The Public Policy Exception to The New York Convention: The Gulf Cooperation Council (GCC) Perspective

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Declaration

I confirm that this is my own work and the use of all material from other sources has been properly and fully acknowledged.

Ahmed Aldhafeeri

Acknowledgements

I dedicate this work to my father, Fahed Alhusseni, a great man who is no longer with us but continues to guide me with every step I take. He gave me everything a father could—love, wisdom, and unwavering support. For this, I am forever grateful.

My sincerest thanks go to my mother Aziza Alhusseni, family and friends, who have been my constant source of strength and motivation throughout this challenging yet rewarding experience. Their willingness to offer a listening ear during times of doubt were truly instrumental in my success. Thank you all for your invaluable support. This achievement is a testament to your collective belief in me

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Abstract

Despite the crucial role of public policy in the recognition and enforcement of arbitral awards, the New York Convention 1958 lacks any explicit elucidation of this exception. This absence of clarification has sparked concerns that public policy may be subject to misuse or misapplied in some states, including the Gulf Cooperation Council (GCC) States. Some practitioners attribute the misapplication of public policy in these States to the impact of Sharia, which is often utilised as a synonym for public policy. Hence, they suggest that these States should minimise the role of Sharia.

The literature on public policy in the GCC States is limited. To build a thorough understanding of public policy within these states and to evaluate their practices, a doctrinal methodology was primarily employed for the critical analysis of both primary and secondary sources. Uniquely, and contrary to other studies that treat GCC States as a monolithic bloc, this thesis argues that the application of the public policy exception varies across the GCC States. It argues further that GCC States do not follow a specific method in applying and interpreting public policy. While practices in Saudi Arabia, Qatar, and the UAE demonstrate broad application and interpretation of public policy, their counterparts—Kuwait, Oman, and Bahrain—show a more favourable approach towards the enforcement of foreign arbitral awards and the application of public policy. The misapplication of public policy is attributable to two primary factors: first, inadequate legislation regulating arbitration, including the role of Sharia in this process; and second, the lack of familiarity among courts and arbitration bodies with the application of public policy.

The thesis finds that Sharia and public policy are not synonymous; however, Sharia constitutes a part of the GCC States' public policy. Additionally, it concludes that Sharia does not inherently hinder the recognition and enforcement of foreign arbitral awards. Nevertheless, the unclear way GCC States adopt Sharia contributes to the misapplication and misinterpretation of public policy. Foreign arbitral awards that breach Sharia may still be enforceable in the GCC States, provided they do not contravene the primary sources of Sharia, namely the Quran and Sunnah. The thesis suggests codifying Sharia or adopting a specific school of jurisprudence as ways of ameliorating the problem. It also urges the legislatures in the GCC States to adopt a unified arbitration law that distinguishes and categorises public policy into, for example, domestic and international public policy.

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Chapter 1 Introduction

1.1 Overview

This chapter introduces the thesis by presenting the research questions and outlining the adopted methodology. It also sets forth the structure of the thesis. Additionally, this chapter offers a brief background on arbitration in the Gulf Cooperation Council (GCC) States and the impact of Sharia on their legal systems. This context is essential for understanding the complexity of the legal systems in the GCC States, where Sharia serves as a primary source of legislation. Furthermore, this chapter clarifies the significance of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the justification for examining the GCC States. The aim of this chapter is to introduce the thesis and provide the reader with a comprehensive understanding of the issues the thesis seeks to address.

1.2 Overview of the New York Convention

The New York Convention of 1958, formally known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is considered a landmark achievement in the development of international commercial arbitration.[1] It facilitates the implementation and recognition of foreign arbitral awards among its signatory states by setting out a clear and straightforward procedure for the implementation of foreign arbitral awards. By supporting dispute resolution in the context of international business, the New York Convention 1958 promotes the continued development of international trade.[2]

The New York Convention deals with the 'recognition' and the 'enforcement' of foreign arbitral awards. Although the terms of recognition and enforcement are demonstrably intertwined, they are distinct.[3] Recognition refers to the acknowledgment by a court in one jurisdiction of an arbitral award issued in another jurisdiction. This means the acknowledgement of the validity and legality of the arbitral award.[4] Recognition involves

[1] Wei Shen, 'Beyond the New York Convention' (PhD thesis, London School of Economics and Political Science 2008) 44.
[2] Gary B Born, 'The New York Convention: A Self-Executing Treaty' (2018) 40 Michigan Journal of International Law 115, 127.
[3] Robert Merkin and Louis Flannery QC, *Merkin and Flannery on the Arbitration Act 1996* (Informa Law from Routledge 2019) 841.
[4] Eiser Infrastructure Ltd v Kingdom of Spain [2020] FCA 157; Several scholars generally agree that recognition involves acknowledging an arbitral award as binding, though not necessarily enforceable. See 'Defining and distinguishing "recognition" and "enforcement"'

the court verifying that the award meets certain criteria established by the New York Convention, such as the award being final and binding and not conflicting with the public policy of the recognising country.[5] Enforcement on the other hand, involves a subsequent step that allows the award to be implemented within the recognising jurisdiction.[6] Enforcement involves taking legal action to compel the losing party to comply with the terms of the award, such as paying damages or taking specific actions ordered by the arbitral tribunal.[7] The New York Convention facilitates this process by allowing signatory states to enforce foreign arbitral awards in the same manner as domestic awards, subject to limited grounds for refusal. However, as will be explained in the next chapter, in the GCC States, it is notable that the arbitration legislations of all GCC states, with the exception of Qatar, do not incorporate the term 'recognition' or establish a procedure for seeking recognition of a foreign arbitral award. These statutes exclusively address the enforcement of arbitral awards.[8]

The Convention also provides several grounds for refusing recognition and/or enforcement of arbitral awards. One of these grounds is that of public policy. Thus, local courts may refuse to implement an arbitral award that contravenes public policy.[9] However, the Convention does not contain any explanation of the concept of public policy, which has led to a broad application of this exception. In some instances, the public policy exception has been manipulated to allow the enforcement of narrowly construed goals.[10] This exception has been widely criticised for its vagueness.[11] Some commentators argue that it undermines the primary purpose of the New York Convention, which is the recognition and enforcement of arbitral awards.[12] Similarly, some argue that the vagueness of this term may lead to its misapplication and exploitation as a means of

<https://newyorkconvention1958.org/index.php?lvl=titre_uniforme_see&id=5> accessed 12 August 2024.

[5] Ibid.

[6] Merkin and QC (n 3) 843.

[7] Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. [2021] FCAFC 3

[8] To ensure concision, henceforth, subsequent indications to 'enforcement' throughout this thesis also means 'recognition and enforcement', unless explicitly clarified otherwise.

[9] This is based on Article V(2)(b) of the New York Convention 1958.

[10] Deanna J Mouser, 'Analysis of the Public Policy Exception After Paperworkers v Misco: A Proposal to Limit the Public Policy Exception and to Allow the Parties to Submit the Public Policy Question to the Arbitrator' [1990] Industrial Relations Law Journal 89, 129.

[11] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 Journal of Private International Law 201, 235.

[12] Richard A Cole, 'The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards' (1985) 1 Ohio State Journal on Dispute Resolution 365, 366.

avoiding the implementation of an arbitral award.[13] Conversely, other authors argue that the public policy exception is a safety valve for the Convention and its signatories.[14] In other words, the concept of public policy allows local courts to refuse to implement decisions that contravene the nation's fundamental principles and values.[15] Hence, proponents of this perspective count on a narrow application of this exception by local courts.[16]

As part of the international community, the Gulf Cooperation Council (GCC) States have sought to expand their global economic global role by becoming members of the New York Convention,[17] beginning with Kuwait in 1978, and then most recently, the UAE in 2006, this being the last GCC State to accede to the Convention. Therefore, any arbitral award issued by a signatory to the New York Convention may be implemented in the GCC States under the Convention.

1.3 Role of Sharia in the Legal Systems and Arbitration of the GCC States

Numerous studies have examined Sharia from both religious and legal perspectives, highlighting its complex and multifaceted nature.[18] Despite this extensive analysis, the term Sharia often elicits a variety of interpretations and understandings. This divergence raises the question: what does Sharia truly mean? In Arabic and Islamic literature, scholars make a distinction between the terms Sharia and Sharia law, with the latter being

[13] Javier Garcia de Enterria, 'The Role of Public Policy in International Commercial Arbitration' (1989) 21 Law & Policy of International Business 389, 410; Amelia C Rendeiro, 'Indian Arbitration and Public Policy' (2010) 89 Texas Law Review 699, 714.

[14] Karen J Tolson, 'Punitive Damage Awards in International Arbitration: Does the Safety Valve of Public Policy Render Them Unenforceable in Foreign States' (1986) 20 Loyola of Los Angeles Law Review 455, 496.

[15] Pontian N Okoli, 'Corruption in International Commercial Arbitration – Domino Effect in the Energy Industry, Developing Countries, and Impact of English Public Policy' (2022) 15 Journal of World Energy Law & Business 136, 140.

[16] Ekenobi ThankGod Chinonso, 'Is Public Policy Truly an Unruly Horse?' [2023] (Ahmadu Bello University, Zaria, 24 July 2023) SSRN Electronic Journals <https://ssrn.com/abstract=4519703> or <http://dx.doi.org/10.2139/ssrn.4519703> accessed 20 October 2023. This will be discussed further in Chapters 5 and 6.

[17] The Gulf Cooperation Council (GCC), consisting of six Middle Eastern states, represents a political and economic cooperation. Arising from common interests, shared culture, and mutual relationships, these countries formed the GCC to address economic and security objectives. The member states—Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates (UAE)—officially established the GCC on May 25, 1981. The key purpose of the GCC is to enhance economic, political, and military cooperation among its members. The organisation strives to align policies and foster integration across diverse sectors, such as economic activities, social and cultural affairs, and security issues. See John Christie, 'History and Development of the Gulf Cooperation Council: A Brief Overview' [2019] The Gulf Cooperation Council 7.

[18] Rudolph Peters and Peri Bearman, 'Introduction: The Nature of the Sharia', *The Ashgate research companion to Islamic law* (Routledge 2016); Maurits S Berger, 'Understanding Sharia in the West' (2018) 6 Journal of Law, Religion and State 236; Asifa Quraishi-Landes, 'The Sharia Problem with Sharia Legislation' (2014) 41 Ohio NUL Rev. 545.

more precise. According to this perspective, Sharia refers to the comprehensive body of Islamic principles, ethics, and jurisprudence.[19] As it will be clarified in Chapter 5, it is derived from primary sources, including the Quran and the Sunnah.[20] Sharia encompasses all aspects of a Muslim's life, including daily conduct, familial and religious duties. In contrast, Sharia law is more specific and is typically used in the context of the legal dimensions of Sharia. It denotes the statutory rules and regulations arising from Sharia that are implemented within legal systems.[21] When referring to Sharia law, it generally pertains to the codified statutes and legal interpretations governing areas such as criminal justice, family law, inheritance, financial transactions, and contractual obligations.[22]

Therefore, it can be asserted that Sharia represents the overarching framework of religious and ethical guidelines, whereas Sharia law relates to the specific legal statutes and regulations derived from this comprehensive framework. This distinction is essential to clarifying the confusion among some scholars who treat Sharia, Sharia law, and even Islam as synonymous terms.[23] However, in the context of this thesis, the argument will focus solely on the role of Sharia law. Even in instances where the term Sharia is mentioned, it often refers to Sharia law. For instance, as will be explained in Chapter 5, the constitutions of the GCC States refer to Sharia as a principal source of legislation rather than explicitly mentioning Sharia law. Nonetheless, it is more precise to cite Sharia law since the constitutions incorporate Sharia as a foundation for legal legislations. Accordingly, this thesis may use both terms interchangeably, though it will mainly mean Sharia law.

In all events, Sharia law plays a fundamental role in the legal systems of Muslim countries overall, but especially so in the GCC States, due to historical and religious factors that will be discussed in depth in Chapter 5. In countries such as Saudi Arabia and Qatar, Sharia law -which derived from religious texts and interpretations-[24] is the main source

[19] Toni Johnson and Mohammed Aly Sergie, 'Islam: Governing under Sharia' (2014) 25 Council on Foreign Relations 1.
[20] Sunnah involves all the statement and deeds of Prophet Mohammed [PBUH] in his capacity as a prophet. See Hamad Alfarisi, Noor Mohammad Osmani and Zainab Zubi, 'The Status of Sunnah in Islam' (2023) 13 Journal of Academic Research in Business and Social Sciences 663, 665.
[21] Peri Bearman and Rudolph Peters, *The Ashgate Research Companion to Islamic Law* (Routledge 2016) 261.
[22] ibid 145.
[23] Abdullahi Ahmed An-Na'im, 'Epilogue: The Normative Relevance of Sharia in the Modern Context', *The Ashgate Research Companion to Islamic Law* (Routledge 2016) 311.
[24] Farooq A Hassan, 'The Sources of Islamic Law', in *Proceedings of the ASIL Annual Meeting*, vol 76 (Cambridge University Press 1982), 65 <https://doi.org/10.1017/S0272503700030123> accessed 8 May 2023, 67.

of law. Conversely, in Kuwait, Oman, Bahrain, and the UAE, Sharia is a primary source of legislation alongside positive law, which refers to codified legal systems derived from secular sources.[25] In all cases, according to the constitutions of the GCC States, it is not permissible to violate the provisions of Sharia.[26]

As mentioned earlier, Sharia is derived from two key sources, namely the Quran and the Sunnah. The Quran is considered as the direct word of God, while the Sunnah represents an account of the words and deeds of the Prophet Muhammad [Peace Be Upon Him (PBUH)].[27] Thus, the question arises of whether the Quran and Sunnah regulate all aspects of life for a Muslim, including contemporary issues. In fact, the Quran and Sunnah form the basic framework for Islamic law, from which a comprehensive system is derived to provide essential guidance. Therefore, in the event that the Quran and Sunnah do not cover a specific matter, reference will be made to secondary sources known as consensus and analogy.[28] Consensus is the agreement of all or most Muslim scholars on specific issues, based on guidance from the Quran and Sunnah.[29] Meanwhile, analogy involves applying a rule from the Quran or Sunnah to a similar issue.[30] For instance, Islam forbids alcohol due to its potential for harm. Consequently, based on this principle, it can be said that any harmful substance is forbidden in Sharia, even if it is not specified.

Sharia developed and broadened as a legal system following the spread of Islam into other nations which adopt Sharia as a legal system.[31] This expansion and modernisation led to the emergence of unprecedented issues that were not regulated by the Quran or Sunnah. These issues gave rise to different schools of jurisprudence, most notably al-Maliki, founded in Mecca, and al-Shafi'i, which emerged in Egypt. Meanwhile, the Hanafi and Hanbali schools were established in Iraq.[32] These schools of jurisprudence play a role

[25] WM Ballantyne, 'The States of the GCC: Sources of Law, the Shari'a and the Extent to Which It Applies' (1985) 1 Arab Law Quarterly 3, 15.
[26] Gianluca De Donno and others, 'The Role of Shari'a as a Source of Law: Looking for a Pragmatic Approach' [2018] JUS 375, 398.
[27] S Ali Raza Naqvi, 'Prophetic Sunna in the Islamic Legal Framework' (1980) 19 Islamic Studies 120, 120.
[28] Achmad Nursobah and Anwar Ma'rufi, 'An Appraisal of the Status of Qiyas in Islamic Jurisprudence', 4th International Conference of the Postgraduate Students and Academics in Syariah and Law 2023 (INPAC 2023), 333.
[29] George F Hourani, 'The Basis of Authority of Consensus in Sunnite Islam' [1964] Studia Islamica 13, 13.
[30] Abdussalam Ismail Onagun and Raihanat Abdussalam Ahmad, 'The Relevance of Qiyas (Analogy) Principle in Islamic Banking Operation' [2017] Quality and Business Management Conference Proceedings 136.
[31] Nasser Alsaif, 'Factors for the Spread of Islam' (*Alukah*, 18 April 2018) <https://alukah.net/sharia/0/126704/> accessed 10 November 2023.
[32] E Okon, 'The Sources and Schools of Islamic Jurisprudence' (2012) 3 American Journal of Social and Management Sciences 106, 109.

similar to the legislative authorities, whereby they are empowered to issue a 'Fatwa' (decision) on any matter that is not directly addressed in the Quran or Sunnah. Nevertheless, a Fatwa is not binding.[33]

Given the multiplicity of schools of jurisprudence, the opinions of scholars have differed on some points, as will be explained in Chapters 3 and 4. Interestingly, although the constitutions of the GCC States have adopted Sharia as their main source of law, they have not opted for a specific school of jurisprudence. This approach has led to a divergence in the interpretations and applications of Sharia as a ground to refuse the recognition and enforcement of arbitral awards, with implications for the assessment of recognition and enforcement across the GCC States. These differences will be investigated later in this thesis.

1.4 Overview of Arbitration in the Legal Systems of the GCC States

It should be emphasised here that the nations of the Arabian Peninsula have always been familiar with arbitration.[34] In the pre-Islamic era, the Arab tribes who inhabited the region would resort to an arbitrator in the event of a dispute.[35] Despite the simplicity of the arbitration system at the time, it was the most popular method of dispute resolution. The only requirement of the arbitrator was to be male and impartial. Moreover, no specific law was to be applied by the arbitrator. Hence, arbitral decisions were subject to the arbitrator's discretion, according to custom and the nature of the dispute. Later, Islam emerged as a religion and an integrated legal system wherein arbitration was adopted and confirmed as a means of resolving disputes.[36] However, it should be noted that the primary sources of Sharia did not regulate arbitration in any depth. Instead, it was the Islamic schools of jurisprudence that dealt with arbitration in more detail, as it will be explained in Chapter 5.

The development of the legal systems in the Arabian Peninsula continued throughout the early Islamic period (beginning in 610 AD) until the time of the Ottoman Empire, which

[33] 'Fatwa' is a legal outlook or ruling delivered by a qualified Islamic scholar on matters of religious practice and law. See Auwal Salisu and Shereeza Mohamed Saniff, 'A Systematic Literature Review on the Relationship between Sharia Regulatory Framework and Islamic Fatwa' (2023) 4 REVENUE: Jurnal Manajemen Bisnis Islam 1.
[34] Before the establishment of the Gulf States and the Gulf Cooperation Council (GCC), the region was called the Arabian Peninsula. See Ahmed Al-Suwaidi, 'Developments of the Legal Systems of the Gulf Arab States' (1993) 8 Arab Law Quarterly 289, 289.
[35] Aseel Al-Ramahi, 'Sulh: A Crucial Part of Islamic Arbitration', LSE Law, Society and Economy Working Paper No 12/2008, Law Department, London School of Economics and Political Science, 4.
[36] Islam emerged on the Arabian Peninsula in the 7th century.

adopted Sharia as its main source of legislation.[37] Thus, the Ottoman Empire contributed to the substantial development of the Sharia legal system, as it witnessed the first codification of Islamic jurisprudence, especially in civil and commercial transactions.[38] However, the influence of Sharia as a legislative source subsequently decreased considerably, primarily due to the trend toward secularisation and the enactment of secular legal frameworks. Following the collapse of the Ottoman Empire, the countries of the Arabian Peninsula began to adopt their own legal systems as independent states,[39] especially after the discovery of oil and the emergence of these countries as major providers of global energy.[40] For political and economic reasons, as well as given the common ties between the countries of the Arabian Peninsula, the Gulf Cooperation Council (GCC) was established in 1981, comprising Saudi Arabia, Kuwait, the United Arab Emirates (UAE), Bahrain, Qatar, and Oman.[41]

Because of the widespread consensus on arbitration as an alternative method of resolving disputes and the role of arbitration in promoting global trade, the GCC States have sought to emphasise the importance of arbitration, thereby adopting arbitration laws that are compatible with their legal nature. In addition, the GCC States have entered into international and regional agreements related to arbitration and the implementation of foreign awards, such as the New York Convention and Riyadh Agreement.[42] These efforts confirm the desire of the GCC States to enhance their international standing as countries that are friendly to the implementation of foreign arbitral awards. However, despite these steps towards the development of arbitration and the enforcement of foreign arbitral awards, the GCC countries are still subject to criticisms over the extent of their

[37] The Ottoman Empire began in the early 14th century and ended in the early 20th century. See Meirison Meirison, 'The Impact of Foreign Capitulation on Islamic Sharia in the Ottoman Empire' (2020) 17 Justicia Islamica: Jurnal Kajian Hukum dan Sosial 109.

[38] The Journal of Judicial Rulings was established after the end of the First Crimean War between the Ottoman Muslims and the Russians, which led to the survival of a large Islamic community under Russian authority. The Ottoman Sultanate asked the Orthodox Church in Moscow for a clear regulation of how to treat Muslim subjects, which prompted the Russians to respond in kind. As a result, the Ottomans established a committee of Hanafi jurists to codify Islamic jurisprudential rulings, resulting in the Journal of Legal Rules (*Al-Majallah*).

[39] Before the establishment of the GCC, the region was called the countries of the Arabian Peninsula. See Gwenn Okruhlik and Patrick J Conge, 'The Politics of Border Disputes: On the Arabian Peninsula' (1999) 54 International Journal 230.

[40] Brian-Vincent Ikejiaku, 'The Role of Law in Economic Development Process within the Context of the Islamic World: De-Linking Oil and Gas Projects and Re-Linking International Legal Reform' (2021) 18 Manchester Journal of International Economic Law 122, 123.

[41] Jamil I Alhejailan, 'Regional Cooperation in the Gulf' (1999) 3 World Affairs: The Journal of International Issues 14, 25.

[42] Minas Khatchadourian, 'Arbitration in the Arab States of the Gulf (GCC): An Overview' (2015) 9 Romanian Arbitration Journal 39, 43.

'friendliness' to implementing arbitral awards.[43] These criticisms will be analysed and examined in depth in subsequent chapters.

Nevertheless, it should not be assumed that the GCC States all have the same constitution and laws, simply because they are all part of the same bloc. On the contrary, each GCC State has its own legal system and an independent constitution. However, the constitutions and laws of the GCC States are very similar to each other, as will be explained in the subsequent chapter, especially as these nations have adopted Sharia as their main source of legislation. Furthermore, the GCC States have undertaken several initiatives to implement unified laws, such as on arbitration, enforcement, and tax legislation.

1.5 Justification for Selecting the GCC States

The GCC countries have gained prominence in the literature because of their exceptional economic importance and significant influence on the global stage. In addition, these countries have historical and religious importance as the main 'Qiblah' for Muslims.[44] The GCC States collectively represent a force located at the crossroads of international trade and geopolitics. This strategic location, combined with their resources and rapid modernisation, have driven the GCC States to the forefront of the global economic discussion. As key contributors to the world's energy supply, the GCC States hold a significant portion of the world's proven oil reserves,[45] giving them considerable influence over energy markets and international diplomacy.[46]

The economies of the GCC States flourished after the discovery of oil, which is now their main source of income. Nevertheless, as a result of the fluctuation and instability of oil prices since the discovery of oil, the GCC States have also sought alternative sources of income to continue to develop their economies. Therefore, all the GCC States have adopted strategic and visionary plans to rely on non-oil sources of revenue in the future. For example, they have invested a significant amount of capital in attracting investors,

[43] Saud Al-Ammari and A Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30 Arbitration International 387, 390; Ahmed Abdelhafez Badr, 'Jurisdictional Challenges and Enforceability of Arbitral Awards in the UAE' (English PhD thesis, Université Paris Cité 2019), 15.
[44] Qiblah in Islam refers to the direction of the Kaaba in Mecca, which Muslims face during their prayers. See Yehia Hassan Wazeri, 'Exploring the Significance of Mecca Sacred Mosque Global Location' (2017) 4 Journal of Islamic Architecture 86, 91.
[45] Steven Wright, 'Foreign Policy in the GCC States' [2011] International Politics of the Persian Gulf 72, 75.
[46] Mahmoud Ghafouri, 'China's Policy in the Persian Gulf' (2009) 16 Middle East Policy 80, 83.

tourists, and foreign wealth.[47] As a significant step towards attracting foreign and local investors, they have issued various laws and joined international agreements to facilitate investment procedures and create a suitable legal environment .[48] For example and as explained earlier, the GCC States have signed and joined agreements on the implementation of foreign contracts and arbitral awards, such as the New York Convention,[49] and the Riyadh Agreement.[50] In addition, they have amended their local legislation, such as arbitration and enforcement laws, [51] in order to comply with the international standards for world trade.[52]

Despite the foregoing, however, the percentage of foreign investment in the GCC States is still not commensurate with their economic status.[53] Some believe that the GCC States still represent ambiguity for many investors and researchers, especially non-Muslims, regarding their legislation and the application of foreign awards. As a result, the GCC States have been the target for harsh criticism over their legal systems and commitment to implementing foreign contracts and arbitral awards.[54] For example, Badah and Roy argue that the influence of Sharia on legal systems in the GCC has impeded the enforcement of foreign arbitral awards in these states.[55] Therefore, misapplying public policy exception to refuse to enforce and recognise the arbitral awards. Furthermore, Sawiris, a prominent Egyptian businessman, commented as follows in a summit for investing in Saudi Arabia: 'Why should I invest in a place where I am not convinced that there is law and order?'. Sawiris describes the GCC States as a 'black box', wherein it is

[47] Muawya Ahmed Hussein, 'Impacts of Foreign Direct Investment on Economic Growth in the Gulf Cooperation Council (GCC) Countries' (2009) 5 International Review of Business Research Papers 362, 368.
[48] Mohamed A Ramady, *The GCC Economies: Stepping up to Future Challenges* (Springer Science & Business Media 2012), 219.
[49] Nadia Darwazeh and Friven Yeoh, 'Recognition and Enforcement of Awards under the New York Convention-China and Hong Kong Perspectives' (2008) 25 J. Int'l Arb. 837, 837.
[50] The Riyadh Arab Agreement for Judicial Cooperation of 1983 is a convention that concerns the enforcement of judicial decisions among the signatories. See RW, https://refworld.org/legal/agreements/las/1983/en/39231 accessed 20 June 2023.
[51] Husain M Al-Baharna, 'The Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain' (1989) 4 Arab Law Quarterly 332, 332.
[52] Rodney Wilson, 'The Development of Islamic Finance in the GCC' (London School of Economics and Political Science, LSE Library 2009), 27.
[53] Reyadh Y Faras and Khalifa H Ghali, 'Foreign Direct Investment and Economic Growth: The Case of the GCC Countries' (2009) 29 International Research Journal of Finance and Economics 134, 136.
[54] Amel K Abdallah, 'Islamic Sharia and Arbitration in GCC States: The Way Ahead' [2020] International Review of Law 318, 325.
[55] Saad Badah, 'The Enforcement of Foreign Arbitral Awards in Kuwait' (2014) 55 Acta Juridica Hungarica 290, 292; Kristin T Roy, 'New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards, The' (1994) 18 Fordham Int'l LJ 920, 922.

challenging to comprehend how the law is applied.[56] In some cases, such criticisms may be the result of unfamiliarity with the nature of the legal systems of the GCC countries. Conversely, there may be problems with the approach adopted in this region. The reluctance of the GCC countries to publish court decisions is an example of the current practices of their local courts, thereby contributing to negative perceptions of the legal framework in these countries.

Furthermore, the distinctive nature of the legal systems in the GCC states makes them a crucial subject of study. In general, a written constitution acts as the supreme source of legislation, requiring that all laws and statutes align with its articles. In the GCC States, all constitutions adopt Sharia as a main source of legislation.[57] However, neither the constitutions nor the local laws clearly outline the role of Sharia, leading to practices that undermine Sharia principles, as will be examined in Chapter 6. Also, the constitutions of the GCC States affirm the principle of separation of powers, which is essential for maintaining a balance among the executive, legislative, and judicial branches.[58] Pursuant to the constitutions of the GCC states, the courts hold the authority to exercise their judicial powers independently, free from interference by the legislative and executive branches.[59] Consequently, courts possess the authority to address legislative gaps in all matters except criminal cases. Notably, although the GCC States have constitutions that uphold this principle, practices frequently undermine it. For example, in Saudi Arabia, Oman, Bahrain, Qatar, and the UAE, there are consultative assemblies rather than

[56] Weizhen Tan, 'I Would Not Invest in Saudi Arabia, Says Egyptian Billionaire Naguib Sawiris' (*CNBC*, 12 February 2019) <https://cnbc.com/2019/02/12/egyptian-billionaire-naguib-sawiris-would-not-invest-in-saudi-arabia-.html> accessed 16 June 2023.

[57] All GCC states adopt Sharia as a source of legislation, as evidenced in their constitutions. The Constitution of Kuwait, promulgated in 1962, states in Article 2 that 'The religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation.' The Constitution of the United Arab Emirates, established in 1971 and made permanent in 1996, asserts in Article 7 that 'Islam shall be the official religion of the Union. The Islamic Sharia shall be a principal source of legislation in the Union.' Bahrain's Constitution, originally promulgated in 1973 and amended in 2002, declares in Article 2 that 'The religion of the State is Islam. The Islamic Sharia is a principal source for legislation.' Saudi Arabia's Basic Law of Governance, issued in 1992, specifies in Article 1 that 'The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution.' Oman's Basic Law of the State, issued in 1996 and amended in 2011, stipulates in Article 2 that 'The religion of the State is Islam and Islamic Sharia is the basis for legislation.' Finally, Qatar's Constitution, enacted in 2003 and effective from 2005, states in Article 1 that 'Qatar is an independent sovereign Arab State. Its religion is Islam, and the Islamic Sharia shall be a main source of its legislations.'

[58] M Elizabeth Magill, 'Beyond Powers and Branches in Separation of Powers Law' (2001) 150 U. Pa. L. Rev. 603, 603.

[59] Salma Waheedi, 'Constitutional Courts in Arab Gulf States: A Comparative Study of Kuwait and Bahrain' (2022) 70 Al-Abhath 215, 220.

parliament with members who are wholly or partly appointed by the ruler.[60] In 2021, the Qatari government authorised legislation restricting voting rights to citizens who can prove residency in Qatar before 1930, drawing significant criticism from human rights activists and organisations.[61] Protests against this discriminatory law led to the imprisonment of many protesters, including lawyers and officials.[62] This approach is not exceptional to Qatar. For instance, Kuwait's Election Law of 1962 restricts voting rights to citizens who can prove residency in Kuwait before 1920.[63] Despite Kuwait's relatively progressive parliamentary history compared to its GCC counterparts, where all members are elected by the people, the ruler of Kuwait dissolved the parliament in 2024 and suspended the constitution for four years.[64] This situation illustrates the lack of genuine separation of powers in the GCC States, where rulers retain predominant control. This lack of separation may compromise the independence and impartiality of the courts and hence affect the recognition and enforcement of foreign arbitral awards, as will be examined in Chapter 6.

The thesis aims to critically examine the criticisms surrounding the public policy defence by analysing its application in resisting and challenging the enforcement of foreign arbitral awards. Therefore, this thesis seeks to clarify the GCC States' interpretation of Article V(2)(b) of the New York Convention, and to establish whether the courts in the GCC States apply the public policy exception effectively. This examination strives to clarify the reasons underpinning the approach adopted by the GCC courts in applying this exception. Also, it endeavours to critically examine and evaluate the criticisms of some scholars to the practices of the GCC States.

It should be noted that several previous studies have examined the arbitration laws of the GCC countries. As will be discussed in subsequent chapters, these studies are often limited to a particular country rather than covering the GCC as one unit. Besides, few studies have dealt briefly with Article 5(2)(b) of the New York Convention. In any case,

[60] Andrzej Kapiszewski, ‘Elections and Parliamentary Activity in the GCC States: Broadening Political Participation in the Gulf Monarchies’ [2006] Gulf Research Center 88, 89.
[61] HR Watch, 'Qatar: Election Law Exposes Discriminatory Citizenship' (HRW, 9 September 2021) <https://hrw.org/news/2021/09/09/qatar-election-law-exposes-discriminatory-citizenship> accessed 20 May 2024.
[62] Reuters, 'Qatar jails four election protesters, including three for life' (Reuters, 13 May 2022) <https://reuters.com/world/middle-east/qatar-jails-four-election-protesters-including-two-life-2022-05-12/> accessed 20 May 2024.
[63] Article 1 of the Kuwaiti Election Law 1962.
[64] Reuters, 'Kuwait's Emir dissolves parliament, suspends some constitution articles' (Reuters, 10 May 2024) <https://reuters.com/world/middle-east/kuwaits-emir-dissolves-parliament-suspends-some-constitution-articles-2024-05-10/> accessed 20 May 2024.

it is necessary to continue researching arbitration and the implementation of arbitral awards, especially since it is a constantly evolving field. This is important since the number of studies on this topic in the GCC States is still very small compared to non-GCC States, which is disproportionate to the key role of the GCC States in the global economy and international trade. The author hopes that this thesis will contribute to the current literature and knowledge in this area, serving as a reference for researchers and investors with regard to the position of the GCC States on the public policy exception. Moreover, it is hoped that the thesis's findings and recommendations will contribute to the development of arbitration and the implementation of foreign arbitral awards across the GCC States.

1.6 Research Questions

Given the lack of clarification of public policy concept and the adoption of uncodified Sharia as a primary source of legislation, the overarching question in this thesis is: *To what extent do the GCC States interpret the public policy exception ineffectively, so as to reduce the indices of successful enforcement?* To answer this main question, it is necessary to examine practices across each GCC State, due to the empirical nature of the claim. Thus, the following additional questions must also be addressed. How does each GCC State apply the public policy exception? Is there a consistent approach across all the GCC States? As a main source of legislation in these States, what is the role of Sharia law in applying the public policy exception? Are the terms of public policy and Sharia synonymous in the GCC context? Should Islamic rules be applied, even if the dispute involves international parties? Finally, Has Sharia law hindered the GCC States from enforcing non-domestic awards, or could it be misused to refuse to enforce an arbitral award?

1.7 Methodology

To answer the above questions, this thesis adopts a doctrinal research methodology. This requires a systematic exposition of the rules governing a particular legal issue.[65] It involves analysing the relationship between rules, elucidating areas of difficulty, and potentially forecasting future developments.[66] This methodology necessitates rigorous analysis and creative synthesis, thereby connecting seemingly disparate doctrinal

[65] Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8 Erasmus Law Review 130, 131.
[66] Ibid.

elements and extracting general principles from a diverse array of primary materials.[67] Accordingly, this thesis conducts a detailed investigation of the primary sources of law in the GCC States.

The doctrinal approach also facilitates a thorough contextual examination and evaluation of court practices across the GCC States, specifically concerning the enforcement of foreign arbitral awards. To this end, the thesis extensively explores published cases on the topic, identifying principal patterns and offering a critical perspective for analysing primary and secondary sources. Consequently, the thesis proposes effective reforms for applying the public policy exception, thereby contributing to current developments in arbitration laws and the enforcement of arbitral awards in the GCC States. As will be explained in the following section, one challenge this thesis encounters is the paucity of published cases. In the absence of sufficient evidence from GCC practices, the author refers to non-GCC jurisdictions with similar legal backgrounds. This is not a comparative approach but an effort to clarify ambiguous terms adopted into GCC legislation without proper elucidation. For instance, jurisdictions like Egypt, which bases its legislation on Sharia law, will be referenced to determine Sharia law's impact on the enforcement of arbitral awards and public policy in other contexts.

Additionally, this thesis critically examines secondary materials, including books, articles, theses, and related conventions, to identify links between relevant sources and literature. [68] The aim is to determine how legislators and courts in the GCC States address the public policy concept and whether their challenges stem from legislation itself or its application. Given that doctrinal methodology is not merely descriptive but also a problem-solving tool,[69] the thesis aims to answer the research questions by applying the aforementioned method to derive practical solutions and recommendations to narrow the application of public policy in the GCC States. The thesis conducts critical examination to gain a comprehensive understanding of the legal issues and facilitate more accurate analysis of the corresponding legal principles and their application.

[67] Council of Australian Law Deans, 'Statement on The Nature of Legal Research' (*CALD*, May 2005) <https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf> accessed 12 June 2023.

[68] In the event that an official translation of texts or sources in English is not available, the author shall translate the texts from Arabic into English.

[69] Jan M Smits, 'What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research', in Rob van Gestel, Hans-W. Micklitz, and Edward L Rubin (eds) (*Rethinking Legal Scholarship: A Transatlantic Dialogue, New York* (Cambridge University Press 2017), 207-228.

Ultimately, the thesis seeks to contribute to the existing legal debate and literature, with the hope that its findings will assist legislators in the GCC States, as well as practitioners, investors, and other researchers, in gaining a better understanding of the issues addressed.

1.8 Contribution

The prevailing discourse surrounding the GCC States typically seeks to diminish the role of Sharia, which is perceived as central to the ineffective application and interpretation of public policy. Contrary to these views, the thesis asserts that Sharia constitutes only a part of public policy in the GCC States and should not be minimised. Foreign parties must respect the role of Sharia, not only because it is rooted in religion but also because it forms a significant part of the legal framework in these states. Following a much more comprehensive analysis of how public policy is interpreted and applied by courts in the GCC States compared to other studies, the thesis identifies the legislative and judicial factors that contribute to the misapplication of public policy. This leads it to challenge the notion that Sharia is the sole impediment. Instead, it argues that the misapplication and misinterpretation of public policy by some courts in the GCC States are not attributable to Sharia itself, as some have suggested, but rather to several factors, including the legislation and practices of local courts. The thesis maintain that Sharia is not inherently an obstacle to the enforcement of public policy; rather, the issue lies in how Sharia is incorporated into the legislative framework of the GCC States, leading to its misapplication and misinterpretation. Finally, the thesis proposes practical recommendations for improving the application and interpretation of public policy within the GCC States, contributing to a more consistent and effective recognition and enforcement of foreign arbitral awards across the GCC States.

1.9 Structure of the Thesis

The thesis comprises seven chapters including the introduction and conclusion. The first chapter presents an overview of the legal systems of the Gulf Cooperation Council (GCC) States and outlines the methodology employed to answer the research questions in this thesis. It also provides a concise background on the New York Convention and the role of Sharia within the legal systems of the GCC States. This chapter briefly addresses Sharia and its relevance to the application of public policy. Consequently, it gives the reader a better understanding for the subsequent chapters. Additionally, it introduces the research questions and the structure of the thesis, concluding by emphasising the significance of this thesis for the GCC States, practitioners, and foreign investors interested in investing

in these states. This chapter aims to provide a comprehensive overview of the thesis and clearly outlines the research problem.

Chapter 2 addresses the recognition and enforcement of foreign arbitral awards within the GCC States. It begins by examining the legal framework governing arbitration in these states and critically analyses the procedures for recognising and enforcing foreign arbitral awards. These procedures have consistently faced criticism for allegedly 'undermining' or challenging 'the implementation of foreign arbitral awards'.[70] To evaluate these procedures and determine whether the local laws comply with the New York Convention, the chapter traces the development of relevant legislations both before and after the independence of the GCC States. In particular, the chapter explores the impact of colonialism and administrative directives on the formation of local legislations and their influence on the interpretation of public policy. Ultimately, the chapter aims to determine whether the procedures in the GCC States pose a challenge to the recognition and enforcement of foreign arbitral awards.

Chapter 3 examines the development of the public policy concept in international commercial arbitration. It begins by tracing the origin and evolution of public policy, laying a historical and conceptual foundation for analysing its current application and identifying challenges in enforcing arbitral awards. This chapter also analyses some practices in non-GCC States, covering both common law and civil law jurisdictions, to investigate the application of the public policy exception under the New York Convention across various countries. By critically examining how non-GCC courts have developed their approach to this exception, including instances of misapplication, this chapter aims to provide valuable insights for GCC States, which have limited experience with this exception. It explores whether GCC states can learn from other jurisdictions to avoid the misapplication of the public policy exception. Additionally, the chapter discusses the incorporation of public policy within the New York Convention and its impact on the enforcement of foreign arbitral awards, distinguishing public policy from other concepts to aid in its correct interpretation. Comments on non-GCC practices will support the thesis in reaching accurate conclusions and recommendations, particularly regarding whether GCC States can benefit from the experiences of non-GCC jurisdictions.

[70] Nicolas Bremer, 'Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries' (2016) 3 McGill Journal of Dispute Resolution 37, 63.

After examining the development of public policy and its role in international commercial arbitration, Chapter 4 will look at the efforts which have been made to narrow the negative application and interpretation of public policy. Thus, this chapter will critically analyse various classifications of public policy, while the multiplicity of classifications helps reduce the broad application of the public policy exception. This chapter explores scholarly opinion on these categories, as well as the legislations in which these categories of public policy have been adopted. Accordingly, this chapter will examine attempts to define and categorise public policy, including efforts by organisations such as the International Bar Association (IBA) and the International Law Association (ILA) to limit the application of the public policy exception. The chapter will assess the significance of the various categories of public policy and whether the drafters of the New York Convention intended to adopt a specific category of public policy.

Chapter 5 concerns Sharia role in the GCC States legal system. This chapter addresses the complexities of Sharia and the legal systems of the GCC States by providing an analysis of the historical development of Sharia law, looking at its impact and relationship with the legal systems of the GCC States. It begins by examining Sharia as a legal system and the role of Fiqh (Islamic Jurisprudence) in its development. Fiqh plays a fundamental role in the interpretation and understanding of Sharia principles. Accordingly, analysing its role will facilitate a more thorough understanding of Sharia. The chapter also provides a critical analysis of arbitration within Sharia law (Islamic Arbitration). This analysis is essential for a thorough understanding of the inclusion of Sharia in arbitration practices within the GCC States, where Sharia serves as a primary source of legislation. Given the significant influence of Islamic Schools of Jurisprudence on Sharia law, the chapter will explore the impact of these schools on the legal systems of the GCC States, and whether these states adhere to a specific school of jurisprudence, considering the varying interpretations of Sharia rules among them. The primary aim of this chapter is to investigate the role of Sharia within the legal frameworks of the GCC States and to determine the extent to which Sharia is fully implemented in their legal systems.

Following a detailed examination of Sharia's role within the legal systems of the GCC States, Chapter 6 will critically analyse the practices of the courts in these states concerning the application and interpretation of the term 'public policy'. The courts in the GCC countries have long been criticised for their broad and ineffective implementation of the public policy exception. Thus, it is necessary to examine the practices of these local courts to ascertain whether and why their application of the public policy exception has

been applied broadly. The chapter will commence with an analysis of the relationship between Sharia and the judicial systems of the GCC states, subsequently shifting focus to the relationship between Sharia and public policy. This analysis is crucial to addressing one of the thesis questions: whether Sharia and public policy are synonymous and hence the violation of Sharia represents a violation of public policy. The examination includes assessing the impact of Sharia as a primary source of legislation on the concept of public policy. Consequently, it will determine whether Sharia negatively hinders the recognition and enforcement of foreign arbitral awards as some claim. Moreover, this chapter will scrutinise the varied practices of the courts in the GCC States in applying the public policy exception, providing a better understanding of what constitutes public policy in the judicial practices of the GCC States. After conducting a detailed examination of the practices in the GCC states, this chapter will identify the main challenges that courts face in applying and interpreting the public policy exception. This analysis will critically assess whether these shortcomings arise from the courts' practices or from deficiencies in the local legislation.

Chapter 7 concludes the thesis by summarising key findings and answering the research questions. Also, it covers the potential tension between GCC States' future visions and Sharia. It begins by analysing the GCC States' approach to defining and categorising public policy, comparing it with practices in non-GCC States discussed in Chapter 4. This analysis is crucial for determining whether GCC States should adopt a specific category of public policy to avoid its broad application by local courts. The chapter also ties together insights from Chapters 2, 3, and 4, highlighting lessons from non-GCC jurisdictions that could improve the application of public policy in the GCC States. It includes the author's observations on public policy in the GCC States, its inclusion in the New York Convention, and offers recommendations for legislators and courts. These recommendations aim to promote a more arbitration-friendly environment in the GCC States, particularly concerning the application of public policy exception.

1.10 The Challenge

Several challenges face this thesis, especially with regard to extracting findings and drawing conclusions. The first challenge is the lack of published court decisions in relation to the application of the public policy concept in the courts of the GCC States. Therefore, some arbitral awards and judicial decisions which will be examined later in the thesis are not related to international commercial arbitration. However, these cases

will be examined because the GCC courts apply public policy to refuse recognition and/or enforcement of these awards. This examination is necessary due to the lack of published cases. Moreover, it should be noted that there is a lack of research on the concept of public policy in the GCC States in general, as compared to non-GCC countries. For instance, many studies have dealt with the recognition and enforcement of arbitral awards in certain GCC States. However, despite the crucial role of public policy, these studies have only briefly mentioned this exception.[71] In order to overcome this challenge, the present thesis examines accessible materials that deal with the concept of public policy, whether consisting of primary sources such as statutes, regulations, case law, and other official legal documents, or secondary sources, for example, published and unpublished articles, commentaries, and books. Furthermore, to keep this thesis up to date, it examines online resources and official statements pertaining to this exception. Additionally, it considers current developments in the GCC States, particularly those aimed at modernising their legislation to attract foreign investments. This involves an analysis of recent laws and regulations that are either directly or indirectly related to the issues discussed in this thesis. The objective of this analysis is to gain a better understanding of the stance of the GCC States on the application of the public policy defence.

In addition to the gaps identified in the existing literature concerning public policy in the GCC states, the author aimed to adopt an empirical methodology to obtain more precise and current results through the collection of up-to-date data. However, due to the political tensions that arose between the GCC states,[72] the implementation of this empirical approach proved to be challenging. As a result, the research was constrained to the application of a doctrinal methodology alone.

Another challenge involves the relationship between the public policy concept, Sharia law, and state sovereignty, which has led some researchers in the GCC region to avoid this sensitive topic. In contrast, this thesis addresses the impact of Sharia on the concept of public policy and examines whether Sharia prevents or conflicts with the enforcement

[71] Badah (n 55); Mohamed Al-Nasair and Ilias Bantekas, 'Nullity and Jurisdictional Excess as Grounds for Non-Enforcement of Foreign Awards in Bahrain and the UAE' (2013) 30 Journal of International Arbitration.

[72] The Qatar crisis, which began in June 2017, was a diplomatic and economic conflict between Qatar and several GCC nations, including Saudi Arabia, the UAE, Bahrain, and Egypt. These countries imposed a blockade on Qatar, accusing it of supporting terrorism and destabilising the region, which Qatar denied. As part of the blockade, citizens of these countries were not allowed to visit one another. The crisis led to significant political, economic, and social repercussions, but it was formally resolved in January 2021 with the signing of the Al-Ula Agreement in Saudi Arabia. See Ben Smith, 'The Qatar crisis and regional ramifications' (The House of Commons Library, October 2019) <https://commonslibrary.parliament.uk/research-briefings/cbp-8690/> accessed 27 December 2024.

of foreign arbitral awards. This thesis aims to elucidate the relationship between Sharia and arbitration by tracing the history of arbitration within Islamic legal systems. Additionally, it seeks to clarify the stance of Islamic jurisprudence on arbitration. These analyses are intended to provide a comprehensive understanding of Sharia's position on the enforcement of foreign arbitral awards in the GCC States, which all consider Sharia their primary source of legislation. The purpose of this examination is to determine whether the adoption of Sharia as a legislative source in the GCC States poses any issues, or whether the challenge lies in the interpretation and application of Sharia. It will also assess whether GCC States fully implement Sharia or exhibit some flexibility in specific matters. Given the significance of the recognition and enforcement of arbitral awards, which is the main aim of the New York Convention of 1958, the following Chapter will examine the legal framework governing arbitration in the GCC States. It will also analyse the procedures for the recognition and enforcement of foreign arbitral awards within the legal systems of the GCC States.

Chapter 2 Recognition and Enforcement of Arbitral Awards in the GCC States

2.1 Introduction

Arbitration has obtained global recognition as an effective method of dispute resolution, including among the Gulf Cooperation Council (GCC) States.[73] These States, which include Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the UAE, have established legal frameworks to enhance arbitration and attract foreign investors. To facilitate the recognition and enforcement of arbitral awards, the GCC States have sought to domesticate existing prominent conventions such as the New York Convention 1958. Regionally, they have also established the Riyadh Agreement 1983,[74] as explained in Chapter 1.[75] Nevertheless, the Gulf States still receive criticism regarding their seriousness about implementing foreign arbitral awards as it will be seen in this chapter. Therefore, the implementation of arbitral awards remains a concern that affects the reputation of GCC States as arbitration-friendly jurisdictions. To critically evaluate these challenges, this chapter provides an overview of the development of arbitration systems in the GCC States. Thereafter, it provides an analysis of their recognition and enforcement procedures. Finally, it critically discusses the obstacles and hurdles facing the recognition and enforcement procedures of foreign arbitral awards in these States.

2.2 Legal Framework for Arbitration in the GCC States

Arbitration has been a vital tool for resolving disputes in the Arabian Peninsula. In the absence of formal court systems, people have turned to arbitration because it provides a reliable and flexible way to resolve disputes. The importance of arbitration has continued as the region has undergone significant transformation and witnessed the development of codified legal systems. The Gulf Cooperation Council (GCC) states have witnessed a fascinating shift in their legal framework for arbitration. This transformation can be divided into two stages, the pre-oil stage and the post-oil stage. Therefore, this section will be divided into two parts.

[73] The Gulf Cooperation Council is hereinafter referred to as the GCC.
[74] The Riyadh Agreement 1983.; This agreement aims to facilitate judicial cooperation between the signatory countries and enforce the judicial decisions. See Killian Balz and Aouni Shahoud Almousa, 'The Recognition an Enforcement of Foreign Judgements and Arbitral Awards under the Riyadh Convention (1983) Thirty Years of Arab Judicial Co-Operation' (2014) 4 IJPL 273.
[75] See page 7.

Part 1 explores the early foundations of arbitration in the GCC States, drawing on customary practices and potentially influenced by Islamic principles. Part 2 examines the transformation of the GCC legal landscape with the discovery of oil. It analyses the emergence of codified arbitration laws, likely influenced by international models like the UNCITRAL Model Law. it will also discuss the role of regional cooperation and international treaties in shaping the current framework.

2.2.1 Initial Legal Framework for Arbitration in the GCC States

According to Abdallah,[76] in the pre-Islamic period, the Arabian Peninsula[77] was a vital commercial area because of its religious and political status. Due to its tribal nature, in the event of a dispute, parties would resort to conciliation or mediation. However, if a settlement was not reached, recourse would be made to an arbitrator or '*Hakeem*',[78] the choice of whom was agreed upon by the parties to the dispute. The decision of the *Hakeem* was decisive and would resolve the dispute. Later, Islam endorsed and assimilated an arbitration system during the Islamic era.[79] The Quran and Sunnah, considered as the main sources of Islamic law, affirm arbitration as a method of resolving disputes.[80] For example, in the Quran, the Almighty Allah declares as follows:

> And if you fear discord between them, then send an arbitrator from his family and an arbitrator from her family; if they want reconciliation, Allah will bring about harmony between them. Indeed, Allah has always been All-Knowing, All-Aware.[81]

Meanwhile, in the Sunnah, the Prophet [PBUH] declares: '*Whoever arbitrates between two people fairly, Allah will shade him with His shade on the Day of Resurrection.*'[82] In fact, the Islamic era witnessed numerous arbitration practices, the most prominent of

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[76] Amel K Abdallah, 'Islamic Sharia and Arbitration in GCC States: The Way Ahead' [2020] Int'l Rev. L. 318, 325.

[77] Before the union of the GCC States, the region of the Arab Gulf was called the Arabian Peninsula. See Gwenn Okruhlik and Patrick J Conge, 'The Politics of Border Disputes: On the Arabian Peninsula' (1999) 54 International Journal 230.

[78] It is interesting that the tribal arbitration system still exists and is applied in some countries such as Yemen and Jordan. Some attribute the application of this system to the special nature of the people of these countries, especially in cases that concern tribes. According to this system, the parties to the dispute have the right to resort to the tribal arbitrator, and in the event that a solution is not reached, they resort to the national courts. See Oussama Safa, 'Conflict Resolution and Reconciliation in the Arab World: The Work of Civil Society Organisations'. *Conflict Resolution and Reconciliation in the Arab World: The Work of Civil Society Organisations* [Berghof Handbook] (Research Centre for Constructive Conflict Management 2007) <https://berghof-foundation.org/library/conflict-resolution-and-reconciliation-in-the-arab-world-the-work-of-civil-society-organisations-in-lebanon-and-morocco> accessed 1 May 2024.

[79] Md Mashiur Rahman, 'Islamic Perspective of Alternative Dispute Resolution (ADR)' (2018) 4 Journal of Asian and African Social Science and Humanities 28, 32.

[80] The primary and secondary sources of Islamic law are explained in Chapter 6. See also Hassan (n 24).

[81] Quran, v 4:35

[82] Sahih al-Bukhari, Kitab al-Azan, Hadith 660.

which involved a dispute arising between the Prophet Muhammad [PBUH] – who was the ruler – and a Jewish tribe, wherein the parties resorted to an arbitrator chosen by the Jews.[83] Perhaps what is remarkable about this incident is that the Prophet Muhammad [PBUH] affirmed a fundamental principle in arbitration, which is the principle of the arbitrator's independence. Nevertheless, despite Sharia's approval of arbitration, it does not regulate the arbitration process in great detail, but rather highlights the integrity of the arbitrator as a principal requirement. After the Prophet's era, as it will be examined in the following chapters, different schools of jurisprudence emerged that dealt with arbitration in more detail, leading to the spread and success of arbitration.[84] Thus, it could be said that arbitration was the most prominent and effective method of resolving disputes at that time.[85]

It can be said that before the discovery of oil, the legal framework for arbitration in the GCC States was far less formalised. It was primarily based on tribal customs and Sharia law. Tribal leaders or respected elders often acted as arbitrators, relying on customary practices and their understanding of Sharia to reach a resolution. There were no established arbitration courts, and the enforcement of arbitration awards relied heavily on social pressure and community respect for the chosen arbitrators. As a result, pre-oil arbitration in the GCC States was likely more suited to resolving minor disputes within communities rather than complex commercial matters. While this system was effective within tribal communities, it lacked the structure and enforceability that characterise modern legal systems.

2.2.2 Current Legal Framework for Arbitration in the GCC States

The GCC States have always been considered as a vital economic region, due to their geographical location and ports that connect the continent of Asia with Africa.[86] However, the prominence of the Gulf countries in the global economy first emerged with the advent of oil production in the period following the Second World War.[87] The region has witnessed several arbitration disputes relating to oil and gas disputes. For instance,

[83] Charles N Brower and Jeremy K Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 The American Journal of International Law 643, 643.
[84] See page 138.
[85] See page 140.
[86] Muawya Ahmed Hussein, 'Impacts of Foreign Direct Investment on Economic Growth in the Gulf Cooperation Council (GCC) Countries' (2009) 5 International Review of Business Research Papers 362, 366.
[87] Mr Ugo Fasano-Filho and Mr Zubair Iqbal, *GCC Countries: From Oil Dependence to Diversification* (International Monetary Fund 2003) 87.

Petroleum Development Ltd v Sheikh of Abu Dhabi, Saudi Arabia v Arabian American Oil Company (Aramco),[88] and *Ruler of Qatar v International Marine Oil Company.*[89] However, limitations in local legislation and arbitration frameworks often led parties to seek resolution through foreign arbitration bodies or apply foreign laws. This was true even when parties agreed to apply local law, as seen in *Petroleum Development Ltd v Sheikh of Abu Dhabi,* [90] where the arbitrator ultimately deemed the local law inapplicable.[91]

Petroleum Development Ltd v Sheikh of Abu Dhabi,[92] concerned the interpretation of a concession convention that Petroleum Development had signed with the Sheikh of Abu Dhabi. According to this convention, the company was granted an exclusive right to explore and export oil in Abu Dhabi. It was as a result of Petroleum Development's discovery of oil off the coast of Abu Dhabi that the dispute arose. The Sheikh of Abu Dhabi argued that the concession convention excluded the continental shelf, thereby giving Abu Dhabi the right to grant oil rights to other companies. Conversely, Petroleum Development asserted that the contract covered the continental shelf and therefore, the Sheikh had breached the contract. The arbitration dispute was filed in London and presided over by Lord Asquith.[93] Interestingly, Lord Asquith did not apply the local laws of Abu Dhabi, as he found them 'uncertain and obscure'.[94] Instead, he applied principles that rooted in common practice of the civilised nations which he considered to be the proper law of the agreement.[95]

Lord Asquith's approach confirmed the shortcomings of the then legislative system in the GCC States including its arbitration laws. These shortcomings revealed inadequate and, in some cases, the total absence of relevant laws. In other words, while some GCC States did not enact any arbitration laws and were, therefore, resigned to foreign legislation in the event of a dispute, other GCC States drafted ineffective and impractical arbitration laws. This situation could be attributed to two main factors. The first of these is sovereignty, as some GCC countries did not gain their independence until the beginning

[88] Saudi Arabia v Arabian American Oil Company (1963) 27 ILR 117.
[89] Ruler of Qatar v International Marine Oil Company Ltd (1953) 20 ILR 534.
[90] Petroleum Development (Trucial Coast) Ltd v Sheikh of Abu Dhabi (1951) 18 ILR 144.
[91] Ibid 149
[92] Ibid.
[93] Richard Young, 'Lord Asquith and the Continental Shelf' (1952) 46 American Journal of International Law 512, 513.
[94] Petroleum Development (n 90) 150
[95] Edwin J Casford Jr, 'The Continental Shelf and the Abu Dhabi Award' (1952) 1 McGill LJ 109, 115.

of the 1970s.[96] Therefore, the legislators were unable to draft laws that would be appropriate for the economic situation in these States.[97] Second, the area did not attain global economic or commercial importance until after the commencement of large-scale oil production. Thus, some GCC States chose to apply foreign laws in the event of a dispute and resorted to international rather than local arbitrators, with their local rules.[98]

The prevailing arbitration framework in the GCC States had thus become demonstrably incompatible with the needs of the post-oil discovery economies as seen in *the Petroleum Development's* case.[99] For this reason and for the role of arbitration in promoting global trade, the GCC States sought to emphasise the importance of arbitration.[100] Therefore, following their independence, they embarked on comprehensive legal transformation, as outlined in Chapter 1.[101] This period saw the establishment of written constitutions that affirmed the role of Sharia as the foundation of their legal codes.[102] A key aspect of this reform was the enactment of laws regulating arbitration. Thus, arbitration rules were dispersed within broader civil and commercial procedural laws. This was the case in Bahrain,[103] Qatar[104], Kuwait, Oman,[105] and the UAE.[106] In contrast, Saudi Arabia had a dedicated Arbitration Law established in 1983.[107] While these regulations might seem basic and some received harsh criticism as will be seen in Section 2.3,[108] their adoption represented a significant step towards a more structured approach to arbitration in the region.

[96] For example, Bahrain and the UAE gained their independence in 1971.
[97] Zulkifli Bin Hasan, 'Regulatory Framework of Shari'ah Governance System in Malaysia, GCC Countries and the UK' [2009] Kyoto Bulletin of Islamic Area Studies 3, 8.
[98] Al-Suwaidi (n 34) 292.; It should be emphasised that the determination of the applicable law is not solely at the discretion of the GCC State as the sovereign authority over the oil resources. Other involved parties retain the right to negotiate and discuss the applicable law in the event of a dispute. In principle, all terms must be mutually discussed and agreed upon by all parties involved. However, given the GCC State's position as the sovereign authority over the oil resources, it may have a stronger negotiating position and may seek to impose additional terms in its favour, subject to the agreement of the other parties.
[99] Petroleum Development (n 90)
[100] Wright (n 45) 86.
[101] See page 6.
[102] It is worth noting that GCC legislations was heavily influenced by the Egyptian legislator as also will be examined in the next Chapter. See Gianluca P Parolin, 'The Constitutional Framework of International Law in the Gulf: Ratification and Implementation of International Treaties in GCC Constitutions' (2020) 34 Arab Law Quarterly 24, 29.
[103] The Bahraini Civil and Commercial Procedure Code issued by Decree Law No. (12) of 1971.
[104] Law No. 16 of 1971 issuing the Qatari Civil and Commercial Procedures Law.
[105] Law No. (38) of 1980 promulgating the Kuwaiti Commercial and Civil Procedures Law.
[106] Omani Royal Decree No. 32/84 of the Commercial Disputes Settlement Authority of 1984.
[107] The UAE Federal Law No. (5) of 1985 promulgating the Civil Transactions Law
[108] See page 26.

Furthermore, as explained earlier, the GCC States sought to promote foreign investments by joining relevant international agreements, most notably, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.[109] However, the Gulf States acceded to the New York Convention at different times, Kuwait being the first in 1978. Bahrain followed suit in 1988, and then Saudi Arabia in 1994, Oman in 1999, Qatar in 2002, and the UAE in 2006. The GCC States implement the provisions of the Convention on a reciprocal basis, recognising and enforcing only those arbitral awards rendered within the jurisdiction of another contracting state that is a party to the New York Convention.[110] It is therefore axiomatic that arbitral awards rendered in countries that are party to the New York Convention are generally presumed to be legally enforceable in the GCC States, unless they breach the grounds set out in Article V of the Convention.[111]

However, it should be noted that some Gulf States, as well as certain other Arab countries, joined the New York Convention with political reservations. For example, Kuwait affirmed that its accession to the Convention did not in any way signify recognition of the State of Israel or entry into relations with Israel under the Convention.[112] Kuwait made this clear, due to its political views of the Israeli occupation of the State of Palestine. Therefore, arbitral awards issued by or in Israel would not be implemented in the State of Kuwait.[113] Likewise, Bahrain asserted that its accession to the convention would in no way constitute recognition of Israel or be a cause for the establishment of any relations of any kind therewith.[114] Nevertheless, Bahrain retracted this declaration in 2020, during the signing of the normalisation agreement between the Kingdom of Bahrain and Israel.[115] Thus, any arbitral awards issued in Israel can now be enforced in Bahrain.

More recently, several GCC States have modernised their arbitration laws, with Saudi Arabia's Arbitration Law in 2012, Bahrain's Arbitration Law in 2015, Qatar's Arbitration Law in 2017, and UAE's Arbitration Law in 2018.[116] These laws are largely based on the

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[109] Reyadh Mohamed Seyadi, *The Effect of the 1958 New York Convention on Foreign Arbitral Awards in the Arab Gulf States* (Cambridge Scholars Publishing 2017) 49.
[110] The New York Convention 'Contracting States' (NYC, 2024) <https://newyorkconvention.org/contracting-states/> accessed 13 June 2024.
[111] Arbitral awards issued by the Israeli courts are not enforceable in Kuwait or Saudi Arabia.
[112] The New York Convention (n 110).
[113] Ali M Radwan and Howard L Stovall, 'Reconstruction of Kuwait: Emerging Legal Issues' (1991) 14 Middle East Executive Reports 4, 8.
[114] Howard L Stovall and others, 'Middle East Commercial Law Developments' (HeinOnline 1998) 412.
[115] Joel Singer, 'The Abraham Accords: Normalization Agreements Signed by Israel with the UAE, Bahrain, Sudan, and Morocco' (2021) 60 International Legal Materials 448, 450.
[116] Omani Arbitration law was issued in 1997, while Kuwait's Arbitration Law was enacted in 1980.

UNCITRAL Model Law or international standards, for example, the legislator in Bahrain granted special considerations to international arbitral awards in line with their international nature.[117] This can be seen in Article 1 of the Bahraini Arbitration Law 2015, which stipulates that in the event of an international dispute, courts and arbitrators should consider an international perspective when interpreting its provisions. Generally, the above laws regulate all stages of arbitration, from the arbitration agreement, through the rise of disputes, to the recognition and enforcement of the arbitral award and even its challenge. In 2012, the GCC States reached an agreement on a unified arbitration law. According to the Unified Arbitration Law of 2012, the arbitrator as well as the courts will avoid any inconsistencies in local arbitration laws if they exist as the law also adopted a specific mechanism for implementing foreign arbitration awards. Unfortunately, this law was not implemented due to political disputes that occurred amongst the GCC States.[118]

Additionally, the GCC States have established dispute resolution centres, such as Dubai International Arbitration Centre (DIAC) and Saudi Centre for Commercial Arbitration (SCCA).[119] These centres additionally improve the reputation of the GCC States which providing an alternative to national courts when disputes arise in relation to international contracts. Nonetheless, it is impossible to eliminate national courts from the arbitration framework, as they are essential for the recognition and enforcement of New York Convention awards and other foreign awards. Thus, it is important to explore the approach to recognition and enforcement.

2.3 Recognition and Enforcement Procedures in the GCC States

As explained in Chapter 1, the New York convention concerns the 'recognition' and the 'enforcement' of foreign arbitral awards. The terms of recognition and enforcement are demonstrably intertwined. Certain agreements, like the New York Convention, explicitly link the two, as evidenced by Article 5's use of the phrase 'recognition and enforcement'. Conversely, agreements like Riyadh Convention distinguish the terms,[120] reflected in

[117] Yousif Zainal, 'Prevalence of Arbitration in the Gulf Cooperation Council Countries, The' (2001) 18 J. Int'l Arb. 657, 658.
[118] Hessa Aldosari, 'The Effectiveness of International Dispute Settlement Mechanisms in International Organizations: The GCC Crisis as a Case Study' (LLM thesis, Hamad Bin Khalifa University 2020) 3.
[119] Salim Yaacoub and Carrie Shu Shang, 'Judicial Cooperation as Belt and Road Initiative (BRI) Transnational Dispute Settlement Order: Perspectives from the Arab Middle Eastern States' (2022) 21 European Journal of East Asian Studies 395, 399.
[120] Riyadh Agreement of 1983. This agreement relates to the implementation of judicial rulings and arbitration awards. This agreement has been ratified by most Arab countries, including the Gulf Cooperation Council countries. By referring to the Riyadh Agreement, the author does not mean equivalence between the two agreements, but rather shows the relationship between 'recognition' and 'enforcement' in other agreements related to the Gulf Cooperation Council countries.

Article 25's mention of 'recognition' or 'enforcement'.[121] This distinction raises the possibility of recognising an award without enforcing it, while in many cases, the court may recognise and enforce the award.

In any case, although the two terms are related and seemingly intertwined, they are different. The recognition of an arbitral award is a distinct step from its enforcement. Recognition is an initial stage, where a party requests a national court to formally acknowledge the award's validity and binding nature on the issues it addresses between the parties. If the court is satisfied that the arbitral award meets the provisions of Articles 3 and 5 of the New York Convention,[122] it will therefore be recognised.[123]

In *Kingdom of Spain v Infrastructure Services Luxembourg,*[124] the Federal Court of Australia distinguished between the two terms. While recognition signifies the formal confirmation by the competent court that an arbitral award is binding and possesses legal consequences under the domestic legal system. Enforcement, a subsequent stage, entails the successful party seeking the competent court's assistance to ensure compliance with the recognised award and obtain the designated redress. As mentioned earlier, while recognition of an arbitral award constitutes a crucial prerequisite for its enforcement, it does not guarantee successful enforcement. Courts may acknowledge the award's validity by recognising it but ultimately decline to enforce it. In other words, to recognise an award is not necessarily to enforce it.[125]

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[121] Also see Belgian delegate, 'Travaux Préparatoires "Committee on the Enforcement of International Arbitral Awards", Summary Record of the First Meeting In 'Defining and distinguishing "recognition" and "enforcement"' <https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1785> accessed 13 June 2024.

[122] Article III of the New York convention states that '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'. Also, Article IV of the New York convention affirms that '1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof. 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.'

[123] In addition to the procedures required by the New York Convention to recognise an arbitration award, some local laws may impose additional procedures.

[124] Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. [2023] HCA 11

[125] In some instances, judicial bodies may enforce an arbitral award that has been set aside in another jurisdiction or refuse to enforce an arbitral award that has been recognised in a different jurisdiction, as exemplified in Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs (Government of Pakistan) [2011] 1 AC 763

In the GCC States, however, it is noteworthy that the arbitration legislations of all GCC States, except Qatar, do not include the term 'recognition' or procedure for seeking recognition of a foreign arbitral award. These statutes solely address the enforcement of arbitral awards as it will be seen in the following sections.[126]

2.3.1 Saudi Arabia

Out of all the GCC States, Saudi Arabia has long been described as having the strictest enforcement procedures.[127] Saudi Arabia has the biggest share of foreign investment in the GCC States. Moreover, it offers the clearest example of a Sharia law legal system, with its constitution explicitly adopting Sharia law as its sole source of legislation.[128] Thus, Saudi Arabia has always been recognised as having the most complex approach to implementing foreign arbitral awards, due to the overlap of Sharia law with statutory legislation.[129] The legal grounds to recognise and enforce foreign arbitral awards in Saudi, either by international agreements or reciprocity.[130]

According to Article 1 of the Saudi Arbitration Law 2012, the Enforcement Court is the competent court where the winning party should file the arbitral award.[131] Saudi Arbitration Law regulates the process of the enforcement of arbitral awards. When considering the arbitration law in Saudi Arabia regarding the enforcement of foreign awards, a distinction must be made between two basic periods, namely the old approach, which is represented by the Arbitration Law of 1983, and on the other hand, the modern approach, which is represented by the Arbitration Law of 2012.

The 1983 Arbitration Law drew criticism for not being consistent with international best practice, as set out in the UNCITRAL Model Law on International Commercial Arbitration.[132] It was seen as less supportive of arbitration, relying more on court

[126] To ensure concision, henceforth, subsequent indications to 'enforcement' throughout this thesis also means 'recognition and enforcement', unless explicitly clarified otherwise.
[127] Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Award in the Middle East' (2008) 21 New York International Law Review 1, 44.
[128] Article 1 of the Basic Law of Governance (the 'Saudi Constitution') stipulates that 'the Kingdom of Saudi Arabia is a sovereign Arab Islamic State… its constitution is Almighty God's Book, The Holy Qur'an, and the Sunna (Traditions) of the Prophet (PBUH)'.
[129] Husain M Al-Baharna, 'The Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain' (1989) 4 Arab Law Quarterly 332, 339.
[130] Saudi Arbitration Law of 2012.
[131] It should be noted that the old Saudi Arbitration Law of 1983 stipulated that the Board of Grievances is the competent authority in the implementation of foreign arbitral awards. However, according to the Saudi Law of Arbitration dated 2012 the Enforcement Court has jurisdiction over disputes related to the enforcement of foreign judgments.
[132] Amer Tabbara, 'Preserving the Local Culture While Modernising Arbitration in Saudi Arabia: A Blessing or a Curse?' [2022] Journal of Law in the Middle East 26, 15.

intervention throughout the arbitration process. Moreover, the formal requirements for arbitration agreements remain undressed, creating potential ambiguity. The Arbitration Law 1983 required the arbitrator to be male and Muslim. In addition, the process of enforcing arbitration awards under the 1983 Law was considered unfriendly and subject to extensive court approval.[133] Therefore, it can be inferred that arbitral awards issued by non-Muslim or female arbitrators may not be enforceable in Saudi Arabia.

On the other hand, the 2012 Arbitration Law marks a significant step forward for the country's arbitration landscape. It draws inspiration from the UNCITRAL Model Law, promoting party autonomy by explicitly recognising written arbitration agreements as binding. This shift empowers parties to choose arbitration for dispute resolution with greater certainty. Furthermore, the 2012 law limits court intervention to specific circumstances, including public policy and non-arbitrability.[134] This allows for a more efficient arbitration process. A significant improvement is the alignment of the enforcement process with the New York Convention 1958. [135] This simplifies enforcement and brings Saudi Arabia's legal framework in line with international standards. Furthermore, the new law of 2012 does not require specific gender or religion for the arbitrators.

Similar to the terms of the New York Convention 1958, Saudi Arbitration Law 2012 requires specific procedures to enforce a foreign arbitral award in Saudi Arabia. According to its Article 53, the winning party should submit the original award or an attested copy thereof, as well as a true copy of the arbitration agreement. An Arabic translation of the arbitration award, attested by an accredited authority, should only be submitted if the award is not issued in Arabic.[136] In addition to the requirements of Article 53, Article 55 obligates the enforcement court to ensure that the arbitral award is not in conflict with a judgment or decision issued by a court, committee, or commission has the jurisdiction on the subject of the dispute in the Kingdom of Saudi Arabia.[137]

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[133] Amnah Abahussain, 'The Rising Tide of Change: Saudi Arabian Women in Dispute Resolution' (2018) 73 Dispute Resolution Journal 91, 103.
[134] Article 50(2) of the Saudi Arbitration Law 2012.
[135] Ahmed Altawyan, 'The Arbitral Proceedings Under the New Saudi Arbitration Law: A Comparison with International Rules' [2017] XII (2) Journal of Strategies and International Studies 113, 123.
[136] Article 44 of the Saudi Arbitration Law states that the arbitration tribunal shall deposit the original award or a signed copy thereof in its original language with the competent court, within the period set in Article 43, para 1 of this Law, accompanied by an Arabic translation of the award attested by an accredited body, if the award is issued in a foreign language.
[137] Article 55 of Saudi Arbitration Law 2012 states that the request for the enforcement of the arbitral award shall not be accepted unless the deadline of filing the invalidity of the award has passed. Also,

Saudi Arbitration Law has received some criticism with regard to the implementation of foreign arbitral awards. Carbonneau argues that the procedures included in Saudi Arbitration Law for the implementation of foreign arbitral awards are an indirect way of refusing to implement such awards.[138] He observes that the Saudi legislator has imposed a requirement for numerous procedures and steps to implement an arbitral award, such as ratification by the courts and translation of the arbitral award.[139] However, the above claims do not represent an unfriendly approach to either the New York Convention or the enforcement of foreign arbitral awards. This is because the procedures set out in the Saudi Arbitration Law are compatible with the articles of the New York Convention.[140] Furthermore, most signatories to the New York Convention have included similar provisions in their domestic laws.[141]

The Saudi Arbitration Law of 2012 shows more harmonisation with the global practices of international commercial arbitration, compared to its predecessor from 1983.[142] For instance, as explained earlier, the previous Saudi Arbitration Law of 1983 explicitly required the arbitrator to be male and Muslim. Thus, arbitral awards issued by female and non-Muslim arbitrators could be refused enforcement in Saudi Arabia. Meanwhile, the Arbitration Law of 2012 does not include such terms. Furthermore, compared to the arbitration laws of certain other GCC States, such as Kuwait and Oman, the Saudi Arbitration Law regulates arbitration and the implementation of foreign arbitral awards in greater detail. For instance, it confirms that the competent court shall consider the action for nullification in the cases referred to in Article 50 of Saudi Arbitration Law, without inspecting the facts or subject matter of the dispute. This approach complies with international standards for the recognition and enforcement of foreign arbitral awards. Generally, all foreign arbitral awards are enforceable in the Kingdom of Saudi Arabia, unless they violate Article 50 of the Saudi Arbitration Law of 2012, which provides grounds for refusal to enforce an arbitral award where:

> a) no arbitration agreement exists, or if such agreement is void, voidable, or terminated due to expiry of its term….b) If either party, at the time of concluding

Article 55(2)(A) of the same law stipulate that the award does not conflict with an award or decision issued by a court or committee or authority that has the jurisdiction on the subject of the dispute in the Kingdom of Saudi Arabia.

[138] Thomas E Carbonneau, 'The Ballad of Transborder Arbitration' (2001) 56 U. Miami L. Rev. 773, 795.

[139] ibid 797.

[140] Article 4 of the New York Convention 1958.

[141] It is not only the GCC States that require such procedures but also several other signatories to the New York Convention. For instance, Article 53 of Jordan Arbitration law of 2001 includes similar terms as well as Article 56 of Egypt Law No. 27/1994.

[142] Saudi Arbitration Law of 1983.

> the arbitration agreement, lacks legal capacity, pursuant to the law governing his capacity…c)If either arbitration party fails to present his defence due to lack of proper notification of the appointment of an arbitrator or of the arbitration proceedings, or for any other reason beyond his control…d) If the arbitration award excludes the application of any rules which the parties to arbitration agree to apply to the subject matter of the dispute.. e) If the composition of the arbitration tribunal or the appointment of arbitrators is carried out in a manner that violates this Law or the agreement of the parties. f) If the arbitration award rules on matters not included in the arbitration agreement. Nevertheless, if the sections of the award relating to matters subject to arbitration can be separated from those not subject thereto, then nullification shall apply only to the sections not subject to arbitration. g) If the arbitration tribunal fails to observe the conditions required for the award in a manner that affects its substance, or if the award is based on void arbitration proceedings that affect it.

The Saudi legislator also affirms that issues related to nationality, family law or criminal liability are not arbitrable.[143] Furthermore, Article 10(2) of the Arbitration Law stipulates that the official authorities in Saudi Arabia should not resort to arbitration without the approval of the Prime Minister, and this includes administrative contracts.

Another ground for refusal is the lack of reasoning. Under Saudi Arbitration Law, a competent court may refuse to enforce a foreign arbitral award if the decision is not reasoned. This approach was confirmed by the Board of Grievances when a court stated that 'a failure to provide reasons for all or part of the award constitutes a valid ground for refusal, regardless of the terms of the arbitration agreement'.[144] This approach has been adopted across the GCC States, whereas some non-GCC jurisdictions have regulated this exception with greater harmonisation. For instance, Article 42(2) of the Egyptian Arbitration Law stipulates that the arbitral award shall state the reasons upon which it is based, unless the arbitration parties have agreed otherwise or the law applicable does not require the award to be supported by reasons.[145] Furthermore, some scholars argue that foreign awards that are contrary to economic interests will not be enforced in Saudi Arabia.[146]

Moreover, the recognition and enforcement of an arbitral award may be refused if the arbitral tribunal exceeds its authority, for example, considering claims outside the scope of the arbitration agreement, or overlooking the parties to the dispute requests.[147] This may be seen from Article 50(f) of the Saudi Arbitration Law, which states that if the

[143] Article 2 of the Saudi Arbitration Law of 2012.
[144] Board of Grievances, Case No 126/114 of 2011.
[145] Egyptian Law No 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters.
[146] Tabbara (n 132) 28.
[147] Saudi Court of Appeal, Case No 233/2013.

arbitral award rules on matters that are not included in the arbitration agreement, the award will not be enforced. Nevertheless, if sections of the award that relate to the subject matter of the arbitration can be separated from those that are not, then only those sections that are not subject to arbitration may be nullified. Additionally, Article 50, para 2 states that arbitral awards that violate public policy or Islamic Sharia shall not be enforceable in Saudi Arabia. However, the Law does not provide any clarification of public policy or Islamic law.

With regard to the implementation of arbitral awards in Saudi Arabia, although some criticisms are inaccurate or exaggerated, as mentioned above, there have been cases that raise concern. In *Jadawel International (Saudi Arabia) v Emaar Property PJSC (UAE),*[148] which involved a dispute over a construction agreement, the claimant resorted to local arbitrators, claiming compensation for the defendant's breach of the agreement. The arbitral tribunal subsequently rejected the claimant's claims for compensation for lost profit, whereupon the claimant challenged the award before the competent court in Saudi Arabia. The Saudi court overturned the award and obligated the defendant to pay an amount of USD 250 million in compensation.[149] This decision was subjected to extensive criticism from arbitration practitioners, who questioned the legitimacy of the implementation of arbitral awards by the Saudi courts, especially since the award was issued by local arbitrators.[150]

The decision described above increased global doubts about arbitration in Saudi Arabia, particularly because the court not only refused to enforce the arbitral award but also reversed a decision. In this instance, the issue pertains not to public policy or Sharia law but rather to the procedures for enforcing arbitral awards. Consequently, concerns remain regarding the impartiality of the local courts in enforcing such awards, particularly when a foreign party is the beneficiary. Additionally, it has been noted that some Saudi courts tend to refuse to enforce arbitral awards that conflict with Sharia.[151] For instance, the Saudi Board of Grievances refused to enforce an arbitral award of approximately USD

[148] Jadawel International (Saudi Arabia) v Emaar Property PJSC (UAE) [2008].
[149] In Board of Grievances, Case No 433/2009, the decision was not implemented, as the parties to the dispute reached a settlement in 2010, and as a result, all cases were withdrawn.
[150] Ibrahim Mathker Saleh Alotaibi and others, 'Reassessing Saudi Arabia's Foreign Investment Laws: From Protectionism to Liberalization' [2024] International Journal of Law and Management 10; Abdulrahman Saleem, 'A Critical Study on How the Saudi Arbitration Code Could Be Improved and on Overcoming the Issues of Enforcing Foreign Awards in the Country as a Signatory State to the New York Convention' [2012] Available at SSRN 2315728 6 <https://ssrn.com/abstract=2315728> accessed 15 June 2024.
[151] Sharia role will be examined in the next Chapter (Chapter 3). However, cases relate to Sharia and public policy as refusal grounds will be discussed in Chapter 6.

60,000 in favour of the claimant. The court based this refusal on the fact that the amount resulted from a contract related to a music concert, which conflicted with Sharia.[152] The court affirmed that although there is widespread debate among Muslim scholars regarding music and singing contracts, with some schools of jurisprudence, such as Shafi'i and Hanafi, permitting such contracts, others, like Hanbali, forbid music concerts and their contracts.[153] However, the court applied the strictest opinion in this case,[154] despite having the authority to enforce the agreement by applying the school of jurisprudence that would be most consistent with enforcement. On the contrary, the court applied the more rigorous school of thought, which affirmed the negative approach adopted by some local courts towards enforcing the awards.[155] Hence, such decisions could be the reason why many parties avoid the Saudi courts.[156]

Although the above negative practices, the new Saudi Arbitration Law of 2012 aligns with the New York Convention. Criticisms regarding the recognition and enforcement procedures suggest that Saudi law does not present an obstacle to the enforcement of arbitration awards. However, the law exclusively addresses the enforcement of arbitral awards, omitting the term 'recognition.' Despite this omission, no cases have been found where it has led to the refusal of an arbitral award due to this absence. Additionally, it should be noted that the law applies the same enforcement procedures to both domestic and international arbitral awards. This uniform approach may undermine Saudi Arabia's efforts to promote arbitration as the primary method for dispute resolution.

2.3.2 The United Arab Emirates (UAE)

The procedures to enforce an arbitral award in the UAE depend on whether the award is domestic or foreign. According to the UAE Arbitration law 2018, parties who seeks recognition and enforcement of domestic arbitral award should file a request before the Court of Appeal for ratification and enforcement of the award. This request should include the original award or a certified copy, along with the arbitration agreement. The Court of Appeal will examine the request to ensure the award meets the conditions. For

[152] Board of Grievances Case No 375/1/G of 2003.
[153] See page 134.
[154] Different schools of jurisprudence will be examined in Chapter 5.
[155] As will be examined in Chapter 5, the school of jurist Ahmad ibn Hanbal (Hanbali) is the most stringent school of jurisprudence, compared to its counterparts. However, it should be noted that the Saudi courts have not adopted a specific school of jurisprudence.
[156] ibid.

instance, the award must be valid and binding under UAE law. Also, the arbitration agreement must be valid and enforceable. Furthermore, the court should ensure that there is no violation of due process during the arbitration proceedings. Therefore, if the court is satisfied with the award, it will issue an enforcement decision.

On the other hand, when the arbitral award is foreign or a New York Convention award, the winning party should follow specific procedures since the UAE is a signatory to the New York Convention 1958. To recognise and enforce foreign arbitral award, an application should be submitted to the Enforcement Court. The court may enforce the award unless the other party challenges the recognition and the enforcement. Therefore, the court will examine the application to ensure that neither arbitral award no arbitration agreement conflict with the refusal grounds of the New York Convention and the UAE arbitration law.[157] Under the UAE Arbitration Law 2018, the competent court should issue an enforcement order within 60 days of the filing date.[158]

Article 53 of the UAE Arbitration Law 2018 provides grounds for refusal to enforce an arbitral award, wherein the applicant for annulment must provide proof that:

> A- There was no Arbitration Agreement, or such agreement was null and void, or forfeited pursuant to the Law chosen by the Parties, or according to the present Law if no reference is made to a certain law. b- A party was, at the time of conclusion the Arbitration Agreement, incapacitated or lacking capacity according to the Law governing his legal capacity. c- A party has no legal capacity to act in the disputed right, according to the law governing his legal capacity, set out in Article 4 of the present Law. d- A party to the arbitration was unable to submit his statement of defence due to that he was not given a proper notice of the appointment of an arbitrator or of the arbitration proceedings, or due to the failure of the Arbitral Tribunal to comply with the principles of litigation or for any other reason beyond his will. e- The arbitral award has not applied the law agreed by the Parties to cover to the subject-matter of the dispute. f- The composition of the Arbitral Tribunal or appointment of an arbitrator has been made contrary to the provisions of the present Law or the agreement of the Parties. g- The arbitration proceedings are void in such a way that has influenced the award, or if the arbitral award was issued after the termination of its specified period. h- The arbitral award has decided on matters not covered by the Arbitration Agreement or falling beyond the scope of said arbitration. Nevertheless, if the decision on matters submitted to arbitration can be separated from those not so submitted, then only the last said parts of the award may be deemed null and void.

Furthermore, in the event that the dispute underlying the arbitral award is not subject to settlement by arbitration or violates the UAE's public policy and public morality, the

[157] Article 55 of the UAE's Arbitration Law of 2018; if the award is made in another language, an Arabic version should be submitted.
[158] Article 51 of the UAE Arbitration Law.

court shall on its own initiative nullify that award.[159] Current practices of the UAE courts indicate that certain disputes cannot be resolved through arbitration due to their relation to public policy. Article 3 of the UAE Civil Transactions Law affirms what should constitute public policy:

> provisions relating to personal status, such as marriage, inheritance, lineage, provisions relating to systems of governance, freedom of trade, circulation of wealth, private ownership and other rules and foundations on which the society is based, provided that these provisions are not inconsistent with the imperative provisions and fundamental principles of the Islamic Sharia.[160]

Therefore, the Dubai Court of Cassation has refused to enforce arbitral awards concerning property transactions, with the competent court affirming that the transfer of real estate ownership must be through the Dubai Land Department.[161] In *Baiti Real Estate Development v Dynasty Zarooni Inc*, the court based its decision on Article 3 of Law No 13 of 2008, which stipulates that all actions on off-plan property units sold shall be registered in the initial property register. Moreover, sales and all other legal actions that transfer or restrict ownership and any right based thereon shall be deemed null and void unless registered in the initial property register.[162] It is worth highlighting that in this case the court refused to enforce the arbitral award as it breached the public policy of the country.

Nevertheless, this broad approach to applying the public policy exception has been criticised. For example, Blanke argues that Article (4)(2) of the UAE Arbitration Law states that 'arbitration is not permitted in matters which do not permit compromise'. Moreover, Article 733 of the UAE Civil Transactions Law provides the list of conditions for what cannot be settled.[163] Interestingly, Article 733 does not include real estate as a non-arbitrable matter,[164] although the Dubai Court of Cassation has refused to enforce an

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[159] Article 53(2) of Federal Law No 6 on Arbitration of 2018.
[160] Federal Law No (5) of 1985 On the Civil Transactions Law of the United Arab Emirates.
[161] Baiti Real Estate Development v Dynasty Zarooni Inc, Dubai Court of Cassation, Case No 14/2012.
[162] The court affirmed that its decision had been made according to the relevant laws, as above. Furthermore, the court clarified that considering real estate disputes as a matter of public policy is derived from the importance of this sector, in an attempt to protect individuals' rights when they bought properties.
[163] Gordon Blanke, K Cronin and J Paulsson, 'Public Policy in the UAE: Has the Unruly Horse Turned into a Camel' (Kluwer, 2017) <https://arbitrationblog.kluwerarbitration.com/2012/10/14/public-policy-in-the-uae-has-the-unruly-horse-turned-into-a-camel/> accessed 13 April 2024.
[164] Article 733 states that 'It shall not be permissible to enter into an accord if it includes any of the following impediments:
(1) The annulment of a debt by another debt.
(2) the sale of food by way of commutative contract prior to delivery.
(3) The deferred exchange of gold against silver and vice versa.
(4) Riba al-nasi'a (usurious interest in consideration of the deferment of the payment of a debt).

arbitral award in such a case.[165] Thus, Blanke concludes that the Dubai Court of Cassation committed a fundamental error by assuming that real estate disputes are categorically excluded from arbitration on the grounds that they represent matters of public policy.[166] This decision may be attributed to a failure to adopt a clear definition of public policy, and demonstrates the negative practices of some local courts in the GCC States. Overall, local court decisions in the UAE demonstrate practices that are unfriendly to arbitration.[167] In addition to the broad application of the public policy exception, some courts of the UAE review the merits of the arbitral award, which undermines a fundamental principle of arbitration, namely party autonomy.[168]

Similarly, in *Bechtel v Civil Aviation of Dubai,* where the arbitral decision was issued in favour of Bechtel,[169] the Dubai government challenged this decision before the Dubai courts, on the ground that the arbitrator violated the law with regard to the oath of witnesses. This violation consisted of merely reminding the witnesses to tell the truth or else face severe consequences, rather than applying the UAE law by compelling the witnesses to declare: 'I swear by the Mighty God to say all the truth and nothing but the truth.'[170] The court responded to the appeal and annulled the arbitral award, [171] in a decision that has been criticised by practitioners who question the credibility of the UAE courts regarding the enforcement of arbitral awards, especially where one of the parties is linked with the government.[172]

2.3.3 Qatar

Similar to the arbitration laws of the other GCC States, the Qatari Arbitration Law 2017 sets out clear steps to implement arbitral awards in Qatar. This law replaced the outdated Qatari Arbitration Law codified under Qatar's Civil and Commercial Procedures Law of

(5) Substituting part of a deferred debt owed by a debtor in consideration of advancing the date of payment.
(6) Reducing the amount of a guarantee on a deferred debt owed by a debtor in consideration of accelerated payment with an increase.
(7) A loan involving a benefit.

[165] It is the highest court in the Emirates and therefore, parties cannot appeal against its decisions.
[166] Gordon Blanke and others (n 163).
[167] Mahmood Ahmad, 'Critical Study of the Role of Sharia Public Policy in the Recognition and Enforcement of Foreign Arbitral Awards in UAE' (PhD thesis, University of East Anglia 2020) 207.
[168] Dubai Court of Cassation, Civil Appeal for Cassation No 275 of 2014.
[169] International Bechtel Co LLC v Department of Civil Aviation of the Government of Dubai [2002] DIAC.
[170] Article 43 of the Federal Law No 10 of 1992 on Evidence in Civil and Commercial Transactions.
[171] Dubai Court of Cassation, Case No 502/2003.
[172] John M Townsend, 'The New Bahrain Arbitration Law and the Bahrain "Free Arbitration Zone"' (2010) 65 Dispute Resolution Journal 74, 76.

1990, which no longer aligned with international practices. The new law, issued in 2017, aims to enhance Qatar's economic position and attract foreign investment by aligning its arbitration practices with international standards and offering more detailed regulations compared to the 1990 law. Article 34 of the Qatari Arbitration Law 2017 states that an application for the enforcement of an arbitral award shall be submitted in writing to the civil and commercial arbitral disputes circuit in the Court of Appeal, along with a copy of the arbitration agreement, the original award or a certified copy of it in the language in which it was issued, and a certified Arabic translation if it was issued in a foreign language, unless the parties have agreed on alternative methods of enforcing the arbitral award. Article 35 of the Qatari Arbitration Law affirms that the court may refuse on its own motion to recognise or enforce the arbitral award, if its recognition or enforcement would be contrary to the State's public policy.[173]

While the Arbitration Law outlines a clear process for the recognition and enforcement of arbitral awards, it adopts similar procedures for the recognition and enforcement of domestic and international arbitral awards. The absence of different procedures could lead to misapplication of the law itself. Certain practices employed by the Qatari courts raise concerns regarding this issue. For instance, Qatar's Court of Appeal has applied domestic procedural law to an international arbitral award affirming that the award breaches the public policy of Qatar.[174] In this case, the court refused to enforce the arbitral award on the grounds that it conflicted with local legislation, specifically Qatar Civil and Commercial Procedural Law of 1990. Notably, the court determined that a breach of this law constitutes a violation of Qatari public policy. Furthermore, in *International Trading and Industries Inv Co v DynCorp Aerospace Technology*,[175] the Qatari Court of Appeal violated the arbitration agreement between the parties in reviewing the merits of the arbitration decision, rather than responding to the claims of the disputing parties.[176]

Practices such as those described in the cases above raise doubts as to whether these are due to misapplications of the law or exploitation of the vagueness of public policy exception in Article 5 of the New York Convention 1958. Some scholars, such as

[173] It is worth noting that in Article 35, the Qatari legislator adopted the same refusal grounds as in UAE Arbitration Law.
[174] Qatari Court of Cassation, Case No 64/2012.; This chapter aims only to examine the recognition and enforcement procedures and hence cases where Qatari courts refuse to enforce arbitral awards will be examined further in Chapter 6.
[175] International Trading and Industries Inv Co v DynCorp Aerospace Technology, No 09-791 (DDC, Jan 21, 2011).
[176] The cases above will be presented in more detail in Chapter 6, see page 208.

Mohtashami and Lawry,[177] attribute these negative practices to two main reasons: first, a lack of consideration for international or regional agreements when enacting arbitration laws;[178] and second, insufficient training of judges in Qatari courts, leading to their failure to comply with international arbitration practices.[179] This second reason may be noted in the Court of Cassation's decision, wherein the court considered the arbitral award issued by an international arbitration centre as a 'domestic' arbitral award, consequently applying the local law to an international arbitral award, as per a domestic award.[180] Additionally, Kehoe and Mallis describe the enforcement of arbitral awards in Qatar as a 'long process' that demonstrates unfamiliarity with applying the New York Convention.[181] Moreover, Townsend argues that a lack of confidence in the local courts, especially when arbitral awards are issued against local parties with influence over or relationships with the government, causes parties to avoid Middle Eastern countries.[182]

However, the negative approach to international commercial arbitration and the enforcement of foreign arbitral awards in Qatar extends beyond merely refusing to implement foreign decisions or broadly applying the public policy exception. It is also rooted in the personal and criminal liability of the arbitrators. In a decision issued by the Criminal Court, arbitrators received a custodial sentence of three years for exceeding their authority.[183] This decision related to an arbitration agreement between a foreign company and a businessman from the Qatari royal family, whereby the parties agreed that in the event of a dispute, the seat of arbitration should be Qatar. A dispute arose between the parties, and instead of the arbitrators' decision being issued in Qatar as the seat of arbitration, the arbitrators referred the dispute to an international arbitration centre in Tunisia, where an arbitral award was issued against the Qatari businessman. Thus, the court imprisoned the arbitrators on the premise that they had misapplied the agreement.

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[177] Reza Mohtashami and Merryl Lawry-White, 'The (Non)-Application of the New York Convention by the Qatari Courts: ITIIC v. Dyncorp' (2012) 29 J. Int'l Arb. 429, 435.
[178] ibid.
[179] ibid.
[180] In the Qatari Court of Cassation, Civil and Commercial Circuit, Case No 64/2012, the court based its decision on Article 63 of the Qatari Constitution, which stipulates that 'The Judicial Power is exercised by the courts in the manner specified in this Constitution. Judgments are issued in the name of the prince'. Likewise, Article 69 of the Civil and Commercial Procedural Law 13/1990 affirms that 'awards shall be delivered in the name of His Royal Highness, Emir of the State of Qatar'.
[181] Caroline Kehoe and Janine Mallis, 'Qatar- Another Positive Step Forward in the Enforcement of Foreign Arbitral Awards' (*Herbert Smith Freehills, 2016*) <https://hsfnotes.com/arbitration/2016/10/18/qatar-another-positive-step-forward-in-the-enforcement-of-foreign-arbitral-awards/> accessed 12 January 2022.
[182] John M Townsend, 'The New Bahrain Arbitration Law and the Bahrain" Free Arbitration Zone"' (2010) 65 Dispute Resolution Journal 74, 76.
[183] Qatari Court of First Instance, Criminal Court, Case No 1650/2018.

Indeed, it would seem that the negative approach adopted by certain courts in the Gulf countries, like in Qatar, will lead to increasing doubts among investors about the seriousness of these countries in adhering to international agreements regarding the implementation of arbitral awards.

2.3.4 Bahrain

The Kingdom of Bahrain was one of the first Gulf countries to enact laws governing arbitration, beginning with its first Arbitration Law in 1971, and later acceding to the New York Convention in 1988. In 1993, the Bahrain Centre for International Commercial Arbitration was established, followed by the enactment of a new Arbitration Law in 1994.[184] Additionally, Bahrain has positioned itself as a regional hub for international commercial arbitration, being approved as the seat of the GCC Centre for Commercial Arbitration, established in 2000.[185]

Nevertheless, similar to its neighbours in the GCC, Bahrain acceded to the New York Convention 1958 with some reservations over the implementation of foreign arbitral awards. For instance, Bahrain applies the Convention on the basis of reciprocity and solely for the recognition and enforcement of awards made on the territory of another contracting state that is a signatory to the Convention.[186] Foreign arbitral awards may be enforced in Bahrain by the High Civil Court, depending on the nature of the dispute.[187] However, it is not permissible to enforce a foreign arbitral award without filing an enforcement application before the Bahraini Implementation Court.[188] Bahrain is a party to the New York Convention 1958, which simplifies the process for recognising and enforcing foreign arbitral awards in the country. The party seeking recognition and enforcement of an award must file a written application with the Bahraini High Civil Court. Along with the application, the original arbitral award or a certified copy and the arbitration agreement should be submitted. The Bahraini court will generally recognise and enforce the award unless one of the limited grounds outlined in the New York

[184] Article 10 of the Law establishing the Bahrain Arbitration Centre states that 'The Arbitration Rules of the Bahrain Centre for International Commercial Arbitration mean those rules established by the United Nations Commission on International Trade Law for the year 1976 'The UNCITRAL Arbitration Rules'.
[185] See GCC, http://gcccac.org/en/ accessed 25 January 2022.
[186] Moreover, in 1988, Bahrain affirmed that 'The accession by the State of Bahrain to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 shall in no way constitute recognition of Israel or be a cause for the establishment of any relations of any kind therewith'. However, in 2021, Bahrain withdrew this declaration after normalisation with Israel.
[187] Article 3 of Bahrain Arbitration Law No 9/2015 and Article 252 of the Bahrain Civil and Commercial Procedures Act promulgated by Legislative Decree No (12) of 1971.
[188] Bahrain Court of Appeal, Case No 3514/2019.

Convention applies. Once the award is recognised by the High Civil Court, the successful party can apply to the Court of Enforcement for enforcement.

Alkhalifa argues that arbitration practices in Bahrain show a pro-enforcement approach to foreign arbitral awards.[189] This approach is not only limited to the enforcement of arbitral awards, but also to the consideration of arbitration agreements.[190] This is evident from a decision by the Court of Cassation, which confirmed that resorting to regular courts by one of the parties, despite the existence of an arbitration agreement, contravened public policy in Bahrain.[191] The court applied the same approach in a recent decision concerning a dispute between Bahraini and Kuwaiti parties. The parties had agreed to resort to arbitration in the event of a dispute. However, the Kuwaiti party brought the matter before a Kuwaiti court, demanding compensation of KWD 900,000. The Bahraini party argued that an arbitration agreement existed, and therefore the local courts were not permitted to hear the dispute. The court subsequently rejected this argument and ruled in Favor of the claimant (the Kuwaiti party).[192] As a result, the defendant appealed to the Court of Appeal, arguing that the case should be dismissed due to the existence of an arbitration clause. The Court of Appeal upheld the lower court's decision and ordered the defendant to pay the claimant KWD 900,000. [193]

The claimant subsequently sought to implement the ruling in the defendant's country, so he submitted the ruling to the Enforcement Court in Bahrain. However, the defendant objected to the enforcement of the decision issued by the Kuwaiti court, arguing that the presence of an arbitration clause in the underlying agreement precluded the local courts from exercising jurisdiction over the dispute. The Bahraini Enforcement Court affirmed this claim and refused to implement the decision issued by the Kuwaiti court, whereupon it considered that reviewing this dispute violated the public policy of Bahrain, since both parties had agreed to resort to arbitration.[194] In this case, despite Bahraini courts generally favouring arbitration, invoking public policy to refuse enforcement of a judgment might have been inappropriate in this context. The implementation of foreign judgments or awards can be refused on other grounds without broadly applying the public policy

[189] Mariam Alkhalifa, 'Legal Regulation of International Commercial Arbitration in the Kingdom of Bahrain' (2009) 6 Journal of Law.
[190] Soraya Corm-Bakhos and Gordon Blanke, 'The Enforcement of International Commercial and Investment Arbitration Awards in the MENA Region' (2017) 83 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 76.
[191] Court of Cassation, Case No 60/2000.
[192] Court of First Instance Case No 2017/G/11.
[193] Court of Appeal Case No 2017/G/11/1.
[194] Bahrain Civil Enforcement Court Case No 2017/51 issued on 08/12/2018.

exception, even if the judgment or award violates certain standards. Thus, it is unnecessary to rely extensively on the public policy exception when there are other valid grounds for refusal.

Furthermore, despite the scarcity of cases referring to the misapplication of the public policy exception which will be discussed in Chapter 6, the laws in Bahrain indicate a friendly approach to the New York Convention. For example, in 2015, Bahrain issued its new Arbitration Law, wherein its Article 1 emphasises the application of UNCITRAL Model Law to arbitration agreements in Bahrain. Additionally, in the event of an international dispute, the law allows the courts and arbitrators to adopt an international perspective in interpreting its provisions. Hence, it could be assumed that Bahraini courts apply international rather than local public policy. Interestingly, Bahrain is the only GCC country where legislators take this approach. In this regard, the other GCC States should follow the Bahraini approach in terms of its legislation by fully adopting the UNCITRAL Model Law and allowing the courts to consider international criteria in interpreting the law.

Although Bahraini arbitration law does not explicitly state that a breach of Sharia is a ground for refusing foreign arbitral awards, any award that violates Sharia may still be considered void. This has led some commentators to argue that the vagueness of Sharia can pose difficulties in enforcing arbitral awards in Bahrain.[195] Ayad emphasises that there is considerable risk that a Bahraini court will not enforce an arbitral award that involves usury, a loss of profit, or consequential damages.[196] However, Ayad's perspective that arbitral awards contravening Sharia law will not be enforced by the courts of the GCC States, including Bahrain, will be analysed in Chapters 3 and 4. It is important to note that Ayad's view is grounded in legislative provisions rather than judicial decisions. Similar to other GCC arbitration laws, such as in Saudi Arabia and the UAE, Article 16 of Bahraini Enforcement Law affirms that foreign arbitral awards should not constitute a breach of the public order or morals or conflict with any judgment or order previously issued by the courts of Bahrain in the same matter. Therefore, it can be concluded that the legislation in Bahrain does not present obstacles or challenges concerning the procedures for the recognition and enforcement of arbitral awards. On the contrary, it appears that Bahrain's legislative framework and procedures are more

[195] Mary B Ayad, 'Harmonisation of International Commercial Arbitration Law and Sharia-The Case of Pacta Sunt Servanda vs Ordre Public-The Use of Ijtihad to Achieve Higher Award Enforcement' (2009) 6 Macquarie J. Bus. L. 93, 96.
[196] ibid 115.

favourable toward international commercial arbitration and the enforcement of foreign arbitral awards compared to other GCC States.

2.3.5 Oman

Similarly, Oman has sought to enhance its role in international trade by joining various international and regional agreements, particularly those related to the enforcement of foreign awards. For instance, Oman acceded to the Riyadh Agreement for Judicial Cooperation in 1997 and later joined the GCC Convention for the Enforcement of Judgments, Delegations, and Judicial Notifications in 1996. Additionally, Oman is a signatory to the New York Convention of 1958. Moreover, arbitral awards may be recognised and enforced in Oman on the basis of reciprocity.[197]

Oman's Arbitration Law was issued by Royal Decree in 1997.[198] According to this law, the court of first instance is the competent authority for enforcing arbitral awards. The President of the Commercial Court, or any judge appointed by the President, has the authority to issue orders for the enforcement of awards rendered by arbitrators.[199] Applications for enforcement must be submitted with the original award or a duly signed copy, along with a copy of the arbitration agreement. Similar to other GCC States, Omani Arbitration Law 1997 requires an Arabic translation of the award, certified by a recognised firm, if the award is in a foreign language.[200]

Corresponding to the rest of the GCC States, foreign arbitral awards that breach public policy and public morals are not enforceable in Oman. Pursuant to Article 59, foreign awards should not breach Oman's mandatory laws or public order.[201] The Omani legislator did not explicitly define public policy but touched upon this notion in Article 28 of Omani Civil Law, which stipulates that 'it is not permissible to apply the provisions of a foreign law specified by the previous texts if these provisions contradict Islamic Sharia, public order or morals in the Sultanate of Oman'.[202] Likewise, Article 2 of the

[197] Article 352 of the Civil and Commercial Procedures Law 2002.
[198] Law of Arbitration in Civil and Commercial Disputes Royal Decree 47/97 of 1997.
[199] Article 56 of the Omani Arbitration Law of 1997.
[200] Article 56 of the Omani Arbitration Law.
[201] Furthermore, pursuant to Article 352 of the Civil and Commercial Procedures Law, the award is first issued by a competent judicial body according to the international rules of judicial competence, as determined by the domestic law of the country in which the award was delivered, and has become final under that law, and was not delivered on the basis of deception. Secondly, the litigant parties to the case in which the foreign judgment was delivered had been rightfully notified and represented. Finally, the country in which the foreign judgment was delivered accepts the enforcement of judgments delivered by the Omani Courts within its own territories
[202] Royal Decree No 29 of 2013 promulgating the Civil Transactions Code.

GCC Convention, which Oman signed in 1997, states that the implementation of an arbitral award may be rejected in full or in part if the award violates provisions of Islamic Sharia, the constitution, or public order in the state where the award is to be enforced.[203] Furthermore, Article 30(a) of the Riyadh Agreement clarifies that the recognition of judgements shall be refused if they contradicts stipulations of Islamic Sharia, the constitution, public order, or the rules of conduct of the requested party.[204] Thus, the local court is empowered to interpret the concepts of public policy, Islamic principles, and public morals in its decisions.

Clearly, the nature of public policy, which causes it to differ from one country to another and from one period to the next, has made it difficult for the Omani legislator to adopt a unified definition of this concept. Thus, due to the lack of clear legislations and court decisions on this particular matter, it is difficult to say whether the Omani courts adopt a broad approach to the application of public policy. However, practices indicate a positive approach to the implementation of foreign arbitral awards by the Omani courts. For instance, the competent court has implemented a foreign judgment despite the absence of an agreement obligating the Omani courts to accept foreign arbitral awards issued against Omani parties.[205] Moreover, the court affirmed this approach by concluding that foreign arbitral awards that fulfil the conditions of Article 352 of the Civil and Commercial Procedures Law 2002 may be enforced without the need for an agreement or convention.[206]

It should be noted that under the New York Convention, a competent court that is seized of a foreign arbitral award is not permitted to examine the merits of the award. However, Bremer argues that the Omani courts apply the public policy exception excessively when comprehensively reviewing the merits of foreign arbitral awards.[207] It should be noted that Bremer based his perspective on the law itself and the approaches of the courts in other GCC States, rather than actual practices of the Omani courts. Furthermore, some believe that foreign arbitral awards will not be enforced in Oman if these awards breach Sharia principles, since the Omani constitution affirms that Sharia is the basis of legislation in Oman.[208] Also, the Omani courts have considered real estate disputes to be

[203] The GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications 1997.
[204] Riyadh Arab Agreement for Judicial Cooperation 1983.
[205] Sigvard Jarvin, 'Enforcement of an Arbitration Award in Oman' (1985) 2 J. Int'l Arb. 81, 82.
[206] Court of Cassation, Case No 176/2005.
[207] Bremer (n 70) 42.
[208] Article 2 of the Omani Constitution of 1996 affirms that 'the religion of the State is Islam and Islamic Sharia is the basis for legislation'.

a matter of public policy.[209] In addition, arbitral awards that include interest on civil debts exceeding the legal rate are considered contrary to public policy, and courts may refuse to enforce them.[210] Therefore, it can be said that arbitral awards related to property disputes and those involving usury are generally not enforced in Oman.

2.3.6 Kuwait

Since its independence in 1961, Kuwait has sought to enhance its economic role. One of the steps towards this aim is its accession to the New York Convention in 1978.[211] Later, Kuwaiti Arbitration Law 1980 was issued as part of the Kuwaiti vision to attract foreign investments. However, it would seem that the law was issued without regard to the New York Convention and foreign arbitral awards, as it only considers domestic arbitral awards.[212] The Kuwaiti Arbitration Law is outdated, compared to the other Gulf countries, as it is embodied in the Kuwaiti Civil and Commercial Procedure Code of 1980. Conversely, similar to the other GCC States, Kuwait has adopted simple procedures for enforcing arbitral awards. According to Kuwaiti Arbitration Law, the winning party in an arbitration procedure must file the original copy of the arbitration award with an official translation, if it is issued in a language other than Arabic, along with a copy of the arbitration agreement, before the court of first instance. These procedures align with the New York Convention, which stipulates in Article III that each contracting state must recognise arbitral awards as binding and enforce them in accordance with the procedural rules of the territory where enforcement is sought.[213]

Although current practice regarding the enforcement of arbitral awards in Kuwait shows a pro-enforcement bias, the Kuwaiti Arbitration Law needs to be amended to keep pace with global developments in the implementation of arbitral awards. Al-Houti argues that due to Kuwait's outdated Arbitration Law, parties to disputes may resort to the local

[209] Omani Court of First Instance, Case No 216/1999.
[210] Omani Court of Appeal, Case No 42/1998.
[211] Kuwait acceded to the Convention with some reservations. For instance, Kuwait will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It is understood that the accession of the State of Kuwait to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, established in New York on 10th of June 1958, does not mean in any way recognition of Israel or entering with it into relations governed by the Convention thereto acceded by the State of Kuwait.
[212] Nina Jankovic, 'International Arbitration in Kuwait' (*International Arbitration*, 15 March 2021) <https://international-arbitration-attorney.com/en/international-arbitration-in-kuwait/> accessed 9 July 2022.
[213] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

courts or international arbitration centres rather than local arbitration centres.[214] The above author believes that Kuwait should reconsider its arbitration laws, in order to fall in line with the initiatives undertaken by its neighbours in the GCC, thereby enhancing Kuwait's attractiveness for foreign direct investment.[215]

In terms of the grounds for refusing enforcement, the Kuwaiti legislator has drawn upon Article V of the New York Convention 1958. Thus, there are cases where the implementation of an arbitral award may be refused at the request of one of the parties, such as in the absence of an arbitration agreement, invalid formation of the arbitration tribunal, the tribunal's excessive power, and if the award has not yet become binding on the parties. Furthermore, a Kuwaiti competent court has the right to refuse to enforce an arbitral award in disputes over nationality, inheritance, and family law, if the legislator considers them to be a matter of public policy. Alnwaisr believes that the reason why the GCC legislator forbids arbitration in family law disputes is to offer the parties greater protection.[216] Therefore, the legislator recently approved courts dedicated to family disputes, due to the sensitivity of these disputes.[217] Moreover, Almahameed argues that issues of nationality are not arbitrable because they pertain to state sovereignty.[218] Similarly, disputes involving government matters are not subject to arbitration. Consequently, foreign arbitral awards related to such issues are not enforced in Kuwait. Huneidi explains that under Kuwaiti Arbitration Law, only disputes that allow for reconciliation and involve parties with the legal capacity to dispose of the rights in question are arbitrable.[219]

It should be noted that Kuwait is a signatory to the Riyadh Agreement for Judicial Cooperation 1983, its Article 30 stipulating that:

> Recognition of judgments shall be refused in the following cases: (a) If recognition would be in contradiction with the stipulations of the Islamic Sharia, the provisions of the constitution, public order, or the rules of conduct of the requested party. (b) If the judgment was passed in absentia without notifying the convicted party of the proceedings in an appropriate fashion that would enable him to defend himself. (c)

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[214] Dalal Al Houti, 'Arbitration in Kuwait: Time for Reform?' (*Al Tamimi & Company*, April 2015) <https://tamimi.com/law-update-articles/arbitration-in-kuwait-time-for-reform/> accessed 19 June 2022.
[215] ibid.
[216] Khalid Alnwaisr, 'Matters Outside the Jurisdiction of Arbitration' (*Aleqt*, 20 November 2011) <https://aleqt.com/2011/11/20/article_599775.html> accessed 5 July 2022.
[217] Bashayer Alghanim, 'The Enforcement of Foreign Judgments in Kuwait' (2020) 16 Journal of Private International Law 493, 508.
[218] Abdallah Almahameed, 'Restrictions on Commercial Arbitration' (DPhil thesis, Middle East University 2018).
[219] Isa A Huneidi, 'Arbitration Under Kuwaiti Law' (1989) 4 Arab Law Quarterly 20.

> If the law of the requested party applicable to legal representation of ineligible persons or persons of diminished eligibility were not taken into consideration. (d) If the dispute has given rise to another final judgment in the requested state, or in a third state and if the requested party has already recognised such a final judgment. (e) If the dispute is also the subject of a case being heard by the courts of the requested party and the action has been brought before the courts of the requested party on a date preceding the presentation of the dispute to the court of the requesting party.[220]

As Kuwait is an Islamic State, Sharia law plays a crucial role in its legislation. Hence, arbitral awards in breach of Islamic principles are unlikely to be enforced in Kuwait. The Kuwaiti legislator has therefore obligated the arbitrator and the competent court to ensure that arbitral awards do not clearly violate public policy or Sharia principles. This can be seen in a recent decision where the dispute related to late payment interest, the defendant challenged the decision as it breached the Sharia rules that prohibit interest or 'usury'. [221] However, the court rejected this claim and affirmed that although Sharia is the main source of legislation in Kuwait's legal system, in the event that Sharia does not regulate the matter, the court is obligated to apply the written law rather than uncodified Sharia.[222] Moreover, if a foreign arbitral award partially breaches public policy or Islamic Sharia, the part of the award that does not contain the breach may be enforced.[223]

In view of the above, it is difficult to predict the approach of the Kuwaiti courts with regard to the implementation of arbitral awards, especially since parties often resort to litigation and foreign arbitration centres. Nevertheless, the Kuwaiti courts do tend to implement foreign arbitral awards, except in the case of violations of public policy, Islamic law, or Article 5 of the New York Convention. Badah argues that although the legislator does not make any clarification regarding public policy concept, the courts tend to apply public policy narrowly. Therefore, the Kuwaiti courts will not refuse to implement a foreign arbitral award on the ground of public policy unless there is an 'obvious' violation of basic principles of the State.[224]

In contrast, Al-Humaidi believes that there is an attitude of hostility, disillusionment, or distrust in arbitration and the enforcement of arbitral awards.[225] For instance, arbitration

[220] Riyadh Arab Agreement for Judicial Cooperation of 1983.
[221] Kuwait Court of Cassation, Case No 958/2008.
[222] Ibid.
[223] Kuwait Court of Cassation, Case No 236/2010.
[224] Saad Badah, 'Public Policy and Non-Arbitrability in Kuwait' (2016) 12 Asian Int'l Arb. J. 137, 178.
[225] HM Al-Humaidi, 'Arbitration in Kuwait: Study of Current Practices and Suggestions for Improvements' (2014) 6 Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 3013001, 8.

is not widely practiced in Kuwait, due to the shortcomings of its current Arbitration Law. According to the Arbitration Law, only private parties may resort to arbitration, unlike disputes involving a governmental or public party.[226] It is a fact that Kuwait's Arbitration Law is not as developed as that of its counterparts in the GCC States. Nevertheless, Al-Humaidi's claim may be inaccurate that there is a lack of confidence in arbitration in Kuwait since parties tend to resort to litigation more often than arbitration. Indeed, the reason for the reluctance of parties to resort to arbitration can be attributed to the affordable fees. In other words, litigation in Kuwait and resorting to local courts is more affordable than arbitration,[227] and in many cases, the courts provide a lawyer for the parties. Therefore, parties favour the national courts over arbitration. Furthermore, the concept of resorting to arbitration between individuals is still limited, whereas it is widely practiced among the corporate giants.

It is noteworthy that the Kuwaiti Arbitration Law is governed by the Civil and Commercial Pleadings Law No. 38 of 1980 and Regulation No. 11 of 1995. These governing provisions have impacted the law's efficiency, particularly in instances where the articles are ambiguous or contradictory. For instance, Article 181 of Pleadings Law No 38 stipulates that the arbitrator should make a decision within six months of filing the claim. Meanwhile, Article 7 of the Regulation of 11/1995 does not require a similar period. Furthermore, there are doubts about whether the Kuwaiti courts enforce unreasoned arbitral awards, in that Article 183 the Civil and Commercial Procedures Law affirms that arbitrators should reason their decisions.[228] Interestingly, the Kuwait Court of Appeal has enforced foreign arbitral awards, although the arbitrators did not clarify the reasons for their decision, with the court stating that 'the arbitral award shall be enforceable by including the facts of the dispute, even if the arbitrator fails to state the reasons'.[229]

In conclusion, it would appear that Kuwait's Arbitration Law still needs further development, despite the absence of negative practices among the local courts with regard to the implementation of foreign arbitral awards. However, it is necessary to avoid sole reliance on the experience of the local courts and their practices, but rather to look at laws

[226] ibid 9.
[227] Khaled Alrasheed and others, 'Litigation versus Judicial Arbitration as Binding Dispute Settlement Techniques in Public Construction Projects' (2023) 15 Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 04522034, 7. DOI:10.1061/(ASCE)LA.1943-4170.0000580
[228] Article 183 of the Civil and Commercial Procedures Law, Code No 38 of 1980.
[229] Court of Appeal, Case No 414/1998.

that will facilitate the tasks of the courts and arbitrators in the enforcement of arbitral awards.

2.4 The Recognition and Enforcement Procedures of GCC States: A Critical Review[230]

The GCC States, as discussed previously, have taken steps to encourage the recognition and enforcement of foreign arbitral awards, both by joining relevant international agreements and enacting domestic arbitration laws. However, Section 2.3 highlighted some examples, which suggest a less cooperative approach in practice.[231] This discrepancy has led scholars to criticise the implementation mechanisms in GCC states, arguing that a disconnect exists between stated policy and actual practice.[232] Almutawa and Maniruzzaman argue that certain GCC States lack effective implementation mechanisms, leading to delays and inefficiencies in the enforcement process,[233] especially since 'justice delayed is justice denied', as the saying goes.[234] Likewise, Saad points out that the procedures for implementing arbitral awards in the GCC States undergo several stages that prolong their enforcement.[235]

In contrast, some scholars argue that it is not the procedures required under the laws of the GCC States that slow implementation; on the contrary, they are considered as a guarantee for all parties, since the local laws require measures to be taken that will ensure the integrity and validity of arbitral decisions.[236] In addition, the formalities required by local laws are similar to those stipulated in international agreements such as the New York Convention.

In fact, there seems to be some confusion among researchers between the laws of enforcement, which ensure the validity of procedures, and the bureaucratic laws that delay and undermine the implementation of arbitral awards and contracts. Unfortunately, it

[230] The cases where courts invoke or apply public policy or Sharia as a refusal ground will be discussed in Chapter 6, where the practices of the GCC States courts will be critically examined. See page 198.
[231] See page 26.
[232] Ahmed M Almutawa and AFM Maniruzzaman, 'The UAE's Pilgrimage to International Arbitration Stardom: A Critical Appraisal of Dubai as a Centre of Dispute Resolution Aspiring to Be a Middle East Business Hub' (2014) 15 the journal of world investment & trade 193, 223.
[233] Ibid.
[234] This saying is attributed to William E Gladstone, British Prime Minister in the 19th century. See Tania Sourdin and Naomi Burstyner, 'Justice Delayed Is Justice Denied' (2014) 4 Victoria University Law and Justice Journal 46, 46.
[235] Nehme Abi Saad, 'Construction Contracts Form an Integral Part of the Economy and Development of the UAE' (2010) 4 Int'l. In-House Counsel J. 1, 1.
[236] Abdulmalik M Altamimi, 'An Appraisal of the Gulf Cooperation Council's Mechanisms for Co-Operation and the Settlement of Disputes' (2020) 10 Asian Journal of International Law 321, 343.

would appear that the enforcement of arbitral awards is more complex in some GCC States than it is in some other non-GCC jurisdictions. Hence, foreign investors or parties seeking enforcement in the Gulf countries must consider a number of laws and agreements. As can be seen from section 2.3.1, in Saudi Arabia, the foreign arbitral award must comply with the Saudi Arbitration Law, the Board of Grievances Law, and the Law of Procedures. [237] Furthermore, some arbitral awards should be consistent with the Riyadh Judicial Agreement, the Arab League Agreement if they issued under these agreements, and the New York Convention if they foreign arbitral awards. Therefore, one may ask whether investors will put money into countries where the enforcement of awards requires compliance with multiple pieces of legislation and agreements. However, it is important to note that not all GCC States have procedures that obstruct the recognition and enforcement of arbitral awards. In fact, some, like Bahrain, have adopted processes compliant with the New York Convention provisions.

In addition to implementation mechanisms, some arbitration laws in the GCC States represent an obstacle to the implementation of foreign awards and contracts, since local laws prohibit recourse to arbitration in various types of disputes, which may only be heard before the national courts. For example, and as explained earlier, if a foreign contract or arbitral award relates to a family dispute, real estate, or any contract prohibited by local laws, it will not be enforced by the courts.[238] Some critics argue that it is the negative practices of the GCC courts that hinder the enforcement of arbitral awards. [239] Ballantyne considers that some local courts exceed their power to review the merits of an arbitral award, whereas they should either enforce or refuse to enforce it.[240] Other authors, such as Brower and Sharpe, are of one view that certain courts undermine the purposes of arbitration agreement, with the claim that misleading courts jeopardise the effectiveness of international arbitration.[241] In fact, the above cases in section 2.3, affirm these concerns where on several occasions some GCC courts misapplied and misinterpreted the law itself. The capacity and expertise of the domestic courts and arbitrators surely play a vital role in the implementation of foreign awards, in these cases, practices indicate that some

[237] Law of Procedure before the Board of Grievances, Royal Decree No M/3 of 2013.
[238] As explained earlier, the legislators in the GCC States have considered several disputes to be matters of public policy. These cases will be examined and explained in depth in Chapters 5 and 6. See pages 133 and 166.
[239] For instance, in Case No 64/2012, the Qatari Court of Cassation applied domestic law of procedure to an international arbitral award without regard for the New York Convention.
[240] William M Ballantyne, ‘Arbitration in the Gulf States: "Delocalisation": A Short Comparative Study’ (1985) 1 Arab Law Quarterly 205, 213.
[241] Brower and Sharpe (n 83) 656.

GCC courts are unfamiliar with the principles of international commercial arbitration. This leads to misinterpretation or an overly cautious approach to enforcement. Hence, it could be said that inconsistencies in the interpretation and application of enforcement laws can hinder the implementation of arbitral awards.

In fact, the above shows the differences between the GCC States regarding the procedures of the recognition and enforcement of arbitral award as well as the application of relevant legislations. These differences do not mean that all GCC States apply unfriendly approach regarding the recognition and enforcement of arbitral awards as some claim.[242] This is because most of the recognition and enforcement procedures comply with the New York convention provisions. However, these procedures can be improved to ease the enforceability of arbitral awards. For instance, the UAE Arbitration Law gives the court the authority to issue enforcement order within 60 days which is a long period of time. The legislator does not regulate the case where the court refuses to issue enforcement order. Another observation regarding the enforcement procedures is unreasoned awards.

Also, although there is no clear Article stipulates that unreasoned foreign arbitral awards and arbitral awards that breach Arbitration Law will violate public policy of the state where recognition and enforcement is sought, however, some GCC courts may invoke public policy to refuse to recognise and enforce some arbitral awards under these refusal grounds.[243] As explained in Section 2.3.6,[244] according to the Kuwaiti Arbitration Law courts may refuse to enforce unreasoned arbitral awards. It should be noted that the New York Convention does not stipulate such a requirement. However, many non-GCC legislators require arbitrators to reason awards. Therefore, it can be suggested that the GCC States courts apply this requirement only to domestic arbitral awards.

Additionally, the absence of a clear distinction between procedures for recognising and enforcing domestic and international awards could constitute an obstacle to a pro-enforcement approach, as discussed in Section 2.3.3.[245] However, while modernising GCC arbitration laws is important, the most critical issue for enforcing awards might be something else entirely. The previous section demonstrated that applying existing laws effectively is a major challenge.

[242] Essam Al Tamimi, 'Enforcement of Foreign Arbitration Awards in the Middle East' (2014) 1 BCDR International Arbitration Review 99.
[243] Qatari Court of Cassation, Case No 64/2012.
[244] See page 44.
[245] See page 36.

It is clear from the discussions in this and the previous chapter that Sharia plays a unique role in the legal and arbitration systems of GCC states. However, before further examining Sharia and its relationship with public policy, and after examining the legal framework for arbitration in the GCC states, as well as the recognition and enforcement procedures for arbitral awards in these states, it is important to examine the concept of public policy itself to understand its meaning, scope, and applicability. Therefore, the thesis shifts its focus to a critical analysis of the public policy concept and its development.

2.5 Conclusion

In principle, the region of the Arabian Peninsula has been familiar with arbitration and the enforcement of arbitral decisions since the pre-Islamic era. As a legal system, Islam places an emphasis on arbitration practices. In the contemporary context, the countries of the GCC have established modern legal systems that keep pace with international practices in the field of international commercial arbitration, having enacted laws based on the UNCITRAL model law. However, recent disputes in the region have witnessed widespread negative practices in arbitration, especially with regard to the implementation of foreign awards.

Nonetheless, despite extensive criticism of the attitude to enforcing foreign arbitral awards in the GCC States, current practices in these states confirm their efforts to implement foreign arbitral awards. National and international parties can enforce their arbitral awards and agreements in the Gulf countries under the New York Convention, since all the GCC States are signatories to this convention. However, certain challenges face the implementation of foreign arbitral awards and contracts in the GCC States, including the impractical mechanism for their implementation and the lack of competence of some local courts, due to their unfamiliarity with the principles of international commercial arbitration. Thus, some courts in the GCC States often invoke public policy to refuse enforcement of foreign arbitral awards, rather than considering other valid grounds for refusal. Likewise, these courts reject to enforce foreign arbitral awards that violate Islamic Sharia.

It may be concluded that the negative approach adopted by some GCC courts in implementing foreign arbitral awards is often grounded in two main reasons: some courts that seem unfamiliar with international commercial arbitration practices, and the law itself, wherein local laws do not provide practitioners with clear legislation and often

hinder the enforcement of arbitral awards. Therefore, the parties must take into account the local laws of the GCC States when drafting arbitration contracts. Consequently, irrespective of the attempts of the GCC States to develop their arbitration laws, certain obstacles remain. Thus, in order to bring the GCC States into line with the international arbitration standards, the legislators should consider distinguishing between domestic and international arbitral awards in their enforcement and recognition.

Chapter 3 Development of the Public Policy Concept in International Commercial Arbitration

3.1 Introduction

The concept of public policy has a long history, not only in international commercial arbitration but also in the field of law. Given its evolving nature, this concept is often misapplied and misinterpreted as will be seen in the this Chapter and Chapter 6.[246] In order to better understand public policy and hence narrow its application, it is crucial to examine its historical development.

This chapter delves deeper into the development of the public policy concept. The chapter discusses the evolution of public policy and examines how courts have approached its application. Additionally, the chapter critically examines the relationship between public policy and other legal concepts, such as non-arbitrability, public morality, and mandatory rules. This analysis aims to differentiate these concepts from public policy itself. This distinction is crucial, as some GCC and non-GCC courts often blur the lines between these concepts when applying the public policy exception, as will be discussed in the Chapter 6.[247] By clarifying these distinctions, the chapter seeks to provide a more nuanced understanding of the public policy exception.

To better understand the concept of public policy, it is important to track its development beyond GCC States. This enables a better understanding of its dimensions and potentially narrow its misapplication. To achieve this, the following section will first examine the initial applications of the public policy exception, followed by an analysis of modern approaches to public policy. It also analyses the development of this concept in common law and civil law jurisdictions.

3.2 Origin of the Public Policy Concept

It should be borne in mind that the law and legal terms are not fixed or static; instead, they are dynamic and constantly evolving to keep pace with changes in society and nations.[248] The term 'public policy' has undergone iterations.[249] In other words, the

[246] See page 210.
[247] See page 166.
[248] Oscar Schachter, 'The Evolving International Law of Development' (1976) 15 Columbia Journal of Transnational 1, 13; Bruce L Benson, 'The Spontaneous Evolution of Commercial Law' [1989] Southern Economic Journal 644, 647.
[249] John Maurice Kelly, *A Short History of Western Legal Theory* (Clarendon Press 1992), 109.

development of communities, nations, and legal provisions has led to the development of public policy, since it represents the fundamental principles of the community, and these developments continue to shape public policy.[250] Therefore, some argue that public policy will never be defined.[251]

It is in fact difficult to trace the history of public policy because it is unclear when the term was first used. Some, such as Gotti, attribute this difficulty to the vague and evolving nature of the concept.[252] Meanwhile, Nippel believes that 'public policy' as a concept has always existed in the local legislations, with the aim of protecting the fundamental principles of society.[253] In general terms, there is no agreed date for when the term 'public policy' was first used, but some argue that the literature indicates that from the 17th century onwards, it was often used to refer to the laws and policies designed to promote the public good and protect the interests of society.[254] The history of public policy may even be traced back to the political and philosophical debates of ancient Greece and Rome, regarding the state's function in society.[255] For example, the Roman statesman Cicero is credited with using the term 'public policy' in several of his writings.[256] Cicero explores the value of public service and the necessity for governments to work in the interests of the people.[257] According to his view, all citizens have a responsibility to take part in the creation and implementation of public policy since it is the ultimate form of good.[258]

In contrast, scholars such as Weimar believe that the notion of public policy first appeared in the work of Bartolus, the prominent Italian jurist.[259] One of the key contributions made

[250] Stavros Brekoulakis, 'Public Policy Rules in English and International Arbitration Law' (2018) 84 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 205.
[251] Thomas R Dye, *Understanding Public Policy* (Pearson 2013), 78.
[252] Maurizio Gotti, 'Vagueness in the Model Law on International Commercial Arbitration' (2005) 23 Vagueness in Normative Texts 227, 237.
[253] Wilfried Nippel, *Public Order in Ancient Rome* (Cambridge University Press 1995), 44.
[254] Christopher S Gibson, 'Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law' (2008) 113 Penn State Law Review 1227, 1230.
[255] Anthony M Honoré, 'Legal Reasoning in Rome and Today' (1973) 4 Cambrian Law Review 58, 66; See also Nippel (n 753).
[256] Marcus Tullius Cicero, a Roman statesman, lawyer, scholar, philosopher, writer, and academic sceptic (106 BC-43 BC), who defended idealistic ideas amid the political crises that resulted in the founding of the Roman Empire. See Marcus Tullius Cicero, *The Orations of Marcus Tullius Cicero: Volume 4* (Cicero MT, *The Orations of Marcus Tullius Cicero: Volume 4* (Outlook Verlag GmbH 2018).
[257] Robert A Kaster, *Cicero: Speech on Behalf of Publius Sestius* (OUP Oxford 2006), 18.
[258] Malcolm Schofield, *Cicero: Political Philosophy* (Oxford University Press 2020) 287.
[259] One of Bartolus' notable contributions to the field of conflict of laws was his distinction between real and personal actions. He argued that real actions, which involve disputes over property rights in immovable assets such as land or buildings, should be governed by the *lex rei sitae*, or the law of the place where the property is located. Personal actions, on the other hand, which involve disputes over

by Bartolus to the field of public policy was his emphasis on the role of public interest in the interpretation and application of the law.[260] Bartolus argued that the primary purpose of the law was to serve the 'common good',[261] and that judges should interpret and apply the law in a way that advances the public interest.[262] He therefore made a distinction between 'favourable' legislation, which serves the needs of the people, and 'odious' legislation, which negatively affects individuals, for example, legislation that imposes excessive taxes.[263] Bartolus especially noted a conflict of laws when applying foreign legislation that contradicted local laws.[264] He asserted that conflict of laws could arise, not only between different countries but also within a single country, where different regions or jurisdictions might have their own distinct legal systems. In other words, the evolution of the conflict of laws led to the emergence of the public policy concept, with the courts applying local laws in consideration of the public interest.[265] Following Bartolus' exploration of this topic, various scholars, including Huber, Story, Savigny, and Mancini, have likewise addressed this concept and brought about positive developments, with a new approach to public policy.[266]

Historically, it can be argued that the concept of public policy has existed for a considerable period, consistently aiming to safeguard the interests of the society. This concept has undergone continuous evolution, incorporating principles and values deemed necessary for societal development and protection. In its earliest iterations, public policy

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contractual obligations, torts, or other non-property related matters, should be governed by the *lex fori*, or the law of the forum where the case is being heard. See Albert A Ehrenzweig, 'Lex Fori – Basic Rule in the Conflict of Laws' (1959) 58 Michigan Law Review 637, 665.

[260] Pietro Franzina, 'Bartolus', *Encyclopaedia of Private International Law* (Edward Elgar Publishing 2017), 163.

[261] The common good can be defined as the general state of living in a society that enables various groups and their members to attain their individual fulfilment to a greater extent and with greater completeness. See Antonio Argandoña, 'The Stakeholder Theory and the Common Good' (1998) 17 Journal of Business Ethics 1093, 1095.

[262] Bartolus was a 14th century Italian jurist and legal scholar, considered as one of the greatest legal minds of the Middle Ages. His work had a significant influence on the development of civil law in Europe. His ideas on public policy and the role of the courts in advancing the common good were influential in the development of civil law systems and are still an important part of legal thought today. However, there is widespread debate over the definition of public interest. Some believe it has no precise definition but rather refers to the interests of society in general. It should be noted that public policy as a term is wider than public interest. See Frank J Sorauf, 'The Public Interest Reconsidered' (1957) 19 Journal of Politics 616.

[263] Peter Weimar, 'Inheritance Contracts and Public Policy' [1994] Journal of South African Law 787, 794.

[264] Nikitas Hatzimihail, 'Bartolus and the Conflict of Laws' (2007) 60 Revue hellénique de droit international 12, 39-56.

[265] Gui J Conde e Silva, 'Transnational Public Policy in International Arbitration' (PhD thesis, Queen Mary University of London 2007), 92.

[266] Yongping Xiao and Zhengxin Huo, 'Ordre Public in China's Private International Law' (2005) 53 American Journal of Comparative Law 653, 653.

likely manifested through customary practices and unwritten rules that prioritised the collective good. Therefore, one could posit that the concept of public policy predates the formation of the modern state. The Arabian Peninsula, for instance, demonstrates the application of public policy principles prior to the emergence of Islam. For example, various tribes implemented policies aimed at safeguarding the well-being of their people. However, with the advent of Islam, the focus of public policy shifted to encompass both the needs of the people and the tenets of the religion.

In fact, the foregoing establishes that public policy, as initially conceived, was primarily concerned with safeguarding the interests of both the state, including its sovereign, and the community. However, this concept has undergone continual development, which has been intertwined with the evolution of modern states and their respective legal systems. Therefore, the following sections will analyse the development of public policy within common law and civil law jurisdictions.

3.2.1 Public Policy in Common Law Jurisdictions

Common law has played a key role in the development of the public policy concept.[267] Therefore, some argue that public policy is a 'part of the spirit of our common law'.[268] In fact, there is no consensus on where or when the concept was first applied in common law jurisdictions as explained in Section 3.2.[269] Some refer to the *Dyer's* case, [270] where the court found a term in a contract that restricts trade which was 'detrimental to the society and the interests of the commonwealth'.[271] Many other cases followed where the courts addressed the concept of public policy, in consideration of contracts that are 'against the benefit of the commonwealth',[272] 'against the statute law',[273] and 'against the principle of the established law',[274] constituting a violation of public policy.

Nevertheless, some scholars, including Knight, argue that the term 'public policy' was not addressed explicitly until 1711,[275] when the court annulled an agreement restricting

[267] Arthur Nussbaum, 'Public Policy and the Political Crisis in the Conflict of Laws' (1939) 49 Yale LJ 1027, 1031.
[268] Percy H Winfield, 'Public Policy in the English Common Law' (1928) 42 Harvard Law Review 76, 98.
[269] See page 53.
[270] Dyer's case (1414) 2 Hen V, fol 5, pl 26.
[271] WSM Knight, 'Public Policy in English Law' (1922) 38 Law Quarterly Review 207, 207.
[272] 9 Anon (1586) Moo No 379.
[273] Bragge v Stanner (1621) Palmer 172.
[274] Egerton v Brownlow (1853) 10 ER 359, 437 (HL).
[275] Dyer's case (n 270).

trade in *Mitchel v Reynolds.*[276] One of the earliest definitions of this exception was proposed by Lord Hardwicke, who affirmed that agreements in breach of public policy were invalid because they represented general mischief against society. [277]In other words, agreements that breach public policy are void, not only because of the interests of one of the parties but also because of the general risk of harm posed to the public utility.[278] Indeed, because the application of the public policy exception was considered as precedent in the *Dyer's* case, the courts subsequently became more receptive to applying the concept, albeit with caution and great care. This caution was affirmed in *Janson v Driefontein Consolidated Mines,*[279] where Lord Lindley affirmed that public policy was a 'very unstable and dangerous foundation on which to build until made safe by decision'.[280]

The modern approach to public policy emerged in the early 18th century and was influenced by the boom in world trade. This approach shifted public policy from the 'common good' to the interests of the modern state.[281] Indeed, the courts in common law jurisdictions, although they are cautious in applying the public policy exception, do not hesitate if the matter relates to the state's interests, would be 'repugnant to the interests of the state,[282] or would be 'repugnant to good morals'.[283]

Lord Mansfield subsequently laid down a vital foundation for the modern approach to the public policy, whereby he concluded that the court should not use its power to support individuals who are basing their claims on an illegal or immoral ground.[284] In a dispute between a seller and buyer over the sale of a quantity of tea, the buyer intended to smuggle it into England without paying the relevant duty.[285] The seller subsequently brought an action against the buyer for recovery of the value of the tea. The buyer argued that the seller could not recover the value of the goods because the contract of sale was in violation of English law. This was due to the buyer's illicit intention, which was known to the seller. The seller contended that the sale of the tea was completed on delivery of the goods at Dunkirk, where the transaction was lawful, and that it was not the seller's concern what

[276] Mitchel v Reynolds, (1711) 24 ER 347.
[277] Knight (n 271) 208.
[278] Earl of Chesterfield v Janssen, 28 ER 531.
[279] Janson v Driefontein Consolidated Mines Ltd (1902) AC 484.
[280] Ibid 507.
[281] Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2015) 94 Nebraska Law Review 685, 735.
[282] Kellner v Le Mesurier (1803) 4 East 396.
[283] Bond & Buttfield v Hume, 243 US 15 (1917).
[284] Holman v Johnson (1775) 1 Cowp 341.
[285] Ibid.

the buyer intended to do with the tea. The court ultimately held in favour of the seller, the key question being whether the seller's demand was founded on the ground of an immoral act or contract. However, the court found the seller not guilty of any offence, as the interest in the contract was completed by delivering the goods to Dunkirk. After this delivery, there was nothing left for the seller to do. The court observed that it would set a dangerous precedent to designate such an act as a crime, noting that if the seller had agreed to send the tea to England, it would have been an offence against English law and the seller would not have been able to recover the value of the tea.[286]

Nevertheless, interpretation of the public policy concept in common law jurisdictions has been known to raise some controversy. For instance, in *Egerton v Brownlow*,[287] the court indicated that violating 'the principle of the established law' is considered a violation of public policy, although the court may have adopted a limited approach in this interpretation. In contrast, the concept of public policy is broader and more comprehensive than simply being at odds with established law.[288] Public policy, as Knight describes it, is intended to fill the legislative gap, thereby allowing the courts to achieve optimal application and interpretation when issuing their decisions.[289] However, the approach adopted by the court may be the result of conflict of laws rather than fill the legislative gap, which some believe is the basis of public policy.[290]

In *Antelope, The Vice-Consuls of Spain and Portugal v. United States,*[291] slaves were smuggled to America, whereupon the court rejected the parties' claim of ownership of the slaves on the basis that no title or evidence of ownership had been provided. In addition, the court took into account the sovereignty of the state and its laws, affirming that foreign laws that contradicted American laws could not be applied, as the parties were relying on foreign laws to prove their ownership. Therefore, the court granted freedom to the slaves and declared that foreign penal statutes would not be enforced. Thus, local law prevailed over the law of Spain, which permitted the slave trade at that time.[292] Although this issue was not directly one of public policy, it involved principles of public policy, especially conflict of laws and state sovereignty. The concept of public

[286] ibid.
[287] Egerton (n 274).
[288] ibid.
[289] Knight (n 271) 210.
[290] Kojo Yelpaala, 'Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California' (1989) 2 Transnational Law 379, 409.
[291] The Antelope, 23 US 66 (1825)
[292] ibid.

policy has expanded to include the local aspect of public policy as well as international and transnational aspects, this being the contemporary approach. Therefore, public policy has become broader but more precise to include fundamental principles such as the prohibition of discrimination, bribery, and corruption.[293]

In common law, a number of scholars, including Goodrich, have linked public policy to conflict of laws.[294] From this perspective, foreign contracts must not conflict with essential local laws.[295] In his article, Goodrich mentions a case during the reign of Edward II when the court refused to enforce a foreign contract that conflicted with local legislation.[296] Similarly, Professor Lorenzen argues that 'the notion that the rules of the conflict of laws can be derived from some general formula or theory is responsible for another doctrine that of public policy'.[297] Goodrich describes public policy as 'an elastic kind of a grab bag from which one can take out anything which he chooses to put in'. Therefore, Goodrich criticises the broad application of public policy, affirming that 'to deny enforcement to the foreign made contract makes the state of the forum a shelter for those who refuse to perform their legal obligations'.[298] Goodrich's concerns also resonate with the observations of other prominent scholars. Some, like Paulsen and Sovern, argue that the problem does not lie in the concept of public policy itself but rather in its application, clarifying that 'the most troublesome use of public policy comes when it is employed as a cloak for the selection of local law to govern a transaction having important local contacts'.[299] Due to these concerns over the misapplication of the public policy exception, some scholars believe that it is necessary for the legislator, not the court, to address the issue. In this context, Winfield supposes that 'a state legislature is a better judge of its own public policy than the Supreme Court is likely to be'.[300] He justifies this outlook as 'judges are more to be trusted as interpreters of the law than as expounders of public policy'.[301] Similarly, Alderson commented in *Egerton v Brownlow* that 'it would be solved much better by the legislature and have considered it to be the main reason why

[293] Bernardo M Cremades and David JA Cairns, 'Corruption, International Public Policy and the Duties of Arbitrators' (2003) 58 Dispute Resolution Journal 76, 78.
[294] Herbert F Goodrich, 'Public Policy in the Law of Conflicts' (1929) 36 West Virginia Law Quarterly 156, 170.
[295] Otto Kahn-Freund and others, 'Reflections on Public Policy in the English Conflict of Laws' (1953) 39 Transactions of the Grotius Society 39, 46.
[296] Goodrich (n 281) 157.
[297] Ernest G Lorenzen, 'Territoriality Public Policy and the Conflict of Laws' (1923) 33 Yale LJ 736, 746.
[298] Goodrich (n 281) 171.
[299] Monrad G Paulsen and Michael I Sovern, 'Public Policy in the Conflict of Laws' (1956) 56 Columbia Law Review 969, 1016.
[300] Winfield (n 268) 102.
[301] ibid 97.

the courts should leave public policy alone'.[302] Likewise, Parke B stated in *Egerton v Brownlow* that 'it is [for] the statesman to discuss and the legislature to determine what is best for the public good, and to provide for it by proper enactments'.[303] Moreover, in *Janson v Driefontein Consolidated Mines*,[304] Lord Lindley confirmed this approach, stating:

> I do not think he (the judge) has any jurisdiction to bring into the discussion his own views of what he may consider an inexpedient thing in his own peculiar view of public policy. To permit such a discussion to arise it must be a question of some public policy recognised by the law.[305]

Conversely, the allocation of responsibility for setting and interpreting public policy continues to spark debate. Therefore, entrusting this task solely to legislators would appear to offer several advantages. Primarily, it seeks to limit the overly broad application of public policy, potentially mitigating misinterpretation and unintended consequences. However, such an approach raises concerns about its compatibility with the fundamental principles of common law. Common law traditionally invests courts with substantial authority to interpret and apply legal principles. This judicial discretion serves as a cornerstone of the system, empowering judges to address disputes not only by considering the existing laws but also broader societal values and evolving notions of justice. Restricting this power solely to legislators could potentially clash with the established principle, raising questions over the appropriate balance between democratic representation and judicial independence.

In fact, public policy development encompasses not only its interpretation and definition, but also the limitation of its applicability. In this context, the experience of the English courts can be a distinctive example of positive development in the application of public policy by the courts. For instance, in *Fender v St John Mildmay*,[306] the court affirmed that public policy '*should only be invoked in clear cases in which the harm to the public is substantial incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds'*.[307] This approach was confirmed in *Westacre v Jugoimport*,[308] in a dispute over a contract to supply military equipment to the Kuwaiti Ministry of Defence, the parties agreed that the contract would be governed by Swiss law. The defendant claimed

[302] Egerton (n 274).
[303] ibid.
[304] Janson (n 279).
[305] Ibid 500.
[306] Fender v St John Mildmay [1938] AC 1
[307] Ibid.
[308] Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd [1999] Q.B. 740

that the contract included the bribery of officials in Kuwait (the Secretary General of the Council of Ministers) and the use of personal influence by the claimant to conclude the contract. The arbitral tribunal rejected this claim and issued the award in favour of Westacre, who sought to enforce the award in England. However, the implementation of the award was challenged by the defendant, who alleged that the contract involved bribery and the purchase of personal influence, thereby violating public policy in England. These allegations were rejected by the Court of Appeal, with the court stating:

> There are some rules of public policy which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance but others are based on considerations which are purely domestic: (i) contracts for the purchase of influence are not of the former category; thus (ii) contracts for the purchase of personal influence if to be performed in England would not be enforced as contrary to English domestic public policy; and (iii) where such a contract is to be performed abroad, it is only if performance would be contrary to the domestic public policy of that country also that the English court would not enforce it.[309]

In this case, Justice Colman affirmed that where arbitrators had the power and made a positive decision upon their own jurisdiction, the court should *'prima facie'* not deny enforcement of the award on that ground. [310] This case affirms the pro-enforcement approach of the English court. Therefore, it can be said that it is rare for English courts to refuse enforcement of an arbitral award on public policy ground. However, English courts will refuse to recognise and enforce arbitral award if there is clear violation of public policy.[311]

Nevertheless, in *Soleimany v Soleimany*,[312] the English court took a different approach to Justice Colman's view. This case relating to a dispute between Sion Soleimani and his son Abner Soleimani, both of whom were Iranian; Abner was studying in England but returned to Iran on his father's orders to smuggle carpets from Iran to sell abroad. Abner claimed that he was tortured by the authorities in Iran during the process of exporting the carpets, which was in violation of Iranian law. Abner also asked his father, Sion, to pay him approximately £576,000 for his efforts in smuggling the carpets. Considering that the two parties were Jews, they therefore resorted to the Beth Din[313] to resolve the dispute.

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[309] Westacre Investments Inc v Jugoimport-SDRP Holding Co Ltd [2000] QB 288, 11.
[310] Ibid.
[311] Section 103(3) of the Arbitration Act 1996 states: 'Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.'
[312] Soleimany v Soleimany [1998] 3 W.L.R. 811
[313] The Beth Din occupies a vital position as the Rabbinical court of Judaism, functioning as both a legal and ethical cornerstone within the community. The Beth Din addresses a broad spectrum of matters,

Although the dispute concerned an illegal matter, the Beth Din issued a decision in favour of the son because the arbitration contract was valid under Jewish law. However, when Abner sought to implement the award in England, the Court of Appeal refused on the ground that it was contrary to English public policy, justifying its refusal as follows:

> The fact that in a contract alleged to be illegal the arbitration clause may not itself be infected by the illegality, does not mean that it is always so, and does not mean that an arbitration agreement that is separate may not be void for illegality. There may be illegal or immoral dealings which are from an English law perspective incapable of being arbitrated because an agreement to arbitrate them would itself be illegal or contrary to public policy under English law. The English court would not recognise an agreement between the highwaymen to arbitrate their differences any more than it would recognise the original agreement to split the proceeds.[314]

The court also confirmed that

> An English court will not enforce a contract governed by English law, or to be performed in England, which is illegal by English domestic law. Nor will it enforce a contract governed by the law of a foreign and friendly state, or which requires performance in such a country, if performance is illegal by the law of that country.[315]

In this case, Justice Waller clarified that the court

> In an appropriate case it may enquire, as we hold, into an issue of illegality even if an arbitrator had jurisdiction and has found that there was no illegality. We thus differ from Colman J, who limited his sixth proposition to cases where there were relevant facts not put before the arbitrator.[316]

Regardless the court decision in the above case, Justice Colman' approach has been adopted on several occasions by the English courts. For instance, in *Sinocore International Co Ltd v RBRG Trading (UK) Ltd*,[317] the court maintained the same approach by stating that 'where the arbitration tribunal has jurisdiction to determine the relevant issue of illegality and has determined that there was no illegality on the facts the English court should not allow the facts to be re-opened, save possibly in exceptional

encompassing personal issues like marriage and divorce, and financial disputes like contracts and property. Through meticulous analysis of legal precedents and the application of Halakhic principles, the Beth Din seeks fair and just resolutions for both parties involved, often employing conciliatory methods alongside pronouncing binding rulings. See Lee Ann Bambach, 'The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent' (2009) 25 Journal of Law and Religion 379.

[314] Ibid.

[315] Soleimany (n 312).

[316] Ibid.

[317] Sinocore International Co Ltd v RBRG Trading (UK) Ltd [2019] 1 All ER (Comm) 810.

circumstances'.[318] Similarly, in *Alexander Brothers Ltd (ABL) v Alstom Transport SA*,[319] where the dispute related to consulting agreements, the claimant was obligated to provide consultancy for railway projects in China. The defendants paid only part of the agreed amount to the claimant and refused to pay the rest on the ground that the claimant was subject to a criminal investigation by the American and British authorities. Therefore, the claimant commenced arbitration proceedings against the defendants to recover the outstanding sums owed, given that the defendants had breached the agreement. Alstom claimed that ABL had used these agreements to bribe Chinese government officials, making the agreements illegal and contrary to public policy. The arbitral tribunal concluded that the defendants lacked a valid defence to the claims presented and issued a decision in favour of the claimant. Later, ABL sought to enforce the award in France, where Alstom challenged the enforcement, claiming that the agreement involved bribery. The French Court of Appeal affirmed this claim, concluding that the contract included 'financed and remunerated corrupt activities of public officials'.[320] Alexander Brothers Ltd then attempted to enforce the award in England, whereby Alstom applied to set it aside under the Arbitration Act 1996, s 103(3). The English court refused Alstom's claim and enforced the award, ruling that Alstom had the opportunity to raise bribery allegations during the initial arbitration but failed to do so sufficiently. The court confirmed that

> the authorities demonstrate that where the arbitration tribunal has jurisdiction to determine the relevant issue of illegality and has determined that there was no illegality on the facts, there is very nearly no scope for this court to re-open the issue of illegality. The general rule is that the court will not do so; though it remains conceptually possible that it might be done in exceptional circumstances.[321]

In fact, it can be seen that English courts tend to apply public policy exception 'with extreme reserve'.[322] Therefore, it is rare for English court to invoke public policy unless there is a clear violation. In recent case English court affirmed this approach. For example, in *Chechetkin v Payward*, [323] the claimant, having lost over £600,000 through cryptocurrency trading on a platform operated by the defendants, initiated legal proceedings in the UK. He alleged that the trades and transactions violated Section 26 of the Financial Services and Markets Act 2000 (FSMA) which stipulates that 'an agreement

[318] Ibid [25].
[319] Alexander Brothers Ltd (Hong Kong SAR) v Alstom Transport SA and another [2020] EWHC 1584 (Comm).
[320] Judgment of the Paris Court of Appeal 16/11182 - May 28, 2019.
[321] Alexander Brothers Ltd (Hong Kong SAR) v Alstom Transport SA and another [2020] EWHC 1584 (Comm).
[322] Vervaeke v Smith [1983] 1 AC 145/164.
[323] Chechetkin v Payward Ltd [2022] EWHC 3057 (Ch)

made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party',[324] entitling him to reclaim his losses. In response, the defendants relied on an arbitration clause within their trading terms and conditions. This clause stipulated that the claimant agreed to resolve any disputes through arbitration in San Francisco, governed by the Judicial Arbitration and Mediation Service (JAMS) rules.[325] Following the defendants' application, an arbitrator confirmed their authority under the JAMS rules and issued a final award. This award dismissed the claimant's claims, finding no liability on the part of the defendants. Shortly before the current hearing, the defendants initiated further proceedings in the UK, seeking to enforce the arbitral award.[326]

The court determined that Mr Chechetkin qualified for consumer protections under the Consumer Rights Act 2015.[327] This means any disputes related to his consumer rights would be handled under this Act, superseding any foreign law, provided the contract had a significant link to the UK as Mr Chechetkin is a British citizen resident in England. Therefore, the court refused the enforcement of the arbitral award as it beaches public policy. The court clarified that consumer protection as regards the fairness of contractual terms had 'equal standing to national rules which rank as rules of public policy'. This approach was adopted before by the Court of Justice where the court considered unfair terms in consumer contracts represents a violation of public policy.[328] The court states that 'reasonable consumer' would be unlikely to accept arbitration in California under the JAMS Rules and the Federal Arbitration Act where there would have been no qualified right to appeal in the event of an error of law. Also, the court considered Financial Services and Markets Act 2000 (FSMA),[329] as an expression of English public policy. The court confirmed that the enforcement of arbitral award will breach public policy related to FSMA. This is because the JAMS arbitration proceedings in San Francisco was

[324] The Financial Services and Markets Act 2000.
[325] Clause 23 of the agreement between the above partis stipulates that '(b) that any arbitration will occur in San Francisco, California; (c) that arbitration will be conducted confidentially by a single arbitrator in accordance with the rules of JAMS; and (d) that the state or federal courts in San Francisco, California have exclusive jurisdiction over any appeals of an arbitration award and over any suit between the parties not subject to arbitration. … Any dispute between the parties will be governed by these Terms and the laws of the State of California and applicable United State law, without giving effect to any conflict of laws principles that may provide for the application of the law of another jurisdiction.'
[326] Payward Inc v Chechetkin [2023] EWHC 1780 (Comm)
[327] The Consumer Rights Act 2015
[328] Asturcom Telecommuncaciones SL v Rodríguez Nogueira [2012] 1 C.M.L.R. 34
[329] The Financial Services and Markets Act 2000.

unfair as Mr Chechetkin was incapable to pursue his claim under the protections of the Financial Services and Markets Act 2000 within that arbitration process.

The court's approach in *Payward's* case does not signify a shift or broadening in the application and interpretation of public policy by English courts.[330] This is due to the nuanced manner in which English courts assess the fairness of arbitration in the context of consumer rights. In *Eternity Sky Investments Ltd (ESIL) v Mrs. Xiaomin Zhang,*[331] the court addressed the enforcement of an arbitral award and its interaction with the UK's consumer protection framework under the Consumer Rights Act 2015 (CRA). Mrs. Zhang (the defendant), who resides in England, sought to set aside the arbitral award, arguing that the personal guarantee she provided was subject to the CRA and contained unfair terms, and that enforcing the arbitral award would breach English public policy.

In this case, the defendant provided a personal guarantee to support her husband's business (Chong Sing), specifically for obligations arising under a subscription agreement related to bonds listed on the Hong Kong Stock Exchange. Although the defendant resided in England, the relevant transactions, including the subscription agreement, were primarily connected to Hong Kong. The guarantee itself was governed by Hong Kong law, and disputes were to be resolved through arbitration under the rules of the Hong Kong International Arbitration Centre (HKIAC). Following Chong Sing's failure to redeem the bonds, resulting in a default, Mrs. Zhang's husband passed away shortly thereafter. Consequently, ESIL demanded payment from the defendant under the personal guarantee for the outstanding amounts due under the subscription agreement. Mrs. Zhang initiated arbitration proceedings, seeking declaratory relief that both the arbitration agreement and the guarantee were either non-binding or, in the alternative, had been rescinded. The arbitrator dismissed Mrs. Zhang's claims and upheld ESIL's counterclaim, ordering Mrs. Zhang to pay ESIL the sum of HK$ 500,000,000, along with interest and costs.

Subsequently, the claimant-initiated proceedings to enforce the arbitral award, and the court granted permission for enforcement. The defendant challenged the enforcement, arguing that enforcing the award would violate English public policy. She claimed she was a consumer under the CRA and argued that certain terms in the guarantee, specifically the arbitration clause and the governing law clause, were unfair under the CRA. The

[330] Payward (n 326).
[331] Eternity Sky Investments Ltd v Zhang [2023] EWHC 1964 (Comm).

claimant opposed her application, contending that the defendant did not qualify as a consumer under the CRA, asserting that she had a genuine business interest in Chong Sing. Moreover, the claimant argued that the CRA was inapplicable due to the parties' choice of Hong Kong law and the absence of a close connection between the guarantee and the UK, as required under the CRA. The claimant further maintained that none of the contested terms were unfair.

The court was required to adjudicate on two principal issues: the consumer status of the defendant and the connection between the personal guarantee and the United Kingdom. Firstly, the court needed to determine whether defendant was acting in the capacity of a consumer when she entered into the guarantee. The court acknowledged the defendant's assertion that she acted as a consumer within the meaning of the CRA.[332] However, regarding the connection to the UK, although the defendant resides in England, the court found that the personal guarantee's ties to Hong Kong were overwhelmingly significant. While the guarantee had connections to the UK, the court determined that these connections failed to meet the threshold of being close as required under section 74(1) of the CRA and so, it was not engaged.[333] Furthermore, the court evaluated whether the core provisions of the guarantee were transparent and fair. The court ultimately concluded that the provisions were fair, and accordingly, dismissed the defendant's challenge.[334]

From the above it can be argued that public policy exception has developed from broad application to narrow application in some jurisdictions like in England. Despite the decision in *Payward v Chechetkin*,[335] the English courts still adopt very narrow approach in the application of public policy. Nonetheless, it is difficult to state that most of common law jurisdictions follow the English approach to public policy exception. Given the vague nature of this exception, there will always be the possibility of misapplying this exception in some jurisdictions. While the underlying rationale for the concept of public policy may remain contested, with notions ranging from ‘the interest of the state’ to ‘parliamentary legislation’ or even ‘conflict of laws’, there is a widespread consensus that public policy is variable and cannot be defined.[336] The apparent inability to define public policy definitively and to limit its application, makes it better for courts to approach it with

[332] Ibid [86]
[333] Ibid [128]
[334] Ibid [205]
[335] Payward (n 326).
[336] Lawaree Valentin, ‘Public Policy in English and American Law’ (Master of Laws, Universiteit Gent 2014), 26.

extreme caution.[337] In this context, some have described public policy as a 'principle of judicial legislation or interpretation founded on the current needs of the community'.[338] Therefore, it could be more practical to describe than define 'public policy', due to its elusive nature. Having examined public policy development in common law jurisdictions, the focus now turns to civil law jurisdictions.

3.2.2 Public Policy in Civil Law Jurisdictions

A civil law jurisdiction is a legal system that is founded on written codes, wherein judicial decisions are made based on the interpretation of these codes.[339] This system has its origins in Roman law and is widely used across the world, including in the GCC States.[340] Judges in civil law jurisdictions are regarded as unbiased interpreters of the law, and their primary responsibility is to apply the law to the specific facts of each case. The main objective is to determine the applicable legal rules and how they should be interpreted.

Contrary to the common law system where public policy is largely shaped by judicial decisions, civil law systems derive their public policy from a more robust legislative framework. some like Dainow, argues that public policy is often shaped by the country's constitution and other fundamental laws, as well as by international treaties and conventions that the country has ratified, with courts tasked with interpreting and applying these codified provisions to specific cases.[341] For instance, the adoption of Sharia as the primary source of legislation in the constitutions of Islamic States has led many researchers to consider that it represents the public policy of those countries.[342] Legislative bodies also play a role in the development of public policy by enacting laws that reflect the values and priorities of the corresponding society.[343] In addition, public policy may be influenced by decisions of the courts, particularly when the courts interpret and apply the law in a way that reflects or advances certain principles or values.[344]

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[337] Deutsche Schachtbau-und Tiefbohgesellschaft M.B.H. v. R'AS al-Khaimah National Oil Co. [1988] 3 W.L.R. 230
[338] Winfield (n 268) 92.
[339] Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1966) 15 American Journal of Comparative Law 419.
[340] George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Springer 2015), 287.
[341] Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1966) 15 American Journal of Comparative Law 419.
[342] Mohammad M Althabity, 'Enforceability of Arbitral Awards Containing Interest-A Comparative Study between Sharia Law and Positive Laws' (PhD thesis, University of Stirling 2016), 84.
[343] Thomas J Anton, 'The Legislature, Politics, and Public Policy: 1959' (1959) 14 Rutgers L. Rev. 269, 273.
[344] Rosalie Silberman Abella, 'Public Policy and the Judicial Role' (1988) 34 McGill LJ 1021, 1022.

The civil law concept analogous to public policy is 'ordre public,' or 'public order'. Ordre public encompasses fundamental principles of public morality, social order, and economic welfare that are foundational to the legal system. Therefore, courts may refuse to enforce foreign arbitral awards or contracts if they are found to contravene the public policy of the jurisdiction. For example, a contract that contains illegal terms, or an agreement that violates fundamental human rights, may be invalidated by the courts on the ground that it violates public policy.[345] This include contracts that are illegal or perceived as contradicting the principles of justice and fairness.[346] However, courts have a limited discretion to invoke public policy.[347]

In civil law jurisdictions, legislator plays key role in the development of public policy. Therefore, some argue that forming the concept of public policy should be tackled by the legislator rather than the courts.[348] Thus, legislators in some civil law jurisdictions provide clarification and categorisation of public policy. This clarification does not aim to definitively define the concept but rather to classify it. For example, Article 1520(5) of the French Civil Code identifies 'international public policy' as a ground for refusal, distinct from domestic public policy, in matters concerning arbitral awards related to international or foreign disputes.[349] This approach ensures that courts disregard domestic public policy when addressing foreign arbitral awards.[350] Article 1520(5) of the French Civil Code has been interpreted as 'the rules and values which cannot be violated within the French legal order, even in the framework of situations of an international nature'.[351] Similarly, Article 27 of the Swiss Federal Act on Private International Law 1987 stipulates that awards must comply with Swiss public policy, which includes fundamental principles such as ensuring that a party is granted the opportunity to present their defence.[352] This pre-defined legal framework can potentially facilitate judicial decision-

[345] Sébastien Besson, 'Arbitration and Human Rights' (2006) 24 ASA Bulletin 395.
[346] Walter Gellhorn, 'Contracts and Public Policy' (1935) 35 Colum. L. Rev. 679, 679.
[347] Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11 Ga. J. Int'l & Comp. L. 591, 596.
[348] Winfield (n 268) 102.
[349] Also, Article 1514 of the French Civil Code stipulates that 'an arbitral award shall be recognised or enforced in France if the party relying on it can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy'.
[350] Chapter 4 will examine the various categories of public policy. See page 93.
[351] Court of Appeal, Paris, June 14, 2001, SA Compagnie commercial André v SA Tradigrain France, Rev Arb 773 (2001).
[352] Federal Act on Private International Law of 18 December 1987.

making compared to common law jurisdictions, where courts rely more heavily on precedent and judicial interpretation of laws.[353]

While legislator plays a central role, public policy can also evolve through judicial interpretation of existing statutes and constitutional provisions. Courts may adapt their interpretations over time to reflect changing societal values and ensure the continued relevance of public policy principles. For instance, the Swiss Supreme Court, distinguishes between different types of public policy.[354] It defines 'transnational' public policy as 'the fundamental legal and moral principles recognised in all civilised states'.[355] However, it would appear that civil law jurisdictions often restrict the authority of the court in exercising its power to apply the public policy exception if the legal text is absent or in the case of unclarified legislation.[356] As a result, it may be argued that civil law jurisdictions have a narrow application and interpretation of public policy.[357] In fact, scholars who advocate this view may be overlooking the fact that public policy is an evolving concept and varies from one jurisdiction to another. Hence, it is important to allow the courts, like in common law jurisdictions, to have the upper hand in deciding on matters of public policy. Allowing the courts this discretion could be justified by the variable nature of the public policy concept. However, while the dynamic nature of public policy arguably necessitates broader judicial authority to interpret and apply it, particularly in instances of clear contravention of fundamental state principles, such discretion is susceptible to misuse.[358] This is especially true in jurisdictions lacking a well-established distinction between domestic and international public policy This omission can be observed in the case of civil law systems, in countries such as those found in the Gulf Cooperation Council (GCC) States and Egypt.[359]

The development of public policy includes not only defining its scope but also narrowing its application. This is because public policy is difficult to define in theory but can be more readily described in practice. Therefore, many efforts have been made by legislators

[353] Murphy (n 347) 599.
[354] *Société de grands travaux de Marseille v Republique populaire du Bangladesh*, 102 ATF Ia 576 (1976).
[355] Swiss Supreme Court, 4P 278/2005, para 2.2.2.
[356] Murphy (n 347) 596.
[357] Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11 Georgia Journal of International & Comparative Law 591, 596.
[358] Chang Wang, 'The impact of Chinese arbitration law and services on international arbitration law and practice' (PhD thesis, University of Exeter 2021) 233.
[359] Veena Anusornsena, 'Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration: The United States, Europe, Africa, Middle East and Asia' (PhD thesis, Golden Gate University 2012) 122.; See also page 211.

in civil law jurisdictions to make its application more specific. In France, for instance, in order to narrow the application of public policy, the legislator has made a clear distinction between national and international public policy. This can be seen in Article 1488 of the Code of Civil Procedure, which deals with national arbitration, provides for public policy, while Article 1514 of the same law refers to 'international public policy'. As a result, the Court of Appeal affirmed that a foreign arbitral award will not be enforced if the award breaches the international public policy of France. The court asserted that a breach of domestic public policy – assuming it has been established – does not provide grounds for appealing against a ruling to enforce a foreign arbitral award in France, because Article 1502(5) only refers to cases where the recognition or enforcement of an award is contrary to international public policy.[360]

In civil law jurisdictions, public policy refers to the fundamental principles of the state. Accordingly, courts may refuse to enforce contracts and arbitral award that breach national sovereignty, interest of the state or involve fraud and corruption. Some argue that the notion of public policy expanded to include political as well as public components.[361] Therefore, on numerous occasions, the courts have refused to enforce arbitral awards and agreements, citing the public policy exception in consideration of political and economic aspects of this exception.[362] In *Avia-Fed Service v Artem*,[363] a dispute arose over a sales agreement that obliged a Ukrainian company to provide Avia-Fed Service with military products, so that it could then supply Russian companies on the Ukrainian sanctions list. The arbitral award was issued in favour of the Russian party, who sought to enforce the arbitral award in Ukraine. Its effect was that the Ukrainian party had to export the goods to Avia-Fed Service. The competent court in Ukraine subsequently rejected the enforcement of the arbitral award on the ground of public policy. However, the Russian party appealed this decision in the Ukrainian Supreme Court, which ruled:

> Assuming that the company is affiliated with a hostile country is not a proper ground for the failure to perform [an] obligation… the mere fact that the claimant is put on the sanctions list does not mean that the enforcement of the ICAC [International Commercial Arbitration Court] award will violate Ukrainian public

[360] Intrafor Cofor v Gagnant, Court of Appeals Judgment (12 March 1985), [1985] Rev Arb 299, cited in Fouchard P and Goldman B, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International BV 1999).
[361] Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2015) 94 Nebraska Law Review 685, 693.
[362] Andrey Kotelnikov, 'Economic Sanctions Arbitrability and Public Policy.' (2020) 23 International Arbitration Law Review 35.
[363] Avia-Fed Service v Artem, Ukrainian Supreme Court, Case No 761/46285/16-c, issued in September 2018.

> order, as the award concerns only private relations between the commercial entities in relation to the performance of a contract they have entered into.[364]

Interestingly, in another award by the International Commercial Arbitration Court, involving the same case and parties, the Ukrainian Supreme Court adopted a different approach, considering that 'being on the sanctions list' constituted a breach of the Ukraine's public policy. The court decided that the enforcement of such an award would be unfavourable to the Ukrainian military industry, as well as detrimental to the security of the Ukrainian people and the interests of the state.[365]

Theoretically, civil law judges may exhibit greater restraint in invoking public policy compared to their common law counterparts. This stems from the emphasis on codified law and the principle of legality, which dictates that judges should primarily apply existing laws rather than create new ones. However, judges can still interpret legislation and consider public policy principles within the bounds of the codified framework. As a result, some courts have invoked public policy in cases involving very serious procedural irregularities.[366] This is referred to by a few authorities as 'procedural public policy'.[367] In this context, the German *Bundesgerichtshof* ruled that '[f]rom the viewpoint of German procedural public policy, the recognition of a foreign arbitral award can therefore only be denied if the arbitral procedure suffers from a grave defect that touches the foundation of the State and economic functions'.[368] Similar to the German courts, the Swiss courts have declared that '[a] foreign decision can be incompatible with the Swiss legal system not only because of its substantive content, but also because of the procedures that lead to it'.[369] In this respect, Swiss public policy requires compliance with the fundamental principles of procedure, as deduced from the constitution, such as the right to a fair process and the right to be heard.[370]

According to one Swiss court, procedural public policy safeguards the right of parties to a fair and impartial judgment based on legal arguments and presented facts, as governed by relevant procedural laws. This policy is breached when a fundamental and widely

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[364] Avia-Fed Service v Artem, Ukrainian Supreme Court, Case No 824/100/19, issued in February 2020.
[365] ibid.
[366] Fernando Mantilla-Serrano, 'Towards a Transnational Procedural Public Policy' (2004) 20 Arbitration international 333, 335.
[367] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (Oxford University Press 2009).
[368] Charterer v Shipowner, Bundesgerichtshof, published in Yearbook of Commercial Arbitration 1987, Van den Berg, 489-490.
[369] Albert J Van den Berg, *Yearbook Commercial Arbitration, 2004*, vol 28 (Kluwer Law International BV 2003).
[370] ibid.

accepted principle is violated, resulting in a severe distortion of the concept of justice and rendering the decision inconsistent with the values upheld in a lawful society.[371] However, not all procedural breaches are considered to contravene public policy, as affirmed by the above-mentioned court; only the violation of a rule that is essential to ensure the fairness of proceedings can be taken into account.[372] Lack of independence can be found in circumstances where the arbitrator is being paid by one of the parties for consultation[373] or is recruited by one of the parties shortly after making the arbitral decision.[374] In some cases, there is a clear indication of this ground. For example, one arbitrator was overheard to say in *Catalina v Norma*[375] that 'Italians are all liars in these cases and will say anything to suit their book. The same thing applies to the Portuguese'.[376]

In fact, principles such as impartiality and independence are universally recognised as essential components of public policy, irrespective of whether in common law or civil law jurisdictions. These principles are therefore integral to the concept of public policy. However, certain courts have occasionally misapplied this exception. In a recent decision by the Supreme Court of the Russian Federation,[377] the court refused to enforce an arbitral award on the grounds that the arbitrators who rendered the award were of 'unfriendly' nationalities. The case involved a dispute between a German claimant and a Russian defendant arising from a contract for the supply of flaxseeds from Russia to Belgium. Due to delivery difficulties, attributed to drought and market challenges, the Russian defendant was unable to fulfil its contractual obligations. Consequently, the claimant-initiated arbitration proceeding with the Federation of Oils, Seeds and Fats Associations (FOSFA) in London and was awarded approximately $600,000 in damages.[378]

The claimant sought recognition and enforcement of this award in Russia. The Arbitrazh court of the Novosibirsk Region and the Arbitrazh court of the West Siberian District both upheld the application. However, the defendant appealed to the Supreme Court of

[371] First Civil Law Court of the Swiss Federal Tribunal, 4A 440/2010, issued in 2011.
[372] ibid.
[373] Philippe Fouchard and Berthold Goldman, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International BV 1999).
[374] Raoul Duval v Merkuria Sucden [1996] rev arb, 381.
[375] Catalina (Owners) v Norma (Owners), [1938] 61 Lloyd's Law Reports 360 et seq.
[376] Ibid.
[377] The Supreme Court of the Russian Federation (Case A45-19015/2023, judgment No. 304-ЭС24-2799)
[378] Jevgenia Tarassova, 'Arbitral award not recognised because arbitrators came from "unfriendly countries"' (KDB, 5 August 2024) <https://kdb.legal/en/arbitral-award-not-recognised-because-arbitrators-came-from-unfriendly-countries/> accessed 9 August 2024.

the Russian Federation, arguing that enforcement of the award would contravene Russian public policy. The defendant asserted that the arbitration proceedings were flawed because the arbitrators were nationals of 'unfriendly states'—specifically, Ukraine, the United Kingdom, and Denmark. It was contended that the arbitrators' nationalities compromised their impartiality and independence. Interestingly, the Supreme Court ultimately accepted this argument, concluding that the composition of the arbitration panel could have violated the principles of fairness and impartiality. As a result, the previous ruling was overturned.[379]

This recent case underscores that, despite international efforts to prevent the misuse and overbroad interpretation of public policy, some courts continue to exploit the ambiguity surrounding the concept of public policy to refuse enforcement of final arbitral awards. Nevertheless, it would appear to be rare for an arbitrator to clearly favour one party over the other during arbitration proceedings, unless there is clear evidence to the contrary. In a dispute in Switzerland, the competent court held that just because the defendant's counsel and the arbitrator practiced before the same court without any further precisions, or where the arbitrator's daughter had met the counsel of one of the parties when practising in the same legal firm, neither of these facts constituted a breach of the arbitrator's independence. [380] Therefore, the grounds of lack of independence or impartiality only arise if there is proof of actual bias.[381] In another example of violating the principle of arbitrator impartiality, in *DIT v Port Autonome de Douala*,[382] where the court found that there are close personal ties between the arbitrator and the party's counsel.[383]

The concept of public policy is not static, however. New situations and legal developments can lead to an expansion of its scope. For instance, as earlier explained in Section 3.2.1,[384] awards that disregard consumer protection laws, designed to safeguard weaker bargaining positions, may also be deemed a violation of public policy.[385] The challenge lies in recognising these evolving boundaries. While courts possess some flexibility in interpreting public policy, it is crucial to maintain a balance. Upholding the validity of arbitration agreements remains a cornerstone principle. Therefore, courts

[379] The Supreme Court of the Russian Federation (n 377).
[380] First Civil Law Court, 4A 233/2010.
[381] Emivir, Loniewski, Gauthier v ITM Supreme Court, France 1 July 2011.
[382] Douala International Terminal (DIT) v. Port Autonome de Douala, ICC Case No. 24211/DDA
[383] French Supreme Court, 19 June 2024, no. 23-10.972.
[384] See page 56.
[385] Payward (n 326).

should only intervene on the grounds of public policy when faced with clear and undeniable violations.

From the above, it can be argued that courts in common law jurisdictions play a more prominent role in shaping public policy compared to their counterparts in civil law jurisdictions. However, this does not necessarily mean a more restrictive application of public policy principles in common law jurisdictions. Conversely, it can be said that, with clear legislative pronouncements and a degree of judicial discretion vested in courts familiar with public policy considerations, the application of public policy exceptions will likely be confined to narrow circumstances.

3.3 The New York Convention and Public Policy

The New York Convention 1958 is clearly considered the most significant agreement related to the international commercial arbitration and the recognition and enforcement of foreign arbitral awards. Kallweit attributes the prosperity of world trade to international agreements over the enforcement of arbitral awards, for example, the New York Convention 1958.[386] The convention as explained in Chapter 1, includes several cases where the court may refuse to recognise and/or enforce foreign arbitral awards, one of these grounds is public policy exception. Public policy as a bar to enforcing arbitral awards under the New York Convention was originally derived from Article 1 of the Geneva Convention 1927, which stipulates that 'the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon'.[387] It is worth noting that there was a debate among the drafters of the New York convention regarding the formulation of this exception.[388] This is whether to refuse recognition and enforcement of arbitral awards that clearly contrary to 'public policy' or 'fundamental principles of the law'.[389] The drafters adopted 'public policy' term.[390]

However, the convention has been harshly criticised for its inclusion of the public policy exception. Some describe this inclusion as the convention's 'Achilles heel', or weak

[386] Dominik Kallweit, 'Towards a European Contract Law: For a Prosperous Future of International Trade' (2004) 35 Victoria University Wellington Law Review 269, 284.
[387] Geneva Convention on the Execution of Foreign Arbitral Awards 1927, Article 1(e).
[388] Merkin and QC (n 3) 881.
[389] Ibid.
[390] Ibid.

point.[391] Similarly, Joel describes it as a loophole and the greatest threat to the efficiency of the New York Convention.[392] The convention does not specifically address the application of the public policy exception, but its Article V permits parties to dispute and the court to resist the recognition or enforcement of an award on several grounds, including where the award is 'contrary to the public policy' of the country in which recognition or enforcement is sought.

One might ask, if the main aim of international conventions such as the New York Convention is the enforcement of awards, then why do these conventions include a vague exception that may eventually undermine their core objective? In fact, there is widespread debate over whether it is necessary to include such a refusal ground. Scholars who are in favour of this inclusion believe that public policy aims to protect the integrity of the legal system. In other words, it allows courts to ensure that arbitration agreements and awards are consistent with the fundamental principles of the legal system of the host country.[393] This helps to protect the sovereignty and autonomy of states. Furthermore, it allows courts to refuse to recognise and enforce arbitration agreements and awards that are clearly unfair or unjust, thereby helping to ensure that the parties to an arbitration are treated fairly and the outcome of the arbitration reflect the principles of justice and fairness. Finally, the concept of public policy allows courts to consider the interests of the state when determining whether to recognise and enforce an arbitration agreement or award. This can be particularly important in cases where the arbitral award has the potential to significantly affect the interests of the state or its citizens.[394]

Conversely, several arguments have been levied against the inclusion of public policy in enforcement conventions. Some argue that public policy is subjective and can vary from one jurisdiction to another, making it difficult to apply consistently in international arbitration.[395] Alternatively, the use of public policy in arbitration can lead to inconsistent or arbitrary results, as different arbitrators and courts may have varying interpretations of

[391] Ben Giaretta and Akshay Kishore, 'Public Policy in Indian Arbitration' (*Ashurst*, 1 March 2015) <https://ashurst.com/en/news-and-insights/legal-updates/public-policy-in-indian-arbitration/> accessed 4 September 2022.
[392] Joel R Junker, 'The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards' (1977) 7 California Western International Law Journal 228, 228.
[393] Tolson (n 14) 496.
[394] Javier Garcia de Enterria, 'The Role of Public Policy in International Commercial Arbitration' (1989) 21 Law & Pol'y Int'l Bus. 389, 419.
[395] Jeffrey W Stempel, 'Pitfalls of Public Policy: The Case of Arbitration Agreements' (1990) 22 St Mary's Law Journal 259, 343.

what constitutes a violation of public policy.[396] Another argument is that the use of public policy in arbitration may represent an interference with the parties' agreement and party autonomy to resolve their disputes through arbitration.[397] Parties may choose arbitration precisely because they wish to avoid the involvement of the state and its laws. Thus, allowing the public policy defence in arbitration may be seen as undermining this choice. Some commentators, such as Voser and Meshel, believe that even if public policy is applied narrowly as a bar, there is still the risk of it being misused, especially in a corrupt or unqualified legal system.[398] Furthermore, this provision could create uncertainty and unpredictability in the arbitration process. Finally, it has been suggested that applying public policy in arbitration could allow the state to exert undue influence over the outcome of the arbitration, consequently undermining the independence of the arbitration process.[399] Therefore, several scholars, like Gaillard called for the New York Convention to be revisited, as it has been over 60 years since its ratification and some of its Articles are still misapplied, especially the public policy exception.[400] However, it should also be considered that although there are some negative practices in the application of the public policy exception, international arbitration and international trade have contributed to the development of the public policy concept.

In fact, public policy has a crucial role in international commercial arbitration as it aims to ensure that the fundamental principles of the legal system and interests of the state are protected, while also promoting the enforceability of arbitration awards as a means of resolving disputes in a fair and efficient manner.[401] This role can be seen in the fact that international commercial arbitration serves as a cornerstone for facilitating international trade and resolving disputes effectively. However, a delicate balance exists between respecting party autonomy in resorting to arbitration and ensuring arbitral awards are consistent with the fundamental principles of the state where the recognition and

[396] Anton G Maurer, *Public Policy Exception Under The New York Convention: History, Interpretation, and Application-Revised Edition* (Juris Publishing, Inc 2013), 55.
[397] Christopher Style QC and Philomena Cleobury, 'Jivraj v Hashwani: Public Interest and Party Autonomy' (2011) 27 Arbitration International 563, 572.
[398] Nathalie Voser, 'Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration‖ (1996) 7 American Review of International Arbitration 319, 335; Tamar Meshel, 'The Use and Misuse of the Corruption Defence in International Investment Arbitration' (2013) 30 Journal of International Arbitration 270.
[399] Jeffrey W Stempel, 'Pitfalls of Public Policy: The Case of Arbitration Agreements' (1990) 22 St Mary's Law Journal 259, 355.
[400] Emmanuel Gaillard, 'Is There a Need to Revise the New York Convention' (2008) 2 Dispute Resolution International 187, 189.
[401] Peter Basil Carter, 'The Role of Public Policy in English Private International Law' (1993) 42 International & Comparative Law Quarterly 1, 4.

enforcement is sought. This is where the concept of public policy plays a fundamental role. Public policy contributes to protecting basic societal principles such as competition, consumer protection and human rights. The public policy protection of these principles indirectly contributes to the prosperity of international commercial arbitration. For example, when it comes to enforcing an international commercial arbitration award, public policy provides a basic guarantee of protecting the basic rules of law to ensure that the award does not contravene the fundamental values of the state. Thus, it acts as an indirect contributor to the prosperity of international commercial arbitration. It offers a mechanism for ensuring legitimacy and fairness regarding the arbitration process. When parties and arbitral tribunals recognise that awards must align with fundamental principles, it fosters confidence in the system's ability to deliver just outcomes. This, in turn, encourages more parties to choose arbitration for resolving their disputes, contributing to the continued success of international commercial arbitration as a preferred method of dispute settlement.

In fact, although there are negative perceptions of the public policy exception in some countries, public policy still aims to protect the public interest, public morality, and public security.[402] Thus, one should not overlook how the inclusion of public policy within the New York Convention 1958 contributes to the evolution of public policy. Specifically, the incorporation of public policy has prompted numerous parties, arbitrators, and courts to engage with public policy as a basis to refuse the recognition and enforcement of foreign arbitral awards. This invocation has undoubtedly compelled many courts to clarify the concept of public policy, as previously discussed in Section 3.2.[403] In all events, as emphasised by Bell, public policy does not denote any one rule or principle but is rather an umbrella covering an array of considerations that may have a bearing on the issue before the court.[404] Therefore, courts and arbitrators should work together to narrow the misapplication of this exception. Accordingly, Buchanan believes that public policy will continue to be discussed more in theory than in practice.[405] This could be described as an accurate statement since the courts tend to apply foreign arbitral awards. However, defendants will always challenge the enforcement and recognition under public policy exception in a final attempt to avoid enforcing an arbitral award.

[402] Ghodoosi (n 281) 736.
[403] See page 53.
[404] John Bell, *Policy Arguments in Judicial Decisions* (Oxford University Press 1983), 156.
[405] Mark A Buchanan, 'Public Policy and International Commercial Arbitration' (1988) 26 Am. Bus. LJ 511, 531.

From the above, it can be said that while there may be divergent outlooks concerning the inclusion of public policy under the New York Convention, this exception remains a crucial mechanism to safeguard the fundamental principles of the state where recognition and enforcement is sought. As demonstrated by numerous cases throughout this chapter and Chapter 4, its application is necessary. Nevertheless, it is essential to restrict the scope of this exception. One approach to achieve this limitation is to clearly differentiate between the concept of public policy and other legal principles that can be misconstrued as synonymous. Therefore, the following section will examine some cases where some courts confuse public policy with other terms.

3.4 Mandatory Rules, Non-arbitrability, and Public Morals

It has been demonstrated that public policy is a vague term that evolves thereby evading precise definition.[406] However, it can still be distinguished from similar terms, like 'public morals' or 'mandatory rules'. Yet it is pertinent to make these distinctions because, some courts and legislators, as has been demonstrated in Chapter 6, [407] struggle to distinguish between public policy and these closely related but distinct terms. The distinction between them must be highlighted, in order to narrow the application of the public policy exception.

3.4.1 *Mandatory Rules and Public Policy*

As indicated earlier, public policy refers to the fundamental principles and values of a state, which are often reflected in its laws and regulations.[408] They may also be drawn upon at the discretion of a designated decision maker such as a judge.[409]

Generally, mandatory rules are rules that must be applied in a given legal system, regardless of the parties' intentions or agreements. However, this does not mean that parties can agree to waive their right to challenge an award on public policy grounds, since the courts may invoke this exception at any stage.[410] Chong defines mandatory rules

[406] Devin Bray and Heather L Bray, *International Arbitration and Public Policy* (Juris Publishing, Inc 2014) 29.
[407] This approach is common within the GCC States courts, See Chapter 4.
[408] Adam A Anyebe, 'An Overview of Approaches to the Study of Public Policy' (2018) 4 International Journal of Political Science 8, 8.
[409] ibid 13.
[410] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), Article V(2)(b), provides that a court may refuse to enforce an arbitral award if it is 'contrary to the public policy of the State'. See Qisheng He, 'Public Policy in Enforcement of Foreign Arbitral Awards in Thee Supreme People's Court of China' (2013) 43 Hong Kong Law Review 1037, 1038.

as the compulsory rules that must be applied in a given legal system, regardless of the parties' intentions, desires, or agreements.[411] Thus, mandatory rules are rules that cannot be 'excluded, altered or limited'[412] by a contract or the parties concerned. These rules may be based on statutory or regulatory provisions, or else derived from principles of common law.

According to Kunda, there are two categories of mandatory rules: national and international.[413] Kunda defines national mandatory rules as the rules that apply when the law governing a contract is the same as the law containing the specific mandatory rule. On other hand, international mandatory rules are narrower but more powerful rules that should be applied regardless of the chosen governing law. In the context of the European Union, the European Court of Justice has defined international mandatory rules as national provisions, compliance with which has been deemed crucial to protect the political, social or economic order in the Member State concerned.[414] Thus, compliance is required from every inhabitant of the member state's national territory and in all legal relationships within it.[415]

In fact, in Kund's definition, it appears that he relies on the court decision which it seems more national than international. Therefore, Kund may meant the foreign mandatory rules rather than international mandatory rules. In this context, Chukwumerije defined foreign mandatory rules as rules distinct from those that govern the dispute.[416] However, from practical point, it is hard to distinguish between domestic, international, foreign mandatory rules. Thus, there seems to be no point in classifying mandatory rules into multiple categories, especially since there is no definition that clearly distinguishes between categories of mandatory rules. Therefore, it is better to have solely one category for this term. This is because it is often difficult to apply mandatory rules, taking into account many of the criticisms that have been made regarding the application of

[411] Adeline Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2 Journal of Private International Law 27, 31.
[412] TC Hartley, 'Mandatory Rules in International Contracts: The Common Law Approach, vol 266 (Brill 1997), 346.
[413] Ivana Kunda, 'Defining Internationally Mandatory Rules in European Private International Law of Contracts' (2007) 4 Zeitschrift für Gemeinschaftsprivatrecht 210, 213.
[414] Court of Justice of the European Union (CJEU), Cases C-369/96 and C-376/96 [30].
[415] Chong (n 411) 31.
[416] Okezie Chukwumerije, 'Mandatory Rules of Law of International Commercial Arbitration' (1993) 5 Afr. J. Int'l & Comp. L. 561, 568.

mandatory rules in international commercial arbitration, especially since they may conflict with the principles of the party autonomy.[417]

While public policy and mandatory rules can overlap, they are not necessarily synonymous. There are those who argue that public policy is a broad concept that encompasses the principles and values deemed important to the functioning of a society, while mandatory rules are specific legal provisions to be applied in certain circumstances.[418] Additionally, in its broader sense, public policy may serve as a basis for judicial decision-making and other government actions, while mandatory rules are typically enforced via courts. Interestingly, some like Bermann, believe that some courts misinterpret 'mandatory rules' as synonymous with 'public policy' especially those who lacking familiarity with mandatory rules.[419] For instance, some jurisdictions may refer to mandatory rules as public policy in certain cases.[420] Thus, the concept of mandatory rules is sometimes considered to be broader than that of public policy because the former could, in that case, encompass the latter. Arbitral awards that breach mandatory rules do not necessarily breach public policy.[421] Nevertheless, it should be noted that courts tend to refuse to enforce arbitral awards that violate mandatory rules. For instance, in Italy, a court refused to enforce an arbitral award that breached the nucleus of mandatory rules.[422]

While public policy and mandatory rules may be related and could serve similar functions in a legal system, they are not necessarily similar, as observed by Chukwumerije, who asserts that the latter would include aspects of public order and rules of national law that are imperative in their presentation, since they embody the basic socio-economic policies of the state concerned.[423] Similarly, mandatory rules have not only been mentioned in domestic regulations but also in some international agreements. For instance, Article 53 of the Vienna Convention 1969 explicitly refers to mandatory rules as 'peremptory norms'.[424] It is worth mentioning here that the term *jus cogens* first appeared in

[417] Audley Sheppard, 'Mandatory Rules in International Commercial Arbitration: An English Law Perspective' (2007) 18 Am. Rev. Int'l Arb. 121, 123.
[418] Michal Wojewoda, 'Mandatory Rules in Private International Law: With Special Reference to the Mandatory System under the Rome Convention on the Law Applicable to Contractual Obligations' (2000) 7 Maastricht Journal of European and Comparative Law 183, 192.
[419] George A Bermann, 'Mandatory Rules of Law in International Arbitration' (2007) 18 American Review of International Arbitration 3.
[420] Qatar Court of Cassation, Civil and Commercial Circuit, Case no 348/2015.
[421] Luigi Fumagalli, 'Mandatory Rules and International Arbitration: An Italian Perspective' (1998) 16 ASA Bulletin 43, 57.
[422] Albras Establishment v Bordon & Giacobbe SpA, Judgment no 4033, Court of Cassation, 29.
[423] Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Praeger 1994), 181.
[424] Article 53 of Vienna Convention on the Law of Treaties 1969 stipulates that 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes

international law in 1936, specifically in an article by Professor Verdross, wherein he explains the importance of the idea of mandatory rules *jus cogens* in the international legal system.[425] The above study had a significant impact on the adoption of Articles 53 and 64 of the Vienna Convention on the Law of Treaties 1969.[426]

In many circumstances, rules of law are referred to as 'mandatory' if private parties cannot deviate from them in the exercise of their party autonomy. Therefore, a mandatory rule is one that parties are unable to contract around. It is conceivable that a strong public interest justifies prohibiting parties from conducting their business in a way that is inconsistent with the mandatory standard, including the need to safeguard weaker parties.[427] Therefore, parties are not entitled to preclude the application of mandatory rules. This is stipulated by the European Convention on the Law Applicable to Contractual Obligations 1980,[428] wherein its Article 3(3) affirms that the fact of parties having chosen a foreign law, whether or not this is accompanied by the choice of a foreign tribunal, shall not prejudice the application of legal rules to that country, if all other elements are connected to just one country and there can be no derogation from this via mandatory contract rules.

In this context, the GCC States dealt with mandatory rules in the same way that they dealt with the public policy concept. Neither legislators nor courts interpret this term. However, some domestic legislations have referred to 'mandatory rules' without defining the term or distinguishing it from similar terms and concepts. For instance, arbitration laws in the GCC States prohibit resorting to arbitration in family law disputes. This ambiguity has led to judicial confusion. Some critics argue that due to the unclear legislation, the courts of certain GCC States tend to invoke public policy when the agreement or contract concerns mandatory law.[429] For instance, in Qatar, Article 69 of the Civil and Commercial

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of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

[425] Alfred Von Verdross, 'Forbidden Treaties in International Law: Comments on Professor Garner's Report on "The Law of Treaties"' (1937) 31 American Journal of International Law 571, 572.

[426] Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 European Journal of International Law 33, 53.

[427] George A Bermann, 'Mandatory Rules of Law in International Arbitration', *Conflict of Laws in International Arbitration* (Otto Schmidt/De Gruyter European Law Publishers 2010), 326.

[428] The Convention on the Law Applicable to Contractual Obligations 1980, also known as the Rome Convention.

[429] Sharaf Khaled Al-Sharaf and Anas Faisal Al-Tourah, 'Validity of the Arbitration Clause in the International Employment Contract: The Viewpoint of the GCC Countries' (2023) 29 Comparative Law Review 175, 184.

Procedures Law 1990 stipulates that a court's decision and awards should be issued in the name of the ruler of Qatar and this rule is treated as mandatory. Consequently, the Qatari Appeal Court refused to enforce an international arbitral award because it breached the earlier mandatory rule in this law and hence, Qatar's public policy.[430] It should be highlighted that although the law considers this article to be a mandatory rule, the court refused to enforce the arbitral award as it violated Qatar's public policy rather than because it breached a mandatory rule.

The above example affirms the misunderstanding and misapplication of these terms. However, it can be argued that it would constitute a violation of public policy to contravene mandatory rules. Mandatory rules are designed to serve social and public interests, thereby prohibiting private individuals from circumventing them through contractual agreements. Although public policy is distinct from mandatory rules, it is essential to recognise their close alignment and interconnection within the public policy exception. The issue may arise from the fact that some countries have a greater number of mandatory rules, covering matters that may not hold the same significance elsewhere. Consequently, the public policy exception may appear to have a broader scope of application in these jurisdictions compared to others. In any case, while several jurisdictions may refuse the recognition and enforcement of foreign arbitral award on the grounds that it conflicts with mandatory rules rooted in public policy, it would be more practical to restrict such an approach to domestic disputes rather than international ones. Applying this approach exclusively to domestic disputes would prevent an undue expansion of the public policy exception. Therefore, courts should consider limiting the application of this approach to matters of domestic concern.

3.4.2 *Non-arbitrability and Public Policy*

A common misinterpretation of the public policy exception occurs when disputes are deemed non-arbitrable, and the disputing parties are not permitted to resort to arbitration to tackle their dispute. National laws frequently restrict recourse to arbitration for particular types of disputes, either to safeguard the rights of specific individuals who require additional protection from the state or to protect the public interest.[431] Some

[430] Qatar Court of Cassation, Civil and Commercial Circuit, Case No 64/2012.
[431] Penny Madden KC and Ceyda Knoebel, 'Arbitrability and Public Policy Challenges' (*Global Arbitration Review*, 17 May 2023) <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/arbitrability-and-public-policy-challenges> accessed 12 October 2023.

scholars observe that non-arbitrability is usually influenced by public policy, especially since public policy has the same effect on an arbitral award where the award is issued in non-arbitrable disputes or a breach of public policy might not be recognised or enforced by the competent courts.[432] Furthermore, both public policy and non-arbitrability differ from country to country. For instance, while family disputes are not arbitrable in the GCC States, the jurisdictions of England,[433] and Canada allow parties to resort to arbitration in family matters.[434] Similarly, what is considered to be part of public policy in a specific country might not mean that it is a matter of public policy elsewhere. For example, in *Booz-Allen vs Sbi Home Finance,*[435] the Supreme Court of India declared that tenancy issues are non-arbitrable on public policy grounds. In contrast, issues of this nature are arbitrable in the GCC States.[436]

The relationship between arbitrability and public policy is often intertwined.[437] Some countries, such as Tunisia, Zambia, and Zimbabwe, use public policy as a factor to determine whether a dispute is eligible for arbitration.[438] Similarly, in Finland and Lebanon, the courts may only refuse to enforce an arbitral award in non-arbitrable matters if the award will breach public policy.[439] Significantly, during the drafting of the New York Convention, the French delegation proposed removing the provision that non-arbitrable disputes can be denied recognition and enforcement,[440] arguing that it gave unnecessary authority to domestic rules over foreign arbitral awards.[441] Hence, public policy would be a sufficient ground for refusal.[442] However, this proposal was not accepted by the majority. In contrast, Harris argues that it is not necessary for disputes to

[432] Joseph Mante, 'Arbitrability and Public Policy: An African Perspective' (2017) 33 Arbitration International 275, 278.
[433] Wendy Kennett, 'It's Arbitration, but Not as We Know It: Reflections on Family Law Dispute Resolution' (2016) 30 International Journal of Law, Policy and the Family 1, 1.
[434] Vianney Sebayiga, 'The Arbitrability of Family Disputes in Kenya: A Case Study of the Court of Appeal Decision in TSJ v SHSR (2019) eKLR' [2022] Available at SSRN 4136412 3.
[435] Booz-Allen & Hamilton Inc vs Sbi Home Finance Ltd. & Ors 2011 AIR SCW 3089
[436] See also the US Supreme Court in Wilko v Swan, 346 US 427 (1953) concerning securities Act.
[437] Stephen W Makau, 'The Application of the Principle of Arbitrability and Public Policy in International Commercial Arbitration' [2022] 4176183 SSRN Electronic Journals 12.
[438] Mante (n 432) 289.
[439] Pascal Hollander, 'Report on the Concept of Arbitrability under the New York Convention' (2017) 11 Dispute Resolution International 47, 52.
[440] Article V(2)(a) states that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that '(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country'.
[441] Madden and Knoebel (n 431).
[442] Ibid.

involve a public policy matter for them to be non-arbitrable.[443] The latter perspective found its roots in Article V(2) of the New York Convention 1958, where the two refusal grounds are mentioned in different sub-sections, rather than in a single one. Therefore, these grounds refer to separate exceptions.[444]

In fact, several jurisdictions invoke public policy when the matter related to non-arbitrable disputes. For instance, in Egypt, criminal matters, real estate disputes, labour disputes, contracts for the transfer of technology, and antitrust disputes are considered non-arbitrable,[445] Therefore, the Egyptian Court of Appeal invalidated an arbitral award issued as a result of a real estate dispute, since the court confirmed that this matter could not resolved through arbitration and was related to public policy. It should be noted here that the court did not explain why it considered such a conflict to be related to public policy, but it confirmed that the parties' intention was to evade paying fees and tax to the state.[446] Likewise, in Turkey, the Court of Cassation affirmed that disputes involving the determination of lease payments were not amenable to arbitration. In its analysis, the Turkish court employed the criterion of whether parties can freely enter into an agreement over the subject matter of the dispute, concluding that the determination of lease payments was not subject to the parties' unconstrained discretion, as it implicated public policy considerations. Consequently, the court held that such disputes could not be resolved through arbitration.[447]

As explained in Chapter 6, in the GCC States, disputes related to real estate and family law are not arbitrable, and so arbitral awards for such matters are neither recognised nor enforced.[448] For instance, the Saudi legislator stipulates that 'a foreign award or order may not be enforced in cases falling within the jurisdiction of courts in the Kingdom, such as lawsuits *in rem* relating to real estate in the Kingdom and similar lawsuits'.[449]

[443] Troy L Harris, 'The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention—With Particular Reference to Construction Disputes' (2007) 24 Journal of International Arbitration 16.
[444] Some attribute this confusion to the vagueness of Article V(2)(b) which led to a broad application of the public policy concept. See Serge Lazareff, 'Mandatory Extraterritorial Application of National Law' (1995) 11 Arbitration International 137, 140.
[445] Yehya Ikram Ibrahim Badr, 'The Grounds for Setting Aside Arbitral Awards under the Egyptian Arbitration Code: Unresolved Choice of Law Issues and Unwanted Extraterritorialism' (2018) 32 Arab Law Quarterly 33, 47.
[446] Court of Appeal, Appeal No 68/133, issued on 02/07/2007.
[447] Court of Cassation, Case No 2004/13018, issued on 02/12/2004.
[448] The Dubai Court of Cassation in Civil Appeal for Cassation No. 275 of 2014.
[449] Article 11 Saudi Implementing Regulation of the Enforcement Law (1) of the

Likewise, in all other GCC States, the law prohibits parties from resorting to arbitration in family or real estate disputes.[450]

That said, it is important to draw attention to the main reason for excluding real estate disputes from recourse to arbitration, as declared by Dubai court in the UAE: '…real estate disputes are only subject to the local dispute resolution authority as this matter belongs to people interest and by law it is consider a part of UAE's public policy.'[451] Minas states that this prohibition comes as a result of enormous numbers of fraud cases involving real estate in the UAE.[452] Interestingly, according to the laws of the GCC States, family law is considered as a matter of public policy across the entire GCC. This approach could be a method of guaranteeing that only local laws and regulations are applied to such matters, thereby offering fair protection to the institution of the family in this context. Nevertheless, some scholars claim that local legislation can prohibit recourse to arbitration in disputes of public interest or in the grant of protection for vulnerable individuals.[453] Ballantyne adds that this consideration is to ensure that only Sharia law will be applied in such disputes, rather than non-religious legislations that can be applied by arbitrators.[454] It should be emphasised that although there is a tendency to secularise laws in the GCC countries, family law is still based on Sharia, and this could be the reason why family disputes are treated as a matter of public policy as examined in Chapters 3 and 4.

In fact, many scholars have criticised this approach, despite acknowledging that the reasons for this exception are justified. The consideration of real estate and family disputes as matters of public policy will undoubtedly open the door to consider other matters as part of public policy.[455] Furthermore, the GCC States even apply this public policy exception to foreign and international arbitral awards, beyond applying it solely to local disputes. Therefore, justifying this approach as a method of protecting individual

[450] None of the GCC States' arbitration laws allow parties to resort to arbitration regarding family and real estate disputes. See also, GCC, https://gcccac.org/en/arbitration-laws-and-rules/kingdom-of-bahrain accessed 20 May 2023.; Also explained in Chapter 6.
[451] Baiti Real Estate Development v Dynasty Zarooni Inc, Dubai Court of Cassation, Case No 14/2012.
[452] Minas Khatchadourian, 'Arbitration in the Arab States of the Gulf (GCC): An Overview' (2015) 9 Rom. Arb. J. 39, 45.
[453] Arthur J Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2007) 5 Santa Clara Journal of International Law 180.
[454] Ballantyne, William M and Howard L Stovall, *Arab Commercial Law: Principles and Perspectives* (Chicago: American Bar Association 2022), 15, 20.
[455] Nica Nguyen Worthy, 'Disputes That Raise Public Policy Issues: Special Problems in International Disputes' (2019) 86 Defense Counsel Journal 1, 17; Mohammed Anwar al Jelani, 'A Study on UAE Courts Supervisory Powers in Arbitration on the Grounds of Public Policy Consideration' (MSc dissertation, British University in Dubai 2017), 49.

interests could represent a misunderstanding of the concept of public policy. Hence, treating these matters as non-arbitrable rather than public policy matters could be a positive step towards a narrow application of the public policy exception in the GCC States.

The application of the New York Convention described above is a clear indication of the confusion that prevails in some courts of the GCC States, with regard to the public policy concept. In other words, Article V(2)(a) of the New York Convention states that the 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'. Thus, the above Article affirms that even when the non-arbitrability of an award is not a public policy matter, it is still a refusal ground that will allow the courts to refuse to enforce a foreign arbitral award. Therefore, the courts should apply this refusal ground to disputes over non-arbitrable matters, rather than invoking the public policy exception to refuse to enforce an arbitral award.

3.4.3 Public Morals and Public Policy

Another confusing term in the context of public policy is 'public morals'. These terms are sometimes used interchangeably, with the effect that arbitral awards that breach public morals are not enforced, citing the public policy ground.[456] This could be due to the courts having consistently referred to public morals when indicating public policy. For instance, a US court affirmed that the recognition and implementation of foreign arbitral awards may only be rejected on the ground of public policy if such enforcement would contravene the fundamental principles of morality and justice in the state where enforcement is sought.[457] Likewise, a Swiss tribunal concluded that 'A universal understanding of public policy holds that an award will be considered inconsistent with public policy if it goes against the fundamental moral or legal standards acknowledged in all civilised nations'.[458]

Thus, similar to public policy, the concept of public morals has played a crucial role in the enforcement of arbitral awards, serving as a safeguard to ensure that the enforcement

[456] Hadeel Malik and Abbas Nedal, 'The Role of International Law in Protecting Freedom of Opinion and Expression' 7 The International and Political Journal 319, 325.
[457] Parsons & Whittemore Overseas v Société Générale de L'Industrie du Papier (RAKTA), Court of Appeals, Second Circuit, United States of America, 508 F2d 969, 974 (1974).
[458] European Gas Turbines SA v Westman International Ltd, 30 September 1993, (1994) Rev Ark 359.

of an award does not violate the fundamental values and principles of the surrounding society. However, similar to public policy, the concept of public morals is not always clear cut and can vary across societies and cultures. For example, what may be considered as a violation of public morals in one country might be overlooked in another.

As clarified earlier, public policy refers to the principles and values that are considered fundamental to a society. These principles and values may be reflected in the laws and regulations of a jurisdiction and may be used as a basis for judicial and government actions. Public morals, on the other hand, refer to the beliefs and values that are generally accepted as morally right or wrong by a society.[459] These beliefs and values may be derived from religious, cultural or other sources, and they can likewise be reflected in the laws and regulations of a jurisdiction.[460] The confusion between these two terms is possibly due to the similar functions of the two concepts, since both public policy and public morals reflect the fundamental principles and values of a society, and they are used to ensure that actions and decisions are consistent with these principles and values. Furthermore, both concepts may be cited as a basis for judicial decision-making and may be invoked to ensure that legal decisions are consistent with the fundamental principles and values of a society.[461]

Other reasons for this confusion stem from court decisions. Some courts refer to public morals as a separate ground for refusal. For instance, the highest Arbitrazh Court of the Russian Federation applied the public policy principle to reject the recognition and implementation of awards that breach universally acknowledged moral and ethical principles.[462] Similarly, a US court determined that it is an indisputable principle of common law that it will not lend its aid to enforce a contract for an act that is illegal or inconsistent with sound morals or public policy.[463] This approach has also been adopted by the legislator in the Republic of Korea, wherein a foreign judgment must be consistent with the 'good morals and the social order' of the nation, in order to be recognised.[464] This approach has led a number of scholars to state that 'some moral, social or economic

[459] Caroline E Foster, 'The Problem with Public Morals' (2019) 10 Journal of International Dispute Settlement 622, 628.
[460] Robert P George, 'The Concept of Public Morality' (2000) 45 American Journal of Jurisprudence 17, 19.
[461] Nicholas Poon, 'Striking a Balance between Public Policy and Arbitration Policy in International Commercial Arbitration' [2012] Singapore Journal of Legal Studies 185, 192.
[462] Ansell SA (France) v OOO MedBusinessService-2000 (Russia), Case No A40-24208/10-63-209.
[463] Marshall v Baltimore and Ohio RR 57 US 314, 334 (1853).
[464] Korean Civil Law of 2013 Act No 11728, Article 103.

principles are so sacrosanct ... as to require maintenance at all costs and without exception'.[465]

Other scholars are of the view that every matter that represents public morals should be included as part of public policy, but not every public policy issue represents part of public morals.[466] Therefore, George explains that 'public morals' are the set of ethical foundations and values on which the basic structure of society is based, and the violation of which would lead to the disintegration and dissolution of society.[467] The idea of public morals is the ethical aspect of the public order, and it is part of the public order in its broadest sense. It is one of the necessary rules to preserve society from disintegration, and it must be adhered to by everyone and not be prejudiced.[468] Mohammed believes that the notion of public morals is a basic pillar of the preservation of society from a social perspective, but from a legal angle, it allows local authorities to exercise their power to preserve the morals of society.[469] Thus, local authorities may confiscate goods that violate public morals, despite the absence of a clear legal text prohibiting this violation.[470]

In the GCC States, although there is no definition of public morals, the term has been severally mentioned in court decisions and legislation. For instance, the Unified Arbitration Law 2012 of the GCC States affirms that in order to be able to enforce an arbitral award, 'it must comply with public morals and the principles of public order'.[471] Therefore, contracts that involving pornography will not be enforced in the GCC States as they breach public morals.[472] Furthermore, the Riyadh Agreement 1983 indicates 'Sharia, morals, and public order' as grounds for refusing enforcement of awards.[473] However, it should be noted that when arbitral awards include a public moral matter, the

[465] Peter Machin North, Geoffrey Chevalier Cheshire, and James J Fawcett, *Cheshire and North's Private International Law* (Oxford University Press 1999), 102.
[466] Grzegorz Blicharz, *Public Policy and Public Morality* (Wydawnictwo Instytutu Wymiaru Sprawiedliwości 2019), 195.
[467] George (n 460) 24.
[468] Munther Al-Fadl, *Arbitration: A Comparative Study between Islamic Jurisprudence and Arab and Foreign Civil Laws* (Egyptian Public Library 2006), 136.
[469] Faron Mohammed, 'Judicial Monitoring over Arbitral Awards' (PhD thesis, Djillali Liabes University of Sidi Bel Abbes 2017) 107.
[470] In this regard, it is possible that some goods may not be sold or imported in the GCC States because they violate public morals. For example, in Saudi Arabia and Kuwait, some items may be confiscated for violating public morals.
[471] Article 50 of the Unified Arbitration Law of the GCC States of 2012.
[472] Muhammad Faishal Ibrahim, Seow Eng Ong, and Kola Akinsomi, 'Shariah Compliant Real Estate Development Financing and Investment in the Gulf Cooperation Council' [2012] Journal of Property Investment & Finance.
[473] Article 30 of Riyadh Arab Agreement for Judicial Cooperation of 1983.

GCC courts invoke 'public policy' as a refusal ground rather than 'public morals'.[474] This highlights the view that public morals are often considered to be part of public policy.[475]

The complex relationship between public policy and public morals requires recognition of their interconnectedness while acknowledging their distinct spheres of influence. Even if they share some basic principles, they differ in their scope and application. Public policy embodies a variety of societal values and norms that are essential to the collective good. They are shaped through legislative or judicial processes, reflecting existing legal frameworks and evolving societal needs.[476] Conversely, public morals often include more subjective, individual, and societal values relating to acceptable behaviour and ethical conduct. These standards may influence the formulation of public policy, but they do not completely determine it.[477] Undoubtedly, the absence of legislative texts to regulate ambiguous concepts such as public morals and public policy could lead to confusion between these concepts. Therefore, a broad negative application may occur, especially the refusal to enforce contracts.

From the foregoing, it can be argued that public policy and public morals are not synonymous. However, courts may invoke both concepts to refuse the recognition and enforcement of arbitral awards. This is because public morals represent an aspect of public policy. Therefore, it can be said that public policy as a concept is broader than public morals. It should be noted that, given the local nature of public morals, it can be suggested that they constitute a component of domestic public policy. Thus, when local arbitral awards violate public morals, courts may invoke public policy to challenge the recognition and enforcement of such awards. This is because public morals are likely to vary more significantly from one country to another than the concept of public policy. For instance, arbitral awards involving bribery will not be enforced in both GCC and non-GCC jurisdictions, as they breach public policy. In contrast, arbitral awards concerning the pornography industry may still be recognised and enforced in non-GCC jurisdictions, as they neither breach public policy nor public morals. However, such awards will not be enforced in GCC States, as they contravene public morals. Thus, public morals tend to reflect more localised norms rather than international ones.

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[474] Qatar's Court of Cassation, Case No 64/2012.
[475] Malik and Nedal (n 456).
[476] Renate Mayntz, 'The Conditions of Effective Public Policy: A New Challenge for Policy Analysis' (1983) 11 Policy & Politics 123, 124.
[477] Chang-fa Lo, 'Principles and Criteria for International and Transnational Public Policies in Commercial Arbitration' (2008) 1 Contemporary Asian Arbitration Journal 67, 70.

3.5 The Public Policy Practices of non-GCC Courts: A review

The New York Convention primarily aims to facilitate the enforcement of arbitral awards, and despite criticism of the inclusion of the public policy exception, which some claim 'undermines' the main purpose of the convention, it is considered to be important for protecting the basic principles of the countries in which implementation of these awards is sought. The practices of the above-mentioned courts generally vary. In some countries, like England, it has been noted that they have adopted a strict approach to applying the public policy exception.[478] In other words, public policy is not invoked except in the case of a clear violation of the fundamental principles of the state. Moreover, in some countries, the courts have sought to establish a non-exclusive list of what is considered contrary to the concept of public policy, as is the case in Switzerland and Brazil. In addition, most non-GCC courts have adopted approach that confirms their commitment to the main aim of the New York Convention,[479] which is to invoke public policy as a refusal ground only when there is a clear violation of basic principles and no other violation of Article 5 of the Convention.

In contrast, a small number of non-GCC courts have applied the public policy exception broadly. For example, Harer believes that China is unfriendly towards invoking this exception.[480] This approach has led some to question the credibility of certain local courts, the extent of the political influence upon them,[481] and the automatic application of the public policy exception as a result. Tsarova believes that the public policy exception has allowed some countries, such as Russia, to misapply it to refuse to enforce legitimate arbitral awards. Hence, seeking to enforce arbitral awards in these countries is a waste of parties' resources.[482] Despite these negative outlooks, some, like Wang, challenge these views. He argues that the harsh criticism expressed by foreign scholars regarding Chinese public policy is inaccurate.[483] He believes that it is rare for courts in China to invoke public policy. In his thesis, he affirms that the violation of Chinese law does not represent

[478] Pascal Hollander, 'Report on the Public Policy Exception in the New York Convention' (2016) 10 Disp. Resol. Int'l 35, 43.
[479] In contrast, the GCC courts tend to invoke the public policy exception first. See Chapter x5
[480] Charles Kenworthey Harer, 'Arbitration Fails to Reduce Foreign Investors' Risk in China' (1999) 8 Pacific Rim Law & Policy Journal 393, 396.
[481] Fiona D'Souza, 'The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China' (2006) 30 Fordham International Law Journal 1318, 1358.
[482] Maria Tsarova, 'Yukos Winning Award: Will Russia Avoid Arbitral Enforcement Again?' (*CIS Arbitration Forum*, 15 August 2004) <http://cisarbitration.com/2014/08/15/yukos-winning-award-will-russia-avoid-arbitral-enforcement-again/> accessed 12 October 2023.
[483] Wang (n 358) 234.

a violation of Chinese public policy.[484] However, he notes that arbitral awards that breach fundamental legal principles of Chinese law may not be enforced. These fundamental principles include violations of the basic spirit of the constitutional law, the four basic principles of Chinese constitutional law, the sovereignty and safety of China, and the principles of international treaties signed by China.[485]

Illustrated above are the practices of non-GCC states and global efforts to tackle the public policy dilemma, although some courts, like in the UK, France and Switzerland, demonstrate a narrow application of public policy. This narrow application means that public policy should be applied only in unequivocal instances where the award clearly violates the fundamental principles of the state. Also, it dictates that courts should refrain from expanding the extent of public policy to comprise extraneous matters or non-essential principles. Nevertheless, it remains a 'loophole' that can be misapplied to refuse to enforce a foreign arbitral award.[486] There is no doubt that the vagueness of public policy has made it 'difficult' to define and apply narrowly.[487] Some of the attempts to define and limit this exception have even served to make it more ambiguous. For instance, a Brazilian court considered that any matters relating to the constitution, administration, procedure, crime, organisation of the judiciary, tax, police, protection of vulnerable by law, family disputes, conditions and formalities required for certain acts, economic order related to wages, currency, and social security as matters of public policy.[488] These practices, whether positive or negative, confirm the difficulty of controlling the public policy concept, and emphasise that the provisions of the New York Convention require independent, knowledgeable and experienced courts to achieve this Convention's main objective. Otherwise, the process of enforcing arbitral awards is merely one of 'wasting time and money'.[489]

Given the inherent vagueness and expansive application of public policy, numerous attempts have been made to categorise it for more focused application. These categories will be further explored in the next chapter.

3.6 Conclusion

[484] As will be discussed in Chapter 6, some states, such as Qatar and other GCC states, consider violations of local legislation to be a violation of their public policy. See page 208.
[485] Wang (n 358) 237.
[486] Junker (n 392) 247.
[487] Enterria (n 394) 390.
[488] Racal NCS v Fonseca Brazil Superior Court of Justice SEC 802.
[489] Tsarova (n 482).

This chapter demonstrates the dynamic nature of public policy as a legal concept. Over time, the scope of public policy has evolved, reflecting a shift from broad principles to a focus on fundamental legal precepts. While conflict of laws and state sovereignty were historically central to public policy, the modern approach emphasises core legal principles and essential state values like public morals.

Common law jurisdictions have witnessed significant contributions to the development of public policy through courts. Conversely, civil law jurisdictions have seen a pronounced role for legislations in shaping this concept. Through the practices of courts in common law jurisdictions and the initiatives of legislators in civil law jurisdictions, distinct categories of public policy, such as international public policy, have emerged. These efforts have contributed to reducing the broad and potentially negative application of public policy in international commercial arbitration.

The inclusion of public policy within the New York Convention has demonstrably fostered the evolution of not only public policy itself, but also international commercial arbitration and global trade. This inclusion serves as a safety valve, empowering courts to ensure that arbitral awards and contracts do not violate fundamental principles within the state where enforcement and recognition is sought. Although it is possible for public policy to be misused or exploited, this chapter affirms that many jurisdictions tend to apply this exception narrowly. Therefore, despite some negative practices and the misapplication of the public policy exception, it is still significant to include such an exception in international conventions.

The chapter acknowledges the distinction between non-arbitrability, public morals, and mandatory rules. While some jurisdictions and legislators may confuse between these terms, these terms are not necessarily synonymous with public policy. While non-arbitrability constitutes a separate ground for refusal of enforcement, mandatory rules and public morals may be considered aspects of the broader concept of public policy. This distinction does not necessarily explicitly narrow the application of public policy, but it contributes to a better understanding of what is considered public policy.

Chapter 4 Categories of Public Policy: Domestic, International and Transnational Public Policy

4.1 Introduction

The preceding chapter emphasises the vague nature of public policy, rendering it difficult to define. It results in broad and often misapplication of this exception. Nevertheless, due to its critical role in safeguarding the fundamental principles of the state, numerous conventions, such as the New York Convention, have sought to incorporate this exception. This inclusion remains crucial despite the harsh criticism discussed in Chapter 3. Given the importance of this exception and the challenges in regulating it, several efforts have been made to identify and clarify this concept. Many attempts sought to describe this concept rather than precisely define it. Therefore, these efforts have focused on either distinguishing it from other legal concepts or categorise it to narrow its application.

Having determined that public policy can be interpreted both broadly and narrowly, this chapter advocates for a narrow approach to its interpretation and application. Accordingly, it aims to critically examine the attempts to define public policy. This examination aims to ascertain whether the current definitions of the public policy concept contribute to the adverse application and interpretation of this exception. Then the chapter shifts its focus to examine the various categories of public policy and the global efforts to narrow its application. Following this, the chapter will elucidate the importance of categorising this concept and whether the New York Convention intended to consider specific category of public policy. It then examines the GCC States' position on the definition of public policy and its various categories. In this section, the chapter highlights the normative insights that should be followed by the GCC States regarding the definition of public policy and its categories. Based on this analysis, the chapter aims to ascertain whether it is feasible to provide a more precise definition of public policy or if it is more pragmatic to leave this exception undefined.

4.2 Definition of Public Policy

Public policy is considered as the main potential obstacle to the recognition and enforcement of arbitral awards at various stages of arbitration procedures. Furthermore, in addition to non-arbitrability, public policy is the only ground for refusal that the court can invoke without the parties' submission. Therefore, it is widely accepted that the local courts have the ultimate right to refuse to implement an arbitral award if that award will violate the State's public policy. In this case, the courts derive and exercises this right from Article V(2)(b) of the New York Convention and local legislation.[490]

Generally speaking, and as explained in the previous chapter, public policy consists of the '*moral, social or economic principles so sacrosanct… as to require their maintenance at all costs and without exception'*.[491] Therefore, the implementation of arbitral awards may be refused if the fundamental principles of a national legal system's public policy are threatened.[492] However, despite the significance of the public policy defence, neither international conventions nor domestic legislation have offered a precise definition of this concept.

Public policy as a term is not only widely used by legal practitioners but also by politicians and government. In this context, it commonly refers to governmental plans and aims. Undoubtedly, variation in the term's usage has rendered it difficult to achieve a comprehensive definition of the concept. Scholars and practitioners tend to use different terms to refer to the notion underlying public policy. For instance, as explained in Chapter 3,[493] in common law jurisdictions, practitioners tend to use the term 'public policy',[494] whilst in civil law, it is common to use the term 'public order' for the same concept.[495] Some commentators argue that public policy is a broader concept than the public order,[496]

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[490] Article V2(b) of the New York Convention stipulates that 'recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country'. See also Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.
[491] Audley Sheppard, 'Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 Arbitration International 217, 218.
[492] Mills (n 11).
[493] See Section 3.2 in Chapter 3 where the developments of public policy in common and civil law jurisdictions have been examined on page 53.
[494] Murphy (n 347) 591.
[495] ibid.
[496] Ioanna Thoma, 'Public Policy (Ordre Public) 1', *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017), 1455.

however, in the context of international commercial arbitration and the enforcement of arbitral awards, these terms are treated as synonymous.

In this context, Winfield gives a classic definition of public policy as a principle of judicial legislation or interpretation that is founded on the current needs of society.[497] Winfield argues that public policy plays an essential role in a legal system, allowing courts to exercise their authority in refusing to enforce agreements and contracts that are contrary to the public good. Nevertheless, Winfield's definition has been criticised by some scholars, who claim that it is too vague and subjective.[498] Furthermore, some commentators argue that this definition opposes party autonomy. Hence, Cardozo states:

> [C]ourts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonwealth.[499]

While some scholars are of the view that no precise or unified definition of public policy exists,[500] legislators and courts often attempt to clarify the notion by narrowing the concept of public policy. For example, in *Egerton v Earl of Brownlow,*[501] the court explained that public policy is a principle of law, which holds that no subject can lawfully do anything that has a tendency to injure the public or contravene the public good. Therefore, it may be described, as has sometimes been the case, as the policy of the law for the administration of the law.[502] Nevertheless, other scholars maintain that public policy will always be a vague and unclear term.[503] For example, Corr, Paulsen and Sovern claim that 'public policy' is an imprecise term, which can lead to confusion when determining legal rights.[504]

In fact, it has been observed that, due to its elusive nature, scholars and courts are more inclined to describe public policy rather than define it. For instance, public policy has

[497] Percy H Winfield, 'Public Policy in the English Common Law' (1928) 42 Harv. L. Rev. 76, 77.
[498]James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (University of Wisconsin Press 1956), 50.
[499] Loucks v Standard Oil Co 120 NE 198 at 202 (1918).
[500] Paul Cairney, *Understanding Public Policy: Theories and Issues*, vol 2 (Bloomsbury Publishing 2019), 19.
[501] Egerton (n 274).
[502] ibid.
[503] Audley Sheppard, 'Public Policy and the Enforcement of Arbitral Awards' (2003) 1 Oil, Gas & Energy Law Journal (OGEL) 1.
[504] John Bernie Corr, 'Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes' (1984) 39 University of Miami Law Review 647, 679; Paulsen and Sovern (n 299) 981.

been described as an 'escape route',[505] which the conflicting parties can invoke in a final attempt to challenge the enforcement of an arbitral award. Likewise, Ghodoosi describes public policy as a 'trump card', which is capable of rendering null and void both awards and agreements.[506] Similarly, public policy has been described as a harmful tool that can 'frustrate the parties' legitimate expectations'.[507] *In Janson v Driefontein,* the court referred to this exception as treacherous ground for a legal decision and a very unstable and dangerous foundation on which to build, until made safe by a decision.[508] Justice Burrough in *Richardson v Mellish,* stated that 'public policy is a very unruly horse and when once you get astride it you never know where it will carry you'.[509] Despite these vague and pessimistic definitions, Lord Denning believes that with 'a good man in the saddle', the unruly horse can be kept in control. It can even jump over obstacles.[510] Lew notes that public policy reflects the fundamental economic, legal, moral, political, religious, and social standards of every state or extra-national community. Naturally, public policy differs according to the character and structure of the state or community to which it pertains and covers those principles and standards that are so sacrosanct as to require their maintenance at all costs and without exception.[511]

Some legislators concentrate on the factors that constitute a breach of public policy rather than offering a precise definition. In Australia, for instance, under the Arbitration Act 1974,[512] the recognition and enforcement of a foreign award would be considered contrary to public policy if: (a) the award was induced or affected by fraud or corruption; or (b) there was a breach of the principles of natural justice in connection with the issuance of the award.[513] Similarly, certain organisations sought to limit the application of public policy by either offering valuable recommendations for its application or by illustrating how various jurisdictions implement this interpretation. For instance, the International Bar Association (IBA) Subcommittee on the Recognition and Enforcement of Arbitral Awards report on the public policy exception constitutes a distinct effort to address the

[505] Peter Basil Carter, 'The Role of Public Policy in English Private International Law' (1993) 42 International & Comparative Law Quarterly 1, 1.
[506] Ghodoosi (n 281) 735.
[507] Bernard Audit, Arthur Taylor von Mehren, and Friedrich K Juenger, 'A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles' [1979] American Journal of Comparative Law 589, 610.
[508] Janson (n 279) 500.
[509] Richardson v Mellish (1824) 2 Bing 229, 252.
[510] Enderby Town Football Club Ltd v The Football Association Ltd (1971) Ch 591, 607.
[511] Julian DM Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Dobbs Ferry 1978), 531.
[512] The Australian International Arbitration Act of 1974
[513] Section 8 of the Australian International Arbitration Act of 1974

application of the public policy exception.[514] However, the report merely provides various examples of how different jurisdictions apply and interpret public policy. In contrast to the International Law Association (ILA) Committee on International Commercial Arbitration report on public policy,[515] which will be examined later in this chapter,[516] the IBA did not offer any recommendations or suggestions aimed at narrowing the scope of the public policy exception.

According to the IBA and ILA reports, public policy encompasses two dimensions, namely, substantive and procedural.[517] This distinction is not intended to create separate categories but rather to provide greater clarity regarding the nature of public policy.[518] According to these reports, procedural public policy entails the impartiality and independence of the arbitral tribunal, fraud, corruption, and breach of the rules of natural justice.[519]Additionally, enforcing an award that is inconsistent with a court decision or an arbitral award that has a *res judicata* effect—award that is considered final and binding—in the enforcement forum also falls into this category.[520] Meanwhile, substantive public policy focuses on the content or subject matter of the award, specifically whether it contradicts the primary laws and basic principles of the legal system.[521] It includes arbitral awards that are contrary to good morals, national interests and foreign relations, the prohibition of the abuse of rights, and the proscription of piracy, terrorism, genocide, slavery, smuggling, drug trafficking, and paedophilia. It also covers the prohibition of uncompensated expropriation and the prohibition of discrimination.[522]

Despite the difficulty involved in defining public policy, there is a general consensus that it has certain characteristics that distinguish it from other concepts as explained in Chapter 3.[523] Indeed, defining public policy with precision is inherently challenging. This

[514] International Bar Association, 'IBA Subcommittee on Recognition and Enforcement of Arbitral Awards Report on the Public Policy Exception in the New York Convention' (2015) <https://ibanet.org/document?id=Subcommittee-on-Recognition-and-Enforcement-of-Arbitral-Awards-Public-Policy-Oct-2015> accessed 12 May 2024.
[515] International Law Association, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2002) <https://ila-hq.org/en_GB/documents/conference-report-new-delhi-2002-3> accessed 4 April 2024.
[516] See page 123.
[517] Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 Arbitration International 249, 259.
[518] International Bar Association (n 514) 13.
[519] Mayer and Sheppard (n 517) 256.
[520] ibid.
[521] Inae Yang, 'A Comparative Review on Substantive Public Policy in International Commercial Arbitration' (2015) 70 Dispute Resolution Journal 49, 51.
[522] Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 Arbitration International 249, 256.
[523] See page 78.

difficulty arises primarily due to the two main characteristics of public policy: its vagueness and its evolving nature. Firstly, it is evident from the foregoing analyses that the concept of public policy is vague and open to interpretation. This indeterminacy complicates the ability to anticipate when an arbitration agreement or award may be deemed to contravene the public policy of a particular jurisdiction.[524] The vagueness of the public policy concept can also make it difficult for parties to an arbitration agreement to know in advance whether their agreement or award will be enforceable in a particular country. Thus, the ambiguity of public policy is one of the main reasons why it is hard to define the term. This outlook was confirmed in *DST v Rakoil*, where the court affirmed that considerations of public policy can never be exhaustively defined, but should rather be approached with extreme caution.[525] It should be demonstrated that there must be some element of illegality, that the enforcement of the award would clearly be injurious to the public good, or that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public, on whose behalf the powers of the state are exercised.[526]

Some critics of the public policy defence point out that the vagueness of the concept allows courts to use it as a broad exception to the enforceability of arbitration agreements and awards, rather than as a narrow and limited exception, reserved for cases where the agreement or award is clearly inconsistent with the fundamental principles of the legal system in the country where recognition and enforcement are sought.[527] The main concern regarding vague terms is the risk of them being interpreted to include a wide range of local provisions and laws, which contradicts the fundamental aim of Private International Law.[528] Others argue that the vagueness of the public policy concept is necessary to give the courts sufficient flexibility to consider the specific circumstances of each case, and to ensure that arbitration agreements and awards are not enforced if they are clearly contrary to the interests or morals of the country wherein they seek recognition and enforcement.[529]

[524] Gotti (n 252) 237.
[525] D.S.T. v Rakoil [1987] 2 Lloyd's Rep 246 at p254.
[526] Deutsche Schachtbau v Ras Al Khaimah National Oil Co, ICC Case No 3572, 38 (*DST v Rakoil*).
[527] Roy (n 55).
[528] Peter Machin North, Geoffrey Chevalier Cheshire, and James J Fawcett, *Cheshire and North's Private International Law* (Oxford University Press 1999), 105.
[529] Najeeb Aljabsha, 'The Concept of The Public Policy and Its Applications in Palestinian Law' (LLM thesis, An-Najah National University 2017).

As the public policy exception has long been criticised for its vagueness and lack of clarity, many legal scholars have made suggestions to limit its use. Some propose that this exception should only apply when the foreign arbitral award or law 'manifestly' contravenes the country's public policy.[530] Numerous scholars endorse such a narrow application. For example, Schlosser states that the public policy exception is only justified where there is a clear violation of fundamental moral and ethical values.[531]

In addition to its vague nature, it can be argued that the clearest distinction between public policy and other similar terms, like mandatory rules, is that the former is an evolving term.[532] In other words, public policy varies according to time and place.[533] For instance, what may be considered as a matter of public policy in a particular state could be a non-public policy matter in another. Furthermore, even within the same jurisdiction, a matter might only be considered as part of public policy for a specific time. One example of how public policy can evolve in the context of arbitration refers to the sale of alcohol in Kuwait. As explained in Chapter 5, in the 1970s, alcohol consumption was permitted in Kuwait, as part of a plan by the Kuwaiti government to provide foreign oil workers with an appropriate environment that would suit their needs. However, as society's attitudes towards this matter have evolved, starting with the religious movements that took place in Kuwait during the 1980s, the competent authorities banned the consumption of alcohol.[534] Therefore, agreements to buy and sell alcohol are null and void because they breach the State of Kuwait's public policy.[535] Another example of this may be seen in the case of Saudi Arabia, where the appointment of women as arbitrators is covered by Sharia and is therefore a matter of public policy as explained in Chapter 6.[536] Under the previous Saudi Arbitration Law, an arbitral award issued by a woman could not be enforced because it was interpreted as a breach of Sharia.[537] In contrast, the new Saudi Arbitration

[530] Xiao and Huo (n 266) 676.
[531] Peter F Schlosser, 'Arbitration and European Public Policy' [1997] L'Arbitrage et le Droit Européen 81.
[532] Gibson (n 254) 117.
[533] Gerhart Husserl, 'Public Policy and Ordre Public' [1938] Virginia Law Review 37, 42.
[534] See page 152.
[535] For example, in Kuwait, the consumption of alcohol was allowed during the period between the 1950s and the beginning of the 1970s. It was permitted for commercial reasons such as flights or for foreign labour who were working in the oil industry at that time. However, due to the religious movement during the 1970s, the consumption of alcohol was totally banned for religious purposes. Consequently, the agreements made in this regard are not only nullified, but the parties to them are held accountable, either by imprisonment or a fine. See Shafeeq N Ghabra, 'Balancing State and Society: The Islamic Movement in Kuwait' (1997) 5 Middle East Policy 58, 64.
[536] As will explained in Chapter 6, Sharia is a matter of public policy in the GCC States, see page 198. See also George Khoukaz, 'Sharia Law and International Commercial Arbitration: The Need for an Intra-Islamic Arbitral Institution' [2017] J. Disp. Resol. 181, 181.
[537] Saudi Arbitration Law 1983.

Law 2012 does not include the same restriction, and so such an arbitral award can be enforced.[538] Similarly, in *Santos v Illidge*,[539] the dispute related to the slave trade, which was prohibited in the UK. Nevertheless, the competent court upheld the contract on the ground that the slave trade was legal in Brazil.[540] In *Stevens v Keogh Dixon*, the court stated that notions of public policy are not fixed but vary according to the state, the evolution of society, and living conditions within the community.[541]

Public policy has been described as 'one of the most elusive and divergent notions in the world of juridical science'.[542] Indeed, Lew argues that uncertainty and ambiguity are among the essential characteristics of public policy.[543] Some attribute the controversy and ambiguity surrounding this term to two main reasons.[544] Firstly, the concept of public policy is a function of place, which means each country has its own public policy, which is likely to differ from that of other country. For example, while principles of Sharia form part of the public policy of Islamic countries; the breach of Sharia principles in a non-Muslim country does not equate to a breach of its public policy.[545] Secondly, public policy is a function of time.[546] In other words, public policy is not necessarily a permanent feature of the State. Thus, what is considered to be public policy today might not be considered as such tomorrow, even in the same State or geographic location. Wagoner explains that 'each State has its own rules, which may be different from those of other states. At the same time public policy shifts with time, reflecting the changing values of society'.[547] Similarly, the Supreme Court of India declared that the notion of public policy escapes absolute definition, with the court stating that 'public policy connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what is injurious or harmful to the public good or public interest has varied from time to time'.[548]

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[538] Saudi Arbitration Law 2012.
[539] Santos v Illidge (1860) 8 CB (NS) 861.
[540] Parliament, 'Observations' (UK Parliament) <https://api.parliament.uk/historic-hansard/commons/1859/jul/14/observations> accessed 12 August 2021.
[541] Stevens v Keogh (1946) 72 CLR 1, 28.
[542] Javier Garcia de Enterria, 'The Role of Public Policy in International Commercial Arbitration' (1989) 21 Law & Policy of International Business 389, 401.
[543] Lew (n 511) 532.
[544] Garcia de Enterria (n 542) 402.
[545] Abdul Hamid El-Ahdab, 'The Recognition and Enforcement of Foreign Arbitral Awards in the Arab Gulf Region' (2014) 1 BCDR International Arbitration Review 110.
[546] Garcia de Enterria (n 542) 403.
[547] David E Wagoner, 'Interim Relief in International Arbitration' (1996) 62 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management.
[548] *Central Inland Water v Brojo Nath Ganguly, 1986 AIR 1571, 1986 SCR (2) 278, para 25*.

The aforementioned efforts to define public policy have faced criticism for their inaccuracy. [549] This thesis supports these criticisms and argues that these definitions are either vague or inapplicable. It contends that the absence of a specific definition within the New York Convention 1958 as to what constitutes public policy will perpetually render it impractical to formulate a comprehensive definition applicable across all jurisdictions and signatory states. This difficulty arises because states have diverse legal systems and varying conceptions of public policy, influenced by their unique legal, social, and economic norms. Consequently, it is more pragmatic for each country to adopt its own specific definition of public policy. The discussion above underscores the challenge in establishing a global definition of public policy while also highlighting the rarity of jurisdictions defining their own public policy. Therefore, it is imperative for countries to consider formulating their own definitions of public policy, not for global adaptation but for application within their respective jurisdictions.[550]

It is clear from the foregoing that public policy is a dynamic notion that is continuously evolving.[551] Therefore, it is unsurprising that attempts to provide a precise definition of it have been unsuccessful.[552] In fact, the elusive notion of the public policy concept has led to perceived inconsistencies in the recognition and enforcement of awards, with the effect that the pro-enforcement aspirations of the NY Convention may be truncated. [553] Therefore, it can be said that the definition of public policy is challenging due to its ambiguous and evolving nature. The foregoing discussion affirms that defining public policy in a manner that is suitable for all jurisdictions is difficult. Therefore, the invocation of public policy should be limited to instances of clear violation. This lack of clarity undoubtedly results in broad interpretations and misapplications of public policy, as explained in Chapter 3.[554] As a result, efforts have been undertaken to address these

[549] James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (University of Wisconsin Press 1956), 50.
[550] The hurdle in defining public policy for global application is similar to the challenges in applying specific public policy categories. As will be examined later, transnational public policy is based on fundamental principles agreed upon by all civilised nations. However, the practical challenges in adopting this category make it very difficult to apply such public policy universally. See page 102.
[551] Christopher S Gibson, 'Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law' (2008) 113 Penn State Law Review 1227, 117.
[552] International Bar Association, 'IBA Subcommittee on Recognition and Enforcement of Arbitral Awards Report on the Public Policy Exception in the New York Convention' (International Bar Association 2015).
[553] Murphy (n 347) 591.
[554] See page 90.

issues by attempting to classify this concept. Accordingly, the chapter will now shift its focus to the categorisation of public policy.

4.3 Categories of Public Policy

The concept of public policy has long been a cornerstone of the enforcement of arbitral awards,[555] playing a crucial role in ensuring that these awards uphold fundamental societal values and do not conflict with the overriding interests of the state or core societal values which would have been upheld through dispute resolution methods under the aegis of the court. In recent years, the notion of public policy has evolved beyond its domestic confines to encompass international and transnational dimensions,[556] reflecting the increasingly interconnected and globalised nature of commerce and dispute resolution.

As touched upon earlier, the concept of public policy varies from one state to another and can even change within the same state over time.[557] Therefore, what is considered as public policy in one country might not form part of its public policy at a different time. This dilemma led several legislators, courts, and scholars to categorise public policy in order to narrow its application. Ghodoosi, for instance, divides the notion of public policy into three categories rather than defining it. To him, public policy consists of three public aspects, namely, the public interest, public security, and public morality.[558] In his article, Ghodoosi asserts that public policy is a multifaceted concept comprised of three distinct yet interconnected categories. The public interest category equates private arrangements with public arrangements, advocating for a balance between the two. Ghodoosi argues that most cases fall into the public interest category, which necessitates minimal judicial intervention and a balanced approach. The public security category focuses on protecting citizens from external threats that could endanger their well-being and undermine the public sphere. Conversely, the public morality category seeks to preserve the social bonds and collective identities that sustain societal life. In cases involving public morality and public security, which are characterised as rare and extreme, the courts should adopt a more proactive stance and employ methods beyond mere balancing. These instances are

[555] Bruno Zeller, Gautam Mohanty, and Sai Ramani Garimella, *Enforcement of Foreign Arbitral Awards and the Public Policy Exception: Including an Analysis of South Asian State Practice* (Springer Nature 2021), 29.
[556] Alec Stone Sweet and Florian Grisel, 'The Evolution of International Arbitration: Delegation, Judicialization, Governance' (1999) 31 Studies 147, 39.
[557] Nathee Silacharoen and others, 'Public policy and its implications on the enforcement of arbitral awards in Thailand' (*International Bar Association*, 21 October 2022) <https://ibanet.org/public-policy-implications-enforcement-arbitral-awards-Thailand> accessed 12 April 2023.
[558] Ghodoosi (n 361) 689.

termed ‘extreme’ due to the heightened priority of public interests over private arrangements in matters of public security and morality.[559]

While Ghodoosi endeavours to categorise public policy into three distinct notions—public interest, public morality, and public security—his framework falls short of practically narrowing the application of public policy. Although Ghodoosi provides an explanation of what constitutes public policy, his categorisations do not introduce any novel insights or offer a practical method for limiting its scope. It is widely accepted that public interest, public morality, and public security form the primary components of public policy. However, Ghodoosi's categorisations fail to clarify how these established categories can effectively narrow the application of public policy in practice. In essence, Ghodoosi's framework does not contribute to a more precise or limited application of public policy. Instead, it reiterates well-known principles without offering concrete guidelines or mechanisms for their practical implementation. The categorisations provided by Ghodoosi, while theoretically sound, do not translate into a more confined or clearly defined application of public policy. Consequently, Ghodoosi's attempt to categorise public policy neither narrows its application nor provides a new or enhanced understanding of its practical implications.

In addition to the aforementioned categories, there exist more commonly recognised categories of public policy. Practices indicate that these categories have been frequently referenced by various legislators and courts. Therefore, the following sections will examine the categories of public policy concerning the recognition and enforcement of arbitral awards, namely, domestic, international, and transnational public policy.

4.3.1 Domestic (National) Public Policy

The doctrine of public policy is founded on the principle that states possess the sovereign right to decline the enforcement of a foreign law or award if it conflicts with their own public policy.[560] At its core, domestic public policy refers to the fundamental principles and values that underpin the legal and social order of a particular nation.[561] These principles, often enshrined in constitutions, statutes, and judicial precedents, serve as a benchmark against which arbitral awards are evaluated. Mainly, this category is invoked

[559] ibid.
[560] Murat Sümer, ‘Jurisdiction of Sovereign States and International Commercial Arbitration: A Bound Relationship’ (2008) 1 Ankara Bar Review 55, 62.
[561] Mark A Buchanan, ‘Public Policy and International Commercial Arbitration’ (1988) 26 American Business Law Journal 511, 514.

by a state court when it is faced with the task of enforcing an agreement or contract that originated in the same territory. Therefore, in applying this exception, the courts only consider domestic public policy. Thus, 'domestic public policy' is undoubtedly the main category of public policy to be applied in this regard.[562] Ryabinin endorses this perspective, asserting that the predominant application of public policy before the New York Convention was that of domestic public policy.[563] However, he contends that after the New York Convention,[564] domestic public policy is primarily restricted in its application to domestic disputes and arbitral awards.[565]

Domestic public policy encompasses the fundamental rules and values deemed essential to the state's society.[566] Some, such as Vidyarthi and Khan, argue that domestic public policy is generally assessed based on the prevailing fundamental notions of morality and justice within the state, and is embodied in the state's local laws and public interest regulations.[567] Consequently, an award is subject to more rigorous scrutiny when evaluated under the state's domestic public policy compared to its international public policy.[568] Although it is widely accepted that domestic public policy is broader than international public policy, some, like Budak, acknowledge that domestic public policy consists of the mandatory rules of the state.[569]

Pryles believes that domestic public policy refers to the principles and policies established within a country's own laws.[570] Therefore, in this category, public policy has more of a domestic character, in that it clearly differs from one jurisdiction to another. For instance, while religion plays a crucial role in Muslim-majority countries and as a result, some jurisdictions consider it to be part of their public policy; in other jurisdictions, especially non-Muslim states, arbitral awards that breach religious rules can still be applied and do

[562] James D Fry, 'Désordre Public International under the New York Convention: Wither Truly International Public Policy' (2009) 8 Chinese Journal of International Law 81, 86.
[563] Andrey Ryabinin, 'Procedural Public Policy: In Regard to the Enforcement and Recognition of Foreign Arbitral Awards' (LLM Thesis, Central European University 2009) 4.
[564] Ibid 25.
[565] Whether the intention of the New York Convention aimed to adopt a specific category of public policy will be examined in Section 4.5. See page 127.
[566] J William Rowley KC (ed), The Guide to Challenging and Enforcing Arbitration Awards (Second Edition, David Samuels 2021) 40.
[567] Abhisar Vidyarthi and Sikander Hyaat Khan, 'India: A Late Opening to the Notion of International Public Policy?' (2022) 38 Arbitration International 249, 250.
[568] Ibid 251.
[569] Aslı Budak, 'International vs. Domestic Public Policy in International Arbitration: Where Does It Begin, Where Does It End?' (Lexology.com, 5 September 2019) <https://www.lexology.com/library/detail.aspx?g=8edc0dee-29e9-45e9-9879-e0b4deb80105> accessed 30 April 2024.
[570] Michael Pryles, 'Reflections on Transnational Public Policy' (2007) 24 J. Int'l Arb. 1, 3.

not constitute a breach of public policy.[571] In fact, domestic public policy embodies significant regional priorities and reflects critical local value structures.[572] For instance, Sharia law, as explained in Chapter 5, represents a main source of legislation and part of the public policy of the Muslim countries. Thus, the refusal to enforce foreign arbitral awards that breach Sharia are also justified by the local dimension, given the crucial role of Sharia in the legal systems of Muslim countries. Therefore, domestic public policy is defined as the fundamental notion of morality and justice, as determined by a state through its laws or court decisions and applied to purely domestic situations.[573] Thus, domestic public policy has wider scope than international or transnational public policy, which will be examined later. Alhashemy attributes this broader scope to the fact that the concept of domestic public policy expands to include both local and international considerations of the state.[574]

Although some commentators suggest applying domestic public policy solely to local disputes, foreign arbitral awards will generally not be enforced in some jurisdictions if they contravene the domestic policy of that country.[575] For example, the competent court in Greece held that 'A foreign award cannot be declared enforceable in Greece if it is contrary to Greek public policy'.[576] Similarly, A German court affirmed that 'an arbitral award violates public policy when it violates a norm that regulates the basic principles of German state and economic life in a manner that is mandatory and outside the parties' scope of action'.[577] Meanwhile, in Russia, the Supreme Court interpreted the term 'public policy' in the New York Convention as the basis of a State's economic, political, and legal system.[578] Likewise, in Hong Kong, the Court of Appeal affirmed that the expression, 'contrary to the public policy of that country' in the New York Convention

[571] Mary B Avad, 'International Commercial Arbitration Award Enforcement at the Crossroads of Sharia Law and Ordre Public in the MENA: Paving the Golden Path towards Harmonisation' (2009) 10 Journal of World Investment & Trade 723, 733.
[572] Michael C Pryles, 'Internationalism in Australian Private International Law' (1989) 12 Sydney Law Review. 96, 113.
[573] Pedro Arcoverde, 'Public Policy and the Recognition and Enforcement of Foreign Arbitral Awards in Brazil and in France an Analysis against the Backdrop of Global Governance' (*Academia*, 2013) 10 <https://academia.edu/39304964/> accessed 15 June 2021.
[574] Moses Alhashemy, 'Arbitration in the GCC States and Islamic States' (*Arbitration in Arab States Blogspot,* 2019) <https://arbitrationinarabstates.blogspot.com/2019/12/arbitration-in-gcc-states-and-islamic.html> accessed 10 August 2021.
[575] Brower and Sharpe (n 83) 649.
[576] Judgment No 6886 of 1984, XIV YB Comm Arb 637 (Athens Efetio) (1989); Gary Born, International Commercial Arbitration (Second Edition, Aalphen an den Rijn: Wolters Kluwer 2014) 3654.
[577] Judgment of 20 November 2003, XXIX YB Comm Arb 771, 773 (*Bayerisches Oberstes Landesgericht*) (2004).
[578] Kotraco Inc v Vo Rosvneshtorg No 5, Moscow District Court (Civil Department), issued on 31 October 1995, cited in Albert Jan, *Yearbook of Commercial Arbitration, V. XXIII, 1998* (Kluwer 1998), 735.

refers to the fundamental conceptions of morality and justice of the forum.[579] Similarly, in *Renusagar Power Co Ltd vs General Electric Co,*[580] the Supreme Court of India held that 'the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality'. [581] However, in *Oil & Natural Gas Corporation Ltd vs Saw Pipes,*[582] a later decision, the same court adopted a broader approach and found that an arbitral award breaches public policy if it breaches substantive law, Indian Arbitration Law, and the terms of the contract.

Without a doubt, this approach has attracted strong criticism from several commentators.[583] Domestic public policy has been considered as an 'escape route' for the local courts to refuse to apply a foreign arbitral award that contravenes the fundamental principles of the country where enforcement is sought. [584] Many scholars and commentators believe that domestic public policy should not be applied in disputes where one of the parties is foreign. Roy argues that applying domestic public policy can lead to a misuse of this exception by the local authorities – taking into account that the concept of public policy varies from country to country – which is contrary to the main aim of the New York Convention. However, Despite the criticism of domestic public policy, it remains commonly applied in many jurisdictions, including India and Hong Kong.[585]

Although some authors argue that it is now recognised that domestic public policy applies only when the arbitration dispute does not involve a foreign party,[586] in countries that do not make a distinction between different categories of public policy, the local courts tend towards a broad application of the public policy exception. Thus, these courts apply domestic public policy, regardless of the nature of the parties to the conflict. In fact, there are global concerns regarding the misapplication and broad interpretation of public policy, especially when courts apply domestic public policy to foreign arbitral awards. However, it should be noted that although the public policy exception is the most

[579] Polytek Engineering Company Limited v Hebei Import & Export Corporation No 12, High Court of the Hong Kong Special Administrative Region, Court of Appeal, issued on 16 January 1998.
[580] Renusagar Power Co Ltd v General Electric Co (1994) AIR 860.
[581] Ibid, para 66.
[582] Oil and Natural Gas Ltd v SAW Pipes Ltd (2003) 5 SCC 705.
[583] Badrinath Srinivasan, 'Public Policy and Setting Aside Patently Illegal Arbitral Awards in India' (March 27, 2008) SSRN Electronic Journals <https://ssrn.com/abstract=1958201> or <http://dx.doi.org/10.2139/ssrn.1958201>, 3.
[584] Carter (n 401) 5.
[585] Vidyarthi and Khan (n 567) 254.; Rowley (n 566) 41.
[586] Andrey Ryabinin and Tibor Varady, *Procedural Public Policy: In Regard to the Enforcement and Recognition of Foreign Arbitral Awards* (LAP LAMBERT Academic Publishing 2018) 4.

frequently invoked refusal ground, it is hardly successful.[587] For instance, in *Westacre Investments v Jugoimport,*[588] the Westacre Investments consultancy firm helped a Yugoslavian arms agency secure Kuwaiti contracts in a deal governed by Swiss law and ICC arbitration.[589] When a payment dispute arose, Jugoimport claimed that the contract was void, due to potential bribery. However, the tribunal dismissed this claim and issued an award in favour of Westacre, who sought to enforce the award in England. The defendants challenged the enforcement of the arbitral award, but the English courts ultimately upheld it. While considering the importance of respecting the arbitral tribunal's decision, the court affirmed that the defendants had a chance to argue their case in arbitration. Therefore. the English court refused to set aside the award, upholding the arbitral tribunal's decision because it did not contradict public policy.[590]

With a broad negative application of this exception—where courts apply purely domestic public policy to international arbitral awards—, public policy clearly has the potential to introduce uncertainty and undermine trust in the arbitral process, especially given that it affects party autonomy.[591] However, courts and arbitrators should not always give priority to the parties' agreement, especially when dealing with crucial national laws. Certain rules are fundamental to a country's economic or social well-being. Therefore, international arbitrators must uphold these rules, even if they contradict the parties' intentions. In one International Chamber of Commerce case, a construction project was awarded to the defendant, while the claimant was a subcontractor. A dispute arose regarding the quality of the subcontractor's work, leading to a termination of the contract. Since French law governed the contract, the arbitral tribunal faced the challenge of applying relevant French mandatory rules to resolve the dispute. As a result, the court affirmed that

> In international arbitration, the parties' agreement should not be allowed to prevail over all mandatory rules of national laws and in all circumstances: some rules are so important to the economic or social welfare of the country whose legislature enacted them that international arbitrators must be prepared to enforce them irrespective of the contrary intent of private parties.[592]

[587] Gibson (n 551) 1243; Buchanan (n 405) 519.
[588] Westacre Investments Inc v Jugoimport SDPR Holding Company Ltd and others [1999] 3 WLR 811.
[589] See page 60.
[590] ibid.
[591] Huseyin Alper Tosun, *Public Policy Concepts in International Arbitration* (PhD thesis, University of California 2019) 108.
[592] International Chamber of Commerce Case No 7528 of 1993, cited in Jean-Jacques Arnaldez, Yves Derains, and Dominique Hascher, *Collection of ICC Arbitral Awards, 1996-2000*, vol 4 (Kluwer Law International BV 2003), 116.

In fact, courts should exercise caution in accepting claims based on national public policy. In *Westacre Investments Inc v Jugoimport SDPR Holding Company Ltd*,[593] as explained earlier, the defendant attempted to invoke the argument that bribery contravened UK national public policy to avoid enforcement. The courts acknowledged that national public policy might have a restricted role in international contexts such as international commercial arbitration (ICA). However, they observed that the tribunal had already considered and dismissed this issue. While the approach in *Westacre* does not completely preclude the application of domestic public policy, the French case illustrates its potential applicability.[594]

From the above, it could be said that it is not accurate to presume that applying domestic public policy to international arbitral awards is always a sign of broad application or misapplication of this exception. However, occasionally, it is necessary to make exceptions in the application of public policy, in order to protect a state's fundamental values.[595] Prevailing practices demonstrate a wide-ranging application of this exception due to the variation in domestic public policies across different legal systems. This is particularly evident in the context of applying domestic public policy to international disputes. These negative practices have therefore led some scholars and courts to consider other categories of public policy as a route to clarifying the term and narrowing its misapplication. Consequently, many courts and practitioners have favoured considering international public policy over domestic public policy in the context of international commercial arbitration, particularly following the adoption of the New York Convention.

4.3.2 International Public Policy

Generally, international public policy refers to the public policy applied by a particular state's courts in relation to the recognition and enforcement of foreign laws, judgments, and arbitral awards. International public policy is significantly narrower than domestic public policy and is invoked only in exceptional and unequivocal cases to prevent the application of a foreign law, judgment, or arbitral award.[596] International public policy has a significantly narrower scope than domestic public policy and encompasses only those principles of morality and justice pertinent to the international context.[597] Similarly,

[593] Westacre Investments Inc (n 588).
[594] International Chamber of Commerce Case No 7528 of 1993 (n 592).
[595] It should be noted here that the court referred to mandatory rules. The relationship between mandatory rules and public policy has been examined in Chapter 3.
[596] Pryles (n 570) 3.
[597] Vidyarthi and Khan (n 567)

some define international public policy as that part of the public policy of a state which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award.[598]

Although Article V did not explicitly mention international public policy, there is wide acceptance that the drafters of the New York Convention, in providing the public policy exception, intended international rather than national public policy, which is only to be considered in domestic disputes.[599] Therefore, when the matter concerns a foreign arbitral award and requires the application of the public policy defence, some courts consider only international rather than domestic public policy.[600] Historically, the concept of international public policy may have emerged in response to the increasing globalisation of commerce and the need to uphold common standards of fairness and justice.[601] Some researchers maintain that international public policy encompasses universal principles and norms, rather than domestic public policy. Hence, it is broader as it involves domestic and international criteria.[602] In its report, the ILA defined international public policy as a

> …body of principles and rules recognised by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered or of its contents.[603]

According to this category, foreign arbitral awards that breach domestic public policy can be enforced since they do not contradict the state's international public policy. Some authors argue that international public policy encompasses crucial legal principles that hold such significance within a country's legal framework that they must not be disregarded or violated.[604] Accordingly, many jurisdictions tend to recognise and enforce contracts and arbitral awards even if they breach their domestic public policy as long as they do not contravene their international public policy. For instance, in *Tampico*

[598] Mayer and Sheppard (n 491) 251.
[599] Andrey Ryabinin and Tibor Varady, *Procedural Public Policy: In Regard to the Enforcement and Recognition of Foreign Arbitral Awards* (LAP LAMBERT Academic Publishing 2018), 4.
[600] Petrotesting Colombia SA & Southeast Investment Corporation v Ross Energy SA, Supreme Court of Justice, Colombia, 27 July 2011; KM v UAB A Sabonio Žalgirio krepšinio centras, Court of Cassation, Lithuania, 4 November 2011.
[601] Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11 Georgia Journal of International and Comparative Law 591, 593.
[602] Winnie (Jo-Mei) Ma, 'Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia' (PhD thesis, Bond University 2005), 82.
[603] Mayer and Sheppard (n 491).
[604] Emmanuel Gaillard, 'International Arbitration Law' (2008) 2008 New York Law Journal 3, 1.

Beverages Inc v Productos Naturales de la Sabana SA Alquería,[605] the Civil Appeals Chamber of the Colombian Supreme Court of Justice adopted a new approach by applying 'international public policy' instead of 'domestic public policy', in order to limit the broad interpretation of public policy. In this case, the court enforced an award, although it was contrary to Columbia's domestic public policy. The court reasoned this result as the award not violating Columbia's international public policy.[606] The court stated that the 'international public order' refers to the most basic notions of morality and justice; it therefore includes fundamental rights, the protection of legal rights from criminal offences, the principle of good faith, the prohibition of abuse of rights, and other standards that safeguard a minimum of morality in society.[607] In France, a court has similarly referred to international public policy as all rules and values that the French legal system cannot ignore, even in international matters.[608]

A Swiss court has explained this concept in more detail, considering various aspects of public policy. The court emphasised the importance of public policy as 'it is a safety valve helping to preserve the fundamental rules of which, ideally, every state should ensure that they are respected'.[609] Furthermore, in clarifying Swiss public policy, the court held that a

> Swiss judge, who does not live in a no man's land but in a country attached to a given civilisation where certain values are privileged as opposed to others, is led to identify these principles with his own sensitivity and on the basis of the essential values shared by this civilisation.[610]

The same decision stated that it

> strove to free the public policy from any national connection, whether the *lex fori*, the *lex causae* or the law of a third country [...] because [it] does not aim at protecting the Swiss legal order and neither does it purport to sanction the failure to apply – or the improper application of – the foreign law governing the merits of the dispute, even if it were binding and nor does it sanction the failure to consider an immediately applicable mandatory provision of a third state.[611]

[605] Tampico Beverages Inc v Productos Naturales de la Sabana SA Alquería, Case No 11001-0203-000-2014-01927-00, s 652.
[606] Tampico Beverages Inc v Productos Naturales de la Sabana SA Alquería, Supreme Court of Colombia, July 12, 2017, [2017] SUDC 142.
[607] Ibid.
[608] Paris Court of Appeal, June 14, Rev Arb 2001, 773.
[609] Swiss Supreme Court 'Federal Tribunal', Tensaccia SPA v Freyssinet Terra Armata RL, 4P 278/2005, decision of March 8, 2006.
[610] Ibid.
[611] Ibid.

However, there are commentators who argue that not every breach of a mandatory rule or international public policy of a host country could justify refusing the recognition or enforcement of a foreign award. Such refusal is only justified where the award contravenes principles that are considered by the host country as reflecting its fundamental principles, or as having an absolute universal value.[612]

In *Hardy Exploration and Production Inc. v. Ministry of Petroleum and Natural Gas,*[613] the court affirms that international public policy includes respect for the sovereignty of other nations, encompassing their territorial integrity and the principle of international comity.[614] Similarly, the ILA report considered international obligations as matters of international public policy. A clear example of the earlier term consists of a United Nations (UN) Resolution that imposes sanctions. This approach can be seen in *Kuwait Airways Co v Iraqi Airways Co,*[615] the dispute related to aircraft owned by Kuwait airways, which were seized by Iraqi Airways following Iraq's invasion of the state of Kuwait. The competent court refused to enforce the resolution of the Iraqi Revolutionary Command Council to transfer ownership of Kuwaiti aircraft to Iraqi airways, which amounted to 'a gross breach of the established rules of international law'.[616] Accordingly, as a matter of international public policy, the court declined to recognise it. Therefore, the court affirmed that 'enforcing or recognising the resolution would be contrary to public policy and would, furthermore, be contrary to the obligations of the United Kingdom under the UN Charter'.[617] International public policy also involves the interests of states and international comity. In *Foster v Driscoll*,[618] where the contract involved smuggling alcohol from Glasgow to the US during the prohibition period,[619] the Court of Appeal refused to enforce the contract, not only because it was illegal in the US at the

[612] Fouchard and Goldman (n 373) 989.
[613] Hardy Exploration and Production (India) Inc. v. Government of India, Ministry of Petroleum and Natural Gas, United States District Court, District of Columbia, Civil Action No. 16-140 (RC)
[614] Ibid 22.
[615] Kuwait Airways Corp v Iraqi Airways Co [2002] UKHL 19.
[616] Ibid 29.
[617] Ibid 114.
[618] Foster v Driscoll [1929] 1 KB 470.
[619] As a result of the high rate of alcohol-related problems, such as alcoholism and domestic violence, a nationwide constitutional ban was imposed in the United States of America from 1920 to 1933. Under this ban, the importation, exportation, and sale of alcoholic beverages was prohibited. See Ernest Hurst Cherrington, *The Evolution of Prohibition in the United States of America: A Chronological History of the Liquor Problem and the Temperance Reform in the United States from the Earliest Settlements to the Consummation of National Prohibition, by Ernest H. Cherrington.* (Westerville, Ohio: American Issue Press 1920).

time but also based on international comity. The court considered that enforcing the contract would breach the country's public policy.

Berg and others[620] recommend 'international public policy' rather than domestic public policy to be applied by the national courts when the arbitral dispute contains a foreign party.[621] Likewise, Sanders adopted a similar outlook, arguing that the concept of international public policy is narrower in scope than domestic public policy and hence, should be applied.[622] Similarly, in Luxembourg, the Court of Appeal reached the same conclusion, affirming that according to Article V(2)(b) of the New York Convention, the public policy of the state where the arbitral award is invoked is not the internal public policy of that country, but rather its international public policy, which is defined as being all that affects the essential principles of the administration of justice or the performance of contractual obligations. In other words, international public policy comprises everything that is considered essential to the moral, political, or economic order.[623] Thus, a foreign arbitral award will not be enforced if it involves a clear breach of the most fundamental principles of the country in which enforcement is sought.

In some legal systems, the legislator has made a clear indication to national and international public policy. In France, for instance, Article 1488 of the Code of Civil Procedure, which deals with national arbitration, provides for public policy, while Article 1514 of the same law refers to 'international public policy'. As a result, the Court of Appeal affirmed that a foreign arbitral award will not be enforced if the award breaches the international public policy of France. The court held that a violation of domestic public policy, even if proven, does not constitute a valid basis for challenging a decision to enforce a foreign arbitral award in France. This is because Article 1520(5) is limited to instances where the recognition or enforcement of an award is contrary to international public policy.[624] However, to contest the recognition and enforcement of a foreign award in France, the violation of international public policy must be 'flagrant, actual, and

[620] AN Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1995) 42 Netherlands International Law Review 81, 97.
[621] Albert Jan Van den Berg, 'Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards' (2015) 50 Albert van den Berg (ed.) 649, 25.
[622] Paul Sanders, 'Consolidated Commentary' [1979] Yearbook on Commercial Arbitration 231, 245.
[623] Kersa Holding Company Luxembourg v. Infancourtage, Famajuk Investment and Isny, Court of Appeal of Luxembourg, issued on 24 November 1993, cited in Albert Jan Van Den Berg, *Yearbook Commercial Arbitration Volume XXI - 1996 (Yearbook Commercial Arbitration Set)* (1996), 624.
[624] Intrafor Cofor v Gagnant, Court of Appeals Judgment (12 March 1985), [1985] Rev Arb 299, cited in Fouchard P and Goldman B, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International BV 1999).

concrete'[625] or 'serious, effective, and characterised'.[626] According to a French court, the principle of equal treatment of the parties constitutes a part of international public policy. In this case, the Court of Cassation decided to annul an arbitral award, determining that the award violated international public policy due to the failure to uphold the equality of the parties in the appointment of arbitrators.[627]

However, not all legislators distinguish between various categories of public policy. In this event, the local courts exercise their authority to consider the matter. This omission, as explained in Chapter 6, could lead to a broad application of the public policy exception, which in turn raises the chance of the misapplication of the public policy exception.[628] Although many courts tend to apply international public policy to limit the misuse of the public policy exception, some may argue that adopting a specific category of public policy, such as international public policy, violates Articles of the New York Convention, as it does not explicitly indicate or adopt a specific category of public policy.[629] In addition, it is considered as an infringement of the sovereignty of some countries. For instance, although there are agreed principles such as the prohibition of human and drug trafficking, there are some countries that have their own esoteric but fundamental public policy and principles. This is most evident in the case of non-Western countries whose influences go beyond the basic rules adopted by their Western counterparts.

Muslim-majority countries, for example, consider breaches of Sharia principles to be a violation of their public policy. Therefore, arbitral awards and contracts contrary to Sharia law are considered a violation of the public policy of these countries.[630] A clear example of this may be seen from Article 1 of the Libyan Law of 2013 regarding the prevention of usurious transactions, which states that any agreement to receive interest in return for the benefit of a sum of money or in return for delaying the fulfilment of an obligation shall be null and void.[631] Thus, arbitral awards involving interest may not be enforceable in Muslim countries. Such a principle does not apply in non-Muslim countries. Importantly, no Western country is a Muslim-majority country. Hence, it appears that Muslim-majority countries have a broader concept of the public policy exception than

[625] Paris Court of Appeal, 19 October 2021, n°18/01254
[626] Court de Cassation, 23 March 2022, n° 17-17.981, para 14
[627] Court de Cassation, Chambre civile 1, du 7 Janvier 1992, 89-18.708 89-18.726
[628] This can be seen in Qatar, where the court applied local legislation to foreign arbitral awards as discussed on page 125.
[629] Articles 3 and 5 of the New York Convention 1958.
[630] The Court of Cassation, ruling on Appeal No. 1528 of Judicial Year 81, Commercial Chambers on 06/27/2021.
[631] Law No. 1 of 2013 regarding the prevention of usurious transactions in Libya

their Western counterparts. However, this does not imply a negative or ineffective application of public policy. In fact, these countries are simply subject to specific rules that do not apply to non-Muslim countries.[632]

It follows from the above in examining the concept of international public policy, it could be argued that international public policy is part of the local public policy. This is because the international category of public policy is likely to represent and reflect some aspects of the domestic public policy of a particular jurisdiction but in an international field. Some consider international public policy as a subset of domestic public policy, requiring courts to evaluate challenges to an award from an international perspective while still applying the state's own laws or standards of public policy.[633] Ryabinin has the same view, asserting that the national values underpinning domestic public policies constitute the core values of international public policy.[634] Therefore, similar to domestic public policy, the international public policy of a jurisdiction will vary from that of other jurisdictions. Nevertheless, it is worth highlighting that domestic public policy is, in principle, broader than other categories of public policy.

In theory, it is not hard to categorise public policy and effectively apply it, with domestic public policy being applicable to local disputes, and international public policy being applicable to foreign arbitral awards. However, in practice, it is difficult to distinguish between domestic and international public policy and hence, between applications of these categories. As a result of this difference and confusion, a great deal of effort has been made to clarify these categories. These efforts have resulted in the emergence of transnational public policy, which refers to the fundamental principles and morals that are universally accepted and recognised.[635]

4.3.3 Transnational Public Policy

As a result of widespread confusion among arbitration practitioners over whether the courts should apply domestic or international public policy, another category of public policy has emerged, namely, 'transnational' or 'truly international' public policy which

[632] Husni Almisri, *International Commercial Arbitration: Under Kuwaiti Law and Comparative Law* (1st edition, Dar Alkotob Al Qanoniah 2006).
[633] Rowley (n 566) 40.
[634] Ryabinin (n 563) 34.
[635] Hossein Fazilatfar, 'Transnational Public Policy: Does It Function from Arbitrability to Enforcement?' (2011) 3 City UHKL Rev. 289, 292.

has been mentioned by several courts.[636] Transnational public policy is a narrow classification of norms and principles, which one commentator has described as 'the fundamental values and interests of the international community as a whole, without being attached to any domestic legal order in particular'.[637] Transnational public policy entails the moral or legal rules that are recognised in all civilised countries. Thus, it does not represent the public policy of a specific country, but rather includes fundamental morals and essential principles. An example of the transnational public policy is public moral. In the US, for instance, the Supreme Court found that an agreement, signed as a result of the forbidden influence of a third party, to be contrary to public morals.[638] Transnational public policy is the concept of having essential legal principles that are universally recognised by the international community.[639] These principles are seen as so significant that they should not be compromised or overridden. This includes principles relating to human rights and anti-corruption measures.

In fact, transnational and international public policy share common principles, which may lead to confusion between these terms. As a result, Lew concludes that transnational public policy arises from the core principles of international public policy. Its widespread adoption in international principles elevates it to transnational level.[640] In fact, transnational public policy lies at the intersection of domestic and international public policy, encompassing universally recognised principles and norms that transcend the boundaries of a single nation, but are not yet fully codified in international law. It integrates norms derived from international treaties, customary international law, and peremptory norms.[641] The concept of transnational public policy has gained traction in recent years, reflecting the growing recognition that certain public interests may require protection beyond the confines of traditional domestic or international legal frameworks.[642] It serves as a mechanism to address evolving societal concerns and to

[636] Stavros Brekoulakis, 'Transnational Public Policy in International Arbitration' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (Oxford University Press 2020) para 125 <https://doi.org/10.1093/law/9780198796190.003.0005> accessed 17 February 2024.
[637] Jean-Michel Marcoux, 'Transnational Public Policy as an International Practice in Investment Arbitration' (Oxford University Press 2019), 499.
[638] Oscanyan v Winchester Repeating Arms Co [15 Blachf 79: 17 Am Law Reg (NS) 626; 13 Am Law Rev 161] 103 US 26, 1880.
[639] Marie Louise Seelig, 'The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility' (2009) 57 Анали Правног факултета у Београду 116, 122.
[640] Julian DM Lew, *Transnational Public Policy: Its Application and Effect by International Arbitration Tribunals* (CEU Ediciones 2018), 64.
[641] Margaret Moses, 'Public Policy: National, International and Transnational' (*Kluwer Arbitration,* 12 November 2018) <https://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/> accessed 20 November 2023.
[642] Fazilatfar (n 635) 312.

adapt the principles of public policy to the increasingly interconnected global landscape.[643] Therefore, while transnational public policy refers to principles that extend beyond national border and universally recognised**,** international public policy refers to basic principles relating to justice or morality of specific state.

In this context, arbitral tribunals have affirmed that the prohibition of bribery overrides the general principle of party autonomy, which is widely recognised in international and comparative law. Normally, arbitral tribunals respect and give effect to contracts that are concluded by parties who have agreed on the arbitration clause from which they derive their powers. However, party autonomy is not without limits. In international transactions, the most important limit is that of transnational public policy. A contract in conflict with transnational public policy cannot be given effect by arbitrators.[644] Similarly, in Switzerland, the Federal Tribunal refused to enforce an arbitral award where the parties had tried to bribe a third person.[645]

Some courts have also referred to the concept of transnational public policy. For instance, the Paris Court of Appeal held that 'the security of international commercial and financial relations requires the recognition of a public policy which is, if not universal, at least common to the various legal systems'.[646] Similarly, an Italian court has defined transnational public policy as a body of universal principles that are shared by nations of the same civilisation, aimed at the protection of fundamental human rights, and often embodied in international declarations or conventions.[647] Furthermore, a Russian court has described transnational public policy as consisting of 'universally recognised moral and ethical rules'.[648]

In one report, the ILA Committee on Public Policy has defined transnational public policy as 'comprising fundamental rules of natural law, principles of universal justice, *jus cogens*

[643] Seelig (n 639) 122.
[644] Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited ('Bapex') and Bangladesh Oil Gas and Mineral Corporation ('Petrobangla'), ICSID Case No ARB/10/18, Decision on the Corruption Claim (25 February 2019), para 434.
[645] Swiss Federal Court, G v L, Civil Court, 1980 <https://trans-lex.org/206248/_/final-award-in-icc-case-no-6248-of-1990-yca-xix-at-124-et-seq/>.
[646] Comité de défense des actionnaires de la Banque ottomane et autres v Banque ottomane, R 1985, 526 note SYNVET, cited in Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', in *Comparative Arbitration Practice and Public Policy in Arbitration* (VIIIth International Arbitration Congress, New York, 6-9 May 1986, Kluwer Law and Taxation Publishers 1987), 278.
[647] Allsop Automatic Inc v Tecnoski snc, Court of Appeal of Milan, Italy, 4 December 1992, XXII YB Com Arb 725.
[648] Ansell SA v OOO MedBusinessService-2000 The Highest Arbitrazh Court of the Russian Federation Ruling No VAS-8786/10, 3 August 2010.

in public international law, and the general principles of morality accepted by what are referred to as 'civilised nations'.[649] Consequently, transnational public policy is likely to be narrower but more uniform in scope, compared to other categories of public policy.[650] Mayer and Sheppard defined the transnational public policy as that public policy which is common to many states.[651]

However, there is still confusion between the concept of 'domestic, 'international' and 'transnational' public policy. Cairns details the differences between the norms of the latter, stating:

> Transnational public policy does not form part of the legal orders either of public international law, or any national legal order. The public policy of individual states is divided into domestic public policy and international public policy, with the latter being the (more restricted) public policy of the state as applied to international transactions. By contrast, transnational public policy is the 'common core' of the international public policy of many states, which by its very nature also reflects fundamental principles of public international law. It is the amalgam of the public policy of multiple forums but is the public policy of no individual forum. It embodies the transnational consciousness and solidarity of international commercial arbitration.[652]

Despite the recent emergence of this concept in the field of international commercial arbitration, several courts have explicitly or indirectly referred to it in their decisions. For instance, as explained earlier, in *Kuwait Airways Co v Iraqi Airways Co*,[653] the English court issued its decision based on transnational considerations. Likewise, the Swiss Federal Tribunal identified the supra term as the fundamental legal and moral principles that are recognised in all civilised states. Hence, arbitral awards that are contrary to transnational public policy will not be enforced.[654]

Niboyet, one of the earliest scholars to describe transnational public policy as a real international public order, identified it as common to civilised nations, wherein there is a duty to respect the transnational order, in order not to avoid stepping outside the law.[655]

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[649] Mayer and Sheppard (n 517) 259.
[650] Martin Hunter and Gui Conde E Silva, 'Transnational Public Policy and Its Application in Investment Arbitrations' (2003) 4 Journal of World Investment & Trade vii, 368.
[651] Mayer and Sheppard (n 517) 251.
[652] David JA Cairns, 'Transnational Public Policy and the Internal Law of State Parties' (2009) Transnational Dispute Management <https://transnational-dispute-management.com/article.asp?key=1304> accessed 15 May 2024.
[653] Kuwait Airways Co v Iraqi Airways Co [2002] UKHL 19.
[654] The Swiss Federal Tribunal 4P 278/2005.
[655] Jean Paulin Niboyet, Alcide Darras, and P Goulé, *Répertoire de Droit International: Condition Des Étrangers; Conflit Des Lois; Respect Des Droits Acquis; Lois Penales; Nationalité; Jugements; Procédure, Etc*, vol 10 (Recueil Sirey 1929), cited in Chong (n 411) 5.

Pryles argues that domestic and international public policy have been broadly interpreted.[656] Therefore, the application of transnational public policy, which tends to be much less broad, will narrow the application of Article V(2)(b). However, despite the emergence of transnational public from a broad interpretation of public policy, some scholars expand this criterion to comprise more norms, such as labour standards, security matters, and the rights of indigenous peoples.[657] Furthermore, transnational public policy has been described as 'composed of mandatory norms which may be imposed on actors in the market, either because they have been created by those actors themselves or by civil society at large, or because they have been widely accepted by different societies around the world'.[658]

Hence, there is no doubt that transnational public policy is widely accepted. Credit for this goes to French jurisprudence,[659] with a French court observing that French law has developed a doctrine of French public international policy, which brings together rules and principles that are considered to have normative status under all circumstances in the area of international legal relations.[660]

Consequently, in *Kuwait Airways v Iraq Airways,*[661] the UK's House of Lords affirmed the form of this term as follows:

> In recent years, particularly as a result of French scholarship, principles of international public policy have been developed in relation to subjects such as traffic in drugs, traffic in weapons, terrorism, and so forth.[662]

Meanwhile, Moses defines transnational public policy as

> …not the public policy of any one state, but rather involve[ing] public policy that transcends state boundaries. Such public policy is defined as arising out of an international consensus regarding universal standards as to norms of conduct that are generally recognised and agreed upon as unacceptable in most civilised countries, such as slavery, bribery, piracy, murder, terrorism, and corruption. It is generally agreed that transnational public policy has an even more restrictive scope than international public policy.[663]

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[656] Michael Pryles, 'Reflections on Transnational Public Policy' (2007) 24 Journal of International Arbitration 1, 4.
[657] ibid.
[658] Catherine Kessedjian, 'Transnational Public Policy' [2006] International Arbitration 857.
[659] Devin Bray and Heather L Bray, *International Arbitration and Public Policy* (Juris Publishing, Inc 2014) 26.
[660] Jean-Pierre Ancel, 'French Judicial Attitudes Toward International Arbitration' (2014) 9 Arbitration International 121.
[661] *Kuwait Airways Corporation v Iraqi Airways Company and Others [2001] 1 Lloyd's Rep 161*.
[662] ibid.
[663] Moses (n 641).

Therefore, 'transnational public policy' is a narrower standard than 'international public policy' and 'national public policy'. This new norm could lead to a more positive approach to applying the public policy exception. In other words, it could help clarify what is meant by 'public policy' through the adoption of reasonable and clear standards to represent this term.[664] The consistent application of transnational public policy would make arbitral awards more predictable and as a result, more likely to be implemented.[665]

Nevertheless, it is still reported in the literature that there can be difficulty in applying this category, due to differences in the concept of public policy among the signatories to the New York Convention.[666] Additionally, transnational public policy requires that fundamental principles and morals be accepted by all nations. In practice, it is difficult to reach an international consensus on specific matters. Thus, such a standard potentially leads to either a broad interpretation of public policy, contrary to the original intention of the convention, or hurdles and difficulties with the application of this category. Therefore, transnational public policy should be narrowly interpreted by adopting a clear criterion.[667] In this context, it has been suggested that the application of transnational public policy should be limited solely to international arbitral awards that relate to international commerce and trade.[668] However, this outlook has been harshly criticised for undermining the aim of public policy. For instance, this approach could minimise the critical role of public policy as a 'safety valve' to ensure that arbitral awards do not breach fundamental principles.[669] Furthermore, it could devalue the concept of public policy, thereby potentially violating basic values and principles that are unrelated to trade. Consequently, it is hard to apply this category.[670]

In her paper, Shenoy challenges the existence and feasibility of a purely transnational conception of public policy.[671] She contends that transnational public policy presupposes

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[664] Fernando Mantilla-Serrano, 'Towards a Transnational Procedural Public Policy' (2004) 20 Arbitration International 333, 337.
[665] MS Rawat, 'International Commercial Arbitration and Transnational Public Policy' (2007) 49 Journal of the Indian Law Institute 60, 62.
[666] Troy L Harris, 'The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention – With Particular Reference to Construction Disputes' (2007) 24 Journal of International Arbitration 19.
[667] Johannes Koepp and Agnieszka Ason, 'An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' (2018) 35 Journal of International Arbitration 11.
[668] Kenneth M Curtin, 'Judicial Review of Arbitral Awards' (2001) 56 Dispute Resolution Journal 74, 77.
[669] Tolson (n 14) 496.
[670] Lo (n 477) 76.
[671] Nivedita Chandrakanth Shenoy, 'Public Policy under Article V (2)(b) of the New York Convention: Is There a Transnational Standard' (2018) 20 Cardozo J. Conflict Resol. 77, 98.

a degree of commonality or universality. Although a few judicial decisions mention transnational public policy, none have explicitly defined or applied the concept. Decisions concerning public policy clearly indicate that it is essentially linked to a state's moral, social, political, and economic perceptions. These fundamental notions are primarily shaped by factors unique to a particular state or region, making it practically impossible to reconcile diverse perceptions to formulate universal policies.

Furthermore, in his article, Kleinheisterkamp presents a critical analysis of transnational public policy.[672] He asserts that this concept is largely constructed on theoretical foundations rather than practical realities, thereby questioning its actual efficiency and coherence within the field of international arbitration. Kleinheisterkamp contends that transnational public policy functions more as an idealised construct than a practical doctrine. Furthermore, he challenges the perception that transnational public policy effectively safeguards public interests in a globalised economy.[673]

Conversely, Kessedjian asserts that transnational public policy exists and is distinct from international public policy. She attributes the existence of transnational public policy to juridical pluralism and globalisation. Kessedjian argues that, in applying public policy, courts should take into account transnational public policy, which encompasses issues such as environmental concerns and corruption.[674] Similarly, Marcoux asserts that transnational public policy plays an essential role not only in international commercial arbitration but also in international investment arbitration.[675] In his article, he highlights the significant role of transnational public policy over its mere definition. He contends that the application of transnational public policy is marked by a perception that it facilitates a more coherent conceptualisation of international investment arbitration.[676] Specifically, the reliance on transnational public policy represents an international practice that emphasises and perpetuates the obligation of foreign investors to adhere to this doctrine in the context of international investment arbitration.[677]

Lalive acknowledges that determining the existence of a principle of transnational public policy may be challenging in specific instances but maintains that such a principle does

[672] Jan Kleinheisterkamp, 'The Myth of Transnational Public Policy in International Arbitration' (2023) 71 The American Journal of Comparative Law 98, 98.
[673] ibid 137.
[674] Pryles (n 570) 2.
[675] Marcoux (n 637) 496.
[676] ibid 514.
[677] ibid 515.

exist. He contends that most arbitrators possess shared ethical standards and common conceptions of how the arbitral process should be conducted, which may guide them towards similar conclusions.[678] In *Omnium v Hilmarton Ltd*,[679] where a Greek company (Omnium) hired an Iranian national (Hilmarton) to help secure government contracts in Iran. In return, Omnium agreed to pay Hilmarton a commission on all contracts obtained, with a minimum of 2% of the contract value. However, the 1979 Iranian Revolution interrupted their collaboration, and Omnium never paid the promised commission. Consequently, Hilmarton filed for arbitration against Omnium in 1982, claiming breach of contract and demanding payment of the outstanding commission. The Arbitral Tribunal was seated in Paris and applied French law to the dispute. One of the key issues in the case was whether the contract was void due to its connection to alleged corruption. Specifically, the question arose of whether the commission payments were intended to facilitate the award of contracts through bribery. Due to the contract's ambiguity regarding the governing law, the Arbitral Tribunal reviewed Iranian and French law, finding that both legal systems outlaw bribery and corrupt activities, and any agreement involving the use of influence with a public official to secure business is invalid. The Tribunal further emphasised that the prohibition of bribery represented a universally recognised transnational principle.[680]

The preceding cases may confirm the existence of transnational public policy, whether in explicitly or implicitly. However, there are still difficulties involved in providing a practical and precise definition of this term. Furthermore, the cases affirm that fundamental principles and universal morals, as well as state relationships, fall under this category, as transnational public policy draws upon the general principles of morality that are accepted by civilised nations.[681] However, this category can be difficult to apply in some cases, for example, in Saudi Arabia, where Sharia law is the main source of legislation.

The ILA report clarifies

> Nevertheless, in order to determine whether a principle forming part of its legal system must be considered sufficiently fundamental to justify a refusal to recognise

[678] Ricardo de Carvalho Aprigliano, 'Homenagem a Pierre Lalive, Transnational (or Truly International) Public Policy and International Arbitration' (2014) 11 Rev. Bras. Arb. 171, 213.
[679] ICC Court Case No 3916 of 1982 also known as Omnium Traitement et de Valorisation SA v Hilmarton Ltd.
[680] ibid.
[681] M Cherif Bassiouni, 'A Functional Approach to General Principles of International Law' (1989) 11 Michigan Journal of International Law 768, 772.

> or enforce an award, a court should take into account, on the one hand, the international nature of the case and its connection with the legal system of the forum, and, on the other hand, the existence or otherwise of a consensus within the international community as regards the principle under consideration (international conventions may evidence the existence of such a consensus). When said consensus exists, the term 'transnational public policy' may be used to describe such norms.[682]

Some researchers argue that international and transnational public policy contain the same principles, especially in terms of their 'cross-border' nature.[683] However, despite sharing some similarities, transnational public policy is quite distinct from international public policy. While international public policy is inherently shaped by the specific public policies of individual nations, transnational public policy adopts a broader perspective, aligning with the shared fundamental principles that are upheld by the international community and representing the 'norms agreed upon by all civilised nations'.[684]

In fact, transnational public policy is based on universally accepted principles and the public policy shared among all civilised nations. However, achieving global consensus on many principles is practically difficult. This complexity suggests that applying 'regional public policy' may be more practical than striving for universal agreement. It is more feasible to reach a consensus among a group of nations on specified principles. For instance, all EU member states consider corruption a violation of public policy, thus establishing it as a regional public policy where all EU signatories condemn such acts. Similarly, in the GCC States, Sharia law is integrated into their public policy, as will be discussed in Chapter 6.[685] Therefore, Sharia can be regarded as regional public policy within the GCC States. Some practitioners refer to regional public policy, which includes principles that are developed and implemented by different jurisdictions in a particular region.[686] These policies my address a wide range of issues, such as trade, investment, the environment, and human rights. As explained earlier, various regional public policy regimes exist globally, each with its own set of characteristics.[687]

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[682] Mayer and Sheppard (n 517) 259.
[683] Winnie (Jo-Mei) Ma (n 602) 88.
[684] Michael Pryles, 'Reflections on Transnational Public Policy' (2007) 24 Journal of International arbitration 1, 3.
[685] As will be seen in Chapters 5 and 6, the GCC States consider Sharia and some disputes, such as those involving family and real estate matters, as part of their public policy, see page 198.
[686] Maria Pavlidou, 'Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Commercial Arbitration' (LLM dissertation, International Hellenic University 2015), 14.
[687] Weixia Gu, 'Harmonising the Public Policy Exception for International Commercial Arbitration along the Belt and Road' Gu W, 'Harmonising the Public Policy Exception for International Commercial Arbitration along the Belt and Road' [University of Hong Kong Faculty of Law Research Paper No 2021/007], in Nottage L and others (eds), *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Kluwer Law International 2021), 15.

The foregoing discussion presents various perceptions on the existence of transnational public policy and its effectiveness. From a practical standpoint, the ambiguous nature of public policy has led many jurisdictions to broaden its application and, hence, misapply or misinterpret this exception. Thus, it is more efficient for practitioners and courts to adopt domestic and international public policy. An examination of transnational public policy reveals that its fundamental principles are encompassed within international public policy. Concepts such as corruption and fair justice are present in both transnational and international public policy. Furthermore, even if we concede, for the sake of argument, that transnational and international public policies are distinct, it would be challenging to determine whether a matter breaches transnational public policy. This difficulty arises because transnational public policy requires the principle to be universally accepted by all civilised nations, a condition that is hard to fulfil. By way of illustration, although there is no international consensus on banning the liquor trade, it is difficult to implement arbitral awards relating to the sale of alcohol in a state where Sharia law predominates, given that the sale of alcohol is inconsistent with Sharia law. As a result, the Saudi Court of Appeal refused to enforce part of an arbitral award that violated Sharia principles.[688] The purpose of this example is to elucidate that, although most civilised nations concur on specific principles—in this instance, the regulation of alcohol trade—this does not imply that such principles are universally applicable across all jurisdictions. This exemplifies one reason why the adoption of transnational public policy is challenging.

4.4 Importance of Making a Distinction between Different Types of Public Policy

The lack of clarity in the concept of public policy within the New York Convention has led to the emergence of a widespread debate over whether the drafters of the convention intended domestic or international public policy to be recognised under this term.[689] As a result of its vagueness, the public policy defence has been interpreted broadly in many cases.[690] Thus, numerous practitioners and theorists have endeavoured to define a category that would be more widely accepted among the convention's signatories.[691] As a result of this gap, arbitration theorists and practitioners have sought a clear method to

[688] Board of Grievances, Case No 207/D/2, issued in 1998.
[689] Louis Kossuth and P Sanders, 'Transnational (or Truly International) Public Policy and International Arbitration' [1987] Comparative Arbitration Practice and Public Policy in Arbitration, Kluwer Law International, 30-35.
[690] Roy (n 55).
[691] International Law Association (n 515); International Bar Association (n 514).

narrow the use of this exception.[692] These efforts have resulted in the emergence of different categories of public policy as explained earlier.

It should be noted that both domestic and international public policy represent the public policy of a particular country and consist of the fundamental principles and values of that country. Meanwhile, domestic public policy is broader in its approach and is applied in national disputes, whereas international public policy is narrower and may only be applied in disputes involving a foreign party.[693] However, these categories are part of an attempt to adopt a narrow interpretation of public policy by dividing it into three main categories. According to these classifications, international and transnational public policy only apply in international disputes. Thus, the earlier terms apply in international arbitral disputes where the foreign element is one of the disputing parties, and where a narrow interpretation and application of public policy will be applied.[694] In contrast, domestic or national public policy is only applied in local disputes. [695]

This distinction undoubtedly gives rise to a pro-enforcement bias regarding foreign arbitral awards by applying a specific category of public policy, taking into account the nature of the conflicting parties. Therefore, the public policy exception is applied in a narrow approach. Indeed, the diversity of public policy classifications poses a critical question: in the event of a clash between these public policies, which category should prevail? Here, as with all questions relating to public policy, there are no easy answers. Some authors suggest that international public policy should be applied where there is a foreign party or foreign award.[696] Conversely, the application of transnational public policy could affirm the pro-enforcement approach of the courts. However, this could be more complex in jurisdictions that do not distinguish between public policy categories. In any event, similar issues could only be tackled by the courts in determining the most appropriate approach.

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[692] Stavros Brekoulakis, 'Transnational Public Policy in International Arbitration', *Oxford Handbook of International Arbitration* (2020), 30.
[693] Clive M Schmitthoff, 'Select Essays on International Trade Law' Schmitthoff CM and Cheng C-J (ed), *Select Essays on International Trade Law* (Brill 1988), 592-593.
[694] Zhilsov (n 620) 98.
[695] In 1882, the first distinction between national and international public policy was presented by Brocher, wherein national public policy applies in domestic matters, while international public policy governs international affairs. Charles Brocher and Alphonse Rivier, *Cours de Droit International Privé Suivant Les Principes Consacrés Par Le Droit Positif Français*, vol 1 (E Thorin 1882), 110.
[696] Jacob Dolinger, 'World Public Policy: Real International Public Policy in the Conflict of Laws' (1982) 17 Texas International Law Journal 167, 192.

In fact, the aim of categorising the concept of public policy is to narrow its application and avoid its misapplication. As explained in this thesis, public policy is inherently challenging to define, which can lead to confusion among courts and arbitrators when determining whether a matter breaches public policy. By categorising public policy, courts can more easily determine whether a particular matter constitutes a breach of public policy. Therefore, domestic public policy should encompass the 'characterised' principles of the state, including mandatory rules and principles unique to specific jurisdictions, such as Sharia law in Muslim countries. Accordingly, courts should apply domestic public policy to local disputes. In contrast, international public policy is typically narrower and possesses an international character, applying in cases involving foreign parties.

Despite the efforts to categorise public policy and narrow its application as explained in Section 4.3,[697] the application of this doctrine can still be challenging because courts must determine what constitutes 'public policy' in each specific case. Due to this confusion, some attempts have been made by scholars to narrow its application and identify the concept of this exception, such as those outlined in the ILA and IBA reports on the public policy exception.

In 2002, the ILA Committee on International Commercial Arbitration published a report on public policy as an exception to the implementation of non-domestic arbitral awards. the ILA make vital comments to avoid the misapplication of this exception by providing valuable recommendations in the application of public policy.[698] In fact, the ILA's 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' represents a significant advancement towards refining the application of public policy in international arbitration.[699] By examining both theoretical and practical aspects, the report offers invaluable guidance to national courts on the delicate balance between enforcing arbitral awards and safeguarding essential public interests. The recommendations for a harmonised approach to public policy aim to reduce the risk of varied national interpretations, thereby fostering a more predictable and stable international arbitration framework. The ILA report provides several recommendations aimed at achieving the highest possible degree of consistency in the interpretation and application of public

[697] See page 102.
[698] Audley Sheppard, 'Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 Arbitration International 217, 247.
[699] International Law Association (n 515).

policy as a bar to the enforcement of international arbitral awards, while also seeking to narrow the scope of its application.

However, despite its commendable efforts, the ILA report is not without shortcomings. One criticism is that the report's call for harmonisation, while theoretically sound, may be overly optimistic given the diverse legal, cultural, and political landscapes of different jurisdictions. The report's broad guidelines may also lack the specificity needed for practical application by national courts, which could lead to continued inconsistency in how public policy is interpreted and applied. Additionally, the reliance on comparative case law, while useful, might not fully capture the unique challenges faced by developing countries or those with less established legal systems. These limitations suggest that while the ILA's report is a significant step forward, further refinement and contextualisation are necessary to achieve truly effective and uniform application of public policy in international arbitration. However, the report remains an important attempt in the field of international arbitration, as it makes several recommendations for limiting the broad application of the public policy exception.

Likewise, in 2015, the International Bar Association (IBA) Subcommittee on the Recognition and Enforcement of Arbitral Awards issued a report on public policy as a defence to the recognition and enforcement of arbitral awards under the New York Convention.[700] As explained in Section 4.2,[701] both IBA and ILA reports affirm that public policy has two dimensions. Firstly, procedural international public policy which entails the impartiality and independence of the arbitral tribunal, fraud, corruption, breach of the rules of natural justice. Additionally, under this category, a breach of procedural public policy may consist of enforcing an award that is inconsistent with a court decision or arbitral award, which has a *res judicata* effect in the enforcement forum.[702] Secondly, substantive international public policy which includes prohibition of the abuse of rights, proscription against piracy, terrorism, genocide, slavery, smuggling, drug trafficking, and paedophilia. It also covers the prohibition of uncompensated expropriation and discrimination.[703] Furthermore, the IBA report provided examples of how various jurisdictions define or apply public policy. However, the IBA report did not add more

[700] International Bar Association, 'IBA Subcommittee on Recognition and Enforcement of Arbitral Awards Report on the Public Policy Exception in the New York Convention' (International Bar Association 2015).
[701] See page 94.
[702] Mayer and Sheppard (n 517) 256.
[703] ibid.

than the ILA report to this field, with the subcommittee merely outlining how some countries define public policy and hence did not propose solutions to prevent its misapplication. Nevertheless, the IBA report affirmed that the concept of public policy is hard to understand and impossible to define with any precision.[704]

From the above, it may be observed that the concept of public policy remains a vital component of international arbitration law, serving as a mechanism for states to protect their fundamental legal principles. Therefore, due to its vagueness, several attempts have been made to categories this concept in order to narrow its application. These categories likely to increase overtime due to the evolve nature of this concept and in order to narrow its application. In fact, the multiplicity of public policy classifications aims to clarify this concept and thus facilitate its positive application in international commercial arbitration. However, in practice it seems that the increase in public policy classifications has led to more complexity in terms of applying this exception. These complications may lead, in one way or another, to an expansion of the negative approach in applying the public policy exception. Therefore, it seems more likely in practical terms to adopt only the domestic and international public policy, especially since the transnational public policy is more ambiguous and more difficult to apply in practical terms. while the domestic category is applied to internal disputes, the international category is applied to cases of an international nature.

Having examined the various attempts to categorise public policy and recognised the importance of such categorisation, the focus shifts to examine the intent of the New York Convention and whether its drafters aimed to apply a specific category of public policy.

4.5 New York Convention: Intention of the Drafters

There is no doubt that the New York Convention 1958 has made a significant contribution to the recognition and enforcement of foreign arbitral awards in the field of international commercial arbitration.[705] However, the ambiguity surrounding 'public policy' still plays a key role in the enforceability of foreign arbitral awards. The absence of a clear definition of the public policy concept in the New York Convention has consequently led to the concerted efforts of arbitration theorists and practitioners to find criteria for formulating

[704] ibid 18.
[705] Herbert Kronke, Patricia Nacimiento, and Dirk Otto, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International BV 2010), 9.

the concept and arriving at a precise definition of the term. These attempts have resulted in the emergence of various categories of public policy as explained above.

There is widespread debate over whether domestic or international public policy is implied by the New York Convention.[706] In this context, the Superior Court of Justice in Luxembourg held that public policy, as intended by the New York Convention, is not domestic but international, which is 'all that affects the essential principles of the administration of justice or the performance of contractual obligation'.[707] Similarly, the French legislator explicitly refers to international public policy in the Code of Civil Procedure, wherein Article 1502 stipulates that the appeal of a court decision granting recognition or enforcement is available if recognition or enforcement is contrary to international public policy.[708] Thus, the Court of Appeal clarified that

> A breach of domestic public policy does not provide the grounds on which to appeal against a ruling granting enforcement in France of a foreign arbitral award, because Article 1502 5 only refers to cases in which the recognition or enforcement of an award be contrary to international public policy.[709]

Article V(2)(b) states that 'the recognition or enforcement of the award would be contrary to the public policy of that country'. However, there is no clear indication of the category intended by the drafters of the New York Convention.[710] By reviewing the language of this article, it may be assumed that the drafters considered public policy to be the domestic public policy of the state in which enforcement is sought. Therefore, the local courts can apply this exception to prevent intervention on state public policy. Sharma argues that by applying domestic public policy, the country where recognition and enforcement is sought can provide more of a guarantee to protect its own principles.[711] In *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*,[712] the competent court in Hong Kong dismissed the perception that public policy under the New York Convention should be interpreted as an international standard or transnational standard. However, the court took a narrow view of public policy. The court determined that the public policy exception

[706] Maurer (n 396) 30.
[707] Kersa Holding Company Luxembourg v Infancourtage and Famajuk Investment and Isny [1996] XXI YBCA 617, 625.
[708] Article 1502 of the French Civil Procedure Code. Some legislation has adopted a similar approach. For instance, Article 46 of the Portuguese Voluntary Arbitration Law 2011 and Article 817 of the Lebanese Code of Civil Procedure have considered international rather than domestic public policy.
[709] Intrafor Cofor v Gagnant, 1985 REV ARB 299 Paris Court of Appeals decision of March 12, 1985.
[710] Born (n 576) 3652.
[711] Sidharth Sharma, 'Public Policy Under the Indian Arbitration Act in Defence of the Indian Supreme Court's Judgment in ONGC v Saw Pipes' (2009) 26 Journal of International Arbitration 140.
[712] Hong Kong High Court, Hebei Import & Export Corporation v. Polytek Engineering Company Limited [1999] 2 HKC 205

will only be invoked in the most extreme cases, where an award is so profoundly offensive to the justice of the forum and 'seriously breach of natural justice and has a strong case of apparent bias' that enforcing it would be patently unreasonable.[713] Likewise, in *Renusagar Power Co. Ltd. v. General Electric Company*,[714] an Indian court stated that the New York Convention's reference to public policy does not imply international public policy, by concluding that 'in view of the absence of a workable definition of 'international public policy' we find it difficult to construe the expression 'public policy' in Article V(2)(b) of the New York Convention to mean international public policy'.[715]

Conversely, some scholars argue that applying domestic or national public policy is hard in practical terms.[716] Hence, applying diverse domestic public policy according to the signatory concerned would open the door to misuse of this exception, making it difficult to enforce the foreign arbitral award. However, the main aim of the New York Convention is to facilitate the enforcement of arbitral awards, even though each country can adopt a broad interpretation of this term.[717] Roy argues that in misusing the public policy exception to refuse to enforce a foreign arbitral award, a signatory country could protect and give preference to domestic interests over the interests of the foreign party.[718] Additionally, public policy is still a vague term. Thus, most of the signatories to the New York Convention have avoided adopting a clear and specific definition of it. As a result, it may be argued that on some occasions, applying the domestic public policy of the country where enforcement is sought demonstrates an unfriendly approach to implementing the provisions of the New York Convention.

Certain legal scholars have advocated for the adoption of 'transnational' or 'truly international' public policy by State courts.[719] It has been suggested that this concept, though intended for universal application, should be narrowly defined to include fundamental principles of natural law; principles of universal justice; jus cogens norms in public international law; and general principles of morality recognised by what are termed 'civilised nations'.[720] Indeed, some argue that the application of international and transnational public policy represents the intention of the drafters of the New York

[713] Ibid.
[714] Renusagar Power Co. Ltd. v. General Electric Company, 1994 AIR 860, Supreme Court of India.
[715] Ibid 63.
[716] Gibson (n 254) 123.
[717] Roy (n 55) 947.
[718] ibid 925.
[719] Mayer and Sheppard (n 517) 259.
[720] ibid.

Convention.[721] From this perspective, public policy entails the fundamental principles and values that are shared by all or nearly all civilised nations.[722] Therefore, public policy is rather predictable, without giving ultimate authority to the local courts to apply a broad interpretation of it. Yousfi argues that the inclusion of local arbitration laws, as well as the New York Convention, without clarifying what is meant by the public policy exception could lead to its misuse, since each country will have a different public policy, thereby greatly increasing scope for refusing to implement arbitral awards.[723] Thus, it was suggested in the ILA report that a specific international category of public policy be adopted, thereby only implementing arbitral awards that are compatible with international public policy, even when it is contrary to domestic public policy.[724]

It should be noted here that not only does the New York Convention fail to provide further clarification of public policy, several other agreements, such as the Geneva Convention of 1927, Panama Convention of 1975,[725] Riyadh Agreement,[726] UNCITRAL Model Law of 1985, and the Unified Law of the GCC States, all indicate that the applicable public policy is that of the state where enforcement is sought.[727] It should be noted that the only convention that has adopted a clear category of public policy is the OHADA (*L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - Organisation for the Harmonisation of Corporate Law in Africa) Convention 1999, wherein it is stipulated that 'the recognition and exequatur shall be refused where the award is manifestly contrary to international public policy of the member States'.[728] The OHADA Convention could be described as more accurate in its treatment of public policy categories, because it stipulates that the violation of international public policy should be 'manifest'.[729]

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[721] Albert Jan Van den Berg, 'Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards' (2015) 50 Albert van den Berg (ed) 649, 25.
[722] Adeline Swee Ling Chong, 'Transnational Public Policy in Civil and Commercial Matters' (2012) 128 Law Quarterly Review 88, 23.
[723] Muhammad Yousfi, 'The Idea of Public Order and General Exceptions Contradicts the Implementation of Foreign Rule in the Comparative Systems and the Algerian Legal System' (DPhil thesis, University of Mostaganem 2016), 81.
[724] Mayer and Sheppard (n 517).
[725] Inter-American Convention on International Commercial Arbitration (The Panama Convention) of 1975
[726] Riyadh Arab Agreement for Judicial Cooperation of 1983 (Riyadh convention)
[727] Cairney (n 500) 19.
[728] The OHADA Arbitration Act 1999, art 31.
[729] In *Scherk v Alberto-Culver Co*, the US Supreme Court affirmed that 'A contractual choice of forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision' [417 US 506 (1974)].

From the above, it may be observed that the intent of the drafters of the New York Convention is unclear, as in the case of public policy. The aforementioned perspectives highlight divergent opinions on the appropriate category of public policy to be applied under the New York Convention, particularly since both sides present reasonable justifications. In the absence of a clearly defined category of public policy, it is challenging to ascertain the New York Convention's intent regarding the specific category to be applied. Nonetheless, it is unequivocal that the New York Convention sought to restrict the application of public policy. The convention relies on local courts in this context, and consequently, this significant issue remains within the courts' discretion.

Among the proponents of domestic public policy and supporters of international public policy, it has been observed that in several jurisdictions, notably in England, France, and Switzerland as discussed in Chapter 3, courts generally apply international public policy when addressing foreign arbitral awards. Indeed, the thesis supports this perspective, asserting that when an award is connected to the New York Convention, courts should take into account international public policy. Adopting this approach will limit the misapplication of this concept, thereby preventing local courts from abusing this exception. Furthermore, domestic public policy, which is more expansive than other categories, varies from country to country and may encompass a multitude of principles. This variation could result in an overly broad application of this concept, thereby undermining the primary objective of the New York Convention.

Having examined the various categories of public policy and the development of public policy in non-GCC states, it is now necessary to shift the focus of the thesis to the position of the GCC states regarding public policy. However, as Sharia plays a crucial role in these states, it is essential to first examine Sharia in greater depth. Therefore, the next chapter will investigate the complexities of Sharia and the legal systems of the GCC states before addressing the practices of the courts in these states.

4.6 Conclusion

Due to its significant role in safeguarding the fundamental principles of a state, many legislations and international conventions incorporate a public policy exception. However, because of its evolving nature, public policy has been difficult for most legislators and convention drafters to define with precision. The absence of a clear explanation of public policy in the New York Convention has led to broad interpretations, often resulting in the misapplication of this exception.

To narrow its application, numerous efforts have been made by practitioners to refine and categorise the concept of public policy. Courts and arbitration practitioners have sought to adopt various categories of public policy, resulting in the emergence of classifications, namely domestic, international, and transnational public policy. While these various categories have helped to narrow the application of public policy on many occasions, they do not eliminate the risk of misapplication this exception, especially in jurisdictions that do not distinguish between different categories of public policy.

In practice, many courts apply the public policy exception narrowly to the enforcement of foreign awards, while some apply it broadly. It has been noticed that this expansive approach is common in jurisdictions that do not distinguish between different categories of public policy. Conversely, it is rare in states that have recognised various categories of public policy. This chapter contends that defining public policy in a manner applicable to all jurisdictions is challenging. Therefore, it is more practical for states to adopt categories of domestic and international public policy. Domestic public policy should apply exclusively to local disputes, whereas international public policy should apply to foreign disputes. In any case, the invocation of public policy should be reserved for instances of clear violation.

Finally, despite the emergence of different categories of public policy intended to narrow the application of the public policy defence, some courts continue to apply a broad interpretation of public policy exception. Therefore, it may be asserted that the primary responsibility for achieving the objective of the New York Convention—the recognition and enforcement of arbitral awards—lies with the courts, as they are the designated authorities for enforcing arbitral awards and interpreting public policy.

Chapter 5 Exploring the Complexities of Sharia and the Legal Systems of GCC States

5.1 Introduction

The previous chapter indicated that Sharia plays a significant role in the recognition and enforcement of arbitral awards in GCC States. Also, that it is central to the notion of public policy in these jurisdictions. Indeed, the constitutions of the GCC States stipulate that Sharia is a primary source of legislation.[730] However, it is not the only source of legislation. It interacts with other laws that are being developed to cater to contemporary issues that are not expressly regulated by Sharia. In fact, the limitations of Sharia law in this regard have long been recognised, leading to the emergence of several strands of Islamic jurisprudence. Flowing from this, the chapter argues that references to Sharia often elide two conceptions, Sharia strictly speaking, and Sharia broadly described. This chapter unpacks the two conceptions of Sharia and their impact on the legal systems of GCC States. It also assesses the implications of attempts to modernise the legal systems of GCC States following their attainment of control over their States after years of Ottoman and then British rule. Essentially, the chapter argues that the complexities of the legal systems of GCC States must be fully understood, before critiquing their approach to arbitration and the recognition and/or enforcement of awards.

The chapter begins by presenting the sources of Sharia law and clarifying the distinction between Sharia and jurisprudence *(Fiqh).* It then outlines the development of Islamic arbitration and explores the relationship between Sharia law and GCC legislations. Additionally, the chapter examines the stance of the GCC States on the Islamic schools of jurisprudence to determine whether these states have adopted a specific school of thought and how this might affect the implementation of Sharia principles.

[730] The constitutions of the GCC countries, namely Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the UAE, all recognise Sharia as the primary source of legislation. This is explicitly stated in Article 2 of the Kuwaiti Constitution of 1962, the Omani Constitution of 1996, and the Bahraini Constitution of 2002, as well as Article 1 of the Saudi Constitution of 1992 and the Qatari Constitution of 2004. Moreover, the UAE Constitution of 1971 confirms this approach in its Article 7.

5.2 Sharia and Fiqh (Islamic Jurisprudence)

As mentioned in Chapter 2, in 610, Islam first appeared as a religion in Mecca.[731] From that date, it began to spread widely, not only on the Arabian Peninsula, but also across the whole world. Islam plays a central role in the Arabian Peninsula, shaping both religious beliefs and legal practices, with Sharia representing the core corpus of Islamic law.[732] Sharia as a legal system primarily derives its provisions from the Quran and Sunnah. The Quran is a record of the word of God, while the Sunnah represents what the Prophet Mohammed [PBUH] said, did, or approved.[733] Therefore, when a dispute or issue arose during the Prophet's lifetime, the disputing parties would consult the Prophet to address the matter.[734] After the death of the Prophet Mohammed [PBUH], in the event of a dispute, arbitrators would rely on the Quran and Sunnah to achieve resolution. However, in some cases, neither the Quran nor the Sunnah contained specific guidance. As a result of these gaps, [735] secondary sources of Sharia emerged, namely, consensus (*Ijmaa)* and analogy (*Qiyas).*

The named secondary sources may be referenced to deal with contemporary issues that are not explicitly addressed by the main sources of Sharia.[736] *Ijmaa*[737] - consensus - refers to the community's agreement or the agreement of a number of Muslim scholars on a particular issue, while *Qiyas*[738] - analogy - is the process of deductive analogy in which the teachings of the Sunnah are compared and contrasted with those of the Quran, in order to apply a known provision to a new circumstance.[739] *Ijmaa* and *Qiyas* are the basis of *Fiqh*[740] or what is known as the Islamic schools of jurisprudence. Therefore, while Sharia

[731] Mecca, located in Saudi Arabia, is the holiest city for Muslims. It is where the Prophet Muhammed was born and where Muslims undertake pilgrimages every year.
[732] John Hursh, 'The Role of Culture in the Creation of Islamic Law' (2009) 84 Ind. LJ 1401, 1404.
[733] Javaid Rehman, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq' (2007) 21 International Journal of Law, Policy and the Family 108, 110.
[734] Cristina Puglia, 'Will Parties Take to Tahkim: The Use of Islamic Law and Arbitration in the United States' (2012) 13 Chi.-Kent J. Int'l & Comp. L. 151, 153.
[735] Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* (International Institute of Islamic Thought (IIIT) 2008) 236.
[736] Anna C Korteweg and Jennifer A Selby, *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration* (University of Toronto Press 2012) 133.
[737] M Mansha Tayyab and Hafiz Hamid Hammad, 'The Vision Of Imam Ibne Hazm About Ijmaa (Consensus) And Daleel (Significance)' (2018) 23 AL-Qalam 135, 136.
[738] A clear example of the term analogy is the jurisprudence's prohibition of smoking, as this ruling was issued based on the Prophet's command: 'Do not harm yourselves or others'
[739] Faisal Ahmadi and Muhammad Randhy Martadinata, 'THE VALUE OF QIYAS IN ISLAMIC JURISPRUDENCE' (2020) 1 Wasatiyah: Jurnal Hukum 39, 42.
[740] Harald Motzki, 'The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools' 51.

derives its provisions from the Quran and Sunnah, Fiqh draws from the Quran and Sunnah, as well as *Ijmaa* and *Qiyas*.[741]

Sharia is more than a set of laws. It represents a way of life and a moral code.[742] Schacht believes that as a body of religious duties, Sharia is a comprehensive collection of Allah's commands to regulate every aspect of a Muslim's life.[743] However, no individual or religious organisation can provide an in-depth comprehension of Islamic law.[744] Moreover, there is no universal religious authority. This has led to the development of *Fiqh*, which outlines the opinions of Muslim scholars on issues not explicitly addressed in the Quran or Sunnah.[745] In other words, *Fiqh* represents scholars' understanding of Sharia and as a result, it is changeable and challengeable according to the circumstances in contrast to Sharia which has been immutable and stable since the death of Prophet Mohammed [PBUH]. Therefore, in the case of a new issue arising, Muslim scholars look first at the Quran to address it. Thereafter, they resort to the Sunnah. In the event that neither of these primary sources addresses the issue, they will attempt to find a solution in the secondary sources. Thus, it becomes more problematic when there are diverse provisions from different Islamic schools of jurisprudence for the same subject matter.

Accordingly, Sharia can be described as a broad concept based on the fact that it is neither fixed nor monolithic. It involves a diverse range of sources, interpretations and applications that can differ based on cultural, historical, and local contexts.[746] Furthermore, as will be explained in Section 5.5,[747] there are various schools of Islamic jurisprudence, each with its own methodologies and interpretations, leading to distinct conclusions on specific issues. When a vague issue arises, Islamic scholars interpret it through *Ijtihad*, which is the process of tackling the new issue based on interpreting the various sources of Sharia.[748] This process allows for several interpretations and adaptations to new circumstances and contexts. Consequently, the application of Sharia

[741] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society Cambridge 1991) 98.
[742] Charles P Trumbull, 'Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts' (2006) 59 Vand. L. Rev. 609, 626.
[743] Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 1993) 63.
[744] Trumbull (n 742) 227.
[745] Kamali (n 741) 77.
[746] See page 3.
[747] See page 147.
[748] Aznan Hasan, 'An Introduction to Collective Ijtihad (Ijtihad Jama 'i): Concept and Applications' (2003) 20 American Journal of Islam and Society 26, 35.

can vary significantly from one territory to another, shaped by different customs, traditions, and legal systems.

The above affirms the widespread perception that Sharia is always vague and broad. However, this prevailing misunderstanding contrasts with the reality that Sharia can concurrently be conceptualised narrowly and specifically. This narrow perspective of Sharia can be established by either adopting its main sources and codifying them or by adhering to a specific school of jurisprudence. In fact, Sharia as a legal system does not fundamentally differ from other legal sources such as constitutions and secular legislation. The primary distinction is that Sharia remains uncodified.

Sharia has long been subjected to harsh criticism, with some authors stating that Sharia law is impractical and unsuitable for the needs of modern society.[749] This criticism, especially among non-Muslim scholars, may be due to misunderstanding the components of the body of rules and principles generally encompassed by the reference to Sharia. Their approach conflates the *Fiqh* and Sharia; failing to account for the fact that *Fiqh* is varied and changeable, shifting according to the scholar, time and place. For example, the jurisprudential ruling on a specific issue may differ according to the society, as illustrated in the difference between jurisprudential provisions in Saudi Arabia and those in Egypt, where different schools of jurisprudence are adopted.[750] For example, according to the *Hanbali* school of jurisprudence, prevalent in Saudi Arabia, it is impermissible to invest in companies that involve in activities contradicting Sharia, even if these companies also invest in some Sharia-compliant activities.[751] Conversely, *Shafai* school of jurisprudence, common in Egypt, assert that it is permissible to invest in companies whose activities are mostly compatible with Sharia.[752] This does not mean that one of these interpretations is right and the other wrong, rather its embedded flexibility is aimed at providing an integrated legal system that corresponds to the needs and orientation of that society.
Essentially *Fiqh* can be described as the process of interpreting the sources of Sharia, while Sharia law is the law itself. *Fiqh* is the theoretical framework of Sharia law, while Sharia is the practical application of that framework.

[749] Maha Abualfaraj, 'Evidence in Islamic Law: Reforming the Islamic Evidence Law Based on the Federal Rules of Evidence' (2011) 13 J. Islamic L. & Culture 140, 140.
[750] Nathan Brown, 'Politics over Doctrine: The Evolution of Sharia-Based State Institutions in Egypt and Saudi Arabia' [2018] Baker Institute for Public Policy, September 5.
[751] Hossam Afaneh, *Islamic Jurisprudence for the Muslim Trader* (1st edn, Scientific Library and Dar Al-Tayeb for Printing and Publishing 2005) 132.
[752] Ibid.

Several Islamic schools of jurisprudence have developed over time. This is because Islamic schools of thought are primarily responsible for interpreting and upholding Islamic law. Each presents a distinctive viewpoint on how to understand and apply the Quran and Sunnah in diverse situations.[753] Therefore, these schools of jurisprudence play a significant role in forming the Islamic legal system.[754] While some display a strict or even extreme application of Sharia, others demonstrate more flexibility.[755]

The first Islamic schools of thought emerged as a result of the requirement for systematic legal interpretations following the Prophet's demise. Four eminent scholars, namely, *Abu Hanifa, Malik ibn Anas, Muhammad ibn Idris al-Shafi'i,* and *Ahmad ibn Hanbal* were the founders of the four main Islamic schools of thought.[756] The first of these, *Imam Abu Hanifa*, established an Islamic school of thought in Kufa, Iraq, emphasising reason and analogous reasoning (*Qiyas*) in legal interpretation. The *Hanifa* school of thought is renowned for its flexibility and adaptability to shifting conditions.[757] Likewise, in Medina, the *Maliki* School was founded by *Imam Malik ibn Anas*, drawing strongly upon local customs. The *Maliki* school is distinguished by its commitment to regional consensus and customs (*Ijmaa*).[758] In Mecca, the *Shafi'i* School was established by *Imam Al-Shafi'i*, emphasising the use of analogy (*Qiyas*) and consensus (*Ijma*) in legal reasoning and placing a high value on the Quran and Sunnah.[759] Lastly, *Imam Ahmad ibn Hanbal* originated the *Hanbali* school in Baghdad, Iraq. The *Hanbali* school is renowned for its strict devotion to the Quran and Hadith, and its reluctance to apply analogical reasoning (*Qiyas*).[760]

It should be noted that although they share many views in common, each school of jurisprudence has its own interpretations of the Quran and the Sunnah. This affects

[753] Irshad Abdal-Haqq, 'Islamic Law-an Overview of Its Origin and Elements' (2002) 7 J. Islamic L. & Culture 27, 38.
[754] Akh Minhaji, 'Reorientasi Kajian Ushul Fiqh' (1999) 37 Al-Jami'ah: Journal of Islamic Studies 12, 13.
[755] Mohammad Hashim Kamali, 'Methodological Issues in Islamic Jurisprudence' (1996) 11 Arab LQ 3, 25.
[756] The four schools of jurisprudence emerged between the 8th and 9th centuries. See Eirinin Kakoulidou, 'The Background and Formation of the Four Schools of Islamic Law' [2018] Academia. edu 1. <https://academia.edu/2310961/The_background_and_formation_of_the_Four_Schools_of_Islamic_Law > accessed 12 August 2022.
[757] HYDER GULAM, 'Comparing the Legal Rules (Ahkam-i Shar'iyya) in Maliki and Shafi Schools (Eg, It Is Wajib, Mandub, Makruh…) with the Hanafi School of Thought.' 8.
[758] Umar F Abd-Allah, *Mālik and Medina: Islamic Legal Reasoning in the Formative Period,* vol 101 (Brill 2013) 137.
[759] Ahmad Dahlan Salleh and others, 'Theory and Application of Sadd Al-Dhara'i '(Blocking the Means) in Shafi 'iyya School' (2019) 9 International Journal of Academic Research in Business and Social Sciences 724, 726.
[760] Amir Hussain, 'The Concept of Law in Islam' (1997) 22 Journal of Dharma 418, 427.

various issues in society, including the interpretation of legal processes and concepts relevant to this thesis like arbitration. For instance, although there has historically been a consensus among all schools of jurisprudence prohibiting the appointment of women as judges and arbitrators, this position has varied over time. Thus, whereas the *Hanafi* and *Shafi'i* schools of jurisprudence accommodate the appointment of women as judges or the validity of appointing a non-Muslim arbitrator in a dispute between Muslim parties, the *Hanbali* School does not.[761] It is therefore axiomatic that the distinction between Sharia and *Fiqh* is highly necessary in the field of international commercial arbitration, particularly in relation to the recognition and enforcement of foreign arbitral awards. However, before addressing this importance, it is crucial to understand arbitration in the light of Sharia law.

5.3 Arbitration in Sharia Law (Islamic Arbitration)

5.3.1 overview

Arbitration as a method for resolving disputes has a long and well-established tradition within Islamic law. This section will examine the relationship between arbitration and Sharia. However, to fully understand this integration, it is crucial to distinguish between two key stages, namely, the early period of arbitration and the era of the schools of jurisprudence. Therefore, this section will firstly explore the use of arbitration in the early years of Islam before the development of the formal schools of Islamic jurisprudence. Following this, focus will shift to how the various schools of jurisprudence have approached and integrated arbitration practices into their legal frameworks.

5.3.2 Initial era of Arbitration in Islam

As explained in Chapter 2,[762] as a region, the Arabian Peninsula region has been familiar with the concept of arbitration since the pre-Islamic era.[763] Kirazli confirms that the tribes living on the Arabian Peninsula resorted to arbitration in the event of a conflict before Islam.[764] Although no formal laws existed to regulate dispute resolution, arbitration was the most widespread method, governed by local customs and traditions. However, these

[761] Christopher M Blanchard, 'Islam: Sunnis and Shiites' in Cofie D. Malbouisson (eds), Focus on Islamic Issues (Nova Publishers 2007), 12 ;Christopher M Blanchard, 'Islam: Sunnis and Shiites' (Congressional Research Service 2006) 4.
[762] See page 20.
[763] Islam emerged in 610 AD.
[764] Sadik Kirazli, 'Conflict and Conflict Resolution in the Pre-Islamic Arab Society' [2011] Islamic Studies 25, 41.

customs required that the arbitrator be a male known for his wisdom and impartiality. Baamir argues that as a result of the absence of religion and written law, the inhabitants of the Arabian Peninsula resorted to arbitration for any and every dispute, as their issues were always related to water, blood, or inheritance. Arbitrators were traditionally required to be senior in age and known for their wisdom and fairness.[765]

In 610, when Islam emerged as a religion in Mecca through the Prophet Muhammad, his role was not limited to spreading the religion of Islam but introducing the law of God.[766] Thus, his role included the organisation of the civil and commercial relations of Muslims and their relationship with non-Muslims.[767] In the event of a dispute, Muslims and non-Muslims in Mecca and Medina would consult the Prophet [PBUH] to resolve matters according to the rules of Islam.[768] As a legal system, Sharia adopted arbitration as a means of resolving disputes, and this is confirmed by the main sources of Sharia: the Quran and Sunnah.[769] Islam affirms the legitimacy of arbitration as a means for resolving disputes. This endorsement is evident in the Quran, as verse 4:35 states '*if you fear a breach between the two of them, appoint (two) arbitrators, one from his family and the other from hers. If they both desire reconciliation, Allah will bring them together*'.[770] In the Sunnah, perhaps the most significant example of this is the dispute that arose between the Prophet Muhammad and a Jew, for which an arbitrator was appointed.[771] Furthermore, in many cases, the Prophet [PBUH] himself was appointed as arbitrator.[772] In fact, the legitimacy of arbitration in Islam finds its roots in basic Islamic principles. According to the principle of the freedom of contract, Muslims are free to enter into contracts and agreements, as long as these contracts and agreements do not contradict Islamic principles.

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[765] AY Baamir, 'Sharia Law in Commercial and Banking Arbitration' [2010] Law and Practice in Saudi 45.
[766] Gabriel Said Reynolds, *The Emergence of Islam: Classical Traditions in Contemporary Perspective* (Fortress Press 2012) 21.
[767] Muhammad Abu Sadah, 'Philosophical Basis of the Legal Theory Underlying International Commercial Arbitration in the Middle East Region' (2009) 8 Journal of International Trade Law and Policy 137, 146.
[768] LS Katbeh, 'Palestine Moving Ahead-New Draft of the Arbitration Law' (2015) 12 Transnational Dispute Management (TDM) 15.
[769] Md Shahadat Hossain, 'Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview' (2013) 1 Journal of Philosophy, Culture and Religion 1, 4.
[770] Holy Quran, Surah An-Nisa (4:35)
[771] Brower and Sharpe (n 83) 643.
[772] ibid.

After the Prophet's death, disputing parties would resort to the *Caliph* as arbitrator, who would then implement the provisions of Sharia.[773] Therefore, it can be said that the first form of Islamic arbitration, which preceded the development of formal legal structures, can be seen as a confirmation of existing dispute resolution practices in the Arabian Peninsula. Although it lacks codified procedures for modern arbitration, it reflects established customs regarding the appointment of arbitrator *(Hakeem)* to resolve disputes.[774] Therefore, the arbitrator is required to be a male and Muslim.[775] However, over time, and as a result of the spread of Islam to different cultures, numerous issues arose that Islam did not explicitly or directly regulate. It was in response to this that *Fiqh* and the four schools of jurisprudence developed as discussed above.[776]

5.3.3 Arbitration in the Schools of Jurisprudence era

There is no doubt that schools of jurisprudence contributed to the development of arbitration by issuing many views regulating it. However, there is widespread debate among Muslim scholars regarding the nature of Sharia arbitration. Some like *Shafi'i* believe that the concept is closer to reconciliation or mediation than it is to arbitration.[777] They justify this by affirming that in Islamic arbitration, the tribunal's decision is not binding. Hence, parties are not obligated to apply the arbitrator's decision. This perspective is based on a verse from the Quran, which stipulates: '*If you anticipate a split between them, appoint a mediator from his family and another from hers. If they desire reconciliation, Allah will restore harmony between them. Surely Allah is All-Knowing, All-Aware.*'[778]

On the other hand, some maintain that arbitration in Islam is similar to contemporary arbitration, wherein the arbitrator's decision is binding on the disputing parties. This opinion is based on verse 4:58 of the Quran, which affirms: '*Indeed, Allah commands you to return trusts to their rightful owners; and when you judge between people, judge with fairness.*'[779] According to Alqurashi, Islam established a general framework of arbitration

[773] Zeyad Alqurashi, 'Arbitration Under the Islamic Sharia' (2004) 1 Transnational Dispute Management (TDM).
[774] See page 21.
[775] Mahdi Zahraa and Nora A Hak, 'Taḥkīm (Arbitration) in Islamic Law within the Context of Family Disputes' (2006) 20 Arab Law Quarterly 2, 15.
[776] See page 134.
[777] Shahin Alam, 'Commercial Arbitration: Factors Making It Lose Out Against Other Processes' (2014) 9 Middle East Journal of Business 51, 58.
[778] Holy Quran, v 4:35.
[779] Holy Quran, v 4:58.

and as a result, Muslim scholars are responsible for laying down rules that comply with the principles of Muslim society and the details of arbitration rules.[780]

Despite the similarities between contemporary and Islamic arbitration, the latter is of a special nature, especially with regard to the obligations of the arbitration contract and the tribunal's decision. According to the *Hanafi, Maliki* and *Hanbali* schools of thought, the disputing parties are bound to the arbitration agreement and hence, the arbitrator's decision shall be binding.[781] In contrast, the *Shafi'i* school of thought does not consider an arbitral decision to have binding authority unless the parties agreed in advance to be so bound.[782] This is because the *Shafi'i* school of jurisprudence considers arbitration as one of the aspects of reconciliation as mentioned earlier.[783]Additionally, regarding the appointment of arbitrators, according to some Islamic schools of thought, like *Hanbali* and *Hanfi,* arbitrators should be appointed once the arbitration agreement is signed. In the event that arbitrators are not appointed, the arbitration agreement may be invalidated. [784] Moreover, arbitrators should be appointed by the disputing parties themselves. However, with the agreement of the disputing parties, a third party can appoint the arbitrators. Meanwhile, for the arbitral tribunal, the parties are free to appoint an odd or even number of arbitrators, although *Hanbali* and *Hanafi* allow the tribunal to appoint third arbitrator, however, decisions should be issued by majority only if the parties approve that.[785]

In Islamic arbitration, there are restrictions over an arbitrator's qualifications. As Sharia considers arbitration to be a judicial process, arbitrators are required to meet the same requirements that are expected of judges. Therefore, under Sharia rules, fundamental principles such as integrity, independence and impartiality must be met by the arbitrator.

The arbitrator's gender presents a dilemma in Islamic law, stimulating widespread debate among Muslim scholars. As mentioned earlier, all the Islamic schools of jurisprudence initially prohibit women from being judges.[786] The *Hanbali*, *Shafi'i* and *Maliki* schools of jurisprudence also stipulate that the arbitrator should be male.[787] However, the *Hanafi*

[780] Alqurashi (n 773) 9.
[781] Umar Aimhanosi Oseni, 'Dispute Resolution in Islamic Banking and Finance: Current Trends and Future Perspectives' [2009] Available at SSRN 1461895 12.
[782] Nadia Yas, 'Powers of Arbitrators in the Implementation of Arbitral Awards' (2021) 58 PSYCHOLOGY AND EDUCATION 6900, 6904.
[783] See page 138.
[784] Alqurashi (n 773) 6.
[785] ibid 7.
[786] See page 139.
[787] Baamir (n 765) 45.

school of jurisprudence permits women to be arbitrators on specific occasions, such as family disputes, but they are never appointed as judges.[788] In contrast, the modern Islamic trend shows a degree of openness regarding the appointment of women as arbitrators. This approach has been applied in many Muslim-majority countries that have adopted Sharia as a primary source of legislation in their legal systems, especially the GCC States.[789] The former president of the *Fatwa* Council of Egypt[790] affirmed that the Quran and Sunnah contain no explicit prohibition of the appointment of female judges; therefore, interpretations depend on the rulings of modern-day jurists.[791] Thus, there is no justification in the sacred texts for not appointing women as arbitrators, as the Quran affirms: '*To whoever, male or female, does good deeds and has faith, we shall give a good life and reward them according to the best of their actions.*'[792] This is a clear indication of gender equality in Sharia, rendering it permissible to appoint a woman as a judge whenever the general conditions are met.

Generally, there are differing opinions on the scope of issues covered by Islamic arbitration and the breadth of available rules. Hagshah argues that arbitration in Sharia is broader in its application than arbitration in contemporary laws, as it expands to include commercial, family, and criminal disputes, while contemporary arbitration is limited to commercial and some family disputes.[793] On the other hand, Roy believes that Sharia limits arbitration and the implementation of arbitral awards since it can be used to refuse to enforce arbitral award as a refusal ground.[794]

In fact, within Islamic jurisprudence, there exists no uniform perspective on the permissible scope of arbitration according to Sharia. In simpler terms, the question of which disputes can be settled through arbitration varies depending on the specific school of Islamic law. On this matter, the schools of jurisprudence hold three distinct viewpoints. *Hanafi* school advocates for a broad scope of arbitration, encompassing all disputes

[788] Karen Bauer, 'Debates on Women's Status as Judges and Witnesses in Post-Formative Islamic Law' (2010) 130 Journal of the American Oriental Society 1, 3.
[789] Iqra Naz, 'The Role of Women in the Judiciary under the Context of Maqsaid Al-Shari'a' [2023] Available at SSRN 4506587 15.
[790] It is the highest religious institution to issue religious verdicts and conduct research related to the Islamic religion. It is resorted to for the purpose of receiving its decisions on religious issues.
[791] Adam Morrow, 'Egypt: Female Judge Appointments Stir Controversy' (*Inter Press Service*, 2007) <http://ipsnews.net/2007/04/egypt-female-judge-appointments-stir-controversy/> accessed 6 January 2022.
[792] Holy Quran, v 16:97.
[793] Faihan ibn Farraj ibn Hagshah, 'Arbitration in Islamic Shari'ah: A Comparative Study with International Law and English Law' (Lancaster University, 2013) 263.
[794] Roy (n 55) 923.

except those pertaining to the *Hudud* (God's inviolable rights).[795] This approach posits that arbitration is applicable to the vast majority of conflicts, with the sole exception being matters categorised as offenses directly against God, such as blasphemy or apostasy. Since these offenses constitute public concerns, they are deemed outside the realm of arbitration.

In contrast, the *Shafai* school maintains that arbitration is strictly limited to financial disputes.[796] This perspective underscores the significance of state intervention in matters that extend beyond mere financial concerns. Finally, the *Hanbali* school proposes limitations on the scope of arbitration, specifically excluding two categories: marriage contracts and *Qisas* (retribution).[797] This viewpoint is grounded in the heightened sensitivity surrounding these issues. Their proper resolution necessitates the involvement of the judicial system to guarantee a just and appropriate outcome.

It is further argued that the rules of Islamic arbitration have been shaped by Sharia and the *Fiqh* as developed by the Schools of Jurisprudence. Sharia adopted arbitration as a method of resolving disputes, wherein it is required that the arbitrator be independent, male, and impartial.[798] While the Islamic jurisprudential schools have contributed to its development, they have introduced some of the inconsistencies observed. For example, on issue of the appointment of a non-Muslim arbitrator in a dispute between Muslim parties, the schools of jurisprudence differ over the validity of the arbitral award that is ultimately issued. The *Hanafi* school permits the appointment of a non-Muslim arbitrator, whereas the *Hanbali* school does not. Furthermore, in the aforementioned matter of female arbitrators, the *Hanafi* school, considers it permissible to appoint them in contrast to other schools. *Hanafi* scholars argue that the Prophetic Hadith upon which the other schools of jurisprudence rely, rejected the appointment of women as arbitrators or judges only in a specific case, which was when a woman was appointed ruler of the Persian

[795] Saidilyos KHAKIMOV, 'Arbitration (Tahkim) And Reconciliation (Sulh) In Islam As Alternative Dispute Resolution Mechanisms' (2020) 2020 The Light of Islam 31, 34.
[796] Muhammad Al-Alfi, 'Arbitration and Its Developments in Light of Islamic Jurisprudence' (1997) 13 Yarmouk Research Journal Humanities and Social Sciences Series 41, 47.
[797] ibid 48.
[798] Hakimah Yaacob, 'Shariah Arbitration in Islamic Finance Transaction: An Urgent Need for Muslim Arbitrators' (2014) 22 Pertanika Journal of Social Science and Humanities 205, 211.

Empire.[799] In other words, the Prophet [PBUH] did not mean to declare an order or issue a rule as it was only an observation.[800]

From the above, it may be understood that although Sharia originally adopted arbitration as the main method of dispute resolution, it did not regulate it in any depth. In fact, it did not regulate it in much greater detail than the arbitration that prevailed before the emergence of Islam. This has given Islamic jurisprudence the upper hand to form and shape arbitration rules in light of their interpretation of Sharia principles.[801] From the foregoing, it can thus be argued that it is inaccurate to claim that Sharia law in itself hinders or conflicts with arbitration as has been stated by some scholars.[802] However, given the role of *Fiqh* and the Islamic Schools of jurisprudence in the development, interpretation and implementation of the process, there are bound to be inconsistencies as have been observed. Having explored the foundations of Sharia and its application in dispute resolution through arbitration, the thesis shifts its focus to examine the relationship between Sharia and the legal systems of the GCC states.

5.4 The Ascension of Sharia Law in GCC States

Sharia, as a legal system, has played a central and enduring role in shaping the legal landscape of the Arabian Peninsula throughout history.[803] Its influence extends beyond the lifetime of Prophet Muhammad [PBUH] and the era of the Caliphs. Following the Prophet's passing, Sharia continued to evolve through the interpretations of Islamic scholars and jurists as discussed in Section 5.2.[804]

The Ottoman Empire ruled all Arab and Muslim countries, including the GCC States, applying the *Al-Majallah*.[805] *Al-Majallah* represented a codification of Sharia law

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[799] Syamsul Bakri, 'Women's Leadership In Islam: A Historical Perspective Of A Hadith' (2020) 5 Indonesian Journal of Islamic Literature and Muslim Society 219, 231.
[800] David Solomon Jalajel, 'Women & Leadership in Islam' (PhD thesis, UNIVERSITY of the WESTERN CAPE 2013) 52.
[801] Charles P Trumbull, 'Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts' (2006) 59 Vand. L. Rev. 609, 628.
[802] Khoukaz (n 536) 189.
[803] The region of the GCC States was previously known as the Arabian Peninsula and the Hijaz. See John E Peterson, 'The Arabian Peninsula in Modern Times: A Historiographical Survey' [1991] The American historical review 1435, 1435; JE Peterson, 'The Emergence of Nation-States in the Arabian Peninsula' [1986] GeoJournal 197, 197.
[804] See page 134.
[805] *Al-Majalla* was established after the first Crimean War between the Ottomans and the Russians, which led to the survival of a huge Muslim community under the rule of the Russians. The Ottoman Sultanate asked the Orthodox Church in Moscow for a clear codification of how to treat Muslims residing in Russia, which prompted the Russians to respond in kind. Sultan Abdul Majeed formed a committee of Hanafi jurists to codify the provisions for transactions and the judiciary, which led to the issuance of *Al-Majalla.*

according to *Hanafi* jurisprudence.[806] Following the collapse of the Ottoman Empire in 1922, its territories were divided by the global empires, with the GCC States going under British rule.[807] Notwithstanding, the GCC States continued to apply Al-*Majallah*, creating some complexity in their legal systems. The GCC States subsequently sought independence from the British; each achieving it in different years.[808]

After the Ottoman collapse, the GCC States embraced Sharia as a cornerstone of their legal systems. This is evident in their respective constitutions, where Islam and Islamic law are referenced as the foundation for legislation. For instance, in the Saudi constitution,[809] Article 1 states that '*The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, The Holy Qur'an, and the Sunna (Traditions) of the Prophet [PBUH]…*'.[810] Likewise, Article 2 of the Kuwaiti constitution asserts that '*The religion of the State is Islam and Islamic Law shall be a main source of legislation*'.[811] Similarly, Article 2 of the Omani constitution declares that '*The religion of the State is Islam and Islamic Sharia is the basis for legislation*'.[812] In the UAE, Article 7 of the constitution stipulates that '*Islam is the official religion of the Union. The Islamic Sharia shall be a main source of legislation in the Union. The official language of the Union is Arabic*.'[813] Meanwhile, in Bahrain, the constitution establishes in its Article 2 that '*The religion of the State is Islam. The Islamic Sharia is a principal source for legislation. The official language is Arabic*'.[814] Finally, the Qatari constitution sets out in its Article 1 that '*Qatar is an Arab State, sovereign and independent. Its religion is Islam, and the Islamic Law is the main source of its legislations…*'.[815]

In the UAE, in addition to what is confirmed by Article 7 of the constitution, namely, that Sharia is the main source of legislation, several Articles in the UAE Civil Code confirm

[806] Md Habibur Rahman and Noor Mohammad Osmani, 'An Appraisal of Majallat Al-Ahkam al-Adliyyah: A Legal Code of Islamic Civil Transactions by the Ottoman' (2018) 8 International Journal of Academic Research in Business and Social Sciences 1392.
[807] James Onley, 'Britain and the Gulf Shaikhdoms, 1820-1971: The Politics of Protection' [2009] CIRS Occasional Papers 10.
[808] The Gulf States became independent in different periods as follows: Saudi Arabia in 1932, Oman in 1951, Kuwait in 1961, and the UAE, Qatar, and Bahrain in 1971
[809] Basic Law of Governance of 1992.
[810] Ibid.
[811] Kuwait's Constitution of 1962.
[812] Oman's Constitution of 1996.
[813] Constitution of the UAE, 1971.
[814] Bahrain's Constitution of 2002.
[815] Qatar's Constitution of 2003.

the link between Sharia and UAE law.[816] For example, Article 2 of the underlying law states that the rules and principles of Islamic jurisprudence shall be relied upon in the understanding, construction, and interpretation of these provisions. Furthermore, Article 3 considers provisions and fundamental principles of Islamic Sharia as a matter of public policy in the UAE. In addition, Article 27 stipulates that the provisions of laws and contracts that are inconsistent with Islamic law may not be applied.[817] Similarly, the rest of the GCC States legislations adopt the same approach.[818]

In all cases, in the GCC States, the importance of Islamic law is confirmed by what is stipulated in Article 50 of the Unified Arbitration Law 2012, namely, that '*The court hearing the case of nullity shall decide to nullify the arbitral award if its contents violate public policy, public morals and Islamic Sharia*'. As a result, arbitral awards that contradict Sharia shall be void.

Following independence, the influence of Sharia in shaping legislations and local laws has diminished in some GCC States, like Kuwait and Bahrain.[819] This decline is partly attributed to the transplantation of laws from Egypt.[820] In the 1970s, the countries of the GCC witnessed a widespread intellectual and cultural movement towards full implementation of Sharia instead of the secular constitutions adopted by some GCC countries after their independence.[821] Almoqatei attributes this movement to a rejection of Western culture and its impact on local legislations.[822] As a result, the Kuwaiti population exerted pressure through the National Assembly to amend Article 2 of the Kuwaiti Constitution.[823] A proposal was submitted to amend the Article to; 'The religion of the State is Islam, and Sharia law shall be the only main source of legislation.' This amendment was proposed four times by a parliamentary majority, but the government rejected it on the ground that Sharia is a primary source and there is no need for this amendment. However, these attempts clearly indicate the efforts made by Kuwaitis to apply Sharia law, despite the government's avoidance of this approach. A similar

[816] Federal Law No (5) of 1985 on the Civil Transactions Law of the United Arab Emirates.
[817] In addition to the above, the same law contains rules and theories from Islamic jurisprudence in Articles 1/42, 43, 44, 67, 69, and 117.
[818] El-Ahdab (n 545) 202.
[819] Egdūnas RAČiUS, 'Diversification of Domestic Politics of the GCC Member States after the Second Gulf War' (2000) 1 Acta Orientalia Vilnensia. 201, 206.
[820] Parolin (n 102) 28.
[821] James A Bill, 'Resurgent Islam in the Persian Gulf' (1984) 63 Foreign Aff. 108, 119.
[822] Mohammad Al-Moqatei, 'Introducing Islamic Law in the Arab Gulf States: A Case Study of Kuwait' [1989] Arab Law Quarterly 138, 148.
[823] Paul Salem, 'Kuwait: Politics in a Participatory Emirate' (July 2007) <https://policyarchive.org/handle/10207/6437> accessed 5 January 2024.

movement was witnessed in Bahrain, where members of Parliament sought to apply Sharia law. Nevertheless, these attempts did not end with the full implementation of Islamic law, although they did succeed in preventing the sale of alcohol and prohibited prostitution.[824] Thus, the attempts to the full implementation of Sharia were rejected by the government in Kuwait and Bahrain.

From the foregoing, it is evident that the legal systems of the GCC States are deeply rooted in Sharia law. The principles of Sharia extend to the regulation of commercial, economic, political and all other aspects of life in the GCC States. However, as has been argued in Section 5.2, Sharia does not regulate these aspects in detail, it only provides general rules. Wherever the details are inadequate, they are further developed by Muslim scholars and the Islamic schools of jurisprudence to which we turn, next.

5.5 Legislation and the Islamic Schools of Jurisprudence in the GCC States

Islamic jurisprudence has undergone a profound transformation over the past 14 centuries, responding to the evolving needs and contexts of Muslim communities.[825] By clarifying the ambiguity that covers some religious texts, and by offering guidance on how to apply these texts to contemporary issues, the Islamic schools of jurisprudence play a vital role in interpreting and clarifying the main sources of Sharia law. Each school has its own unique approach to interpreting sources of Sharia, and each has its own body of legal rulings. In this context and since these schools of thought differ on crucial issues in Islamic law, perhaps the first question to be asked is whether the GCC States have adopted a specific Islamic school of jurisprudence. This is important given that the *Hanafi* School prevailed in the Arabian peninsula during the era of the Ottoman empire.

In the GCC States, when an issue arises that requires a religious ruling, governments often consult scholars from the different schools of jurisprudence, who can offer guidance on how to apply the law to the specific issue at hand.[826] There is widespread debate as to whether the GCC States have adopted one or more specific Islamic schools of thought. Ballantyne argues that the adoption of a single school could ease the decision-making

[824] *Trade Arabia*, 'Bahrain MPs in New Push to Ban Alcohol' (TR, 28 May 2014) <https://tradearabia.com/news/LAW_258982.html> accessed 23 April 2023.
[825] Christopher Gregory Weeramantry, *Islamic Jurisprudence: An International Perspective* (Springer 1988) 28.
[826] Joseph A Kechichian, 'The Role of the Ulama in the Politics of an Islamic State: The Case of Saudi Arabia' (1986) 18 International Journal of Middle East Studies 53, 55.

process for issues relating to Sharia law.[827] In other words, when a dispute arises, the competent authorities would not need to go through all the provisions of the Islamic schools of thought. Instead, they could apply a single interpretation. In so doing, the authorities would avoid confusion and save time in arriving at a decision in dispute resolution.

However, because the legislators have not adopted a uniform school of thought, the arbitrator or judge may apply different provisions to the same issue based on the Islamic school of jurisprudence that they uphold, which will eventually lead to contradictions in their decisions. In the UAE, for example, in the absence of a provision in Civil Law, the judge shall adjudicate according to Islamic Sharia, taking into consideration the choice of the most appropriate solutions in the *Maliki* and *Hanbali* schools of jurisprudence. If not found there, solutions will then be sought in the schools of *Shafi'i* and *Hanafi*, as the interest so requires.[828] Some like, Mahmood, argues that even in the same court, judges might rely on different Islamic legal schools to reach their decision.[829] However, there is no room for personal interpretation.

While the legislator in the UAE explicitly refers to recourse to specific schools of jurisprudence, the legislators in the other Gulf countries have not adopted a specific school. Hence, the courts may apply various schools of jurisprudence, although in Saudi Arabia, it is often mentioned that the legal system is based on *Hanbali* jurisprudence.[830] This is because King Mohammed ibn Saud, the first ruler of Saudi Arabia, appointed Mohammed ibn Abdul Wahab, a prominent Muslim scholar, as his advisor.[831] Mohammed ibn Abdul Wahab was of the *Hanbali* school and so there is the widespread assumption that the Islamic school of thought in Saudi Arabia is inspired by *Hanbali* provisions, despite the legislator never having stipulated the school of thought to be followed in that context.[832] Furthermore, the vast majority of Saudi courts have issued their decisions based on *Hanbali* principles Also, this presumption may find basis in the

[827] WM Ballantyne, 'The States of the GCC: Sources of Law, the Shari'a and the Extent to Which It Applies' (1985)' 1 Arab Law Quarterly 3, 7.
[828] Article 1 of the Federal Law No (5) of 1985 on the Civil Transactions Law of the United Arab Emirates.
[829] Ahmad (n 167) 121.
[830] Ahmed A Al-Ghadyan, 'The Judiciary in Saudi Arabia' (1998) 13 Arab Law Quarterly 235, 235.
[831] Nabil Saleh, 'The Role of Intention (Niyya) under Saudi Arabian Hanbali Law' (2009) 23 Arab Law Quarterly 469.
[832] Akram Abdul Cader, 'Islamic Challenges to Advertising: A Saudi Arabian Perspective' (2015) 6 Journal of Islamic Marketing 166, 171.

Onassis Agreement, signed in 1953 by the Saudi government,[833] wherein its Article 5 mandates that in the event of a dispute arising between the parties, Islamic law shall be applied according to the *Hanbali* school of jurisprudence.[834]

In contrast, there are scholars who claim that Saudi Arabia does not adopt any specific school of Islamic jurisprudence,[835] as recent court decisions exhibit a break with the prevailing perception that only *Hanbali* principles are applied in the Saudi courts. Rather, various courts have issued decisions based on other Islamic schools of thought, for instance, in a recent decision, the Saudi Commercial Court of Appeal based its ruling on provisions of *Shafi'i* rather than *Hanbali*.[836] Likewise, the same court issued its decision in a different Case based on *Maliki* provisions.[837] Similarly, in Kuwait, the Constitutional Court affirmed that the legislator has not adopted a specific Islamic school of thought. Hence, the courts may apply provisions from any school of jurisprudence. Nevertheless, in a previous decision, a lower court has stated that the Kuwaiti legislator adopts the *Maliki* school of thought only in family law disputes.[838]

This flexible approach is evident across the GCC States, giving the courts authority to follow the appropriate school of thought to issue their decisions. This is rooted in the words of the Prophet Mohammed, '*O Allah! Treat harshly those who rule over my people with harshness and treat gently those who rule over my people with gentleness*'.[839] Therefore, for any controversial issue viewed in light of the different schools of thought, or if more than one opinion has been given on it, the judge should adopt the most appropriate approach.

As explained earlier, the constitutions of the GCC States stipulate Sharia as the main source of legislation.[840] However, Sharia law does not fully cater to several modern practices, leaving room for further development by the schools of jurisprudence. As a

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[833] This agreement was established between Saudi Arabia and Aristotle Onassis. Under the agreement, Saudi Arabia granted the concession to Onassis for the shipment of oil outside Saudi Arabia.
[834] Jalal El-Ahdab and Abdel Hamid El-Ahdab, 'Arbitration with the Arab Countries' [2011] Arbitration with the Arab Countries 1, 620.
[835] Ahmad Swaidan, 'The Judicial System in the Kingdom' (*Aljazirah*, 15 January 2019) <https://al-jazirah.com/2019/20190115/rj1.htm> accessed 10 June 2023.
[836] Saudi Appeal Court, decision No 165, issued on 04/10/2021.
[837] Saudi Appeal Court, decision No 2212, issued on 28/09/2021.
[838] Family court, Case No 89/2013. It should be noted that the Maliki school of thought only applies to the Sunni sect, while the Shi'a sect applies the Jafari school of thought, according to Kuwait family law. See Fisal Al-Temimi, 'Organization and Functioning of Kuwaiti Legal System' (2015) 1 Journal of Humanities, Culture and Social Sciences 62, 72.
[839] Imam Mohiuddin Abi Zakariyya An-Nawawi, *Riyad As-Saliheen* (Manshurat dar Maktabat Bil-Hayat 1983) 651.
[840] See page 144.

result, attempts have been made to develop and encourage the application of Sharia by codifying the provisions of the four schools of jurisprudence. For instance, in 1984, an agreement was signed between the GCC States, concerning the application of Islamic law. Under this agreement, six prominent Muslim jurists were nominated to amend local laws to conform to Sharia within five years.[841] However, this committee failed to achieve its goal, due to political circumstances in the Gulf States during said period, which ended with Iraq's invasion of Kuwait.[842]

As mentioned earlier, there was also a significant, well-documented attempt to unify Sharia principles under the Ottoman Empire through *Al-Majallah*, established by the prominent Ottoman leader Ahmed Pasha.[843] Pasha was assigned to codify civil transactions in the manner of man-made laws. His committee took seven years to complete its work, finishing in 1876. The journal of judicial judgments was subsequently published, containing a code with 1851 Articles, predominantly based on *Hanafi* jurisprudence. Notably, certain provisions of this Code remain in effect in some Islamic majority countries, specifically Kuwait, the UAE, and Jordan.[844] For instance, Kuwaiti courts frequently reference this code in their rulings.[845]

Similar to the Ottoman approach, King Abdulaziz, first ruler of the Kingdom of Saudi Arabia, sought to codify Sharia principles once he had taken over the nation's leadership. He therefore adopted the four main schools of Islamic thought: *Hanbali*, *Maliki*, *Shafai*, and *Hanafi*. In addition, he proposed reforms to the Saudi court system by considering precedent as a binding authority.[846] However, these suggestions evoked the disapproval[847] of the Ulema Committee,[848] which insisted on adopting the *Hanbali* school of jurisprudence as the sole source of interpreting Sharia rules and principles.[849]

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[841] Nesta Ramazani, 'Arab Women in the Gulf' (1985) 39 Middle East Journal 258, 270.
[842] Joseph Kostiner, 'State, Islam and Opposition in Saudi Arabia: The Post-desert Storm Phase' (1996) 8 Terrorism and Political Violence 75, 76.
[843] Oussama Arabi, 'Contract Stipulations (Shurut) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya' (1998) 30 International Journal of Middle East Studies 29.
[844] Mahmoud M Dodeen, 'Formation of Contract under the Islamic Majallah and UNIDROIT Principles of 2010' (2016) 30 Arab LQ 262, 264.
[845] Kuwaiti Court of Cassation, Appeal No U6 of 1982.
[846] George N Sfeir, 'The Saudi Approach to Law Reform' (1988) 36 The American journal of comparative law 729.
[847] ibid 733.
[848] The Ulema are the Muslim scholars who usually preside over the religious authorities in their states. They are also religious advisers to the heads of their countries. In the event that the Sharia texts are unclear, they issue provisions to clarify the ambiguity. These provisions are known as 'fatwa'; Mun'im Sirry, 'Fatwas and Their Controversy: The Case of the Council of Indonesian Ulama (MUI)' [2013] Journal of Southeast Asian Studies 100.
[849] Sfeir (n 846) 730.

Nevertheless, attempts to codify Islamic jurisprudence did not stop there. In Egypt, an attempt was made by the Islamic Research Academy of Al-Azhar Al-Sharif to codify the provisions of jurisprudence on sales. Hence, it codified the relevant provisions in each school of jurisprudence separately, rather than other aspects of *Fiqh*.[850] It should be noted that there is widespread debate among Muslim jurists over whether Islamic jurisprudence should be codified. The lack of consensus among scholars may be a contributing factor to the frequent failures in the attempts to codify Sharia law successfully. Quraishi is of the view that the codification of jurisprudence would limit Sharia doctrine, which is incompatible with the nature and purpose of Sharia.[851] Similarly, some scholars believe that the courts should be allowed to apply various provisions of the Islamic schools of jurisprudence. In particular, Ibrahim considers that the plurality and differences of schools of jurisprudence offer an advantage in Islamic law, as they provide judges with the flexibility to apply the appropriate Islamic provisions to address issues.[852] Some authors go further, like Vikør, who does not believe Sharia will ever be codified, due to its nature as a divine law.[853]

In contrast, Hawari suggests that allowing judges to exercise their authority by applying provisions of the various schools of jurisprudence leads to uncertainty and inconsistency in court decisions, especially since judicial precedents are not binding in the Gulf countries.[854] Hawari claims that opening the door for the courts to investigate all Islamic schools of thought can lead to prolonged litigation, during which judges are obliged to go through all the schools of jurisprudence before they arrive at a decision.[855] Therefore, the lack of codification of Sharia and *Fiqh* would make issuing decisions a challenging process for judges and arbitrators. Thus, some see the necessity to codify Islamic jurisprudence, which would help introduce stability into court decisions. Likewise, Orfan states that the codification of Sharia would ensure greater certainty and clarity in the law and consistency in its application.[856]

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[850] Muhammad Amanullah and Habibur Rahman, 'The Origin and Evolution of Fiqh Codification: A Preliminary Analysis Asal-Usul Dan Evolusi Kodifikasi Fiqh: Satu Analisis' (2016) 13 Journal of Islam in Asia (E-ISSN 2289-8077) 194, 214.
[851] Quraishi-Landes (n 18) 564.
[852] Farman Ibrahim, 'The Impact of Different Schools of Jurisprudence' (2013) 9 Journal of Surra Man Raa 140.
[853] Knut S Vikør, 'The Sharia and the Nation State: Who Can Codify the Divine Law?' [1998] The Middle East in a globalized world 222.
[854] Yossi Hawari, 'The School of Jurists and Its Approach: A Study of Fundamental Rules' (University of Algeria 2005) 77.
[855] ibid 79.
[856] Fatah Orfan, 'The Emergence of Islamic Sects - a New Vision' [1980] Al-Adab Journal 433, 437.

Interestingly, as mentioned earlier, despite the significant impact of Islamic schools of thought in Islam and the key role of Sharia in their legal systems, the GCC States have not adopted a specific school of jurisprudence. This raises doubts about the extent to which Sharia can influence the development of the legal system, particularly in arbitration, which is the focus of this thesis. It raises questions about how Sharia affects the enforcement of arbitral awards and contracts, especially when these conflict with an Islamic school of thought. Despite its positive aspects and justifications, the approach of uncodifying Sharia could contribute to instability in judicial decisions and potential contradictions in court rulings due to the lack of a unified school of jurisprudence. The position adopted by the GCC States regarding the four schools of jurisprudence undoubtedly contributes to a broad application of Sharia and the public policy exception, particularly in controversial matters among Muslim scholars, such as usury and the gender of the arbitrator.

From the above, it can be said that the failure to codify Sharia and the allowance for courts to apply provisions from various schools of jurisprudence means that there will be a level of inconsistency. This inconsistency may lead to broad application of Sharia and public policy. Having understood the various elements of Sharia and its application, we can move to explore the extent to which GCC States implement Sharia in their legal frameworks.

5.6 Is Sharia Fully Implemented in the GCC States?

Although the Gulf countries consider Sharia as their main source of legislation, there are doubts about the extent of their implementation of it. In particular, as explained above, there is even some legislations and evidence of practices that contradict Sharia. According to Ballantyne, the extent of Sharia's influence in the GCC States varies; while application is narrow in Kuwait, it tends to be strict in Saudi Arabia.[857] In the other Gulf countries, Qatar, Oman, Bahrain and the UAE, it appears to be less strict than the Saudi approach.[858] Ballantyne contends that while most of the GCC States have adopted Sharia law as their main source of legislation, Kuwait considers Sharia as just one of its main sources of law.[859] He bases his argument on Article 1 of the Kuwait's Civil Code, which stipulates that if there is no legislative provision, the judge gives judgment in accordance with

[857] WM Ballantyne, 'The Middle East' (1975) 3 Int'l Bus. Law. 383, 387.
[858] Baamir (n 765) 45.
[859] WM Ballantyne, 'States of the GCC: Sources of Law, the Shari'a and the Extent to Which It Applies, The' (1985) 1 Arab LQ 3, 3.

custom. If there is no custom, the judge deduces his opinion taking guidance from the dictates of the Islamic jurisprudence most in accord with the reality and interests of the country.[860]

In fact, as previously mentioned in Section 5.4,[861] despite the Kuwaiti legislator's endeavour to parallel Egyptian law, itself inspired by French jurisprudence, the Kuwaiti constitution explicitly treats Sharia as a primary source of legislation.[862] It should be emphasised here that Kuwait is considered as one of the most developed countries of the Gulf in terms of law, and although its constitution requires the application of Islamic law, alcohol was officially sold there after the discovery of oil. This is an illustration of the secular approach adopted by the Kuwaiti government from the 1960s to the 1980s.[863] However, after the Iraqi invasion, commonly referred to as 'Desert Storm', the Kuwaiti government adopted a religious approach.[864] Therefore, the ruler of Kuwait formed the 'Supreme Advisory Committee on the Completion of the Implementation of the Provisions of Islamic Sharia', the main aim of which was to ensure that current laws do not contradict Sharia law.[865] However, in 2017, the ruler of Kuwait issued a decision to terminate this committee after more than a quarter of a century, ostensibly because the committee had achieved its aim by preparing a final draft of Sharia law. Nevertheless, the committee's outcomes have not been applied.[866]

Recently, as a clear indication of the influence of Sharia, a member of the Kuwaiti Parliament intervened to cancel the institution of a yoga session on the ground that it violates Sharia. The member of Parliament justified that the mixed gender yoga sessions contradicted the customs and traditions of the Kuwaiti society and the principles of Islamic law. Consequently, the event was cancelled by the local authorities.[867] There is no doubt that such practices confirm the significant influence of Islamic law on the state's legal system and indicate a strict approach to applying Sharia. Similar to the Kuwaiti

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[860] Kuwait Civil Law 1980.
[861] See page 144.
[862] HS Shaaban, 'Commercial Transactions in the Middle East: What Law Governs' (1999) 31 Law & Pol'y Int'l Bus. 157, 165.
[863] Alexandra González, *Islamic Feminism in Kuwait: The Politics and Paradoxes* (Springer 2013) 82.
[864] Courtney Freer, 'The Rise of Pragmatic Islamism in Kuwait's Post-Arab Spring Opposition Movement' [2015] Rethinking Political Islam 4.
[865] Hamad Salama, 'The Supreme Committee for the Application of Sharia' (*Alqabas,* 14 November 2017) <https://alqabas.com/article/461140> accessed 19 July 2023.
[866] ibid.
[867] Holly Bancroft, 'Women-Only Yoga Trip in Kuwait Slammed as 'Danger' to Society by MP' (*The Independent,* 2022) <https://independent.co.uk/news/world/middle-east/kuwait-women-yoga-mp-government-trip-b2006780.html> accessed 5 February 2022.

approach, the legislator in Bahrain stipulates Sharia law as the main source of legislation. Consequently, alcohol was gradually banned in 2013, with only non-Muslims permitted to consume it. Then, in 2016, alcohol was banned completely, [868] but this decision was later suspended for economic reasons. Likewise, the governments of Qatar, Oman, and the UAE allow the sale of alcohol for economic and tourism purposes.[869]

The prohibition of alcohol is an issue that finds a consensus among all Muslim jurists and scholars, with a ban on alcohol explicitly confirmed in the main sources of Sharia. For instance, the Quran warns: '*O believers! Intoxicants, gambling, idols, and drawing lots for decisions are all evil of Satan's handiwork, so shun them so you may be successful.*'[870] In addition, the Prophet Mohammed stated: '*Allah has cursed wine, its drinker, its server, its seller, its buyer, its presser, the one for whom it is pressed, the one who conveys it, and the one to whom it is conveyed.*'[871] Therefore, allowing the sale and consumption of alcohol in countries where Sharia law is considered the main source of legislation raises crucial questions about the extent to which GCC States adhere to Sharia, especially that the above approach clearly indicates a reluctance and unwillingness on the part of these countries to fully implement Sharia law.[872] Thus, according to these practices, a foreign arbitral award pertaining to alcohol may be enforced in a GCC State that permits alcohol consumption. On the contrary, alcohol is still completely prohibited in Kuwait and Saudi Arabia, clearly demonstrating a strict approach to the implementation of Sharia law, especially with regard to issues that breach the main sources of Sharia.

Interestingly, in 2024, Saudi Arabia open its first liquor store for non-Muslim diplomats in Riyadh. [873] This move, while seemingly contradictory to Sharia's prohibition on alcohol, is aimed at non-Muslim diplomats and comes with tight restrictions. The Saudi government justifies this decision on political grounds, hoping to improve its image as a

[868] In 2018, the government suspended this decision for economic reasons.
[869] *BBC*, 'Alcohol tax in the UAE' (BBC, 2 January 2023) <https://bbc.com/arabic/business-64144696> accessed 20 June 2023.
[870] Holy Quran, v 5:90.
[871] Sunan Abi Dawud 3674, Book 26, Hadith 3666, cited in Imro Atut Toyyibah and others, 'Distribution and Sale of Alcoholic Drinks in Regional Regulation of Kapuas Regency Number: 3 of 2011 (Study of Sharia Economic Law Analysis)' (2023) 24 Darussalam 45.
[872] Similar to the Bahraini approach, alcohol consumption is allowed in Oman, Qatar, and some of the United Arab Emirates such as Dubai and Abu Dhabi, where Sharia law is considered as a main source of legislation.
[873] Graeme Baker, 'Saudi Arabia to get first alcohol shop in more than 70 years' (BBC, 24 January 2024) <https://bbc.co.uk/news/world-middle-east-68085190> accessed 13 May 2024.

business and tourism destination.[874] Additionally, the limited scope, restricted clientele, purchase quotas, and location within the diplomatic quarter minimises societal impact.

However, critics argue that this decision undermines Sharia law's centrality in Saudi Arabia.[875] While Sharia interpretations can vary, Alcohol is one of undisputed cases in Sharia.[876] This action, even with justifications, weakens the role of Sharia in Saudi Arabia. Furthermore, this step suggests a potential shift in how Sharia will be interpreted and applied within the kingdom and the whole GCC States. In fact, this substantial shift may support the thesis argument, which posits a new approach adopted by the GCC States aimed at diminishing the influence of Sharia law. Historically, Saudi Arabia strictly prohibited the consumption of alcohol, even within its airspace.[877] However, it now permits such consumption for diplomatic reasons as explained earlier.[878] This transformation may become more obvious and widespread across all GCC States due to economic and commercial necessities. This is particularly relevant given the principle and rule in Islamic jurisprudence that states necessities permit prohibited acts.[879] Basically, this principle allows for the violation of Sharia in cases of necessity.[880] For example, while Sharia law forbids Muslims from consuming pork or alcohol, it mandates their consumption if no other food or drink is available.

In the UAE, in one case involved a dispute over a life insurance policy.[881] The husband (claimant) sought to enforce an arbitral award granting him the full insurance benefit after his wife's death (the insured). However, the insurance company (defendant) contested the award, arguing it violated Sharia law on inheritance. The lower courts sided with the defendant, nullifying the arbitral award as the award breach Sharia.[882] However, the Court of Cassation ultimately overturn this decision and enforce the arbitral award.[883] The court

[874] Ibid.
[875] News Desk, 'Social media reacts to first alcohol store in Saudi Arabia' (Globalvillagespace, 25 January 2024) <https://globalvillagespace.com/social-media-reacts-to-first-alcohol-store-in-saudi-arabia/> accessed 14 May 2024.
[876] Mustapha Sheikh and Tajul Islam, 'Islam, Alcohol, and Identity: Towards a Critical Muslim Studies Approach' (2018) 3 ReOrient 185, 199.
[877] Alternative Airlines, 'Alcohol Rules on Saudi Arabian Flights' <https://alternativeairlines.com/alcohol-rules-saudi-arabia-flights> accessed 19 June 2024.
[878] Straits Research, 'Saudi Arabia Makes History by Lifting the Longstanding Ban on Alcohol' (SR, 30 April 2024) <https://straitsresearch.com/statistic/saudi-arabia-lifts-alcohol-ban> accessed 19 June 2024.
[879] Mansour Al-Mutairi, 'Necessity in Islamic Law' (PhD thesis, The University of Edinburgh 1997) 57.
[880] ibid.
[881] Dubai First Court of Instance Case No 424/2015
[882] Dubai court of Appeal Appeal No. 305 of 2007
[883] Dubai Court of Cassation Case No. 146/2008

affirms that the lower courts failed to adequately demonstrate a violation of Sharia inheritance rules.[884]

In fact, this arbitration decision is significant because it contradicts the prevailing opinion among Islamic scholars who view life insurance as incompatible with Sharia law. Notably, the award included 7% interest, which is also prohibited under Sharia principles. However, the court ultimately upheld the decision. Therefore, this decision raises doubts about the United Arab Emirates' full implementation of Sharia law.

In Oman, much of the legislation clearly indicates the influence of Sharia provisions. For instance, Article 2 of Oman's Civil Law affirms that the understanding, interpretation, significance of a provision shall be based on the rules and principles of Islamic doctrine.[885] Likewise, Article 28 of the Civil Law declares that contracts that contravene Sharia shall be void. Similar to the UAE and Bahrain, Oman allows alcohol consumption for economic reasons. This policy is based on the belief that fully enforcing Sharia could conflict with the country's economic and trade interests. In this context, not all scholars support that the adoption of Sharia law in local legislation hinders the enforcement of contracts and arbitral awards; instead, it contributes to the development of all commercial aspects of states.[886] Therefore, reliance on Sharia law in the commercial sphere is credited with the growth of the local economy and the emergence of Islamic banks.[887]

Despite the foregoing and considering Sharia as the main source of legislation, there are a considerable number of laws in the GCC States that conflict with Sharia and treat it as a third source of legislation. For instance, Article 1(b) of Bahrain's Civil Law states that 'in the absence of a provision of a law that is applicable, the judge will decide according to custom and in the absence of custom in accordance with the principles of Islamic Sharia that suit the conditions and circumstances of the country'.[888] A similar approach has been adopted in Kuwait, Oman, Qatar, and the UAE. Therefore, according to the Civil Law, the judge first refers to provisions of the law, and then customs, and in the absence of the above, to the provisions of Sharia. Nevertheless, these Articles clearly contradict the

[884] Ibid.
[885] Omani Civil Law of 2013.
[886] Reports indicate a widespread trend in Islamic countries, especially in the Gulf, for local companies and individuals to invest more with Islamic banks, due to their compatibility with Sharia compared to non-Islamic banks. See Bashar AlNatoor, 'Guide to Islamic Finance: Fitch Ratings' Perspective' (*Fitch Ratings*, 2020) <https://your.fitch.group/rs/732-CKH-767/images/Guide_to_Islamic_Finance.pdf> accessed 31 January 2023.
[887] Soofi Asra Mubeen, Neelufer Aslam Kulkarni and Yahya Khamis Al Hussaini, 'The Future of Islamic Banking in Sultanate of Oman' (2014) 6 International Journal of Economics and Finance 203, 208.
[888] Bahraini Civil Law 2001.

constitutions of these countries, which assert that Sharia is the primary source of legislation, while also stipulating that subordinate legislation must not conflict with the constitution.

In Qatar, Sharar argues that Islamic law applies only to Muslims, while non-Muslims are excluded from this application.[889] Meanwhile, Elbarrawy points to a contradiction in the application of Sharia in Qatar, with the constitution stipulating that Sharia is a primary source of legislation, whereas Qatar's Civil Law 2004 considers Sharia as a secondary source.[890] Conversely, the Qatari constitution affirms in its first Article that 'Qatar is an Arab State, sovereign and independent. Its religion is Islam, and the Islamic Law is the main source of its legislations.'[891] Thus, due to the principle of sovereignty in Qatar, Abdullah argues that Sharia law applies to everyone regardless of their religion.[892] Similarly in Saudi Arabia, the law and Sharia prevent unmarried partners from sharing the same accommodation. However, there are many cases that violate this law.[893] Thus, such issues raise concerns over the extent to which the GCC States are committed to implementing Sharia law.[894]

Given the above, current practices in the GCC States indicate a paradoxical position concerning the application of Sharia. While some of these States explicitly breach Sharia by enacting laws that conflict with Sharia, the practices of other states suggest that Sharia principles are being indirectly breached. For instance, in Kuwait, where the constitution has expressly adopted Sharia as its main source of legislation, it can be seen that Kuwait's Trade Law 1980 breaches Sharia in its Article 102, which permits *Riba*.[895] In the UAE, a similar approach has been adopted, although Article 7 of the UAE constitution considers Sharia as the main source of legislation. However, Article 76 of the Trade Law 1993 does

[889] In 1916, the Ottoman Empire collapsed, and Britain signed a protection agreement with Qatar. This agreement contained a set of provisions related to the British residing in Qatar (mostly oil workers). Thus, the two legal systems emerged. The first of these is based on the provisions of Islamic law and applies to Muslims, whereas the second is based on the basic principles of British law and applies to British and non-Muslims residing in Qatar.
[890] Hassan Elbarrawy, 'The Impact of Islamic Law on Qatari Civil Law: A Comparative Study' (2013) 2013 International Review of Law 2, 20.
[891] Qatar's Constitution of 2003.
[892] Abdullah Abdullah, 'The Legal Impact of Islamic Law in the Identity and Provisions of Qatari Legal System' (2020) 58 Al-Jāmi'ah: Journal of Islamic Studies 469.
[893] David Averre, 'Cristiano Ronaldo and Georgina Rodriguez "Will be Excused from Saudi Arabia's Laws Which Forbid Unmarried Couples to Live Together" Following his £175m-a-year Move to Al-Nassr' (*Daily Mail*, 9 January 2023) <https://dailymail.co.uk/news/article-11613993/Cristiano-Ronaldo-Georgina-Rodriguez-live-Saudi-despite-strict-marriage-laws.html> accessed 20 March 2023.
[894] WM Ballantyne, 'The States of the GCC: Sources of Law, the Shari'a and the Extent to which It Applies' (1985) 1 Arab Law Quarterly 3.
[895] Kuwait Trade Law of 1980.

not prohibit usury.[896] Similarly, in Saudi Arabia, which is well-known for its strict application of Sharia rules, banking practices reveal usury in transactions through the adoption of *Murabaha.*

Some commentators attribute these contradictory practices to the lack of clarity in the provisions of Sharia and Islamic jurisprudence. Meanwhile, others argue that there are economic reasons why the GCC States are reluctant to implement Islamic law. For example, Sharia prohibits interest, thereby denying a major source of income for banks and the government. Therefore, many disputing parties avoid enforcing arbitral awards in Sharia-based states, due to the effects of Islamic law.[897] As a result, Alrashidi declares that while Islam is the main religion in the GCC States, Sharia law is not the main source of legislation.[898] He argues that the GCC States originally adopted Sharia law as their main source of legislation for political purposes, when the local populations of these states sought to appoint a religious leader.[899] Moreover, at the time, the legislators of the GCC States lacked the necessary experience to establish their own positive law, which is why Sharia law was adopted instead.[900] Another justification for minimising the role of Sharia in the GCC is the difficulty facing courts and practitioners in applying Sharia, with its apparent lack of clarity and the failure to decide on a specific school of jurisprudence, leading to confusion between Islamic jurisprudence and Sharia.[901] Nevertheless, this confusion between jurisprudence and Sharia does not mean that Sharia is insufficient. On the contrary, it is an indication of its flexibility, demonstrating that it can be applied in any context or era, including in non-Muslim societies.[902] Moreover, Sharia could be codified as a source of legislation,[903] and there have been several attempts to do so, even though there are a number of reasons why these attempts have yet to be successful.

[896] Commercial Transactions Code (promulgated by Federal Law No 18 of 1993).
[897] Khoukaz (n 536) 189.
[898] Hussien Alrashidi, 'The Relationship between Sharia and Kuwaiti Legislation' (2012) 2013 Law Journal 119.
[899] ibid 180.
[900] As has been mentioned in Chapter 2, some GCC States, such as Kuwait, have adopted legalisation from the Egyptian and French doctrines, while others like Oman have imported English laws and integrated them, especially in relation to trade and corporate law. See pages 20 and 25.
[901] Mohammed Alabdin, 'Obstacles to the application of Islamic Sharia' (*Albayan,* 23 October 2011) <https://albayan.co.uk/MGZarticle2.aspx?id=1468> accessed 20 August 2023.
[902] Prawitra Thalib, 'Distinction of Characteristics Sharia and Fiqh on Islamic Law' (2018) 33 Yuridika 439, 440.
[903] Maurits S Berger, 'Sharia and the Nation State', *The Ashgate Research Companion to Islamic Law* (Routledge 2016) 224.

In contrast, Alsaid claims that the GCC States are Islamic countries, as confirmed in their constitutions.[904] He argues that the laws and decisions that breach Sharia law are individual practices, which are due to the lack of parliamentary oversight over executive power and do not represent public opinion.[905] Here, it should be highlighted that not all the GCC States apply the doctrine of the separation of powers.[906] Therefore, the executive authority has the upper hand in enacting laws without reference to the legislative authority.[907]

One of the indications of contradictory practices in the GCC States is the issue of women assuming positions of public authority. In Sharia, this refers to a woman occupying a public position, such as that of a ruler or judge, or taking charge of affairs of state like parliamentary representation. As explained earlier in section 5.2,[908] this matter has always been the subject of widespread debate among Muslim scholars.[909] Some contend that while there is no explicit text prohibiting the appointment of a woman as judge, the Prophet did not do so, even when men were absent.[910] These scholars base their argument on the words of the Prophet Mohammed: '*A people who make a woman their ruler will never be successful.*'[911] In contrast, other scholars are of the view that the Prophet's Hadith is not a general rule, but refers instead to a specific occasion.[912] Moreover, Mueenza does not believe that the absence of female judges at the time of the Prophet indicates a prohibition.[913] Furthermore, the appointment of women as arbitrators is a

[904] Hassan Alsaid, 'The Rules Regulating the Inheritance of Government in the Countries of the Gulf Cooperation Council' (2008) 33 Law Journal 408.
[905] ibid 428.
[906] Separation of powers is a doctrine of constitutional law under which the three powers of government are kept separate. The aim of this principle is to establish a balance between the three powers and hence, the application of this principle ensures that the three powers do not exceed their authority.
[907] It should be noted that there is a lack of representation of the legislative authority in the Gulf countries. Only in Kuwait and Bahrain are there councils that represent the people. Although their democratic experience is still recent, they practice a broader scope than their counterparts in Saudi Arabia, the UAE, Qatar, and Oman, where the councils are appointed by the ruler and have limited powers. See Andrzej Kapiszewski, 'Elections and Parliamentary Activity in the GCC States: Broadening Political Participation in the Gulf Monarchies' [2006] Khalaf A., Luciani G.(a cura di), Constitutional Reform and Political Participation in the Gulf, Gulf Research Center, Dubai 88.; Michael Herb, 'Democratization in the Arab World? Emirs and Parliaments in the Gulf' (2002) 13 Journal of Democracy 41.
[908] See page 134.
[909] Svetlana Peshkova, 'Muslim Women Leaders in the Ferghana Valley: Whose Leadership Is It Anyway?' (2009) 11 Journal of International Women's Studies 5, 17.
[910] Moulouk Berry, 'The Right of Women to Occupy Positions of Judge or State Leadership in Islamic Shi'i Imami Law' (2003) 81 U. Det. Mercy L. Rev. 693, 701.
[911] Sahih al-Bukhari 7099, cited in Abdulkadir Salaudeen and Saidu Ahmad Dukawa, 'A Critique of Abu Bakrah's Hadith on Women Political Leadership' (2021) 24 'Abqari Journal 1, 2.
[912] Nadia Sonneveld and Monika Lindbekk, *Women Judges in the Muslim World: A Comparative Study of Discourse and Practice* (Brill 2017) 106.
[913] Aishath Mueenza, 'Appointment of Female Judges in Muslim Countries' (2014) 16 Eur. JL Reform 317, 327.

consolidation of a fundamental Islamic principle, wherein 'All things are originally licit, until there's a rule prohibiting them'.[914] However, a recently proposed law in Kuwait has faced criticism for including a provision that requires female candidates to adhere to Sharia principles. Opponents of this view argue that there is no clear Quranic text or Hadith explicitly prohibiting female candidates, and they also contend that the reference to 'Sharia principles' is too vague.[915]

Nevertheless, compared to previous decades, women's rights in GCC States have witnessed remarkable development.[916] One reason for this progress may be the GCC States' signing of international agreements related to women's rights. For instance, all the GCC States are signatories to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which has placed pressure on the GCC countries to grant more rights to women, including the right to be appointed as arbitrators and judges.[917] However, the Gulf countries have also expressed their reservations about certain articles that conflict with Sharia and national laws.[918]

In examining the reasons for the GCC States' reservations concerning certain articles of CEDAW, it can be inferred that these reservations are more likely based on political considerations than on concerns over Sharia law. This raises an important question about the extent to which the GCC States adhere to Sharia law. In short, did the Gulf States adopt Sharia law merely for religious or political purposes? In this context, Buhazza argues that the Gulf States use national security and Sharia as an excuse to further their political interests, especially since they have justified their reservations about CEDAW as relating its alleged violation of Sharia. In contrast, there are Muslim countries that have likewise adopted Sharia as their primary source of legislation, such as Tunisia and Malaysia, which have not expressed any reservations over Articles of CEDAW.[919]

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[914] Ahmad Saad Ahmad Al-Dafrawi, 'An Islamic Viewpoint on Doping in Sports: An Analytical Study' (2020) 10 Journal of Islamic Thought and Civilization 114.
[915] Ghassan Nawaf Jaber Alhomoud, 'On Translating and Drafting Sharia Legal Terms and Expressions in Saudi Contracts' (2022) 2022 Education Research International 7.
[916] Ebtisam Al-Kitbi, 'Where Do GCC Women Stand in the Development Process' [2010] The EU and the GCC: Challenges and prospects under the Swedish EU presidency 95, 101.
[917] Rachel George, 'The Impact of International Human Rights Law Ratification on Local Discourses on Rights: The Case of CEDAW in Al-Anba Reporting in Kuwait' (2020) 21 Human Rights Review 43, 59.
[918] Zeyad Jaffal, Faisal Shawabkeh and Ali Hadi Al Obeidi, 'Toward Constructive Harmonisation of Islamic Family Law and CEDAW: A Study on the UAE's Reservation to CEDAW Article 16 and Equal Rights to Marriage and Family Relations' (2022) 28 Australian Journal of Human Rights 139, 160.
[919] Khalil Buhazza, '(CEDAW) in the Gulf Cooperation Council Countries: Empowering Women or Continuing the Policy of Marginalisation' (*Gulf Centre for Development Policies,* 2018) <https://gulfpolicies.org/2019-10-30-15-35-55> accessed 20 May 2023.

Consequently, the commitment of the GCC States to implementing Sharia law is a matter of ongoing debate. As mentioned earlier, while Sharia is officially recognised as the primary source of legislation in these countries, there is evidence of a reluctance to fully implement its precepts. For instance, the sale of alcohol is prohibited under Sharia, but is legal in some Gulf countries, namely, the UAE, Bahrain, and Oman. Likewise, usurious interest is considered to be a clear violation of Sharia, even though some Gulf countries, such as Kuwait and Oman, allow it at certain rates. These inconsistencies have led to increasing doubts over the extent to which the GCC countries are truly committed to implementing Sharia. Nevertheless, Alwan, a scholar of Islamic law, asserts that certain contentious practices in the GCC countries do not constitute a violation of Sharia, especially regarding issues that are not agreed upon among scholars.[920] Similarly, Al-Ramahi argues that practices are not considered to be a violation of Sharia unless there is a clear consensus among scholars that they are prohibited.[921]

Nevertheless, Al-Kuraiti takes a different view, believing Sharia to play a fundamental role in the GCC countries, but due to political and economic challenges, these States are obliged to violate some Sharia rules.[922] He points to the example of the sale of alcohol to foreigners, which is prohibited under Sharia. Conversely, other scholars point out that the GCC countries only allow this among non-Muslim immigrants.[923] Ghabra explains that governments balance Sharia, social, and international consideration by allowing these practices.[924] Also cited frequently is the example of interest being charged on banking transactions, which is prohibited under Sharia, but the GCC countries permit it because it is a vital source of income for the banking sector.[925] This perspective aligns with Hamid's position, asserting that the GCC States' embrace of Sharia as their primary legislative foundation was predominantly driven by political rather than purely religious motives. [926] There is still no doubt that the legal systems of the GCC countries are profoundly influenced by Sharia, but the extent of this influence and its limitations are a matter of

[920] Ali Alwan, 'The Dilemma in Applying Sharia Law in Contemporary Islamic Thought' (2020) 0 Political Science Journal 191, 201.
[921] Al-Ramahi (n 35) 8.
[922] Haider Al-Kuraiti, 'Constitutional Regulation of the Status of Islamic Law in the Legal System' 2017 Alutroha 133, 152.
[923] Johnson and Sergie (n 19) 3.
[924] Shafeeq N Ghabra, 'Balancing State and Society: The Islamic Movement in Kuwait' (1997) 5 Middle East Policy 58, 64.
[925] Rosylin Mohd Yusof, Mejda Bahlous and Hamza Tursunov, 'Are Profit Sharing Rates of Mudharabah Account Linked to Interest Rates? An Investigation on Islamic Banks in GCC Countries' (2015) 49 Jurnal Ekonomi Malaysia 77, 85.
[926] Peter Mandaville and Shadi Hamid, *Islam as Statecraft: How Governments Use Religion in Foreign Policy* (Brookings Institution Washington, DC 2018) 9.

ongoing debate among scholars and practitioners. As Al-Haj comments in this regard, Islam has a major influence on the societies of the Gulf, shaping their principles and values. Generally, the people of the Gulf are religious, and their religious beliefs inform their worldview and daily lives. Conversely, Haji contends that the regimes in the GCC States are secular, using religion for political purposes.[927]

Nevertheless, what cannot be denied is the vital role of Sharia law and its influence on the legal systems of the GCC States. For instance, as mentioned briefly earlier, some Members of the Kuwaiti Parliament have proposed a new Election Law that requires women to adhere to the rules and provisions of Islamic Sharia, in order to be permitted run for election. This proposal has been met with strong opposition from political and human rights activists, who argue that it is discriminatory and violates international law.[928] In response, the supporters of Article 16 of the proposed law argue that it is consistent with the Kuwaiti constitution, which states that Islam is the state religion and Sharia is the main source of legislation. It is also argued that this Article is necessary to protect the moral and religious values of Kuwaiti society.[929]

On the other hand, the opponents of Article 16 argue that it is a step backwards for women's rights in Kuwait, reminding that Kuwait is a signatory to international agreements that prohibit gender discrimination. In this light, Article 16 would effectively disenfranchise women from Kuwait's political elections. The opponents of Article 16 also declare that the term 'provisions of Sharia' is vague and could be interpreted in a discriminatory manner.[930] In addition to the above example, there has recently been thorny debate among researchers over whether Kuwait is a civil or religious state. This debate arose following the decision of the President of Kuwait University, which separated its students according to their gender. The President justified this decision based on Article 2 of the Kuwaiti constitution, which confirms that 'the religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation'.[931] Furthermore,

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[927] Abdullah Juma Al-Haj, 'The Politics of Participation in the Gulf Cooperation Council States: The Omani Consultative Council' [1996] The Middle East Journal 559, 568.
[928] Kuwait National Assembly, 'Election Commission Law' (*KNA,* 27 July 2023) <https://kna.kw/News/NewsDetail/5/22/811> accessed 19 August 2023.
[929] Mahmoud Al-Zahi, 'Article 16 of the Election Commission Is an Attempt to Impose Religious Ideology' (*Alqabas,* 27 July 2023) <https://alqabas.com/article/5917341> accessed 3 August 2023.
[930] *Alsyaaq*, 'The Election Commission Law in Kuwait... a Threat to the State's Civilization or a Course Correction?' (*Alsyaaq,* 2 August 2023) <https://alsyaaq.com/Kuwait-Elections-Law> accessed 15 August 2023.
[931] Mohammed Alhuseny, 'Threatening (Kuwait Civil Society) after Banning Coeducation at the University' (*Independent Arabia,* 16 September 2023) <https://independentarabia.com/node/496476/> accessed 20 September 2023.

Aldaferi clarifies that in addition to Article 2 of the Kuwait Constitution 1962, the Universities and Higher Education Institutions Law 1996 confirms the separation of students in universities.[932] Hence, his decision was lawful.[933] Interestingly, in 2015, the Constitutional Court issued a decision clarifying the vagueness of the law of 1996, wherein the court confirmed that Islamic law represents the very core of Kuwaiti society, and what is meant by separating students is the division of students within the same hall based on their gender.[934] This court decision, regardless of its legal or even political dimensions, confirms the extent to which the legal system in the State of Kuwait is influenced by Islamic law. It should also be noted that the Law of 1996, as well as the Kuwaiti Constitution, was issued in alignment with the desires of citizens, since Kuwait is the only State in the Gulf to have a full democratic Parliament that is elected by the people.

Clearly, therefore, Sharia law continues to play a fundamental role in the legal systems of the GCC States. However, earlier instances affirm its misapplication, manifested in a lack of clarity regarding the concept of Sharia and the scope of its influence. The above example of the proposed Election Law, which requires candidates to adhere to the teachings of Sharia law, confirms this approach, especially in that the proposed legislation will effectively exclude non-Muslim citizens, who do not constitute a numerical majority but social minority in Kuwait.[935]

From the above, the prevailing notion that Saudi Arabia and Qatar present the strictest model of Sharia law application among the Gulf States is challenged by the evidence from Kuwait. While Saudi Arabia and Qatar have a reputation for strict Sharia law enforcement, Kuwait's practices indicate that it may be the most stringent Gulf State in this regard. The Kuwaiti approach to Sharia law is demonstrably influenced by the relative freedoms enjoyed by its citizens. The Kuwaiti National Assembly, directly elected by the populace, serves as a crucial mechanism for expressing the citizenry's desires regarding the application of Sharia principles. This level of transparency is notably absent in other member states of the Gulf Cooperation Council (GCC) that lack elected legislatures. Consequently, it is challenging to gauge the level of public interest in the implementation of full or partial Sharia law in these countries. Moreover, it is clear from

[932] Law No 26 of 1996 on Universities and Higher Education Institutions.
[933] Alhuseny (n 931)
[934] Kuwaiti Constitutional Court, Appeal No 13/2015.
[935] Faisal Mukhyat Abu Sulaib, ‘Christians in Kuwait: A Challenge for Political Tolerance’ (2022) 29 Middle East Policy 121, 126.

the foregoing that all the GCC States consider Sharia to be a primary source of legislation, in addition to other sources such as laws issued by the legislative authority – with the exception of Saudi Arabia. However, the application of Sharia appears to be limited to certain domestic laws, as in the case of family disputes. In controversial issues like usury and the appointment of women as arbitrators, the practices of the GCC States show flexibility in their application of Sharia. Therefore, the notion that Sharia hinders the enforcement of arbitral awards in the GCC States can be challenged. Having provided a nuanced understanding of Sharia, its components, and its application in this chapter, the next chapter will examine the practices of the courts in the GCC States regarding public policy exception and international commercial arbitration in greater depth before fully exploring the nuanced role of Sharia in the public policy exception.

5.7 Conclusion

Sharia has played a crucial role in the Arabian Peninsula, functioning not only as a religion but also as a legal system. It confirmed pre-Islamic arbitration practices and endorsed arbitration in its primary sources. While Sharia did not extensively regulate arbitration in its main sources, Islamic schools of jurisprudence contributed to the development of arbitration, culminating in what is known as Islamic arbitration.

Sharia has maintained its influence over time in Islamic countries, particularly in the Gulf Cooperation Council (GCC) states, where constitutions often designate Sharia as a primary source of legislation. However, these states do not adopt a specific school of jurisprudence. This lack of a unified school leads to inconsistencies in applying Sharia, as different schools hold varying interpretations on legal matters.

Moreover, there is widespread confusion among non-Muslim scholars regarding the terms Sharia and jurisprudence (*Fiqh*). Sharia does not necessarily conflict with arbitration or the implementation of arbitral awards unless there is a clear violation of fundamental Sharia principles. In contrast, *Fiqh* differs across the schools of jurisprudence and could hinder the enforcement of arbitral awards, especially in controversial maters such as the appointment of women and non-Muslims as arbitrators. Hence, practices in the GCC States affirm the legitimacy of appointing women and non-Muslims as arbitrators. Thus, it could be said that Sharia does not negatively affect arbitration.

The degree of application of Sharia principles varies amongst the Gulf states. Despite their constitutions designating Sharia as the foundational legal framework, a fully and comprehensive implementation across the region is not currently observed. Current practices indicate a decline in the role of Sharia in most GCC States. Therefore, it is inaccurate to assert that all arbitral awards conflicting with Sharia will be refused enforcement in the GCC States.

Chapter 6 Practices of the Courts in the Gulf Cooperation Council (GCC) States When Interpreting the Term 'Public Policy'

6.1 Introduction

Courts play a crucial role in resolving ambiguities within local legislation. In the Gulf Cooperation Council (GCC) States, their constitutions expressly empower local courts to interpret domestic legislation and provide clarification for vague legal terms as explained in Chapter 1.[936] Notably, the concept of 'public policy' remains undefined by most of the GCC legislatures. This deliberate omission creates a space for, and grants discretion to, local courts in determining the parameters of public policy within specific contexts. Consequently, GCC courts exercise their interpretive authority to construe and apply the concept of public policy, both in the context of domestic legislation and during arbitration proceedings. Local legislations within the GCC States, in accordance with the New York Convention 1958, permit courts to invoke the public policy exception at any stage of the recognition and enforcement process.

This chapter delves into the role of GCC courts in interpreting the public policy in ICA, aiming to provide a comprehensive analysis and clarification of how the courts in the GCC States interpret and apply public policy exception. It commences with an overview of the judicial system within the GCC States, including a historical examination of the development of local courts and GCC arbitration centres. Following this, the chapter analyses specific instances where local courts have invoked the public policy exception. Furthermore, a critical examination is undertaken of situations where the legislature has implied the application of public policy, but the courts have yet to address them. Additionally, the chapter identifies and analyses the challenges and obstacles faced by GCC courts when interpreting public policy.

The ultimate goal of this chapter is to explore the methods employed by GCC courts in interpreting and applying public policy, while also examining the relationship between Sharia principles and public policy as grounds for refusal of recognition and enforcement of arbitral awards.

[936] See page 8.

6.2 Sharia and Dispute Resolution Systems in the GCC States

Building upon the analysis of the intersection between Sharia and the legal systems of GCC states in the preceding chapter, this section delves into the intersection of Sharia and the framework of dispute resolution mechanisms within GCC States. As will be demonstrated, while these systems initially functioned according to Sharia principles, the inherent limitations of Sharia law narrowly construed and the exigency to address contemporary issues necessitated the introduction of legislative reforms. Subsequently, the chapter will illustrate several instances where the courts have applied public policy considerations to arbitral awards and decisions that contravene Sharia principles.

6.2.1 *Sharia and the Judicial System in the GCC States*

The judicial system in each GCC country is divided into three levels: the courts of first instance (trial courts), the courts of appeal, and the supreme courts.[937] Trial courts hear cases at the preliminary level, while courts of appeal review the decisions of the lower courts, and supreme courts are the highest courts in the judicial system, with the power to overturn decisions of the lower courts.[938] In fact, the GCC States share many legal aspects. This means that they have several aspects in common, for instance, they all consider Sharia as a main source of legislation. However, in addition to Sharia, while some GCC States, like Kuwait and Bahrain, primarily base their legal systems on civil law, influenced by the Egyptian legal system as explained in Chapter 2.[939] Others like Saudi Arabia and Qatar base their legal system purely on Sharia law. By reviewing the constitutions of the GCC States, it can be said that the influence of Sharia varies among the GCC States. While other states incorporate Sharia to a lesser extent, Saudi Arabia adheres to a stricter approach.

It should be noted that, given the historical development of the judicial system in the GCC States, especially before their independence, the Saudi judicial system was considered less developed compared to its counterparts in the Gulf before their current independence. For example, when the Kingdom of Saudi Arabia was originally established, its geographical borders did not exceed Riyadh; its judicial system was simpler than that of the Hejaz (Mecca and Medina), which had a modern judicial system with litigation at three levels. The reason for the more advanced development of the judicial system in

[937] Zain Al Abdin Sharar and Mohammed Al Khulaifi, 'The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis' (2016) 46 Hong Kong Law Journal 529, 532.
[938] ibid 533.
[939] See pages 39 and 44.

Hejaz was due to the impact of the Ottoman Empire, which controlled the area. The Hejaz applied the Ottoman judicial system until the establishment of the Saudi state.[940] In contrast, the initial Saudi legal system was primarily based on Sharia, wherein it is not permissible to appeal decisions issued on the basis of a fair trial that does not violate Sharia.[941] Although this principle has legal considerations, it raises some doubts about its effectiveness. For example, what guarantees are there that the trial was fair? Clearly, challenging the fairness of a trial or the impartiality of a judge should lead to a review of the entire case. Therefore, it is conceivable that applying this principle to contemporary disputes can be challenging.

In 1926, the Saudi King issued the first law regulating the country's judicial system. Accordingly, two judges were appointed to settle all State disputes. The judges' rulings were final and could be appealed before the ruler. Following this law, further regulations were issued that witnessed development in Saudi Arabia's judicial system.[942] In the early 2000s, the Kingdom undertook extensive reforms to its legislation and local laws as a result of public pressure for modernising legislations, the most prominent of which consisted of reforms to the country's judicial law.[943] As a result, the Judicial Law of 2007 was issued to regulate and grant more independence to the judiciary. In addition to dividing the judiciary into three levels, as is common in other GCC States, one of the most significant outcomes of this law is the clarification of the role of each court and the designation of specific courts to handle particular types of disputes.

While each member state of the GCC has its own judicial system and regulations, there is a high degree of convergence between them. For instance, no judicial system in the GCC considers precedents as binding authority. Moreover, the GCC States have all adopted the same procedures for implementing foreign arbitral awards, and this is confirmed by local laws, the Riyadh agreement of 1983 and the GCC's Unified Arbitration Law of 2012. In addition, with regard to the appointment of judges, the laws of the GCC States all stipulate the same procedures and conditions. Also, Sharia plays

[940] William Ochsenwald, *Religion, Society, and the State in Arabia: The Hijaz under Ottoman Control, 1840-1908* (Ohio State University Press 1984), 121.
[941] Mohammad Bashayreh, 'The Authority of Judges under Shariah: Perspectives on Recent Legal Reforms in Saudi Arabia' (2022) 18 J. Int'l L. Islamic L. 42, 52.
[942] Ahmed A Al-Ghadyan, 'The Judiciary in Saudi Arabia' (1998) 13 Arab LQ 235, 236.
[943] Pekka Hakala, 'Cautious Reforms in Saudi Arabia' [Briefing Document] (Think Tank: European Parliament 2013), 1-2.

crucial role in the judicial system as a ground to refuse the recognition and enforcement of arbitral awards.

However, it should be noted that the laws of the GCC States have witnessed various amendments since their initial issuance. Nevertheless, these amendments have tended to be about establishing further judicial departments to facilitate litigation procedures. Perhaps the most prominent amendments refer to the contemporary trend in some GCC States regarding the conditions for appointing judges. In other words, when the laws regulating the judicial system were initially issued, the requirement at the time was for the judge to be male. Thus, the position of judge was restricted to men. For instance, the Federal Law of 1983 in the UAE, and the Saudi Judicial Law of 1975 required the judge to be male and Muslim.[944] Some justify this trend as an affirmation of the commitment of the GCC States to Sharia law as the primary source of legislation.[945] Nevertheless, although Sharia is still a primary source of legislation in the GCC States, a contemporary trend has emerged towards appointing women to the GCC courts as judges. As a result, some GCC States have amended their laws governing the conditions for appointing judges, including the required gender for judges. Consequently, the first female judge in the GCC States was appointed in 2006, specifically in the Kingdom of Bahrain.[946]

It is worth noting that the only countries to date among the GCC States where a woman has not been appointed as a judge are Saudi Arabia and Oman.[947] Some justify this as their adherence and commitment to Sharia law. Since Saudi Arabia is considered to be the most stringent model of the application of Sharia law, and it is argued that Sharia does not permit the appointment of women as judges.[948] However, other scholars argue that the non-appointment of women as judges in countries such as Oman is due to social rather than religious reasons,[949] especially since the Omani constitution affirms in its Article 12 that 'justice, equality, and equal opportunities between Omanis are pillars of the society

[944] Article 18, Federal Law No 3 of 1983 of the United Arab Emirates; Article 37, Saudi Judicial Law of 1975.
[945] Ahmad Aldaferi, 'The Role of Women in the Arabic Jurisdiction: A Review of the Legal and Social Status of Women in the Arab World' (2023) 9(1) Journal of Legal Studies & Research 113, 114.
[946] Mona Abbas Fadhl, 'Bahraini Women and Their Position in the Reform Process' (*Arab Reform Initiative*, 2008) <https://arab-reform.net/publication/bahraini-women-and-their-position-in-the-reform-process/> accessed 10 May 2009.
[947] All laws of the Gulf countries have been amended regarding the conditions for appointing judges. Therefore, there is no Article explicitly requiring the judge to be male. These amendments have included the UAE Law of 1983 and the Saudi Law of 1975.
[948] Amnah Abahussain, 'The Rising Tide of Change: Saudi Arabian Women in Dispute Resolution' (2018) 73 Dispute Resolution Journal 91, 103.
[949] OCHR Oman, 'Women in the Judiciary' (*Omani Centre for Human Rights*, 10 August 2020) <https://ochroman.org/2020/08/womenjudiciary/> accessed 12 October 2023.

guaranteed by the state'.[950] Furthermore, some authors attribute the failure to appoint women as judges to the weak level of transparency and fairness in judicial appointments and low commitment to gender equality in the national legislation and policy framework.[951]

One of the most prominent features of the laws regulating the judicial authority in the GCC States is their inability to consider sovereign disputes. For example, the local courts are not entitled to hear disputes related to nationality. In addition, there is a deficiency in the independence of the judiciary in the GCC States as it will be discussed in Section 6.7.5,[952] whereby the powers of the executive authority overlap those of the local courts. According to the local laws, judges are appointed by Ministers of Justice in the GCC States, who are considered as members of the executive government. This practice clearly represents a violation of the principle of separation of powers. However, before examining the courts practices it is necessary to examine the relationship between Sharia and public policy.

6.2.2 *Sharia and the Public Policy Exception*[953]

As has been argued in the preceding chapter,[954] and reiterated in the preceding section,[955] the legal and dispute resolution systems of the GCC States are deeply rooted in Sharia principles. Chapter 2 has provided an overview of the framework for international commercial arbitration in GCC States. An important aspect of these frameworks is that they all incorporate the recognition and enforcement framework set out in the New York Convention 1958.[956] Having understood the centrality of Sharia in the legal systems of these States, this section delves deeply into its role in determining the scope of the public policy exception.

[950] Omani Constitution of 1996.
[951] Economic and Social Commission for Western Asia (ESCWA), 'Women in the Judiciary in the Arab States: Removing Barriers, Increasing Numbers' (January 2019). <http://www.unescwa.org/sites/default/files/pubs/pdf/women-judiciary-arab-states-english_0.pdf> accessed 18 March 2024, 39.
[952] See page 232.
[953] The relationship between Sharia Law and arbitration in the GCC States is examined in Chapter 5. However, this section presents some cases where the GCC courts have invoked Sharia as public policy, in order to refuse to enforce arbitral awards and contracts.
[954] See page 133.
[955] See page 167.
[956] See page 26.

There is no gainsaying that arbitral awards that breach Sharia rules might not be recognised or enforceable.[957] In this light, contracts resulting from the sale of pork, wine, and musical instruments, for example, could be construed as contravening public policy with the effect that recognition and/or enforcement may be refused.[958] In Kuwait, the Court of Cassation affirmed that '*it is considered contrary to public policy to agree on usurious benefits in civil transactions, or debt arising from gambling, or from selling alcohol and drugs which conflict with Sharia*'.[959] It is, however, imperative to highlight the vagueness of Sharia as a concept, as argued in Chapter 5.[960] This vagueness plays a role in narrowing or expanding the scope of public policy, which impacts on recognition and enforcement. Chapter 5 argues that Sharia can be construed in a narrow or broad sense. In its narrow sense, Sharia refers to the Qur'an and the Sunnah, whereas the broad sense also includes the *Fiqh*. While the Qur'an and Sunnah are constant, *Fiqh* varies depending on the Islamic school of jurisprudence to which an adherent adheres.[961]

In fact, the development of jurisprudence and the various schools of jurisprudence led to the emergence of many jurisprudential and Sharia rules. This led to an expansion of the application and interpretation of Sharia, especially since the rules of jurisprudence varied depending on place and time. Lombardi attributes the wide range of interpretations applied to Sharia to the differing viewpoints of schools of jurisprudence on the same issues, and the absence of a formally codified Sharia legal code.[962] Unsurprisingly, Balouziyeh is of the view that

> [i]nterpreting and predicting how a Saudi judge or arbitrator will apply Sharia remains difficult and somewhat evasive. Whereas some Sharia principles are well-established principles rooted in tradition, others are subject to a judge's individual view or considerations as to fair application under equity.[963]

By this, Balouziyeh impliedly refers to the role that the *Fiqh* plays in the influencing the judge's view. Two cases from Saudi Arabia illustrate this broad approach to the

[957] Saud Al-Ammari and A Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30 Arbitration International 387.
[958] Naif S Al-Shareef, 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal under Article (V) of the New York Convention of 1958.' (PhD thesis, University of Dundee 2000).
[959] Court of Cassation, Case No 835/2005.
[960] See page 133.
[961] See page 147.
[962] Clark B Lombardi, 'Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State' (1998) 37 Columbia Journal of Transnational Law 81.
[963] John Balouziyeh, 'Saudi Arabia's New Arbitration Law Sees More Investors Opting for Arbitration in Saudi Arabia' (*Kluwer Arbitration Blog*, 2013) <http://arbitrationblog.kluwerarbitration.com/2013/05/29/saudi-arabias-new-arbitration-law-sees-more-investors-opting-for-arbitration-in-saudi-arabia/> accessed 8 February 2021.

interpretation of Sharia rules. In the first case,[964] the dispute related to a contract where the defendant was compelled to provide the claimant with a specific type of tobacco. Since the defendant had violated this contract, the claimant filed a lawsuit. However, the competent court subsequently rejected the claim and decided that the contract was incompatible with Sharia, reasoning that Sharia texts, derived from the Quran, and the principles of *Hanbali* school of jurisprudence clearly prohibit substances and activities that harm the body, such as hookah pipes and recreational drugs.[965]

In another case, [966] the dispute concerned a commercial contract whereunder the claimant had rented a barber shop to the defendant. Due to the defendant's breach of contract, the claimant resorted to litigation to recover the unpaid rent and additional compensation. The defendant objected to the legality of this contract, citing his new knowledge after signing the contract that operating a barber shop contravened the principles of Islamic law according to *Hanbali* school of jurisprudence.[967] It is interesting that the judges who issued these decisions were both suspended, and also that the Supreme Court decided to overturn their decisions and reconsider the cases.[968] This demonstrates that there is room to limit the broad application of Sharia even in the strictest of GCC States as explained in Chapter 5.[969] Considering the role of judges in applying the *Fiqh*, Reem stated:

> Judicial work is an institutional act that leaves no room for the individual's opinion regarding the direction of the institutional system, which is based on the country's legislation, principles and decisions, and it rejects rulings by individuals, such as prohibiting tobacco and shaving.[970]

It should be noted that in both cases, the claimants affirmed that they obtained licenses from the competent authority to practice their commercial activities, however, the court of first instance courts dismissed their claims. This raises serious doubts about the practices of the courts in some GCC States when it comes to the application of Sharia as a ground for refusal.

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[964] Saudi General Court Civil Circuit Case No 261/S/2019 issued in 2020.
[965] Ibid.
[966] Saudi General Court Civil Circuit Case No 182/S/2018 issued in 2019.
[967] Ibid.
[968] Reem Krimly, 'Saudi Arabia Suspended Two Judges for Issuing Controversial Rulings, Prohibiting Mu'assel (Shisha Tobacco) and Shaving' (*Alarabiya*, 2020) <https://english.alarabiya.net/News/gulf/2020/11/17/Saudi-Arabia-suspends-two-judges-for-prohibiting-shisha-tobacco-shaving> accessed 1 February 2023.
[969] Several cases within the GCC suggests a potential retreat from and inconsistent application of Sharia principles. A prime illustration is the establishment of the first alcoholic beverage retail outlet in Saudi Arabia as discussed in Section 5.6. It is noteworthy that all GCC States, with the sole exception of Kuwait, authorise the sale of alcohol, albeit subject to imposed limitations. See page 152.
[970] Krimly (n 968)

Although these cases are not directly related to international commercial arbitration, they support the argument that any dispute involving the trade of goods that are forbidden by the principles of Sharia as stated in the Qur'an and Sunnah, such as tobacco or pork, may be refused enforcement. Notably, these cases illustrate that some Saudi courts adopt an expansive interpretation of Sharia by enforcing the most stringent or extreme perspectives of some jurisprudence schools, rather than those of other schools that exhibit greater flexibility.

Given the foregoing, it is necessary to explain in more detail what is considered as 'public policy' under Sharia and how this may be given a broader interpretation than required. Given that the thesis is concerned not with litigation but with arbitration, the relationship between public policy and Sharia will be examined within the arbitration context. GCC States have all adopted the same procedures for implementing foreign arbitral awards, and this is confirmed by local laws, the Riyadh agreement and the GCC's Unified Arbitration Law of 2012. In addition, Sharia plays crucial role in the refusal to recognise and/or enforce arbitral awards. The following sub-sections will analyse instances where public policy was invoked under Sharia, namely, *Riba*, loss of profit, the arbitrator's gender, and awards issued by non-Muslims.

6.2.2.1 Riba

Riba is an Arabic term that translates to 'increase' or 'excess'.[971] In Islamic law, it refers to transactions involving inequitable exchanges or unjust charges, particularly in the context of lending and borrowing.[972] It is also called usury, or the charging of unreasonable interest rates.[973] *Riba,* comes in various forms. In addition to the traditional forms already identified, for most Islamic jurists, it also takes the form of the simultaneous exchange of goods in unequal quantities or of uneven quality.[974] Ayub defines *Riba* as any extra amount added to the principal sum in a contractual obligation,

[971] Farooq Aziz and Tasneem Fatima, 'Qur'Anic Concept of Al-Bay & Al-Riba' (2012) 1 International Journal of Independent Research and Studies 118, 120.
[972] Wayne AM Visser and Alastair Macintosh, 'A Short Review of the Historical Critique of Usury' (1998) 8 Accounting, Business & Financial History 175, 175.
[973] Some Gulf countries have laws that set a maximum limit for commercial interest rates. For example, in Kuwait, the maximum interest rate is 7% (Kuwait Trade Law (68/1980), art 102). In the UAE, the maximum interest rate is 9% (UAE Commercial Transactions Law 2022, art 72). In Oman, the maximum interest rate is 10% (Oman Royal Decree No 114/2000 issuing the Banking Law, art 61). Therefore, any interest rate that exceeds the permissible limit is considered unreasonable. Meanwhile, in the rest of the Gulf countries, the interest rate is not fixed. Therefore, legislation has allowed local courts to determine when an interest rate is unreasonable.
[974] Talib Siraaj Abdus-Shahid, 'Interest, Usury and the Islamic Development Bank: Alternative, Non-Interest Financing' (1984) 16 Law & Policy of International Business 1095.

where the increase is not substantiated by a corresponding rise in effort, goods, risk, or expertise.[975] The charging or payment of interest is classified as *Riba*, as it constitutes exploitative and unjustified financial gain. *Riba* is explicitly prohibited under Islamic law, as evidenced by the Prophet's Hadith: '*Allah has cursed the one who consumes Riba, the one who provides it, the one who records it, and the two who witness it*'[976]

The concept of *Riba* extends beyond interest on loans and encompasses other forms of inequity. For instance, many Islamic jurists identify another form of *Riba* in the immediate trade of goods that are unequal in quantity or quality as it will be seen in this chapter. [977] Such transactions are also prohibited under Islamic principles. [978] Nevertheless, the underlying principle remains the prevention of unfair practices, ensuring that all transactions are conducted with fairness, transparency, and mutual consent. In this context, Ayub believes that the primary objective of the prohibition of *Riba* under Sharia law is to prevent practices that facilitate the concentration of wealth in the hands of a limited group, whether these entities are financial institutions such as banks or private individuals.[979]

In Islamic finance, *Riba* is primarily divided into two categories, each defined by specific characteristics and prohibited under Islamic law. These categories, along with the stance of the GCC courts on awards involving *Riba*, will be examined in the following sections.

6.2.2.1.1 Riba al-Fadl

Riba al-Fadl arises in a sale or exchange contract when goods of the same type are traded in unequal quantities or qualities.[980] This results in an unfair advantage or unjust gain for one party. This form of *Riba* arises in situations where the exchange involves commodities like gold, silver, or other tradeable goods that are not equivalent in value or amount.[981] Islamic law prohibits such exchanges because they result in exploitation, where one party benefits unfairly from an unequal transaction. For example, if one person exchanges 1 kg of gold for 1.5 kg of gold or 1 bushel of wheat for 1.2 bushels, the

[975] Muhammad Ayub, *Understanding Islamic Finance* (John Wiley & Sons 2009) 45.
[976] Sahih Muslim 1598
[977] Muhammad Imran Ashraf Usmani, *Meezan Bank's Guide to Islamic Banking* (first edition, DARUL - ISHAAT KARACH 2002) 50; Mohammad H Fadel, 'Riba, Efficiency, and Prudential Regulation: Preliminary Thoughts' (2007) 25 Wis. Int'l LJ 655, 690.
[978] Ibid.
[979] Ayub (n 975) 55.
[980] Ziaul Haque, 'Some Forms of Ribā Al-Faḍl in Trade and Commerce' (1983) 22 Islamic Studies 73, 78.
[981] Shehu UR Aliyu, M Ahmad and Safiyya A Abba, 'Ills of Riba: Jurisprudential and Contemporary Evidences' (International Institute of Islamic Banking and Finance 2014) 469.

exchange is considered invalid and constitutes Riba al-Fadl. Such transactions are forbidden as they create an imbalance in trade, undermining the principles of fairness and justice central to Islamic economic ethics. This prohibition is based on the following Hadith: '*Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt, like for like and equal for equal, payment being made hand to hand. If these classes differ, then sell as you wish if payment is made hand to hand'*[982]. This Hadith establishes a fundamental principle of equitable exchanges in Islamic law, prohibiting unjust enrichment and exploitation in commercial transactions. It stipulates that when goods of the same type are exchanged—such as gold for gold or wheat for wheat—the exchange must occur in equal quantities and be conducted immediately, on a hand-to-hand basis. However, when goods of different types are exchanged—such as gold for silver or wheat for dates—the requirement for equal quantities does not apply, allowing flexibility in the terms of exchange.[983]

It is important to note that there is significant debate among Islamic scholars regarding the specific commodities that fall under the prohibition of Riba. Scholars of the Hanbali school assert that this category of *Riba* applies exclusively to the commodities explicitly mentioned by the Prophet [PBUH] in the cited Hadith.[984] Accordingly, they maintain that *Riba* does not apply to transactions involving commodities not mentioned in the Hadith.[985] Conversely, scholars from other schools of Islamic jurisprudence argue that this type of *Riba* extends to all commodities, provided that these commodities are lawful for trade under Islamic law.[986] It should be noted that transactions and contracts involving items explicitly prohibited in Islam, such as pork and alcohol, are impermissible in general and, therefore, do not fall within the scope of valid trade or the application of *Riba* principles.[987]

This thesis supports the broader view for several reasons. First, the *Hanbali* interpretation is impractical and could lead to violations of Sharia principles. For instance, under the *Hanbali* perspective, it would theoretically permit unequal exchanges of commodities not explicitly mentioned in the *Hadith*, undermining the fundamental principles of equity and fairness in trade. Second, restricting the application of the *Hadith* to specific commodities

[982] Sahih Muslim 1587
[983] Khalid Zaheer, ' Why Is Riba Al-Fadl Unacceptable?' (KhalidZaheer, March 2019) <https://www.khalidzaheer.com/why-is-riba-al-fadl-unacceptable/> accessed 28 December 2024.
[984] M Umer Chapra, 'The Nature of Riba in Islam' [2008] Millah: Journal of Religious Studies 8.
[985] ibid 18.
[986] Qazi Irfan, 'Riba and Hadith of Six Commodities' [2011] Available at SSRN 1790222 8.
[987] Azman Mohd Noor, 'SharĪ'ah Issues In Gold Trading And Gold Related Scam Schemes' [2017] Al-Shajarah: Journal of the International Institute of Islamic Thought and Civilization (ISTAC) 61, 83.

reflects a narrow interpretation that fails to account for the dynamic and evolving nature of Islamic legal principles. Sharia aims to provide comprehensive guidance adaptable to contemporary contexts, including newly emerging forms of trade and assets. Therefore, it can be concluded that unequal exchanges of commodities of the same kind are not permissible under Islamic law. This broader interpretation allows for the application of *Riba* principles to modern assets, such as cryptocurrencies, where transactions involving unequal amounts of the same type of digital currency would similarly fall under the prohibition of Riba.[988]

6.2.2.1.2 Riba al-Nasiyah

Riba al-Nasiah occurs in loan contracts when interest is charged on loans or credit transactions due to a delay in repayment.[989] This form of *Riba* also arises when a lender charges additional amounts for the extension of time granted to repay a debt.[990] In essence, it involves a financial arrangement where the lender profits from the mere passage of time, rather than from any productive activity or risk-taking. This type of *Riba* is most commonly seen in conventional lending systems, where interest is added to the principal amount based on the length of time the borrower takes to repay.[991] For example, if a person borrows money from a financial institution and the repayment is delayed, the lender charges interest on the overdue amount, which is considered *Riba al-Nasiah*.

This form of Riba constitutes an increment over the principal amount of a loan or debt that becomes payable. It pertains specifically to loan or credit transactions, where money is lent with the understanding that the borrower will repay the principal amount at the end of the agreed period, along with an additional sum as compensation for the deferment of payment. In modern financial systems, the interest charged in banking transactions falls squarely within the scope of *Riba Al-Nasiah*.

6.2.2.1.3 The Prohibition of Riba and the GCC States' Position

[988] Saleh Nawaz Khan, 'The Legality of Cryptocurrency from an Islamic Perspective: A Research Note' (2023) 14 Journal of Islamic Accounting and Business Research 289, 292.
[989] Abdirahman Muse Abdi, 'Riba in Transactions: Negative Implications and Imperativeness of Its Elimination' 9.
[990] MK Kareem, 'Time Value of Money and the Chronological Revelations on Riba in the Quran' 35.
[991] Diana Carina Azoitei, 'Critical Analysis of the Contemporary Application of Riba in Islamic Banking' (2020) 16 J. Int'l L. Islamic L. 76, 78.

Riba, as explained earlier,[992] often defined as interest or usury, is categorically forbidden in Islam due to its exploitative nature and the detrimental socioeconomic consequences it causes. Islamic teachings highlight that *Riba* results in unjust enrichment without corresponding productive contribution, thereby exacerbating economic inequality and fostering social injustice. This prohibition is firmly rooted in the Quran and Hadith, which condemn *Riba* as a practice that consolidates the wealth of the affluent while disadvantaging the economically vulnerable, thus undermining the core Islamic principles of fairness and equity. For example, the Qur'an explicitly forbids Riba, stating: *'O you who have believed, do not consume usury, doubled and multiplied, but fear Allah that you may be successful.*'[993] Additionally, Allah says in the Qur'an: '*God has allowed trade and forbidden Riba'*.[994] Similarly, the Prophet Muhammad [PBUH] also condemned *Riba* in his teachings, stating: '*The Messenger of Allah cursed the one who consumes Riba, the one who gives it, the one who writes it down, and the two who witness it*'.[995]
Moreover, *Riba*-based transactions are criticised for their inefficiency in capital allocation, as they prioritise guaranteed returns over productive and sustainable investments.[996] This approach stifles genuine economic progress and hampers long-term development. [997] By prohibiting *Riba*, Islamic finance aims to foster risk-sharing, encourage entrepreneurial activity, and promote social justice, ensuring that economic activities align with the ethical and moral framework espoused by Islamic principles.

As Sharia serves as the primary source of legislation in the GCC States, as detailed in previous chapters, numerous local laws within the GCC explicitly prohibit the practice of Riba. In Kuwait, the legislator has explicitly prohibited *Riba*, with Article 305 of Kuwait's Civil Law stipulating that '*any agreement to charge interest in exchange for the use of a sum of money or in return for delay in fulfilling its obligation is null*'.[998] This Article has likewise been adopted in the legislation of most of the GCC States, especially the UAE,[999] Bahrain,[1000] and Oman.[1001]

[992] See page 173.
[993] Hoy Quran verse 3:130
[994] Holy Quran verse 2:275
[995] Sahih Muslim 1598
[996] Muhammad Wajid Raza, Syed Farhan Shah and Malik Rizwan Khurshid, 'Islamic Banking Controversies and Challenges' (2012) 03 Interdisciplinary Journal of Contemporary Research in Business 1018, 120.
[997] Zeeshan Rais Khattak, 'Impact of Riba Based Transactions on the Socio-Economic System of Pakistan' [2024] Available at SSRN 5012906 46.
[998] Kuwait Civil Law of 1980.
[999] Article 1118 of Federal Law No 5 of 1985 on the Civil Transactions Law of the UAE.
[1000] Article 491 of Royal Decree No 19 of 2001 on the Civil Law of the Kingdom of Bahrain.
[1001] Article 784 of Sultani Decree No 29 of 2013, promulgating the Civil Transactions Code.

Significantly, the four main Islamic schools of jurisprudence have different approaches to *Riba.*[1002] For instance, in *Hanbali,* acknowledged as the strictest school of Islamic jurisprudence,[1003] usury is considered to be a matter that violates Sharia principles.[1004] Meanwhile, other schools of jurisprudence, such as *Hanafi* and *Shafai,* affirm that usury is only invoked when both parties to the contract are Muslim.[1005] Walid and Ahmed believe that the broad consensus on the prohibition of usury 'does not mean that Islamic schools of law share the same view on Usury; On the contrary each school and practically every scholar has an individual view'. [1006] The above authors conclude that 'this has made the *Riba* issue one of the most debated in Islamic Jurisprudence'.[1007]

In contemporary international arbitration practice, arbitral awards typically include an interest amount in addition to the primary damages to be paid to the winning party. This raises an important question: will GCC courts recognise and enforce arbitral awards that include *Riba*? According to Roy[1008] and El-Ahdab, 'arbitral awards containing *Riba,* or usurious transactions will not be enforced by Islamic courts'.[1009] In Egypt, the Court of Appeal invalidated a contract in which the interest rate exceeded 7%, considering it to be a violation of public policy.[1010] Nevertheless, it should also be noted that 'excessive interest' not only violates public policy in Islamic countries, such as the GCC States, but also in non-Islamic jurisdictions. For instance, in *Buyer (Austria) v Seller (Serbia and Montenegro*), [1011] the court found that an annual interest rate of 73% with daily capitalisation breached public policy principles of Austrian law on debt. The court concluded that interest should not 'lead to unjust enrichment of the creditor and cannot have a punitive and deterrent function'.[1012] Therefore, the Austrian Supreme Court only

[1002] Although the constitutions of the Gulf countries do not explicitly adopt a specific school of jurisprudence; from court decisions of the GCC States, it may be noted that the provisions of the Hanbali School are the most frequently applied.
[1003] Martin Lewison, 'Conflicts of Interest? The Ethics of Usury' (1999) 22 Journal of Business Ethics 327, 327.
[1004] Ballantyne (n 859) 7.
[1005] Daniel Klein, 'The Islamic and Jewish Laws of Usury: A Bridge to Commercial Growth and Peace in the Middle East' (1994) 23 Denver Journal of International Law & Policy 535.
[1006] Walid Saleh and Ahmad Ajaj, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking* (Brill 1992).
[1007] Ibid.
[1008] Kristin T Roy, 'New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards, The' (1994) 18 Fordham Int'l LJ 920, 922.
[1009] Abdul Hamid El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' (1994) 11 J. Int'l Arb. 87, 109.
[1010] Egyptian Court of Appeal, Case No 502/2021.
[1011] Austrian Buyer v. Serbian and Montenegrin Seller, Oberster Gerichtshof (Austria Supreme Court) 3Ob221/04b (2005)
[1012] ibid.

enforced the core amount awarded by the arbitral tribunal. The court refused to enforce the high interest rate, citing its violation of Austrian public policy.[1013]

In one case,[1014] the Saudi Court of Appeal refused to enforce part of an arbitral award that violated Sharia principles. The dispute concerned a Dutch party (the claimant) who claimed that he had signed a contract with a Saudi party (the defendant), wherein the claimant was obligated to provide the defendant with machinery and engines. According to Article 11 of this contract, in the event of a dispute, arbitration would be the means of its resolution. Thus, the claimant asserted that the Saudi party should pay 2,307,697 Dutch krone plus interest (according to the conditions of the contract). Later, the arbitrator issued the arbitral award in part and in favour of the claimant (the Dutch party), who had applied to the Saudi Court of Appeal (Board of Grievances) for its enforcement. The Saudi party was therefore obliged to pay 2,307,697 Dutch krone, but the court rejected the award of interest on the ground that it would breach public policy in Saudi Arabia.[1015] This decision is considered as one of the most important to be issued by the Saudi Court of Appeal, primarily because it was unprecedented. It was the first instance of a court invoking public policy in the enforcement of an arbitral award, and it was the first partial rejection of a specific element of an arbitral award. It should be noted that the court refused to enforce the interest on the grounds that it breaches public policy, which could be more justified if Sharia were used as the refusal ground. This practice affirms that Sharia and public policy are often intertwined in Saudi Arabia.[1016]

Although Sharia explicitly prohibits *Riba*, some scholars contend that permitting certain types of Riba may be necessary under specific circumstances.[1017] They base their argument on the premise that one of the primary objectives of Sharia is to promote economic prosperity. They assert that imposing strict and widespread prohibitions on Riba could hinder economic progress, thereby undermining the broader objectives of Sharia.[1018]

[1013] The contract in question involved the purchase of mushrooms and included a provision for dispute resolution through arbitration. A disagreement arose when the Austrian buyer did not pay for the received goods. In response, the seller-initiated arbitration proceedings. The arbitral tribunal ultimately awarded the seller 22,500 Deutsche Marks (DM) and mandated the addition of interest calculated at an annual rate of seventy-three percent.
[1014] Board of Grievances, Case No 207/D/2, issued in 1998.
[1015] Ibid.
[1016] Ibid.
[1017] Mahmood Ahmad, 'Critical Study of the Role of Sharia Public Policy in the Recognition and Enforcement of Foreign Arbitral Awards in UAE' (PhD thesis, University of East Anglia 2020) 148.
[1018] Ibid.

Interestingly, this perspective is reflected in the practices of certain GCC courts, which have allowed the enforcement of arbitral awards containing provisions for interest. Such practices can be observed in jurisdictions like Bahrain, Kuwait, and the United Arab Emirates (UAE). In contrast, Saudi courts have not issued similar decisions or permitted the enforcement of such awards. In a contemporary approach, the GCC courts have adopted a different attitude to usury, distinguishing between the interest accrued in civil transactions and the interest resulting from commercial transactions. Consequently, in Kuwait, the Court of Cassation affirmed that the compensations in this claim do not constitute usury but represent commercial debts. Thus, the court enforced arbitral award that involves commercial interest.[1019] However, Saudi Arabia continues to take a more conservative stance regarding usury. In *National Investments v Discovery Trading,*[1020] the defendant claimed that the arbitral award contravened the principles of Islamic law since it involved usury and consequently sought to void the arbitral award. The court affirmed that the award did not involve usury and therefore did not contradict Saudi Arabia's public policy, except in terms of 'compensation for late payment', whereby the court refused to enforce this part of the award because it violated Sharia principles.

While the aforementioned view may have its basis in economic reasoning, it fundamentally contradicts the principles of Sharia. The prohibition of *Riba* is explicitly outlined in the primary sources of Islamic law, namely the Qur'an and Sunnah, as previously explained. Any deviation from these unequivocal injunctions represents a clear conflict with the foundational tenets of Sharia. In this context, Chapra believes

> 'it is difficult to see how anyone could justify interest in an Islamic society. The difficulty to understand the prohibition comes from lack of appreciation of the whole complex of Islamic values, and particularly its uncompromising emphasis on socio-economic justice and equitable distribution of income and wealth. Any attempt to treat the prohibition of Riba as an isolated religious injunction and not as an integral part of the Islamic socio-economic order with its overall ethos, goals and values is bound to create confusion.'[1021]

In fact, contemporary practice has generally given rise to modern concepts that circumvent the concept of usury.[1022] Numerous Islamic jurists have devoted considerable effort to developing methods for incorporating modern economic practices without

[1019] Kuwaiti Court of Cassation, 298/2018.
[1020] Saudi Appeal Court, 1491/2019.
[1021] Chapra (n 984) 10.
[1022] Mervyn K Lewis, 'Comparing Islamic and Christian Attitudes to Usury' (Edward Elgar Publishing Limited Cheltenham 2007).

violating the principles established in the Quran.[1023] One such method to circumvent *Riba* is the use of *Murabaha*,[1024] a Sharia-compliant financing structure that replaces interest with a fixed markup, allowing for the facilitation of credit sales in a manner consistent with Islamic law.[1025] *Murabaha*[1026] is an Islamic financial instrument that is widely accepted across most Islamic schools of jurisprudence as a means of circumventing usury.[1027] This term has been defined as a contract of sale, whereby the bank (first party), at the request of the client (second party), purchases assets from a third party with the aim of reselling these assets to the client (second party) in exchange for a pre-agreed profit margin.[1028] *Murabaha*, commonly known as cost-plus financing.[1029] Unlike conventional interest-bearing loans, *Murabaha* constitutes a permissible form of credit sale under Islamic law.[1030] Similar to a rent-to-own agreement, ownership of the asset is transferred to the purchaser only upon the full repayment of the agreed-upon price, including the markup.[1031] Therefore, it is considered fully compliant with Sharia principles and, as such, arbitral awards or contracts that incorporate the Murabaha financing structure are recognised and enforceable in the GCC States. This is due to *Murabaha's* alignment with Islamic law, which ensures that transactions are free from *Riba* (interest) and other impermissible elements. Consequently, contracts utilising the *Murabaha* system are legally valid and can be upheld within the legal frameworks of the GCC countries,

Consequently, the GCC courts have adopted a new approach regarding the interests of commercial and banking transactions, wherein a transaction is only usurious if the interest exceeds a permissible percentage.[1032] In an application of this approach, the Kuwaiti

[1023] Gilles Kepel, *Jihad: The Trail of Political Islam* (Harvard University Press 2002) 77.
[1024] Michael JT McMillen, 'Shari'ah-Compliant Project Finance: An Overview, Including Structures' (2007) 3 Journal of Islamic Economics, Banking and Finance 1, 32.
[1025] ibid.
[1026] *Murabaha* has been defined by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) as 'the sale of goods at cost plus an agreed profit mark-up' (see Nidal Alsayyed, 'The Uses and Misuses of Commodity Murabaha: Islamic Economic Perspective', MPRA Paper No 20262, posted 27 January 2010 <https://mpra.ub.uni-muenchen.de/20262/>.
[1027] Mezbah Uddin Ahmed, Ruslan Sabirzyanov, and Romzie Rosman, 'A Critique on Accounting for Murabaha Contract' [2016] Journal of Islamic Accounting and Business Research.
[1028] K Chelhi and others, 'Estimation of Murabaha Margin' (2017) 7 Journal of Applied Finance and Banking 49, 50.
[1029] Syed Zahid Ahmad, 'Why Murabaha (Cost-plus Finance) Is Allowed Whereas Lending On Interest Is Prohibited In Islam?' (2013) 30 Journal of Islamic Banking & Finance 20.
[1030] Abdulwahid Hassan, 'The Challenges and Prospects of Islamic Finance in Australia: A Case Study of Murabaha Contract' (PhD thesis, Victoria University 2020) 6.
[1031] DAVID Loundy, 'Islamic Mortgages' [2013] Contemporary Islamic finance: Innovations, applications, and best practices 283, 285.
[1032] Another example of circumventing usury law was affirmed by the US Supreme Court in *Marquette National Bank of Minneapolis v First Omaha National Bank*, namely, by allowing national banks to establish headquarters in States that apply usury laws at different rates: 439 US 299 (1978).

Court of Cassation held that interest sums paid by borrowers to a defendant did not exceed 3% of the total loan and therefore, did not represent serious interest.[1033] Similarly, the Emirati Supreme Court has allowed interest when it is less than the transaction amount.[1034] Meanwhile, in Bahrain, a court confirmed that interest amounting to a total of 5% interest of the value of a transaction did not violate Sharia principles.[1035] This contemporary approach has not only been affirmed by the courts, but also by the governments of GCC States. In 2017, for example, the Bahraini government rejected a proposal by the Bahraini Parliament to ban usurious interest altogether,[1036] with the government stating that 'this prohibition would lead to the collapse of the banking sector in Bahrain'.[1037] Likewise, in Kuwait, Parliament did not approve a legislative proposal to ban usury.[1038]

Indeed, the difficulty in prohibiting usury has led to a contradiction between legislation and court decisions in the GCC States. As highlighted by An-Na'im, in practice, Muslims and their governments routinely charge and pay interest on loans, and conclude and enforce contracts of insurance because a viable economic system is not possible today without these practices.[1039] This paradox inevitably has a direct effect on foreign investment. However, the current practices of the Gulf courts demonstrate a new approach that is more receptive to arbitral awards involving usury, as long as the percentage is considered reasonable or if the awards comply with the *Murabaha* system.[1040] This could be a reaction to the harsh criticism that the GCC States have received for their unfriendly approach to the enforcement of foreign arbitral awards or due to the lack of a codified Sharia. In fact, the approach taken by most GCC courts with respect to usury serves as further evidence supporting the conclusions reached in the preceding chapter regarding the reluctance of the GCC States to comprehensively implement Sharia principles.[1041]

[1033] Kuwaiti Court of Cassation, 105/2019.
[1034] Federal Supreme Court, Case No 831/25 of 2018.
[1035] Supreme Court, Case No 4/05208/2016/02, issued on 13/01/2020.
[1036] Zahra Habib, 'The Government Rejects the "Prohibition of Usurious Interest"' (*Watan*, 2017) <https://alwatannews.net/article/737333/Bahrain/> accessed 26 February 2021.
[1037] ibid.
[1038] Osama Almnawer, 'Proposal to Prevent Usurious Interest' (*Sabr*, 2012) <https://sabr.cc/2012/04/10/52171/> accessed 26 February 2021.
[1039] Abdullahi A An-Na'im, 'Islam and Human Rights: Beyond the Universality Debate', *Proceedings of the ASIL Annual Meeting* (Cambridge University Press 2000), 97.
[1040] Devvrat Periwal and Adil Shafi, 'Charging interest in the UAE' (Lexology, 24 March 2020) <https://lexology.com/library/detail.aspx?g=6e0fd976-ebca-4259-a28c-a9fe1e69644a> accessed 30 April 2024.
[1041] See page 152.

6.2.2.2 Gharar

The prohibition of most unlawful contracts in Sharia is rooted in the principle of preventing unjust enrichment, often described as 'acquiring the wealth of others without just cause'.[1042] This concept aligns with zero-sum exchanges, where one party's gain comes solely at the expense of the other, creating an inequitable, win-lose situation.[1043] Similar to *Riba*, *Gharar* is prohibited under Sharia law due to its potential for harm, specifically its capacity to undermine fairness and transparency in financial dealings. Generally, *Gharar* can be defined as excessive uncertainty or ambiguity.[1044] While some scholars, such as Paldi, have argued that *Riba* may be classified as a form of *Gharar*,[1045] this interpretation is inaccurate. In Islamic finance, both *Riba* and *Gharar* are explicitly prohibited, yet they address distinct concerns.

As explained earlier,[1046] *Riba* refers to the imposition of guaranteed interest on loaned money, which is deemed exploitative and unjust. For instance, the State Bank of Pakistan defines *Riba* as 'any excess compensation without due consideration'.[1047] In contrast, *Gharar* pertains to excessive uncertainty or ambiguity in contractual terms, which can result in unjust enrichment or deceptive practices. As explained by Ayub in his book, *Gharar* is the sale of an object which is not present and thus whose quality of being good or bad is not known to the buyer.[1048]

Although both prohibitions aim to ensure equitable and transparent financial transactions, they serve separate purposes within Islamic jurisprudence. *Riba* governs the ethical dimensions of profits derived from loans,[1049] while *Gharar* addresses the clarity and predictability of contractual obligations.[1050] Therefore, categorising *Riba* as a form of *Gharar* is a mischaracterisation, as each concept is fundamentally distinct

[1042] Sami Al-Suwailem, 'Towards an Objective Measure of Gharar in Exchange' (2000) 7 Islamic Economic Studies 98.
[1043] Mahmoud El-Gamal, 'An Economic Explication of the Prohibition of Gharar in Classical Islamic Jurisprudence' (2001) 8 Islamic Economic Studies 30.
[1044] Waeibrorheem Waemustafa and Suriani Sukri, 'Theory of Gharar and Its Interpretation of Risk and Uncertainty from the Perspectives of Authentic Hadith and the Holy Quran: A Qualitative Analysis' 19.
[1045] Camille Paldi, 'Understanding Riba and Gharar in Islamic Finance' (2014) 2 Journal of Islamic Banking and Finance 249, 250.
[1046] See page 173.
[1047] State Bank of Pakistan, 'Islamic Banking' (SBP, 2016) <https://www.sbp.org.pk/IB/FAQ.asp> accessed 20 December 2024.
[1048] Muhammad Ayub, *Understanding Islamic Finance* (John Wiley & Sons 2009) 58.
[1049] Romi Adetio Setiawan, 'Avoidance of Riba-Based Loans and Enhancement of Quality of Life: An Indonesian Context Analysis' (2023) 14 Religions 1376, 5.
[1050] Yasushi Suzuki, 'A Post-Keynesian Perspective on Islamic Prohibition of Gharar' (2013) 6 International Journal of Islamic and Middle Eastern Finance and Management 200, 208.

Gharar refers to the concept of uncertainty, ambiguity, or excessive risk within contractual agreements, particularly when the essential terms of a contract, such as the subject matter, price, or delivery, are undefined or unclear.[1051] Under Sharia law, contracts that contain significant elements of *Gharar* are strictly prohibited, as they undermine the principles of fairness, transparency, and mutual consent that are fundamental to Islamic jurisprudence.[1052] The prohibition of *Gharar* seeks to prevent disputes, exploitation, and injustice that may arise from uncertain or ambiguous transactions. Examples of *Gharar* are varied but share a common element of excessive uncertainty.[1053] One prominent example involves ambiguity in the subject matter of a contract, such as the sale of an unidentified or undefined item. For instance, an agreement to sell a car from specific garage without specifying which car constitutes *Gharar,* as the lack of clarity could lead to disputes or unfairness. Another example arises when the price in a transaction is not clearly fixed or determinable at the time of the agreement, such as when parties agree that 'the price will depend on market conditions in the future'. This creates uncertainty and undermines the stability of the contractual obligations.

Speculative transactions also fall within the scope of *Gharar*, particularly those involving excessive risk about whether the transaction will materialise.[1054] A common instance is entering into an insurance agreement with vague terms, where neither the risk nor the payout is clearly defined.[1055] Similarly, incomplete information about essential contractual details, such as the quantity or quality of goods being sold, constitutes *Gharar*. For example, agreeing to purchase an unspecified quantity of goods from a seller without defining the terms creates ambiguity and exposes both parties to potential harm.[1056]

Under Islamic jurisprudence, Gharar denotes any element of uncertainty, ambiguity, or significant risk within contractual arrangements. Such practices are prohibited under Sharia law, as they may result in harm, inequity, or exploitation. Gharar is broadly categorised into two forms: *Gharar Fahish*, which represents substantial or excessive

[1051] Md Abdul Awwal Sarker, 'Islamic Business Contracts, Agency Problem and the Theory of the Islamic Firm' (1999) 1 International journal of Islamic financial services 12, 14.
[1052] ibid 15.
[1053] Mahmood M Sanusi, 'Gharar' (1993) 3 IIUMLJ 88, 91.
[1054] Nur Raqibah Rafaheh, 'Smart Contracts and the Possibility of Gharar' (2024) 2 iEco| Islamic Economics Journal 60, 70.
[1055] Ahmad Farikhin and Heni Mulyasari, 'Gharar, Fraud and Dispute in Islamic Business Transaction an Islamic Law Perspectives' (2022) 1 International Economic and Finance Review 40, 48.
[1056] ibid 50.

uncertainty,[1057] and *Gharar Yasir*, which pertains to minor or negligible uncertainty.[1058] These classifications carry distinct consequences in the realm of Islamic finance and commercial dealings.

6.2.2.2.1 Gharar Fahish (Excessive Uncertainty)

Gharar Fahish refers to a degree of uncertainty or ambiguity so significant that it invalidates a contract under Sharia principles.[1059] This form of uncertainty typically occurs when fundamental elements of the agreement—such as the subject matter, price, or terms of delivery—are undefined, ambiguous, or uncertain.[1060] Examples include entering into contracts for the sale of items that do not yet exist, such as unborn animals or unplanted crops, or for goods whose availability or characteristics are indeterminate. Such arrangements are deemed impermissible due to the excessive risk and ambiguity they entail.

Islamic legal scholars unanimously concur that Gharar Fahish is prohibited, as it has the potential to cause disputes and unjust enrichment.[1061] Contracts involving such excessive uncertainty are deemed void, as they contravene the fundamental principles of fairness, transparency, and mutual consent enshrined in Islamic commercial law.[1062] A pertinent example of this prohibition is the invalidation of conventional insurance contracts in numerous Islamic jurisdictions, due to the substantial uncertainty associated with the payment of premiums and the contingent nature of benefit payouts.[1063]

6.2.2.2.2 Gharar Yasir (Minor Uncertainty)

By contrast, *Gharar Yasir* refers to a minimal or insignificant degree of uncertainty that is permissible under Sharia law.[1064] Such minor uncertainty is regarded as inevitable in the majority of commercial transactions and does not render a contract invalid. Examples

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[1057] Wan Marhaini Wan Ahmad, 'Some Issues of Gharar (Uncertainty) in Insurance' (2003) 11 Jurnal Syariah 61, 66.
[1058] ibid 67.
[1059] Mohd Faisal Mohamed and Mualimin Mochamad Sahid, 'Syeikh Daud Al-Fatani's Economic Thought Regarding the Concept of Gharar in the Book of Fiqh Jawi (Sullam al-Mubtadi): Focusing on Akad Mua'wadah' (2019) 7 Malaysian Journal of Syariah and law 25, 26.
[1060] ibid.
[1061] Wan Musyirah Wan Ismail, Ida Rahayu Mahat and Nurul Asma Mazlan, 'Awareness on Prohibited Elements in Muamalat: Common Practice in Life' (2020) 6 Journal of Contempory Islamic Studies 95, 97.
[1062] ibid 98.
[1063] Atikullah Hj Abdullah, 'The Elements of Qimar (Wagering) and Gharar (Uncertainty) in the Contract of Insurance Revisited' (2013) 9 Journal of Islamic Economics, Banking and Finance 89, 98.
[1064] Yousuf Sultan, 'Ribā, Gharar & Maysir: A Review from Classical Shari'ah and Contemporary Implications' 8.

include slight variations in the quality of goods or minor ambiguities regarding the exact timing of delivery

Islamic jurists acknowledge that the absolute eradication of all forms of uncertainty is unfeasible, particularly in contemporary commercial practices.[1065] Consequently, they have adopted a pragmatic stance, permitting transactions involving Gharar Yasir provided that such uncertainty does not result in exploitation or harm.[1066] For example, contracts for the sale of goods based on description, rather than physical inspection, may involve minor uncertainty regarding the precise quality or attributes of the goods. However, such transactions are generally considered valid, provided the contractual terms are adequately clear and specific.[1067]

The differentiation between *Gharar Fahish* and *Gharar Yasir* demonstrates the adaptability of Islamic law in addressing the practical realities of commercial and financial activities.[1068] While Sharia categorically prohibits excessive uncertainty to safeguard parties from injustice and disputes, it permits minor uncertainty to facilitate the effective functioning of trade and commerce.[1069] This distinction highlights the necessity of balancing economic growth with strict adherence to Islamic legal principles. By distinguishing between the two forms of Gharar, Islamic jurists and financial professionals are able to ensure that contractual agreements remain both practical and compliant with Sharia law. This approach promotes transparency, equity, and mutual benefit in commercial transactions while preserving the ethical and moral principles that underpin Islamic finance

6.2.2.2.3 The Prohibition of Gharar and the GCC States' Position

The prohibition of *Gharar* is rooted in the objective of ensuring equitable and transparent transactions that protect the rights and interests of all parties.[1070] By eliminating uncertainty and excessive risk, Islamic law promotes contractual clarity and adherence to

[1065] Nadhirah Nordin and others, 'Contracting with Gharar (Uncertainty) in Forward Contract: What Does Islam Says?' (2014) 10 Asian Social Science 37, 40.
[1066] ibid 45.
[1067] ibid 39.
[1068] Marilyn Siew-Ai Ong and Chun-Phuoc Jeong, 'Commodity Futures Trading: Its Permissibility According to Sunni Traditionalist Ijtihad and Ijtihad Maqasidi' (2012) 13 Int. J. Busin. Soc 93, 101.
[1069] ibid 102.
[1070] Mohammad Ashraful Ferdous Chowdhury, 'Why Islamic Finance Is Different? A Short Review of Islamic Jurisprudential Interpretation about Usury, Ambiguity (Gharar), Gambling (Maysir) and Exploitative Commercial Arbitrage (Talaqi alRukban)' (2015) 3 Journal of Emerging Economies and Islamic Research 69, 78.

ethical principles, thereby fostering trust and integrity within economic dealings.[1071] Unlike the prohibition of *Riba*, which is explicitly addressed in the primary sources of Sharia—the Quran and the Sunnah—there is no direct textual evidence that defines or stipulates the prohibition of *Gharar*.[1072] Instead, Muslim scholars and schools of jurisprudence rely on principles of *Qiyas* (analogical reasoning) and *Ijma* (consensus) to establish its impermissibility.[1073] This is exemplified in the case of gambling, which constitutes a form of Gharar.[1074] The prohibition of gambling stems from the inherent uncertainty and the potential jeopardy it poses to financial resources.

Despite the absence of explicit Quranic or Sunnah-based prohibitions against *Gharar*, there is a near-unanimous consensus among Muslim scholars that *Gharar* is forbidden.[1075] However, ambiguity persists regarding the precise definition and scope of what constitutes uncertainty or risk. Seyadi believes that the issue lies in the lack of a clear definition regarding the degree of uncertainty that renders a transaction invalid under Islamic principles.[1076] Some scholars, such as Al-Saati, have sought to narrow these definitional gaps to facilitate clearer applications in Islamic law.[1077] Many scholars agree that *Gharar* occurs when there is an excessive level of risk or uncertainty.[1078]

Some scholars like Nor and Fidhayanti argue that *Gharar* can be understood in two forms.[1079] The first involves risk where uncertainty and probability dominate, making the outcome unpredictable and speculative.[1080] The second form arises from doubt caused by deceit or fraud, where the lack of transparency undermines the integrity of the transaction.[1081] Similarly, Al-Saati contends that a degree of *Gharar* may be permissible if it arises from endogenous or exogenous uncertainties that fall within an acceptable range.[1082] This argument is rooted in the Islamic legal maxim ‘Damage and benefit go

[1071] ibid 79.
[1072] See page 173.
[1073] Reyadh Seyadi, ‘Challenges in Implementing the 1958 New York Convention: A Case Study of the Arab Gulf States’ (PhD thesis, University of Sheffield 2015) 236.
[1074] ibid.
[1075] Mohammad Hashim Kamali, ‘Uncertainty and Risk-Taking (Gharar) in Islamic Law’ (1999) 7 IIUMLJ 199, 208.
[1076] Reyadh Mohamed Seyadi, ‘Legal Aspect of Islamic Finance’ (2015) 29 arab law quarterly 285, 288.
[1077] AbdulRahim Al-Saati, ‘The Permissible Gharar (Risk) in Classical Islamic Jurisprudence’ (2003) 16 Journal of King Abdulaziz University: Islamic Economics 4.
[1078] Salman Lambak, ‘ShariahJuristical Effect of Gharar in Predetermining Takaful Contribution’ (2013) 1 International Journal of Education and Research 1, 3.
[1079] Mohd Shahid bin Mohd Nor and Dwi Fidhayanti, ‘Riba and Gharar on Digital Payment Applications: Comparison between Malaysia and Indonesia’ (2022) 13 Jurisdictie: Jurnal Hukum dan Syariah 40, 49.
[1080] ibid.
[1081] ibid 50.
[1082] Al-Saati (n 1077) 14.

together'.[1083] This can be interpreted to mean that risk and reward are inherently linked in any business or financial transaction. In contrast, scholars from the *Hanbali* school adopt a stricter position, prohibiting any form of *Gharar*, whether the uncertainty is definitive or merely probable.[1084] According to this view, any contract or transaction involving risk or uncertainty is deemed void and null.[1085]

In fact, adopting the position that all transactions involving any degree of risk or uncertainty are impermissible presents significant challenges, particularly in the context of modern financial systems and commercial practices.[1086] Many contemporary transactions inherently involve some level of risk or uncertainty, making it impractical to enforce a blanket prohibition.[1087] Therefore, a more pragmatic approach would be to restrict the prohibition of *Gharar* to cases involving excessive or extreme levels of uncertainty, such as gambling and betting.

This discussion highlights a critical issue regarding the treatment of contracts or transactions that contain elements of *Gharar* or uncertainty under Islamic law. Specifically, the question arises whether the presence of *Gharar* in certain clauses renders the entire contract invalid or merely those specific clauses. In this context, some Muslim scholars contend that a contract remains valid even if it includes clauses with *Gharar*, provided the uncertain clauses are severable.[1088] In such cases, the contract can be enforced, while the clauses containing *Gharar* are deemed void. Conversely, many scholars argue that if a contract includes clauses involving Gharar, the entire agreement is invalid,[1089] as *Gharar* undermines the essential principles of fairness and certainty in transactions.

Adopting the stricter interpretation—that any contract containing Gharar should be deemed entirely invalid—presents significant challenges, particularly within the context of modern commercial and financial practices. As discussed earlier, contemporary banking and financial transactions inherently involve some level of risk, making it

[1083] ibid.
[1084] Farikhin and Mulyasari (n 1055) 43.
[1085] ibid.
[1086] Saidatolakma Mohd Yunus, Zuraidah Kamaruddin and Rahimah Embong, 'The Concept of Islamic Banking from the Islamic Worldview' (2018) 8 International Journal of Academic Research in Business and Social Sciences 539, 541.
[1087] Muhaimin Iqbal, *General Takaful Practice: Technical Approach to Eliminate Gharar (Uncertainty), Maisir (Gambling), and Riba'(Usury)* (Gema Insani 2005) 10.
[1088] Ahmad (n 1057) 74.
[1089] Al-Suwailem (n 1042) 78.

impractical to eliminate all forms of uncertainty from contractual agreements.[1090] This thesis, therefore, supports the perception that contracts containing clauses with *Gharar* should remain valid, with the *Gharar*-laden clauses rendered void. For instance, consider a contract for the sale of a specific car at a specific price, which also includes an additional clause for insurance fees in case of an accident—a clause that constitutes *Gharar* under Sharia principles. In such a case, the core contract for the sale of the car should remain valid, while the insurance clause would be void. Courts in the GCC states have recognised and applied this approach in practice.[1091] For example, there have been cases where courts enforced arbitral awards containing *Riba*, but while upholding the award as a whole, they refused to enforce the portions involving *Riba*.[1092] Although this example pertains to *Riba* rather than *Gharar*, it illustrates the practical application of the principle of partial validation. This approach ensures that the core contractual obligations are upheld, while excluding or invalidating any elements that conflict with Sharia principles.

In recent years, GCC states have adopted a more lenient and pragmatic approach toward the application of *Gharar* in regulatory and commercial practices.[1093] For instance, conventional insurance contracts were historically prohibited in certain GCC states on the grounds that they contravened Sharia principles, as they are considered a form of *Gharar*.[1094] This prohibition extended to car insurance and compulsory travel insurance. However, this approach has been largely abandoned, as all GCC states now mandate compulsory insurance for travellers and vehicles. This prohibition was grounded in the view of the majority of Muslim scholars who considered conventional insurance a form of *Gharar*.[1095] This perspective argued that policyholders pay premiums without certainty of receiving a payout, thereby enabling insurance companies to accumulate wealth without providing a tangible service, which is impermissible under Islamic law.[1096]

Nonetheless, an alternative view, which has become dominant in contemporary practice, permits such insurance contracts under certain conditions. According to this prevailing opinion, insurance is permissible if the company utilises collected premiums to fund payouts for other policyholders and invests the funds responsibly within the same

[1090] See page 181.
[1091] See page 182.
[1092] See page 179.
[1093] Amel K Abdallah, 'Islamic Sharia and Arbitration in GCC States: The Way Ahead' [2020] Int'l Rev. L. 318, 333.
[1094] ibid 34.
[1095] Abdulraheem Alsaatai, 'Islamic Insurance System: Solidarity in Bearing Risk' (2010) 23 King Abdulaziz University Journal: Islamic Economics, 55, 69.
[1096] ibid 71.

country.[1097] This approach ensures compliance with Sharia principles by mitigating Gharar and promoting mutual benefit. In light of the foregoing, arbitral awards and contracts involving *Gharar* or substantial uncertainty such as gambling and fraud may not be enforceable in the Gulf Cooperation Council (GCC) states, as such agreements contravene Sharia, which serves as a principal source of legislation in these jurisdictions.[1098] Conversely, contracts and arbitral awards characterised by a greater degree of certainty and lower levels of risk are generally enforceable within the GCC states.[1099]

6.2.2.3 Loss of Profit

There are some doubts about whether Sharia prohibits claims for compensation of the loss of profit arising from delayed enforcement or the illegal termination of a contract, and if so, whether this ban is generally applicable or limited to specific cases.[1100] According to legal commentators, awards that include loss of profit may be rejected on the ground of breaching Sharia.[1101] This controversial issue has led to different approaches across the Islamic schools of jurisprudence, with some schools banning these claims explicitly, while others allow them in certain circumstances.[1102] However, there is a consensus on one ground where arbitral awards can be enforced in this case, which is when compensation is based on loss or damage that has occurred then.[1103] Furthermore, although there are no explicit regulations governing loss of profit in the legislation of the GCC States,[1104] such a rule may be derived from Sharia principles.[1105]

[1097] Meerna Mroueh and André de Waal, 'Is the High Performance Organization Framework Applicable to Takaful Insurance Companies?' (2018) 9 Journal of Islamic Accounting and Business Research 77, 83.
[1098] Saudi Commercial Court, Mecca Circuit, Case No. 4530064882 of 2022
[1099] Ilias Bantekas, 'Invalid and Defective Contracts in Islamic Legal Theory: The Rise of a Transnational Islamic Law' (2024) 21 UCLA Journal of Islamic and Near Eastern Law 16.
[1100] Syarifuddin Syarifuddin, 'Financing Schemes and Lost Profit Sharing in Islamic Banking: Challenges and Opportunities' (2020) 3 ATESTASI: Jurnal Ilmiah Akuntansi 1.
[1101] Pierre-Yves Lucas and Hugues Scalbert, 'Agents in the GCC Countries' [1993] Int'l Bus. LJ 883, 889.
[1102] Islamic schools of jurisprudence and their different positions on matters related to public policy are discussed on page 54.
[1103] Mohammed Al Jarba, 'Commercial Arbitration in Islamic Jurisprudence: A Study of its Role in the Saudi Arabia Context' (PhD, Aberystwyth University 2001).
[1104] In the Islamic Republic of Iran, where Sharia rules are applied, art 515(2) of Iranian Civil Law stipulates that 'damages arising from loss of non-profit are not recoverable'.
[1105] Besan Abu-Joudeh, 'Exploring the Potential for Profit-Loss Sharing Models in Islamic Microfinance' (2012) 12 Social Impact Research Experience 1

In fact, despite the scarcity of court precedent relating to this issue in arbitration, it is still possible to provide a clear outline of the position of the courts of the GCC States on this matter by reviewing a number of court decisions. In one arbitration case,[1106] where the dispute related to a contract to export cars to Saudi Arabia, with the exclusive right of the Saudi party to sell and market the cars, it was later discovered that the cars did not meet the Saudi standards. Thus, the Saudi party declined to pay for the remaining value of the contract. The claimant consequently initiated arbitration proceedings before the arbitral tribunal, which issued a decision in the claimant's favour. According to the tribunal award, the Saudi party (defendant) was compelled to pay compensation for the damage caused to the claimant, in addition to compensation for lost profit. The claimant sought to implement the award in Saudi Arabia, but the defendant challenged the award on the basis that its enforcement would contravene the Law of the Saudi Standards, Metrology and Quality Organisation. In addition, the defendant claimed that the award would contradict Saudi public policy, as it contained a claim for loss of profit, thereby breaching Sharia principles.[1107] The court refused to enforce the award, affirming that the imported cars did not meet the Saudi standards. Moreover, concerning the loss of profit, the court held as follows: 'claiming for future profit violates the principles of Sharia, which is the main legislation of this country.'[1108]

In the above case, the claimant subsequently submitted an appeal to the competent court, which annulled the decision of the lower court, stating: 'the lower court has exceeded its jurisdiction by interpreting the terms of the arbitration contract.' The court also added that the lower court had based its decision on broad explanations and unclear terms regarding compensation for the lost profit. Therefore, in order to refuse the enforcement of the arbitral award on the ground of its violation of Sharia rules, the court should provide evidence from the main source of Sharia conforming to its decision. Consequently, the court remanded the case to the lower court,[1109] which reconsidered it and found that the Saudi party had violated the contract terms. As a result, the court decided to enforce the arbitral award concerning compensation for the contract's value. However, the court refused to enforce aspects of the award that granted compensation for lost of future profits to the claimant, as this breached principles of Sharia and public policy.[1110]

[1106] Board of Grievances, 5/T/235, 1994.
[1107] Ibid.
[1108] Ibid.
[1109] Board of Grievances, 20/D/10, 1995.
[1110] Board of Grievances, 6/T/235, 1996.

In another domestic case in Saudi Arabia,[1111] where the claimant claimed compensation for lost profit, the court rejected the claimant's claims and reasoned its decision by affirming that such a claim breaches the principles of Sharia.[1112] The court took into account the damage suffered by the claimant and what he had missed in terms of realised but not probable gain. It held that compensation must relate to the amount of damage estimated according to the established reality, not based on assumed conditions that may or may not occur.[1113] In a different case, where the loss of profit rule was applied, the competent authority unlawfully closed the claimant's shop, depriving the claimant of profit. Therefore, the claimant filed a lawsuit in which he claimed compensation for rent, employee wages, and lost profit. The court issued a judgment in favour of the claimant, affirming that 'compensation is for the lost profit in the event that the profit is certain and not only an expected profit'.[1114]

In another recent case, [1115] a dispute arose over a contract where the defendant was obligated to supply air conditioners amounting to a value of SAR 7,000,000, provided that the claimant paid the full value within three months of the date of the contract. After three months had passed, the claimant had only paid SAR 2,000,000 of the full payment. Thus, the defendant informed the claimant that the agreement was cancelled based on a term of the contract that stated: 'the second party (the defendant) may cancel the contract in the event that he does not receive the full payment within the first three months.' The claimant subsequently filed a lawsuit, claiming that the defendant had failed to abide by the contract. Therefore, the claimant requested a final award in the principal amount of SAR 20,000,000, which included lost profit. The court found that the claimant, with proven negligence, had not abided by the terms of the contract. Therefore, the court dismissed the claims. Regarding loss of profit, the court explained: 'the court's judiciary has settled on the inadmissibility of compensation for the loss profit if it is of a probable matter and thus, compensation is only for the profit that is certain to occur.'[1116]

Indeed, the above attitudes illustrate that the Saudi position on loss of profit is to consider it as a matter of public policy. It may be noted from the earlier cases that arbitral awards, including loss of profit claims, are not enforced unless the loss of profit is based on actual

[1111] Board of Grievances, 1654/1/G of 2008.
[1112] Ibid.
[1113] Ibid.
[1114] Board of Grievances, 481/5/T, 2008.
[1115] Board of Grievances, G/2/4280, 2017.
[1116] Ibid.

damage. In terms of the courts in other GCC States, since legislation in the GCC States is all largely influenced by Sharia principles, it may be assumed that the same approach to loss of profit is adopted across their jurisdictions.

6.2.2.4 Arbitrator's Gender

Although arbitration conventions do not refer to an arbitrator's gender, there is wide debate over gender diversity among arbitrators, and the extent of female representation in arbitration.[1117] Undoubtedly, the under-representation of female arbitrators is of global concern,[1118] described as an 'ongoing issue... rearing its head now and again'.[1119] According to a report by the International Court of Arbitration (ICC), the overall percentage of female representation amongst arbitrators worldwide was 21% in 2019. Meanwhile, out of all sole arbitrators appointed or confirmed, 33% were women, as were 24% of tribunal presidents and 15% of co-arbitrators.[1120] Without delving into other issues that lie beyond the scope of this research, the arbitrator's gender seems to be a more complex issue in the GCC States. Here, there have even been debates on whether it is possible to enforce an arbitral award issued by a woman.

As has been argued in Section 6.2,[1121] the traditional view was that women could not validly be appointed as arbitrators and that an award involving a female arbitrator would not be enforced. Bhatti discusses the ways in which Sharia is implemented in the contemporary world,[1122] after providing an overview of the theological foundations of Sharia in light of the four Sunni schools of jurisprudence.[1123] She argues that arbitral awards issued by a female arbitrator are unenforceable in Islamic countries such as Saudi Arabia.[1124] Another proponent of this view, Baamir,[1125] concludes that 'any arbitral award issued by a woman shall be void', giving two justifications for this statement: firstly, Saudi Arbitration Law 1983 stipulates that the arbitrator should be male, and secondly,

[1117] Lucy Greenwood and C Mark Baker, 'Is the Balance Getting Better? An Update on the Issue of Gender Diversity in International Arbitration' (2015) 31 Arbitration International 413.
[1118] Gus Van Harten, 'The (Lack of) Women Arbitrators in Investment Treaty Arbitration' (FDI Perspectives, 2012) <https://ssrn.com/abstract=2005336> accessed 15 May 24.
[1119] Lucy Greenwood and C Mark Baker, 'Getting a Better Balance on International Arbitration Tribunals' (2012) 28 Arbitration International 653.
[1120] The International Chamber of Commerce, 'Full Dispute Resolution Statistical Report' (ICC 2019). See also ibid.
[1121] See page 167.
[1122] Maria Bhatti, *Islamic Law and International Commercial Arbitration* (Routledge 2018). 89
[1123] Sunni Islam is one of the two main branches of Islam. See Blanchard (n 761).
[1124] Bhatti (n 1122) 90.
[1125] Abdulrahman Baamir, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD thesis, Brunel University 2009) 116.

there is the Hadith: *'[a] people who make a woman their ruler will never prosper*.'[1126] Therefore, an arbitral award issued by a woman shall be null and void. However, in 2012, major amendments were made to Saudi Arbitration Law 2012, whereupon the new law did not specify the arbitrator's gender. It may also be noted from a review of developments in the judiciary across the GCC States that women currently hold judicial and leadership positions. Hence, it is envisaged that the notion of female arbitrators will eventually become more acceptable across the region.[1127]

In light of the above-mentioned developments in Saudi Arabia toward a more liberal and open approach among the judicial authorities, the Saudi Court of Appeal has already appointed a female arbitrator to mediate between disputing parties where both parties had agreed that in the event of a dispute, they would resort to arbitration.[1128] The claimant appointed a male arbitrator, while the defendant appointed a female arbitrator. The claimant subsequently resorted to the competent court, claiming that appointing a female arbitrator would render the arbitral award issued by that arbitrator void, since such a matter would breach Sharia principles and hence, violate public policy. The court rejected this claim and upheld the appointment of the female arbitrator.[1129] This remarkable decision was considered as crucial evidence of Saudi tolerance regarding this issue. However, the court neither gave reasons nor explanations for its decision.[1130] Similarly, the Administrative Appeal Court in Saudi Arabia has also appointed a woman as arbitrator.[1131] It should be highlighted here that the underlying award was issued in a domestic dispute. However, it could be argued that since the Saudi legislator did not make any distinction between national and international public policy, it would appear that international arbitral awards issued by female arbitrators could be enforced.[1132]

In the same context, the Deputy Minister of Human Resources and Social Development[1133] announced that 'the Ministry is serious about appointing Saudi women

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[1126] *Sahih al-Bukhari*, 7099.
[1127] Nadia Sonneveld and Monika Lindbekk, *Women Judges in the Muslim World: A Comparative Study of Discourse and Practice* (Brill 2017) 106.
[1128] Board of Grievances, Appeal Panel, Case No 3022/G 2016.
[1129] Ibid.
[1130] Ibid.
[1131] Mulhim Hamad Almulhim, 'The First Female Arbitrator in Saudi Arabia' (*Kluwer Arbitration Blog*, 2016) <http://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/> accessed 20 March 2021.
[1132] Domestic, international, and other categories of public policy are discussed in depth in Chapter 4, see page 93.
[1133] The first Saudi woman to be appointed Deputy Minister of Labour and Social Development. *Al Arabiya*, 'Tamader Al-Rammah Appointed Saudi Deputy Minister of Labour' (Alarabiya, 26 February

to leadership positions and appointing women as judges very soon'.[1134] However, it should also be noted that the Shura Council recently rejected a proposal to appoint women as judges,[1135] with 58 members voting for, and 57 against. The proposal needed 20 more votes to be passed. The same proposal was put forward in 2018 but was ultimately rejected.[1136] In response to this rejection, a member of the Shura Council declared that 'there are no reasons to deny Saudi women being appointed as judges, since the law does not stipulate a specific gender'. However, she assured that 'appointing women as judges is something that cannot be avoided. It is simply a matter of time'.[1137]

In contrast, AlFawzan, a member of the Council of Scholars[1138] gave his response to the claim that 'appointing a woman as a judge breaches Sharia principles'.[1139] He based his argument on verses in the Quran, which state: '*Men are the protectors and maintainers of women.*'[1140] He added that the Prophet Mohammed also rejected this notion by warning that '*a people who make a woman their ruler shall never prosper*'.[1141]

Despite Sharia constituting the main source of legislation, the other GCC States have adopted a more secular approach to this issue. Although their arbitration laws provide no clarification on the matter, the position of the legislator in these countries can be inferred from the legislation that allows women to be judges. For example, in 2006, the King of Bahrain appointed the first female judge in the GCC States. Subsequently, in 2008, the President of the UAE followed suit, after which Kuwait and Qatar also appointed their first female judges in 2020 and 2021, respectively. Nevertheless, this matter remains vague in countries such as Oman, where Article 21 of the Royal Decree on the

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2018) <https://english.alarabiya.net/News/gulf/2018/02/26/Tamader-Al-Rammah-appointed-Saudi-Deputy-Minister-of-Labor> accessed 5 February 2021.

[1134] *Arab News*, 'Saudi Arabia to Appoint Women as Court Judges "Very Soon"' (16 January 2021) <https://arab.news/ytj6p> accessed 5 February 2021.

[1135] The Shura Council is the legislative and advisory entity in Saudi Arabia, functioning in accordance with the principle of 'Shura', which means consultation. The concept of Shura is derived from Islamic tradition and referenced in the Quran as a means for decision-making and governance through mutual consultation. The Shura Council holds a legislative role, regularly engaging in the legislative process by drafting, reviewing, and approving laws. See Bandar Al Harbi, 'Constitutionalism, constitutionalisation and legitimacy: reforming Al-Shura Council law in Saudi Arabia' (PhD thesis, Brunel University 2014).

[1136] Saudi Shura Council, held on June 15, 2020.

[1137] Bandar Algaloud, 'Saudi Shura Council Refuses to Appoint Female Judges' (*Middle East Monitor*, 2020) <https://middleeastmonitor.com/20200619-saudi-shura-council-refuses-to-appoint-female-judges/> accessed 18 February 2021.

[1138] This Council is considered as the highest religious authority in the Kingdom of Saudi Arabia; it includes the King's advisors and Muslim scholars who are responsible for issuing religious fatwa.

[1139] ibid.

[1140] Quran, v 4:34.

[1141] Prophet Muhammad's [PBUH] sayings and actions constitute the 'Sunnah', which is used as the second main source of Sharia law after the Quran.

appointment of judges simply stipulates that 'the judge must be a Muslim and Omani citizen'.[1142] Although the legislator has not explicitly stated a gender requirement, the terms and expressions used in the above Article imply that the judge should be male. In contrast, Article 16(2) of the Omani Arbitration law stipulates that the arbitrator is not required to be of a particular sex or nationality.[1143]

In fact, Saudi Arabia and the other GCC States should clearly be applauded for their attempts to improve and modernise their arbitration laws, even if these attempts may need more time, since one must not forget that Sharia law is their main source of legislation. One accurate description of the reforms adopted in the GCC States, with regard to the laws governing women, is that 'reforms are not moving as fast as they should be, but they are definitely moving'.[1144] However, the slow progress in implementing reforms should not be an excuse, especially since most of the GCC States do not have a democratic system. Therefore, the approval of the legislative and the executive powers is usually required, necessitating longer procedures. On the contrary, the process in the GCC States seems less complex than other non-GCC States in applying new reforms, since the executive power has the ultimate authority and upper hand in enacting new laws and reforms.[1145]

6.2.2.5 Non-Muslim Arbitrators

In terms of the key ongoing debate among scholars of Islamic jurisprudence, concerning the religion of the arbitrator, some argue that any arbitral award issued by a non-Muslim should be considered null and void.[1146] El-Ahdab gives further support to this claim, stating that 'awards made by non-Muslim arbitrators are contrary to Saudi law'.[1147] Oseni likewise suggests that arbitral awards should be issued by a Muslim arbitrator. However, he accepts that there may be instances where no Muslim arbitrator is available. In those

[1142] Judicial Authority Law, promulgated by Royal Decree No 90/99.
[1143] Omani Law of Arbitration in Civil and Commercial Disputes Royal Decree 47/97; similarly, art 10(3) of UAE Federal Law No 6 of 2018 on arbitration does not require a specific gender or nationality for the arbitrator.
[1144] Louise Redvers, 'Keys to the Kingdom: The Slow Rise of Saudi Women' (*BBC*, 2015) <https://bbc.com/worklife/article/20150408-slow-gains-for-saudi-women> accessed 18 February 2024.
[1145] Kuwait is arguably the only state in the GCC that has an independent legislative power.
[1146] Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009) 25 Arbitration International 239; Inae Yang, 'A Comparative Review on Substantive Public Policy in International Commercial Arbitration' (2015) 70 Dispute Resolution Journal 49.
[1147] Abdul Hamid El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' (1994) 11 Journal of International Arbitration 87.

cases, he asserts that the principles of Sharia permit a non-Muslim arbitrator to issue an arbitral award.[1148] Conversely, Hagshah argues that although Sharia indicates that the arbitrator should be Muslim, it does not explicitly prohibit non-Muslims from serving as arbitrators.[1149] This argument is based on verses from the Quran that read as follows: '*let the people of the Gospel judge by what Allah has revealed in it. And those who do not judge by what Allah has revealed are truly the rebellious.*'[1150] Thus, in Hagshah's view, non-Muslims can issue arbitral awards where one or both parties are Muslim. However, Similar to Oseni, Hagshah believes that non-Muslim arbitrators should consider Sharia principles when they issue their decisions.[1151]

Nevertheless, the Saudi Arbitration Law of 1983 stipulated that the arbitrator should be Muslim. Therefore, some, such as Alrajhi, assert that arbitral awards issued by non-Muslim arbitrators may not be recognised and enforced if the parties to the arbitral dispute are Muslim.[1152] However, it was only the previous Saudi Arbitration Law 1983 that required the arbitrator to be Muslim; the arbitration laws of the other GCC States do not explicitly state this requirement.[1153] Moreover, in 2012, and as a step towards reforming the Kingdom's laws on arbitration, Saudi Arbitration Law was amended, repealing the term that required arbitrators to be Muslim. That said, it raises the question of whether the courts of the GCC continue to apply this term in cases where the arbitrator is not Muslim. In light of current practice, it could be said that the GCC States, including Saudi Arabia, demonstrate a pro-enforcement stance towards foreign arbitral awards that have been issued by non-Muslim arbitrators. In Saudi Arabia, the competent court rejected a claimant's claims arguing that the award had been issued by a non-Muslim arbitrator. Thus, the court enforced the award.[1154] Likewise, in *Airmech Dubai v Maxtel International LLC*,[1155] where the award was rendered under International Chamber of Commerce (ICC) rules in London, the competent court in the UAE affirmed that 'since the UAE is a signatory to the New York Convention, its courts are obligated to implement

[1148] Dato'Syed Ahmad Idid and Umar A Oseni, 'Appointing a Non-Muslim as Arbitrator in Tahkim Proceedings: Polemics, Perceptions and Possibilities' (2014) 5 Malayan Law Journal Articles 1.
[1149] Faihan ibn Farraj ibn Hagshah, 'Arbitration in Islamic Shari'ah: A Comparative Study with International Law and English Law' (PhD thesis, Lancaster University, 2013) 263.
[1150] Quran, v 5/47.
[1151] Hagshah (n 793).
[1152] Abdulmajed Alrajhi, 'Islamic Finance Arbitration: Is It Possible for Non-Muslims to Arbitrate Islamic Financial Disputes?' (2015) 12 Transnational Dispute Management (TDM) 6.
[1153] Saud Al-Ammari and A Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30 Arbitration International 387, 392.
[1154] Saudi Court of Appeal, Case No 2475/2/S of 2015.
[1155] Court of Cassation of Dubai, Cassation No 132/2012.

foreign arbitral awards, unless these awards contradict Article 5 of this agreement'.[1156] A similar approach has been adopted in Bahrain,[1157] Kuwait,[1158] and Qatar.[1159]

It can be seen from the foregoing that arbitral awards issued by non-Muslim arbitrators are enforced in the GCC States. Further evidence of this approach can be found on the official website of the Saudi Commercial Arbitration Centre, whereby some non-Muslim arbitrators have already been appointed.[1160] Unequivocally, this behaviour on the part of a state that has long been described as 'unfriendly' to the New York Convention[1161] reflects the new pro-enforcement bias towards foreign arbitral awards, not only in Saudi Arabia, but across all the GCC States. Therefore, it can be stated that the issue of non-Muslim arbitrators tends to be more prevalent among the various schools of jurisprudence than in the legislations of the GCC States. This undoubtedly serves as further evidence supporting the conclusion of the previous chapter, which argued that there is a new approach among the GCC States to reduce the influence of both Sharia and traditional schools of jurisprudence. Having examined cases related to Sharia as a refusal ground, it is necessary to examine the impact of Sharia on public policy concept.

6.3 Impact of Sharia on the Concept of Public Policy

The above practices of the courts affirm the relationship between Sharia and public policy as refusal grounds. The concept of public policy has long been associated with Sharia, both among Muslim and non-Muslim scholars.[1162] In addition to the discussion in Section 6.2,[1163] Roy argues that foreign arbitral awards are routinely rejected in countries like Saudi Arabia due to their alignment with Sharia, which functions as the de facto public policy in these contexts.[1164]

Some, like Masoud, argue that the terms Sharia and public policy are synonymous.[1165] Therefore, arbitral awards that contradict Sharia may be said to contradict public

[1156] Airmech Dubai LLC v Maxtel International LLC, Court of Cassation of Dubai, Cassation No 132/2012.
[1157] Bahraini Appeal Court, Case No 9/19751/2018/02.
[1158] Court of Cassation, Case No 230/2001.
[1159] Court of Cassation, Case No 358/2015.
[1160] *Saudi Centre for Commercial Arbitration*, 'Arbitrators' (2021) <https://sadr.org/about-advisory-committee?lang=en> accessed 7 January 2021.
[1161] Roy (n 55) 923.
[1162] Abdallah (n 54) 329.
[1163] See page 167.
[1164] Roy (n 55).
[1165] Az Al-Din Masoud, 'The reality of public order and morals and their legitimacy in Islamic jurisprudence and positive constitutional systems: A comparative study' (2011) 3 Dirasat Abhath 21, 34.

policy.[1166] Similarly, Baamir, argue that Sharia serves as the fundamental standard and benchmark for public policy.[1167] Therefore, arbitral awards that contradict Sharia may be said to contradict public policy.[1168] This argument is based on what was stipulated in Article 11(3) of the Implementing Regulation of Saudi Enforcement Law 2017, wherein it is stipulated that 'public policy in the enforcement law means Sharia principles'. Similarly, Hamdan delves deeper into the historical and contemporary understanding of public policy within Islamic jurisprudence,[1169] clarifying that while the concept of public policy existed in ancient Islamic jurisprudence, it has been further explored and defined in the contemporary context. Hamdan also points out that Sharia encompasses a broader scope than public policy, not only incorporating religious tenets but also a comprehensive legal and social system.[1170] He further contends that all divine commandments fall under the purview of public policy, rendering any violation of Sharia, a violation of public policy itself.[1171] This perspective finds support in Saudi Arabia's Enforcement Law 2012, which explicitly identifies the public order as a permissible reason for rejecting the enforcement of foreign arbitral awards. Indeed, judicial practices in the GCC States exhibit a strong tendency to equate public policy with Sharia.[1172] Arbitral awards and contracts deemed contradictory to Islamic law are often rejected under the guise of public policy concerns.[1173] Examples include contracts and arbitral awards involving usury, lost profits, contracts related to prohibited goods like alcohol or drugs. Therefore, Bamir asserts that no foreign contract or arbitration award conflicting with Sharia may be enforced.[1174]

Conversely, Alajloni holds that the term 'public policy' is more comprehensive than Sharia, as it includes basic principles and good morals.[1175] In fact, regardless of what is

[1166] AA Altawyan, 'Arbitral Awards Under the New Saudi Laws and International Rules, Challenges and Possible Modernization', *4th Academic International Conference on Interdisciplinary Legal Studies* (2016), 33.
[1167] Abdulrahman Baamir, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD thesis, Brunel University 2009), 186.
[1168] AA Altawyan, 'Arbitral Awards Under the New Saudi Laws and International Rules, Challenges and Possible Modernization', *4th Academic International Conference on Interdisciplinary Legal Studies* (2016), 33.
[1169] Hamdan Ali, 'The Connotation of Public Order in Islamic Law' (2023) 27 International Journal of Contemporary Islamic Law and Society 12, 66.
[1170] ibid.
[1171] ibid.
[1172] Cases and court decisions related to Sharia and public policy are presented in Chapter 4.
[1173] Saudi Board of Grievances, Case No 207/D/2, issued in 1998; Kuwait Court of Cassation, 298/2018.
[1174] Abdulrahman Baamir, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD thesis, Brunel University), 187.
[1175] Yaser Alajloni, 'Arbitration and Public Order in Jordanian Law' (2014) 2014 Al-Manara for Legal and Administrative Studies 142.

stipulated in Article 11 of the Saudi Enforcement Law, Alajloni argues that there is a difference between the two terms on several counts. First, in court decisions related to Sharia, it would appear that the courts have permitted some forms of usury, despite its prohibition in Islamic law. Therefore, public policy cannot be described as synonymous with Sharia.[1176] Furthermore, the domestic laws of the GCC States consider issues relating to real estate, family disputes, and labour disputes as public policy matters, despite the absence of a relationship between these matters and Sharia.[1177]

While the other GCC States lack explicit legislative definitions of public policy and its relationship to Sharia, judicial practices often conflate them. Legislation frequently cites both public policy and Islamic law as justifications for refusing to enforce a foreign arbitral award. From a linguistic perspective, this would suggest that most GCC legislation treats these concepts as distinct yet equally valid grounds for non-enforcement. The distinction is also evident in regional agreements like the Riyadh Agreement 1983, wherein its Article 30 states that arbitral awards violating public policy, Sharia, or public morality are unenforceable.[1178] Despite this difference in language, all three categories ultimately lead to the refusal to implement foreign arbitral awards.

In fact, equating public policy with Sharia presents several practical challenges. Firstly, the inherent ambiguity surrounding the interpretation of both concepts creates difficulties in application. Second, diverse and often conflicting schools of Islamic jurisprudence exist across different countries, making it difficult to establish a universal standard for what constitutes a violation of Sharia. [1179] Moreover, some practices that are not expressly forbidden by Sharia might still violate public policy. For example, while slavery existed historically and even during the early Islamic era, it is now condemned by international treaties and considered to be a violation of contemporary public policy.[1180]

Nevertheless, Sharia remains part of public policy in the GCC States. Thus, foreign arbitral awards that are inconsistent with Sharia are voidable. Perhaps the clearest example of this is the rejection of usury or *Riba* and other forms explained earlier in

[1176] ibid 144.
[1177] MOHAMMED ANWAR AL JELANI, 'A Study on UAE Courts Supervisory Powers in Arbitration on the Grounds of Public Policy Consideration' (LLM thesis, The British University in Dubai 2017) 50.
[1178] Riyadh Arab Agreement for Judicial Cooperation of 1983.
[1179] Lewison (n 1003).
[1180] It should be noted that in 1962, King Faisal abolished slavery in Saudi Arabia by Royal Decree. See George Lenczowski, 'Tradition and Reform in Saudi Arabia' (1967) 52 Current History 98.

section 6.2.2.[1181] Therefore, while public policy and Sharia are undeniably intertwined within the GCC States, they remain distinct notions with nuanced application.[1182] Recognising and understanding these distinctions is crucial for navigating the complex legal landscape of the GCC States, and fostering more informed dialogue on international cooperation and the enforcement of foreign arbitral awards.[1183] Consequently, it is clear that Sharia has a direct impact on the concept of public policy in the GCC States. However, this does not mean that the concept of public policy is synonymous with Sharia. Rather, Sharia represents an aspect of public policy in the above context. The contemporary practices of the Gulf countries confirm that there is flexibility in the application of Sharia. Therefore, contracts and foreign arbitral awards that contradict Sharia can be enforced in the GCC countries, provided that they do not represent a clear violation of the principles agreed upon by Sharia or its main sources, namely, the Quran and Sunnah.

Having clarified the role of Sharia in the legislation of the GCC States and the relationship between Sharia and public policy, an important question arises over whether Sharia hinders the implementation of foreign arbitral awards.

6.4 Does Sharia Hinder the Implementation of Foreign Arbitral Awards?

Sharia law adopts two fundamental principles, consisting of liberty to contract and respect for contracts.[1184] According to Ayad, the principle of *pacta sunt servanda* is inherent within Islam and so Sharia law provides Muslims with the flexibility and freedom to sign contracts if the terms and conditions do not contravene Islamic principles.[1185] This is based on the exhortations of Allah in the Quran: '*those who believe, fulfil the contracts*.'[1186] Thus, Muslims are required to honour all their commitments. Other evidence of this view can be found in the Sunnah, where the Prophet Mohammed [PBUH] states: '*Muslims are bound by their conditions.*' In other words, Muslims are obliged to

[1181] Wayne AM Visser and Alastair Macintosh, 'A Short Review of the Historical Critique of Usury' (1998) 8 Accounting, Business & Financial History 175.; See also page 170.
[1182] Abdul Hamid El-Ahdab, 'Enforcement of Arbitral Awards in the Arab Countries' (1995) 11 Arbitration International 169, 109.
[1183] Mutasim Ahmad Alqudah, 'The Impact of Sharia on the Acceptance of International Commercial Arbitration in the Countries of the Gulf Cooperation Council' [2017] Journal of Legal, Ethical and Regulatory Issues 15.
[1184] Stephen M Schwebel, 'The Kingdom of Saudi Arabia and Aramco Arbitrate the Onassis Agreement' (2010) 3 Journal of World Energy Law & Business 245, 250.
[1185] Mary B Ayad, 'Harmonisation of International Commercial Arbitration Law and Sharia-The Case of Pacta Sunt Servanda vs Ordre Public-The Use of Ijtihad to Achieve Higher Award Enforcement' (2009) 6 Macquarie J. Bus. L. 93, 115.
[1186] Holy Quran, v 5:1.

honour their contracts and terms.[1187] This can be seen in the case of *OGIM BV v. King Abdul-Aziz University (KAZ)*,[1188] OGIM BV, a Dutch company, entered into a contract with KAZ, a public entity, to design and construct certain facilities. The contract included an arbitration clause. When a dispute arose between the parties, they agreed to initiate arbitration proceedings. The tribunal awarded the Dutch company approximately $200,000,000 in compensation, ordered the release of bank guarantees worth about $5,000,000, and required a submission to the Saudi Ministry of Finance to exempt OGIM from delay fines.[1189] OGIM sought enforcement of the award before the Board of Grievances. The University contended that it lacked the capacity to enter into the arbitration agreement with OGIM, arguing that as a public body, it did not have permission from the Council of Ministers to enter into such an agreement. This argument was based on the Saudi Arbitration Law of 1983, which prohibits public bodies from resorting to arbitration without the Prime Minister's permission. The Board of Grievances dismissed the University's claim and decided to enforce the arbitral award without providing a justification for disregarding the University's argument on the grounds of capacity. The court held that the award would be enforced according to the Islamic principle that 'Muslims must execute their contracts'.[1190]

Furthermore, Weeramantry affirms that in commercial law, the high standards of certain elements of Islamic law have positively influenced the development of modern concepts, which is where its enduring merit lies.[1191] According to Altuofi, a prominent scholar of the *Hanbali* school of thought, the public interest is superior to all provisions of the Quran and Sunnah.[1192] This is because the public interest and the welfare of the people is the supreme goal of Islam. Consequently, Sharia permits agreements that are in the interests of all.[1193] However, due to the ambiguity of Sharia, some commentators believe that only

[1187] Oussama Arabi, 'Contract Stipulations (Shurut) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya' (1998) 30 International Journal of Middle East Studies 29, 41.
[1188] Dutch O Co v University of King Abdullaziz (2002) 1T 102.
[1189] Ibid.
[1190] The Board of Grievances Case number 109/1417/G.
[1191] Christopher Gregory Weeramantry, *Islamic Jurisprudence: An International Perspective* (Springer 1988) 110.
[1192] Azmat Hayat and Muhammad Hakimi Muhammad Shafiai, 'The Nature of Public Interest in Muslim and Non-Muslim Writers' (MPRA 2019), 113.
[1193] It is worth noting an important incident in the first era of Islam, when Omar Ibn Al-Khattab took power, the country was going through a famine, which led to some individuals stealing food to feed their children. When they were arrested, they were sentenced to prison because Islam forbids theft. However, the governor released them on the ground that their motive for the theft was acceptable. See Samiul Hasan, 'Islam, Property and Philanthropy: Ethical and Philosophical Foundations and Cultural Influences' [2015] Human Security and Philanthropy: Islamic Perspectives and Muslim Majority Country Practices 51, 55.

serious violations of Sharia should result in the non-enforcement of arbitral awards. Alqahtani affirms that with the development of the field of arbitration and global trade, it has become difficult to rely on unclear legislation and provisions.[1194] In *Petroleum Development v The ruler of Abu Dhabi,*[1195] Lord Asquith stated that 'If any municipal legal system was applicable, it would prima facie be that of Abu Dhabi'. Nevertheless, he also noted that:

> No such law could reasonably be said to exist. ...it is fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments and that the Sheikh of Abu Dhabi administers a purely discretionary justice with the assistance of the Quran.

On this ground, Lord Asquith avoided the application of land law. Similarly, in Qatar, Sir Alfred Bucknill, who was appointed as arbitrator, asserted that 'after hearing the evidence of the two experts in Islamic law, Mr Anderson, and Prof Milliot, there is no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments'.[1196] It is worthy of note that the experts appointed by Sir Alfred Bucknall are non-Muslims. Therefore, their claims could be based solely on personal opinions.[1197] Furthermore, in *Aramco v Saudi Government,*[1198] the arbitrator excluded Islamic law from application to the case, although both parties had agreed to apply Islamic law in the event of a dispute. The tribunal justified this by affirming that Islamic law was not competent to meet the requirements of the agreement, and the disputing parties had never intended to apply Sharia law.[1199] Alternatively, general principles of law were applied. Rawabda and Jbor justified this approach as Sharia law containing inconsistencies that render it responsible for the slow growth of arbitration in the GCC States.[1200]

In contrast, Aljumah points out that Sharia respects international commercial arbitration and is compatible with it, except where an arbitral award explicitly contradicts the principles of Islam. However, Aljumah believes that the reason behind avoiding the application of Islamic law in arbitration is due to 'autocratic rule and monopoly in

[1194] Saad Alqahtani, 'Commercial Arbitration in the Saudi System and the Regulations of the Gulf Cooperation Council Countries' (LLM thesis, Naif Arab University for Security Sciences 2012), 58.
[1195] Petroleum Development Limited v The Ruler of Abu Dhabi (1951) 18 ILR 144.
[1196] Ruler of Qatar v International Marine Oil Company Ltd (1953) 20 ILR 534
[1197] Khaled Mohammed Al-Jumah, 'Arab State Contract Disputes: Lessons from the Past' (2002) 17 Arab Law Quarterly 215, 220.
[1198] Saudi Arabia v Arabian American Oil Company (1963) 27 ILR 117.
[1199] Al-Jumah (n 1197) 222.
[1200] Waleed Rawabda and Amal Jbor, 'Arbitration Procedures in Islamic Jurisprudence and Jordanian Law' (2015) 12 Jordanian Journal of Islamic Studies 170.

decision-making against Islam'.[1201] Furthermore, Hallaq considers that historical and political factors such as the rise of colonialism and the collapse of the Ottoman Empire have resulted in the collapse of Sharia law.[1202] Aljumah concludes that although some contracts stipulate the application of Islamic law in the event of a dispute, arbitrators tend to avoid enforcing such a clause if Islamic law cannot be applied to the subject matter of the disputed issue.[1203]

As arbitration is recognised in Islam, some argue that the contradiction between Sharia and arbitration is limited.[1204] For instance, Alqudah affirms that there is no explicit prohibition of the appointment of women as arbitrators in the Quran or the Sunnah. Thus, Alqudah supports the *Hanafi* approach, which allows the appointment of female arbitrators, unlike the other schools of thought. Moreover, according to Alqudah, non-Muslim arbitrators are only forbidden under Sharia in a limited number of circumstances. Furthermore, parties are allowed to choose the applicable law as long as Sharia principles are respected.[1205]

However, given this lack of codification of Sharia, it is difficult to apply Islamic jurisprudence to disputes that have not been clearly addressed by Sharia, especially if the arbitrators are unfamiliar with Sharia law or are not Muslim. A recent effort was made by the Asian International Arbitration Centre,[1206] to address this issue by developing I-Arbitration rules.[1207] Under these rules, a range of alternatives to usury or interest are provided, such as delay penalties or compensation.[1208] Furthermore, instead of applying conventional interest rates, I-arbitration permits the Islamic money market, established by the Central Bank of Malaysia to determine the rate of profit. Therefore, according to the principle of party autonomy in international commercial arbitration, parties have the option to select the I-Arbitration rules if they mutually agree.

Alqudah observes that in the Western legal community, Sharia is often perceived as insufficient and unsophisticated. He attributes this misunderstanding to the practices of some arbitrators who avoid the application of Sharia law, as in the case of *Petroleum*

[1201] Al-Jumah (n 1197) 239.
[1202] Wael B Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009), 86.
[1203] Al-Jumah (n 1197) 238.
[1204] Alqurashi (n 773) 5.
[1205] Alqudah (n 1183) 15.
[1206] The Asian International Arbitration Centre in Malaysia (AIAC), formerly known as Kuala Lumpur Regional Centre for Arbitration (KLRCA).
[1207] 'I' stands for Islamic law.
[1208] Thomas Panighetti, 'I-Arbitration: Not the Newest Apple (R) Product, But Sharia Law in International Commercial Arbitration' (2013) 5 Arbitration Law Review 287, 289.

Development Ltd v Sheikh of Abu Dhabi,[1209] *Saudi Arabia v Arabian American Oil Company (Aramco),*[1210] and *Ruler of Qatar v International Marine Oil Company.*[1211]

While some scholars consider that the multiplicity of schools of jurisprudence has led to the ambiguity of Sharia in the field of arbitration, Alqurashi rather thinks that it has led to the flexibility of Sharia and proves its ability to adapt.[1212] He argues that by adopting several different schools of thought, arbitration practitioners can apply the most appropriate principles to the case at hand. However, Alqurashi contends that there are no restrictions on the gender and religion of the arbitrator in Islamic law. Hence, arbitral awards issued by non-Muslim or female arbitrators can be enforced in the GCC States.[1213]

Indeed, it is imprecise to claim that Sharia law is broadly incompatible with arbitration or prevents the enforcement of arbitral awards. Rather, it is important to distinguish between Sharia itself and the various schools of Islamic jurisprudence. A historical review of Sharia reveals that it contains many texts that promote arbitration as explained in Chapter 5. Therefore, it could be said that Sharia does not hinder the application of foreign arbitral awards in an unfriendly approach, although it does impact their enforcement. In other words, arbitral awards that do not explicitly breach Sharia principles are enforceable in the GCC States. In this context, when the GCC courts refuse to enforce an arbitral award that breaches Sharia, they are exercising their power as stipulated in Article V of the New York Convention. This Article allows the competent court to refuse enforcement of any arbitral award that breaches the public policy of the state where enforcement is sought. Thus, if a foreign arbitral award is not enforced by the courts of a GCC State due to a violation of that state's public policy, the court is exercising its right under the New York Convention. Consequently, there is no basis for claiming that Sharia contradicts the New York Convention.

As a result, one Saudi court explained that violating Sharia consists of breaching the Quran, Sunnah or any of the basic principles of Sharia, such as usury.[1214] Therefore, Sharia itself cannot be said to hinder the application of foreign arbitral awards unless those awards contradict Sharia provisions.[1215] In the literature as seen above, there is

[1209] Petroleum Development (Trucial Coast) Ltd v Sheikh of Abu Dhabi (1951) 18 ILR 144.
[1210] Saudi Arabia v Arabian American Oil Company (1963) 27 ILR 117.
[1211] Ruler of Qatar v International Marine Oil Company Ltd (1953) 20 ILR 534.
[1212] Alqurashi (n 773).
[1213] ibid 9.
[1214] Saudi Court of Appeal, 5190/2/S, issued on 04/08/2012.
[1215] Amel K Abdallah, 'Islamic Sharia and Arbitration in GCC States: The Way Ahead' [2020] International Review of Law 318, 335.

some insistence that Sharia conflicts with contemporary arbitration and the implementation of foreign arbitral awards, especially arbitral awards issued by women or a non-Muslim arbitrator. In fact, although these issues are controversial, Sharia does not hinder the enforcement of arbitral awards. First, these matters are more closely related to Islamic schools of thought than to Sharia itself. Moreover, there is no consensus among Muslim scholars on these issues: while some prohibit them, others permit them. Second, the claim that Sharia impedes the implementation of arbitration awards is akin to asserting that the inclusion of a public policy exception hinders such implementation. In other words, both public policy and Sharia do not aim to undermine the enforcement of arbitral awards but rather to ensure that these awards do not violate either.

In fact, perhaps the key reason why some believe Sharia to be an obstacle to the implementation of foreign arbitral awards is due to the insufficient efforts of Muslim states and organisations in codifying and clarifying Sharia rules and its principles. Despite the significance of Sharia in all Muslim countries and the fact that Islamic finance and banking have grown in popularity, there is no serious initiative to codify Sharia principles and present Sharia as a comprehensive legal system that will suit modern economic and commercial development. Therefore, Muslim majority countries must clarify their position on the role of Sharia in their legal systems, as well as regarding the vagueness surrounding Sharia law, especially in controversial cases.

Having examined the intersection between Sharia and public policy, with particular attention to judicial position of arbitral awards that contravene Sharia principles, this chapter shifts its focus to the application of public policy by courts in matters devoid of any Sharia connection.

6.5 The Non- Sharia public policy

The practices of some GCC courts have been discussed in Section 6.2.2,[1216] show a broad application of public policy exception by invoking Sharia to refuse to recognise and enforce foreign arbitral awards. As illustrated earlier, the legislator in the GCC States has left room for the domestic courts to decide whether the matter falls within the scope of the public policy exception. Therefore, the courts have the upper hand in shaping public policy. This authoritative power has led to harsh criticisms of the legal system across the

[1216] See page 170.

GCC States, especially with the negative application of the refusal ground as discussed earlier.

In this context, Gemmell concludes that 'it takes little business acumen to ascertain whether an investor will put money into a country or region wherein implementation of the New York Convention is robust or into a country or region wherein implementation of the Convention is either lukewarm or lethargic'.[1217] Hussein claims that despite the efforts of the GCC States in attracting foreign investment, there are still doubts about their commitment to the New York Convention.[1218] These doubts usually concern the negative interpretation of public policy in the Gulf region, and the question of whether the GCC States use this exception as an excuse to evade their international obligations.[1219]

Similarly, Wakim[1220] observes:

> [F]or foreign investors, uncertainties surrounding the content of Saudi commercial law, especially as to its fundamental Sharia component, causes various problems and insecurities. The situation is, of course, highly disadvantageous for the Saudi economy.

Carbonneau asserts that Middle Eastern Muslim countries, especially Saudi Arabia, 'appear to be the countries that have taken the most negative position on ICA, questioning its value, origins, and legitimacy'. [1221] Thomas affirms that the 'Saudi government reserves the right to refuse enforcement of an award. Therefore, awards rendered by default against a Saudi party are automatically unenforceable'. [1222] Also, Egyptian billionaire, Naguib Sawiris, confirmed Carbonneau's view when he was asked whether he intended to invest in the GCC States, particularly in Saudi Arabia, replying:

> Personally, since I can invest anywhere in the world. Why would I go somewhere where I'm not convinced that there's rule of law and order? Political stability and economic stability go together. You need to go somewhere where you feel comfortable.[1223]

Nevertheless, investors' concerns, as expressed by Sawiris, were corroborated by what the Saudi Crown Prince recently elaborated upon in reference to the enactment of new

[1217] Arthur J Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2007) 5 Santa Clara Journal of International Law i.
[1218] Hussein (n 86).
[1219] Roy (n 55).
[1220] Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Award in the Middle East' (2008) 21 New York International Law Review 1.
[1221] Carbonneau (n 138).
[1222] ibid 795.
[1223] Tan (n 56).

laws, projected for the end of 2021 and concerning the organising and unification of Saudi legislations. The Crown Prince consequently stated that the current situation neither helps the judges, nor corresponds to the vision projected for Saudi Arabia.[1224] This is because judges need to analyse different Sharia provisions and examine the thoughts of Sharia scholars on various matters, in order to be able to issue a decision. This process inevitably prolongs litigation and arbitration.[1225] According to the Saudi Minister of Justice, the new reforms should help to attract foreign investors, because court decisions will be more predictable. Therefore, judges will be compelled to issue decisions according to the text of laws, without expanding their interpretation.[1226] Indeed, investors' concerns over the broad interpretation of public policy in the GCC States are not limited to Saudi Arabia but to all GCC States.[1227] Also, it seems that these criticisms not only related to the application of Sharia but also includes the negative application of public policy to refuse to recognise and enforce foreign arbitral awards. Given the foregoing, it is necessary to explain in more detail what is considered as 'public policy' and how this may be given a broader interpretation than required. Thus, the following sub-sections will analyse examples where public policy was invoked by the GCC courts under non-Sharia factors, namely, local procedural laws, non-arbitrability, family law, and real estate law.

6.5.1 Local Procedural laws

There are no doubts that courts have the power to invoke public policy as a ground for refusing to implement or recognise arbitration awards that conflict with the fundamental principles of the state. As will be explained in the next chapter, in non-GCC jurisdictions, courts frequently invoke the public policy exception to challenge arbitral awards tainted by serious violations such as corruption or bribery.[1228] However, these courts are more hesitant to apply public policy to refuse recognition and enforcement of arbitral awards that violate domestic legislation.

[1224] Saudi Vision 2030 is a strategic framework for reducing Saudi Arabia's dependence on oil, diversifying its economy, and developing public service sectors such as health, education, infrastructure, recreation, and tourism. See https://vision2030.gov.sa accessed 25 January 2023.
[1225] 'New Laws to Reform the Kingdom's Judicial Institutions' (*Official Saudi Press Agency,* 2021) <https://spa.gov.sa/viewfullstory.php?lang=en&newsid=2187801> accessed 1 January 2021.
[1226] Talat Hafiz, 'Judicial Reform Set to Improve Saudi Competitiveness' (*Arab News,* 2021) <https://arabnews.com/node/1810091> accessed 3 February 2021.
[1227] Azab Alaziz Alhashemi, 'A Contemporary Look at Qatari Arbitration of Civil and Commercial Materials from a Future Perspective' (2020) 4 Journal of Economic Administrative & Legal Sciences 193.
[1228] National Iranian Oil Company v Crescent Petroleum Company International Ltd [2016] EWHC 510 (Comm).

Conversely, while uncommon, some GCC courts have clearly adopted a more stringent approach in some cases, where the courts refuse to enforce arbitral award for breaching local legislations. In Qatar, for instance, the Court of Cassation set a dangerous precedent by adopting a broad approach to the interpretation of public policy.[1229] In this case, the court refused to enforce an arbitral award on the public policy ground. The court noted that the arbitral award breached Article 69 of the Civil and Commercial Procedures Law 1990, which states that judgments and awards shall be delivered in the name of His Highness, Emir of the State of Qatar.[1230] Therefore, since this award was not issued in the name of the Emir, the court refused to enforce it and asserted that doing so would breach the state's public policy. The aforementioned case clearly illustrates the negative approach to interpreting public policy in Qatar. Although Qatar acceded to the New York Convention in 2002, the court did not give the convention or its provisions any consideration with regard to the special nature of an international dispute. On the contrary, the court continued to treat the international arbitral award as a domestic arbitral award by applying the local legislation. This approach, where the court applies its national legislation to a foreign dispute, has been criticised for undermining the purpose of the New York Convention 1958.[1231] This negative approach can be attributed, at least in part, to the absence of a clear legal distinction within Qatari law between the enforcement procedures for domestic and foreign awards as it will be examined in Section 6.7.1.[1232]

Similarly, in the UAE, where the Dubai government challenged a decision issued against it in *Bechtel v Civil Aviation of Dubai,*[1233]arbitral decision was issued in favour of Bechtel,[1234] the Dubai government challenged this decision before the Dubai courts, on the ground that the arbitrator had violated the Federal Law of Evidence with regard to the oath of witnesses of 1992.[1235] This violation consisted of merely reminding the witnesses to tell the truth or else face severe consequences, rather than applying the UAE law by compelling the witnesses to declare: '*I swear by the Mighty God to say all the truth and nothing but the truth*.'[1236] The court responded to the appeal and annulled the arbitral

[1229] Qatari Court of Cassation, Appeal No 64, 2012.
[1230] Qatari Civil and Procedures Law, Law No 13 of 1990.
[1231] Khadeja Al-zarraa, 'Recognition and Enforcement of Foreign Arbitral Awards: Case Study on the State of Qatar' (2015) 70 Dispute Resolution Journal 61, 78.
[1232] See page 227.
[1233] Dubai Court of Cassation, Civil Appeal for Cassation No 275 of 2014.
[1234] International Bechtel Co LLC v Department of Civil Aviation of the Government of Dubai [2002] DIAC.
[1235] The UAE Federal Law of Evidence of 1992.
[1236] Article 43 of the Federal Law No 10 of 1992 on Evidence in Civil and Commercial Transactions.

award under public policy violation, [1237] in a decision that has been criticised by practitioners who question the credibility of the UAE courts regarding the enforcement of arbitral awards, especially where one of the parties is linked with the government.[1238] However, the claimant subsequently sought to enforce the award in France, where it was implemented, as the French court confirmed that the award did not conflict with public policy.[1239]

In fact, the above decisions rise serious concerns regarding the application of public policy in the GCC States. While both courts ostensibly grounded their decisions on public policy considerations, the possibility of influence on the judicial process by parties connected to the regime cannot be entirely disregarded. Notably, in each case, the losing party in the arbitration possessed significant ties to the ruling regime. In the Qatari case, the defendant has familial relations with the royal family. Similarly, the Dubai case involved an award against an airport controlled by Dubai government and chaired by a member of the royal family of Dubai. These circumstances raise concerns regarding the potentially restrictive application of the public policy exception, particularly where influential parties with regime ties are involved.

6.5.2 Non-arbitrability

Although 'non-arbitrability' is a separated refusal ground, the courts in the GCC States often fail to distinguish between this term and 'public policy'. Article V(2)(a) of the New York Convention 1958 stipulates that 'recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country'. It should be noted that the legislations in the GCC States do not prohibit commercial disputes from being subjected to arbitration. However, the arbitration laws of these states provide specific instances where a dispute cannot be settled by arbitration, namely, disputes arising from crime, matters of family law, and issues that are not subject to conciliation. Similar to the broad approach in interpreting and applying public policy, it may be noted that the courts of the GCC States have adopted the same trend in 'non-arbitrability' disputes. In *Kuwait*

[1237] Dubai Court of Cassation, Case No 502/2003.
[1238] John M Townsend, 'The New Bahrain Arbitration Law and the Bahrain "Free Arbitration Zone"' (2010) 65 Dispute Resolution Journal 74, 76.
[1239] Court of Appeal of Paris, Case No 2004/07635.

Football Association v FIFA,[1240] the Court of Cassation rejected the enforcement of the award on the ground that the dispute was not subject to arbitration, since it was an 'internal' matter and therefore, its enforcement would have breached the state's public policy.[1241] It should be noted that the case related to a dispute between two political parties who had significant influence in the state of Kuwait, which raises doubts about whether political influence can affect the courts' interpretation of public policy.

Local laws in the GCC States prohibit resorting to arbitration in certain disputes because they are considered as part of their public policy. In the UAE, for example, local laws prohibit resorting to arbitration in disputes that related to intellectual property, anti-dumping, bankruptcy, and labour matters.[1242] As a result, the UAE's Court of Appeal has even rejected parties' recourse to arbitration where an arbitration agreement exists in these cases.[1243] The court justified this rejection on the basis of Article 7 of the Labour Law 1980, which does not permit an agreement to violate the Labour Law, whereupon arbitration was rejected. In this case, the court linked between public policy and arbitrability where it confirmed that resorting to arbitration in non-arbitrability disputes breaches public policy.[1244] Nevertheless, some researchers are of the view that the consideration of various matters as aspects of public policy does not necessarily indicate abuse or misapplication of this exception; on the contrary, such considerations provide greater protection for individuals in labour disputes.[1245] This is also the case in disputes relating to bankruptcy, which the legislator only permits the local courts to consider, as these issues concern the state's economic interests and are therefore a matter of public policy.[1246]

In general, disputes that are prohibited by Sharia are not subject to arbitration, or rather, arbitral awards concerning these matters are not implemented in the GCC States. However, current practices illustrate controversial examples of 'non-arbitrability' in the GCC States, and a few such cases are presented below.

[1240] Court of Arbitration for Sport (CAS), 2018/A/5560.
[1241] Kuwaiti Court of Cassation, Case No 415/2019.
[1242] Article 7 of Labour law, Federal Law No 8 For 1980. The new labour law was issued in 2021 and it adopted the same approach as Article 65
[1243] Dubai Court of Cassation, Case No 123/2009.
[1244] Ibid.
[1245] MOHAMMED ANWAR AL JELANI, 'A Study on UAE Courts Supervisory Powers in Arbitration on the Grounds of Public Policy Consideration' 50.
[1246] ibid 51.

6.5.2.1 Family Law

Within the GCC States, family law disputes represent one of the common non-arbitrable matters. For example, according to Saudi Arbitration Law 2012, family disputes cannot be settled through arbitration.[1247] The same approach has been adopted by all the GCC States, especially Kuwait,[1248] Qatar,[1249] Oman,[1250] and the UAE.[1251] However, it should be noted that since the UNCITRAL Model Law on International Commercial Arbitration of 1985 is adopted by the legislator in Bahrain, Bahraini Arbitration Law 2015 does not impose any restrictions on deciding family disputes.[1252]

Although Sharia and *Fiqh* allow arbitration in family disputes, as discussed in Chapter 5, the GCC States have opted to exclude such matters from the scope of arbitrable proceedings. Some commentators attribute the prohibition of family law arbitration to the sanctity of this law and its provisions for marriage, inheritance, and family relations.[1253] In the GCC States, family law derives its provisions solely from Sharia. Therefore, any marriage contracts that are recognised as falling outside Sharia rules and provisions are considered null and void.[1254] Another justification for this approach was affirmed by El-Ahdab, in the belief that religious matters, like those that fall under family law, should be subject to litigation in the courts, where the judges are experts in Sharia law.[1255]

In fact, although these justifications are logical, prohibiting recourse to arbitration in general violates the principle of party autonomy. Furthermore, regarding El-Ahdab's outlook, arbitrators are no less experienced than judges; on the contrary, arbitrators are usually expert in matters of dispute.[1256] Besides, in family law disputes, the parties can resort to a Muslim arbitrator. Without delving into other issues that lie beyond the scope of this thesis, family law disputes constitute the majority of disputes filed before the courts of the GCC States. For instance, according to the latest statistics, family law cases

[1247] Article 2 of the Saudi Arbitration Law 2012.
[1248] The legislative framework that organises arbitration in the State of Kuwait is codified under Kuwait Civil and Commercial Procedures Law, issued in 1980.
[1249] Law No 2 of 2017, promulgating Civil and Commercial Arbitration Law.
[1250] Law of Arbitration in Civil and Commercial Disputes, Royal Decree 47/1997.
[1251] Federal Law No 6 of 2018 on Arbitration.
[1252] Bahrain Arbitration Law 9/2015.
[1253] Korteweg and Selby (n 736) 133.
[1254] ibid.
[1255] El-Ahdab (n 1009) 109.
[1256] Susan Franck, 'The Role of International Arbitrators' (2005) 12 ILSA J. Int'l & Comp. L. 499, 507.

represent 43% of all cases filed before the Saudi courts.[1257] Consequently, maintaining this approach would lead to the courts being overwhelmed by family law disputes. Hence, it has become necessary to re-address this approach.

It is clear that family law is unrelated to commercial disputes, but in practical terms, neither is it related to public policy. However, the legislator has considered family disputes to be among those where arbitration is not permissible. Some GCC courts have deemed arbitration in family disputes to be a contravention of public policy, thereby precluding the enforcement of arbitral awards in such cases. Although neither the legislators nor the courts of the GCC have justified this approach, it could be argued that necessity and the public interest have led to the trend, especially since family law disputes relate to the interests of the family and therefore, the interests of society. As mentioned previously, the laws applied in these disputes is Sharia law. Thus, consideration of these disputes as an aspect of public policy is derived from a desire to protect the public interest.

6.5.2.2 Real Estate Law

In the UAE, another example of broad interpretation and misconstrued application of the term 'public policy' has been observed. In *Baiti Real Estate Development v Dynasty*,[1258] the Emirati Court of Cassation refused to implement an arbitral award that had been issued by the Dubai International Arbitration Centre. In this arbitral dispute, the new owner of a property had failed to register ownership of the property after the sale. Thus, the arbitration tribunal applied Article 3 of Dubai's Law Regulating Initial Property Registration of 2008 and considered the sale to be null and void.[1259]

Article 3 from the supra legislation states:

> any sale or any other legal disposition that transfers or restricts ownership or any ancillary rights will be void unless entered in that register… buyers who disposed of a real property unit by way of sale or any other disposition that transferred or encumbered a real property unit before this law came into force, must apply to the department to enter such disposition or encumbrance in the property register or in the interim property register, as the case may be, within a maximum of sixty (60) days from the date on which this law comes into force.

[1257] *Ministry of Justice*, 'Courts Statistics' (2021) <https://moj.gov.sa/ar/opendata/bi/bijudicial/Dashboards/100_kpiDispatch/kpi100_01.aspx> accessed 8 January 2024.
[1258] Baiti Real Estate Development v Dynasty Zarooni Inc, Dubai Court of Cassation, Appeal No 14/2012, Real Estate Cassation (16 September 2012).
[1259] Dubai Regulating the Interim Property Register Law No (13) of 2008.

Meanwhile, the Court of Cassation clarified that disputes regarding the sale of units are matters of public policy and so any arbitral awards issued in this regard shall be void. Therefore, where a dispute subject to Article 3 of Law No (13) of 2008 is brought before an arbitral tribunal, and the tribunal renders an award to settle the dispute, the award shall be null and void, because only the local courts shall decide on the same dispute, at its own discretion, since it is a matter of public policy.[1260] However, Gordon believes that in the above mentioned case, the competent court set a dangerous precedent for the unenforceability of national and international arbitral awards, based on an excessively broad interpretation of the public policy concept.[1261] Thus, such an action is likely to lead to more concerns over the ultimate authority of the domestic courts to refuse arbitral awards. As a result, national and foreign investors would reconsider whether to resort to arbitration or other forms of alternative dispute resolution.

Approving Gordon's view, one commentator argues that the arbitral award described above shed light on a controversial issue in the Dubai courts. Mechantaf has also criticised the way in which the competent court relied on 'real estate' as a ground to refuse the award's enforcement, which left further vagueness in the interpretation of public policy.[1262] Mechantaf therefore concluded that the UAE should make more effort to identify the public policy concept and place limitations on the national courts in their broad application of the public policy exception.[1263] Likewise, the Court of Cassation in Abu Dhabi has affirmed that real estate disputes can only be heard before the UAE courts.[1264] This renders any arbitral proceedings concerning real estate that take place outside the federal courts null and void.[1265] Interestingly, the court based its decision on Article 3 of the UAE Civil Transactions Code of 1985, which provides:

> Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to systems of government, freedom of trade, the circulation of wealth, rules of individual ownership and the other rules and foundations upon which society is based.[1266]

[1260] Dubai Court of Cassation (n 161).

[1261] Gordon Blanke, K Cronin and J Paulsson, 'Public Policy in the UAE: Has the Unruly Horse Turned into a Camel' (Kluwer, 2017) <https://arbitrationblog.kluwerarbitration.com/2012/10/14/public-policy-in-the-uae-has-the-unruly-horse-turned-into-a-camel/> accessed 13 April 2024.

[1262] Khalil Mechantaf, 'Public Policy in the UAE as a Ground for Refusing Recognition and Enforcement of Awards' (*Kluwer Arbitration Blog*, 2012) <http://arbitrationblog.kluwerarbitration.com/2012/07/06/public-policy-in-the-uae-as-a-ground-for-refusing-recognition-and-enforcement-of-awards/> accessed 12 January 2021.

[1263] ibid.

[1264] Abu Dhabi Court of Cassation (2013) 410/2013.

[1265] ibid.

[1266] Federal Law No (5) of 1985 on the Civil Transactions Law of the United Arab Emirates.

It is significant to mention that in the GCC States, non-citizens are excluded from owning real estate, unless they obtain personal permission for such ownership.[1267] This special approach has been adopted by most of the GCC States in an attempt to control the price of real estate.[1268] Similar to the UAE's position, the Kuwait legislator has adopted a strict approach to real estate law, with the result that owning property in Kuwait is perhaps more complicated than might be anticipated. Therefore, the national courts will not enforce any arbitral award or contract that involves a real estate transaction. Moreover, by revising Kuwait's legislation on this matter, it can be said that the Kuwaiti legislator adopted unprecedent approach regarding real estate disputes. According to Article 1 of Kuwait's Real Estate Law of 1979, non-citizens are not allowed to own any property in Kuwait. However, Article 3 makes an exception, providing that 'by a decision of the competent minister, non-citizens are allowed to own a property if the conditions are met'. Conversely, the same Article deprives non-citizens of the right to purchase a new property within five years of selling a property that they already own. In addition, as a clear reflection of the Kuwaiti legislator's strict approach, Article 4 of Kuwait's Real Estate Law 1979 stipulates that it is not permissible for non-citizens who own real estate in Kuwait to own further property in the country, and if they inherit another property, they must sell the other property within a year of the inheritance date.[1269]

Nevertheless, this raises the following question: What if the disputing parties are Kuwaiti? Despite the level of uncertainty surrounding this matter, it would seem that Kuwait's national courts will not enforce any arbitral awards or contracts pertaining to Kuwaiti Real Estate Law, even between Kuwaiti parties. Therefore, according to Alhashemy, the challenging terms and conditions imposed by Kuwait Real Estate Law prove that the Kuwaiti courts are reluctant to enforce arbitral awards involving property transactions.[1270]

In Saudi Arabia, the situation is no different, regardless of the fact that there are no court precedents to indicate whether Saudi Real Estate Law relates to public policy. However, it seems patently clear from the relevant laws that property transactions are not subject to

[1267] James England, 'Real Estate Investing in the Middle East: Foreign Ownership Restrictions in the GCC' (*CCBJ*, 20 January 2012) <https://ccbjournal.com/articles/real-estate-investing-middle-east-foreign-ownership-restrictions-gcc> accessed 10 January 2021.
[1268] However, there are some exceptions to this law, such as in Dubai, where foreign ownership is permitted if met conditions.
[1269] Law No 74 of 1979 Regulating the Ownership of Real Estate by Non-Kuwaitis.
[1270] Moses Alhashemy, 'Arbitration in Real Estate Disputes - The Kuwaiti Case' (*Global Arbitration Blogspot,* 2017) <http://globalarbitration.blogspot.com/2017/01/blog-post.html> accessed 26 November 2020.

arbitration. In 2019, the Saudi Real Estate Arbitration Centre was established, with the aim of reducing the burden on the courts by settling real estate disputes.[1271] Article 6 of the Statute of the Saudi Centre for Real Estate Arbitration of 2019 explicitly states that the centre is competent to settle disputes involving real estate activities that arise within the territory of the Kingdom of Saudi Arabia.[1272] Therefore, disputes arising outside of Saudi Arabia are not subject to arbitration by the centre. In addition, the same Article clarifies that contracts concern buying and selling of real estate fall outside the Centre's jurisdiction.[1273]

Indeed, this approach appears to have been adopted broadly, not only in the GCC States but also in other Arab countries. In Egypt, for instance, the Court of Cassation refused to enforce an arbitral award for the sale of a property by a non-Egyptian buyer. The court found that the award was manifestly contrary to Egypt's public policy, reasoning that 'the parties resorted to arbitration to evade the application of Egyptian real estate law 1996 and hence, it contravenes public policy'.[1274] In the same case, the Court of Cassation defined public policy as

> the rules that achieve the political, social and economic interests of the state, which take precedence over the individual interest. Thus, at all events, individuals are not allowed to circumvent this term through special agreements that achieve their interests. Therefore, it is not acceptable for individual interest to prevail over the public interest.[1275]

However, despite the exaggerated reservation regarding real estate law, some legal commentators support this broad interpretation of public policy. For example, Alhashemy believes that land and real estate represent a national asset. Therefore, they should not be subject to a non-national jurisdiction, such as arbitration.[1276]

Ultimately, there is no explanation for the GCC courts confusing non-arbitrability with the public policy exception to refuse the enforcement of foreign arbitral awards, except that the law has been misunderstood, as previously pointed out. Regardless of whether this misapplication was deliberate or inadvertent, it indicates poor application of the

[1271] The Saudi Centre for Real Estate Arbitration was established in 2019, aimed at resolving real estate disputes through arbitration (see Real Estate General Authority, [Website] <https://rega.gov.sa/en/electronic-services/saudi-real-estate-arbitration-center/>).
[1272] Law of the Saudi Centre for Real Estate Arbitration 2019.
[1273] ibid.
[1274] Court of Cassation Case No 3504/78, issued in 2015.
[1275] ibid.
[1276] Moses Alhashemy, 'National Public Policy in the GCC States' (*Global Arbitration Blogspot*, 2021) <http://globalarbitration.blogspot.com/2021/02/> accessed 14 March 2021.

public policy concept. In the cases presented above, disputes related to real estate and family law are considered non-arbitrable by the law. However, local courts have invoked the public policy exception rather than non-arbitrability as a basis for refusing to enforce a foreign arbitral award. This trend confirms the doubts of some researchers regarding the unfriendly approach of the GCC courts to implementing foreign arbitral awards. Despite the justifications presented for the practices of the GCC legislators and courts, regarding disputes related to real estate as part of public policy, these practices do not reflect the efforts made by the GCC States to attract foreign investment, especially real estate investments. Thus, the continuation of these practices could negatively affect the commitment of the GCC countries to international conventions on the implementation of foreign arbitral awards and contracts. In all cases, states have the right to protect their fundamental principles, without expanding the application of exceptions to challenge the implementation of foreign arbitral awards. Nevertheless, this peculiar approach of the courts across the GCC States could be the result of the difficulties they face in applying the appropriate legislation. Having examined the impact of Sharia on the concept of public policy, along with examples of what constitutes public policy in the GCC States, the chapter now shifts its focus to examine the position of GCC States' concerning the categorisation and definition of public policy.

6.6 Position of the Courts in the GCC States Regarding National, International and Transnational Public Policy and public policy definition

Chapter 4 examined the different categories of public policy and efforts to define this concept in non-GCC States.[1277] Regardless of whether these categories and efforts were initially introduced and acknowledged by legislators, courts, or practitioners in non-GCC States, they have effectively contributed to constraining the broad application or even misapplication of the public policy exception. Given their importance in narrowing the application of public policy, the following sections will explore and examine the stances of GCC States concerning the definition of public policy and whether these states adopt various categories of public policy.

6.6.1 Definition of Public Policy within the GCC States' Legal Systems

Unlike some non-GCC States, neither the legislations nor the courts in the GCC States have explicitly defined the term 'public policy'. In the GCC States, scholars have been

[1277] See page 93.

hesitant about defining the concept of public policy. In addition to the evolve nature of public policy, some attribute this negative approach to issues within the legal system itself, as the concept of public policy has always been linked to state sovereignty and Sharia.[1278] Therefore, since Sharia principles are essential to the formation of public policy in the GCC States, some researchers may avoid its examination as it is sensitive topic since the concept relates to the religion.

As discussed in earlier,[1279] the only legislator among the GCC States to provide a definition is the Saudi legislator. This definition is found in Article 11 of the Saudi Implementation Regulation of Enforcement Law 2013, which states that 'public policy means Sharia principles'.[1280] However, the legislator did not clarify what is meant by Sharia principles, particularly since Saudi Arabia has not adopted a specific school of jurisprudence that might elucidate the term 'Sharia principles,' as discussed in Chapter 5.[1281] Furthermore, some practices in Saudi Arabia contradict this definition, thereby making it inaccurate to assert that Article 11 of the Saudi Implementation Regulation of Enforcement Law 2013 adequately defines public policy.[1282] While scholars such as Masoud argue that public policy is synonymous with Sharia principles,[1283] this thesis contends that they are not synonymous for two reasons. Firstly, public policy is broader than Sharia and accepting the hypothesis that public policy equates to Sharia principles could permit the enforcement of many unfair arbitral awards in the GCC States, including those based on modern economic principles and international commitments, provided they do not breach Sharia. Secondly, this chapter demonstrates several instances where courts in the GCC States have enforced arbitral awards that breach Sharia, indicating that it is inaccurate to assume that public policy refers solely to Sharia principles. Therefore, it can be said that while the Saudi legislator has indicated what constitutes public policy, it has failed to provide a clear definition of the concept.

In the UAE, the legislator did not define public policy, however, it has clarified matters of public policy. According to Article 3 of the UAE Civil Code 1985, several issues constitute matters of public policy, including personal status such as marriage,

[1278] Ahmad Shehab Alshehab, 'Free Speech and Defamation in Kuwait and US Law: Historical Dimension of Jurisdictions and Law in a Social Context' 5.
[1279] See page 199.
[1280] Article 11(3) of the Saudi Implementation Regulation of the Enforcement Law of 2013.
[1281] See page 147.
[1282] See page 200.
[1283] Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Routledge 2016) 125; Masoud (n 1165) 34.

inheritance, and lineage, matters relating to systems of government, freedom of trade, the circulation of wealth, rules of individual ownership, and other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of Islamic Sharia.[1284] The UAE's attempt to narrow the scope of public policy indicates that legislators in the GCC States may misunderstand or confuse matters of public policy with non-arbitrable matters. Although this confusion is not unique to the GCC States, as discussed in Chapter 3, it can be more problematic in the GCC States, which have not adopted various categories of public policy that could narrow its application.[1285]

In the rest of the GCC States, while legislators have not defined public policy, some courts have described it using terms such as public morals, public interest, state sovereignty, mandatory rules, and Sharia. Furthermore, the GCC courts regard non-arbitrable disputes as issues pertaining to state public policy as explained in this chapter. Therefore, it can be said that unlike non-GCC States, legislators and courts in the GCC States have failed to narrow the public policy exception by precisely identifying its scope. [1286]

Indeed, it may argue that there is no solid rule for practitioners to apply in distinguishing or defining public policy. Thus, some scholars believe that finding a comprehensive theory for courts to adhere to in situations involving the public policy defence remains a difficult task from a normative perspective.[1287] Therefore, it could be said that there is no one unified or agreed definition of public policy, neither in the GCC nor non-GCC States. However, while courts in non-GCC States, particularly those following common law jurisdictions, possess the authority to delineate the concept of public policy, the inefficiency prevalent in GCC courts may have constrained their ability to adopt a similar approach. As elucidated in Chapter 1, the constitutions of GCC states authorise the courts to act in the absence of legislative text, provided the matter is not criminal in nature.

[1284] Federal Law No. (5) of 1985 concerning the issuance of the civil transactions law of the United Arab Emirates.
[1285] In Chapter 6, several cases have been examined where courts in the GCC States confused between public policy and non-arbitrable matters. See page 210.
[1286] Similarly, in the legal systems of many Arabic countries, including Egypt, from which the GCC States derive their legislation, the legislature has not provided a definition for public policy. Some scholars believe that there is no unified definition of public policy. Instead, public policy in general is recognised as a set of principles designed to protect a state's political, economic, and moral (social and religious) norms by prioritising public over private interests, while at the same time respecting individual liberties. See Ashrf Al Rifaie, *Public Policy and Arbitration of Private International Relations* (Ein Shams 1996), 115.
[1287] Ghodoosi (n 281) 700.

Despite this, GCC courts continue to exhibit a reluctance in interpreting the public policy exception.

In fact, it is evident from the examination of various jurisdictions in this thesis that defining public policy in a manner that is universally applicable is difficult.[1288] However, the thesis contends that it is more feasible to define public policy within a specific jurisdiction or among a group of countries that share many common characteristics, such as the GCC States. Therefore, based on the legislative enactments and judicial practices discussed in Chapters 3 and 6,[1289] public policy in the GCC States can be understood to encompass principles that safeguard the national interest, including economic and political interests. Additionally, public policy includes the protection of public morals and adherence to Sharia principles that affirmed by the Quran and Sunnah. However, it is challenging to formulate a comprehensive definition of public policy for a specific jurisdiction without adopting various categories of public policy. The thesis asserts that the GCC States do not adopt diverse categories of public policy.[1290] Therefore, to achieve a more precise definition of public policy in the GCC States and narrow its application, the following section will elucidate the thesis's normative perspective on the various categories of public policy in the GCC states.

6.6.2 Categories of Public Policy within the GCC States' Legal Systems

In terms of the categories of public policy, the GCC States do not adopt any specific category. In contrast to some non-GCC States that explicitly refer to various categories of public policy, as discussed earlier in this chapter,[1291] neither legislators nor courts have attempted to classify or categorise public policy in the GCC States despite its importance. The non-GCC States efforts stem from their responsibility to control the 'unruly horse' while balancing the importance of enforcing arbitral awards and safeguarding the fundamental principles of the state. Notably, even among scholars in the GCC States, the thesis did not find references to categories of public policy. Instead, it is common for scholars to adopt the same approach as legislators and courts, referring to public interest, public morals, and Sharia. There is no clear reason behind this lack of categorisation, but one possible reason is the infrequent refusal of foreign arbitral awards on public policy

[1288] See page 94.
[1289] See pages 53 and 166.
[1290] See page 210.
[1291] See page 93.

grounds. Another reason could be the adoption of the same procedures to enforce arbitral awards, whether national or international.

In fact, the GCC States have been constantly in the spotlight for their application of only domestic public policy. Some scholars argue that the reasons for this broad approach to applying domestic public policy are local arbitration laws and the legal nature of these states. For instance, legislators and national courts of the Gulf countries do not make any procedural distinction between foreign and national arbitral awards.[1292] Therefore, the winning party must follow the same procedures to recognise and enforce arbitral awards, regardless of whether they are domestic or foreign.

Generally, it can be said that the experience of the GCC States in implementing foreign arbitral awards and arbitration laws remains modest compared to non-GCC countries. In non-GCC States, there is a clear distinction between domestic and international public policy frameworks, as evidenced by the repetitive application of international principles in the courts of Germany, Luxembourg, Italy, and Switzerland as examined in Chapter 3.[1293] In contrast, this distinction is still absent from the legal systems of the GCC States. However, several conclusions can be drawn from the judicial practices of the GCC States concerning the categories of public policy.

As previously mentioned, there is widespread debate over whether the competent court should apply the domestic public policy of the country where recognition or/and enforcement is sought, as stipulated in Article V(2)(b), the domestic public policy of the country where the arbitral award was issued, or another category of public policy, such as international or transnational public policy.[1294] Similar to local legislation, the Unified Arbitration Law of the GCC States 2012, which was issued to modernise and address gaps in domestic arbitration laws, has not adopted a specific category of public policy to narrow its application. Instead, Article 50(2) of this Law merely stipulates that an 'arbitral award shall be null if it contains what is contrary to public order, public morals, and Islamic Law,' without providing further clarification. It is worth noting that Article 55(2)(b) of the Unified Arbitration Law implicitly refers to 'regional public policy,' stating that foreign arbitral awards that breach the public policy of the GCC States will not be

[1292] The GCC States Unified Arbitration Law 2012.
[1293] Mayer and Sheppard (n 517) 259.
[1294] See page 102.

enforced.[1295] This Article integrates the public policy of the entire GCC region rather than the public policy of any specific GCC country.[1296]

As a result of this legislative absence, the courts of the GCC States are empowered to exercise their authority to fill in the legislative gap regarding public policy.[1297] However, similar to the GCC legislators, the courts of the GCC States do not make a distinction between the categories of public policy.[1298] This approach may increase concerns over the implementation of foreign arbitral awards, especially in the event that these awards violate public policy. In fact, the absence of a distinction between domestic, international, and transnational public policy has led to a broad interpretation of public policy in the GCC States, which has been demonstrated in Chapter 6.[1299]

In Qatar, for example, the Court of Cassation refused to enforce an arbitral award on the ground that it would breach Qatar's public policy.[1300] In this controversial decision, the arbitral award issued by the Qatar International Centre for Conciliation and Arbitration was treated as null and void because it was not issued in the name of His Highness the Prince of Qatar. The court justified its decision with several legal articles, first affirming that the arbitral award violated Article 63 of the Qatari Constitution, which stipulates that 'judgments are issued in the name of the Prince'.[1301] Secondly, Article 69 of the Qatari Civil and Commercial Procedures Law 1990 was cited to confirm that 'judgments shall be delivered in the name of His Royal Highness, Emir of the State of Qatar'.[1302] Consequently, the court refused to enforce the arbitral award. However, it should be noted that the aforementioned articles mainly relate to judgments and decisions issued by national courts rather than by international arbitral tribunals and arbitrators. The Qatari courts issued an unprecedented decision on this matter. Therefore, according to this approach, foreign arbitral awards that breach Qatar's Constitution or domestic laws are unenforceable. Likewise, any arbitral award that is not issued in the name of the Qatari Prince are not implemented in Qatar. Indeed, this illustrates the complexity of applying the public policy defence in the GCC courts.

[1295] The Unified Arbitration Law (n 1292).
[1296] Similarly, in Lucasfilm Ltd v Ainsworth, the Supreme Court of the United Kingdom mentioned 'European public policy', [2011] 3 WLR. 487, [106].
[1297] Alhashemy (n 1270)
[1298] Jalal El-Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International BV 2011) 196.
[1299] See page 208.
[1300] Court of Cassation, Civil Circuit, Appeal No 64 of 2012.
[1301] Qatar's Constitution of 2003.
[1302] Qatari Civil and Commercial Procedure Law No 13 of 1990.

The previous decision confirms international concerns about the commitment of the Gulf States to implementing foreign awards, as well as affirming the importance of distinguishing between domestic and international public policy. In the foregoing case, the court did not give consideration to whether Article 63 of the Qatari Constitution could solely be applied to domestic arbitral awards or whether it could also be expanded to include international awards. It also confirms the broad interpretation of public policy, whereby the courts do not take into account the nature of the parties or disputes. Therefore, it can be said that the courts only consider domestic public policy when invoking the exception as a refusal ground regardless the nature of the dispute and arbitral award. Alhashemy attributes this trend to two main reasons. Firstly, the lack of developed legislative texts not only leaves courts without guidance on the implementation of appropriate laws, but also prevents them from keeping pace with global developments in international commercial arbitration.[1303] Secondly, most disputing parties in the GCC States resort to international arbitration centres, which affects the quality of local courts and arbitration centres.[1304] It is therefore unsurprising that terms like 'international' and 'transnational' public policy neither emerge in the courts nor in the legislations of the GCC States.

Recently, arbitration centres and national courts in the GCC States have held forums and conferences relating to the judicial system and the enforcement of arbitral awards with their counterparts in European countries.[1305] However, due to the lack of GCC judicial publications on this issue, it is difficult to determine how far the GCC States are from achieving this goal. The question could be posed of which classification should prevail in the GCC States, if there is conflict between different categories of public policy. However, unfortunately, the answer is unclear. Neither the local legislations nor the practices of the courts provide any clear procedure for classifying public policy exceptions, whether domestic, international, or transnational. Therefore, it is difficult to ascertain the decisions of courts and arbitration bodies when these categories conflict. For example, if there is an arbitral award that conflicts with domestic public policy but does not conflict with international or transnational policy, will the local courts in the GCC States refuse to enforce the award? It is difficult to envisage such a decision, especially

[1303] Moses Alhashemy, 'National Public Policy in the GCC States' (*Global Arbitration Blogspot,* 2021) <http://globalarbitration.blogspot.com/2021/02/> accessed 14 March 2021.
[1304] ibid.
[1305] *GCC Commercial Arbitration Centre*, 'Annual Conference of Lawyers and Arbitrators' (GCC CAC, 2019) <http://gcccac.org/ar/training-programmes/annual-lawyers-arbitrators-conference> accessed 17 August 2021.

in the current legislative situation in the GCC countries. However, as explained above, practices suggest that the courts of the GCC States tend to apply the domestic public policy exception broadly, whether the arbitral award is domestic or foreign, particularly when it conflicts with local matters.

In fact, the practices of the GCC courts suggest an absence of categorising public policy and a tendency to broaden its application, as demonstrated in the above cases. As a general legal principle, the courts have the power to exercise jurisdiction in the absence of legislation. In the case of public policy, the courts of the Gulf countries must exercise their powers in a way that is consistent with global practices in the enforcement of foreign arbitral awards and demonstrate their commitment to international agreements such as the New York Convention. Therefore, the courts of the GCC States need to narrow the application of public policy. One way of achieving this would be to adopt different categories of public policy that can be applied according to the nature of the dispute. This approach should be applied by the courts without the need for legislative intervention, since the application of public policy not only needs sufficient legislations, but also continuous and effective court practices.

In this context and in addition to domestic and international public policy, it can be proposed that the GCC States court may possess a regional public policy. Therefore, if an arbitral award breaches the public policy of one GCC State, it will be deemed to breach the public policy of all GCC States. This conclusion is drawn from Article 55 of the Unified Arbitration Law 2012 and the examination of the courts in the GCC States, as discussed in Chapter 6.[1306] For example, Sharia, non-arbitrability, and state interest matters, all constitute parts of the public policy of the GCC States. Hence, it can be suggested that the GCC States should adopt and apply this category of public policy in cases where the award involves parties from the GCC States.

Section 4.5 examines whether the New York Convention intended to specify a particular category of public policy.[1307] In the absence of a clear indication of a specific category, it is challenging to determine the convention's intent regarding the application of public policy. Due to this ambiguity, many jurisdictions have differentiated between various categories of public policy. International public policy applies to foreign disputes, while domestic public policy is invoked only in local arbitral awards.[1308] The dilemma arises

[1306] See pages 170 and 206.
[1307] See page 127.
[1308] See page 123.

when neither courts nor legislators distinguish between these categories, as observed in the GCC States. This lack of clarity undoubtedly contributes to the negative application of public policy in the GCC States, as discussed in Chapter 6.[1309] Therefore, the thesis suggests that all jurisdictions should adopt both international and domestic public policy. However, a problem remains for courts and arbitration in states like the GCC States: defining the distinction between international and domestic public policy. In other words, if the GCC States decide to adopt various categories of public policy, with domestic public policy applying to local disputes and international public policy to foreign arbitral awards, what constitutes these categories?

The position of some non-GCC jurisdictions regarding the various categories of public policy has been examined earlier;[1310] however, these jurisdictions did not explicitly define what constitutes domestic and international public policy. Some argue that domestic public policy represents the mandatory rules of the state,[1311] while others contend that international public policy encompasses local legislation from an international perspective.[1312] These definitions are, in fact, inaccurate and not widely applicable. For instance, defining domestic public policy solely as mandatory rules narrows its scope, which is intended to be broader, encompassing aspects such as the fundamental principles of the legal system and state interests. Similarly, the definition of international public policy as principles of local legislation viewed through an international lens remains vague and difficult to apply.

The thesis affirms that defining public policy or adopting a universally applicable distinction standard is challenging due to the vague nature of public policy. However, it might be more feasible to establish such definitions within a specific state. Therefore, the thesis urges the GCC States to adopt both domestic and international public policy. Domestic public policy, which should be broader, would apply solely to local disputes. In contrast, international public policy, which should be narrower, would apply exclusively to foreign arbitral awards.

The critical question that arises is what constitutes these various categories of public policy. Chapter 6 examines court practices in the GCC States,[1313] and Chapter 5 explores

[1309] See page 166.
[1310] See page 102.
[1311] Budak (n 569).
[1312] Rowley (n 566) 40.
[1313] See page 166.

the role of Sharia in these states.[1314] Based on these analyses, it is suggested that adopting a strict domestic public policy is acceptable in the GCC States. In other words, domestic public policy in the GCC States could include mandatory rules, public interest, public morals, and all sources of Sharia. Conversely, international public policy would exclude local legislations that are not essential to international business and encompass only the principles of the legal system that are fundamental to upholding international business, such as justice and state interests. These principles would be added to the twin foundational systems of the law in the state namely the primary principles of Sharia found in the Quran and Sunnah, and the constitution. This narrower dimension of public policy, particularly regarding Sharia, is proposed because some GCC courts have shown more flexibility toward arbitral awards that breach secondary sources of Sharia.

In applying this normative view, GCC courts will avoid the broad and negative application of public policy where they apply domestic public policy to foreign arbitral awards and confuse public policy with other refusal grounds. For instance, in *the Qatari case,*[1315] the court considered local legislation as part of its public policy, leading to the refusal to enforce the foreign arbitral award. However, under the normative approach of this thesis, such a foreign arbitral award would be enforced. This is because, under this approach, local legislation would only constitute part of Qatar's domestic public policy. Given that the foreign arbitral award does not conflict with the proposed definition of international public policy in this thesis, it would be enforced.

Having examined the courts practices regarding Sharia and public policy as refusal grounds which indicates to negative application of both exceptions, as well as the impact of Sharia on the concept of public policy. It is necessary to analyse the reasons that led to the negative application of public policy by the GCC courts. Therefore, the following section focuses on the difficulties, which may be the cause of contradictory decisions and the broad application of public policy exception in the GCC courts.

6.7 Challenges Facing the Courts in Applying the Public Policy Exception in the GCC States

Scholars such as Ballantyne, argue that many of the provisions of contemporary commercial contracts conflict with Sharia law and are therefore not enforced in the GCC

[1314] See page 133.
[1315] Qatari Court of Cassation, Appeal No 64, 2012.

courts.[1316] The previous section agrees that Sharia is central to the interpretation of public policy in GCC States. The interconnectedness of Sharia and public policy produces vagueness and perceived inconsistency in the interpretation of the latter in GCC countries. Nonetheless, as has been argued in Chapter 5 and demonstrated in the preceding section, Sharia can be interpreted to include *Fiqh*, which introduces complexities and has been a significant source of controversy in GCC courts. To illustrate, it is unclear whether an arbitration award issued by a female or non-Muslim arbitrator would be deemed inconsistent with Sharia because it will be rejected by some Islamic Schools of jurisprudence. In fact, it is likely to be rejected by the *Hanbali* School to which Saudi dispute resolution and legal systems typically defer.

While there is no doubt that the legal system in the GCC States has a special character, given that Sharia has a significant influence on the legislation of these states, it is here argued that Sharia is not the sole reason for the perceptibly vague and seemingly inconsistent interpretation of the public policy exception by GCC courts. In fact, additional nuance is required to achieve a more granular understanding of the unique challenges facing the GCC courts when applying the public policy exception. This section examines additional factors that must be considered, which may lead to the courts in the GCC States negatively interpreting and applying public policy.

6.7.1 Inadequate Legislation

Despite criticisms over the unfriendly approach to implementing arbitral awards, the GCC States have made significant efforts to render international agreements more effective. For instance, most GCC countries have modernised their arbitration laws, with Qatar's Arbitration Law of 2017; the UAE's Arbitration Law of 2018; Bahrain's Arbitration Law of 2015, and Saudi Arabia's Arbitration Law of 2012. Nevertheless, regarding the role of public policy and Sharia, ambiguity still exists in the legal systems of the GCC States,[1317] giving rise to the question of whether these states are serious about tackling the aforementioned issue. This state of affairs lead scholars such as Roy to argue that, 'some countries can use the public policy exception to refuse arbitral award implementation'.[1318]

[1316] WM Ballantyne, 'The States of the GCC: Sources of Law, the Shari'a and the Extent to Which It Applies' (1985) 1 Arab Law Quarterly 3, 9.
[1317] Most of the GCC States have adopted the UNCITRAL Model law on International Commercial Arbitration with some amendments, except for Kuwait. See <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 15 June 2023.
[1318] Roy (n 55).

Roy even describes Saudi Arabia as 'traditionally hostile' to the recognition and enforcement of non-domestic arbitral awards, suggesting that because 'Saudi Arabian law and policy is diametrically opposed to the rules and laws of many member nations, courts may find it easy to reject non-domestic arbitral awards pursuant to New York Convention Article V(2)(b)'.[1319]

In 2007, representatives of the GCC States held a meeting in the UAE to discuss the necessity to adopt a unified arbitration law as a step towards significant reforms to the recognition and enforcement of arbitral awards.[1320] Their efforts resulted in the Unified Arbitration Law of 2012. This Law relates to foreign arbitral award and supposes to take precedent over the local arbitration Laws. According to Article 55 of this Unified Arbitration Law, 'the court hearing the case of nullity shall decide to nullify the arbitral judgment if its contents violate public order, public morals of the GCC states, and Islamic Sharia'.[1321]

As can be seen, this promising law did not go further than the current legislations in the GCC States, in terms of public policy serving as a bar to the enforcement of arbitral awards. Furthermore, the Unified law did not provide a clear definition of terms such as 'public order' or 'public morals'. Thus, public policy remains far from clear. Such legislative ambiguity has made foreign investors apprehensive about the justice of arbitration laws in the GCC States.[1322] In this context, Alqudah suggests that the GCC States 'should continue modernising their arbitration laws'.[1323] However, the Unified Arbitration Law of 2012 is still a remarkable step by the GCC States towards unifying their arbitration laws and the procedures of the recognition and enforcement of arbitral awards.

Indeed, inadequate legislation that lacks clear provisions can result in the negative application of the law, particularly when courts are unfamiliar with international arbitration practices. One option may be to pursue the French or Swiss approach as it will be explained further in the next chapter. The French legislator has made a distinction between domestic and international public policy.[1324] Similarly, the Swiss have adopted

[1319] ibid.
[1320] Jassim Mohammed AA Al-Obaidli, 'Arbitration Law in Qatar: The Way Forward' (PhD thesis, Robert Gordon University 2016).
[1321] GCC Unified Arbitration Law 2012.
[1322] Alqudah (n 1183).
[1323] Ibid.
[1324] French Code of Civil Procedure 1981 and Decree No 2011-48 regarding the arbitration law reforms of 2011.

classifications that distinguish between domestic and international public policy,[1325] with international public policy being applied only in international disputes.[1326] In any event, the lack of clear legislation facilitating the enforcement and recognition of foreign arbitral awards, particularly regarding the definition and scope of public policy, remains a significant obstacle for the GCC courts. Consequently, the restrictive approach adopted by certain GCC courts is likely to persist as long as they continue to rely exclusively on the existing legal framework.

6.7.2 Failure to Distinguish Related but Distinct Dispute Resolution Systems

In some cases, the problem lies in misunderstanding the existing law rather than the inadequacy of the law itself. The legislation in the GCC states does not distinguish between international and local arbitral awards in the enforcement context. The judges also often fail to distinguish the standards required for judgments from those required for foreign awards. For instance, as mentioned earlier, the Qatari Court of Cassation refused to enforce an arbitral award because it was not issued in the name of the Emir of Qatar,[1327] the court based its decision on Article 69 of the Civil and Commercial Procedures Law, wherein it is stated that 'judgments shall be delivered in the name of the Emir of the State'.[1328] Thus, the court refused to enforce this award, as it was not issued in the name of the Emir. In fact, the court in this instance exacerbated the ambiguity surrounding public policy and should have made a distinction between the judgments issued by courts and the arbitral awards issued by arbitrators. This was especially pertinent since Qatar is a signatory to the New York Convention and adheres to a demonstrated pro-enforcement bias under this Convention.

One option would be for GCC States to adopt specific procedures to be followed in order to enforce international arbitral awards rather than adopting the same procedures for both domestic and international arbitral awards. This will assist GCC courts to show more pro-enforcement approach regarding the international arbitral award.

[1325] Ádám Boóc, 'Observations on the Definition of Public Policy (Ordre Public) in Swiss Arbitration Law' (2012) 53 Acta Juridica Hungarica 181, 182.
[1326] Inter Maritime Management SA v. Russin & Vecchi (Switz. v. U.S.), XXII Y.B. COM. ARB. 789-799 (1997).
[1327] Qatari Court of Cassation, Appeal No 64, 2012.
[1328] Qatar's Civil and Commercial Procedures law, Law No 13 of 1990.

6.7.3 Lack of Judicial Precedent and Accessible Case Reporting Systems

Generally, precedents play a crucial role in the judicial process.[1329] In the legal systems of the UK and US, lower courts are bound by decisions issued by the higher courts.[1330] Although precedent does not represent binding authority in the judicial systems of the GCC States, court decisions are still relied on as a vital source by judges and lawyers. Interestingly, in a review of GCC State court decisions referring to public policy, it may be observed that there is a scarcity of decisions relating to this exception. Previous decisions have only briefly mentioned public policy, without giving sufficient detail. As explained earlier, courts tend to refuse to enforce arbitral awards on the ground that they breach public policy, without explaining what public policy is or more importantly, how they have applied this exception.[1331]

As will be seen in the next chapter, unlike non-GCC judicial systems, the courts in the GCC States do not have accessible or updated platforms for lawyers or the relevant authorities to view court decisions. The only available data are either old or inadequate. The lack of familiarity with the international commercial arbitration practices can be seen in the court's practices. As examined earlier, the Qatari court affirms this concern by applying local legislation to an international arbitral award. It is fact that the absence of proper legislation could contribute to this negative decision in this case. However, court should have considered the application of the New York convention provisions as the award is international.

The lack of judicial precedent, along with the inherent difficulty in reaching court decisions regarding public policy exception, can create challenges for judges and arbitrators. While the absence of previous factors does not mean judges will misuse the application of public policy, it certainly makes it harder for them to get clear guidance especially in legal systems that adopt Sharia as a main source of legislation without codifying it. Judicial precedent and accessible case reporting systems would be helpful for courts and arbitrators when it comes to the application of public policy in the GCC

[1329] Precedent or *stare decisis* is the main feature distinguishing common law from civil law, with precedent representing a binding authority in common law states such as the UK and the US. Therefore the lower courts cannot overrule the principles of the higher courts; James H Fowler and Sangick Jeon, 'The Authority of Supreme Court Precedent' (2008) 30 Social Networks 16.
[1330] Evan H Caminker, 'Why Must Inferior Courts Obey Superior Court Precedents?' [1994] Stanford Law Review 817.
[1331] See pages 198 and 206.

States. Also, it would clarify how local courts approach applying and interpreting public policy.

6.7.4 Lack of a Sophisticated Judiciary and Jurisprudence

The courts play a fundamental role in the interpretation of public policy. Courts in GCC States have struggled to develop a consistent and nuanced approach to the interpretation of public policy. Conversely, as will be examined further in the next chapter, the Swiss Supreme Court, for example, distinguishes between different types of public policy.[1332] Also, a Swiss court recognises various categories of public policy, including domestic, international, and transnational.[1333] It has been noticed that many non-GCC courts often shun applying public policy exception. Increasingly, some courts have adopted an 'extreme' bias in favour of the enforcement of foreign arbitral awards, demonstrated in their narrow approach to applying the public policy defence.[1334] Thus, the English courts are not reluctant to enforce a contract tainted by fraud or bribery.[1335]

The above-mentioned examples confirm the significant role of the courts in applying and interpreting the public policy exception. Thus, courts do not refuse to enforce contracts or arbitral awards merely because they violate purely domestic public policy. Moreover, they provide detailed decisions which contribute to the development of the jurisprudence on this concept. This contributes to a better understanding of the approaches adopted by the courts for the issues at hand.

It is evident from the foregoing that the courts play a significant role in developing the interpretation of the public policy defence. The emerging jurisprudence from non-GCC countries, such as the UK and Switzerland, suggests that public policy at the point of recognition and enforcement refers to international public policy. Purely domestic policy will not be applied to refuse recognition and/or enforcement of foreign arbitral awards. In this context, Hakeem declares that courts should not invoke national public policy to challenge the enforcement of a foreign arbitral award.[1336]

[1332] *Société de grands travaux de Marseille v Republique populaire du Bangladesh*, 102 ATF Ia 576 (1976).
[1333] Swiss Supreme Court, 4P 278/2005, para 2.2.2.
[1334] IPCO Limited v Nigerian National Petroleum Corporation [2017] UKSC 16.
[1335] Sinocore International Co Ltd v RBRG Trading (UK) Ltd [2017] EWHC 251 (Comm).
[1336] Hakeem Olalekan Seriki, 'Judicial Involvement and Intervention in Arbitration Proceedings after the Arbitration Act 1996' (PhD thesis, Cardiff University 2002), 377.

Conversely, in the GCC States, there is concerning lack of developed jurisprudence that distinguishes between domestic public policy and international public policy. As mentioned earlier, decisions of the GCC jurisdictions regarding public policy do not align with each other.[1337] Thus, it is necessary that GCC States and courts consider various categories of public policy. One approach could be to adopt the framework utilised by France or Switzerland. The French legislature has established a clear distinction between domestic and international public policy. [1338] Similarly, Swiss courts employ classifications that differentiate between domestic and international public policy,[1339] applying international public policy exclusively in the context of international disputes.[1340]

6.7.5 Lack of Judicial Independence

The judicial systems in the GCC States share many characteristics, perhaps the most prominent of which is their lack of independence. According to local laws, judicial authority is associated with the executive authority. In this context, Kapiszewski argues that the ability of the legislative power to review decisions of the courts undermines the independence of the courts in the GCC States.[1341] Indeed, it can be said that the executive authority has the upper hand over judicial power. Therefore, there are doubts about the extent of application of the principle of separation of powers and the independence of the local courts. Many countries in the Middle East, not just the GCC States, have long been subject to criticism over the independence of their courts. Some scholars argue that the nature of the governance systems in the Middle Eastern countries has led to a basic constitutional principle being undermined, which is the principle of separation of powers. [1342] Additionally, some argue that arbitral awards that issued against the government, or individuals close to the power in the regime, are not implemented, due to the lack of impartiality and independence of judges.[1343]

[1337] As illustrated earlier in terms of usury, see page 173.
[1338] French Code of Civil Procedure 1981 and Decree No 2011-48 regarding the arbitration law reforms of 2011.
[1339] Boóc (n 1325) 182.
[1340] Inter Maritime Management SA v. Russin & Vecchi (Switz. v. U.S.), XXII Y.B. COM. ARB. 789-799 (1997).
[1341] Andrzej Kapiszewski, 'Elections and Parliamentary Activity in the GCC States: Broadening Political Participation in the Gulf Monarchies', in Khalaf A and Luciani G (a cura di), *Constitutional Reform and Political Participation in the Gulf* (Dubai: Gulf Research Center 2006), 88, 121.
[1342] Roger Sapsford and others, 'Corruption, Trust, Inclusion and Cohesion in North Africa and the Middle East' (2019) 14 Applied Research in Quality of Life 1, 14.
[1343] Randall Peerenboom, 'Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC' (2001) 49 The American Journal of Comparative Law 249, 269.

In the GCC States, although there are no clear indications of this approach, the procedures and laws raise doubts about the extent of the judiciary's independence. For example, all GCC court decisions are issued in the name of the ruler. Although this is also the procedure in many non-GCC States, some local courts in the Gulf have an exaggerated stance on this point as demonstrated earlier in Kuwait, Qatar, and Dubai courts.[1344] This could be illustrative of the lack of independence of the judiciary in the GCC States, especially if foreign arbitral awards are rendered against the government or officials. Moreover, three arbitrators were imprisoned after a Qatari businessman close to the government claimed that they had violated the arbitration agreement in a dispute between Sheikh Khalid – a member of the ruling family – and Société d'Entreprise et de Gestion (SEG).[1345] In *Sheikh Khalid v. Société d'Entreprise et de Gestion (SEG),*[1346] the arbitrators referred the dispute to an institutional arbitration centre in Tunisia on the premise that it was a more neutral forum.[1347] In Tunisia, the arbitral tribunal issued a decision obligating Sheikh Al Misnad to pay an amount of USD 20,000,000 to the claimant.[1348] As a result, Sheikh Al Misnad filed a criminal case against the arbitrators on the ground that they had violated arbitration procedure. Hence, the Qatari Criminal Court sentenced the arbitrators to three years in prison.[1349]

In Saudi Arabia, in the well-known Case between *Jadawel International (Saudi Arabia) v Emaar Property PJSC (UAE),*[1350] the Emirati company (Emaar) sought to implement the award issued in its favour by a Saudi arbitral tribunal against Jadawel (Saudi Arabia), which challenged this award before a Saudi court. Interestingly, the court not only overturned the decision, but also obligated Emaar (UAE) to pay compensation in favour of Jadawel. This controversial decision raised many doubts about the extent of the independence and impartiality of certain courts, especially where one of the parties to the dispute is a government official.[1351]

[1344] See page 210.
[1345] Sheikh Khalid Nasser Abdullah Al Misnad v Société d'Entreprise et de Gestion, issued in Qatar on 31/03/2016.
[1346] Ibid.
[1347] Ibid.
[1348] Société d'Entreprise et de Gestion v Sheikh Khalid Nasser Abdullah Al Misnad, issued in Tunisia on 20/11/2017.
[1349] Krystal Lee, 'The Arbitration Vaccine: Immunity of Arbitrators' (*Thomson Reuters*, 29 January 2021) <http://arbitrationblog.practicallaw.com/the-arbitration-vaccine-immunity-of-arbitrators/> accessed 20 June 2023.
[1350] Jadawel International (Saudi Arabia) v Emaar Property PJSC (UAE) [2008].
[1351] Board of Grievances, Case No 433/2009, wherein the decision was not implemented, as the parties to the dispute reached a settlement in 2010. As a result, all cases were withdrawn.

Although the above cases do not necessarily represent clear confirmation of the lack of independence of the judiciary, especially since there are many cases of judicial corruption worldwide,[1352] the legislation related to the judiciary in the GCC countries indicates a violation of the principle of separation of powers. For instance, in the GCC States, local laws authorise the Minister of Justice to appoint judges and prosecutors. Furthermore, by law, the government determines the judiciary's financial allocations, thereby giving the government control over the judiciary.[1353] Consequently, some commentators observe that it is difficult to implement some arbitral awards in the GCC countries for reasons related to the judiciary's lack of independence.[1354] In fact, the doubts of some scholars have been confirmed by the efforts of several members of Gulf parliaments and local human rights organisations to amend local laws that grant more independence to the judiciary. For example, in Kuwait, there are efforts by members of Parliament to amend the Judicial Authority Law of 1990 to grant the courts greater independence.[1355] These efforts to consolidate the independence of judges came as a result of the government undertaking measures against Members of Parliament and political activists. For instance, some citizens were stripped of their citizenship because of their political views.[1356] It is worth noting here that the courts do not have the authority to consider disputes and issues related to nationality. This is justified on the grounds that the granting of citizenship is an act of sovereignty. As such, it is an inherent right of the state and cannot be considered by the courts.[1357]

In addition to these practices and as a result of the tension in parliamentary life and difficulty in unifying the opinions of the government and Parliament, the Emir of Kuwait issued a decision to dissolve the Kuwaiti Parliament in 2023.[1358] This decision was appealed before the Constitutional Court, which confirmed the unconstitutional nature of the Emir's decision and consequently annulled it. However, the decision of the

[1352] Ishiguro Hirotake, 'Development and Anti-Corruption in the Era of Reforms in the GCC States' (2021) <https://ide.go.jp/English/Publish/Reports/Dp/817.html> accessed 12 June 2023, 13.
[1353] Hamad Alazmi, 'Independence of the Judiciary in Kuwait' (*Mohamoon*, 10 November 2009) <https://mohamoon-kw.com/default.aspx?Action=DisplayNews&ID=17704> accessed 11 April 2023.
[1354] Ahmed Almutawa, 'The Arab Court of Human Rights and the Enforcement of the Arab Charter on Human Rights' (2021) 21 Human Rights Law Review 506, 511.
[1355] Hussain Abdullah, 'Independence of the Judiciary' (*Aljarida*, 17 October 2017) <https://moj.gov.kw/AR/pages/DisplayDailyBulletin.aspx?ItemID=392> accessed 21 May 2023.
[1356] *Human Rights Watch*, 'Kuwait: 5 Critics Stripped of Citizenship' (10 August 2014) <https://hrw.org/news/2014/08/10/kuwait-5-critics-stripped-citizenship> accessed 25 June 2023.
[1357] Law No 20 of 1981 regarding the establishment of the Administrative Court in Kuwait.
[1358] *Aljazeera*, 'Kuwait Parliament Dissolved by Royal Decree Again' (1 May 2023) <https://aljazeera.com/news/2023/5/1/kuwait-parliament-dissolved-by-royal-decree> accessed 13 June 2023.

Constitutional Court sparked widespread controversy among political and legal circles in Kuwait, leading to the resignation of the President of the Constitutional Court. Later, the Emir of Kuwait issued another decision to dissolve the National Assembly and called for a new election.[1359]

In fact, although these practices are not related to international commercial arbitration, however, these actions raised doubts about the extent of the judiciary's independence, especially in the context of challenging the orientation of the government or ruler. This overlap between the powers of the executive and judicial authorities poses questions about whether and how far the public policy exception or Sharia law may be misused or misapplied to refuse to implement a foreign arbitral award on political rather than legal grounds, especially since some courts invoke the public policy exception to refuse to enforce arbitral awards issued against local authorities.[1360] Indeed, the lack of independence courts can lead to doubts regarding the credibility of courts especially with the exception of public policy as the court can invoke it to refuse the recognition and enforcement of arbitral award. These concerns affirmed by Egyptian businessman as presented earlier.[1361] Again, although this statement not related to public policy or international commercial arbitration, but it shows the concerns regarding the independence and impartiality of the GCC courts.

In 2014, the GCC States issued the Unified Law on the Judicial Authority of the GCC countries, with the aim of facilitating litigation procedures in the GCC States and granting more independence to the judiciary. Article 1 of this Law stipulates, 'The judiciary and judges are independent and there is no authority over them in their judiciary other than the provisions of Sharia and the laws applied in the GCC states'. Although one of the main goals of this law is to grant more independence to the judiciary, it authorises the executive authority to appoint judges, which explicitly contravenes the principle of separation of powers. As a result, Omlode argues that under the Unified Law and local laws, the judiciary does not have complete independence in the GCC States.[1362]

[1359] Interestingly, in 2024, the Emir dissolved Parliament again. The Emiri Decree was based on Parliament's 'violation of constitutional principles', and the use of offensive and inappropriate language with the ruler. See Fiona MacDonald, 'Kuwaiti Emir Dissolves Parliament after Lawmakers' Offensive Language' (*Bloomberg*, 15 February 2024) <https://bloomberg.com/news/articles/2024-02-15/kuwaiti-emir-dissolves-parliament-after-mps-offensive-language> accessed 17 February 2024.
[1360] Peerenboom (n 1343) 289.
[1361] See page 207.
[1362] Naima Omlode, 'The Institutional Independence of the Judiciary through the Gulf Cooperation Council Countries Common System Document and International Standards' (2023) 40 Journal of Jurisprudential and Legal Research 1563, 1632.

6.7.6 Lack of Clarity in Interpreting Sharia Principles

As discussed in Chapter 5, the legislator considers Sharia as main source of legislations in the GCC States. However, the lack of regulating Sharia led to inconsistencies in applying its provisions. This includes the absence of adopting a specific school of jurisprudence. This absence leads to several contradictions in applying Sharia as seen in many cases.[1363] Also, the vague role of Sharia has led some scholars, like Mahmood, to refer to 'Sharia public policy' rather than 'Sharia' and 'Public policy'.[1364] Therefore, some commentators attribute the generally broad application of public policy in the Gulf States to the contradictory provisions contained in Sharia as the main source of legislation in the region.[1365] Alternatively, Lord Phillips points to 'widespread misunderstanding' of the nature of Sharia law.[1366] According to Kayadibi, issues arise when the Quran or Sunnah leave room for Islamic scholars to determine a matter.[1367] In this case, the courts refer to secondary sources of Sharia law, namely, *Ijma* (consensus) and *Qiyas* (analogy). Consequently, the same issue will be addressed with distinct provisions in different schools of jurisprudence. The dilemma lies in the fact that the GCC States have not adopted a specific school of jurisprudence. Therefore, the courts need to review the various jurisprudential provisions, so that they can apply what they deem to be appropriate. In adopting this approach, the interpretation of Sharia principles and rules will vary from scholar to scholar and from country to country.[1368]

It is worth noting that two attempts have been made to unify Sharia principles, for example, under the Ottoman Empire and Saudi Arabia as explained in Chapter 5.[1369] However, these attempts did not success. In this context, Otto is of the view that Sharia interpretation varies from country to country, and the process of unifying Sharia rules appears unachievable, since each school of thought deals with issues from a different angle.[1370] Furthermore, it is worth highlighting that the four prominent schools of thought

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[1363] See page 198.
[1364] Ahmad (n 1017) 79.
[1365] Ahmad Azzam, 'Whether Sharia Law Is an Obstacle to the Development of Commercial Arbitration' (LLM Thesis, Vytautas Magnus University Faculty of Law 2021), 27.
[1366] John R Bowen, 'How Could English Courts Recognize Shariah' (2009) 7 University of St Thomas Law Journal 411.
[1367] Saim Kayadibi, *Istihsan: The Doctrine of Juristic Preference in Islamic Law* (The Other Press 2019), 298.
[1368] John H Donboli and Farnaz Kashefi, 'Doing Business in the Middle East: A Primer for US Companies' (2005) 38 Cornell International Law Journal 413.
[1369] See page 144.
[1370] Jan Michiel Otto, *Sharia and National Law in Muslim Countries. Tensions and Opportunities for Dutch and EU Foreign Policy* (Leiden University Press 2008), 20.

only represent Sunni Islam, which is the largest denomination of the Islamic religion.[1371] It should likewise be mentioned that all the GCC States are predominantly Sunni and Shia, these being the main denominations of Islam.[1372] According to Alsuwaidan, in 2010 and as a comprehensive initiative to modernise Saudi legislation, the late King Abdullah[1373] sought to codify Sharia principles, with crucial decisions being made to achieve this goal.[1374] However, due to the lack of approval from the Kingdom's religious scholars, implementation of this project was delayed.[1375]

Remarkably, in the legislation of the GCC States, there is no indication of which school of jurisprudence the courts should follow as clarified in Chapter 5. For instance, in Saudi Arabia, some courts adopt the *Hanbali* school of jurisprudence when issuing their decisions, whereas other courts adopt different schools of thought.[1376] However, this variation may be justified by the Hadith (sayings) of the Prophet Mohammed: '*O Allah! Treat harshly those who rule over my Ummah with harshness and treat gently those who rule over my Ummah with gentleness*.'[1377] Therefore, in applying the Prophet's sayings, if there is a controversial issue that is viewed in light of different schools of thought, or if more than one opinion has been given on the matter, the judge should adopt the most appropriate approach. Another reason for the variation in Islamic schools of jurisprudence in the GCC States is that during the time of the Ottoman Empire, the Arabian Peninsula was divided into three main provinces, with each territory adopting a different school of thought. Thus, after the Ottoman era, these schools of jurisprudence were retained in the Gulf region.[1378]

[1371] Emad Khalili, 'Sects in Islam: Sunnis and Shias' (2014) 1 Humanities 41.

[1372] John Harney, 'How Do Sunni and Shia Islam Differ?' (The New York Times, 3 January 2016) <https://nytimes.com/2016/01/04/world/middleeast/q-and-a-how-do-sunni-and-shia-islam-differ.html> accessed 15 June 2024.

[1373] King Abdullah of Saudi Arabia (1924-2015) was an important figure in the history of the country and the Middle Eastern region. He ascended to the throne in 2005 and was known for his efforts to modernise Saudi Arabia, with an emphasis on education and infrastructure development. His reign witnessed significant social and economic reforms, including increased women's rights. See Deepanjana Varshney, 'King Abdullah, a Leader Towering above Constraints in Saudi Arabia' (2014) 3 Journal of Business Management & Social Sciences Research 49.

[1374] Fahed Alsuwaidan, 'The Judicial System in the Kingdom' (*Aljazirah*, 2019) <https://al-jazirah.com/2019/20190115/rj1.htm> accessed 11 January 2021.

[1375] Ibid.; As mentioned in Chapter 5, Kuwait undertook efforts to codify Sharia law within its legal system, although these attempts were ultimately unsuccessful, see section 3.6.

[1376] Frank E Vogel, *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia*, vol 8 (Brill 2000), 175.

[1377] An-Nawawi (n 839) 651.

[1378] Meirison Alizar and Qasim Muhammadi, 'Islamic Sharia and Non-Muslim Citizens in Kanunname During Sultan Abdul Hamid II of the Ottoman Empire' (2019) 27 Walisongo: Jurnal Penelitian Sosial Keagamaan 37.

Generally, due to the holy sites located in Saudi Arabia, especially Mecca and Medina, the Council of Senior Scholars in Saudi Arabia is considered as the most important Muslim religious institution, responsible for interpreting Sharia principles to issue *fatwa*.[1379] *Fatwa* issued by this Council are often accepted by the courts in the GCC States,[1380] but the courts are not bound to implement them.[1381] In light of this situation, there is clear ambiguity in the provisions of Sharia, especially in those issued as *fatwa* by Muslim scholars. Furthermore, the passive role of the legislators in the GCC States, in failing to adopt a specific school of thought, has led to irregularity in judicial decisions. As a result, the courts of the GCC States have adopted sometimes inconsistent interpretations of Sharia and consequently, they are not reluctant to invalidate arbitral awards on the public policy ground.

Upon thorough examination of the stance of the GCC and non-GCC States concerning the aforementioned cases, along with the normative approach and a critical analysis of their practices as showed in the preceding chapters, the next chapter will present important observations on the public policy practices of the GCC States, followed by the conclusion of the thesis. This includes the potential tension between the future vision of the GCC States and the principles of Sharia.

6.8 Conclusion

This chapter demonstrates the wide interpretation of public policy by the GCC courts. While public policy is a necessarily undefined concept, the role of courts is typically to delineate its scope, resulting in a narrower application except in cases of clear contravention. However, unlike courts in other jurisdictions, GCC courts have arguably broadened the concept of public policy to encompass a wider range of situations.

Specifically, this chapter identifies four primary occasions where GCC courts invoke public policy as a ground for refusing to recognise and enforce arbitral awards or contracts: (i) where the award or contract violates Sharia principles; (ii) where enforcement would harm the national interest; (iii) where enforcement contravenes mandatory local procedural rules; and (iv) where the underlying dispute is deemed non-arbitrable under applicable law.

[1379] *Alifta,* 'Council of Senior Scholars' (*Alifta*) <https://alifta.gov.sa> accessed 11 February 2021.
[1380] AlKilani Sari, 'Effects of Error in Fatwa in Islamic Law' (2017) 13 Jordanian Journal of Islamic Studies 112.
[1381] ibid.

The chapter argues that such expansive application of public policy by GCC courts is potentially problematic. Several factors contribute to this issue, including: (i) a lack of comprehensive legislation in certain areas; (ii) ambiguities in the interpretation of Sharia; and (iii) the potential for misapplication of local laws and international conventions. The latter issue may stem from either a misunderstanding of these instruments or a lack of judicial independence.

With respect to Sharia, this chapter highlights the inconsistency in its application by GCC courts. While Sharia principles undoubtedly inform public policy within the GCC States, they are not synonymous concepts. Further, the chapter emphasises that the GCC States do not have a codified Sharia law or adhere to a single school of Islamic jurisprudence. This lack of uniformity contributes to the inconsistent application of Sharia as a justification for refusing to enforce arbitral awards. Also, it has been observed that courts within the GCC States are more inclined to apply public policy exception to deny enforcement of arbitral awards that contravene the primary sources of Sharia, specifically the Quran and Sunnah. Conversely, such invocation of the exception appears less frequent when arbitral awards are found to be in violation of *Fiqh*, or the secondary sources of Sharia.

The chapter concludes by acknowledging the significant overlap between Sharia and public policy in the GCC States. However, it emphasises a clear distinction between the two concepts, recognising Sharia as a source of public policy, but not its entirety, within the GCC.

Chapter 7 A New Approach to the Public Policy Exception in GCC States

7.1 Introduction

The objective of the thesis is to critically examine and analyse the interpretation of the public policy exception by the GCC States in the recognition and enforcement of foreign arbitral awards. To achieve this, the preceding chapters have rigorously examined the legislations of the GCC States, relevant conventions, and court practices on arbitration and public policy. The thesis has elucidated the laws governing the implementation of foreign arbitral awards in general, with a particular focus on the procedures in the GCC States. Additionally, the thesis traced the historical development of arbitration in the GCC States to provide a comprehensive understanding of the legal systems in these States.

Given that New York Convention is a significant foundation for the legal framework regulating the recognition and enforcement of foreign arbitral awards in the GCC States, the thesis critically analysed Article V(2)(b) of this convention to determine whether its ambiguity has undermined its primary objective of enforcing arbitral awards. Specifically, the thesis aimed to answer the following research question: To what extent do the GCC States interpret the public policy exception effectively, thereby reducing the likelihood of successful enforcement of foreign arbitral awards? To address this question, it was necessary to examine several sub-questions, including how each GCC State applies the public policy exception and whether a consistent approach exists across all the GCC States. Additionally, the role of Sharia law in applying the public policy exception was scrutinised, as well as whether the terms ‘public policy’ and ‘Sharia’ are synonymous in the GCC context and whether Islamic rules should be applied even in disputes involving international parties. Ultimately, the thesis considered whether Sharia law has impeded the GCC States from enforcing non-domestic awards and whether Sharia could be misused to refuse enforcement of foreign arbitral award.

This concluding chapter presents the results of the thesis and addresses the key and subsidiary research questions. It also explores the reasons behind the GCC States' seemingly negative approach to the application of public policy. Consequently, this chapter begins with critical observations on the GCC States' legal systems before addressing the thesis questions and results. Then it offers valuable lessons to the GCC States to learn from some non-GCC States' practices regarding the application of public

policy. Finally, the chapter provides several recommendations to legislators and courts in the GCC States, as well as to the drafters of the New York Convention, in an effort to minimise the misapplication of the public policy exception. However, before presenting the results and addressing the thesis questions, it is important to clarify the potential clash between the efforts made by GCC States to attract foreign investment and the principles of Sharia.

7.2 The GCC States' Future Vision and Potential Conflict with Sharia

As outlined in the thesis, the Gulf Cooperation Council (GCC) states have adopted long-term strategic visions aimed at reducing their dependence on oil as the primary economic resource.[1382] The future visions of the GCC states, such as Saudi Arabia's Vision 2030, Kuwait's Vision 2035, and the UAE's Centennial 2071, underscore a shared commitment to diversifying economies, attracting foreign investment, and fostering sustainable development.[1383] Central to these initiatives is the development of legal and regulatory frameworks that align with international standards, particularly in areas such as arbitration and dispute resolution. A key strategy in achieving economic diversification is the attraction of foreign investments. Evidence suggests that all GCC states have already taken significant steps towards achieving this objective, implementing various reforms and initiatives designed to create a more favourable environment for foreign investors.[1384]

Nevertheless, some commentators argue that despite these efforts, GCC states still face challenges and must undertake further substantial measures to attract higher levels of foreign investment.[1385] Among the issues cited is the perception that certain aspects of Sharia law may pose obstacles to foreign investment.[1386] As discussed in the thesis, Sharia law prohibits activities and industries that conflict with its principles, which may, in some cases, limit investment opportunities.[1387] Examples of such prohibitions include interest-based financial transactions (Riba), excessive uncertainty in contracts *Gharar*, gambling, alcohol production or consumption, and any contracts that violate fundamental Sharia

[1382] See pages 44 and 208.
[1383] Corina Goetz, 'Visionaries in the GCC' (StarCat, 29 September 2024) <https://star-cat.co.uk/blog/visionaries-in-the-gcc/> accessed 29 December 2024
[1384] Robert Mogielnicki, 'Competing Economic Visions in the Gulf' (2022) 40 The Cairo Review of Global Affairs 64.
[1385] Ashraf Mishrif, 'Challenges of Economic Diversification in the GCC Countries' [2018] Economic Diversification in the Gulf Region, Volume II: Comparing Global Challenges 1, 17.
[1386] Serkan Akguc and Naseem Al Rahahleh, 'Shariah Compliance and Investment Behavior: Evidence from GCC Countries' (2021) 57 Emerging Markets Finance and Trade 3766, 3770.
[1387] See pages 173 and 183.

principles.[1388] These restrictions can deter investment in industries that depend on such activities, potentially impacting the overall appeal of the GCC market to certain foreign investors.

Without doubts, religious and cultural beliefs significantly influence the investment strategies and behaviours of individuals, governments, and institutions. Al-shammari's research demonstrates that Muslim investors, in particular, base their investment decisions on their religious principles and values.[1389] Investors require a supportive and conducive business environment to engage in risk-taking, as it fosters the confidence and stability necessary for informed decision-making.[1390] In their research, Tawfik and others identify an inverse relationship between Sharia compliance and foreign investments.[1391] This suggests that companies adhering to Sharia principles must undertake additional efforts to attract these categories of investors. The study underscores the dual impact of a company's commitment to Islamic law on its investment prospects. On one hand, adherence to Sharia principles can serve as a strong incentive for investors with religious motivations, encouraging them to invest in such companies.[1392] On the other hand, the same commitment may deter foreign and institutional investors, whose primary focus is profit maximisation—a capitalist objective that may not align with the ethical and operational frameworks inherent in Sharia-compliant enterprises.[1393]

Some researchers doubt the seriousness of certain GCC states. For example, some argue that ‘it is not entirely clear that the Kingdom is committed to long-lasting legal reform, given its reluctant embrace of economic and legal modernisation over the past decades’.[1394] Many scholars have raised concerns regarding investments in the GCC states. For instance, Pepper contends that foreign investors in the region should proactively address and resolve potential issues related to the dissolution of the operating

[1388] See page 190.
[1389] Turki Rashed Alshammari and Jean-Noël Ory, ‘The Impact of Religious Announcements on Stock Prices and Investment Decisions on the Saudi Stock Exchange’ (2023) 23 Borsa Istanbul Review 1013, 1014.
[1390] Costas Siriopoulos and others, ‘Foreign Direct Investment in GCC Countries: The Essential Influence of Governance and the Adoption of IFRS’ (2021) 14 Journal of Risk and Financial Management 264, 266.
[1391] Omar Ikbal Tawfik, Hamada Elsaid Elmaasrawy and Khaled Hussainey, ‘The Impact of Sharia Compliance on Attracting Investments: Empirical Evidence from GCC’ (2025) 18 International Journal of Islamic and Middle Eastern Finance and Management 23, 43.
[1392] ibid.
[1393] ibid 44.
[1394] Ibrahim Mathker Saleh Alotaibi and others, ‘Reassessing Saudi Arabia’s Foreign Investment Laws: From Protectionism to Liberalization’ [2024] International Journal of Law and Management 509.

entity at the outset, to the extent feasible.[1395] These concerns are highlighted in the European Union report, which recommends that GCC states undertake a comprehensive review of ownership requirements, particularly the mandatory involvement of a local partner. [1396] The report further advises an evaluation of legal frameworks, with a focus on reducing the duration of judicial proceedings and addressing the high costs associated with legal processes. Additionally, it calls for an assessment of access to qualified personnel, including easing restrictions on employing women in certain sectors and streamlining visa regulations to facilitate workforce mobility.[1397]

In addition to the potential tension between foreign investments and Sharia principles, scholars such as Alhagas and Alhenaki argue that foreign investments may also conflict with local social values and cultural norms.[1398] One concern is that foreign investment might intensify competition for employment opportunities, as foreign companies often prefer to bring their own personnel rather than hire from the local workforce.[1399] This practice could foster resentment among local workers, potentially aggravating tensions between foreign nationals and citizens of Saudi Arabia. Moreover, cultural conflicts may arise between foreign investors and local communities. Foreign companies frequently introduce their own cultural practices and business norms, [1400] which may diverge significantly from those traditionally observed in Saudi Arabia. Such differences can lead to misunderstandings and friction, particularly if foreign investors fail to demonstrate adequate sensitivity to local customs and traditions. To mitigate these risks, it is essential for foreign investors to adopt a culturally informed approach and ensure their business practices are respectful of and aligned with the values and expectations of the local society.[1401]

As previously noted, tensions arise not only between Sharia principles and foreign investment but also between certain local legislative frameworks and the interests of foreign investors. For instance, administrative contracts and agreements entered into by the government in its capacity as a sovereign state are not subject to arbitration under

[1395] William F Pepper, 'Foreign Capital Investment in Member States of the Gulf Cooperation Council Considerations, Issues and Concerns for Investors: Part 2' [1991] Arab Law Quarterly 331, 337.
[1396] Maximilian Bossdorf, Christian Engels and Stefan Weiler, 'EU GCC Invest Report 2013' (2013) 8 <https://mobil.tobb.org.tr/MansetResimleri/19370-4.pdf> accessed 22 December 2024.
[1397] Ibid.
[1398] Wasan Khaled Alhagas and Moodhi Abdulrahman Alhenaki, 'The Implementation of Foreign Investment Law in Saudi Arabia' (2023) 2 Pakistan JL Analysis & Wisdom 1, 11.
[1399] ibid 12.
[1400] Kwok Leung and others, 'Culture and International Business: Recent Advances and Their Implications for Future Research' (2005) 36 Journal of international business studies 357, 374.
[1401] Alhagas and Alhenaki (n 1398) 11.

current regulations.[1402] In such cases, arbitration can only be pursued with the express approval of the Prime Minister.[1403] This legislative requirement raises significant concerns among foreign investors regarding the practical feasibility and predictability of resolving disputes in the GCC states, potentially deterring investment in the region.

In certain instances, some GCC states have enacted new legislation without adequately balancing the need to preserve local norms and cultural values with the imperative to attract and facilitate foreign investments. For example, the consumption of alcohol is permitted in the UAE, Bahrain, and Oman without strict adherence to Sharia as the primary source of legislation, despite Sharia's prohibition of alcohol consumption.[1404] This approach reflects a divergence from traditional legal principles in favour of accommodating foreign investment and expatriate communities, but it also raises questions about the balance between economic priorities and the preservation of cultural and religious norms.

In some cases, some GCC states have enacted legislation aimed at facilitating foreign investments, which, had unintended adverse effects on existing domestic laws and regulations. This misalignment between new investment-focused laws and established local legislation can create legal inconsistencies, undermine regulatory coherence, and potentially impact the effectiveness of the broader legal framework. For example, the introduction of the new tax system has contributed significantly to diversifying the country's revenue streams,[1405] enhancing transparency and accountability in fiscal governance, and fostering a more stable economic environment. However, the system has also introduced certain challenges for businesses and investors, particularly in terms of regulatory complexity and uncertainty, which may affect compliance and long-term planning.[1406]

It should be noted that, in certain instances, some GCC states have prioritised attracting foreign investments, even when doing so conflicts with local norms, including Sharia principles. For example, permitting interest-based financial transactions (Riba) and the consumption of alcohol are measures that have been implemented in some jurisdictions

[1402] Ahmed Aldhafeeri, 'Administrative Contracts and Arbitrability: Obstacles and Barriers' (2021) 26 Journal of Humanities and Social Science 37, 38.
[1403] ibid 41.
[1404] Mohamed Al Marzouqi and Omar Khodeir, 'The Law Applicable To Alcohol Consumption in the UAE' (Tamimi, 2021) <https://www.tamimi.com/law-update-articles/the-law-applicable-to-alcohol-consumption-in-the-uae/> accessed 18 December 2024
[1405] Law of Value Added Tax 2017.
[1406] Alhagas and Alhenaki (n 1398) 19.

to appeal to foreign investors and expatriate communities.[1407] While such measures may enhance the attractiveness of these states as investment destinations, they risk undermining the core principles of these nations, which identify as Muslim-majority countries where Sharia serves as a primary source of legislation. These practices have been subject to criticism and condemnation by local communities on numerous occasions, as detailed in Chapter 4.[1408] The tension between economic liberalisation and adherence to cultural and religious norms highlights the need for a more balanced approach. GCC states must carefully consider legislative reforms that align with their long-term development goals while ensuring that such reforms respect local norms and Sharia principles to preserve their legal, cultural, and religious identity.

Although there are notable shortcomings in the local legislations of the GCC states and potential conflicts between the future visions of these states and Sharia principles, significant efforts have been made to address these challenges.[1409] As outlined in this thesis, the desire to attract foreign investment often intersects with the need to preserve Sharia compliance and local cultural norms. In response, some GCC states have undertaken legislative reforms aimed at modernising their legal frameworks while maintaining adherence to Sharia. For example, Saudi Arabia has introduced reforms in business law and commercial practices that align with international standards yet continue to respect Islamic legal principles.[1410] These reforms include the establishment of regulatory bodies to oversee foreign investment while ensuring compliance with Sharia law, thereby balancing modernisation with tradition.[1411]

Additionally, the GCC states have made strides in integrating international conventions into their legal systems, while taking care to preserve public policy and protect local norms. These efforts involve joining global treaties and conventions, such as those relating to trade and arbitration, while ensuring that the application of such international agreements does not conflict with the principles of Sharia law or the state's cultural values. For instance, while adhering to the UNCITRAL Model Law on International Commercial Arbitration,[1412] all GCC states have incorporated provisions that allow for the protection

[1407] See page 152.
[1408] See page 99.
[1409] Siriopoulos and others (n 1390) 267.
[1410] Abdulrahman Alfatta, 'The Impact of the Shari'ah on Foreign Direct Investment and Arbitration: The Case of Saudi Arabia and Its Vision 2030' (PhD thesis, University of Westminster 2019) 25.
[1411] ibid 242.
[1412] The UNCITRAL Model Law on International Commercial Arbitration is a model law prepared and adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985.

of local public policy and Sharia-compliant considerations within their arbitration frameworks. [1413] Such efforts enable these states to foster an investment-friendly environment while simultaneously safeguarding their legal and cultural heritage.

Despite these challenges, the GCC states continue to attract substantial foreign investment, which highlights the success of their legal reforms and investment policies. The UAE, in particular, has emerged as the top destination for high-net-worth individuals, with projections indicating that it will attract the highest number of billionaires in 2024. [1414] This growth is not surprising, considering the comprehensive legal and regulatory improvements that have been made across the region. The UAE's efforts to modernise its business laws, including the introduction of investor-friendly tax regimes and the enhancement of property rights, have contributed to its appeal as a global financial hub. Moreover, the GCC states have demonstrated a strong commitment to supporting Alternative Dispute Resolution (ADR) mechanisms, further reinforcing their attractiveness to foreign investors. For instance, the Dubai International Arbitration Centre (DIAC) is ranked among the top 10 arbitration centres worldwide in 2024,[1415] reflecting the region's growing reputation for offering efficient, impartial, and Sharia-compliant dispute resolution options. These advancements, alongside continued efforts to streamline the legal framework and support ADR, highlight the GCC states' ability to reconcile modern economic ambitions with the preservation of Sharia principles, creating a stable and appealing environment for foreign investment.

7.3 General Observations and Findings

This thesis has dealt with the interpretation of the public policy exception in the GCC States. The interpretation of this exception was critically examined in light of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. It should be noted that the thesis indicates that, in several instances, some arbitral awards and judicial decisions are not related to international commercial arbitration. However,

[1413] Article V(2)(b) of the New York Convention 1958.
[1414] Abegail Jacob, 'Millionaires on the Move: Why the UAE Is Their Top Choice in 2024' (Medium.com, 22 January 2025) <https://medium.com/@MissAbegail/millionaires-on-the-move-why-the-uae-is-their-top-choice-in-2024-4998ee03463e> accessed 23 January 2025.
[1415] Antonia Birt, Chris Edwards, and Avinash Poorooye, 'Dubai International Arbitration Centre: Two years of transformation under review' (Reedsmith.com, 2024) <https://www.reedsmith.com/en/perspectives/2024/06/dubai-international-arbitration-centre> accessed 26 December 2024. See also Abby Smutny, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' (School of International Arbitration, Queen Mary University of London 2021) <https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> accessed 30 December 2024.

these cases were examined because courts applied public policy to refuse recognition and/or enforcement of the awards. This examination was necessary due to the lack of published cases, as explained in Chapter 1.[1416]

The overarching aim of the thesis is to build on the existing literature and contribute to the ongoing debate over the public policy exception. Prior to addressing the main research question, it is essential to highlight key observations and analyses of the practices of the GCC States in the application of the public policy defence.

7.3.1 Saudi Arabia

Many scholars have described Saudi Arabia as the GCC State with the broadest application of the public policy concept. Baamir, for instance, argues that the scope of public policy in Saudi Arabia is very broad, as it encompasses not only the standard public policy limitations but also the conservative social traditions of the country.[1417] Furthermore, some authors are of the view that Saudi practices in this area are unfriendly to the implementation of foreign arbitral awards.[1418] Critics attribute this approach to the lengthy procedures that must be followed to implement foreign arbitral awards in Saudi Arabia as discussed in Chapter 2,[1419] as well as the impact of Sharia on this implementation. In Chapter 5, the thesis subsequently found Sharia to have a somewhat similar effect in all GCC States, not just Saudi Arabia. In addition, the procedures used to enforce foreign arbitral awards are largely similar across the GCC countries. However, this does not mean that Saudi Arabia applies public policy exception narrowly. In particular, the thesis found that the Saudi courts mostly apply the public policy exception when an arbitral award violates Sharia, or the matter of dispute is non-arbitrable.

In addition to the negative application of public policy, the thesis found that some Saudi courts exhibit an unfriendly attitude towards enforcing arbitral awards. For instance, and discussed in Chapter 2, in *Jadawel International (Saudi Arabia) v Emaar Property PJSC (UAE),*[1420] the thesis found that the Saudi court exceeded its jurisdiction, not only by voiding the arbitral award, but also by issuing a decision in favour of the appellant. This

[1416] See page 17.
[1417] Baamir (n 1125) 239.
[1418] Hossein Abedian and Reza Eftekhar, 'Consent to Investor-State Arbitration in the Second Largest International Investment Protection Agreement: The Correct Interpretive Approach to Article 17 of the OIC Investment Agreement' (2018) 35 Journal of International Arbitration 59, 75; Essam Al Tamimi, 'Enforcement of Foreign Arbitration Awards in the Middle East' (2014) 1 BCDR International Arbitration Review 97.
[1419] See page 28.
[1420] Jadawel International (Saudi Arabia) v Emaar Property PJSC (UAE) [2008].

case clearly indicates the negative approach of some Saudi courts regarding the enforcement of arbitral awards. It is worth noting that judicial practices in Saudi Arabia demonstrate that its courts do not adopt any particular school of jurisprudence, which is contrary to the prevailing perception that Saudi Arabia conforms to the *Hanbali* school of thought. The important point to be derived from this is that there is no general consensus on many issues surrounding the implementation of foreign arbitral awards under the various schools of jurisprudence, such as the appointment of women as arbitrators or contracts related to musical instruments. While the *Hanbali* school prohibits this subject matter, the *Hanafi* school permits them. These differing opinions on some issues have led to contradictions in the decisions of the local courts, as clarified in the previous chapters. For instance, one local court refused to enforce a contract linked with the tobacco trade because it violated Sharia. Nevertheless, this decision was overturned by the Court of Appeal.[1421]

The thesis also found that the concept of public policy and Sharia are not synonymous in Saudi Arabia. In addition to the cases previously referenced and analysed, the linguistic formulation of these two exceptions in laws and agreements refers to Sharia and public policy as different grounds for refusal, which confirms the terms as two separate concepts. However, as examined in Chapter 5, the Implementing Regulation of Saudi Enforcement Law indicates that the term 'public policy' in the Enforcement Law means Sharia.[1422] Hence, as a rule, contracts and arbitral awards that breach Sharia will not be enforced in Saudi Arabia. That said, the Saudi courts have been observed to enforce arbitral awards that breach Sharia, as mentioned in Chapter 6, which confirms the contradictory practices of the local courts in their application of Sharia. These contradictory practices raise an important question over what should prevail, the courts or the legislation? In response, it can be said that the practices of the courts that seem to prevail. However, this contradiction could give rise to doubts and concerns among investors about the legal and judicial environment in the Kingdom of Saudi Arabia. Nevertheless, these concerns are not due to the application of Sharia law or public policy, but rather to contradictions in the legislators' legal practices on the one hand and the courts on the other, thereby potentially affecting investors' trust in the Saudi judicial system as explained in Chapter 6.

[1421] Saudi General Court Civil Circuit Case No 261/S/2019 issued in 2020.
[1422] Article 11(3) of the Saudi Implementation Regulation of the Enforcement Law 2013.

7.3.2 Oman

After reviewing Omani court practices, it can be stated that Oman has a friendly approach to the implementation of international arbitral awards and contracts. Although its Arbitration Law is relatively outdated, the thesis did not find provisions indicating a broad implementation of the public policy exception. On the contrary, Omani practices indicate a positive approach, such as the implementation of a foreign arbitral award against an Omani party by an Omani court, although Oman was not bound by any enforcement convention at the time.[1423] However, there is still some ambiguity in Omani legislation with regard to arbitration and the implementation of foreign arbitral awards, especially in terms of the public policy exception and Sharia. This is because neither the legislator nor the courts have clarified the dimensions of these terms, and there are very few cases where the courts have addressed these two terms. Hence, it cannot be assumed that Oman's enforcement practices are always positive.

7.3.3 Bahrain

Due to its rare invocation of the public policy exception, as compared to the other GCC States, Bahrain's approach to the New York Convention is one of the most consistent, having as its main objective the enforcement and recognition of foreign arbitral awards. The recent amendment to the Bahraini Arbitration Law 2015, aligns with its commitment to international trade and the implementation of foreign awards. The Bahraini legislator has adopted the UNCITRAL Model Law. Furthermore, the practices of the Bahraini courts confirm this approach, as shown in the previous chapters. Pursuant to Article 2 of the Bahraini Arbitration Law 2015, in the event that the dispute is international, any ambiguity in the provisions of the law shall be interpreted according to international considerations.[1424]

Despite the positive approach adopted by the Bahraini courts and legislator, some observations may be made regarding both the legislator and the courts. For instance, the Bahraini Enforcement Law stipulates in its Article 16(4) that the arbitration award should not contradict public policy or public morals.[1425] However, it should be noted that the legislator did not clarify the meaning of 'public morals'. While public policy is widely acknowledged as a controversial concept with no precise definition, the inclusion of

[1423] Court of Cassation, Case No 176/2005.
[1424] Bahrain Arbitration Law No 9/2015.
[1425] The Bahraini Enforcement Law in Civil and Commercial Matters 2021.

'public morals' as a ground for refusing to enforce foreign arbitral awards risks opening the door to the misapplication of this exception. In addition, before the courts, although the Bahraini Arbitration Law 2015 and Implementation Law 2021 do not consider the breach of Sharia as a ground for refusing to enforce an arbitral award, the Bahraini courts refrain from implementing foreign arbitral awards that contain a clear violation of Sharia principles in the form of usury.[1426]

7.3.4 Qatar

Despite the efforts made by Qatar to develop its legal system, especially with regard to arbitration and the implementation of foreign arbitral awards, there are some cases that have elicited global concern. For example, as previously examined, an international arbitration award issued in France was set aside because it did not comply with Qatari domestic law, which requires awards to be made in the name of the Emir of the State.[1427] Likewise, a Qatari court sentenced arbitrators to a term in prison for violating an arbitration agreement, which led to huge losses for the party, who was close to the Qatari government.[1428] In any instance, Qatari courts will invoke Article V(2)(b) if a foreign arbitral award contravenes public policy, Sharia law, mandatory rules, or pertains to a non-arbitrable subject matter. Meanwhile, there is no evidence to indicate whether these negative practices are due to the influence of the conflicting parties or because of the unprofessional practices of the local courts

7.3.5 The UAE

Similar to the Qatari approach, the thesis found a negative application of the public policy exception in the UAE. Firstly, in terms of the legislator, UAE laws contain provisions that may lead to a misapplication of the public policy concept. For example, the UAE legislator has considered that disputes involving real estate are a matter of public policy. According to Article 3 of the UAE's Civil Transactions Law 1985, public policy includes matters relating 'to personal status such as marriage, inheritance, and lineage, and matters relating to systems of government, freedom of trade, the circulation of wealth, rules of individual ownership and the other rules and foundations upon which society is based'.

[1426] Bahraini Civil Enforcement Court, Case No 2022/77 of 08/12/2023, wherein the Court justified its refusal to implement the award because it violated Islamic Sharia, affirming that the Bahraini Constitution, as well as the Civil Transactions Law, emphasised the role of Sharia and the need to avoid violating it.
[1427] Qatari Court of Cassation, Appeal No 64, 2012.
[1428] Qatari Court of First Instance, Criminal Court, Case No 1650/2018.

As a result, the court in *Baiti Real Estate Development v Dynasty Zarooni Inc* refused to implement a decision relating to a real estate dispute on the ground that it was a public policy matter, whereupon the parties should resort to litigation.[1429]

In the UAE courts, practices show that there is an unfriendly attitude towards enforcing foreign arbitral awards in some cases. This is evident in certain cases where some courts have reviewed the merits of the awards and issued decisions contrary to those of the arbitral tribunal as discussed in Chapter 6. Interestingly, the UAE courts tend to challenge awards that are issued against an official party.[1430] Therefore, such practices call into question the impartiality and credibility of some courts in the UAE, especially in the implementation of foreign arbitral awards. What should be considered here is that the UAE courts generally tend to implement foreign arbitral awards, but there remain instances that incur suspicion when one of the parties is influential or close to the government. Overall, it can be stated that UAE courts tend to invoke public policy in instances where the matter is non-arbitrable or when the awards contravene Sharia principles.

7.3.6 Kuwait

Out of all the GCC States, Kuwait has the most outdated laws on arbitration. With its Arbitration Law dating from 1980, Kuwait has some way to go in its legislative development. However, the thesis did not find a broad application of public policy in the enforcement of foreign arbitral awards. On the contrary, similar to the Omani approach, Kuwait tends to enforce foreign arbitral awards unless there is a clear violation of Sharia law. This positive approach to the application of foreign arbitral awards could serve as evidence that a narrow application of public policy not only requires clear legislation but also qualified practitioners.

Sharia plays an important role in Kuwait's legal system, making it one of the main sources of the state's legislation, according to Article 2 of the Kuwaiti Constitution of 1962. In controversial Sharia matters, such as the appointment of women as judges or arbitrators, Kuwait was the first GCC State to appoint a female arbitrator. Thus, the courts in Kuwait would appear to be less strict in their application of Sharia law, compared to its neighbours in the GCC. However, in 2023, some Members of the Kuwaiti Parliament

[1429] The Court of Cassation of the Government of Dubai, appeal No 14/2012, Real Estate Cassation.
[1430] International Bechtel Co LLC v Department of Civil Aviation of the Government of Dubai, the Court of Cassation of the Government of Dubai, appeal number 503/2003 issued on 15/5/2004.

called for the repeal of the law permitting women to serve as judges. Despite the practical challenges associated with implementing this proposal, it received substantial support from a significant portion of the Kuwaiti populace. These developments have raised concerns among foreign investors and arbitrators regarding the enforceability of arbitral awards issued by female arbitrators in Kuwait.

Similar to most GCC countries, the approach of the courts is vague regarding contracts and arbitral awards that involve usury. As such, the Kuwaiti courts are still not decisive on this point. While some courts enforce awards involving usury, others have refused to do so. Here, it should be noted that precedent has no binding authority in Kuwait. Hence, the courts can issue different decisions on the same matter. Generally, it could be said that the Kuwaiti courts allow usury that does not surpass the legal percentage, but only in commercial transactions, whereas usury is prohibited in civil debt and contracts.

7.4 Lessons to Learn from Non-GCC Courts

In recent years, there has been a growing body of case law from the courts of non-GCC states, concerning the application of the public policy exception in arbitral disputes as examined in Chapter 3.[1431] This case law provides a number of valuable lessons for the courts of the GCC States. First and foremost, the public policy exception is intended as a safeguard, rather than a loophole. Thus, courts should not use it to review awards on their merits or second-guess the arbitrators' findings of fact or law. For instance, in *Sinocore International Co Ltd v RBRG Trading (UK) Ltd*,[1432] the court maintained this approach, stating that 'where the arbitration tribunal has jurisdiction to determine the relevant issue of illegality and has determined that there was no illegality on the facts, the English court should not allow the facts to be re-opened, save possibly in exceptional circumstances'.[1433] The courts of the non-GCC States have consistently applied the public policy exception narrowly and exceptionally. It is notable that, particularly in common law jurisdictions, public policy is seldom invoked.

However, this infrequent application should not be perceived as inherently positive or indicative of sound legal practice. Courts must invoke public policy when there is a clear violation of fundamental principles. The observed approach in these jurisdictions indicates that public policy is invoked only in instances of manifest violation.

[1431] See page 53.
[1432] Sinocore International Co Ltd v RBRG Trading (UK) Ltd [2019] 1 All ER (Comm) 810.
[1433] Ibid [25].

Furthermore, the non-GCC courts have not only narrowly applied public policy, but also sought on numerous occasions to clarify the concept by providing a list of what is considered to be a public policy matter. For instance, in Switzerland, the courts have refused to enforce arbitral awards that violate *pacta sunt servanda*,[1434] the principle of good faith,[1435] the prohibition of abuse of rights,[1436] the protection of individuals who do not have legal capacity to act,[1437] the prohibition of bribery and corrupt practices,[1438] the prohibition of discriminatory measures,[1439] and the protection of individual rights.[1440]

Legislators in many non-GCC States, as previously discussed, have made significant efforts to guide the application of public policy by either defining what constitutes public policy or by categorising this concept.[1441] This approach is similarly reflected in the practices of courts within these jurisdictions. Global efforts have been made to avoid the negative application of public policy, as elaborated in Chapter 4. The ILA and IBA reports exemplify substantial efforts toward a more positive application of the public policy exception. Consequently, many courts in non-GCC States either apply public policy infrequently or approach it with caution.

Undoubtedly, the courts play an essential role in clarifying the ambiguity of laws and provisions through interpretation. The above cases confirm the diverse practices of the courts in interpreting and applying Article 5 of the New York Convention.[1442] These efforts result from the difficulty of defining public policy, one of the key challenges being its vague nature. Public policy is a broad and amorphous concept that can encompass a wide range of values and interests, such as fundamental human rights and national security. This renders it difficult to draw clear and precise lines between what is or is not considered as public policy. Another challenge is the dynamic nature of public policy. In other words, what is considered to be public policy today might not be considered as such tomorrow. This means that the courts need to be flexible and adaptable in their approach to interpreting public policy in international commercial arbitration.

[1434] Swiss Supreme Court Case 4A 682/2011.
[1435] Swiss Supreme Court 4A 579/2010.
[1436] Swiss Supreme Court 4A 453/2021.
[1437] Swiss Supreme Court 4A 414/2012.
[1438] Swiss Supreme Court 4A 534/2014.
[1439] Swiss Supreme Court 4A 486/2019.
[1440] Swiss Supreme Court 4A 558/2011.
[1441] See pages 53 and 93.
[1442] In addition to the cases in this section, also see pages 56 and 206.

However, despite the difficulties outlined above and proven earlier, many courts have effectively contributed to controlling the 'unruly horse'.[1443] Some of these courts have narrowly applied the concept of public policy, and therefore only invoke this exception when there is a clear violation of fundamental principles of the state as illustrated in Chapter 3. Other courts have attempted to categorise the concept of public policy, as explored in Chapter 4, applying local public policy exclusively to domestic disputes and international public policy to international disputes.

Indeed, after examining the practices of GCC courts and non-GCC courts in Chapters 3 and 6,[1444] it is evident that GCC courts have not adopted the narrow application of public policy seen in non-GCC courts. In contrast, the GCC courts have broadly and ineffectively applied the public policy exception, even invoking it to challenge the recognition and enforcement of arbitral awards in matters unrelated to public policy.[1445] Furthermore, with respect to arbitrability, it has been observed that the scope of non-arbitrable disputes in GCC countries is relatively broader and differs from that in non-GCC jurisdictions, often without reasonable justification.

Chapter 2 presented and examined the legal framework of arbitration in the GCC States, including the relevant legislation. The main conclusion was the lack of distinction between the procedures for the recognition and enforcement of foreign and local arbitral awards. Additionally, it was observed that the legislations in the GCC States do not distinguish various categories of public policy nor clarify the notion of this exception. It was also noted that some GCC States, such as the UAE, explicitly classify specific non-arbitrable disputes as public policy matters, encompassing a wide range of disputes without reasonable justification, as previously explained.[1446]

Chapter 5 examined the role of Sharia as a fundamental source of legislation. Although the challenges in adopting Sharia without clarification, all GCC states' legislations explicitly consider Sharia a part of their public policy.[1447] As discussed, schools of jurisprudence play a crucial role in interpreting Sharia and codifying its principles.[1448]

[1443] Winnie Jo-Mei Ma and Helena Hsi-Chia Chen, 'Taming the Unruly Horse? The New York Convention's Public Policy Exception to the Enforcement of Arbitral Awards', in Lo C-F, Li NNT, and Lin T-Y (eds), *Legal Thoughts between the East and the West in the Multilevel Legal Order: A Liber Amicorum in Honour of Professor Herbert Han-Pao Ma* (Springer 2016) 575, 576.
[1444] See page 53 and 166.
[1445] See page 208.
[1446] See page 250.
[1447] See page 147.
[1448] See page 134.

However, GCC States have neither codified Sharia nor adopted a specific school of jurisprudence. Despite Sharia's significance in their legal systems, some GCC legislation explicitly breaches Sharia principles, as evidenced by the allowance of alcohol trade.[1449] This ambiguous approach towards adopting Sharia, which is part of their public policy, further complicates the issue of public policy in the GCC States

Chapter 6 reviewed the practices of courts in the GCC States, showing a generally negative application and interpretation of public policy.[1450] Courts often demonstrate inconsistency in applying and interpreting Sharia, sometimes adopting an extreme approach by refusing to enforce any arbitral awards or contracts that breach Sharia, while in other cases, showing flexibility by allowing awards and contracts that do not manifestly breach Sharia. Some courts, for example, permit usury within specific percentage.[1451] Additionally, courts often confuse public policy with other terms, leading to the erroneous classification of non-arbitrable disputes and breaches of local legislation as public policy issues, even for foreign arbitral awards. This approach reflects the legislative tendency in the GCC States not to distinguish between various categories of public policy.

The negative approach in the GCC States is attributed to several factors, some discussed in Chapter 6, including the lack of clear legislation defining public policy and the inefficiency of courts. Neither legislators nor courts in the GCC States have made real attempts to narrow the application of public policy. This includes providing a definition of public policy and/or categorising public policy. Therefore, the thesis supports its normative views outlined throughout the previous chapters, [1452] which provide a more precise definition of the public policy of the GCC States and suggests the necessity of adopting various categories of public policy. Drawing from these normative views and the examination of the GCC States' practices concerning public policy, the subsequent sections will present the conclusion of the thesis and several recommendations, including reforms aimed at fostering a more pro-enforcement approach.

7.5 Conclusion

The thesis concludes that the public policy exception has been ineffectively applied in the GCC States. This approach is often due to insufficient local laws or the incompetence of certain local courts. In addition, this negative approach may sometimes be due to the

[1449] See page 154.
[1450] See page 166.
[1451] See page 180.
[1452] See page 217.

influence of one of the conflicting parties. It has been observed that courts in the GCC often confuse public policy with other concepts due to the ambiguity surrounding the notion of public policy. For example, practices indicate that the courts invoke public policy when the matter is not subject to arbitration or if it violates Sharia and mandatory rules. Although the foregoing refusal grounds lead to the refusal to recognise or/and enforce arbitral awards, the courts favour applying the public policy exception over other grounds for refusal, thereby confirming the misunderstanding and misapplication of public policy.

With regard to Sharia, despite the legislator's confusion between Sharia and public policy, the thesis concludes that the terms are not synonymous. However, Sharia may be considered as a matter of public policy in the GCC States. Therefore, it is part of public policy. The thesis also found that contracts and arbitral awards concerning the payment of interest (usury) are not enforced in Saudi Arabia, while the part of the arbitral award that does not relate to the payment of interest may be implemented. As for the other GCC countries, court decisions indicate that arbitral awards containing usury can only be enforced if they do not exceed the percentage stipulated by law.

Thus, there are some differences between the GCC countries in their consideration of Sharia as a ground for refusing the implementation of arbitral awards under their arbitration laws. In Bahrain, for example, the arbitration and enforcement laws do not stipulate Sharia as a refusal ground. However, this does not mean that arbitral awards and contracts that contravene Sharia may be implemented in Bahrain, as confirmed by Bahrain's Enforcement Law 2021, and explained in Chapter 5. These practices also find their roots in the Bahraini constitution 2002, wherein its Article 2 affirms that the religion of the State is Islam, and Islamic law is an essential source of legislation. Similar to the Bahrani constitution, all constitutions of the GCC States contain a similar Article that confirms Sharia law as a main source of legislation that should not be breached.

Nevertheless, the absence of clear regulations to define the limits and concept of Sharia in the GCC States raises questions over the extent to which some courts and parties could misuse it to refuse to implement an arbitral award, especially since the constitutions of these states emphasise the primary role of Sharia in their legal systems. Furthermore, it has been noted that the negative perception of Gulf countries, along with the criticisms they have received, often stems from their broad application of the public policy defence and Sharia. However, amendments to local laws and legislation have failed to address the

core issues, namely the lack of clarity and the overly broad interpretation of these exceptions.

In all events, it has been observed that some practices indicate a decrease in the role of Sharia law across all GCC States, consistent with the thesis argument. This decline is not exclusive to specific state but is evident across all GCC States. In addition to the discussion in Chapter 5 relating to the alcohol consumption, [1453] the thesis contends that political, legal, economic, and commercial considerations will lead to noticeable shifts in minimising the role of Sharia law in the GCC States. This does not mean that the GCC States are moving towards an extreme secular approach but rather are applying a principle of Sharia that permits violates of Sharia law in cases of necessity, as explained in Chapter 5.[1454]

The thesis also identified a widespread misconception of the GCC States as a unified bloc, meaning that one state's negative practices in the implementation of foreign arbitral awards would also be common to the rest of the GCC States. This perception is inaccurate. Despite the commonalities between the Gulf countries and as explained in previous chapters, the practices of the courts with regard to the implementation of foreign arbitral awards and the application of the public policy exception differ between them.

Overall, the role of the New York Convention in the ineffective application of the public policy exception must not be overlooked. If some countries and local courts are accused of undermining provisions of the New York Convention, it should be stressed that the ambiguity of some of the convention's articles has led to its possible misapplication, thereby contributing to the broad application of the public policy exception. For example, considering this exception as a ground for refusing to implement an arbitral award, without specifying a category of public policy, has led to its broad and ineffective application, especially since the concept of public policy is constantly evolving and varies from one country to another.

Regarding the main questions of this thesis, the thesis found that the GCC courts do not have a specific approach in their interpretation of public policy. Due to the absence of clear legislative texts and the lack of familiarity among some courts with applying the public policy exception, the Gulf courts consider contracts that violate Sharia and mandatory rules that breach public policy to be unenforceable in their jurisdictions.

[1453] See page 153.
[1454] Ibid.

Furthermore, the GCC courts have considered that contracts and arbitral awards in non-arbitrable disputes are contrary to public policy, exemplified by real estate and family law disputes. Moreover, one of the reasons for the broad application of the public policy exception could be a lack of understanding of the laws on implementing arbitral awards. Nevertheless, while this is a likely reason for the public policy exception being misapplied, the refusal to enforce a foreign arbitral award always appears to be linked to the influence of one of the disputing parties. This would suggest that the dilemma is not only posed by the law itself, but also by the practices of the local courts.

In terms of the role of Sharia in the enforcement of arbitral awards, the thesis found that Sharia in itself does not hinder the implementation of foreign arbitral awards or contracts. In contrast, the thesis found that Sharia promotes the enforcement of arbitral awards and contracts based on the principle of *pacta sunt servanda.* Conversely, Sharia prevents the enforcement of arbitral awards that explicitly breach its core values. Thus, the widespread perception that Sharia prevents the enforcement of foreign arbitral awards is inaccurate. Instead, this misunderstanding may be attributed to the negative practices of the legislator and courts in the GCC States. In other words, adopting Sharia as a fundamental source of legislation and as a ground for refusing to enforce an arbitral award, without clarifying what is meant by Sharia, has contributed to the broad application of the public policy defence. The legislators in the GCC States have consequently failed to consider that foreign and non-Muslim parties are likely to be unfamiliar with Sharia. Therefore, it is necessary to tackle the ambiguities surrounding Sharia.

Furthermore, despite the essential role of Sharia in shaping the legislation and legal systems of the GCC States, the thesis found that legislators in the GCC States failed to clarify its dimensions. It should be mentioned here that Sharia is complex and multi-faceted, but the aspects that represent public policy are the texts of the main sources of Sharia, namely, the Quran and Sunnah. Thus, the courts of the GCC States invoke the public policy exception when arbitral awards breach these texts, and the application of public policy in this case, is not limited to domestic disputes but also extends to foreign arbitral awards.

Therefore, it could be said that the courts of the GCC States neither follow a specific interpretation of the public policy exception nor adopt a uniform method to do so. Moreover, they tend to invoke the exception without regard to the nature of the conflict,

whether local or international, whenever the arbitral award is contrary to Sharia law or public policy, and if it is considered to be non-arbitrable.

7.6 Recommendations and Proposed Reforms to the Laws on Enforcing Foreign Arbitral Awards in the GCC States

Based on the above observations and the normative view of this thesis, it seems necessary for the GCC States to amend their current laws on the implementation of foreign contracts and arbitral awards. These recommendations refer to two main factors in the process of implementing foreign arbitration awards, namely the legislator and the courts. First, with regard to the legislator, although the above observations do not always reveal the negative application of the public policy exception by some GCC countries, such as Bahrain and Oman, this is not conclusive evidence that the exception is never, and will never, be misapplied in these countries. Therefore, the GCC States must draft and amend their local legislations which will help in limiting or even ending the misapplication of the public policy exception. In this light, the thesis suggests that the GCC States should enact a unified law on arbitration and the recognition and enforcement of foreign arbitral awards, similar to the Law of 2012, which has yet to be applied. The reason why a unified law is recommended is because the GCC States share sufficient common ground in their legal systems as explained in Chapter 2, especially in their adoption of Sharia law as a main source of legislation. Also, one of the aims of GCC States is to promote and enhance unified legislation across the region.

As has been clarified in Section 6.7.1,[1455] the Unified Law proposed by the GCC States does not contain any initiatives or methodologies to limit the broad application of the public policy defence. On the contrary, it was similar to the local arbitration laws of the GCC countries. Nevertheless, this Unified Law is considered to be one of the most significant attempts made by the GCC States to unify their laws on arbitration and the enforcement of foreign arbitration awards. Thus, in order for the GCC States to become legal regimes that are friendly to the enforcement of foreign arbitral awards, they must adopt a unified arbitration law. This law should contain clear recognition and enforcement procedures for foreign arbitral awards. In turn, these procedures must comply with the international conventions signed by the GCC States, such as the New York Convention. In addition, this law must be oriented towards international rather than domestic public policy. Hence, when the dispute or arbitral award is foreign, the courts should only

[1455] See page 227.

consider international public policy and apply domestic public policy exclusively to local disputes. The adoption of domestic and international public policy will avoid the local courts the misapplication of public policy exception as seen in Chapter 6.

In adopting various categories of public policy, the drafters of the unified law for the GCC States should not overlook that international public policy is narrower than domestic public policy. Consequently, foreign arbitral awards can be enforced even if they contradict domestic public policy. However, this latitude may be exploited by local parties to circumvent domestic public policy. Therefore, it is imperative for GCC States, particularly those with outdated arbitration laws like Oman and Kuwait, to modernise their arbitration legislation. This modernisation should clearly distinguish between local and foreign arbitral awards and their respective procedures. Hence, international public policy should only apply to disputes involving at least one foreign party.

Alternatively, local legislations should acknowledge different categories of public policy. In other words, if enacting a unified arbitration law across all GCC States proves challenging, each state can endorse its own legislation delineating various categories of public policy. Under such legislation, domestic public policy would apply exclusively to local disputes, while international public policy would be invoked solely in foreign disputes. This approach may require further clarification from legislators regarding the specific factors that constitute domestic and international public policy.

Another aspect that the GCC States should address in the proposed law is the clarification of what constitutes a violation of Sharia. In Chapter 5, the role of Sharia in the legal systems of the GCC States was critically examined in depth, and the primary and secondary sources of Islamic Sharia were analysed. Moreover, the role of jurisprudential schools in interpreting and clarifying the principles of Sharia was presented. It was concluded that the concept of Sharia is very broad, largely paralleling public policy in terms of its ambiguity. Thus, it is difficult from a practical perspective to adopt such a term as a ground for refusing to implement a foreign arbitral award. For these reasons, it is suggested in this thesis that the violation of the Sharia law be considered solely in local disputes. In the event that the legislator insists on considering the violation of Sharia as a ground for refusing to implement a foreign arbitration award, the proposed law must consider that this breach should be a violation of one of the main sources of Sharia, comprising the Quran and Sunnah.

The suggestion to adopt Sharia as a refusal ground solely for domestic arbitral awards does not imply an undermining of Sharia's role. On the contrary, the thesis repeatedly emphasises that foreign arbitral awards and the principle of party autonomy should consider local norms, and foreign awards should not always take precedence over local considerations and state sovereignty. However, due to the lack of a clear understanding of Sharia rules, it may be practically challenging to treat every breach of Sharia as a breach of public policy. Should the GCC States' courts adopt an approach where every challenge of Sharia is deemed a breach of public policy, the legislature should provide clear principles or codify Sharia. This approach necessitates the adoption of a specific school of jurisprudence or at least specific principles of Sharia.

The proposed law could adopt and codify a specific school of jurisprudence, thereby considering any violation of the provisions of that school as a violation of Sharia principles. By implementing such a proposal, it would be possible to avoid a broad application of Sharia and the public policy exception, consequently providing clarity for judges, who would be better placed to issue effective judicial decisions based on legal foundations. In addition, such clear texts would offer foreign investors a comprehensive view of what might contravene Sharia, instead of the current negative perception of many investors with regard to investing in GCC countries or countries that adopt Sharia as their primary source of legislation. In all cases, Sharia should be codified and not left as a collection of incohesive texts that are interpreted in a different way each time. This codification is necessary, whether based on the Quran and Sunnah as the main sources of Sharia, or according to one or all of the schools of jurisprudence, in an approach that is consistent with the modern legal system of the GCC States and global considerations.

In Chapter 5, which examines Sharia, the thesis discusses several instances where efforts have been made to codify Sharia.[1456] One reason these efforts were previously unsuccessful was the influence of Islamic scholars and the unstable political situation in the GCC States, which made codification difficult and led some Sharia scholars to view it as an attempt to undermine Sharia. In contrast, the GCC States are now more politically stable and powerful, making the codification of Sharia more feasible. Additionally, Chapter 3 confirms that Sharia evolves similarly to the concept of public policy, indicating that the GCC States should consider this issue. In other words, as explained in Chapter 6, Sharia adapts to address contemporary issues facing Muslims, such as the

[1456] Several attempts have been made to codify Sharia, see page 144.

Murabaha system, which avoids usury.[1457] Therefore, since Sharia is part of public policy, the GCC States should establish specific committees that address contemporary issues potentially conflicting with Sharia principles. This would assist courts and practitioners in better understanding what may contravene Sharia principles and avoid refusing to enforce arbitral awards on this ground.

With regard to the national courts, the thesis found several shortcomings, as mentioned previously, specifically with regard to their unfamiliarity with the principles of international commercial arbitration. Accordingly, the thesis findings suggest that the GCC States should establish a special court to implement local and international arbitral awards, wherein the judges would receive continuous training to develop the competence of these courts and improve their expertise in implementing foreign arbitral awards. The above measures would contribute to the ongoing reforms that are taking place in the GCC States and would assist the courts in avoiding inappropriate decisions, such as those issued in Qatar, Saudi Arabia, and the UAE, as examined in this thesis.[1458] In addition, the courts should be granted more independence, so that political or personal considerations do not influence their decisions.

Nevertheless, this is not to say that there is always a negative or unfriendly approach to implementing foreign arbitral awards across the whole of the GCC. On the contrary, Oman and Bahrain present an example that the other GCC countries can learn from. However, this approach may simply be due to the efficiency of the courts themselves, or even due to the lack of foreign arbitral awards considered by those courts. In any case, it is not enough to rely on the experience of the local courts to ensure that the public policy exception is not misapplied. Undoubtedly, the absence of clear and specific provisions to regulate the application of the public policy exception and Sharia law will lead to further broad application of these two concepts. Thus, the GCC States could avoid further misapplications of the public policy exception by implementing the above recommendations.

It has been suggested earlier that legislations in the GCC States should recognise various categories of public policy. However, the absence of such recognition does not limit the courts' authority to distinguish between domestic and international public policy. The thesis urges the courts in the GCC States to apply domestic and international public

[1457] See page 173.
[1458] See pages 208 and 210.

policy, especially when dealing with awards related to the New York Convention. As seen in Chapter 3, this approach has been adopted by several non-GCC jurisdictions, even in the absence of specific legislative provisions stipulating such a distinction.

Another recommendation for legislators and courts in the GCC States concerns non-arbitrable issues. Legislators often designate several issues as non-arbitrable without substantial justification. For instance, despite the importance of the real estate sector in enhancing foreign and local investments, legislators still consider it non-arbitrable. This position can be attributed to the ineffectiveness of some transplanted legislations in the GCC States, as explained in Chapter 2. Similarly, although Sharia permits arbitration in family disputes, legislators do not allow such resorting. The list of non-arbitrable issues includes many cases, which may lead courts in the GCC States to continue considering non-arbitrable issues as matters of public policy. Therefore, courts should distinguish between non-arbitrable issues and public policy matters.

A significant concern in the GCC States' courts is reasoning their decisions, particularly when refusing the enforcement and recognition of foreign arbitral awards on public policy and Sharia grounds. As examined in Chapter 6, it has been observed that most GCC courts issue decisions without providing justifications. For instance, courts often refuse to enforce awards that conflict with Sharia without explaining what Sharia entails and how the award conflicts with it. Therefore, providing reasoning and justification for decisions would help practitioners better understand what constitutes a breach of the GCC States' public policy.

Another important recommendation is for the GCC States to allow researchers and practitioners access to relevant legislation and court decisions in both Arabic and English. This access would not only help legal practitioners and researchers but also investors and even the legislators in the GCC States. As a result, a more comprehensive perspective of the legal systems of the GCC States could be obtained. Furthermore, it would allow practitioners and international researchers to make suggestions and recommendations to improve the process of enforcing foreign arbitral awards and the application of public policy in the GCC States.

As for the New York Convention, regardless of the position of the GCC States and the implementation of foreign arbitration awards, many signatories still adopt a broad approach to public policy. Although it is practically challenging to amend the domestic legislation of the over 160 signatories to the convention, it is relatively easier to amend

the New York Convention itself. More than 60 years have passed since it was drafted, and the broad application of the public policy exception remains prevalent in many local courts, thereby undermining the core purpose of the convention, which is the recognition and enforcement of foreign arbitral awards. Therefore, the signatories of the New York Convention must review its articles to improve its efficiency and tame the 'unruly horse'.[1459] One of the most significant reforms to be considered by the signatories is the public policy exception. In other words, the New York Convention should explicitly adopt a specific category of public policy, rather than allowing local courts to apply various categories of public policy to foreign arbitral awards, which leads to inconsistency in the application of this exception. Therefore, the thesis suggests the adoption of only international public policy in the context of the New York Convention.

As presented in the previous chapters, the adoption of the public policy exception was controversial among the drafters of the New York Convention. Therefore, if the adoption of this idea was for political reasons or to attract more countries to sign the convention,[1460] then this exception should be reviewed, especially after the convention has proven its importance and effectiveness for implementing foreign arbitral awards. In addition, given that the New York Convention relates to international commercial arbitration, which is clearly an evolving field, its provisions must be continuously reviewed, so that they may be adapted to suit continuous developments. This includes the significance of clarifying the public policy concept, since from a practical perspective, it is easier to amend the New York Convention than to amend the local legislation of all its signatories.

[1459] John Shand, 'Unblinkering the Unruly Horse: Public Policy in the Law of Contract' (1972) 30 Cambridge Law Journal 144, 144.

[1460] The potential adoption of this exception could be driven by political considerations or other factors. However, the overriding aim would be to provide a guarantee to member states that the Convention and its stipulations will not infringe upon their sovereign rights or contradict their fundamental principles. This includes ensuring that the enforcement of foreign arbitral awards stemming from this Convention does not lead to such violations.

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