Chapter 17

PUBLIC POLICY

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I. INTRODUCTION

The effectiveness of international commercial arbitration depends on the coercive powers of the State. In supporting arbitration, the State sets an important condition, namely that the arbitration is in conformity with the principles and values that inform and underpin the State's formal legal system. The conditionality of the State's support affects all stages of the arbitral proceedings, from the very inception of the arbitral process up to the enforcement of the award. The term "public policy" captures the principles and values that regulate the interface between the private process of commercial arbitration and its public effect.[1]

In the context of international commercial arbitration, it is accepted and indeed uncontroversial that a State can refuse to recognise or enforce an arbitral award that is in breach of its public policy. The role of the public policy exemption has been described as "a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundaments on which it is based."[2]

To the users and practitioners of international commercial arbitration, understanding the role of the public policy exemption is of critical importance. Understanding public policy as a ground for the setting aside or refusing to recognise an arbitral award creates diversity in a system of international commercial arbitration that values uniformity. Being tied to the fundamental notions of justice within national legal systems, attempts to agree on a conception of public policy that could be adopted internationally have been unsuccessful. Despite the claim that "most developed arbitral jurisdictions have similar conceptions of

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[1] For the differentiation between private process and public effect, *see* NIGEL BLACKABY, CONSTANTINE PARTASIDES & ALAN REDFERN, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 27, 1.92 (6th ed. 2015).

[2] *See* EMMANUEL GAILLARD AND GEORGE A. BERMAN EDS., UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION OF THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 254 (2017). *See* also the ILA Interim Report on Res Judicata and Arbitration 248 (2009).

public policy,"[3] all attempts to agree on a set of supranational principles that could be adopted internationally have ended in failure.[4]

In the world of international commercial arbitration, the MENA region stands out. In the last century, MENA jurisdictions have forged regional alliances and agreements for the mutual recognition and enforcement of arbitral awards. In these regional approaches, Islam and Arab national unity serve as supranational principles of public policy. More recently, it is also in the MENA region that some countries have begun to move in the opposite direction, again breaking new ground with innovative approaches to tame the unruly horse of public policy.[5] Rather than attempting to agree on regional, supranational conceptions of public policy, some States, such as the United Arab Emirates (**UAE**) and Qatar, have embarked on bifurcating their legal systems, thereby allowing for the application of rules inspired by the English common law by judiciaries largely recruited internationally rather than nationally. Others have taken radical steps to align their legal system with best international practice, such as Bahrain, which has adopted the whole of the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law as its national arbitration law.

The first part of this chapter provides a general overview on the definition and role of the public policy exemption in international commercial arbitration practice across the MENA region. The second part explores the region's attempts to formulate MENA specific approaches to international commercial arbitration. The last part introduces some national examples of the more recent innovations adopted within the region. It is preceded by a review of those aspects of public policy, that present themselves most frequently in the legal practice of international commercial arbitration in the MENA region, namely the role of religion and the role of procedural public policy.

Whilst there are a number of shared features and common denominators amongst many of the members of the MENA region, it is important not to generalise the jurisdictions and systems across this diverse region as representing a single or monolithic system. This applies in particular to any assessment on the role of religion within the context of the public policy exemption. Broad invocations of *Shari'a* absent any historical, national or local context for example, are made at one's own peril, and best avoided.

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[3] BLACKABY, PARTASIDES & REDFERN, *supra* note 3, at 598.

[4] ILA Interim Report on Res Judicata and Arbitration, *supra* note 2, at 218.

[5] *See* Gordon Blanke, *Public Policy in the UAE: Has the Unruly Horse Turned into a Camel?*, KLUWER ARBITRATION BLOG (14 October 2012), http://arbitrationblog.kluwerarbitration.com/2012/10/14/public-policy-in-the-uae-has-the-unruly-horse-turned-into-a-camel/. For comprehensive recent assessments of public policy in MENA arbitration, *see* Nayla Comair-Obeid, *Arbitration Practice and Procedure in the MENA: You Had Better Watch Out!*, 83(1) ARBITRATION 21–28 (2017); and Samaa A.F. Haridi and Mohamed S. Abdel Wahab, *Public Policy: Can the Unruly Horse be Tamed?*, 83(1) ARBITRATION 35–47 (2017).

II. DEFINING PUBLIC POLICY IN MIDDLE EAST ARBITRATIONS

For arbitrators and arbitration practitioners alike, defining public policy is no easy task, whether in national jurisdictions in the Middle East or internationally. As recently noted, "[t]he notion of public policy is so vague that it may not appear to be easy to tell what constitutes a matter of public policy from what does not".[6] Grappling with this vagueness, Elie Kleiman and Claire Pauly questioned:

> But what does international public policy exactly include? In fact, it has often been referred to the notion of mandatory rules of law (lois de police) as a subcategory of international public policy. These rules are designed to protect a public interest or policy. They must be applied regardless of the law applicable to the relationship.[7]

What can be considered as matters of public policy or public order often stretch across a vast panoply of provisions from national legislation, international and regional treaties and conventions, which in turn are predicated on or influenced by domestic religious laws and shifting State policies towards arbitration. While capable of pervasively permeating almost every aspect of arbitration in the Middle East, public policy is often specifically addressed in the arbitrability of disputes, the basis and content of arbitral awards, and their corresponding enforcement.[8] Navigating this variable indeterminacy and the intersectionality of issues necessarily requires some exploration of the definition of public policy as relevant to arbitration in Middle Eastern jurisdictions.[9]

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[6] Elie Kleiman and Claire Pauly, *Arbitrability and Public Policy Challenges*, *in* THE GUIDE TO CHALLENGING AND ENFORCING ARBITRATION AWARDS 33–42, 34 (J. William Rowley QC ed., May 2019).

[7] *Id.* at 34–35. Towards defining what constitute mandatory rules, Kleiman and Pauly refer to Article 9 of the Rome I Regulation, which states that: "[o]verriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation" (Article 9, Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)).

[8] *See*, *e.g.*, Karl-Heinz Böckstiegel, *Public Policy and Arbitrability*, *in* 3 COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, ICCA Congress Series 178 (Pieter Sanders ed., 1987); and Lanfang Fei, *Public Policy as a Bar to Enforcement of International Arbitral Awards: A Review of the Chinese Approach*, 26(2) ARB. INT. (2010).

[9] For a broad, comprehensive and lucid assessment of how public policy infiltrates various aspects of arbitral proceedings across the jurisdictions of the Arab world, *see* NATHALIE NAJJAR, ARBITRATION AND INTERNATIONAL TRADE IN THE ARAB COUNTRIES 391–537 (2018), under the heading "The Field of Arbitration" (in Najjar's section on "Arbitration in the Arab Countries and the Requirement Of Freedom", 239–843), and also at 795–843 under the heading

The Arabic term النظام العام (*al nitham al 'am*), which frequently appears in certain national legislation,[10] and regional treaties,[11] is often translated as either "public policy" or "public order". The etymological construction of the term emanates from shifting Arabic language references to the word "public",[12] and encompasses divergent meanings for the Arabic words corresponding to "order"[13] and "policy".[14] The use of the term النظام العام (*al nitham al 'am*) in the Arab law tradition, refers broadly to government policy concerning matters in the public interest, and matters pertaining to the status quo or prevailing orthodoxy. More generally, the term brings within its purview, commonly agreed or understood principles for maintaining social order and harmony.

Historically influenced by *Shari'a* principles in the Quran, itself a cornerstone reference for the growth and development of the Arabic language, the term النظام العام (*al nitham al 'am*) intrinsically takes on matters of religious ethics and moral virtues together with other Islamic law principles governing the relationship between rulers, governments and the people. While at first glance the term relates to powers within the gift of any government or ruler, the term also encapsulates a harnessing of State authority and the protection of the public at large from abuses of absolute power. Notwithstanding this shared etymological and historical development across the Middle East, the political nature of the terminology surrounding النظام العام (*al nitham al 'am*) is open to interpretation over time in different national and local contexts throughout the region.[15] At its essence, النظام العام (*al nitham al 'am*) is a reflection of the social contract in each MENA country. For parties and practitioners, this will diverge significantly according to different systems of governance, including for example between secular-styled nationalist rule, monarchies and federalist forms of government. It is worth noting

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"The Arbitrator Faced with the Specificity of Arab Public Policy" (in Najjar's section on "Autonomy of the International Arbitrator", 239–843).

[10] *See*, *e.g.*, the Arabic language references at Articles 2, 37 and 53(2)(b) of UAE Federal Law No. 6 of 2018 Concerning Arbitration, and at Articles 814 and 817(5) of the Lebanese Civil Procedure Code (Lebanon Decree No. 90 of 1983).

[11] *See*, *e.g.*, Articles 10, 17, 35, 36 and 37 of The Convention on Judicial Cooperation between the States of the Arab League, endorsed by the Council of Arab Ministers of Justice on 6 April 1983 (the "Arab League Convention" or "Riyadh Convention").

[12] *E.g.*, "public" has been translated as وطني (*watani/national*), حكومي (*hukumi/government*), اجتماعي (*ijtima'i/society*), جمهور (*jumhur/crowd*), and شعب (*sha'b/people*): *See* MUNIR BA'ALBAKI, AL-MAWRID, A MODERN ARABIC-ENGLISH DICTIONARY 737 (16th ed. 1982).

[13] *E.g.*, "order" has been translated as نظام (*nitham/system*) and ترتيب (*tarteeb/arrangement*) (*see* ROHI BAABLAKI, AL-MAWRID: A MODERN ARABIC-ENGLISH DICTIONARY 1177 (2007)), but also as عدم الفوضى (*adm al fawda*) (*see* HARITH SULEIMAN FARUQI, FARUQI'S LAW DICTIONARY ARABIC TO ENGLISH 355 (2nd ed. 1983)).

[14] *E.g.*, "policy" has been translated as حكمة (*hikma/wisdom*), حكمة عملية (*hikma 'maliya/practical rationale*), and سياسة (*siyasa/politics*): *See* Munir Ba'albaki, Al-Mawrid, *supra* note 13, at 704).

[15] *See*, *e.g.*, Leon Zolondek, *Ash-Sha'b in Arabic Political Literature of the 19th Century*, 10(1/2) DIE WELT DES ISLAMS 1–16 (1965).

that a diverse process of origination and construction of the term "public policy" also exists in the English common law tradition.[16] While generally considered to be coterminous, the teleological difference between Arabic to English translated references to "public policy" or "public order" appears to stem, in part, from the influence of civil law French legislation and codified references to "*l'ordre public*".[17]

In contemporary Middle Eastern arbitration laws, the term "public policy" relates broadly to the rights of States or national courts, to determine whether the subject matter of a dispute is arbitrable, the conduct of the parties or the tribunal in the proceedings was permissible, or the form and content of any award is such that it is either liable to be set aside or incapable of being enforced. It is therefore local judges and judiciaries that are principally tasked with giving texture and meaning to public policy.[18]

In so far as international arbitration is a lucrative industry of global disputes, "pro-arbitration" policies and approaches are actively pursued by nation States as a gateway for encouraging foreign investment. As such, generally "pro-arbitration" Middle Eastern jurisdictions have sought to reduce the role of "public policy", whereby it is considered, ostensibly at least, that an active public policy jurisprudence is a feature of legal regimes hostile to arbitration. However, the pursuit of diverse national arbitration policies poses central questions about the monopoly over justice, and the relationship between national legal systems and international legal orders. This requires both regional legal systems and arbitration practitioners involved in Middle Eastern arbitrations to unpack what it means to be "pro-arbitration".[19]

Contemporary Middle Eastern jurisdictions, the vast majority of which comprise complex and hybrid legal systems bearing features of both civil and common law traditions, often find themselves caught between competing stakeholders in the international arbitration community, each vying for pole position in the global growth of modern arbitration law and practice.

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[16] *See* Percy H. Winfield, *Public Policy in the English Common Law*, 42(1) HARVARD LAW REVIEW 76-102 (1928).

[17] An Arabic-English dictionary reference to النظام العام (*al nitham al 'am*), translated as "public order", also refers to "order public", the French equivalent to public order, as a way of espousing further meaning: *See* Baablaki, *supra* note 13, at 1178). References to "*l'ordre public*" appear in Articles 7, 36, 69, 121, 190, 257, 431, 575, 605, 606, 807, 932, 944, 1006, 1051, 1056, of the Algerian Code of Civil and Administrative Procedure, as amended by Algerian Law No. 8 of 2009, issued on 25 February 2008, and in force from 25 February 2009, published in French (the "Algerian Civil Procedure Code").

[18] With respect to the UAE, it has been suggested that "…the UAE courts appear to have given content to a concept of 'procedural "public policy"', by reference to court decisions concerning the need for an even number of arbitrators, proper execution of arbitral awards, the rules on quorum for rendering arbitral awards, the partiality of arbitrators and the exclusive competence of the courts in disputes involving registered agencies": *See* GORDON BLANKE, COMMENTARY ON THE UAE ARBITRATION CHAPTER 77–82 (2017).

[19] *See* George A. Bermann, *What does it mean to be "pro-arbitration"?* 34 ARB. INT. 341–353 (2018).

Several Middle Eastern jurisdictions have introduced common law fashioned, English language international commercial courts, whilst leaving in place arbitral institutions and local court practices borne out of civil law systems. While these modern growth opportunities engender aspects of the historical development of these systems, they also present a number of questions, particularly with respect to determining public policy matters. Such developments have either not sought to include, or not taken account of the integral place of arbitration within the Arab legal tradition and family of alternative dispute resolution, or the role of Islamic law and the *Shari'a* in the structural formation of their host legal systems. To this end, certain jurisdictions find themselves almost perpetually in pursuit of dominant international norms. Equally, local judiciaries across the Middle East continue to require further education and development in order to effectively officiate and assist the efficient conduct of arbitral proceedings within their national legal systems.[20] These questions and the scope for development, often unintentionally, re-present themselves under the guise of public policy exceptions.

In light of the above, it becomes necessary to establish the contours of State public policy in different national contexts, in order to accurately understand the meaning and impact of divergent national approaches to public policy in arbitration. To work towards determining the public policy framework within a given Middle Eastern jurisdiction, arbitrators and arbitration practitioners may wish to consider the following factors:

- The current legislation governing arbitrability and conduct of arbitration disputes and the influence of common and civil law features in the development of the local arbitration landscape;
- the ascension of the given State to international and regional arbitration treaties on recognition and enforcement of arbitral awards;
- the track record of the local judiciary in providing judicial assistance during ongoing arbitral proceedings, and with respect to enforcement of judgments and local and international arbitral awards;
- the influence of Islamic *Shari'a* on the national legislative and procedural rules governing arbitration and the national legal system generally, including any provisions for religious arbitration;
- the historic national position of, and changing attitudes towards, both local and international arbitration, and an appraisal of the role of arbitration in different nation building contexts, as well as the country experience with arbitrating certain industry disputes; and

[20] For a lucid and insightful background explanation of the regional frictions between local judiciaries and arbitrators across the Middle East, *see* CHIBLI MALLAT, INTRODUCTION TO MIDDLE EASTERN LAW 345–353 (2007). *See* also Faris Nasrallah and Gordon Blanke, *Reflections on the Future of Arbitration in Dubai and the Middle East* 17(4) TDM 1-14 (2020).

- the existence and/or status of extraordinary courts and special tribunals, and the substantive and procedural rules governing those forums.

While these issues will undoubtedly offer up similarities between different systems across the Middle East, the almost innumerable diversity in local, national and regional arbitration governance cautions against espousals of a common Arab or Middle Eastern public policy. Taking account of the above factors, and as a point of departure, arbitrators involved in arbitral proceedings in Middle Eastern jurisdictions should consciously sort between matters which speak to national policy towards arbitration and those substantive and procedural rules that in fact define and govern public policy within a given national legal system.

III. PUBLIC POLICY PROVISIONS IN INTERNATIONAL AND REGIONAL COVENTIONS AND TREATIES RELATING TO ARBITRATION

A. The Development of the Public Policy Exemption under the New York Convention and the Role of the MENA Region

The international agreements for the mutual recognition and enforcement of arbitral agreements and awards reflect as much the interests of international trade as they do political and economic alliances. Historically, the MENA region has had little involvement in the shaping of the international legal frameworks that govern the field of international commercial arbitration, including the determination of the role of public policy. The Geneva Protocol for the Recognition of Arbitration Clauses 1923,[21] the Geneva Convention on the Execution of Foreign Arbitral Awards 1927, as well as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 had all been conceived and promoted by the International Chamber of Commerce (**ICC**) rather than by governments. At its London Congress in 1921, the ICC recommended that "the rules of procedure in arbitration proceedings should be uniform in all countries", including the enforcement of arbitral awards without discussion upon the merits.[22] National exemptions to enforcement should be limited, first, to ascertaining compliance with applicable procedural rules in force in the country where the award was rendered and, secondly, to "whether the award contained anything contrary to the public order in the country in which the enforcement or exequatur is demanded".[23]

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[21] *See* International Chamber of Commerce, Proceedings of the First Congress (London 27 June–1 July 1921, Brochure No. 18), at 97.

[22] *Id.*

[23] Robert Briner and Virginia Hamilton, *The History and General Purpose of the Convention – The Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreements*, in EMMANUEL GAILLARD AND DOMENICO DI PIETRO (EDS.) ENFORCEMENT OF ARBITRATION

Thirty years later, at the conclusion of World War II, the ICC again led the campaign to reform the international law governing the recognition and enforcement of international arbitral awards. This time the ICC went a step further. The success of international trade depended on the recognition of the idea of an international arbitral award, i.e., an award that was completely independent of national laws and that could be enforced in all countries in the same way. While the ICC conceded that all legal relationships were subject to some national law, it would, at the same time, "be hard to imagine the sense of frontier and of sovereignty disappearing, economically to start with and later politically, without the simultaneous establishment of international forms of procedure along similar lines".[24] According to the ICC, the autonomy of will should be recognised as a valid source of private international law, as had already been reflected in some conventions, "such as the Rome's Institute Draft Uniform Law".[25] At the same time, the ICC conceded that the conditions "insisting on the public order of the country in which enforcement is sought and on that of all legal systems (such as respect of the rights of defence) cannot but be maintained in principle".[26]

The Ad Hoc Committee set up by the UN Economic and Social Council to study the ICC Draft found the ICC campaign for an international, effectively delocalised, arbitral award that was independent of a national legal system as an "interesting and extremely bold idea" that was, however, not juridically feasible.[27] The ICC was more successful in narrowing down the public policy exemption for the enforcement of international arbitral awards to a simple reference to national public policy. Article 1(e) of the Geneva Convention 1927 referred to public policy and the "principles of law of the country". Article 4(h) of the UN Draft of 1955 proposed that enforcement could be refused if "the award, or the subject thereof, would be clearly incompatible with public policy or with fundamental principles of the law (*ordre public*) of the country in which the award is sought to be relied on". The proposal of the ICC ultimately prevailed. The final wording of public policy exemption in Article V(2)(b) of the New York Convention provides that recognition and enforcement of an arbitral award may also be refused if

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AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS – THE NEW YORK CONVENTION IN PRACTICE (Cameron May Ltd 2008) 3–38.

[24] ICC, Enforcement of International Arbitral Awards. Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting on 13 March 1953 (Brochure 174), *available at* http://newyorkconvention1958.org/visionneuse.php?lvl=afficheur&explnum=2932#page/1/mode/2up (last accessed on 30 July 2022).

[25] *Id.* at 8.

[26] *Id.*

[27] Briner & Hamilton, *supra,* note 23, at 13. Anton G. Maurer argues that it was the term "international arbitral award" that was considered unsuitable because it was associated with the appropriate expression for arbitration between states: *See* ANTON G. MAURER, THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION: HISTORY, INTERPRETATION, AND APPLICATION 23 (2012).

doing so would be contrary to the public policy of that country. The qualification of the term public policy with "of that country" allows for only interpretation, namely that the UN Conference did not intend to provide for a transnational meaning of public policy.[28]

In the MENA region, Iraq (1926),[29] and Israel (1951) remain participants of the Geneva Protocol 1923. In addition, Palestine (1931, by adherence), and Israel (1951) remain participants of the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. In contrast to their absence from the adoption of the two instruments adopted in Geneva, a number of countries from the MENA region were present during the drafting and adoption of the New York Convention. Egypt was particularly active, being amongst the eight countries that formed the Ad Hoc Committee established by the UN Economic and Social Council in 1954 to consider the ICC Draft Convention. Mr. Osman, the Egyptian representative of the Ad Hoc Committee, had proposed that in the new Convention the public policy exemption should be expressed as "contrary to public policy or to the basic principles of the country in which it is sought to be relied on".[30] Subsequently, Lebanon was amongst the 15 countries that submitted comments to the Secretary General on the Draft UN Convention.[31] Forty-five countries participated in the concluding United Nations Conference on International Commercial Arbitration that took place in New York from 20 May to 10 June 1958. In relation to the public policy exemption, it was Iran that expressed a preference for following the wording of the 1927 Geneva Convention and, for the sake of clarity, to use the words "clearly incompatible with public policy or with fundamental principles of law (order public)".[32] Tunisia was a member of the Working Party No. 3 of the UN Conference that had been assembled to consider the public policy exemption. Finally, at the final UN Conference that adopted the New York Convention, it was Israel that actively participated in the discussion of the proposal of the Working Party No. 3.

At the conclusion of the UN Conference, Jordan[33] and Israel were amongst the first ten countries that signed the New York Convention on 10 June 1958. The Convention came into force on 7 June 1959, after Morocco, Egypt and Syria had also deposited instruments of ratification or accession with the Secretary-General. Others joined later: Tunisia in 1967, Kuwait in 1978, Bahrain

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[28] MAURER, *Id.* at 53. The supplemental explanation of the UNCITRAL Model Law on International Commercial Arbitration 2006 ("UNCITRAL Model Law") aims to define "public policy" more precisely as "to be understood as serious departures from fundamental notions of procedural justice".

[29] Not being a participant of the New York Convention, the Geneva Protocol 1923 remains relevant for Iraq.

[30] MAURER, *supra* note 27, at 21.

[31] *Id.* at 26.

[32] *Id.* at 41.

[33] Jordan subsequently ratified the New York Convention in 1979.

in 1988, Algeria in 1989, Lebanon in 1989, Saudi Arabia in 1994, Mauritania in 1997, Oman in 1999, Iran in 2001, Qatar in 2002, UAE in 2006, the State of Palestine in 2015 and, most recently, Sudan in 2018, Iraq in 2021. Currently, only Libya, Somalia and Yemen have not acceded to the New York Convention.[34]

B. The Development of Public Policy Provisions in MENA Treaties and Conventions relating to Arbitration

The active participation of certain MENA nations in the drafting of the New York Convention cannot mask the regional disillusionment and disappointment with the world of arbitration. The Middle East's early experiences with international commercial arbitration showed it as insensitive, indeed even hostile, to its legal traditions, among other concerns over neutrality and independence. It was in particular Lord Asquith's infamous arbitral award in *Trucial Coast Ltd. v. Abu Dhabi*,[35] rendered in 1951, which some argue has haunted the Middle East like a ghost, stunting the growth of international commercial arbitration in the region for decades.[36] Sitting as a sole arbitrator, Lord Asquith had described the municipal law of Abu Dhabi as a system of "purely discretionary justice with the assistance of the Koran", holding that "it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments".[37]

Lord Asquith's ghost became the symbol of the arbitration crisis in the Arab world. The preferential application of the law of European countries was one manifestation of the crisis. Others were the impression that a small number of European arbitrators, confined to their own European legal culture, had a monopoly over Arab-European arbitration. In these arbitrations, Arab parties were at a disadvantage because the language of the arbitration was often not

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[34] For further detail on Iraq's long history of joining the New York Convention and the role of its continued membership of the 1923 Geneva Protocol for the Recognition of Arbitral Awards: *See* Noor Kadhim, *"Between Iraq and a Hard Place": The Problem of Non-Ratificatino of the New York Convention in Baghdad*, KLUWER ARBITRATION BLOG (18 March 2014), http://arbitration blog.kluwerarbitration.com/2014/03/18/between-iraq-and-a-hard-place-the-problem-of-non-ratification-of-the-new-york-convention-in-baghdad/ (last accessed on 30 July 2022).

[35] *Petroleum Development Co. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi* (Arbitral Tribunal comprising Lord Asquith of Bishopstone as Sole Arbitrator) 18 ILR 144 (1951). Other examples of awards regularly referred to for being dismissive of Middle Eastern and Islamic legal cultures include *Ruler of Qatar v. International Marine Oil Co. Ltd.* 20 ILR 534 (1953); and *Saudi Arabia v. Arabian American Oil Co. (Aramco)* 27 ILR 117 (1963).

[36] *See* Reza Mohtashami, *Banishing the Ghost of Lord Asquith's Award: A Resurgence of Arbitration in the Middle East*, 1(1) BCDR INT'L ARB. REV. 121–124 (2014).

[37] Paragraph 5 of the final award in *Trucial Coast Ltd. v. Abu Dhabi*, *supra* note 35.

Arabic. Equally, there was an imbalance in the outcome of Euro-Arab arbitrations, whereby the European investor usually prevailed over the Arab host country.[38]

From the early 1950s onwards, MENA countries embarked on regional solutions to address the arbitration crisis in the Arab world by adopting a number of regional treaties for the reciprocal recognition of judgements and arbitral awards, among them the following:

- Arab League Convention on the Enforcement of Judgments and Arbitral Awards 1952 ("**The Arab League Convention**");[39]
- Convention Establishing the Inter-Arab Investment Guarantee Corporation 1971 ("**IAIGC Convention**");[40]
- Unified Agreement for the Investment of Arab Capital in the Arab States 1980;[41]
- Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference 1981 ("**APPGI of the OIC**");
- The Arab Convention of Judicial Corporation 1983 ("**Riyadh Convention**");[42]
- The Arab Convention on Commercial Arbitration 1987 ("**Amman Convention**");[43]
- Islamic Corporation for the Insurance of Investment Credit 1992;[44] and
- GCC Protocol 1995.[45]

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[38] *See* Abdul Hamid El Ahdab, *Is there an Arbitration Crisis in the Arab World*, *in* STRENGTHENING RELATIONS WITH ARAB AND ISLAMIC COUNTRIES THROUGH INTERNATIONAL LAW (papers emanating from the Fourth PCA International Law Seminar October 12, 2001) 309–318 (Permanent Court of Justice/Peace Palace Papers ed. 2002).

[39] The Arab League Convention on the Enforcement of Foreign Judgments and Awards was signed by members of the Arab League of States on 14 September 1952.

[40] The Convention Establishing the Inter-Arab Investment Guarantee Corporation 1971, as amended by Council Resolution No. 9 of 1987, has twenty one contracting countries, seven of which acceded to the convention between 1976 and 1988.

[41] Issued on 26 November 1980. For an example of an arbitral award issued under the Unified Agreement for the Investment of Arab Capital in the Arab States 1980, *see* the Final Award in *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, rendered in Cairo on 23 March 2013, and which was the subject of an annulment application. It is notable that Libya advanced a public order argument as part of a jurisdictional challenge during the proceedings: *See* para. 20a-1-2 at 209 of the *Final Award in Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*).

[42] The Convention on Judicial Cooperation between the States of the Arab League, endorsed by the Council of Arab Ministers of Justice on 6 April 1983 (the "**Arab League Convention**" or "**Riyadh Convention**").

[43] Concluded in Amman between 11 and 14 April 1987.

[44] *Articles of Agreement of the Islamic Corporation for the Insurance of Investment and Export Credit*, concluded in Tripoli, Libya in Tripoli on 19 February 1992.

[45] The Gulf Cooperation Council Convention for the Execution of Judgments, Delegations and Judicial Notifications, was concluded on 4 June 1995.

Of the three regional conventions that refer to international commercial arbitration, the Arab League Convention of 1952 has been replaced by the Riyadh Convention and is of limited practical importance to the practitioner.[46] The Riyadh and the Amman Conventions retain some practical relevance in relation to the three States that have not acceded to the New York Convention, namely Libya, Sudan and Yemen.[47] All three are signatories to the Riyadh Convention,[48] and, in addition, Sudan and Yemen are also signatories to the Amman Convention. Despite their limited practical significance, it is still worth recalling the Riyadh and the Amman Convention, if only to appreciate their role in creating regional solutions to the imbalance in arbitral practices involving the Arab world, as well as their role shaping the public policy exemptions in MENA seated arbitrations.

In some respects, the Riyadh Convention succeeds where the ICC had failed, namely in conceiving an international framework for the recognition and enforcement of arbitral awards as part of a larger endeavour to create uniform legal and institutional orders that transcended national borders. The Preamble of the Riyadh Convention stresses that "the legislative unity between the Arab countries is a national objective which must be met in order to realize the Arab unity". The Convention's inclusion of express references to Islamic law as constituting Arab public policy gives concrete expression to such legislative unity. Article 37 of the Riyadh Convention, headed Arbitral Awards, provides that the competent judicial authority of the contracting State where enforcement is sought may refuse the enforcement of the award *inter alia* if the award is "contrary to the provisions of the Islamic Sharia'a, public policy or good morals".[49] In singling out and expressly referring to "Islamic Sharia'a", the Riyadh Convention separates Islamic law from national definitions of public policy and, arguably,

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[46] The member States of the Arab League Convention were Jordan, Syria, Iraq, Saudi Arabia, Lebanon, Egypt and Yemen. Article 2 of the Arab League Convention 1952 provided a public policy exemption for the enforcement of judgements that did not accord "with the public order or morals in the State, or when it violates international public order." For a brief discussion of the Arab League Convention, *see* Husain M. Al-Baharna, *The Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain*, 4(4) ARAB LAW QUARTERLY 332–344, 333 (Nov. 1989); and Samir Saleh, *The Recognition and Enforcement of Arbitral Awards in the States of the Arab Middle East*, 1(1) ARAB LAW QUARTERLY 19-31 (Nov. 1985).

[47] For an introduction to the Riyadh and Amman Conventions, *see* Abdul Hamid El-Ahdab, *Enforcement of Arbitral Awards in the Arab Countries*, 11(2) Arb. Int. 169, 178–180; and ABD AL-ḤAMID EL-AḤDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 875-887 (3rd ed. 2011). Both conventions remain relevant for the mutual recognition of judgements.

[48] With the exception of Egypt and the Comoros, all member States of the League of Arab States have ratified the Riyadh Convention: Algeria (2001), Bahrain (2000), Iraq (1984), Jordan (1986), Libya (1988), Morocco (1987), Mauritania (1985), Oman (1999), Palestine (1983), Saudi Arabia (2000), Somalia (1985), the UAE (1999) and Yemen (both the People's Democracy of Yemen and the Yemen Arab Republic in 1984).

[49] Article 30 of the Riyadh Convention, in the context of the refusal of recognition of judgements, adds provisions of the constitutions of the contracting states.

makes the application of *Shari'a* principles more extensive under the Riyadh Convention than under the national laws of its signatories.

In referring to "Islamic Sharia'a", the Riyadh Convention is the only international treaty for the enforcement of arbitral awards that provides specified normative content to the concept of "public policy". It is generally accepted that the New York Convention reference to public policy denotes fundamental legal principles, a departure from which would be incompatible with a national legal systems fundamental notions of justice or morals or conflict with its fundamental national or economic values. Equally, it is generally accepted that whilst the concept is nebulous and difficult to define, it would be useful to agree on a workable definition of the concept, because it "would provide an effective way of preventing an award in an international arbitration being set aside for purely domestic policy considerations."[50] This goal has proven elusive, with the unruly horse and the chameleon,[51] being some of the more concrete definitions, and contracts concerning gambling,[52] illegal arms deals, slavery or cocaine being the more tangible examples: "If a workable definition of international public policy could be found, it would provide an effective way of preventing an award in an international arbitration from being set-aside for purely domestic policy considerations".[53]

Arbitration practitioners and academics are divided over the merits of introducing Islamic law as part of an internationally mandated public policy exemption. Approvingly, El-Ahdab finds that the Riyadh Convention under Article 37 "introduces a religious element and a kind of law common to the religious countries, i.e. the Moslem Sharia, whereby the Convention refuses to recognize decisions which are contrary to *Shari'a*."[54] Kilian Bälz focuses on the practical difficulties inherent in the recognition of Islamic law as a transnational norm that binds national courts. What will happen if an arbitral award is found to be repugnant to Islamic *Shari'a* but not in breach of the public policy that applies in the State where enforcement is sought? Taken in isolation, the reference to Islamic *Shari'a* as a public policy exemption could potentially prevent the enforcement of an arbitral providing for the payment of interest, despite the State where enforcement is sought actual permitting interest to be charged.[55]

For Hassan Al Radhi, the Riyadh Convention looks like a "nostalgic legal ghetto". Its undifferentiated references to the *Shari'a*, combined with a

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[50] BLACKABY, PARTASIDES & REDFERN, *supra* note 3, at 600, 10.87.

[51] WILLIAM PARK, ARBITRATION IN INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 323 (2nd ed. 2012).

[52] BLACKABY, PARTASIDES & REDFERN, *supra* note 3, at 598, 10.82.

[53] *Id.* 600, 10.87.

[54] EL-AḤDAB & EL-AHDAB, *supra* note 47, at 895.

[55] Killian Bälz and Aouni Shahoud Almousa, *The Recognition an Enforcement of Foreign Judgements and Arbitral Awards under the Riyadh Convention (1983) Thirty Years of Arab Judicial Co-Operation* 4 IJPL 273–288, 284 (2014).

confusing system of references and cross-references between overlapping conditions of exequatur of judgements and awards, made the Riyadh Convention "a rather unattractive regional instrument for many Arab States, despite the plethora of signatures".[56]

The Amman Convention, adopted in 1987, also aimed to address the arbitration crisis in the Arab world. Like the Riyadh Convention, its political background was stronger than the legal one.[57] Rather than referring to religious law, the Amman Convention stressed both modernisation as well as geo-political and linguistic unity. The Preamble of the Amman Convention on Commercial Arbitration refers to the need to formulate unified Arab rules on commercial arbitration, the wish to "obtain a fair balance in the matters of solution of disputes which might arise out of international commercial contracts" and the objective of the Council of Arab Ministers of Justice to "unify Arab legislations and their adoption to modern evolution". The Amman Convention achieves these aims by anchoring its institutions, personnel and processes in a regional, Arab context. Article 4 provides for the establishment of an Arab Centre for Commercial Arbitration with a Board of Directories "made up of Arab personalities experienced in matters of law and arbitration" (Article 5). Article 23 provides that the language of the proceedings, pleadings and the award is Arabic. Under Article 35 of the Amman Convention, enforcement of an award can only be refused if the Supreme Court of each contracting State finds it to be contrary to public policy. In omitting the inclusion of Islamic law in the definition of public policy, the Amman Convention replicates the conceptual uncertainty inherent of Article V(2)(b) of the New York Convention:

> However, public policy is not the same in each of the Arab countries. For example, some of these countries hold that interest on money is contrary to public policy, whereas others authorize, in their civil and commercial laws, payment of interest which does not exceed a certain rate. It results that arbitral awards remain subject to systems of public policy which vary from country to country. It should be added that awards covered by the Convention are international awards. Would the public policy referred to be national or international public policy?[58]

Finally, the Charter of the Gulf Corporation Council, created in 1981, appeals to the member States' conviction to serve the "sublime objectives" of the Arab nation and Arab and Islamic causes, calling in Article 4 to "effect coordination, integration and inter-connection between Member States in fields in order to

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[56] Hassan Al Radhi, *Bahrain*, *in* COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: JORDAN, KUWAIT, BAHRAIN, AND SAUDI ARABIA 217–326, 320 (Samir Saleh ed., 2nd ed. 2012).

[57] EL-AḤDAB & EL-AHDAB, *supra* note 47, at 887.

[58] *Id.* at 886–887.

achieve unity between them".[59] The GCC Convention aims to realise these political and economic objectives for coordination and integration regarding the reciprocal recognition and enforcement of judgements. Article 2 of the GCC Convention provides for the public policy exception to the reciprocal recognition of judgements, for judgements to be denied recognition if it is in "in violation of the provisions of *Shari'a*, the provisions of the Constitution or the public order in the State where the judgement is required to be executed".

IV. PUBLIC POLICY PROVISIONS IN NATIONAL LEGISLATION

Having considered the abovementioned international and regional treaties and conventions, in order to accurately determine the public policy landscape within a given Middle Eastern jurisdiction, arbitrators and arbitration practitioners have no choice but to refer to the relevant national arbitration laws and applicable arbitral rules. While these provisions are often expressly referenced within the respective national arbitration laws concerning recognition and enforcement of arbitral awards, practitioners should also consider other national legislation which might mandate compliance with public policy in relation to arbitrability of certain industry disputes and conduct within proceedings.[60] Notwithstanding the absence of any doctrine of precedent within Middle Eastern jurisdictions, attention should also be paid to established and persuasive court decisions related to these provisions and public policy generally.[61]

Before turning to overviews of individual MENA jurisdictions, it is useful to identify certain common denominators and cross-cutting themes that surround the issue of public policy and commercial arbitration in the region. The first of these common denominators is the absence of any sharp divisions between concepts of domestic, international and transnational public policy. With the exception of certain States such as Algeria, Lebanon and Tunisia,[62] the arbitral

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[59] Concluded in 1981, the parties to the Charter of the Cooperation Council for the Arab States of the Gulf are the UAE, Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, Qatar and Kuwait.

[60] *E.g.*, Article 15(2) of Syrian Law No. 32 of 2019, on the Formation of the State Council and its Powers, concerning the authority of competent state courts to decide on the annulment of arbitral awards in disputes related to commitment contracts, public works and supply contracts or any other administrative contract, as well as contracts concluded by professional unions and grass-roots organizations.

[61] Admittedly, for some jurisdictions this is easier said than done. For instance, BLANKE'S THE UAE ARBITRATION CHAPTER *supra* note 18, and more recently BLANKE ON UAE ARBITRATION LEGISLATION AND RULES: A MULTI-VOLUME ARTICLE-BY-ARTICLE COMMENTARY, VOLUME I (2nd ed. 2021) contain a detailed discussion and analysis of arbitration related case law and legal developments in the UAE. For other MENA jurisdiction, such comprehensive and accessible analysis remains work in progress.

[62] Article 78 of Tunisian Law No. 94 of 1993, the Arbitration Law, refers to the exception of public policy for setting aside arbitral awards "as understood in private international law".

laws of MENA jurisdictions generally do not differentiate between international and domestic public policy. In addition, issues of transnational public policy tend to be subsumed under the shared influence of Islam and Islamic law. Secondly, in formulating concepts of public policy, courts draw on a wider range of sources than their counterparts outside the MENA region. Importantly, this range of sources includes religious law, namely the Islamic *Shari'a*. Generally speaking, within the MENA region the constitutional recognition of Islam as the official religion not only mandates that the actions of the ruler or the government should be in harmony with *Shari'a*, but that formulations of public policy should be as well. In 1979, the Court of Cassation of Egypt expressed the confluence of secular and religious factors in informing public policy as follows:

> Public policy represents the principles that aim at realizing the public interest of a country, from a political, social and economic perspective. The concept is based on a purely secular doctrine that is to be applied as a general doctrine. . . . However, this does not exclude that [public principle] is sometimes based on a principle related to religious doctrine in the case when such a doctrine has become intimately linked with the legal and social order, deeply rooted in the conscience of society. . . . The definition [of public policy] is characterized by objectivity, in accordance with what the general majority of individuals of the community believe.[63]

In addition to references to Islam, regional formulations of public policy are often based on purely secular considerations of public welfare. The third common denominator is therefore the role played by national social or economic policies in excluding particular subjects from the scope of both international and domestic arbitration. For example, in much of the MENA region, disputes involving real estate fall under the exclusive jurisdiction of the courts, reflecting the State's public interest in protecting the social function of landed property: "where the right of ownership comes into conflict with a public interest, the latter takes precedence".[64] Lastly, and perhaps least easily classified, are the many examples of applications of "procedural public policy", i.e., the application of particular formal requirements to the recognition of enforcement of arbitral awards as matters of judicially determined public policy. Of these four, it is the role of Islam and that of procedural public policy that are expanded upon below as areas of particular interest to arbitration practitioners.

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[63] Court of Cassation, Nos. 16 and 26, Year 48 (14 January 1979), trans. Maurits Berger, *Public Policy and Islamic Law: the Modern* Dhimmì *in Contemporary Egyptian Family Law*, 8 ISLAMIC LAW AND SOCIETY 88-122 (2001), as quoted by CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT. THE INCORPORATION OF THE SHARI'A INTO EGYPTIAN CONSTITUTIONAL LAW 141 (2006).

[64] FARHAT J. ZIADEH, PROPERTY LAW IN THE ARAB WORLD. REAL RIGHTS IN EGYPT, IRAQ, JORDAN, LEBANON, LIBYA, SYRIA, SAUDI ARABIA AND THE GULF STATES 27 (1979).

A. Shari'a *and Public Policy*

The majority of MENA jurisdictions recognise Islam as the State's religion and as the principal source of law. By way of example, Article 7 of the Constitution of the UAE identifies Islam as the official religion and the Islamic *Shari'a* as the main source of legislation. Most prominent is the role of Islam and the *Shari'a* as a source of law in the case of Saudi Arabia. Article 1 of Saudi Arabia's Basic Law of Governance of 1992 names Islam as the State's religion and "the Holy Qur'an, and the Sunna (Traditions) of the Prophet (**PBUH**)" as its constitution. In turn, Article 23 provides that it is the duty of the State to apply the Sharia and, under Article 48, that

> Courts shall apply rules of the Islamic Sharia in cases that are brought before them, according to the Holy Qur'an and the Sunna, and according to laws which are decreed by the ruler in agreement with the Holy Qur'an and the Sunna.

Enshrined at the very heart of their constitutions, the *Shari'a* radiates across the entire legal system in most MENA jurisdictions. Thus, the UAE Civil Code requires judges to apply the Islamic *Shari'a* in cases not covered by statutory law.[65] Article 3 of the UAE Civil Code lists particular matters, such as personal status, provisions relating to the systems of governance, freedom of trade and circulation of wealth as constituting public policy, as being subject to the "imperative provisions and fundamental principles of Islamic *Shari'a*." Article 27 restricts the freedom to contract with reference to Islam: a court can only recognize the parties' choice of the governing law of the contract to the extent that it does not violate Islamic *Shari'a*, public policy or morals.

In the context of international commercial arbitration, the role and influence of *Shari'a* is most noticeable with respect to the overlapping issues of objective arbitrability and of enforceability of arbitral awards. Summarised briefly, the *Shari'a* prohibits two types of consensual transactions, namely the charging of interest, or, at least, usuary interest (*riba*), and that of aleatory or uncertain obligations (*gharar*).[66] Both prohibitions are based on the scriptural authority of the Quran and Sunnah, the principle and immutable sources of Islamic law which have "primacy over any human, State or conventional norm."[67] The moral dimension of the Islamic law of contract mandates an equivalence of services. Enrichment that is not earned through honest work but is based on either chance, i.e., *gharar*, or the gaining of monetary advantage without counterpart, i.e., interest, does not meet the requirement of "perfect equivalence of services."[68]

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[65] Article 1 of UAE Federal Law No. 5 of 1985, on Civil Transactions.

[66] FRANK E. VOGEL & SAMUEL L. HAYES, ISLAMIC LAW AND FINANCE. RELIGION, RISK AND RETURN 63 (1998).

[67] NAJJAR, *supra* note 9, at 799.

[68] *Id.* at 801.

As explained by Nabil Saleh, the prohibitory rules on *riba*, i.e., the "unlawful advantage by way of excess or deferment", and *gharar*, i.e. "uncertainty, risk and speculation", are "unanimously acknowledged, in principle at least, by Muslims".[69]

There is, however, variation across the MENA region in the application of these widely acknowledged, if not ubiquitous principles. Some MENA jurisdictions such as Saudi Arabia, prohibit interest entirely while others have opted for partial prohibitions. Its total prohibition means that in Saudi Arabia, a court will refuse to enforce domestic or international arbitral awards which provide for the payment of interest. Other jurisdictions differentiate between civil and commercial matters, allowing interest only with regard to the latter.

For the arbitration practitioner, it is important to note that even in situations where the curial law of the arbitration and the governing law of the contract permit interest, the issue of its prohibition under Islamic law could remain relevant. Contracts concerning Islamic banking and Islamic financial instruments are by definition supposed to comply with the *Shari'a* prohibition of interest. This object of the contract is achieved by the incorporation of contractual clauses that provide for compliance with *Shari'a*, such as "[t]he parties hereby acknowledge that this Agreement is Shariah compliant", or, as in the case of *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd*,[70] that "[s]ubject to the principles of the Glorious Sharia'a, this Agreement shall be governed by and construed in accordance with the laws of England". Regarding the latter clause, the English Court of Appeal held that:

> ...the words are intended simply to reflect the Islamic religious principles according to which the Bank holds itself out as doing business rather than a system of law intended to 'trump' the application of English law as the law to be applied in ascertaining the liability of the parties under the terms of the agreement. ….I share the judge's view that, having chosen English law as the governing law, it would be both unusual and improbable for the parties to intend that the English court should proceed to determine and apply the Sharia in relation to the legality or enforceability of the obligations clearly set out in the contract.[71]

Arguably, in much of the MENA region, the application of Islam as a matter of transnational public policy would lead to a different result, with the judge and the arbitral tribunal being required to apply Islamic law to the interpretation of the contract and the decision of the case. Thus, an arbitral award is liable to be set aside or its enforcement refused as a matter of public policy if

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[69] NABIL A. SALEH, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW 3 (1992).

[70] [2004] 1 WLR 1784.

[71] *Id.* para 54. For further analysis of this judgment, *see* Kilian Balz, *Shamil Bank of Bahrain v. Beximco Pharmaceuticals and Others*, 9 YEARBOOK OF ISLAMIC & MIDDLE EASTERN LAW 509–626 (2002–2003).

it fails to apply Islamic law, despite not being named as the governing law of the contract.

Given the continued rise and growth of Islamic banking and finance industries, it is likely that the issue of contractual *Shari'a* compliance, rather than legal prohibitions of interest, will become an increasingly common feature for arbitration practitioners in the MENA region.[72]

B. Procedural Public Policy

Charles Brower's and Jeremey Sharpe's observation in 2003 that "national courts of Islamic States often have rejected foreign awards on domestic policy grounds, including precepts of Islamic Law" can now be revised. It seems clear that national courts of MENA jurisdictions do not often reject foreign awards on public policy arguments grounded in Islamic law. However, public policy remains an important factor in MENA based commercial arbitrations. It is in particular the application of public policy considerations to an array of procedural and formal matters that tend to undermine the confidence of arbitration practitioners and users in the arbitral systems of some MENA jurisdictions. The matters included within the category of procedural public policy cannot be defined easily.

Whilst many of these procedural requirements are based on mandatory requirements incorporated into legislation, such as the rules prescribing the form and substance of an arbitration agreement,[73] others are derived from public policy considerations. Writing in 2014, Nayla Comair-Obeid noted that "[m]ore recently there has been a trend in some Middle Eastern jurisdictions to adopt a highly formalistic approach regarding the practical exigencies for the issuance of the arbitration award."[74] With reference to the UAE, Gordon Blanke usefully employs the term "procedural public policy" in order to capture and analyse the application of the concept of public policy to a wide range of procedural irregularities, raised *ex offico* by courts in setting aside or enforcement applications. These include:

> ...the even number of arbitrators, the proper execution of an arbitral award, the rules on quorum in rendering an arbitral award, the partiality of an arbitrator, the exclusive competence of the courts in disputes involving registered agencies, Art. 27 of the UAE Civil Transactions Code and Art. 409 of the UAE Criminal Code.[75]

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[72] AHMAD ALKHAMEES, A CRITIQUE OF CREATIVE SHARI'AH COMPLIANCE IN THE ISLAMIC FINANCE INDUSTRY 11 (2017).

[73] NAJJAR, *supra* note 9, at 303.

[74] *Id.* at 65

[75] BLANKE, *supra* note 18, at 80. *See* also Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, 20(4) ARB. INT. 333–354 (2004).

Across the MENA region, much of procedural public policy emerges through caselaw rather than legislation, possibly reflecting, as Chibli Mallat has argued, a rising frustration on the part of judges who are paid fixed salaries but find "a glittering chunk of commercial law, typically involving commercial transactions with a large monetary significance, being diverted to wealthy lawyers, or worse, to retired or former judges".[76] Comair-Obeid's prudent advice to both arbitrators and parties to "watch out" remains relevant.

C. Public Policy Provisions in MENA National Legislation

The following examples illustrate the different national law approaches to public policy found in Egypt, Syria, Oman, Kuwait, Algeria, Lebanon, Iraq, the UAE, Qatar, Bahrain, and Saudi Arabia.

(1) Egypt

Egypt, a signatory to the New York Convention, introduced a dedicated arbitration law in 1994.[77] Inspired by the UNCITRAL Model Law and motivated by a desire to attract foreign investment, Egyptian Law No. 27 of 1994, Concerning Arbitration in Civil and Commercial Matters, governs both domestic and international arbitration.[78] Public policy can be invoked in relation to actions for the setting aside and for the enforcement of an arbitral award. In an action of nullity, the court seized with the action can set aside an arbitral award on its own motion if it violates the public policy of the Arab Republic of Egypt.

Article 53(2) of Egyptian Law No. 27 of 1994 provides that "[t]he court adjudicating the action for annulment shall ipso jure annul the arbitral award if it is in conflict with the public policy in the Arab Republic of Egypt".[79] Pursuant to Article 54, a court will only enforce an arbitral award that does not violate public policy in the Arab Republic of Egypt.[80] A 2009 survey of arbitration law and practice in Egypt found that courts construed public policy narrowly and that its authors were not aware of any foreign awards that had been refused enforcement on the grounds of public policy under Article V(2)(b) of the New

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[76] MALLAT, *supra* note 20, at 349. Mallat recommends for the salaries of judges to be increased to the level of that of international arbitrators.

[77] Egypt ratified the New York Convention on 10 June 1958, which entered into force on 8 June 1959 under Presidential Decree No. 171 of 1959.

[78] Egyptian Law No. 27 of 1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, issued on 21 April 1994 ("**Egyptian Law No. 27 of 1994**").

[79] EL-AḤDAB & EL-AHDAB, *supra* note 47, at 157. The authors point out that Egyptian public policy does not mean international public policy. Therefore, "public policy would be violated if the arbitration agreement … refers a dispute to arbitration despite the restrictive jurisdiction of the courts thereon. … When public policy is violated, the court sets aside the award on its own motion even if no party raised the issue" (219).

[80] Article 53(1)(g) of Egyptian Law No. 27 of 1994.

York Convention.[81] The survey also found the same judicial attitude reflected in the enforcement of domestic awards, with courts construing public policy in a very narrow way and showing a tendency in favour of enforcement.[82]

By way of specific example, and under the guise of Article 53(2) of Egyptian Law No. 27 of 1994, the Egyptian Court of Cassation has repeatedly empowered the Egyptian public prosecution services to challenge arbitral awards violating the regulation of foreign ownership of real estate, which under specific legislation is exclusive to Egyptian nationals in designated areas,[83] and more broadly is deemed a matter of public order.[84]

(2) Syria

Syria signed the New York Convention on 9 March 1959 and gave effect to it on 7 June 1959. In order to promote foreign investment, a dedicated arbitration law was enacted in 2008. Inspired by the UNCITRAL Model Law and the Egyptian Arbitration Law, the national arbitration law of Syria,[85] has been hailed as following the trend of international arbitration and strengthening the role of institutional arbitration. As arbitration was becoming a credible alternative to litigation in the Arab world, the UNCITRAL Model Law was perceived to be the most appropriate template to follow not least due to its business-friendly provisions.

Under the Syrian Arbitration Act, arbitration agreements are not permitted in matters contrary to public order, which are specified as those which relate to nationality, personal status or where compromise is precluded.[86] Notably, this prohibition does not apply where the agreement concerns "financial effects" resulting from such matters although the term "financial effects" is undefined in the Syrian Arbitration Act. Regarding the annulment of arbitral awards, Article 50(2) of the Syrian Arbitration Act states that "[t]he court seized with the action of nullity shall rule by its own motion for the annulment of the arbitral award if its content violates the public order of the Syrian Arab Republic". Similarly, on enforcement Article 56(2)(b) of the Syrian Arbitration Act provides

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[81] Hossam Tawfik Hafez (et. al), *Arab Republic of Egypt*, *in* THE PRACTITIONER'S GUIDE TO ARBITRATION IN THE MIDDLE EAST AND NORTH AFRICA 83 (Essam Al Tamimi ed. 2009).

[82] *Id.* at 79. *See* also EL-AḤDAB & EL-AHDAB, *supra* note 47, at 156-223.

[83] *See*, *e.g.*, Egyptian Law No. 14 of 2012, Concerning the Integral Development of the Sinai Peninsula, Egyptian Law No. 114 of 1946, on Property Registry and Certification and Egyptian Law No. 230 of 1996, Regulating the Ownership by Foreigners of Buildings and Land Plots.

[84] *See* Mohamad Talaat (et. al) *Egypt*, *in* THE BAKER MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK 153-163 (10th Anniversary Edition 2016–2017).

[85] Syrian Law No. 4 of 2008, the Syrian Arbitration Act (the "**Syrian Arbitration Act**"). The English language translation of this law has been produced by Sayed & Sayed Attorneys at Law.

[86] Article 9(2) of the Syrian Arbitration Law 2008. This provision is inherited from Article 507 of the Syrian CPC.

that an award shall not be enforced unless it is verified that the award "is not contrary to a judgment previously issued by the Syrian courts on the subject matter of the dispute". As with most national courts across the region, the Syrian courts have developed experience in arbitration and appear to be conscious of the implications of invoking the public policy exceptions. In Syrian Court of Cassation Case No. 741 of 2007, an application to set aside enforcement of an arbitral award concerning a dispute over a brokerage contract, on the basis of an alleged violation of public order, was rejected by the court. Leave for enforcement was confirmed by the Syrian Court of Appeal and again by the Syrian Cassation Court.

The major obstacle hindering progress towards increasing recourse to arbitration is quite visibly the ongoing conflict in the country since 2011. The rationale behind enacting the Syrian Arbitration Act was an attempt to instil confidence among foreign investors who were taking notice of Syria at the time. It was evident that Syria's economic prospects were on the rise in the decade before 2011. Companies from around the world, particularly from the Gulf region, were investing capital into the country. Although scant attention has been paid to the development of Syrian arbitration law, recent legislative and court developments show that arbitration is pervasively planted throughout the Syria legal system.[87]

(3) Oman

The national arbitration law of Oman,[88] permits the courts of their own volition to "nullify the arbitration award if such an award is contrary to the public order of the Sultanate of Oman".[89] With similar license in respect of enforcement, the Omani courts are not permitted to issue orders for enforcement of an arbitral awards without first confirming that "the award does not contain any terms which are contravening the public order of the Sultanate of Oman".[90] Regarding disputes arising out of administrative contracts concluded with Omani public entities, which are broadly considered as matters of public policy, there remains a degree of uncertainty as to the requirements to crystallise the

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[87] For a detailed appraisal of Syrian arbitration law, *see* Faris Nasrallah, *Arbitration in Syria: Navigating Post-War Disputes*, ASIAN JOURNAL OF LAW AND SOCIETY, COMMERCIAL DISPUTE RESOLUTION IN ASIA (2021).

[88] Omani Royal Decree No. 47 of 1997 The Omani Law of Arbitration in Civil and Commercial Disputes, as amended by Omani Royal Decree No. 3 of 2007 Amending Some Provisions of the Law of Arbitration in Civil and Commercial Disputes Promulgated by Sultanate Decree No. 47/1997, issued on 21 January 2007 ("**Omani Royal Decree No. 47 of 1997**").

[89] Omani Royal Decree No. 47 of 1997, Article 53(2).

[90] *Id.* Article 58(2).

arbitrability of such disputes.[91] Whereas the Omani courts had previously upheld the validity of arbitration clauses in such disputes, an amendment to the Omani administrative courts law in 2009, expressly extended the scope of Oman's national arbitration law to apply to disputes arising out of administrative contracts.[92]

(4) Kuwait

Kuwait, which has not legislated a free-standing national arbitration law, continues to govern arbitrations pursuant to the arbitration related provisions of the Kuwaiti Code of Civil and Commercial Procedure,[93] and the provisions concerning Judicial Arbitration in Civil and Commercial Matters.[94] Generally speaking, these provisions do not conform to the UNCITRAL Model Law. Under Article 182 of the Kuwaiti Code of Civil and Commercial Procedure, arbitral awards may be challenged on the basis a number of reasons including that an award relates to a matter that is not capable of being arbitrated, or is contrary to the public policy of Kuwait. It is notable that the Kuwaiti Administrative Court has sole jurisdiction over disputes arising out of administrative contracts,[95] and which effectively prohibits arbitral panels from hearing such disputes.

(5) Algeria

Similar civil code provisions in Algeria,[96] in fact require that arbitration agreements in the country "must not be contrary to Algerian public order".[97] Notably however, regarding the recognition and enforcement of arbitral awards in Algeria, Article 1051 of the Algerian Civil Procedure Code requires the requesting party to prove that the arbitral award is not contrary to international public order. The reference to "international public order" reappears under Article 1056(6) of the Algerian Civil Procedure Code, which allows arbitral awards

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[91] *See* Amel K. Abdallah, *Critical Analysis of Foreign Capital Investment Law in Oman*, 16 THE JOURNAL OF WORLD INVESTMENT & TRADE 506–531, 25–528 (2015).

[92] Omani Royal Decree No. 3 of 2009, amending Omani Royal Decree No. 91 of 1999, the Administrative Courts Law.

[93] Kuwaiti Code of Civil and Commercial Procedure (Kuwaiti Law No. 38 of 1980), under Chapter 12 (Articles 173 to 188).

[94] Provisions on Judicial Arbitration in Civil and Commercial Matters (Kuwaiti Law No. 11 of 1995 as amended by Kuwaiti Law No. 102 of 2013).

[95] Kuwaiti Law No. 20 of 1981, Concerning the Establishment of a Court Division to Hear Administrative Disputes.

[96] Articles 1006 to 1061 of the Algerian Code of Civil and Administrative Procedure, as amended by Algerian Law No. 8 of 2009, issued on 25 February 2008, and in force from 25 February 2009 ("**Algerian Civil Procedure Code**"). The French language translation of this law has been produced by the General Secretariat of the Algerian Government.

[97] Article 1006 of the Algerian Civil Procedure Code.

rendered in Algeria to be set aside where the arbitral award was rendered in violation of international public order.

(6) Lebanon

Lebanon, which continues to govern arbitrations pursuant to the Lebanese Civil Procedure Code,[98] also contains references to compliance with "international public order", to allow for the recognition and enforcement of arbitral awards,[99] failing which a decision a decision granting recognition or enforcement to an award may be appealed.[100] It is worth noting that Article 1037 of the Lebanese Civil Code, defines matters that may not be subject to transactions, as those including "public policy issues", which leaves an open door to questions about the extent of the application of this article to arbitrability and the permissibility of conducting proceedings in certain matters.[101] It has been stated that public policy in Lebanon includes "...all matters considered by law as guaranteeing social, economic or political interests".[102] Also under the public policy rubric, pursuant to both local legislation,[103] and local court decisions,[104] all disputes arising from commercial agency contracts are not capable of being submitted to arbitration.

(7) Iraq

In Iraq, the applicable Iraqi Civil Procedure Code concerning arbitration,[105] mandates arbitrators to abide by the rules and procedures stipulated in the code, unless otherwise expressly exempted from doing so in the parties' arbitration agreement.[106] Uniquely, the application of public order emerges as a limitation on the right of arbitrators to authorize the parties to conduct a settlement.[107] Under Article 273(2) of the Iraqi Civil Procedure Code, when an arbitral award

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[98] Articles 762 to 821 of the Lebanese Civil Procedure Code (Lebanon Decree No. 90 of 1983, issued on 16 September 1983 ("**Lebanese Civil Procedure Code**"). For further reference, *see* Nassib G. Ziadé, *Introductory Note – Lebanon: International Arbitration Provisions of the Code of Civil Procedure*, 27(4) INTERNATIONAL LEGAL MATERIALS 1022–1031 (July 1988).

[99] Lebanese Civil Procedure Code, Article 814.

[100] *Id.* Article 817.

[101] *See* Court of Appeal of Beirut Case No. 1417 of 2000 (19 December 2000), and Court of First Instance of Mount-Lebanon Case No. 25 of 2001 (25 June 2001), for further reference as to how the Lebanese court's handle public policy questions concerning the arbitrability of matters.

[102] Nayla Comeir-Obeid, *Lebanon*, *in* THE MIDDLE EASTERN AND AFRICAN ARBITRATION REVIEW 2019 (11 April 2019).

[103] Article 5 of Lebanese Law No. 34 of 197, Concerning Commercial Representation.

[104] Lebanese Supreme Court Judgment No. 4 of 2005, issued on 11 January 2005.

[105] Articles 251–276 of the Iraqi Code of Civil and Commercial Procedure (Iraqi Law No. 83 of 1969, issued on 27 May 1969) ("**Iraqi Civil Procedure Code**").

[106] Iraqi Civil Procedure Code, Article 265(1).

[107] *Id.* Article 265(2).

is submitted to the competent court, the court on its own initiative, and the parties pursuant to an application, can revoke an award which is not in accordance with or contradicts the rules of public order and regulations or any of the arbitration rules specified in the Iraqi Civil Procedure Code.[108] Perhaps conscious of the implications of blanket public policy invocations, Iraq has permitted the use or arbitration by domestic and foreign investors making investments in the country, and in relation to government contracts.[109]

(8) UAE

The UAE was the first of the MENA countries to introduce an economic free zone with its own special legal system, consisting of laws that only applied inside the zone but not outside it, and a hierarchy of courts and judiciary, whose jurisdiction was confined to cases connected to the special economic zone. In 2004, the UAE issued federal legislation concerning financial free zones,[110] and establishing the Dubai International Financial Centre (**DIFC**), as a financial free zone in Dubai.[111] This followed the earlier enactment of Dubai local legislation establishing the DIFC in 2002.[112] Subsequent Dubai local legislation established a "Dispute Resolution Authority" in the DIFC,[113] comprising "The Centre's Courts", and an "Arbitration Institute", as separate legal personalities,[114] as well as the Judicial Authority at the DIFC, which in turn established the DIFC Court of First Instance and Court of Appeal.[115]

In line with the DIFC and DIFC courts mould, the emirate of Abu Dhabi established an English language international common law court system within the Abu Dhabi Global Markets free zone at Al Maryah island in 2013.[116] Like the DIFC, the Abu Dhabi's International Financial Centre (**ADGM**) is equipped with its own courts and a dedicated judiciary drawn from inside and outside the UAE. As a matter of commonly used terminology, the DIFC is referred to as "off-shore" whereas the rest of the emirate of Dubai is referred to as "on shore-Dubai". While the UAE boasts a nuanced and successful system of federal

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[108] It is worth noting that Article 273(3) of the Iraqi Civil Procedure Code offers courts expansive powers to revoke arbitral awards "for any grounds valid for a retrial".

[109] Pursuant to Article 11 of Iraqi Regulation No.1 of 2008, Regulations for Implementing Government Contracts.

[110] UAE Federal Law No. 8 of 2004, Concerning Financial Free Zones.

[111] UAE Federal Decree No. 35 of 2004, Concerning the Establishment of a Financial Free Zone in the Emirate of Dubai.

[112] Dubai Law No. 3 of 2002 establishing the Dubai International Financial Centre.

[113] Dubai Law No. 9 of 2004, Concerning the Dubai International Financial Centre (as amended), Article 3(3)(c).

[114] *Id.* Article 8.

[115] Dubai Law No. 12 of 2004, Concerning the Judicial Authority of Dubai International Financial Centre (as amended).

[116] Pursuant to Abu Dhabi Law No. 4 of 2013 Concerning Abu Dhabi Global Market.

governance, parties and practitioners should consider potential differences between the public policy as determined by the local governments of the respective emirates. An analysis of the complex arrangements which create and maintain two separate jurisdictions within both Dubai and Abu Dhabi, themselves representing two of the UAE's seven emirates, are beyond the scope of this chapter.[117] As such, the following discussion focuses on the definition and role of public policy in the arbitral laws that apply to "on-shore" and to "off-shore" Dubai.

On-shore arbitration in Abu Dhabi, Dubai and the other emirates is subject to UAE Federal Law No. 6 of 2018, the federal arbitration law that applies throughout the UAE, except in the DIFC and the ADGM.[118] The application of UAE Federal Law No. 6 of 2018 is limited to:

> Any Arbitration which is carried out in the State, unless the Parties agree on the application of the provisions of another arbitration law, provided that it is does not contravene the public order and public morals in the State.[119]

It is telling that the reference to "public morals",[120] beside the term "public order",[121] is deployed as an edifying feature of customary public principles of morality, politeness and etiquette (□الآدا / *al adab*). This complimentary doublet reappears under Chapter V of UAE Federal Law No. 6 of 2018. On the "application of the law of choice on the substance of dispute", Article 37(1) states that arbitral tribunals shall decide the dispute in accordance with the substantive rules of law chosen by the parties and as applicable to the substance of the dispute, "provided that it does not contravene the public order and morals in the State". Under Article 37(2):

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[117] For further reference on inter-jurisdictional relations within the UAE and Dubai particularly, *see* Faris Nasrallah, *Article 257 of the UAE Penal Code: Inter-jurisdictional conflict and the battleground of arbitration*, 19 YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW 334-350 (2015–2017), and Nasrallah & Blanke, *supra* note 20. *See also* Blanke, *supra* note 5. On free zone arbitration in the UAE, *see* Chapter 21.

[118] UAE Federal Law No. 6 of 2018 Concerning Arbitration ("**UAE Federal Law No. 6 of 2018**").

[119] Article 2(1) of the UAE Federal Law No. 6 of 2018 [Translation and interpretation by Faris Elias Nasrallah]. Article 2(3), further provides that "Any Arbitration arising from a dispute on a contractual or non-contractual legal relationship organised by the Laws in force in the State; unless whatever is excluded by a special provision". The reference to "special provision" under Article 2(3) may also allow for the application of public order or public policy rules in respect of arbitrability of certain disputes. For commentary on both Articles 2(1) and 2(3), *see* Blanke, *supra* note 61, at III-043 and III-048.

[120] الآدا□ العامة (*al adab al 'am*).

[121] النظام العام (*al nitham al 'am*).

> If the parties agree that the legal relationship between them is subject to the provisions of a model contract, international agreement or any other document, then said provisions including special arbitration clauses shall be applicable provided that they are not contrary to the public order and morals in the State.[122]

Article 53, concerning objections to arbitral awards, contains a number of references which implicitly and expressly allow the application of public order and public morals:

> 1- An objection against an arbitral award may not be accepted unless by lodging an action in nullity with the Court or during the examination of the request for recognition of the award, and the applicant for annulment shall provide a proof that:
>
> …
>
> e- The arbitral award has not applied the law agreed by the Parties to cover to the subject-matter of the dispute.
>
> f- The composition of the Arbitral Tribunal or appointment of an arbitrator has been made contrary to the provisions of the present Law or the agreement of the Parties.
>
> …
>
> h- The arbitral award has decided on matters not covered by the Arbitration Agreement or falling beyond the scope of said arbitration. Nevertheless, if the decision on matters submitted to arbitration can be separated from those not so submitted, then only the last said parts of the award may be deemed null and void.
>
> 2- The Court shall, on its own initiative, nullify the arbitral award, if it finds any of the following:
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> a- That the subject-matter of the dispute is not capable of settlement by arbitration.
>
> b- That the arbitral award contravenes the public order and the public morals of the State.[123]

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[122] Translation and interpretation by Faris Elias Nasrallah. For commentary, *see* again Blanke, *supra* note 61, at III-366.

[123] *Id.* For commentary, *see* Blanke, *supra* note 61, at III-472 *et seq*. and in particular III-500–III-501, which deal with the interpretation of the public policy exception under Article 53(2)(2)(b).

The UAE has developed an internationally recognized national arbitral infrastructure, which increasingly draws in disputes from across the region and further afield. While this ensures a significant degree of accommodation for international practitioners involved in UAE related arbitrations, attention should be paid to take account of the laws and customary practices in force within the particular emirate relating to a given dispute. This is important when determining the UAE federal law position on arbitrability and the conduct of proceedings, but more so in relation to recognition and enforcement of local and international arbitral awards, where different levels of experience and judicial compositions distinguish the local Arabic language civil law inspired court practices in each emirate. Practitioners may wish to consult a number of sources which survey the available UAE court decisions and judgments concerning the enforcement of arbitral awards.[124] Article 3 of the UAE Civil Code defines public policy under UAE law as follows:

> Public order shall be deemed to include 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 individual 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 shari'ah.

Essam Al Tamimi reports that while "...the meaning of public policy in the UAE is subject to wide interpretation",[125] the Dubai Court of Cassation has "...concluded that dealing with real estate property is construed as dealing with the circulation of state wealth and therefore arbitrators cannot arbitrate such matters according to Article 3 of the Civil Code".[126]

While references to "public order" or "public policy" do not appear under the contemporary and in force rules of most UAE based arbitral institutions,

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[124] *See*, *e.g.*, Essam El Tamimi and Richard Price, UNITED ARAB EMIRATES COURT OF CASSATION JUDGMENTS 1989–1997 (1998), Richard Price, *UAE Country Survey*, 4 YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW 351–362 (1997), WILLIAM M. BALLANTYNE, ESSAYS AND ADDRESSES ON ARAB LAWS (2000); and Karen Seif & Daniel Aranki, *International Arbitration in Dubai Courts: Let the Data Speak for Itself,* TDM (19 February 2020). *See* also Hasan Arab & Dalal Al Houti, *The Pendulum of Public Policy and the Enforcement of Arbitral Awards in the UAE*, 6(4) INTER'L J. OF ARAB ARB. (2014), which refers to the recognised Dubai Court of Cassation decision in *International Bechtel Co Ltd v. Department of Civil Aviation of the Government of Dubai* (Dubai Court of Cassation Case No. 503 of 2003, 15 May 2004).

[125] Essam Al Tamimi, *Arbitrators Dealing with Real Estate Property Disputes – Is it a matter of Public Policy?* (June 2014), https://www.tamimi.com/law-update-articles/arbitrators-dealing-with-real-estate-property-disputes-is-it-a-matter-of-public-policy/.

[126] *Id. See* Dubai Court of Cassation Case No. 14 of 2012. Albeit that under this ruling, the application of public policy is clearly limited to matters of registration of off-plan real estate in Dubai.

such references, in Dubai at least, appear to have been phased out over time. Under the Dubai Chamber of Commerce Conciliation and Arbitration Rules 1994, Article 34 provided that:

> In the event that the parties agree to an arbitration authorizing arbitrators to act as amiable compositeurs, the parties must name all the members of the Arbitral Tribunal who are authorized to act so. Arbitrators authorized to act as amiable compositeurs shall not be bound to follow the principles of the law originally applicable except those relating to public order.[127]

It is notable however, that Article 33 of the Ras Al Khaimah Chamber of Commerce & Industry ("**RAK Chamber**") Arbitration Regulations 2008,[128] permits the RAK Chamber Committee to implement "…the current valid laws and customs of the country if the subject of the litigation is internal and between parties whose their business addresses inside the country…", where the parties fail to agree explicitly or implicitly on the law requires to be implemented.[129]

The DIFC, i.e., off-shore Dubai, benefits from its own dedicated arbitration law, the Arbitration Act 2008. It applies exclusively in the jurisdiction of the Dubai International Financial Centre. Sections 41 (2)(b)(iii) and 44(1)(b)(vii) empower the DIFC courts respectively to set aside or to refuse to enforce an arbitral award that is in conflict with, or is contrary to, the public policy of the UAE. In a similar vein, the ADGM has also introduced its own arbitration law, the ADGM Arbitration Regulations 2015. In language identical to that employed in the DIFC Arbitration Law, sections 53(2)(b)(ii) and 57(1)(b)(ii) allow the ADGM courts to set aside or refuse an arbitral award that is contrary to the public policy of the UAE.

Whilst all three arbitration laws currently in force in the UAE refer to the public policy of the UAE, there is no UAE apex court with the jurisdiction to determine the question of what constitutes the public policy of the UAE in relation to the setting aside or the enforcement of arbitral awards. As a result, there is the possibility that three different courts, namely those of the DIFC, the ADGM, and the UAE Federal Supreme Court, could hand down three different

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[127] These rules have been followed by the establishment of the Dubai International Arbitration Centre, the corresponding arbitral rules of which in 2004 and 2007, do not refer to either "public order" or "public policy".

[128] Pursuant to the RAK Amiri Decree No: 17 of the Year 2008 and the Centre's Board of Directors Resolution dated 7 September 2008.

[129] Article 34 of the RAK Chamber Arbitration Regulations 2008 places an obligation on arbitrators to "…follow the law required to be implemented, except what is related to the general rules".

judicial pronouncements on a public policy grounds that is supposed to reflect the fundamental conception of the UAE's legal order.[130]

(9) Qatar

Following the establishment of the DIFC in Dubai, Qatar followed suit, setting up the Qatar Financial Centre (**QFC**) in 2005. Similar to the UAE's DIFC and ADGM, Qatar also established the Civil Commercial Court for the QFC, referred to as the Qatar International Court and Dispute Resolution Centre. The QFC Courts operate parallel to the courts of Qatar. However, in a marked difference to the approach adopted in the UAE, both the Civil and Commercial Court of the Qatar Financial Centre and the "on-shore" Qatari Court of Appeals apply the same, newly enacted Qatari Law No. 2 of 2017, Promulgating the Civil and Commercial Arbitration Law ("**Qatari Law No. 2 of 2017**").

The Qatari Arbitration Act of 2017, provides that following a request from the parties for written permission from the Arbitral Tribunal, "the Competent Judge shall order the enforcement of the mentioned order or award, unless such order or award contradicts the law or public policy".[131] Under the heading "appealing the Arbitral Award", Article 33 states:

> The Competent Court shall decide to set aside the arbitral award on its own motion if the subject-matter of the dispute is not capable of settlement by Arbitration under the law of the State or the arbitral award is in conflict with the public policy of the State.

With respect to recognition or enforcement of any arbitral award, Article 35(2) provides that:

> 2. The Competent Judge on his own motion refuses to recognise or enforce the arbitral award in the following two cases:
>   a. If the subject-matter of the dispute is not capable of settlement by Arbitration under the law of the State.
>   b. Recognition or enforcement would be contrary to the public policy of the State.
>
> If the Competent Judge became aware that the arbitral award for which the recognition or enforcement is sought, is subject to the setting aside before the court of the country where the award was issued, he may adjourn the order of enforcement as he deems fit. In addition, the Competent Judge may upon the

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[130] For a variable geometry of UAE public policy onshore-offshore, *see* Chapter 21, section IV.D.

[131] Article 17(3) of Qatari Law No. 2 of 2017.

> request of the Party seeking recognition or enforcement require the other Party to provide suitable surety.

While the Qatari national arbitration law refers only to "public policy", this diverges from the reference to "public order" in the preceding Rules of Arbitration of the Qatar International Center for Conciliation and Arbitration (**QICCA**) Rules of Conciliation and Arbitration 2012, Article 2(2) of which states:

> Where the parties have agreed to submit their disputes to arbitration before the Qatar Chamber of Commerce and Industry or the Qatar International Center for Conciliation and Arbitration or under these Rules, they shall be deemed to have submitted to the Rules in effect on the date of commencement of the arbitration proceedings. Such arbitration shall be conducted by the Tribunal on amiable compositeur terms or ex aequo et bono without prejudice to the application of any provisions related to public order in Qatar. The award shall not be subject to any appeal.[132]

Having avoided legislative plurality by settling on one arbitration law for the whole of Qatar, the co-existence of two competent courts applying its provisions could nevertheless result in divergent judicial pronouncements on what constitutes Qatari public policy. Article 14 of Schedule 6 of the QFC Law No. 7 of 2005 provides that the decisions of the Appellate Circuit of the Civil and Commercial Court of the QFC "are final and may not in any way be appealed further".[133]

(10) Bahrain

In 2009, Bahrain also decided to create a specialist commercial court. Unlike its counterparts in Qatar and the UAE, the Bahrain Chamber for the Settlement of Disputes (**BCSD**), established by Bahraini Law No. 30 of 2009, is fully integrated in the judicial hierarchy of the courts of Bahrain. The draft 2009 law had been judicially reviewed by the Constitutional Court of Bahrain, resulting in the removal of the bill's provisions on mandatory arbitration and ensuring that all judges of the BCSD are appointed by Bahrain's Supreme Judicial Council.[134]

The Bahraini approach of integration rather than implantation of a specialist court has been favourable compared with "the practices of international commercial arbitration in some Gulf States where, with due respect to the qualifications of Western and Middle Eastern arbitrators, the arbitration process appears to have been artificially 'implanted' for the comfort of western panels

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[132] The English language translation of these rules has been produced by the QICCA.

[133] *See* https://qfcra-en.thomsonreuters.com/rulebook/schedule-6-civil-and-commercial-court (last accessed on 31 July 2022).

[134] Al Radhi, *supra* note 56, at 283.

and parties".[135] Indeed, in some Gulf States the "Arbitration has been treated, in certain instances, like a commodity handled in tax-free zones".[136]

Uniquely amongst Middle Eastern jurisdictions, Bahrain has integrated arbitration into the standing judicial infrastructure of the State.[137] Bahraini Decree No. 30 of 2009, channels particular disputes, previously within the jurisdiction of the Bahraini courts, to the BCSD. Article 9 of Bahraini Decree No. 30 of 2009 confers mandatory and exclusive jurisdiction to the Bahrain Chamber for Dispute Resolution (**BCDR**) to hear two types of disputes. First, disputes brought by or against financial institutions licensed by the Central Bank of Bahrain. Second, international commercial disputes, i.e., all disputes of an international commercial nature, where the claim value exceeds Bahraini Dinars 500,000 (around $ 1.3 million).[138]

The BCSD also has jurisdiction over consensual methods of settlement, effectively including arbitration but referred to as "voluntary method of settlement". As a result of the Supreme Court's powers for judicial review, Bahraini Decree No. 30 of 2009 does not expressly refer to "arbitration", and Bahrain's Court of Cassation can set aside a judgement or an arbitral award if it "contravenes the public policy rules of the Kingdom of Bahrain".[139]

In 2015, Bahrain decided to consolidate its arbitration laws and adopted the UNCITRAL Model Law as the national arbitration law of Bahrain.[140] Article 1 of Bahraini Law No. 9 of 2015 provides that:

> Subject to the provisions of international agreements in force in the Kingdom of Bahrain:
>
> (1) The provisions of the UNCITRAL Model Law on International Commercial Arbitration attached to this law, applies to all arbitration, whatever the nature of the legal relationship that originated the dispute, whether the arbitration takes place in the Kingdom or abroad, as long as the parties to the dispute agreed to apply the provisions of the attached law.

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[135] *Id.* at 284. *See* also Hassan Ali Radhi, *International Arbitration and Enforcement of Arbitration Awards in Bahrain*, 1(1) BCDR INTER'L ARB. REV. 29-47 (2014).

[136] Al Radhi, *supra* note 56, at 283.

[137] Pursuant to Bahraini Decree No. 30 of 2009, with respect to the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution (amended by Legislative Decree No. 65 of 2014) ("**Bahraini Decree No. 30 of 2009**"), the Bahrain Ministry of Justice entered into a partnership with the American Arbitration Association, creating the Bahrain Chamber for Dispute Resolution-American Arbitration Association (**BCDR-AAA**). The English language translation of this law has been produced by the BCDR-AAA.

[138] *Id.* Article 9.

[139] Articles 13 and 24 of Bahraini Legislative Decree No. 30 of 2009.

[140] Bahraini Law No. 9 of 2015, promulgation of the law on arbitration. For in-depth analysis, *see* Nassib Ziadé, *The New Bahraini Arbitrations Act*, 8(1) INT'L J. OF ARAB ARB. 5-14 (2016).

In addition to the grounds under Chapter VII of the UNCITRAL Model Law, Bahraini Decree No. 30 of 2009 retains the need for compliance with public order in the Kingdom, with respect to applicable law,[141] and to allow for the enforcement of arbitral awards before the High Court of Appeal.[142] Failing which, the parties are able to request nullification,[143] or challenge enforcement,[144] of an arbitral award that contradicts public order.

(11) Saudi Arabia

Setting itself apart from the approaches of other Middle Eastern jurisdictions, Saudi Arabia, in the provisions of the 2012 Saudi Arbitration Law,[145] places public policy besides the provisions of *Shari'a* as overarching duties of compliance for arbitral tribunals.[146] Article 38 of the 2012 Saudi Arbitration Law mandates that arbitral tribunals comply with the "provisions of Sharia and public policy in the Kingdom", in determining the applicable law of the proceedings, and the prevailing customs and practices applicable to the transaction and previous dealings between the parties. The same requirement applies to the duties on competent courts considering the nullification of arbitral awards,[147] and orders for the execution of awards.[148] In what may be considered as a broad national approach towards the islamisation or re-islamisation of public policy, under the 2018 Saudi Centre for Commercial Arbitration 2018 Rules, Article 31(1) and (4) on "applicable law", provide that both the centres rules and the rules designated by the parties, shall apply "without prejudice to the rules of Sharia".[149]

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[141] Bahraini Decree No. 30 of 2009, Article 11.

[142] *Id.* Article 23.

[143] *Id.* Article 13(3).

[144] *Id.* Article 24.

[145] Saudi Royal Decree No. M/34 approving the Law of Arbitration, issued on 16 April 2012 ("**Saudi Arbitration Law**").

[146] *See* Saudi Arbitration Law, Articles 38, 50(2) and 55(2)(b).

[147] *Id.* Article 50(2).

[148] *Id.* Article 55(2)(b). It is notable that Article 55(2)(a) of the Saudi Arbitration Law requires that "[t]he award is not in conflict with a judgment or decision issued by a court, committee or commission having jurisdiction to decide the dispute in the Kingdom of Saudi Arabia".

[149] According to Abd al-Ḥamid El-Aḥdab & Jalal El-Ahdab: "In Saudi Arabia, public policy is constituted by the *Shari'a*. The Hadith states as follows: "Muslims must comply with contractual provisions except for those which authorize what is forbidden or forbid what is authorized." This rule of Islamic public policy has been explained by Ibn Taymiya as follows: "The rule in contracts and provisions is that anything is permitted which is valid and that only what is forbidden or annulled by the text or by 'Qiyas' (reasoning by analogy) is forbidden (The Fatawa of Ibn Taymiya, III, 263). The *Shari'*a has prohibited aleatory contracts (Gharar) or those containing interest. As a general rule, the criterion for public policy is public interest" (El-Aḥdab & El-Ahdab, *supra* note 47, at 669–670).

V. CONCLUSION

Notwithstanding general uncertainty surrounding the definitions of public policy at international level, countries in the MENA region share some linguistic and historical legal developments, which give credence and constitutive relevance to *Shari'a* and Arab national unity. While largely absent from international efforts to harmonise the laws and rules governing international commercial arbitration, MENA countries have actively developed regional and national instruments that edify and set the boundaries of public policy. Practitioners should, therefore, be concerned with extracting national customs and approaches to public policy, which are evident from national legislative provisions and established national court rulings within each jurisdiction throughout the region. A broad blueprint for such endeavours has been suggested under Section II of this chapter.

At inter-jurisdictional level, the examples of the DIFC and ADGM free zone and QFC financial centre courts within Dubai, Abu Dhabi and Qatar respectively, highlight the risk of multiple competent courts issuing divergent decisions on the contours and characteristics of public policy, within the broader national legal orders of these States. Practitioners should be conscious of sorting between a broad range of public policy related matters with respect to arbitrability, conduct in proceedings, and the recognition and enforcement of arbitral awards in different disputes. Heightened attention should be paid by practitioners regarding public policy exceptions, governance or guidance in disputes arising out of administrative contracts concluded with public entities, the sale and purchase of land to non-nationals, and certain industry specific disputes throughout the MENA region.

Connecting public policy to *Shari'a* is not something that governments or legal systems across the Middle East can readily exclude. In turn, this might explain the burgeoning creation of off-shore, free zone, jurisdictions within their national borders. However, these developments, unless managed appropriately, risk creating conflicts between the arbitration community and the local judiciaries within MENA jurisdictions who are principally, although not necessarily exclusively, tasked with upholding and determining matters of public policy.