi Al Uqud* (2nd edn, Silsilat Saleh Kamel fi Al-Eqtisad Al-Islami, Jeddah 1995).pp. 587-593.
[881] Ibid. See also Al-Sanhury, Abdul Razaq, *Masadir Al-Haq Fi Al-Fiqh Al-Islami* (Vol 3, 1st edn, Manshourat Alhalabi Alhuqouqiah, Beirut 1998).p. 56.
[882] Ibid.
[883] Cited by Al-Suwailem, Sami Ibrahim, 'Towards and Objective Measure of Gharar in Exchange' (2000) 7(1) Journal of Islamic Economic Studies 61.
[884] Vogel, Frank E. and Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (Arab and Islamic Laws Series, Kluwer Law International, The Hauge 1998).p. 64.

The review of the definition confirms that scholars approached *Gharar* differently and they introduce different definitions for the term *Gharar,* such as risk, uncertainty, fraud, deceit, and misrepresentation. Mahmoud El-Gamal pointed out that the various definitions of concept of *Gharar* resulted in contradictory concepts and application in modern life[885]. For instance, some scholars confine *Gharar* to risk and uncertainty. Obviously, the two terms are distinct and have different meanings in economics[886]. Risk can be considered as future events that occur with measurable probability and, therefore, one can take certain measures to mitigate such events. In contrast, uncertainty can be considered as future events that occur with non-measurable probability and, therefore, one cannot take any measures to mitigate these events.

Furthermore, Risk or *Mukhatarah* is an essential element that makes a contract legal and binding according *Sharia* jurisprudence and Islamic contract theory. Additionally, the concept of risk is associated with the *Sharia* legal maxim *al-gunm bil ghurmi*, where profit is only legitimate when a party engages in real economic activities and risks. Whereas the *Sharia* legal maxim *Kharaj bil-al-Daman* requires that any gain should be accompanied with liability for losses in order to be permissible or it will be considered as prohibited *Riba*.

The review of the definition of Muslim scholars reveals that the majority of scholars define *Gharar* as uncertainty, unknown outcome, or the probability of more than one outcome. Thus, uncertainty which amount to prohibited *Gharar* in *Sharia* law is related to speculative activities like gambling or *Mysir*, which is highly prohibited, and renders a contract void and null[887].

Some scholars confine *Gharar* to fraud, deceit and misrepresentation[888] as per Nehad Khanfar and Aseel Khanfar, the aforementioned terms will fall under the meaning of

---

[885] Supra note 865.

[886] Adil, Mohamed Azam Mohamed and others, 'Tadlis in Islamic Transactions' (2010) 9 Malaysian Accounting Review 44; Elfakhani, Said and Yusuf M. Sidani, 'Uncertainty or ‘Gharar’ in Contracts Under the Islamic Ethical Code' in Ali, Abbas J. (ed), *Handbook of Research on Islamic Business Ethics* (Edward Elgar Publishing, Cheltenham 2015).pp. 126-140.

[887] Waemustafa, Waeibrorheem and Suriani Sukri, 'Theory of Gharar and its Interpretation of Risk and Uncertainty from the Perspectives of Authentic Hadith and the Holy Quran: A Qualitative Analysis Review of Literature' (2016) 10(2) International Journal of Economic Perspective 21.

[888] Adil, Mohamed Azam Mohamed and others, 'Tadlis in Islamic Transactions' (2010) 9 Malaysian Accounting Review 44; Elfakhani, Said and Yusuf M. Sidani, 'Uncertainty or ‘Gharar’ in Contracts Under the Islamic Ethical Code' in Ali, Abbas J. (ed), *Handbook of Research on Islamic Business Ethics* (Edward Elgar Publishing, Cheltenham 2015).p. 128; Mowla, Muhammad Masrurul, 'Identifying the Presence of Gharar in Buying and Selling Mechanism Under Different Kinds of the Market Structure Global' (2019) 19(1) Journal of Human-Social Science: E Economic 37.p. 38.

Gharar.[889] Furthermore, *Gharar* meaning misrepresentation is not classified by this group of scholars into clear categories such innocent, negligent and fraudulent. In contrast, in English Common Law, a statement made during the negotiation of contract can be classified to innocent misrepresentation, negligent misrepresentation and fraudulent misrepresentation. Each will have different legal implications and tests.[890] This classification does not exist in *Sharia* jurisprudence[891].

In practice, these contradictory definitions of the term *Gharar* among scholars and Arabic lexicographers have led to contradictory judgments by the courts depending on the definition of the term *Gharar* applied by the court[892]. For example, if the court defines *Gharar* as a risk or uncertainty, the application of the concept by the court may lead to setting aside various foreign arbitral awards, whereby the underlying agreement or transaction contains an element of risk and uncertainty, which is unknown to one of contracting parties[893]. The next section will provide more details regarding the UAE courts practice in adopting different contradicting definitions, thereby generating different meanings and application for the concept of *Gharar*.

In the researcher's opinion *Gharar* manifests when one of contracting party attempts to intentionally or unintentionally hide information related to risk and uncertainty of the transaction from the other contracting party to cause unfair bargaining and unjust enrichment and not to preventing risk[894]. Furthermore, the *Sharia* law underlying principle of *Gharar* is that the parties to the agreement must be fully aware of their rights, obligations, and risk at the time of entering into the agreement to prevent uncertainty. Accordingly, the full knowledge of risk and uncertainty will prevent unfair bargaining and unjust enrichment.

5.8 UAE Laws and Practice of *Gharar*

The UAE Civil Code is the cornerstone of the UAE legal system and it governs all issues concerned with the validity and nullity of contracts. It can be noticed that there

[889] Nehad, A and A. Knanfar, 'A Critical Analysis of the Concept of Gharar in Islamic Financial Contracts' (2016) 37(1) Journal of Economic Cooperation & Development 1.
[890] Supra note 901.
[891] Supra note 901. See also Martin, Elizabeth A., *Oxford Dictionary of Law* (6th edn, Oxford University Press, Oxford 2008).
[892] Nehad, A and A. Knanfar, 'A Critical Analysis of the Concept of Gharar in Islamic Financial Contracts' (2016) 37(1) Journal of Economic Cooperation & Development 1.
[893] Supra note 901.
[894] Supra note 901, p. 14.

is a significant departure from the Civil Code of Egypt in terms of permissibility and non-permissibility of certain commercial transactions and contracts, in that the UAE Civil Code is much more strongly influenced by the *Sharia* jurisprudence than the Egyptian code[895].

The *Sharia* law influence is due to the fact that the UAE government attempted to Islamise the whole UAE legal system. Precisely, in 1978, the UAE council of Ministers issued a Resolution No. 50/1978 establishing a High Committee to review and ensure the compliance of all legislation issued or of any that will be issued by the UAE government with *Sharia* law principles[896]. Due to this effort, the UAE Civil Code has had a huge influence from *Sharia* law in many aspects and more precisely in governing the invalidity of contracts and transactions, particularly relating to *Gharar* and gambling[897].

The UAE Civil Code begins by stating that in the instance that the Code does not cover a matter, then *Sharia* law principles and jurisprudence will apply. Additionally, *Sharia* law principles are to be used in interpreting the text and provision of the UAE Civil Code[898]. The *Sharia* law concept of *Gharar* has been addressed more comprehensively by the UAE Civil Code than other Arab Civil Codes[899].

Article 185 of the UAE Civil Code[900] defines *Gharar* or *Tagreer* which is a verbal noun of *Gharar* as an *"…act by which one of the contracting parties deceives the other through the use of fraudulent means, in words or other means, inducing him to assent to what he would have never consented to do in the absence of such means"*. Also, Article No.186 of UAE Civil Code[901] establishes that a deliberate silence over an actual fact or situation is misrepresentation and deceit if it can be proved that the induced party would not have entered the contract had he known of this fact or situation. For

---

[895] Sloane, Peter D., 'The Status of Islamic Law in the Modern Commercial World' (1988) 22(3) The International Lawyer 743.
[896] AL-Muhairi, Butti Sultan Butti Ali, 'The Islamisation of Laws in the UAE: the Case of the Penal Code' (1996) 11(4) Arab Law Quarterly 350.
[897] Ibid. See also Crawley, Shaun, 'Does an Extension of Time Clause Prevent a Construction Contract Being Infected by Gharar?' (2012) 26(2) Arab Law Quarterly 155.pp. 156-157.
[898] The UAE Civil Code- see Sloane, Peter D., 'The Status of Islamic Law in the Modern Commercial World' (1988) 22(3) The International Lawyer 743.
[899] Supra note 907.
[900] Article 185 of the UAE Civil Code.
[901] Article 186 of the UAE Civil Code.

the deceived party to rescind the contract, he has to establish that *Gharar* existed in the contract and the contract has been made an exorbitant hardship[902].

Furthermore, Article 1021 of the UAE Civil Code[903] declares that contracts involving ''gambling'' are invalid. However, the term ''gambling'' is not defined in the law, so whether anything other than wagers on sporting events or the like are intended to be prohibited by the law is unclear.

It appears that the UAE Civil Code defined *Gharar* as to defraud, deceive and as misrepresentation. In this context, the ruling of Dubai Court of Cassation No. 188/2012 and 213/2012[904] defines *Gharar* as *Tadlis,* which amounts to misrepresentation, fraud, and deceit. As well, ruling of Federal Supreme Court No. 321/1991[905] declared that the deliberate silence of one of party on some material fact of the contract in order to induce the other party to enter into the contract is considered as misrepresentation and deception, which amounts to prohibited *Gharar,* which will be considered as against public policy. Interestingly, a ruling of Dubai Court of Appeal No. 514 of 2014[906] declared that spread betting, forex, and other forms of trading and other form of speculation on movements in international share and stock prices contain elements of *Maysir* or gambling which constitutes *Gharar* under the UAE law. Thus, the court declared that the contract is void and null due to violation of the UAE's public policy.

The review of various UAE courts rulings and jurisprudence indicate that the court defined *Gharar* as a deception, misrepresentation, danger, risk, uncertainty, speculation, gambling, and fraud[907]. The courts used these terminologies interchangeably to define *Gharar,* which may lead to broadening the scope of application of the concept of *Gharar* and, subsequently, broaden the scope of the UAE's concept of public policy. It is worth mentioning that foreign arbitral awards that seek recognition and enforcement in the UAE are subject to the same scope of application of *Gharar* that is applicable to domestic arbitral award. Accordingly, if an element of deception, misrepresentation, danger, risk, uncertainty, speculation,

[902] Article 187 of the UAE Civil Code.
[903] Article 1021 of the UAE Civil Code.
[904] Ruling of Dubai Cassation Court No. 188/2012 and 213/2012 issued on 7 March 2013; see also ruling of Dubai Court of Appeal No. 514 issued on 10 January 2015.
[905] Ruling of Federal Supreme Court No. 321/1991 issued on 20 October 1991.
[906] Ruling of Dubai Court of Appeal No. 514 issued on 10 January 2015.
[907] Ruling of Federal Supreme Court No.321/1991 issued on 20 October 1991; ruling of Dubai Cassation Court No. 188/2012 and 213/2012 issued on 7 March 2013.

gambling and/or fraud exists in the arbitration agreement, the underlying agreement, or the award itself, the arbitral award would be completely or partially unenforceable. In this context, the UAE courts are competent to raise issues of *Gharar* as a part of public policy of their own motion and undertake a full review of the merits of the foreign arbitral award[908]. However, it should be noted, that in the UAE there is not myriad case law dealing with the enforcement of a foreign arbitral award and public policy. However, there are various domestic court judgments that deal with this issue.

5.8.1 The Subject Matter and the Future Condition of the Underline Contract and *Gharar*

It was obvious from the previous discussion of the classification of the definitions of *Gharar* that the majority of *Sharia* law scholars consider that the subject matter of a contract should be in existence at the time that the contract is concluded and executed, or otherwise it will be void. Furthermore, the subject matter of the contract should be a possible one and adequately defined and lawful, otherwise the contract would be null and void.

In this context, Article 201 of UAE Civil Code stipulates that *"If the subject matter of contract is inherently impossible at the time the contract is made, the contract shall be void"* [909].Therefore, under the UAE Civil Code, it is not enough that the subject matter of the contract exists at the time of concluding the contract, it is also required that the subject matter be a possible one. Most contemporary Arab Civil Codes adopted similar provisions that state that if the subject matter of a contract is something impossible in itself, the contract is void. For example, Article 132 of the Egyptian Civil Code,[910] Article 127.1 of the Iraq Civil Code, Article 167 of the Kuwait Civil code, Article 32 of the Qatari Civil Code and Article 159 of the Jordanian Civil Code[911]. Accordingly, if the subject matter of an underlying contract is inherently impossible at the time the contract is created, then the UAE court may refuse to enforce the foreign arbitral award due to existence of the prohibited *Gharar*.

---

[908] Ruling of the Federal Supreme Court No. 449 of Judicial Year 21 issued on 11 April 2001; ruling of the Federal Supreme Court No. 371 of Judicial Year 18 issued on 30 June 1998.
[909] Article 201 of the UAE Civil Code.
[910] Article 132 of Egyptian Civil Code No. 131 of 1948.
[911] Saleh, Nabil, 'Freedom of Contract: What Does it Mean in the Context of Arab Laws?' (2001) 16(4) Arab Law Quarterly 346.p. 352.

Similar to the case of a non-existent subject matter of underlying contract, an undefined or ill-defined subject matter of the contract caries along with it vulnerability to *Gharar* and may risk refusal of enforcement of the foreign arbitral award by the UAE courts. Article 203 of the UAE Civil Code provide that the characteristic of the subject matter have to be clearly identified by the contracting parties at the time that contract is concluded or the contract will be considered as null and void[912]. Furthermore, Article 409 of UAE Civil Code[913] emphasises that the underlying contract may be null and void if there is uncertainty on the subject matter of the contract at the time that the contract is concluded. This includes the substance, the genus, the type, the quantum and the date of delivery of the subject matter.

However, in case of necessity (*Al-Darura*), the non-existence of the subject matter was tolerated and permitted by some *Sharia* law scholars, provided that the future inception of the subject matter was certain. Some *Sharia* law scholars such as Ibn Rushd and Ibn Qayyim Al-Jawziyya adopted this view[914]. Ibn Rushd, for example, pointed out that contracting on future things or subject matter is valid and permitted if there is necessity[915]. Ibn Qayyim Al-Jawziyya, on the other hand[916], pointed out that if there is no doubt on the possibility of future existence of subject matter of the contract, then the contract is considered valid under *Sharia* law.

In the instance that there is uncertainty surrounding the subject matter (in that there is a chance that the subject will not exist at a future date), the underlying contract will be deemed invalid as the contract would contain Gharar[917]. In the same vein, Article 202(1)[918] has declared that the subject matter of a contract may be a thing in the future provided *Gharar* is averted[919]. The UAE Civil Code permits future things with some reservations in place, which is the absence of uncertainty or *Gharar.* The explanatory Memorandum of the UAE Civil Code[920] states that while the *Hanafi* School deems as

912 Supra note 907.
913 Article 490 of the UAE Civil Code.
914 Abu Sadah, Muhammad, 'International Arbitration Contract Principles: Analysis of Middle East Perceptions' (2010) 9(2) Journal of International Trade Law and Policy 148; Alqudah, Mutasim Ahmad, '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 1.
915 Ibid.
916 Ibid.
917 Ibid.
918 Article 202 of the UAE Civil Code.
919 Supra note 926.
920 The explanatory Memorandum is an official commentary of UAE Civil Code issued by the UAE Ministry of Justice and purported to explain the provisions of the Civil Code.

a requisite that the subject matter of a contract be in existence at the time the contract is concluded and executed, and considers that it may not exist in exceptional cases, such as *Salam* and manufacture. Similarly, Article 160.1 of Jordanian Civil Code of 1976 provides that the subject-matter of a contract may be a thing in the future, provided that *Gharar* is averted[921]. However, Article 131.1 of Egypt's Civil Code of 1948 stipulates that *"things in future may be the subject-matter of an obligation"*[922]. In contrast to the UAE Civil Code and the Jordanian Civil Code of 1976, the Egyptian Civil Code permits future things without any qualification or reservation. The scholar Al Sanhury's monumental explanation of the Egyptian Civil Code maintains that the above provisions contravene *Sharia* law's best-known jurisprudence[923]. Accordingly, if there is possibility that the subject matter of the underlying contract will exist at a future date, then that contract is considered valid under *Sharia* law and the UAE law and the foreign arbitral award will likely be enforced by the court.

Further, the UAE Civil Code under Article 420[924] permits and recognises a contract that is conditional on occurrence of a particular future event or condition. However, Article 206 of UAE Civil Code[925] states that a contract may include a suitable condition which confirms it terms, admitted by custom or usage, beneficial to one of the contracting parties or others, unless it is prohibited by the legislator or contrary to public policy or morals. In this case, the condition is void but the underlying contract remains valid except where the condition is the prime motive or intention of contracting and, in this case, the underlying contract shall also be void. In this context, the scholar Ibn Taymiyah pointed out that contractual clauses are valid as long as they are not contrary to the purpose of the contract and if it is not essential or relevant to the purpose of the contract[926]. Professor Al-Sanhury pointed out that

> "*the Hanbali doctrine has come quite close to the western doctrines: any clause which accompanies the contract is valid unless it is impossible or contrary to public order or good morals. Said clause is then set aside but the contract*

[921] Saleh, Nabil, 'Freedom of Contract: What Does it Mean in the Context of Arab Laws?' (2001) 16(4) Arab law quarterly 346.p. 351.
[922] Ibid. p. 352.
[923] Al-Sanhury, Abdull Razak, *Al-Wasit Fi Sharah Al-qanoun Almadani* (Vol 1, 1st edn, Dar Ihya Al Turath Al-Islami Publishing, Beirut 1952).p. 377.
[924] Article 420 of the UAE Civil Code.
[925] Article 206 of the UAE Civil Code.
[926] Supra note 411, p. 79.

remains valid unless this clause condition is the determining motive of the contract: in this case, the contract is also set aside"[927].

In line of Article 206 of UAE Civil Code and *Sharia* jurisprudence, it was decided in the Dubai Court of Cassation No. 405/428 of 2001 that it can be deduced from the provisions of Articles 420 and 206 of the Civil Code that a future condition shall be void if the existence depends on an impossible condition or if it permits what is forbidden, or forbids that which is lawful, or is contrary to the public order or morals. Thus, if the underlying contract contained a future condition that is impossible or contrary to public policy, then UAE court may refuse enforcement of whole or part of foreign arbitral award[928].

In other words, the nullity, rescission or termination of the future clause contained in underlying contract will not affect the whole underlying contract if the other clauses of the contract are valid in itself[929]. To illustrate, if the future condition cannot be separated from the main obligation of the other clauses contained in the underlying contract or the future condition is the prime motive of the underlying agreement, then the whole award will be rendered null and void and the court may refuse the enforcement of the foreign arbitral award. However, if the future condition can be separated from the main obligation of the underlying agreement or the future condition is not the prime motive of the underlying contract, then the court may partially enforce the foreign arbitral award excluding only the future clause or condition that is impossible or contrary to public policy[930].

5.8.2 Arbitration Agreement and *Gharar*

An arbitration agreement can be defined as *"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not"*[931]. Accordingly,

---

[927] Al-Sanhury, Abdul Razaq, *The Sources of Truth in the Muslim Fiqh* (1st edn, Vol 2, Maktabat Alhalabi Alhoqouqiyah, Beirut 1998). p. 102. Cited by Al-Samaan, Y., *The Legal Protection of Foreign Investment in The Kingdom of Saudi Arabia* (1st edn, Dar Alandalus for Publication and Distribution, 2000). p. 254; and Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).p. 79.
[928] Ruling of Dubai Court of Cassation No. 405/2001 and 428/2001 issued on 21 January 2002.
[929] Ruling of the Dubai Court of First Instance No. 603/2010 issued on 16 February 2011.
[930] Article 206 of the UAE Civil Code.
[931] Poudret, Jean-François and Sébastien Besson, *Comparative Law of International Arbitration* (Stephen Berti and Annette Ponti (trs), 2nd edn, Sweet & Maxwell, London 2007).p. 121;

the arbitration agreement may contain some essential terms, such as the choice of substantive law, seat of arbitration, the body administering the dispute (whether it is an institution or the court), supervisory court if it is different from the seat, number of arbitrators, name of arbitrator, appointing body, procedural rules governing the arbitral proceedings, interest rates and time periods and etc[932]. It is also worth mentioning that while the law governing the arbitration agreement is usually the same as the substantive law of the contract, this is not always the case. In some cases, there may be a variance between specific clauses and the law governing the arbitration agreement.

The validity of the arbitration clause or agreement is debatable under the *Sharia* contract law. There is no explicit reference to the validity of the arbitration agreement in the primary sources of *Sharia* law, the *Quran*, and the *Hadith*[933]. Therefore, the research should resort to the secondary source of *Sharia* law, namely *Ijtihad*. However, arbitration agreements were not examined by classic and medieval law scholars[934] due to the fact the volume of international trade was not as high, transactions were very simple and there was no need for an expedited private dispute resolution system to adjudicate the parties differences[935]. The issue was examined intensively by modern day *Sharia* law scholars[936].

Blackaby, Nigel and others, *Redfern and Hunter on International Arbitration* (5th edn Oxford University Press, Oxford 2015).p. 72.

[932] Althabity, Mohammad Motlg., 'Enforceability of Arbitral Awards Containing Interest: a Comparative Study Between Sharia Law and Positive Laws' (PhD Thesis, University of Stirling 2016); Girsberger, Daniel and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (3rd edn, Nomos, Baden-Baden 2016).p 63.

[933] Ayub, Muhammad, *Understanding Islamic Finance* (John Wiley & Sons Publishing, West Sussex, Chichester 2010).p. 57; Wakim, Mark, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21(1) New York International Law Review 1.p. 51.

[934] Alqudah, Mutasim Ahmad, 'Alleviating Jurisdictional Uncertainty: An Arbitration Clause or a Jurisdiction Clause?' (2016) 37(4) Business Law Review 124.

[935] Baamir, Abdulrahman Yahya, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009); Alqudah, Mutasim Ahmad, '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 1.

[936] Ibid.

Modern *Sharia* jurisprudential schools suggest that there are two different types of arbitration agreements[937]. The first type is the valid arbitration agreement, which meets the following condition and requirements[938]:

1. The arbitration agreement is essential on the performance of the contract[939].
2. The arbitration agreement is certain and is not based on unclear conditions or circumstances, which may lead to divergent interpretations of the arbitration agreement[940].
3. The arbitration agreement should not give advantage to one party over the other party of the contract. It should put the both parties to equal position[941].

The second type of arbitration agreement is the invalid and non-enforceable one as per the *Sharia* jurisprudence. Accordingly, the effect of the invalidity of such an arbitration agreement might extend to the whole agreement or be limited to the arbitration agreement itself[942]. In this context, there are two scenarios that were examined by *Sharia* law scholars. With regards to the first scenario, if the arbitration agreement is invalid in itself, the underlying agreement will remain valid and enforceable. This issue may arise when there is impossibility of performing the arbitration agreement by the parties because of foreign reasons. In the second scenario, the arbitration agreement is valid in itself, but the underlying agreement is not void due to existence of *Riba* and *Gharar*[943]. Therefore, if an underlying agreement

---

937 Kutty, Faisal, 'The Shari'a factor in international commercial arbitration' (2006) 28(3) Loyola of Los Angeles international & comparative law review 565.p. 596; El-Aḥdab, Abd al-Hamid and Jalal El-Ahdab, *Arbitration With the Arab Countries* (3rd revised and expanded edn, Kluwer Law International, Netherlands 2011); Seyadi, Reyadh Mohamed, *The Effect of the 1958 New York Convention on Foreign Arbitral Awards in the Arab Gulf States* (Cambridge Scholars Publishing, Newcastle upon Tyne 2017).pp. 174-178
938 Ibid.
939 Ibid.
940 Supra note 940.
941 Supra note 940.
942 Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *AlGharar Fi Aloqoud wa Atharoh Fi Altatbiqat Almoasirah* (Islamic Institution of Research and Training, Jeddah 1993).p. 13.
943 Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *AlGharar Fi Aloqoud wa Atharoh Fi Altatbiqat Almoasirah* (Islamic Institution of Research and Training, Jeddah 1993); Kutty, Faisal, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28(3) Loyola of Los Angeles International & Comparative Law Review 565.p. 596; Ahdab, El-Ahdab, Abd al-Hamid and Jalal El-Ahdab, *Arbitration With the Arab Countries* (3rd revised and expanded edn, Kluwer Law International, Netherlands 2011).p. 2; Seyadi, Reyadh Mohamed, *The Effect of the 1958 New York Convention on Foreign Arbitral Awards in the Arab Gulf States* (Cambridge Scholars Publishing, Newcastle upon Tyne 2017).pp. 174-178.

contains a clause that has an element of *Gharar*, then the whole contract might be rendered void[944].

Some scholars have argued that the basic condition for the validity of the arbitration agreement under *Sharia* law is for the dispute to have already arisen at the time the agreement to arbitrate was concluded[945]. Wakim, for example, argued that *"contract clauses calling for the arbitration of future disputes are technically unenforceable"*[946]. It is thought that this opinion was given by some modern Muslim scholars because the *Majella* has adopted this view and prohibited such clause or agreement that refers a future dispute to arbitration due to *Gharar*.

However, the majority of the modern *Sharia* law scholars challenged this view and argued that it is difficult to prohibit an arbitration agreement for a future dispute since the necessity of modern commercial transactions require such agreements to facilitate business transactions. As well, *Sharia* law's secondary sources such as Interest or *Al-Maslah*, *Istihsan* and *Urf*, permit using arbitration agreement due to necessity and in order to remove the hardship on traders and community[947].

Furthermore, in reality there are no real uncertainties involved within the meaning of the validity of the clause in the *Sharia* contract law[948], if parties decide to settle their future dispute by arbitration since the subject matter is normally defined through the applicable law, supervisory courts, the body administering the dispute whether arbitral institution or court. Thus, the arbitration agreement only grants the jurisdiction of the national court to the arbitrators. The ruling of Abu Dhabi Court of Cassation No.138 and 425 of Judicial Year 18[949] confirmed that submission to arbitration for a future dispute arising from that contract between the contracting parties is compatible with the Islamic *Sharia*.

Nevertheless, some *Sharia* law scholars adopted the opinion that the invalidity of the whole contract that contains a *Gharar* clause is an exception, and it occurs only when

944 Supra note 943.
945 Kutty, Faisal, 'The Shari'a Factor inIinternational Commercial Arbitration' (2006) 28(3) Loyola of Los Angeles International & Comparative Law Review 565.p. 605; Mahmoud, Qadri Mohmad, *Altahkiem fi Dowa Ahkam Alsharia* (Dar Alsomiai Publishing, KSA 2009).p. 134.
946 Supra note 348, pp. 47-48.
947 Supra note 411.
948 Supra note 411.
949 Ruling of Abu Dhabi Court of Cassation No.138 and 425 of Judicial Year 18 issued on 26 February 1997.

the uncertainty of the clause is contrary to the whole purpose of the contract and it is impossible to perform the contract[950]. For example, if a tenancy agreement contains a clause that imposes that the lessee does not have the right to use the premises in certain unidentified circumstances, then the whole agreement will be invalid, because the clause is against the whole purpose of the contract[951]. Therefore, according to this opinion, as long as the clause is not contrary to the purpose of the contract, the clause is valid[952]. This opinion is based on the fact that, although *Gharar* in any contract may make the whole contract void, this is subject to the situation where the clause is contrary to the purpose of the whole contract[953].

To sum up, *Sharia* contract law emphasises the autonomy of the parties to engage in any contractual relations, subject to a number of prohibitions. There are two major prohibitions. The first is the prohibition of *Gharar* and the second is the prohibition of *Riba*. *Gharar* is an unfamiliar concepts in other legal traditions, and they are most likely to affect the validity of arbitration agreements and in the UAE pursuant to Article V (2)(b) of the NYC. Therefore, it is suggested that the elements of the expected dispute should be comprehensively articulated, such as that the dispute might involve an insurance issue or payment obligation, or any other types of disputes that can be expected to avoid an uncertainty that might be classified as prohibited *Gharar,* which amounts to UAE public policy.

5.8.3 Damages in International Arbitration and *Gharar*

The legal interest awarded by the arbitral tribunal might take a form of damages, which includes losses suffered or profits lost. Therefore, it is important to examine the theory governing contracts and damages under *Sharia* jurisprudence to assess whether the compensation for the loss of profits is speculative in nature and may be considered as *Gharar*. Accordingly, the UAE courts are competent to raise issues of *Gharar* as a part

[950] Al-Dharir, Dr Al-Siddiq Muhammad al-Amein, *AlGharar Fi Aloqoud wa Atharoh Fi Altatbiqat Almoasirah* (Islamic Institution of Research and Training, Jeddah 1993).p. 44; El-Ahdab, Abd al-Hamid and Jalal El-Ahdab, *Arbitration With the Arab Countries* (3rd revised and expanded edn, Kluwer Law International, Netherlands 2011).p. 23.Seyadi, Reyadh Mohamed, *The Effect of the 1958 New York Convention on Foreign Arbitral Awards in the Arab Gulf States* (Cambridge Scholars Publishing, Newcastle upon Tyne 2017).pp. 174-178.
[951] Ibid.
[952] Supra note 953.
[953] Supra note 953.

of public policy of their own motion and undertake a full review of the merits of the foreign arbitral award[954].

As discussed in the previous chapter, the primary purpose of *Maqasid Al-Sharia* is to accomplish benefits to uphold justice for mankind and protect the society at large[955]. Essentials that benefit under *Maqasid Al-Sharia* principle are those considered vital to human and society survival and without which the society at large may be affected[956]. Accordingly, *Al-Mejalah*, in its preliminary pages, identified six legal maxims in line with *Maqasid Al-Sharia*. These legal maxims are the general rules of *Fiqh* that portray the goals and objectives of *Sharia* law[957]. These six maxims are:

(1) Necessity allows actions which would otherwise be forbidden (Article 21).
(2) Hardship is solved by tolerance (Article 17 and 18).
(3) There shall be neither retaliatory harm nor causing of harm (Article 19).
(4) Necessity is judged according to its merits (Article 22).
(5) Harm must be eliminated (Article 20).
(6) A major harm may be replaced by a lesser one (Article 27)[958].

One of *Sharia* law's legal maxims is that harm must be eliminated[959]. This legal maxim has lead *Sharia* law scholars to adopt a more restrictive approach in determining the amount of eligible damages[960]. Due to the above legal maxims, the dissolution of a contract under *Sharia* law can be for the following reasons: by either mutual agreement of the contracting parties, without fault or legal cause, and due to frustration of contract[961]. As well, the affected parties can only claim damages that are direct and a consequence of a breach of contract. Ibn Taymiyah argued the essence of justice and

---

954 Ruling of the Federal Supreme Court No. 449 of Judicial Year 21 issued on 11 April 2001; ruling of the Federal Supreme Court No. 371 of Judicial Year 18 issued on 30 June 1998; ruling of the Dubai Court of Cassation No. 146/2008 issued on 9 of November 2008.

955 Al-Ghazali, Abu Hamid Muhammad ibn Muhammad, *Al Mustasfa min ilm Al Usul: On Legal theory of Muslim Jurisprudence* (Ahmad Zaki Mansur Hammad (trs), Vol 1, 1st edn, Dar Ul Thaqafah Publishing 2018).

956 Amkhan, Adnan, 'The Effect of Change in Circumstances in Arab Contract Law' (1994) 9(3) Arab Law Quarterly 258; Nordin, Nadhirah and others, 'Commodity Futures: A Maqasid Al-Shariah Based Analysis' (2017) 7(8) International journal of academic research in business and social sciences 602.

957 Pasha, Ahmad Cevdet, *The Civil Code of the Ottoman Empire: Al-Majalla Al-Ahkam Al-Adaliyyah* (CreateSpace Independent Publishing Platform, California 2017).

958 Ibid.

959 Ibid. See also Islam, Muhammad Wohidul, 'Dissolution of Contract in Islamic Law' (1998) 13(4) Arab Law Quarterly 336.

960 Al-Ammari, Saud and A. Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30(2) Arbitration International 387.

961 Islam, Muhammad Wohidul, 'Dissolution of Contract in Islamic Law' (1998) 13(4) Arab Law Quarterly 336.

fairness requires compensation to be measured and assessed by similar things without any addition and deduction. Furthermore, he pointed out that the accurate evaluation of fair and reasonable compensation should be based on the analogy and the estimation of the goods with other equivalent goods[962]. Al-Ammari and Martin pointed out that *"Sharia will only restore a party to the position it was in before the breach, not to where it would have been had the obligations been performed. Otherwise, this would be speculative in nature [Gharar], which is not enforceable under Sharia"*[963]. Consequently, the only damages that can be awarded under *Sharia* law must be of direct consequence and is certain and quantifiable to avoid *Gharar*. However, the indirect and speculative damages are not awarded in *Sharia* law[964].

Therefore, *Sharia* law scholars reject the compensation for missed opportunities or lost profits due to speculation or *Gharar*. However, some *Sharia* law scholars argued that the prohibition should be considered in line of *Maqasid Al-Sharia* where one of *Sharia* law's objective is to protect *Al-Mall* or the assets. This group of scholar's attempted to classify the damage due to loss of profit into two types, firstly, definite future damages and secondly, possible future damages[965]. The first type does not contain an element of *Gharar* or speculation since the damage is clear, for example, an employee who was permanently injured in his work due to the negligence of his employer. Accordingly, the damage is quantifiable, and it is a direct consequence of the employer's negligence. The quantification can be easily measured through the employee's salary and benefits that he would lose for the period of his life. This was the position of scholar Ibn Taymiyah who permitted the compensation for associated profit that does not materialise immediately[966]. Nevertheless, the second category has been considered as speculative in nature and contains element of *Gharar* by the majority of *Sharia* law scholars[967].

---

[962] Duriana, Duriana, 'Principles of Economic Ibn Taymiyyah (Moral Analysis)' (2015) 15(1) Al-Ulum (Gorontalo) 185.p. 192.
[963] Supra note 972.
[964] Supra note 972.
[965] Supra note 972.
[966] Aleisa, Mohammed I. E., 'A Critical Analysis of the Legal Problems Associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?' (PhD Thesis, University of Essex 2016).
[967] Ibid.

This has been a position adopted by the Saudi judiciary in the decision of the Board of Grievance No 235/1415 while enforcing a foreign judgment[968]. However, Alsaif[969] in his thesis explained that this matter is not settled under Saudi judiciary jurisprudence and there are contradicting judgments issued. For example, the Saudi court took a restrictive approach toward definite future damage while enforcing a foreign judgment issued by the *Sharia* law circuit of the Dubai court. The Saudi court[970] has refused to enforce a foreign judgment issued by *Sharia* circuit of the Dubai court due to the fact that this court granted the Claimant's compensation for definite loss of future profit. The Saudi court pointed out that the *Sharia* circuit of Dubai court ruling has violated Saudi public policy since remedies for breach of contract are restricted under *Sharia* jurisprudence to direct and actual damages[971]. Subsequently, the definite future damage or possible future damage of anticipated profits would constitute *Gharar* under *Sharia* jurisprudence[972]. The outcome of the case illustrated that each court has a different understanding of what constitutes *Gharar* under *Sharia* jurisprudence and how it should be applied.

The Egyptian judiciary adopted different approach than the Saudi judiciary, Article 221 of the Egyptian Civil Code No. 131 of 1948 permits the judge to fix the amount of damage if it has not been agreed by the parties or on the condition that the loss is a consequence of the non-performance of the obligation.

The UAE Civil Code under Article 42[973] influenced by *Sharia* law legal maxim states that,

> *"1. No prejudice caused and no harm inflicted.*
>
> *2. Prejudice should be removed.*
>
> *3. Prejudice is not removed by a similar one".*

In line with the above *Sharia* law legal maxim, Article 389 of UAE Civil Code[974] provides that the quantum of damages shall be fixed by the courts if the parties did

---

968 Supra note 966.
969 Supra note 204.
970 Ruling No. 235/T/2 of 1415 AH–(1995) cited in Alsaif, Bander, 'Two Sides of the Saudi Public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards' (PhD Thesis, University of New South Wales 2018).
971 Supra note 981.
972 Supra note 981.
973 Article 42 of the UAE Civil Code.
974 Article 389 of the UAE Civil Code.

not fix the amount contractually, or if the damages are not quantified by the law. In this situation, the judge will follow *Sharia* jurisprudence and award only the actual damages to restore the party to the position he/she was in before the occurrence of the breach. The Dubai court of cassation has confirmed this[975]. The court further confirmed that the court can restore the actual damages, but they must also examine the burden of proof from the affected party[976]. However, the contracting parties may intend to include a provision in their agreement that allows for the payment of a specified sum should one of the parties be in breach of contract. The UAE legal system allows for parties to include provisions in their agreement that allow for the payment of a specified sum should one of the parties be in breach of contract. This is found in Article 390 of UAE Civil Code, which states that:

> *"1. The contracting parties may fix the amount of compensation in advance by making a provision therefore in the contract or in a subsequent agreement, subject to the provisions of the law.*
>
> *2. The court may, on the application of either party, vary such agreement so as to make the compensation equal to the loss and any agreement to the contrary shall be void."*

However, as per Article 390 of the UAE Civil Code, the judge can interfere to commensurate the compensation to the actual damages sustained if the assessment of compensation by the parties in the agreement was excessive and does not represent the actual loss suffered or damage occurred[977]. Then, according to the Federal Supreme Court of Abu Dhabi, the court can reduce or increase the damage to be equivalent to the actual damage sustained by the affected party[978]. The explanatory Memorandum of UAE Civil Code, which states that compensation for pre-detainment contractual damages shall be in line with the *Sharia* law principle that the compensation shall be equal to the actual loss suffered[979]. We can conclude that the UAE law intended to align and limit the parties' freedom on pre-determining the loss

---

[975] Ruling of Dubai Court of Cassation No. 41/2007 issued on 15 April 2007; ruling of Dubai Court of Cassation No. 37/2004 issued on 18 of September 2004.
[976] Ibid.
[977] Article 390 of the UAE Civil Code.
[978] Ruling of Federal Supreme Court of Abu Dhabi No. 356 of the Judicial Year 23 issue on 19 October 2004; ruling of Dubai Court of Cassation No. 63/ 2005 issued on 26 of June 2005.
[979] Supra note 972.

suffered to avoid *Gharar* and to align the practice with *Sharia* law. Furthermore, although the UAE Civil Code did not provide any article relating to loss of profit in the cause of contractual liability, The Dubai Court of Cassation in petition No. 51/2007[980] and petition No. 46/2006[981] followed the scholar Ibn Taymiyah and his student Ibn Al-Qayyim Al-Jawziyyah recognised definite future damage and therefore the court awarded lost profits, on the condition that the occurrence of the future damage is certain and not speculative in nature or probable to avoid *Gharar*.

We can conclude that the UAE court may refuse enforcement of foreign arbitral awards if the tribunal has awarded excessive or probable future damage, as this may arise to *Gharar*. Furthermore, if the compensation or damages is excessive, then the court may reduce the damage awarded by the tribunal to make it equivalent to the damage suffered.

5.9 Conclusion

The finding of this chapter reveals that the prohibition of *Gharar* in *Sharia* law is fundamental and exclusive to *Sharia* law. The concept of *Gharar* has been broadly defined and construed by both Arabic lexicographers and *Sharia* scholars in two ways. First, *Gharar* implies uncertainty, risk, speculation, hazard, and gambling. Second, it implies deceit, fraud, and/or misrepresentation. It is established by this chapter that there is a significant difference of these terminologies in modern contract law and theory. It is evident that *Sharia* law scholars have been unable to define the exact scope of and precise meaning of the prohibited *Gharar*.

This study further found that the definitions of *Gharar,* based on *Sharia* law principles and used by UAE courts, are based on the dictionary definitions and *Sharia* Jurisprudence that are subjected to arguments, debates, and controversy. This was evident in various UAE court cases where the court used various terms to define *Gharar* such as misrepresentation, cheating, fraud, gambling, risk, and uncertainty. Thus, the definition used by the court is vague, which may lead to the courts unnecessarily broadening the scope of the UAE's public policy during the enforcement of a foreign arbitral award. Furthermore, the UAE court has failed to provide a single

[980] Ruling of Dubai Court of Cassation No. 51/2007 issued on 29 April 2007.
[981] Ruling of Dubai Court of Cassation No. 46/2006 issued on 8 May 2006.

test or standard of what may constitute prohibited *Grave Gharar* and what is considered as a permitted Trivial *Gharar* that does not invalidate the contract or effect the enforcement of a foreign arbitral award. Hence, the wide scope of *Gharar* may poses a great risk to the smooth enforcement of a foreign arbitral award since *Gharar* is part of *Sharia* law's mandatory rules that constitute UAE public policy.

Chapter 6 Conclusions and Recommendations

6.1 Concludions and Recommendations

This study and research has aimed to highlight the issues that surround *Sharia* law, public policy and the enforcement of foreign arbitral awards. Despite that the concept of public policy is incredibly vague this research has highlighted its influence on the judicial system. Furthermore, this research provided an in depth understanding of Islamic law concepts such as *Riba* and *Gharar* and how these concepts can be largely problematic during the enforcement of foreign arbitral awards.

While the UAE has made significant progress in its arbitration framework, further reform must be implemented in order to progress further. While this may appear to be a significant task, it is not an impossible one. With additional research and reform, the UAE will become a favourable region for arbitration, whether it be domestic or foreign.

The NYC, has been acclaimed as a revolutionary treaty. It has limited the discretionary power of the domestic courts of contracting states to refuse the recognition or enforcement of foreign arbitral awards by providing an exclusive and limited list of grounds of refusal under Article V of NYC. However, it is clear from the study that there is significant deference to parochialism in the context of the application of the principle of public policy under Article V(2)(b) of the NYC, despite emerging calls for internationalising its meaning and scope. This has permitted UAE courts' to far exceed the normal discretion accorded to national courts when enforcing arbitral awards.

It is evident that the UAE's approach places *Sharia* law compliance as a paramount consideration for public policy analysis. Article 3 of the UAE's Civil Code has provided the court with unlimited power to refuse the enforcement of any foreign award on broad grounds, including *Sharia* law principles. However, there is an ongoing debate over whether *Sharia* law or certain principles of *Sharia* law should in fact rise to the level of public policy and, how the scope of public policy should be defined in circumstances which falls within the boundary of necessity. If there is necessity, then *Maqasid Al-Sharia* should be used in order to permit overriding *Sharia* law and subsequently, limit the scope of applicable *Sharia* public policy.

The aim of this thesis has been to understand whether (and if so how) the relationship between *Sharia* law and public policy thwarts and impedes the smooth enforcement

of foreign arbitral awards in the UAE. Furthermore, there are fundamental issues that arise from the inherent conflict between the exercise of party autonomy and the imposition of *Sharia* law as a means of *de facto* review on the merit of foreign arbitral awards during their recognition and enforcement. As the UAE attempts to modernise its arbitration regime through becoming a party to the NYC and promulgating a new arbitration law and enforcement regulation, the UAE continues to struggle with its intrinsic historic *Sharia* law roots which broadens the scope and influence of its domestic public policy during the enforcement stage of a foreign arbitral award.

As ascertained through an exploration of the literature, much controversy exists over the UAE's arbitration regime with regard to the role *Sharia* law plays during the recognition and enforcement of foreign arbitral awards. However, there is little comprehensive reporting of arbitration enforcement efforts in the UAE. This is one aspect that should be more comprehensive to avoid any future ambiguities in the UAE's arbitral framework.

Based on the systematic examination of several factors, the researcher further identified that religion, culture, political and economic models adopted by the nation, as well as international norms and practices, have a significant effect on understanding how foreign arbitral awards should be enforced in an efficient and expeditious manner. Therefore, in Middle Eastern countries, the scope of public policy should be assessed and investigated at the national level of each country due to the fact that there are a variety of factors that influence each of Middle Eastern government systems which all have different understandings of *Sharia* Jurisprudence.

Furthermore, the comprehensive analysis of various judgments issued by the UAE courts led to the finding that UAE Judges apply *Ijtihad* and *Taqlid* to examine whether or not international commercial arbitration awards are compliant with the fundamental principles of *Sharia* law. An understanding of such judicial analysis is crucial in order to analyse how the UAE's judicial system operates.

It has been established in this study that *Sharia* law's mandatory rules that constitute public policy in the context of the enforcement of foreign awards under the UAE legal system are limited to two prohibitions, namely *Riba* and *Gharar*. This study highlighted that the concept of *Riba* is influenced by religious beliefs, economic structure, and the political and cultural foundation of each society, therefore, the concept inevitably

differs from one country to another. *Riba* is a complex area of law, and it becomes even more complex when it is applied to the field of international arbitration.

Despite a general consensus on the prohibition of *Riba* amongst jurist and scholars, the conceptual framework, and implications of *Riba* has been among the most contentious issues in *Sharia* jurisprudence. This disagreement has transferred to the courts where different interpretations of *Sharia* jurisprudence led to conflicting rulings by the courts through either the enforcement or the refusal to enforce foreign arbitral awards that contain *Riba*. However, the study highlighted that the importance of defining the concept of *Riba* within *Maqasid Al-Sharia* framework, which leads to permitting *Riba* to restore the well-being of the society.

This research and study demonstrated that, in addition to the Riba, *Gharar* is one of the major Islamic constraints on contracts, as it renders a contract invalid and void in *Sharia* law. This study highlighted that the concept of *Gharar* is similar to modern legal concepts, such as misrepresentation and fraud. However, despite the general consensus on the prohibition of *Gharar* among Islamic jurists and scholars, considerable disagreements continue to exist between jurists and scholars concerning *Gharar's* definition, its scope and what level of uncertainty may exist in a contract to consider that contract as a *Gharar* contract. This study illustrated that the UAE's courts adopt a very broad and vague definition of *Gharar,* which has led to broadening the scope of the UAE's concept of public policy during the enforcement of foreign arbitral awards. Hence, the wide scope of *Gharar* may provide a great risk to the smooth enforcement of foreign arbitral awards.

It has been emphasised in this study that public policy in the context of enforcement of foreign arbitral award in the UAE is highly complex and requires a detailed understanding of the interplay between *Sharia* law and public policy. Because of the conceptual challenges presented by sharia the core focus of this research has been to find ways to reconcile *Sharia* law to UAE public policy and the UAE's commitment to its international obligations under the enforcement mechanism of the NYC 1958 and what that equilibrium could means for the UAE judges when recognising and enforcing foreign arbitral awards. In this regard, this study has made unique and impactful contributions to the field of enforcement of foreign arbitral awards in the UAE. This study has addressed how the modernisation efforts of the UAE arbitration framework

have not yet resolved the concerns of public policy and *Sharia* law during the enforcement of foreign arbitral awards.

However, these challenges are further complicated and compounded when attempting to reconcile the UAE's international obligations with its domestic practices and values. In light of these challenges, this study provided various workable recommendations that the UAE's government could implement to further develop its newly established arbitral framework, which will in turn, become a more appealing jurisdiction for international investors and attract more foreign direct investment.

It was evident that the court has questioned how *Sharia* law fits into public policy analysis. It also demonstrated how *Maqasid Al-Sharia* should be used to align the scope of *Sharia* public policy with the UAE's economic and social policy, in the circumstances where they both come into conflict. This ambiguity creates uncertainty for the successful party seeking to enforce their foreign arbitral award in the UAE on how and to what extent the courts will include public policy and/or *Sharia* principles during the enforcement stage.

It is crucial that the UAE's legislators and courts delineate the extent to which *Sharia* law is in fact distinct from UAE public policy, the circumstances under which *Sharia* law principles are considered part of UAE public policy and how this will impact the enforcement of foreign arbitral awards. This will require the UAE judiciary to take a positive step to harmonise the current practice with international norms by analysing what underlying principles of *Sharia* law rise to the level of public policy. These principles should then be identified as public policy grounds for the refusal to recognise or enforce an arbitral award without reference to *Sharia* law. This was evident when the UAE legislators interfered and codified the concept of *Gharar* under *Sharia* law in the Civil Code and raised it to the level of public policy or mandatory laws. This analysis should apply to other principles of *Sharia* law that are considered public policy; this in turn will increase the predictability of the enforcement of foreign arbitral award.

Additionally, regardless of how UAE incorporate *Sharia* law into UAE public policy, the UAE legislators should define both its domestic and international public policy. Accordingly, foreign arbitral awards will be refused enforcement by the enforcing states court in special circumstances where the award violates or invokes the fundamental principles of UAE international public policy, which is different from

domestic public policy. Domestic public policy will apply only during the enforcement of a domestic award. The UAE's international public policy should be defined in line with the essential principles for the administration of justice and performance of uts international obligations, thus, giving a narrow definition to the UAE's public policy during enforcement of a foreign arbitral award.

In order to curb the impact of *Sharia* public policy, the following recommendations propose ways in which the UAE can further develop its arbitral enforcement regime, which will help achieve efficient and effective enforcement of arbitral awards and comply with its obligation under NYC. It is important to codify *Sharia* law principles to make the legal system more predictable for foreign investors. The initiative can be built on the previous initiative of the Council of Ministers in 1978, where the Council issued Resolution No. 50/1978 establishing a High Committee to review and ensure the compliance of all legislation issued by the UAE government with *Sharia* law principles. The initiative has codified various *Sharia* law legal maxims and principles, such as *Gharar*, where it has defined the scope of *Gharar* in light of modern and prevailing *Sharia* jurisprudence and in line with *Maqasid Al-Sharia*. Furthermore, the thesis proposes that the UAE legislators should adopt only one *Sharia* school of jurisprudence, instead of the four schools which are currently adopted by the UAE Civil code where the judge has unlimited discretionary power to choose his view from one of the four schools.

Finally, there are some research themes emerging from this thesis. The following issues are highly recommended by the researcher for proposed researchers, who wish to conduct further research on the interplay between sharia and international law in general and international commercial arbitration in specific. These issues can be further explored along the following premises:

1. Is Islam considered to be a religion or law? In the instance that it is considered to be a religion and law at the same time, what would be the best way to harmonise it with international arbitration practice?
2. How to codify *Sharia* law principles in the UAE legal system. Additionally, the researcher proposes that there should be a study conducted to assess whether the UAE legislators can adopt only one of the *Sharia* schools of jurisprudence, rather than the current four schools adopted in interpretation.

3. How can the UAE government introduce a new legal regime where offshore Common Law Courts, such as the DIFC and ADGM jurisdictions, are extended to handle the recognition and enforcement of foreign arbitral awards for their execution before the onshore UAE Courts, thus operating as a conduit of enforcement between the offshore courts and onshore UAE domestic onshore courts. This will aid in reconciling the conflicts between the UAE's public policy and international norms and practice of international Arbitration. Additionally, this will give the successful party seeking to enforce their award a potential route that is more predictable and less ambiguous.

In conclusion, it is hoped that by considering the interrelation between *Sharia* and

UAE public policy, the current research could serve as a modest contribution to understanding the role that *Sharia* law plays in defining and framing the underlying notion of public policy, which enables the domestic UAE courts to refuse recognition and enforcement of arbitral awards. Furthermore, by providing an insight on *Sharia* law concepts and judicial reasoning, it will provide a greater understanding of the operation of the UAE's judicial system, which in turn allows policy makers to consider best approach to reform the legal framework for arbitration so that the UAE becomes a favourable region for arbitration and for foreign direct investors.

Bibliography

Table of Cases

Abu Dhabi Court Judgments

Ruling of Abu Dhabi Court of appeal No. 10007 issued on1981 (unpublished).

Ruling of the Abu Dhabi Court of Cassation No. 209 of Judicial Year 15 issued on 22 January 1995.

Ruling of Abu Dhabi Court of Cassation No. 26/18 issued on 31 of December 1996.

Ruling of Abu Dhabi Court of Cassation No.138 and 425 of Judicial Year 18 issued on 26 February 1997.

Ruling of Abu Dhabi Court of Cassation No. 1376/2009 issued on 25 February 2010.

Ruling of Abu Dhabi Court of Cassation No. 65/2012 issued on 15 April 2012.

Ruling of Abu Dhabi Court of Cassation No. 190/2012 issued on 28 November 2012.

Ruling of the Abu Dhabi Court of Cassation No. 494/2013 issued on 13 March 2013.

Ruling of Abu Dhabi Court of First Instance No. 2847/2013 issued on 12 of February 2014.

Dubai Court Judgments

Ruling of Dubai Court of Cassation No. 41/1988 issued on 1989.

Ruling of Dubai Court of Cassation No. 53/1991 issued on 26 October 1991.

Ruling of Dubai Court of Cassation No. 186/1996 issued on 5 January 1997.

Ruling of Dubai Court of Cassation No. 405/2001 and 428/2001 issued on 21 January 2002.

Ruling of Dubai Court of Cassation No.37/2004 issued on 18 September 2004.

Ruling of Dubai Court of Cassation No. 1/2005 issued on 25 April 2005.

Ruling of Dubai Court of Cassation No. 503/2003 issued on 15 May 2005.

Ruling of Dubai Court of Cassation No. 63/ 2005 issued on 26 June 2005.

Ruling of Dubai Court of Cassation No. 46/2006 issued on 8 of May 2006.

Ruling of Dubai Court of Cassation No.41/2007 issued on 15 of April 2007.

Ruling of Dubai Court of Cassation No.51/2007 issued on 29 of April 2007.

Ruling of Dubai Court of Cassation No. 268/2007 issued on 19 February 2008.

Ruling of Dubai Court of Cassation No. 51/2008 (Personal Status) issued on 21 October 2008.

Ruling of Dubai Court of Cassation No. 146/2008 issued on 9 November 2008.

Ruling of Dubai Court of Cassation No. 280/2008 issued on 22 February 2009.

Ruling of Dubai Court of Cassation No. 266/2008 issued on 17 March 2009.

Ruling of Dubai Court of First Instance No. 268 issued on 12 January 2011.

Ruling of the Dubai Court of First Instance No. 603/2010 issued on 16 February 2011.

Ruling of Dubai Court of Cassation No.180/2011 issued on 12 February 2012.

Ruling of Dubai Court of Cassation No. 188/2012 and 213/2012 issued on 7 March 2013.

Ruling of Dubai Court of Cassation No. 202 / 2012 issued on 26 March 2013.

Ruling of Dubai Court of Cassation No. 56/2013 and 58/2013 issued on 8 of October 2013.

Ruling of Dubai Court of Cassation No. 496 / 2013 issued on 23 November 2014.

Ruling of Dubai Court of First Instance No. 674/2014 issued on 24 November 2014.

Ruling of Dubai Court of Appeal No. 514 of 2014 issued on 10 January 2015.

Ruling of Dubai Court of Cassation No. 371 of 2013 issued on 12 of February 2015.

Ruling of Dubai Court of Cassation No. 249/2014 issued on 15 February 2015.

Ruling of Dubai Court of Cassation No. 248 / 2014 issued on 19 April 2015.

Ruling of Dubai Court of Cassation No. 293/2015 issued on 27 of January 2016

Ruling of Dubai Court of Cassation Case No. 613 of 2015 issued on 18 March 2016.

Ruling of Dubai Court of Cassation No. 199/2014 issued on 21 August 2016.

Fujairah Federal Court Judgment

Ruling of Fujairah Federal Court of First Instance No 35/2010 issued on 27 April 2010.

UAE Federal Court Judgments

Ruling of Abu Dhabi Federal Court of Appeal No.102/1980 issued on 29 October 1980(unpublished).

Ruling of Federal Supreme Court No. 135/1984 issued on 29 Fuburary 1984.

Ruling of Federal Supreme Court No.321/1991 issued on 20 October 1991.

Ruling of Abud Dhabi Federal Court of first instance No. 3148/1991 issued on 31 May 1994.

Ruling of the Federal Supreme Court No. 176 of judicial year 17 issued on 21 November 1995.

Ruling of Federal Supreme Court No. 331/ 1996 issued on 14 January 1996.

Ruling of the Federal Supreme Court No. 371 of judicial year 18 issued on 30 June 1998.

Ruling of Federal Supreme Court No. 73 of 1996 issued on 15 July 1996.

Ruling of the Federal Supreme Court No. 165 of Judicial Year 18 issued on 30 November 1996.

Ruling of Federal Supreme Court No. 263 of Judicial Year 18 issued on 8 December 1996.

Ruling of Federal Supreme Court No. 371 of Judicial Year 18 issued on 30 June 1998.

Ruling of Federal Supreme Court No.321/1999 issued on 25 April 1999.

Ruling of Federal Supreme Court of Abu Dhabi No. 245/2 issued on 7 May 2000.

Ruling of Federal Supreme Court No. 449 of Judicial Year 21 issued on 11 April 2001.

Ruling of Federal Supreme Court No. 11 of Judicial Year 23 issued on 19 May 2002.

Ruling of Federal Supreme Court No. 831 of Judicial Year 25 and No.67 of Judicia Year 26 issued on 23 May 2004.

Ruling of Federal Supreme Court of Abu Dhabi No. 356 of the Judicial Year 23 issued on 19 October 2004.

Ruling of Federal Supreme Court No. 236 of Judicial Year issued on 13 December 2005.

Ruling of Federal Supreme Court No. 57 of Judicial Year 25 issued on of 21 March 2006.

International Steel & Contractors Co V. G. Steel Industry Co, ruling of Federal Supreme Court Case No. 138/10, unpublished.

Egyptian Court Judgments

Egyptian Court of Appeal Judgment No.37SS of Judicial Year 97 issued on 21 January 1982.

Organisme des Antiquitiés v G Silver Night Company, (1998) 23 ICCA Yearbook of Commercial Arbitration 22 (CA Cairo, 19 March 1997).

Ruling of Court of Cassation of Egypt 282 of the Judicial Year 89 issued on 9 January 2020.

Supreme Constitutional Court Decision No. 20 of Judicial Year No. 1.

Saudi Court Judgments

Ruling No. 235/T/2 of 1415 AH–(1995).

Ruling No. 269/ES/4 of 1431 AH–(2010).

French Court Judgments

Bomar Oil NV v Entreprise Tunisienne d'Activites Pétrolières (1992) XVII YBCA 488 (France Court of Appeal 1991).

International Bechtel v. Department of Civil Aviation of Dubai [2005] 07635 Paris Court of Appeal.

Intrafor Cofor v Gagnant, (1985) Rev Arb 299 (Paris Court of Appeals 1985).

Siemens AG/BKMI Industrienanlagen GmbH v. Dutco Construction Company (1993) XVII Y. B. Com. Arb. 140-142 (1993).

Societe Hilmarton v Societe Omnium de traitement et de valorisation, Cour de justice de canton de Geneve, judgment of 17 November 1989, (1993) Revue de l’Arbitrage 315 at 316, translated in (1994) 19 YB Com Arb 214.

Societe Hilmarton v Societe Omnium de traitement et de valorisation, Tribunale Federal Suisse, judgment of 17 April 1990, (1993) Revue de l'Arbitrage, 315 at 322, translated in (1994) 19 YB Com Arb 220.

Societe Hilmarton v Societe Omnium de traitement et de valorisation, CA Versailles, judgment of 29 June 1995, (1995) Revue de l'Arbitrage 639; Cour de cassation, judgment of 10 June 1997.

Societe Hilmarton v Societe Omnium de traitement et de valorisation, judgment of 19 December 1991, CA Paris, 1st Ch supplement, 19 December 1991, (1993) Revue de l'Arbitrage, 300 at 301.

Societe Hilmarton v Societe Omnium de traitement et de valorisation, judgment of 22 September 1993, Tribunale Gr Inst de Nanterre 1st Ch; Societe Hilmarton v Societe Omnium de traitement et de valorisation, Cass civ 1st, judgment of 23 March 1994, (1994) Revue de l'Arbitrage, 327-328, translated in (1995) 20 YB Com Arb 663.

Sté Grands Moulins de Strasbourg v Cie Continentale France Cass. Civ. 1ère, 19 November 1991, Rev. Arb. 1992 p.61.

Lebanese Court Judgments

DecisionNo.773 dated 28 May 2013, Beirut Court of Appeal, Ninth Commercial Chamber.

Indian Court Judgments

Renusagar Power Co. Ltd v. General Electric Co. reported in (1995) XX Y.B. Comm. Arb. 681, par 63

English Court judgments

Besant v. Woods [1879] 12 Ch 605 at 620.

Cheni v Cheni [1965] P 85.

Chesterfield v. Janssen, 2 Ves. Sr., I24 (1750).

China Agribusiness Development Corporation v. Balli Trading [1998] 2 Lloyd's Rep. 76.

China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd - [1994] 3 HKC 375.

Coke v. Turner (1846) 15 M & W.735.

Colgate v. Bacheler (1602) Cro. Eliz.872, Owen, 143.

Collins v Blantern [1767] 2 Wils 341 at 350.

Deutsch Schachtbau-und Tiefbohrgesllschaft MBH v RasAlkaimah National Oil Co [1987] England and Wales Court of Appeal, 3 Weekly Law Report W.L.R.

Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co [1987] 2 All ER 769 (CA).

Dyer (1413) Anon., Y.B. Hen. V, Pasc. No. 2 of 1413. 2078.

Dyer's case (1414) 2 Hen. V, fol. 5.

Egerton vs. Earl Brownlow, 4 H. of L. C 1 (1853).

Evanturel v. Evanturel (1874) L. R. 6. P.C .

Holman v Johnson (1775) 1 Cowp 341.

Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd [1988] 1 Lloyd's Rep 361 (UK QBD Comm Ct).

Mitchel v Reynolds [1711] EngR 38, (1711) 1 P Wms 181, (1711) 24 ER 347.

Norsk Hydro ASA v The State Property Fund of Ukraine & Ors [2002] EWHC 2120 (Comm) (18 October 2002).

Prat v. Phanner (1586) Mo. No. 683.

Richardson v. Mellish [1824] 2 Bing 229, 252.

The Secretary of State for the Home Department v Raytheon Systems Ltd [2014] EWHC 4375 (TCC) and [2015] EWHC 311 (TCC).

Vervaeke v Smith [1983] 1 AC 145.

Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd [1999] 2 Lloyd's Rep 65 (UK Court of Appeal) 74.

Xstrata Coal Queensland P Ltd (Company Number 098156702) (aka Rolleston Coal Holding PTY Ltd) & Anor v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd [2020] EWHC 324 (Comm).

USA Court Judgments

Chromalloy Aeroservices Inc. v. Ministry of Defence of the Republic of Egypt [1996] 939 F. Supp. 907.

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 US 145,149.(1963)

Dragon, Inc. v Gebr. Van Weelde Scheepvaartkantoor BV, 574 F. Supp. 367, 372 (SDNY 1983).

Dwokin-Cosell Interair Courier Serv. v. Avraham, 728 F. Supp. 156 (S.D.N.Y. 1989).

Fiorilla v. Citigroup Global Markets, inc, 54 N.Y.S.3d 586, 586 (N.Y. App. Div. 2017).

International Bechtel v. Department of Civil Aviation of Dubai [2005] 360 F.Supp.2d 136 United States District Court, District of Columbia, published in YBCA (2005): Volume XXX at 1113.

Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 264 F. Supp. 2d 470 (S.D. Tex. 2002).

Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198, 1918 N.Y. LEXIS 862 (N.Y. 1918).

Parsons & Whittemore Overseas Co., Inc. v. Société Générale De L'industrie Du Papier (Rakta). 508 F.2d 969. U.S. Court of Appeals, 2d Cir., Dec. 23, 1974.

Yusuf Ahmed Alghanim & Sons v. Toys "R" Us Inc., 126 F.3d 15, 20 (2d. Cir.1997).

Australian Court Judgments

Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty. Ltd., Supreme Court of Queensland, Australia, 29 October 1993, XX Y.B. COM. ARB. 628 (1995).

Netherlands Court Judgments

G.W.L. Kersten & Co. BV v. Société Commerciale Raoul-Duval et Cie., XIX Y.B. COM. ARB 708-09 (1994).

Rice Trading (Guyana) Ltd. v. Nidera Handelscompagnie BV, Court of Appeal, The Hague, Netherlands, 28 April 1998, XXIII Y. B. COM. ARB. 731 (1998).

Societe d'Etudes et de Commerce SA v Weyl Beef products BV (2001) XXIV YBCA 827 (Netherlands Court of First Instance 2000) 828.

Luxembourg Court Judgment

Sovereign Participations International SA v Chadmore Developments Ltd (1999) XXIV YBCA 714 (Luxembourg Court of Appeal 1999) 721.

Turkish court Judgments

Osuuskunta Matex VS v TKK General Directorate, File Nr 94/662, Decision Nr 95/140, unreported 4th Commercial Court of Ankara.

Hong Kong Court Judgments

HKSAR, Court of Final Appeal, 9 February 1999, *Hebei Imp & Exp Corp v Polytek Engineering Comp Ltd*, (1999) 14(2) Mealey's IAR G-1 - G-15, [1999] XXIVa YBCA 652 – 677.

Italian Court Judgments

Carters Ltd v Francesco Ferraro (1979) IV YBCA 275 (Italy Court of Appeal 1975).

German Court Judgments

Firm P (US) v Firm F (Germany) (1977) II YBCA 241 (Germany Court of Appeal 3 Apr 1975).

Swiss Court Judgments

Société des Grandes Travauz de Marseille v Republique Populaire des Bangladesh, (1980) 5 ICCA Yearbook of Commercial Arbitration 129 (Award) and 217 (decision of Swiss Tribunal Federal, 5 May 1976).

Swiss Federal Tribunal W v F and V (Switzerland Supreme Court 30 Dec 1994).

Mexican Court Judgments

Presse Office S.A. v. Centro Editorial Hoy S.A., High Court of Justice, Eighteenth Civil Court of First Instance, Federal District of Mexico, Mexico, 24 February 1977, IV Y. B. COM. ARB. 301 (1979).

Tribunal Superior de Justicia, Court of Appeals (Fifth Chamber) for the Federal District of Mexico, 1 August 1977, Malden Mills Inc. v. Hilaturas Lourdes S.A., YCA, Vol. 4 (1979).

Pakistani Court Judgments

Order of the Supreme Court of Pakistan dated 24th June 2002 on the Civil Shariat Review Petition No. 1 of 2000 and Civil Shariat Petition No. 1 of 2001.

European Court of Justice

Eco Swiss China Ltd v Benetton International NV, C-126/97, [1997] OJC 166/9.

The International Court of Justice Judgments

Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970.

Table of Legislations

Domestic Legislations

Abu Dhabi Procedural Code by Law 3 of 1970.

Constitution of the Arab Republic of Egypt of 2014.

French Civil Code of 1804 or The Napoleonic Code.

Kingdom of Jordan Civil Procedures Law No 24 of 1988.

Kingdom of Saudi Arabia Basic Law of Government 199.

Kuwait Commercial Code No. 68 of 1980.

Lebanese Code of Civil Procedure issued by Decree-Law No. 90/1983 dated 16 September 1983 and in force since 1 July 1985 (as amended).

The Algerian Law No. 83/1993.

The Arbitration Act 1999 of Sweden.

The Arbitration Act 1999 of the Republic of Korea.

The Arbitration Act 2001 of Singapore.

The Arbitration and Conciliation Act 1996 of India.

The Code of Civil Procedure 1964 of Poland.

The Code of Civil Procedure 1983 of Austria.

The Code of Civil Procedure 1986 of Portugal.

The Code of Civil Procedure 1992 of Yemen.

The Egyptian Civil Code, promulgated by Law No. 131, 1948 became effective from 15 October 1949.

The Federal Decree No. 43 of 2006 concerning the United Arab Emirates joining the Convention of New York on Recognition and Enforcement of Foreign Arbitral Awards dated 13th June 2006.

The French Code of Civil Procedure 1981.

The German Code of Civil procedure incorporating the Arbitral Proceedings Reform Act 1998 of Germany.

The German Code of Civil procedure incorporating the Arbitral Proceedings Reform Act 1998 of Germany.

The Italian Code of Civil Procedure incorporating the Law No.25/1994 of Italy.

The Judicial Code 1998 of Belgium.

The Law No. 27/1994 of Egypt.

The Law No.9.307/1996 of Brazil.

The Law of the Russian Federation on International Commercial Arbitration 1993 of Russian Federation.

The Lebanese Code of Civil Procedure, enacted by Decree Law 90/83, with amendments resulting from Law No. 440 dated 29 July 2002.

The mew Algerian Code of Civil and administrative Procedure of 2009.

The Penal Code of Sharjah.

The Portuguese Code of Civil Procedure 1986.

The Romanian Private International Law Relations Act 1992.

The Royal Decree No. M/34 of Kingdom of Saudi Arabia.

The Tunisian Arbitration Act 1993.

The UAE Cabinet Decision No. 57 of 2018 Concerning the UAE Civil Procedure Law.

The UAE Federal Constitution of 1971.

The UAE Federal Law by Decree No. 19 of 2018.

The UAE Federal Law No. 10 of 1973 Concerning the Supreme Federal Court.

The UAE Federal Law No. 11 of 1992 regarding Civil Procedures.

The UAE Federal Law No. 5 of 1985 on the Civil Transactions as amended by Federal Law No. 1 of 1987.

The UAE Federal Law No. 6 of 1978 Regulating the Conditions and Procedure for Appeal Before the Union Supreme Court.

The UAE Federal Law No. 6 of 2018 on Arbitration of UAE.

The UAE Federal Law No.18 of 1993 on Commercial Transactions Law.

International Treaties

Convention of the Arab League on Judicial Cooperation between the League of Arab States of 1952.

Convention on the Execution of Foreign Arbitral Awards Issued on 26th of September 1927.

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature 18 March 1965 < https://icsid.worldbank.org/en/Pages/arbitrators/CVSearch.aspx >accessed on March 14, 2020.

New York convention Travaux Préparatoires < http://www.newyorkconvention.org/travaux+preparatoires > accessed on January 20, 2020.

Protocol on Arbitration Clauses issued on 24th of September 1923.

The Convention for the Pacific Settlement of Disputes adopted on 29 July 1899 which is resulted from the First International Peace Conference Conducted in Hague in 1899.

The GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications of 1996.

Treaty Establishing the European Community 1957 '' Treaty of Rome'' (Rome, 25 March 1957).

United Nations Convention on Contracts for the International Sale of Goods adopted in 11th April 1980 in Vienna (CISG).

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 21 UST 2517, 330 UNTS 38 (entered into force 7 June 1959) [The New York Convention].

United Nations Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol 1155, < https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> accessed on February 17, 2020.

Secondary Source

Books

Abidin M, *Radd Al-Muhtar Ala Al-Mukhtar* (Vol 5, 1st edn, Daar al-Fikr, Beirut 2000).

Afanah H, *Yassanlounk an Almuamalat Almuasserah (*Vol 1, 1st edn, Dar Altaiub Liltibah was Alnasher, Ramallah 2009).

Aghnides N, *Mohammedan Theories of Finance with an Introduction to Mohammedan Law and a Bibliography* (1st (2005 reprint) edn Columbia Univ, New York 1916).

Al Hadawie H, *Tanazie Alqawanien, wa Alhuloul Alwadiea fi Alqanoun Alairduni, Dirasah Muqaranah* (1st edn, lil Nashier was Al-Tawziea, Dar Althaqafaq lil Nasher wa Altwzie, Jordan 1997).

Al Jaziri A, *Al-Fiqh ala al-Madhahib al-Arbaah* (Vol 2, Dar Alkutub Alilmiah, Beirut 2003).

AL- Tamimi E, *Practical Guide to Litigation and Arbitration in the United Arab Emirates* (Arab and Islamic laws series, 1st edn, Kluwer Law International, The Hague 2003).

Alamad S, *Financial and Accounting Principles in Islamic Finance* (1st edn, Springer Publishing 2019).

Alandalousi A, *Kitab Alriba (*Dr Nathir Wahab (ed), 1st edn, Juma Almajid Centre for Culture and Heritage, Dubai 2012).

Alansari A, *Iktilaf Abu Hanifa wa Abu Laila (Ridwan* Muhammad Ridwan (ed), Al-Wafa Publishing, Cairo 1938).

Al-Arabi A, *Ahkam Al-Quran* (Vol 1, 3rd edn, Dar Alkutub Alilmiah, Beirut 2003).

Al-Attar A, *Madkel Le Derasat Al-Qanoon: wa Tatbeeq Al-Shariah Al-Islamiah* (1st edn, Matbaat Al-Saadah, Cairo 1994).

Alawadi R, *Almathoumah Almaerifiah Laiat Al Riba fe Alquran (*Almahad Alalami llil Fikar Alislami, Amman 1997*)*.

Al-Azami M, On Schacht's Origins of Muhammadan Jurisprudence (Islamic Texts Society, King Saud University 2004).

Al-Baji A, *Al-Muntaqa Sharh Al-Muwatta Al-Muntaqa Sharh al-Muwatta Imam Malik* (Dar Alkoutub Alilmiah, Beirut 1999).

Albukhari A, *Al-Siraj Al- Wahaj Fi kashf Mtalb Muslim ibn al-Hajjaj Sharha Mkhtsar Sahayha Muslim Ilhaafz almndhry* (Vol 4, 1st edn, Dar Akutub Al-Ilmiah, Baghdad 2004).

Al-Dharir A, *Al Gharar wa Atharuhu fi Al Uqud* (2nd edn, Silsilat Saleh Kamel fi Al-Eqtisad Al-Islami, Jeddah 1995).

Al-Dharir A, *AlGharar Fi Aloqoud wa Atharoh fi Altatbiqat Almoasirah* (Islamic Institution of Research and Training, Jeddah 1993).

Aldohni A, *The Legal and Regulatory Aspects of Islamic Banking: A Comparative Look at the United Kingdom and Malaysia* (1st edn, Routledge, London 2011).

Alfasfous F, *Albnouk Alislamiha* (Dar knouz Almarifah Alelmiah lilnashir was Altowzie, Amman 2010).

Al-Ghazali A, *Al-Mustasfa Min Ilm Usoul Alfiqh* (1st edn, Hamza Bin Zihair (ed), Al-Madina Al-Munwara Printing & Publishing Co, Beirut 2008).

Al-Ghazali A, *Al Mustasfa min ilm Al Usul: on Legal Theory of Muslim Jurisprudence* (Ahmad Zaki Mansur Hammad (trs), Vol 1,1st edn, Dar Ul Thaqafah Publishing 2018).

Al-Hammam K, *Fath Alqadir* (Vol 17, 1st edn, Dar al kotob al ilmiyah, Beirut 2003).

Al-Haythami N, *Majmau Al-Zawaid wa Manba Al-Fawaid* (Vol 4, 1st edn, Dar Al-Kutub Al-Elmia, Beirut 2001).

Al-Jaburr A (ed.), *Fiqh Al-Imam Awzaie (*Vol 2, 1st edn, Dar Alfikr Alislami, Beirut 2000).

Aljawhari I, *Taj al-Lughah wa Sihah al-Arabiyya* (Vol 2, 1st edn, Dar Alfikr Alislami, Beirut 2000).

Alkhouli M, *Aladab Alnabouie (*Dar Alktoub AlIlmiah, Beirut 2012).

Almezeini A, *The Negotiability of Debt in Islamic Finance: An Analytical and Critical Study* (Brill, Leiden; Boston 2017).

Al-Mun'am J, *Nizam Al-Qada & Fial-Mamlaka Al- Arabiyyah Al-Saudia* (Public Administration Institute Press 1988).

Al-Nabahani T, *Al-Nazam Al-Egtsadi Fi Al-Islam (*1st edn, Dar El-Umma Publishing, Abu Dhabi 2004)).

Alnaisabouri A, *Alwasiet fi Tafseer AlQuran Almajieed* (Adel Ahmad Almowjoud and others (eds), Vol 3, 1st edn, Dar Alkutoub Alelmiah, Beirut 1995).

Al-Nasaie A, *Alsunan Al-kubra* (The Book of Financial Transactions, Vol 6, Hadith 6109, Resalah Publishing 2001)

Alobaidi K, *Aliqtisad was Alijtima* (Vol 14, 1st edn, Dar Alkutub Alilmiah, Beirut 2004).

Al-Qasimi M, *Tafsir Al Qasim: Mahasin Al Tawil* (1st edn, Darul Ehia Alkutub Alarabi, Cairo 1957).

Al-Qayyim M, *Ilam Al-Muwaqqiin an Rabb Al-Aalamin* (Vol 2, 1st edn, Dar Al-Kutub Alilmiah, Beirut 1998).

AlQurnati M, *Al-Qawanin Al-Fighiyyah* (Majid Alhamaoy (ed), Dar Ibn Hazim, Beirut 2013).

Al-Raysuni A, *Imam Al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, (1st edn, International Institute of Islamic Thought, VA 2005).

Al-Razi A, *Al-Tafsir Al Kabir* (Vol 7, 1st edn, Dar al-Fikr, Damascus 1981).

Al-Razi F, *Al Mahsul Fi Ilm Usul Alfiqh (*Dr Taha Jabir AlAlwani (ed), Vol 1, 1st edn, Dar Alrisalah Publishing, Beirut 1992).

Alrousaini A, *Nazriat Almuqasd End Alimam AL-Shatabi* (4th edn, The International Institute of Islamic Thought, VA 1990).

Al-Sanhury A, *Masadir Al-Haq Fi Al-Fiqh Al-Islami* (Vol 3, 1st edn, Manshourat Alhalabi Alhuqouqiah, Beirut 1998).

Al-Sanhury A, *The Sources of Truth in the Muslim Fiqh* (1st edn, Vol 2, Maktabat Alhalabi Alhoqouqiyah, Beirut 1998).

Al-Sanhury A, *Al-Wasit Fi Sharah Al-Qanoun Almadani (*Vol 1, 1st edn, Dar Ihya Al Turath Al-Islami Publishing, Beirut 1952).

Al-Sarakhsi A, *Money Exchange, Loans and Riba: A Translation of Kitab Al-Sarf From Kitab Al-Mabsut* (Imran Ahsan Khan Nyazee (trs), 1st edn, The Advanced Legal Studies Institute, Islamabad 2018).

Al-Sarakhsi A, *Kitab Al-Mabsut* (Vol 13, Dar Almarifah, Beirut 1989).

Al-Shafie M, *Kitab Al-Umm* (Dar Al-Marifa, Beirut 1990).

Al-Shafii M, *Al-Shafie's Risala: Treatise on the Foundations of Islamic Jurisprudence* (Majid Kbaddurib (trs), 2nd edn, The Islamic Texts Society, Cambridge 1997).

Alshaibani M, *Aljamie Alkhabier (Dar* Alkutub Al-Elmiah, Beirut 2000).

Alshirazi A, *Al-Muhathab Fi Fiqh Al-Shafie* (Vol 3, 1st edn, Dar Alqalam, Dubai 1992).

Alsousi A, *Sharah Nail Almuna Alguranti fi Nuthem Almowafaqat Lal Shatabi* (Vol 1-2, Dar Alkutub Alilmiah, Beirut 2015).

Al-Tabari I, *Jami ul Bayan fi Tafseer Al-Quran* (Vol 8, Part 20, 1st edn, Darul Fikr, Beirut 1988).

Al-Wahidi A, *Reasons and Occasions of Revelations of the Holy Quran* (Mokrane Guezzo(trs), New edn, Royal Aal Al-Bayt Institute for Islamic Thought, Amman 2008).

Al-Zahiri A, *Al-Ihkam fi Usul Al- Ahkam* (Vol 1, 1 edn, Dar al-Kutub al-Ilmiyyah, Beirut 2004).

Al-Zahri A, *Al-Muahalla Bil Athar (*Abdullqafar Albanari (ed), Vol 7, 1st edn, Dar Alkutub Alilmiah Publishing, Beirut 2003).

Al-Zamakhshari M, *Al-Kashshaf (*3rd edn, Dar Almarifah, Beirut 2009).

Al-Zarqa M, *Al Fiqah Alislami fi Thawbih Al Jaded* (Vol 1, 1st edn, University Press, Amman 1959).

Al-Zarqa M, *Al-Madkhal Al-Fighi Al-Amm* (2nd edn, Dar Al-Qalam, Damascus 2004).

Al-Zarqa M, *Nizam Al Tamin Haquiatuh wa Alraie Al Sharie fih* (1st edn, Dar Alrisalah Publishing, Beirut 1984).

Alzarqani A, *Sharh Alzarqani Ala Mouta AlImam Malik* (Vol 3, 1st edn, Dar Alkutub Al-Ilmiah, Beirut 1990).

Alzaylaie O, *Tabeen Alhaqaiq Sharh Kanz Aldaqaiq* (1st edn, Vol 1, Dar Alkotoub Alilmiyah 2000).

Al-Zuhayli W, *Al-Wajiz fi Usul Al-Fiqh* (Dar Alfiker Almuaser, Beirut 1999).

Al-Zuhayli W, *Al-Fiqh Al-Islami wa Adilatuh* (Vol 2, 1st edn, Daar al-Alfikr, Damascus 1987).

Al-Zuhayli W, *Nadariyat Al-Adarura Al-Shariah* (Dar al-Fikr, Vol 2, 1st edn, Daar al-Alfikr, Damascus 1997).

Anderson J, *Public Policymaking: An Introduction (*8the edn, Cengage Learning, Boston 2014).

An-Na'im A, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Contemporary issues in the Middle East, Revised edn, Syracuse University Press, NY 1996).

Arabi O, *Studies in Modem Islamic Law and Jurisprudence* (1st edn, Kluwer Law International, Den Haag 2001).

Aristotle, *The Basic Works of Aristotle* (McKeon, Richard (ed), 1st edn, Random House Publishing Group, NY 2009).

Ashraf S, *Judicial Culture in Islam* (Encyclopaedia of Islamic Culture and Civilization, Vol 21, Anmol Publications, New Delh 2006).

Ayoub M (ed), *Contemporary Approaches to the Quran and Sunnah* (International Institute of Islamic Thought, VA 2012).

Ayub M, *Understanding Islamic Finance* (John Wiley & Sons Publishing, West Sussex, Chichester 2007).

Baamir A, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (1st edn, Routledge Ltd, London 2016).

Backman C, *The Worlds of Medieval Europe* (Oxford University Press, New York, NY 2003).

Baderin M, *Islamic Legal Theory* (Islamic law, Vol I, Taylor & Francis Ltd, Oxfordshire 2014)

Balala M, *Islamic Finance and Law: Theory and Practice in a Globalized World* (International Library of Economics, 1st edn, I.B. Tauris & Company Publishing, London 2011)

Banu R, *Nineteenth Century Perspectives on Private International Law* (The History and Theory of International Law, 1st edn, Oxford University Press, Oxford 2018).

Bello I, *The Medieval Islamic Controversy Between Philosophy and Orthodoxy: Ijma and Tawil in the Conflict Between Al-Ghazali and Ibn Rushd* (Islamic Philosophy and Theology, Brill Academic Pubishing, Leiden 1989).

Bennison A*, The Great Caliphs: The Golden Age of the 'Abbasid Empire (*Yale University Press, New Haven 2009).

Berg A, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law and Taxation Publication, Deventer 1981).

Berger K, *International Economic Arbitration* (Studies in Transnational Economic Law, Kluwer Law and Taxation Publishers, Deventer 1993).

Berkey J, *The Formation of Islam: Religion and Society in the Near East, 600-1800* (Cambridge University Press, Cambridge 2003)

Blackaby N and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, Oxford 2015).

Blanke G, *Commentary on the UAE Arbitration Chapter* (Law Commentaries, 1st edn Sweet & Maxwell/Thompson Reuters, London 2017).

Boroujerdi M (ed), *Mirror for the Muslim Prince: Islam and the Theory of Statecraft* (Modern intellectual and political history of the Middle East, 1st edn Syracuse University Press, NY 2013).

Bradshaw T, End *of Empire in the Gulf: From Trucial States and the Origins of the United Arab Emirates* (I.B. Tauris, London 2020).

Brown A, *The Rise and Fall of Communism* (HarperCollins Publishers LLC, NY 2009).

Brumerg D and Farhi F (eds), *Power and Change in Iran: Politics of Contention and Conciliation* (Indiana University Press, Bloomington, Indianapolis 2016).

Burak G, *The Second Formation of Islamic Law: the Hanafi School in the Early Modern Ottoman Empire* (1st edn, Cambridge University Press, New York 2015).

Burton J, *An Introduction to the Hadith Tradition* (The New Edinburgh Islamic Surveys, 1st edn, Edinburgh University Press, Edinburgh 1994).

Burton J, The Sources of Islamic Law: Islamic Theories of Abrogation (Edinburgh University Press, Edinburgh 2003).

Calder N, *Islamic Jurisprudence in the Classical Era* (Colin Imber (ed), Cambridge University Press, NY 2010).

Chapra M, *Objectives of the Islamic Economic Order* (Islamic Foundation, Leicester 2007).

Collier J*, Conflict of Law* (3rd edn, Cambridge University Press, Cambridge 2001).

Comair-Obeid N, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Law Series, Kluwer Law International, London 1996).

Cook M, *The Koran: A Very Short Introduction* (1st edn, Oxford University Press, Oxford 2000).

Dawoud H, *Taguier Alquimah Alshraeiha Ilinqoud Alwaraquiah* (Vol 35, International Institute of Islamic Thought, VA 1999)

Dien M, *Islamic Law: From Historical Foundations to Contemporary Practice* (1st edn, Edinburgh Univ. Press, Edinburgh 2004).

Dupuy P, Francioni F and Petersmann E (eds), *Human Rights in International Investment Law and Arbitration* (International Economic Law Series, Oxford University Press, NY 2009)

El-Ahdab A and El-Ahdab J, *Arbitration with the Arab Countries* (3rd revised and expanded edn, Kluwer Law International, Netherlands 2011).

El-Gamal M, *Islamic Finance: Law, Economics and Practice* (Cambridge University Press, Cambridge 2006).

El-Malik W, *Minerals Investment Under the Shari'a law* (International Energy and Resources Law and Policy Series, 1st edn, Graham & Trotman for Kluwer Law, London 1993).

El-Tigani M, *Muhammad - the Hadith Jurisprudence: The Development of Islamic Law After the Qur'an* (1st edn, Edwin Mellen Press 2018).

Ercanbrack J, *The Transformation of Islamic Law in Global Financial Markets* (Cambridge University Press, Cambridge 2015).

Esposito J and DeLong-Bas N, *Women in Muslim Family law* (2nd edn, Syracuse University Press, Syracuse, NY 2004).

Esposito J, *Islam: The Straight Path* (5th edn, Oxford University Press, NY 2016).

Esposito J, *The Oxford History of Islam* (1st edn, Oxford University Press, NY 1999).

Fahim K, *Essays In Islamic Economics* (Islamic Economics Series, Islamic Foundation, UK 1995).

Farahat O, *The Foundation of Norms in Islamic Jurisprudence and Theology* (1st edn, Cambridge University Press, New York 2019).

Ferrari F and Arroyo D, *Private International Law: Contemporary Challenges and Continuing Relevance* (Elgar Monographs in Private International Law, 1st edn, Edward Elgar Publishing, London 2019).

Forrester D, *Christian Justice and Public Policy* (Cambridge University Press, Cambridge 1997).

Furmston M, *Cheshire, Fifoot, and Furmston's Law of Contract* (17th edn, Oxford University Press, Oxford 2017).

Gaillard E and Savage J (eds*), Fouchard, Gaillard, Goldman on International Commercial Arbitration* (International Law, 1st edn, Kluwer Law International, The Hague, Netherlands 1999).

Girsberger D and Voser N, *International Arbitration: Comparative and Swiss Perspectives* (3rd edn, Nomos, Baden-Baden 2016).

Goldziher I, *Introduction to Islamic Theology and Law* (1st edn, Princeton University Press, Princeton, N.J 1981)

Graham W, *Divine Word and Prophetic Word in Early Islam: a Reconsideration of the Sources, with Special Reference to the Divine Saying or Ḥadith Qudsi* (Religion and Society, Walter De Gruyter, Berlin/Boston 1977).

Grote R and Röder T, *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, US 2012).

Hajaj M, *Sahih Muslim* (Vol 3. Hadith No 1597, 1st edn Dar Al-Kutub Alilmiah, Beirut 1991)

Hallaq W, *An introduction to Islamic Law* (1st edn, Cambridge University Press, Cambridge 2009).

Hampstead D, *Public policy: A Comparative Study in English and French Law* (University of London Legal Series, Athlone Press, London 1953).

Haqqi A, *The Philosophy of Islamic Law of Transactions* (Cert Publications, Kuala Lumpur 2009).

Hassan A, *Fundamentals of Shari'ah in Islamic Finance* (IBFIM Publishing, Kuala Lumpur 2011).

Hassan A, *Sales and Contracts in Early Islamic Commercial Law* (Islamic Research Institute of Pakistan, Pakistan, Islamabad 1994)

Hassan S, *Almushtafat Almaliah wa Douruha fi Idarat Almukater wa Dour Alhandasah Almaliah fi Sinat Adwatuha* (1st edn, Dar Alnashir Liljamat, Cairo 2005).

Heyneman S, *Islam and Social Policy* (1st edn, Vanderbilt University Press, Nashville 2004).

Hindou M, *Alkuliat Altashriehia wa Atharuha fi Alijtihad wa Alfatwa* (1st edn, Almahad Alalami lil Fikr Alislami, VA 2016).

Hirsch F, *Empire of Nations: Ethnographic Knowledge and the Making of the Soviet Union* (1st edn, Cornell University Press, Ithaca 2014).

Ibn Ibrahim J, *Kitab Alkharaj* (Dar Almarifa, Beirut 1979).

Ibn-Anas M, *Al Muwatta of Imam Malik ibn Anas: The First Formulation of Islamic Law* (Aisha Abdurrahman Bewley and Yaqub Johnson (trs), 3rd edn, Diwan Press Ltd, Norwich 2014).

Iqbal M and Molyneux P, *Thirty Years of Islamic Banking: History, Performance and Prospects* (1st edn, Palgrave Macmillan, London 2005).

Iqbal Z and Mirakhor A, *An Introduction to Islamic Finance: Theory and Practice Practice* (2nd edn, John Wiley & Sons (Asia) Pte. Ltd, Singapore 2011).

Iqbal Z and Tsubota H, *Emerging Islamic Capital Markets: A Quickening Pace and New Potential* (The Euromoney International Debt Capital Markets Handbook 2006, London 2006)

Jabali F, *Companions of the Prophet: A Study of Geographical Distribution and Political Alignments* (Wadad Kadi and Rotraud Wielandt (eds), Vol 47, Brill Academic Publishing, Leiden 2003).

Jemielniak J, *Legal Interpretation in International Commercial Arbitration* (1st edn, Ashgate Publishing Limited, Surrey 2014).

Juenger F, *Choice of Law and Multistate Justice* (Transnational Classics in International Law (Book 2), Special edn, Transnational Publishers, Ardsley, NY 2005).

Kamali M, *Principles of Islamic Jurisprudence* (3rd revised edn, Islamic Texts Society, Cambridge 2011).

Katheir E, *Tafseer Al Quran Al-Azeem* (Vol 1, 1st edn, Dar Ibn Hazem, Beirut 2000).

Katheir E, *Tafseer Al Quran Al-Azeem* (Vol 14, 1st edn, Dar Ibn Hazem, Beirut 2000).

Kayadibi S, *Istihsan: The Doctrine of Juristic Preference in Islamic Law* (1st edn, Islamic Book Trust, Kuala Lumpur 2010).

Kelly J, *A Short History of Western Legal Theory* (Oxford University Press, Oxford 1992).

Lapidus I, *A History of Islamic Societies* (2nd edn, Cambridge University Press, Cambridge 2002).

Levi S and Sela R (eds), *Islamic Central Asia: An Anthology of Historical Sources* (Indiana University Press, Bloomington 2010).

Lew J, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (International Commercial Arbitration, 1st edn, Oceana Publications, Dobbs Ferry, NY 1978).

Lew J, *Contemporary Problems in International Arbitration* (1st edn, Nijhoff, Dordrecht 1987).

Lew J, Mistelis L and Kröll S, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague 2003).

Lewis B and Churchill B, *Islam: The Religion and the People* (1st edn, Pearson Education, Publishing as Prentice HallWharton School Publishing, NJ 2009).

Lewis B, *The political Language of Islam* (1st edn, The University of Chicago Press, Chicago, IL 1988).

Lewis B, *The Middle East: 2000 Years of History from the Rise of Christianity to the Present day* (4th edn, Phoenix Press, Phoenix 2004).

Lewis M and Kaleem A, *Religion and Finance: Comparing the Approaches of Judaism, Christianity and Islam* (Edward Elgar, Cheltenham, UK, Northampton 2019).

Lombardi C, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law* (Ruud Peters and Bernard Weiss(eds),Studies in Islamic Law and Society, Vol 19, 1st edn, Brill, Leiden 2006).

Mahfuz A, *Rafa Al-Haraj fi Altashrie Al-Islami: Dirasah Usuliah wa Fiqhia* (Matbat Jamiat Al- Mansoura, Al-Mansoura 1996).

Mahmoud Q, *Altahkiem fi Dowa Ahkam Alsharia* (Dar Alsomiai Publishing, KSA 2009).

Mansuri M, *Islamic Law of Contracts and Business Transactions* (Adam Publishers & Distributors, New Delhi 2006).

Manzur M, *Lisanul Arab* (Vol. 5, 1st edn, Dar Al-Maref, Cairo 2009)

Martin E, *Oxford Dictionary of Law* (6th edn, Oxford University Press, Oxford 2008).

Masters B, *The Arabs of the Ottoman Empire, 1516-1918: a Social and Cultural History* (Cambridge University Press, New York 2013).

Maurer A, *The Public Policy Exception Under the New York Convention: History, Interpretation and Application* (Revised edn, Juris Publishing, Huntington, N.Y 2013).

Moses M, *The Principles and Practice of International Commercial Arbitration* (3rd edn Cambridge University Press, Cambridge 2017).

Motzki H, *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools* (Marion H. Katz (trs), Islamic History and Civilization: Studies and Texts, Vol 41, Bril Publications, Leiden 2002).

Naqvi S, *History of Banking and Islamic Laws* (1st edn, Hayat Academy, Karachi 1993).

Obaidullah M, *Introduction to Islamic Microfinance* (1st edn, IBF Net (P) Limited, India 2008).

Ozment S, *The Age of Reform, 1250-1550: An Intellectual and Religious History of Late Medieval and Reformation Europe* (1st edn, Yale University Press, New Haven 1980).

Pasha A, *The Civil Code of the Ottoman Empire: Al-Majalla Al-Ahkam Al-Adaliyyah* (CreateSpace Independent Publishing Platform, California 2017).

Paulsson M, *The 1958 New York Convention in Action* (Kluwer Law International B.V, Alphen aan den Rijn, The Netherlands 2016).

Poudret J and Besson S, *Comparative Law of International Arbitration* (Stephen Berti and Annette Ponti (trs), 2nd edn, Sweet & Maxwell, London 2007).

Ramadan H, *Understanding Islamic Law from Classical to Contemporary* (1st edn, Altamira Press, Lanham, MD 2006).

Ramadan T, *The Messenger: The Meanings of the Life of Muhammad* (Penguin edn Allen Lane, London 2007).

Rayner S, *The Theory of Contracts in Islamic Law: a Comparative Analysis With Particular Reference to the Modern Legislation in Kuwait, Bahrain, and the United Arab Emirates* (1st edn, Graham & Trotman, London 1991).

Renard J (ed), *Islamic Theological Themes: A Primary Source Reader* (1st edn, Univirsity of California Press, California, Oakland 2014).

Riad F and Rashed S, *Tanazie Alqwanien wa Aliktisas Alqadie Aldowalie wa Athar Alahkam Alajnabiah* (Dar al-Nahda, Cairo 1994).

Riedler F, Opposition and Legitimacy in the Ottoman Empire: Conspiracies and Political Cultures (SOAS/Routledge Studies on the Middle East, 1st edn, Taylor and Francis, Chichester 2010).

Rudnyckyj D, *Beyond Debt: Islamic Experiments in Global Finance* (1st edn, University Of Chicago Press, Chicago 2019).

Rushd A, *Bidayat Al-Mujtahid wa-Nihayat Almuqtaṣid (*Majid al-Hamawi (ed), Vol 3, 1st edn, Dar Ibn Hazm, Beirut 1995).

Saeed *A, Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation* (Studies in Islamic Law and Society, Vol 2, 2nd edn, Brill, Leiden 1999).

Saeed A, *Reading the Qur'an in the Twenty-First Century: A Contextualist Approach* (Routledge Publishing, London 2014).

Saleh N, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking* (2nd edn, Graham & Trotman, London 1992).

Saleh S, *Commercial Arbitration in the Arab Middle East: A Study in Shari'a and Statute Law* (Graham & Trotman, London 1984).

Schacht J*, An Introduction to Islamic Law* (Oxford: Clarendon Press, Oxford 1964).

Seyadi R, *The Effect of the 1958 New York Convention on Foreign Arbitral Awards in the Arab Gulf States* (Cambridge Scholars Publishing, Newcastle upon Tyne 2017).

Shabana A, *Custom in Islamic Law and Legal Theory: The Development of the Concepts of `Urf and `Adah in the Islamic Legal Tradition* (Palgrave Macmillan, NY 2011).

Shalabi M, *Usul al-Fiqh al-Islami* (Vol 1, Dar al-Nahdah al-Arabiyah, Cairo 1986).

Sheikhzadegan A and Meier A (eds), *Beyond the Islamic Revolution: Perceptions of Modernity and Tradition in Iran Before and After 1979* (World of Islam, Vol 8, de Gruyter Mouton, Berlin 2017).

Siddiqi M, *Insurance in an Islamic Economy* (Islamic Economics Series, Islamic Foundation, London 2007).

Siddiqi M, *Hadith Literature: Its Origin, Development & Special Features* (2nd Revised edn, Islamic Texts Society, Cambridge 1996).

Story J, *Commentaries on the Conflict of Laws : Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Lawbook Exchange, NJ 2008 edn, First edn, Little, Brown, Massachusetts 1834)).

Surdam D, *Business Ethics from Antiquity to the 19th Century: An Economist's View* (1st edn, Palgrave Macmillan US, Cham 2020).

Taymiyah T, *Al Quwaed Al-Nouraniah Al-Fiqhia* (Ahmad Bin Muhmmad Alkhalil (ed), 1st edn, Dar Ibn Al-Jawziyah, KSA 2001).

Taymiyah T, *Al-Fattawa Al-Kubra* (1st edn, Dar al-Kutub Al-Elmiah, Beirut 1987).

Taymiyah T, *Majmou Fatawi Ibn Taymiyah* (Vol 29, 1st edn, Wizarak alshoun Alislamiah wa Alawqaf wa Aldawa wal Ershad of KSA, Riyadh 2004).

Taymiyah T, *Nazrial Al-Aqid* (1st edn, Al-Sunnah Al-Muhamadiah Publishing, Cairo 1949).

Thomas A (ed), *Interest in Islamic Economics: Understanding Riba* ((Islamic Studies Series, Routledge Ltd, Florence 2006).

Turner C, *Islam: The Basics* (2nd edn Routledge Ltd, London 2011).

Udovitch A, *Partnership and Profit in Medieval Islam* (Princeton University Press, NJ 1970).

Usmani M, *The Text of the Historic Judgement on Riba (Interest) by Supreme Court Pakistan* (The Other Press, Petaling Jaya, Malaysia 2001).

Usmani M, *Fiqh Al-Buyu* (Vol 1, 1st edn, Maktaba Ma'ariful Quran, Karachi 2015)

Visser H, *Islamic Finance: Principles and Practice* (3rd edition, Edward Elgar Publishing, Cheltenham 2019).

Vogel F and Hayes S, *Islamic law and Finance: Religion, Risk, and Return* (Arab and Islamic Laws Series, Kluwer Law International, The Hauge 1998).

Waines D, *An introduction to Islam* (2nd edn, Cambridge University Press, Cambridge 2003).

Warde I, *Islamic Finance in the Global Economy* (2nd edn, Revised and Updated edn, Edinburgh University Press, Edinburgh 2010).

Warren H and others (eds), *Oxford Learner's Dictionary of English Idioms* (2nd Revised edn, Oxford University Press, Oxford 1995).

Watt W, *Islam and Christianity Today: A Contribution to Dialogue* (Vol 11, Routledge, London 2013).

Weiss B, *The Spirit of Islamic Law* (University of Georgia Press, Athens 2006).

Zahra M, *Al-Milkiah wa Nazariyyat Al-Aqid* (Dar Al-Fikir Alarabi, Cario 1996).

Zahra M, *Tahreem Al-Riba Tanzeem Igtisadt* (2nd edn, Dar Al Saudiah Lilnasher, Jeddah 1985).

Zahra M, *Buhouth Fi Al-Riba* (Dar Al Fikhar Alarabi, Cairo, undated).

Zaid A, *Fiqh Al-Riba Dirasa Muqaranah wa Shamilah lil Tatbiqat Almuaserah (*1st edn, Aresala Publishing, Beirut 2004).

Contribution to Edited Books

Abdelkarim A, 'Oil, Population Change and Social Development in the Gulf: Some Major Trends and Indicators' in Abdelkarim, Abbas (ed), *Change and Development in the Gulf* (Macmillan Press, London 1999).

Al-Zuhayli W, 'The Juridical Meaning of Riba' in Thomas, Abdulkader (ed), *Interest in Islamic Economics* (Islamic Studies Series, 1st edn Routledge Ltd, London 2006).

Basedow J, 'The Effects of Globalization on Private International Law' in Basedow, Jurgen and Toshiyuki Kono (eds), *Legal Aspects of Globalization Conflict of Laws, Internet, Capital Markets and Insolvency in a Global Economy* (1st edn, Kluwer Law International 2000).

Berg H, 'The Divine Sources’ in Peters, Rudolph and Peri Bearman (eds), *The Ashgate Research Companion to Islamic Law* (Ashgate Publishing Limited, Farnham 2014).

Berger M, 'Sharia and the Nation State' in Peters, Rudolph and Peri Bearman (eds), *The Ashgate Research Companion to Islamic Law* (Ashgate Publishing Limited, Farnham 2014).

Çizakça M, 'History of Islamic Public Finance: Gharar and Risk Aversion' in Ariff, Mohamed, Munawar Iqbal and Shamsher Mohamad (eds), *The Islamic Debt Market for SukukK Securities: The Theory and Practice of Profit Sharing Investment* (1st edn Edward Elgar Publishing, Cheltenham 2014).

El-Ahdab A, 'General Introduction on Arbitration in Arab Countries' in Sanders, Pieter and Albert Jan van den Berg (eds) International Handbook on Commercial Arbitration (Suppl. II, edn Kluwer, The Hague 1998)).

Elfakhani S and Sidani Y, 'Uncertainty or ‘Gharar’ in Contracts Under the Islamic Ethical Code' in Ali, Abbas J. (ed), *Handbook of Research on Islamic Business Ethics* (Edward Elgar Publishing, Cheltenham 2015).

Houtte H, 'From a National to a European Public Policy' in Nafziger, James and Symeon Symeonides (eds), *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren* (Brill, NY 2002).

Jana and A others, 'Article V(1)(b) ' in Kronke, Herbert and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International B.V, Netherlands 2010).

Kain B and Yoshida D, 'The Doctrine of Public Policy in Canadian Contract Law' in Hon. Todd L. Archibald and Hon. Randall Scott Echlin (eds), *Annual Review of Civil Litigation* (Thomson Carswell, a division of Thomson Reuters Canada Limited, Toronto 2007).

Kegel, Gerhard, 'Fundamental Approach' in Drobngi, U., R. David and others (eds), *International Encyclopedia of Comparative Law* (Chapter 3 edn Martinus Nijhoff, Netherlands 1986).

Lagarde P, 'Public policy' in Kurt Lipstein*(ed), International Encyclopedia of Comparative Law* (Chapter II, Vol III, Mohr Siebeck, TÜbingen, and Martinus Nijhoff Publishers 1994).

Lalive P, 'Transnational (or Truly International) Public Policy and International Arbitration' in Sanders, Pieter, *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series No 3, Kluwer International Law, The Hague 1987).

Lewis K, 'Comparing Islamic and Christian Attitudes to Usury' in Hassan, M. Kabir and Mervyn K. Lewis (ed), *Handbook of Islamic Banking* (Edward Elgar Publishing, Cheltenham 2007).

Mohammed N, 'Principles of Islamic Contract Law' in Ramadan, Hisham M.(ed), *Understanding Islamic Law: From Classical to Contemporary* (AltaMira Press 2006).

Nelken D,' Changing Legal Cultures' in Likosky, Michael (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths, London 2002).

Otto D and Elwan O, 'Article V(2)' in Kronke, Herbert and others (eds), *Recognition and Enforcement of Foreign Awards: A Global Commentary on the New York Convention* (Kluwer Law International B.V, Netherlands 2010).

Stovall, H, 'Doubts persist Arab Commercial Law into the Future' in Ballantyne, William M. and Howard L. Stovall (eds), *Arab Commercial Law: Principles and Perspectives* (Section of International Law & Practice, American Bar Association, Chicago, IL 2002).

Waardenburg J, 'The Early Period: 610–650 ' in Jacques Waardenburg (ed), *Muslim Perceptions of Other Religions: A Historical Survey* (Oxford University Press, Oxford 1999).

Journal Articles

Abdal-Haqq I, 'Islamic Law: An Overview of Its Origin and Elements' (1996) 1(1) The Journal of Islamic Law 1.

Abdelaal M, 'Taqlid v. Ijtihad: The Rise of Taqlid as the Secondary Judicial Approach in Islamic Jurisprudence' (2012) 14 The Journal Jurisprudence 151.

Abdulla M, 'Assessing the United Arab Emirates Decisional Law on Arbitration' (SJD Thesis, Penn State University 2017).

Abdullah A, 'A Critical Study of the Concept of Gharar and its Elements in Islamic Law of Business Contract' (PhD Thesis, University of Birmingham 1998).

Abdullah A, 'Islamic Law on Gambling and Some Modern Business Practices' (2017) 7 International Journal of Academic Research in Business and Social Sciences 738.

Abu Sadah M, 'International Arbitration Contract Principles: Analysis of Middle East Perceptions' (2010) 9(2) Journal of International Trade Law and Policy 148.

Adil M and others, 'Tadlis in Islamic Transactions' (2010) 9 Malaysian Accounting Review 44.

Ahmad A and Hassan M, 'The Time Value of Money Concept in Islamic Finance' (2006) 23(1) The American Journal of Islamic Social Sciences 66.

Ahmad A and others, 'Islamic Banking and Prohibition of Riba/Interest' (2011) 5 African Journal of Business Management 1763.

Akaddaf F, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?' (2001) 13 Pace International Law Review 1.

AL- Tamimi E, 'Enforcement of Foreign Arbitration Awards in the Middle East' (2014) 1(1) BCDR International Arbitration Review 1.

Al-abdullah A, 'An Examination of the Role of Shariah in the Recognition and Enforcement of Arbitral Awards in Saudi' (PhD Thesis, University of Exeter 2016).

AL-Ammari S and Martin A, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30(2) Arbitration International 387.

AL-Baharna H, 'The Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain' (1989) 4(4) Arab Law Quarterly 332.

Aleisa M, 'A critical analysis of the legal problems associated with recognition and enforcement of arbitral awards in Saudi Arabia: will the new Saudi Arbitration Law (2012) Resolve the Main Legal Problems?' (PhD Thesis, University of Essex 2016).

Alexander G, 'The Application and Avoidance of Foreign Law in the Law of Conflicts: Variations on a Theme of Alexander Nekam' (1975) 70(4) Northwestern University Law Review 602.

Al-Fozan S, 'The Difference Between Selling and Riba in the Islamic Sharia, on Contrast to the Customs of Al-jahlya' (1983)(Issue 10) Islamic Research Magazine 86.

Al-Hussayen S, 'Commentary on The Difference Between the Banks Interest Rate and Riba' (1991)(Issue 31) Islamic Research Magazine 123.

Al-Hussayen S, 'The Response of Sheikh Saleh Al-Hussayen on Ibrahim Al-Nasser Article on the Stand of the Islamic Sharia in Regard to the Banking Transactions' (1988)(Issue 23) Islamic Research Magazine 121.

Al-Jerafi W, 'Yemen's Ratification of the New York Convention: An Analysis of Compatibility and the Uniform Interpretation of Article V(1)(A) and V(2)(B)' (PhD Thesis, University of Leicester 2013).

Al-Moqatei M, 'Introducing Islamic Law in the Arab Gulf States: A Case Study of Kuwait'(1998) 4(2) Arab Law Quarterly 138.

AL-Muhairi B, 'Islamisation and Modernisation within the UAE Penal Law: Shari'a in the Pre-Modern Period' (1995) 10(4) Arab Law Quarterly 287.

AL-Muhairi B, 'The Development of the UAE Legal System and Unification with the Judicial System' (1996) 11(2) Arab Law Quarterly 111.

AL-Muhairi B, 'The Islamisation of Laws in the UAE: the Case of the Penal Code' (1996) 11(4) Arab Law Quarterly 350.

AL-Muhairi B, 'The Position of Shari'a within the UAE Constitution and the Federal Supreme Court's Application of the Constitution Clause Concerning Shari'a' (1996) 11(3) Arab Quarterly Journal 219.

Al-Mutairi M, 'Necessity in Islamic Law' (PhD Thesis, University of Edinburgh 1997).

Almutawa A and Maniruzzaman A,'The UAE's Pilgrimage to International Arbitration Stardom – A Critical Appraisal of Dubai as a Centre of Dispute Resolution Aspiring to be a Middle East Business Hub' (2014) 15 The Journal of World Investment & Trade 193.

Almutawa A, 'Challenges to the Enforcement of Froing Arbitral Award in States of The Gulf Cooperation Council' (PhD Thesis, University of Portsmouth School of Law 2014).

Alqudah M, 'Alleviating Jurisdictional Uncertainty: An Arbitration Clause or a Jurisdiction Clause?' (2016) 37(4) Business Law Review 124.

Alqudah M, '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 1.

Al-Saati A, 'The Permissible Gharar (Risk) in Classical Islamic Jurisprudence' (2003) 16(2) Journal of King Abdulaziz University: Islamic Economics 3.

Alsaif B, 'Two Sides of the Saudi Public Policy Coin: Reconciling Domestic and Transnational Values in Recognition and Enforcement of International Commercial Arbitration Awards'(PhD thesis, University of New South Wales 2018).

Al-Shareef N, 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958'(PhD thesis, Centre for Energy, Petroleum and Mineral Law Policy, University of Dundee 2000).

Al-Suwailem S, 'Towards and Objective Measure of Gharar in Exchange' (2000) 7(1) Journal of Islamic Economic Studies 61.

Althabity M, 'Enforceability of Arbitral Awards Containing Interest – A Comparative Study Between Sharia Law and Positive Laws' (PhD Thesis, University of Sterling 2016).

Al-Tuwaigri W, 'Grounds For Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention of 1958: With Special Reference to the Kingdom of Saudi Arabia' (PhD Thesis, University of Glasgow 2006).

Amkhan A, 'The Effect of Change in Circumstances in Arab Contract Law' (1994) 9(3) Arab Law Quarterly 258.

Anderson W, 'Enforcement of Foreign Judgments Founded Upon a Cause of Action Unknown in the Forum' (1993) 42(3) International and Comparative Law Quarterly 697.

An-Na'im A, 'The Rights of Women and International Law in the Muslim Context' (1987) 9(3) Whittier Law Review 491.

Avedian V, 'State Identity, Continuity, and Responsibility: The Ottoman Empire, the Republic of Turkey and the Armenian Genocide' (2012) 23(3) European Journal of International Law 797.

Ayad M, 'International Commercial Arbitration Award Enforcement at the Crossroads of Sharia Law and Ordre Public in the MENA: Paving the Golden Path towards Harmonisation' (2009) 10(5) Journal of World Investment & Trade 723.

Ayad M, 'The Doctrines of Public Policy and Competence in Investor–State Arbitration' (2013) 27(4) Arab Law Quarterly 297.

Baamir A, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009).

Baderin M, 'A comparative Analysis of the Right to a Fair trial and Due Process Under International Human Rights Law and Saudi Arabian Domestic Law' (2006) 10(3) International Journal of Human Rights 241.

Ballantyne M, 'The States of the GCC: Sources of Law, the Shari'a and the Extent to Which It Applies' (1985) 1(1) Arab Law Quarterly 3.

Banakar R and Ziaee K, 'The Life of the Law in the Islamic Republic of Iran' (2018) 51(5) Iranian Studies 717.

Bennoune K, 'As-Salmu Alaykum? Humanitarian Law in Islamic Jurisprudence' (1994) 15(2) Michigan Journal of International Law 605.

Berg A, 'Recent Enforcement Problems under the New York and ICSID Conventions' (1989) 5(1) Arbitration International 2.

Bhat P, 'Comparative Method of Legal Resarch: Nature, Process and Potentiality' (2015) 57(2) Journal of the Indian Law Institute 147.

Bin Baz A, 'The Response of Sheikh Abdul-Aziz bin Baz on Ibrahim Al-Nasser Article on The Stand of The Islamic Sharia in Regard to The Banking Transactions' (1986)(Issue 18) Islamic Research Magazine 121.

Blanke G, ''On Recent Developments of 'Public Policy' and Their Potential Implications for the Enforcement of New York Convention Awards in the UAE: Is It a 'Camel' or a 'Trojan Horse'?' (2013) 18(1) Newsletter of the International Bar Association Legal Practice Division 48.

Blom J, 'Public Policy in Private International Law and Its Evolution in Time' (2003) 50(3) Netherlands International Law Review 373.

Borhan J and Saari C, 'An Analysis of The Prohibition of Riba in the Quran' (2004) 19 Journal Usuluddin 45.

Boyer G, 'The Historical Background of the Communist Manifesto' (1998) 12(4) Journal of Economic Perspectives 151.

Brand J, 'Aspects of Saudi Arabian Law and Practice' (1986) 9(1) Boston College International and Comparative Law Review 1.

Brekoulakis S, 'The Evolution of Public Policy and Judicial Function in English Law' (2019) 10(3) Journal of International Dispute Settlement 472.

Buang A, 'The Prohibition of 'Gharar' in Islamic Law of Contracts: a Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia' (PhD Thesis, School of Oriental and African Studies (University of London) 1996).

Buchanan M, 'Public Policy and International Commercial Arbitration' (1988) 26(3) American Business Law Journal 511.

Cairns D, 'Transnational Public Policy and the Internal Law of State Parties' (2009) Transnational Dispute Management 1.

Carter P, 'The Role of Public Policy in English Private International Law' (1993) 42(1) The International and Comparative Law Quarterly 1.

Castel J, 'Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?' (1995) 33(1) Osgoode Hall Law Journal 35.

Cavalier G, 'Is the Economic Crisis Driving Western Laws Closer to Islamic Laws on Interest Rate Prohibition? ' (2013) 7(2) International Journal of Economic Perspectives 47.

Chapra M, 'Islam and the International Debt Problem' (1992) 3(2) Journal of Islamic Studies (Oxford, England) 214.

Chapra M, 'The Nature of Riba in Islam' (2006) 2(1) The Journal of Islamic Economics and Finance 7.

Chen H, Bao H and Zhang T, 'Piercing the Veil of Public Policy in the Recognition and Enforcement of Foreign-Related Awards in China' (2016) 7(1) Beijing Law Review 23.

Childress III D, 'Comity as Conflict: Resituating International Comity as Conflict of Laws' (2010) 44(1) UC Davis Law Review 11.

Chng K, 'A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws'(2018) 14(1) Journal of Private International Law 130.

Cole R, 'The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards' (1986) 1(2) Ohio State Journal on Dispute Resolution 365.

Craig W, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (2016) 50(4) Texas International Law Journal 699.

Crawley S, 'Does an Extension of Time Clause Prevent a Construction Contract Being Infected by Gharar?' (2012) 26(2) Arab Law Quarterly 155.

Crawley S, 'The Difference in How UAE and EW Law Controls Gharar (Risk) and so Riba in a Construction Contract in the Emirate of Dubai, UAE'(PhD thesis, Robert Gordon University 2017).

Cuneo G, 'Some Practical Applications of International Law to Government Contracts'(1974) 50(5) Notre Dame Law Review 843.

Darwish H, 'Critical Study of the Concept of International Arbitration in the UAE: Identifying Problems Affecting the Recognition and Enforcement of Foreign Arbitral Awards' (PhD thesis, University of Essex 2016).

Dayan F and Sheraz M, 'The Concept of Uncertainty in Islamic law: Its Reasons and Related Terms' (2016) 6(12) Journal of Basic and Applied Scientific Research 21.

Delaume G, 'State Contracts and Transnational Arbitration' (1981) 75(4) American Journal of International Law 784.

Dodge W, 'International Comity in American Law' (2015) 115(8) Columbia Law Review 2071.

Dolinger J, 'World Public Policy: Real International Public Policy in the Conflict of Laws' (1982) 17(2) Texas International Law Journal 167.

Dragu T and Polborn M, 'The Rule of Law in the Fight Against Terrorism' (2014) 58(2) American Journal of Political Science 511.

Dubey Y, 'Analysis of Public Policy and Enforcement of Domestic and Foreign Arbitral Awards in India' (2018) 7(2) Christ University Law Journal 63.

Duriana D, 'Principles of Economics Ibn Taymiyah (Moral Analysis)' (2015) 15(1) Al-Ulum 185.

Dusuki A and Said Bouheraoua, 'The Framework of Maqasid Al-shari'ah and its Implication for Islamic Finance' (2011) 2(2) Islam and Civilisational Renewal 316.

Ehrenzweig A, 'American Private International Law and the Restatement' (1958) 28 Nordic Journal of International Law 229.

Ehrenzweig A, 'The Lex Fori-Basic Rule in the Conflict of Laws' (1960) 58(5) Michigan Law Review 637

El-Fishawy S, 'Contracts and Litigation in Islamic Law' (1982) 76 Proceedings of the Annual Meeting - American Society of International Law 62.

El-Gamal M, 'An Economic Explication of the Prohibition of Gharar in Classical Islamic Jurisprudence' (2001) 8(2) Islamic Economic Studies 29.

El-Malik E, 'Aspects of Natural Resources Contracts, Investment & Finance at Sharia and Arab Secular laws: a Comparative Study' (PhD Thesis, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee 1997).

Enforcement of Arbitral Awards in Saudi' (PhD Thesis, University of Exeter 2016).

Fadel H, 'The Islamic Viewpoint on New Assisted Reproductive Technology' (2002) 30(1) Fordham Urban Law Journal 147.

Farooq M, 'Riba, Interest and Six Hadiths: Do We Have a Definition or a Conundrum?' (2009) 13(1) Review of Islamic Economics105.

Farooq M, 'Stipulation of Excess in Understanding and Misunderstanding Riba: The Al-Jassas Link' (2007) 21(4) Arab Law Quarterly 285.

Forde M, 'The “Ordre Public” Exception and Adjudicative Jurisdiction Conventions' (1980) 29 International and Comparative Law Quarterly 259.

Fry J, 'Desordre Public International under the New York Convention: Wither Truly International Public Policy' (2009) 8(1) Chinese Journal of International Law 81.

Gaillard E, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) 14(1) ICSID Review - Foreign Investment Law Journal 16.

Gaitis J, 'International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards' (2004) 15(1) The American Review of International Arbitration 9.

Garcia de Enterria J, 'The Role of Public Policy in International Commercial Arbitration'(1990) 21(3) Law and Policy in International Business 389.

Gemmell A, 'Commercial Arbitration in the Islamic Middle East' (2006) 5(1) Santa Clara Journal of International Law 169.

Ghani H, 'Conditions of a Valid Custom in Islamic and Common Laws' (2012) 3 International Journal of Business and Social Science 306.

Gharavi H, 'A Nightmare Called Hilmarton' (1997) 12(9) Mealey's International Arbitration Report 20.

Ghodoosi F, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2015) 94(3) Nebraska Law Review 685.

Gibson C, 'Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law'(2009) 113(4) Penn State Law Review 1227.

Gotanda J, 'Awarding Interest in International Arbitration' (1996) 90(1) American Journal of International law 40.

Guedj T, 'The Theory of the lois de Police, a Functional Trend in Continental Private International Law—A Comparative Analysis with Modern American Theories' (1991) 39(4) American Journal of Comparative Law 661.

Habachy S, 'Commentary on the Decision of the Supreme Court of Egypt Given on 4 May 1985 concerning the Legitimacy of Interest and the Constitutionality of Article 226 of the New Egyptian Civil Code of 1948' (1986) 1(2) Arab Law Quarterly 239.

Hallaq W, 'On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad'(1986) 63 Studia Islamica 129.

Hascall S, 'Islamic Commercial Law and Social Justice: Shari'ah-Compliant Companies, Workers' Rights, and the Living Wage' (2014) 88(2) St. John's Law Review 291.

Hong Y and Molife P, 'The Impact of National Law Elements on International Commercial Arbitration' (2001) 4(2) International Arbitration Law Review 17.

Humphreys R, 'Islam and Political Values in Saudi Arabia, Egypt and Syria' (1979) 33(1) Middle East Journal 1.

Hunter M and Silva G, 'Transnational Public Policy and its Application in Investment Arbitration' (2003) 4(3) The Journal of World Investment 367.

Husserl G, 'Public Policy and Ordre Public' (1938) 25(1) Virginia Law Review 37.

Inafuku E, 'How Does the 1979 Iranian Revolution Affect Current Iranian Fundamentalism and International Politics?' (2010) 5(3) Journal of Applied Security Research 414.

International Journal of Arab Arbitration (Volume 6, Issue 4, 2014).

Islam M, 'Dissolution of Contract in Islamic Law' (1998) 13(4) Arab Law Quarterly 336.

Jackson S, 'Jihad and the Modern World' (2002) 7(1) Journal of Islamic Law and Culture 9.

Juenger F, 'Two European Conflicts Conventions' (1998) 28(3) Victoria University of Wellington Law Review 527.

Junita F, 'Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia' (2008) 5 Macquarie journal of Business Law 369.

Junita F, 'Pro Enforcement Bias under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview' (2015) 5(2) Indonesia Law Review140.

Junita F, 'Public Policy Exception in International Commercial Arbitration – Promoting Uniform Model Norms'(2012) 5(1) Contemporary Asia Arbitration Journal 45.

Kamali M, 'Methodological Issues in Islamic Jurisprudence' (1996) 11(1) in Arab Law Quarterly 3.

Kegel G, 'Story and Savigny' (1989) 37(1) The American Journal of Comparative Law 39.

Khan H, 'Nothing is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law' (2002) 24(1) Michigan Journal of International Law 273.

Khanfar N, 'A Comparative Critical Analysis of the Concepts of Error and Misrepresentation in English, Scottish, Islamic, International Contract Law, and Palestinian Draft Civil Law' (PhD Thesis, University of Abertay Dundee 2010).

Kirschenbaum A, 'Jewish and Christian Theories of Usury in the Middle Ages' (1985) 75(3) The Jewish Quarterly Review 270.

Knight W, 'Public Policy in English Law' (1922) 38 The Law Quarterly Review 207.

Kosters J, 'Public Policy in Private International Law' (1920) 29(7) The Yale Law Journal 745.

Kutty F, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28(3) Loyola of Los Angeles International and Comparative Law Review 565.

Labat A and Block W, 'Money Does Not Grow on Trees: An Argument for Usury' (2012) 106(3) Journal of Business Ethics 383.

Laldin M and Furqani H, 'Developing Islamic Finance in the Framework of Maqasid al-Shari'ah Understanding the Ends (Maqasid) and the Means (Wasa'il) '(2013) 6(4) International Journal of Islamic & Middle Eastern Finance & Management 278.

Lalive P, 'The New Swiss Law on International Arbitration' (1988) 4(1) Arbitration International 2.

Levi-Tawil E, 'East Meets West: Introducing Shari'a Into the Rules Governing International Arbitrations at the BCDR-AAA' (2011) 12 Cardozo Journal of Conflict Resolution 609.

Lewison M, 'Conflicts of Interest? The Ethics of Usury' (1999) 22(4) Journal of Business Ethics 327.

Lorenzen E and Heuknab R, 'The Restatement of the Conflict of Laws' (1935) 83(5) University of Pennsylvania Law Review and American Law Register 555.

Lorenzen E, 'Story's Commentaries on the Conflict of Laws: One Hundred Years After' (1934) 48(1) Harvard Law Review 15.

Lorenzen E, 'The Validity of Wills, Deeds and Contracts as Regards Form in the Conflict of Laws' (1911) 20(6) The Yale Law Journal 427.

Lorenzen E, 'Validity and Effects of Contracts in the Conflict of Laws' (1921) 30(6) Yale Law Journal 565.

Luttrell S, 'The Changing Lex Arbitri of the UAE' (2009) 23(2) Arab Law Quarterly 139.

Ma W, 'Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia' (SJD Thesis, Bond University 2005).

Magazines and Newsletters

Maier H, 'Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law'(1982) 76(2) American Journal of International Law 280.

Makdisi J, 'Legal Logic and Equity in Islamic Law' (1985) 33(1) The American Journal of Comparative Law 63.

Maloney R, 'Usury in Greek, Roman and Rabbinic Thought' (1971) 27 Traditio 79.

Mansoor Z, 'Contracts Contrary to Public Policy Under English and Dutch Law' (2014) 1(4) European Journal of Comparative Law and Governance 297.

Mantilla-Serrano F, 'Towards a Transnational Procedural Public Policy' (2004) 20(4) Arbitration International 333.

Mayer P and Sheppard A, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration International 249.

McKerchar M, 'Philosophical Paradigms, Inquiry Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation' (2008) 6(1) eJournal of Tax Research 5.

Mechantaf K, 'Public Policy in the UAE as a Ground for Refusing Recognition and Enforcement of Awards' (Kluwer Arbitration Blog, 6 July 2012) <http://arbitrationblog.kluwerarbitration.com/2012/07/06/public-policy-in-the-uae-as-a-ground-for-refusing-recognition-and-enforcement-of-awards/ > accessed on April 20, 2020.

Meislin B and Cohen M, 'Backgrounds of the Biblical Law against Usury' (1964) 6(3) Comparative Studies in Society and History 250.

Messineo F, 'Is There an Italian Conception of International Law?' (2013) 2(4) Cambridge Journal of International and Comparative Law 878.

Mews C and Abraham I, 'Usury and Just Compensation: Religious and Financial Ethics in Historical Perspective' (2007) 72(1) Journal of Business Ethics1.

Mills A, 'The Dimensions of Public Policy in Private International law' (2008) 4(2) Journal of Private International Law 201.

Mills A, 'The Private History of International Law' (2006) 55(1) The International and Comparative Law Quarterly 1.

Mistelis L, 'International Law Association – London Conference (2000) Committee on International Commercial Arbitration "Keeping the Unruly Horse in Control" or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards' (2000) 2(4) International Law Forum du droit international 248.

Mohtashami R and Tannous S, 'Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East' (2009) 25(2) Arbitration International 173.

Morgenstern F, 'Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts Which Are contrary to International Law' (1951) 4(3) The International Law Quarterly 326.

Mowla M, 'Identifying the Presence of Gharar in Buying and Selling Mechanism Under Different Kinds of the Market Structure Global' (2019) 19(1) Journal of Human-Social Science: E Economic 37.

Muhammad A, 'Possibility of Conducting Ijma’ in the Contemporary World' (2010) 6 Journal of Islamic Law109.

Murphy K, 'Traditional View of Public Policy and Ordre Public in the Private International Law' (1981) 11(3) Georgian Journal of International and Comparative Law 591.

Myburgh A and Paniagua J, 'Does International Commercial Arbitration Promote Foreign Direct Investment?' (2018) 59(3) The Journal of law and Economics 597.

Nadar A, 'Islamic Finance and Dispute Resolution: Part 1' (2009) 23(1) Arab Law Quarterly 1.

Nadelmann K, 'Joseph Story's Contribution to American Conflicts Law: A Comment' (1961) 5(3) The American Journal of Legal History 230.

Nadelmann K, 'Mancini's Nationality Rule and Non-Unified Legal Systems: Nationality Versus Domicile' (1969) 17(3) The American Journal of Comparative Law 418.

Nadelmann K, 'The Comity Doctrine: Introduction' (1966) 65(1) Michigan Law Review 1.

Nehad A and Knanfar A, 'A Critical Analysis of the Concept of Gharar in Islamic Financial Contracts' (2016) 37(1) Journal of economic cooperation & development 1.

Noorzoy M, 'Islamic Laws on Riba (Interest) and Their Economic Implications' (1982) 14(1) International Journal of Middle East Studies 3.

Nordin N and others, 'Commodity Futures: A Maqasid Al-Shariah Based Analysis' (2017) 7(8) International Journal of Academic Research in Business and Social Sciences 602.

Nordin N and others, 'Contracting with Gharar (Uncertainty) in Forward Contract: What Does Islam Says?' (2014) 10(15) Asian Social Science 37.

Nur E, 'Riba Versus Profit-Sharing: Theoretical Foundation and Policy Implication in Islamic Perspectives' (PhD Thesis, International Islamic University 1999).

Nussbaum A, 'Public Policy and the Political Crisis in the Conflict of Laws' (1940) 49(6) Yale law Journal p 1027.

Nwagbara C, 'Re-Examining the Theory of Savigny, the Theory of Acquired Rights and the Local Law Theory under Private International Law' (2014) 27 Journal of Law, policy and Globalization 12.

Nyazee I, 'The Scope of Taqlid in Islamic Law' (1983) 22(4) Islamic Studies 1.

Nygh P, 'Foreign status, Public policy and Discretion' (1964) 13(1) International and Comparative Law Quarterly 39.

Paldi C, 'Understanding Riba and Gharar in Islamic Finance' (2014) 31(3) Journal of Islamic Banking and Finance 35.

Paulsen M and Sovern M, ' "Public Policy" in the Conflict of Laws' (1956) 56(7) Columbia Law Review 969.

Pavlova I, 'The history of Private International Law: the Theory of Belgian Realism in the 16th Century' (2018) 2(5) Sociology International Journal 431.

Peari S, 'Savigny's Theory of Choice-oF-Law as A Principle of 'Voluntary Submission' ' (2014) 64(1) The University of Toronto Law Journal 106.

Persky J, 'Retrospectives: From Usury to Interest' (2007) 21(1) Journal of Economic Perspectives 227.

PhD Theses

Pillai R and Kumar M, 'The Political and Legal Status of Kuwait' (1962) 11(1) International and Comparative Law Quarterly10.

Pryles M, 'Reflections on Transnational Public Policy' (2007) 24(1) Journal of International Arbitration 1.

Qoyum A, '*Maqasid Ash-Shari'ah* Framework and the Development of Islamic Finance Products: The Case of Indonesia' (2018) 12(2) Tazkia Islamic Finance and Business Review 169.

Quigley L, 'Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1961) 70(7) The Yale Law Journal 1049.

Razali S, 'The Dominance Entry of the Principles of Gharar in Electronic Contracts' (2009) 23(2) Arab Law Quarterly 207.

Rittenberg R, 'Gharar in Post-Formative Islamic Commercial Law: A Study of the Representation of Uncertainty in Islamic Legal Thought' (PhD Thesis, University of Pennsylvania 2014).

Roosevelt III K, 'Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward' (2014) 65(2) Mercer Law Review 501.

Rosly S, 'Iwas as a Requirement of Lawful Sale: A Critical Analysis' (2001) 9(2) IIUM Journal of Economics and Management 187.

Roy K, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards? ' (1994) 18(3) Fordham International Law Journal 920.

Saadallah R, 'Concept of Time in Islamic Economies' (1994) 2(1) Islamic Economic Studies 81.

Saeed A, 'The Moral Context of the Prohibition of Riba in Islam Revisited' (1995) 12(4) American journal of Islamic studies 496.

Saiti B and Abdullah A, 'Prohibited Elements in Islamic Financial Transactions: A Comprehensive Review' (2016) 21 Al-Shajarah: Journal of the International Institute of Islamic Thought and Civilization (ISTAC) 139.

Saleh N, 'Freedom of Contract: What Does It Mean in the Context of Arab Laws?' (2001) 16(4) Arab Law Quarterly 346.

Saleh S, 'Some Aspects of Frustrated Performance of Contracts Under Middle Eastern Law' (1984) 33(4) The International and Comparative Law Quarterly 1046.

Samir S, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 1(1) Arab Law Quarterly 19.

Samiullah M, 'Prohibition of Riba (Interest) & Insurance in the Light of Islam' (1982) 21(2) Islamic Studies 53.

Sattar S, 'Enforcement of Arbitral Awards and Public policy: Same Concept, Different Approach' (2011) 5 Transnational Dispute Management 1.

Saumier G, 'Public Policy, Mandatory Rules and Uniform Choice-of-Law Rules in Contract: the Impact of European Harmonisation on English Private International Law' (PhD Thesis, University of Cambridge 1997).

Schmidt F and Cheshire G, 'Nationality and Domicile in Swedish Private International Law' (1951) 4(1) The International Law Quarterly 39.

Schwartz E, 'Multiparty Arbitration and the ICC: In the Wake of Dutco' (1993) 10(3) Journal of International Arbitration 5.

Shaffer G, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229.

Shaleva V, 'The ‘Public Policy’ Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 67.

Shand J, 'Unblinkering the Unruly Horse: Public Policy in the Law of Contract' (1972) 30(1) The Cambridge Law Journal 144.

Shihata I, 'Some Observations on the Question of Riba and the Challenges Facing Islamic Banking' (2000-2001) 5(1) Yearbook of International and Economic Law 23.

Sibon A, 'Enforcing Punitive Damages Awards in France: Facing Proportionality Withing International Public Policy' no page number available<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2382817> accessed on April 20, 2020.

Silva G, 'Transnational Public Policy in International Arbitration' (PhD thesis, Queen Mary College, University of London 2007).

Sloane P, 'The Status of Islamic Law in the Modern Commercial World' (1988) 22(3) The International lawyer 743.

Stempel J, 'Pitfalls of Public Policy: The Case of Arbitration Agreements' (1990) 22 ST. Mary’s Law Journal 259.

Stevenson J, 'The Relationship of Private International Law to Public International Law' (1952) 52(5) Columbia Law Review 56.

Sylla R, 'Financial Systems and Economic Modernization' (2002) 62(2) The Journal of Economic History 277.

Tahir I, 'The Reason Why the Companion Ibn Abbas Changed his Opinion on Riba Al-fadhl' (2016) 6(6) International Journal of Social Science and Humanity 475.

Tamimi H, 'Interest under the UAE Law and as Applied by the Courts of Abu Dhabi' (2002) 17(1) Arab Law Quarterly 50.

Tetley W, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (2000) 60(3) Louisiana Law Review 677.

Trakman L, 'Aligning State Sovereignty with Transnational Public Policy' (2018) 93(2) Tulane Law Review 207.

Trakman L, 'Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection' (2018) 6(2) The Chinese Journal of Comparative Law174.

Uddin M, 'Principles of Islamic Finance: Prohibition of Riba, Gharar and Maysir' in (MPRA Paper 67711, University Library of Munich, Germany 2015) <https://ideas.repec.org/p/pra/mprapa/67711.html> accessed on March 23, 2020.

Visser W, and McIntosh A, 'A Short Review of the Historical Critique of Usury' (1998) 8(2) Accounting, Business & Financial History 175.

Voorhoeve M, 'Formalising the Informal Through Legal Practice. The Case of Prostitution in Authoritarian Tunisia' (2018) 4(2) Interdisciplinary Political Studies 21.

Waemustafa W and Sukri S, 'Theory of Gharar and its Interpretation of Risk and Uncertainty from the Perspectives of Authentic Hadith and the Holy Quran: A Qualitative Analysis Review of Literature' (2016) 10(2) International Journal of Economic Perspective 21.

Wahab M, 'Public Policy as a Fundamental Legal Conception Precluding the Application of Foreign Law in the Age of Globalisation' (PhD Theses, University of Manchester 2004).

Wakim M, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21(1) New York International Law Review 1.

Websites, Blogs, and Electronic Sources

Wette J, 'The Internationalization of International Arbitration: Looking Ahead to the Next Ten Years' (1995) 11(2) Arbitration International 117.

Winfield P, 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76.

Yang I, 'Procedural Public Policy Cases in International Commercial Arbitration' (2014) 69(4) Dispute Resolution Journal 59.

Yelpaala K, 'Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California' (1989) 2(2) The Transnational Lawyer 379.

Zahraam M, 'Characteristic Features of Islamic Law: Perceptions and Misconception' (2000) 15(2) Arab Law Quarterly 168.

Zarqa M, and Elgari M, 'Compensation for Delinquency in Debt Repayment: A Comparative Islamic Juristic and Economic Study' (1991) 3(1) Journal of King Abdulaziz University: Islamic Economics 23.

Zhang M, 'Party Autonomy and Beyond: an International Perspective of Contractual Choice of Law' (2006) 20(2) Emory International Law Review 511.

Zhilsov A, 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1995) 42(1) Netherlands International Law Review 81.

Ziadè N, 'Lebanon: international Arbitration Provisions of the Code of Civil Procedure' (1988) 27(4) International Legal Materials 1022.

Conferences, Symposiums and Workshops

Al-Dharir A, 'The Amount of Gharar that Prevents Transactions From Being Valid' (4th conference of the Shariah Boards of Islamic Financial Institutions, Kingdom of Bahrain, 3rd – 4th October 2004).

Renteln A, 'Cultural Bias in International Law' (1998) 92 Proceedings of the Annual Meeting - American Society of International Law 232.

Reports and Official Publications

'Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)' <https://www.icj-cij.org/en/case/33> accessed on January 15, 2020.

NYC Arabic version< https://www.uncitral.org/pdf/arabic/texts/arbitration/NY-conv/New-York-Convention-A.pdf> accessed on June 3, 2020.

Report of the Committee on the Enforcement of International Arbitral Awards, (UN DOC E/2704, E/AC.42/Rev.1 (March. 28, 1955) < http://newyorkconvention1958.org/index.php?lvl=notice_display&id=3423> accessed on January 4, 2020.

Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards (2003) 9(2) Arbitration International 213–215.

Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards, adopted at the International Law Association's 70th Conference held in New Delhi, India, 2-6 April 2002.

Spender P, '1958 Separate Opinion of Sir Percy Spender ICJ Reports' (Opinion, The Hague November 28).

UNCTAD World Investment Report 2018 and 2019<https://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Country-Fact-Sheets.aspx> accessed on March 12, 2020.

United Nations Conference on Trade and Development<https://unctad.org/en/Docs/edmmisc232add37_en.pdf > accessed on March 21, 2020.

World Bank, 'Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature 18 March 1965 ' <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx> accessed on March 14, 2020.

Appendix A: Overview of the UAE legal system

Source of Law

UAE Constitution

The United Arab Emirates was formed in 1971 and it is a federation of seven emirates including Dubai, Abu Dhabi, Ajman, Fujairah, Ras Al Khaimah, Sharjah, and Umm Al Quwain. Prior to that, the seven Emirates were under the protection of Great Britain through a Treaty of Maritime Truce signed in 1850 between each Emirate and Great Britain[982].

The rulers of the Emirates consented to sign a Provisional Constitution on 2 December 1972[983] and the constitution was made final in 2nd of September 1996 by issuance of the Constitutional Amendment Act No.1 of 1996.[984] The UAE constitution governs all aspects of the federation and allocates powers and duties between the federal government and the Emirates. Accordingly, each individual Emirate retains the right to administer its own internal affairs and enjoys other exclusive rights such as issuing laws that do not conflict with federal laws. The Constitution establishes key federal bodies including the FSC of the Union, Council of Ministers of the Union, the Federal National council and the Judicial Authority[985].

The FSC consists of the Rulers of all the Seven Emirates or their substitutes in the event of their absence or incapacity to attend and each emirate has a single vote in the deliberations of the Council. As the highest constitutional body, the FSC of Union performs essential responsibilities relating to the federation, which includes formulating the general policy of the Union, approving Federal laws including the general budget of the Federation and the closing accounts, ratification of treaties and

---

[982] AL-Tamimi, Essam, *Practical Guide to Litigation and Arbitration in the United Arab Emirates* (Arab and Islamic Laws Series, 1st edn, Kluwer Law International, The Hague 2003).pp. 1-3.

[983] The Provisional of the UAE Federal Constitution was signed on 18/7/1971by Abu Dhabi, Dubai, Sharjah, Ajman, Um Al Quwain and Fujairah. Ras Al Khaimah joined on 10/2/1972.

[984] AL-Tamimi, Essam, *Practical Guide to Litigation and Arbitration in the United Arab Emirates* (Arab and Islamic laws series, 1st edn, Kluwer Law International, The Hague 2003).pp.1-3.

[985] The UAE Federal Constitution of 1971 comprises 152 articles divided into ten parts: Union and the basic principles and objectives; the fundamental social and economic basis of the Union; Freedom, rights and public duties; the Union authorities; Union legislation, decrees and the authorities having jurisdiction therein; the Emirates; the distribution of legislative and executive powers between the Federation and the United Arab Emirates; financial affairs of the Union; armed forces and security forces and final and transitional provisions.

international agreements through decrees, approving the appointment of the President and the judges of the Supreme Court and accepting their resignations and dismissing them if they fail to perform their duties. As per Articles 51 and 52 of the Constitution, the President and Vice President of the Union should be elected for five years among the seven emirates rulers[986].

The Constitution also establishes a Council of Ministers of the Union, which consists of the Prime Minister, his Deputies, and a number of Ministers[987]. The Council of Ministers is the executive branch of the Federation. The UAE President appoints the Prime Minister, the Deputy Prime Minister and the Ministers and they are collectively responsible before the President and the Supreme Council of the Union. The Council performs essential responsibilities in the Federation, which includes implementing domestic and foreign policy of the Federal Government, initiating and drafting federal laws and submitting them to the FNC and the President of the Federation for presentation to the Supreme Council for approval, drawing up the annual general budget of the Federation, and the final accounts and issuing regulations necessary for the implementation of federal laws[988].

The FNC of the Union consists of 40 members[989]. Twenty members of the FNC of the Union are elected by the citizens through an electoral college, while the remaining twenty are appointed by the rulers of each emirate, the allocation of the number of representatives for each Emirate being based on the size of the Emirate[990]. Article 69 of the Constitution gives each Emirate the right to determine the method of selection for the citizens who represent it in the Union National Council[991]. The powers of the FNC are limited to discussion and approval of federal draft laws, examining the Annual General Budget draft law and the draft law of the final accounts, discussing international treaties and agreements and discussing general subjects pertaining to the affairs of the Federation and offering recommendations[992].

---

[986] Article 47 of the UAE Federal Constitution of 1971.
[987] Article 55 of the UAE Federal Constitution of 1971.
[988] Article 60 of the UAE Federal Constitution of 1971.
[989] Article 46 of the UAE Federal Constitution of 1971.
[990] Article 69 of the UAE Federal Constitution of 1971.
[991] These seats are distributed as follows: Abu Dhabi and Dubai, both 8 seats; Sharjah and Ras Al Khaimah, both 6 seats; Ajman, Umm Al Quwain, and Fujairah, all 4 seats.
[992] AL-Muhairi, Butti Sultan Butti Ali, 'The Development of the UAE Legal System and Unification with the Judicial System' (1996) 11(2) Arab Law Quarterly 116.

As per UAE constitution, the UAE court system can be broken down into two categories. The first category is the federal court system, which applies to the emirates that have opted to be part of the federal judicial system. The second category is the local courts, which applies to the emirates that opted to have their own independent judicial system. The emirates of Abu Dhabi, Dubai and Ras Al Khaimah have each opted to maintain its own Judiciary[993]. The next section will discuss the courts system in more details.

Laws and regulations

The UAE's legal system is based on a combination of the modern civil law system and traditional Sharia law. Historically, the civil law system was heavily influenced by Egyptian law, which in turn was influenced by French and Roman law[994]. Similar to other Civil Law origins, the UAE are governed by a collection of comprehensive statutory codes that provide the general principles of law. Sharia law heavily influences both the Civil and the Commercial Codes and key Sharia principles are heavily embedded in these laws[995]. This was due to fact that in 1978, the UAE council of Ministers issued a Resolution No. 50/1978 which established a High Committee to review and ensure the compliance of all legislation issued or those that will be issued by UAE government with Sharia law principles[996]. Due to this effort, the UAE Civil Code has a huge influence from Sharia law in many aspects and more precisely in some aspects governing the invalidity of contracts and transactions, particularly relating to *Gharar* and *Riba.*

For example, Federal Law No. (5) of 1985 On the Civil Transactions as amended by Federal Law No. (1) of 1987("Civil Code"), the rules on Civil Procedure are set out in Federal Law No.10 of 1992 on Evidence in Civil and Commercial Matters ("Evidence Law") and Federal Law No.11 of 1992 on Civil Procedure Law (the "UAE CPC") (as amended by Law No.30 of 2005 and Law No 10 of 2014). The UAE CPC has unified

[993] Article 94 to 109 of the UAE Federal Constitution of 1971.
[994] Blanke, Gordon, *Commentary on the UAE Arbitration Chapter* (Law Commentaries, 1st edn, Sweet & Maxwell/Thompson Reuters, London 2017).p. 4
[995] El-Aḥdab, Abd al-Ḥamid and Jalal El-Ahdab, *Arbitration With the Arab Countries* (3rd rev. and expanded edn, Kluwer Law International, Netherlands 2011).p. 157
[996] AL-Muhairi, Butti Sultan Butti Ali, 'The Islamisation of Laws in the UAE: the Case of the Penal Code' (1996) 11(4) Arab Law Quarterly 350.p. 371

the procedure for civil and commercial cases in all of the UAE courts, whether they are local or Federal.

The UAE CPC also governs court jurisdiction, appearance and representation of the parties, service of summons, filing of pleadings and evidence, procedure of hearings, preliminary objections, joinder of parties and actions, interim applications, cross claims, adjournments, hearing of witnesses, withdrawal and discontinuance of proceedings, judgments, appeals, arbitration before enactment of UFAL 2018, attachment of assets, execution and enforcement of domestic and foreign judgments and arbitration awards.

Before 2018, UAE did not have an independent arbitration law and arbitration proceedings were governed by Articles 203 to 218 of Chapter 3 of the UAE CPC. UAE CPC has often been criticised by practitioners as being outdated and inadequate to govern domestic and international commercial arbitration[997]. In order to overcome this issue, the UAE government has enacted, in May 3rd of 2018, a new arbitration law, UFAL 2018. UFAL 2018 repealed Articles 203 to 218 of chapter 3 of UAE CPC that was governing arbitration proceedings and enforcement of domestic arbitral awards. UFAL 2018 will apply on any arbitration if:

(1) arbitration takes place in the UAE unless the parties agree on the application of a different arbitration law, provided that such a law does not contravene UAE public policy and morals.
(2) arbitration taking place outside of the UAE where the parties have agreed to submit the arbitration to the provisions of UFAL 2018; and
(3) arbitration arising out of a legal dispute, whether contractual or non-contractual, governed by the laws of the UAE, unless an exception applies.

Accordingly, UFAL 2018 will govern any arbitration unless the parties have agreed to apply another arbitration law, provided that other law is not in conflict with the public policy and morals.

[997] Mohtashami, R. and S. Tannous, 'Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East' (2009) 25(2) Arbitration international 173.p. 186.

If the arbitration is considered as international, then the provision of The Cabinet Decision of 2018 regulates and streamlines the process of enforcement of international or foreign arbitral awards.

Sharia Law

Sharia plays pivotal role in the UAE legal system and it can be applied through four gateways. The first gateway is the constitution. Article 7 of UAE constitutions declared sharia as a primary or main source of legislation[998]. Also, Article 1 of the UAE Civil Code provides that if the judge does not find provision in this law, he has to pass judgment according Sharia law or as per one of the accepted Sharia schools of jurisprudence or *Fiqh,* which are the schools of Imam Malik or Imam Ahmad bin Hanbal, Imam *Al-Shafie* and Imam Abu Hanifa[999].

International treaties

The UAE constitution did not provide any guidance with regards to whether the international treaties ratified by the UAE government are considered part of the UAE's domestic legislation, or whether it has priority in the event of a conflict with the domestic law. The UAE Civil Code and UAE CPC has illustrated this matter in very detailed manner. Article 22 of the UAE Civil Code provided that international treaties are a part of the UAE's domestic laws.[1000] Furthermore, Article 238 of the UAE's CPC states that international treaties that have been signed by UAE government have priority over specific articles set out in the UAE CPC.

The UAE is currently a party to several multi-lateral conventions, such as the NYC on the recognition and enforcement of foreign arbitral awards (1958), the Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention of 1965) and the Riyadh Convention of Judicial Cooperation between States of the Arab League (1983).

Court Structure

[998] Article 7 of the UAE Federal Constitution of 1971 states that "Islam is the official religion of the Federation and the Islamic Sharia is a main source of its legislation".
[999] Article 1 of the UAE Civil Code, cited from AL-Muhairi, Butti Sultan Ali, 'The Position of Shari'a Within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause Concerning Shari'a' (1996) 11(3) Arab Law Quarterly 219. pp .219-244
[1000] Article 22 of UAE Civil Code.

The UAE court system can be broken down into two categories. The first category is the federal court system, which applies to the Emirates that have opted to be part of the Federal judicial system. The second category is the local courts, which applies to the Emirates that opted to have their own independent judicial system. The Emirates of Abu Dhabi, Dubai and Ras Al Khaimah have each opted to maintain its own independent judiciary[1001].

The Federal court system includes the Federal Supreme Court, Federal appeal courts, Federal first instance courts, and Public Prosecution[1002]. It is presided over by the Federal Supreme Court as the highest judicial body in the UAE[1003]. The UAE Federal Supreme Court is located in Abu Dhabi and reviews and decides on appeals from the appeal courts of the Emirates that fall within the jurisdiction of the Federal court system and other matters that have exclusive jurisdiction as per the Constitution. Due to the current Federal system, there are four supreme courts in UAE, namely the Federal Supreme Court, the Abu Dhabi Cassation Court, the Dubai Cassation Court, and the Ras Al Khaimah Cassation Court. These four courts have the highest authority and hold the last stage in the appeal process within the cases that fall within their jurisdiction.

In 2004, the UAE government passed an amendment to Article 121 of the UAE constitution[1004]. Article 121 of the UAE Constitution, which was amended, deals with the division of powers between Federal and Emirati authorities and which allows the Federation to enact a Financial Free Zone Law. This allowed each of the Emirates to establish its own financial free zone which can be exempted from application of federal civil and commercial laws. Pursuant to the constitution amendment, the Emirate of

---

[1001] Article 94 to 109 of the UAE Federal Constitution of 1971.

[1002] Article 45 of the UAE Federal Constitution of 1971.

[1003] AL-Tamimi, Essam, *Practical Guide to Litigation and Arbitration in the United Arab Emirates* (Arab and Islamic laws series, 1st edn, Kluwer Law International, The Hague 2003).pp. 1-10.

[1004] Article 121 of the UAE Federal Constitution of 1971 states that “Without prejudice to the provision of the previous article, the Federation shall solely be in charge of enacting laws on the following matters: Work relation and social securities, real estate ownership and expropriation for public interest; handover of criminals; banking; insurance of all kinds; protection of fauna & flora; major legislations related to Penal Code, Civil & Commercial Transactions Code, Companies Law, Code of Procedures before the civil and penal courts; protection of moral, technical and industrial property rights; copyrights, printings and publication rights; import of weapons and ammunitions unless the same was for the use of the Armed Forces or Security Forces of any Emirate - other aviation affairs which are not within the Federation executive competencies; determination of territorial waters and organization of navigation overseas; organization and method of establishing financial free zones and scope of excluding the same from the implementation of the Federal Legislations provisions”.

Dubai has established Dubai International Financial Centre (DIFC), which has its own civil and commercial laws that are based on Common Law.

The DIFC maintains an independent English language Common Law judiciary. The DIFC Courts have jurisdiction over civil and commercial matters concerning contracts that were concluded or performed within the DIFC, the insolvency of DIFC corporate entities, and other civil or commercial disputes between parties who have opted to submit their dispute to the DIFC courts. The DIFC Court is comprised of a system consisting of two courts, the court of First Instance and the DIFC Court of Appeal, together commonly known as “the DIFC Courts”. In 2013, Abu Dhabi government has established another financial free zone Abu Dhabi Global Market (ADGM), which has been as well modelled on the English Common Law system and regulated with an independent judicial system that is modelled on Common Law courts.

The DIFC and ADGM Arbitration system and courts are outside the scope of this study, which aims to focus on enforcement of foreign arbitral award within mainland UAE or onshore UAE.

Arbitration Institution

Several arbitration institutions were established in the UAE due to the growing demands of arbitration in the UAE. Prominent arbitration centres include the Dubai International Arbitration Centre (DIAC), the Dubai International Financial Centre - LCIA Arbitration Centre (a joint venture between the London Court of International Arbitration (“LCIA”) and the Dubai International Financial Centre (“DIFC”), and the Abu Dhabi Commercial Conciliation and Arbitration Centre (“ADCCAC”). These arbitration centres offer their rules and regulations that govern the arbitration proceeding.

The DIAC was formed in 1994, and the rules applied for administering arbitration proceedings in the DIAC are the DIAC Arbitration Rules 2007. Following its inception, the number of arbitrations registered with DIAC has tremendously increased, making it one of the most prominent arbitration institutions in the UAE.

The DIFC-LCIA administers arbitrations under the DIFC-LCIA International Rules of Arbitration 2008, which are modelled on the Rules of Arbitration of the LCIA, in association with the London-based LCIA. The Dubai International Financial Centre

(DIFC) is a Common Law jurisdiction, and arbitration is governed by the DIFC Arbitration Law No. (1) 2008 based upon the UNCITRAL Model Law.

Arbitration proceedings in the Abu Dhabi Commercial Conciliation and Arbitration Centre are administered in accordance with ADCCAC Procedural Regulations. ADCCAC, as an arbitration institution for resolving commercial disputes, is preferred mostly by Abu Dhabi based parties.

On 17 October 2018, the ICC International Court of Arbitration opened a representative office for the Middle East and North Africa (MENA) in Abu Dhabi. The office is located in Abu Dhabi Global Market (ADGM). The ADGM has enacted the ADGM Arbitration Regulations 2015, which are closely modelled on the UNCITRAL Model Law (with some contemporary modifications) and will apply to arbitrations seated in the ADGM. The ADGM also has its own Common Law courts (with a world class courtroom and a world class body of judges).

Other Emirates, such as Sharjah, Ajman and Ras Al Khaimah, also feature arbitral institutions and rules, which are intended to cater to domestic arbitrations. However, they are less prominent than their counterparts in Abu Dhabi and Dubai.

In addition, the Islamic Centre for Reconciliation and Arbitration is intended to facilitate the resolution of disputes of an Islamic financial nature, thereby further increasing the choices available for the arbitration process in the UAE.