other than real property, especially in the case of guarantees. Guarantees under Saudi law can be classified into two types: presence guarantee, called 'kafalah hodouriya', is where the guarantor guarantees the presence of the debtor before the official authorities only; and full guarantee, 'Kafalat Ghorm wa Ada'', gives the bank the option of claiming the debt from the guarantor directly. The main problem associated with such guarantees arises when the amount of the claim is not stated in the letter of guarantee provided by the guarantor. The guarantee will be considered void and of no effect or the amount claimed by the guarantor will be considered as the correct amount.

Third, as with conciliation, acceptance of the award by the parties is an essential condition for the enforcement of any award, showing the conciliatory nature of the Committee's decisions. Fourth, in addition to the absence of clear procedural and substantive rules and owing to the fact that none of the members of the Committee have a legal background, the Committee cannot function as a judicial body. Some of its decisions even seem to be impractical and harmful to parties, as in the case of rescheduling a debt in annual instalments for 20 years with a fixed interest. In this case, a debtor refused to pay his instalments because of financial difficulties. The defendant presented an official document issued from the Shari'a court stating that he was unable to pay off his debt and that he should enjoy very flexible terms of repayment.[102] The Committee calculated the amounts claimed by the bank and divided it by 20 years instead of five years. The decision was accepted by both parties as being the last resort for the bank.[103] In another case, the Committee totally cancelled the interest in exchange of the repayment of the principal in cash. The decision is seen to be reasonable in normal circumstances, but in this case the bank had to accept the decision after more than two years of not receiving any payment for the facilities granted to the defendant, which means that the defendant enjoyed an interest-free loan.

It has been noted that in many of its decisions the Committee rescheduled debt claims for various periods ranging from five years to up to 30 years. Nonetheless, the Committee can issue relaxed decisions if it finds the defendant willing to pay the full amount in cash. Such relaxations include discounting part of the interest as in the following example: a businessman borrowed an amount of SR 19,000,000 from one of the commercial banks in Jeddah. The parties stipulated on charging interest at the rate of 5.5 per cent per annum for five years. Following the market depression in the late 1990s, the businessman was unable to pay the instalments for 14 months owing to financial difficulties. The bank brought a claim before

102 This kind of document is known as Saq E'isar; one of the main advantages of obtaining such a deed can be the very relaxed repayment terms as such documents are issued for insolvent persons.

103 This case and the following cases have been provided by one of the commercial banks in Saudi Arabia and the author is not allowed to disclose any information that might give any assumption of the identity of the parties to the dispute, by either providing numbers, dates or names, etc.

the Committee asking for the payment of the principal plus the stipulated interest in full or a direct liquidation of the collateral in accordance with the terms of the contract. The Committee, during the hearing, proposed that the businessman could end the dispute if he paid the principal in cash and the bank should exclude 50 per cent of the outstanding claim of interest; the parties agreed on that.

Following the stock market crash in early 2006, the Committee has been experiencing some difficulties dealing with the large number of disputes between banks and their clients, vice versa with regard to banking facilities granted to buy shares with the guarantee of existing shares owned by debtors. This kind of dispute started to appear as a result of the common banking practice of liquidating securities placed as collaterals when the market value falls below a certain limit without notifying the clients, even though it is a violation of SAMA's regulations.[104] Until recently, commercial banks used to conduct stock brokerage directly, not through a specialized subsidiary, which raised the suspicion that banks were contributing to the crisis because of the conflict of interest between conducting stock brokerage, holding shares as debt security and managing speculative funds. This problem was also worsened by the ill supervision of the Capital Market Authority, which denied supervision of the practices of commercial banks because it fell under the competence of SAMA. SAMA in its turn denied the responsibility because such activities relate to the stock market and it was the responsibility of the Capital Market Authority to supervise such activities.[105] The settlement of such disputes would take a long time because the competence of this kind of dispute is still a matter of conflict between the Committee for the Settlement of Securities Disputes of the Capital Market Authority and the Committee for the Settlement of Banking Disputes, and also because of the large number of disputes. These disputes relate to banking business because they arose out of the execution of banking transactions, and they could also fall under the jurisdiction of the Committee for the Settlement of Securities Disputes of the Capital Market Authority because they relate to price manipulation and to the selling of securities without the owner's permission.

The Committee for the Settlement of Negotiable Instruments Disputes

Another competent body for the settlement of banking disputes is the Committee for the Settlement of Negotiable Instruments Disputes, which is competent to settle disputes arising out of negotiable instruments such as cheques, promissory notes and bills of exchange. Established by the Law of Negotiable Instruments, the Commercial Paper Committee is also known as the Office for the Settlement of Commercial Papers Disputes and has the jurisdiction to hear claims concerning bills

104 See Circular No. 333/BC/200 dated 22/08/1413 H. (1993).

105 A. Baamir, 'Issues of Disclosure and Transparency in the Saudi Stock Market', *Arab Law Quarterly*, 22 (2008), pp. 63–85.

of exchange, promissory notes and cheques only.[106] The Negotiable Instruments Law provides the substantive legal provisions applied by the Commercial Paper Committee. The law largely reproduces the provisions of the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes of 7 June 1930 and for Cheques of 9 March 1931, even though Saudi Arabia has not become a party to the conventions themselves. The Law of Commercial Papers can be considered as a mixture of the Code of Commercial Courts of 1931 and the above-mentioned Conventions, with some modifications to meet Shari′a requirements. For instance, as Shari′a forbids the payment and charging of interest, any provisions in the Conventions relating to prohibited practices under Shari′a were omitted from the Negotiable Instruments Law. In practice, this position has been applied by offsetting interest payments voluntarily made by the debtor against the principal of the debt. The procedure before the Committee is subject to the provisions of the Code of Commercial Courts of 1931 and decisions may be appealed to the Minister of Commerce or to the Committee itself.[107] It is planned for this committee to join the new commercial courts; however, up to the time of writing this book nothing much has been done in the merging process.

Unlike the Committee for the Settlement of Banking Disputes, wherein most of the submitted disputes occur between banks or between banks and customers, the majority of the disputes submitted to this Committee do not involve interest. The Committee for the Settlement of Negotiable Instruments Disputes applies Shari′a law and does not recognize the obligation to pay interest as a valid contract. At the same time, this Committee does not have the competence to award damages – all claims for damages should be directed to the appropriate authority.[108] With regard to riba, negotiable instruments related to usurious transactions are considered by the Committee to be void and of no value because the underlying contract is considered void.[109] Appeals against the Committee's decisions are made either to the Minister of Commerce and Industry or to the Committee itself. When the decisions of the Committee become final, they are enforced by the Alhoqooq Almadaniyah, which may detain the losing party until full payment is made. The Committee is not really a committee and, contrary to its name, it consists only of one of the legal advisers of the Ministry of Commerce and Industry, who is usually not a Shari′a-trained adviser. The legal adviser usually works as the secretary and arbitrator at the same time. The hearings of the Committee are held in the legal department of the Ministry of Commerce and Industry, where attendance is

106 See, in general, The Law of Commercial Papers, *Nizam Alawraq Altejariyah*. Issued by Royal Decree No. 37 dated 11/10/1383 H. (1963). *Umm Alqura Gazette*, issue No. 2010 dated 15/10/1383 H. (1963).

107 Ibid.

108 See the decision of the Committee for the Settlement of Negotiable Instruments Disputes No. 82/1405 dated 08/05/1405 H. (1985).

109 The Committee for the Settlement of Negotiable Instruments Disputes, decision No. 67/1404 dated 11/04/1404 H. (1984).

restricted to the parties to the dispute only. It has been noticed that the decisions of this Committee are easier to enforce than the decisions of the Committee for the Settlement of Banking Disputes for the reason that the decisions of this Committee do not contradict Shari′a. The decisions of this Committee are directly enforced by the Alhoqooq Almadaniyah, which will detain the respondent until full settlement of the claim is reached.

Unlike Saudi Arabia, the majority of the legal systems in the Muslim world have no problem with regard to arbitration in banking disputes, as it is treated in the same manner as other commercial disputes. In Saudi Arabia, the problem occurs because the principles of conventional banking contradict the principles of Shari′a, especially when it comes to sensitive issues such as interest. Nowadays, interest is the main motive behind the banking system, which can be considered as the core of modern economies; nonetheless, Saudi law does not give a clear answer to the question of the arbitrability of disputes in general and of banking disputes in particular, and refers the whole issue instead to the law on conciliation. The law on conciliation itself carries a great deal of ambiguity and conflict among the fiqh schools, especially when added to the fact that there were no rules on conciliation in Saudi Arabia until now. What is practised over there is no more than a personal effort to find pacific solutions to disputes or to avoid litigation. Another issue that worsens the situation is the duality within Saudi law. This duality is not a problem in itself, as two straight lines can go in parallel without clashing and two different schools of thought can complement each other, unless a fundamental point of conflict occurs between them, which is the case of interest in arbitral awards in Saudi Arabia. The contradiction between the two bodies of law with regard to interest is the main problem and it has caused a great deal of uncertainty in relation to arbitration, as Shari′a prohibits all forms of banking interest and Saudi law does not enforce this prohibition. After being the best solution for banking disputes, it can be concluded that arbitration becomes a less attractive method for the settlement of domestic conventional banking disputes for the reason that the Committee for the Settlement of Banking Disputes offers a better chance for recovering interest claims. Moreover, arbitration for banking disputes tends to be more risky, as the *Diwan* will consider arbitral awards providing for the payment of interest as contrary to public policy and will refuse the enforcement either in part or in full. In the latter case, the *Diwan* will either exclude the interest from the award or refer the whole dispute to the Committee for the Settlement of Banking Disputes to be decided anew, which is a waste of time and money and weakens the credibility of arbitration as a fast, cheap and effective dispute settlement mechanism. It has also been noted that banks attempt to avoid the jurisdiction of the Saudi judiciary in international banking contracts and try to apply a mechanism in which Saudi law has no influence on the transaction in general and on the settlement of disputes in particular.

The future of the semi-judicial committees is not yet clear as the new Law of Judiciary states that such committees will be incorporated in the new commercial

courts.[110] The Law first calls for a reform in the procedural law before joining the specialized committees within the competence of the Ministry of Justice.[111] The new Law excludes some of the committees from this merger because it deals with sensitive issues on the one hand and on the other hand because Shari′a judges are not qualified enough to decide on them. The law excludes the Committee for the Settlement of Banking Disputes, the Committee for the Settlement of Securities Disputes and the Committee for the Settlement of Customs Disputes.[112] There are a few reasons behind excluding the Committee for the Settlement of Banking Disputes from the expected merger. First, the Ministry of Justice, when upholding the practice of riba, violates the Constitution of Saudi Arabia, especially articles 1 and 7 that regard the Quran and the Sunna as the main sources of legislation – these sources state clearly that riba, speculation on banking assets like shares and bonds, is forbidden. Second, recognizing riba contradicts the main objectives behind the establishment of the Ministry as a tool for applying Shari′a in daily life and also violates the Law of Judiciary, which states that Shari′a prevails over all man-made regulations.[113] Finally, the reason for excluding the Committee for the Settlement of Banking Disputes from the competent of the general judiciary is exactly the same reason for establishing it in the first place.

As an issue related to arbitration, the Saudi judiciary suffers from the lack of judges in general and judges specializing in commercial matters in particular. This is owing to the nature of the training received by judges, who do not receive enough training in modern commerce. Such training programmes as are available are neither efficient nor sufficient. The curriculum of Shari′a faculties and the High Institute of the Judiciary totally depend on the classical Shari′a treatises, which were written a few centuries ago before the creation of current business practice. Moreover, it is difficult to find people who are qualified equally well in Shari′a and commercial law. Even if such a person is found, as in the case of experienced lawyers, such a person must hold a Shari′a degree in order to be appointed as a judge, in addition to further hidden requirements. The old guard within the Ministry of Justice considers any attempt at reform as a threat to the application of Shari′a in Saudi Arabia – in their view Shari′a should be kept in the same way as applied by classical scholars. Such attitudes result in a conflict between the application of Shari′a and economic interest that is not a result of the application

110 These committees are: the Committee for the Settlement of Negotiable Instruments Disputes; the Committee for the Settlement of Commercial Disputes; the Committee for the Settlement of Labour Disputes; the Committee for the Settlement of Media Disputes; the Committee for the Settlement of Securities Disputes; the Committee for the Settlement of Customs Disputes; and the Commercial Departments of *Diwan Almazalim*.

111 See article 9.1 of the Law of Judiciary of Saudi Arabia.

112 See, generally, section 3, articles 1 and 2 of the Law of Judiciary of Saudi Arabia of 2007.

113 See the Law of Judiciary of Saudi Arabia, issued by Royal Decree No. M/78 dated 19/09/1428 H. (2007). *Umm Alqura Gazette*, issue No. 4170 dated 30/09/1428 H. 12/10/2007.

of Shari′a itself; it is a result of not adapting the application of Shari′a principles to modern commercial life. Failure to update Shari′a teachings in Saudi Arabia has many negative impacts, where the difficulties faced in arbitration in banking disputes reflect the wider scene of daily life in the continuous conflict between the different schools of thought, nepotism, slow procedures, etc.

The application of Saudi arbitration law to banking disputes contradicts the main objectives behind resorting to arbitration as a reliable, independent, swift and cheap dispute settlement mechanism. Unlike many arbitration rules, the arbitration agreement should be sent to the *Diwan* in order to obtain approval before the commencement of the arbitration. According to some officials at the *Diwan*, the ratification may take a period of between one and three months and in some cases may take years! Furthermore, the law does not give a clear answer to the question of whether banking interest is prohibited. However, as a final conclusion it can be said that interest is prohibited in Saudi Arabia but that the prohibition is unenforceable in the sense that the prohibition will only apply if there is a dispute before a Shari′a court. There are other alternative remedies in case arbitration fails to serve its objectives, such as resorting to the Committee for the Settlement of Banking Disputes of the Saudi Arabian Monetary Agency, which would be the best solution in a case where the party is claiming the payment of interest. Nonetheless, the decisions of this Committee are not binding on the party that rejects them. Avoidance of the jurisdiction of the Saudi judiciary has been proved to work on such occasions. Yet, if the enforcement is sought in Saudi Arabia, Shari′a rules will apply and such steps of jurisdiction avoidance will not work.

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