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The Effect of Culture and Religion on Enforcement of International Arbitration Awards in Iran

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**THE EFFECT OF CULTURE AND RELIGION ON ENFORCEMENT
OF
INTERNATIONAL ARBITRATION AWARDS IN IRAN**

**A Dissertation Submitted
To
The Committee of International Legal Studies
In
Candidacy for the Degree
Of
Scientiae Juridicae Doctor**

Department of International Legal Studies

GOLDEN GATE UNIVERSITY

By

Atoosa Zeinali

San Francisco, California

April, 2018

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By

Atoosa Zeinali

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Golden Gate University

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**The Effect of Culture and Religion on Enforcement
of
International Arbitration Awards in Iran**

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TITLE

**THE EFFECT OF CULTURE AND RELIGION ON ENFORCEMENT
OF
INTERNATIONAL ARBITRATION AWARDS IN IRAN**

Acknowledgment:

I would like to dedicate this dissertation to the most exquisite law, the one that brings nations together. To my mentors in academia, spirit and life, without whom this wouldn't be, but a figment of imagination. To my immensely valued tutors, Prof Dr. Christian N. Okeke, Prof. Dr. Arthur Gemmell and Prof. Dr. Jiri Toman, who were my instructors throughout this work. To the authors and conditioners of my life, my parents, Ali and Ehteram, siblings Bahram, Salar and Mahsa. To my husband Alireza, who went above and beyond to pave the road I chose to walk on. To the joy of my life, my Daniel.

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Chapter I. Introduction

1 General Introduction

International Arbitration is one of the best and most popular method for dispute resolution arising from international relationships and commercial agreements. It has obtained growing popularity with business over the past 50 years. International arbitration is the product of contracts and will be created when the parties decide to submit disputes to binding resolution by a disinterested, nongovernmental body.¹

There are numerous reasons for the parties to elect arbitration as a method for resolving their disputes. Like domestic arbitration, international arbitration has some strengths and weaknesses compared to litigation for resolving international commercial disputes.²

To begin with, international arbitration is considered as a faster, less expensive, more flexible, efficient and confidential way to resolve a dispute through a neutral decision-maker, unattached to either party or any governmental authority. These characteristics can decrease the business fears of potential bias in a foreign court. On the other hand, although arbitration is frequently recognized as an inexpensive and expeditious means of dispute resolution, some criticize arbitration as both slow and expensive.³

Also, by arbitration, there is the possibility of consolidation of all pending disputes between the parties in just one forum, and have less expense than having multiple proceedings.⁴

¹THOMAS E. CARBONNEAU, ARBITRATION IN A NUTSHELL 254 (2007).

² Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 Loy. L.A. L. Rev. 1337, 1343-1349 (2007), available at <http://digitalcommons.lmu.edu/llr/vol40/iss4/3>.

³Kevin C. Kennedy, *Invalidity of Foreign Arbitration Agreement or Arbitral Award*, 31 Am. Jur. Proof of Facts 3d 493, 493 (originally published in 1995 but updated in 2015).

⁴See *id.* at 493. (contending that arbitration is informal, quick, private, convenient, and inexpensive).

Moreover, compared to litigation, the arbitration process would be less formal than litigation. As a result, the parties to the arbitration will have more freedom to select efficient procedural rules and choose expert decision-makers. However, the lack of detailed procedural rules may result in additional disputes between the parties. Finally, international arbitration is usually confidential which is helpful to preserve business secrets.⁵

In addition, it helps the parties to have their cases somewhere other than foreign judicial forums. There has been always some uncertainty regarding litigations in foreign countries since the parties were worried about the disadvantages based on unfamiliarity with the foreign legal system, language barriers, and possibility of national bias leading to a “hometown judgment”.⁶

Generally, the most important reason that makes arbitration the most popular method of international dispute resolution is that the agreement to arbitrate and the arbitration award will receive worldwide enforcement and recognition way more than foreign court judgments. Given the absence of multilateral conventions for the recognition of foreign judgments, even when a party receives the judgment in his/her favor, there is no guarantee that the judgment will be enforced in another country.⁷

On the other hand, there are bilateral and transnational conventions and instruments that provide an international framework for the recognition and enforcement of arbitral awards which makes the arbitration agreements and awards legally enforceable in other countries.⁸

⁵*Id.* at 494; see also Ehrenhaft, *Effective International Commercial Arbitration*, 9 Law & Pol’y Int’l Bus. 1191, 1224 (1977).

⁶Remiguis Oraeki Chibueze, *The Adoption and Application of the Model Law in Canada: Post Arbitration Challenge*, 18 J. INT’L ARB, 192, 192-194 (2001); see Laurence W. Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 Tex. Int’l L.J. 1, 3 (1995).

⁷Chibueze, *supra* note 6, at 192; see also Micheal J. Mustill, *Arbitration: history and background*, 6 J. Int.Arb. 2, 43 (1989).

⁸Recognition and Enforcement of Foreign Arbitral Awards Convention art. V (1) &(2), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

The bilateral and transnational conventions have created an international legal regime that significantly favors the enforcement of international arbitration agreements and awards.⁹

It should be considered that beside the issues of resolving a dispute with arbitration, there would be another important issue, which is its recognition and enforcement.

When the arbitration proceeding comes to an end, and the award is rendered, the enforcement of that award will be the next step. In arbitration, enforcement of the award by the state is not necessarily a natural consequence.¹⁰ The winning of an arbitration award may not immediately end the dispute when the unsuccessful party doesn't voluntarily comply with the award. The most carefully drafted international arbitration agreement is worthless if an award stemming from that agreement cannot be enforced. So, there would always be an uncertainty whether the award might be recognized and enforced or not.

In the absence of any international convention or treaty, the enforceability of the award will depend on the law of the country in which the enforcement is sought. Today, most of the major trading nations have entered into international conventions addressing the enforceability of the arbitration awards to reduce this uncertainty.¹¹

The most important convention on international commercial arbitration is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (hereinafter The New York Convention) enforced at 1958.¹²

The New York Convention was drafted under the auspices of the United Nations and has been ratified by 156 countries, which are the largest countries dealing with the most important

⁹Noah Rubins, "Manifest Disregard of the Law" and Vacatur of Arbitral Awards in the United States, 12 *Am. Rev. Int'l Arb.* 363, 365 (2001).

¹⁰DOMENICO DI PIETRO& MARTIN PLATTE, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS: THE NEW YORK CONVENTION OF 1958 14 (2001).

¹¹ Kevin C. Kennedy, *supra* note 3, at 495.

¹² DOMENICO, *supra* note 10, at 11.

international trade and economic transactions.¹³

The New York Convention addresses the critical problem in international commercial arbitration that has been created within the trading nations. It secures enforcement of foreign arbitral awards, regardless of the place of the arbitral proceeding or the nationality of the arbitrators.¹⁴

The Convention authorizes the direct enforcement of a foreign arbitral award in courts of any country that is a party to the Convention. But, the courts of the enforcement countries will review the arbitration awards on the procedural grounds and usually consider the fairness in obtaining the award, arbitrability, and public policy in those agreements and awards.¹⁵ For example, Based on Article V (2(b)) of New York Convention, countries can prohibit enforcement of an award if it is against the public policy of that country.¹⁶

As a result, arbitration agreements and awards can be invalid if certain substantive legal or procedural steps are not taken, and although the arbitral awards are often final, there are some circumstances that it will not be the end of the dispute resolution process.

Despite the uncertainty that the annulment grounds of arbitration awards, specified in the New York Convention will bring with them, there is the need to have such grounds in the Convention. Sometimes, the parties to the arbitration need some protection to deal with the serious procedural defects like fraud on the arbitrators, improper constitution of the tribunal, and excess of powers, and to make sure that those problems will be corrected, there is the need for judicial review.

¹³ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 235-236 (2009).

¹⁴ *Id.* at 236.

¹⁵ Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 Int'l Law. 269, 296-304 (1979).

¹⁶ New York Convention, *supra* note 8, art. V (2).

On the other hand, judicial review of an arbitral decision will bring some doubts in international arbitration since the local courts can review the arbitration proceedings according to their local law. Ultimately, under the New York Convention, the power and authority of the national courts have a vital effect on the arbitration awards.¹⁷ Countries can apply any rules they like to invalidate an award rendered in their territory.¹⁸

However, approximately fifty countries have adopted some inspiration from the 1985 UNCITRAL Model Law on International Commercial Arbitration (“UNCITRAL Model Law”) to set some standards for grounds of annulment of arbitration awards in their national arbitration laws to help in reforming their national arbitration laws considering the modern features and needs of international commercial arbitration.

Article 34 of the UNCITRAL Model Law, entitled “Application for Setting Aside as Exclusive Recourse Against Arbitral Award,” contains annulment grounds, which consists of the list of grounds for non-enforcement of awards provided in Article V of the New York Convention.¹⁹

However, only a third of these fifty countries that are inspired by the Model Law have adopted Article 34 faithfully. Some adopt the laws that give them the opportunity to obtain judicial review of the substantive reasoning of a non-domestic award. In addition, some adopt their national laws containing additional grounds to make the award void. On the contrary, some countries adopt their national law providing fewer annulment grounds than what the Model Law contains. These different approaches and non-uniformity in states create some doubts and

¹⁷ Laurence W. Craig, *supra* note 6, at 11.

¹⁸ U.N. Comm’n on Int’l Trade Law (UNCITRAL), *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects 4*, U.N. Sales No. E.99.V.2 (1998), available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>.

¹⁹ UNCITRAL Model Law on Int’l Commercial Arb. (1985), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf.

uncertainty in international commercial arbitration.²⁰ As a result, recognition and enforcement of international arbitral awards are not without obstacles and pitfalls.

Giving so much authority to the national courts with regards to the international arbitral awards has created so many problems in some Islamic countries in the Middle East.

In order to adapt with modern International commercial and political relations, some Islamic countries in Middle East has tried to change their arbitration laws, considering the modern features and needs of international commercial arbitration, make them more compatible with Western countries.²¹ They have adapted some inspiration from the 1985 UNCITRAL Model Law on International Commercial Arbitration (“UNCITRAL Model Law”). So, they set some standards in reforming their national arbitration laws, considering the modern features and needs of international commercial arbitration.²²

However, since the challenges in enforcing arbitral awards are usually indirectly attributed to the cultural perception of the arbitration process in the countries, facing biased actions from Western countries toward their Islamic cultures, have made these adaptations more challenging.

In an arbitration between the parties, one should not forget the strong influence of culture in International relations as it defines many actions and concerns of society. Ignoring this issue can create many problems and a hostile atmosphere between nations that even affect International commercial arbitration enforcements.

Recently the relationship between legal culture and the practice of international arbitration became an important issue that has attracted so much attention. Knowing the significance of

²⁰Winston Stromberg, *supra* note 2, at 1337, *see also* HAMID G. GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 16, 30-33 & 128 (2002).

²¹ The phrase “Western countries” in this context refers to developed countries, which have their roots in Roman civilization and Roman law and are located in the West and central of Europe and North America.

²² UNCITRAL Model Law on Int’l Commercial Arb. (1985), *supra* note 19.

the effect of culture, it is essential for many lawyers, scholars, and practitioners to study and learn more about culture and norms of other countries.

2 Islamic Rule of Sharia:

To completely understand the dispute settlement and more specifically, arbitration in Islamic countries, the knowledge of “the law” of those countries should be accompanied by the deep understanding of their culture and religion. It is difficult to discuss Islamic jurisdiction in a meaningful way without first looking at the history of the arbitration and then Sharia: the source of Islamic laws.²³

For Muslims, Islam affects all their lives. It is not just the religion, but it encompasses everything including morality, theology, scripture, politics, and also the legal system.²⁴

Din—is an Arabic word meaning creed or religion that features heavily in Islam. In Quran, it means the way of life in which Muslims must adapt to comply with the Divine law including Quran and Sunnah. Accordingly, Islam is Din, a complete way of life.²⁵

The Followers of Islam are mainly divided into two groups, called Sunni and Shia. The main difference Between these two groups is that Shia believes that after Prophet Mohammad, Ali was the leader of Muslims. They believe that after Prophet Mohammad, a man who is a decedent from Prophet Mohammad should have the leadership of Muslims, but Sunni does not require this condition. Also, these two branches of Islam have different views in some areas of Islam which will be explored in detail in the following chapters.

Sharia is the Islamic divine law. It is meant to govern all human activities as it makes no distinction between political and religious issues. In the most Islamic countries, Sharia is the

²³ Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 Santa Clara J. Int'l L. 169, 169 (2006).

²⁴ *Id.* at 170.

²⁵ AMINA WADUD, *INSIDE THE GENDER JIHAD* 92 (2006).

basic source of their legislation.

As a body of law, official Islamic scholars declare that Islamic jurisprudence(Fiqh) functions according to five sources of Law which are Quran, Sunna(Tradition of The Prophet), Ijma(Consensus), Qiyas, and Ijtihad.²⁶ However this classification is according to Sunni, and Shia believes slightly different. For example, Shia doesn't accept Qiyas. Accordingly, the sources of Law in Shia are Quran, Sunna, Ijma, and Intelligence (Aghl).

The Quran is the written collection of revelations verbally communicated to the Prophet Mohammad in Arabic. The word "Quran" means "he read", and "he recited" and Muslims believe that it is the direct word of God.²⁷ The Sunnah consists of authenticated stories regarding the customs and practices of the Prophet Mohammad. Since the Quran and Sunnah are not self-explanatory, the role of the Islamic scholar and the courts is to interpret and develop the Sharia into a robust code of rules and principles so as to assist the wider Muslim community to live in accordance with God's law. These rulings and laws are created using "ijtihad" (legal reasoning), which will be discussed in depth in the next chapters.

Islamic rule of Sharia has so much influence in Muslim's commercial activities. Islam generally encourages being honest, treating others as well as what you have expected to be treated, and being equitable and fair to others.

Also, Islam has some specific provisions regarding the way to conduct commercial transactions, such as how carefully merchants have to weigh items before selling them, acting in good faith, the prohibition of Riba (Usury), and prohibition of Gharar (Uncertainty). For example, gambling contracts are considered immoral and are prohibited. This kind of

²⁶ AMR ELATTAR, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS: A COMPARATIVE STUDY BETWEEN EGYPT, USA, AND THE GULF COOPERATION COUNCIL COUNTRIES 26 (2013).

²⁷ Javaid Rehman & Aibek Ahmedov, *Sources of Islamic Law: Teaching Manual*, <http://www.pgil.pk/wp-content/uploads/2014/04/Sources-of-Islamic-Law1.pdf> (2011).

regulations and prohibition will also have some impact on commercial arbitration in Islamic countries.²⁸

3 Commercial Arbitration under the Rule of Sharia:

Islamic law mostly deals with private law, and the public law mostly adopted from Western models, but with some changes to comply with Sharia's principles. This is the case, especially with regard to financial transactions in Islamic countries in the Middle East. As a matter of fact, the arbitration-related matters are mainly based on the European models, and mostly, the Islamic jurisprudence has only been examining the compliance of these models with Sharia Law.²⁹

The main concern raised regarding Sharia is that it may make it difficult to enforce arbitral awards in the Islamic country because there is always the risk that the award will be deemed non-compliant with a Sharia principle (such as the rule against interest), and be found to be contrary to public policy and unenforceable.

Although the non-compliance with the Sharia Law will raise some level of uncertainty in the enforcement of arbitration awards in Islamic countries, but the practitioners in other countries must accept that this level of uncertainty exists in any region whether in the Islamic Middle Eastern countries or any other countries. There will always be occasions where the public policy exception will be used because the award violates a country's basic notions of morality and justice, even if they have a well-established pro-arbitration policy. For example, in the 1998 case of *Soleimany v. Soleimany*, the English courts refused to enforce an award that arose from a contract relating to an illegal operation to smuggle rugs out of Iran. Under the

²⁸ AIDA MAITA, "DEVELOPMENT OF A COMMERCIAL ARBITRATION HUB IN THE MIDDLE EAST", CASE STUDY, THE STATE OF QATAR 29 (2013).

²⁹ *Id.* at 30.

applicable law, the illegality did not impede the claim, but the English courts found that it was against the public policy of England for an illegal contract to be enforced.³⁰

Despite the existence of uncertainty in all states regardless of being Islamic or not, the fear of this uncertainty in the enforcement of arbitration awards is stronger in the Islamic Middle Eastern countries. This fear is mostly because of the lack of knowledge of Sharia Law and its restrictions by the West. It is Muslim scholars' responsibility to provide advice and guidance to Western scholars and practitioners on Sharia and make them familiar with the Islamic principals.

4 Why Iran?

Since the signing of the JCPOA, known as "Iran Nuclear Deal", and the subsequent lifting of sanctions there has been significant growth in interest from international companies to invest in and do business with Iran. Many commercial agreements are currently being signed with Iranian parties and it is, therefore, important to consider the type of dispute resolution mechanisms available.

Flexibility, speed, and confidentiality of arbitration have made it the most popular and attractive method of Dispute Resolution to investors and parties in contracts of an international nature.³¹

However, Middle Eastern countries are suspicious of the modern usage of International Commercial Arbitration and perceive the practice to be biased in favor of Western interests. On the other hand, the International Legal Community does not consider the Middle East as

³⁰ Paul Turner, *Finding your path: Arbitration, Sharia, and the Modern Middle East*, <http://www.tamimi.com/en/magazine/law-update/section-7/august-september-1/finding-your-path-arbitration-sharia-and-the-modern-middle-east.html>.

³¹ United Nations Conference on Trade and Development, *Dispute Settlement: International Commercial Arbitration* 36, (2005), available at http://unctad.org/en/Docs/edmmisc232add38_en.pdf.

Commercial Arbitration friendly; therefore, most foreign investors have been hesitant to seat their arbitrations in the Middle East. This is largely because of complicated enforcement procedures in some states and the influence of Sharia-based local laws in others.

The legal system in Iran has a rich history. Iran has a long-standing tradition with arbitration practice. Since 1939, the Iranian Code of Civil procedure has allowed referrals to arbitration as a method of resolving disputes.³² Further, as a result of long-running disputes such as (the Iran v United States Claims Tribunal), Iranian lawyers have had significant exposure to arbitration.³³

There are two main arbitration bodies in Iran:

- The Arbitration Centre of the Iran Chamber (“ACIC”) which was established by law in 2002 as an affiliate of the Iran Chamber of Commerce, but enjoys an independent legal personality. It was established for the settlement of domestic and international disputes, and
- The Tehran Regional Arbitration Centre (“TRAC”) which was established in 2004 as an independent international organization, under the auspices of the Asian-African Legal Consultative Organization (“AALCO”). The agreement between AALCO and Iran was signed in 1997 and came into force in 2004. TRAC commenced its activities in July 2005. TRAC Rules are essentially based on the UNCITRAL Rules.

Domestic arbitration is governed by specific provisions of the Civil Procedure Code of Iran (CPC). International arbitration is governed by the Law of International Commercial

³² AINI DADRASSII MADANI [CIVIL PROCEDURE CODE] Tehran 1379 [2000], art 632 (Iran).

³³ IRAN-UNITED STATES CLAIMS TRIBUNAL, <http://www.iusct.net>. (“The Iran-United States Claims Tribunal was established on 19 January 1981 by the Islamic Republic of Iran and the United States of America to resolve certain claims by nationals of one State Party against the other State Party and certain claims between the State Parties. To date, the Tribunal has finalized over 3,900 cases...”).

Arbitration (LICA), which was adopted in 1997 and is based on the UNCITRAL model law. Parties are free to choose the procedure and rules that will govern their arbitration, provided they are consistent with the public policy and good morals of Iran, and subject to certain mandatory provisions of LICA. LICA sets out the circumstances in which the parties or the arbitrators may appeal for assistance from the courts, or in which the courts should supervise the tribunal.

Also, Iran is a party to the New York Convention, subject to a reservation whereby, if one party is of non-Iranian nationality, referral to arbitration of disputes concerning public and governmental properties requires the approval of the Council of Ministers and of the Consultative Assembly (the Parliament of Iran).

As it is mentioned above, the fact that International Legal Community does not consider the Middle East, including Iran, as Commercial Arbitration friendly, may discourage foreign investments in Iran and trade with Iranian parties. Accordingly, foreign investors in Iran and foreign trade partners of Iranian parties are likely to refuse arbitration of their disputes in Iran against Iranian parties, since, in the event of a favorable award, they would subject themselves to a recourse for annulment of the award by the Iranian party before Iranian courts based on the annulment grounds such as non-compliance with public policy and good morals.

Also, it will discourage parties from neighboring countries - particularly Central Asian countries whom Iran has strong historical and cultural ties with - to consider selecting Iran as the neutral arbitral forum for the settlement of their disputes.

According to what has been discussed above, bellow is the main reasons behind choosing Iran as the subject of my study:

- First, After the signing of the JCPOA and the subsequent lifting of sanctions, and subsequently, the significant growth in interest for investments in Iran by international companies, the financial transactions between Iran and Western countries has been increased a lot. As a result, the possibility of having more commercial disputes stemming from these financial transactions will increase as well, which will increase the need to use arbitration as a mechanism for dispute resolution in Iran.
- Second, the impact of Sharia over domestic laws, and subsequently its effects on commercial arbitration, and more importantly international commercial arbitration.
- Third, the need to provide advice and guidance to Western scholars and practitioners on Sharia rules to make them familiar with the Islamic principals.
- Fourth, I am Iranian and able to read and understand the original texts in Farsi. Also, to some extent, I am familiar with the reliable legal and Sharia related texts, due to my previous legal education in Iran.

Non-recognition of the legal system of the Islamic world by the West has produced a questionable attitude towards Islamic culture, which adversely affects both the process of arbitration and the views of parties and lawyers toward arbitration. It is Muslim practitioners and scholars' responsibility to provide advice and guidance to Western scholars and practitioners on Sharia and change the prejudiced perception of Sharia as a set of primitive rules.

My goal in this dissertation is to explore some of the rules of Sharia with regard to the arbitration and reduce this level of non-recognition of the Islamic legal system by the West. Also, I am going to analyze the Iranian culture and its effect on enforcement of international

arbitration awards and suggest some solutions to reduce the cultural obstacles in the enforcement of foreign arbitration awards.

The first chapter of this dissertation is simply an introduction. We will look at the international arbitration awards, the advantages, and disadvantages of arbitration and following that we will have a look at the enforcement of arbitral awards, more specifically, Under the New York Convention in chapter 2.

Cultural differences have been a significant factor of conflict in the relations between the West and the Islamic Countries in the Middle East. In chapter three, we see the definition of culture and the role of religion in Iranian culture. After that, in order to understand Islam, we briefly look into the history and sources of Sharia, and its different schools, and at the end, there would be concluded that in order to understand the effect of culture in enforcement of international arbitration awards in Iran, it is necessary to study arbitration under Iranian applicable laws and Islamic rules separately, which are discussed in chapter four and five.

Chapter four explores the history of arbitration laws during two different time frames in Iran, the applicable law to enforcement of national and foreign arbitration awards in Iran, and the development of arbitration rules in the Iranian applicable legal system.

Chapter five, Enforcement of International Arbitration Awards under Islamic Sharia, explains the history of Arbitration in Sharia and whether Sharia has approved arbitration as a method of dispute resolution in Islamic countries. During this chapter, we explore arbitration under rules of Sharia and the effect of arbitration awards under Islamic rule of Sharia.

Chapter II. Enforcement and Annulment of International Arbitration Awards

1 Enforcement of International Arbitration Awards

Since most of the states have been joined one or more international conventions with regard to recognition and enforcement of foreign arbitral awards, their legal regime on enforcement of these awards are different. These countries have been differentiated the awards rendered under the conventions with other awards. Therefore, there are at least two legal procedures in these countries; one for the awards under convention and the other for other foreign awards which are under national laws. And, if one country has joined more than one convention, the legal procedures to enforce the awards would be even more.

On the other hand, if a country hasn't joined any of these conventions, only national laws on enforcement of foreign arbitral awards will be governed.

So, in this chapter, different enforcement regimes, considering the international conventions, and national laws will be discussed.

1.1 International Documents

Generally, the international conventions on enforcement of foreign arbitration awards (New York Convention 1958, Geneva Convention 1927, European Convention 1961), are just for the awards rendered in other countries and not national awards.

Article 35(1) of UNCITRAL Model Law on International Commercial Arbitration 1985 says:

“An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36”.

This article talks about the enforcement of awards regardless of the place where they were made, and mentions the necessity of recognition and enforcement of awards in case that the enforcement is being asked from the court of jurisdiction.

Washington Convention 1965, in Article 54(1) declares that:

“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state”.

Here, in Washington Convention, the awards rendered from a Contracting State should be considered as national judicial award.

According to article 34(6) of ICC Rules of Conciliation and Arbitration,

“Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made”.

Also, in article 26(9) of Rules of London Court of International Arbitration, it is mentioned that:

“All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay”.

Also, in the Arbitration and Expertise of the Euro-Arab Chambers of Commerce, the enforceability of the arbitration awards has been emphasized and says that the parties shall enforce the awards in good faith.

Furthermore, according to the article 32(2) of UNCITRAL Arbitration Rules (1976):

“... The parties undertake to carry out the award without delay.”

1.2 National Legal Systems

It should be clear that even under the various international conventions, the national law of each individual nation plays an important role in the enforcement of a judgment or arbitral award. Therefore, a comparison of national legislation is relevant.

The concurrent legal systems of the world are generally based on civil law (also known as Continental European), common law, religious and sharia law or combinations of these. However, the legal system of each country is shaped by its unique history and so incorporates individual variations. We should consider that all these systems are important among the developing countries because of the former colonial relationships of many of the developing countries with Great Britain, a common-law country, and with France, a civil law country. In addition, here, the role of sharia law in the developing countries is pretty obvious.

Accordingly, the national legal systems in this section has been discussed based on above categories. Since Sharia is mostly governed in Arabic countries, I will discuss it as legal system in Arabic countries.

1.2.1 Civil Law Countries

The civil law is codified, and is based exclusively on written laws organized into ‘codes’ depending on their area of application. The parliament is the main source of law and continuously updates these codes. The judge’s role is to establish the facts of the case and to

apply the provisions of the applicable code. In the civil law system, the judge has an active role during the trial. He will question the parties, their counsel, witnesses and experts. So, the civil law system is inquisitorial rather than adversarial.

Accordingly, the civil law arbitration procedures have some differences from common law procedures. For example, civil law arbitration proceedings are distinguished from those in common law by a major emphasis on documentary evidence. Witnesses, if any, are heard only after a series of exchanges of statements, briefs and documents by both parties. Hearings are much briefer than in common law jurisdictions. Their function is only to highlight disputed issues already placed before the tribunal by documentary evidence and written briefs analyzing and interpreting such evidence.

With regard to the international arbitration awards, "in most civil law countries, enforcement, if allowed at all, requires the court approval by a special validation proceeding, generally known as the *exequatur*. In common law countries, the traditional method of enforcement is an ordinary civil suit based on the foreign judgment."¹

The civil law system, characterized by the *exequatur* process, is a proceeding through which the foreign judgment or arbitral award is validated or given legal significance in the requested forum. After the *exequatur* has been granted, the foreign judgment or arbitral award is treated as if it were a domestic judgment.²

There has been two general rule until 1980 regarding the annulment of arbitration awards in Civil Law countries. First, the possibility of setting aside of the national arbitration awards and asking for their annulment were accepted as a general rule. Second, if the award had

¹ Homburger, *Recognition and Enforcement of Foreign Judgments: A New Yorker Reflects on Uniform Acts*, 18 AM. J. COMP. L. 377 (1970).

² *Id.* at 377

been annulled in the country of origin, it was not enforceable anywhere else. With regard to the first rule, the possibility of demanding to set aside the national arbitration awards, and its annulment, despite the various changes, it has been still accepted in the most civil law countries.

Civil law countries have different approaches dealing with the recognition and enforcement of international arbitration awards. Here, some of the current procedures to enforce the foreign arbitration awards in different civil law countries have been discussed.

1.2.1.1 Germany

German Law distinguishes national and foreign awards according to the German Code of Civil Procedure (ZPO). The awards rendered under the ZPO are disputable and might have been set aside. An award can be enforced in Germany if it has been hold enforceable by the German courts (Declaration of enforceability).³ Jurisdiction lies with the Provincial Court of Appeal (OLG)⁴ designated by the parties in the arbitration agreement or, if there is not such a selection, with the court where the seat of arbitration is situated in its district.⁵ The only situation that the court might refuse to announce the award enforceable is when there are grounds for setting aside the award under Section 1059(2) of the ZPO.⁶ Specially, the declaration of enforceability cannot be refused on the grounds that the arbitral tribunal has made an incorrect decision. Also, with the consent of the parties, an award on agreed terms

³ Zivilprozessordnung [ZPO] [Code of Civil Procedure], Sep. 12, 1950, s 1060(1).

⁴ OLG stands for "Oberlandesgericht" which means "Provincial Court of Appeal". There are 24 OLGs in Germany. They are positioned above regional courts (*Landgericht*) and below the Federal Court of Justice (*Bundesgerichtshof*), in family and child law above the district courts (*Amtsgericht*) and below the Federal Court of Justice. In criminal cases that are under primary jurisdiction of the Federal Court of Justice (i.e., cases concerning the national security), the Oberlandesgerichte act as a branch of the Federal Court of Justice, that is, as "lower federal courts" ("*Untere Bundesgerichte*"). The OLGs deals with civil and criminal matters. For more information, see: <https://en.wikipedia.org/wiki/Oberlandesgericht>

⁵ ZPO, s 1062(1).

⁶ Id. s 1060(2).

can be declared enforceable by a German notary public, unless the award is against the public policy.⁷

Germany has been joined the New York Convention, and the enforcement of foreign awards in Germany is governed under the Convention.⁸

It should be noted that since according to German Law, the award is considered domestic, regardless of governing the New York Convention on foreign arbitral awards, there is still the possibility of judicial interference.

Accordingly;

A. “If the arbitration award that falls under the New York Convention, according to the ZPO, has been rendered in another contracting state, it is allowed to ask for its annulment. Its annulment would be according to Articles 1041, 1043, 1045, and 1046 of ZPO.

B. If the demand for annulment got rejected according to article V of New York Convention, simultaneously, the court can accept the annulment by finding one of the annulment grounds specified in Article 1041 of ZPO.”⁹

1.2.1.2 Spain

In Spain, with regard to Domestic arbitral awards, even when an application to set aside an award has been made, the award is still enforceable. However, the party against whom enforcement is sought may ask the competent court to suspend the enforcement. In order to do so, he should put a security deposit equal to the amount awarded, plus the damages and losses that may arise from the delay in the enforcement of the award.¹⁰

⁷ Id. s 1053(4).

⁸ Id. s 1061(1).

⁹ ALBERT JAN VAN DEN BERG, NON-DOMESTIC ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION 199 (1986).

¹⁰ Spanish Arbitration Act, art 45.1.

If a court rejects the application to set aside, the suspension shall be lifted and the enforcement will continue. Otherwise, by granting the application to set aside an award, any previous enforcement of the set aside award will be revoked.¹¹

With regard to Foreign arbitral awards in Spain, the recognition of foreign awards (i.e. any award which has been issued outside Spanish territory) is governed by the New York Convention (without prejudice to the provisions of other, more favorable, international conventions) and takes place in accordance with the procedure set out in the civil procedure rules for judgments issued by foreign courts.¹²

1.2.1.3 Italy

In Italy, the enforcement of domestic awards is subject to an application to the competent national court where the arbitration has its seat. Upon assessment of the formal requirements of the award, the court shall issue an execution order (*exequatur*).¹³

The parties can file a complaint with the court if it denies enforcement of the domestic award. The court must decide on the merits of the complaint within 30 days from the date of notification of the court's decision to the parties. The decision of the court is final and is not open to appeal.

With regard to foreign arbitral awards, the relevant Italian provisions on recognition and enforcement of foreign awards comply almost entirely with the provisions of the New York Convention. The 1994 Reforms introduced a recognition and enforcement regime which applies to all foreign awards unless more favorable provisions are available in an international treaty.

¹¹ Id, art. 45.3.

¹² Id, art. 46.2.

¹³ Art. 825 Codice di procedura civile [C.p.c.] (It.).

Here, a party must file an application with the President of the Court of Appeal where the other party has its residence, and if the other party is not resident in Italy, with the Court of Appeal of Rome.¹⁴

Upon assessment of the formal requirements, the President of the Court of Appeal must announce that the the award is enforceable in Italy, unless he establishes that:¹⁵

- i. the subject-matter of the dispute cannot be settled by arbitration under Italian law;
- or
- ii. the award is contrary to public policy.¹⁶

A party may challenge the decision of the Court of Appeal if that party proves:

- the incapacity of one of the parties to the arbitration agreement, the invalidity of the agreement under the selected law or the law of the state in which the award was rendered;
- lack of the proper notice of the appointment of the arbitrator or of the arbitral proceedings or one party being unable to present his case;
- the dispute is not provided for or the award is not falling within the terms of the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the law governing the arbitration; or

¹⁴ Id, art 839.

¹⁵ The party must provide the President of the Court of Appeal with an original copy of the foreign award and the arbitration agreement, together with a certified Italian translation.

¹⁶ Id. art. 839. Italian courts will apply an international concept of public policy applied under the New York Convention, which is intended as a body of universal principles aimed at the protection of fundamental human rights, and is often embodied in international declarations or conventions.

- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.¹⁷

1.2.1.4 Sweden

The provisions on the recognition and enforcement of Swedish awards in Sweden are found in the Swedish Enforcement Code, and not in the Swedish Arbitration Act. Swedish awards are enforced based on an application for execution filed with the Swedish Enforcement Authority (SEA).

The SEA may refuse the execution of an award only in situations where the award does not meet the requirements of written form and signature, or if the arbitration agreement includes a right to appeal the award on the merits. Also, the award may be invalid if the issue decided is non-arbitrable, or the award is against public policy. In these situations, if the opposing party has not already initiated the court proceedings concerning the validity of the award, the SEA shall direct the party seeking enforcement to initiate it.

With regard to the enforcement of foreign awards, they have been generally recognized and enforced in Sweden.¹⁸ The same as in Italy, to be able to enforce the foreign award, an exequatur must be granted by the Svea Court of Appeal in Stockholm.

The grounds for refusal of enforcement are based on the New York Convention and has been set out in the Swedish Arbitration Act. Accordingly, foreign awards are not enforced if the party against whom the award is invoked proves that:

¹⁷ Id, art. 840.

¹⁸ The Swedish Arbitration Act [SFS 1999: 116], s 53. Available at <http://www.sccinstitute.com/media/37089/the-swedish-arbitration-act.pdf>.

- pursuant to the law applicable to them, the parties to the arbitration agreement lacked capacity to enter into the agreement or were not properly represented;
- the arbitration agreement was not valid, either under the law to which the parties subjected it or, failing any indication thereof, under the law of the country where the award was made;
- the party against whom the award is invoked was not given proper notice of the appointment of the arbitral tribunal or the arbitral proceedings, or was otherwise unable to present their case;
- the award deals with a dispute not falling within the arbitral tribunal's mandate,¹⁹ provided that where those parts of the dispute that fall outside of the arbitral tribunal's mandate can be separated, that part of the award which contains decisions on matters falling within the mandate may be recognized and enforced;
- the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitral proceedings took place;²⁰ or
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the laws of which, the award was made.²¹
- the award includes the determination of an issue which, in accordance with Swedish law, may not be decided by an arbitral tribunal; or

¹⁹ i.e. it deals with disputes not falling within or contemplated by the terms of the request for arbitration or contains a decision on matters beyond the scope of the arbitration agreement.

²⁰ Harald Nordenson and Marie Ohrstrom, Setterwalls, *CMS Guide to Arbitration Vol I: Arbitration in Sweden*, 872-873, available at https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_SWEDEN.pdf.

²¹ The Swedish Arbitration Act, s 54.

- it would be clearly incompatible with the basic principles of the Swedish legal system to recognize and enforce that award.²²

1.2.1.5 Latin American Countries

All of the Latin American countries use the civil law *exequatur*.²³ In general, Latin American countries apply the treaties to enforce the foreign judgments. In the absence of the treaties, foreign judgments are given the same force as a judgment of the particular country where enforcement is sought. Before the judgment can be enforced, there are various requirements in each country that must be satisfied. For instance, in Argentina, the party seeking enforcement must file a request for execution of the judgment before a judge who has proper jurisdiction.²⁴

Most of the procedures of other Latin American countries are similar to the procedures of Argentina, with some variations. For example, Bolivia, Brazil, Costa Rica, Mexico, Nicaragua, Panama, Uruguay, and Venezuela will recognize default judgments if the defendant was given proper notice,²⁵ and, Chile, Colombia, Guatemala, Mexico, Nicaragua,

²² *Id.*, s 55.

²³ L. KOS-RABCEWICZ-ZUBKOWSKI, *INTERNATIONAL COOPERATION IN CIVIL AND COMMERCIAL PROCEDURE-AMERICAN CONTINENT* (1975). The book discusses, among other things, the enforcement procedure of each Latin American country; Argentina (8-13); Bolivia (28), Brazil (51-62), Chile (141-156), Colombia (167), Costa Rica (197-202), Ecuador (214-215), Mexico (308-311), Nicaragua (333-336), Panama (342-344), Paraguay (357), Peru (369-370), Uruguay (425-430), Venezuela (449-454).

²⁴ Article 559 of the Code of Civil Procedure of Argentina states the requirements for the issuance of the *exequatur*:

1. That the judgment to be enforced be the result of the prosecution of a personal legal action;
2. That it not be a judgment by default against the condemned party, provided such party has been domiciled in the Republic; *
3. That the obligation on which the judgment is based be valid under [Argentine] laws; and
4. That the judgment to be enforced meet the conditions which under the law of the country where it has been rendered, are necessary for the judgment to be considered as such, and also those required under Argentine law. **

* Execution of default judgments against one who, at the start of the foreign proceedings, was a domiciliary of Argentina, is against the due process of laws of Argentina.

** This requirement mandates that the foreign judgment be valid, final and enforceable where rendered.

²⁵ KOS-RABCEWICZ-ZUBKOWSKI, *supra* at 28, 53, 207, 309, 335, 343, 427, and 450.

Panama, Uruguay, and Venezuela will recognize default judgments if reciprocity exists between the two countries.²⁶

It is noteworthy that the enforcement procedure for arbitral awards is the same as that of a judgment in most of the countries. For the purposes of obtaining an exequatur and subsequent enforcement, there isn't any distinction between a judgment and an arbitral award, with the exception that the arbitral award must have been rendered pursuant to a matter capable of settlement by arbitration.²⁷ Brazil requires that the arbitral award first be reduced to a judgment in the country where the award was rendered,²⁸ while Costa Rica does not recognize or enforce awards because of the lack of any such provisions within its code of civil procedure.²⁹

1.2.2 Common Law Countries

In contrast with the civil law, the Common Law is not codified. The law originates from both the legislative branch of government and the previous higher court orders. In this system the lower courts are bound by the previous court orders established by higher courts (*stare decisis*), but, judges are not bound by decisions of other judges sitting in the same court.

Common Law system is an adversarial system. It is contrary to the civil law system, which is inquisitorial. Here, there would be a contest between two opposing parties before a passive judge who simply moderates, and in jury trials, gives directions to a jury of laymen who ultimately decide on the facts of the case. The judge then determines the appropriate sentence based on the jury's verdict.

²⁶ *Id.* at 143, 168, 262-263, 309, 334, 342, 427, and 449.

²⁷ *Id.* at 10.

²⁸ *Id.* at 62.

²⁹ *Id.* at 202.

The common law concept of arbitration is inspired by English Arbitration system. The English Arbitration Act has been changed substantially over the time. Since there are some common law countries that have not followed the evolution in England, legislations based on the 1950 and 1979 Acts may exist, as these Acts did in England for all arbitrations commenced before 1996 Act came into force. Also, adopting the Model Law of UNCITRAL by some common law countries, brought different system of court control over arbitration which made the situation even more complex.

The common law system, including the United States, requires an action on the judgment. Accordingly, the common law "treats the foreign judgment as an obligation which, although conclusive, is not enforceable in another state, but must first be converted into a new domestic judgment by an action in debt to recover the amount owing under the foreign judgment."³⁰

With regard to the arbitration in UK, it should be noted that the English domestic awards may be enforced with the permission of the court as if they were court judgments.³¹ Permission shall only be refused if the person against whom the award is going to be enforced shows that the arbitral tribunal lacked substantive jurisdiction to make the award.

Also, dealing with foreign arbitral awards, the Arbitration Act 1950 continues to apply to the recognition and enforcement of awards under the 1927 Geneva Convention, which continues to apply in relation to certain awards which cannot be enforced under the New York Convention.³²

³⁰ *Id.* at 377.

³¹ English Arbitration Act, 1996, powers of the court in relation to award, § 66.

³² *Id.* § 99.

The recognition and enforcement of New York Convention awards may only be refused if the party against whom the award is going to be enforced proves: incapacity of a party to the arbitration agreement; invalidity of the arbitration agreement; lack of due notice or opportunity to present its case; lack of substantive jurisdiction of the arbitral tribunal; irregularity in the composition of the arbitral tribunal or conduct of the arbitral proceedings; award not binding on parties, set aside or suspended; the subject matter of the arbitration is not capable of settlement by arbitration; or recognition and enforcement of the award would be contrary to public policy.³³

It is rare for the English courts to refuse to enforce a foreign award under the New York Convention. However, they will not enforce an award given against an entity which was not a party to an agreement under which the arbitration was brought (but which the arbitral tribunal concluded was bound by the arbitration agreement).³⁴

As stated, in common law countries, a party seeking enforcement of a judgment must bring an action upon the judgment, while in civil law countries, that party must obtain an exequatur. Both process function similarly. Both are based on the principles of a bilateral hearing and judicial supervision of the enforcement of the foreign judgment. If a party protests the enforcement of the judgment, both process would proceed it like a civil suit. Many American jurisdictions, including New York, when it appears that there is no genuine issue as to any material fact, provide for summary disposition of actions on a judgment without a full trial. Such a procedure compares favorably with the exequatur of the civil law.³⁵

³³ Id. § 100–104.

³⁴ *Dallah Real Estate & Tourism Holding Co v. Pakistan*, [2010] UKSC 46.

³⁵ *Homburger*, supra at 184, at 378.

Therefore, a party armed with a judgment or an arbitral award need not be concerned primarily with the type of jurisdiction, whether common or civil, in which enforcement will be sought. However, the party must be concerned how the courts will interpret the various defenses to the exequatur or the action on the judgment.

1.2.3 Arabic Countries

By joining the United Arab Emirates' to the New York convention in 2006, almost every Arab states has joined the Convention³⁶. Despite the extensive adoption of the New York Convention, the enforcement of foreign arbitral awards can be difficult or even impossible to obtain in some Arab states.

Egypt joined the New York Convention in 1959 and enacted a modern arbitration law in 1994 (the Egyptian Arbitration Law) ('EAL')³⁷. There are several instances where the Egyptian courts have enforced arbitral awards, but also some that they have not.

In 1990, the Egyptian court confirmed that the New York Convention establishes the substantive conditions for the enforcement of foreign awards in Egypt, trumping any inconsistent requirements in the Egyptian Code of Civil Procedure.³⁸ By its terms, the EAL applies only if the arbitration is conducted in Egypt (or if the parties agree to submit the arbitration to this law).³⁹ The Egyptian courts' decisions on requests for annulment under the EAL are nonetheless relevant to the enforcement of foreign awards, because the grounds for annulment under the EAL broadly mirror the grounds for non-enforcement under the New York Convention.

³⁶ Except Iraq, Libya, Sudan and Yemen.

³⁷ Egyptian Law No 27 of 1994, *ICCA International Handbook on Commercial Arbitration*, November 2002, Annex I, pp. 1-16 (Egypt).

³⁸ Egyptian Court of Cassation, 16 July 1990, *Court Bulletin*, 41st year 434.

³⁹ Law No. 27 of 1994, art. 1(Egypt).

In 1997, the Cairo Court of Appeal confirmed the award, ruling that disputes arising from administrative contracts may be settled by arbitration under the EAL.⁴⁰ Similarly, in 2007, the Court of Cassation rejected the claim that the award was against the Egyptian public policy.⁴¹

But in 2009, the Court of Cassation demonstrated excessive formalism by annulling an award on the ground that it did not contain the text of the arbitration agreement, even though a copy of the agreement was annexed to the case file.⁴² Also, in 1995, the Cairo Court of Appeal granted the request to annul an award on the ground that the tribunal had incorrectly applied civil law to the dispute rather than administrative law.⁴³

A very good example of the development of international arbitration in Egypt, is the holding of the Court of Cassation in 2005, which says a party seeking to enforce a foreign award can follow the expedited procedure for the enforcement of domestic awards under Article 56 of the EAL.⁴⁴ This Article provides for the filing of an *ex parte* application for enforcement with the President of the Cairo Court of Appeal, because requiring a party seeking to enforce a foreign award to bring an ordinary action in the Court of First Instance,

⁴⁰ Cairo Court of Appeal, 19 March 1997, *XXIII YBCA* 169 (1998).

⁴¹ Egyptian Court of Cassation, 27 December 2007, summary available at: www.kluwerarbitration.com.

⁴² Egyptian Court of Cassation, 27 February 2007, summary available at: www.kluwerarbitration.com.

⁴³ Cairo Court of Appeal, 5 December 1995, *XXIVa YBCA* 265 (1999). Notwithstanding the Cairo Court of Appeal's decision, courts in the United States and France subsequently granted enforcement of the award. *See* United States District Court, District of Columbia, 31 July 1996, *XXII YBCA* 1001 (1997); Paris Court of Appeal, 14 January 1997, *XXII YBCA* 691 (1997). In two more recent cases, the Cairo Court of Appeal similarly granted an annulment request on the ground that the tribunal had applied the wrong body of Egyptian law. Cairo Court of Appeal, 7 September 1999 and 20 March 2003. In at least two other cases, however, Section 91 of the Court held that such error does not constitute a ground for annulment. Cairo Court of Appeal, 29 January 2003 and 26 February 2003; *see* Borham Atallah, *The 1994 Egyptian Arbitration Law Ten Years On*, ICC International Court of Arbitration Bulletin, Vol 14, No 2 (October 2003), at 16-17.

⁴⁴ Egyptian Court of Cassation, 10 January 2005.

as prescribed by Article 297 of the Egyptian Code of Civil Procedure, would violate Article III of the New York Convention.⁴⁵

As we see above, the Egyptian courts have a good record of enforcing arbitral awards, although a decree issued by the Ministry of Justice in 2008 may cause some delay in the enforcement proceedings, where the Ministry of Justice, in its verdict, required that the Ministry's Arbitration Technical Office scrutinize awards prior to their review by the courts.⁴⁶The Arbitration Technical Office's decisions are not rendered public, and there is no right to appear before the Office. While this extra level of review most likely will delay might impede the enforcement proceedings, several ongoing cases are challenging the decree's constitutionality.

Also, Syria has joined the New York Convention in 1959, but did not enact a modern arbitration law until 2008,⁴⁷ and its courts have a poor record of enforcing arbitral awards.

The Syria's biggest obstacles to the enforcement of foreign awards are; the fact that the enforcement proceedings can be extremely lengthy,⁴⁸ and the fact that where one of the parties to the arbitration is a Syrian state entity, the Syrian administrative courts have consistently prevented the enforcement of awards in favor of the foreign party. For instance, the administrative court in *Entrepose* case (1988), denied enforcement of an ICC award in

⁴⁵ "...[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards".

⁴⁶ Decree of the Egyptian Minister of Justice No 8310 of 2008, 21 September 2008, available at: www.kluwerarbitration.com.

⁴⁷ Syrian Law No 4 of 2008, available at: <http://sayedlaw.com/>.

⁴⁸ Jacques El-Hakim, *Enforcement of Foreign Judgments and Arbitral Awards in Syria*, 5 Arab Law Quarterly 137, 141 (1990).

favor of a foreign contractor on the ground that the ICC Arbitration Rules violated the state entity's rights of defense.⁴⁹

Saudi Arabia is another Arab state that acceded to the New York Convention in 1994. Saudi Arabia has an outdated Arbitration Law, which applies numerous mandatory requirements,⁵⁰ and gives the Saudi Board of Grievances an active supervisory role throughout the arbitration proceedings.⁵¹ The Board of Grievances also has jurisdiction over the enforcement of domestic and foreign arbitral awards.⁵²

Although it is hard to have a firm idea about the Board of Grievances' decisions due to not being published, but it appears to be almost impossible to obtain the enforcement of a foreign award in Saudi Arabia. Generally, in order to ensure that the award does not violate Islamic Sharia, the Board retries the entire case on its merits.⁵³

Despite all these facts disfavoring enforcement of foreign awards, the important Saudi companies tend to comply with foreign awards, for reputational reasons and also, because they have assets abroad that are subject to execution.

In conclusion, while Egypt has a creditable regime for the enforcement of foreign arbitral awards, Syria and Saudi Arabia have been failing to execute the New York Convention.

⁴⁹Antoine A Moussalli, *International Arbitration in Syria: Recent Developments*, 9(3) J Int'l Arb 45, 60-62 (1992). Six years later, the Conseil d'Etat overturned the Damascus Administrative Court's decision. Syrian Conseil d'Etat, 26 December 1994; see YVES DERAIS & ERIC SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 315- 41 (2005).

⁵⁰Among those mandatory requirements, we can mention the language of the arbitration which should be Arabic. Also, there are some requirements as a qualified arbitrator. For example, the arbitrators must be Muslim male.

⁵¹ Saudi Arbitration Regulation, 25 April 1983, *ICCA International Handbook on Commercial Arbitration*, Annex I (January 1994), at 1-3 (Saudi Arabia); see also Implementation Rules for Saudi Arbitration Regulation, 27 May 1985, *ICCA International Handbook on Commercial Arbitration*, Annex II (January 1994), at 1-8 (Saudi Arabia).

⁵²Article 13(g) of Board of Grievances Law (2007), available at: www.moj.gov.sa/adl/ENG/attach/40.pdf.

⁵³ Belal T Al-Ghazzawi et al, *The European & Middle Eastern Arbitration Review 2010; Saudi Arabia*, Global Arbitration Review in association with Al- Ghazzawi Professional Association (2010). Available at: http://ghazzawilawfirm.com/files/Our_Chapter_in_the_European_and_Middle__Eastern__Arbitration_Review_2011.pdf.

2 Enforcement of Awards in The Countries Other Than Country of Origin When There is a Convention

The international arbitration award is made by a private tribunal which does not have the sovereignty of the States. In order for an award to be enforceable it depends on a system of national law providing for recognition and enforcement of arbitral awards by national courts. However, there might be some questions with regard to whether the courts would recognize the awards, review of the awards and even the extent of the review. Questions like whether the review would be restricted to considering the due process and public policy, or it includes the review of the merits as well.

If we want to talk about the legal documents with regard to the recognition and enforcement of arbitration awards, we should consider the existing multilateral conventions on this subject as the most important legal resources on the recognition and enforcement of international commercial arbitration awards.

2.1.1 Geneva Convention 1927

The first well known convention regarding international arbitration is Geneva Convention 1927.⁵⁴ This convention is still enforceable in a few countries that have not joined New York convention yet. But, in other countries that has been joined New York convention, according to article VII (2) Geneva Convention has been invalidated and is void. “The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting

⁵⁴ Geneva Convention on the Execution of Foreign Awards, 1929-1930 92 L.N.T.S. 302.

States on their becoming bound and to the extent that they become bound by this Convention.”⁵⁵

Although the provisions of this convention has been nulled by New York Convention and is not applied by most of the states, but it would be worthy of consideration as a part of legal history of international arbitration as it shows the trend of improvements in multilateral conventions, and also since the Geneva documents have been very successful in furthering international arbitration, specially with regard to enforceability.

In Geneva Protocol 1923 Article 3, it mandates the contracting states the execution and recognition of awards without offering any instruction or mechanism to do so.

*“Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.”*⁵⁶

Geneva Convention has gone one step further and provides a special mechanism, although complicated, to enforce the international arbitration awards. In general, its most important improvement is the omission of review of the awards in order to recognize and enforce the foreign awards.⁵⁷

Comparing Geneva Convention 1927 and New York convention 1958 shows that the scope of Geneva Convention is more limited than New York convention. Geneva Convention is applicable to the awards between persons who are subject to the jurisdiction of one of the High Contracting Parties. And, it has been said that by jurisdiction it has been

⁵⁵ New York Convention, supra note 8, art. VII (2).

⁵⁶ Geneva Protocol, art. 3, 1929 94 L.N.T.S. at 66-74.

⁵⁷ Andrea Giardina, *The Practical Application of Multilateral Conventions*, 14th ICCA Congress, Paris 2-3 (May 1998)

meant their nationality, or their domicile.⁵⁸ But in New York convention, the difference in nationality of parties or the specific legal jurisdiction of parties has not been taken into account and it only considers the place where the award has been made.

*“In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognized as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.”*⁵⁹

*“This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”*⁶⁰

Also, one of the requirements of recognition and enforcement of awards according to Article 1(d) of Geneva Convention 1927 is that the award has become final in the country in which the award has been made. Accordingly, the award can not be enforced at the time that is open to opposition or appeal because it is not final. But, New York convention doesn't have such a requirement.

⁵⁸ ALBERT J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, TOWARDS A UNIFORM JUDICIAL INTERPRETATION 15-17(1994)

⁵⁹ Geneva Convention 1927, art. 1, available at: http://interarb.com/vl/g_co1927

⁶⁰ New York Convention, supra note 8, art. I.

*“...That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending...”*⁶¹

What made it harder was the so called “double exequatur” requirement.⁶² According to Geneva Convention, the enforcing party had to prove the requirements of article 1, such as the award becoming final. As a result, the enforcing party had to seek to obtain two different court orders; One from the place where the award has been made and the other one from the place where the enforcement has been sought. New York Convention has solved this problem by putting the burden of proof on the one who is against the enforcement of award and not on the enforcing party.⁶³

Despite all these difficulties, the Geneva documents have proven to be very successful instruments in furthering international arbitration, in particular as regards enforceability.⁶⁴

2.1.2 New York Convention 1958

In 1953 the ICC proposed a new treaty to regulate international commercial arbitration. This proposal was taken up by the United Nations Economic and Social Council (ECOSOC) and led to the adoption of the New York Convention of 1958. New York Convention has been one of the most successful instruments in the history of international treaties. It has been ratified by 156 states including basically all major trending nations.⁶⁵ It is common

⁶¹ Geneva Convention 1927, art. 1(d).

⁶² Domenico at 15.

⁶³ LAYA JONEIDI, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS 162. taken from CF. PH. FOUCHARD, E. GAILLARD, B. GOLDMAN, TRAITE DE L'ARBITRAGE COMMERCIAL INTERNATIONAL, 141 et seq. (Paris, 1996).

⁶⁴ Domenico at 15.

⁶⁵ United Nations Commission on International Trade Law, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

knowledge how difficult it is to obtain agreement on certain points of law by countries with different morals, religion, and politics. However, the huge number of signatory States is an obstacle to modify the Convention. The problem is that each amendment to the Convention needs to be ratified by each member State individually, and in the absence of these ratifications, there wont be just one Convention and instead, there would be different versions of New York Convention depending on whether each State has ratified the particular amendment.

Another difficulty with the New York Convention is that the courts of different States may come to different conclusions while interpreting the provisions of the Convention.

Despite these difficulties, the New York Convention has been recognized as one of the most important documents on recognition and enforcement of international commercial arbitration awards, since it provides simple and effective method of obtaining recognition and enforcement of both arbitration agreement and arbitration awards.⁶⁶

Comparing with Geneva Convention, New York Convention has done some improvements to the enforcement of arbitration awards;

First, as has been discussed above, this Convention has solved the “double exequatur” requirement of Geneva Convention and also abolished the requirement of the award being final in order to be enforced.

Second, New York Convention has shifted the burden of proof from the enforcing party to the opposing party. In fact, it changed the requirements of obtaining the recognition and enforcement of awards, and instead of providing necessary requirements to be recognized

⁶⁶ VAN DEN BERG, *supra* note 58 at 121 et seq.

and enforced, New York Convention has been mentioned the grounds that the awards might be refused.

Finally, according to Article III of New York Convention, the recognition and enforcement of awards should be in accordance with the rules of procedure of the territory where the award is relied upon. Although according to this article, there shall not be imposed more conditions or higher fees on the recognition and enforcement of awards under this convention than are imposed on the recognition or enforcement of domestic arbitral awards.

*“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”*⁶⁷

2.1.3 European Convention 1961

The European Convention on International Commercial Arbitration (ECICA) was signed in Geneva in April 21, 1961. It is a multilateral treaty regulating certain aspects of international arbitral proceedings. At the moment, it has 31 members, including most EU states and several non-EU members such as Russia.⁶⁸

Some of ECICA’s provisions cover issues also governed by the New York Convention. And like New York Convention, it is best known in regard to the issue of the enforcement

⁶⁷ New York Convention, art. III.

⁶⁸ United Nations Treaty Collection at:

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en

of arbitral awards. But, ECICA itself does not provide means of enforcing arbitral awards. Rather, in an enforcement context, it serves as a supplement to the New York Convention.⁶⁹

More specifically, the ECICA provides that the successful setting aside of an award, in the country in which it was made, does not automatically constitute a ground for refusal of enforcement, and it will be only relevant, if the award was set aside based on one of the reasons provided in Art IX (1) ECICA, that are almost similar to the grounds for refusal of enforcement set out in Articles V(1)(a) to V(1)(d) of the New York Convention. They both come up with the reasons of party incapacity, invalidity of the arbitration agreement, violation of due process, an excess of the authority of the arbitrator (including partial enforcement of those parts of an award which are covered by the arbitrator's authority) and finally, Irregularity in the Composition of the Arbitral Authority or the Arbitral Procedure.⁷⁰

Since ECICA does not refer to the grounds of lack of arbitrability and violation of public policy, if an award has been set aside in the country of origin on the basis of these reasons, the enforcing state's courts may not refuse enforcement of the award on this basis.

Article IX of ECICA with regard to setting aside of the arbitral award says:

“1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:

⁶⁹ Christian W. Konrad, *Arbitration Awards, Enforcement, Europe, European Convention On International Commercial Arbitration 1961 (Ecica), Buried in Oblivion? The Significance and Limitations of the European Convention on International Commercial Arbitration* (November 2, 2010), available at : <http://kluwerarbitrationblog.com/2010/11/02/buried-in-oblivion-the-significance-and-limitations-of-the-european-convention-on-international-commercial-arbitration>.

⁷⁰ DOMINIQUE T. HASCHER, EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION OF 1961, COMMENTARY 537-539, available at: [http://www.arbitrationicca.org/media/4/49305067580462/media113534204360520hascher commentary on the european convention 1961.pdf](http://www.arbitrationicca.org/media/4/49305067580462/media113534204360520hascher%20commentary%20on%20the%20european%20convention%20on%201961.pdf).

(a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or

(b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.

2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.”⁷¹

Some other important issues to be considered are first, according to ECICA, legal persons of public law can validly conclude arbitration agreements. Legal persons of public law include public corporations, the state itself and any of its independent state agencies as well

⁷¹ European Convention on International Commercial Arbitration, art. IX Apr. 21, 1981, available at: www.newyorkconvention.org/11165/web/files/document/1/6/16021.pdf

as any federal states. This provision overrides any contradictory law within the home state's jurisdiction. However, it is possible for contracting states to make a reservation on this issue.⁷²

Accordingly, article II of ECICA says:

"1. In the cases referred to in Article I, paragraph 1, of this Convention, legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude valid arbitration agreements.

*2. On signing, ratifying or acceding to this Convention any State shall be entitled to declare that it limits the above faculty to such conditions as may be stated in its declaration."*⁷³

Second, the ECICA contains provisions that may help overcome the problem of defective arbitration agreements. While the application of national arbitration laws would often lead to the invalidity of such clauses, the ECICA provides a mechanism for determining certain details of ambiguous and unclear arbitration agreements. This mechanism assists with the decision of whether the parties to an arbitration agreement have to refer their dispute to ad-hoc or institutional arbitration and, in case of institutional arbitration, which institution a dispute must be referred to.⁷⁴

⁷² DOMINIQUE T. HASCHER, EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION OF 1961, COMMENTARY 507-517 available at: [http://www.arbitration-icca.org/media/4/49305067580462/media113534204360520hascher commentary on the european convent on 1961.pdf](http://www.arbitration-icca.org/media/4/49305067580462/media113534204360520hascher%20commentary%20on%20the%20european%20convention%20on%201961.pdf).

⁷³ European Convention on International Commercial Arbitration, art. II, Apr. 21, 1981, available at: www.newyorkconvention.org/11165/web/files/document/1/6/16021.pdf

⁷⁴ ECICA, art. IV (as in effect 1961)

Organization of the arbitration:

1. The parties to an arbitration agreement shall be free to submit their disputes:

(a) to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution;

(b) to an ad hoc arbitral procedure; in this case, they shall be free inter alia:

(i) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute;

(ii) to determine the place of arbitration; and

(iii) to lay down the procedure to be followed by the arbitrators.

Despite the fact that ECICA provides for a limitation of the refusal of enforcement of arbitral awards, and also, according to what has been discussed above, it sets out a mechanism for overcoming problems that have been, and may continue to be, the subject of

2. Where the parties have agreed to submit any disputes to an ad hoc arbitration, and where within thirty days of the notification of the request for arbitration to the respondent one of the parties fails to appoint his arbitrator, the latter shall, unless otherwise provided, be appointed at the request of the other party by the President of the competent Chamber of Commerce of the country of the defaulting party's habitual place of residence or seat at the time of the introduction of the request for arbitration. This paragraph shall also apply to the replacement of the arbitrator(s) appointed by one of the parties or by the President of the Chamber of Commerce above referred to.

3. Where the parties have agreed to submit any disputes to an ad hoc arbitration by one or more arbitrators and the arbitration agreement contains no indication regarding the organization of the arbitration, as mentioned in paragraph 1 of this article, the necessary steps shall be taken by the arbitrator(s) already appointed, unless the parties are able to agree thereon and without prejudice to the case referred to in paragraph 2 above. Where the parties cannot agree on the appointment of the sole arbitrator or where the arbitrators appointed cannot agree on the measures to be taken, the claimant shall apply for the necessary action, where the place of arbitration has been agreed upon by the parties, at his option to the President of the Chamber of Commerce of the place of arbitration agreed upon or to the President of the competent Chamber of Commerce of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration. Where such a place has not been agreed upon, the claimant shall be entitled at his option to apply for the necessary action either to the President of the competent Chamber of Commerce of the country of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration, or to the Special Committee whose composition and procedure are specified in the Annex to this Convention. Where the claimant fails to exercise the rights given to him under this paragraph the respondent or the arbitrator(s) shall be entitled to do so.

4. When seized of a request the President or the Special Committee shall be entitled as need be:

- (a) to appoint the sole arbitrator, presiding arbitrator, umpire, or referee;
- (b) to replace the arbitrator(s) appointed under any procedure other than that referred to in paragraph 2 above;
- (c) to determine the place of arbitration, provided that the arbitrator(s) may fix another place of arbitration;
- (d) to establish directly or by reference to the rules and statutes of a permanent arbitral institution the rules of procedure to be followed by the arbitrator(s), provided that the arbitrators have not established these rules themselves in the absence of any agreement thereon between the parties.

5. Where the parties have agreed to submit their disputes to a permanent arbitral institution without determining the institution in question and cannot agree thereon, the claimant may request the determination of such institution in conformity with the procedure referred to in paragraph 3 above.

6. Where the arbitration agreement does not specify the mode of arbitration (arbitration by a permanent arbitral institution or an ad hoc arbitration) to which the parties have agreed to submit their dispute, and where the parties cannot agree thereon, the claimant shall be entitled to have recourse in this case to the procedure referred to in paragraph 3 above to determine the question. The President of the competent Chamber of Commerce or the Special Committee, shall be entitled either to refer the parties to a permanent arbitral institution or to request the parties to appoint their arbitrators within such time limits as the President of the competent Chamber of Commerce or the Special Committee may have fixed and to agree within such time-limits on the necessary measures for the functioning of the arbitration. In the latter case, the provisions of paragraphs 2, 3 and 4 of this Article shall apply.

7. Where within a period of sixty days from the moment when he was requested to fulfil one of the functions set out in paragraphs 2, 3, 4, 5 and 6 of this Article, the President of the Chamber of Commerce designated by virtue of these paragraphs has not fulfilled one of these functions, the party requesting shall be entitled to ask the Special Committee to do so.

controversy and lengthy discussions, the ECICA is not applying significantly. The most likely explanation for this lack of appreciation is its limited scope of application. According to Article I (1) of ECICA, *“This Convention shall apply:*

(a) to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States...”

Accordingly, not only both the state of the award’s origin and the state of enforcement being members of the ECICA, but also requires that all parties to an arbitration agreement must have their place of residence or seat in a contracting state. Furthermore, it applies only to the disputes arising from international trade, while New York Convention applies to the recognition and enforcement of any arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.⁷⁵ Considering the fact that the convention has been ratified only by 31 states (most notably, Switzerland not being amongst them), undoubtedly, this is the ECICA’s most significant limitation.

2.1.4 Washington Convention 1965

The Washington Convention on the settlement of investment disputes between states and nationals of other states has been adopted in March 18, 1965 in Washington, and the disputed resolutions of this convention are managed by the International Center for Settlement of Investment disputes.

⁷⁵ New York Convention, supra art. I.

International Center for Settlement of Investment disputes is part of the World Bank. It has been established by the Washington Convention of 1965 in order to provide an internationally accepted framework for disputes concerning international investments.

Before October 1966, one of the main roles of the World Bank was the settlement of the investment disputes between the governments of the member states and foreign investors.

According to Ibrahim Shihata “Although its Articles of Agreement do not specifically mention the Bank’s power to undertake this type of activity, the settlement of the investment dispute is clearly a way to improve investment conditions and thus to stimulate increased flows of international investment.”⁷⁶

The Washington Convention is enforced in more than 153 countries.

Comparing this Convention to New York Convention, these facts are worth of consideration;

First-- Article 25 of Washington Convention provides that “...*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre...*”⁷⁷

According to article 25, the legal disputes should be arising directly out of investment matters. So, its field of application is the settlement arising out of investment disputes between private entities and member States. Also, the parties to the dispute should have

⁷⁶ Ibrahim Shihata, *the settlement of dispute regarding foreign investment: The role of the World Bank, with particular reference to ICSID and MIGA*, 1 Am.U.J.Int’l L. & Pol’y 97, 98(1986).

⁷⁷ Convention On the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25, 1965, see at: <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Convention-on-the-Settlement-of-Investment-Disputes-between-States-and-Nationals-of-Other-States.pdf>

consented in writing to the provisions of the International Center for Settlement of Investment disputes. As a result, the scope of New York Convention is wider than the scope of Washington Convention. More importantly, the existence of the written consent of the parties in Washington Convention, almost disappears the possibility of any conflict between these two conventions.

Despite what has been discussed above, compare to New York Convention, Washington Convention is more general since this Convention has the same enforcement procedure in the International Center for Settlement of Investment disputes' awards in all countries regardless of being recognized as domestic or foreign awards.⁷⁸

Second—As I have explained above, the Washington Convention has its own regime for handling arbitration and enforcement of awards. International Center for Settlement of Investment disputes provides for its own internal annulment and enforcement procedures. Under this Convention, arbitration would be only according to the rules and provisions of this convention without regard to national laws of the countries. Appeals against its awards are possible only in very limited circumstances. These appeals are then directed to an ad hoc tribunal – as opposed to a national court. Appeals on grounds of wrong interpretation or application of law are not possible.

Unless an award from International Center for Settlement of Investment disputes is revised or annulled, the awards must be recognized and enforced by its member states like final decisions of their national courts. So, the awards are directly enforceable in its member states and do not depend on other international conventions such as the New York Convention.⁷⁹

⁷⁸ M. RUBINO-SAMARTANO, INTERNATIONAL ARBITRATION LAW 490 (2001).

⁷⁹ DOMENICO at 18.

2.1.5 Moscow Convention 1972

Convention On the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation was signed in 1972 in Moscow. All disputes between economic organizations resulting from contractual and other civil law cases arising between Eastern European States which formed the Council for Mutual Economic Assistance, in the course of economic and scientific-technical cooperation of the countries-parties to the present Convention shall be subject to arbitration proceedings with the exclusion of the above disputes from jurisdiction of the courts of law.⁸⁰

According to article IV of the Moscow Convention, arbitral awards are to be enforced voluntarily by the parties.

“The arbitration awards rendered by arbitration courts referred to in paragraph 1, Article II, shall be final and binding. The parties shall execute them voluntarily. These awards shall be recognized without any further procedure and shall be subject to enforcement in any country party to the Convention in the same manner as judgments passed by the state courts of the country of execution and which have come into legal force...”⁸¹

Accordingly, the enforcement and recognition of awards has the same procedure as the judgments passed by the state courts of the country of execution.

⁸⁰ Convention On the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation, art. I, Aug. 13, 1973. Available at: <http://arbitrations.ru/userfiles/file/Law/Treaty/Moscow%20Convention.pdf>

⁸¹ Moscow Convention, art. IV (1972), available at: <http://arbitrations.ru/userfiles/file/Law/Treaty/Moscow%20Convention.pdf>

The grounds of refusal of enforcement of awards are so similar to the those grounds set out in the New York Convention, like lack of jurisdiction, lack of due process and that the award has been set aside in the country of origin.⁸²

2.1.6 Panama Convention 1975

The Inter-American Convention on international commercial arbitration, 1975 (Panama Convention) entered into force on June 16, 1976.

Panama Convention is modelled after the New York Convention but it is not completely the same.

The Panama Convention does not provide for any express definition of its field of application but according to Van Den Berg, it may be assumed that an award will be under the convention if:

“1) the award relates to an international arbitration, and 2) the award relates to a commercial transaction, and 3) the award is made in the territory of another State, and 4) possibly, conditions of reciprocity are met.”⁸³

So, the convention will be applied for the awards made in the country other than the place where the enforcement is being sought. The word “Inter-American” in the title of the

⁸² Article V provides that “The enforcement of an arbitral award may be refused by the judicial executive body of the country of enforcement only if:

(a) the award has been made in violation of the rules of competence, established by the present Convention, or
(b) the party against which the award has been made proves that it was deprived of the possibility to exercise its rights owing to violation of rules of arbitral procedure or other circumstances which it could not prevent and to inform the arbitration court about these circumstances, or

(c) the party against which the award had been made proves that this award has been set aside or its enforcement has been suspended on the basis of national legislation of the country in which it was made. In case of refusal to enforce an award for the reasons referred to in points " a " and " b ", paragraph 1 of the present Article, the party in whose favor the award has been made is entitled to lodge a new claim on the same grounds with the competent body within the period of three months from the date of coming into force of the order for this refusal.

⁸³ Van Den Berg, supra note 58, at 219.

convention shows that the country where the award has been made should have been a member to the convention.

Also, the name of the convention shows that the award should be related to an international transaction. Although it is unclear whether the reciprocity is implied in Panama Convention but the reference to “Inter-American” in the convention’s title may suggest to. Also, for practical purposes, we can assume that reciprocity will be applied by the courts in the States Party to the Panama Convention in view of the traditional Latin American tendency to protect national interests and to require reciprocity.⁸⁴

According to article 4 of Panama Convention, an unappealable arbitral award under the applicable law or procedural rules shall have the force of a final judicial judgment. Also, the execution and recognition of those awards will be in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.⁸⁵

Where both New York and Panama Convention are applicable, there wont be such a big conflict in applying any of these two conventions since Panama Convention has modeled after New York Convention and the terms of these two conventions are so similar to each other. Where there are some minor conflicts, since Panama Convention has been the later treaty, that will more likely be applied.

For example, according to article 3 of Panama Convention, where there is no express agreement between the parties, the rules of procedure of the Inter-American Commercial Arbitration Commission will be applied.⁸⁶ In the past there wasn’t any practical issue with

⁸⁴ *Id.* at 221.

⁸⁵ Article 4 of Panama Convention provides that:

“An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.”

⁸⁶ Article 3 of Panama Convention provides that:

regard to this article and its conflict with New York Convention because there were few countries that were members of both conventions and also there were few commercial transactions between those countries. But, with United States becoming a party to the convention, that might be important to solve this conflict.

Here, we can say that since the Panama Convention has come to existence after New York Convention and since article 3 is mentioning a specific condition, article 3 of Panama convention will trump over article V of New York Convention.

Article 3 of Panama Convention:

“In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.”

Article V of New York Convention provides that *“recognition and enforcement of the award may be refused at the request of the party against whom it is invoked only if that party furnishes to the competent authority where the recognition and enforcement is sought...”*

In the case of other conflicts between these two conventions, the best solution would be to apply New York Convention according to the rule of “maximum efficacy.”⁸⁷

Notwithstanding these minor conflicts, the key provisions of the two conventions are very similar to each other to the extent that it has been said that “ The New York Convention and the Inter-American Convention are intended to achieve the same results, and their key provisions adopt the same standards...”⁸⁸

“In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.”

⁸⁷ VAN DEN BERG at 229.

⁸⁸ H.R. Rep. 101-501, 101st Cong., 2d Sess. 5 (1990), reprinted in 1990 U.S. Code Cong. & Adm. News 675, 678.

Arguably this convention is one of the main reasons that Latin America market is opening up to arbitration.⁸⁹

2.1.7 Convention Between Arabic Countries

There are some regional conventions among Arabic countries which are applicable to arbitration as well. One of those conventions is “The Arab League on the Enforcement of Judgments and Arbitral Awards of 1952”. The Arab League on the Enforcement of Judgments and Arbitral Awards of 1952, deals with the enforcement of judgments and arbitral awards in the Saudi Arabia and the other Member States of the Arab League who have ratified the Convention, which are Egypt, Iraq, Jordan, Kuwait, Libya, Syria and the United Arab Emirates. This convention has been enforced in Saudi Arabia, Egypt, and Syria since September 15, 1953. Although Lebanon has signed this convention but has not ratified it yet. The Convention’s terms on recognition and enforcement of arbitration awards are so close to Geneva Convention 1927.

After enforcing New York Convention in Egypt and Syria, the Arab League Convention has practically become useless in those countries. Accordingly, among those States that this convention has been enforced, only Saudi Arabia has been benefited from this convention.

Saudi Arabia joined the Arab League Convention for the Enforcement of Judgments of September 14, 1952 and the GCC Convention on Enforcement of Judgments and Judicial Representation and Notices among Members of the GCC.⁹⁰ Consequently, any final judgment rendered in any member state of the Arab League or GCC and any final arbitral

⁸⁹ DOMENICO at 18.

⁹⁰ The Cooperation Council for the Arab States of the Gulf, originally (and still colloquially) known as the Gulf Cooperation Council (GCC), is a regional intergovernmental political and economic union consisting of all Arab states of the Persian Gulf, except for Iraq. Its member states are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. The Charter of the Gulf Cooperation Council was signed on 25 May 1981, formally establishing the institution.

award rendered in a GCC state will be enforceable in Saudi Arabia without evaluation of the merits of the case or re-litigation, except to ensure compliance with sharia principles and public policy.⁹¹

Albeit, it should be noted that by joining Saudi Arabia to New York Convention, the effect of this convention has become questionable.

Amman Convention is another regional convention. In 1987, the Council of Arab Ministers of Justice, approved a new arbitration Convention called the Amman Arab Convention on Commercial Arbitration (Amman Convention), with the purpose of developing “a unified Arab system for commercial arbitration”.⁹² This Convention has been signed by the 14 Arab States (Algeria, Djibouti, Iraq, Jordan, Lebanon, Libya, Mauritania, Morocco, Palestine, Sudan, Syria, Tunisia, Yemen (N) and Yemen (s)).

Although the Amman Convention appears to be modelled on the International Centre for Settlement of Investment Disputes(ICSID) Convention, but it is not limited to the resolution of investment disputes and also prescribes as the language of submissions and pleadings exclusively the Arabic language, which makes it less attractive in international trade.

2.1.8 Treaty Concerning the Harmonization of Business Law in Africa 1993

On 17 October 1993, 14 Central and West African countries signed a treaty establishing the Organization for the Harmonization of Business Law in Africa, generally referred to by

⁹¹ GCC Convention, art. 1 provides that: “A. Each of the GCC countries shall execute the final judgments issued by the courts of any member state in civil, commercial and administrative cases and the personal affairs cases in accordance with the procedures as provided under this agreement, provided that the court that issued the judgment has the jurisdiction in accordance with the international jurisdiction as applicable in the member state where the judgment is required to be executed or has the jurisdiction in accordance with the provisions of this agreement.

B. the preceding paragraph shall apply to any resolution whatsoever shall be issued in accordance with judicial or venue procedures by courts or any competent party in one of the member states.”

⁹² Preamble of Amman Convention, available at:

http://www.miripravo.ru/lexmercatoria/arbitration/amman_convention.htm

its French acronym, OHADA. The OHADA Treaty is made up today of 17 African states. Initially fourteen African countries signed the treaty, with two countries (Comoros and Guinea) subsequently adhering to the treaty and a third (the Democratic Republic of Congo) due to adhere shortly.

In joining to this treaty, Dr. Okeke has mentioned that “While entry into such a treaty promises additional business prosperity, the requirements of law modernization, e.g. accepting arbitration rather than court adjudication for business law disputes, need to be evaluated and balanced with an eye toward local legal context.”⁹³

The principal objectives of OHADA are to harmonize and modernize business laws in Africa so as to facilitate commercial activity, attract foreign investment and secure economic integration in Africa.

These are laudable objectives which fall within the framework of the objectives of the New Partnership for Africa’s Development (NEPAD) agreed in June 2002 at the G8 Kananaskis summit.

One of the important innovations of OHADA is the creation of a common court of justice and arbitration. According to OHADA, judgments of the Common Court of Justice and Arbitration are final and enforceable. They shall be enforceable in the States Parties in the same manner as decisions of national courts. Any decision which is contrary to a judgment of the Common Court of Justice and Arbitration delivered in respect of the same matter shall not be enforceable in the territory of a State Party.⁹⁴

⁹³ Okeke, Chris Nwachukwu, *African Law in Comparative Law: Does Comparativism Have Worth?* 16:1 Roger Williams University Law Review 1,14 (Winter 2011).

⁹⁴ Amended treaty on the harmonization of business law in Africa, art. 20, Oct. 17,1993, available at <https://www.droit-afrique.com/uploads/OHADA-Treaty-2008-harmonization-business-law.pdf>

Article 25 of this convention has articulated the situations where the enforcement of awards can be refused. These conditions are limited to;

*“1) where the Arbitrator has ruled without an arbitration agreement or where the arbitration agreement was void or had expired; 2) where the Arbitrator has not ruled within the scope of the mission conferred upon him; 3) where the principle of an adversary process has not been respected; 4) where the award is contrary to international public policy.”*⁹⁵

2.1.9 UNCITRAL

After talking about multilateral conventions about recognition and enforcement of arbitration awards, it is necessary to mention some of the provisions of UNCITRAL Model Law on International Commercial Arbitration.

The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the close of the Commission's 18th annual session. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice".

Although UNCITRAL is not considered a convention, but it has an important role in the international trade among the countries. In the years since its establishment, UNCITRAL has been recognized as the core legal body of the United Nations system in the field of international trade law. A legal body with universal membership specializing in commercial law reform worldwide for over 40 years, the Model Law constitutes a sound and promising

⁹⁵ Id, art. 25.

basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.

Articles 35, and 36 of UNCITRAL are two important regulations with regard to the arbitration and are applicable to all the arbitration awards irrespective of the countries in which they were made.

Article 36 provides the grounds for setting aside the awards, that are so close to the grounds in New York Convention. The Model Law contains an exclusive list of limited grounds on which an award may be set aside. This list is essentially the same as the one in article 36(1), taken from article V of the 1958 New York Convention: lack of capacity of parties to conclude arbitration agreement or lack of valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present his case; award deals with matters not covered by submission to arbitration; composition of arbitral tribunal or conduct of arbitral proceedings contrary to effective agreement of parties or, failing agreement, to the Model Law; non-arbitrability of subject-matter of dispute and violation of public policy, which would include serious departures from fundamental notions of procedural justice.

Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, two practical differences should be noted. Firstly, the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State in question (i.e. State of setting aside or State of enforcement).

Secondly, and more importantly, the grounds for refusal of recognition or enforcement are valid and effective only in the State (or States) where the winning party seeks recognition and enforcement, while the grounds for setting aside have a different impact: The setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of article V(l)(e) of the 1958 New York Convention and article 36(1)(a)(v) of the Model Law.⁹⁶

Article 35 express the required documents to be submitted to have the awards being recognized and enforced. These provisions are the maximum requirements and the countries that accepted UNCITRAL can choose less requirements to apply for enforcement of the awards.

“Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.”⁹⁷

“Article 36. Grounds for refusing recognition or enforcement

⁹⁶ United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006*. Explanatory Note By The UNCITRAL Secretariat On The Model Law On International Commercial Arbitration (Vienna: United Nations, 2008), available from www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

⁹⁷ *Id.*, art. 35.

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.”⁹⁸

3 Judicial interference in International Arbitration Awards

Considering the reasons behind the need for the international arbitration, as an alternative dispute settlement mechanism, at first glance, we expect it to be free from judicial intervention. When the parties agree for their disputes to be settled through a private forum, judicial review of the award would in principle conflict with the parties’ contractual expectation, where they have agreed to submit to the ruling of such a private forum. This approach would support the finality of the arbitral award. However, the binding nature of the arbitral award and its enforceability similar to that of final judgments of national courts needs some degree of judicial scrutiny.

When the enforcement of the award is sought, the necessity of judicial scrutiny of the award is obvious. A national judge, who is expected to recognize the res judicata effect of an arbitral award, should be able to overlook the issue of basic fairness of the proceedings leading to the award by making sure that the award is free from procedural irregularities and that the recognition of the award would not endanger the public policy of the place where the enforcement is requested.

⁹⁸ Id, art. 36.

However, there are various views and practices in different states with regard to the issue of judicial scrutiny of an arbitral award by courts other than the enforcement court. On one hand, some accept the view that an arbitral award is subjected to a system of review like appeal in national judicial regimes, which may cover both procedural and substantive aspects of a case; on the other hand, some of the states have the view according to which an arbitral award, particularly where it has no connection whatsoever to the place where the proceedings are held, is free from any kind of judicial interference. There are, of course, moderate views, which advocate a certain degree of judicial scrutiny to ensure fairness in the proceedings.⁹⁹

The diversity of national systems for judicial review of arbitral awards, in the absence of an international convention regulating the matter, is a source of concern giving rise to some degree of uncertainty. States are free to “apply whatever measures of judicial control” they wish to international arbitrations taking place within their jurisdiction.¹⁰⁰

Also, it is important to note that the absence of judicial scrutiny would adversely affect the victims of manifestly flawed arbitrations and, in some cases, the interests of the state where the arbitration has taken place.¹⁰¹ The possibility of judicial scrutiny of an arbitral award at the seat of arbitration will promote the integrity and efficiency of the arbitral proceedings: it increases the confidence and trust of the business community in international arbitration by reducing the risk of the rendering of arbitrary decisions by some arbitrators.

Furthermore, it will significantly decrease the risk of any improper conduct on the part

⁹⁹ Hossein Abedian, *Judicial Review of Arbitral Awards in International Arbitration, A Case for an Efficient System of Judicial Review*, 28 J. INT’L ARB. 589, 589 (2011).

¹⁰⁰ W. Laurence Craig, *Uses and Abuses of Appeal from Awards*, 4 Arb. Int’l 174 (1988).

¹⁰¹ William W. Park, *Why Courts Review Arbitral Awards*, Festschrift Fur Karl-Heinz Böckstiegel 595, 599 (2001).

of arbitrators, and also, it will considerably decrease the risk of being subjected to almost endless enforcement actions in different jurisdictions, as many jurisdictions will respect a lawfully rendered judicial decision setting the award aside.¹⁰² Therefore, the diversity of national regimes for judicial review should not result in a total elimination of judicial scrutiny at the seat of arbitration; instead, the efforts should be to harmonize the grounds for judicial review of arbitral awards.

Among the various views between the states on this matter, the most popular view, to reach a balance between finality and fairness, is allowing judicial review of arbitral awards for procedural irregularities and violation of public policy.

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which is the result of attempts to harmonize the law with respect to international arbitration, follows this model.

Article 34 of the Model Law provides for an action to set aside as the exclusive means of recourse against an international arbitral award, and allows setting aside on the exhaustive grounds provided in that Article which will be discussed later.¹⁰³

¹⁰² For arguments in favor of the necessity of judicial scrutiny, see Roy Goode, *Arbitration: Should Courts Get Involved?* *Jud. Stud. Inst. J.* 33, 46 (2002); Park, *supra* note 100, at 599–600.

¹⁰³ Art. 34(2) of the Model Law provides exhaustively for the following as grounds for setting aside: “An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted may be set aside; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement was not in accordance with this Law; or (b) the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.”

Although states, in adopting the Model Law as part of their legislation, have the flexibility to differ from the text of the Law, a considerable number of states have, with respect to the judicial review of arbitral awards, adopted the Model Law on International Arbitration.

Some states have slightly restricted the grounds for judicial review. Among those are France in its New Code of Civil Procedure. French legislation confines the scope of judicial review to: (i) the absence, invalidity or expiry of an arbitration agreement; (ii) irregular constitution of the arbitral tribunal; (iii) excess of authority; (iv) violation of due process; and (v) conflict of the award with international public policy.¹⁰⁴ These grounds have been held to be the only grounds applicable.¹⁰⁵

Some states have chosen some extended grounds for the judicial review of arbitral awards. For example, the Arbitration Act of Finland, in addition to non-arbitrability of the subject matter and being contrary to the public policy, for nullity of an arbitral award, refers to two further grounds:

*“... (3) if the arbitral award is so obscure or incomplete that it does not appear in it how the dispute has been decided; or (4) if the arbitral award has not been made in writing or signed by the arbitrators”.*¹⁰⁶

There are also some states that has expanded the scope of judicial review to a right to request the substantive review of the award’s holdings on the legal merits. One of the states adopting this approach is England.

The English Arbitration Act 1996, in addition to setting out certain grounds for judicial

¹⁰⁴ CODE DE PROCEDURE CIVILE [C.P.C] art. 1504 (Ff.).

¹⁰⁵ EMMANUEL GAILLARD, JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 923 (1999).

¹⁰⁶ 967/1992 including amendments up to 460/1999 [Arbitration Act of Finland], s. 40(1).

scrutiny of the award for procedural irregularities, in section 69 foresees the possibility of appeal on a question of law. Section 69 provides that “[u]nless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings’.¹⁰⁷ However, section 69 is not mandatory. The parties can exclude the possibility of such an appeal, either directly or through incorporation of the rules of an arbitral institution by which the parties may validly exclude the possibility of recourse to the courts. This exclusion may be made in the arbitration agreement or subsequently, and the parties ‘are taken to do so if they agree to dispense with reasons for the award’.¹⁰⁸

Moreover, the appeal on a question of law is considerably limited in scope by the fact that:¹⁰⁹ (i) it is possible only on questions of the law of England and Wales, and questions of the law of Northern Ireland;¹¹⁰ (ii) it is not usually available as a matter of course, but a leave to appeal must be applied for within the time limit provided for in section 70(3);¹¹¹ (iii) the leave is granted only subject to certain conditions;¹¹² and (iv) any available arbitral process of appeal or review and any available recourse under section 57 (correction or additional award) ought to have been exhausted.¹¹³

In the United States, there are some statutory grounds for annulment stipulated in the 1925 Federal Arbitration Act. The statutory grounds focus on the procedural integrity of the

¹⁰⁷ Abedian at 596.

¹⁰⁸ Goode, supra note 101, at 39.

¹⁰⁹ HAMID G GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 34 (2002).

¹¹⁰ English Arbitration Act 1996, s. 82(1), provides that “‘question of law” means . . . (a) for a court in England and Wales, a question of the law of England and Wales, and . . . (b) for a court in Northern Ireland, a question of the law of Northern Ireland.”

¹¹¹ Id. s. 69(2)(b), unless all the other parties to the proceedings agree: id. s.69(2)(a).

¹¹² Id. s. 69(3); see Goode, supra note 101, at 38.

¹¹³ English Arbitration Act 1996, s. 70(2).

award as follows;

*“(1) where the award was procured by corruption, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”*¹¹⁴

In addition to statutory grounds for annulment contained in the 1925 Federal Arbitration Act many federal courts have recognized ‘manifest disregard of the law’ as a non-statutory basis for annulment of arbitral awards.¹¹⁵ This concept, as a possible additional ground for annulment of arbitral awards,¹¹⁶ has a hybrid nature and provides a possibility for a national court to revisit the merits of a dispute on a point of law decided by an arbitral tribunal.

Accordingly, this ground has also been applied to international arbitral awards rendered in the United States.¹¹⁷ Although after the landmark decision of the US Supreme Court in *Hall Street Associates, LLC v. Mattel, Inc.*,¹¹⁸ there has been some doubt as to whether this ground still exists as a basis for annulment, some federal courts still adhere to the idea that ‘manifest disregard’ survives as a distinct non-statutory ground for annulment.¹¹⁹

¹¹⁴ 9 U.S.C. s. 10(a) of the Federal Arbitration Act.

¹¹⁵ *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999).

¹¹⁶ 346 U.S. 427 (1953).

¹¹⁷ *Alghanim v. ToysRUs*, 126 F.3d 15 (2d Cir. 1997).

¹¹⁸ 128 S. Ct. 1396 (2008). It was stated in this case that “[m]aybe the term “manifest disregard” was meant to name a new ground for review, but maybe it merely referred to the s.10 grounds collectively, rather than adding to them. Or, as some courts have thought, “manifest disregard” may have been shorthand for s.10(a)(3) or s.10(a)(4), the subsections authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.” We, when speaking as a Court, have merely taken the Wilko language as we found it, without embellishment.”

¹¹⁹ See, e.g., *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F.App’x 415 (6th Cir. 2008) (unpublished). For a

Similarly, the Swiss International Arbitration Concordat, as compared to the Swiss Federal Statute on Private International Law, provides for more expansive grounds for judicial scrutiny of arbitral awards, including annulment for “arbitrariness”. Article 36(f) of the Concordat defines ‘arbitrariness’ to include “evident violations of law or equity”.

Here, similar to the concept of “manifest disregard of the law”, the “arbitrariness”, provides a possible avenue for the reconsideration of the merits of the dispute by the reviewing court. However, it should be stated, that unlike the English concept of “appeal on a point of law”, both concepts of “manifest disregard of the law” and “arbitrariness” “imply something beyond a simple mistake, but not necessarily clear excess of authority”.¹²⁰

On the other hand, there are some states that support the idea of elimination of judicial review by the courts of the seat either mandatory or voluntarily. This view which was inspired by the idea that a system of ‘mandatory “non-review” of awards’ and “a completely laissez-faire system” would attract arbitration,¹²¹ had its roots in French case law. They advocate the idea that “a State would have no entitlement, or indeed no benefit, to review awards rendered on its territory as long as neither party is seeking enforcement of the award in that State”.¹²²

But, such a judicial interpretation brought up concerns that international arbitral awards rendered in France, due to the lack of judicial scrutiny, might not be recognized and enforced by foreign courts.¹²³ Furthermore, the the international business community was also concerned about the total lack of judicial scrutiny, and avoids selecting such states as the

review of the decisions of Federal Circuits on the issue, see Stephen S. Schwartz, “*Manifest Disregard of the Law*”: Does It Provide Courts a Reason to Vacate Arbitration Awards?, 24 Leg. Backgrounder (2009).

¹²⁰ Park, at 597.

¹²¹ Id. at 599.

¹²² EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 63–64 (2010).

¹²³ Park, at 599.

seat of arbitration. Therefore, on 12 May 1981, France allowed a certain degree of judicial scrutiny of international arbitral awards.

In certain jurisdictions, the possibility for the parties to opt-out of any judicial review has been recognized, mostly where the parties have no connection with the state concerned except for that state being the seat of the arbitration.

Although the mandatory elimination of judicial review of international arbitral awards may imply to abandon “the idea that the source of validity of arbitral awards lies in the legal order of the seat”,¹²⁴ the possibility of exclusion of judicial scrutiny by the parties does not have such an implication. The need for speedy resolution of disputes, and the particular requirements of international commerce may be convincing enough to adopt a solution by which the parties may opt-out of any possibility for judicial review by the courts of the seat.

4 New York Convention

The New York Convention was drafted under the auspices of the United Nations and has been ratified by 156 countries, which are mostly the biggest countries that are dealing with the most important international trade and economic transactions.¹²⁵

The convention was a great step forward with regard to the enforcement of awards.

The New York Convention addresses the critical problem in international commercial arbitration that has been created within the trading nations. It secures enforcement of foreign arbitral awards, regardless of the place of the arbitral proceeding or the nationality of the arbitrators.¹²⁶

¹²⁴ GAILLARD at 66.

¹²⁵ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 235, 236 (2009).

¹²⁶ Id. at 236.

The Convention authorizes the direct enforcement of a foreign arbitral award in courts of any country that is a party to the Convention but the courts of the countries will review the arbitration awards on the procedural grounds and usually consider the fairness in obtaining the award, nonarbitrability, and public policy in those agreements and awards.¹²⁷

The fact that the refusal of enforcement of awards are limited to the grounds set forth in Article V of this Convention made it more advantageous than its predecessor, the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. This convention superseded the Geneva Protocol on Arbitration Clauses 1923. Today, according to Article VII, both the 1927 Geneva Convention and the 1923 Protocol ceased to have effect between contracting states.¹²⁸

4.1 Formal and Essential Validity of Arbitration agreements under Article II of New York Convention

Article II

“1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

¹²⁷Sanders, supra note 15, at 269.

¹²⁸ SANDERS, PIETER, QUO VADIS ARBITRATION? SIXTY YEARS OF ARBITRATION PRACTICE 69(1999).

3. *The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*”¹²⁹

This Article has mentioned the formal and essential requirements of a valid arbitration agreement. First, the agreement to submit future or existing dispute to arbitration must be in writing. Secondly, “there must be a dispute (“all or any differences”).”¹³⁰ Thirdly, there must be a defined legal relationship, contractual or non-contractual, between the parties, while the dispute has arisen out of that relationship. The last but not the least, the matter must be capable of settlement by arbitration.

Article II (3) mentions that when the court faces an action in which the parties have made an agreement to arbitrate, the court must “refer the parties to arbitration. This means that “the court become incompetent to entertain the case and must stay proceeding.”¹³¹ However it still has jurisdiction over some matters to assist the arbitration proceedings.

The other issue in Article II (3) is that even if the court finds a valid arbitration agreement, it cannot refer it to arbitrate by itself, but it should refer it to arbitrate when one of the parties asks for it. So the court cannot force the parties to go to arbitration when they want to go to litigation. As a result, in the absence of any request by either party, the court has jurisdiction to hear the case, even if there is a valid arbitration agreement.

However, all of the above would be applicable when there is an agreement to arbitrate within the meaning of Article II. So the agreement must comply with all of the formal and

¹²⁹ New York Convention.

¹³⁰ DOMENICO at 66

¹³¹ Id.

essential requirements mentioned in this article, and must not be “*null and void, inoperative or incapable of being performed.*”

4.1.1 Writing Requirement

Article II (1) of the convention requires the arbitration agreement to be “in writing”. To satisfy this requirement, according to Article II (2) of the convention, the arbitration clause or the arbitration agreement must have been “*signed by the parties or contained in an exchange of letters or telegrams.*”

Since the convention was drafted in 1985, when many of the modern means of communication did not exist, the convention is not interpreted strictly literal, and all the situations below are considered valid.

- 1) One document signed by both parties, which contains an arbitration clause,
- 2) Exchange of letters, telexes, telegrams, email, or any other means of communication that provide a record of the agreement and have an arbitration clause,
- 3) Where there is no arbitration clause in the documents itself, reference in the written contract to a document containing an arbitration clause, when the parties are aware of that arbitration clause.¹³²

It is noteworthy that there are two questions that courts have to answer dealing with writing requirement of arbitration agreements. First, whether Article II (2) is a uniform rule or a maximum requirement. Many national courts look at article II (2) in the light of article 7(2) of the Model Law and their more liberal national arbitration laws. The other question is whether Article II and Article V have to be read together in order to enforce the award.

¹³² Id. at 66-78.

Here, the prevailing opinion is that lack of compliance with article II (2) can also be brought up in the enforcement stage since Article V (1)(a) says:” *The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.*”

There is at least a minimal requirement of writing in Article IV. According to that to obtain recognition and enforcement of an award, the party must provide the original or the certified copy of the original award and agreement.¹³³ This requirement implies that the agreement and the award must be in writing.

4.1.2 Dispute Arising Out of a Defined Legal Relationship

It is clear that there would be arbitration only if there is a conflict. Here the fact that what constitute dispute is not clear. In a case that liability is admitted on the merits but the amount of liability is not established yet, this would be a dispute according to Article II.¹³⁴

Furthermore, mere an agreement that just implies that all the future disputes will be resolved by arbitration will not be valid. The agreement must relate to a specific legal relationship, which is almost always a contract.

4.1.3 Capable of Settlement by Arbitration

The term “*capable of settlement by arbitration*” shows that there are some disputes that are not capable of settlement by arbitration and in other words are not arbitrable. The issue of arbitrability is an important one since it can frustrate the arbitration.¹³⁵

¹³³ New York Convention, art. IV.

¹³⁴ Associated Bulk Carriers Ltd v Koch Shipping Inc. (“The Fuohsan Maru”); English Court of Appeal; [1978] 2ALL ER 1301.

¹³⁵ Kirry, *Arbitrability: Current Trends in Europe*, 12 Arbitration International No. 4, 373(1996).

Most commercial and civil matters are arbitrable and don't have any problem to go to arbitration but the criminal and family matters are mostly not capable of being resolved by arbitration because they are the matters that are related to the public interests and so are influenced by the political policies.¹³⁶

4.1.4 Null and Void

Article II (3) says that when the court finds out that the arbitration agreement is *null and void*, it is not obligated to seize the action in order to refer it to the arbitration. So, there should be a valid agreement to begin with. Because of attempt to reach the same application of the convention in different jurisdictions, the factors stated in the Convention to determine what makes the agreement invalid are so broad and it compass every possible national doctrine or principle causing the "invalidation" of the arbitration agreement.

The concept of null and void depends on the concerned jurisdiction, so it can be different in each jurisdiction. So, in order to figure out whether an arbitration agreement is null and void, we should analyze it according to the governing law in that agreement.

There are some situations that the agreement is "inoperative" which means the arbitration agreement, even though existing has no effect. This situation might happen when the validity of the arbitration agreement is conditional, the arbitration agreement is explicitly or implicitly revoked or modified, Res Judicata, incapable of being performed, Inconsistency, uncertainty, and deadlock clauses.¹³⁷

4.2 Recognition and Enforcement of the Award

In most of the cases, the losing party voluntarily complies with the award, but if in a case, he does not voluntarily comply with it, there is a strong possibility for the winning party to

¹³⁶ DOMENICO, *supra* at 91-93.

¹³⁷ DOMENICO, *supra* at 113-120.

be able to enforce it by the judicial enforcement. This possibility is so high because so many countries have adopted international conventions on enforcement of awards (Most importantly New York Convention) in which provide narrow possibility of setting aside the awards.¹³⁸

According to Article III of New York Convention, countries are required to recognize arbitral awards as binding and to enforce them in accordance with national law, consistent with the provisions of the convention.

The term “Recognition” and “Enforcement” are not the same.¹³⁹ When a court recognizes an award, it informs that the award is valid and binding. So, it has an effect same as of a court judgment. On the other hand, enforcement means using whatever official means are available in the jurisdiction in which the award is being sought, to collect the amount or carry out whatever that is in the award.

4.2.1 Requirements for Enforcement

4.2.1.1 Scope

According to Article I of New York Convention, the convention was intended to apply to international awards and states that it covers “awards made in a state other than where enforcement is sought”. It also permits enforcement of awards that are considered “nondomestic” by the enforcing jurisdiction.¹⁴⁰

Since the meaning of “nondomestic” is not determined in the Convention, it must be realized by each of the contracting states. In the United States, according to the Federal

¹³⁸ MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 202 (2008).

¹³⁹ THOMAS E. CARBONNEAU & JEANETTE A. JAEGGI, HANDBOOK ON INTERNATIONAL ARBITRATION & ADR, AMERICAN ARBITRATION ASSOCIATION 162.

¹⁴⁰ New York Convention, art. I

Arbitration Act, an award is nondomestic even between citizens of United States, if the “relationship involves property located abroad, envisages performance of enforcement abroad, or has some other reasonable relation with one or more foreign states.”¹⁴¹

As a result, in US, for an award to be under the convention, it should either be rendered in a foreign country, or has an international aspect involving the legal system of another country.¹⁴² In some other countries, they only enforce the awards that were rendered in a foreign country.

There are two reservations that the contracting states are allowed to make. One is Reciprocity. According to that, the contracting state will only apply the convention to the awards that are made in the territory of another contracting state. The other permitted reservation is that a contracting state may “declare that it will apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial...”¹⁴³

Since the definition of “commercial” is not clarified in the convention, the law of the enforcing jurisdiction determines what is commercial, and there is not a uniform understanding of the meaning of commercial, but what is generally accepted is that criminal and family matters, such as divorce, custody and adoption, wills and trusts are not commercial.¹⁴⁴

¹⁴¹ 9 U.S.C. § 202.

¹⁴² Yusuf Ahmed Alghanim & Sons v. Toys ”R” Us Inc., 126F. 3d 15(2d Cir.1997); Bergesen v. Joseph Muller Corp., 710F. 2d 928 (2d Cir. 1983).

¹⁴³ New York Convention, art. I (3).

¹⁴⁴ MARGARET L. MOSES at 204-206.

4.2.1.2 Jurisdiction and Forum Non- Convenience

In order to seek enforcement of an award in a contracting state, the presence of the losing party's assets in that state will usually be enough to have a jurisdiction for the enforcement of the award under the convention. But in US, some courts have refused the enforcement of such awards on the ground that there is no personal jurisdiction over the defendant or that the forum is inappropriate under the doctrine of forum non-convenience.

A court can dismiss a case based on its determination that an adequate alternative forum exists, and that there are public or private interests that weigh more heavily in favor of a different forum.¹⁴⁵ However the better view in United States is that enforcement of convention awards should not be denied based on lack of jurisdiction and Forum non-convenience.

4.2.1.3 Procedures for Enforcement

Procedures for enforcing an award is according to the rules of practice in the contracting state where the enforcement is being sought.¹⁴⁶ However, it cannot impose higher fees or any more difficult conditions on the process than would be applicable in enforcing a domestic award.¹⁴⁷

The only requirements by the convention are that the party who looks for enforcement must provide the court with the authenticated original award or a certified copy, and the original arbitration agreement or a certified copy. If the award or agreement is not in the same language used in the enforcing state, the party needs to provide a certified translation of the documents.¹⁴⁸ Other than that, the procedures are determined by the enforcing

¹⁴⁵ MARGARET L. MOSES at 204-206.

¹⁴⁶ New York Convention, art. III.

¹⁴⁷ New York Convention, art. III.

¹⁴⁸ New York Convention, art. IV.

jurisdiction, which are mostly similar to the jurisdiction procedures to enforce court judgments.

4.2.2 Grounds for Non Enforcement under the Convention

The New York Convention provides limited grounds as defense for enforcement of the arbitration awards. The defenses are exhaustive. It means that they are the only defenses for non-enforcement. There are five defense in Article V (I), and two additional defenses in Article V(II).¹⁴⁹

According to Article V of the New York Convention, recognition and enforcement of the award may be refused for lack of capacity of parties to the agreement, lack of proper notice of the appointment of the arbitrator or of the arbitration proceedings, if the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitrate.

Also, if the arbitral award is either not yet binding or has been set aside or suspended in the arbitral forum, it may be denied recognition and enforcement.

Furthermore, if the subject matter of the dispute is not capable of settlement by arbitration under the laws of the enforcing country, enforcement of the award may be refused. The final ground mentioned in the New York Conventions for refusing recognition or enforcement of the arbitral award is when the award is contrary to the public policy of the enforcing country.¹⁵⁰

¹⁴⁹ New York Convention, art. V.

¹⁵⁰ New York Convention, article V provides that;

I. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

4.2.2.1 Incapacity and Invalidity

The first defense in Article V has two parts; (1) There is some incapacity of the party, or (2) The agreement is invalid, either under the law chosen by the parties, or if the parties did not choose a governing law, then under the law of the country where the award was made.¹⁵¹

The capacity of the party to enter into an arbitration agreement is governed by its national law. Also, it is clear that the court should not enforce an award against a party who has never agreed to arbitrate.

As a result, the Convention allows the enforcing state to determine the validity of the agreement under the law that the parties has chosen, and if they hadn't chosen the law, it should be examined under the law of the state where the agreement has been made.

Here, also there is the issue of writing requirement for having a valid agreement (Article II) that has been discussed earlier.

4.2.2.2 Lack of Notice, and Fairness

According to Article V (1)(b), a party must be provided with the notice of the appointment of the arbitrator and the arbitral proceeding. Also, it will not be a fair proceeding if the parties

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

¹⁵¹ New York Convention, art. V (1)(a).

are not given a full opportunity to present their case. So, the award will not be enforced if the party did not receive the proper notice, or if the arbitrators didn't let the party to present his case, since the party has been denied a fair hearing.

As a result, if the arbitrators act in a way that considered essentially denying justice, the award cannot be enforced since that was denying of due process.¹⁵²

4.2.2.3 Arbitrator Acting in Excess of Authority

This ground is really a restatement of the first ground in which an award should not be enforced against a party that never agreed to arbitrate that issue.

The arbitrators' power comes from the consent of the parties in their agreement, and when the arbitrator acts outside of that consent, it will not be enforceable. However, in Article V (I)(c), there is a saving clause that says in a situation where some matters are beyond the scope and some within the scope, only the matters that are beyond the scope will be excluded and the rest that are within the scope may be recognized and enforced.

4.2.2.4 Improper Composition of the Arbitral Tribunal

Where the constitution of the tribunal or the arbitral procedure is not consistent with the agreement of the parties, the award will not be enforced. If the parties do not reach an agreement in these regards, then the constitution of the tribunal and the arbitral procedure must be according to the law of the country where the arbitration took place. However, this defense is not a strong defense for non-enforcement of the arbitration award.

4.2.2.5 The Award is Not Yet Binding, or Has Been Set Aside

To be enforceable, the award must be final and still in effect. There was a long discussion about how to interpret the word "binding". Most courts consider that an award is binding if

¹⁵² MARGARET at 210-211.

there is no way of bringing an appeal on the merits.¹⁵³

Choosing the word “binding” in the Convention was to avoid the problems in the 1927 Geneva Convention. Under the Geneva Convention, awards first had to be confirmed in the country that rendered the award before they could be enforced in another jurisdiction. So two separate judicial processes were required. But the Convention made it easier and an award that is binding can be enforced without having been confirmed in the jurisdiction where made.¹⁵⁴

Also, using the word “binding” gives this opportunity to enforce the partial awards. Since the arbitration awards are generally not appealable on the merits, an arbitrator’s award will most likely be considered binding, and for the same reason, the partial award is binding and enforceable as well.

Furthermore, to be enforceable, the award should not have been previously set aside or vacated in the country where rendered, or under the law that it was subjected.¹⁵⁵

If a party seeks to vacate the award, he can do that only in the country where the award has been rendered while the party can enforce the award in any contracting country that the opposing party has some assets there, since according to the convention, the contracting states can only enforce the awards but not vacate them.

When the award become vacated, that award has no effect anymore and cannot be used in other jurisdictions, however if the enforcement of an award is refused in one jurisdiction, its enforcement can be sought in other jurisdiction, and the award will still have its legal

¹⁵³ Ramona Martinez, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The refusal provisions*, 24 INT’L Law 487, 501-502 (1990).

¹⁵⁴ MARGARET at 210-211.

¹⁵⁵ New York Convention, art. V (1)(e).

effect.¹⁵⁶

Article V (1)(e) permission to vacate the award under the local law is in oppose to the Convention's goal in limiting the enforcement defenses, and provides a loophole for the countries to go beyond the limited defenses of the Convention since the local court can vacate an award on the ground that is not listed in Article V of the Convention. And if the award becomes vacated, the contracting countries will refuse to enforce the award because it is vacated under the law of the country that rendered the award.

It is noteworthy to say that although most of the countries will not enforce an award that has been vacated in the rendering state but they are not obligated to do so. Article V (1) (e) states that recognition and enforcement of the award may be refused (not must be refused). This language shows that the countries have discretion to enforce the vacated award and if they want, they can enforce an award that has been vacated in the country that has rendered it. As a result some countries has chosen the position that a vacated award is still enforceable.¹⁵⁷

4.2.2.6 Subject Matter Not Arbitrable

As has been discussed earlier, some types of disputes are not arbitrable. The enforcing state has the authority to decide whether a dispute is arbitrable or not.¹⁵⁸ Family issues like child custody disputes, criminal matters, disputes related to trademarks and patents, and bankruptcy and any other matter that affects the public interests or affects the third parties' rights usually are needed to be decided by the court.

¹⁵⁶ BORN, *supra* at 774.

¹⁵⁷ CODE DE PROCEDURE CIVILE [C.P.C] art. 1502 (Ff.). See also various rulings in the case of *Hilmarton v. OTV*, from 1994 to 1997, discussed in Hamid G. Gharavi, *Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention*, 6 J. Transnat'l L. & Pol'y 93 (1996).

¹⁵⁸ THOMAS E. CARBONNEAU, *supra* at 171-173.

Most of the disputes that are arbitrable are related to the contracts and commercial relations because the parties are free to resolve their problems without any supervision of the court.

Accordingly, if the dispute cannot be settled by arbitration under the law of the enforcing country, the court may refuse to enforce the award that has been rendered in another country.

Since the arbitrability of the disputes varies from state to state, it would be in the best interest of the parties to consult the issue with the local attorneys before going to solve the dispute by arbitration.

4.2.2.7 Public Policy

According to Article V (2)(b) of New York Convention, recognition or enforcement of an award may be refused if it determined to be contrary to the public policy of the enforcing country. The courts of the enforcing country will decide over the issue.¹⁵⁹

Since the meaning of public policy is not clearly determined by the Convention, it makes it a freeway for the states to get rid of the arbitration awards and not to enforce them whenever they want, and they can misuse the public policy defense as a basis to reach decisions that are more favored by their courts.

4.3 The Problems Created by New York Convention

Obtaining recognition and enforcement of arbitration awards is not without obstacles and pitfalls. Most of these obstacles are because of the deficiencies in the regime provided in New York Convention, and the defects in the way the arbitration agreement is drafted. Here, some of the problems that have been created by the New York convention have been discussed.

¹⁵⁹ New York Convention, art V (2)(b).

4.3.1 Dual Regime of Annulment and Recognition and Enforcement

New York Convention provides for the recognition and the enforcement of the arbitration agreements. It also provides for the recognition and enforcement of the arbitration awards. It is obvious that unless there is a valid agreement, there won't be any valid arbitration award since the tribunal will lack competence.¹⁶⁰

First, the Convention in Article V (1)(e), provides an annulment action “in the country in which, or under the law of which, the award was made.” This language in the Convention is unclear, but looks like that it limits an annulment action to the specified states' jurisdictions. Second, the Convention has not specified the grounds for the annulment, and has left it to the specified countries to annul an award on any ground they want.¹⁶¹

Moreover, the Convention has not clarified the effect of an annulment judgment in an action to recognize and enforce the award beyond what has been brought in Article V (1)(e), that says an award may be denied recognition and enforcement if the award “has been suspended” in an annulment action brought in a country mentioned in Article V (1)(e).

4.3.2 Annulment Action in the New York Convention

While New York Convention pursued to have a uniform recognition and enforcement in all of the member countries, bringing the annulment actions seems to be in contrary to that goal, since the countries are free to effect, or deny recognition and enforcement on the grounds not specified in the convention. The convention could have provided that in contracting countries, only an action for recognition and enforcement would be allowed, or the annulment could have happened only if one or more of the grounds for non-recognition specified in the convention were present.

¹⁶⁰ New York Convention, art. V (1) (a).

¹⁶¹ BORN, supra at 707-708.

4.3.3 The Effect of Annulment Action in Other Countries

It's been argued that when an award has been annulled, or vacated, its recognition and enforcement must be denied as well.¹⁶² This argument is not derived from the language of Article V (1)(e) since it provides that an annulled award “may” be denied recognition. It also lacks support in reason and fairness.

The proponents of the argument that has been discussed above, believe that once an award has been annulled, it will not exist any more and as a result cannot be enforced or recognized. But, it is noteworthy that an annulment judgment is binding only in the country where it is rendered, and the other countries shouldn't be obliged to comply with it. And that is why in the Convention “may” has been used instead of “should”.

Judgments of annulment that can be recognized on any grounds specified in the domestic law are suspect at the time of their recognition in other countries since the defenses to recognition are specified in the Convention.

Since denying recognition and enforcement of international arbitral awards that are annulled on grounds not specified in the Convention results in denying recognition and enforcement to awards that otherwise would be recognized and enforced, it disrupts the uniform treatment of the Convention.

Denying recognition and enforcement on the domestic grounds of annulment in the country in which the award has been rendered would result in getting far from the effect given to the awards by the Convention.

Therefore, annulment judgments should be looked with caution, and the one that has been rendered in the home court of one of the parties should not have extraterritorial effect. Since

¹⁶² VAN DEN BERG, *supra* at 20.

such a broad non- recognition rule will make the home court to use its power of annulment improperly. Although there is less concern when the home country annuls the judgment on proper grounds, but even here, annulment may have rendered on grounds not specified in the Convention.

4.3.4 The Effect of a Judgment Granting or Denying Recognition and Enforcement

Unfortunately, the effect of a judgment that grants or denies recognition and enforcement of an award is not regulated in the New York Convention.

According to the universally accepted principal of *lites finiri oportet*, there should be an end to the enforcement proceedings.¹⁶³ This will be achieved when the enforcement proceedings become binding. When the automatic binding effect is not given to a previous recognition judgment, the effect should be within the discretion of the court in which recognition of the earlier judgment is sought which is different in each case.¹⁶⁴

This regime will reduce multiple enforcement actions. Moreover, it saves the courts authority to do justice in individual cases where the automatic binding is not given.

5 Conclusion

Recognition and enforcement of international arbitral awards is not without obstacles and pitfalls. Since the award would be worthy only if it can be enforced where the enforcement is sought, it is so important to have such a possibility. The international Conventions especially New York Convention have solved the issue to some extent but there are still some difficulties.

¹⁶³ LAWRENCE W. NEWMAN, RICHARD D. HILL, THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 603(second edition, 2008).

¹⁶⁴ Id. at 604.

Most of these obstacles can be referred to the deficiencies in the regime appeared under New York Convention and the defectively drafted arbitration agreements. Although in New York Convention, the circumstances in which the courts can invalidate the awards or deny recognition and enforcement of the awards has been specified and become limited, but there are still some loopholes for the states in order to deny enforceability of the awards and it is needed to limit the grounds in a way that the countries cannot misuse them to deny the recognition and enforcement of arbitral awards.

Chapter III. Culture and Religion

In the previous chapter, we talked about the international arbitration awards and the different enforcement regimes, as well as the international conventions. In this chapter, we will see the definition of culture and its interrelationship with religion. In addition, we will talk about the influence of these two concepts in Iranian legal system.

As we have previously mentioned, the bilateral and transnational conventions have created an international legal regime that significantly favors the enforcement of international arbitration agreements and awards. However, in the absence of any international convention or treaty, the enforceability of the award will depend on the law of the country in which the enforcement is sought. Although, most of the major trading nations have entered into international conventions addressing the enforceability of the arbitration awards, but still there are so many circumstances in which the national courts and the law of the country in which the enforcement is being sought will affect the enforcement.

For instance, although some Islamic countries in Middle East have tried to change their arbitration laws and have made them more compatible with Western countries, but there is still a strong influence of Islamic culture and Islamic Law (*Sharia*) in enforcing the arbitral awards. So, in addition to international treaties and conventions, we also need to consider the influence of Islamic law in the arbitration rules of Iran.

To completely understand the dispute settlement and more specifically, arbitration in Islamic countries, the knowledge of “the law” of those countries should be accompanied by the deep understanding of their culture and religion. It is difficult to discuss arbitration rules of Iran in a meaningful way, without first looking at its culture and religion.

Consequently, in order to understand arbitration law and regulations in Iran, considering the influence of culture and religion, we need to know what culture and religion are.

Therefore, in this chapter, we will discuss the relationship between culture and religion, and their influence in Iranian legal system, and more specifically, arbitration. Then, we will talk about the meaning of culture, Islam and its cults, and Islamic jurisprudence to be able to understand the subsequent chapters, where we shall discuss the influence of Iranian culture and Islam in international arbitration award and its enforcement.

1 The Role of Culture and Religion in Iranian Legal System

As discussed earlier, Iranian culture and religion has affected its rules and regulations strongly. Here we will talk about the role of culture and religion in Iranian legal system, and more specifically, the legal system with regard to international arbitration awards and their enforcements.

A legal regime is not merely a set of rules and regulations, but also, a number of rules and regulation which follows a specific target and is well-organized in terms of structure, principles, purposes, concepts, and terms. Every country has its specific law, following its own conditions and requirements. There could be even different legal systems in a country with one legal regime.

From the arbitration practitioners' viewpoint, the fixed stable component, the variant and unstable component are two types of components constituting the laws of a country. The fixed stable component cannot be changed. It includes basics, purposes, and structure which are affected by the social values, social thoughts, civilization, and culture of a country. On the other

hand, the variant and unstable components can be modified. Among those are rules and regulations, terms, terminologies, and legal techniques used to state and interpret legal rules.¹

Legal entities and organizations with the same components, both fixed and variant, make a “legal system”, and systems with the same fixed components can make a “legal regime”. For example, Islamic countries, like Iran, Saudi Arabia, Egypt, and some other countries that have the same Islamic principles, purposes, and resources, have similar legal regime, while they have different legal systems (Shia and Sunni legal systems) due to their differences in rules and regulations, and methods of resource selection, and law interpretation. As a result, the different legal regimes have different fixed law components, while the ones with different legal systems have different unstable and variant components of law.²

Although, a single legal regime for all the world is a dream of man, he has always been faced with various legal regimes. Due to the considerable variety of those regimes, the only way to study all the existing regimes is the comparative method and classification of regimes into smaller groups.

There have been different classifications of legal regimes so far; some of them have been made based on legal rules and some based on racial, geographical or a combination of several sources. Apparently, legal basics and sources have had the most effect on differentiation of legal regimes.³

¹ NASER KATOUZIAN, PHILOSOPHY OF LAW, Vol. 1, 136-37(1998)

² J. M. OTTO (ED.), SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT, 627 et seq. (2010).

³ NASER KATOUZIAN, PHILOSOPHY OF LAW, Vol. 1, 38(1998)

Accordingly, legal regimes are classified into two groups of Secular and Religious regimes. Roman-German Law, Common Law, and Socialist Law are of the first group while Islamic, Christian, and Jewish Laws are addressed under the title of second group.⁴

Based on the foregoing discussions, in reviewing the Iranian legal system and the impact of culture and religious beliefs on the establishment of this system, it is inevitable to study principles of such system during the periods before and after Islam.

The ancient Iranian texts and documents show that custom, traditions of the society and religion have been a significant source of legal system during the period before Islam. The local existing traditions had a definitive role as the source and basis of judgment and legal rules of the respective territories.⁵

During that time, the variety of traditions due to the vast territory of Iran, led to the different and various legal issues and respective verdicts. The judicial standards, as far as not contrasting the idea of king, rulers, and Satraps(governors), could be according to the local traditions and beliefs.⁶

Also, the religion and religious beliefs were the factors and resources of judicial and legal systems. The private relationships of individuals and the basis of judgments had been established based on the religion.⁷ The clergymen and the king were at the top of legal system and law making. They used to issue verdicts and penalties appropriate to the circumstances, local traditions, and religions of the subsidiary states.

Following the variety of traditions in nations, the crimes and punishments were different, and could be divided into three groups of political, religious, and public crimes. Public crimes were

⁴ *Id.*

⁵ HASSAN PIRNIA, HISTORY OF ANCIENT IRAN 1487 (1362).

⁶ HADI HEDAYATI, HERODOTUS 140 (1336).

⁷ ASHRAF AHMADI, LAW AND JUSTICE IN THE PERSIAN EMPIRE 65 (1346).

of vast variety based on the multiplicity and differences of cultures and traditions in the tribes and territories. In some cases, an action was permissible in one area, while the same action was a crime in another land.⁸ For example, during the time of *Darius the Great* in ancient Iran (600 – 530 BC), the punishment of liars was death due to the significance of *Zoroaster* religion.⁹

There were different legal resources and decisions during the different periods of ancient Iran, which were rooted in the kings' commands, common traditions existing in the society, and religious regulations specially *Zoroaster* religion.

Except for the time of Alexander and *Seleucid empire* (312 BC to 63 BC)¹⁰, the legal regime in Iran was constantly improving, and got to its utmost development during the *Sassanid* period (224 to 651 AD)¹¹, so that some scholars could compare the Iranian system of the time with the circumstances existing in Europe in 18th century. That status of legal system and civilization of *Sassanid* era could significantly affect the socio-political and legal system of Arabs, even though they had defeated *Sassanid*.

Upon entrance of Islam into Iran, the Islamic rules and viewpoints interacted with the Iranian culture, so that the principles of Islamic law became the basis of Iranian legal system. Nowadays, the legal regime of Islamic Republic of Iran includes the *Shia* legal system as the basis, while it covers the other *Sunni* legal regimes and legal systems of religious minorities as well.

2 Interrelationship Between Culture and Religion

As previously mentioned, culture and religion have a strong effect in Iranian legal system, and following that, they affect how Iranian legal system treats international arbitration awards

⁸ Fathallah Yawari, 1344, *Judgment of the Achaemenid Kings*, 129 Judicial Monthly 76(1344), No. 129, p. 76

⁹ KUHRT, AMELIE, *THE ANCIENT NEAR EAST: C3000-330 BC.*, 647(1995)

¹⁰ Judith R. Baskin, Kenneth Seeskin, *The Cambridge Guide to Jewish History, Religion, And Culture*, Cambridge University Press, 37.

¹¹ A Brief History, Culture of Iran (2001), available at https://web.archive.org/web/20011121030510/http://www.cultureofiran.com/b_history.php

and their enforcements, considering Iranian national legal system. Now, we will discuss whether, these two concepts, with respect to Iranian legal system, have any association with each other, or not.

Concerning the relationship between culture and religion, some scholars believe that there is a deep relationship between culture and religion, while some others are of the belief that there is no relationship. However, there is no doubt that the roots in believing in something, and accepting a religion by a society is directly affected by the society's existing cultural beliefs.

Some theoreticians believe that there is no relationship between culture and religion since culture is a social heritage, having a national aspect, which is created upon the natural and gradual evolution of society, and affected by the geographic and climate conditions. In other words, what a society creates in a natural geographical and perhaps historical condition, and gives it to the people is called "culture". On the other hand, religion is not a social heritage and is not created by human. As indicated by the scholars, religion is divine entity. Based on this assumption, religion is independent of culture, while they are compatible with each other.¹²

On the other hand, some theoreticians believe that it is difficult to reject the existence of relationship between religion and culture since many of religious messages are the same as cultural guidelines. For example, morality is discussed in religion, while the spirit of culture addresses the same subject as well. Also, behaviors and manners have been addressed by both.¹³

Undoubtedly, there are differences among cultures, due to their climatic and geographical situations. Some cultural practices, like burying the girls alive by Arabs before Islam, and superstitions existing in different communities have no relationship with religion. However,

¹² Mohammad Reza Kashefi, *Religion and Culture, Relations of Religion and Culture in Iranian Society*, 13844 Article Collection L.J. ,1, 170-177.

¹³ MAHDI HADAVI TEHERANI, BELIEFS AND QUESTIONS 58 – 45 (1382).

some cultural practices are accepted by religion with some changes. Furthermore, in many cases, religion becomes the basis of some cultures.¹⁴

History has proven that a new religion usually appears, when an organized system of earlier religion becomes corrupted, or when a deviation from morality exists in society. When a religion comes into existence, a revolution or major changes are usually made in the values and system of the society, so that culture can be changed dramatically by removing certain elements, and accepting new elements according to the modern new values or the new school. Accordingly, the religion and schools of thought can create culture.¹⁵

Not every religion brings a new culture, but it creates or addresses certain values, which leads to the collapse of the earlier culture that does not match the new values. Like, appearance of Islam and disappearance of the tradition of burying the girls alive by Arabs.

Besides, there are certain cultures which have no content and oppose the new values. It is possible to give spirit to such formats, based on the new values, and get them out of corruption, and consider them as a device of creating new values. For example, *hajj*, in which its previous format was not according to divine criteria. yet, it was not removed by Islam, and the same tradition was preserved, but has been given a new content, so that it could remain and be improved in the new culture.¹⁶

In fact, religion does not bring a new culture. Religion creates new values, so that based on those values, society can create a new culture. Accordingly, after appearance of the new culture out of the new religion, the religion will become a part of that culture.

Also, this should be pointed out that entrance of the same religion into different nations and tribes leads to creation of different cultures, based on the same values. Let's not assume that if

¹⁴ *Id.*

¹⁵ Kashefi, supra note 12.

¹⁶ *Id.*

religion enters into any territory, it would create the same culture as anywhere else. Religion actually brings the same values into different lands, but different cultures would be created due to the earlier different cultures and the geographical living situations. However, the divine religions have had an effective role in development of good traditions, behaviors, and manners.¹⁷

Considering the role of religion and the concept of culture, we will realize that the said two items have continuously addressed human issues, presented appropriate solutions to guide human towards evolution and meeting his/her needs. Therefore, it can be argued that the foundation of any religion lies in three systems: belief, value or morality, and jurisprudence. Hence, religion introduces its specific new culture to the human society and call men and women to get acquainted with it.¹⁸

Upon appearance of religion, a useful and fruitful development is created in people's thoughts and spirits. It renews the thinking process to see the realities, improves the morality and education of human being, and removes the old disrupting traditions and systems, so that new dynamic systems, with certain excellent ideas, could replace them. Under such developments, the economic life improves, and the scientific, philosophical, art, and literature starts blooming. This is not only accepted by Muslims, but also confirmed by Catholics in the Vatican Council indicating that "religion has formed culture, and culture has given entity to people. In other words, the human need of religion is the basis of culture".¹⁹

In light of the meaning of religion and culture, their principles and purposes, functions and roles, and the existing common areas between these two concepts, it can be concluded that religion and culture have an inseparable connection with each other. As religion plays an effective role in human civilization and culture, culture helps society to get benefit from its

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

physical and spiritual activities based on logic and good feelings. So, culture and religion can be the effective factors of extensive developments in human growth and evolution.

As a result, culture and religion are two important and effective factors influencing, Iranian legal system, regarding how to act with regard to international arbitration awards and their enforcements.

3 Culture

As previously noted, in order to understand arbitration law and regulations in Iran, considering the influence of culture and Islam, first, we need to know what culture and Islam are. Now that we have touched on relation between culture and religion, and their influence in Iranian legal system, and more specifically, arbitration, we need to talk about the meaning of culture, Islam and its cults, and Islamic jurisprudence to be able to understand the following chapters, that will discuss the influence of Iranian culture and Islam in international arbitration awards and their enforcement. So, in this section, we are going to talk about culture, its meaning and concept, and finally the Islamic culture.

3.1 The Meaning of Culture

The word culture (*Farhang*) is quite an old word in Persian language. It is found not only in the primary texts of Dari Persian, but also in the text remained from Pahlavi Dynasty era.²⁰ Basically, culture means manner and nurture,²¹ and it has been an equivalent to education in European languages; however, propagation of the word culture and concepts related to it, necessitated finding an equivalent for it and thus Persian language found an equivalent for the

²⁰ *Pahlavi* is strictly speaking the alphabet that was used for both Middle Persian and Parthian. In a more colloquial sense, today, *Pahlavi* refers to the Middle Persian language, not to Parthian. *Dari* is more or less classical Persian as it was codified and pronounced some 1000 years ago (since then, the phonology in Iran has slightly changed). Today, we can roughly say that it corresponds to the Persian dialects spoken in Afghanistan.

²¹ DR. MOHAMMAD MOEIN, FARHANG MOEIN (MOEIN CULTURE), under the word “*Farhang*” (2009).

word culture called “*Farhang*” and another equivalent for education called “*Amoozesh and Parvaresh*”.²²

The ancient form of culture has not been seen in current *Avesta* and texts remained from ancient Persia.²³ However, the *Pahlavi* Dynasty format of this word is probably rooted from “*far*” which means “high” and “*hang*” which means “to draw and raise above”. This combination means drawing up. Lexically, “*farhang*” means knowledge and wisdom. However, it has been used in other meanings too, including Goodness, education, nurture, highness, virtue, art, science, dignity, jurisprudence and science of law.²⁴

The word culture has been rooted in Latin Classical languages and even before that, which means agriculture or nurture, and that’s why it is used in agriculture, apiculture. It is quite recent that the word culture has been used regarding human societies and history and is probably been used in this meaning in 1750 AD in German language.²⁵

English language used to adopt the word culture as equivalent to civilization. This term is rooted from *Cius*, *Civilis* and *Civiliz* which mean “political” and “urban”. In other words, it places citizens of an organized government contrary to tribesmen. “A civilization is any complex society characterized by urban development, social stratification imposed by a cultural elite, symbolic systems of communication (for example, writing systems), and a perceived separation from and domination over the natural environment”.²⁶

²² D. N. MACKENZIE, “FRAHANG” IN A CONCISE PAHLAVI DICTIONARY, 32 (1971).

²³ *Avesta* is the primary collection of religious texts of *Zoroastrianism*.

²⁴ BEHMARDI, THE ROOTS OF THE WORD “FARHANG” IN THE MIDDLE ERA, 25.

²⁵ DOUGLAS HARPER, ONLINE ETYMOLOGY DICTIONARY (2001); A. L. KROEBER, C. KLUCKHOHN, CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS (1952).

²⁶ ROBERT MCCORMICK ADAMS, THE EVOLUTION OF URBAN SOCIETY, 13 (1966).

Accordingly, both culture and civilization are primarily rooted in being advanced to the level of prosperity, and have still kept the same meaning in so many vulgar or/and intellectual applications.

3.2 The Concept of Culture, And What the International Arbitration Practitioners Should Be Aware of

As we have previously mentioned, to completely understand the dispute settlement and more specifically, arbitration in Islamic countries, we need to look into their law, and the knowledge of “the law” of those countries should be accompanied by the deep understanding of their culture.

Culture, considering its applications, includes several different historical, psychological, structural and even descriptive definitions. Its historical definition is mostly concentrated on society’s social heritage. Psychological definitions have been formed by emphasis on facilitation of environmental and social compatibility. Structural definitions rely mostly on structures created by human society, and descriptive definitions rely on elements of culture.²⁷

Considering the different aspects of culture, nowadays, many believe that human being is a cultural animal and even consider this definition more inclusive than “speaking animal”. They believe that in the past definition of human being, his social aspect was not considered. However, in all definitions provided for culture, society has always been considered. Accordingly, human without society is out of culture, and cannot be considered as a cultural being.²⁸

On the other hand, this definition cannot be considered as an absolute fact, and be generalized to all human beings. For instance, a human being may live away from society, while having all

²⁷ Vahid Hosseinzade, *Pathology of The Culture of Sacrifice and Martyrdom and The Identification of Inhibitory Factors and The Rooting of Barriers to Promotion*, 37 Monthly Public Culture 52, 53-63 (Winter 2003).

²⁸ ROY F. BAUMEISTER, THE CULTURAL ANIMAL: HUMAN NATURE, MEANING, AND SOCIAL LIFE, 10 (2005).

characteristics of human being, but be unaware of how to live in human societies. Studying the source of culture, some say that culture was started to grow gradually in human being, and began to appear following his existence.²⁹

In sum, there are fundamental disputes, and serious arguments regarding the concept of culture, and we cannot easily consider “cultural animal” an inclusive definition for human being. It’s been said that, Adam and Eve have been the starting point of all modern humans, who have had patterns of thoughts and attitudes regarding the universe. Also, there has been a value system for them for distinguishing right from wrong. According to the existed definitions, these affairs have been elements of culture and thus, Adam and Eve had culture. Consequently, it should be mentioned that defining culture based on concept of society is not precise enough, and may confuse us in defining its applications and implications.³⁰

Ruholamini in his book provided one of the most important definitions of culture, in which there have been some critics on it as well. He has excluded culture from its classic definitions and deem it equivalent to civilization. According to him, “culture is a combination of knowledge, beliefs, art, morals, laws, traditions and customs gained by human as a member of society, and society is also responsible for it”.³¹

According to this definition, cultureless human or cultureless society doesn’t exist since social life means living together and living in culture. With this regard, living in the most primitive tribes is equal to living in the largest and the most complicated modern technologic societies since both lives are specific to the human, who is living with culture in cultural atmosphere, even

²⁹ Hosseinzade supra note 27.

³⁰ ROY F. BAUMEISTER supra note 28.

³¹ MAHMOUD RUHOLAMINI, THE FIELD OF CULTURAL SCIENCE: COMPILATION IN CULTURAL ANTHROPOLOGY AND ANTHROPOLOGY WITH REVISION AND ADDITIONS 17-18 (1394).

though, their cultural elements are fundamentally different from each other due to their form, intent, simplicity, and complexity.³²

According to Gey Roche, culture is an inter-related combination of expressive thoughts, emotions and acts accepted by majority of people in a group, and in order for these people to form a specific group, it is necessary to keep this connected, objective and symbolic combination safe.³³

Practitioners of arbitration, believe that culture includes several social models of behavior, being practiced by all or most of the members of the society, and society is a cultural term being used by people for expressing some of their behaviors, depending on their relations with each other. Some define culture as a combination of acquired behaviors, which are transferred by members of a specific society from a generation to another.³⁴

Some scholars assert that all social realities in their broadest way, including language, marriage, ownership, politeness, artifacts and art are components of culture. Some others say that culture is a combination of human attempts in order to go along with situations and adjust life matters.³⁵ Also, some define culture as a collection of opinions and beliefs that are expanded as a result of attempts, made by a specific group for overcoming and adaptation of external and internal issues. So, culture is a realm of evolution, and transformation.³⁶ As Arthur Gemmell, the professor of international arbitration, brought in one of his articles, “culture is answering the question without the question being asked”.³⁷

³² ASHURI, DEFINITIONS AND CONCEPT OF CULTURE 39-40 (1393).

³³ RUHOLAMINI, *supra* note 31.

³⁴ MANSOUR VOSUGHI, ALI AKBAR NIKKHOLGH, PRINCIPLES OF SOCIOLOGY 118 (1370).

³⁵ MANOUCHEHR MOHSENI, PUBLIC SOCIOLOGY 204 (1374).

³⁶ HOSSEINALI NOZARI, FORMATION OF MODERNISM AND POSTMODERNITY: THE BASES OF HISTORICAL GENESIS AND THE FIELDS OF SOCIAL EVOLUTION 208 (1379).

³⁷ Arthur J Gemmell, *Culture as a Successful Factor in International M&A Dispute Process*, 70 dispute resolution journal, 87 (2015).

Calvin Schrag, a distinguished professor of philosophy, has introduced science, moral, art and religion as important realms of culture.³⁸ Sorokin has theoretically, divided all the phenomena into three categories: Nonorganic, organic and super-organic. He believes that nonorganic phenomena are only consisted of a physicochemical factor, while organic phenomena, in addition to physiochemical factors, are of a life factor too. In super-organic phenomena, in addition to factors mentioned above, another factor is also added, which is quite determinant for the phenomena and is the factor of culture. In his opinion, all cultural phenomena have some meanings.³⁹

Gerhard Lensky and Jane Lensky emphasize on the symbolic systems, taking advantage of micro-sociology. They recognize culture as a combination of social symbolic systems and information and messages located in it. They have noted that a number of sociologists have included behaviors and artifacts of people in the definition of culture; however, it is preferred to consider such factors as cultural products, and not culture itself. So, he believes that in definition and analysis of culture, obvious behaviors and social relations like, social structure and artifacts and artistic products are not automatically considered as the elements of culture.⁴⁰

Although, the above definitions are some of the most acceptable viewpoints in the sociology, anthropology and cultural studies, there are still some omissions and inaccuracy existing in them, which make it difficult to reach a conclusive definition.

Part of the criticism of Ruholamini's definition is that he has not distinguished organizations and social institutions from general concept of culture, which gives a vast definition to the

³⁸ CALVIN O SCHRAG, THE SELF AFTER POSTMODERNITY 75 (1997).

³⁹ ASADOLLAH NOROUZI, THEORIES OF SOCIOLOGY AND MODERN PHILOSOPHY OF HISTORY, translation of Aleksandrovich Sorokin, The Sociology of Revolution 223-225 (1998).

⁴⁰ NASSER MOVAFAGHIAN, THE TRENDS OF HUMAN SOCIETIES, Translation of Gerhard Lensky, Human Societies; An Introduction to Macrosociology 24-25 (1369).

concept of culture.⁴¹ Furthermore, despite having considerable differences, he has interpreted culture and civilization with the same meaning.⁴² For example, culture defines life modes (ideology, religion, literature), while civilization deals with formation of society, system and supervision of social conditions (techniques, social organizations). Accordingly, culture relates to social values and civilization deals with social realities.⁴³

Considering the above definitions, scholars normally look at culture from two aspects: A) As an objective fact, such as anything that has actually happened or considered as a result or conclusion of something; B) As a reality in which people live, and participate in continuous and mobile events, consisting of values.⁴⁴

Sometimes, culture includes explicit behavioral patterns, and sometimes, implicit patterns, which will be attained and transferred via symbols and in a symbolic manner. Sometimes, it includes ideology that justifies a specific way of life, and sometimes includes some general principles by which we can understand the individuals' behavioral patterns through watching the members of the group, and simultaneously distinguish the members' appropriate and favorable patterns of behavior. Thus, culture is used with both general and specific meanings. In its general meaning, culture is the way of living and thinking, and is derived from a combination of knowledge, experiences and beliefs of a nation. In fact, it is a nation's understanding of what it has received during its living through continuous centuries.⁴⁵

However, the specific meaning of culture refers to spiritual assets of a nation, and may include all literary, artistic and intellectual works, and everything that have originated inside the nation, and have become noticeable in their lives. If this creation concentrates mostly on physical

⁴¹ MANOUCHEHR MOHSENI, A SURVEY ON THE CULTURAL SOCIOLOGY OF IRAN, 23 (1386).

⁴² Ruholamini, *supra* note 31 at 48.

⁴³ *Id.* at 48.

⁴⁴ BAQER SAROUKHANI, SOCIAL SCIENCE OF CULTURE, 77.

⁴⁵ *Id.*

and material needs, it is called civilization. But, where it deals with spiritual, immaterial needs, it is called culture. However, both of these concepts are somehow interrelated.⁴⁶

Sometimes, human being is defined as a cultural being. Cultural being is someone who doesn't get satisfied by material possession, physical comfort and obtaining the primary needs, but asks for the depth and spiritual values as well.⁴⁷

Also, culture can be objective or subjective. Objective culture includes phenomena that are sensible and tangible and can be measured by quantitative and scientific measures. Subjective culture, on the other hand emphasizes on issues which cannot be measured quantitatively and cannot be easily compared or assessed like beliefs, familial ties, language, art, literature and traditions which constitute a society's cultural identity and missing them would be a big loss for society.⁴⁸

The practitioners of arbitration believe that culture has three components, which are influenced by each other as follows;

First is the systems of beliefs. This system is deemed as the basis of human activity regarding thoughts. It is actually constituted of assumptions, beliefs, trainings, reasoning methods regarding the world interpretation, relationship of human with the surrounding world and environment, and finally the purpose of human's life.

Second is the system of values and inclinations. This system is indicative of values and believing in them. Through this system, there will be boundaries between good and bad, favorite and useless, preferred and hated in terms of value, moral, and legal statements.

And the last but not the least is the system of manners and actions. This system is constituted of all the educations, which make it possible for human to adjust his/her manners with the other

⁴⁶ *Id.*

⁴⁷ Roy F. Baumeister *supra* note 28.

⁴⁸ M ROUHOLAMINI, THE FIELD OF CULTURAL STUDIES, 11 (1986).

people's action. In this territory, the trainings of the first and second systems will be realized and viewed, meaning that individual and social manners of human will be planned based on his/her viewpoint and inclinations. Actually, in this third system, the practical trainings and techniques of manners will be programmed according to the type of belief and value systems.⁴⁹

So as a unified meaning out of above various, and different definitions of culture, culture can be defined as a combination of beliefs, traditions, customs and values, acceptable by public, which its acceptance does not need any scientific reasoning. Also, its creation or obviation needs passage of time, and it is not located in a specific time or place. Its creation is of different and sometimes opposite reasoning, and creates a bond of kindness among its holders.⁵⁰

In conclusion, we should mention that in an arbitration between the parties, one should not forget the strong influence of culture in International relations as it defines many actions and concerns of society. Ignoring this issue can create many problems and a hostile atmosphere between nations, that even affect International commercial arbitration enforcements. Accordingly, knowledge of Iranian culture will help international arbitration practitioners know what they should expect with regard to Iranians' legal approach in arbitration.

3.3 Islamic Culture

Having discussed culture, we need to talk more specifically, about the Islamic culture which exists in Iran and affects the governing laws, and more specifically, international arbitration in Iran. Islamic culture has its own way of thinking. It teaches Muslims all around the world its own ideology, and how to make the actions, beliefs and morals according to that special ideology and in accordance with the Islamic rules. Sources of Islamic culture include Quran, Sunnat (tradition

⁴⁹ Akbari, *The Role of Religious Thought in the Development Process*, Scientific Journal of Shahed University, 35 (Winter 1995)

⁵⁰ *Id.*

of prophets and Imams) and Hadith (words of the prophets and Imams), which is commonly believed by all Muslims and is recognized by them. Indeed, Quran and Sunnat are reflections of monotheism and form Muslims lives.⁵¹

Accordingly, Islamic culture is a collection of beliefs, values, traditions, patterns and methods derived from Quran and expressions of the messengers and Imams. When the mentioned rules govern the individuals and societies, the culture of those individuals and societies that believe in Islam is considered Islamic.⁵²

On the other hand, whenever culture is used for the findings of man and his social heritage, Islamic culture can be referred to as a combination of positive materialistic and non-materialistic works of Islamic societies, where people gain their beliefs, values, traditions, patterns and methods of life from Quran and expressions of the messengers and Imams and apply no intentional negligence and failure towards them.⁵³

According to Islamic Scholars, the most important specifications of Islamic culture are the facts that the fundamental sources of Islamic culture (Quran and *Sunnat*) are unique, the principles in Islamic Culture are constant, and are not obviated via innovations and inventions, rules and regulations defined by Islamic culture are clear, Islamic culture directs man towards responsibility arising out of awareness and freedom, and prevents him from obedience and submission towards immature social rules and cultures, Islamic culture has the possibility of globalization, transferring Islamic culture is fast and penetrative. Since Islamic culture is approved by human nature, and also, since Islam approves some behaviors and traditions,

⁵¹ Islamic Thoughts, Encyclopedia Britannica available at <https://www.britannica.com/topic/Islam/Islamic-thought>

⁵² Tahoor Encyclopedia available at www.tahoor.com

⁵³ *id.*

Islamic culture is easily accepted by individuals and societies, and Islamic culture deals with transaction and communication with other cultures.⁵⁴

4 Religion as an Influential Factor in Arbitration Proceeding in Iran

In addition to culture, in order to understand the Islamic dispute settlement and more specifically, arbitration in Iran as an Islamic country, an international arbitration practitioner should have a deep understanding of the religion (*Din*) in Iran. It is difficult to discuss Islamic jurisprudence in a meaningful way without first looking into Sharia. In other words, in addition to culture, religion of Islam affects the international relations of Iran. Consequently, in order to understand the religion of Islam and its classifications, we need to define religion and cult. The understanding of these concepts will help us understand the different points of views of different Islamic cults and sects, with regard to international arbitration, which will be discussed in the following chapters.

4.1 Religion and Cult

Before delving into the definition of cult, and investigating the differences in cults, we need to define religion (*Din*).⁵⁵ In fact, believing in originality and unity of divine religions have made their major differences go away. Indeed, cult differences have created all the approaches and interpretations of religions. Religion is a divine and supernatural phenomenon. It is said to originate from a divine source.⁵⁶

There is no scholarly consensus over what precisely constitutes a religion. It may be defined as “a cultural system of designated behaviors and practices, world views, texts, sanctified places,

⁵⁴ Islamic Daneshnameh available at <http://wiki.ahlolbait.com>

⁵⁵ The term cult usually refers to a social group defined by its religious, spiritual, or philosophical beliefs, or its common interest in a particular personality, object or goal.

⁵⁶ WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE. A STUDY IN HUMAN NATURE. 31 (1902).

prophesies, ethics, or organizations, that relate humanity to the supernatural, transcendental, or spiritual". Religion is an attempt for displaying the mere truth of goodness existed in all aspects of universe. It is believing in an eternal GOD. It is believing in a divine will and mind, ruling the whole universe, who has moral similarities with human being.⁵⁷

In each of the provided definitions, some different aspects have been emphasized, and each scholar has considered one aspect of religion. In fact, it is wise not to consider one aspect as a complete definition, and create a comprehensive definition of religion by the common specifications of all religions. Following this approach, six general aspects or dimensions of all religions has been introduced as follows: Experiential, Mythical, Doctrinal, Ethical, Social and Practical.⁵⁸

Considering these aspects, it can be said that religion is a combination of beliefs, actions and emotions, which has focused on the ultimate truth. This truth can be treated according to differences in religions, being single or multiple, specific or nonspecific, divine or non-divine and the like.

According to *Sharia*, religion is a set of regulations defined by God and introduced to human being via the prophets. As asserted by Allamah Tabatabai, true religion is a specific manner, by which the secular and temporal needs of man is met, following his path to perfection and eternal life in the hereafter. Thus, it is required for religion to include regulations meeting human secular needs as well.⁵⁹

⁵⁷ BRENT NONGBRI, BEFORE RELIGION: A HISTORY OF A MODERN CONCEPT, 16 (2013).

⁵⁸ JOHN MORREAL, TAMARA SONN, 50 GREAT MYTHS OF RELIGION; Myth 1: All societies have religions, 12-17 (2013).

⁵⁹ ALL'AMAH SAYYID M.H. TABATABA'I, THE QURAN IN ISLAM: ITS IMPACT AND INFLUENCE ON THE LIFE OF MUSLIMS, 86 (1987).

The term “*Din*” (religion) is a common word of Arian and Sami. It is an Arabic term, which is used in *Sami* language and means judgment and punishment. Customary meaning of religion is *Sharia*, which is brought about by divine messengers or claimants of prophecy. In Arabic, it means obedience and submission and in *Avesta*, it is clear conscience and ego.⁶⁰ In Islamic culture, religion is introduced as the verbal acknowledgement, and belief in divine award and punishment in this world, and practicing the rules and regulations aligned with it.⁶¹

In fact, the difference between cult and religion is that religion has an inclusive meaning, and cult can define its different interpretations and principles. In other words, general outlines of Islamic sects are the same but there are some conflicts in their principles, and sometimes, some parts of religion have been removed from them. Cult means way and path and ethic based on which, followers of a religion will separate their ways from each other due to specific thoughts or interpretations. If separate interpretations are due to thoughts and beliefs, it is called verbal, and if it is due to practical rules, it is called juridical cult.⁶²

According to some scholars, cult is an attempt for realizing what is capable of being realized, and expressing what is hard to express. cult is in fact, man’s relationship with supernatural powers, in which people have faith, and upon which they are depending on. It acknowledges existence of a superhuman power on which people are depending on. In addition, it makes it possible and necessary to communicate with them. Indeed, cult is the human attempts and activities, which are rooted in believing in supernatural powers and dependence on which is felt

⁶⁰ The *Avesta* /ə'vestə/ is the primary collection of religious texts of Zoroastrianism, composed in the otherwise unrecorded *Avestan* language.

⁶¹ Dekhoda Dictionary, available at <http://dictionary.abadis.ir/?LnType=dekhoda,fatofa,moeen,amid&Word=%20دین>

⁶² BENJAMIN DAVID ZABLOCKI, THOMAS ROBBINS, MISUNDERSTANDING CULTS: SEARCHING FOR OBJECTIVITY IN A CONTROVERSIAL FIELD, 474 (2001).

by human. Cult is a common system of beliefs and actions related to sanctities and prohibitions.⁶³

Cult is a social institution, which its major specification is the existence of a nation with the members, who are different in accomplishment of some rituals and compliance with orders, believing in an absolute value for which there is no equivalent and the nation support and protect that value, Relating individuals with a spiritual and superhuman power, called GOD (cult is an individual system of emotions, beliefs and actions, which its purpose is GOD).⁶⁴

In the past, cult used to be referred to schools of thought inside the religion.⁶⁵ Also, in the west, the term religion is used for schools of thoughts inside a religion and also religion itself. It is almost half a century that the Iranian modernists use this term for both of these meanings.⁶⁶

Some scholars believe that religion is the adjoining point of relationship between human and God. The aim of a religious person is also being matched with God, and attracting his attention. Religion roots in the conscience and wisdom. Religious acts join followers of that religion together, and force them to form their beliefs in a specific shape, so that it is comprehensible for everyone. Religion, like armies, has a sign and symbol, called religious customs and rituals, which is like a flag, being respected by followers of that religion.⁶⁷

The Arabic term of “*Mazhab*” (cult) might be rooted from the verb “*Zahab*” meaning “going”. Accordingly, *Mazhab* (cult) is a “noun of place”⁶⁸, meaning “A place to go”. On the other hand, if it is rooted from “*zahab*” meaning “having a tendency towards a theory”, then it means “idea, belief and religion”.⁶⁹ Thus, it can be concluded that the second meaning is also

⁶³ M.J MASKOUR, ISLAMIC CULTURE, 197.

⁶⁴ Zablocki, supra note 62.

⁶⁵ Maskour, supra note 63.

⁶⁶ H TOFIGHI, FAMILIARITY WITH THE GREAT RELIGIONS, 13 (2001).

⁶⁷ *Id.*

⁶⁸ In Arabic and other Semitic languages, a noun formed from a root and expressing the sense of “place of X”.

⁶⁹ Mohammad Moein, Moein Culture, vol. 2, p. 2523 (1997)

rooted from the first meaning. It refers to going into a specific path in physical way, and also a specific method in issues of thought and theoretical. So, they are both referring to “*Zahab*”, which is a “noun of place” in Arabic.⁷⁰

As a result, the word cult, refers to a specific belief or method dealing with theoretical and spiritual issues.⁷¹ Thus, two meanings can be inferred from the word cult; the specific meaning of cult refers to a branch of religion like *Shia* or *Sunni* in Islam; and the general meaning is equivalent to the concept of religion. In order to understand the Islamic cults’ points of view regarding international arbitration and its enforcement, first, we should know about these cults, and their differences to be able to understand the differences in their ideas.

4.2 The Islamic Concept of Religion and Cult

As previously mentioned, in order to understand the different thoughts of different branches of Islam regarding international arbitration, we need to know what those branches are and how they are different from each other. So, here we will discuss the concept of Islam and its cults.

The term religion has been used in two different meanings in Quran; the first means arbitration, punishment, revenge, and the second means habits, rituals, *sharia* and rules based on which people arbitrarily plan their lives. According to Quran commentators, in verse “Sovereign of the Day of Recompense”⁷², *Din* (religion) has been used as judgment and punishment which refers to the conclusion of life. However, in some verses it has been used in a way not referring to these meanings at all.⁷³

Din is an Arabic word entailing several meanings in different encyclopedias. Some of those meanings are Kingdom, obedience and submission, wrath and dominance, reward and

⁷⁰ MOHAMMAD BANDAR RIGI (TRANSLATED), ALMONJAD, Vol. 2, 1321

⁷¹ IBN AL-MANZOUR, LASSAN AL-ARAB, vol. 10, 244.

⁷² The Arabic word for “Sovereign of the Day of Recompense” in Quran is «مالك يوم الدين».

⁷³ Z Shmidtkeh, H Ansari, Summary of Islamic teachings, Tehran: The Institute of Philosophy and Philosophy of Iran, 75 (1992).

punishment, honor and pride, reluctance and benefaction, solidarity, humiliation and modesty, Islam and monotheism, habit and method, presidency and obedience, etc.⁷⁴

Also, in Quran verses, different meanings of *Din* have been used. Each verse refers to one meaning. For instance, in *Al- Saff* verse 9, “*It is he who has sent his messenger with guidance and the religion of truth, that he may proclaim it over all religion, even though the Pagans may detest*”, the word *Din* refers to religion and sharia; or in another instance in *Al- Zumar* verse 2, “*Verily it is we who have revealed the book to thee in Truth: so serve Allah, offering him sincere devotion*” where *Din* refers to monotheism and belief in unity of God.

This usage of the word *Din* in Quran can be used as a way to identify the definition of religion from Islamic point of view. For example, religion refers to respect, tendency, obedience and submission towards reality, in which case it will be equivalent to the meaning of the word “*Din*” itself.

One of the greatest Islamic scholars and the invaluable Shia interpreter, Allameh Tabatabai states that religion includes a set of beliefs and practical and moral orders brought by God messengers for guidance of man. Believing in these orders and applying them bring about happiness in both worlds.⁷⁵

In the introduction of the book “*Shia in Islam*”, Allameh Tabatabee has mentioned that “Man is always willing to fulfill his needs as complete as possible in order to continue his existence. That is why he has arbitrarily determined his rules and regulations, or has taken them from others, and match his actions in accordance with them. The regulations that govern man’s life are based on some fundamental beliefs, which are basis of his life. In fact, these are the images of man from the universe he is living in, and the judgment he has. Combination of these beliefs and

⁷⁴ *Id.*

⁷⁵ TABATABAI, SHIA IN ISLAM, 174 (2001).

rules and regulations in accordance with them is called Din (religion). If any divergence appears in religion, it is called cult, like Shia and Sunni in Islam, Vatican and Protestant in Christianity”.⁷⁶

4.2.1 Islam and Its Cults

As we have discussed earlier, different cults of Islam have different opinions and points of view with regard to arbitration, and more specifically here, international arbitration awards and their enforcement. So, understanding of what these cults are is the first step in knowing their different ideas regarding the international arbitration. Here, these cults and the history behind them are discussed below.

The word “Islam” means submission and obedience. Thus, in Quran, the religion inviting people to act in certain way is called Islam. It is a plan for man’s submission towards the God of the whole universe, so that Muslims only obey God and his rules.⁷⁷ As declared in Quran, the first person who called this religion “Islam” and its followers, “Muslims” was Ibrahim.⁷⁸

History indicates that the followers of a religion –whether holy or not- always face some divergence. It is due to social, psychological or moral reasons, and leads to creation of cults. Accordingly, after Prophet Mohammad (PBUH) deceased, due to several social and non-social factors influencing the emotions of Muslims, they have started following different paths under the name of Islam. So, they became afflicted by arguments, conflicts and even bloody fights leading to their weakness against enemies.⁷⁹

⁷⁶ *Id.*

⁷⁷ *Aal-i-Imraan*, verse 19; The Religion before Allah is Islam (submission to His Will): Nor did the People of the Book dissent therefrom except through envy of each other, after knowledge had come to them. But if any deny the Signs of Allah, Allah is swift in calling to account.

⁷⁸ *Aal-i-Imraan*, verse 67; Abraham was not a Jew nor yet a Christian; but he was true in Faith, and bowed his will to Allah's (Which is Islam), and he joined not gods with Allah.

⁷⁹ ABDUL QA'IR BIN TAHER ABU MANSOUR, *AL-FURQ BIN AL-FURQ*, 13 (1977).

During the era of Prophet Mohammad (PBUH), there were apparently no political or ethical disputes among Muslims- at least apparently- and all Muslims were under one flag, and with one belief led by the prophet, who had formed a unique Islamic nation. However, after his death, the dispute on the issue of leadership over Islamic society started. Consequently, a group of the prophet's followers named "Ansar" believed in leadership of "Sa'debne Ebad" and the Ghoreysh tribe⁸⁰ believed that the leader should be someone in their tribe.⁸¹

Also, a limited number of his followers, by referring to Quran verses, considered his orders as God's revelation, and believed that obeying them were mandatory. Thus, following the holy prophet's will, regarding the issue of leadership, they deemed it appropriate to consider Imam Ali as their religious leader. That's why they were called Shia as has been asserted in holy prophet's statements as well, and to this day the followers of Ali are referred to as "*Shia* Muslims".⁸²

After Prophet Mohammad (PBUH) 's death, some others who were led by his relatives, formed a group in *Saghife Bani Saede*. In fact, they staged a *coup d'etat* against Ali, and after several tribal disputes, allied with Aboobakr who started to rule Muslims, and as a result, the *Sunni* cult was born. These group of Muslims didn't have a name at the beginning, and were only known as followers of Caliph. However, according to Aboohatam Razi, after Osman's death, during the era of Moavieh, they started to be known as Ottoman. Imam Ali's follower's (Shia) were also known as *Alavieh*. In *Abasian* era, the names *Alavieh* and *Ottoman* gradually vanished, and they started to be known by their old names, which were *Shia* and *Sunni* again.⁸³

⁸⁰ The *Quraysh* were a mercantile tribe that historically inhabited and controlled Mecca and its *Ka'aba*. The Islamic prophet Mohammad was born into the Banu Hashim clan of the *Quraysh* tribe. The *Quraysh* staunchly opposed Mohammad until converting to Islam en masse in 630 CE. Afterward, leadership of the Muslim community traditionally passed to a member of the Quraysh as was the case with the *Rashidun*, Umayyad, and *Abbasid* Caliphs.

⁸¹ *Id.*

⁸² SHEIKH TUSI, AL-SHI'A JURISPRUDENCE, 16 (1411 AH).

⁸³ *Id.*

In addition to the preceding cases, other religious disputes that led to the creation of different religious sects and groups in Islam are verbal thoughts, political thoughts, and Islamic jurisprudence and *hadith* thoughts.⁸⁴

Undoubtedly, various opinions on the subject of verbal issues have led to division in the religion of Islam, as the Christianity has been divided into branches of Catholic, Protestant, and Orthodox due to the same reason. A number of ideas such as comprehending the Quran concepts, considering the Imams' comprehension respectively, the concepts of inherent nobility or obscenity, and the ideas of Imams' infallibility and immunity of committing any fault have led to the dispute between *Shia* and *Sunni*.⁸⁵

The most important separation point between Shia and Sunni throughout the history has been created due to the political thoughts. The Shia believes in the Imams exclusively as the true successors of the Prophet Mohammad (PBUH) for the purpose of ruling over the Muslims; however, the Sunni's beliefs challenge the Shia's.⁸⁶

With regard to the Islamic jurisprudence and *hadith* thoughts, we should say that the *Shia* jurisprudence is based on four sources including The Holy Book (Quran), Tradition of the Prophet (*Sunna*), Logic, and Consensus (*Ijma*). On the other hand, the *Sunnis'* resources include Quran, Tradition, Analogical Reason (*Qiyas*), and *Istihsan* (Juristic Preference)⁸⁷. According to Shia, the *hadith*- quoted from the followers and companions of the Prophet at time- cannot be completely accepted since some of them have been fabricated while some companions lack

⁸⁴ Tabatabai, S.M.H, *Shia in Islam*, 1379, Qom: Society of Teachers in the Qom Islamic Seminary, p180.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Istihsan* (Juristic Preference) is Islamic Law means application of discretion in a legal decision.

justice. Although, the Sunnis believe that all the sayings quoted of The Prophets' companions must be accepted.⁸⁸

Accordingly, the lack of a leader being believed and accepted by all the Muslims was the first reason of dispute and appearance of different Islamic religious sects. Given the Prophet's special interest in Ali, introducing him as brother, successor, *Caliph* (leader) following himself, the one who will divide Hell and Heaven, and the science gate, Muslims were then divided into two groups of Ali's friends and enemies.

However, the said disagreement was not an organizational one until the *Saqifah* meeting, where the opponent forum of Imam Ali was organized. So, once the second caliph was killed, the titles "Ali's *Shia*" and "*Sheikhein's* (the previous caliphs) Sunna" were created and applied to describe two different groups or party. Therefore, in contradiction to what has been portrayed to the public, the said disputes have not been due to theoretical discussions on the subject of Islamic principles and/or different Islamic verdicts(*Fatwa*). In other words, the disagreement was about realization of the Prophet's will, and also his orders in *Ghadir* incident about Islamic government and ruling system.⁸⁹

After a certain period of time, justification of the innovations by the rulers in different areas led to drafts of theories on the subject of Islamic main and secondary principles. In fact, it provided the ground for appearance of different schools of thoughts and various Islamic sects

⁸⁸ *Id.*

⁸⁹ The event of *Ghadir Khumm* took place in February 632. It was where, among other things, the Islamic prophet Mohammad reportedly announced that "to whomsoever I am *Mawla*, Ali is also their *Mawla*." Shia Muslims believe this to be the appointment of Ali as Mohammad's successor. Most Muslims accept the historicity of the event, but not all believe that this constituted an appointment of Ali as the successor to the Prophet, since the word *Mawla* can have many meanings.

It was very hot. About one hundred ten thousand people were there. By the order of Mohammad a rostrum of camel saddles was made. After performing the Zuhr prayer, Mohammad made the long speech now known as the *Ghadir* Sermon. He recited numerous verses from the Quran, and reminded the people of their deeds, and warned them about the future. However, he spoke its most well-known sentence when he raised Ali's hand and said, "*whomever I am his master, this Ali is his master (Mawla)*". When Abu Bakr & Umar heard this, they said to Ali: "O son of Abu Talib, you have become the master of every male and every female believer, morning and evening, congratulations". Available at <http://www.valiasr-aj.com/persian/shownews.php?idnews=5892>

justifying the manners and orders of the rulers of the time. Ideas, like believing in divinity of Imam Ali, believing in *Mahdaviat*, and also the dispute about how to recognize the successor Imam and/or Imam Mahdi are some of the most important factors of Shia sects' formation.⁹⁰

The sects of *Imamiyah*, *Ghulat*, *Ismailiyah*, and *Kaysanieh* are some of the most significant Shia sects. On the next level, the sects of *Waghefiah*, *Sheikhiyah*, *Ahl-e-Hagh*, *Nassiriyah*, etc. are also of considerable significance. It is to be pointed out that some Shia jurisprudence do not believe in the *Ghulat* as a *Shia* sect and/or even an Islamic sect.⁹¹ In fact, a major issue leading to divisions in *Shia* was the chain of Imams and how the ruling systems were transferred from one Imam to another.⁹²

Of the other important issues, causing the different divisions of Shia, one can point out to the following: divisions made upon the dispute over recognition of a true person for the title of Imam, such as those who believe in Mohammad-ibn-Hanafiah as the successor of Imam Hosein, and some people who argue Mohammad-ibn-Ismael was the right Imam after Imam Sadeq; exaggeration among the Shia, like the *Nassiriyah* sect who believed in the divinity of Imam Ali; belief in *Mahdaviat*; and finally the mistakes committed regarding the recognition of Imam

⁹⁰ In Islamic eschatology, the Mahdi is the prophesied redeemer of Islam who will rule for five, seven, nine, or nineteen years (according to differing interpretations) before the Day of Judgement (*yawm al-qiyamah*, literally, *the Day of Resurrection*) and will rid the world of evil.

There is no explicit reference to the Mahdi in the Quran, but references to him are found in Hadith (the reports and traditions of Mohammad's teachings collected after his death). According to Islamic tradition, the Mahdi's tenure will coincide with the Second Coming of Jesus Christ (Isa), who is to assist the *Mahdi* against the Masih ad- Dajjal (literally, the "false Messiah" or Antichrist). Both Sunni and Shia Muslims agree that there is to be a Mahdi in Islamic eschatology, and that he will rule over the Muslims and establish justice; however, they differ extensively on his attributes and status. For Sunnis, the Mahdi is the Muslims' future leader who is yet to come. For most Shia Muslims, the Mahdi was born but disappeared and will remain hidden from humanity until he reappears to bring justice to the world, a doctrine known as the Occultation. For Twelver Shia, this "hidden Imam" is Mohammad al-Mahdi, the Twelfth Imam. According to Shia Quran commentators, implicit references to the Mahdi can be found in the Quran.

⁹¹ NASER MAKAREM SHIRAZI, PREPARED BY MOHAMMAD REZA HAMED, KETAB AL NEKAH, 9 (2003).

⁹² HUSSEIN SABERI, HISTORY OF ISLAMIC DIVISIONS, vol. 2, 29 (2005).

Mahdi. For example, the *Waghefah* sect started to believe in Imam Kazem as Imam Mahdi, after he (Imam Kazem) was martyred.⁹³

During Mokhtar Uprising until the martyrdom of Imam Sadeq, that took about eight decades, the main branches of Shia were formed, and subsequently, the smaller sects originated from these main branches.⁹⁴ According to Malati, there have been around eighteen Shia sects, while Ash'ari divides the Shia into three main branches of *Ghulat*, *Rafedhiah (Imami)*, and *Zeidi Shia*. Ash'ari knows the *Keysaniyah* as a sect branched from *Imami*.⁹⁵

4.2.2 Shia Sects

As has been noted earlier, after a certain period of time, justification of the main innovations by the rulers in different areas led to drafts of theories on the subject of Islamic main and secondary principles. This, in turn, provided the ground for appearance of different schools of thoughts and various Islamic sects justifying the manners and orders of the rulers of the time.

To be able to know about international arbitration in Iran, we need to know the different *Shia* sects and their different ideas in that regard. In the following notes, there is a brief introduction of some notable *Shia* sects.

4.2.2.1 Kaysanieh

Kaysanieh believed in Mohammad-ibn-Hanafiah as the right Imam after Imam Hossein.⁹⁶ There is a verse in the Holy Quran, which swears on the fig, olive, the mountain of Sina, and a safe land. Kaysanis interpreted fig as Imam Ali, Olive as Imam Hasan, the Sina mountain as

⁹³ RASOUL JAFARIAN, SHIA ENCYCLOPEDIA, 19 (2008).

⁹⁴ SABERI, supra note 92 at 30.

⁹⁵ MOHAMMAD-IBN-AHMAD MALATI SHAFE'I, AL TANBIH AL RAD ALA AHL AL HAVA AND AL BADA'A, 16-30 (Citing Saberi, History of Islamic Sects, vol. 2, 32).

⁹⁶ ASHARI, PREPARED BY MOHAMMAD JAVAD MASHKOUR, AL MAGHALAT AL FORAGH, 21 (1981).

Imam Hossein, and finally the safe land as Mohammad Hanafiah. Islamic scholars have not named any follower of Kaysanieh in the Islamic lands.⁹⁷

4.2.2.2 Zaydi Shia

Zaydi *Shia* is one of the famous *Shia* sects that believes in Zeid as the Imam after Ali-ibn-Hossein.⁹⁸ This sect got separated from the main *Shia* branch, and faced against the other *Shia* branches in the beginning of second *Hijri* Century/eighth century AD.⁹⁹

Zeid used to invite people to follow and obey the Holy Quran and the Prophet's tradition, fight against the oppressors, support the deprived ones, and do charity regarding poor people. He also believed that the war gained booty must be distributed based on justice, insisting on observing the true rights of men and women.¹⁰⁰

This sect is actually the closest Shia sect to the Sunnis.¹⁰¹ After Zeid, the Zaydi Shia was divided into various branches. Some scholars describe the Zaydi Shia in terms of three branches of *Jarudiyya*, *Soleimaniyah*, and *Salehiyah and Batriyah*.¹⁰²

Nobakhti, in the book points out to seventeen Zaydi Shia divisions, while ,Ash'ari in his book "Maghalat Al-Islamin" (Islamic Articles), mentions six of the said sects as Zaydi Shia's sects.¹⁰³

4.2.2.3 Ismailiyah

The Ismailiyah is one of the divisions that believes Ismail or his descendant Mohammad-ibn-Ismael is the Imam of the time after Imam Sadegh, his oldest son. According to the Shia resources, Imam Sadegh introduced Ismail as the next Imam when both were still alive.

⁹⁷ ABU ZOHREH, HISTORY OF ISLAMIC RELIGIONS AND JURISPRUDENCE, 41-44.

⁹⁸ NOBAKHTI, TRANSLATED BY MOHAMMAD JAVAD MASHKOUR, SHIA SECTS, 89 (1974).

⁹⁹ HUSSEIN SABERI, *supra* note 92 at 63.

¹⁰⁰ Mohammad Javad Mashkour, Encyclopedia of Islamic Branches, with introduction by Professor Modir Shanehchi (1996).

¹⁰¹ NOBAKHTI, *supra* note 98, 40.

¹⁰² *Id.* at 140-142.

¹⁰³ *Id.* at 91-93 & 66-69.

However, Ismail passed away before his father. Ismail death, before reaching to the title of Imam, led to certain disputes about determination of the Imam following Imam Sadegh.¹⁰⁴

Some people believe that Ismail was still alive and will appear as Imam Mahdi since they were on the belief that Imam Sadegh's saying is not to be changed. Some other Muslims believe that except for Imam Hasan and Imam Hossein, the title of Imam will not go from brother to brother. Therefore, they happened to believe that Ismail's son, named Mohammad is the next Imam after Imam Sadegh.¹⁰⁵

Some other people believed in a change of God's decision so that they would know Imam Kazem as the next Imam after Imam Sadegh. The dynasty of Twelver Shia is continued by the said group of people.¹⁰⁶

4.2.2.4 Imamiyah

Imamiyah is a term which refers to the Shia division that believes in twelve Imams appointed by God and assigned by the Prophet Mohammad (PBUH). They are called Twelver Shia and/or Jafari Shia (the Ithnā'ashariyyah'). Some refer to Imamiyah as any sect who believe in the appointed Imam. Based on this, one can know all the Shia divisions as Imamiyah. However, the term Imamiyah describes a Shia division, other than any other sect, which believes in the twelve Imams appointed after the Prophet Mohammad (PBUH).¹⁰⁷

4.2.3 Sunni Sects

The Sunnis are also divided into several sects, which will be explained briefly, as follows:

¹⁰⁴ ASHARI, supra note 96.

¹⁰⁵ MOHAMMAD- IBN- ABDOLKARIM SHAHRESTANI, THE BOOK OF NATIONS AND ERAS, INTERPRETED BY MOHAMMAD- IBN- FATTHOLLAH BADRAN, 149 (1956).

¹⁰⁶ ASHARI, supra note 96 at 213-14

¹⁰⁷ NOBAKHTI, supra note 98.

4.2.3.1 Hadith People

This branch includes a group of people who believes Quran and *Sunnat* (the prophet's tradition) are the only principles of Islam. Hadith People do not believe in logic to be used in the said subjects. This group that are known as *Salafiyah*, had been called *Hashviyah* and/or *Hanabelah* in the past. The most well-known persons among this group includes Malek-ibn-Anas (93-179 AH), Ahmad-ibn-Hanbal (164-241 AH), Davoud-ibn-Ali Esfahani (202-270 AH), and Ali-ibn-Ahmad known as "Ibn-e-Hazam" (384-456 AH).¹⁰⁸

4.2.3.2 Mo'tazeleh

A group who gives too much significance to logic, and made so many attempts to interpret situations where God's order or assignment opposes logic. This group believes in five principles: 1. Monotheism 2. Justice 3. Promises 4. Enjoining good and forbidding wrong 5. A middle range. Wasel-ibn-Ata, Hasan Basri's student, was the person who established this branch. Wasel got separated from Hasan Basri due to an argument so that he would establish an independent sect. Therefore, Hasan said "they are separated from us now". So, they were called "*Mo'tazeleh*", which means those who are separated.¹⁰⁹

4.2.3.3 Asha'ereh

This group would accept the beliefs of Hadith People with a slight difference. AbolHasan Ashari (260-324 AH) established this branch. He was actually an ex-*Mo'tazeleh* follower.¹¹⁰

¹⁰⁸ ALI, RABANI GOLPAYEGANI, VERBAL SECTS AND RELIGIONS, 201; JAFAR SOBHANI, THE ENCYCLOPEDIA OF ISLAMIC BELIEFS AND RELIGIONS, 149 (1992).

¹⁰⁹ ALI RABANI GOLPAYEGANI, AN INTRODUCTION TO VERBAL SCIENCE, 246 (1999).

¹¹⁰ MORTEZA MOTAHARI, WORKS COLLECTION, vol. 3, 125 (1993).

However, he turned against *Mo'tazeleh*, while defending the beliefs of Hadith People, so that he could establish a new school of Islam, which then got very famous among Muslims.¹¹¹

4.2.3.4 Khavarej

A group who love the first and second khaliphas, while separating themselves from the third and fourth khaliphas. This group have some special ideas about main and secondary principles of Islam. This sect was established in the year 37 AH during the Seffein war and the famous judgment issue, which is one of the notable arbitration cases in Islam, and will be discussed later in the fifth chapter.¹¹²

4.2.3.5 Materidiyah

This division is another verbal sect accepted by Sunnis, and appeared during the fourth century AH. Abu Mansour Materidi (333 AH) established this verbal sect.

Materidi and Ash'ari had the same motivation in opposing the Mo'tazeleh with two different approaches, since compared to Ash'ari, Materidiyah gives more value to logic than appearance.¹¹³

4.2.3.6 Marje'ah

This sect is called Marje'ah since it gives more weight to intention than action. Therefore, the founders and followers of this sect believe that sincere belief is enough for human prosperity and do not give so much gravity to the actions of men and women. As a result, they believe that sins will not avoid Muslims redemption, so that it gives so much hope to the sinners.¹¹⁴

¹¹¹ *Id.*

¹¹² RABANI GOLPAYEGANI, *supra* note 108, at 201.

¹¹³ RABANI GOLPAYEGANI, *supra* note 109, at 296.

¹¹⁴ RABANI GOLPAYEGANI, *supra* note 108, at 283.

4.2.3.7 Wahabiyah

The *Wahabi* sect is founded by Sheikh Mohammad, son of AbdolWahab Najdi. He was born in 1115 AH in Najd. This group named itself as *Salafiyah*, and added some issues to *Salafiyah* with regard to Monotheism and Polytheism.

Mohammad-ibn-AbdolWahab, being influenced by the books of Ibn-Tamimeh, decided to revitalize his own thoughts. Accordingly, he believed that paying visit to the Prophet's tomb, knowing his traces as holy, appealing him to do something special, and building a shelter over the graves are the true cases of polytheism. Therefore he called all the other Muslim tribes as unbelievers and said that only *Wahabi* men and women will be saved at last.¹¹⁵ Their extreme thoughts, and inflexible manners became the source of division and dispute among the Muslims. Their beliefs have been used by Islam enemies against Muslims.¹¹⁶

The said sects were the verbal sects of *Sunnis*. Other than the above-mentioned divisions, there are other sects as *Abaaziyah*, *Jamiyah*, *Karramiyah*, *Zarrariyah*, and *Najjariyah*.¹¹⁷

Numerous schools of jurisprudence developed and began along geographical lines, in *Medina* and *Kufa* (Iraq), but later evolved around individual scholars or jurists.¹¹⁸ The four schools of *Sunna* jurisprudence are named after the respective founders: the *Hanafi* School (Abu Hanifah. d.767), the *Maliki* School (Malik ibn Anas, d.795), the *Shafi'i School* (d.819), and the *Hanbali* School (d.855).¹¹⁹

Hanafi is one of the four schools of thought (*madhabs / Maddhab*) of religious jurisprudence (*fiqh*) within Sunni Islam. It makes considerable use of reason or opinion in legal decisions.

¹¹⁵ JAFAR, SOBHANI, WAHABIAT RELIGION, 29.

¹¹⁶ Shahrestani, Nations and Circles, volume 1, 115, adaptation of Verbal Sects and Religions, 287.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 62.

¹¹⁹ G. Makdisi, *Legal History of Islamic Law and The English Common Law: Origins and Metamorphoses*, 34 Cleveland State Law Review 3, 6.

Sunni Hanafi creed is essentially non-hierarchical and decentralized, which has made it difficult for 20th century rulers to incorporate its religious leaders into strong centralized state systems.¹²⁰

Hanafi sect is related to Abu-Hanifa, who was born in 80 AH, and passed away in the 150 AH. He was one of the earliest Muslim scholar-interpreters to seek new ways of applying Islamic tenets to everyday life. In his lifetime Abu Hanifa was disgraced, called ignorant, inventor of new beliefs, hypocrite and kafir. He was imprisoned and poisoned. Abu Hanifa's interpretation of Muslim law was extremely tolerant of differences within Muslim communities. He also separated belief from practice, elevating belief over practice.¹²¹

This school appeals to reason (personal judgment) and a quest for the better. It is generally tolerant and the largest movement within Islam. The *Hanafi* school is known for its liberal religious orientation that elevates belief over practice and is tolerant of differences within Muslim communities.¹²²

Hanafi scholars refuse to control a human religious or spiritual destiny, and refuse to give that right to any human institution. Among the *Hodud* crimes, those crimes against God, blasphemy is not listed by the *Hanafi*. *Hanafi* concluded that blasphemy could not be punished by the state. The state should not be involved in deciding God-human relationships. Rather, the state should be concerned only with the violation of human rights within the jurisdiction of the human affairs and human relationships.¹²³

¹²⁰ CHRISTOPHER MELCHERT, THE FORMATION OF THE SUNNI SCHOOLS OF LAW: 9TH-10TH CENTURIES, 178 (1997).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

The Sunni *Hanafi* school is dominant in the Arab Middle East, India, Pakistan and Afghanistan. The followers of Imam Abu Hanifa are found in Pakistan, India, Afghanistan, Turkey, Iraq, Syria, China, North Africa, Egypt, and in the Malay Archipelago.¹²⁴

Maleki school is related to Malek-ibn-Anas, who was born at the time Valid-ibn-Abdolmalek and died in Medina, during the time of Harroun Al-Rashid ruling. This school recorded the *Medina* consensus of opinion, and uses *Hadith and tradition* as a guide. The *Maleki* is predominant in north, central and west Africa and Egypt. Following the tradition of Imam Malik, this school appeals to common utility and the idea of the common good.¹²⁵

Malik did not record the fundamental principles on which he based his school and on whose basis he derived his judgments and to which he limited himself in the derivation of his rulings. In that respect he resembled his contemporary, Abu Hanifa. Malik only transmitted from people that he had confidence in their narration of Hadith. That is why his great concern was with the choice of transmitter. When he had confidence in the character, intelligence and knowledge of the transmitter he dispensed with the chain of narration.¹²⁶

The *Shafei* school is considered the easiest school and the *Hanbali* is considered the hardest, in terms of social and personal rules. *Hanafi* took *Shafei* as his rival and vice versa. The *Shafei* school predominantly relies on the Quran and the *hadith* for *Sharia*. Where passages of Quran and *hadiths* are ambiguous, the school first seeks religious law guidance from *Ijma* - the consensus of Sahabah (Muhammad's companions). If there was no consensus, the *Shafei* school

¹²⁴ HISHAM M. RAMADAN, *UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY*, 24--29 (2006).

¹²⁵ *Id.*

¹²⁶ *Id.*

relies on individual opinion (*Ijtihad*) of the companions of Mohammad(PBUH), followed by analogy.¹²⁷

Shafei sect related to Mohammad-ibn-Edris Shafei. He was born in 150 AH in Gaza and passed away in 204 AH in Egypt. At the time of Al-Shafi'i, the Prophet's *hadiths* were gathered from different countries, and the disagreements among the scholars increased until Al-Shafi'i wrote his famous book, Al-Risalah, which is considered the foundation of Islamic jurisprudence.

The Shafi'i tradition is particularly accessible to English speaking Muslims due to the availability of high quality translations of the Reliance of the Traveler. Most Kurds in Iraq follow the *Shafei* school of Sunni Islam.¹²⁸

Hanbali Sect or *Hanabehleh*, related to Ahmad-ibn-Hanbal. He was born in 165 AH and died in 241. The Shafi school is considered the easiest school and the Hanbali is considered the hardest in terms of social and personal rules. The government of Saudi Arabia vigorously enforces its prohibition against all forms of public religious expression other than that of those who follow the government's interpretation and presentation of the *Hanbali* school of *Sunni* Islam. This is despite the fact that there are large communities of non-Muslims and Muslims from a variety of doctrinal schools of Islam residing in Saudi Arabia.¹²⁹

Under the *Hanbali* interpretation of *Sharia* law, judges may discount the testimony of people who are not practicing Muslims, or who do not have the correct faith. Legal sources report that testimony by *Shia* is often ignored in Saudi courts of law or is deemed to have less weight than testimony by *Sunnis*. The explanation of Saudi officials is that their *Hanbali* school of Islam

¹²⁷ Id. at 27-28.

¹²⁸ DR. ABULGHASEM, GORJI, HISTORY OF JURISPRUDENCE AND JURISPRUDENTS, 83 (2000).

¹²⁹ Id. at 84.

religiously mandates that they deny other religions the right to function openly on the Arabian Peninsula - a right that is clearly protected in international law.¹³⁰

5 Jurisprudence

Earlier, it was noted that the legal regime of Islamic Republic of Iran includes the Shia legal system as the basis, while it covers the Sunni legal regimes and legal systems of religious minorities as well. Accordingly, in order to understand the Iranian legal approach with regard to international arbitration awards, we need to know the Islamic Legal systems of both Shia and Sunni. Although other religious minorities have some influence in Iranian Legal system, since it is out of scope of this dissertation, it will not be discussed.

Besides, some aspects of the law always remained in the hands of the mullahs. The village mullah was the natural arbiter in matters of marriage, divorce, and inheritance; and the exalted jurisconsult, in order to carry out the very function for which he was exalted, gave opinions on those matters of law on which he was consulted. In between the village mullah and the jurisconsult there were mullahs with courts which, while sometimes sanctioned by the royal government, depended for their power on the prestige of the presiding mullah judge as much or more than on the government's sanction.¹³¹

Since Islam is a combination of individual and social instruction and beliefs, its legal regime is completely religious. Therefore, the legal resources of Islam are the "Islamic jurisprudence" resources.¹³² As a result, to be able to understand Islam and its legal effect in arbitration and more specifically, international arbitration, here, the Islamic jurisprudence and its various resources in Shia and Sunni are explained below.

¹³⁰ Id.

¹³¹ ROY, MOTTAHEDEH, THE MANTLE OF THE PROPHET: RELIGION AND POLITICS IN IRAN, 208 (1985).

¹³² JANIN HUNT & ANDRE, KAHLMEYER, ISLAMIC LAW, 142 (2007).

5.1 Jurisprudence Definition

Jurisprudence is one of the main factors in differentiation of various Islamic sects' points of views with regard to international arbitration and enforcement of its awards.

As mentioned earlier, after the issue of Prophet's following substitutes in *Ghadir Khumm*, the jurisprudence of Islam was divided into two branches. The two branches include the jurisprudence achieved from the family of Prophet after his death, and the jurisprudence made by the fatwa-makers who were the Prophet's companions and followers at time.¹³³

The term 'jurisprudence' (or 'Figh' in Arabic) means understanding and knowledge, understanding the speaker's intention, having a good mind and good speed in transferring knowledge, and understanding hidden matters from the apparent ones.¹³⁴

The meaning of jurisprudence mentioned in Quran, is almost the same. However, from the jurists' viewpoint, jurisprudence is the knowledge of religious verdicts, which is achieved through looking and reasoning by means of best evidences. According to another definition, jurisprudence refers to the spirit of religious verdicts.¹³⁵

Islamic Jurisprudence is an Islamic knowledge to reach the practical verdicts or religious duties. The Shia verdicts are achieved through reasoning and research in four resources including Quran, *Sunna* (tradition), Consensus(*Ijma*), and Logic. The *Shia* and *Sunni* jurisprudence has passed different periods and also a common period at the time of Prophet that is called "Tashree'i Period".¹³⁶

The essential need of human to comprehensive, and social disciplinary rules and regulations, based on religious and moral principles has led to regulations that cover human needs in different

¹³³ The story has been brought supra note 89.

¹³⁴ MORTEZA, MOTAHARI, AN INTRODUCTION TO ISLAMIC SCIENCES (JURISPRUDENCE PRINCIPLES), 52-58 (1998).

¹³⁵ Jurisprudence available at www.sunnatonline.com.

¹³⁶ MOTAHARI, supra note 134.

areas of life, and respect the individual and social rights of people. Therefore, Islam and its religious verdicts have been formed to provide for the needs and necessities of human's developing life according to Quran verses and divine prophets' guides, so that men and women could be out of confusion via the given solutions and plans.¹³⁷

The Islamic jurisprudence has undergone through certain stages, so that it could get a complete scientific face and spirit. The periods of drafting jurisprudence and changes in the methods of *Shia* jurisprudence have direct relationship with religious-social situations of *Shia*, so that *Shia* jurisprudence is the reflection of the particulars of historical era, and simultaneously an influence on the elements of next era. The said changes and developments not only covers the verdicts and jurisprudence divisions, but also includes understanding methods and the roles of jurists in applying the verdicts.¹³⁸

The *Shia* jurisprudence, same as Sunni's, implies the verdicts and manners based on which the moral-legal system of Islam has been formed. However, the difference between *Shia* and Sunni jurisprudence is that a Sunni jurist often remains as a religious interpreter, while the *Shia Imamiyah* jurists are known as the following substitutes of Imams, transferring their knowledge. They can also get to the highest rank of an Islamic leader, based on certain rules and conditions.¹³⁹

5.2 Jurisprudence in *Shia* and *Sunni*, The Dominant Factor in Various Islamic Approaches, Regarding The International Arbitration Awards

After Prophet Mohammad (PBUH), Sunnis were in the need of religious comprehension and jurisprudence to find out new verdicts for the newly appeared issues. The Islamic territories were

¹³⁷ *Id.*

¹³⁸ *Id.* at 136

¹³⁹ Shii Legal Thought and Jurisprudence, The Oxford Dictionary of Islam available at <http://www.oxfordislamicstudies.com/article/opr/t125/e1153>

expanded, and many people converted to Islam. The increase in Muslims' relationships both with other Muslims and outside of Islamic lands created new issues requiring certain answers.¹⁴⁰

Since upon death of the Prophet, connection to the divine source had gone away, comprehension and jurisprudence based on Quran and the Prophet's tradition came into existence.¹⁴¹

Undoubtedly, decision-making was also applied, where there was no certain verse or *Hadith*. For example, Shoraih was appointed by Omar as the judge of Kufah. Omar wrote him a letter saying "Attend to what has been made, determined obviously by God. Ask nobody in this regard. If there is anything not determined by God in Quran, then follow the Prophet's tradition. And if the tradition did not answer you, then you can make decision based on your jurisprudence".¹⁴²

Thus, upon death of the Prophet, Sunnis decided to do jurisprudence based on Quran, tradition, and decision-making. Decision-making means, whenever Sunnis do not find any direct or indirect argument in the Quran and tradition, they can issue fatwa, by observing all the general targets and purposes of what holly divine (God) has determined.¹⁴³

Upon Prophet Mohammad's (PBUH) death, Shia decided to refer to the innocent Imams, so that they could be guided facing new religious challenges.¹⁴⁴ As long as such leaders were available, Shia didn't feel the need of jurisprudence in its wide sense. As a result, they didn't do jurisprudence until the Long Absence period started.¹⁴⁵

¹⁴⁰ EL-GAMAL, ISLAMIC FINANCE, 30-31 (2006).

¹⁴¹ NJ COULSON, A HISTORY OF ISLAMIC LAW, 9-20 (1964).

¹⁴² *Id.*

¹⁴³ *Fatwa* is a ruling on a point of Islamic law given by a recognized authority.

¹⁴⁴ SAYYID MAHMUD HASHEMI, THE STAGES OF DEVELOPMENT OF SHIA JURISPRUDENCE, vol. 12, 4 (2012).

¹⁴⁵ Long Absence Period: According to Twelver Shia, the state religion in the Islamic Republic of Iran, al-Mahdi ('the chosen one') is the 'Absent Imam'. According to Shia doctrine, Mohammed Ibn Al-Hassan Al-Askari, who they claim is the final Imam, was born in Samarra in 255 Hijra [869 AD], and is still alive, but in a state of suspension or occultation (Ghaibah). This figure is revered by Shia people, who call him Al-Mahdi, Sahib Al-Zaman ('The Lord of the Age'), and Al-Hujjah Ibn Al-Hassan. When his name is mentioned, Twelver Shia express their

After that event, jurisprudence domain was expanded by Shia. Of course, due to the big number of narrations on the part of the Innocents (12 Imams) regarding various topics and issues, the Shia jurisprudence was enriched, so that there was no serious need for jurisprudence.¹⁴⁶

However, Shia still felt the need for jurisprudence. Further, the Innocents used to order their prominent figures to make serious jurisprudence attempts. The following statement has been narrated in a credible religious book: “it is our job to express the rules and general principles, and after that, it is your job to find the details by approaching to the general principles”.¹⁴⁷

This approach caused some changes in religious attitudes, on how to face the current issues and international law during different eras of jurisprudence. For example, the famous four divisions of Sunnis were established (*Hanafi, Maleki, Shafei, and Hanbali*) during the third period of jurisprudence history (the era of religious leaders starting from second century AH until the mid-fourth century AH). The Islamic civilization was expanded to the big cities such as Baghdad, Qortabeh in Angelus, Qirvan in Africa, Fostat in Egypt, Damascus, Kufah, Basra, Marv, and Neishabour, and helped the development of jurisprudence significantly. During this period, the *Sunna* (tradition) and *Hadith* were drafted as ordered by Omar-ibn-AbdolAziz, the Omavi Khaliphah of time, and the field of *Sunni* jurisprudence principles was established by Imam Shafei.¹⁴⁸

In the fourth period, jurisprudence process was stopped. This period- from mid-fourth century to the downfall of *Abbasid*- was against sects and spread of debates. During this period, along with the political weakness of Islamic world, jurisprudence was also weakened scientifically.

eneration by chanting, “May Allah hasten his release”, to end his occultation and accelerate his reappearance. The disappearance of the Imam was an event of most importance. Shias became upset and much disappointed. They were uncertain as to what would happen politically, religiously and socially. It's far reaching effects in every field was alarming. Some remained dumbs founded, perplexed and confused knowing not what to do.

¹⁴⁶ HAMID ALGAR, PRINCIPLES OF ISLAMIC JURISPRUDENCE: ACCORDING TO SHI'I LAW, 45 (2005).

¹⁴⁷ MORTEZA MOTAHARI, WORKS COLLECTION: AN INTRODUCTION TO ISLAMIC SCIENCES, JURISPRUDENCE PRINCIPLES, vol. 20, 36.

¹⁴⁸ GORJI, supra note 128, at 71-80.

The jurists were inclined to follow the previous jurists, so that they would only describe, interpret, collect, or write an earlier jurist.¹⁴⁹

The fifth period is the time of pure imitation. During this juncture, while the connection among the scholars of different territories did not exist anymore, jurisprudence was weakened as much as possible.¹⁵⁰

The sixth period refers to the present time starting from the World War II until the recent century. There are two prominent features for this period;¹⁵¹

First, *Sunnis* are no longer strictly following only one special sect, meaning that they do not deem necessary to follow only one jurist. For example, a *Shafei* man can follow Abu Hanafiah, Malek, or Ahmad and vice versa. After the World War II, Islamic countries got acquainted and affected with the western civilization more than before.¹⁵²

The relationship between the western nations and the Islamic nations led to certain revision made by the Muslims in the religious matters to reach compatibility with the international current issues. Therefore, they had no way except for choosing religious verdicts with most compatibility regarding such challenging issues.¹⁵³

Second, due to appearance of incidental issues such as insurance, family relevant matters, equal rights, economic issues, bank interactions (promissory notes, bank profit, Riba etc.) the scholars started to use jurisprudence again.¹⁵⁴

¹⁴⁹ *Id.* at 91-93.

¹⁵⁰ *Id.* at 11.

¹⁵¹ EL-GAMAL *supra* at 140.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Riba* can be roughly translated as “Usury”, or unjust, exploitative gains made in trade or business under Islamic law. *Riba* is mentioned and condemned in several different verses in the Quran. It is also mentioned in many *hadiths* (reports describing the words, actions, or habits of the Islamic prophet Mohammad (PBUH)). While Muslims agree that *riba* is prohibited, not all agree on what precisely it is, or whether its use should be punished by humans rather than Allah. It is often used as an Islamic term for interest charged on loans, and the belief this is based on — that there is a consensus among Muslims that all loan/bank interest is *riba* — forms the basis of a \$2 trillion Islamic

5.3 Jurisprudence Resources

After talking about the Islamic jurisprudence in Shia and Sunni, we should review their resources, as legal resources of Islam, affecting the Iranian legal system and its approach regarding how to treat international arbitration awards and their enforcement in Iran.

Since legal regime of Islamic Republic of Iran includes the *Shia* legal system as the basis, while it covers the other *Sunni* legal regimes, these two legal systems of *Shia* and *Sunni* will be analyzed. Furthermore, since the legal resource of Islam is the “Islamic jurisprudence” resources, to be able to understand Islam and its legal effect in arbitration and more specifically, international arbitration, these resources should be known by the international arbitration practitioners.

Islamic theoreticians, and jurists extract the Islamic rules and verdicts from certain resources called jurisprudence resources. These resources, which are also called “reasons of verdicts” or “religion resources” are known as credible reasons to understand the religious verdicts.¹⁵⁵

The jurists of Islamic divisions have different ideas about the resources of jurisprudence including both *Sunni* and *Shia*. For example, the *Sunnis* use Analogical Reason as a resource instead of logic, and other resources which will be described in summary as follows:

According to Abu Zahreh in “The Four Religions”, the *Hanfi* jurists (followers of Abu Hanafiah, Naman-ibn-Sabet) believe that the jurisprudence resources include Quran, Tradition

banking industry. However not all scholars equated *riba* with all forms of interest, or agree whether its use is a major sin and against Sharia (Islamic law), or simply discouraged (makruh).

¹⁵⁵ MUHAMMAD BAQIR AL-SADIR supra note 146 at 39-40.

(*Sunna*), the Companions' Statements, the Companions' Consensus, Analogical Reason, *Istihsan* (Juristic Preference), and Local Custom.¹⁵⁶

As Sobhi Mohamsani points out in his book, "Philosophy of Religion in Islam, a number of Maleki scholars (followers of Malek-ibn-Anas) believe in Quran, Tradition (*Sunna*), Consensus, Statements of Companions, etc. as the jurisprudence resources". It is also quoted from Malek-ibn-Anas believing in the following items as the jurisprudence resources: Quran, Tradition, Consensus, Analogical Reason, *Istihsan* (Juristic Preference), Justice Discretion, The Companions Religion, The Ruling of the First Generation of Muslims, Inference, Public Interest, Local Custom, Pure Reasoning, etc.¹⁵⁷

Also, certain divisions, such *Shafe'i* (the followers of Mohammad-ibn-Edris Shafe'i), have accepted Quran, Tradition (*Sunna*), Consensus, and Analogical Reason as the resources of jurisprudence.¹⁵⁸

Moreover, *Hanbali* scholars (the followers of Ahmad-ibn-Hanbal Sheibani) believe that the resources of jurisprudence include: Quran, Tradition, Analogical Reason, and the companions *fatwas* (in case of not opposing the Holy Quran and Tradition, even not contrary to a documented or weak *Hadith*). The last but not least, Zeheri who follows Davoud-ibn-Ali Zaheri Esfahani believes in Quran, Tradition, Consensus, while they don't believe in Consensus after the era of chaliphs. In this regard, Ibn-Hazam Andalosi Zaheri, the second leader of this group, says "anyone who argues Consensus about issues after the caliph's era, he is actually a liar".¹⁵⁹

It should be pointed out that there are also some other viewpoints among the Sunni followers, such as what has been raised by Mohammad Davalibi in his book entitled "An Introduction to

¹⁵⁶ MOHAMMAD IBRAHIM, JANAATI, JURISPRUDENCE RESOURCES FORM ISLAMIC RELIGIONS PRESPECTIVE, 3.

¹⁵⁷ *Id.* at 5.

¹⁵⁸ *Id.* at 4.

¹⁵⁹ *Id.*

the Knowledge of Jurisprudence Principle” as the resources of understanding the verdicts including Quran, *Sunna* (Tradition), *Ijma* (Consensus), and *Ijtima*.¹⁶⁰

The resources of Shia jurisprudence include Quran, Tradition (the sayings, actions, and statement of innocent Prophet, his daughter, and Imams), Consensus made based on the innocents’ statements, and logic.¹⁶¹

Although this belief is the dominant belief existing among the Imamiyah jurisprudents, but there are some other beliefs exciting. For example, Akhbari scholars, have only accepted the Quran and Prophet’s tradition as the true resources. Some others limit the resources of jurisprudence to Tradition.¹⁶²

In *Shia* school, the decision-making and Analogical Reason is rejected, while logic and reasoning have been given credit. Actually, in this school, a jurisprudent is not obligated to limit himself to the words in Quran verses or a certain *Hadith*, and to find all solutions from them. Also, he is not obliged to analyze the words in Quran and Hadith when there is no direct verdict for an issue.¹⁶³

The mission of a Shia jurisprudent is to understand the main principles, and extract the secondary principles accordingly. Since the Islamic principles already exist in Quran and Tradition, only one thing is required, which is “jurisprudence”. And, it means matching the general principles of Islam to the ongoing variant events in a smart way. Accordingly, there is a chapter in the book “*Kafi Principles*” saying that there is no issue, without its respective principle in Quran and Tradition.¹⁶⁴

¹⁶⁰ *Id.*

¹⁶¹ ABDOLLAH JAVADI AMOLI, *TASNEEM TAFSIR*, vol.1, 57.

¹⁶² *Id.* at 58.

¹⁶³ *Id.*

¹⁶⁴ JANAATI, *supra* note 156.

In Shia jurisprudence, the principle of following what is actually good or bad, and the rule of logic have been confirmed. Furthermore, Shia has rejected the role of Analogical Reason and decision-making. The principle of “justice” and logic, indicating that Islamic verdict should support what is good or bad in the real world, is known as the basis of Shia jurisprudence.¹⁶⁵

In Shia jurisprudence, logic and unreality and irrationality are separated. Actually, the logical argument and subjective Analogical Reason have been separated from each other. The most important mission of Shia scholars is “jurisprudence”, which means conscious attempts, made through creditable methods, to understand the Islamic rules, using resources like Quran, Tradition, Consensus, and Intellect. The jurists have very sensitive and essential role in the era after the Prophet, so that they could help Islam live forever.¹⁶⁶

Accordingly, the major schools of Islamic jurisprudence represent various regional and doctrinal approaches to solving legal questions at the beginning of the first two centuries of Islam. All Islamic scholars accept that the Quran and the *Sunna* are the main sources of *Sharia* and thus, whatever is stated within them must be followed by Muslims. The primary differences between the schools lie in the circumstances in which their doctrines use the different techniques of interpretation like *Ijma*, *Qiyas*, *Ijtihad* and reasoning.¹⁶⁷

Below is a brief explanation of some of the jurisprudence sources, which has the most influence in adapting Islamic regulations into Iranian rules. So, the international arbitration practitioners should know these sources as influential factors on Iran’s approach regarding international arbitration awards. Knowing these sources will help understanding the next

¹⁶⁵ MURTEZA, MUTAHARI, GETTING FAMILIAR WITH QURAN, 24-27 (2002).

¹⁶⁶ *Id.*

¹⁶⁷ I. FARUQI, ISLAMIZATION OF KNOWLEDGE: PROBLEMS, PRINCIPLES AND PROSPECTIVE IN ISLAM: SOURCES AND PURPOSE OF KNOWLEDGE, 34 (1988).

chapters where the influence of Islamic law in international arbitration awards and the enforcement of them in Iran have been discussed.

5.3.1 Quran

Undoubtedly, Quran is the first source of Islamic law. It is believed to be the direct word of God as revealed to Mohammad through angel Gabriel in Mecca and Medina. It specifies the moral, philosophical, social, political and economic basis on which a society should be constructed.¹⁶⁸ So, all of the verses in Quran does not relate to the rules and regulations, but hundreds of other subjects have been addressed in Quran. Actually, around 500 verses, one thirteenth of all the 6600 verses existing in Quran, are allocated to the Islamic verdicts.¹⁶⁹

In fact, the verses of the Quran are categorized into three fields: "science of speculative theology", "ethical principles", and "rules of human conduct". The third category is directly concerned with Islamic legal matters, which contains about five hundred verses or one thirteenth of it.¹⁷⁰

The task of interpreting the Qur'an has led to various opinions and judgments. The interpretations of the verses by Mohammad's companions for Sunnis and Imams for Shias are considered the most authentic, since they knew why, where and on what occasion each verse was revealed. The Qur'an was written and preserved during the life of Mohammad, and compiled soon after his death.¹⁷¹

¹⁶⁸ FARHAD NOMANI, ALI RAHNEMA, ISLAMIC ECONOMIC SYSTEMS, 3-4 (1994).

¹⁶⁹ MOHAMMAD BAGHER MAJLESI, BAHAR AL ANVAR, vol. 2, 277.

¹⁷⁰ *Id.*

¹⁷¹ MORTEZA, MOTAHARI, JURISPRUDENCE AND ITS PRINCIPLES, 98-100 (2008).

5.3.2 Sunna (Tradition)

“*Sunna*” means a chosen method and procedure.¹⁷² According to scholars, it means sayings, actions (manners), and statements (confirmation) of the Prophet.¹⁷³ In Shia terminology, *Sunna* include sayings, actions, and statements of Innocents, who are the Prophet, his daughter (*Fateme*), and 12 Imams. In other words, as an Islamic source of Jurisprudence, *Sunna* includes "the traditions and customs of Mohammad (PBUH)" or "the words, actions and silent assertions of him". It includes the everyday sayings and utterances of Mohammad (PBUH), his acts, his tacit consent, and acknowledgments of statements and activities.¹⁷⁴

Accordingly, a scholar or jurist can truly refer to a verdict stated by the prophet, an action that has been performed in a special way by Prophet Mohammad (PBUH), or has been performed in a special way by others in his presence, and has been confirmed by him explicitly or implicitly.¹⁷⁵

There is no difference in opinion of the scholars regarding the credit of Tradition, except for the fact that *Sunni* scholars limit the Tradition to the Prophet while the *Shia* scholars develop it to Innocents. If there is a verdict stated by Innocents, or if they do any action that proves a verdict, or if it is proved that they have confirmed the others' actions explicitly or implicitly, then a jurist can refer to it as a verdict in Islam, based on which fatwa can be issued.¹⁷⁶

Although narrations and Hadith are not *Sunna* (Tradition) by themselves, but sometimes, they might be used as tradition (*Sunna*). In fact, if they are stated via a creditable method, they are “indicative” of tradition. Much of the *Sunna* is recorded in the Hadith.¹⁷⁷

¹⁷² SHEIKH ANSARI, SECONDARY PRINCIPLES, 140-142.

¹⁷³ Seyyed Jafar Sajjadi, Encyclopedia of Islamic Education.

¹⁷⁴ MOHAMMAD REZA MOZAFFAR, JURISPRUDENCE PRINCIPLES, vol. 3, 63.

¹⁷⁵ N.J. COULSON, A HISTORY OF ISLAMIC LAW, 14 (1964).

¹⁷⁶ MOZAFFAR supra note 174.

¹⁷⁷ *Id.* at 64-71.

Initially, Mohammad (PBUH) had instructed his followers not to write down his acts, so they may not confuse it with the Quran. As long as he was alive, any doubtful record could be confirmed as true or false by simply asking him. His death, however, gave rise to confusion over Mohammad's (PBUH) conduct. Thus the *Hadith* were established.¹⁷⁸

Due to problems of authenticity, a method of textual criticism developed by early Muslim scholars in determining the veracity of reports attributed to Mohammad (science of *Hadith*) is established. This is achieved by analyzing the text of the report, the scale of the report's transmission, the routes through which the report was transmitted, and the individual narrators involved in its transmission. On the basis of these criteria, various *Hadith* classifications developed.¹⁷⁹

To establish the authenticity of a particular *Hadith* or report, it had to be checked by following the chain of transmission. Thus the reporters had to cite their reference, and their reference's reference all the way back to Mohammad. All the references in the chain had to have a reputation for honesty and possessing a good retentive memory.¹⁸⁰

Accordingly, *Hadiths* are classified into three categories of Undoubtable *Mutavafir*, which are very widely known, and backed up by numerous references, Widespread (*Mashhur*), which are widely known, but backed up with few original references, and Isolated or Single (*Wahid*), which are backed up by too few and often discontinuous references.¹⁸¹

¹⁷⁸ I. Faruqi and L. Faruqi, *The Cultural Atlas of Islam*, 114 (1986).

¹⁷⁹ "Hadith", *Encyclopedia of Islam*. At <http://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/hadith-0>

¹⁸⁰ N.J. Coulson, *supra* note 175.

¹⁸¹ FARHAD NOMANI, ALI RAHNEMA *supra* note 168 at 4-7.

5.3.3 Ijma (Consensus)

Ijma, as the third source of Islamic law, means agreement.¹⁸² In terminology of Islam, this term refers to the agreement made by Islamic jurists about a religious verdict.¹⁸³

Consensus, as a source, indicates that a jurist can refer to the consensus of other jurists as the basis of understanding and concluding a religious verdict, and it gets its validity from what Mohammad (PBUH) himself said, "My followers will never agree upon an error or what is wrong".¹⁸⁴

Sunni scholars believe that in addition to Quran and Tradition, Consensus is an independent reason which, for the first time, was used to prove the legitimacy of Abubakr as the caliph of time.¹⁸⁵ But, still, there is diversity amongst the *Sunni* jurists on who is eligible to participate in *Ijma*.¹⁸⁶

On the other hand, *Imamiyah* jurists do not believe in it as an independent reason. They believe that if it is discovering the Innocents' saying, action, or statement, then it can be true and credible. Consequently, they believe that *Sunna* is the actual reason and source for the jurists in discovering a religious verdict, not Consensus. Thus, Consensus cannot be deemed as a separate independent reason to understand the religious verdicts, but is a source of secondary importance.¹⁸⁷

5.3.4 Reason (*Aghl*, Logic)

Aghl is an Arabic term meaning the reason or the rational faculty of the soul or mind.

¹⁸² Mahmasani, S. *Falsafe-e Ghanoongozari dar Eslam*. Tehran: Amir Kabir. pg. 143,

¹⁸³ MOTAHARI supra note 171 at 102

¹⁸⁴ S, MAHMASANI, THEORY OF LEGISLATION IN ISLAM, 143.

¹⁸⁵ *Id.* at 110

¹⁸⁶ M. MUSLEHUDDIN, PHILOSOPHY OF ISLAMIC LAW AND THE ORIENTALISTS, 146 (1986).

¹⁸⁷ *Id.*

Imamiyah jurisprudents believe that, along with Quran and tradition, Reason is an independent source to conclude religious verdicts and relevant matters. *Shia* has neither taken the approach of those group of *Sunnis*, who deem Reason is an independent base and accept it as a source under titles of “Analogical Reason and *Istihsan* (Juristic Preference)” nor the approach of those, who gives no credit to Reason.¹⁸⁸

Instead, *Shia* has chosen a moderate way, believing that first, Reason is the only reference with regard to the religion principles. Second, in secondary religious principles, Reason is just an evidence, not a verdict. Third, Reason needs to be trained and educated to avoid being lost. And fourth, Reason can understand all the general secondary religious principles through comprehending good or bad nature of things.¹⁸⁹

Although, Reason can understand some of the said general principles, it can not comprehend all the relevant details since it is not dominating all the things considered by God related to the good or bad nature of things. All in all, where Reason can cover the good or bad nature of matters, we can refer to it.¹⁹⁰

Ibn Sina, the great Iranian philosopher, addressed this issue as follows: “The general Islamic principles are fixed, non-variant, and limited. However, events and incidents are unlimited and variant, each time requiring relevant certain needs. Therefore, in any time period and era, a group of experts who dominates the general principles of Islam and is aware of events of the time, should be responsible for jurisprudence, comprehension, and deduction of new verdicts from the general Islamic principles.”¹⁹¹

¹⁸⁸ FARHAD NOMANI, ALI RAHNEMA *supra* note 168 at 15-16.

¹⁸⁹ MOHAMMAD TAKI, HAKIM, GENERAL ASSETS OF COMPARATIVE JURISPRUDENCE, 299 (1418 BC),

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

6 Conclusion

Based on the foregoing discussions, in reviewing the Iranian legal system we understood that the legal system in Iran has been influenced strongly by its culture and religion. For example, the ancient Iranian texts and documents show that custom, traditions of the society and religion have been a significant source of legal system in the ancient Iran even before Islam. The local existing traditions had a definitive role as the source and basis of judgment and legal rules of the respective territories.¹⁹²

Also, the religion and religious beliefs were the factors and resources of judicial and legal systems. The private relationships of individuals and the basis of judgments had been established based on the religion.¹⁹³ This strong influence of religion in the legal system of Iran lead us to investigate more into Islam which is the dominant religion over there.

It is important to note that the areas governed by strict, detailed and clear rules in Islam are relatively limited and are mostly related to religious practices such as praying and fasting. The relationship between members of society in different fields including dispute resolution is governed by general principles interpreted and explained by the three secondary sources of Islamic law; *Ijma*, *Qiyas* and *Ijtihad*.

The doctrines of the different sects of Islam produced an immense wealth of differing opinions ranging from extreme conservative opinions to the most liberal ones, however, none of those opinions could contradict with the Quran and the *Sunna*.

¹⁹² HASSAN PIRNIA, HISTORY OF ANCIENT IRAN 1487 (1362).

¹⁹³ ASHRAF AHMADI, LAW AND JUSTICE IN THE PERSIAN EMPIRE 65 (1346).

The *Sunna* is the term used to refer to the normative behavior, decisions, actions, and tacit approvals and disapprovals of the Prophet. The *Sunna* was heard, witnessed, memorized, recorded, and transmitted from generation to generation.¹⁹⁴

The *Qiyas* is reasoning by analogy to solve a new legal problem. The *Ijtihad* is defined as the intellectual effort by a *mujtahid* (one who is qualified to do *ijtihad*, a jurist consult) in deriving rules consistent with the first principles of Islam. To carry out these techniques it was imperative that jurists, be familiar with the broad purposes of the Law, so that when choices are to be made they will be able to choose interpretations which accord with the spirit of the Law.¹⁹⁵

The major schools of Islamic jurisprudence represent various regional and doctoral approaches to solving legal questions. All Islamic scholars accept that the Quran and the *Sunna* are the main sources of *Sharia* and thus, whatever is stated within them must be followed by Muslims. The primary differences between the schools lie in the circumstances in which their doctrines use the three techniques of interpretation described above.

Numerous schools of jurisprudence developed and began along geographical lines, in Medina and Iraq, but later evolved around individual scholars or jurists.¹⁹⁶ The four schools of *Sunna* jurisprudence are the *Hanafi* School, the *Maliki* School, the *Shafei* School, and the *Hanbali* School.¹⁹⁷ Each developed its own scholarship by interpreting the Quran and *Sunna* using three techniques; *Ijtihad*, *Ijma* and *Qiyas* in relation to many areas of Muslim life including dispute resolution.

¹⁹⁴ N.J. Coulson, *supra* note 175 at 14.

¹⁹⁵ B. Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 *American Journal of Comparative Law* 210, 212 (1978).

¹⁹⁶ *Id.* at 62.

¹⁹⁷ G. Makdisi, *Legal History of Islamic Law and The English Common Law: Origins and Metamorphoses*, 34 *Cleveland State Law Review* 3, 6.

In conclusion, with regard to international arbitration, jurisprudents should refer to above resources, to deduct the verdict and issue fatwa on how to deal with this subject. The result of what the jurisprudents has derived out of these resources, is determinative in how international arbitration awards are dealt with in Iran.

Chapter IV. Culture and Its Influence in International Arbitration

Awards

1 Introduction

Globalization and international business are topics one hears everywhere. With the growth in international business, and following that, increasing the need to use international arbitration, the need for effective intercultural communication has increased, and at the same time the danger of intercultural problems and miscommunication has been grown.

The influence of culture on international business and international arbitration has been examined for several decades now. However, culture does not act in isolation. It is closely connected to law. Culture influences law, and law influences culture. For example, an egalitarian culture may establish laws that respect the rights of individuals and guarantee that these rights are not violated. accordingly, laws that enforce equal rights for men and women may foster a change in cultural values regarding the position of men and women in society. The culture may change very slowly, but it does change.

The connection between culture and law can be rather complex. As Kocbek argues, the legal systems exist independently from the legal languages they use. There is no direct correlation between legal languages and legal systems.¹ There is no universal legal language, but rather every legal language reflects the history out of which it comes. As a result, the translation of legal concepts is very complex and can lead to severe misunderstandings.²

The complexity does not end with the differences in legal systems, but it extends to different structures of the court systems and legal specializations. The legal term may appear similar, but

¹ A., Kocbek, *The challenges of intercultural legal communication*. International Journal of Euro-Mediterranean Studies 1(1), 54-71(2008).

² R., GOODE, COMMUNICATION ON EUROPEAN CONTRACT LAW. www.law.ox.ac.uk/profile/gooder. Retrieved 1 March, 2014.

frequently in translation, they may not reflect the exact degree that the term may hold in the original language.

One of the obstacles in international arbitration and international business is the Self-Reference Criterion or SRC.³ That means we evaluate other cultures from our own viewpoint. Our values and priorities are seen as natural and logical. They become the norm against which we judge other people's behavior. Someone who comes from a culture with a precise time orientation considers that approach the standard. For example, if a manager from another culture violates that norm, he is considered unreliable. The SRC exists in all cultures. In order to overcome the negative evaluations of the others caused by the SRC, we have to understand our own priorities and those of our foreign partners. We also need to understand our own language and communication styles to become effective intercultural arbitrator.⁴

The SRC also influences our view of laws and their impact on communication in international business, and international arbitration. As was mentioned earlier, legal systems come out of the people's history and culture, and in return, they also shape culture.

When arbitrators deal with parties in other countries, the understanding of legal systems and legal practices is crucial, and translations need to be checked for meeting the actual intended meaning in the original.

As the previous discussion has shown, cultural and legal differences pose significant hurdles to international commercial arbitration. Cultural priorities have an effect on the legal system of a country, and law helps shape and change cultural priorities.

³ VARNER, I.I., & BEAMER, L., INTERCULTURAL COMMUNICATION IN THE GLOBAL WORKPLACE (2011).

⁴ Kameda, N., *Japanese Global Companies: The Shift from Multinationals to Multiculturals*, *Global Advances in Business Communication*, 2(1), (2013), available at [www.common.emich.edu/gabc/vol 2/iss1/3](http://www.common.emich.edu/gabc/vol%202/iss1/3). Retrieved May 28, 2014.

The difference can be partially explained based on historical developments. Today we are living in global economy, where we use goods manufactured in one country and packaged in another country. Businesses have crossed boundaries of countries and expanded themselves across the world, in search of availability of raw materials, cheap labor, talent and market for their goods. However, doing business internationally is totally different than in home country. While doing business in other countries, business people have to be well aware of country's culture, people's behavior, country's legal system, its political environment and economical conditions.

When it comes to business arbitration, the legal system of a country is significantly important to international businesses. Differences in legal systems can affect the attractiveness of a country as a market or investment site. A country's law regulates business practices, defines business policies, rights and obligations involved in business transactions. The government of a country defines the legal framework within which the businesses are being exercised.

2 Legal Cultures

Legal cultures are described as being temporary outcomes of interactions and occur pursuant to a challenge and response paradigm. Analyses of core legal paradigms shape the characteristics of individual and distinctive legal cultures. Comparative legal cultures are examined by a field of scholarship, which is situated at the line bordering comparative law and historical jurisprudence.⁵

Legal cultures can be examined by reference to fundamentally different legal systems. However, such cultures can also be differentiated between systems with a shared history and basis which are now otherwise influenced by factors that encourage cultural change.

As a general proposition, the concept of legal culture depends on language and symbols, and any attempt to analyze non-western legal systems in terms of categories of modern western law

⁵ CSABA VARGA, COMPARATIVE LEGAL CULTURES, 19 (1992)

can result in distortion attributable to differences in language.⁶ So while legal constructs are unique to classical Roman, modern civil and common law cultures, legal concepts or primitive and archaic law get their meaning from sensed experience based on facts as opposed to theory or abstract. Legal culture therefore in the former group is influenced by academics, learned members of the profession and historically, philosophers. The latter group's culture is harnessed by beliefs, values and religion at a foundational level.

3 Islamic Legal Culture

The Islamic Legal System exemplifies law as part of a larger culture where the concepts of knowledge, right and human nature play a central role. A case study by Lawrence Rosen explains the anthropological, procedural and judicial discretion aspects of bringing a case to court in Sefrou, Morocco, which makes those fundamentals in Islamic society that shape Islamic legal culture and differentiate this from western legal cultures clear.⁷

Rigid procedural rules and strict court room decorum or etiquette which is entrenched in western legal cultures clears the way for arbitration as a more neutral process of dispute resolution. In most Islamic countries, close attention is paid to social origins, connections and identity, where these concepts influence a judge's judicial interrogation and discretion.⁸

While the systems of law found in the western world consist of conceptualization and implementation that mimic the extrajudicial world only slightly, in the Islamic courts, the culture of law being propounded reflects the overall culture of its people. This is attributable to the goals of law in Islamic society, which is not to hold state or religious power as supreme or to develop

⁶ J.C. Smith *The Unique Nature of the Concepts of Western Law*, *The Canadian Bar Review*, 46: 2, 191-225 (1968), cited in Csaba Varga, *Comparative Legal Cultures* (1992).

⁷ Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (1989).

⁸ *Id.*

an exacting body of legal doctrine, but to restore relationships and then facilitate the resolution of disputes independently of rigid precedent.⁹

The number of Muslim countries is growing, but the main common feature is the Islamic religion, which aims to cover all areas of life, not merely the spiritual. Thus, it has the features of a religious system of law, as described above. In its strongest formulation, some Islamic scholars state that law cannot exist outside religion and therefore the state has no power to legislate. However, in practice the religion is found in countries with very different histories, whose formal legal systems vary from the absolute sovereignty of some Gulf states through the French and Swiss-influenced codes of Egypt and Turkey, the common-law patterns of Pakistan and India, the Soviet structures of the central Asian republics, to the revolutionary councils and tribunals of Iran.

As was noted above, Law is specialized and frequently left to the lawyers. However, a knowledge of the legal environment and an ability to clearly communicate legal ramifications in an international environment are important tools. Laws are a crucial tool for a country to protect its interests. Nations establish laws that promote and protect their interests. An understanding of the historical background is useful to determine the most effective communication environment for arbitration.

So, here the history of arbitration in Iran has been discussed to understand the cultural position of Iran with regard to arbitration and enforcement of arbitration awards, specially in international criteria.

4 History of Arbitration in Iran

Judgment and legal procedures have had existed in a simple and primitive form, and in terms of arbitration and private judgment since long time back in the history. Now, this has been

⁹ Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (1989).

developed into a complicated system appropriate to the level of civilization, type of ruling system and government, political, social, and scientific considerations of communities. In other words, to be dynamic and continuously developing is an essentially inevitable feature of the judiciary components.

Development of the judicial system in ancient Iran has undergone various alterations since the procedure of such developments have been affected noticeably by the dominant religion of the time, and also socio-political circumstances of the country at that time.

Before appearance of governments and prior to the time that human started establishment of rules and courts of law, where judges could draft and write the legal principles, the arbitration tradition had existed to resolve disputes among men and women. Such tradition had been widely used by many tribes. Although origin of arbitration is unknown, there is no doubt that such concept goes back to a time before appearance of governments because this tradition existed among the civil societies, which have been created before governments.

The emergence of the concept of arbitration is simultaneous with the appearance of civil societies. It has been used in a stage between the time of personal revenge and existence of governmental judicial entities.¹⁰

Accordingly, the basis of arbitration could be rooted in the tradition of wise people since their logic and common sense distinguish the advantage of settlement versus violence as a method of dispute resolution. Therefore, they invented the concept of settlement and arbitration within their society.¹¹

¹⁰ HUSSEIN SAFAI, INTERNATIONAL LAW AND INTERNATIONAL ARBITRATIONS, 84 (2006).

¹¹ JAFARI, LANGEROUDI, MOHAMMAD JAFAR, A COMPLETE PERIOD OF LAW TERMINOLOGY, 258 (2009).

4.1 Arbitration and Judgment in Ancient Iran

Here, I have gone into arbitration and the legal system during the time of *Achaemenid*, and *Sassanid* Empires to show the influence of Iranian culture, and religious beliefs on arbitration and legal systems in Iran.

In ancient Iran, there were two types of formal and informal judgment and arbitration done by the judges and arbitrators. The informal type of judgment was usually done by the family and tribe leaders and elders, while the formal and official judgments were often executed by Zoroastrian clergymen and priests. Also, it should be pointed out that the political crimes were resolved by the king or his local rulers in the states in question.¹²

In the past, there were two types of judicial courts. The religious courts that used to proceed the legal procedure by means of settlement method were gradually removed in the system. However, the arbitration entity was formally recognized by the law-makers.

4.1.1 Arbitration and Judgment During the Time of *Achaemenid* Empire

The first dynasty of the Persian Empire was created by *Achaemenids*, established by Cyrus the Great in 550 BC with the conquest of Median, Lydian and Babylonian empires (550-330 BC).¹³ It covered much of the Ancient world and controlled the largest percentage of the earth's population in history when it was conquered by Alexander the Great.

In the existing texts and documents, there is almost nothing about judicial system during the *Achaemenid* dynasty. There has been the word “*dat*” found in the old *Achaemenid* and *Avesta* meaning “law”. This word has been changed into “*dad*” in Persian which means “justice”.

¹² Adrian David Hugh Bivar, Mark J. Dresden, T. Cuyler Young, Roman Ghrishman, *Ancient Iran*, available at <https://www.britannica.com/place/ancient-Iran>

¹³ A. D. GODLEY HERODOTUS, THE PERSIAN WARS, vol. I, Book I (1920).

Therefore, it can be understood that there has been a settlement and legal system in the said period.¹⁴

During the *Achaemenid* period, judgment and arbitration was done under the supervision of king, while the religious leaders were responsible to execute the law and issue verdicts. during that era, true judgment and realization of rights were highly significant. Within the territories ruled by Pars, the living tribes could judge based on their own religious rules and regulations. Actually, the subject matter of their judgments was limited to issues that were not within scope of what was related to the king, in which judgment on such issues was done by certain high-ranking judges called Satrap. Sometimes, even the king would interfere to accomplish the judgment.¹⁵

According to Herodotus, judicial system, and justice was so important to Iranians. “A great smart man, named Diokis, rose from the Mad tribe, and was chosen by the people as the judge. The other villages’ residents started to take their disputes to his arbitration. Gradually, there was a time, in which people would take no other judgment except his.”¹⁶

Based on Herodotus, “since Cyrus was fair in such circumstances, he was chosen by a public association as the head of *Achaemenid* dynasty and the king”. According to the historical texts, there were judges and arbitrators in different areas, who would address legal issues. The people, residing in different areas, had certain traditions, and relevant rules, which were respected, to the point that their legal issues could be settled based on those principles.¹⁷

¹⁴ Aliabadi, Mohammad Hussein, *History of Iranian Law before Islam*, Education Pamphlet in Law and Political Sciences College of Tehran University, 60-61, (1972 & 1973).

¹⁵ SANEIPOUR, PARVIZ, *PUBLIC PENAL CODE*, 82 (1992).

¹⁶ Hojjati Kermani, Ali, *Judgment Procedure during Different Periods of History*, Ettela’at Newspaper, November 23, 1986.

¹⁷ *Id.*

Therefore, Darius (the king of *Achaemenid*) ordered to prepare a comprehensive draft of laws, including all the legal rules and regulations of all the areas within his empire, so that the legal rights of all the people of his empire could be observed, and an all-inclusive civil law could be executed throughout his territory.¹⁸

The criminal justice, at the time of *Achaemenid*, was executed by courts managed by heads of social classes. The judgment in such courts was based on the old common traditions and regulations called “*Daata*”. There were also official courts of law, with arbitrators called “*Daate Bera*”, who were directly appointed by the king. This kind of job was being inherited from father to son.¹⁹

Of the noticeable points in the judgment procedures during the time of *Achaemenid*, is the fact that personal and social records of individuals were taken into consideration, so that the penal code could be executed accordingly. Such principle is now realized by the west countries indicating that penalty and punishment of any person should be determined appropriate to his personality. In this respect, Herodotus says: “The king would never kill any person due to only one mistake, and no other Pars man would determine an irrecoverable punishment for a man in a tribe, neither would he make decision while he is angry. But, he should contemplate the things and look at the number of good and bad things done by the person in question”.²⁰

Due to the big territory of Iran during *Achaemenid* Empire, morality and traditions of different tribes were of great significance. Darius had ordered all the races, and tribes to collect their own moral and religious regulations, and behave accordingly. Therefore, each tribe had a

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ SANEIPOUR, *supra* note 15 at 82.

written collection of laws and regulations, and execution of them were guaranteed by Darius. All such rule and regulations were introduced to the public as King Laws.²¹

Some of the notable features in the legal system of the *Achaemenid* are the facts that the settlement entity and invitation to settlement and arbitration were commonly used in the courts of law, due to the fact that legal issues got multiplied and highly complicated during years, certain human resources were trained as Law Speakers in order to consult people respectively. Nowadays, such men and women are called Legal Consultants, and Confession, witness, evidence, and taking oath were used as methods of proving claims in penal code.²²

As mentioned before, it was so important to consider the certain custom and traditions of the communities, to the point that even the king would have done so. Also, during the *Achaemenid* period, since Zoroastrianism was the religion of people, the family issues, and property law and regulations were extracted from the orders of their religious texts, *Avesta*.²³

4.1.2 Arbitration and Judgment During the Time of Sassanid Empire

After *Achaemenid* Empire, Iran was ruled by *Sassanid* Empire, which ruled up until the mid-7th century (224–651 AD). The Persian Empire in the *Sassanid* era was interrupted by the Arab conquest of Persia in 651 AD, establishing the even larger Islamic caliphates, and later by the Mongol invasion. The main religion of ancient Persia was the native Zoroastrianism, but after the seventh century, it was replaced by Islam.²⁴

²¹ *Id.*

²² MOHAMMAD, AKHONDI, PENAL CODE, vol. 1, 72.

²³ *Id.*

²⁴ NEIL, MACGREGOR, HISTORY OF THE WORLD IN 1,000 OBJECTS, 71 (2014).

During the *Sassanid* period, there were two types of courts named court of religion, and court of custom. The judge of the first was a clergy man called “*dastour*” or “*dastvir*”, which was changed into “*davar*” or “*datovir*” later on, which means arbitrator.²⁵

At the beginning of *Sassanid* Empire, King would have held two feasts in *Nowrouz* and *Mehregan* or *Jarchi* celebration, every year, where people were informed to bring their claims, arguments, and complaints.²⁶ Within the said days, it was being announced publicly that nobody should stop the complaining people from referring to the king, or he will be responsible for his own death. All the people including the poorest ones could plead for justice against high-ranking officials including the king. If there was any complaint or lawsuit against the king, he would have come down his position, and ask for a fair judgment. In case of any verdict against the king, he could not go back to his position as the king before he compensated the loss in question.²⁷

Respectively, in Iran’s ancient era, arbitration was the same during the different periods and ruling systems, and it was not unique to any period or governing Empire. Probably, the reason(s) of this similarity during the *Achaemenids*, *Ashkanids*, and *Sassanids* could be found in the formation and type of Iranian community organization and also the basis of family lives on one hand, and religious rules and regulations on the other. In other words, it was because of the influence of Iranian culture, and religious beliefs.²⁸

So, as we can see, from the beginning, the Iranian culture had strong influence on Iranian legal systems. Accordingly, culture had a strong and influential role on legal systems and arbitration in Iran.

²⁵ HUSSEIN, PIRNIA, IRAN HISTORY, 248 (1991).

²⁶ Nowruz is the name of Iranian new year, and is at the beginning of Spring; Mehregan is a Zoroastrian and Persian festival celebrated to honor the Yazata Mithra (Persian: Mehr), which is responsible for friendship, affection and love. It is also widely referred to as the Persian Festival of Autumn.

²⁷ *Id.*

²⁸ MORTEZA, EHTESHAM, IRAN OF THE ACHAEMENID, 89 (1976).

4.1.3 Classification of the Arbitrators in Ancient Iran

In this part the classification of the arbitrators in Ancient Iran has been mentioned. It will show the fact that even in that time different subject matters (related to army, family issues...) were resolved by different forum and different judges or arbitrators with different qualifications. It also shows how the various legal issues were resolved with respect to different groups like minorities. Accordingly, in ancient Iranian's culture, certain subject matters needed special considerations, and some were handled according to their religion at the time.

Generally speaking, judgment and arbitration in ancient Iran could be classified as follows:

4.1.3.1 King

King was the head of ancient Iran's legal system. During the *Achaemenid*, the king as the general judge, were appointed for this job and they would inherit it from the previous kings.²⁹

During the *Sassanid*, the supreme judiciary was headed by the king, and this was something real and not just in theory. There are quite a number of narrations indicative of true justice executed by the *Sassanid* kings. Accordingly, if there was anybody whose rights were not realized by the local courts of law, he could directly come to the king, seeking for justice. Based on these documents, the Iranian kings' level was higher than all the other judges.³⁰

4.1.3.2 Zoroastrian clergymen

The ancient Iranian society was of religious type, and especially Zoroastrianism had a very significant role in the people thoughts. For a long time in the history of Iran, Zoroastrianism was the primary and determinative ruling power up to the point that the religious texts and documents were considered as the legal texts. Accordingly, one can realize the major role of Zoroastrian clergymen in the legal system of ancient Iran.

²⁹ Id. at 92

³⁰ ARTHUR, CHRISTIAN SAINT, IRAN OF THE SASSANID, 40.

Based on the historical texts, courts of law in each area or state were managed by a clergy man as the head of the judges, who supervised the other probably non-clergy judges, so that their procedures and verdicts would match the justice.³¹

According to *Avesta*, the primary collection of religious texts of Zoroastrianism, during that time, the judges had various privileges and credibility based on their 10, 11, 12, 13, 14, and 15 years of studying the jurisprudence. Apparently, decisions and legal verdicts issued by any of them were of different credit based on their grades. Moreover, most of the high-ranking legal officers were clergymen called *Hirbod*, who could issue *fatwa* as a judge.³²

According to certain researchers, judges were selected among the clergymen and priests due to their legal knowledge and information.³³

4.1.3.3 The Army Arbitrator

The military judicial system was managed by a special judge called the *Sepah Davar* (Army Judge). During that time, the crimes such as deserting the army at war time could face death penalty, and even the king would have interfered in making such decisions.³⁴

4.1.3.4 Family Arbitrators

In ancient Iran, the crimes committed within the family boundaries, and not involving the society were addressed by the family elders. Initially, the head of the family was responsible for holding the religious ceremonies. In addition, he was the executor of religious rules and justice as well. Such man was named “*Zentobekhteh*”, who was highly respected due to his legal and clerical privileges.³⁵

³¹ Id. at 405.

³² Id. at 405-406.

³³ PIRNIA supra note 25 at 246-9.

³⁴ CHRISTIAN SAINT, supra note 30 at 405.

³⁵ EHTESHAM supra note 28 at 83.

In a bigger social unit, called “*Vis*” or “*Vispeh*”, the head was called “*VisPe iTish*”, who was responsible for the religious ceremonies and justice. Furthermore, in another greater unit named “*Dehio*”, religious ceremonies were managed by “*DehioPe iTish*”, who could use all the authorities and privileges of *Zentobekhteh*, and *VisPe iTish*.³⁶

4.1.3.5 The Minorities Arbitrators

The ancient Iran governments usually used to rule over vast territories constituted of different nationalities, tribes, and religious followers. Considering the fact that most ancient Iranian rulers respected the people’s freedom, the courts of said religious minorities were naturally held based on their own rules and regulations. These ethnic minorities had courts of law constituted of experienced persons, jurists, and law experts from each area. In areas of *Israelites*, the legal issues were addressed by a council of elders and scholars of the tribe headed by a judge named *Resh-Galuta*.³⁷

Thus, while people could enjoy religious freedom throughout the states and provinces of Iranian Kingdom, legal issues were also enforced according to the common laws and religious regulations of each state.³⁸

4.1.4 The qualifications of the Judges

Usually, *Daate Bera* (judges) were chosen among the heads of tribes, princes, smart and experienced elders. Some of the requirements of being appointed as a judge were being well-known for observing religious consideration, acting based on religious teachings, and avoiding

³⁶ Id.

³⁷ Id at 97.

³⁸ Id. at 86.

any bribe or extortion of individuals.³⁹ During the time of *Sassanid*, the position of a judge was highly respected, as they were selected among impartial and experienced people.⁴⁰

In the ancient Iran, like so many other positions, the position of a judge was also inherited from father to son.⁴¹

As another requirement of being a judge or arbitrator, was being Persian. According to historical texts and documents, at the time of *First Sassanid Ardeshir*, judges were exclusively Persian.⁴²

There is no doubt that long-lasting governments in ancient Persia were the products of special attention to the laws and justice, as deviation from rules and regulations could confront punishment. Of course, such great empire with that kind of vast territories would not last for a long time unless enjoying supervision of law and justice.⁴³

4.2 Judgment and Arbitration in Iran after Islam

After *Sassanid Empire*, the legal Islamic regime gradually replaced Zoroastrian legal regime, and an important reason of such approach was Islam's focus on justice. In Medina, the adjudication was being done by the Prophet, while in far distance territories, such task was taking care of by his companions.

During the time of the first four Caliphs (*Rashidun* Caliphate), a separated judicial administration was formed,⁴⁴ and during the *Umayyad* time until the *Abbasid* Caliphate, the

³⁹ Id. at 92.

⁴⁰ CHRISTIAN SAINT, *supra* note 30 at 403.

⁴¹ POURDAVOUD, IBRAHIM, PREPARED BY DR. BAHRAM FARAHVASHI, YASSNA, 23 (1977).

⁴² ROMAN, GHIRSHMAN, TRANSLATED BY MOHAMMAD MOEIN, IRAN: FROM THE EARLIEST TIMES TO THE ISLAMIC CONQUEST, 219 (1993).

⁴³ ABDOLHUSSEIN, ZARRINKOUB, HISTORY OF IRANIAN PEOPLE BEFORE ISLAM, 220-221.

⁴⁴ A Caliphate is a territory under the leadership of an Islamic steward known as a caliph, a person considered a religious successor to the Islamic prophet Mohammad (and a leader of the entire Muslim community). Historically, the Caliphates were polities based in Islam which developed into multiethnic transnational empires. During the medieval period, three major Caliphates existed: the Rashidun Caliphate (632–661), the Umayyad Caliphate (661–750) and the Abbasid Caliphate (750–1258). The fourth major Caliphate, the

Islamic land, including Iran had a decentralized legal regime. Upon *Abbasid* taking over the Islamic land, and its legal system, influenced by Iranian civilization, a centralized legal regime was established. Therefore, instead of the Supreme Priest of the Sassanid, the position called “Judge of the Judges” or Supreme Judge was created who was responsible for Supervision of the other judges’ activities throughout the *Abbasid* territory. This legal regime, which was mainly based on the Sunni jurisprudence, continued until the downfall of *Abbasid* Caliphate.⁴⁵ Accordingly, we can discuss this subject in each different eras as follows;

4.2.1 Umayyad Caliphate

During the Umayyad Caliphate (661-750 CE), for political reasons, like to keep Iranian people satisfied, the Arab rulers in Iran addressed some legal issues, while giving sermons to teach religion. So in order to make the Iranian people satisfied, they had to respect the justice and their legal system since it was in their culture from the beginning, and paying attention to justice was in priority for the them. During the said period, Private Law domain was separated from the Public Law. Therefore, due to the lack of Arabs’ experience regarding public law and administrative knowledge, local governors usually collected taxes and managed the tax documents and books following the *Sassanid* rules in *Pahlavi* language.⁴⁶ With regard to the private law, the old local religious rules were used for those people who wanted to remain in their own religion via payment of tax (*jizya*) to the Muslim rulers.⁴⁷

During the *Umayyad* and *Marwanid* Caliphates, upon establishment of pure Arabic government, the Islamic rules regarding justice and equal rights were abandoned. During the said

Ottoman Caliphate, established by the Ottoman Empire in 1517, was a manifestation whereby the Ottoman rulers claimed caliphal authority. During the history of Islam, several other Muslim states, almost all of them hereditary monarchies, have claimed to be Caliphates.

⁴⁵ IBN AL-NADIM, TRANSLATED BY MOHAMMAD REZA TAJADOD, THE *FIHRIST*, 442 (1987).

⁴⁶ *Id.*

⁴⁷ *Jizya* or *jizyah* is a per capita yearly tax historically levied by Islamic states on certain non-Muslim subjects, permanently residing in Muslim lands under Islamic law.

periods, social and political circumstances of Iran became unstable, resulting in anti-Arabs upheavals and movements. Therefore, the judgment procedures and methods of the time proved to be inappropriate and ineffective.⁴⁸

During the *Umayyad*, Abdolmalek Marvan, decided to use the *Sassanid* kings' pattern of holding feasts for the purpose of addressing ordinary people's complaints. In the said administration, caliph would hold a feast once a week, so that anybody from any social class could personally refer to the caliph to address his complaint. The caliph would then treat the complaints appropriately, and if there was any complicated problem or an ambiguous religious issue, he would seek help of the present jurists and scholars.⁴⁹

4.2.2 Abbasid Caliphate

Upon the start of *Abbasid Caliphate* (750-945 AD), the Iranian culture influenced different military, political, social, cultural, and legal areas. Additionally, Iranian people, especially those Iranians who were knowledgeable in Islamic jurisprudence, by using the Iranian mental and cultural elements, significantly affected the process of theoretical and practical development of laws and establishment of justice administration in the *Abbasid* time. Evidences of such influences could be found in various subjects. For instance, after the *Abbasid*, the Medina jurisprudence school, where the *Rashidun* Caliphate and Shia Imams used to live, was abandoned during the time of the war between *Umayyad* and *Abbasid*. Upon abandonment of this school, the Kufa and Basra jurisprudence school influenced the legal system of *Abbasid*. The logical inclinations of the said school toward certain processes like comparison and nobility

⁴⁸ JALAL HOMA'I, MANOUCHER QODSI (ED.), SHA'OUBIYAH, 21 (1984).

⁴⁹ SEYED MOHAMMAD MOHIT TABATABA'I, JUSTICE ADMINISTRATION IN IRAN FROM SASSANID DOWNFALL TO CONSTITUTIONALISM, 18 (1968).

proof were considerably the results of Iranian cultural influences. As we see the Iranian culture had a huge influence in the Islamic governing system of the time.⁵⁰

Upon the change of capital city of Caliphate from *Damascus* to *Anbaar*, a famous Iranian city located at north-west of *Tisfoon*, where was the logistic center of the *Sassanid*, the Iranian systems and culture started to significantly affect almost all the fields including judicial organizations and entities.

According to the texts remaining from that period, Ibn Moghafa in the book "*Al Sahabah*", which was written for Mansour Abbasid caliph, described the procedure of public judgment and the appointment of judges, along with the country's public and tax policies. Ibn Moghafa recommended the Caliph to collect all the past precedential decisions, and verdicts, based on various understandings and interpretations in his territory, so that he could draft a comprehensive collection of laws to be notified to all judges in all parts of the country. Accordingly, the judges could practice the law based on the notified instructions. Therefore, the justice administration, and judicial system would enjoy a centralized system throughout the Abbasid territory.⁵¹

At the time of *Rashidun Caliphates*, the judges of Arab Island and the respective territories were appointed directly by the Caliphate; however, during the *Umayyad* time, this responsibility was not excluded to Caliphate's power since Arabs realized that they were unable to establish political and legal regime without cooperation of local big heads. So, provincial governors could appoint anybody as judges in their own discretion. Thus, different areas of Iran including Khorasan, Azerbaijan, Shervan, Jorjan, Tous, Jebal, Khuzestan, Fars, Kerman, Sistan, Qahestan, Kharazm enjoyed such a legal independence.⁵²

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² ALI-IBN-MOHAMMAD, MAVERDI, THE KING RULINGS, 65 (1996); MOHAMMAD TAGHI, MAJLESI, ROWZEH AL-MOTAGHIN FI SHARH MAN LAAYAHZEHO AL-FAGHIH, vol. 6, 44 (1989).

Upon the start of *Abbasid* period, judge appointment process became concentrated as a result of recommendations provided by certain scholars like Ibn Moghafa in the book *Al Sahabah*. Therefore, Caliph would appoint one person as the Supreme Judge in Baghdad, which was similar to *Sassanid* Supreme Priest, so that other judges could be appointed by Caliph, using the advice of the Supreme Judge.

At the time of *Abbasid*, following the Supreme Priest of *Sassanid*, the position of Supreme Judge was formed. Upon establishment of supreme judge position by the Abbasid, jurisprudence books, providing instructions about judge and arbitrator's qualifications and judgment principles, arbitration and judicial Manners and judgment and arbitration basics were written by the supreme judge and jurists, which the oldest ones were written by the Sunni jurists. Such resources were actually a collection of Sunni jurisprudence verdicts concerning judicial organization, civil and penal codes, arbitration and judicial instructions.⁵³

Up to now, the process of writing such books and resources continued throughout the history of Islam. Upon the position of supreme judge being institutionalized during the *Abbasid* period, the judicial organizations and justice administration were established.

Consequently, upon the downfall of Sassanid and during the initial years of Islam in Iran, the justice organization faced basic changes. The religious system started to rule over the public fields, due to the expansion of Islam throughout the country. In the period of *Rashidun* Caliphates, judiciary got separated from the government or ruling system. From *Umayyad* to *Abbasid*, the legal system was administered via a decentralized method. The *Umayyad* used to observe the independence of judiciary as far as issues were of general and non-political quality.

Upon the start of *Abbasid* dynasty and under the effects of Iranian civilization, the supreme judge position similar to *Sassanid* supreme priest position was created, so that judgment in all

⁵³ *Id.*

parts of the country could be coordinated by the capital of Caliphate. Nevertheless, the significant judges in *Abbasid* period used to practice independent of the Caliphates, and did not change the religious legal system according to the Caliphates' will. However, the judgment procedures practically started to suffer from corruption in certain parts of Iran, as injustice in the Balkh judicial administration was an example of such corruption.

4.2.3 *Safavid Empire*

The *Safavid* Empire was the first Persian Empire established after the Arab conquest of Persia (1501–1736 AD).⁵⁴ The judicial system of *Safavid* dynasty was divided into two parts of conventional and religious issues. The conventional offices were responsible for addressing the crimes like murder, violation and quarrels, and aggression (functions related to security provision and preserving the political system). The religious part of the judiciary was responsible for legal arguments and religious complaints. The chief of conventional crimes office was a person with the title “*Divaan Beigi*” while certain officers entitled as “*Darougheh*” were responsible to address the relevant crimes in every city.

The chief of judiciary's religious office was a person entitled as “*Sadr*” who had the highest religious rank in the government, selected among the famous Shia scholars. The religious judges were appointed by *Sadr* via selection among the Shia scholars. Of the other responsibilities of *Sadr*, one can point out to changing people in “*Sheikh al-Islam*” positions in every city and also furthering issues related to the endowed properties throughout the country.⁵⁵

Upon the *Shia* religion being chosen as the official religion of the country, all the judicial verdicts, which were previously issued based on the Sunni jurisprudence, were actually changed

⁵⁴ DOUGLAS E., STREUSAND, ISLAMIC GUNPOWDER EMPIRES: OTTOMANS, SAFAVIDS, AND MUGHALS, 135 (2011)

⁵⁵ ABBASQOLI, GHAFARIFARD & ABDOLHUSSEIN, NAVA'I, THE HISTORY OF POLITICAL, SOCIAL, ECONOMIC, AND CULTURAL DEVELOPMENTS IN IRAN DURING THE SAFAVID, 21-36 (2002).

according to the *Imamiyah* jurisprudence. Development process of the judiciary regime in the country during this period led to separation of religious and conventional crimes offices. The position “*Divaan Beigi*” as the justice minister used to manage the conventional or state courts, while the religious or Islamic courts of law were administered by the position “*Sadr al-Sodour*” who was a Shia jurisprudent.⁵⁶

During the *Safavid* period, the most significant success in centralization of the judiciary was achieved. Sensitivity concerning the conventional courts was increased, so that the judiciary administration responsibility mainly remained under the control of kings and state courts. This issue was seriously followed, especially by Shah Abbas the Great, and clergymen were completely prohibited of interfering in issues within the domain of state courts jurisdiction.

As we see, during this time, once again the culture was to follow the religious instructions of the time, and the religious system had more power over the non religious one. The pattern of *Safavid* judicial system included a binary judicial regime constituting non-religious and non-clergy judges, and religious judges. In this period, Iran was divided into several judiciary districts that each one had 600-700 km domain. The criminal courts were managed by religious judges accompanied by non-religious judges, while religious judges enjoyed more power in such respect. However, non-religious judges acted independently in commercial cases.

There were also certain positions established like *Divaan Beigi* as the highest judicial rank of country, Special *Sadr*, General *Sadr*, Special Judge for the capital city of Esfahan who all respectively enjoyed a degree of power. There was also a position established called “*Ghazi Askar*” who were responsible for the crimes committed by the soldiers. “*Darougheh*” position was created as a guard for every city, while a person called “*Mohtaseb*” had to supervise the foods, their price rates, and general problems of people in every city. All in all, it can be argued

⁵⁶ ENGELBERT, KAEMPFER, KAEMPFER TRAVELS, 125-126 (1984).

that there was a noticeable organizational stability within the judiciary regime during the *Safavid* era, and the religious judiciary system became in accordance with conventional structure of government.

4.2.4 Qajar Empire

In *Qajar* period (1794-1925 AD), the justice administration was established by Naser al-Din Shah. The judicial system of *Qajar* included certain justice offices called “*Divaan Khaneh*”. The heads of these offices were selected and appointed by the king, and the public complaints were resolved by religious judges over there. The religious judges, who were clergymen or jurists, would issue verdicts relevantly, however, such verdicts had no guarantee to be enforced.

Also, non-legal complaints were settled in the governmental offices. Religious issues were furthered by clergymen, while disciplinary and punitive crimes were addressed by the government representatives in the cities.

The above-said justice offices were established by the king’s order, although he did not monitor their activities sufficiently, and deemed their reports enough. The main defect of the justice office was the fact that many of the complaints did not reach these offices. The responsible officers of these entities including local rulers, princes, big heads, etc. had established relatively majestic organizations, imitating the king, and did not address people’s problems based on justice but also based on their own wills and benefits. Judgments enforced by many of clergymen as the religious judges were affected by the current circumstances of the time.

Of the most significant events in the judiciary system of Iran during *Qajar* dynasty, one can refer to European judicial patterns applied and enforced by Iranians in their legal regime.

Another important judicial event in Qajar period was the one, which happened under the effects of treaty of *Turkmenchay* which prohibited any legal lawsuit against foreign nationalities in Iranian courts of law.

A very significant measure taken by Naser al-Din Shah was to establish ministry of justice and to appoint *Moshir al-Dowleh* as the minister of justice. *Moshir's* first action was forcing the king to issue an order, so that all the local rulers could be prohibited from making any judicial decision or issuing any legal verdict.

During the Qajar period, judiciary issues were addressed via two methods as follows.⁵⁷

1. Judicial process under the supervision of governmental officers such as sheriff or police chief who used to address the violations against the governmental orders in the conventional courts.
2. Judicial process under the supervision of religious scholars through which problems like inheritance lawsuits, family arguments, and all the other daily life issues could be furthered. Such courts were known as religious courts.

Discussing the legal system during different eras in Iran shows the fact that culturally, the Iranians always had a tendency to resolve their issues by getting help from the religious people, and despite having the legal system that followed the governmental rules, there was still another judicial system available, which was supervised by religious scholars.

As was previously noted, legal systems come out of a people's history and culture, and in return, they also shape culture. culture does not act in isolation. It is closely connected to law. Culture influences law, and law influences culture. As the previous discussions have shown, cultural and legal differences pose significant hurdles to international commercial arbitration.

⁵⁷ ABBASALI, KADKHODAI, IMPACTS OF SHIA ON THE IRANIAN JUDICIAL REGIME, 2 (2006).

Cultural priorities have an effect on the legal system of a country, and laws help shape and change cultural priorities.

Accordingly, in order to understand the culture with regard to arbitration in Iran, we looked into its history, and the way arbitration and judicial system were dealt with in various Empires during different times. Furthermore, since culture is being affected strongly by the law of the country, in order to understand the Iranian culture with regard to arbitration, a little study of Iranian law of arbitration would be necessary.

When arbitrators deal with parties in other countries, the understanding of legal systems and legal practices is crucial, and translations need to be checked for meeting the actual intended meaning in the original. Subsequently, when it comes to business arbitration, the legal system of a country is significantly important to international businesses. Differences in legal systems can affect the attractiveness of a country as market or investment site. A country's law regulate business practices, defines business policies, rights and obligations involved in business transactions. The government of a country defines the legal framework within which firms do businesses.

As was noted above, Law is specialized and frequently left to the lawyers. However, a knowledge of the legal environment and an ability to clearly communicate legal ramifications in an international environment are important tools. Even though there is a growing body of international law, most laws are territorial. Laws are a crucial tool for a country to protect its interests. Nations establish laws that promote and protect their interests. An understanding of the Iranian arbitration related laws is useful to determine the Iranian cultural environment for arbitration.

Since culture affects Law and law has influence on culture, and we have already discussed the history of Iran to have an understanding of its culture, now it is time to look into the arbitration laws in Iran, which has affected the Iranian culture with that regard as well.

5 Arbitration in Iranian Legal system

Arbitration means ending a dispute by individuals, while the parties of the dispute willingly agree to refer their claims and arguments to their trusted people, instead of eligible courts of law. In other words, arbitration means settling a dispute outside a court of law with the binding decision of person(s), who are accepted and trusted by the parties. Such trusted individuals are appointed either directly by the parties of dispute or indirectly via the help of certain people. In fact, the arbitrator would be one or more persons trusted and accepted by the parties.⁵⁸

The legal definition of arbitration, according to Iranian legal textbooks is not far from its meaning. The arbitration practitioners explain the concept of settlement as follows: “It is not prohibited to refrain from going to official courts of law and take the private disputes to individuals who are specially trusted for their technical knowledge, good reputation, and trustworthiness. This type of dispute settlement is called Arbitration”.⁵⁹

According to Matindaftari, “Settlement happens when people avoid the judiciary officials’ interference for the purpose of ending disputes related to their private rights and arguments, instead, they submit to the judgment of individuals, who are trusted due to their technical information, good reputation, and trustworthiness.”⁶⁰

⁵⁸ Iran Newspaper, No. 4080, Dated November 20, 14 (2008).

⁵⁹ Morteza, Yousefzadeh, *Settlement Procedure and Methods of Dispute Settlement*, Judgment Magazine, No. 35 available at: www.aria-law.com

⁶⁰ AHMAD, MATINDAFTARI, CIVIL & COMMERCIAL LAW PROCEDURE, vol. 1, 76 (1999).

Some law scholars believe that “arbitration includes ending disputes by individual, either happily chosen by the parties, or arbitrarily appointed by judiciary organizations.”⁶¹

Professor Rene David writes “Arbitration is a technique targeted at settling issues between two or more persons by one or more individuals called Arbitrator(s). The arbitrators’ authorities come from a private agreement, and they make decision and issue verdict based on such agreement, without being obliged to do so by the government”.⁶²

Comparison of the said definitions with the other definitions reveals that there are different answers to the following issues and questions regarding settlement or arbitration;

Contractual: Based on certain definitions, arbitration is simply contractual, and the arbitrators come from agreements and contracts. On the other hand, settlements in certain other definitions could be by law.

Public: Some law scholars believe that arbitration is completely public, while the others are on the belief that it is governmental or semi-governmental.

The above-said differences reveal that lawyers have provided certain definitions based on the legal circumstances of their time. It means that they have provided certain definitions of arbitration, according to the arbitration regulations in the applicable law of the time they have lived.

6 Development of Arbitration Rules in the applicable Iranian Legal system

In review of Iranian legal history, it is determined that arbitration has been always accepted and respected by the public as a resolving method for the disputes and disagreements. Here, we are going to study the development of arbitration rules in Iranian legal system before and after Islamic revolution in Iran in 1979.

⁶¹ SEYED JALALADDIN, MADANI, CIVIL LAW PROCEDURE, vol. 2, 668 (1993).

⁶² DR. HUSSEIN, SAFA’I, INTERNATIONAL LAW AND INTERNATIONAL ARBITRATIONS, translated from Rene David, Arbitration in International Trade, 84.

6.1 Before Revolution

Before Iranian Constitutional Revolution, parliament establishment and law making via modern methods, and before foundation of Iranian judiciary system, people generally used to take their arguments and complaints to religious scholars and jurists. They also would refer to the elders of the tribe or city, so that they could arbitrate and settle the respective dispute. Decision of such arbitrators or judges were respected and observed by the parties.⁶³

After Islamic conquest in the Iranian territories, according to the Islamic jurisprudence rules, arbitration method was recognized as a method for settlement, which was accepted by the religious scholars and jurists. However, during the contemporary history of Iran, the first law approved by the first National Council in the area of courts' procedures was known as "Law of Legal Courts Principles". This law, which was approved in 1910, was almost a comprehensive law on the subject of parties' satisfaction.⁶⁴

Based on the Art. 757 of the said law, all the individuals who were competent to bring about an argument could take their complaint(s) to one or more persons who were satisfactorily chosen by the parties.⁶⁵ The arbitration agreement should have been signed by the parties in dispute and arbitrator(s) (Art. 758). The arbitrator was obliged to make appropriate decision(s) within 2 months unless a certain deadline was stipulated in the arbitration agreement (Art. 760). Satisfaction with arbitration blocked the option of taking the argument to the court of law, while arbitration option was available for the parties even during the court of law process. In such case, legal process in the court of law was stopped, and the relevant files and documents were assigned

⁶³ MOHAMMAD, SANGLAJI, JUDICIARY IN ISLAM, 36 (1968).

⁶⁴ *Id.*

⁶⁴ Law Collection of The 2nd Law Approval Round, 456 seq.

⁶⁵ Law Collection of Justice Ministry, 62 seq. (1928).

to arbitrator(s) (Art. 763). The arbitrators were not obliged to observe the legal considerations of a court of law but they had to practice according to the arbitration agreement (Art. 765).

In three-member arbitration, at least the agreed decision of two members was enough for it to be enforceable (Art. 769), unless it was stipulated by the parties that arbitration decision must be confirmed by all the members (Art. 771). The arbitration decision was final and nobody could appeal the verdict in question (Art. 772). The arbitration verdicts could be enforced based on the justice organization's rules and regulations (Art. 778), while the enforcement notice was to be issued by the court of law to which the arbitration verdict was submitted (Art. 779). Any objection to the arbitration verdict could be filed within one month of the notice date, and such objection(s) must be addressed by the court to which the arbitration verdict was submitted (Art. 776).

Invalidation of the arbitration verdict could be done in two probable cases: 1) Issuance of the verdict after the deadline agreed by the parties; and 2) Any violation or invalidation regarding the required signatures on the arbitration agreement that should have been signed by the parties and arbitrator(s) (Art. 774).

Finally, according to the Article 775, arbitration verdict(s) could be nullified in the following cases: 1) In case that the verdict is issued about individuals, who have not either taken part in preparation of the arbitration agreement or have not been permitted to participate in such practice even if they have had done such; 2) In cases that a verdict is issued concerning issues which have not been the subject of arbitration; 3) In cases that the arbitration is decided to be practiced regarding murder crimes; and 4) In cases that arbitration is enforced on issues within the domain of religious jurisprudence.

Based on the above-said discussion, it can be concluded that arbitration rules and regulations set in the first Iranian civil procedure code were almost comprehensive.

Later on, a law known as “Arbitration Law” was approved in order to revise the earlier law. In the new law, a type of compulsory arbitration was approved indicating that in case of request filed by any one of the parties, the dispute must be assigned to arbitration. Due to this new law, the Articles 757 to 779 of legal principles of courts concerning settlement were invalidated so that arbitration could be all included in the Arbitration law of 1928.⁶⁶

According to the first article of Arbitration Law, any time one of the parties requests for arbitration or settlement, the dispute should be followed via arbitration. In such cases, the court forces the other party to accept the arbitration request. Of course, the settlement request should be filed by the end of first court session, and the arguments and lawsuit should be initially brought about in the first court session. Additionally, in case of parties’ satisfaction and agreement, they can file a settlement request at any stage of the lawsuit; however, in such cases (agreement of the parties on settlement method), the arbitrator(s)’ decision and verdict would be deemed as final and irreversible.⁶⁷

As discussed above, the arbitration mentioned in the said law was basically a type of mandatory arbitration, and the request for which could be filed by the end of first court session. Therefore, the court was obliged to stop the lawsuit according to the received request and make decision to assign the case for arbitration. Such decision, of course, could be appealed.⁶⁸

Thus, almost all the process of arbitration or settlement was enforced under the supervision or even interference of the related court of law. For example, if the plaintiff requested for assignment of the case to arbitrator(s), then the defendant was obliged by the court to determine

⁶⁶ ARBITRATION LAW, LAW COLLECTION OF JUSTICE MINISTRY, 62 seq. (1928).

⁶⁷ Art. 13 of Arbitration Law.

⁶⁸ Art. 3 of Arbitration Law.

his arbitrator within certain deadline. In case of defendant's avoidance, the court of law would arbitrarily choose a person as arbitrator on behalf of the defendant. In case of defendant's request for arbitration, the plaintiff had a two-month deadline to introduce his own confirmed arbitrator. Otherwise, the court would order motion to dismiss, while such decision could not be appealed.

Additionally, the decision for selecting a third party arbitrator was up to the court of law.⁶⁹ The arbitration decision of the court had to be immediately signed by the parties. Such decision had to be signed by the arbitrator(s) within 3 days, while in case that any of the arbitrators refrained from signing the agreement, the court of law could arbitrarily appoint someone else instead of him.⁷⁰

The practical problems of the Arbitration law approved on March of 1928, especially the misuse of the option for taking the lawsuit to compulsory arbitration, made it not to be in effect for a long time. Accordingly, the mandatory arbitration of 1928 practically did not have a good result.⁷¹ The Arbitration Law Revision was approved one year later on March 31, 1929.⁷²

The most significant change was taking back the arbitration to its earlier status, canceling the mandatory arbitration, and making arbitration option depending on both parties' satisfaction. In addition, arbitrators were no longer permitted to do arbitration on the subjects related to the spouses and bankruptcy. According to the Article 2 in the said law, it was prohibited to assign the cases with marriage and bankruptcy subjects to arbitration.

6.2 After Revolution

Upon the approval of the above-mentioned revision, the regulations of 1928 Arbitration law were still in effect, except the the changes made in the revision (Art. 8). As a result, the other

⁶⁹ Art. 2 of Arbitration Law.

⁷⁰ Art. 7 of Arbitration Law.

⁷¹ AHMAD, MATINDAFTARI, CIVIL AND COMMERCIAL CODE, vol. 1, 91.

⁷² Law Collection of The 7th Law Approval Round of the Parliament, National Parliament Printing House, 109 seq.

matters including arbitration arrangements, appointment of arbitrator for the party, who avoids choosing an arbitrator, objection to arbitrator's decision, verdict execution stipulated in that law were not replaced so that both laws could remain together.

Dispersal of arbitration rules and regulations in the said two law (the original law and its revision), along with the time to time discrepancies, and also problems of arbitration execution led to ambiguities in arbitration arrangements.⁷³

The current arrangements of arbitration continued until the year 1935 as a new Arbitration Law containing 38 articles were ratified by the parliament on the date February 9, 1935. This very new law was far more comprehensive than the earlier version. This law was later used as the basis of regulations included in the 8th chapter of Civil Procedure on the subject of Arbitration.

Article 1 of the 1935 Arbitration law says: "All the people eligible for raising a lawsuit can take their case of dispute to arbitration by one or more persons in case both parties' satisfaction."⁷⁴ Assignment of case to arbitrator(s) can either take place before bringing the case to a court of law or during the judicial procedures". As said, due to this article, not only settlement option is arbitrary and agreed by the parties but also it is possible to take the case for arbitration before or during the judicial and legal lawsuit.

Explaining the other arbitration relevant points mentioned in this law is not necessary. As said, the regulations included in the 8th chapter of Civil Procedure on the subject of Arbitration, which are typically comprehensive, have been mainly adapted from the Arbitration law taken into effect on the year 1935.⁷⁵

⁷³ MATINDAFTARI supra at 92.

⁷⁴ This does not include family law disputes, criminal law disputes, etc., and is only regarding to the arbitrable disputes.

⁷⁵ Id. at 11.

The above-said discussion indicates special attention of the Iranian lawmakers to arbitration method during three decades starting from 1911, which shows it was in their culture. Therefore, the arbitration's rules and regulations were revised in the years 1911, 1928, 1929, 1935, and 1938 using legal and enforcement experiences.

This law was finally drafted in terms of 8th chapter of Code of Civil Procedure, which can still be used and enforced after 60 years. Currently, the regulations mentioned in the 7th chapter of lawsuit procedures in the Iranian Public and Revolution Courts are allocated to arbitration issue. These regulations have many parts in common with the regulations included in the Code of Civil Procedure on the subject of arbitration.

As discussed, before Revolution, added to what was determined about arbitration in the Iranian Code of Civil Procedure, there were some other rules which typically addressed the arbitration subject and even made arbitration mandatory for certain lawsuits. For instance, the law of establishment of arbitration council, approved in the year 1967, put lawsuits up to 20,000 Rial within the jurisdiction of arbitration council.⁷⁶

Article 10 of the Revision of Certain Justice Administration Laws of 1978 stipulated that 5-year lawsuits in the justice organization with no verdict yet could be assigned for arbitration, upon the request of main plaintiff.⁷⁷ Due to this article, "in any legal action" except for the cases included in the Article 675 of Code of Civil Procedure, which had been started before this law taking into force, and has prolonged for 5 years or more can be assigned to arbitrator(s) upon the request of main plaintiff within two years, whether the lawsuit is in the initial stages of investigation or not. Such request could be filed under the condition that lawsuit process in the court of law was not finished yet.

⁷⁶ Law Collection of Justice Administration, 101 seq. (1967).

⁷⁷ Law Collection of Justice Administration, 48 seq. (1978).

Furthermore, with regard to arbitration, there has been also some rules that deal with arbitration in special fields, like industry, mine, stock exchange, and etc.

In addition to the positive laws of the country, in the practical situations before the Islamic Revolution in Iran, in many trade contracts between private people, the conditions of arbitration and settlement were determined. There was usually arbitration article stipulated even in the civil or oil contracts concluded between state organizations and enormous Iranian or non-Iranian companies. Also, international arbitration was applied in order to resolve disputes in the international contracts.

Upon the Islamic Revolution in Iran and approval of Islamic Republic of Iran Constitution Law, despite certain doubts concerning the legitimacy and reliability of arbitration method, this method was practically confirmed and applied, while its legitimacy and reliability was never seriously challenged as a valid and effective pattern to resolve disputes, especially international trade ones.

Another instance of confirming arbitration in the Iranian applicable law was “The Law on the Establishment of the General Courts of the Revolution” of 1993. Article 6 of which explicitly discuss the arbitration method. Added to that, in the Articles 430 onward of the 7th Chapter of The Law on the Procedure of Public and Revolutionary Courts, the arbitration subject along with settlement method for civil disputes via arbitration have been addressed.

As the last instance, International Commercial Arbitration Law was composed in December of 1997 based on the UNCITRAL Model of International Commercial Arbitration.⁷⁸ This recent law was an absolute confirmation of arbitration entity’s eligibility in international contracts. Not only this law was deemed valid to use the arbitration template in the international contracts, but

⁷⁸ Refer to the text of UNCITRAL Model of Arbitration Law in the legal magazine No. 4, 207 (1985).

also established relatively comprehensive rules and regulations regarding international arbitration within the Iranian territory.

The Interim Law of Principles of Legal Trials approved on November 9, 2011 has on chapter allocated to the regulations of arbitration. Accordingly, if there is any dispute between entities, they can take their case to an odd number of arbitrators via an agreement signed by both parties. According to the Amendment of the law in 1928, in any stage of the lawsuit, arbitration was allowed if both parties agreed on it.⁷⁹

Actually in the Law of Arbitrary Arbitration (1928), one can find the background of ideas concerning dispute settlement via arbitration entities in the ratified laws, which were revised during 1930-1935. Such ideas can also be detected in the temporary law of legal courts' principles approved in the Interim Law of Principles of Legal Trials (1911). Upon the articles of a chapter in this law, in case of any dispute between the parties, they could take their case to an odd number of arbitrators by means of a mutual agreement. As a result, in order to avoid traffic in the courts and accomplish fast settlement of disputes, the Law of Arbitrary Arbitration was ratified on March 20, 1928.

In July of 1928, another law was approved indicating that there is no need to always assign the case for arbitration upon the disputes. Instead, the parties of contracts and business deals could include an article in their mutual contract, stipulating that probable disputes should be furthered via arbitration and settlement. The arbitrary arbitration mentioned in the law approved on March 20, 1928 practically had no good results, and faced different problems and defects. Upon ratification of the Law in February of 1935, the arbitrary arbitration and board of appeal were stopped performing.

⁷⁹ MOHAMMADZADEH ASL, ARBITRATION IN IRANIAN LAW, 124.

Later on, this law was determined as the basis of drafting the regulations of 8th chapter of Code of Civil Procedure on the subject of arbitration. Article 1 in the arbitration law of 1935 says: “all the eligible people for raising a lawsuit can take their disputes to arbitrator(s) by mutual agreement, whether the dispute in question is raised in a court or not”. As discussed, due to this article, not only the principle of “mutual agreement in arbitration” is explicitly observed, but also it is possible to take a case to arbitration either before bringing the case before the court, or during any stage of the lawsuit. Explaining the other arbitration relevant points mentioned in this law is not necessary.

So, the regulations included in the 8th chapter of Code of Civil Procedure on the subject of arbitration, which are typically comprehensive, have been mainly adapted from the Arbitration law passed in 1935. Finally, the Code of Civil Procedure ratified in 1940, using the achieved experiences, replaced all the above-mentioned laws in its chapter 8.⁸⁰

Under the present circumstances, the 8th chapter of Code of Civil Procedure (articles 632 to 680) is the prevailing law on the subject of arbitration. Due to the Article 632, all the eligible people for raising a lawsuit can take their disputes to arbitrator(s) by mutual agreement, whether the dispute in question is raised in a court or not.⁸¹

According to the Article 633 of the Civil Code, “the involved parties can determine by means of their business deal or agreement that in case of any dispute, the arbitration should resolve the issues while they can even choose the arbitrator(s) prior to the probable disputes”.

After the Islamic Revolution in Iran, the use of arbitration method was even increased, because of the large number of domestic and international disputes, which were raised upon the disorders and confusions in execution of the contracts after the revolution. Such disorders led to

⁸⁰ MOHAMMADI GILANI, JUDICIARY AND JUDGMENT IN ISLAM, 223.

⁸¹ Id. at 81.

disputes between the parties, and since many of such contracts contained the arbitration article, the parties had no way other than using arbitration to resolve their disputes.

Now, after twenty years from Islamic Revolution, most of the said disputes have been settled. However, in the contracts being concluded, the arbitration method is still used, especially in the international trade contracts. A very prominent instance of arbitration after the revolution is the Iran-United States Claims Tribunal, which is the product of Algiers Accord (1981) and is established to resolve the disputes and arguments between Iranian or U.S. citizens and the respective governments.

Some of the legal authors have interpreted this tribunal as the most significant arbitration in history. Presence of Iran and Iranian governmental organization in this tribunal depends on the permission achieved from “the article permitting resolution of financial and legal disputes between Iran and United States” approved in April 14, 1980.

The disciplined process of this international arbitration during years, even during the years of Iran-Iraq war, is indicative of legal and practical recognition of international arbitration on the part of Iran. In addition to the Iran-United States Claims Tribunal, Iranian public and private organizations have participated in many international arbitration cases with foreign nationals, while some of these cases have been addressed by means of the rules of the International Chamber of Commerce.

Among the instances of Iran’s presence and practical participation in international trade arbitration after the Islamic Revolution, there are certain cases indicative of Iran’s confirmation and emphasis on international arbitration, as an effective method for international dispute resolution.

For example, establishment of the Tehran Regional Arbitration Center, a subsidiary entity of Asian–African Legal Consultative Organization, shows Iranian officials’ serious determination for encouraging international and regional arbitrations. The agreement for establishment of such arbitration center in Tehran was made between the government of Iran and the heads of that organization in 1978.

Establishment of Iranian Arbitration Association during the recent years targeted at creating a chamber of arbitration, and also approval of “International Trade Arbitration Law” in the December of 1997 are two new developments in the field of international arbitration in Iran. Such events show serious determination of Iranian lawyers and officials to develop and deepen international arbitration method on one hand, and also indicate the Iranian Legal Regime’s obligation to contemplate the necessary legal guarantees for international arbitrations execution – including case and organizational – in Iran.

7 Business Arbitration Law

In Article 455 of The Code of Civil Procedure and the Revolution Civil Procedure (2000), it has been determined that business parties can agree, as part of the deal or by means of a separate mutual agreement, to refer to arbitrator(s) in case of any dispute. They can even appoint their arbitrator(s) before or after dispute has been arisen.

The deficiencies and restrictions of the legal procedure in the courts of law, along with the advantages of arbitration have led individuals and entities to be increasingly inclined to arbitration, especially in commercial issues. The domestic tendency to arbitration has been proved via establishment of arbitration entities and inclusion of arbitration article within the contracts.

Furthermore, it should be mentioned that the development of arbitration has not been only at domestic level. Increase of international relations and arrangements, accompanied by appearance of natural and legal business entities, who conclude different mutual contracts with other foreign nationals and governments, have resulted in development and formation of trade at the international level.

Here, since the entities deal with the foreign (non-Iranian) elements, the issue of not being interfered by the national courts to resolve probable disputes is so important. Basically, businessmen do not trust the national courts sufficiently – especially if they are of different nationalities, neither the nature of international trade is not cooperative and synchronized with raising disputes in the national courts. Therefore, inclination to resolve disputes arising out of international contracts via arbitration has been increased, so that almost all the current international contracts contain an arbitration clause.

The International Commercial Arbitration Law has been ratified by congress in December of 1997. This event is considered as a significant development in the arbitration system in Iran's legal regime included in the regulations of chapter 8 of Code of Civil Procedure (approved in 1940). This part of Code of Civil Procedure had arranged arbitration's relevant rules and regulations in terms of 48 articles (articles 632-680), basically monitoring the domestic arbitrations, while the lawmakers have not looked at the international arbitration during the approval of such regulations.

However, in the absence of regulations monitoring the international arbitrations based in Iran, such arbitrations were monitored and administered via regulations of chapter 8 in Code of Civil Procedure. If the arbitration in question was of organizational type, which required certain

arbitration rules, the rules of that organization must be interpreted and executed in accordance with the regulations of chapter 8.

Although the relatively detailed rules of Code of Civil Procedure on the subject of arbitration were noticeably flexible for interpretation and enforcement in international arbitrations, they could not cover all the circumstances and developments related to international arbitrations. And the reason was that it was not the intention and purpose of lawmaker to ratify such rules to cover that criteria in the first place.

In addition to that, upon the 60 years of Code of Civil Procedure approval, using the said regulations to resolve international arbitration issues was confronted with serious problems since international arbitration was constantly developing. Among the said problems, one can point out to absence of organizational arbitration, silence about the independence of arbitration article in the main contract, ambiguity and sometimes silence, regarding proper lawsuit principles and method of addressing the claims in arbitration, ambiguity in the subject of changing the arbitrator, silence about how to determine the arbitration language and location, jurisdiction of domestic court to interfere with international arbitration process in Iran, recognition and enforcement of international arbitration awards, and finally not enough cases for nullifying the arbitration awards, especially with regard to the international arbitration.

The previous international arbitrations held in Iran shows such deficiencies. Added to that, due to the lack of independent law monitoring the international arbitration, and insufficiency of the existing law, the Iranian parties of international contract (including public and private entities) could not convince the non-Iranian parties to accept Iran as the arbitration forum.

The developments of international arbitration in international trade as a valid mechanism for international dispute resolution, along with the need to be coordinated with it on one hand, and

the start of post-war stable years and economic renovations and development of the country on the other hand, were two factors which paved the way for approval of International Commercial Arbitration Law in Iran after the Islamic Revolution.

Iran's International Commercial Arbitration Law was adapted from the UNCITRAL Model of Arbitration Law and drafted in 9 chapters and 36 articles. The titles of 9 chapters include Public Regulations, Arbitration Agreement, Board of Arbitrators, Methods of Addressing Claims, Finalizing the Lawsuit and Issuing Award, Objection to Verdict, Enforcement of Award, and Finally "Other Regulations", which actually determine the jurisdiction with regard to the enforcement of awards and respective exceptions.

According to the recent part, first, international commercial arbitration is not subject to regulations of Code of Civil Procedure. Second, the new law is not applicable to certain claims which could not be assigned to arbitration. Third, arbitration included in conventions and international contracts between Iranian government and the other foreign governments is subject to arrangements and regulations mentioned in the mutual agreements therein.⁸²

With regard to the enforcement of international arbitration awards, A huge step for recognition and enforcement of the foreign and international arbitration awards was taken in Iran through joining the New York Convention on Enforcement and Recognition of Foreign Awards dated 1958 (New York Convention) on 10 April 2001.

Before joining the New York Convention, the Iranian courts and judges took different procedures with respect to the foreign and international awards or in the arbitration awards in cases when one party was a foreign company or a foreign legal entity. Some of the courts treated such awards as domestic and some as foreign awards that their enforcement were subject to the

⁸² Goudarz, Eftekhar Jahromi, *Developments of Arbitration Entity in Iran's Positive Law, Its Achievements in the field of international arbitration*, Law Researches Magazine of Shahid Beheshti University, No. 27-28, 13-44 (1999).

rules of Code of Civil Procedure of Iran (on enforcement of foreign awards). Finally, after ratification of the New York Convention, a more unified and homogenized procedure has been taken with respect to the enforcement of foreign and international awards.⁸³

8 Arbitration award and Public Policy

Iran ratified the New York Convention in 2001 and its Law on International Commercial Arbitration (LICA), enacted in 1997, is based on the UNCITRAL Model Law. LICA does not expressly refer to Sharia law, but it may be taken into account in the enforcement of awards as part of “public policy” or “good morals.”

According to article 5(2)(b) of the New York Convention, a court can refuse recognition or enforcement of a foreign arbitral award if it is contrary to the public policy of that country. A very important issue that one would expect here, is the definition of public policy, which is very broad and open-ended term, and has not been provided anywhere in New York Convention. The Convention even does not make it clear whether it concerns the domestic public policy or international. This issue has raised many talks about the interpretation and execution of the provision and made it the most disputable ground for refusal of recognition and enforcement of an arbitral award since the lack of a specific definition for public policy has opened the door for various interpretations in different countries. In addition, the broad meaning of public policy has turned this ground into the most invoked one by the parties resisting recognition and enforcement of a foreign arbitral award.⁸⁴

Most commentators view public policy in domestic law as absolute respect of mandatory provisions. Others believe that not every mandatory provision is within public policy realm. Some other commentators believe that domestic public policy consists of principles of moral and

⁸³ MORTEZA, ZAHRAIE, ARTICLE ON SECURITY OF INTERNATIONAL ARBITRATION AWARDS, 1 (2012).

⁸⁴ GARY, BORN, INTERNATIONAL COMMERCIAL ARBITRATION: Part III. vol. 2, 2827 (2009).

justice that shall not be violated by the parties to a contract based on mutual agreement. These principles may be reflected in the constitution or other legal sources of a country and are higher in number compared to notions related to international public policy.

It is obvious that applying mere domestic public policy for the annulment of domestic arbitral awards is proper and permissible, but its application for refusal of recognition and enforcement of international arbitral awards should be doubted seriously. In fact, the application of pure domestic public policy principles that consists of mandatory provision of the country, is not compatible with international arbitration. Many countries have even explicitly permitted an agreement between parties that violates against mandatory provisions and consider their agreement as valid. This means that they made a distinction between domestic and international public policy and refer to international public policy with regard to international arbitration.⁸⁵

But, we should mention that in some cases some national courts have referred to domestic public policy in order to refuse enforcement of a foreign arbitral award. Iran is among the countries where the application of the public policy ground could lead to unfortunate results.

In *Jahan Profil vs. Ascotec Steal*, the defendant appealed the decision of the court of first instance regarding recognition and enforcement of an arbitral award rendered by London Chamber of Commerce. Tehran's appeal court, branch 15, held that referring the dispute to arbitration in the case at hand was a violation of article 139 of the constitution of the Islamic Republic of Iran and denied recognition and enforcement of the award arguing that it was against the mandatory laws related to arbitration and against the public policy of the country.⁸⁶ The mentioned ruling says:

⁸⁵ ALIREZA, IRANSHAH, OBJECTION TO THE INTERNATIONAL TRADE ARBITRATION AWARD, DISSERTATION IN PRIVATE LAW, 202 (1388).

⁸⁶ Award No. 543, 02/09/2014.

“The settlement, of claims relating to public and state property or the referral thereof to arbitration is in every case dependent on the approval of the Council of Ministers, and the Assembly must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important cases that are purely domestic, the approval of the Assembly must also be obtained. Law will specify the important cases intended here.”⁸⁷

One can observe a similar approach in the decisions by some other Iranian courts. For instance, the Iranian Supreme Court, branch 21, in an award rendered in 1987 held that based on article 139 of the Iranian Constitution, the state-owned Aviation Company Iran’s cannot attend arbitration, and the court has jurisdiction to deal with the merit of the dispute. Using the same argument, the same court in 1994 rejected the objection of ASP, a subsidiary of the state-owned Saderat Bank, against an arbitral award.⁸⁸

Considering the role of public policy in enforcement of international arbitration awards in Iran, there is the need to know what exactly public policy of Iran is. Therefore, here the legal definition of public policy in Iran has been mentioned.

8.1 Definition of Public Policy in Iran

The issue of public policy was addressed in Article 6 of The Principles of Legal Trials Act, 1290 for the first time⁸⁹. As a result, the private contracts in contradict with the public policy was declared invalid. According to Article 975 of Civil Code approved in May 8, 1928 “the court of justice cannot execute those foreign regulations and/or private contracts, which oppose the

⁸⁷ *Id.*

⁸⁸ Abbas, Zeraat, Civil procedure law in legal order of Iran, 1292 (2003).

⁸⁹ Mehrzad, Abdali & Mohammad Eisa, Tafreshi, *A Review of Illegitimate Contracts (Opposing the Public policy) in the French, English, and Iranian Legal System*, No. 37, 22-1, 3 (2004). As definition of Public policy, one can say: “a set of legal-obligatory rules and the rules and regulations associated with good enforcement of country’s daily affairs along with laws concerning the security and morality of people on which no individual’s opposing determination cannot impact. Although these regulations are pointed in the state laws, they do not have law title”.

code of morality and are deemed as opposing the public policy via violating the community emotions, although enforcement of such rules are basically permitted”.⁹⁰

Also, Article 1295 of Civil Code,⁹¹ Articles 6, 211, and 212 of the Code of Public Proceedings and the Revolutionary Courts, approved in April 9, 2000,⁹² and Article 34 of International Commercial Arbitration Law, ratified in September 17, 1997 have pointed out to public policy.⁹³

Although “code of morality” has been used beside “public policy” in some of Iranian laws (Article 293 of Civil Code and Article 1 of Code of Civil Procedure), but most of the lawyers believe that public policy contains general meaning including code of morality. In other words, using “code of morality” following Public policy is an instance of “specific” coming after “general”. Accordingly, the logical relationship between these two terms is the type of general-specific relationship meaning that whatever opposes code of morality, so it opposes Public policy too and not vice versa.⁹⁴

As discussed earlier, Article 975 does not explicitly nullify the contracts that contradict Public policy and code of morality. However, the court of law has been obliged to avoid execution of such contracts. Apparently, the reason of not using the verb “nullify” in the Article 975 of Civil

⁹⁰ As definition of Code of Morality, one can say: “a set of moral rules, violation of which would lead to moral violation of public conscious (ibid).

⁹¹ Article 3423 – The Iranian courts of justice would deem validity for the documents prepared in the foreign countries as the same as validity given to them in the source on condition that ... and the provisions of such documents do not oppose the Public policy or code of morality in Iran.

⁹² Article 1 – Those contracts and agreements which violate the Public policy or oppose the code of morality and religious considerations cannot be addressed in the courts of law.

Article 433 – If declaration of a document is not possible in a court, or if partial and/or complete declaration of that document or public declaration of the provisions therein the court of justice opposes the Public policy or honor and public benefits or the honor of disputing parties, the judge or his secretary can separately take note of that matters outside the court process. Article 434 also points out to Public policy term like the Article 433.

⁹³ Article 12 – In the following cases, the arbitrator’s decision is basically null and cannot be enforced: ... 4- In case that provisions of the made decision oppose Public policy or code of morality and/or the instructive regulations of this rule. ...

⁹⁴ SEYYED HUSSEIN, SAFAI, ELEMENTARY COURSE OF CIVIL CODE, GENERAL RULES OF CONTRACTS, vol. 4, 32 (2003).

Code has been the fact that two subjects have been addressed in the said article: the domestic rules and private rules.

Obviously, the lawmakers could not nullify the non-Iranian laws since they were opposing the Public policy and code of morality in Iran. In addition, the term “null” is not basically used with regard to laws. Therefore, it has been just mentioned that court of law cannot execute foreign laws and private contracts in case of contradiction with Public policy and code of morality in Iran. Thus, it might have been better if lawmaker had drafted two separate articles for the said two subjects.⁹⁵

Since arbitration does not enjoy enforcement power, the courts of law appears to support and execute the arbitrators’ decision since the courts have the ruling authority from the state government. Courts of law are the reference entity to address the arbitrator’s award in terms of objection. Judicial control of the arbitrator’s decision at the stage of enforcement leads to either execution of the arbitrator’s award, or nullification of that award due to the reasons stipulated in law.⁹⁶

Arbitration is the most frequent method of dispute settlement in the area of international trade and has two stages of addressing the dispute, and recognition and execution of decision. As soon as a decision is made by international arbitration entities, it requires formal recognition by the enforcement entities, so that it can be executed.

The arbitrators settle the disputes and make decision based on the mutual contract of the parties. The arbitrator’s decision stops the claims and affects the Public policy. In this regard, there are certain things blocking execution of the decision among which Public policy is the most

⁹⁵ Mehrzad, Abdali, *Comparative Study of Public policy and Code of Morality in Laws of France, England, and Iran*, Research Magazine of Humanities, International University of Imam Khomeini, 3rd year, No. 3 & 4, 1 (2006).

⁹⁶ *Id.*

generic and prominent criterion existing. According to Article 33 of International Trade Arbitration Law, the arbitrator's decision can be declared null and void by the court upon the request made by one of the parties involved. The purpose to submit the court the nullification request is not to make decision on the merit, but is to have a judicial monitoring on the justice and Public policy.⁹⁷

Obviously, substantial review or revision endangers the finality of arbitration decision and also arbitration entity's independence.⁹⁸ Interference of the court with the validity of arbitrator's decision is not limited to provisions stipulated in the Article 33. Article 34 in the International Trade Arbitration Law has discussed cases indicating that although the arbitrator's decision is basically null and void, the court's interference is afforded for nullification announcement meaning that the court's verdict is only to announce the nullification. This article says "the arbitrator's decision is basically null and cannot be executed in the following cases:

1) in case that the subject in dispute is not allowed by Iran's law to be settled through arbitration;

⁹⁷ **Nullification Request.** The arbitrator's decision can be declared null and void by the court of Article 6 upon the request made by one of the parties involved if any of the followings happen: A) If any of the parties had not been eligible; B) If the arbitration agreement is not valid due to the law determined by the parties to rule over the agreement, and in case of law silence, the decision explicitly opposes Iran's law; C) Regulations of the ruling law have not been observed concerning notice of arbitrator determination or arbitration request; D) The nullification requestor have not succeeded to present his documents and evidence; E) The arbitrator has made decision and issued verdict outside his authorities. If the subject assigned for arbitration are separable, then only that part outside the "arbitrator's" decision can be nullified; F) If the arbitration board line-up or the lawsuit procedure is not based on the arbitration agreement, and in case of silence and/or no arbitration agreement, it opposes the regulations of this law; G) If the arbitration verdict includes the positive and effective idea of the arbitrator whose changing has been accepted by the reference entity of Article 6; H) If the arbitration decision is based on the evidence or document which is proved as fake and fabricated by the final verdict; and I) After the arbitration verdict issuance, there are evidences found which prove a party's objection, and it is proved that such evidences have been hidden by the other party. Regarding the cases H and I content, the party suffering from the fake or hidden evidence can officially ask the arbitrator to address the case of dispute again before filing the request for nullification of the arbitration verdict unless the parties have agreed otherwise. The request for nullification of the verdict subject to Clause (1) of this article should be filed to the Court of Article 6 within three months of arbitration verdict notice including corrective, complementary, or interpretative notice to the objector, otherwise the objection will not be received or heard (<http://www.icbar.ir>).

⁹⁸ Katherine, Helm, *The Expanding Scope of Judicial Review of Arbitration Awards, Where Does the Buck Stop?* *Dispute Resolution Award*, vol. 61, No. 4, 1-10 (Nov. 2006-Jan. 2007).

2) in case that provisions of the decision oppose the Public policy or code of morality in the country and/or instructive regulations of this law;

3) in case that the arbitrator's decision regarding the real properties located in Iran opposes the instructive rule of Iran or contradicts the valid official documents unless the arbitrator enjoys "settlement" authority in this recent item.⁹⁹

A type of Public policy is the international Public policy, which indicates collection of organizations and legal rules having strong relationship with basic principles of a country's civilization. Therefore, they enjoy higher priority than foreign laws. Such Public policy is not common among all the countries; however, it is a balance point between benefits and Public policy of a country and the other countries' benefits and international trade requirements.¹⁰⁰

Concerning the Public policy observation at the stage of executing the international trade arbitration verdicts, there is a contradiction between preventing violation of domestic rules and inclination to have respect for finality of international arbitration verdicts. The most suitable solution to remove such contradiction is to use narrow Public policy concept.

In fact, Public policy is the most significant criterion of judicial monitoring over the international trade arbitration decisions, included in the international trade arbitration resources in order to support and secure the basic principles and considerations of public laws and values of each country. This criterion has a dynamic and flexible concept which covers both merit and apparent issues. However, not all Public policy considerations of countries could be practiced in

⁹⁹ Mehrzad, Abdali, *Supra* note 95.

¹⁰⁰ *Id.*

the international trade arbitration, and only the international Public policy of the respective country, preferably in terms of a narrow interpretation, should be applied.¹⁰¹

The most important features of Public policy criterion include conceptual dynamics and flexibility, the possibility of court's interference with the merit of arbitration subject and awards, possibility of objection to the arbitration award being made directly by the court of law, no deadline for referring to this criterion, and finally no way to waive the right of referring to such criterion. Public policy is the most significant tool of judicial monitoring over the international trade arbitration awards, which is necessary to secure the basic public rights of a society. This criterion is able to include most of the other criteria due to its flexibility and dynamism.¹⁰²

However, there are various issues that differentiate and discriminate this criterion from the other tools of judicial monitoring over the international trade arbitration awards. One of the most important issues is the feasibility for the courts of law to interfere with the merits of arbitration subject and the awards made, while this is not basically permitted in the other criteria. The other difference is that it is possible that court of law refers to this criterion on its own, and this is also not viable through other judicial monitoring tools. Of the other differences between this criterion and the other criteria, one can point out to the impossibility of waiving the right of asking for judicial monitoring over the arbitration decision based on this criterion and also lack of any deadline for referring to such criterion, especially in those cases by means of which the court of law independently resorts to this criterion.

But, the said basic and significant differences are based on some reasons. The already mentioned criterion, the impact of which has been determined as “nullification” of arbitration

¹⁰¹ Alireza, Iranshahi, *A Review of Public Policy Criterion in Judicial Monitoring over the International Trade Arbitration Decision*, International Law Magazine, published by Law Center of Presidential Office, 28th year, No. 44, 73-114, (2011).

¹⁰² *Id.*

decision according to Iran's International Trade Arbitration Law, indicates the most essential instructive regulations of a society which can by no means be violated, and if so, it will be followed by invalidity of arbitration award.

Nevertheless, it must be reminded that in the area of international trade arbitration, only the concept of international Public policy of a country can be taken into consideration, while the mere domestic Public policy of the countries is not to be practiced therein. Applying the ultra-national Public policy instead of countries' international Public policy in the judicial monitoring over the awards of international trade arbitration, apart from the fact that it is illegal, cannot guarantee the benefits of the developing and investment-recipient countries including ours. Using such type of Public policy even contradicts the benefits Iran.¹⁰³

Therefore, the Iranian's courts of law are required to consider this issue when monitoring the international arbitrations, so that they can use Iran's international Public policy to address the probable objections to decisions made by Iran's international trade arbitrations and also to execute the foreign arbitrators' verdicts. Accordingly, they must actually refrain from practicing the domestic and ultra-national public policy in this regard.

8.2 Public Policy Instances

Legal scholars, based on their interests and inclinations, have defined classifications of public policy including "public policy stipulated in law", "political public policy", "economic public policy", "supportive public policy", and "conductive public policy", "public policy of public law" and "public policy of private law", finally classification of public policy into "national Public policy" and "ultra-national Public policy". This last classification of Public policy into national and ultra-national Public policy is more comprehensive and includes secondary

¹⁰³ Abdolghani, Ahmadi Vastani, Public Policy in Private Law, 78-79 (1962).

classifications, the definition and review of which can provide the accurate concept of Public policy.¹⁰⁴

8.2.1 National Public policy

In the “national” division of Public policy, the adjective “national” is indicative of a country. Therefore, this assumption that national Public policy can be the equivalent of domestic Public policy, and/or ultra-national Public policy would be the equivalent of international Public policy is not correct because in this classification, both concepts of domestic Public policy and international Public policy appended to certain rules called disciplinary rules are included as subdivisions of national Public policy.¹⁰⁵

8.2.2 Domestic Public policy

The meaning of domestic Public policy is a set of instructive rules in every legal regime which cannot be violated by individuals and their private contracts. For example, the instructive rules related to basic circumstances of business deals, family, job relations, etc. that cannot be violated by individuals and their mutual private contracts and agreements. It is also to be pointed out that based on most of the lawyers, the resources of rules, which are included under the domestic Public policy, are also including the code of morality in every community.¹⁰⁶

8.2.3 International Public policy

International Public policy is a type of national Public policy which has function and domain different from domestic Public policy. In contrast with domestic Public policy which blocks the parties’ consents in private contracts and agreements without considering application of foreign law, the foreign elements are involved in international Public policy as the title implies so. Thus,

¹⁰⁴ NASER, KATUZIAN, GENERAL RULES OF CONTRACTS, vol. 1, 165 (1997).

¹⁰⁵ *Id.*

¹⁰⁶ HUSSEIN, SAFAI, ELEMENTARY COURSE OF CIVIL CODE (General Rules of Contracts), 51 (1999).

the international Public policy prevents enforcement of some foreign rules, which basically should have been enforceable.

Therefore, international Public policy is a collection of legal rules which has a strong relationship with culture, civilization, and morals of a society and blocks execution of foreign rules in case of any contradiction. It means where the judge should execute the foreign rules or recognize the foreign evidences and verdicts based on the conventional rules of dispute resolution, the said rules, evidences, or verdicts cannot be exercised, if they contradict the international Public policy of the society.

For instance, if marriage is legal for people of the same gender in a country, and such marriage happens, and the parties ask for recognition of their marriage documents in Iran and plead for certain rights accordingly, the judge refrain from accepting their request since their marriage is in contrast with the Public policy in Iran, although according to the private international law in Iran, people obey the rules of their respective country as far as personal situation is concerned while marriage is an obvious case of such.¹⁰⁷

8.2.4 Disciplinary Rules

There are rules in public law entitles as disciplinary rules or public rules or public security. These rules are observed in order to maintain the political, economic, and social organization of a country. As instance of such rules, one can point out to currency rules, tax regulations, and customs restrictions. These rules are reminded as a modern realization of Public policy and should be taken into consideration of the judge and arbitrator apart form the law ruling over the

¹⁰⁷ *Id.*

international trade contracts. These rules are instances of national Public policy in terms of their relationship with law of every country.¹⁰⁸

8.2.5 Ultra-national Public policy

Following the increasing development in the area of trade and international trade arbitration, one of the necessities that attracted the scholars' attention was tendency to set aside national rules and systems or Denationalization especially in the field of international trade arbitration. This in turn played a significant role in paving the way for appearance of "ultra-national rules" and "ultra-national Public policy".

Although this tendency faced certain successful results in many of the areas, it faded out gradually, so that inclination toward national rules and systems or Renationalization can be felt again. However, ultra-national rules and ultra-national Public policy especially in the area of international trade and international trade arbitration are still considered.

Ultra-national rules are legally accepted principles, ruling over the contractual relations,¹⁰⁹ the application of which in terms of today's concept goes back to 11th century.

Some features including automatic existence, independence, and universality of ultra-national rules paved the grounds for acceptance of such rules in the international trade arbitration,¹¹⁰ in a way that even in certain countries like England in which there were some opponent viewpoints, the nowadays courts of law accept, without any hesitation, the arbitative decisions made based on the ultra-national rules. In some countries with civil law system, the ultra-national rules

¹⁰⁸ Yves Derains, *Public Policy and Applicable Law in Nature of Claims in International Arbitrations*, translated and summarized by Mohammad Ashtari, Legal Magazine, No. 9, 190 & 191 (1988).

¹⁰⁹ Clive M. Schmitthoff, *The Law and Practice of International Trade*, translated by Dr. Behrouz Akhlaghi et al. vol. 2, 999 (1988).

¹¹⁰ Fabrizio, Marrella, & Christopher S., Yoo, *Is Open Source the New Lex Mercatoria?*, Virginia Journal Of International Law, vol. 47: 4, 815 (2007).

gradually were included as part of national trade rules,¹¹¹ and according to French law, in case of any disagreement on the part of parties concerning dispute resolution via national rules, arbitrators can refer to ultra-national rules.¹¹²

“Ultra-national Public policy” refers to certain basic principles, common among most of legal regimes and international trade systems, which are now publicly accepted. Some scholars have criticized the ambiguity of this term, while some others have dispelled their doubts about the term. However, certain authors like Goldman have confirmed this Public policy as cross-boundaries Public policy.¹¹³

This concept of Public policy is the one that enjoys a bigger and unique domain in the international trade arbitration since the arbitrators, especially international arbitrators, have more opportunities for resorting to ultra-national rules apart from the restrictions determined by the judicial entities. For example, this fact that a government or party who has accepted the arbitration condition, and cannot cite the nullification of arbitration condition and restrictions of national law is one of the rules based on which some arbitrators have made decisions.

In the case of ELE. Aquitaine’s claim against National Iranian Oil Company, the arbitration entity decided that although defendant (Iran) argues that the article of arbitration condition stipulated in the contract is not correct based on the article 139 of Iranian Constitution, the ultra-national Public policy requires that whenever a contract’s party has trusted the arbitration condition stipulated therein, the other party cannot cite its own country’s domestic rules to

¹¹¹ Id. at 812.

¹¹² Philippe, Fouchard, *L. arbitrage Mercatoria?*, Virginia Journal of International Law, Vol. 47:4. Commercial International, Paris: Dalloz, 395 (1965).

¹¹³ LAYA, JONEIDI, THE LAW OF INTERNATIONAL TRADE ARBITRATIONS, 31 & 59 (1997).

nullify the said condition. Such high-frequency decision indicates the prominent position of Public policy in the area of international trade and international trade arbitration.¹¹⁴

In many cases, the applicable law is rooted in Public policy while in some other cases, Public policy rules have not been stated in terms of law. This should be mentioned that those rules which have entered into the Public policy under the title of applicable rules, have actually exited the domain of Public policy; however, they are still rooted in Public policy. This is while the rules of recent classification have not still entered into the law so that the recent rules can be considered as instances of Public policy rules.

In conclusion, Iranian culture under Iranian Public policy has an effective role in annulment of international arbitration awards, when they are against Iranian Public policy, and Iranian culture.

9 Women in Arbitration

In the past, in some European countries, women could not be elected as arbitrators and even now in some countries where arbitration has a close relationship to governmental judiciary, women are not able to be selected as arbitrators. In Islamic countries, there are limitations for judgment by women since according to Islamic rules women have no right to judge and issue an award. So, since an arbitrator issues an award, a woman cannot be selected as an arbitrator.¹¹⁵

In Iran, women's judgment has been accompanied with numerous tensions and disputes. Some believe that women cannot judge fairly and others believe that women's sensitiveness is a weak point in arbitration and judgment. According to most Shi'a jurisprudents, judgment by women is not supported, which will be discussed more in the next chapter. In legal ratifications,

¹¹⁴ *Id.*

¹¹⁵ ABDULRAMAN YAHYA, BAAMIR, SHARI'A LAW IN COMMERCIAL AND BANKING ARBITRATION: LAW AND PRACTICE IN SAUDI ARABIA, ENGLAND, 80 (2010).

women are not competent for judgment and they are not able to issue an award, despite the fact that in recent years many graduates from law schools are women.

Before Islamic revolution in 1979, there was no condition for judge to be a man in the first law on employing judges approved in 1923. It was in 1969 when five women received judicial certifications and the procedure continued to Islamic revolution.¹¹⁶ (Mehrpour, 2000: 314).

After the Islamic Revolution in Iran and establishment of Islamic Republic Government, upon referring to Quran verses and certain hadiths and narrations and also the Shia jurisprudence resources and existing belief in absolute consensus about no judgment right for women from a religious point of view, the necessary measure were taken to stop hiring women for judgment positions and change employment status of existing female judges.¹¹⁷ (Kadivar, 2005: 33). These measures were as follows:

Letter of approval about changing the women's judgment ranks into office ranks ratified in October 6, 1979, by the temporary government of Iran: due to this letter of approval, women with judgment ranks in the Ministry of Justice whose ranks have been confirmed by Cleansing Committee of the ministry can request to be transferred to Iranian National Oil Company and the other corporations of the government, Central Bank of Iran and the other banks, the other ministries and state foundations. By means of this, their judgment ranks would be changed into office ranks. Salary and advantages of such women would not be changed upon their transfer.

In Iran Constitution approved in 1979, the judges' conditions have not been discussed, while the lawmakers have assigned such conditions to normal law according to jurisprudence considerations and Principle 163 of Constitution. The judge required qualifications was approved

¹¹⁶ HUSSEIN, MEHRPOUR, DISCUSSION ON WOMEN RIGHTS (2000).

¹¹⁷ Jamileh, Kadivar, *The Barriers of Women Judgment in Iran*, Economic and Political Information Journal, Vol. 217-218, 32-39 (2005).

in May of 1982 by the Islamic Parliament of Iran, in execution of Principle 163 of Constitution as follows:

- 1) Belief in God,
- 2) Justice,
- 3) Practical obligation for Islamic considerations,
- 4) Loyalty to Islamic Republic of Iran regime,
- 5) Legitimate child,
- 6) Iranian Nationality,
- 7) Male Gender,
- 8) Jurisprudence or permission of judgment, and
- 9) No addiction to narcotics.

Thus, by approval of this regulation, even those women meeting all the already mentioned conditions cannot be judge.

Gradually, some prominent developments were established regarding the status of female judges. Upon these changes and developments, female judges were then able to preserve their judgment rank and do their job in some specific civil courts of law and minor children offices as consultants. Such developments were indicative of officials' care for the women's obtained rights, although they meant no judgment right for female at the same time.

In 2002 there was another modification in law with that regard, upon which specific civil courts of law can enjoy female consultant selected among women meeting legal judgment conditions and requirements. Accordingly, the Judiciary Chief can hire female competent judges in consultancy positions within Administrative Justice Council, specific courts of law, investigation judge in legal studies and law drafting offices of Justice Ministry, minor children

offices, and all the other offices containing judgment positions. Although there were more judgment positions made available for women due to this revision, the nature of it was not different from the previous modification. Thus, women were still deprived of the right to occupy judgment positions in its specific sense of issuing verdict.

There was another development recently made in The Judiciary so that some female high-ranking employees were appointed as prosecutor in The Supreme Court of Iran, while certain other women in the judiciary system were appointed as the vice-presidents of provincial justice offices and some other females were chosen as consultants in revision courts, so that they could take part in issuance of judicial verdicts.¹¹⁸

Although in Iranian laws, women's competency for judgment is negated and current laws do not permit to employ women judges, we should know whether the situations for arbitrators are the same as the judges'.

As was discussed above, after Islamic revolution in Iran, women's judgment competency has been always discussed by scholars. Based on article 4 of Iranian Constitutional Law, all civil, criminal, financial, economic, cultural, military, and political and other laws and regulations should be in accordance with Islamic rules. Concerning the Islamic rules and opinions of Islamic jurists on judges' conditions, Iranian lawmakers believe that women are not competent for judgment, while neither in Civil Procedural Law (concerning internal arbitrations) nor in the Law of International Commercial Arbitration, it has not ruled that arbitrator shall be male.

¹¹⁸ Hafizollah, Zaki, Women's Judgment in Domestic and International Law (January 13, 2005); Qasem, Qamous, Restraints of Women's Political Participation available at <http://www.wahdat.net>.

Therefore, women's arbitration is not forbidden as it is practically happening, especially when the parties in dispute have mutually agreed in choosing their arbitrator(s), which is the most powerful reason to reject all the other opposing claims.¹¹⁹

With regard to international commercial arbitration, the Iranian Law on International Commercial Arbitration (1997) should be considered as the criterion. As mentioned, this law considered UNCITRAL Model Law as the main point and pattern, while should be adapted to Iranian internal conditions. However, the changes are not paramount and the main principles of arbitration are particularly scrutinized. In fact, Iranian Law on International Commercial Arbitration has two remarkable traits: one is to use common norms in international arbitration theory and practice, and another one is to remedy deficiencies in Chapter 7 of "The Law on the Establishment of the General Courts of the Revolution" (in civil issues).

Concerning above points, since in UNCITRAL Model Law, except than impartiality and independence no other conditions are mentioned for arbitrators, Iranian lawmakers have acted the same. Guardian Council which monitors and confirms the laws ratified by the congress, in terms of no contradiction to the Islamic rules and the Constitutional Law, has not seen it necessary that the conditions of judges and arbitrators should be similar. Therefore, Iranian Law on International Commercial Arbitration has created no limitation of women arbitrators and the right of parties in dispute to choose an arbitrator.

10 Conclusion

In conclusion, as has been mentioned in the beginning of this chapter, Iranian culture under the concept of Public policy has an effective role in annulment of international arbitration awards (whenever those awards are against Iranian Public policy, and Iranian culture). Culture has a

¹¹⁹ Mohammad Reza, Edrisian, Shahid Motahari Supreme School, PhD Thesis, Advisor: Mohammad Sadeq Mousavi, 12 (2010).

huge influence on international business and international arbitration. However, culture does not act in isolation. It is closely connected to law. Iranian culture influences Iranian law, and Iranian law influences Iranian culture.

As was mentioned earlier, the legal system of Iran comes out of a people's history and culture, and in return, they also shape culture. So, its legal language reflects the history out of which it comes. As a result, the translation of legal concepts is very complex and can lead to severe misunderstandings. In other words, Iranian cultural and legal differences pose significant hurdles to international commercial arbitration. Cultural priorities have an effect on the legal systems of Iran, and also, Iranian laws help shape and change Iranian cultural priorities.

Accordingly, a competent international arbitrator has to understand these priorities, and be aware that the Iranian legal culture influences the Iranians' view of laws and their impact on communication in international business, and international arbitration. When arbitrators deal with parties in Iran, the understanding of legal systems and legal practices is crucial, and translations need to be checked for meeting the actual intended meaning in the original. While doing business in Iran, business people have to be well aware of Iranian's culture, people's behavior, Iran's legal system, its political environment and economical conditions.

The difference can be partially explained based on historical developments, which has been discussed above. In conclusion, when it comes to business arbitration in Iran, its legal system and culture is significantly important to international businesses.

Chapter V. Arbitration in Islamic Jurisprudence

In the previous chapter, the influence of Iranian culture in arbitration and its enforcement has been discussed. Looking into the history of Iran, and discussing its legal system during different eras, show that culturally, the Iranians always had a tendency to resolve their issues by getting help from the religious people, and despite having the legal system that followed the governmental rules, there was still another judicial system available, which was supervised by religious scholars.

Accordingly, we can realize the importance, and the influence of religion in Islamic legal system of Iran. Therefore, in this chapter, arbitration and the enforcement of arbitration awards under Islamic rules of sharia will be discussed.

1 Islamic Concept of Arbitration

Upon the appearance of Islam and considering the focus of Holy Quran on the subject of arbitration, this topic has been recognized in judicial field. Arbitration in Islam is deemed as a type of settlement as has been emphasized in verses bellow;

*“If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from hers; if they both wish for peace, Allah will cause their reconciliation. Indeed, Allah is Ever All-Knower, Well-Acquainted with all things.”*¹

*“But no, by your Lord, they can have no Faith, until they make you (O Muhammad (PBUH)) arbitrate in all disputes between them, and find in themselves no resistance against your decisions, and accept (them) with full submission.”*²

Although the earlier jurists have confirmed legitimacy of arbitration but they have not provided a certain definition for it. However, they have implied its meaning by saying that “It is

¹ Nisa surah, verse 35 available at: <https://www.noblequran.com/translation/>

² Nisa surah, verse 65 available at: <https://www.noblequran.com/translation/>

allowed that two disputing persons take their case to another person and ask him to arbitrate therein.³

Also, where they talked about the arbitrator, they have implied the meaning of arbitration as well. Arbitrator has been expressed as “*Ghazi Tahkim*” translated as “Arbitration Judge” in the jurisprudence resources. It has been defined as a person chosen and agreed by the disputing parties, so that he can address their dispute, and they will abide by his decision regarding the subject in dispute.⁴

From a jurisprudence perspective, arbitration has a judicial nature (except for arbitration before divorce and those cases in which the mutually-agreed mediator, whose job is to establish settlement, is called arbitrator). Arbitrator is a type of judge that should address the disputed case based on the religious orders.⁵

According to Imamiyah jurisprudence, the only difference between arbitrator and appointed judge is that arbitrator is not appointed by Imam, while he must enjoy the other conditions of judgment including *Ijtihad*. However, some jurisprudents believe, that there is no *Ijtihad* requirement for arbitrator. For example, Ayatollah Khui in his book says “it is true to have an arbitrator who does not have *Ijtihad*”.⁶ Sheikh Ansari also says: “there is no creditable document indicating that arbitrator should have *Ijtihad*.”⁷

In fact, the arbitrator is a person who has agreed to be chosen by the disputing parties to arbitrate certain dispute(s), so that the parties be obligated to practice the decision and accept it. The legitimacy of choosing the arbitrator, despite existence of official judges, has been stipulated in

³ TOUSI, MOHAMMAD-IBN-HASAN, AL-KHELAF, vol. 6, 1st edition, 341(1996).

⁴ MOUSAVI ARDABILI, SEYYED ABDOLKARIM, JUDGMENT JURISPRUDENCE, 107-108 (1987).

⁵ AL-KHUI, SEYYED ABULQASEM, TAKLAMEH AL-MENHAJ, vol. 1, PP. 6.

⁶ *Id.* at 9.

⁷ ANSARI, SHEIKH MORTEZA, JUDGMENT AND EVIDENCES, 47 (1994).

Islamic books and articles. It is mentioned in the book “*Jaame Abbasi*” that “it is possible to ask for arbitration and refer to a third party and agree that he makes decision concerning the case although real judges are present”.⁸

According to the above-said definitions, arbitration enjoys the following features:

- Arbitration is a contractual entity among individuals;
- Arbitration is a non-governmental entity since the arbitrator is chosen by the parties in dispute; and
- Arbitration can be done by a legal person;

Therefore, due to the mentioned definition, arbitration and choosing the arbitrator are consensual. Thus, the parties’ intention and consent on arbitration is the basic condition for creditability of the arbitrator’s decision since the absence of such agreement on the part of disputing parties will remove the arbitrator’s legitimacy therein.

Here, the history of arbitration in Islam has been discussed to understand the Islamic position with regard to arbitration and enforcement of arbitration awards, especially international criteria.

2 The History of Arbitration in Islam

The arbitrators applied and at the same time developed the sunna. It was the sunna with the force of public opinion behind it, which had in the first place insisted on the procedure of negotiation and arbitration.⁹ In order to understand the history of arbitration in Islam, we need to discuss it in different eras. Since arbitration has been existed even before Islam, in Arab society, that makes it worthy to look into that era as well. Therefore, here, the history of Arbitration in the

⁸ SHEIKH BAHA’I, *JAAME ABBASI*, 349 (2010).

⁹ R. B. CUNNINGHAM & Y. K. SARAYRAH, *WASTA, THE HIDDEN FORCES IN MIDDLE EASTERN SOCIETY*, 12 (1993).

times of ignorance (the pre-Islamic Arab community), during the time of Prophet Mohammad (PBUH) and the time after prophet Mohammad has been discussed.

2.1 Arbitration during the *Times of Ignorance*

Arbitration has been a tradition remaining from the *Times of Ignorance*.¹⁰ This was the usual method of dispute resolution at that time. This tradition has been confirmed and sometimes recommended by Islam, while its content has been changed and revised seriously and the form and nature of this tradition have been affected.

Saudi Arabia, as a community with no central and powerful ruling system e.g. during *Times of Ignorance* could not enjoy a central judicial system using permanent courts of law managed by employees, documentations, etc. (as today's modern systems), this does not mean that disputes and belligerencies would lead to nowhere. Every society with any degree of simplicity or complexity has some sort of dispute resolution methods which have strong relationship with the type of that society.¹¹

Judgment and arbitration among people was not deemed as an official and systematic practice in the Saudi Arabia in *Times of Ignorance*; however, it was dependent on the traditions, customs, and beliefs of people. From a general point of view, "arbitration" was the usual method of judgment and justice execution among the Arabs in that era.¹²

This method of judgment, which was the most logical procedure in the absence of central Arabian government and is still applied by tribes, was widely used by the Arabs of the time. However, this did not extend to the whole peninsula because the southern Arabs used to enjoy a

¹⁰The period in the Arabian history which preceded the birth of Islam is known as the *Times of Ignorance*.

¹¹ YAGHOUBI, translated by MOHAMMAD IBRAHIM AYATI, YAGHOUBI HISTORY, vol. 1, 258-260 (2000).

¹² M. Hamidullah. *Administration of Justice in Early Islam*, 11 Islamic Culture 163 (1937).

central ruling system administered by law, and the execution of awards was mandatory and dependent on the power of the ruling system.¹³

For the southern Arabs, ruler was a specific person who had a law-based power and could rule over the state according to law. Therefore, it is confirmed that beside arbitration, official judgment was also another method used in Arabian Peninsula, while its use was different in various areas. Accordingly, arbitration method was used in *Hejaz* area (west of present Saudi Arabia) more than the other parts.¹⁴

According to this method, the disputing parties would choose one or several arbitrators who were mutually agreed on and trusted by them, so that they could provide the arbitrator(s) with the case in dispute to be resolved.

Every tribe gradually started to have rulers to whom arbitrations were assigned. Yaghoubi, in his history book, says: “There were rulers for Arabs, who were assigned with disputes about inheritance, blood, water, etc. Since they had no religion to use its religious orders, men of dignity, honesty, and experience were those who could make decision and issue verdict”.¹⁵

Arabs didn't choose any person as arbitrator, but certain praised features such as justice, recognition, intelligence, experience, and fast communicating were essential for anybody to be arbitrator. Thus, there were special people appointed as arbitrator while due to the above-said reason, the tribes' chiefs were not necessarily deemed as the arbitrator there. Of the other features of an arbitrator was that he must be familiar with the tribes' nature, traditions, and relationships. Elocution and eloquence were of the other features of an arbitrator since for the Arabs of Ignorance Era, the dignity of speech was of great significance so that it could directly affect the audience.

¹³ *Id.*

¹⁴ YAGHOUBI supra note 11 at 258.

¹⁵ *Id.*

Added to this, for stating the verdicts rhymes had been used in order to increase the significance of arbitrator's elocution and eloquence.¹⁶

The most important condition of an arbitrator was justice because in case of any action opposed to justice, the ruler was accounted as an oppressor and his ruling was oppressive. Perhaps for the same reason, some lexicology scholars have defined verdict as "judgment based on justice" while they do not deem the oppressor's verdict as verdict at all.¹⁷

These features of a verdict are indicative of arbitration and arbitrators' position for the pre-Islamic Arabs. Even in the poetry of Quraysh poets, arbitration and arbitrators' education have been praised very much.¹⁸

For example, use of arbitration was common among Jews and Christians. As addressing the circumstances and events of 5th century, Tabari points out that "the woman who was killed as ordered by The Prophet was named Bananeh. She was an arbitrator who had thrown a millstone on Khala-ibn-Sowayed and killed him."¹⁹ This confirms arbitration among Jews even by female arbitrators. The Jewish scholars (*Ahbar*) were of those visited by people especially Jews. However, sometime, unjust arbitrations of the *Ahbar* have led people to take their cases to the other people including Prophet Mohammad (PBUH).

Also, referring to Christian scholars was common at that time, and famous Arab wise Qeis-ibn-Saedeh (*Najran's bishop*) was one of such scholars. Sometimes, the words "arbitrator" and "*Kahen*" were used synonymously. The fame and position of the *Kahen* had led people from far and away lands to tolerate all the difficulties during the trip and take their case to such arbitrators.

¹⁶ SAKET, MOHAMMAD HUSSEIN, JUSTICE ENTITY IN ISLAM, 41 (1986).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ TABARI, TABARI'S HISTORY OR HISTORY OF MESSENGERS AND KINGS, translated by AbulQasem Payandeh, vol. 3. 1093 (1983).

Kahens used to present their speech and verdicts with rhymes, and this in turn led to such quality appeared in the verdicts of the other arbitrators. Rhymes were somehow rooted in the *Kahens*' ingenuity and cleverness since the resulted ambiguities of their speech would lead to the being corrected interpretation on the part of people. Testing the *Kahens* before arbitration was famously accepted in order to get ensured of their arbitration. Such test was usually done in terms of posing a question about the place or type of a hidden thing. Sometimes, the prophesiers and physiognomists²⁰ were chosen as arbitrators per their expertise.²¹

The Prophet Mohammad was chosen as an arbitrator before he became a prophet due to his honesty and trustworthiness and sometimes he was referred to as a *kahen*. One of the most famous disputes during that time was in relation to the black stone. This was a dispute between the sheikhs of Mecca over the placing of a holy black stone.²² There was fierce disagreement between the tribes as to who will have the honor of choosing the position of the stone. They could not resolve this so they asked Mohammad to find them a solution. He took his robe and placed the black stone in the middle of it. Then, asked each sheikh to hold a side of his robe and told them together they can all place the holy stone in whatever place they agree on collectively which resolved the dispute.²³

The arbitration process used to start with selecting the arbitrator(s) mutually by the parties. Then, the arbitrator(s) would receive the parties promise to obey the to-be-made decisions. After that, the statements and evidences of both parties were heard, and finally the decision and verdict were made accordingly. The issued awards did not have enforcement guarantee; however, they

²⁰ Physiognomist is a person who can tell about the person's condition through looking at his body.

²¹ RAGHEB ESFAHANI, ABULQASEM-IBN-MOHAMMAD-IBN-AL-MAFZAL, AL-MOFRADAT FI GHARIB AL-QURAN, 332 (1983).

²² The black stone has become a holy stone in Islam.

²³ Aseel Al-Ramahi, *Sulh: A Crucial Part of Islamic Arbitration*, LSE Law, Society and Economy Working Papers, London School of Economics and Political Science, Law Department, 6 (2008).

were dependent on responsibility and decorum of the parties involved. This was the reason why arbitrator(s) did not accept to address the case of dispute unless the parties mutually accepted their arbitration, took oath to enforce the final decisions, and/or provided something as enforcement guarantee.²⁴

Therefore, the power of every verdict was a spiritual verdict dependent on the position and highness of the arbitrator. Disobeying the arbitrator(s) was basically deemed as sorts of disrespect and oath-breaking which were accused by Arabs and were faced the consequences by the respective tribes and arbitrator(s). Additionally, it was best to a party's interests to enforce the issued award since the dispute would not be prolonged anymore, and no other arbitrator would be accepting to address the same case again.²⁵

The arbitrators' qualifications scope was so vast. It was quoted from Yaghoubi that "Arab people used to refer to arbitrators in case of any dispute. Arbitration of cases such as being proud of ancestors, the poets' poetry, trespassing the borders, and also arbitration of "*Monaferaat*"²⁶ were instances of arbitrators' vast domain of competency and jurisdiction".²⁷

The Saudi Arabia's big markets such as *Okaz* had their own arbitrators. These arbitrators were used to address issues relevant to traders and businessmen as well as settlement of other miscellaneous cases. Thus, *Mecca* markets were known as places to judge important issues. *Bani-Tamim* tribe was responsible of arbitration in the *Okaz*, and the last one of them to arbitrate in *Okaz* before appearance of Islam was Eqra-ibn-Habess. Any time an arbitrator from this tribe died, his son or another person from his own tribe would replace him, while nobody from the other tribes

²⁴ *Id.*

²⁵ *Id.* at 5.

²⁶ "*Monaferah*" event includes judging race and ancestry of a person. Being proud of race and ancestors was of special significance for Arabs; therefore, this was the subject of many arbitrations during which the arbitrator could determine excellence on party in relation to the other one based on their speeches and poems.

²⁷ RAGHEB ESFAHANI supra note 21 at 332.

could fight for such position in *Okaz*. Naturally, such position was created due the high position and influence of *Bani-Tamim* tribe since this tribe was made responsible by Quraysh to manage all the *Haj* ceremonies. Therefore, the great significance of such event and its ceremonies were indicative of Bani-Tamim's high position.²⁸

Probably there were other arbitrators in the other markets of *Mecca* because such bazaars could provide the ground for people to gather and break through their problems. Added to responsibilities including market monitoring, receiving wages, and protecting people safety, another authority held by the market chief was to resolve disputes among individuals.

Arbitrations were usually performed in the arbitrator's house. Tribe and town's meetings were also places where arbitration could be accomplished. Of such places, one can point out to *Dar al-Nadwa* in *Mecca*. Temples were also of the important places in which arbitration could be done since the priests and even servants of the temples were of the most significant group of arbitrators. They used to choose such places to arbitrate and issue verdict based on their role as priest and their relationship with gods.²⁹

The commissions of arbitrators were usually deducted from mortgages and guarantees received from parties before starting arbitration. Thus, arbitration was the usual method of dispute resolution in the Saudi Arabia of *the Ignorance Times* which followed certain conventional rules monitoring the process of choosing the arbitrator(s), domain of his (their) jurisdiction, place and commission of arbitration, etc.³⁰

²⁸ YAGHOUBI, *supra* note 11 at 258-260.

²⁹ *Id.*

³⁰ A. AHDAB, *ARBITRATION WITH THE ARAB COUNTRIES*, 11 (1999).

2.2 Arbitration During the Time of Prophet Mohammad (PBUH)

Upon appearance of Islam in the sixth century, Saudi Arabia of the time underwent deep developments in all the social grounds and relations. Determination of religion as the main axis of Arab lives and society, as well as establishment of central ruling system would be known as the most significant developments occurred in that territory.³¹

Certain authors are on the belief that The Prophet's immigration to *Yathreb (Medina)* and establishment of central ruling system were rooted in the wishes for arbitration because two tribes of *Owss* and *Khazraj* were exhausted of war and asked for peace. However, according to the current tradition of tribes, blood money of the killed people must have been paid to their heirs so that war could be finished and peace established. Price of such bloods was to be determined by a great man, whose position and respective responsibility were accepted by both parties. In addition, arbitration should be held by somebody who was not involved in the dispute by any means.³²

People of *Medina* had chosen Abdollah-ibn-Obay as the arbitrator since he was a strong and impartial during the disputes; however, when faced with a person like Prophet Mohammad (PBUH), they found him the most appropriate man from different viewpoints to take such responsibility. Thus, they invited him to immigrate to *Medina*.³³

Upon entrance of The Prophet into Medina, the first religious government was established in *Hejaz*, while the power, authority, and dominance of this government were increased day to day. However, such process of empowering the government was not accompanied by removal of certain methods like arbitration.

³¹H. Mahassini, *General Principles of Islamic Law relating to International commercial arbitration*, 3(1) The ICC International Court of Arbitration Bulletin, Special Supplement, 31(1992).

³² Id.

³³ SHAHIDI, SEYYED JAFAR, 45-46 (1984).

Mohammad advised both Muslims and non-Muslims to refer their disputes to arbitration. One of the first non-Muslims that followed this advice was the tribe of *Bani Kornata*.³⁴ Mohammad acted both as an arbitrator and as a party who accepted the decision of an arbitrator. Another example of the use of arbitration during the Prophet's time was a clause in the Treaty of Medina, the first treaty entered by the Muslim community, signed in 622 A.D. between Muslims, Non-Muslim, Arabs and Jews which called for disputes to be resolved by arbitration.³⁵

From a practical point of view, it was impossible for the Arabs to easily abandon their current traditions and customs, especially without understanding the divine religion. Therefore, rulers and judges of the Islamic government continued to enforce the on-going rules except for the cases in which there was direct prohibition order stipulated in Holy Quran. Muslims did not execute the Islamic orders in a decontextualized environment, but also they used to refine their current traditions and customs using the filters of Islamic thoughts and orders. Due to this, certain authors believe that the legal system of Mecca before Islam and probably the old rules of Medina form the basis of tradition in Islam. Therefore, survival of arbitration was deemed normal and accountable since not only it was not denied by Holy Quran, but also it was explicitly confirmed in this book.³⁶ Verses 114 and 65 of Al- An'am and Al- Nisa surahs respectively confirm the above-said statements:

*"Then is it other than Allah I should seek as judge while it is He who has revealed to you the Book explained in detail?" And those to whom We previously gave the Scripture know that it is sent down from your Lord in truth, so never be among the doubters".*³⁷

³⁴ Libyan Am. Oil Co. (LIAMCO) v Libyan Arab Republic (Apr. 12, 1977), 20 I.L.M., 1 (1981).

³⁵ R. B. Cunningham, *supra* note 9 at 12.

³⁶ KHADOURI, MAJID, WAR AND PEACE IN ISLAMIC LAW, translated by Saeidi, Seyyed Gholamreza, 102 (1956).

³⁷ Al- An'am Verse 114, available at: <https://quran.com/6>

*“But no, by your Lord, they will not truly believe until they make you judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in full, willing submission.”*³⁸

Each one of these verses as well as the other similar verses prohibit taking arbitration to anybody other than God and The Prophet, and this clarifies that there were people who were still acting based on the earlier methods assigning arbitrations to people other than The Prophet and those known with Islamic rules. Holy God had strongly prohibited them from doing such. The noticeable point of the said verses is that the arbitration method itself has not been denied and denounced anywhere; however, it has been stipulated that taking cases of arbitration to anybody other than God and Prophet is not correct.³⁹

Thus it was determined that arbitration for dispute resolution was normally continued despite central government presence during the time of Prophet Mohammad (PBUH), while this method has been never prohibited by Islam. However, content and criteria of verdict issuance by the arbitrator(s) have been always emphasized by Islam. In other words, Islam has especially focused on divinity of the issued verdicts with no sensitivity regarding the method of issuing the verdicts.⁴⁰

It has been always important for the verdict to be Islamic and not “ignorant” while there was no prohibition or recommendation about the relevant formalities. Due to the same reason, Holy Quran has emphasized on assignment of arbitration to The Prophet, meaning that instead of Jewish and Christian priests who undoubtedly had non-Islamic criteria to understand issues and make decisions, Muslims should refer to The Prophet, who was aware of the divine rules more than any

³⁸ *Al- Nisa* Verse 65, available at: <https://quran.com/4>

³⁹ KHADOURI, *supra* note 36 at 103.

⁴⁰ J.A. BELLAMY, *THE MAKARIM AL-AKHLAQ BY IBN ABI-DUNYA*, 119 (1963).

other person, or even seek help from certain Muslims familiar with Islamic rules because they were able to understand and declare God's verdict.⁴¹ The following verses confirm the said points:

*"Have you not seen those who claim to have believed in what was revealed to you, [Muhammad], and what was revealed before you? They wish to refer legislation to Taghut, while they were commanded to reject it; and Satan wishes to lead them far astray. And when it is said to them, "Come to what Allah has revealed and to the Messenger," you see the hypocrites turning away from you in aversion."*⁴²

Therefore, Islam basically changed the content of a tradition of Arabs ignorant community without changing its form and required Muslims to issue verdicts according to Islamic rules and divine book. There were some other consequences for the said change since a divine verdict had to be issued on one hand, while disobeying the divine verdicts meant unbelieving the Holy God on the other. Thus, Muslims were obliged and committed to execute the verdicts issued. As observed earlier in the current study, according to the verse 65 of *Al- Nisa* surah, a person needs to be surrendered to The Prophet's verdicts in order to be deemed a believer in God. This came only from one source, in which the verdicts issued by The Prophet were divine verdicts. Due to the same reason, any verdict issued based on Islamic rules could enjoy enforcement guarantee, and Muslims who were looking for divine verdicts would obey such verdicts without any compulsory measure.⁴³

Perhaps it can be argued that judgment, as known nowadays, has appeared within such ground following the arbitration process in the society. Accordingly, what has been raised by certain authors indicating that no arbitration has been narrated as done by The Prophet seems to be untrue,

⁴¹ SHAHIDI, supra note 33 at 47.

⁴² *Al- Nisa* vesre 60-61.

⁴³ SHAHIDI, supra note 33 at 48.

because The Prophet's speech was to be necessarily obeyed while it was far from possible for him to deny arbitration. However, necessity to obey The Prophet's order is true.⁴⁴

2.3 Arbitration During the Time of the Caliphs Following the Prophet

Arbitration during the time of the caliphs following The Prophet, remained as a method for dispute resolution. It should be mentioned that continuation of arbitration beyond a tradition or custom was rooted in Quran stipulations. In other words, not only Quran did not deny arbitration, but also it explicitly recommended arbitration in certain cases. So, the Islamic community did not consider arbitration as opposed to religion. Even, they believed that it was necessary and mandatory in some cases.

Omar (the second Caliph after The Prophet) believed that making peace among the belligerent parties is better than judicial resolution because the latter causes tension among individuals, while the first is based on the peace and satisfaction of the parties. Such a thought undoubtedly would pave the way for use of arbitration in which there were parties' satisfaction rather than using judicial procedures. Arbitration was applied during the said caliph's time, especially when a party of dispute was the caliph himself. Since he was the judge of Islamic society, it was rather fair not to be appointed as the judge or arbitrator. Another reason was that if his saying was to be obeyed, dispute would be canceled in most of the cases. Thus, choosing an arbitrator was the best and fairest way to settle the dispute.⁴⁵

There are various historical evidences from the said caliph regarding arbitration. For instance, Omar took an Arab man's horse to test before buying. The horse died when it was with Omar. The Arab man asked for the cost of his horse. Omar suggested him to choose an arbitrator between them. The man chose for Iraqi Shoraih. Upon hearing the speeches of the parties, Shoraih told

⁴⁴ Ahdab, supra note 30 at 11.

⁴⁵ Aseel Al-Ramahi, supra note 23 at 11.

Omar: “you have been given a healthy horse, and you are expected to give back the horse like you have received it. Omar was astonished by Shoraih’s arbitration, so he appointed him as a judge.⁴⁶

Also, in another incident, Omar told a man: “choose a person as arbitrator between us, the one that we have been ordered to take our probable disputes to his arbitration”, and by the probable arbitrator, Omar meant Ali (The Prophet’s son-in-law). Here, Omar, as the caliph and ruler of the Islamic society, introduces Ali as a person recommended to be the arbitrator.⁴⁷

Furthermore, there are some stories that confirm arbitration as a proper method of dispute resolution at the time of Caliph Uthman (the third caliph of Muslims after Mohammad(PBUH)). For example, Talha-ibn-Obeidollah bought something from the third caliph Uthman. The merchandise was located in *Kufa*. Uthman was told that there has been loss for him in the deal, so he told Talha that since he has sold something unseen, he (Uthman) has the right to cancel the deal. Talha objected: “oh, no! I have bought a thing unseen, so I have the cancellation right”. They referred to Jobair-ibn-Mot’am for arbitration, and he believed that Talha was right.⁴⁸

The point clearly observed in all of the said events is the independence and justice of arbitrators while the parties did not get angry even if they were caliphs of the time. They believed that choosing some other people would be more appropriate for arbitration and judgment than themselves.

Arbitration and arbitrator were so sensitive subjects that in dispute between Talha and Zobair about a property in Medina, Amr-ibn-al-Aas (the chosen arbitrator in the dispute) told them that arbitrator is in need of justice more than the plaintiff because if the arbitrator does oppression, his religion and beliefs will be in vein. However, if the plaintiff is oppressed, only his current world

⁴⁶ TABARI, *supra* note 19 at 1423.

⁴⁷ *Id.*

⁴⁸ *Id.*

will be damaged.⁴⁹ Amr's statements are indicative of arbitrator and arbitration's sensitivity from the Muslims' perspective at that time.

during Ali's time as the fourth caliph, the central ruling system was rather empowered more than the previous caliphates. Accordingly, the role and significance of justice and judgment system was increased, so that the number of arbitrations was decreased. The most important arbitration case positively captured in history of this period is the case of arbitration in *Battle of Siffin*.

The Battle of Siffin (657) occurred during the first Muslim civil war. It was fought between Ali who ruled as the Fourth Caliph and Muawiyah I, on the banks of the Euphrates river (Raqqah, Syria).⁵⁰ The story began where the Levant (today known as Syria) troops speared the Holy Books of Quran and chose this book as arbitrator between them and Imam Ali troops. Ali opposed the suggestion: "I have come to fight them, so that they would obey the rules of this book since they have forgotten the orders of Holy God and their promise to God and thrown away His Scripture". However, a number of people in his troops opposed him: "we are obliged to practice what Quran says, and to return to what Holy God has determined for us in His Book, you (Ali) should choose your trusted representative and Muawiyah must also do so. Then, they will be committed to act based on Quran and should not violate The Book. After that, you all will do whatever they mutually agree on". After arguments between Imam Ali and these people in his troops, he was forced to accept the arbitration.⁵¹

Muawiyah chose Amr-ibn-Aas as his arbitrator. Ali wanted Malik Ashtar or Abdullah bin Abbas to be appointed as an arbitrator for the people of Kufa, Iraq, but his troop strongly demurred, alleging that men like these two were, indeed, responsible for the war and, therefore, ineligible for

⁴⁹ SHAHIDI, supra note 33 at 47.

⁵⁰ TABARI, TABARI'S HISTORY OR HISTORY OF MESSENGERS AND KINGS, vol. 5, 243 (1983).

⁵¹ AL-IMAM AL-WAQIDI, ISLAMIC CONQUEST OF SYRIA: A translation of Fatuhusham: The Inspiring History of the Shabah's Conquest of Syria, 31 (2005).

that office of trust. They nominated Abu Musa al-Ashari as their arbitrator. In order to prevent blood in his army, Ali accepted the arbitrator. However, he told them that "You are arbiters on condition that you decide according to the Book of God, and if you are not so inclined you should not deem yourselves to be arbiters. Upon selection of arbitrators, the letter of arbitration was written in which the details of arbitration process were determined.⁵²

“In the Name of God, the most Merciful, the most Compassionate. This is the letter of arbitration between Ali-ibn-Abi-Taleb and Muawiyah-ibn-Abi-Sofian. Ali wants arbitration on behalf of *Kufa* people and their companions who are believers and Muslims. Muawiyah wants arbitration on behalf of *Levant* people and their companions who are believers and Muslims. We surrender to the Holy God’s verdict and His Book, and there will be nothing between us other than Quran. The God’s Scripture will be between us from the beginning to the end while we will keep alive whatever it keeps alive and we will kill whatever it wants to kill. The arbitrators, Abu-Mousa Ash’ari and Amr-ibn-Aas, should practice what they find in Quran, and if not found in Quran, they should reveal from what the unifying tradition, and not the splitting habit says.

The arbitrators were assured by Ali, Muawiyah, and the two troops that their lives, families, relatives, and properties will be safe and secure while the Islamic nation will assist them in arbitration. Truly, the God’s promise to believers and Muslims of two troops is kept. We are responsible for this letter, and their decision will be enforced for the believers. Wherever they go, their lives, families, relatives, properties, present things, and absentees will be safe and secure while there will be no arms. Abdollah-ibn-Qeis and Amr-ibn-Aas are obliged to God’s treaty and should arbitrate among this nation, and they must not take them back to battle while if they do such, they will be disobedient. The arbitration deadline is until *Ramadan*. If they want to postpone,

⁵² Nahjul Balagha, Part 1, The sermons available at Al-Islam.org.

they should do that with their mutual consent. If anyone of the arbitrators dies, another person should be appointed by the leader of that group, he should try to choose someone who is just and fair. The arbitration venue should be between *Kufa* people and *Levant* people. If the arbitrators wish, no one should be present at the arbitration venue.

They can choose anyone as witness while the witness's testament regarding the subject of this letter should be written. The witnesses should oppose anyone who wants to leave the aim of this letter and does oppression. Oh God, we seek your help for us against those who want to leave the aim of this treaty. Among Ali's companions, Ashath-ibn-Qeis Kendi, etc. and from Muawiyah's companions, AbulAwur Salami, etc. will be the witnesses.

This letter was written in 13th of *Safar* in 37 AH, and it was determined that Imam Ali and Muawiyah with 400 of their companions attend the arbitration venue in the month of *Ramadan*.⁵³

When the time arrived for taking a decision about the caliphate, Amr-ibn-Aas convinced Abu-Mousa into entertaining the opinion that they should deprive both Ali and Muawiyah of the caliphate, and give to the Muslims the right to elect the caliph. At the pre-determined deadline, the arbitrators attended the venue in order to publicly declare their decision. First, Abu-Mousa went to the tribune and disposed Imam Ali and Muawiyah from the government and made people authorized to choose their ruler. After that, Amr-ibn-Aas disposed Ali and made Muawiyah stay as the Islamic nation ruler, while this was opposing their mutually agreed decision. Following this event, there happened a dispute among Imam Ali troops.⁵⁴

⁵³ TABARI, supra note 50 at 245.

⁵⁴ ABDUL-MUHSIN IBN HAMAD AL-ABBAAD, MU'AAWIYAH IBN ABEE SUFYAAN, 48 (2002).

Ali refused to accept the verdict and found himself technically in breach of his pledge to abide by the arbitration.⁵⁵ This put Ali in a weak position even amongst his own supporters.⁵⁶

The most vociferous opponents of Ali in his camp were the very same people who had forced Ali to appoint their arbitrator, the Qurrā' ("Quran readers"), called so for their literalist reading of the Quran and their zealous commitment and militant devotion to it. Feeling that Ali could no longer look after their interests and fearing that if there was peace, they could be arrested for the murder of Uthman, they broke away from Ali's force, rallying under the slogan "arbitration belongs to God alone." After the battle of Siffin, the Qurrā' formed their own party called the *Khavarej* ("the Outsiders") which later developed into an anarchist movement.⁵⁷

Khavarej said: "oh enemies of God, you were weak in obeying God's orders and agreed on arbitration practice". Another group used to say: "you got separated from our Imam and caused community to get scattered".⁵⁸

Upon the declaration of Abu-Mousa and Amr-ibn-Aas, Imam Ali wrote a letter to *Khawarij* in which he said: "however, these men to whom and their arbitration we agreed, they opposed to Quran and followed their inclinations without taking God's guidance. They did not practice The Prophet's tradition and did not enforce Quran's order, so God, Prophet, and Muslims hate them for this. As soon as my letter reaches you, you shall come back so that we will attack our enemy and your enemy and will do what we were intended to do".⁵⁹

Although Ali, refused to accept the verdict in the Battle of Siffin, but he strongly believed that the arbitrators' decision was an absolute decision, and warned the arbitrators about their job and

⁵⁵MIKABERIDZE, ALEXANDER, CONFLICT AND CONQUEST IN THE ISLAMIC WORLD: A HISTORICAL ENCYCLOPEDIA, vol. 1, 836 (2011).

⁵⁶SANDLER, STANLEY, GROUND WARFARE:AN INTERNATIONAL ENCYCLOPEDIA, vol. 1, 602 (2002).

⁵⁷H.A.R GIBB, BERNARD LEWIS, ENCYCLOPEDIA OF ISLAM, vol. 7, 265 (1960).

⁵⁸ *Id.*

⁵⁹ *Id.*

consequences of their decisions. Therefore, Ali's role in issuance of awards was monitoring proper execution of divine rules in the stages of issuing the award while he was obliged to guarantee the enforcement of the award as well.

In 39 AH, when Muawiyah's mischiefs were increased, he sent Yazid-ibn-Shajarah Al-Rahawi to do Haj ceremonies in Mecca. Oathem-ibn-Abass, who was sent on the part of Imam Ali, got in a dispute with him. Abu-Saeid Al-Khedri and the others mediated and made peace between them while they entrusted Haj ceremonies responsibility to Shibeh-ibn-Uthman-al-Abdavi, who was the Kaaba's chamberlain. This event can be deemed as an instance of following verses 9 and 10 of *Al-Hujurat* surah which invites Muslims to make peace among the believers.⁶⁰

Considering all the stories above, we can conclude that arbitration was one of the common methods of dispute resolution in Islamic states. The arbitrators applied and at the same time developed the sunna. It was the sunna with the force of public opinion behind it, which had in the first place insisted on the procedure of negotiation and arbitration. Arbitration continued as a dispute resolution practice in the Mohammad and post-Mohammad eras.⁶¹ Upon rising of Islam and establishment of Islamic states, this method faced some changes according to Quran verses and governmental principles, so that it could be lawful, and be used as prevailing method of dispute resolution.⁶²

3 Creditability and Enforceability of Arbitration Awards from Islamic Perspective

Although there are certain disagreements among different Islamic divisions regarding scope of arbitration, it can be argued that the legitimacy of arbitration itself has been accepted by all the Islamic Sects.

⁶⁰TABARI, TABARI'S HISTORY OR HISTORY OF MESSENGERS AND KINGS, Vol. 16, 198 (1983).

⁶¹R. B. Cunningham, *supra* note 9 at 12.

⁶²Mehdi Mehdizadeh, *Arbitration in Initial Islamic Periods*, *Andisheh Sadegh Magazine*, No. 8 & 9, 42-57 (2002).

According to verse 9 of *al-Hujurat* surah, making peace between two Muslim tribes at war can be done by arbitration.

*“And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly.”*⁶³

Added to indication of the said verse regarding arbitration, there are two other points addressed in this verse. The first one is that God orders people to make peace among themselves based on justice which, according to the previously-said verses, requires justice and divinity for the verdicts. The second point is that God does not hold dispute settlement between two Muslim tribes upon their own request; however, He urges Muslims to make peace between them whether being asked for it or not.⁶⁴

In addition, Holy Quran has interpreted arbitration as *“hakamiyyat”* in Arabic. The word *“hakam”* (arbitrator) has been originally taken from the verse 35 of *Nisa* surah. It has been ordered in this verse that if there is any dispute between wife and husband, there should be arbitrators appointed on the part of two parties: *“And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted with all things”*⁶⁵.

The Sunni jurisprudents refer to the said verse to issue permission for arbitration which has been addressed as “arbitration judge” in the other sects.

⁶³ *Al-Hujurat* verse 9, available at <https://quran.com/49>

⁶⁴ MUOSAVI ARDABILI, SEYED ABDOLKARIM, ARBITRATION JUDGE IN JUSTICE REGIME OF ISLAM, vol. 5, 12.

⁶⁵ *Al-Nisa* Verse 35 available at <https://quran.com/4>.

Accordingly, the arbitration's legitimacy has been generally confirmed by the great Islamic jurists, and the main reason of confirming its legitimacy by some Imamiyah jurists is the narration of Ahmad-ibn-Fazl Konasi from Imam Sadegh, and the hadith of The Prophet "if anyone arbitrate unjustly between two persons who have chosen him as the arbitrator, he will be cursed". However, due to the fact that appearance of narration by Ahmad-ibn-Fazl Konasi does not indicate determination of arbitration and its credit. This hadith is to indicate the quality of verdict and necessity of observing the justice by the judge, and not to indicate legitimacy of arbitration. Shia jurists have mainly resorted to Consensus to confirm legitimacy of arbitration judge and its legitimacy.⁶⁶

About the influence of arbitration verdict, this should be said that some jurists believe the arbitrator's decision to be obligatory in case of parties' mutual agreement upon the verdict issuance. However, some other jurists such as Mohaghegh Helli know the arbitration awards as obligatory without any need to mutual agreement of the parties involved. Mohaghegh says: if two parties involved in a dispute agree on arbitration of a person and take their dispute to him, and if that person arbitrate between them, then his decision is obligatory and does not need the parties' agreement after verdict issuance.⁶⁷

In sum, the Quran and the Sunna confirmed the validity of arbitration but the difficulty that arose was in the characteristics of implementation. Therefore, the four schools of Sharia explained the process of arbitration which obliges each Muslim within each school to follow its teachings.

The *Hanafi* School confirmed that according to the *Quran, Sunna, Ijma and Qiyas*, arbitration is a legitimate dispute resolution process because it serves an important social need and it

⁶⁶AL-NAJAFI, SHEIK MOHAMMAD HASAN, JAVAHER AL-KALAM FI SHARHE AL-ISLAM, vol. 40, 27 (1983).

⁶⁷ SANGLAJI, MOHAMMAD, JUSTICE IN ISLAM, 38 (2005).

simplifies disputes. It is also less complex than the courts.⁶⁸ The scholars in this school emphasized the contractual nature of arbitration and stated that it is binding like any other contract. Some scholars argued that an arbitrator has the same duties as a judge but others considered the arbitrator to be closer to an agent or conciliator.⁶⁹

According to *Shafei* school, it is permitted for the parties to choose an ordinary person that does not possess any of the judge's qualities to resolve the dispute, whether or not there is a judge available in the place where the dispute arose.⁷⁰ The scholars within this school confirmed the validity of arbitration by giving an example from history that shows Muslims referring disputes to the Caliph Omar who acted as an arbitrator on many occasions. It is pointed out that an arbitrator is inferior to a judge as the arbitrator could be removed at any time by the parties before an award is rendered.⁷¹

Maleki school placed arbitration as one of the highest forms of dispute resolution. It contended that an arbitrator decides a case based on his conscience therefore, it allowed one of the disputing parties to be appointed as an arbitrator if he was chosen by the other party.⁷² Unlike the other three schools, this school stresses that an arbitrator cannot be revoked after the commencement of arbitration proceedings. An arbitration award is binding on the parties except if a judge declares it to be obviously unjust.

The scholars of *Hanbali* school hold that the decision of the arbitrator has the same binding nature as a court judgment. Therefore, an arbitrator must have the same qualification as a judge and must be chosen by the parties.⁷³

⁶⁸ I. FARUQI AND L. FARUQI, THE CULTURAL ATLAS OF ISLAM, 114 (1986).

⁶⁹ *Id.*

⁷⁰ AL MAWARDI, KITAB AADAB AL-DUNYA W'AL-DIN, 382.

⁷¹ *Id.* at 385.

⁷² R. B. Cunningham *supra* note 9 at 19.

⁷³ *Id.* at 20.

In conclusion, apart from the fact that there are disagreements among the jurists concerning certain issues related to arbitration, this is for sure that arbitration itself is permitted from a jurisprudence viewpoint, and the disputing parties can refer to arbitration judge for resolution of their disputes.⁷⁴

4 Arbitration Domain in Islamic Jurisprudence

The Islamic law experts do not have consensus on the subject of arbitration domain in a way that certain jurists do not accept any limitation for arbitrable subject matters. For instance, some Shia scholars argue that whatever subject matter, including financial issues, marital cases, retaliation, etc. can be assigned for arbitration. The reason for that, according to such scholars, is that the requirement for assigning the case to arbitration exists.⁷⁵

In the following verse, verse 10 of *al-Hujurat*, Holy God takes the case beyond dispute settlement between two conflicting tribes and orders to make peace among individuals since they are brothers.

“The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy”.⁷⁶

According to the above-said verse, dispute resolution between at-war Muslims is a duty for the other Muslims which is by no means dependent on the request of disputing parties. This includes any type of dispute as well. In other words, based on this verse, arbitration’s jurisdiction is general and can include any type of dispute.⁷⁷

⁷⁴ *Id.*

⁷⁵ NAJAFI, MOHAMMAD HASAN, JAVAHER AL-KALAM, vol. 40, 27 (1977), TOUSI, MABSOUT, vol. 8, 165 (1936).

⁷⁶ *Al- Hujurat* verse 10, available at: <https://quran.com/49>

⁷⁷ HUSSEINI AAMELI, MOHAMMAD JAVAD, MEFTAH AL-KERAMAH FI SHARHE GHAVAED AL-ELAMAH, vol. 10, 2 (1998).

Among the Sunni jurists, some of *Shafei* and *Hanbali* have the same idea in this regard.⁷⁸ Also, there are some broad-minded opinions among *Hanafi* jurists as well. In *Maleki* jurisprudence, with regard to penal code, there is a considerable flexibility just for the cases of body injuries and damages. In contrast, a group of Shia scholars have generally doubted about arbitration jurisdiction in penal code cases, such as awards for imprisonment and the other punishments.⁷⁹ Of course, issuing a punishment award by the arbitrator does not guarantee that the award will be enforced for the beneficiaries because jurists have made enforcement of arbitrators' decisions dependent on referring to official authorities.⁸⁰

One of the subjects within the jurisdiction of arbitration is family disputes based on the verse 35 of *Nisa* surah:

*“And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted with all things”.*⁸¹

In this verse, which has been accounted as mandatory by some scholars, it has been stipulated that upon dispute occurrence and concern of separation between couples, each one should choose an arbitrator on their own part in order to arbitrate between them. Here, the points are the presence of two arbitrators and the way to select them, which are indicative of arbitration's quality during the period in question.⁸²

⁷⁸IBN-GHODAMAH, MOGHNI & SHARH AL-KABIR, 285 (1972).

⁷⁹NAJAFI, supra note 75 at 25.

⁸⁰FAZEL HINDI, KASHF AL-LETHATM, Noor Digital Library, vol. 2, 140 (1984), available at www.noorlib.ir.

⁸¹*Al-Nisa* Verse 35 available at <https://quran.com/4>

⁸²MOHAMMAD ABDOLGHADER ABU FAARESS, POLITICS IN ISLAM, 172 (1983).

Arbitration was used for settlement in family disputes even where there was no concern about the divorce. Of course, such cases cannot be taken from the provisions of the said verse (use of two arbitrators and/or choosing arbitrators from kin):

Heithami quotes from Tabrani in *al-Owsat* that “there was a conflict between The Prophet and his wife Ayesha. Prophet said that they should choose Omar as the arbitrator between them, but Ayesha did not accept. The Prophet suggested Abu-Bakr then, and she accepted. They went to Abu-Bakr. “Will you start or should I?” Mohammad asked Ayesha...”⁸³

As seen above, due to a family conflict, The Prophet and Ayesha mutually agreed on one single arbitrator. First, Mohammad suggested Omar who had no family relationship with them, and upon the opposition of Ayesha, The Prophet suggested Abu-Bakr who was agreed by her.

On the other hand, in the four schools of Sunni jurisprudence, there are certain groups or sometimes jurists of those schools, who have established either prohibitions or restrictions regarding arbitral judgment for marital cases, cursing issues, offensive acts, and retaliations.⁸⁴

In sum, some of the jurists limit the jurisdiction of arbitrators only to the disputes related to the public rights, financial disagreements, and issues not relevant to penal code. A group of jurists believe that arbitrators have absolute jurisdiction except for the cases of offensive acts, cursing issues, retaliation, and marriage due to the reason that such cases are among disputes which can be exclusively addressed by Imam or his appointed judge.⁸⁵ Nevertheless, taking all the arguments into considerations, certain religious scholars stress on practicing the arbitrators’ decisions in all types of disputes including God’s rights, public rights, and even punishment

⁸³ HEITHAMI, NOOR AL-DIN, MAJMA AL-ZAWAED & MANBA AL-FAVAED, vol. 4, 196 (1993).

⁸⁴ TOUSI, MABSOUT, supra note 75 at 102.

impossibility of arbitral judgment for marital cases seems strange because arbitration subject has been explicitly addressed in the verse 35 of *Nisa* surah, and this subject should be limited to determination of creditability or cancellation of marriage.

⁸⁵ SHEIK TOUSI, MABSOUT, vol. 8, 165.

cases.⁸⁶ However, it is for sure that all the Shia and Sunni jurisprudents including the four Sunni schools have no doubt about arbitrability of financial and commercial disputes.⁸⁷

5 Arbitrator's Qualifications in Islamic Jurisprudence

In the jurisprudence books and also "The Book of Judgment" (Al-Ghaza), jurisprudents have divided judges into two types: one is the appointed judge who is appointed by Imam and the other is the arbitration judge (arbitrator) whose arbitration is mutually agreed by the opposing parties without permission on the part of Imam. According to jurisprudence, all the necessary conditions for the appointed judge including general conditions such as maturity, logic, and specific conditions which mainly include Islam, justice, and jurisprudence are essential for arbitrators as well, while the only exception is the necessity for having permission of Imam or the jurisprudent who has the authority or ruling power. There is no doubt about necessity of maturity and logic, not only from Islamic perspective but also from any other legal regime's viewpoint. These are the conditions on which the wise men have based their theories. However, the specific conditions should be discussed one by one.⁸⁸

5.1 Islam

In Shia jurisprudence and certain Sunni divisions, Islam is one of the essential conditions for judgment. The most significant evidence of such argument is the verse 141 of *Nisa* surah "*and never will Allah give the disbelievers over the believers a way to overcome them*".⁸⁹ In contrast, some of Sunni scholars, especially *Hanafi*, not only do not see Islam as a condition to do judgment among non-Muslim communities, but also believe that a non-Muslim judge can practice justice

⁸⁶ FAZEL HINDI, *supra*, vol. 2, 140.

⁸⁷ *Id.* at 348; NAJAFI *supra* note 75 at 24; SAANI; TOUSI, MOHAMMAD-IBN-HASAN, AL-KHELAF, vol. 8, 165 (1996).

⁸⁸ Tousi, *supra* note 75 at 105.

⁸⁹ *Al-Nisa* Verse 141 available at <https://quran.com/4>.

BOJNOURDI, MOHAMMAD HUSSEIN, JURISPRUDENCE RULES, vol. 1, 157 (1969).

for the Muslims in the Islamic territories. The recent *Hanafi* scholars with rather more flexibility have concluded that whenever one of the disputing parties is a Muslim, a non-Muslim can be chosen as the judge or arbitrator for commercial cases and not for private issues and/or family rights.⁹⁰

The Islam condition for a judge has not been stipulated in Iranian positive law although this point can be concluded from the Principle 167 of The Constitution of Iran, while it is still open to jurisprudence discussion.⁹¹

5.2 Justice

The next condition which have been stressed in most of the jurisprudence books is justice. By justice, it is meant to have a second nature or permanent habit which makes you completely avoid committing big sins and do not insist on small sins and leave inappropriate manners (which contradicts fair behavior). Although this condition has been known as a famous and dominant belief among jurists of the most Islamic schools including Shia, this is not consensually agreed.⁹²

Many of Sunni jurists especially *Hanafi* have not accepted this condition in its above-said accurate meaning. They actually do not see “lack of this permanent habit” that is interpreted as immorality, to be a barrier in influence of the judgment and verdict of a judge who has been

⁹⁰RAD AL-MAHTAR ALA AL-DAR AL-MOKHTAR SHARH TANVIR AL-ABSAR, vol. 4, 298-299 & 348 (1985).

⁹¹ Article 167 of The Constitution of Islamic Republic of Iran declares: the judge is obliged to find the verdict for any dispute within the drafted laws. If not, he should issue a verdict based on the creditable Islamic resources or fatwas. He can refrain from addressing the dispute and issuing the verdict using excuses such as silence, role, briefness, or contrast of drafted laws.

⁹²SHEIK TOUSI, MABSOUT, vol. 8, 101 (1936); NAJAFI, MOHAMMAD HASAN, JAVAHER AL-KALAM, vol. 40, 13 (1977).

appointed by the ruler.⁹³ So, they reject necessity of this condition for an arbitrator too since legal capacity required for an arbitrator is not more than what is needed for a judge.⁹⁴

Although the said discussions lead to some doubts about necessity of descriptive justice (permanent habit of justice as described), the necessity of practical justice, meaning observing equality for the belligerent parties and justice is consensually agreed by all the Islamic legal schools as a condition for the judges and arbitrators. Necessity of practical justice is actually a logical requirement which is reflected by the wise people. Therefore, it is to be observed in all of the legal regimes as a mandatory principle of judgment.⁹⁵

5.3 *Ijtihad*

Condition of knowledge sometimes addressed as “*Ijtihad*”, or “jurisprudence” is another requirement for arbitration. Most Shia scholars have not accepted the necessity of *Ijtihad*, and some scholars believe that a person not in level of *Ijtihad* has the legal capacity for judgment via having permission from the Imam or a jurisprudent who is the ruler in the system.⁹⁶

Consequently, there are disagreements among scholars about necessity of absolute *Ijtihad* or partial *Ijtihad*.⁹⁷ In Sunni jurisprudence, certain divisions especially *Hanafi* have shown more flexibility. For instance, it has been said in *Al-Ahkam* magazine of Ali Heidar that “the number of persons dominating all the things and subjects of religion are limited in a way that *Ijtihad* subject would confront a dead-end. Thus, while an illiterate person does not enjoy legal capacity, a judge is expected to have knowledge, comprehension, and capacity of judgment. And the least

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Heidar, Ali, *Sharhe Dorar Al-Ahkam*, Majalleh Al-Ahkam, No. 4123 , 525.

⁹⁶ NAJAFI, *supra* note 89 at 15-19.

⁹⁷ HUSSEINI SHIRAZI, MOHAMMAD, *AL-FIQH*, 24-39.

requirement for a judge is that he should be able to hear the events and issues accurately and obtain religious verdicts via possible ways and match them to the actual cases.”⁹⁸

Through interpreting the phrase “it is expected” in the above text, it is even said that this phrase confirms that judge’s knowledge does not mean *Ijtihad* since according to prominent figures of *Hanafi* school, a man is permitted to judge and make decisions based on another man’s fatwas, while a pious man unlearned of *Ijtihad* is better for judgment than a wicked man but learned. Therefore, the argument of *Ijtihad* not being as a condition to arbitrate, and possibility to use the others’ fatwas have been mostly or consensually accepted by certain Islamic legal schools.⁹⁹

However, *Ijtihad* has been accounted as one of the several valid and defensible beliefs in some other schools. Also in legal system of Iran, in clause 5 of the article related to “the law of judiciary judges’ selection criteria”, the *Ijtihad* condition has been treated flexibly, while there are various alternative ways taken into consideration.

5.4 Male Gender

One of the stipulated conditions in jurisprudence is the male gender condition for the appointed judge. This condition is highly disputed so that, due to priority, it is even more doubted as far as the arbitrator is concerned. Ali-ibn-Jorair Tabari believes that women’s judgment is absolutely permitted,¹⁰⁰ while a number of Sunni jurists especially *Hanafi* believe that women are allowed to practice judgment only for special subject matters where their testimony is accepted.¹⁰¹ This recent belief, which is rather well-known, leads the judgment to be at most limited to Hodood (retaliation) and the like. Thus, considering the fact that non criminal subjects especially private

⁹⁸ HEIDAR, supra note 92 at 529.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ IBN-GHODAMEH, MOGHNI AND SHARH AL-KABIR, 380 (1972).

law and financial issues are of the arbitratable subjects, then the permission for women's arbitration can be truly concluded since the women's testimony are accepted for these matters.

However, concerning the international arbitration for trade issues, it is actually defensible and justifiable to believe that there is no male gender condition for arbitrators. In Shia jurisprudence, a considerable number of contemporary jurists as well as some earlier jurists have doubted about prohibition of arbitration by women.¹⁰² The pioneer jurists have even objected the male gender condition for judgment.¹⁰³

In fact, the most significant narrations used by jurists advocating prohibition of women's judgment are weak in terms of validity and being indicative.¹⁰⁴ The provisions of such narrations at most deny obligation and necessity of justice practice by women, while they do not prohibit the females from doing such. Accordingly, since the consensus claimed by some jurists is based on the said narrations and does not have any basis independency, they are not valid.¹⁰⁵

In sum, Majority of the jurists says that women cannot become judge in a Muslim state. in a Hadith it is narrated "a nation cannot succeed if they delegate their power to women". But *Hanafi* says that except criminal and *Hodood* cases, women can be appointed as a judge.

Despite the problems and defects of this requirement in Islamic jurisprudence, the Iranian lawmaker have known male gender as a condition for judgment in justice administration via the article related to "the law of judiciary judges' selection criteria" and the statement "the judges will be selected among the qualified men" included on top of that article. All in all, according to the basic weakness of women's judgment prohibition theory, and considering the flexibilities shown by the lawmakers about possibility of investigative judgment by women, and especially based on

¹⁰² Moghadas Ardabili and Mohammad Javad Husseini Aameli are among these jurists.

¹⁰³ IBN-EDRIS, MOHAMMAD-IBN-AHMAD, JUDGMENT BOOK, vol. 2, 152 (1989).

¹⁰⁴ HOR AAMELI, MOHAMMAD-IBN-HASAN, WASAEL-AL-SHIA, vol. 18, chapter 2, 6.

¹⁰⁵ NAJAFI, supra note 89 at 14.

the permissions to doubt the prohibition, it is not admired to extend this hesitated and irregular verdict to arbitrators.

Accordingly, there are different opinions with regard to required qualifications of arbitrators. For example, according to *Maleki*, he should be Just, male, have proper understanding of Islamic law, and be physically sound. According to *Shafei*, he should be a Muslim, *Mukalaf* (subject to Islamic obligations), a free person (not slave), Male, physically sound, *Mujtahed* (got to the level of *Ijtihad*), and capable of administrative justice. *Hanbali* view on qualification of the arbitrator is to be physically perfect, adult, male, free person, sane, *Mujtahed* (got to the level of *Ijtihad*), and Just. According to *Hanafi*, he should be Muslim, adult, free, physically perfect, sane, Just.¹⁰⁶

6 Arbitration for Non-Muslims in Islamic Jurisprudence

Islam is a religion of mercy to all people, both Muslims and non-Muslims. The Prophet was described as being a mercy in the Quran due to the message he brought for humanity in Quran, *Al-Anbia Surah* verse 107:

“And We have not sent you but as a mercy to all the worlds.”

When a person analyzes the legislations of Islam with an open mind, the Mercy mentioned in this verse will definitely become apparent. One of the aspects constituting an epitome of this Mercy is the way the legislations of Islam deal with people of other faiths. The tolerant attitude of Islam towards non-Muslims, whether they be those residing in their own countries or within the Muslim lands, can be clearly seen through a study of history.¹⁰⁷

Judicial law of non-Muslims and judiciary structure appropriate to that are of the important discussions related to religious differences in legal regimes.

¹⁰⁶ Muhammad Matin, *Understanding the meaning and qualification of Qazi Islamic Judge*, available at: <http://atmateen.com/qualification-of-qazi-islamic-judge/>

¹⁰⁷ TRITTON, ARTHUR STANLEY, *THE PEOPLE OF THE COVENANT IN ISLAM*, 158.

According to *Zemmeh Treaty (Obligation Treaty)*, Islam recognizes non-Muslims especially People of the Book* as the Islamic community's allies.¹⁰⁸ So, their independence even in judicial issues is accepted as far as possible.

Having the fair judgment rights for People of the Book can be addressed from two aspects: first, establishing courts of law which go through their disputes based on their own religious considerations and second, referring to Islamic courts of law.

In Islamic thoughts, human could be divided into two groups of belief, which are Muslim, and Infidel (Non-Muslim).

Among the non-Muslims, the believers of divine religions with a messenger and divine book who have not accepted Mohammad the Prophet's mission are called "People of the Book e.g. Jews, Christians, Zoroastrians, and Sabians."¹⁰⁹

There are verses in Holy Quran indicating that followers of Jew and Christianity are People of the Book. A number of scholars believe that mentioning the said two instances and silence about the other cases do not imply restriction, but also this is due to their fame and reputation and also

¹⁰⁸ The *Obligation Treaty* is a most significant agreements stipulated in Islamic Law. Different interpretations of pros and cons of this legal establishment have led a number of scholars to recognize it equal to other Islamic agreements such as Sale and Donation while some others allocate far more significance to this treaty and include it among the international treaties of the Islamic government, so that they would address its aspects through an international perspective. However, apart from the nature of this treaty, this is not to be denied that the flexibility created via this entity in Islam's confrontations with the other religions and thoughts existing in the global community has led to Islam's expanded reception in the world from its beginning days. Montesquieu write in his book "The Spirit of the Laws" about this treaty: "the exorbitant taxes in Europe granted astonishing convenience to Muslims in their conquests because the minorities conquered by Arabs could get away with a series of aggressions imposed by emperors via a simple tax which was easily given and easily taken; therefore, they would get subordinated to Islamic government. This was how Muslims' conquests were continued while the nations were more prosperous and preferred to be a subordinate of a desert-resident nation rather than following a corrupted ruling system in which they used to suffer all the defects, violations, evildoings, and lack of freedom. Available at: international-law.blog.ir.

* People of the Book is an Islamic term referring to Jews, Christians, and Sabians and sometimes applied to members of other religions such as Zoroastrians. Available at John L. Esposito, ed. (2014). "Ahl al- Kitab". The Oxford Dictionary of Islam. Oxford: Oxford University Press.

¹⁰⁹BERNARD LEWIS, THE JEWS OF ISLAM, 13 (1987).

the obvious fact that they are People of the Book. Jurisprudents of two main Islamic divisions absolutely recognize Jewish and Christians as People of the Book.

Although there are disagreements among jurisprudents about definition of Majus and Sabians, their beliefs, and their verdicts, it has been narrated by Sunni and Shia that The Prophet used to treat them like People of the Book. By Majus in the Quran verses, Zoroastrians are meant while Shia jurisprudents know the Majus as People of the Book or the like of them.¹¹⁰ Except for the Hanafi sect, almost all the Shafei, Maleki, and Hanbali jurisprudents believe that People of the Book are restricted to Jews and Nazarenes (Christians) while the Majus as well as the other infidels are not accounted as People of the Book.¹¹¹

Upon recognition of People of the Book, Islam has considered certain religious freedom and rights including “judicial independence” for the followers of the said religions in the Islamic community. Judicial independence is different from judge independence. Judicial independence of People of the Book means assigning dispute resolution procedures along with judgment process to People of the Book, so that they can act independently in such respect based on their own beliefs.

In the social structure of early Islam, judicial issues, judgment, and arbitration were of well known subjects; however, they were not expanded as nowadays due to the tribal system of the society, while the small communities of that time did not require a highly developed structure and noticeable formalities. The ruling system did not recognize responsibility of addressing the dispute of all social classes including Islamic society’s allies (People of the Book). Of course, there was no prohibition for fair judgment in accordance with Islamic rules. One of the conditions included in the “*Obligation Treaty*” was the rule of applying Islamic rules and orders in disputes between

¹¹⁰ NAJAFI, MOHAMMAD HASAN, JAVAHER AL-KALAM FI SHARH SHARAE AL-ESLAM, vol. 21, 228 & 46 (1983); TOUSI, AL-KHELAF (KETAB AL-JAZIYAH), vol. 5, 1st edition, 542 (1986).

¹¹¹ *Id.*

People of the Book and Muslims (in case of referring to Islamic courts of law), and the judge was expected to issue a verdict accordingly.¹¹²

Therefore, non-Muslims could take judicial measure regarding their disputes and even crimes among themselves. Due to this, they enjoyed judicial independence in their dispute and judgment. Such cooperation was led by social circumstances and structure on one hand while it reflected the utmost justice and fair confrontations on the part of respected Islamic perspective.

Through divine statements, it has been said to The Prophet that if they come to him, he should either arbitrate and judge between them or reject their request for arbitration; however, in case of judgment, he should make fair and just decisions for them.¹¹³

Accordingly, the foundation of judicial independence for People of the Book and its basis in the Islamic communities were consolidated while they were confirmed in narrations.

However, addressing disputes of non-Muslims by Islamic courts of law can be done in two general circumstances as follows;

6.1 Opposing Party Being a Muslim

In case that one of the parties (plaintiff or defendant) in a dispute is a Muslim, the right for the dispute to be addressed in Islamic judicial entities is preserved and accepted while the judge is obliged to judge and make a decision for the case.

Therefore, jurists have stipulated that such cases should be addressed considering that a Muslim is a party of dispute with a non-Muslim.¹¹⁴ Here, since one of the parties is a Muslim, the judge (ruler) must do his judgment based on Islamic considerations, while the judge cannot refrain

¹¹² SHEIK TOUSI, *AL-MABSOUT FI FEQH AL-IMAMIYAH*, vol. 9, 310 & 386 (1967), NAJAFI, MOHAMMAD HASAN, *JAVAHER AL-KALAM FI SHARH SHARAE AL-ESLAM*, vol. 21, 247 (1983).

¹¹³ *Id.*

¹¹⁴ ALLAMEH HELLI, *TAZKORAH AL-FOGHAHA*, vol. 9, 1st ed., vol. 9, 386 (1993).

from judging the case in which one of the parties is a Muslim.¹¹⁵ Thus, wherever an opposing party is a Muslim, the judge is obliged to address the case and there would be no other option in such cases.¹¹⁶

6.2 Opposing Party Being a Non-Muslim

According to the Islamic jurisprudence, non-Muslims have the authority to either refer to their own courts of law or the Islamic judicial entities. This is while the Islamic courts of law enjoy the authority whether to address their case or not.

Sometimes, Jews would choose Mohammad the Prophet (PBUH) as arbitrator. Bani-Nazir tribe was deemed superior to Bani-Qorayzah tribe, up to the point that if there was any man from Bani-Nazir killed by a man from Bani-Qorayzah, the murderer must be killed in revenge while if a murder was committed the other way round, the murderer, who was a Bani-Nazir man was not punished. Once that a Bani-Qorayzah man was killed by a Bani-Nazir man. Bani-Qorayzah asked for the murderer to be revenged. However, Bani-Nazir suggested to take the case to The Prophet's arbitration. And they agreed to do so. It has been said that this event caused coming of certain verses from God to The Prophet (verses 42 to 50 of *Al-Ma'idah* surah).¹¹⁷

"They are avid listeners to falsehood, devourers of what is unlawful. So if they come to you, judge between them or turn away from them. And if you turn away from them - never will they harm you at all. And if you judge, judge between them with justice. Indeed, Allah loves those who act justly. But how is it that they come to you for judgment while they have the Torah, in which is the judgment of Allah? Then they turn away, even after that; but those are not in fact believers.

¹¹⁵ TOUSI, AL-MABSOUT FI FEQH AL-IMAMIYAH, vol. 4, 239-241 (1967).

¹¹⁶ AAMOLI, MOHAGHEGH KORKI, ALI-IBN-AL-HUSSEIN, JAME AL-MAGHASED FI SHARH AL-GHAVAED, vol. 12, 399 (1993).

¹¹⁷ Mohammed Abu-Nimer, *A Framework for Nonviolence and Peacebuilding in Islam*, 15 J.L. & RELIGION 217, n. 62. (2000-2001).

Indeed, we sent down the Torah, in which was guidance and light. The prophets who submitted to Allah judged by it for the Jews, as did the rabbis and scholars by that with which they were entrusted of the Scripture of Allah, and they were witnesses thereto. So do not fear the people but fear Me, and do not exchange My verses for a small price. And whoever does not judge by what Allah has revealed, then it is those who are the disbelievers. And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives up his right as charity, it is an expiation for him. And whoever does not judge by what Allah has revealed, then it is those who are the wrongdoers. And We sent, following in their footsteps, Jesus, the son of Mary, confirming that which came before him in the Torah; and We gave him the Gospel, in which was guidance and light and confirming that which preceded it of the Torah as guidance and instruction for the righteous. And let the People of the Gospel judge by what Allah has revealed therein. And whoever does not judge by what Allah has revealed, then it is those who are the defiantly disobedient. And We have revealed to you, the Book in truth, confirming that which preceded it of the Scripture and as a criterion over it. So judge between them by what Allah has revealed and do not follow their inclinations away from what has come to you of the truth. To each of you We prescribed a law and a method. Had Allah willed, He would have made you one nation united in religion, but He intended to test you in what He has given you; so race to all that is good. To Allah is your return all together, and He will then inform you concerning that over which you used to differ. And judge, between them by what Allah has revealed and do not follow their inclinations and beware of them, lest they tempt you away from some of what Allah has revealed to you. And if they turn away - then know that Allah only intends to afflict them with some of their own sins. And indeed, many among

*the people are defiantly disobedient. Then is it the judgment of the time of ignorance they desire? But who is better than Allah in judgment for a people who are certain in faith?"*¹¹⁸

The points which can be addressed as relevant to the present discussion are as follows:

First: God blames followers of Torah¹¹⁹ (Jews) and consequently people of Gospel¹²⁰ since they have referred to Mohammad the Prophet of Islam, while there is divine verdict among them (Torah and Gospel). If they are looking for divine verdict, it exists in their books. However, if they are searching things other than that, it is false and obscene. God emphatically urges The Holy Prophet to judge between them based on divine rules and not following their inclinations. After that, God question them if they are asking for the judgment of *The Ignorance times*, while the God's verdict and judgment are better than all the others.

Therefore, it is observed that Holy God sees no prohibition regarding verdict issuance for Jews and Christians based on their own divine books and the rules provided therein. He even blames them for not referring to their books.

Second: God authorizes The Prophet whether to choose for arbitration between Jews and Christians or not. So, The Prophet's jurisdiction for arbitration among the followers of other religions is optional and not mandatory.

Third: Whenever Mohammad accepted to arbitrate between Jews and Nazarenes, he was obliged to judge according to justice stipulated in the divine book, which was confirming Torah and Gospel, and not based on individuals' inclinations. By the said divine book, Holy Quran was meant.

¹¹⁸ *Al- Ma'idah* verse 42-50, available at: <https://quran.com/5>

¹¹⁹ It is the central reference of Judaism.

¹²⁰ A gospel is a written account of the career and teachings of Jesus of Nazareth.

Accordingly, Imam or the ruler enjoy the authority whether to receive or reject their (non-Muslims') dispute cases as per what is required by Islam, while there is no obligation for the judge in this respect.¹²¹ However, a number of jurists as well as *Shafei* division of Sunnis believe that Imam is obliged to address their cases, so that they will not undergo probable oppressions since based on the provision of *Obligation Treaty*, it is mandatory to support the people under *Obligation Treaty* and avoid any oppression to them.¹²²

In the events that both parties of a dispute (plaintiff and defendant) are non-Muslims, they are possibly either both from the same religion or each one from two different religions. The latter case is to be more contemplated than the earlier one. A number of scholars believe whether they are both from the same religion or not would make the situation different. On the other hand, it is said that based on the *Maedeh* surah, this does not make any difference in the subjects of judicial independence and optional authority of the judge to either accept or reject the case.¹²³

There are various questions raised by jurists regarding the assumption of having non-Muslims as opposing parties and their differences with respect to their status- whether they are people under *Obligation Treaty* or refugees to Islamic rulers.¹²⁴

This subject and the resulted differences adds to the challenges of judicial independence. However, apart from certain specific cases, providing an appropriate solution to the legal atmosphere do not seem difficult because the Islamic courts of law are not prohibited from accepting the disputes while under the present circumstances, their having discretion can be avoided, so that obligation of addressing their disputes in the judicial entities could be accepted.

¹²¹A NUMBER OF RESEARCHERS UNDER THE SUPERVISION OF SEYED MAHMOUD HASHEMI SHAHROUDI, JURISPRUDENCE CULTURE ACCORDING TO PROPHET'S DESCENDANTS, 1st edition, vol. 1, 733 (2005).

¹²² ALLAMEH HELLI, TAZKORAH AL-FOGHAHA, vol. 9, 1st edition, vol. 9, 385-386 (1993).

¹²³ SHEIK TOUSI, AL-MABSOUT FI FEQH AL-IMAMIYAH, 239-240 (1967).

¹²⁴ ALLAMEH HELLI, HASAN-IBN-YOUSEF, TAHRIR-AL-KALAM, vol. 3, 502 (1999).

This method is not prohibited and, on the contrary, it is in accordance with the ruling system's duties and the people's right to refer to courts of law (judicial right and having access to the judiciary system).

What is concluded from the *Maedeh* surah as well as Shia jurisprudents' fatwas and various narrations indicates that the verdicts are to be issued in the Islamic courts of law based on the Islamic rules. Therefore, in case of receiving the non-Muslims' disputes, the Islamic rules will be executed for them.

However, there is still one problem remaining which indicates that having assumed the judge's obligation to accept addressing non-Muslims' cases in dispute, there is no obligation for the People of the Book to refer to Islamic judicial entities in all of their cases. Especially in cases of personal status and the like, referring to the Islamic courts of law leads to difficulties and is in disagreement with freedom of thought and the other considerations believed on the part of them. Lack of an appropriate judicial solution does not seem logical in such case.

Regarding acceptance of Islamic rules and verdicts for their crimes without them referring the case to Islamic courts of law, it is to be said that such thing can be blemished from a jurisprudence perspective. Basically, one of the results of accepting judicial independence can be the fact that they see no obligation for themselves to refer to Islamic courts of law.¹²⁵

Therefore, in case that we are generally and inclusively obliged to accept the judicial independence of People of the Book, then we have to accept their own independent courts of law because optionality to choose the judge for the People of *Obligation Treaty* does not mean that we

¹²⁵ KHANSARI, AHMAD, JAME AL-MADAREK FI SHARH MOKHTASAR AL-NAFE, vol. 7, 38 (1984).

have left them unguided, but also it means that they should refer to their own independent judiciary entities.¹²⁶

The independence of courts and independence of rules should be addressed too, meaning that accepting such independence requires to accept the independence in two aspects of form and content and merit. Judicial independence actually means recognition of other independent judicial entities in the society, while this requires certain courts of law for People of the Book with their own judges, as well as recognition of rules accepted by People of the Book in their courts of law.

Thus, we need the independent judicial system and structure for People of the Book, their independent judges, and their own independent judicial procedures in the society. Upon the acceptance of sending them to their own courts of law for different issues and crimes, there might be a need for an independent pursuit entity and also appropriate structures.

6.3 Independence of Courts

In fact, permission to have something requires permission to have its necessities too. Nobody can say that People of the Book have complete judicial independence (and the Islamic courts are not obliged to receive their disputes) while they should not have the possibility to follow up and enforce judicial affairs and cannot enjoy judicial independence advantages.

Each one of the recognized religions (Jewish, Christianity, Zoroastrianism) can enjoy their own independence in courts of law and judicial structure without any need to be monitored by the Islamic ruling system.

From jurisprudence viewpoint, there is nothing as condition of monitoring over the courts of people under *Obligation Treaty*. However, in cases where these people have objection to the

¹²⁶ GOLPAYEGANI, SEYED MOHAMMAD REZA, AL-DAR AL-MANZOUUD FI AHKAM AL-HODOUD, vol. 1, 351 (1993).

verdicts issued by their own judicial entities, such objection cases can be addressed in Islamic courts of law based on Islamic legal rules and regulations.¹²⁷

Apart from the challenge of addressing the dispute between two persons with two different religions who are under *Obligation Treaty*, determination of certain issues such as evidences and reasoning system is necessary, which requires its own structure and organization. Upon the acceptance of “People of the Book’s judicial independence”, reasons and the way of reaching to them as well as different formal and content-oriented issues like witness conditions could be different from the Islamic courts.

Obviously, no government can resist such vast structural and content-oriented independence under the current legal circumstances. It might be said that these courts can have their partial independence under the supervision of Islamic judicial entities in a way that they are defined as specific entities with specific circumstances in the judicial system so that the verdicts of such specific courts can be revised in the Islamic courts in case of any objection.¹²⁸

Added to synchronization of this approach with structural stability and public policy in the legal atmosphere, this is justifiable from a jurisprudence point of view, so that the verdicts issued can be revised by Islamic courts while there will be nothing wrong happened in the system.¹²⁹

Having this, and also apart from this challenge and the way of accepting such courts in the judicial structure and also probable permission of having a non-Muslim as a judge among non-Muslims, the bigger challenge is the scope of jurisdiction and competency of such courts. This challenge is of important issues which needs to be determined and is directly related to “Independence of Rules”.

¹²⁷ ALLAMEH HELLI, TAZKORAH AL-FOGHAHA, vol. 9, 386-387 (1993).

¹²⁸ *Id.*

¹²⁹ *Id.*

6.4 Independence of Rules

Upon acceptance of judicial independence for non-Muslims, their independence of rules (content-oriented independence) should be accepted in addition to independence of their courts of law (formal and structural independence).

The concept of judicial independence and sending them to their own courts means that they are to judge and enforce verdicts based on their own rules and beliefs. Therefore, once the judicial independence is accepted, their rules as well as their independent law-making and law enforcement should be accepted, besides the acceptance of formal and structural independence.

As said earlier, apart from the challenge of formal independence and how to structure and organize relevant to structural independence and its relationship with the legal regime of the country, the content-oriented judicial independence makes us confront with duality and multiplicity of laws. Thus, based on the religion variance of the individuals, another law should be enforced where both parties are non-Muslim and are of religious minorities.¹³⁰

To be clear, judicial independence include independent nature of provisions and verdicts as well as independent structure. But where the dispute is related to the public policy, for example to revoke or accept a formal document, such a dispute (and a wide range of similar cases), in the light of the general order and the current laws of the country, without any need for the support of judicial independence, is desirable to be tried by the courts, and does not require any content-oriented and/or even formal independence.¹³¹

In the contemporary legal atmosphere and in the current sovereignty of the state order that many instructive laws have been adopted to regulate the relations of individuals in the society irrespective of their religious variables, and includes all the people, as far as the criminal and legal

¹³⁰ *Id.*

¹³¹ *Id.*

affairs are concerned, the dimensions of judicial independence, or at least its scope, becomes very fainted.

7 Islam and International Law

The first question that arises in the context of international law in Islam is that international law, according to many authors, is a phenomenon in the present era, while there has been no set of rules under this title in the past century. So, what does Islamic International Law mean?

The answer is that there is no doubt that a specific set of rules has not been raised under the title of international law not so long ago. However, the discussion of Islamic international law seems to be necessary in many respects: first, international relations are not the phenomena of the present era, but as history shows, nations and states have had relationship with one another while, whether at war or at the time of peace, they used to respect certain rules and regulations in the form of moral rules.

From an Islamic point of view, we believe that the difference between people is one of God's firmly established traditions, and that it is the source of wealth and harmony of the entire human race. There are many Islamic principles that endorse this standpoint. We shall explain some of them in general, those that apply to the relationship between Muslims and others in peacetime or in the event of war. We shall point out that Islamic States belong to the international community with all its organizations and instruments.¹³²

Although many authors have attributed these principles to the government of the Greek states, claiming that the roots of international law had originated in Greece at the outset, and have finally become revived in Europe by the European states, the fact is that the historical roots of international law were not specific to the Greek state's government, and they existed in other

¹³²Sheikh Wahbeh al-Zuhili, *International review of the Red Cross*, Volume 87, No. 858, 269-267 (June 2005).

societies that preceded the Greeks both in terms of time and in terms of obeying the rules of international law as well.¹³³

Among these societies, the community of Arabian Peninsula before Islam can be noted that under their own special circumstances, they organized regulations in tribal relations with one another, and they were never willing to violate them. Secondly, the holy religion of Islam, which is a universal religion and the founder of a particular social civilization, has not been unable to regulate certain rules in the area of international law as it is clear that, in the area of domestic law, Islam has its own legal system. It can be even said that the provided rules in the field of international law has been wider and more serious than the domestic rules and regulations of the Islamic system since the very beginning of the Islam appearance.¹³⁴

Therefore, many verses of the Holy Quran refer to the international relations of Muslims and non-Muslims and how these relations have been observed in peace and war. These Islamic rules paved the way for emergence of international law in the world, and the Islamic jurists have had written independent works in the area of international law. Thirdly, even if we ignore the international Islamic rules that have been established by Prophet Muhammad (PBUH), there is no doubt that Islam believes in certain values and encourages Muslims to externally realize these values. People are equal in terms of humanity, respect for human rights and human dignity, and no category or individual is better than others except in piety and good deeds. Cooperation is a principle that all people are required to observe.¹³⁵ God says:

“Mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that you may know each other. Verily the most honored of you in the sight of God is

¹³³ MASHOOD A BADER, IN INTERNATIONAL LAW AND ISLAMIC LAW, 3 (2008).

¹³⁴ *Id.*

¹³⁵ *Id.*

(he who is) the most righteous of you. And God has full knowledge and is well acquainted (with all things).”¹³⁶

Accordingly, although in Islamic jurisprudence, a specific set of rules had not been raised under the title of international law, but the discussion of Islamic international law had been brought several times, in many occasions and it had been accepted as an important subject in the Islamic states.

Here, in the next section, the international contracts in Islamic jurisprudence will be discussed, since International arbitration is the product of contracts.¹³⁷ As a result, if we can prove that international contracts have been accepted in Islam, the acceptance of international arbitration as an agreement between the parties would be proved as well.

8 International Contracts in Islamic Jurisprudence

In jurisprudence, whenever discussed within the Islamic society and as part of civil rights, contracts for the purpose of trading, partnership, etc. are considered as part of domestic law. However, if such contracts are concluded at the level of international relations, then they will be included within the domain of international law.¹³⁸

Although there is no distinctive jurisprudential classification in the area of international contracts, the existence of general rules of contracts and the principle of credit and necessity of contracts and bilateral or multilateral agreements on the one hand and the history of a series of special treaties on Muslim relations with non-Muslims on the other hand or, in other words, the contracts concluded between Islamic Territory and Infidels' Territory such as the *Obligation*

¹³⁶*Al- Hujurat*, Verse 49.

¹³⁷THOMAS E. CARBONNEAU, ARBITRATION IN A NUTSHELL 254 (2007).

¹³⁸TABARSI, MAJMA AL-BAYAN, vol. 3, 151 (1952).

Treaty in the era of the Prophet Muhammad (PBUH), indicates that some sort of classification concerning contracts has been accepted by the jurists.¹³⁹

There are in fact quite a few references in the Qur'an as well as in the *ahadith* to the conduct of Muslims towards non-Muslims in the international realm. From these references, in the formative period of Islamic Law during the 8th and 9th century, a body of law has been developed which is commonly referred to as *al-siyar*, literally meaning "motions" or "travels" before it was taken to denote the conduct of the Muslim community or Muslim rulers in their relationships with other, non-Muslim communities. The term itself appears in six verses of the Qur'an, but not yet in its legal-technical sense. It is assumed that the jurists of the legal school of Abu Hanifa were the first group using it in its legal meaning.¹⁴⁰

There were two concepts in *al-siyar*, which are closely related to each other and which served as the first basis of Islamic international law. The first one is *jihad*, that literally means the military spreading of Islam.¹⁴¹ At this time, Islam was expanding (phase of great expansion);¹⁴² Inevitably, the first basic *siyar*-rules dealt mostly with war-related issues, such as legitimate reasons for waging a war, rules on the taking of booty, or the conduct of Muslim soldiers in battle. With this regard, it is interesting that some important rules of "modern" humanitarian law, especially the concept of distinguishing between combatants and non-combatants was already known by the Islamic Law at that time.¹⁴³ The root of all such legal rules in relation to non-Muslims outside of

¹³⁹*Id.*

¹⁴⁰M. KHADDURI, *THE ISLAMIC LAW OF NATIONS – SHAYBANI'S SIYAR: ON THE DEVELOPMENT OF THE NOTION OF SIYAR*, 38 et seq. (1966).

¹⁴¹S.S.Ali/J.Rehman, *present a concise overview of the concept of jihad*, *Journal of Conflict and Security Law* 10/3, 3 et seq. (2005). W. M. Al-Zuhili (also transliterated as Al-Zuhayli), *Islam and International Law*, *Int'l Rev. of the Red Cross* 858, 278 et seq. (2005).

¹⁴²The historical development of Islam and Islamic International Law alongside is generally categorized in three main stages, expansion, interaction, and coexistence. See M. W. JANIS, C. EVANS, *RELIGION AND INTERNATIONAL LAW*, 95 (1999).

¹⁴³K. Bennoune, *Humanitarian Law in Islamic Jurisprudence*, *Mich. J. Int'l L.* 15, 607 et seq. (1994).

Islamic territory, whether in actual times of war or within other political relations, was the second, comprehensive concept of dividing the world, politically and legally, along the line between Muslim and non-Muslim communities, that is, between the *dar al-Islam*, the domain or abode of Islam, and the *dar al-harb*, the abode of war, where the unbelievers dwell.¹⁴⁴

Although the concept of division may not be found anywhere in the Qur'an,¹⁴⁵ but developing such a legal and political structure is understood by means of *ijtihad*.¹⁴⁶ *Dar al-Islam* is to include the countries that first are formed with majority of Muslims, and second there is an Islamic ruling system in it with implementation of Islamic law.¹⁴⁷ This definition does not correspond to the realities of today's world, although it is one of the ultimate goals of the legal system.

However, in the present circumstances one should look for the means by which peaceful relations with other countries, especially Islamic nations, can be expanded and, therefore, a definition should be followed that is more compatible with circumstances of today's world. Therefore, it might be possible to refer to the definition given for *dar al-Islam* at the Islamic Conference which matches to the reality of today's world. In this definition, criteria for an Islamic state include Muslim people of that country and not the type of government ruling on that country.¹⁴⁸

¹⁴⁴M. Fadel, International Law, Regional Developments: Islam, on-line edition, available at <<http://www.mpepil.com>> margin number 7 et seq.

¹⁴⁵ Its occurrence in the body of hadith is in dispute, as this relates to a very small number of *ahadith* the authenticity of which is debatable and refused by the majority.

¹⁴⁶ i.e. individual logical deduction and conclusion by the *Hanafi* jurists based on certain indications in the religious sources, most notably two verses in the sura *al-Mumtahana* of which the shorter one shall be quoted here for illustration: "God only forbids you, with regard to those who fight you for (your) Faith, and drive you out of your homes, and support (others) in driving you out, from turning to them (for friendship and protection). It is such as turn to them (in these circumstances), that do wrong."

¹⁴⁷ Al-Darini al-Fattahi, *Khasa'es Al-Tashri al-Salemi*, 13.

¹⁴⁸ Ziaei Bigdeli, Mohammad Reza, *Islam and International Law*, 11-18 (1989).

Dar al-harb includes those countries which are firstly formed with majority of non-Muslims, and secondly are at the scene of a military conflict with Muslims, or there is a permission for military conflict with them.¹⁴⁹

In addition to *dar al- Islam* and *dar al- harb*, there are countries that are in peace with the Islamic countries, or there has been a ceasefire treaty concluded with them, and it is possible to conclude other treaties with them consequently, which are called *dar al-ahd*. It is easy to understand from the division of the world's nations by Islamic law that the Islamic system, as far as possible, seeks to establish friendly and peaceful relations with other nations. In this regard Imam Khomeini says: “our relations with the West is fair one. We will not go under pressure while we will not do any oppression to them. We treat them with mutual respect.”¹⁵⁰

International arbitration can be very effective in resolving disagreements among different nations in order to achieve such a friendly relationship, and Islam has been so much insisting on resolving disputes via arbitration as it has done so in resolving its conflicts with nations that were even in conflict with Muslims. In jurisprudence, judging in the war is referred to as arbitration in the war which says that the parties involved, after mutually agreeing on a person as arbitrator, they commit to his mandate and act.¹⁵¹

Arbitration is one of the best methods to resolve disputes with the lands inside *dar al-harb*. For example, the dispute between Muslims and infidels of Mecca, who were considered to be *dar al-harb*, with regard to visit of Kaba, was resolved via arbitration.

From the said things, it can be understood that Islam possibly refrains from military conflicts with the other nations while most of the verses in Quran point out to this fact. It is said in the verse

¹⁴⁹ *Id.*

¹⁵⁰ KHOMEINI, SAHIFAH AL-NOOR, vol. 8, 114.

¹⁵¹ NAJAFI, MOHAMMAD HASSAN, JAWAHIR AL-KALAM, vol. 21, 111.

21 of Nisa that Muslims are asked to accept if the infidels propose your peace treaty not asking for war with you, then Muslims should mutually make peace with them. The thing to be contemplated here is that God says in this case that all the ways for them to oppress you will be blocked. Therefore, it is a principle in Quran to establish peaceful relationship with the other nations.

Referring to naming the countries of alignment as *dar al-ahd* in jurisprudence texts, and considering the principle of promise fulfillment in Islam as one of the highest principles in Islam, it is possible to ratify rules and regulations, so that they can be used to develop such international arbitration entities in order to resolve problems with such nations. As the article of joining Iran to 1985 Convention of New York was a step to this necessary need of the country in establishment of arbitration entity with the other countries.¹⁵²

So, regarding the countries of Dar al-Ahd, the permission for such agreement has been issued based on the verses of Quran and jurisprudence opinions. Such arbitration entities can be developed as far as in the form of this agreement it will be possible to reach decisions and rulings to show the deep respect of Islam for the rights of countries inside the *dar al-ahd*, as well as keeping the Muslims' interests. So the Muslims' interests can be advanced by means of such.¹⁵³ Furthermore, there are some verses in Quran that emphasize on the persistence in doing responsibilities arising from international agreements. For example;

*“Except for those with whom you made a treaty at al-Masjid al-Haram? So as long as they are upright toward you, be upright toward them....”*¹⁵⁴, and

¹⁵² MOEZZI, AMIR, THE DIVINE GUIDE IN EARLY SHI'ISM: THE SOURCES OF ESOTERICISM IN ISLAM, 52 (1994).

¹⁵³ Zia'i Bigdeli, supra note 144 at 11-18.

¹⁵⁴ *Al- Tawbah* Verse 7, available at: <https://quran.com/9>

“So complete for them their treaty until their term has ended. Indeed, Allah loves the righteous who fear Him.”¹⁵⁵

Also, among *ahadith* that emphasizes the generalization of the validity and legitimacy of international contracts we can mention the hadith of Prophet with regard to *Hilf al-Fudul* as follows;¹⁵⁶

“I, the Prophet of Islam, in the house of Abdullah-bin-Jayatan (one of the elders of Mecca), was witnessing a contract which is so honored to me that I will never refuse to exchange it with a lot of expensive camels. Whenever I am invited to this treaty, I will respond positive immediately.”¹⁵⁷

Provisions of this treaty, which have been known in the history as *Hilf al-Fudul*, was actually establishment of an inter-tribe entity, through which the tribes of Mecca committed to provide security and justice within the boundaries of Mecca for all those entering into it. There was a welcoming reaction on the part of Prophet of Islam to any type of contract that includes such subjects.¹⁵⁸

Also, In the era of the Ignorance, Arab tribes had made a series of bilateral or multilateral treaties named *Hilf al-Muziibin*, *Hilf al-Ahlaff*, *Hilf al-Fudul*, etc. in order to avoid the murder and plunder that used to threaten their lives permanently. The Prophet said about these inter-tribe contracts: “Islam emphasizes on adherence to whatever contracts remaining from the Ignorance Era”.¹⁵⁹

¹⁵⁵ *Al- Tawbah* Verse 4, available at: <https://quran.com/9>

¹⁵⁶ *Hilf al-Fudul* was a 7th-century alliance created by various Meccans, including the Islamic prophet Muhammad (PBUH), to establish fair commercial dealing. Because of Muhammad's role in its formation, the alliance plays a significant role in Islamic ethics. Because *fudul* commonly means "virtuous" the alliance is often translated as League of the Virtuous.

¹⁵⁷ NAJAFI, MOHAMMAD HASSAN, JAWAHER AL-KALAM, vol. 21, 110 (1981).

¹⁵⁸ Ibrahim, Mahmood, *Social and Economic Conditions in Pre-Islamic Mecca*, International Journal of Middle East Studies, 14(3), Cambridge University Press, 355 (1982).

¹⁵⁹ NAJAFI, supra note 153 at 111.

In the historical charter of Imam Ali addressed to Malik Ashtar, it has been stated: “Never deem petty the kindness you have committed to practice even if that kindness is not so much...Never leave a peace deal that your enemy asks you to make”.¹⁶⁰

In sum, we can say that contracts have been an indispensable part in the social life of human kind, there was not any need that anything be added to that by the Islam. Except in certain cases, Islam has confirmed different types of customary contracts existing among people and their conventions. Since the arbitration agreement has been an instance of International contracts, we can conclude that it has been accepted in Islam as well.

9 International Law Principles Governing the Enforcement of International Arbitration Awards in Islam

Since arbitration is either in the context of a contract or a term stipulated in a contract, the principles that govern the contracts would govern arbitration agreements as well. Thus, an arbitral award is binding in the same way as a contract. According to some schools of *fiqh*, even though the arbitral award maybe weaker in comparison to a judgment, this does not release the parties from following it. Among the principles governing contracts, the principle of promise fulfillment, the principle of fundamental change in circumstances, the principle of country stability, and the principle of good faith are the principles that have the most effect in international agreements, and following that, the enforcement of international arbitration awards.

9.1 Principle of Promise Fulfillment

Islamic scholars refer to the Quran verses as well as the Tradition of the Prophet (PBUH) and The Innocent Imams’ statements in order to deem Promise Fulfillment as one of the principles governing the relations of domestic and international treaties of Muslims. They say that the Holy Quran not only recognizes promise fulfillment in many verses as a mandatory decree for Muslims

¹⁶⁰ JAFAR SHAHIDI, NAHJ AL-BALAGHAH: FARSI EDITION, 442 (2010).

but also considers it a sacred tradition practiced by divine prophets. In addition, The Holy Prophet says “whoever does not respect his contracts and agreement, he is not a believer of God.”¹⁶¹

It should be noted that the cited statements, verses, and narrations of the promise fulfillment principle are so general that nobody has restricted them to domestic and private relations. On the other hand, some scholars have emphasized on the application of this principle in international relations. Accordingly, they say “the day when the Prophet seriously adhered Muslims to their commitments and said: “the God-believers stand by their promises”, he undoubtedly did not restrict his perspective to internal relations of Muslims. Fulfillment of promise as one of the outstanding human virtues not only has been approved by Islam, but also has been highly stressed as a basic condition of faith.¹⁶²

Profit Muhammad (PBUH) would fulfill his promises under all circumstances even when doing so caused him harm. Mention will be made of some examples demonstrating the importance he placed on this characteristic.

Abu 'Abdullah is quoted as saying, *"The Messenger of God (PBUH) made an arrangement with a man that they would meet next to a boulder and so he said, 'I will wait for you here until you come back.' Then the heat of the sun began to beat down where he was standing and his companions urged him, 'O Messenger of God, what would happen if you were to just move to the shade?' He said, 'I promised him (I would meet him) right here so if he doesn't come, he will be the one to have violated his oath.'"*¹⁶³

Also, it has been said that in the Age of Ignorance (the period before the dawn of Islam) a number of youth from the tribe of Quraysh contracted an agreement called “*hilf al-fudhul*” aimed

¹⁶¹ZIAEE BIGDELI, supra note 144 at 40-42.

¹⁶²*Id.*

¹⁶³ALLAMEH MAJLESI, BIHAR AL- ANWAR, vol. 75, p. 95.

at defending the rights of the oppressed. The Prophet was one of those who took part in this agreement. Not only did he fulfill his word prior to his prophetic mission but also afterwards, whenever reference was made to this agreement, he would say, "I'm not willing to violate my oath even if I were to be offered the most valuable possessions to do so."¹⁶⁴

Furthermore, 'Ammar Yasir has said, "I would graze our own sheep. Muhammad (PBUH) would also graze sheep. One day I said to him, 'I know of a good pasture located at 'Fajj'. Would you like to go there tomorrow?' He answered, 'Yes.' The next morning, I saw that Muhammad (PBUH) came sooner than I but he had not taken his sheep to the pasture. I asked, 'So why are you standing (here)?' He replied, 'I made a promise with you that we would take our sheep to the pasture together and I didn't want to violate my oath and take my sheep to the pasture before you.'"¹⁶⁵

Another example of Profit's fulfillment of his promises is this story; It was the month of Dhu'l-Qa'dah and the Prophet Profit Muhammad (PBUH) had decided to set out for Mecca in order to perform the lesser pilgrimage (*'umrah*). He invited all the Muslims to take part in this journey with him. Then The Profit (PBUH) headed for Mecca with a group of his followers. While on their journey, they were told, "(The tribe of) Quraysh (in Mecca) have learned of your journey and have prepared themselves for war, having set up at Dhi Tuwa, swearing not let you enter Mecca."

Since the Prophet had not set out with the intention of engaging in war, but had intended to perform *'umrah*, he started negotiations with them and they made a treaty that came to be known as the treaty of *Hudaybiyyah*. In this treaty, the Prophet (PBUH) agreed to a number of things, including: "Any individual from the Quraysh who runs away from Mecca without his guardian's permission and becomes Muslim and joins the Muslims, Muhammad (PBUH) must send him back

¹⁶⁴Ibrahim, Mahmood, supra note 154 at 355.

¹⁶⁵ALLAMEH MAJLESI, supra note 167, vol. 16, 224.

to the Quraysh. But if a Muslim runs away and goes to the Quraysh, they are not obliged to return the Muslim."

The Prophet made this pact with Suhayl, the representative of the Quraysh. However, Suhayl's son, Abu Jandal, who had become Muslim, and had been imprisoned by his father, ran away from Mecca and joined the Muslims. When Suhayl saw him he said, "O Muhammad, this is the first case where you can fulfill your promise. If you want us to have peace, you must return him to us." The Prophet accepted to do so. Suhayl took his son by the collar and headed towards Mecca.

Abu Jandal cried, "O Muslims, are you going to allow them to take me back to the idol worshippers and be in their clutches?" The Prophet said, "Be patient, Abu Jandal. God will provide relief for you and others like you. We have made an oath with them and we cannot violate our oath." ¹⁶⁶

One of the clearest examples of the Prophet keeping his word in social matters is the incident concerning Abu Basir. Abu Basir was one of the Muslims in the battle of Mecca who fled to Madinah after the Treaty of Hudaibiyyah. The elders of the Quraysh wrote a letter to The Prophet and gave it to a particular individual who, along with his slave, was to take it to Madinah in order to implement the law in regards to Abu Basir and bring him back to Madinah. When the Prophet received the letter, he requested Abu Basir to come and he said to him, "You know that we have made an oath with the Quraysh and it is not right for us to violate our oath. God will provide relief for you and others like you."

Abu Basir said, "O Messenger of God! Are you going to return me to the enemies who will cause me to forsake my religion?"

¹⁶⁶ABDUS- SALAM M. HARUN, SIRAH IBN HISHAM; BIOGRAPHY OF THE PROPHET, vol. 3, 215 (2000).

The Prophet said, "Go back, Abu Bas'ir. God will provide relief for you and others like you." And so Abu Basir headed back with the two that were sent to take him. When they arrived at Dhill Halifah, they stopped next to a wall. Abu Basir looked at the man and asked, "Is that sword of yours sharp?"

"Yes it is," the man replied.

"Can I see it?" asked Abu Basir.

"Yes, if you would like," replied the man.

Abu Basir took the sword and killed the man without hesitation. His slave, who saw this incident, ran to Madinah out of fear. The Prophet was sitting in a mosque when all of a sudden the slave entered. As soon as he saw him he said, "This man has seen a frightening scene." Then he asked, "What has happened?"

"Abu Basir killed that man," he replied.

At this point, Abu Basir arrived and said, "O Messenger of God, you were faithful to your oath in turning me over to these two men. But I feared my faith was in danger..."

The Prophet said, "If this man has supporters, this event will cause a great war." Abu Basir realized that if he stayed in Madinah the Makkans would send people after him once again. So he left Madinah and headed for the shores of the Red Sea. There, the Qurayshi caravans would pass by on their way to the province of Sham¹⁶⁷.

When the Muslims who were enslaved in Mecca heard the story of Abu Basir and what the Prophet had said to him, they escaped at all costs in order to join Abu Basir. After a while, his supporters numbered about 70 in all. At this point, they had become a serious threat to the caravans

¹⁶⁷Modern Lebanon, Palestine, Jordan and Syria.

of the Quraysh that passed by. They killed all members of the Quraysh that they could. And they would harass the Qurayshi caravans that passed that way.

In order to put an end to this harassment, the Quraysh wrote a letter to Muhammad (PBUH) urging him to request these men to come to Madinah and thereby relieve the Quraysh of this hardship. The Prophet summoned them and they came to Madinah.¹⁶⁸

Moreover, In the Tradition, we can point to statements of The Innocents. For instance, Imam Ali in his letter to Malik Ashtar says: "If you have a deal and treaty with your enemy while you have obliged yourself to leave him in safety, fulfill your promise. Do whatever you have committed yourself to do and stand with your promise. And, people have not been so much seriously allied in anything than enshrining and magnificently respecting promise fulfillment principle in spite of all the different opinions and inclinations they have. So, do not betray what you have promised, do not break the treaty you have signed, and do not deceive your enemy who is in the treaty with you because no one other than a desperate miserable ignorant person does revolt against God. Therefore, there is no betrayal, no deceit, and no tricking practice in treaties and promises."¹⁶⁹

In Quran, the principle of "promise fulfillment" has been emphasized in many verses, but not all of them have a religious decree. In certain verses, promise-keepers have been praised and/or promise-violators been denounced. For example, the verse 25 of *Ra'd* surah states: "But those who break the covenant of Allah after contracting it and sever that which Allah has ordered to be joined and spread corruption on earth - for them is the curse, and they will have the worst home".¹⁷⁰

Certain verses in Quran state that promise fulfillment is the attribute of righteous people. For instance, the verse 177 of *Bagharah* indicates: "Righteousness is not that you turn your faces

¹⁶⁸ *Id.*

¹⁶⁹ ZIAEE BIGDELI, *supra* note 144 at 45.

¹⁷⁰ *Al- Ra'd* verse 25 available at <https://quran.com/13>.

toward the east or the west (or making all your discussions about Kiblah and consume all your time to the subject of changing Kiblah), but true righteousness is in one who believes in Allah, the Last Day, the angels, the Book, and the prophets and gives wealth, in spite of love for it, to relatives, orphans, the needy, the traveler, those who ask for help, and for freeing slaves; and who establishes prayer and gives Zakat; those who fulfill their promise when they promise; and those who are patient in poverty and hardship and during battle. Those are the ones who have been true (their statements match their beliefs), and it is those who are the righteous”.¹⁷¹

With regard to the fact that whether this verse applies to both Muslims and non-Muslims or not, it must be said that this verse is general and there is no reason to allocate or restrict it to any specific community. Ayatollah Makarem Shirazi says: “failure to fulfill the covenant is of sins that removes confidence in society and weaken the basis of social relations. Fulfillment of promise is a human right besides being an Islamic right. It is said in the narratives of religion leaders that in social relations, there are three things in which people should not attend the religious aspects and/or good-doing or evil-doing attributes of the other party whether he is righteous or evil, whether he is Muslim or infidel. That three things include respect and benefaction for parents, promise fulfillment, and trusteeship.”¹⁷²

Certain verses explicitly put emphasis on promise fulfillment of which two of the following verses are noted:

The first verse of Ma’edah surah says “O you who have believed, fulfill all contracts. Lawful for you are the animals of grazing livestock (and their embryos) except for that which is recited

¹⁷¹ *Al- Bagharah* verse 177 available at <https://quran.com/2>.

¹⁷² ZIAEE BIGDELI, *supra* note 144 at 46.

(and will be excluded) to you in this Qur'an - hunting not being permitted while you are in the state of ihram. Indeed, Allah ordains what He intends".¹⁷³

The statement "fulfill all the contracts" in this verse is deemed indicative of legitimacy for indeterminate contracts by many jurists. Commentators comment on this verse as the following: the truth is that most Shia commentators have expressed the same prevailing opinion among jurists, while they believe that the contracts mentioned in this verse are general.

Allameh Tabatabaei says: "because the word of contract has been mentioned with definite article, it is certainly more appropriate and correct to extend the word of contract in the verse to whatever the title of the contract applies to it. Therefore, it becomes clear that the specific meaning that some commentators have considered for the word "contract" is not correct. Somebody has said that the word "contract" refers to agreements that exist among people such as sale contract, marriage contract, and/or a promise that a person gives to himself or herself like a swearing-off to do or not to do something. Some other one has said that the word "contract" refers to the treaties concluded among the people of Ignorance Era indicating that they must help one another when attacked and they should fight those who were going to oppress them. Some others believe that the word "contract" is meant to refer to treaties and promises taken from People of the Book so that they had to practice according to what was said in the Bible and Old Testament (Torah). These are the aspects mentioned regarding the word "contract" while there is no reason indicating that the word itself lexically means so".¹⁷⁴

Another verse about the principle of fulfilling obligations can be found in verse 72 of the *Anfal* surah. This verse expresses "Indeed, those who have believed and emigrated and fought with their wealth and lives in the cause of Allah and those who gave shelter and aided - they are allies of one

¹⁷³ *Al-Ma'edah* verse 1 available at <https://quran.com/5>.

¹⁷⁴ TABATABAEI YAZDI, SEYYED MOHAMMAD KAZEM, *AL-ORVAH AL-VOTHGHAA*, 583-590 (1973).

another. But those who believed and did not emigrate - for you there is no guardianship (friendship and obligation) of them until they emigrate. And if they seek help of you for the religion, then you must help, except against a people between yourselves and whom is a treaty (of no belligerence). And Allah is Seeing of what you do”.¹⁷⁵

As you can see, this verse does not directly refer to the principle of promise fulfillment; however, by referring to one of the instances of promise fulfillment, efficiently expresses the value of international obligations in Islam.

Despite the fact that the value of the promise fulfillment is very clear in this verse, Tabarsi says: “if non-immigrant believers ask you to help them in the path of religion and fight the unbelievers, you are obliged to help them unless you are requested for help in the fight against those with whom you have a treaty. Under such circumstance, you should not help them at all because this will be deemed as promise violation.”¹⁷⁶

However, the only verse that seems to violate the principle of promise fulfillment is the first verse of *Tobah* surah which states: “This is a declaration of disassociation, from Allah and His Messenger, to those with whom you had made a treaty among the polytheists”.¹⁷⁷

Although some commentators have argued that doubts have occurred by means of this verse descended so that treaties with unbelievers have been made ineffective. However, next verses of this surah especially verses 4 and 7 indicate that breaking the covenant is only permitted against those who have previously committed breach of promise and/or are definitively intended to violate the covenant.¹⁷⁸

¹⁷⁵ *Al- Anfal*, verse 72, available at <https://quran.com/8>.

¹⁷⁶ ABU ALI FADHL IBN HASAN TABRESI, MAJMA AL BAYAN, vol.10, 268.

¹⁷⁷ *Tobah* surah, verse 1 available at <https://quran.com/9>.

¹⁷⁸ TABARSI, supra note 180 vol. 11, 24.

Allameh Tabari says: “because God (in the previous verses) has ordered to breach the treaties with unbelievers, He states here in this verse that the reason for this command was the same action of breach on the part of them. However, He has ordered to remain treaty-devoted against those of the idolaters who were standing by their treaties”.¹⁷⁹

In conclusion, it is clear that Promise Fulfillment as one of the principles governing the relations of domestic and international treaties of Muslims has been supported by Quran verses as well as the Tradition of the Prophet (PBUH) and The Innocent Imams’ statements. Therefore, by referring to promise fulfillment principle, international arbitration and enforcement of its awards should be respected as well.

9.2 The Principle of Fundamental Change in Circumstances

Here, the principle of fundamental change in circumstances will be discussed to clarify whether the change in circumstances can be used as an excuse for going out of the contract, and not following its terms, and finally shows whether the losing party to the international arbitration is able to disobey the enforcement of arbitration award by saying that there has been a fundamental change in circumstances.

Those concerned with domestic law understand that the commitments are implemented according to the circumstances within which they were agreed upon "Omnis convention intellegitur rebus L'imprévision". Consequently, they talk about the lack of expectation or emergency "L'imprévision". This is what happens, too, in international law that considers this rule as one of its traditional rules; as the conditions for the application of a treaty, in international law, the circumstances in which that treaty was concluded is often taken into account. So, implementation is based on the continuation of such circumstances. Typically, using that change

¹⁷⁹ *Id.*

as a pretext will result in an exception to the rule that prevents individual renouncing to the commitments of the treaty.¹⁸⁰

As noted above, acceptance of this principle can seriously endanger validity of international treaties. Accordingly, the Vienna Convention on the Law of Treaties of 1969¹⁸¹ has restricted its application and in its Article 62 provides that: “The unexpected fundamental change in circumstances that prevailed at the time of the conclusion of the treaty may not be used as a reason to terminate or withdraw from a treaty unless the following conditions are available:

[A] If the existence of these circumstances formed an important base for the agreement of the parties to be bound by the treaty.

[B] If the change resulted in a radical change in the scope of the obligations which must be implemented in the future in accordance with the Treaty.”¹⁸¹

Muslim scholars have also come up with different opinions about its acceptability in Islam due to the lack of clarity in the scope of this principle in international law. Accordingly, Amid Zanjani has been said in his book that “if the changes of the situation and circumstances cannot be foreseen when concluding a contract, the contracting parties can unilaterally revoke international treaties... According to Abu Hanif, if the interests of Muslims require, the leader of Muslims can unilaterally void international contracts.”¹⁸²

In fact, when the treaty conditions contradict the universal goal of Islam, the international agreements even if made legitimately, are made void and ineffective by law of Islam. Therefore, any treaty that would impede Islamic ideology progress either at the time of treaty conclusion or

¹⁸⁰ Dr. Ayman Salama, *The Principle of Fundamental Change in Circumstances and its Impact on the Nile Basin Agreements*, African perspectives Studies & Articles, Volume 11 - Issue 39, 37 (2013).

¹⁸¹ Vienna Convention on the Law of Treaties of 1969, Article 62.

¹⁸² AMID ZANJANI, ABBASALI, MINORITIES' RIGHTS BASED ON OBLIGATION TREATY LAW, 303.

after that, would inevitably lose its legal value and would be considered as void and ineffective in the light of Islam's universal logic.

It should be noted that the statements of The Innocents are apparently contrary to the fundamental change in circumstances principle. For example, the statement of Imam Ali which tells Malek Ashtar: "Do not let any difficulty makes you break a covenant that has been entrusted to you while this is a covenant God has entrusted to you".¹⁸³

However, accurate look at the words of Imam indicates that the difficulty in this statement is not so strong that it can be used as the reason for termination of the contract. He continues: "do not let the hardship of a covenant causes you to overthrow the covenant. Your patience in a hard job in which you are hopeful for the goods is better than a deceit that you are scared of its atonement".¹⁸⁴ Therefore, this cannot be interpreted as the rejection of the fundamental change in circumstances principle.

However, it can be seen that most contemporary Muslim scholars have accepted the theory of the Fundamental Change in Circumstances. Of course, these scholars have mentioned various matters in as religious reasons for this principle, like "referring to change of circumstances as a manifestation for the rule of refusal of infidels' dominance over Muslims."¹⁸⁵

Some scholars also believe that the fundamental change in circumstances principle is equivalent to the rule of refusal of hardship and difficulty, and believe that in spite of contradictions (between the fundamental change in circumstances principle and the rule of refusal of hardship and difficulty), these two principle and rule have similarities with respect to their operational conditions, and purpose.¹⁸⁶

¹⁸³ Imam Ali's Letter to Malik Ashtar, available at <http://balaghah.net/old/nahj-htm/eng/id/imam-ali/9107/000.htm>

¹⁸⁴ *Id.*

¹⁸⁵ ZIAEI BIGDELI, *supra* note 144 at 55.

¹⁸⁶ Imam Ali's Letter to Malik Ashtar, available at <http://balaghah.net/old/nahj-htm/eng/id/imam-ali/9107/000.htm>

The reason for above mentioned is because first of all, the fields of reference to both of them are implementation of provisions mentioned in a binding contract. A contract that is not impossible to enforce, however, it will have unbearable difficulties for the committed party, is unjust and justice does not accept insisting of such contract execution. So, as per case, one can resort to fundamental change in circumstances principle or the rule of refusal of difficulties and hardships to avoid injustice. Secondly, both theories give the right to the suffering party to modify or terminate the contract, so that he can get rid of its unjust and unbearable circumstances.

Finally, it should be noted that although jurists, in various jurisprudential issues, have considered it acceptable to change the verdict for different subjects including necessity of promise fulfillment principle, due to the emphasis on the principle of promise fulfillment, it is required for jurists to look more closely at this issue, so that the cases of international treaties invalidity led by fundamental change in circumstances principle can be distinguished in Islam.

9.3 The Principle of Country Stability

Change of rulers in an Islamic society by no means affects the previous treaties of that society. As a result, where an Islamic state joins a treaty regarding the enforcement of international arbitration awards like New York Convention, change of rulers in that Islamic state will not make any changes to the obligation of that state to follow the terms of that treaty, unless it was against the values of that Islamic state, and sharia.

Although Muslim scholars have independently discussed less of this principle, their views suggest acceptance of this principle. According to the Muslim scholars, change of the leaders and political men in an Islamic state is not considered to be a change of circumstances so that it cannot be deemed as a reason for announcing unilateral termination of the contracts.”¹⁸⁷

¹⁸⁷ Ziaei Bigdeli, supra note 144 at 54.

Sahib Jawaher believes that when an Imam concludes a contract of no belligerence and then dies, it will be necessary for the next Imam to act in accordance with the contract until up to end of the term. Sahib considers this issue to be uncontested because the Innocent Imam acts according to what is good. Therefore, his successor must adhere to his actions. There would be the same sentence for what comes through specific successor but also general successor while this would apply to oppressing ruler.¹⁸⁸

Also, there is no debate that concluding a contract of no belligerence is one of the duties of Imam, but it seems that Imam's successor during the time of Absence is also permitted for this purpose because of his governorship general nature. It is not unlikely that the oppressing ruler, who would have introduced himself in the position of Imam, can be allowed to do so. According to Imam Reza and as the tradition of public and scholars, it is considered as lawful and *halal* in each region to receive a tax based on a contact with an oppressing ruler.¹⁸⁹

Form the others' perspective, "the contract of obligation is from Imam, and it can be from his successor at the time of Absence in case that he has absolute authority. Under such circumstances, if an oppressor makes a contract, we need to apply its effects and receive the taxes so that he will not be deemed as war enemy."¹⁹⁰

According to the above mentioned, it can be concluded that change of rulers in an Islamic society by no means affects the previous treaties of that society. however, the fact is that such inference is not obtained from the jurisprudents' statements. For example, Shia jurisprudents do not see any validity for the treaties that do not meet the conditions determined by the religion. Therefore, if the previous government enters into treaties that do not have such necessary

¹⁸⁸AL-NAJAFI, SHEIK MOHAMMAD HASAN, JAVAHER AL-KALAM FI SHARHE AL-ISLAM, vol. 21, 213 (1983).

¹⁸⁹ *Id.* at 212- 213.

¹⁹⁰ IMAM KHOMEINI, *supra* note 146, vol. 4, 255.

conditions, the next ruler may, and even is obliged to violate it. One of the great contemporary jurists believes that “if political relations of Islamic states with foreigners is going to lead to their dominance over Muslims’ territories, their populations, and their property or cause political captivity to Muslims, heads of state are prohibited from maintaining such relationships, and their treaties are in vain.”¹⁹¹

Basically, most of Shia jurists do not consider any validity for an international treaty which contradicts the religion, so if the Islamic government concludes a treaty that contains a religious-contradicting issue, then the next ruler is not obliged to adhere to it, but it is necessary for him to deem that treaty as ineffective. Therefore, Shia jurists believe that only treaties that have been concluded within the framework of religious laws can be placed in the scope of country stability principle.

9.4 Principle of good faith

This principle can also be used as a reason for enforceability of international arbitration awards. Muslim scholars have raised less of an independent discussion under the title good faith principle. There are certain scholars who have briefly addressed this subject. One of the scholars says: “conclusion of an international agreement is basically a sign of parties’ willingness to get close to each other and to cooperate with one another, and it will have its true effect once the parties have absolutely good intentions and interest in establishing such connection.”¹⁹²

He further recalls Imam Ali's statement and validates absence of deceit in contracts, which is a manifestation of good faith principle in Islam. He believes that this is confirmed by jurists. In fact, absence of deceit in international treaties is an instance of good faith principle. For instance,

¹⁹¹ *Id.* vol. 2, 329.

¹⁹² NAJAFI *supra* note 192, 78-81.

Sahib Jawaher believes that deceit is permitted in war; however, he does not know it as allowed in Safety contract, which is an international treaty, and he attributes this to some of Shia elders.¹⁹³

Some statements by The Innocents indicate application of good faith principle in contracts. For example, Imam Ali writes in his letter to Malik Ashtar: “there could be no betrayal and deceit in a contract, and do not conclude a contract that could be interpreted otherwise. And when your contract is standing and your promise is established, do not try to find a misinterpretation to terminate it”.¹⁹⁴

As a result, when the parties agree to resolve their dispute by arbitration, they wanted to execute the awards in good faith, and to try to go out of it is betrayal and against what they meant in the beginning and is against the principle of good faith.

10 International Arbitration in Islamic Law

From the Islamic law perspective, international arbitration is that type of arbitration to address all the disputes between a Muslim or an Islamic state with a non-Muslim, or non-Islamic state. According to Islamic jurisprudence, once the Islamic state recognizes other Non-Islamic states, they can naturally have a cultural, economic, political, and even military relationships. In these circumstances, any kind of dispute which can be assigned to international arbitration is valid, unless the dispute in question is of an ideological nature, which falls outside the scope of international arbitration because Islamic law does not accept assignment of ideological disputes to international arbitration.¹⁹⁵

The principles of international law in Islam are to accept asylum, protect foreigners, resolve international disputes peacefully, respect contractual relations, fulfill the promises, and practice

¹⁹³ NAJAFI, supra note 192 at 78-81.

¹⁹⁴ Imam Ali's Letter to Malik Ashtar, supra note 190.

¹⁹⁵ Joneidi, Laya, *International Arbitration Law from Islamic Law Perspective*, *Matin Journal*, No. 10, 137 (2000).

responsibilities within the contracts. From Quran's point of view, pillars of such principles are to respect the obligations in treaties, observe trusteeship in all obligations, hold commitment to fair international justice and order, have respect for the rights of neutral parties in wars and international conflicts, maintain peace and friendship via accepting peaceful treaties, avoid expansionist and aggressive measures, fight against perpetrators of arrogance while assisting the nations that are fighting the arrogance, maintain friendly and peaceful behavior with all non-hostile governments, keep mutual and equitable behavior against all governments that respect trusteeship and justice in their relations, and to confront all aggressors and not going beyond the limits.¹⁹⁶

The Holy Quran invites all believers to peace, reconciliation, and submission to God's command. Therefore, all human beings can live together peacefully with any religion and can resolve their probable disputes in accordance with international or domestic laws using arbitrators, who are knowledgeable, impartial, and competent.¹⁹⁷

In order to avoid continuation of disagreements, further darkening of international relations, and outbreak of wars, Islam holds open peace and reconciliation methods as well as peaceful dispute resolutions methods. The best way to resolve disputes, whether at domestic or international level, is arbitration. Arbitration in Islam is the only legal way to peacefully resolve international disputes. Of course, arbitration had been an old tradition among the primitive Arabs before Prophet Mohammad started his prophetic mission, while Islam has also accepted it as mutually confirmed arbitration. The Prophet has also strengthened it as a good tradition, and he has repeatedly acted as the arbitrator of disputes.¹⁹⁸

¹⁹⁶AMID ZANJANI, ABBASALI, PRINCIPLES OF POLITICAL THOUGHTS IN ISLAM, 261 & 286 (2005).

¹⁹⁷Bahremand, Mehdi, Mahdavi, Seyed Hadi, *Arbitration in Islamic Jurisprudence and Law and its Application to International Law*, International Conference on Humanities, Psychology and Social Sciences, Tehran, IRIB Conference Hall (2015).

¹⁹⁸Mehdizadeh, Akbar, *Islamic Concepts and Principles of Foreign Politics Jurisprudence*, Research-Scientific Seasonal Magazine of Jurisprudence and Islamic Law Principles, 3rd Year, No. 8 & 9, 124-163, and 141 (2011).

Sahib Jawaher says that there is no problem with arbitration's legitimacy. The arbitrator's verdict must be obeyed unless it is against the Islamic law and/or the interests of Muslims. The only problem in the Islamic system of arbitration for peaceful settlement of international disputes is that the arbitrator or arbitration judge should be Muslim and just, although many jurists do not consider it necessary for him to be a jurist. They believe that a non-Muslim person cannot rule over the Muslims according to the very statements of Quran, where it said "and never will Allah give the disbelievers over the believers a way to overcome them"(Nisa:141).¹⁹⁹

However, regarding a non-Muslim's arbitration over a Muslim, Sunni jurists are on the belief that arbitration by non-Muslim arbitrator can be permitted due to necessity. Accordingly, they believe that non-Muslim arbitrators' participation in the arbitration commission is permitted. Based on this theory, the Islamic State can obey the verdicts issued by international arbitration entity constituted of a number of non-Muslim arbitrators.²⁰⁰

Accordingly, International arbitration is accepted in Islam and it is enforceable. However, in order to reach such agreement in arbitration at international level with all the world's nations, the Islamic public policy as well as the common principles of Islamic jurisprudence should be taken into consideration, so that rules and regulations should be established within the framework of the said fundamental principles to be enforced.

11 Public Policy

The public policy in Islam is one of the influential aspects of mutual agreement in international arbitration, which can be a limiting factor in the referral of disputes to arbitration.²⁰¹ jurists have

¹⁹⁹ WAHAB AL-ZAHIRI, *ATHAR AL-HARAB FI AL-FEQH AL-ISLAMI DERASAH VA MOGHRENAH AL-MAKTABAH AL-HADITHAH*, vol. 6, 764 (1969).

²⁰⁰ AMID ZANJANI, *ABBASGHOLI, POLITICAL JURISPRUDENCE*, vol. 3, 508 (2000).

²⁰¹ SALJUGHI, *MAHMOUD, PRIVATE INTERNATIONAL LAW*, 138.

referred to the concept of public policy and effects of opposition to it in social life and have prohibited the execution of cases contrary to public policy.²⁰²

There have been rules defined by God for human to reach excellence. These rules have been the basis of public policy in Islamic community.²⁰³ legal Islamic regime has emphasized that in Islam, preventing corruption which blocks excellence of human values, and Prevention of issues which paves the way for oppression of foreigners against Muslims are two fundamental basis for public policy.²⁰⁴

In the Islamic state, the principles of public policy should be addressed in the religious educations since the real lawmaker in such system is the Holy God whose principles should be the basis of laws established. Regarding the first principle, many verses in Quran can be pointed out which confirm this principle including the following verse which explicitly prohibits corruption among Muslims and deems it a mean of God's torture: "Indeed, those who like that immorality should be spread or publicized among those who have believed will have a painful punishment in this world and the Hereafter. And Allah knows and you do not know".²⁰⁵

Regarding the public policy in Quran, it can be said that there are principles tied with legal foundations of Islam that cannot be avoided, and arbitration agreement cannot be concluded against them. Importance of this subject in arbitration is that public policy is a limiting factor of arbitration process, and the arbitrator cannot legitimate the acts opposing the public policy.

²⁰² ARFANIA, BEHSHID, PRIVATE INTERNATIONAL LAW, vol. 2, P. 94 (1993).

²⁰³ *Id.*

²⁰⁴ ALMASI, NEJAD, PRIVATE INTERNATIONAL LAW, P. 131 (2011).

²⁰⁵ *Al- Noor*, verse 19 available at <https://quran.com/24>

Another thing to be observed by the parties in international Islamic arbitration is that infidels are not to oppress the Muslims. The verses of Quran say that there should be no way for the infidels to overcome the Muslims. And this rule of Quran should be observed under all circumstances.²⁰⁶

On the other hand, we are observing in this world that in many cases of dispute between Muslims and non-Muslims, they go to a court which is majorly formed by non-Muslims. There are even rules enforced in those courts that are not based on the Islamic rules.²⁰⁷ There have been even certain cases of such arbitration during the initial years of Islam. In one of those cases, The Prophet accepted arbitration to resolve the dispute occurred between the Muslims and infidels who did not believe in Islam. It is interesting that Mohammad (PBUH), made decision based on the principles mutually agreed by both parties, even ignoring some Islamic rules in favor of new ruling system of Islam.²⁰⁸ Therefore, based on such conditions, it can be understood that in some cases we can go to arbitrations by non-Muslims in international cases, and will not be against public policy.

12 Conclusion

Islamic scholars have different opinions concerning authority of the arbitration. For example, Imam Fakhr Razi and Imam Abu-Hamed Ghazali have denied its legitimacy and believe that such arbitration awards are not in accordance with the creditable evidences.²⁰⁹ However, Sunni jurists have usually confirmed creditability and legitimacy of arbitration awards, and Shia scholars have stressed on its legitimacy too. Although, certain Islamic scholars believe legitimacy of arbitration and its award depends on certain conditions.²¹⁰

²⁰⁶ BOJNOURDI, HASSAN, AL-QAVAEID AL- FIGHIYA [the rules of Islamic jurisprudence], vol. 1, 187.

²⁰⁷ SAFAEE, SEYED MOHAMMAD, INTERNATIONAL LAW AND INTERNATIONAL ARBITRATIONS, 223-263.

²⁰⁸ NAJAFI, supra note 192 at 113.

²⁰⁹ MOHAMMADI GUILANI, JUSTICE AND JUDGMENT IN ISLAM, 62 (1983).

²¹⁰ IRAQI, ZIA-AL-DIN, SHARH-E TABSAREH AL-MOTEALEMIN; KETAB AL-GHAZA, 21.

Apart from the fact that there are disagreements among the jurists concerning certain issues related to arbitration, especially the scope of arbitration, and also permission for arbitration in non-financial disputes, this is for sure that arbitration itself is permitted from a jurisprudence viewpoint, and the disputing parties can refer to arbitrator for resolution of their disputes.²¹¹

²¹¹ *Id.*

Chapter VI. Conclusion

This dissertation starts by preference to the reoccurrence West denial of recognition of Islamic legal system, alas argued the culture without comprehensive understanding and function of religion, and how it has adversely affected both the process of arbitration and the views of the parties to the arbitration.

Accordingly, I specify in this dissertation the necessity to explore the impact and significance of the Iranian culture and religion of Islam in the international arbitration award. To be clear this strong influence of culture and Islam around the process of arbitration does not affect it negatively. In contrast, both Iranian culture and religion encourage the use of arbitration as a method to resolve disputes in the international arena.

Culture and religion in international relationships define many actions and concerns arising in society. In order to demonstrate my notion, I have deeply looked into the culture and religion in Iran.

On account of studying the historic Iranian texts and documents, it is apparent and perceptible to grasp the deep roots of customs, tradition, and religion. The book of ‘history of ancient Iran’ by Hassan Pirnia, clearly states that religious believes per se, does not only have a definitive role but may be the source and basis of judgment and legal rules of the perspective territories.¹

Religion has a fundamental contribution in shaping one’s society’s culture. As a result, it rules as an effective factor for substantial developments in human mental growth and evolution. As religion plays a powerful role in human civilization and culture, culture helps society to get benefit from its physical and spiritual activities based on logic and good feelings.

¹ HASSAN PIRNIA, HISTORY OF ANCIENT IRAN 1487 (1362).

Prior to deep understanding the effect of culture, one should not forget that the culture and law affect each other in mutual, reciprocal actions and obligations. Culture influences law, and law influences culture. Cultural priorities have an effect on the legal system of a country, and laws help shape and change cultural priorities. For furthermore understanding of the culture with regard to arbitration in Iran, we looked deeper into the history, and the way arbitration and judicial system were dealt with in various empires during different times.

Interestingly, arbitration in Iran's historic era, persisted quite stable regardless of time or the ruling systems, interpreting that its value and expression was not unique to a period or the governing empire. Author Morteza Ehtesham in his book 'Iran of Achaemenids' exert a hypothesis that the reason of this similarity in spite of different empires as in Achaemenids, and Sassanids could be found in deeper disciplines, like formation and uniqueness of Iranian community, establishment of organization, basis of family lives in one hand and religious rules and idiosyncrasy in the other; basically suggesting culture and religious believes as the cornerstone for arbitration.²

Exploring the legal system of multitudinous eras in Iran suggests that Iranian people by cultural drive tended to resolve disagreement and issues via religious principals, in which were consistently acting as a judicial system analogous and parallel to the legal system imposed by the current government of the time.

Current Iranian legal system is deeply influenced by Islamic law (Sharia). When dealing with any part of Islamic Law, we should consider the fact that Islamic Law is not equivalent to each Islamic state individually, since the rules of Islamic law have been adjusted and mixed with the

² MORTEZA, EHTESHAM, IRAN OF THE ACHAEMENIDS, 89 (1976).

national legislation of modern Islamic states,³ it has also been surrounded by a majority of norms stemming from other sources. By developing the Islamic states, they have adapted to many legal concepts of essentially European making. This is also generally true for the area of International Law.⁴

It is important to note that the areas governed by strict, detailed and clear rules in Islam are relatively limited; these disciplines are mainly associated with religious practices such as praying and fasting, whereas, in corresponding areas, the Islamic laws are formulated to be more relevant and applicable within today's matter, in contrast of being purely strict and religious construct. Islamic Law incorporates a large number of very detailed legal rules on all sorts of topics; it also consists of certain general legal principles with regard to content as well as methodology. Nonetheless, much of the mechanisms and effects of Islamic Law is at work below the surface of the written norms, where it remains hidden from the eyes of ordinary people, and would be derived by jurisprudence.

An additional characteristic contemplating Islamic law is the lack of clear-cut notion of "Islam" per se. This characteristic has been associated by scores of Islamic traditions. These traditions led to some distinctions, and substantially there is no distinct Islamic law. Astonishingly, there are numerous legal-religious schools, which give instructions, and teachings that contradict each other. Aside all varieties, the foremost and dominant Islamic division is between the Sunni and the Shia schools of thought.⁵ It is worth mentioning that Beyond that, especially within Sunni Islam, there are some sub-schools among those schools. The most

³ J. M. OTTO (ED.), *SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT*, 627 (2010).

⁴ S. Mahmoudi, *Islamic Approach to International Law*, in: R. Wolfrum (ed.), *MPEPIL*, online edition, available at <<http://www.mpepil.com>>; M. Khadduri, *Islam and the Modern Law of Nations*, *AJIL* 50, 358 et seq. (1956); W. M. Al-Zuhayli, *Islam and International Law*, *Int'l Rev. of the Red Cross* 858, 269 et seq. (2005).

⁵ T. ANSARY, *A HISTORY OF THE WORLD THROUGH ISLAMIC EYES*, 53 et seq. (2009).

important ones are the Hanafi, Maleki, Shafei and Hanbali schools which were named after their founders in the 8th and 9th century.⁶

The doctrines of the different school of Islam produced a vast amount of differing opinions ranging from extreme conservative opinions to the most liberal ones. In these circumstances, it is often challenging for non-Muslim observers to properly perceive the majority of views on specific rules or concepts of Islamic Law, especially since these views can be varying to a significant distinction in each region.

Succeeding to that varying of disciplines in different regions, another important trait in Islamic law is that it has its roots in divine sources, namely in the Quran and in the body of traditions of the Prophet, the Sunna, and Hadith. The major schools of Islamic jurisprudence (Shafei, Maleki, Hanafi, and Hanbali) represent various regional approaches to solve legal questions. However, all Islamic scholars accept that the Quran and the Sunna are the ruling sources of sharia and thus, whatever is stated within must be followed by Muslims.

Yet are other sources to derive Islamic rules out from the above-mentioned sources such as *Ijma*, *Qiyas*, and *Ijtihad*. Between the schools of Islamic law, the field of arbitration is one of the richest fields of differing opinions, this field is mainly governed by general principles interpreted and explained by these three secondary sources of Islamic law.

Providentially and to a large extent, Quran, Sunna and Hadiths have supported arbitration; it's been approved by Quran and referred to in numerous verses as an acceptable mechanism to dispute resolution.⁷ Prophet Mohammad (PBUH), similarly strived to develop a climate where

⁶ A. A. B. Philips, *The Evolution of Fiqh (Islamic Law and the Madhhabs)*, 70 et seq. (1990).

⁷ I. MATTSON, *THE STORY OF THE QUR'AN: ITS HISTORY AND PLACE IN MUSLIM LIFE*, 2010, for background on the Qur'an and its relevance past and present; A. JAFFER/M. JAFFER, *AN INTRODUCTION TO QUR'ANIC SCIENCES*, 2009, provides useful insights into the study of the Qur'an, its structure and the interpretation of its verses.

the Islamic nation resolves their disputes peacefully, without resorting to violence.⁸ . In fact, it was Sunna with the continuous and homogenous support of public opinion insisted on the procedure of negotiation and arbitration.⁹ The implementation of arbitration subsequently influenced the development of Sunna.¹⁰

By the virtue of the Quran and the Sunna confirmed the validity of arbitration, the four school of Sharia take charge of illustration of the characteristics of the execution. Accordingly, the four schools of Sharia explained the process of arbitration and obliged each Muslim within each school to follow it. Closely connected and relevantly, all Hanafi, Shafei, Maleki and Hanbali Schools confirmed the legitimacy of arbitration.¹¹

However, there were controversies, for instance the Hanafi scholars' emphasis was the contractual nature of arbitration, expressing arbitration a binding like any other contract. Another disagreement was the capacity of the authority of the arbitrator, some scholars argued that an arbitrator has the same duties as a judge but others considered the arbitrator to be closer to an agent or conciliator.¹²

According to Shafei, an arbitrator is inferior to a judge as the parties could remove the arbitrator at any time before an award is rendered.¹³ Comparatively, The scholars of Hanbali hold that the decision of the arbitrator has the same binding nature as a court judgment, therefore; an arbitrator must have the same qualification as a judge and must be chosen by the parties.¹⁴ Unlike the other three schools, Maleki school stresses that an arbitrator cannot be revoked after

⁸ J.A. Bellamy, *The Makarim al-Akhlaq by Ibn Abi-Dunya*, LIII Muslim World 100, 114 (1963).

⁹ R. B. CUNNINGHAM & Y. K. SARAYRAH, WASTA, THE HIDDEN FORCES IN MIDDLE EASTERN SOCIETY, 12 (1993).

¹⁰ The Sunna is the term used to refer to the normative behavior, decisions, actions, and tacit approvals and disapprovals of the Prophet. The Sunna was heard, witnessed, memorized, recorded, and transmitted from generation to generation (as the Arabs had a great oral tradition). See N.J., A History of Islamic Law, 14 (1964).

¹¹ I. FARUQI AND L. FARUQI, THE CULTURAL ATLAS OF ISLAM, 114 (1986).

¹² *Id.*

¹³ AL MAWARDI, KITAB AADAB AL-DUNYA W'AL-DIN, 385.

¹⁴ R. B. Cunningham supra note 9 at 20

the commencement of arbitration proceedings. An arbitration award is binding on the parties except if a judge declares it to be obviously unjust.¹⁵

As stated the legitimacy of arbitration has been accepted in Islam, yet, it is necessary to look into Islamic views in the international arena in order to comprehend the extent of its take in international arbitration.

International arbitration had been accepted as an important subject in the Islamic states, where the Islamic rules paved the way for the emergence of international law. There are numerous verses in the Quran that reference to the international relations of Muslims and non-Muslims and how these relations contemplates during peace versus war.

Additional investigation of international arbitration in the long history of the Islamic world exhibits plenty of examples for this subject. A significant instant is the Treaty of Medina of 622 A.D. (a security pact among the city's Muslims, non-Muslim's Arabs, and Jews), in the conflict between Mohammad (PBUH) and the tribe of Banu Quraza, in the arbitration between Muawiyah (the governor of Syria) and the caliph Ali (the Prophet's son- in- law) in 659 A.D to determine the succession to the Caliph, arbitration has been used to resolve the disputes.¹⁶

International arbitration by nature is the product of contracts; therefore the principles that govern the contracts would govern arbitration agreements as well.¹⁷ Among the principles governing contracts, the principle of promise fulfillment, the principle of fundamental change in circumstances, the principle of country stability, and the principle of good faith are the principles that have the most influence and support the enforceability of international arbitration awards. An example is that according to Sharia all contractual obligations, including arbitral awards must

¹⁵ *Id.* at 19.

¹⁶ THOMAS W. LIPMAN, UNDERSTANDING ISLAM: AN INTRODUCTION TO THE MUSLIM WORLD 121 (1982). SEE ALSO PHILIP K. HITTI, HISTORY OF THE ARABS FROM THE EARLIEST TIMES TO THE PRESENT 181-182 (10TH ED. 1970).

¹⁷ THOMAS E. CARBONNEAU, ARBITRATION IN A NUTSHELL 254 (2007).

be specifically performed unless they are against Sharia.¹⁸

Certainly, international arbitration can be very potent in resolving dispute and disagreements among different nations in order to achieve an appropriate collaboration. Providentially, Islam has been insisting on resolving disputes via arbitration to such extent that could continuously resolve its conflicts with other nations, even with a nation that in no scheme were in harmony with Muslims. There is no doubt that there are disagreements among the jurists concerning certain issues related to arbitration, especially the scope of arbitration, and also permission for arbitration in non-financial disputes, otherwise, the international arbitration is permitted and its awards are enforceable commonly and extensively.¹⁹

Now, it is undemanding to comprehend the legitimacy of arbitration in Islam and actuality of arbitration in the Iranians culture via historic rules and events. We have also discussed the influence of religion in shaping the culture and also how culture maneuvers around religion. All together it leaves no doubt that culture and religion has a strong influence in enforcement of international arbitration awards. International arbitration can be used in order to have a more organized and trustworthy regime, to attend with this important field, to utilize it for a more transparent regulation.

Arbitration has been utilized in Iran as an adequate and reasonable method in the legal system; hence it is quite evident in the current legal system. Iran ratified the Law on International Commercial Arbitration (LICA) on 17 September 1997; this law has been drafted based on the UNCITRAL Model Law. Before ratification of this law, the arbitration disputes were subject to section eight of the old Civil Procedure Code of Iran dated 1960. Further to the revision of the Civil Procedure Code, the new version of this law was ratified on 11 December 2000.

¹⁸ S. H. Amin, Commercial Law of Iran (1986).

¹⁹ *Id.*

Furthermore, a huge step for recognition and enforcement of the international arbitration awards was taken in Iran by joining the New York Convention on Enforcement and Recognition of Foreign Awards dated 1958 on 10 April 2001.

Prior joining the New York Convention, there was a controversy between some Iranian Courts and Judges. Some treated the foreign awards as domestic and some as foreign awards by which, their enforcement were subject to the rules of Civil Procedure Code. However, after the ratification of the New York Convention, a more unified and homogenized procedure has been taken with respect to the enforcement of foreign awards.²⁰

Although the enforcement of the foreign arbitral awards subject to New York Convention is quite recent in Iran, efforts have been made so that the courts do not enter into merits of the case and just consider the issued award from a procedural perspective. This can be seen in the few cases that have been decided before the courts of Iran.

Also, it is required for the courts to consider the recognition of awards as a decision as opposed to judgment. The rational for this requirement is that judgments issued by the court of the first instance are appealable under laws of Iran, while the decisions are firm. This procedure aids to appoint recognition of foreign awards final after judicial scanning by the court, however, there is this risk for the lack of guaranty for its persistence, since the judge can revoke his decision later.

Although there are not many branches in the judiciary of Iran, familiar with similar types of order, it is recognized that the major elements that are required to be looked over for recognition of award should include the facts that the dispute has to come out of a commercial matter, no evidence should have been submitted on non- enforceability of the award, and finally, the subject matter under the laws of Iran are arbitrarily and conformity of the award to public policy.

²⁰ LAYA JONEIDI, ENFORCEMENT OF FOREIGN COMMERCIAL ARBITRATION AWARDS, 345 (2013)

After all, it is conclusive that the culture and Islam have positively accepted and influenced arbitration. They repeatedly encouraged its utilization as a method of dispute resolution and have emphasized on the enforceability of such awards. Thus now, it is the responsibility of the Iranian legislator to limit the scope of rejection of the awards, and make that scope more transparent, and reduce its ambiguity as much as possible, as for the businessmen can expect the result of enforcing such awards in Iran even before going into arbitration.

Furthermore, it is the responsibility of the judges to make themselves familiar with this subject and appoint their decisions accordingly; this would guarantee a uniform procedure and consistent result in recognition and enforcement of such awards. As for the public policy, it is expected to witness a balance between protecting the public order, which preserves the values of the community, and the principles of arbitration, which support investors from around the globe to invest in the country, and this assurance is a gate to international investments and economic development in the region. The last but not least, it is essential for Iran to inform the legal community of the advantages of utilization of arbitration, also to promote the culture of referring to the arbitration and its importance to embark on.

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