regard to arbitration, the competent authority in Saudi Arabia is *Diwan Almazalim*. According to article 3 of the Convention, the competent authority does not have to review the arbitral award; however, it does have the right to refuse the enforcement in the following cases:

- if the subject matter of the dispute is not arbitrable under the law of the state where the enforcement is sought;
- if the arbitral tribunal exceeds its jurisdiction;
- if the award is issued under a non-valid arbitration clause or agreement;
- if the award is issued *in absentia*;
- if the award is not final in the country where it is rendered; and
- if the award is contrary to public policy or to the law of the country wherein the enforcement is sought.[80]

The Gulf Cooperation Council (GCC) Commercial Arbitration Centre

The GCC Commercial Arbitration Centre was established as an independent, non-profitable organization by the leaders of the GCC states in December 1993 during the 14th GCC Summit in Riyadh, Saudi Arabia, with its headquarters situated in Bahrain.[81] The arbitration rules of the Centre were issued in November 1994 and the Centre was fully functional by March 1995. The Centre is the most active arbitration centre in the GCC area owing to its understanding of the legal systems of its member states. Moreover, arbitration through the Centre is considered the most advantageous foreign solution for parties with regard to enforcement in Saudi Arabia.[82] In relation to the enforcement of the Centre's awards, article 36 of the rules of procedure of the Centre provides:

> [A]n award passed by the Tribunal pursuant to these Rules shall be binding and final. It shall be enforceable in the GCC member States once an order is issued for the enforcement thereof by the relevant judicial authority.[83]

The rules set the grounds of setting aside an arbitral award in article 36, which are:

Shari′a shall be a main source of legislation; and article 3 of the Constitution of Yemen of 1994, which provides that Islamic Shari′a is the source of all legislation.

80 The Convention of the Arab League of Nations on the Enforcement of Judgements of 14 September 1952.

81 GCC stands for Gulf Cooperation Council, which is a 1981 agreement among the six Arab countries of the Gulf region – Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates – aimed at coordinating and integrating their economic policies.

82 See, in general, the GCC Commercial Arbitration Centre website at <http://www.gcac.biz/en> [accessed 30 April 2009].

83 Arbitral rules of procedure adopted by the GCC Commercial Cooperation Committee in November 1994 in Riyadh, Saudi Arabia.

- when it is passed in the absence of an arbitration agreement or in pursuance of a null agreement, or if it is prescribed by the passage of time or if the arbitrator goes beyond the scope of the agreement;
- when the award is passed by arbitrators who have not been appointed in accordance with the law, or when it is passed by those who are unauthorized to hand down a ruling in the absence of others, or when it is passed pursuant to an arbitration agreement in which the issue of the dispute is not specified, or when it is passed by a person who is not legally qualified to issue such an award.

Bilateral Investment Treaties

Apart from the regional agreements concluded under the Arab League and the GCC, Saudi Arabia concluded an investment promotion and protection agreement with the following 17 countries: Italy, Germany, Belgium, Taiwan, China, France, Malaysia, Luxembourg, Spain, Turkey, India, Republic of Korea, Philippines, Switzerland, Egypt, Singapore, and Austria. These agreements aim to promote and protect the investments of nationals and the enterprises of one contracting party in the territory of another by providing an appropriate legislative environment in which to stimulate and increase investment, trade and industrial activity. With the recession in Western economies and its own ambitious development plans, Saudi Arabia is assuming the role of capital-exporting country. Many Western countries such as the US and the UK are keen to share part of its wealth by any means. In relation to dispute settlement, all the treaties provide for arbitration as a method of settling any dispute arising out of the interpretation of the agreements.[84] The agreements also provide for arbitration under ICSID for the settlement of disputes between the host state and the private parties of another state, as well as ad hoc arbitration under the UNCITRAL arbitration rules for settling disputes between private parties.[85]

84 See for example, article 9 of the agreement between Saudi Arabia and the Belo-Luxembourg economic union (bleu) concerning the reciprocal promotion and protection of investments signed in Jeddah on 22 April 2001; article 10 of the agreement between Saudi Arabia and the Republic of Austria concerning the Encouragement and Reciprocal Protection of Investment signed in Riyadh on 30 June 2000; article 10 of the agreement between the Saudi Government and the Government of Malaysia concerning the promotion and reciprocal protection of investment signed in Kuala Lumpur on 10 October 2000.

85 Ibid. Moreover, article 11.2.b of the Agreement between Saudi Arabia and Austria provides for an ad hoc arbitration tribunal to be established under the rules of UNCITRAL for the purpose of settling disputes between host states and private parties.

The Saudi Arbitration Team

On 24 August 2002 a royal decree was issued under number 7/5/23165 calling for the establishment of the Saudi Arbitration Team. According to some of its members, the main duties of the team are: advertising for arbitration in Saudi Arabia as an auxiliary mechanism to litigation; and attending and holding conferences on issues related to arbitration in Saudi Arabia. In addition, the team's policy aims at encouraging the business community to pay more attention to arbitration in Saudi Arabia in order to take away part of the caseload from local courts and committees. The team has so far achieved moderate success at bringing arbitration into the limelight.[86] The legal community is expecting more from the team than just advertising, because it is the only organized entity which is able to develop and work on the idea of establishing independent arbitration courts and centres.

Conclusion

The attitude of the Saudi Government toward international arbitration has been strongly influenced by the outcome of the Aramco award of 1958. At first, the Government welcomed international arbitration, as seen in the *Buraimi* case of 1955. After the Aramco award, international arbitration was viewed by the Saudis as a breach of their national sovereignty, manifested in terms of disrespecting their laws and regulations and applying foreign laws to their national wealth. It was also suspected that international arbitration was being used by Western parties wishing to escape the application of Saudi law. Some evidence of this lies in the arguably unfair tactical use of arbitration by some Western companies.[87] The disappointing outcomes of the Aramco arbitration were expected, owing to the lack of legal experience and naïve or 'too honest' conduct towards Aramco. Some of the members of the arbitration tribunal in the Aramco case lacked basic knowledge of Islamic Shari′a and its principles. The arbitration tribunal was unfair in judging Shari′a and refused to apply its principles when the application was due. The Aramco award changed the Government's attitude toward arbitration as the Aramco award was followed by the Council of Ministers Resolution No. 85 of 1963, which prohibited the Government and its agencies from accepting arbitration clauses and agreements. Later, the Ministry of Commerce Circulation complemented the Council of Ministers Resolution and prohibited foreign arbitration clauses in the articles of association of joint ventures registered within the kingdom. This approach did not last for long because the oil boom started to relax it. Saudi Arabia agreed to settle certain differences and claims relating to the Agreement on Guaranteed Private Investment and guarantees of Saudi

86 I would like to thank judges I. Alhowaimil, A. Alrudhaiman and E. Alsheikh, who are members of the team, for their useful help on this point.

87 Supra n. 57, Alsamman, p. 219.

public sector contracts and investments with the United States in 1975. Having previously contracted with an individual country, the comprehensive reform, as a legal incentive to foreign investment, began when Saudi Arabia joined the ICSID Convention in 1979–1980. The impacts of the Aramco award were obvious in the reservation made by the Government regarding oil and acts of sovereignty. This step was followed by expanding the jurisdiction of *Diwan Almazalim* to include the enforcement of foreign judgments and arbitral awards in 1982. The Arbitration Act of 1983 and its Implementing Regulation in 1985 were the first comprehensive arbitration regulations in the kingdom still in force today. The real interaction with the world in the field of international commercial arbitration came after the ratification of the New York Convention on the enforcement and recognition of foreign arbitral awards of 1958, regardless of its limited application in Saudi Arabia and the intensive use of the public policy defence. The New York Convention is still the main international instrument for the enforcement of foreign arbitral awards. Saudi Arabia also contributed to the establishment of the GCC Commercial Arbitration Centre, which works as a fully functioning arbitration centre for the GCC countries, with easier and more direct enforcement of its awards in Saudi Arabia. The last few years have witnessed the adoption of several bilateral investment agreements for the protection of foreign investment. These include arbitration as the main method of dispute settlement. The quality of the regulatory relaxation differs between the 1970s and the current phase, which is owing to economic circumstances. In the 1970s, Saudi Arabia needed to attract foreign expertise and technology to contribute to the building of its infrastructure. After the collapse of the global oil market in the 1990s, the objective of attracting foreign capital was added to the Saudi agenda. Despite the fact that Saudi Arabia relaxed its regulation toward foreign elements and showed more tolerance toward foreign arbitral awards, the impact of the Aramco award was still evident in the limitations on arbitration in governmental contracts, such as those demonstrated in article 3 of the Arbitration Act of 1983 and in the reservation made when ratifying the ICSID Convention. Nevertheless, the arbitration clauses in the Gas Concessions of 2004 do show more openness toward the outside world in this area.

Chapter 5
Saudi Law as *Lex Arbitri*: Evaluation of Saudi Arbitration Law and Judicial Practice

The Arbitration Act of Saudi Arabia was adopted by Royal Decree No. M/46, issued on 12/07/1403 H. (1983), repealing in the process the relevant provisions of the Commercial Court Code of 1931.[1] The Implementing Rules of the Act were subsequently adopted by royal decree in 1985.[2] The purpose of the Implementing Rules was to supplement lacunae in the Act and provide guidance on particular aspects of Saudi arbitral proceedings. More specifically, the Act is silent regarding numerous procedural issues, such as the rules pertaining to the delivery of arbitral awards, notifications as to the process and communication between the parties and the arbitral tribunal and between the arbitral tribunal and third parties, the seat of the arbitral tribunal, and others. It will be demonstrated that the Act constitutes a codification of the Hanbali law of arbitration,[3] as elaborated by Ibn Taymiyyah (1263–1328) in his collection of *Fatwas*,[4] and Ibn Qodamah (1146–1223) in his comprehensive work *Almoghni*, which has been considered the most authoritative source of Hanbali teachings until the present day.[5]

As mentioned above, the Act provides a framework for flexible commercial arbitration with a view to establishing it as a real and effective alternative dispute resolution mechanism. Prior to the adoption of the 1983 Act, arbitration existed only as a theoretical possibility on account of several factors. Firstly, the courts at the time did not recognize arbitration agreements or clauses, even where the parties claimed a contractual entitlement to arbitrate as a result. Even where the court approved the arbitration agreement or clause, the subsequent enforcement of the arbitral award was wholly voluntary.[6] Accordingly, reference to arbitration was

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1 Part of this chapter was published in the following article: Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as *Lex Arbitri*: Evaluation of Saudi Arbitration Law and Judicial Practice', *Arbitration International*, 25/2 (2009), pp. 239–70. The Code of Commercial Courts was reprinted in *Umm Alqura Gazette*, issue No. 2969 of 22/08/1403 H. (1983).

2 Royal Decree No. M/7/2021, of 08/09/1405 H. (1985), reprinted in *Umm Alqura Gazette*, issue No. 3069 of 10/10/1405 H. (1985).

3 S. Saleh, *Commercial Arbitration in the Arab Middle East: Shari'a, Syria, Lebanon and Egypt* (2nd edn., Heart Publishing, 2006), especially Chapter 20, pp. 290–325.

4 M. Ibn Taymiyyah, *Majmou' Alfatawa* (2nd edn., The Ministry of Islamic Affairs of Saudi Arabia, 1995), Vol. 29.

5 M. Ibn Qodamah, *Almoghni* (1st edn., Hajar Publications, 1992), Vol. 10.

6 N. Albejad, *Arbitration in Saudi Arabia* (1st edn., Institute of Public Administration, 1999), p. 30

very limited. Secondly, the jurisdictional conflict between the Saudi Commercial Court[7] and Shari′a courts culminated in rendering arbitration ineffective and time-consuming. Although the Arbitration Act of 1983 supersedes the arbitration provisions of the Commercial Court Code of 1931, ad hoc arbitrations lacking a commercial character are still governed by the provisions of the Commercial Court Code.[8] While one generally speaks of either ad hoc or institutional arbitration, in Saudi Arabia there is yet another classification on the basis of the nature of the dispute as either compulsory or voluntary arbitration. As a general rule, resort to arbitration is voluntary,[9] except where the regulator recommends the compulsory route in a particular case. The rationale behind this classification is to restrict the jurisdiction of Shari′a courts with respect to certain controversial matters under Shari′a and also to avoid the conflict between Shari′a and Saudi law on the one hand and Saudi law and some customs and traditions on the other.[10]

The Arbitration Act of 1983 is relatively brief and ambiguous in parts and, as already stated, lacks detail with respect to key issues of arbitration proceedings. Most of the ambiguous issues were ironed out in the Implementing Rules of 1985. The Implementing Rules are elaborate and highly influential for both arbitral tribunals and the judicial bodies overseeing the arbitral process in Saudi Arabia. However, even the Implementing Rules did not give a clear answer to some essential aspects, such as the question of arbitrability, which will be examined in detail in the next chapter. Arbitration regulation is in the redrafting stage and a new act is expected to be issued soon. However, the ratification of a new act will not make any considerable change to current law and practice because it will be a different interpretation to Shari′a law on arbitration, as discussed in previous chapters.

The following sections provide an analysis of the Rules with reference to Hanbali arbitration law and the relevant laws in Saudi Arabia, especially the Law of Procedure before Shari′a Courts.[11]

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7 Upon its establishment, there was only one commercial court seated in Jeddah, which was later substituted by the Commission for the Settlement of Commercial Disputes under the supervision of the Ministry of Commerce and Industry.

8 Supra n. 6, Albejad, p. 30.

9 Article 1, 1983 Arbitration Act of Saudi Arabia

10 Supra n. 6, Albejad, p. 51. For instance, disputes related to tobacco products and musical instruments are compulsorily referred to arbitration.

11 As we have already noted, under Hanbali teachings arbitration is equivalent to litigation and the arbitrator is thus analogous to a private judge having specific jurisdiction only over the issue at hand. Article 36 of the Implementing Rules provides that the arbitral tribunal should comply with the litigation principles of Shari′a. The Implementing Rules were issued in 1985 prior to the enactment of the 2000 Law of Procedure before Shari′a Courts. Prior to the enactment of the 2000 Law, arbitrators relied on Shari′a principles in order to find governing rules for arbitral proceedings.

Arbitration, Arbitrators and Parties

Article 1 of the Implementing Rules concerns the scope of arbitration. According to the article, arbitration is not permitted in matters in which conciliation is not permitted such as hodoud,[12] accusation of adultery between spouses and all matters relating to public order.[13] The Hanbalies mainly give the arbitrator the same jurisdiction as a court judge. Ibn Taymiyyah does not restrict the scope of arbitration and gives it the same scope as litigation; however, according to him an arbitral award has no value without judicial review.[14] The Act follows the restriction made by some Hanbali scholars and does not allow arbitration in some criminal matters because it has a different nature from commercial disputes and is related to state power.[15]

Article 2 deals with the capacity of parties to arbitrate. Like any normal contract, an arbitration agreement is not valid unless it is made by a person with the full legal capacity to conclude a valid contract. In order to conclude a valid agreement under Shari′a, the parties to the dispute must satisfy the requirements of legal capacity, i.e., they must have reached a certain age and have a certain level of mental ability at the time of concluding the contract.[16] Neither the guardian of a minor nor the trustee of charitable trust, called '*waqf*' in Arabic, can conclude an arbitration agreement unless authorized to do so by the court.[17] Even after being authorized to resort to arbitration, an arbitral award against the guardian of an incapacitated person is invalid if it provides for any damage against their interest unless approved by a judge.[18] In accordance with article 5 of the Arbitration Act, the arbitration agreement should be sent to the competent authority for approval, i.e., to the authority having jurisdiction on the dispute originally.[19] When reviewing arbitration agreements, the competent authority decides whether they entail any contradiction with the substantive and the procedural law of arbitration as well as public policy.

After approving the arbitration agreement, the authority, which is mainly *Diwan Alamzalim* (the Board of Grievances) or the Chamber of Commerce and Industry, should inform the arbitral tribunal of the approval and advise it to proceed in looking at the dispute at issue. Alternatively the refusing party may be forced by the *Diwan* to prepare it in accordance with the Arbitration Act.[20] If one of the

12 Hodoud are crimes for which the Quran provides punishments such as theft, adultery and accusation of adultery.

13 Article 1 of the Implementing Rules of the Arbitration Act.

14 A. ben Mofleh, *Al-forou'* (4th edn., A′alam Alkotoub, 1985), Vol. 6, p. 440.

15 Supra n. 5, Ibn Qodamah, Vol. 11, p. 484.

16 M. Zahraa, 'The Legal Capacity of Women in Islamic Law', *Arab Law Quarterly*, 11 (1996), pp. 245–63.

17 Article 2 of the Implementing Rules of the Arbitration Act.

18 See, in general, the Implementing Rules of the Arbitration Act.

19 See article 5 of the Arbitration Act and *Diwan Almazalim* decision No. 59/T/4 of 1412 H. (1992).

20 *Diwan Almazalim* decision No. 184/T/4 of 1412 H. (1992).

parties refuses to arbitrate after concluding a binding arbitration clause, the other party will prepare the arbitration agreement unilaterally but under the supervision of the authority. If the agreement meets the legal requirements and the denying party rejects it, the authority will approve it, inform the arbitral tribunal and ask it to proceed normally following the related provisions of the Arbitration Act and the Implementing Regulations.[21]

Under Saudi law, the existence of the arbitration clause does not affect the right of parties to resort to litigation. It can be understood from case law that referring the dispute to litigation with the existence of an arbitration clause is an implied waiver of the parties' right to arbitrate. In decision number 29/T/4 of 1413 H. (1993), the *Diwan* emphasized the parties' right to insist on arbitration as a means of settling a dispute relating to a valid agreement;[22] however, the action of referring the dispute to litigation is a waiver of the parties' right to arbitrate and the arbitration clause will be of no avail.[23] This view was further supported by decision number 72/T/4 of 1411 H. (1991), in which the *Diwan* denied jurisdiction over the dispute because of the existence of the arbitration clause. When the case was referred to the Review Committee of the *Diwan*, however, it was found that one of the defendants was insisting on his right to arbitrate despite referring the case to litigation, an action which annuls his right to arbitrate. The Committee upheld the nullification of the arbitration clause because the defendant raised his claim after referring the dispute to litigation.[24] The moment when the right to arbitrate is waived by referring the dispute to litigation is not clearly determined but it might be subject to the time of filing the dispute to litigation before the Shari′a court or *Diwan Almazalim*.

It is not a matter of public policy in Saudi Arabia that the arbitration clause waives the parties' right to refer to litigation. In Saudi law, if one of the parties wants to insist on his right to arbitrate, his claim should be made before referring the dispute to litigation, as seen in decision numbers 95/T/4 of 1413 H. (1993) and 142/T/4 of 1409 H. (1989).[25] In the latter decision the Review Committee of the *Diwan* added that the parties to the arbitration have the right to refer the case to litigation even if they have a valid arbitration clause. Litigation is the original method for settling disputes – arbitration is an option only when it has nothing to do with public policy.[26] On the other hand, referring a dispute to litigation does not affect the right of the parties to resort to arbitration. In case number 27/T/4 of 1411 H. (1991), the defendant argued that the plaintiff sued him before a court in the

21 See *Diwan Alamzalim* decision No. 150/T/4 of 1413 H. (1993).

22 *Diwan Almazalim* decisions No. 113/T/4 of 1416 H. (1996) and No. 38/T/4 of 1409 H. (1989).

23 *Diwan Almazalim* decision No. 29/T/4 of 1413 H. (1993).

24 *Diwan Almazalim* decision No. 72/T/4 of 1411 H. (1991).

25 *Diwan Almazalim* decisions No. 95/T/4 of 1413 H. (1993) and No. 142/T/4 of 1409 H. (1989).

26 Ibid.

United States, which is a waiver of his right to arbitrate. The Committee decided that referring the dispute to litigation has no effect on parties' right to arbitrate.[27] As has been seen above, case law carries some contradiction when determining whether referring a dispute to arbitration could annul the arbitration clause or whether the arbitration clause remains valid. Such a conflict may be owing to the fact that precedent cases have little effect on legal practice – the emphasis is placed instead on reasoning and the understanding of judges and arbitrators.

Article 3 determines the nationality of arbitrators as well as other matter of public policy regarding the character of arbitrators. The arbitrator should be a Muslim male of Saudi nationality or a Muslim male of any other nationality of a liberal profession; otherwise he may be a public official upon the approval of the department to which he belongs. If there is more than one arbitrator, the chairman should be knowledgeable about Shari′a rules and the commercial regulations, custom and tradition in effect in the kingdom.[28] Article 4 of the Act adds that in the case of multiple arbitrators the number should be odd.[29] The appointment of a sole arbitrator as well as the validity of arbitral awards rendered by a sole arbitrator is upheld by the common practice and decisions of the *Diwan*.[30] The requirement to have an odd number of arbitrators facilitates the issuing of the arbitral award in the case of conflict in the judgments of arbitrators.[31] Islamic law clearly elaborates the issue of non-Muslims acting as arbitrators and there is no doubt among all the scholars that non-Muslims are not allowed to adjudicate in any dispute involving a Muslim element within Muslim territory. This opinion is based on the assumption that arbitration is another form of litigation.[32]

If the arbitration agreement provides for the settlement of the dispute by conciliation, then the arbitrators/conciliators can be non-Muslims because the agreement is considered to be an agency agreement which can be executed by them.[33] In relation to Saudi law, arbitrators working in the settlement of any dispute within the kingdom must be Muslims in accordance with article 3 of the Implementing Rules of Arbitration.[34] Residing in Saudi Arabia is not a condition for the validity of the appointment of arbitrators. The Arbitration Act is silent on the issue of the place of residence of arbitrators and it requires them to be Muslim males only. In case number 22/T/4 of 1413 H. (1993) *Diwan Almazalim* rejected the decision of the Committee for the Settlement of Commercial Disputes, which annulled the appointment of an arbitrator on the ground that he was not residing in

27 *Diwan Almazalim* decision No. 27/T/4 of 1411 H. (1991).

28 Article 3 of the Implementing Rules.

29 Article 4 of the Arbitration Act.

30 *Diwan Almazalim* decision No. 7/T/4 of 1419 H. (1999).

31 A. Al-Kenain, *Altahkeem fe AlShari'a Alislamiyah: Altahkeem Al'am, wa Altahkeem fe Alshiqaq Alzaouji* (1st edn., Dar Alasimah, 2000), p. 111.

32 A. Alfarra′, Al-Ahkam Al-Sultaniyah, ed. Muhammad Hamid Al-fagy (1st edn., Dar Alkotoub Alilmiyah, 1983), p. 61.

33 Supra n. 5, Ibn Qodamah, Vol. 14, p. 170.

34 See article 3 of the Implementing Rules.

Saudi Arabia, even though he was a Muslim. The Review Committee added that the rejection imposed an unnecessary restriction.[35]

Article 4 provides for some restrictions on the appointment of arbitrators. According to the article, if a person having an interest in a dispute has been convicted of a *hadd* (single of hodoud) or a crime of dishonour, or has been dismissed from public office by punitive decision or adjudicated bankrupt, he may not be an arbitrator unless relieved from such a condition.[36] The concern here is with the issues of impartiality and credibility. Moreover, most of the latter issues can be used as grounds for the challenging of witnesses. The appointment of an arbitrator possessing one of these characteristics violates the principle that the arbitrator must be an adl.[37] The appointment of a fasiq[38] is void because arbitration under Hanbali teachings is litigation – therefore the arbitrator should possess all the characters of a court judge.[39]

Article 5 obliges the authorities to issue an official updated list of licensed arbitrators. The list should be prepared by agreement among the Minister of Justice, the Minister of Commerce and Industry and the Chairman of the Board of Grievances. The courts, judicial commissions and Chambers of Commerce and Industry shall be notified of the list and disputants have liberty to choose arbitrators from such lists. The Ministry of Justice criterion for prospective arbitrators is that they have to pass an exam before they qualify as arbitrators. The exam covers various topics such as the mandatory rules of Shari′a and arbitration procedure under the Arbitration Act and its Implementing Rules, in addition to the valid laws and customs relating to the area in which the arbitrator wants to practise.[40] The test is multiple-choice, with 20 questions. Candidates can download it from the website of the Ministry of Justice and then fax or post in their answers. This process might not be the most appropriate way of qualifying arbitrators, because the test does not cover many important arbitration issues such as public policy, the issuance of the award or even the rules of procedure. For instance, some questions deal with issues like the number of articles in the Arbitration Act and the Implementing Rules, the date of ratifying the New York Convention of 1958, what does UNCITRAL stands for, etc. The Ministry is about to revise the criteria for qualifying arbitrators and a new regulation will be enacted by 2011.

The credibility of such a procedure is also disputed because anyone can answer it on behalf of a candidate. According to the Ministry of Justice website,

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35 *Diwan Almazalim* decision No. 22/T/4 of 1412 H. (1992).

36 Article 4 of the Implementing Rules.

37 Supra n. 3, Saleh, p.36. In general, the term adl refers to someone who does not violate Shari′a law and who has decent mental abilities.

38 Fasiq is a term describing someone guilty of openly and flagrantly violating Islamic law and/or someone whose moral character is corrupt.

39 Supra n. 31, Al-Kenain, pp. 77–79.

40 See article 5 of the Implementing Rules. The list of arbitrators is available from the website of the Ministry of Justice at <www.moj.gov.sa> [accessed 22 September 2009].

if a candidate fails in answering one of the questions, he will have to attend an interview that might be nothing more than a repetition of the test he already sent to the Ministry.[41] Although non-Saudis are allowed to arbitrate if they are chosen by the parties to a particular dispute, the Ministry of Justice requires all applicants to be of Saudi nationality.[42]

Arbitration Clause

Article 6 overcomes one of the main impediments to arbitration in Saudi Arabia, i.e., the recognition of arbitration clause. The article also sets the minimum amount of information that should be included in the arbitration agreement According to the article, arbitrators shall be appointed by agreement of the parties in the arbitration agreement, which should adequately define the subject of the dispute and the names of the arbitrators. An agreement to arbitrate may also be made by a contractual clause – an 'arbitration clause' – relating to disputes arising out of the execution of the contract.[43]

The failure of courts to recognize arbitration clauses characterized arbitration under the Code of Commercial Courts of 1931 as an impractical and time-consuming dispute settlement mechanism.[44] Courts did not recognize the arbitration clause because they doubted its validity under Shari′a (most arbitrations at that time were rejected on the ground of uncertainty). One of the conditions of the validity of an arbitration agreement is to have an existing dispute; therefore, the legality of the arbitration clause is controversial. Under Shari′a, a contract whose object did not exist at the time of the conclusion of the contract is not acknowledged, which is similar to the prohibited contracts related to selling fish in the sea or birds in the sky. Hanbali teachings, as the most flexible school in commercial transactions, consider the arbitration clause to be a contractual clause that is valid as long as it does not contradict the purpose of the contract and is not prohibited under Shari′a.[45] Any rejection may be a result of judges' misunderstanding of the contractual nature of arbitration clauses.

Traditionally, an arbitration agreement should include the names of the arbitrators, the subject of the dispute, the applicable law and the time of rendering the arbitral award, as well as the seat of the arbitration.[46] It can be seen in the

41 The Ministry of Justice of Saudi Arabia website at <www.moj.gov.sa> [accessed 17 May 2009].

42 Ibid.

43 Article 6 of the Implementing Rules.

44 See, in general, supra n. 6, Albejad, p. 30.

45 See, in general, supra n. 5, Ibn Qodamah, Vol. 14.

46 G. Sayen, 'Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia', *University of Pennsylvania Journal of International Business Law*, 9/2 (1987), pp. 211–27.