EAST MEETS WEST: INTRODUCING SHARIA INTO THE RULES GOVERNING INTERNATIONAL ARBITRATIONS AT THE BCDR-AAA

Elana Levi-Tawil*

INTRODUCTION

As the size and complexity of international commercial transactions grow, parties to international commercial transactions are increasingly utilizing Alternative Dispute Resolution (“ADR”) methods, specifically international commercial arbitration, to resolve the disputes that arise. However, since international commercial players first began to use international commercial arbitration to resolve these disputes, transnational recognition and enforcement of foreign arbitral awards has been a major issue. Since 1958, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), an agreement executed by the United Nation’s General Assembly, has vastly expanded the recognition and enforcement of foreign arbitral awards by unifying the manner in which enforcement courts reach their decision.

However, the New York Convention itself allows a pocket of uncertainty to remain. Under Article V(2)(b) of the New York Convention (the “public policy exception”), any country that has

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* B.A., magna cum laude, Brandeis University, 2007; J.D. Candidate, Benjamin N. Cardozo School of Law, Yeshiva University, 2011. The author would like to thank her husband, Ezra, her parents, and her brothers for their immeasurable support and constant inspiration. The author would also like to thank Professor Caroline Levy for her invaluable guidance.

1 ADR refers to “amicable ways of dispute settlement through such means as negotiation, mediation, conciliation, arbitration, ombudsman, expert determination, etc.” Syed Khalid Rashid, Alternative Dispute Resolution in the Context of Islamic Law, 8 VINDOBONA J. INT’L COM. L. 95, 95 (2004) [hereinafter Rashid, Context].

2 Winston Stromberg, Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes, 40 LOY. L.A. L. REV. 1337, 1338–40 (2007). Stromberg explains that, “[b]ecause recent decades have seen a marked increase in the size and complexity of international commercial transactions, the potential for transnational business disputes is perhaps greater now than ever before.” Id. at 1339.


acceded to the New York Convention may choose not to recognize and enforce any arbitral award that is contrary to its public policy.\(^{5}\) Furthermore, the New York Convention never defined the term “public policy,” leaving it to the discretion of the enforcing country to choose whether to apply a domestic or international public policy when reaching its decision.\(^{6}\) The courts of most nations have chosen not to use their domestic public policies to refuse to recognize and enforce a foreign arbitral award, and will enforce the arbitral award as long as it is not contrary to international public policy.\(^{7}\) However, because of the unique influence of Islamic law, or Sharia, on the public policy of the Middle Eastern countries, the Middle Eastern countries are the exception.\(^{8}\) Indeed, many courts in the Middle Eastern countries continue to apply a domestic public policy to the public policy exception of the New York Convention in order to refuse to recognize and enforce foreign arbitral awards.\(^{9}\)

On January 11, 2010, the Ministry of Justice of Bahrain\(^{10}\) and the American Arbitration Association (“AAA”)\(^{11}\) formally launched the Bahrain Chamber for Dispute Resolution-AAA (the “BCDR-AAA”), a center for the arbitration and mediation of

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6 Id. at 82.


9 Id.

10 Bahrain is a Middle Eastern country located in the Persian Gulf. The World Fact Book: Bahrain, [https://www.cia.gov/library/publications/the-world-factbook/geos/ba.html](https://www.cia.gov/library/publications/the-world-factbook/geos/ba.html) (last visited Jan. 25, 2010). The al-Khalifah family has ruled Bahrain since 1783. Presently, Bahrain has a constitutional monarchy accompanied by an elected legislative assembly with the king as the ultimate authority. The major political and military posts are held by the Sunni Muslim ruling family, while the legislative assembly consists predominantly of Shiites. Bahrain is one of the established centers for banking and financial services in the Middle East. Bahrain consists of around 802,000 people. The majority of these people speak Arabic, and practice the religion of Islam. *BBC News: Bahrain Country Profile*, [http://news.bbc.co.uk/2/hi/middle_east/country_profiles/790690.stm](http://news.bbc.co.uk/2/hi/middle_east/country_profiles/790690.stm) (last visited Feb. 14, 2011).

11 The AAA is a public service organization that assists with the resolution of disputes through voluntary procedures such as arbitration, conciliation, mediation, negotiation, and democratic elections. It has been the “[l]eading provider of conflict management and dispute resolution services” since 1926. The AAA helps resolve disputes by providing a forum in which to hear the disputes, rules and procedure that govern the hearings, and impartial experts to help reach a resolution. Press Release, *Am. Arbitration Ass’n, Bahrain Establishes Alternative Dispute Resolution Centre* (Aug. 17, 2009), available at [http://www.adr.org/si.asp?Id=5787](http://www.adr.org/si.asp?Id=5787) [hereinafter AAA Press Release].
commercial cases. The BCDR-AAA is comprised of two offices, the Bahrain Chamber for Dispute Resolution (“BCDR”), which will manage all domestic cases, and the International Centre for Dispute Resolution (“ICDR”), the international division of the AAA, which will address international commercial cases.

When arbitrating cases, the BCDR will apply a set of rules created by the Bahraini government in conjunction with the Bahraini courts. This set of rules will include applicable aspects of Sharia. The ICDR will apply its own set of rules based on its International Dispute Resolution Procedures, which will not incorporate any aspects of Sharia. The International Dispute Resolu-
tion Procedures are flexible and allow parties to choose the law that will be applied to their case.\textsuperscript{18}

Those involved in the creation of the BCDR-AAA have also incorporated many features into the BCDR-AAA in order to remove bars to the recognition and enforcement of foreign arbitral awards in the Middle East. However, until the BCDR-AAA incorporates some aspects of Sharia into the rules governing international commercial arbitrations at the BCDR-AAA, it will not reach its utmost potential in expanding the recognition and enforcement of foreign arbitral awards in the Middle East.

This Note explores how the role of Islam in the financial, legal, and religious institutions of the Middle Eastern countries, as well as Islamic laws regarding arbitration, have caused the New York Convention’s public policy exception to be used in the Middle East as a bar to the recognition and enforcement of many foreign arbitral awards. Furthermore, it explains the major features of the BCDR-AAA that have been developed in hopes of increasing the enforceability of foreign arbitral awards. The importance of incorporating some of the aspects of Islam into the rules that will be applied to international commercial arbitration at the BCDR-AAA also is discussed. This Note asserts that without this incorporation, the BCDR-AAA will not reach its potential in increasing the enforceability of foreign arbitral awards. Finally, the Note proposes that certain important aspects of Sharia should be integrated into the international commercial arbitration rules utilized at the BCDR-AAA.

I. HISTORY AND BACKGROUND INFORMATION

A. International Commercial Arbitration

As dissatisfaction with the use of litigation to solve international commercial disputes has developed, many disputing parties have begun to adopt ADR methods.\textsuperscript{19} Proponents of ADR believe that the “attendant delays, protractedness, costliness, and acrimonious nature” associated with litigation do not exist with ADR, which they believe is speedy, simple, confidential, and inexpensive.\textsuperscript{20} International commercial arbitration, which is arbitration

\textsuperscript{18} Id.
\textsuperscript{19} Rashid, \textit{Context}, supra note 1.
\textsuperscript{20} Id.
that takes place between transnational actors, has become the preferred ADR mechanism through which to resolve international commercial disputes.\textsuperscript{21}

International commercial arbitration is a private dispute resolution system.\textsuperscript{22} In most cases, arbitration tribunals gain jurisdiction over parties who have chosen to participate in arbitration, either through an agreement or an arbitration clause.\textsuperscript{23} Proponents of international commercial arbitration believe that it allows parties to resolve their conflicts faster and cheaper than in the litigation system, while allowing the parties to retain control and flexibility.\textsuperscript{24} For instance, parties are usually able to choose where the conflicts will be arbitrated, who will arbitrate the conflicts, the substantive law that will govern the arbitration, and the procedural rules that will be followed.\textsuperscript{25} In most cases, international commercial arbitration also provides a mechanism through which parties from different jurisdictions can resolve their disputes in a neutral manner.\textsuperscript{26}

\section*{B. The Enforceability of Foreign Arbitral Awards}

Since international commercial arbitration began to be utilized to resolve international commercial disputes, transnational recognition and enforcement of the foreign arbitral award has proved problematic.\textsuperscript{27} For international commercial arbitration to be successful, those who participate in arbitration and receive an award must have the means by which to enforce it.\textsuperscript{28} Although international arbitration is usually undertaken voluntarily, national and international laws have been devised to help ensure that decisions made by tribunals will be binding.\textsuperscript{29} The New York Convention,

\begin{footnotesize}
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  \item \textsuperscript{21} Kutty, \textit{supra} note 8, at 570.
  \item \textsuperscript{22} \textit{Id.} at 569.
  \item \textsuperscript{23} \textit{Id.} at 570.
  \item \textsuperscript{24} \textit{Id.}
  \item \textsuperscript{25} \textit{Id.}
  \item \textsuperscript{26} \textit{Id.} at 570–71.
  \item \textsuperscript{27} Bondurant, \textit{supra} note 3.
  \item \textsuperscript{28} See Kutty, \textit{supra} note 8, at 615. “Without the guarantee of enforceability, the arbitration becomes meaningless, a mere prelude to frustrating litigation.” \textit{Id.} (quoting Jane L. Volz and Professor Roger S. Haydock).
  \item \textsuperscript{29} “[T]he twin objectives of the legal framework are to ensure enforceability of arbitration agreements and clauses and arbitral awards, and to insulate the arbitration process as much as possible from interference by domestic courts and other national or international institutions.” \textit{Id.} at 614–15.
\end{itemize}
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which was adopted by the United Nations in 1958 and is considered by many to be one of the most successful international private law treaties, is the major source of international law regarding the enforceability of foreign arbitral awards.30

1. The New York Convention

The New York Convention imposes two main obligations on those who join it: (1) the national courts must refer parties to arbitration where appropriate; and (2) the national courts must accept and enforce foreign arbitral awards as if they were domestic judgments.31 The New York Convention applies to arbitral awards given in foreign countries.32 The New York Convention also applies to those awards that were not arbitrated in the country in which enforcement is being sought.33 It applies not only to arbitral awards, but also to arbitration agreements, though the arbitral agreements must be in writing.34

Because the New York Convention specifies narrowly the grounds upon which national courts may refuse to recognize or enforce foreign arbitral awards,35 enforcement has been simplified, and jurisdictional issues have nearly been eradicated.36 The New York Convention only requires that an award be “binding” to be enforced.37 To enforce the award, the party seeking enforcement only needs to produce the award and the arbitration agreement under which the award was decided.38 The burden is then on the opponent to prove that the award should not be enforced.39 If the

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32 Wakim, supra note 7, at 23.

33 Id.

34 Kutty, supra note 8, at 616–17.

35 Brower & Sharpe, supra note 31.

36 Wakim, supra note 7, at 24.

37 Brower & Sharpe, supra note 31.

38 Kutty, supra note 8, at 616.

39 Id.
New York Convention applies to an award, a country may not review an award on its merits.\textsuperscript{40} However, the New York Convention does provide a limited amount of exceptions where countries can refuse to recognize and enforce foreign arbitral awards.\textsuperscript{41} If a party can prove the “incapacity of the party or invalidity of the arbitration agreement, denial of a fair hearing, excess of authority or lack of jurisdiction, or procedural irregularities,” the country may refuse to recognize or enforce the arbitral award.\textsuperscript{42}

2. The Public Policy Exception

Recognition and enforcement of a foreign arbitral award may be denied if the country’s court finds that recognition or enforcement would be contrary to the public policy of the country.\textsuperscript{43} The public policy exception is found in Article V(2)(b) of the New York Convention, which states that, “[r]ecognition 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 . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country.”\textsuperscript{44} Although the New York Convention has served to greatly harmonize the recognition and enforcement of foreign arbitral awards, this exception has allowed countries to retain a large amount of discretion, and has caused much confusion.\textsuperscript{45} The confusion arises out of the fact that the New York Convention never defined the term “public policy,” implicitly leaving the enforcing country to choose whether to invoke a domestic or international public policy\textsuperscript{46} when deciding whether or not to recognize and enforce an award.\textsuperscript{47}

Indeed, countries have adopted various interpretations of the public policy exception, as have legal scholars. Charles N. Brower and Jeremy K. Sharpe have explained that, “the better view [of the New York Convention’s public policy exception] is that it is inter-

\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Fry, supra note 5.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 81–82.
\textsuperscript{46} Id. Fry explains that truly international public policy is where “an enforcement State refuses to recognize or enforce an international award in order to protect the fundamental values of a more quasi-universal nature.” Id. at 82–83.
\textsuperscript{47} Id. at 82, 92–93.
national, and not domestic, public policy, that is at issue.” Faisal Kutty has also adopted this view. James D. Fry and Mark Wakim, on the other hand, have argued a contrary view, that the New York Convention refers to domestic public policy.

Fry believes that the New York Convention’s public policy exception refers to the country’s public policy, and not international public policy, as “the New York Convention . . . [is] abundantly clear that the public policy is to be that of the enforcement State, thus preserving an element of State control and discretion over an otherwise international process.” However, he explains that even though the New York Convention refers to a domestic public policy, countries may choose to base their enforcement decisions on international public policy by narrowly interpreting the public policy exception, and that most countries have chosen to do so. Fry also acknowledges the dangers of the public policy exception, which, he believes, “is a significant barrier to the complete internationalization of international arbitration and has the potential of unraveling the entire regime” if countries choose to interpret it broadly.

II. INTERNATIONAL COMMERCIAL ARBITRATION AND THE MIDDLE EAST

A. Background on Islam

To truly comprehend why the public policy exception has proven so vexing in the Middle East, one must first understand the

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48 Brower & Sharpe, supra note 31, at 649.
49 Kutty, supra note 8.
50 Fry, supra note 5; Wakim, supra note 7.
51 Fry, supra note 5, at 81–83. Fry bases his argument on the words “of that country” found in Article V(2)(b), which he believes, “explicitly allows enforcement States to define public policy and thus retain a measure of control over international arbitration.” Id. at 93. Fry explains that,

[i]n fact, the 1958 New York Conference on International Commercial Arbitration, which was responsible for drafting the New York Convention, saw this public policy clause as a provision to allow States their own applications of the exception, which appears to have been necessary for conclusion of negotiations over the New York Convention.

Id. at 93–94.
52 Id. at 94. Fry explains that, “[d]espite the perceived benefits to relying on truly international public policy, there are significant reasons to refrain from pushing for such reliance.” Id. at 82.
53 Id. at 94.
basic principles of Islamic law, Sharia. For those who practice Islam, it “is a complete way of life: a religion, an ethic, and a legal system all in one.” As Gemmell asserts, in Islam, “it is not that religion dominates the life of a faithful Moslem, but that religion . . . is his life.” Sharia influences not only the Muslim’s religious life, but also the Muslim’s commercial dealings. Furthermore, Sharia is integral to the “social, political, and economic relationships and institutions” of many Islamic nations.

To understand Sharia, one must become familiar with Islam’s ideological framework. The word Islam means “submission” to God, who “is the source of authority and the sole sovereign lawgiver.” The Sharia is “the path to achieve this submission” to God. Because Islam does not distinguish between the temporal and the spiritual, the Sharia’s goal is to fulfill both the spiritual and material welfare of its followers. Furthermore, “the Shari’a is divine and eternal, not in letter but rather in spirit.” Therefore, all legislation created by followers of Islam must conform to God’s will.

Because Sharia is a legal system based on principles, rather than a code of law, it can be developed and can be subject to many interpretations. The legal principles of Sharia are derived from both primary and secondary sources. The primary source of Sharia is the Quran, “the holy book of Islam.” The Quran is not a legal treatise. Rather, it explains the guidelines and principles

54 Kutty, supra note 8, at 577. Kutty believes that “[a]n appreciation of the sources, major principles, depth, and dynamism of the Shari’a is imperative to understand its impact on international arbitration in the Middle East.” Id.
56 Id.
58 Kutty, supra note 8, at 577–78.
59 Id. at 578.
60 Id.
61 Id.
62 Id.
63 Id.
64 Sioufi, supra note 57, at 1.
65 Id.
66 Id.; see also Kutty, supra note 8, at 584.
67 Kutty, supra note 8, at 584.
one must follow to attain the ideal civilized society.\textsuperscript{68} The other sources of Sharia are (i) the sunna, “binding authority of the dicta and decisions of the Prophet Mohammed”; (ii) the ijma, “consensus” of the community of Islamic scholars”; and (iii) the qiyas, “analogical deductions and reasoning of the Islamic scholars with respect to the foregoing” as interpreted over time by Islamic scholars.\textsuperscript{69}

The laws derived from the Quran and the Sunna are most sacred, and therefore possess a higher compliance requirement.\textsuperscript{70} The other laws, which are technical legal rules derived from the Quran and Sunna by a faqih, a jurist, can be re-interpreted based on changes in economic, educational, or political circumstances.\textsuperscript{71} Different groups of Muslims have different interpretations of the Sharia sources. The two major groups are the Sunni and the Shi’a.\textsuperscript{72} Sunni Muslims generally follow one of four schools of interpretation: the Hanafi, the Maliki, the Shafi’i, or the Hanbali.\textsuperscript{73} Shi’a Islam possesses its own school of law, which is called Ja’fari.\textsuperscript{74}

B. Arbitration in Islam

Because the practice of ADR in Islam originated from the Quran and was embraced from the time of the prophet, there is a religious sanctity that has attached to its practice.\textsuperscript{75} Many verses of the Sharia “strongly advocate amicable settlement of disputes on equitable and fair manner and promise divine blessings to those who do so.”\textsuperscript{76} Furthermore, while many legal systems recognize

\begin{itemize}
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Sioufi, \textit{supra} note 57, at 1.
\item \textsuperscript{70} Syed Khalid Rashid, \textit{Peculiarities & Religious Underlining of ADR in Islamic Law}, 1–7, 3 [hereinafter \textit{Peculiarities}].
\item \textsuperscript{71} Kutty, \textit{supra} note 8, at 579.
\item \textsuperscript{72} Gemmell, \textit{supra} note 55, at 172. Gemmell also explains that: [b]oth Sunni and the Shi’a Muslims share the most fundamental Islamic beliefs and articles of faith. The differences between them initially stemmed not from spiritual differences but over leadership: who was to lead the Muslim nation after the death of the Prophet? Sunni Muslims maintained that their post-Prophet leader should come from among those capable of the job . . . However, the Shi’a held that post-Prophet leadership belonged within the Prophet’s own family, among those specifically appointed by him, or among Imams appointed by God Himself. \textit{Id.}
\item \textsuperscript{73} Wakim, \textit{supra} note 7, at 6–8.
\item \textsuperscript{74} \textit{Id.} at 8.
\item \textsuperscript{75} Rashid, \textit{Peculiarities, supra} note 70, at 3.
\item \textsuperscript{76} Rashid, \textit{Context, supra} note 1, at 97.
\end{itemize}
ADR processes generally, Islamic law possesses detailed rules by which to regulate it.\textsuperscript{77} This “unique legitimacy and divine approval”\textsuperscript{78} makes the use of ADR an obligation from God.\textsuperscript{79}

Under Sharia, an arbitration must meet the following conditions if the arbitral award is to be upheld: “(a) The dispute must have already arisen (that is future disputes cannot be covered in anticipation), and the dispute is to be defined clearly. . .; (b) There must be an arbitration agreement,\textsuperscript{80} (c) The arbitrator must be appointed by name. . .; and (d) The arbitrator must be mentally and physically competent.”\textsuperscript{81} Under Sharia, parties who have entered into an arbitration agreement may choose to take part in adjudication instead of participating in the arbitration as long as they do so before the award is given.\textsuperscript{82}

Under Sharia, an arbitrator may utilize his own sense of fairness and public policy as long as the arbitrator does not violate a custom or principle of Sharia.\textsuperscript{83} Furthermore, Sharia does not force an arbitrator to follow any procedural or evidentiary rules. Rather, an arbitral award will be upheld as long as the parties are heard in front of one another, and the reasoning upon which the award was decided is given.\textsuperscript{84} However, Sharia does set out the requirements one must meet to become an arbitrator. Under Sharia, parties are required to choose their arbitrators in the original arbitration agreement.\textsuperscript{85} This can be a problem if the chosen arbitrator dies, or is unavailable if a dispute arises.\textsuperscript{86} Arbitrating parties in this situation then need to create a new agreement before proceeding to arbitration.\textsuperscript{87} Furthermore, under Sharia, an arbitrator must be, “a male, adult, wise, free, Muslim, and fair. . .a woman, minor, slave, a non-Muslim and corrupt person cannot be appointed as an arbitrator.”\textsuperscript{88} Some Muslims have interpreted a

\begin{itemize}
\item \textsuperscript{77} Id. at 96.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Rashid, \textit{Peculiarities}, supra note 70, at 1.
\item \textsuperscript{80} The arbitration agreement may be made in writing, or through an oral agreement. Rashid, \textit{Context}, supra note 1, at 105.
\item \textsuperscript{81} Id.
\item \textsuperscript{82} Rashid, \textit{Peculiarities}, supra note 70, at 2.
\item \textsuperscript{83} Rashid, \textit{Context}, supra note 1, at 107.
\item \textsuperscript{84} Id. at 108.
\item \textsuperscript{85} Brower & Sharpe, supra note 31, at 651.
\item \textsuperscript{86} Id. at 648.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Rashid, \textit{Context}, supra note 1, at 105.
\end{itemize}
verse from the Quran to allow non-Muslims to serve as arbitrators.89

Whether or not arbitration is binding is not clear-cut in the Sharia.90 Therefore, the different Islamic schools of thought have greatly debated this issue, basing their arguments on different verses of Sharia.91 The Hanafis and Shafi’is believe that arbitration is similar to compromise, and therefore that the arbitral award will be binding only if the parties agree that it is.92 The Malikis, on the other hand, believe that unless an arbitral award contains a “flagrant injustice,” it will be binding, while the Hanbalis believe that arbitral awards are as binding as court judgments.93

The different schools of Islamic legal thought also have different opinions regarding the type of matters that may be arbitrated.94 The Hanafis believe that arbitration should only be utilized when dealing with the private rights of parties in commercial or proprietary matters.95 The Hanbalis and Shafi’is allow arbitration in all commercial cases, but not in any other cases.96 The Malikis, on the other hand, allow arbitration to be applied to non-commercial cases as well.97 However, that arbitration cannot be used, “in those disputes which a . . . (judge) alone is competent to decide” is agreed upon by all four schools of Islamic thought.98

The enforcement of both domestic and foreign arbitral awards is also discussed by the Sharia.99 Regarding the enforcement of domestic awards, “[i]t is basically up to the parties to enforce the award through mutual agreement and understanding.”100 Furthermore, an arbitrator may interpret any confusion in the award, and may fix any errors in the award as long as these actions are taken before the award is registered in a court that has jurisdiction over the matter.101 However, the court cannot make a judgment on the

89 Id.
90 Kutty, supra note 8, at 598.
91 Id.
92 Rashid, Context, supra note 1, at 104.
93 Kutty, supra note 8, at 597–98.
94 Rashid, Context, supra note 1, at 104.
95 Id.
96 Id.
97 Id.
98 Id. at 104–05. Only judges may decide issues relating to mutual imprecation, paternity, divorce, judicial annulment of marriage, emancipation of slaves, age of discretion, endowments, and other similar categories. Id.
99 Rashid, Context, supra note 1, at 104.
100 Id.
101 Id.
merits of a domestic arbitral award, unless the award violated natural justice or a Sharia principle.\textsuperscript{102} In this one exception, the court may choose to set aside the award.\textsuperscript{103}

Under Sharia, an arbitral award is considered foreign if both parties are non-Muslim, even if both are residents of the state in which the arbitration is being held.\textsuperscript{104} The award is also considered foreign if the arbitration took place outside of an Islamic state.\textsuperscript{105} Under Sharia, there is only one circumstance in which the court of an Islamic state can set aside a foreign arbitral award—when the award clashes with a principle of Sharia.\textsuperscript{106}

C. The Role of Islam in Middle Eastern Commerce

Because Sharia “is not only law but a code of life for the Muslims encompassing [their] entire life from the cradle to the grave,”\textsuperscript{107} it plays a dominant role in the commercial transactions that take place in the Middle East.\textsuperscript{108} Islamic laws that pertain to commercial transactions are based on the sharing of profit and loss, the prohibition of usury (riba), and the prohibition against “investment in businesses that provide goods or services considered contrary to its principles.”\textsuperscript{109} The most common Sharia-based commercial concepts are “profit sharing (Mudharabah), safekeeping (Wadiah), joint venture (musharakah), cost plus (Murabahah), and leasing (Ijarah).”\textsuperscript{110} In addition, speculation (gharar), which in modern times may lead to a prohibition of the investment in futures and commodities options, is based on the Sharia.\textsuperscript{111}

\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.}
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} Rashid, \textit{Context, supra} note 1, at 109.
\textsuperscript{106} \textit{Id.} at 109. Since “no compromise is possible in the domain of . . . Allah . . . [a]ny effort to circumvent the provisions prescribed . . . through mutual settlement,” would be considered sinful, and therefore, void. \textit{Id.}
\textsuperscript{107} Rashid, \textit{supra} note 70, at 3.
\textsuperscript{108} Sioufi, \textit{supra} note 57.
\textsuperscript{109} \textit{Id.} Riba is prohibited because it is morally reprehensible for a lender to exploit a borrower. However, riba does not bar all awards that are interest related, “especially where a party experiences a financial loss due to the withholding of a monetary award to which he or she is otherwise entitled.” Wakim, \textit{supra} note 7, at 45.
\textsuperscript{110} Sioufi, \textit{supra} note 57.
\textsuperscript{111} Wakim, \textit{supra} note 7, at 9. “The underlying idea of gharar is that the parties to a contract must be fully aware of their obligations at the time they enter into the contract; an element of risk in a contract is the equivalent of a gamble and results in immoral gain.” \textit{Id.} at 48.
Because many Middle Eastern commercial actors have begun to demand Sharia-compliant financial products, the role of Sharia has grown.\textsuperscript{112} As more financial institutions develop Sharia-compliant products, the products have become more “competitive in pricing” and many individuals who are not motivated by Islam have begun to request them.\textsuperscript{113} To ensure compliance, supervisory committees comprised of Islamic scholars have been created to decide whether proposals for new transactions or products are, in fact, Sharia-compliant.\textsuperscript{114}

D. History of Arbitration in the Middle East

Although arbitration is deeply embedded in Sharia law, both domestic and international arbitration have had “a long and often troubled history in the Islamic world,” frequently described as “a ‘roller coaster’ experience.”\textsuperscript{115} Brower and Sharpe, in their article, \textit{International Arbitration and the Islamic World: The Third Phase}, have divided the history of international commercial arbitration in the modern Middle East into three phases.\textsuperscript{116}

During the first phase, which began at the end of World War II and lasted until the 1970s, most of the oil that belonged to the countries of the Middle East was controlled by concession agreements with other nations.\textsuperscript{117} At this time, international arbitration was used primarily to resolve the disputes that arose between the owners of the concession agreements and the Middle East country where the oil was located.\textsuperscript{118} During these arbitrations, Islamic law was discounted and general principles of Western arbitration were applied.\textsuperscript{119} The conduct during this phase may explain why the Islamic world has often rejected international arbitration as “Western” and unfair.\textsuperscript{120}

\textsuperscript{112} Sioufi, \textit{supra} note 57. Most of the Middle Eastern commercial actors are “local and regional investors comprised of institutional clients (such as banks, insurance companies, and funds making large investments) and retail clients . . . Governments also participate in the local market, either directly or indirectly through state-owned companies, investment funds, and sovereign wealth funds.” \textit{Id.}

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} Brower & Sharpe, \textit{supra} note 31, at 643.

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} \textit{Id.} at 644.

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.} at 645.
During the second phase of international commercial arbitration in the modern Middle East, which began in the 1970s and ended in the early 1980s, the economies of the Western nations began to revolve around petroleum located in the Middle East.\textsuperscript{121} The stability of the Western nations now relied on the efficient resolution of disputes that arose over this petroleum.\textsuperscript{122} At the same time, many of the Islamic countries began to challenge the legal infrastructure of the international community because “they could not abide by [a] legal system, in whose creation they had not participated and whose values were felt to be inconsistent with their own cultural and legal traditions.”\textsuperscript{123}

During this phase, Islamic countries began to “repudiate contractual obligations, renegotiate or nationalize oil concessions, and reject arbitrations invoked by Western contracting partners.”\textsuperscript{124} As a result, few Islamic states possessed modern arbitration statutes, and much of the national legislation governing international arbitration was “generally [] unfavorable, or even hostile, to modern arbitration.”\textsuperscript{125} Many Islamic nations refused to join the principal arbitration conventions available at the time, including the New York Convention.\textsuperscript{126} Furthermore, the Islamic nations often interfered with international arbitration cases in a manner deemed improper by the Western nations.\textsuperscript{127}

During the third phase of modern international arbitration in the Islamic world, many Islamic countries began to join the international arbitration system.\textsuperscript{128} During this phase, many Middle Eastern countries established international commercial arbitration centers.\textsuperscript{129} They also began to join international arbitration conventions, including the New York Convention.\textsuperscript{130} Before the accession to the New York Convention, many of the Middle Eastern countries did not possess any domestic laws regarding arbitra-

\textsuperscript{121} Brower & Sharpe, supra note 31, at 645.

\textsuperscript{122} Id.

\textsuperscript{123} Id. at 645–46.

\textsuperscript{124} Id. at 646.

\textsuperscript{125} Id.

\textsuperscript{126} Id.

\textsuperscript{127} Brower & Sharpe, supra note 31, at 647.

\textsuperscript{128} Id. According to Brower and Sharpe, the third phase of modern international arbitration in the Middle East was still taking place when their note was published in 2003. Id. at 646.

\textsuperscript{129} Id. at 647.

\textsuperscript{130} Id. “[A]s we shall see, the fact that these states have signed the Convention does not mean all is well with the enforcement of foreign awards. As previously done, the Shariah is analyzed first.” Gemmell, supra note 55, at 187.
However, as a result of this accession, many Middle Eastern countries not only began to enact domestic laws regarding arbitration, but also began to incorporate the two major principles of the New York Convention into these newly enacted laws. One of the incorporated principles was the recognition and enforcement of foreign arbitral awards.

Because of the changes adopted by the countries of the Middle East during the third phase of modern international commercial arbitration, most Middle Eastern countries now possess legal systems that are comprised of both Western law and Sharia. Kutty has categorized the legal systems of the Middle Eastern countries into three categories: “(1) countries which have adopted Western laws, including the civil law tradition . . . and the common law tradition . . . (2) countries that have drawn more substantially—though not completely—from the Shari’a; and (3) countries which Westernized their commercial laws but still are strongly influenced by Shari’a principles.” The category in which a Middle Eastern country fits may greatly influence the recognition and enforcement of arbitral awards in that country, as the influence of Sharia varies based on the category of its legal system.

E. The New York Convention’s Public Policy Exception in the Islamic Middle East

The accession to the New York Convention by many of the Middle Eastern countries during the third phase of international commercial arbitration served to increase the recognition and enforcement of foreign arbitral awards. For example, Qatar and Oman did not possess any legislation “that enabled parties to compel arbitration or stay court actions pending arbitration.” Therefore, arbitrating parties in Qatar and Oman were forced to rely solely on general principles of Islamic Law.

The modern national legislation regarding arbitration enacted by many Middle East countries at this time was based on the Model Law on International Commercial Arbitration, which was developed in 1985 by the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Model Law was developed “in order to facilitate both the modernization of states’ outmoded or inadequate international arbitration laws and the harmonization of states’ disparate international arbitral practices.” Other Islamic states looked to the new national arbitration laws of other states in order to devise their own new arbitration laws.
forcement of the foreign arbitral award.\textsuperscript{137} However, the New York Convention’s public policy exception is still widely used by many Middle Eastern countries that refuse to recognize and enforce foreign arbitral awards.\textsuperscript{138} In order to understand why the Middle Eastern countries have chosen to use this exception, it is important to understand the major differences between the domestic laws of the Middle Eastern countries in respect to arbitration, and the international arbitration norms.\textsuperscript{139}

To begin with, under international arbitration norms, an arbitration award is binding in nature, and those that take part in arbitration are bound by the decision that is rendered.\textsuperscript{140} Under Islam, however, there is great debate over whether or not arbitration is binding.\textsuperscript{141} Before accession to the New York Convention, in order for an award to be upheld in most Middle Eastern countries, a successful party to arbitration had to obtain an enforcement order from a court located in the country where the arbitration was held.\textsuperscript{142} This enforcement order served as proof that the arbitral award was conclusive.\textsuperscript{143} The attainment of the enforcement order “needlessly consumed time and money . . . eviscerating one of the principle advantages of international arbitration,” the ease of enforcing foreign arbitral awards.\textsuperscript{144}

Most Middle Eastern countries now follow the standards set forth by the New York Convention. They require only that the party seeking to enforce the agreement provide both an original or certified copy of the award, and the arbitration agreement to prove that the foreign arbitral award is binding.\textsuperscript{145} For those nations that have not yet adopted the New York Convention’s standard, the debate over whether or not arbitration is binding could serve as a

\begin{itemize}
\item \textsuperscript{137} Wakim, \textit{supra} note 7, at 24.
\item \textsuperscript{138} \textit{Id.} Some Middle Eastern countries have chosen to narrowly interpret the public policy exception, and apply international public policy. For these countries, “the public policy defense would be successful only if enforcement of the award is contrary to basic notions of morality and justice in the international community.” \textit{Id.} at 27.
\item \textsuperscript{139} \textit{Id.} at 37. According to Kutty, the many conflicts between the Sharia laws regarding arbitration, and the international arbitration norms, are due to “[t]he fact that the Shari’a attempts to regulate the secular as well as the spiritual realms, and the fact that much of classical jurisprudence was formulated in a cultural setting long ago.” Kutty, \textit{supra} note 8, at 601–02.
\item \textsuperscript{140} Wakim, \textit{supra} note 7, at 24.
\item \textsuperscript{141} Kutty, \textit{supra} note 8, at 598.
\item \textsuperscript{142} Brower & Sharpe, \textit{supra} note 31.
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} \textit{Id.}
\item \textsuperscript{145} \textit{Id.;} Wakim, \textit{supra} note 7, at 36–38.
\end{itemize}
reason not to uphold an arbitration agreement under the public policy exception.\textsuperscript{146}

The domestic public policies of the Middle Eastern countries regarding what type of matters may be arbitrated also differ from international arbitration norms. In the past, this difference proved a great obstacle to foreign investment.\textsuperscript{147} While some believe that the adoption of international arbitration laws by many of the Middle Eastern countries has ameliorated this issue, others believe that this may become a problem under the New York Convention’s public policy exception when it comes time for enforcement.\textsuperscript{148}

Under international arbitration norms, one of the major advantages of arbitration is the freedom to negotiate the law that will be applied.\textsuperscript{149} However, under Sharia, choice of law provisions do not exist.\textsuperscript{150} Some Middle Eastern countries have chosen to adhere to this Sharia requirement, and will apply domestic law to choice of law issues.\textsuperscript{151} Other countries have chosen to bifurcate their religious and civil codes in order to follow international arbitration norms, and allow the parties to choose the law that will be applied.\textsuperscript{152} Those nations that have not yet adopted the international commercial norm regarding choice of law may choose not to recognize or enforce an arbitration agreement under the public policy exception.\textsuperscript{153}

There are also differences between international commercial norms and the public policies of Middle Eastern nations with regard to the selection of arbitrators. Under Islam, arbitrating parties are limited when choosing their arbitrators.\textsuperscript{154} The restrictions of arbitrators based on gender and religion not only violate inter-

\textsuperscript{146} Brower & Sharpe, supra note 31; Wakim, supra note 7, at 36–38.
\textsuperscript{147} Wakim, supra note 7, at 36; Brower & Sharpe, supra note 31, at 651.
\textsuperscript{148} Kutty, supra note 8, at 601. Faisal Kutty notes that “[t]he differences among jurisdictions in what are considered matters that can be arbitrated will impact greatly on the practice of international commercial arbitration, particularly when it comes to enforcement.” Id.
\textsuperscript{149} Wakim, supra note 7, at 39.
\textsuperscript{150} Id. at 38. In Saudia Arabia, “[the] courts set aside conflict of law principles and instead apply domestic law.” The Yemeni arbitration acts, on the other hand, “require the arbitrator to apply the law chosen by the parties, a notable leniency in a country reputed to be among the more religiously conservative in the Middle East.” Id. at 38–39.
\textsuperscript{151} Id. at 38.
\textsuperscript{152} Id. at 37.
\textsuperscript{153} Brower & Sharpe, supra note 31, at 649; Wakim, supra note 7, at 36–38; Kutty, supra note 8, at 616. According to Kutty, “[t]his area needs further scholarship to determine whether there are ways to comply with the Shari’a while ensuring that parties can exercise their contractual freedom when it comes to the determination of the choice of law.” Kutty, supra note 8, at 614.
\textsuperscript{154} Kutty, supra note 8, at 651.
national arbitration norms, but also international human rights. Kutty explains that, “[t]he fact that these restrictions are ostensibly derived from the Shari’a raise some serious issues for those concerned with bringing uniformity” to Islamic law and international commercial arbitration.

However, many Islamic scholars believe that in regard to non-Muslims and women serving as arbitrators, “the fundamental principle of equality in Islam, the historical evidence, and the emphasis given to freedom to contract and contractual obligations provide sufficient justification to reassess the Islamic position.” In Egypt and Oman, the Sharia texts have been interpreted to allow women and non-Muslims to act as arbitrators. Furthermore, fourteen other Middle Eastern countries possess statutes that do not expressly prohibit women and non-Muslims from acting as arbitrators, thereby indirectly allowing them to be appointed. However, those Middle Eastern nations that have not yet adopted the international commercial norm regarding the choice of arbitrators may choose not to recognize or enforce an arbitration agreement under the public policy exception.

While many of the international commercial arbitration rules provide that interest should be awarded, many Middle Eastern countries have incorporated the Islamic law against riba, or interest, into their domestic public policies. Although, there has not been a case yet to determine whether Middle Eastern nations with domestic law prohibitions against interest will enforce arbitral awards that possess an element of interest within them, those countries that have incorporated riba prohibitions in their domestic law may choose not to enforce them.

155 Id. at 606.
156 Id.
157 Id. at 606–07.
158 Rashid, Context, supra note 1, at 106.
159 Id. at 107.
160 Kutty, supra note 8, at 604 (“Interest or riba is a contentious issue in Islamic jurisdictions . . . Any contracts which include an excessive profit margin will also be considered a form of riba if it is exploitative, oppressive, or unconscionable . . . The fact that interest will meet with strong opposition in many Islamic jurisdictions is borne out by the negotiations leading up to the drafting of the CISG. There, Islamic nations rejected proposals to set an interest rate because interest was banned in their domestic law.”). Id. Saudia Arabia, Qatar, Oman, and, Yemen all strictly enforce the prohibition against riba. Wakim, supra note 7, at 46.
161 Wakim, supra note 7, at 46. Wakim explains, “[i]f an arbitration clause contains a provision for awarding interest, it may be against public policy because of the prohibition against riba.” Id. at 10.
The incorporation of the Islamic prohibition of Gharar, speculation, into the domestic public policies of many Middle Eastern countries, may also cause an arbitral award to not be recognized and enforced under the public policy exception. As with most discrepancies that have arisen between Islamic law and international commercial norms, the Middle Eastern countries have taken different approaches to the prohibition against gambling, and some countries have legalized it while others have not.

III. Argument: The BCDR-AAA Will Not Reach Its Utmost Potential to Increase the Recognition and Enforcement of Foreign Arbitral Awards

Because Sharia continues to play a unique and important role in the financial, judicial, and political institutions of many of the Middle Eastern nations, the BCDR-AAA will not reach its utmost potential to increase the recognition and enforcement of foreign arbitral awards. The major differences that exist between the Sharia laws regarding arbitration and international arbitration norms have allowed the Middle Eastern countries to refuse to recognize and enforce foreign arbitral awards based on the New York Convention’s public policy exception.

The founders of the BCDR-AAA have established this arbitration center with the hope that it will help resolve the issues regarding the recognition and enforcement of foreign arbitral awards. Furthermore, the founders have incorporated many features into the BCDR-AAA, which should increase the enforcement of foreign arbitral awards. However, because the founders chose not to incorporate any aspects of Sharia into the rules that will be used while conducting international commercial arbitrations

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162 Kutty, supra note 8, at 605–06. Wakim explains that, “if an arbitration clause is determined to be speculative because it calls for a settlement of a future dispute by an unspecified arbitrator, the clause may be void or against public policy.” Wakim, supra note 7, at 10.

163 Kutty, supra note 8, at 605. Western insurance countries, most of which contain an element of speculation, could be found void based on Islamic law, and therefore, unenforceable. Id. Modern application of gharar may also lead to the prohibition of investments in futures and commodities options. Wakim, supra note 7, at 9.

164 Wakim, supra note 7, at 26.

165 Id.

166 Appel Interview, supra note 12.
at the BCDR-AAA, the BCDR-AAA will not reach its utmost potential in increasing the enforcement of foreign arbitral awards.

A. Steps Taken By the Founders of the BCDR-AAA to Increase Enforceability

The BCDR-AAA founders have integrated many features into the center with the goal of ameliorating the refusal of many Middle Eastern national courts to recognize and enforce foreign arbitral awards based on the public policy exception.\textsuperscript{167} For example, many steps have been taken to assure that the BCDR-AAA will be regional in scope, a center built by the people of Bahrain and its surrounding nations and for the people of Bahrain and its surrounding nations.\textsuperscript{168} Therefore, the team that will coordinate the center was chosen from 700 initial applications, most of whom are Bahraini.\textsuperscript{169}

The founders of the BCDR-AAA have also dedicated many resources to training their team, as well as the surrounding legal community.\textsuperscript{170} The team now includes four lawyers trained in arbitration in New York, and two Bahraini lawyers who have also been trained in New York.\textsuperscript{171} The rest of the team have had, and will continue to have, training and professional development classes, and will be trained specifically in the mediation and arbitration of commercial cases.\textsuperscript{172} Judges and lawyers in Bahrain’s legal community were also invited to learn more about ADR, and many attended a series of symposia and briefings discussing the development of ADR, which were conducted by the founders of the BCDR-AAA.\textsuperscript{173}

In the few months after the opening of the center, the founders of the BCDR-AAA hope to reach “out to bankers, account-

\textsuperscript{167} Kutty, supra note 8, at 604.
\textsuperscript{168} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id. The team was trained by the Chartered Institute of Arbitrators. According to Sheikh Khalid bin Ali al Khalifa, “[t]he chamber will provide judges and arbitrators specifically trained in mediation and arbitration of commercial transactions, something that their counterpart judges in the normal courts do not possess.” Id.; Toumi, supra note 12.
\textsuperscript{173} Mahdi, supra note 169.
ants, civil engineers and other professional sectors, to help sector specific arbitration expertise.” 174 Mark Appel, the Senior Vice President of the ICDR, says that the founders of the BCDR-AAA hope that through these educational programs, Bahrain and the surrounding Middle Eastern nations will become more comfortable with the international commercial process, thereby creating a more positive environment in which to recognize and enforce foreign arbitral awards. 175

The founders of the BCDR-AAA also hope to ameliorate the issue regarding the enforceability of foreign arbitral awards by establishing the BCDR-AAA as the first arbitration “free zone.” 176 As a result of the BCDR-AAA’s “free zone,” once an award is decided upon during an arbitration held at the BCDR-AAA, the award received will be guaranteed to be upheld in the Bahraini courts and cannot be challenged. 177

Although this “free zone” is being discussed as a feature of the BCDR-AAA that “will offer jurisdictional and legal certainty to the recognition of arbitration awards,” 178 this will not always be the case. To begin with, the parties involved in the arbitration must agree to be bound to this outcome. 179 Even more problematic, although the arbitration is being held in Bahrain, the party seeking to enforce the award may have to do so in another Middle Eastern country, as “[t]he parties involved can still seek alternative legal judgments through other national courts if the law allows in those countries and the parties involved opt to do so.” 180 Therefore, while the arbitration “free zone” should help to increase the enforceability of foreign arbitral awards in Bahrain, it will most likely not be the panacea that many hope for it to be.

174 Id. James McPherson, the chief executive of the BCDR-AAA hoped that within a few months of the opening of the BCDR-AAA, the center would also be able to double its education and training of Bahraini lawyers. Id.
175 Appel Interview, supra note 12.
176 Toumi, supra note 12.
177 Id.
178 Id.
179 Id.
180 Mahdi, supra note 169.
B. The Incorporation of Islam Into International Commercial Arbitration in the Middle East

Even though the founders of the BCDR-AAA have included in the new center many features that should serve to increase the recognition and enforcement of foreign arbitral awards, the fact that the BCDR-AAA’s rules regarding foreign arbitral awards do not incorporate Sharia will continue to allow international arbitral awards in the Middle East to go unrecognized.\textsuperscript{181} The rules that will be applied to domestic cases at the BCDR-AAA were written as a joint effort between the Bahraini government and the Bahraini courts, and include applicable aspects of Sharia.\textsuperscript{182} However, the rules that will be applied to international commercial arbitrations at the BCDR-AAA will be based on its International Dispute Resolution Procedures, which allow parties to choose the law that will be applied to their case, and will not incorporate any aspects of Sharia.\textsuperscript{183} The absence of Sharia could erect a strong bar to the enforcement of any BCDR-AAA arbitrated international award.

Some scholars, however, have taken the position that the recognition and enforcement of foreign arbitral awards in the Middle East is best achieved by educating the Middle Eastern countries about international commercial norms, in hopes that these norms will be adopted in Middle Eastern national laws.\textsuperscript{184} For these scholars, the rules applied to international commercial disputes at the BCDR-AAA, and the other educational elements incorporated into the BCDR-AAA, should prove sufficient.

However, other legal scholars would disagree because the BCDR-AAA fails to incorporate Islamic law into arbitrations that will take place in the Middle East, or with Middle Eastern parties. Kutty, who is one of the legal scholars that discusses the importance of incorporating Islamic law into international commercial arbitration in the Middle East, acknowledges that in many respects, Sharia can be interpreted in a way that will make it compatible with international arbitration norms.\textsuperscript{185} Kutty explains that “the Shari’a provides its own methodology for evolution and re-inter-

\textsuperscript{181} Appel Interview, \textit{supra} note 12.

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Id.} According to Bondurant, the main features of the International Dispute Resolution Procedures are: (1) parties may control the process; (2) arbitrators are neutral; (3) proceedings are fast; and (4) decision may include the arbitrators’ reasoning. Bondurant, \textit{supra} note 3, at 37.

\textsuperscript{184} Wakim believes that, “As ‘international’ legal principles continually impress Middle Eastern national law, public policy values will similarly align.” Wakim, \textit{supra} note 7.

\textsuperscript{185} Kutty, \textit{supra} note 8, at 618–20.
pretation to meet the challenges of the modern era,”186 and that there are enough “diverse opinions and enough dynamism and latitude within the Sharia to reform and/or reinterpret the [ ] rules to be better reflective of modern transactions, circumstances, and cultural outlook.”187 Furthermore, Kutty explains that, “[w]here the methodology and legal principles are not sufficient, the sanctity attached to contractual obligations, including treaties in the Shari’a, make it possible to reform Islamic law.”188

Mary Ayad, another legal scholar, agrees with Kutty, and believes that because common law, civil law, and Sharia share many common principles, the Middle Eastern international arbitration laws can now be harmonized with those of Europe and North Africa.189 Brower and Sharpe took this one step further and quoted a prominent Arab commentator who has argued that, “the evolution of the concept of Moslem arbitration and the adaptation thereof to the spirit of the century is not a derogation from, or a betrayal of Moslem law, but is a return to its sources.”190 However, Kutty also acknowledges that there are certain concepts of Sharia, for instance, usury and speculation, which cannot be interpreted in a way that will correspond with international arbitration norms.191

While acknowledging that Sharia must be reformed from within in order for it to coincide with international commercial norms, Kutty explains that “there is an equal need to better accommodate and address the issues of concern from an Islamic perspective.”192 Kutty believes that for international commercial arbitration to truly be successful in the Middle East, those who participate in international commercial arbitration must create a system that balances the needs of the business community with “the core principles of . . . Shari’a.”193 Ayad agrees with Kutty, and explains that “Islamic law must be taken into account as ‘religious

186 Id. at 620.
187 Id. at 618.
188 Id.
190 Brower & Sharpe, supra note 31, at 656 (quoting Abdul Hamid El-Ahdab, Arbitration with the Arab Countries 13 (2d ed. 1999)).
191 Kutty, supra note 8, at 603.
192 Id. at 623. Wakim also explains that “[a]s Middle Eastern national systems develop alongside international authorities, it is hoped that the trends of reexamination, acceptance, and fair inclusion continue on all sides.” Wakim, supra note 7, at 51.
193 Kutty, supra note 8, at 624.
considerations have played a major role in both the acceptance and the success’’ of the arbitration process.194

Kutty notes that one of the factors that has caused international commercial norms to be rejected in the Middle East is the Western viewpoint that Sharia is “an unsophisticated, obscure, and defective system.”195 This viewpoint of Sharia has bred “significant distrust within the Islamic world and devalue[d] an influential legal system in the eyes of many in the West.”196 Kutty finds it “disturbing that there has been very little examination of the Middle East’s legal system’s religious underpinnings upon the continued acceptance of international commercial arbitration” in the Middle East.197 She also explains that if “[t]he assumption and belief that the Shari’a is being sidelined, and that the current international commercial arbitration framework is exclusively derived from the Western legal heritage,” there will remain to be issues with the acceptance of international arbitration norms, and the recognition and enforcement of foreign arbitral awards.198 Ayad agrees with Kutty and explains that, “a positive perception on the part of Arab participants in international commercial arbitration disputes is a critical determinant” of the success of international arbitration in the Middle East.199

Kutty explains that the need to incorporate Sharia into international arbitration in the Middle East is extremely important in modern times because an increasing Islamic revivalist spirit has swept across the Middle East,200 accompanied by “growing calls for a return to Islamic principles echoing from all corners of the Muslim world.”201 Kutty observes that the opposition of international arbitration has developed from one that is economically based into one that is asking for more inclusion culturally:

Today, cries of foul play over arbitration are neither as vociferous nor as troubling as they were up to the end of the last decade. Why they occur now, as they occasionally do in the Arab Middle East, the oppositional claims are articulated increasingly
in terms of a demand for incorporating the Islamic legal tradition in the international practice of arbitration. 202

Kutty believes that as the Middle Eastern nations “move toward democracy and their populations call for a return to some Sharia principles, the demands for a more inclusive international regime” will continue to get louder. 203

Kutty also specifically discusses the establishment of arbitration centers in the Middle East. 204 Kutty believes that many of the Islamic revivalists will challenge the incorporation of international arbitration norms into the arbitration center practices. 205 Kutty explains that they will do so because these revivalists will view these new centers as “‘the removal of a vast sphere of dispute settlement’ from domestic judicial control, the undermining of domestic laws and the elevation of ‘supranational laws of uncertain origins . . .,’” actions that are harmful to developing states. 206

CONCLUSION

As the size and complexity of international commercial transactions in the Middle East continue to grow, so will the potential for transnational business disputes. As a result, many of the parties to these transactions will turn to international commercial arbitration to resolve the disputes that arise. However, international arbitration cannot be used to resolve disputes, unless the awards received as a result of the arbitrations will be recognized and enforced by the domestic courts. Throughout the history of international commercial arbitration in the Middle East, the Middle Eastern countries have used the New York Convention’s public policy exception to refuse to recognize and enforce foreign arbitral awards. The Middle Eastern countries have been able to do so because of the major differences between Sharia laws regarding arbitration and international arbitration norms.

Using Sharia’s built-in methodology for evolution, many of the aspects of Sharia that are in contrast with international commercial norms can be interpreted in a manner that will correspond with

202 Id.
203 Id. at 619–20.
204 Id. at 594.
205 Id.
modern day international arbitration norms. However, it is just as important to interpret international arbitration norms in a manner that will correspond with Sharia. Kutty has explained that:

It may not be very realistic to expect that international commercial arbitration rules will be consistent with all Islamic interpretations. Yet, given the flexibility inherent in the Shari’a, it is equally unrealistic to expect that international commercial arbitration rules and practice will continue to have legitimacy in the Middle East and the larger Islamic world if Shari’a principles and methodology are completely ignored or undermined.207

This is especially true because of the modern revival of Islam in the Middle East, as well as the growing use of Sharia-compliant products in banking and finance in the Middle East.

Only when Islam is acknowledged and integrated into international arbitration in the Middle East, will international arbitration be truly accepted and integrated into Middle Eastern society. Many legal scholars have acknowledged this. These scholars discuss the need for an international arbitration system that balances the needs of the business community, with the major tenets of Sharia. A system that acknowledges Islam for the influential legal system that it is. As Arthur J. Gemmell has explained:

[T]he day will inevitably come when mutual commercial interests will intertwine and become so interdependent that international private law and Islamic law will stand where neither dominates the other; this day will be predicated on a mutual respect and understanding for each body of law, including its historical foundations and modern application.208

Not until this day comes will the Middle East truly accept modern international commercial norms, and the recognition and enforcement of arbitral awards will no longer prove an issue.

The founders of the BCDR-AAA have incorporated many unique features into the BCDR-AAA that should help to increase the enforcement of foreign arbitral awards. These features include the education of the Bahraini legal community regarding arbitration, and the creation of the first arbitration “free zone.” However, the founders of the BCDR-AAA chose not to incorporate any aspects of Sharia into the rules that will be used while conducting international arbitrations at the center. Until the founders of the BCDR-AAA devise a set of rules that balances international

207 Id. at 622–23.
208 Gemmell, supra note 55, at 193.
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arbitration norms with the major principles and laws of Sharia, the BCDR-AAA will not reach its potential to increase the recognition and enforcement of foreign arbitral awards.