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## The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?

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# The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?

Kristin T. Roy

## **Abstract**

This Note examines whether Saudi Arabia's adoption of the New York Convention will advance the successful use of international arbitration by non-Saudi Arabian investors. Part I provides a background of the New York Convention, its purpose, and its historical application in the United States and the Middle Eastern countries of Kuwait and Syria. Part II examines the conflict between the Saudi Arabian legal system and Saudi Arabia's adoption of the New York Convention. Part III argues that Article V(2)(b) of the New York Convention allows a country with a unique legal system, such as Saudi Arabia, to give the appearance of embracing the international community, while permitting that country to reject arbitral awards that are contrary to its public policy. Part III also recommends possible modifications to Article V(2)(b) in order to prevent countries from refusing to enforce non-domestic arbitral awards. This Note concludes that the modification of Article V(2)(b) will prevent the circumvention of the New York Convention's objectives and promote a uniform set of rules governing non-domestic arbitral awards.

THE NEW YORK CONVENTION AND SAUDI ARABIA: CAN  
A COUNTRY USE THE PUBLIC POLICY DEFENSE  
TO REFUSE ENFORCEMENT OF NON-  
DOMESTIC ARBITRAL AWARDS?

*Kristin T. Roy\**

"Be wary of the man who urges an action in which he himself  
incurs no risk."\*\*

INTRODUCTION

On April 19, 1994, Saudi Arabia acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention" or "New York Convention").<sup>1</sup> Upon adoption, Saudi Arabia became the ninety-fourth party to the Convention,<sup>2</sup> which requires all signatories to recognize the arbitration agreements and awards<sup>3</sup> issued by other member nations.<sup>4</sup> Saudi Arabia adopted the New York Convention to increase its role in the modern international community.<sup>5</sup>

With the decreased threat of war in the Middle East,<sup>6</sup> inves-

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\*\* GIOVACHINO SETANTI, CENTELLAS DE VARIOS CONCEPTOS.

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter *New York Convention*]; see *International Legal Framework*, 1 WORLD ARB. REP. 1, 37 (1994) (listing accession dates for all New York Convention signatories).

2. New York Convention, *supra* note 1, 21 U.S.T. 2517, 330 U.N.T.S. 38; *Saudis Accept New York Convention*, DISP. RES. J., June 1994, at 26 [hereinafter *Saudis Accept*].

3. Michael H. Strub, Jr., *Resisting Enforcement of Foreign Arbitral Awards under Article V (1)(E) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 TEX. L. REV. 1031, 1031 (1990). In the international arena, these awards often must be reduced to judgments in the enforcing jurisdiction before they can be executed. *Id.* An arbitration award is the written resolution of a dispute by a disinterested party. BLACK'S LAW DICTIONARY 137 (6th ed. 1990).

4. New York Convention, *supra* note 1, art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40 (discussing purpose of New York Convention).

5. John C. Hoppe, *Saudi Arabia*, in LEGAL ASPECTS OF DOING BUSINESS IN THE MIDDLE EAST 157, 192 (Dennis Cambell ed., 1986). Saudi Arabia is adopting long term, comprehensive international development plans in the hope of increasing its presence in the modern world. *Id.* at 157. "Foreign investors will find a regulatory regime that is being gradually liberalized and a commercial law system that is still developing. . . . Commercial rules and regulations continue to be expanded, strengthened and regularized." *Investing in Saudi Arabia: Rules, Practices, Trends*, MIDDLE E. EXEC. REP., Jan. 1991, at 18.

6. Daniel Lubetzky, *Incentives for Peace and Profits: Federal Legislation to Encourage*

tors are realizing sound financial reasons for investing in countries such as Saudi Arabia.<sup>7</sup> The Middle East offers investors a skilled and educated labor pool,<sup>8</sup> inexpensive labor prices,<sup>9</sup> unexplored markets,<sup>10</sup> citizens demanding imports,<sup>11</sup> and large numbers of consumers with high spending power.<sup>12</sup> These manufacturing incentives, coupled with Saudi Arabia's vast oil and natural gas resources,<sup>13</sup> have increased non-domestic investor interest in Saudi Arabia.<sup>14</sup> Nonetheless, investors have been hesitant to contract within Saudi Arabia due to Saudi Arabia's favoritism toward its own agencies and rejection of international dispute resolution methods.<sup>15</sup> The Saudi Arabian government

*U.S. Enterprises to Invest in Arab-Israeli Joint Ventures*, 15 MICH. J. INT'L L. 405, 413 (1994). "[T]he first rays of peace have begun to shine on the region." *Id.*

7. *Id.*; see Douglas Davis, *Lebanon Will Recover with Peace*, JERUSALEM POST, Nov. 18, 1993, at 14 (indicating that economic recovery has accelerated now that peace has settled on region); see also Peter Passel, *Economic Scene: The Palestinians May Now Have a Chance to Spur Their Economy*, N.Y. TIMES, Sept. 23, 1993, at D2 (indicating that peace and order could presage an economic blossoming in Palestine).

8. Lubetzky, *supra* note 6, at 413. Lubetzky indicates that Israel devotes approximately 25% of its budget to education. *Id.* Further, over 70% of Israel's work force has completed more than eleven years of formal education. *Id.* at 413 n.31.

9. *Id.* at 413 n.32. In 1983, the average cost of labor in Israel was less than one-half the cost of comparable labor in the United States. *Id.*

10. *Id.* at 414.

11. *Id.* The oil-rich Arab nations have large populations with high levels of spending power. *Id.*

12. *Id.*; see Rafael Benvenisti, *Israel's Foreign Investment Policy*, in THE U.S.-ISRAEL FREE TRADE AREA AGREEMENT § 26.07 (Andrew James Samet & Moshe Goldberg eds., 1989) (indicating that 25% of Israel's budget is devoted to education and that cost per hour of labor is significantly lower in Middle East than in United States).

13. AMERICAN EMBASSY EIYADH, U.S. DEP'T OF COMMERCE, FOREIGN ECONOMIC TRENDS AND THEIR IMPLICATIONS FOR THE U.S.: SAUDI ARABIA 8 (1989). Saudi Arabia holds one quarter of the world's known oil reserves and maintains one fifth of the world's largest natural gas reserves. *Id.* As a result of these vast resources, many foreign corporations seek commercial contracts with Saudi Arabia. *Id.*; David J. Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 25 GEO. WASH. J. INT'L L. & ECON. 131, 131 (1992).

14. Lubetzky, *supra* note 6, at 413; see Bernard Avishai, *Making the Desert Bloom*, N.Y. TIMES, Sept. 29, 1993, at A21 (indicating Israel has greater numbers of scientists and engineers and higher average levels of education than Western nations).

15. Nancy B. Turck, *Dispute Resolution in Saudi Arabia*, 22 INT'L LAW. 415, 417 (1988). "[T]he non-Saudi businessman would not seek redress of commercial grievances in the [Saudi Arabian] courts." *Id.*

As a matter of policy, it would appear that judgments issued by courts or arbitral tribunals . . . will not be enforced in Saudi Arabia without a new hearing before the appropriate Saudi court, subject to Saudi law. Consequently, any such foreign judgment would only be enforced to the extent that it was consistent with Saudi law.

recognizes the need to eliminate this hesitation, thus increasing investment and contracting within its borders.<sup>16</sup>

In trying to assimilate into the Western<sup>17</sup> world, Saudi Arabia and other Islamic countries are facing difficult questions regarding the abandonment of their cultural history.<sup>18</sup> Saudi Arabia has traditionally been hostile to the recognition and enforcement of non-domestic arbitral awards, finding these awards contrary to Saudi Arabian law and public policy.<sup>19</sup> During the 1950's, Saudi Arabian courts refused to enforce many non-Saudi Arabian arbitral awards, finding them degrading and disrespectful to Saudi Arabia's Islamic legal system.<sup>20</sup> In 1963, Saudi Arabian governmental agencies were banned from using arbitration as a means of resolving international commercial disputes.<sup>21</sup> In

*Id.* at 435. Turck is not aware of the Saudi Arabian enforcement of any non-Saudi Arabian judgments. *Id.*

16. Hoppe, *supra* note 5, at 192 (discussing Saudi Arabia's new international focus); *Saudis Accept*, *supra* note 2, at 26; *see supra* note 5 and accompanying text (discussing Saudi Arabia's move to assimilate into modern international arena).

17. *See* THE OXFORD ENGLISH DICTIONARY 165 (2d ed. 1989). "Western" indicates that which is "of or pertaining to the non-Communist states of Europe and America." *Id.*

18. *See* David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT'L L. 819, 848 (1993).

For Muslim intellectuals confronting public international law, the devil's choice is posed: either adopt the culture of the West, and lose one's cultures and thus oneself, or renounce the culture of the West, and lose one's role in the modern world. The Muslim is placed at a crossroads. To take one road is to abandon the other.

*Id.*; *see Saudis Accept*, *supra* note 2, at 26 (stating that Saudi Arabia needs to ease its historic stand toward arbitration to appease lobbying by law firms and business groups); *see also* Hoppe, *supra* note 5, at 189-92 (indicating that Islamic Courts maintain residual jurisdiction over international disputes).

19. *Saudis Accept*, *supra* note 2, at 26.

20. *Id.* Saudi Arabian hostility to arbitration awards culminated in the Aramco case (*Saudi Arabia v. Aramco*). ABDUL HAMID EL-AHDAB, *ARBITRATION WITH THE ARAB COUNTRIES* 598-601 (1990). The arbitrators found that Saudi Arabian law applied to the dispute, but held that Saudi Arabian law was insufficient. *Id.* Therefore, the arbitration tribunal supplemented Saudi Arabian law with customary international law. *Id.*

The legal system [of Saudi Arabia] . . . is still in embryo form . . . , even though the totality of the principles . . . could be sufficient if one takes the initiative to collect and unify them in order to lay down the basis of a petroleum law. However, this is beyond the jurisdiction of the arbitral tribunal which has a judicial and not legislative role.

*Id.* at 601 (citing arbitral tribunal decision in *Saudi Arabia v. Aramco*). Soon thereafter, the Saudi Arabian government began to limit legally the country's use of arbitration. *Id.* at 602.

21. Council of Ministers Resolution No. 58, *Restricting Right of Saudi Governmental Agency to Submit to Arbitration*, dated 17/1/1383 [hereinafter Decree No. 58].

addition, Saudi Arabia passed legislation in the 1983<sup>22</sup> that further restricted its government's use of arbitration.<sup>23</sup>

Saudi Arabia's adoption of the New York Convention indicates an easing of its historical resistance to international commercial arbitration.<sup>24</sup> Saudi Arabia reasons that by adopting the New York Convention, non-Saudi Arabian investors may be more confident that the courts of Saudi Arabia will honor a dispute adjudicated by a non-Saudi Arabian tribunal.<sup>25</sup> Article V(2)(b) of the New York Convention, however, indicates that Saudi Arabia is not required to recognize non-domestic arbitral awards that are contrary to its public policy.<sup>26</sup>

This Note examines whether Saudi Arabia's adoption of the New York Convention will advance the successful use of international arbitration by non-Saudi Arabian investors. Part I provides a background of the New York Convention, its purpose, and its historical application in the United States and the Middle Eastern countries of Kuwait and Syria. Part II examines the conflict between the Saudi Arabian legal system and Saudi Arabia's adoption of the New York Convention. Part III argues that Article V(2)(b) of the New York Convention allows a country with a

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Decree No. 58 of 1963 limits the ability of Saudi governmental organization, e.g., ministries or agencies, to conclude any contract which includes a clause subjecting such organizations to the jurisdiction of any foreign body having a judicial character including arbiters. The Decree also states that this prohibition shall not apply to exceptional cases where the government (usually a Minister) grants a concession. The decree of the Council of Ministers is of prime importance for foreign businessmen as governmental organizations play the major role in development projects of the Kingdom. As a result of this decree, it is clear that companies entering into contracts with governmental bodies cannot refer their disputes to international arbitration for settlement.

Berge Setrakian, *Arbitration Under the Legal System of the Middle Eastern Countries*, MIDDLE E. EXEC. REP., Dec. 1978, at 10.

22. Arbitration Regulations, Royal Decree No. M/46, dated 12/7/1403 (April 25, 1983) [hereinafter Royal Decree No. M/46]. This regulation prohibits any Saudi Arabian government agency from utilizing arbitration unless prior approval from the government has been procured. *Id.*

23. Royal Decree No. M/46, *supra* note 22; Neil F. Allam, *Arbitration in the Kingdom: The New Implementation of Rules*, MIDDLE E. EXEC. REP., Aug. 1985, at 9 (indicating that Saudi Arabia law prohibits all government agency arbitration unless prior approval is received from President of Council of Ministers).

24. *Saudis Accept*, *supra* note 2, at 26.

25. *See id.* (stating that Saudi Arabian government hopes to gain confidence of non-Saudi Arabian companies that have been concerned with having international arbitration awards enforced in Saudi Arabia).

26. New York Convention, *supra* note 1, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

unique legal system, such as Saudi Arabia, to give the appearance of embracing the international community, while permitting that country to reject arbitral awards that are contrary to its public policy.<sup>27</sup> Part III also recommends possible modifications to Article V(2) (b) in order to prevent countries from refusing to enforce non-domestic arbitral awards. This Note concludes that the modification of Article V(2) (b) will prevent the circumvention of the New York Convention's objectives and promote a uniform set of rules governing non-domestic arbitral awards.

### I. *THE NEW YORK CONVENTION*

The New York Convention requires signatories to enforce the arbitral awards issued by other member nations.<sup>28</sup> The Convention contains a public policy defense, which allows a signatory to refuse to enforce a non-domestic arbitral award if the

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27. *See id.* (stating that New York Convention does not require country to enforce foreign arbitral awards that are contrary to its public policy).

28. New York Convention, *supra* note 1, 21 U.S.T. 2517, 330 U.N.T.S. 38. The Convention provides in relevant part:

[The] Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. . . . Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen. . . . Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

*Id.* Article V of the Convention sets forth the defenses pursuant to which a party can challenge a foreign arbitral award. *Id.* art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 40, 42. Article V states that

[r]ecognition and enforcement of the award may be refused . . . only if . . . [there is] proof that: (a) the parties . . . were . . . under some incapacity . . . ; or (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings . . . ; or (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration . . . ; or (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . . ; or (e) the award has not yet become binding on the parties. . . . Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the awards would be contrary to the public policy of that country.

*Id.*

award is contrary to its public policy.<sup>29</sup> Member nations rely on the Convention to enforce international arbitral awards and, therefore, in many instances subordinate their own rules of civil procedure to the requirements of the Convention.<sup>30</sup> Accordingly, in an attempt to give the Convention its intended effect, countries such as the United States, Kuwait, and Syria have given the convention's public policy exception a narrow construction.<sup>31</sup>

#### A. *History and Application of the New York Convention*

A uniform international arbitration system requires the systematic and effective enforcement of international arbitral awards.<sup>32</sup> The New York Convention requires all signatories to recognize and enforce foreign arbitral awards.<sup>33</sup> When the New York Convention was initially promulgated, many countries were hesitant to become signatories.<sup>34</sup> This resistance arose from the belief that the rules of the New York Convention were in conflict with the countries' national laws.<sup>35</sup> Article V(2)(b) of the New York Convention, however, provides a vehicle whereby a signa-

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29. New York Convention, *supra* note 1, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42. Article V(2)(b) 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 awards would be contrary to the public policy of that country." *Id.*

30. *See* Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier, 508 F.2d 969, 975 (2d Cir. 1974) (indicating that U.S. courts subordinate Federal Rules of Civil Procedure to rules of New York Convention); Code of Civil and Commercial Procedure, art. 173(5) (Kuwait) (stating that Kuwaiti courts have no jurisdiction over disputes subject to arbitration).

31. *See* Brandeis Intsel Ltd. v. Calabrian Chems. Corp., 656 F. Supp. 160 (S.D.N.Y. 1987) (holding that public policy defense in New York Convention must be read narrowly); *Revere Copper & Brass Inc. v. Overseas Private Inv. Corp.*, 628 F.2d 81, 83 (D.C. Cir.), *cert. denied*, 446 U.S. 983 (1980) (finding that judicial review of arbitration awards is limited).

32. Strub, *supra* note 3, at 1031-32; *see* David Westin, *Enforcing Foreign Commercial Judgment and Arbitral Awards in the United States, West Germany, and England*, 19 LAW & POL'Y INT'L BUS. 325 (1987) (indicating that enforcement of foreign arbitral awards is of critical importance in international business).

33. New York Convention, *supra* note 1, art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40; Strub, *supra* note 3, at 1031.

34. *See* Strub, *supra* note 3, at 1038-39 (discussing Anglo-Saxon opposition to arbitration processes and U.S. initial belief that New York Convention deviated from U.S. law).

35. *See* HOUSE COMM. ON JUDICIARY, FOREIGN ARBITRAL AWARDS, H.R. REP. NO. 1181, 91st Cong., 2d Sess. 1-2 (1970) (indicating United States resisted New York Convention because Convention provisions deviated from U.S. law); *Saudis Accept*, *supra*

tory can opt out of foreign arbitral award enforcement, if it finds the award contrary to its public policy.<sup>36</sup> This provision, together with increased recognition by international investors of a true international commercial market,<sup>37</sup> has led many nations to adopt the New York Convention,<sup>38</sup> and to embrace the Convention's international arbitral award enforcement policies.<sup>39</sup>

### 1. International Arbitration

Arbitration is a private dispute resolution method whereby the parties to a dispute choose a disinterested party, or arbitrator, to look at the facts of the dispute and render a decision.<sup>40</sup> Several nations initially opposed the international arbitral process because its rules and procedures deviated significantly from the nations' law and rules.<sup>41</sup> As the need to resolve commercial disputes in the international arena increased,<sup>42</sup> however, parties found that submitting a dispute to international arbitration was often preferable to appearing before a non-domestic court.<sup>43</sup>

note 2, at 26 (describing Saudi Arabia's belief that international arbitration was degrading to Saudi Arabian law and religion).

36. New York Convention, *supra* note 1, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

37. Carolyn B. Lamm, *Recent Developments in International Arbitration*, 36 *FED. B. NEWS & J.* 276, 276 (1989). There has been a "dramatic increase in international trade and investment, and transactions involving parties of diverse nationality." *Id.*

38. See *International Legal Framework*, *supra* note 1, at 36-37; Lamm, *supra* note 37, at 276 (indicating explosion of international arbitration in last 25 years).

39. New York Convention, *supra* note 1, 21 U.S.T. 2517, 330 U.N.T.S. 38. *International Legal Framework*, *supra* note 1, at 36-38 (listing accession dates for all New York Convention signatories).

40. MAXWELL J. FULTON, *COMMERCIAL ALTERNATIVE DISPUTE RESOLUTION* 55 (1989).

41. See Strub, *supra* note 3, at 1039. The United States was so opposed to international arbitration that when the New York Convention was adopted in 1958, the United States did not sign. *Id.* "The American delegation believed that some of the Convention's provisions deviated from United States Law." *Id.*; see HOUSE COMM. ON THE JUDICIARY, FOREIGN ARBITRAL AWARDS, H.R. REP. NO. 1181, 91st Cong., 2d Sess. 2 (1970) (indicating that United States was opposed to New York Convention because it deviated from U.S. law).

42. Lamm, *supra* note 37, at 276. "There has been a veritable explosion in international arbitration in the last 25 years. . . . With the dramatic increase in international trade and investment, and transactions involving parties of diverse nationality." *Id.*

43. *Id.*; see Strub, *supra* note 3, at 1042 (stating that enforcement of foreign arbitral awards is more uniform than enforcement of foreign judgments); see also Howard M. Holtzman, *Commentary*, in INTERNATIONAL CHAMBER OF COMMERCE, 60 YEARS OF ICC ARBITRATION - A LOOK AT THE FUTURE 361, 362 (1984). Businessmen choose to include arbitration clauses when negotiating international contracts. *Id.* Holtzman suggests

In the international arena, investors prefer arbitration to litigation because it offers a neutral forum wherein the parties are not restricted by a potentially biased legal system.<sup>44</sup> Further, commercial investors often prefer international arbitration to traditional litigation because arbitration can be faster and less expensive than litigation.<sup>45</sup> An additional advantage of international arbitration is that the tribunal of arbitrators can maintain jurisdiction over all necessary parties.<sup>46</sup> Jurisdiction over all parties is possible because in submitting to arbitration each party has stipulated to the jurisdiction of the chosen arbitral tribunals.<sup>47</sup> This encompassing jurisdiction may not be possible under the laws of a national court.<sup>48</sup>

Further benefits of arbitration include confidential and informal proceedings.<sup>49</sup> Proceedings that remain informal and confidential often enable the parties to maintain working relationships with each other and with outside parties.<sup>50</sup> A final ad-

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that businessmen "are acting in the expectation that if there is an arbitration, there will be an award and, if the award is not complied with voluntarily by the losing party, it will be enforced under law by the courts of a country in which the losing party has assets." *Id.*; see Jay Lawrence Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 MINN. L. REV. 595, 595 (1983) [hereinafter *Arbitration & Bankruptcy*] (finding that parties prefer arbitration to litigation because international arbitration provides assurance of neutrality).

44. Robert S. Matlin, Comment, *The Federal Courts and the Enforcement of Foreign Arbitral Awards*, 5 PACE L. REV. 151, 152-53 (1984); see Jan Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 VA. J. INT'L L. 211, 212 (1981) (indicating that chairman of arbitral tribunal will be of neutral nationality); *Arbitration & Bankruptcy*, *supra* note 43, at 595 (finding that parties often prefer arbitration to litigation because international arbitration provides assurance of neutrality, which is lacking in legal systems of most jurisdictions).

45. Lamm, *supra* note 37, at 276.

46. *Id.* Lamm indicates that arbitration would be especially important where one party "could assert sovereign immunity against the judicial process of most countries." *Id.*; see J. Sorton Jones, *International Arbitration*, 8 HASTINGS INT'L & COMP. L. REV. 213 (1985) (stating that parties agree to mode of arbitration before dispute arises, thus waiving potential jurisdictional objections).

47. Lamm, *supra* note 37, at 276; see Jones, *supra* note 46, at 213 (indicating that parties agree to arbitration and type of arbitration panel before dispute arises).

48. Lamm, *supra* note 37, at 276. For example, United States courts cannot maintain jurisdiction over nations that can assert sovereign immunity in the United States. 28 U.S.C. §§ 1331, 1604-07 (1988 & Supp. V 1993).

49. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 337 (1991).

50. *Id.*

[Arbitration] can be less formal and less contentious than court proceedings, which is especially important if the parties want to maintain a continuing commercial relationship. . . . The proceedings and decision can be kept confiden-

vantage of arbitration is that arbitrators often have a personal background or technical expertise in the area surrounding the dispute.<sup>51</sup> By comparison, judges and jurists trained in the law often lack complete comprehension of the subject matter.<sup>52</sup>

## 2. U.N. Promulgation of the New York Convention

As the international community increased its use and reliance on the international arbitration models,<sup>53</sup> rules and procedures were needed to ensure that a country could rely on an arbitral award issued outside its jurisdiction.<sup>54</sup> As an arbitral award is not self-executing,<sup>55</sup> a method had to be developed to effectuate the enforcement of foreign arbitral awards.<sup>56</sup> The first international convention that addressed the issue of international arbitral award enforcement was the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards ("Geneva Convention").<sup>57</sup> The Geneva Convention established enforcement

tial, which may be very useful when sensitive commercial information is involved."

*Id.*

51. Jones, *supra* note 46, at 213. "[A]rbitrators often have technical expertise which judges sometimes lack." *Id.*

52. *Id.*

53. Lamm, *supra* note 37, at 276 (indicating that use of international arbitration has exploded in past twenty five years).

54. Strub, *supra* note 3, at 1042. "Uniformity is critical to the success of arbitration. Parties would not pursue arbitration if they were uncertain about their ability to enforce an award. Conversely, if business persons are confident that their disputes can be resolved effectively, international trade should advance smoothly." *Id.* Moreover, it has been argued that the

[e]nforcement of foreign arbitral awards thus is not merely a legal exercise; it is a commercial necessity. As we come increasingly to understand that world peace is reinforced by harmonious international trade, we must equally recognize that international commercial arbitration, and particularly an effective climate for enforcing international arbitral awards, are fundamental elements of stability.

Holtzman, *supra* note 43, at 362. "There is no more practical aspect of arbitration than enforcement of international arbitration awards." *Id.*

55. Strub, *supra* note 3, at 1044. "But an arbitral award is not self-executing. Absent voluntary compliance, the authority of the arbitrator does not include the coercive power to enforce the award, and thus the award must be transformed into a judgment, which can be executed with the enforcement mechanism of the state." *Id.* (citations omitted).

56. *Id.* "Historically, effective enforcement has been the most significant barrier to commercial arbitration." *Id.*; see generally V.S. Deshpande, *Enforcement of Foreign Awards in India, U.K. and U.S.A.*, J. INT'L ARB., Mar. 1987, at 41, 43 (explaining foreign award enforcement process in several countries).

57. Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26,

methods for all arbitral awards made pursuant to the Geneva Protocol on Arbitration Clauses of 1923 ("Geneva Protocol").<sup>58</sup> The Geneva Convention did not, however, provide a method for enforcing arbitral awards made pursuant to legislation or treaties other than the Geneva Protocol.<sup>59</sup>

In 1958, representatives from several nations convened in New York to increase the scope of the Geneva Convention, thereby improving the rules and methods for enforcing all foreign arbitral awards.<sup>60</sup> The result was the promulgation of the New York Convention.<sup>61</sup> The New York Convention requires the reciprocal recognition of arbitral awards issued by member nations.<sup>62</sup> The New York Convention also sets forth the circumstances under which a member nation can refuse to enforce a foreign arbitral award.<sup>63</sup> Article V(2)(b) of the New York Convention indicates that a member nation may refuse to enforce any foreign arbitral award that it finds contradictory to its public policy.<sup>64</sup> Furthermore, the enforcement of a foreign arbitral award may be refused where: (1) the parties to the arbitration agreement are, under the law applicable to them, under some incapacity;<sup>65</sup> (2) the arbitration agreement is not valid under the

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1927, 92 L.N.T.S. 302, 1930 Gr. Brit. T.S. No. 28 (Cmd. 3655) [hereinafter Geneva Convention].

58. Geneva Protocol on Arbitration Clauses of 1923, Sept. 24, 1923, 27 L.N.T.S. 158, 1925 Gr. Brit. T.S. No. 4 (Cmd. 2312) [hereinafter Geneva Protocol].

59. Geneva Convention, *supra* note 57, 92 L.N.T.S. 302, 1930 Gr. Brit. T.S. No. 28.

60. Strub, *supra* note 3, at 1045; ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 8 (1981). The Geneva Convention required that the winning party obtain permission to enforce the award from the awarding country. *Id.* at 7. This permission was required even when the award was not questioned by the opposing party. *Id.* This provision required the enforcing party to undertake several time and money consuming steps before reaching the country where the party sought to enforce the award. *Id.*

61. New York Convention, *supra* note 1, 21 U.S.T. 2517, 330 U.N.T.S. 38.

62. *Id.* art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40. The New York Convention is often recognized as the most important international arbitration legislation. BERG, *supra* note 60, at 1. "The New York Convention is 'the most important Convention in the field of arbitration and . . . the cornerstone of current international commercial arbitration.'" *Id.*; see *supra* note 28 (discussing purpose of New York Convention).

63. New York Convention, *supra* note 1, art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 40-42.

64. *Id.* art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42. Article V(2)(b) states that the "[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." *Id.*

65. *Id.* art. V(1)(a), 21 U.S.T. at 2520, 330 U.N.T.S. at 40.

law to which the parties have subjected it;<sup>66</sup> (3) the party against whom the award is invoked is not given proper notice of the appointment of the arbitrator or of the arbitration proceedings;<sup>67</sup> (4) the arbitral award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration;<sup>68</sup> or (5) the arbitration procedure is not in accordance with the law of the country where the arbitration took place.<sup>69</sup>

### 3. U.S. Application of the New York Convention

The United States was initially opposed to the New York Convention.<sup>70</sup> The United States did not sign the New York Convention at its 1958 adoption, and, in fact, did not become a signatory until September 30, 1970.<sup>71</sup> The U.S. resistance to the New York Convention arose from the U.S. belief that many of the Convention's provisions were in conflict with U.S. law.<sup>72</sup> The United States, therefore, preferred to maintain its own independent jurisdiction over disputes submitted to arbitration.<sup>73</sup> Yet, as the use of the international arbitration process became a generally accepted method of international dispute resolution, the United States realized that it would need a method of dispute resolution and enforcement that would permit it to resolve

66. *Id.*

67. *Id.* art. V(1)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

68. *Id.* art. V(1)(c), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

69. *Id.* art. V(1)(d), 21 U.S.T. 2520, 330 U.N.T.S. at 42.

70. Strub, *supra* note 3, at 1039.

71. AMERICAN ARBITRATION ASSOCIATION, *THE INTERNATIONAL ARBITRATION KIT: A COMPILATION OF BASIC AND FREQUENTLY REQUESTED DOCUMENTS 19-20* (4th ed. 1993). Upon ratification the United States declared:

The United State of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State. The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States.

*Id.* at 27.

72. HOUSE COMM. ON JUDICIARY, FOREIGN ARBITRAL AWARDS, H.R. REP. NO. 1181, 91st Cong., 2d Sess. 1 (1970). "[T]he American delegation felt that certain provisions were in conflict with our domestic laws." *Id.*; see Strub, *supra* note 3, at 1039 (stating that United States believed Convention's provisions deviated from U.S. law).

73. Strub, *supra* note 3, at 1039; Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Lauro, 712 F.2d 50, 54 (3d Cir. 1983); Oriental Commercial and Shipping Co., Ltd. v. Rosseel, N.V., 609 F. Supp. 75, 78 (S.D.N.Y. 1985); Haardt v. Binzagr, No. CIV.A.H-83-5846, 1986 WL 14836, \*3 (S.D. Tex. Dec. 19, 1986).

international disputes efficiently and inexpensively.<sup>74</sup>

Since acceding to the New York Convention in 1970,<sup>75</sup> the United States has embraced international arbitration as an effective means of dispute resolution.<sup>76</sup> The United States now relies on the New York Convention as the recognized method for enforcing non-U.S. arbitral awards.<sup>77</sup> When making a determination on the validity of a non-U.S. arbitral award, U.S. courts subordinate the Federal Rules of Civil Procedure to the rules of the New York Convention.<sup>78</sup> U.S. enforcement of the New York Convention is evidenced by several U.S. court decisions that uphold the Convention's terms.<sup>79</sup>

a. *Scherk v. Alberto-Culver Company*<sup>80</sup>

The U.S. Supreme Court addressed the validity of international arbitration agreements soon after the New York Convention was adopted by the United States.<sup>81</sup> In *Scherk v. Alberto-Culver Co.*,<sup>82</sup> Scherk, a German citizen, transferred the rights to several trademarks to Alberto-Culver, a U.S. company, pursuant to a contract containing an arbitration clause.<sup>83</sup> Alberto-Culver discovered alleged encumbrances on the trademarks and tried to rescind the contract.<sup>84</sup> Scherk refused to rescind, and Alberto-Culver brought suit in the Federal District of Illinois.<sup>85</sup> Scherk brought a motion to stay the proceedings pending an arbitration, pursuant to the contract terms.<sup>86</sup> The District Court de-

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74. Matlin, *supra* note 44, at 157-59.

75. AMERICAN ARBITRATION ASSOCIATION, *supra* note 72, at 19.

76. Rhone, 712 F.2d at 54.

77. Matlin, *supra* note 44, at 151.

78. *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969, 975 (2d Cir. 1974). "By agreeing to submit disputes to arbitration, a party relinquished his courtroom rights . . . in favor of arbitration 'with all of its well known advantages and drawbacks.'" *Parsons & Whittemore*, 508 F.2d at 975 (quoting *Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Co.*, 442 F.2d 1234, 1238 (D.C. Cir. 1971)).

79. *Id.*; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Oriental Commercial and Shipping Co., Ltd. v. Rosseel, N.V.*, 609 F. Supp. 75 (S.D.N.Y. 1985); *Haardt v. Binzagr*, No. CIV.A.H-83-5846, 1986 WL 14836, at \*1 (S.D. Tex. Dec. 19, 1986).

80. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

81. *Scherk*, 417 U.S. 506.

82. *Id.* at 506.

83. *Id.* at 508.

84. *Id.* at 509.

85. *Id.*

86. *Id.* The contract provided "that 'any controversy or claim (that) shall arise out

nied the motion to compel arbitration and the Court of Appeals for the Seventh Circuit affirmed.<sup>87</sup>

The Supreme Court, in reversing the Court of Appeals,<sup>88</sup> held that an international agreement to arbitrate should be respected and enforced by U.S. courts.<sup>89</sup> The Court recognized that any dispute involving more than one country will present conflict-of-laws problems, and stated, therefore, that an advance forum selection clause achieves both orderliness and predictability.<sup>90</sup> The Court continued, commenting that if the Court invalidated the arbitration provision, the United States would be requiring all international disputes to be governed by U.S. law.<sup>91</sup> The Court further indicated that the U.S. Congress' recent adoption of the New York Convention evidenced congressional intent to enforce international arbitration agreements.<sup>92</sup> The Court, therefore, compelled arbitration.<sup>93</sup>

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of this agreement or the breach thereof' would be referred to arbitration before the International Chamber of Commerce in Paris, France, and that '(t)he laws of the State of Illinois, U.S.A. shall apply to and govern.' *Id.* at 508.

87. *Alberto-Culver Co. v. Scherk*, 484 F.2d 611 (7th Cir. 1973).

88. *Scherk*, 417 U.S. at 521.

89. *Id.* at 519-20.

90. *Id.* at 516.

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

*Id.* (stating that contract clause calling for arbitration is form of forum selection clause).

91. *Id.* at 519.

The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.'

*Id.* (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1971)).

92. *Id.* at 519 n.15.

93. *Id.* at 519-20. Justices Douglas, Brennan, White, and Marshall dissented. *Id.* at 527. The dissenters conceded that the New York Convention governed the matter but would not compel arbitration based on Convention Article II(3). *Id.* (Douglas, J., dissenting) (finding that 1934 Act would invalidate arbitration provision and therefore New York Convention would not compel arbitration); see New York Convention, *supra* note 1, art. II(3), 21 U.S.T. at 2519, 330 U.N.T.S. at 38, 40.

b. *Oriental Commercial and Shipping Company, Ltd. v. Rosseel, N.V.*<sup>94</sup>

In *Rosseel*,<sup>95</sup> a dispute arose from an international oil purchase agreement executed by Saudi Arabian and Belgian corporations.<sup>96</sup> The defendant, a Belgian corporation, moved to compel arbitration under Article II(3) of the New York Convention.<sup>97</sup> The Southern District of New York, in requiring the parties to submit to arbitration, adopted a general policy favoring the enforcement of arbitration agreements.<sup>98</sup> The court indicated that when a contract provision requiring the parties to arbitrate is valid, the court is bound to enforce the agreement.<sup>99</sup> The court held that because the parties were New York Convention signatories and had agreed to arbitrate their dispute pursuant to the Convention, the parties were bound to the arbitration results.<sup>100</sup> The court reasoned further that the New York Convention provision that invalidates international arbitration agree-

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94. *Oriental Commercial and Shipping Co., Ltd. v. Rosseel, N.V.*, 609 F. Supp. 75 (S.D.N.Y. 1985).

95. *Rosseel*, 609 F. Supp. at 77.

96. *Id.* at 77.

97. *Id.* (moving in District Court for Southern District of New York); see New York Convention, *supra* note 1, art. II, 21 U.S.T. at 2519, 330 U.N.T.S. at 38-40. Article II(3) provides:

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

*Id.*

98. *Rosseel*, 609 F. Supp. at 77.

99. *Id.* at 78. The Southern District of New York reiterated its contention that contract provisions requiring arbitration should be upheld in *Oilex A.G., v. Mitsui & Co.*, 669 F. Supp. 85 (S.D.N.Y. 1987). In *Oilex*, the plaintiff, a Swiss company, brought suit for the alleged breach of a Columbian diesel fuel contract. *Oilex*, 669 F. Supp. at 86. The defendant counterclaimed pursuant to plaintiff's alleged breach of a Saudi Arabian gasoline contract. *Id.* The plaintiff moved to stay the counterclaims, contending that the Saudi Arabian contract was subject to resolution via arbitration. *Id.* The court found that the contract was subject to arbitration and that the court was bound to honor this provision. *Id.* at 87. The court further held, however, that because the contract was unclear as to where and pursuant to what law the arbitration was to be held it was unable to compel arbitration. *Id.* at 87-88.

100. *Rosseel*, 609 F. Supp. at 77-78 (holding that arbitration agreement is void only when internationally recognized defenses such as duress, mistake, fraud or waiver are present) (citing *Rhone Mediterranee Compagnia v. Lauro*, 712 F.2d 50, 53 (3d Cir. 1983)).

ments<sup>101</sup> should be narrowly construed to void agreements only when faced with a contract defense such as fraud or duress.<sup>102</sup>

c. *Haardt v. Binzagr*<sup>103</sup>

In *Haardt v. Binzagr*, the Southern District of Texas enforced a non-U.S. arbitral award.<sup>104</sup> In *Haardt*, the plaintiff brought suit to recover damages for the alleged breach of a partnership agreement.<sup>105</sup> The defendant petitioned the court to compel arbitration in a non-U.S. jurisdiction, indicating that the written agreements between the parties stated that disputes would be resolved by arbitration in London.<sup>106</sup> Based on provisions of the New York Convention, the court granted defendant's motion, and compelled non-U.S. arbitration.<sup>107</sup> The court found that the parties, by agreeing to arbitrate pursuant to the New York Convention, relinquished all of their rights under the Federal Rules of Civil Procedure.<sup>108</sup> The *Haardt* court upheld the validity of the New York Convention, finding that once the parties had agreed to arbitrate, the Federal Rules of Civil Procedure were no longer applicable.<sup>109</sup>

B. *Article V(2)(b) of the New York Convention: The Public Policy Defense*

The signatories to the New York Convention have agreed to

101. New York Convention, *supra* note 1, art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 40, 42.

102. *Rossee*, 609 F. Supp. at 77-78.

103. *Haardt v. Binzagr*, No. CIV.A.H-83-5846, 1986 WL 14836, at \*1 (S.D. Tex. Dec. 19, 1986).

104. *Haardt*, 1986 WL 14836, at \*3. Plaintiff sought to vacate an international arbitration award asserting defenses pursuant to New York Convention Article V(1)(c) and United States Federal Rules of Civil Procedure. *Id.* The court found that the Federal Rules of Civil Procedure were inapplicable and that the plaintiff had no valid Article V defense. *Id.* The court, therefore, ordered enforcement of the arbitral award. *Id.*

105. *Id.* at \*1.

106. *Id.*

107. *Id.*

108. *Id.* at \*3. "By agreeing to submit to arbitration, Plaintiff signs away his rights under the Federal Rules of Civil Procedure in favor of arbitration." *Id.* (citing *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 975 (2d Cir. 1974)). See generally Fed. R. Civ. P. (setting forth rules of procedure that are to be followed in U.S. courts).

109. *Haardt*, 1986 WL 14836 at \*1.

enforce the arbitral awards issued by other member nations.<sup>110</sup> Insofar as a non-domestic award differs significantly from the country's public policy, however, Article V(2)(b) of the New York Convention provides a vehicle whereby the member nation is not required to enforce the award.<sup>111</sup> Consequently, the public policy exception of Article V(2)(b) of the New York Convention has been construed narrowly by many signatory nations in an attempt to give the New York Convention greater effect.<sup>112</sup>

### 1. Middle Eastern Nations

Each Middle Eastern Nation, in considering the adoption of international arbitral legislation, faces its own set of issues and problems.<sup>113</sup> Many Middle Eastern countries, including Yemen, Oman, and Qatar, have not acceded to an international arbitration convention,<sup>114</sup> finding the terms of these conventions contrary to their internal legal systems.<sup>115</sup> Those Middle Eastern

110. New York Convention, *supra* note 1, art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40. Article III of the New York Convention states that

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

*Id.*

111. *Id.* art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

112. *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 973-74 (2d Cir. 1974); *see Brandeis Intsel Ltd. v. Calabrian Chems. Corp.*, 656 F. Supp. 160, 167 (S.D.N.Y. 1987) (indicating that public policy defense remains in Convention, but courts should give exception narrow reading to uphold general purpose of Convention, enforcement of foreign arbitral awards).

113. *See EL-AHDAB, supra* note 20 (discussing each Middle Eastern nation's role in international arbitration).

114. *Id.* at 525, 551, 574; *International Legal Framework, supra* note 1, at 36-38 (listing New York Convention Signatory nations).

[A]t one end of the spectrum are countries which have enacted laws on the topic, and at the other end are those which have not so far done so. Bahrain and Kuwait belong to the former category, whereas Oman and Qatar belong to the latter. Somewhere in between is the position of Saudi Arabia.

Husain M. Al-Baharna, *The Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain*, 4 ARAB LAW Q. 332, 337 (1989).

115. EL-AHDAB, *supra* note 20, at 525, 551, 574. In the field of arbitration there is a lack of uniformity among the Arab countries. SAMIR SALEH, THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE STATES OF THE ARAB MIDDLE EAST 19 (1985-86).

countries that have acceded to the New York Convention, such as Kuwait and Syria, were not traditionally hostile to international arbitration.<sup>116</sup>

#### a. Kuwait

Kuwait acceded to the New York Convention in 1978.<sup>117</sup> This accession, however, did not pose a conflict for Kuwait because Kuwait's general rule of civil procedure<sup>118</sup> was to recognize international arbitration agreements<sup>119</sup> and to subordinate the Kuwaiti legal system to the rules of the arbitration tribunal.<sup>120</sup> Kuwait acceded to the New York Convention primarily to improve Kuwaiti relations with other signatory countries.<sup>121</sup> Kuwait did not accede to the New York Convention to give the international community increased confidence in its enforcement of non-domestic arbitral awards.<sup>122</sup> In fact, Kuwaiti enforcement of international arbitration awards was routine prior to its adoption of the New York Convention.<sup>123</sup>

Arbitration is one of the most valued methods of dispute resolution in Kuwait.<sup>124</sup> Kuwaiti law encourages arbitration and provides that an arbitral award cannot be appealed after it has

116. EL-AHDAB, *supra* note 20, at 363; *see supra* notes 113-16 and accompanying text (discussing Saudi Arabia's intermediate position in Middle Eastern recognition of international arbitral awards).

117. EL-AHDAB, *supra* note 20, at 384.

118. Code of Civil and Commercial Procedure, art. 173(5) (Kuwait).

119. *Id.* "Courts shall not be concerned with the consideration of the disputes where Arbitration is agreed thereto." *Id.*; *see EL-AHDAB, supra* note 20, at 384. "Paragraph 5 of Article 173 categorically states that the courts have no jurisdiction over disputes subject to an agreement to arbitrate." *Id.*

120. *Id.*

It should . . . be understood that, as far as foreign arbitral awards are concerned, the position in . . . Kuwait is that the legal conditions contained in the New York Convention, rather than those laid down in the . . . laws on Civil and Commercial Procedures, will apply to the awards originating from the States parties to the New York Convention. It cannot be disputed that the New York Convention as a treaty will prevail over inconsistent domestic laws.

Al-Baharna, *supra* note 114, at 338.

121. EL-AHDAB, *supra* note 20, at 384.

122. *Id.*

123. Code of Civil and Commercial Procedure, art. 173(5) (Kuwait); Al-Baharna, *supra* note 114, at 338.

124. Isa A. Huneidi, *Arbitration Under Kuwaiti Law*, 4 ARAB LAW Q. 20, 20 (1989). "Kuwaiti law regards arbitration as an exceptional method of litigation." *Id.*; *see supra* notes 40-52 and accompanying text (discussing benefits of arbitration).

been rendered.<sup>125</sup> Moreover, the Kuwaiti grounds for vacating a domestic arbitral award are narrow.<sup>126</sup> In fact, the Kuwaiti grounds are more narrow than the grounds prescribed by the New York Convention.<sup>127</sup>

In 1984, for example, Kuwait was called upon to enforce an arbitral award made in England.<sup>128</sup> In *Merrill Lynch v. Behbehani*,<sup>129</sup> a US\$1,314,484.96 award was issued against Behbehani by an English arbitrator.<sup>130</sup> On an action for enforcement in Kuwait, the court ruled to enforce the award,<sup>131</sup> evidencing Kuwait's willingness to enforce non-Kuwaiti arbitral awards.<sup>132</sup>

#### b. Syria

Syria acceded to the New York Convention in 1959.<sup>133</sup> Although Syria's legal system is based on the ancient laws of Islam,<sup>134</sup> Syria has had significant contact with Western cultures,<sup>135</sup>

125. Huneidi, *supra* note 124, at 21. "One of the most important provisions of the law is that an award is final and unappealable unless the parties agree otherwise before the issue of the award." *Id.*

126. *Id.* The Kuwaiti grounds for arbitral award annulment are:

(1) The absence or invalidity or time lapse of the arbitration agreement, or if the award went beyond the terms of the agreement; (2) The presence of a defect such as would provide ground for review and reconsideration of a court judgment; [or] (3) The presence of a basic defect in the proceedings or in the award as would justify an application for annulment of a court judgment.

*Id.*; see New York Convention, *supra* note 1, art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 40, 42; *supra* notes 64-69 and accompanying text (stating New York Convention grounds for non-enforcement of arbitral awards).

127. Huneidi, *supra* note 124 at 20; New York Convention, *supra* note 1, art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 40-42.

128. *Merrill Lynch v. Behbehani* (1985); see Al-Baharna, *supra* note 114 at 340.

129. *Merrill Lynch*, *supra* note 128.

130. Al-Baharna, *supra* note 114, at 340.

131. *Id.* Enforcement actions were also brought in Bahrain to attach Behbehani's assets in that jurisdiction. *Merrill Lynch v. Behbehani*, Case No. 859/M/1985 before the Civil High Court of Appeal (Bahrain). Bahrain, after appeal, also ordered the enforcement of the English arbitration award. Al-Baharna, *supra* note 114, at 340-41.

132. Al-Baharna, *supra* note 114, at 343. "[O]n the basis of the decision of . . . *Merrill Lynch v. Abdul Jalil Behbehani*, it can be said that courts of Kuwait . . . would enforce a foreign judgment or award issued in England." *Id.* As a general rule, "[f]oreign judgments and awards are enforced in . . . Kuwait when the law of the country of the origin of the judgment or award would enforce the judgments and awards passed in . . . Kuwait on the basis of reciprocity." *Id.* at 342-43. This reciprocity is required by all signatories to the New York Convention. New York Convention, *supra* note 1, 21 U.S.T. 2517, 330 U.N.T.S. 38.

133. *International Legal Framework*, *supra* note 1, at 38.

134. SAYED HASSAN AMIN, *MIDDLE EAST LEGAL SYSTEMS* 355 (1985) [hereinafter

and therefore its laws reflect many Western international views.<sup>136</sup> Syria's traditional public international policy encourages the enforcement of non-Syrian arbitral awards.<sup>137</sup> Syria does not require reciprocity in its enforcement of non-Syrian arbitral awards.<sup>138</sup> Syria, therefore, enforces all non-Syrian arbitral awards, whether or not the award was made by a New York Convention signatory.<sup>139</sup> The New York Convention prevails over traditional Syrian law in all cases of non-Syrian arbitral award enforcement.<sup>140</sup>

Although Syria has a traditional policy that enforces non-Syrian arbitral awards, the obstacles that must be overcome to achieve this enforcement are often onerous.<sup>141</sup> The enforcing court may require an accurate translation of the contract provisions that relate to the arbitration agreement.<sup>142</sup> The court may further require a written verification of the award from the arbitral tribunal or translated copies of the arbitration proceedings.<sup>143</sup> These documents may significantly increase the time

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LEGAL SYSTEMS] (stating that Islamic jurisprudence is main source of law in Syria). Arabs took control of Syria in 635 A.D., establishing Syria's first Muslim dynasty and the Islamic basis of Syrian law. *Id.*

135. *Id.* at 356. "Syria became part of the Ottoman Empire between 1453 and 1918. Accordingly, the legal history of Syria during this period, in spite of the Syrian Crisis which brought this country under Egyptian rules (1832-33), is closely linked with the general political and legal culture of the Ottomans." *Id.*; see ITZKOWITZ NORMAN, *OTTOMAN EMPIRE AND ISLAMIC TRADITION* (1972) (discussing Ottoman law). The French took control of Syria in 1916; Syria regained its independence in 1943. LEGAL SYSTEMS, *supra* note 134, at 358-59.

136. LEGAL SYSTEMS, *supra* note 134, at 357. As part of their legal reform in Syria, the Ottoman's imported the European codes of law. *Id.*

137. *Id.*; Jacques El-Hakim, *Enforcement of Foreign Judgments and Arbitral Awards in Syria*, 5 *ARAB LAW Q.* 137 (1990).

138. El-Hakim, *supra* note 137, at 139. "No reservation was made by Syria requiring reciprocity in the enforcement of the Convention." *Id.*

139. *Id.*

140. *Id.* "[T]he provisions of the New York Convention prevail [in Syria] over the provisions of the [Syrian] Procedure Code." *Id.*

141. *Id.* at 141-42.

142. *Id.* at 141.

143. *Id.*

In case of an arbitration clause, this may require the translation of the whole contract containing that clause, which represents considerable work. If the defendant contends that a condition of enforcement is not fulfilled, he must bring evidence thereon. This may require the production of a certificate from the arbitral body which organized the arbitration or a copy of the arbitration records or the hearing of witnesses.

*Id.*

and cost involved in enforcing a non-Syrian arbitral award.<sup>144</sup>

## 2. The United States

The United States was historically resistant to international arbitration.<sup>145</sup> The U.S. adoption of the New York Convention, therefore, created many of the same public policy and traditional law conflicts that were recently created when Saudi Arabia acceded to the Convention.<sup>146</sup> The U.S. courts initially looked to U.S. legislative history in hopes of resolving this conflict, but the legislative history was generally silent.<sup>147</sup> Subsequently, the courts reconciled the conflict by holding that the U.S. public policy interest in a uniform international policy outweighed the U.S. public policy interest in requiring that all arbitral awards be consistent with U.S. law.<sup>148</sup>

In *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier*,<sup>149</sup> Societe Generale De L'Industrie Du Papier ("RAKTA") sought U.S. confirmation of a non-U.S. arbitral award that found Parsons & Whittemore Overseas Co., Inc. ("Overseas") liable to RAKTA for breach of contract.<sup>150</sup> In 1963, Overseas and RAKTA entered an agreement to build and manage a paperboard mill in Egypt.<sup>151</sup> In 1967, however, on the eve of the Arab-Israeli Six Day War,<sup>152</sup> the majority of Overseas'

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144. *Id.*

145. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). "The United States Arbitration Act . . . revers[ed] centuries of judicial hostility to arbitration agreements . . ." *Id.* at 510. The United States Arbitration Act is the U.S. codification of the New York Convention. 9 U.S.C. §§ 201-208 (1988 & Supp. V 1993). "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in U.S. Courts . . ." 9 U.S.C. § 201 (1988 & Supp. V 1993); *see supra* notes 70-74 and accompanying text (discussing United States initial resistance to international arbitration).

146. *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974); *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F. Supp. 160, 167 (S.D.N.Y. 1987).

147. *Parsons & Whittemore*, 508 F.2d at 973. "The legislative history of the provision offers no certain guidelines to its construction." *Id.*

148. *Fotochrome, Inc. v. Copal Co., Ltd.*, 517 F.2d 512, 516 (2d Cir. 1975); *Parsons & Whittemore*, 508 F.2d at 973.

149. *Parsons & Whittemore*, 508 F.2d at 969.

150. *Id.*

151. *Id.* at 972.

152. *See MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS* 13 (Meir Shamgar, ed. 1982). The Six Days War in 1967 was the period when "the Gaza Strip, Sinai, Judia and Samaria and the Golan actually came under the control and authority of the Israeli Defense Forces." *Id.*

workers fled from Egypt, leaving the contract incomplete.<sup>153</sup> RAKTA sought damages for breach, and Overseas invoked the contract's arbitration clause.<sup>154</sup> The arbitrators found Overseas liable to RAKTA for breach of contract.<sup>155</sup> Overseas challenged the enforcement of the non-U.S. arbitral award, contending that the award was contrary to U.S. public policy.<sup>156</sup>

The Second Circuit confirmed the arbitral award.<sup>157</sup> The court held that a non-U.S. arbitral award may only be denied enforcement on the basis of Article V(2)(b) of the New York Convention<sup>158</sup> when the award would violate the most fundamental notions of morality and justice.<sup>159</sup> The court further held that the history of the New York Convention favored arbitral award enforcement<sup>160</sup> and, therefore, the United States should give a narrow reading to all Convention defenses.<sup>161</sup>

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The roots of the Six Days War go back to the deep-seated hostility of the Arab States towards Israel and their declared intent and purpose to end its existence. The War of 1967, the third between Israel and its neighbors, was one link in the chain of belligerent acts which were designed at first to prevent the reestablishment of Jewish independence . . .

*Id.* at 16. See generally SYDNEY D. BAILEY, *THE MAKING OF RESOLUTION 242* (1985) (providing comprehensive discussion of Arab-Israeli Six Days War and its resolution).

153. *Parsons & Whittemore*, 508 F.2d at 972.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 969.

158. New York Convention, *supra* note 1, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42. Article V(2)(b) states that the "[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 . . . the recognition or enforcement of the awards would be contrary to the public policy of that country." *Id.*

159. *Parsons & Whittemore*, 508 F.2d at 974. The Court concluded that the "[e]nforcement of foreign arbitral awards may be denied on this basis [the Convention's public policy defense] only where enforcement would violate the forum state's most basic notions of morality and justice." *Id.*; see 1 RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 117 cmt. c, at 340 (1969) (discussing enforcement of foreign nation judgments).

Judgments rendered in foreign nations are not entitled to the protection of full faith and credit. A State of the United States is therefore free to refuse enforcement to such a judgment on the ground that the original claim on which the judgment is based is contrary to its public policy. . . . [E]nforcement will usually be accorded the judgment except in situations where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.

*Id.*

160. *Parsons & Whittemore*, 508 F.2d at 973.

161. *Id.*

The Southern District of New York followed this narrow reading of Article V(2)(b) in *Brandeis Intsel Ltd. v. Calabrian Chems. Corp.*<sup>162</sup> Brandeis Intsel Ltd. sought U.S. confirmation of a non-U.S. arbitral award rendered against Calabrian Chemicals Corporation pursuant to an arbitration agreement governed by the New York Convention.<sup>163</sup> Calabrian Chemicals Corporation sought to vacate the arbitration award based on Article V(2)(b) of the New York Convention.<sup>164</sup> The court, in confirming the arbitral award, concluded that although the public policy defense in Article V(2)(b) of the New York Convention remains, the defense must be read narrowly to be effective only when international arbitral award enforcement would violate the most fundamental notions of justice.<sup>165</sup>

## II. THE SAUDI ARABIAN LEGAL SYSTEM AND ITS APPROACH TO ARBITRATION

Saudi Arabia has a long-standing history of rejecting non-domestic methods of dispute resolution.<sup>166</sup> It also has current policies that restrict, if not prohibit, various types of interna-

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To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provisions was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.

*Id.* at 974 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)).

162. *Brandeis Intsel Ltd. v. Calabrian Chems. Corp.*, 656 F. Supp. 160 (S.D.N.Y. 1987).

163. *Brandeis*, 656 F. Supp. at 161.

164. *Id.* at 163; New York Convention, *supra* note 1, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

165. *Brandeis*, 656 F. Supp. at 163-65; *Revere Copper & Brass Inc. v. Overseas Private Inv. Corp.*, 628 F.2d 81, 83 (D.C. Cir.), *cert. denied*, 446 U.S. 983 (1980). "[T]he federal courts have recognized a strong federal policy in favor of voluntary commercial arbitration. . . . As a result, judicial review of an arbitration award has been narrowly limited." *Id.* at 83 (citations omitted).

166. Paul E. Pompeo, *East Meets West: A Comparison of Government Contract Dispute Resolution in the Common Law and Islamic Systems*, 14 *LOY. L. A. INT'L & COMP. L.J.* 815, 840-41 (1992); Royal Decree No. M/46, *supra* note 22 (indicating that government dependents cannot use arbitration without Council of Ministers' approval); MINISTRY OF COMMERCE, MEMORANDUM ON ARBITRATION CLAUSES No. 3/3/1756, dated 24/5/1399 (requesting public decree establishing that arbitration clauses providing for non-domestic resolution are void) [hereinafter MEMORANDUM ON ARBITRATION].

tional commercial arbitration.<sup>167</sup> Saudi Arabia has chosen, however, to adopt the New York Convention, whose primary purpose is to promote the acceptance and enforcement of non-domestic arbitral awards.<sup>168</sup>

### A. Sources of Saudi Arabian Law

The Saudi Arabian legal system is based on the religion of Islam.<sup>169</sup> Islam provides a framework for law and government, in addition to a religion, for the people of Saudi Arabia.<sup>170</sup> The Saudi Arabian legal system focuses on the enforcement of Islamic culture and values.<sup>171</sup> This focus is contrary to contemporary Western law, which generally emphasizes economics.<sup>172</sup>

Islamic law is taken primarily from two sources: the Qur'an,<sup>173</sup> and the Sunna.<sup>174</sup> In the law of Islam, the Qur'an is

167. Pompeo, *supra* note 166, at 840-41; Royal Decree No. M/46, *supra* note 24; MEMORANDUM ON ARBITRATION, *supra* note 166.

168. New York Convention, *supra* note 1, 21 U.S.T. 2517, 330 U.N.T.S. 38.

169. Karl, *supra* note 13, at 132-33; Joseph L. Brand, *Aspects of Saudi Arabian Law & Practice*, 9 B.C. INT'L & COMP. L. REV. 1, 2 (1986).

170. BASSAM TIBI, *ISLAM AND THE CULTURAL ACCOMMODATION OF SOCIAL CHANGE* 57 (Clare Krojzl trans., 1990). "As an organic religious system Islam embraces all spheres of life and has strict commandments for conduct within them. Islamic law . . . claim[s] to define and structure all aspects of human behavior." *Id.* (citations omitted). "Islam is an entire way of life: a religion, an ethic, a lifestyle, and a legal system . . ." Karl, *supra* note 13, at 134.

171. C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* 31 (1988). "[T]he values of Islamic culture are not as focused on contemporary human needs as they are on ensuring that people live according to God's will." Karl, *supra* note 13, at 136-37.

172. WEERAMANTRY, *supra* note 171, at 31; see PATRICK BANNERMAN, *ISLAM IN PERSPECTIVE: A GUIDE TO ISLAMIC SOCIETY, POLITICS AND LAW* 31-33 (1988) (indicating that Western law focusses on societal needs while Islamic law focusses on God's needs).

173. Westbrook, *supra* note 18, at 895-97. The Qur'an is the holy book of Islam. *Id.* It is the record of God's revelations to Mohammed, the Prophet of Islam. *Id.*

174. SAYED HASSAN AMID, *ISLAMIC LAW IN THE CONTEMPORARY WORLD* 8-9 (1985) [hereinafter *CONTEMPORARY WORLD*]. "Islamic Law, as communicated by God through his Prophet, Mohammed, was not a mere collection of metaphysical abstractions, but was transmitted in a context embodying a philosophy for organizing an entire society with a divine purpose." Karl, *supra* note 13, at 134 n.14 (citations omitted).

[The Sunna are the] tradition of examples set by the Prophet, and derivatively, by his closest companions. As the Islamic world extended in time and space, the transmission of the tradition shifted from the direct assimilation of example, to the recounting of stories about the Prophet and those near to him, and ultimately, to the construction of a body of authenticated texts. Although not revealed, Sunna is a divinely sanctioned source of law. . . . In the classical scheme, Sunna was the second most authoritative source of law.

Westbrook, *supra* note 18, at 896.

the word of God ("Allah").<sup>175</sup> The Qur'an is the written basis for all Islamic law,<sup>176</sup> and provides the absolute authority on Islamic life.<sup>177</sup> The Qur'an contains approximately 6000 verses<sup>178</sup> and guides the Muslim in every aspect of his daily life, including the law.<sup>179</sup> The Qur'an is Islam's absolute legal authority.<sup>180</sup> Scholars and jurists may only look to other legal sources if the Qur'an is silent on a topic.<sup>181</sup>

The Sunna, which translates as the "beaten path"<sup>182</sup> or the prevailing customary law,<sup>183</sup> are a set of rules deduced from the stories, texts, and conduct of the Islamic Prophet Mohammed.<sup>184</sup>

175. 5A MODERN LEGAL SYSTEMS CYCLOPEDIA 100.5 (Kenneth R. Redden ed., 1990). Allah is the Islamic word for God. *Id.* The word of Allah is spoken through Mohammed, the Prophet and founder of Islam. Karl, *supra* note 13, at 138 n.37. "Every word of the Qur'an is regarded as the utterance of the Almighty communicated in His actual words by the angel Gabriel, the Holy Spirit, to the Prophet [Mohammed]." S.G. Vesey-Fitzgerald, *Nature and Sources of the Shari'a*, in ORIGIN AND DEVELOPMENT OF ISLAMIC LAW 85 (Majid Khadduri & Herbert J. Liebesny eds., 1955).

176. WEERAMANTRY, *supra* note 171, at 32.

177. *Id.* at 33.

178. Karl, *supra* note 13, at 138.

179. CONTEMPORARY WORLD, *supra* note 174, at 10. Less than eighty verses of the aforementioned 6000 would be deemed legal by a western lawyer. Karl, *supra* note 13, at 138; S.G. Vesey-Fitzgerald, *supra* note 175, at 85. Islam, however, reads the Qur'an as a whole, and therefore the remaining 5920 verses also guide Islamic legal interpretation. Karl, *supra* note 13, at 138. Examples of Qur'anic verses that deal with international commercial law include:

On Commercial integrity: "And draw not near to the property of the orphan except in a godly way till he attains his maturity and fulfills the promise; surely (every) promise shall be questioned about." The Qur'an, 17:34 . . . On treaties: "Except those of the idolaters with whom you made an agreement, then they have not failed you in anything and have not backed up any one against you, so fulfill their agreement to the end of their term; surely Allah loves those who are careful (of their duty). The Qur'an, 9:4.

*Id.*

180. Karl, *supra* note 13, at 138.

181. *Id.* Islamic legal sources, other than the Qur'an include: Sunna, ijma', Qiyas, and royal decrees. *Id.* at 38-44. The followers Islam are divided into two groups: Sunnis and Shi'ites. *Id.* at 47. "The Sunnis seek their inspiration down the centuries in the Qur'an . . . The Shi'ites believe that the indispensable media for understanding the truth proclaimed by the Prophet are the Imam [heads of State]." *Id.* at 48. The majority of Muslims, along with Saudi Arabia nation conforms to the Sunnis legal and religious framework. *Id.*

182. Westbrook, *supra* note 18, at 896; see *supra* note 174 and accompanying text (defining Sunna as customary law).

183. CONTEMPORARY WORLD, *supra* note 174, at 9.

184. WEERAMANTRY, *supra* note 171, at 34. According to Islamic history, Allah, or God, chose Mohammed as his messenger. *Id.* at 34-35. Allah delivered his Divine Revelations to the people through the voice of Mohammed. 5A MODERN LEGAL SYSTEMS CYCLOPEDIA 100.5 (Kenneth R. Redden ed., 1990). In 610 A.D., Mohammed estab-

The Sunna are a major source of Islamic law, second only to the Qur'an.<sup>185</sup> The Sunna provide Islamic jurists with customary law<sup>186</sup> on subjects that the Qur'an does not directly address.<sup>187</sup>

Two other sources of Islamic law are the ijma'<sup>188</sup> and the Qiyas.<sup>189</sup> The ijma' is the third source of Islamic law.<sup>190</sup> It provides answers to questions that arise from changing societal conditions.<sup>191</sup> The ijma' is developed by the unanimous consensus of specific recognized Islamic legal scholars.<sup>192</sup> The scholars modify the accepted interpretations of the Qur'an and the Sunna to coincide with modern language and custom.<sup>193</sup>

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lished a "social order based on Divine Revelation" to correct society's wrongdoings. *Id.* These wrongdoings included: exploiting the poor, malpractice and fraud in trade, and general irresponsibility. *Id.* Mohammed spent ten years at Mecca and then moved to Medina, where he spent thirteen years describing his revelations to young Muslim followers. *Id.*

"The traditions [Sunna] . . . were reduced to writing, compiled and used as a most important authority in Islamic law ranking after the Qur'an. They can be linked to 'case law' in the Anglo-American legal systems." CONTEMPORARY WORLD, *supra* note 174, at 10. The term "hadith" is often used interchangeably with the term "Sunna." *Id.* In actuality, "hadith" refers to a story or tradition, while the term "Sunna" refers to the rule of law which has been deduced from this story. WEERAMANTRY, *supra* note 171, at 34-35.

185. WEERAMANTRY, *supra* note 171, at 34.

186. CONTEMPORARY WORLD, *supra* note 174, at 9-10. Customary law is based on traditional or customary resolution of an issue. *Id.* It is a guide informing Islamic jurists as to prior actions by those similarly situated. *Id.*

187. *Id.* at 9.

188. Karl, *supra* note 13, at 139. Ijma' is adjudication under consensus and unanimity. Westbrook, *supra* note 18, at 895. "Technically, [ijma' is] the unanimous agreement of all qualified legal scholars of an age upon a legal rule. The third source of law in the classical [Islamic] scheme." *Id.*

189. Karl, *supra* note 13, at 140. Qiyas is the analogy used in legal reasoning. Westbrook, *supra* note 18, at 895; see CONTEMPORARY WORLD, *supra* note 174, at 11 (discussing use of juristic analogy or qiyas).

190. CONTEMPORARY WORLD, *supra* note 174, at 10-11; Westbrook, *supra* note 18, at 895.

191. CONTEMPORARY WORLD, *supra* note 174, at 10.

As Islam spread rapidly and was accepted widely the changing conditions of the muslim societies brought about . . . complicated problems for which neither the Qur'an nor the Prophetic Traditions [Sunna] had provided a remedy . . . As such recourse was made to 'consensus' or . . . ijma which was accepted as a further source of law.

*Id.*

192. *Id.* at 10-11. The translation of ijma' means "adjudication under consensus, unanimity. Technically, the unanimous agreement of all qualified legal scholars of an age upon a legal rule. The third source of law in the classical scheme." Westbrook, *supra* note 18, at 895.

193. Karl, *supra* note 13, at 139-40.

Qiyas, a method of legal reasoning by analogy, provides last resort answers to legal problems on which the Qur'an, Sunna, and ijma' are silent.<sup>194</sup> Qiyas allow Saudi Arabian jurists to extrapolate from the Qur'an or Sunna by way of legal reasoning and analogy.<sup>195</sup> Saudi Arabian jurists are able to analogize from matters specified in the Qur'an and the Sunna to topics not specifically addressed in these texts.<sup>196</sup>

### B. Interpretation of Saudi Arabian Law

There are four different methods that Muslims may utilize in interpreting the sources of Islamic law.<sup>197</sup> Hanifa,<sup>198</sup> Maliki,<sup>199</sup> Shafi'i,<sup>200</sup> and Hanbali.<sup>201</sup> Hanbali, the strictest of Islamic inter-

194. *Id.* at 140.

A Muslim judge, therefore, has to search first in the Qur'an, the Sunnah, and 'consensus of opinion' [ijma'] to find out rules applicable to the case before him. If there is no appropriate legal authority or the texts are not clear enough the Islamic judge is authorized to apply an accepted principle or an assumption that to his wisdom and knowledge might fit the problem best.

CONTEMPORARY WORLD, *supra* note 174, at 11.

195. Karl, *supra* note 13, at 139-40.

196. *Id.* at 142 n.72.

197. WEERAMANTRY, *supra* note 171, at 49-54. There are four school if Sunni Islam. *Id.* at 49. "Each of these schools had settled geographical areas of dominance, and cumulatively, the Sunni school commanded the allegiance of the majority of the Islamic World." *Id.* at 49; *see supra* note 181 (discussing Sunni Islam).

198. *Id.* at 49-51.

The Hanafi school of jurisprudence empahsised the importance of the public interest in a consideration of legal question. It is the school largely prevalent in Central Asia, Turkey, Afghanistan and Indian sub-continent. In Egypt, Iraq, Syria and Lebanon, its presence is very strong, while in the Soviet Union and China the majority of Muslims are of this school.

*Id.* at 50-51. The Hanafi school believes arbitration is legal because "it accords to the needs of social life in that it is less complex than resorting to courts." EL-AHDAB, *supra* note 20, at 20; *see* S.H. AMIN, ISLAMIC LAW AND ITS IMPLICATION FOR MODERN WORLD (1989) [hereinafter MODERN WORLD] (discussing Hanifa school of Islamic interpretation).

199. WEERAMANTRY, *supra* note 171, at 51-52. The Maliki school relies heavily on the traditions of the Prophet. *Id.* at 51. Modern Maliki is an "extremely scientific method of inquiry." *Id.* Maliki is utilized in West Africa, Islamic Spain, Tunis, Algeria, Morocco, Nigeria, and upper Egypt. *Id.* at 51; *see* MODERN WORLD, *supra* note 198 (discussing Maliki school of Islamic interpretation); YUSHAU SODIG, MALIK'S CONCEPT OF MASLAHAH (1991) (applying Maliki school of Islamic Interpretation).

200. WEERAMANTRY, *supra* note 171, at 52-53. "The Shafi'ite school was particularly strong in logic and reason." *Id.* The Shafi'i school accepts the doctrine of qiyas and has developed a set of rules with which this doctrine could operate. *Id.* Adherents to Shafi'i are found mostly in East Africa, Bahrain, Sri Lanka, Malaysia, and Indonesia. *Id.* at 51; *see* MODERN WORLD, *supra* note 198 (discussing Shafi'i school of Islamic interpretation); *supra* notes 194-96 and accompanying text (discussing doctrine of qiyas).

pretations, has traditionally rejected independent thinking ("ij-tihad").<sup>202</sup> The Hanbali school of Islamic law, therefore, has resisted the modern trend of Western law, which relies on jurist interpretation of historical documents.<sup>203</sup> In the early twentieth century, Saudi Arabia accepted Hanbali as its official method of interpreting Islamic law.<sup>204</sup> Saudi Arabian civil law courts are required to utilize Hanbali legal texts, including Hanbali interpretations of the Qur'an and the Sunna.<sup>205</sup>

Although Saudi Arabia's adoption of the Hanbali school of law has restricted its use of legal interpretation and independent thought, Saudi Arabia is not bound solely by the Islamic rules and regulations created in 610 A.D.<sup>206</sup> The King of Saudi Arabia,<sup>207</sup> pursuant to royal decree, has the ability to promulgate administrative regulations on topics of public welfare.<sup>208</sup> New regulations are permitted on topics of public welfare because it is an area of the law where the Qur'an and the Sunna are silent.<sup>209</sup> On topics addressed in the Qur'an and Sunna, however, the King, like all Saudi Arabian citizens, is required to follow the Qur'an's and Sunna's established rules, regulations, and laws.<sup>210</sup>

### C. Saudi Arabian Commercial Contracting

#### Several Saudi Arabian commercial contracting principles

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201. WEERAMANTRY, *supra* note 171, at 54; *see* MODERN WORLD, *supra* note 198 (discussing Hanbali school of Islamic interpretation).

202. 5A MODERN SYSTEMS CYCLOPEDIA 100.10 (Kenneth R. Redden 1990) (defining ijihad as original thought). "[S]ince the tenth century, Muslim scholars announced that the door of Ijihad (original thinking) had been closed." *Id.* "The intellectual question which continues to present itself is whether Ijihad alone would bring Muslim societies into the contemporary times." *Id.*

203. HERBERT J. LIEBESNY, FOREIGN LEGAL SYSTEMS: A COMPARATIVE ANALYSIS 238-39 (4th ed. 1981).

204. Karl, *supra* note 13, at 141; Jeanne Asherman, *Doing Business in Saudi Arabia: The Contemporary Application of Islamic Law*, 16 INT'L LAW. 321, 323 n.12 (1982).

205. Karl, *supra* note 13, at 141; LEGAL SYSTEMS, *supra* note 134, at 312.

206. 5A MODERN LEGAL SYSTEMS CYCLOPEDIA 100.5 (Kenneth R. Redden, ed. 1990). "The Prophet started his mission in Mecca in 610 A.D. to establish a social order based on Divine Revelation with the goal of correcting the spiritual and social ills then in existence there." *Id.*; *see* WEERAMANTRY, *supra* note 171, at 3-5 (discussing Prophet Mohammed and beginnings of Islamic law and religion).

207. *Saudis Accept*, *supra* note 2, at 26. King Fahd issued the decree authorizing accession to the New York Convention. *Id.*

208. Karl, *supra* note 13, at 142.

209. *Id.*

210. *Id.* at 142.

differ significantly from Western contracting principles.<sup>211</sup> The first is usurious interest ("Riba").<sup>212</sup> The law of Islam forbids Riba based on the belief that obtaining something for nothing is inherently immoral and wrong.<sup>213</sup> The prohibition of Riba implies that any contract that charges an unusually high interest rate<sup>214</sup> or builds in an excessive profit margin will be void as unconscionable, oppressive, and exploitative.<sup>215</sup> A contract containing Riba will not be enforced by a Saudi Arabian court.<sup>216</sup>

A second Islamic contracting concept that differs from Western contract law is the concept of risk ("Gharar").<sup>217</sup> Gharar prohibits gambling.<sup>218</sup> Any contract containing speculation, or contract clause that turns on the happening of a specified but unsure event, is void under the principle of Gharar.<sup>219</sup> Accordingly, any corporation that intends to have its contract enforceable under the rules and procedures of Saudi Arabia

211. *Id.* at 167. International disputes often arise because a non-Saudi Arabian party and a Saudi Arabian party hold differing views and beliefs as to the requirements and enforceability of the contract. *Id.* These disputes often raise choice of law questions because a contract which may be valid under the rules of one jurisdiction may be void under the rules of another. *Id.*; Turck, *supra* note 15, at 416.

212. Karl, *supra* note 13, at 151-52; see Peter D. Sloane, *The Status of Islamic Law in the Modern Commercial World*, 22 INT'L LAW. 743, 745 (1988) (defining Riba as unearned or unjust profit); *Commerce Farm Credit Co. v. Ramp*, 116 S.W.2d 1144, 1149 (Tex. Civ. App. 1938) (defining usurious interest). Usury is the "[c]harging [of] an illegal rate of interest." BLACK'S LAW DICTIONARY 1545 (6th ed. 1990). "The reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest." *Id.* A "usurious contract" is a "contract where interest to be paid exceeds the rate established by the statute." *Id.*

213. Karl, *supra* note 13, at 152; NOEL J. COULSON, *COMMERCIAL LAW IN THE GULF STATES: THE ISLAMIC LEGAL TRADITION* 103 (1984).

214. Sloane, *supra* note 212, at 748. Technically, contracts calling for any type of interest payment are void under the principle of Riba. *Id.* Several methods of obtaining interest without violating Islamic law, however, have been developed. *Id.* The double sale is one such financing device.

This device establishes a loan with interest when a debtor sells property to a creditor for cash. The debtor then immediately buys the property back from the creditor for more money, which will be paid later. The debt owed to the creditor is effectively a loan, with the higher price for the property in the second sale operating as interest, and the property the creditor holds functioning as collateral.

Karl, *supra* note 13, at 154-55.

215. WEERAMANTRY, *supra* note 171, at 67.

216. Karl, *supra* note 13, at 152.

217. Sloane, *supra* note 212, at 745-46. Sloane defines Gharar as risk. *Id.* at 745.

218. *Id.* The legal doctrine of Gharar prohibits gambling and thus voids any contract involving speculation. *Id.*

219. *Id.*

must be specific in all terms of the contract.<sup>220</sup>

One of the speculation practices prohibited by Gharar is insurance.<sup>221</sup> Islamic law rejects insurance under the principles of Gharar,<sup>222</sup> finding that insurance contracts are speculative.<sup>223</sup> Because policyholders do not benefit unless there is a loss, and a loss is not a guaranteed event, the contract is void as being ill-defined or speculative.<sup>224</sup> The Saudi Arabian government, however, realizing that insurance companies play a major role in modern commerce and industry, has recently relaxed its restrictive policies regarding insurance.<sup>225</sup> Saudi Arabia now permits parties to utilize insurance as an investment tool, so long as the insurance companies invest all insurance profits within the borders of Saudi Arabia.<sup>226</sup>

Finally, the Saudi Arabian approach to the remedies awarded for a breach of contract differs from the approaches adopted by Western jurisdictions.<sup>227</sup> Saudi Arabian jurists are not bound by the principle of *stare decisis*.<sup>228</sup> As a result, Saudi Arabian awards and remedies are often inconsistent.<sup>229</sup> A Saudi Arabian judge may award the remedy he considers appropriate to the situation, with little or no regard to prior judicial deci-

220. *Id.* A contract must set forth the goods to be delivered, the nature of all services, and the exact method of payment and delivery. *Id.*

221. *Id.* at 749.

222. See *supra* notes 217-18 and accompanying text (defining Gharar).

223. Sloane, *supra* note 212, at 749-50.

224. *Id.*

225. C.E. Acker, *The Insurance Business*, MIDDLE E. EXEC. REP., July 1982, at 25.

226. *Id.* The Saudi Arabian government requires private insurance companies to invest their profit in land development or business enterprises with the Kingdom of Saudi Arabia. *Id.* Moreover, in 1986 the government began to recognize the use of cooperative insurance, wherein each policyholder is a partner in the company and all company funds are invested. *Id.* at 26. This type of insurance is not seen as immoral because there is no Riba. *Id.* In the case of loss the policyholder recovers, and if there is not loss the policyholder receives a return on his investment. *Id.* There is no uncertainty of return. *Id.* "The cooperative is strictly a non-profit organization designed to meet the need for insurance without compromising Islamic principles." *Id.*

227. Sloane, *supra* note 212, at 746-47.

228. Karl, *supra* note 13, at 149-50. *Horne v. Moody*, 146 S.W.2d 505, 509-10 (Civ. Ct. App. Tex. 1940). *Stare decisis* is defined as "[t]o abide by, or adhere to, decided cases. . . . A doctrine that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same." BLACK'S LAW DICTIONARY 1406 (6th ed. 1991).

229. Sloane, *supra* note 212, at 747.

sions.<sup>230</sup> Because Islam forbids Riba,<sup>231</sup> however, Saudi Arabian courts generally limit damage awards to immediate, measurable losses.<sup>232</sup> As a result, Saudi Arabian awards for breaches of contract are significantly lower than the awards that would result for comparable breaches in common law courts.<sup>233</sup>

#### D. Saudi Arabia's International Law

There is no Islamic international law.<sup>234</sup> If Saudi Arabia were to develop a purely Islamic international policy, the policy's goal would be to create a global Islamic community sharing one mutual belief in the religion and law of Islam.<sup>235</sup> This Islamic theory of assimilation to one global belief<sup>236</sup> is diametrically opposed to the Western theory of international law, which holds that international peace and coexistence arise from the mutual understanding and acceptance of differing beliefs and philosophies.<sup>237</sup>

230. *Id.*

231. Karl, *supra* note 13, at 151-52; *see supra* notes 212-16 and accompanying text (discussing Saudi Arabian prohibition of Riba).

232. Karl, *supra* note 13, at 162. "Since only God can foresee the future, it would be inappropriate for [Islamic] . . . courts to award damages based on anticipated profits." *Id.* The Islamic courts can "require the terminating party to make some equitable reparation for the other party's immediate losses, but they are unlikely to make him whole by western standards. This is because [Islamic law] . . . does not recognize the concept of consequential damages." Sloane, *supra* note 212, at 746-47.

233. Sloane, *supra* note 212, at 746. "The courts may require the terminating party to make some reparation for the other party's immediate losses, but the aggrieved party will not receive the damages available to Western plaintiffs." Karl, *supra* note 13, at 162.

234. Westbrook, *supra* note 18, at 858.

235. *Id.* at 860.

Islamic international law, like all Islamic law, has a substantive aspiration: to realize the command of God. . . . Unlike the aggregate of individuals presumed . . . by public international law, [Islam] . . . is a community, held together by shared belief. Islamic international law thus ultimately aspires to global community, aspires to be the vehicle through which Islam becomes the world.

*Id.*

236. *Id.* at 829. Islamic law does not separate law and belief. *Id.* "For Islamic scholars, international law is a continual attempt to reconcile Islamic authority and Western category." *Id.*

237. *Id.* "The solution that public [Western] international law offers is the idea that peace arises not from shared belief, but from an order that allows for different beliefs." *Id.* at 828-29. "Western law aspires to be coherent, a closed system. . . . Western law is a language that mediates between abstract purposes, justice, and particular facts, but law itself is neither the impulse nor the object of speech. In contrast, [Islamic] . . . law does not communicate, but is itself the figure of justice." *Id.* at 873; *see generally* Ministry of Commerce, Companies Dept., Circular No. 31/1/331/91, dated 3/

Saudi Arabia's traditional rejection of Western international law is partially based on its belief that Western countries adopt treaties and international conventions to benefit their own self-interest and not to aid other nations or peoples.<sup>238</sup> Nations are motivated by their own self-interest in power, economics, defense, or politics.<sup>239</sup> The law of Islam rejects this self-interest because it believes that self-interest or self-gain is inherently selfish and evil.<sup>240</sup>

Saudi Arabian courts do not recognize the laws of non-domestic jurisdictions.<sup>241</sup> Islamic law is the controlling law in all Saudi Arabian courts.<sup>242</sup> Any international dispute arising with the Saudi Arabian government is relegated to Saudi Arabian litigation, as other methods of dispute resolution are prohibited by Saudi Arabian law.<sup>243</sup> Saudi Arabian private corporations are allowed to utilize alternative methods of dispute resolution such as

13/1399 (Oct. 10, 1979); see Turck, *supra* note 15, at 417 n.3 (discussing Circular No. 31/1/331/91, dated 3/13/1399 (Oct. 10, 1979)).

238. Westbrook, *supra* note 18, at 868.

[P]ublic international law is compromised from the outset, and cannot plausibly claim to derive from righteousness. In the view of the West, were righteousness available, international law would be unnecessary. It is only because the international environment is characterized as the state of nature that states seek to order politics through treaties, through the webs of their own consent. States consent [to international treaties] because it is in their own self-interest to do so. Law is thus derived from evil, the human proclivity to violent self-interest, rather than from righteousness.

*Id.*

239. *Id.*

240. *Id.*; see *supra* notes 238-40 and accompanying text (discussing Islamic belief that Western states consent to international treaties because of self-interest and not righteousness).

241. Turck, *supra* note 15, at 416.

As a general rule, Saudi Courts and regulations do not recognize the concept of conflict of laws. . . . Consequently, if a commercial contract provides for a governing law that is not Saudi law, a Saudi court that takes jurisdiction of the dispute under that contract will ignore the choice of law and apply Saudi law.

*Id.*

242. *Id.* at 418. Inasmuch as non-Saudi Arabian corporations are subject to Saudi Arabian law and policies, a non-Saudi Arabian individual doing business in Saudi Arabia would not attempt to resolve commercial disputes in Islamic Courts. *Id.* at 417.

243. *Id.* at 417; see Royal Decree No. M/46, *supra* note 22 (indicating that parties may not arbitrate unless prior approval has been received from Saudi Arabian government); MEMORANDUM ON ARBITRATION, *supra* note 166 (seeking public announcement that invalidates contract provisions that call for arbitration outside Saudi Arabia); Decree No. 58, *supra* note 21 (restricting rights of Saudi Arabian governmental agencies to submit to arbitration).

arbitration.<sup>244</sup> These methods, however, have to be conducted within Saudi Arabia, pursuant to Saudi Arabian law.<sup>245</sup>

### E. Saudi Arabia's Use of Arbitration

The Saudi Arabian government has historically rejected international arbitration models as methods of international commercial dispute resolution.<sup>246</sup> Saudi Arabian arbitration, however, is widely accepted and encouraged as a means of resolving domestic disputes.<sup>247</sup> Saudi Arabia believes that mutual reconciliation is the best method of dispute resolution and therefore generally prefers both negotiation and arbitration to litigation.<sup>248</sup>

Arbitration as a means of international dispute resolution has been restricted by the Saudi Arabian government.<sup>249</sup> In 1963, Saudi Arabia promulgated a law<sup>250</sup> that prohibited government agencies from submitting certain types of contract disputes to private arbitration.<sup>251</sup> In addition, in 1983, Saudi Arabia passed an arbitration regulation,<sup>252</sup> further restricting the Saudi

244. Turck, *supra* note 15, at 417.

245. *Id.*

246. See *supra* notes 20-23 (discussing Saudi Arabian restrictions on use of arbitration).

247. Pompeo, *supra* note 166, at 840.

248. *Id.* The Saudi Arabian standard dispute clause provides that "[a]ll disputes arising from the fulfillment of this Contract and which can not be *mutually resolved between the two parties* shall be referred to the Board of Grievances for its final judgment." *Id.* The reference to settlement "demonstrates a preference for pursuing expeditious negotiation as a first step to dispute resolution." *Id.* A contract containing a method of dispute resolution would be void in Saudi Arabia based on the principle of Gharar. Sloane, *supra* note 212, at 751; see *supra* notes 217-20 and accompanying text (discussing Gharar). Whether or not a future dispute will arise involves speculation and therefore should be unenforceable. *Id.* Saudi Arabia, however, has "adopted arbitration regulations which specify that arbitration clauses in contracts are enforceable." Karl, *supra* note 13, at 164; Royal Decree No. M/46, *supra* note 22.

249. See *supra* notes 20-23 and accompanying text (discussing Saudi Arabia's historical resistance to international arbitration).

250. Decree No. 58, *supra* note 21; Pompeo, *supra* note 166, at 841; Berge Setrakian, *Arbitration Under the Legal System of the Middle East Countries*, MIDDLE E. EXEC. REP., Dec. 1978, at 10. The Council of Ministers promulgated a decree permitting government agencies and corporations to submit to an arbitration providing non-Saudi Arabian jurisdiction only if the Saudi Arabian government determined, prior to the arbitration, that the arbitration would be to the government's advantage. *Id.* (citations omitted).

251. Pompeo, *supra* note 166, at 841.

252. Royal Decree No. M/46, *supra* note 22; Allam, *supra* note 23, at 9 (noting that

Arabian government's use of arbitration.<sup>253</sup> Until Saudi Arabia's adoption of the New York Convention, therefore, arbitration did not provide a viable option for the resolution of governmental disputes arising out of international commercial contracts.<sup>254</sup>

Private Saudi Arabian corporations, unlike the Saudi Arabian governmental agencies, are not barred from the international arbitration process.<sup>255</sup> In fact, arbitration as a means of dispute resolution between private parties contracting within Saudi Arabia is encouraged by the Saudi Arabian government.<sup>256</sup> Until Saudi Arabia's adoption of the New York Convention,<sup>257</sup> however, Saudi Arabian policy required non-domestic contractors submitting to arbitration within Saudi Arabia to follow the laws of Saudi Arabia.<sup>258</sup> Non-Saudi Arabian corporations were therefore resistant to Saudi Arabian arbitration for the same reason that they rejected Saudi Arabian litigation: the Saudi Arabian arbitral process favored the Saudi Arabian party.<sup>259</sup> Further, any non-Saudi Arabian award holder seeking enforcement against assets held within Saudi Arabia was required to submit the award to a Saudi Arabian court.<sup>260</sup> The Saudi Arabian court, applying Saudi Arabian law, would conduct its own investigation to determine whether to enforce the award.<sup>261</sup> Prior to the Saudi Arabian government's adoption of the New York Convention, Saudi Arabian courts generally refused to enforce non-Saudi Arabian arbitral awards.<sup>262</sup>

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Decree No. M/46 prohibited all government agency arbitration unless arbitration received approval of President of Council of Ministers prior to initiation).

253. Allam, *supra* note 23, at 9.

254. Pompeo, *supra* note 166, at 841; *see supra* notes 20-23 and accompanying text (discussing Saudi Arabian restrictions on government use of international arbitration).

255. Pompeo, *supra* note 166, at 841.

256. Turck, *supra* note 15, at 417.

257. *Saudis Accept*, *supra* note 2, at 26.

258. Turck, *supra* note 15, at 416.

259. *Id.* In addition,

[c]hoice of law provisions can also be deceptive in that Saudi courts and regulations do not usually recognize Western conflicts of laws principles. Thus, if a commercial contract states that [non-Saudi Arabian] law controls, the Saudi court that hears a dispute under that contract may disregard the provision and apply Saudi law instead.

Karl, *supra* note 13, at 167.

260. Karl, *supra* note 13, at 165.

261. *Id.*; Sloane, *supra* note 212, at 765.

262. Sloane, *supra* note 212, at 765; *see supra* note 15 and accompanying text (discussing Saudi Arabian court resolution in favor of Saudi Arabian party).

III. *ARTICLE V(2)(b) SHOULD BE MODIFIED BECAUSE IT ALLOWS A COUNTRY TO REFUSE ENFORCEMENT OF NON-DOMESTIC ARBITRAL AWARDS*

Article V(2) (b) of the New York Convention allows a country to adhere to the international arbitration process, while permitting it to reject any arbitral award that is contrary to its public policy.<sup>263</sup> The public policy defense set forth in Article V(2) (b) of the New York Convention thus permits the circumvention of the Convention's objective: the uniform enforcement of foreign arbitral awards.<sup>264</sup> As this circumvention is contrary to the goals of the international community, the New York Convention should be amended to remove Article V(2) (b), thus giving the Convention its intended effect.

A. *The New York Convention Does Not Require Saudi Arabia to Enforce Non-Domestic Arbitral Awards*

Saudi Arabia's adoption of the New York Convention remains consistent with its historical resistance to international arbitration.<sup>265</sup> The New York Convention provides a vehicle for the recognition of international commercial arbitral awards,<sup>266</sup> thus accomplishing Saudi Arabia's goal of modernizing its international dispute resolution methods.<sup>267</sup> At the same time, Article V(2) (b) of the New York Convention provides a safe harbor wherein Saudi Arabia does not have to recognize a non-Saudi Arabian arbitral award that is contrary to its public policy.<sup>268</sup> Article V(2) (b) allows Saudi Arabia to embrace the international community and its rules for international dispute resolution and enforcement, without rejecting its own history and public policy.<sup>269</sup> Thus, Article V(2) (b) of the New York Convention allows Saudi Arabia to accomplish both of its current needs: (1) the

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263. New York Convention, *supra* note 1, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

264. *See supra* notes 53-69 and accompanying text (discussing drafters' objectives in promulgating New York Convention).

265. *See supra* notes 246-62 and accompanying text (discussing Saudi Arabia's historical resistance to international arbitration).

266. *See supra* note 28 (outlining New York Convention).

267. *See supra* note 5 and accompanying text (discussing Saudi Arabian move to join international community).

268. New York Convention, *supra* note 1, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

269. *Id.*

need to modernize in the international community;<sup>270</sup> and (2) the need to maintain its history and religious beliefs.<sup>271</sup>

A problem arises for non-Saudi Arabian investors and contractors who choose to do business with Saudi Arabia. Saudi Arabia's adoption of the New York Convention is intended to give the international community security in commercial contracts with Saudi Arabia,<sup>272</sup> and confirmation that disputes will be adjudicated fairly.<sup>273</sup> In addition, the New York Convention is meant to assure non-Saudi Arabian investors and contractors that an arbitration award issued in any signatory jurisdiction will be enforced in Saudi Arabia.<sup>274</sup> Article V(2)(b) of the New York Convention, however, appears to nullify this assurance by permitting Saudi Arabia to reject all arbitral awards that are against its public policy.<sup>275</sup> As Saudi Arabian law and policy is diametrically opposed to the rules and laws of many member nations,<sup>276</sup> Saudi Arabian courts may find it easy to reject non-domestic arbitral awards pursuant to New York Convention Article V(2)(b).<sup>277</sup> In essence, Saudi Arabia may not be required to enforce any more non-domestic arbitral awards than it did prior to its 1994 accession to the New York Convention.<sup>278</sup>

Although Article V(2)(b) of the New York Convention permits Saudi Arabia to accomplish its dual goals of gaining needed acceptance by the international community and maintaining its

270. See *supra* notes 6-16 (commenting on Saudi Arabia's need to modernize its international dispute resolution methods in order to attract non-domestic investment).

271. See *supra* notes 246-62 (discussing Saudi Arabia's traditional resistance to international arbitration).

272. See *supra* note 5 and accompanying text (indicating that Saudi Arabia is strengthening its international policies to increase its attractiveness to non-domestic investors).

273. Strub, *supra* note 3, at 1036; see *supra* notes 24-25 and accompanying text (indicating that Saudi Arabia adopted the New York Convention to gain confidence of non-Saudi Arabian investors).

274. New York Convention, *supra* note 1, art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40; see *supra* notes 32-39 and accompanying text (discussing purpose of the New York Convention).

275. New York Convention, *supra* note 1, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42; see *supra* notes 110-65 and accompanying text (discussing New York Convention Article V(2)(b)).

276. See *supra* notes 211-33 and accompanying text (discussing differences between Saudi Arabia and Western commercial contracting).

277. New York Convention, *supra* note 1, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

278. See *supra* notes 246-62 and accompanying text (discussing Saudi Arabia's historical resistance to enforcement of non-Saudi Arabian arbitral awards).

historic law and religion, this provision defeats the purpose of the New York Convention as a whole.<sup>279</sup> The New York Convention was promulgated to give the international community a method for requiring signatories to enforce the arbitral awards of other member nations.<sup>280</sup> Article V(2)(b) affords member nations the ability to circumvent the statute and refuse to enforce the awards that they have consented to uphold.<sup>281</sup>

### B. Possible Modifications of Article V(2)(b) of the New York Convention

For rules of law to be effective, whether local or international, they must have the power of enforcement.<sup>282</sup> Article V(2)(b) of the New York Convention eviscerates the New York Convention's enforcement requirements,<sup>283</sup> leaving the New York Convention without force and effect. Therefore, the public policy provision must be revised to limit its ability to circumvent the purpose of the New York Convention.<sup>284</sup>

#### 1. Narrow Construction of the Public Policy Defense

Many countries, in an attempt to give the New York Convention fuller effect, have chosen to give Article V(2)(b) a narrow reading.<sup>285</sup> For example, the United States, Kuwait, and Syria

279. New York Convention, *supra* note 1, art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40; *see supra* notes 32-39 and accompanying text (discussing purpose of New York Convention).

280. New York Convention, *supra* note 1, art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40; *see supra* notes 32-39 and accompanying text (discussing purpose of New York Convention).

281. New York Convention, *supra* note 1, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42; *see supra* notes 110-65 and accompanying text (discussing application of Article V(2)(b) of New York Convention).

282. *See* Strub, *supra* note 3, at 1042 (discussing importance of effective arbitral award enforcement); *see supra* note 32 and accompanying text (indicating that successful international legislation requires effective enforcement).

283. New York Convention, *supra* note 1, art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40 (discussing New York Convention's enforcement requirements); *see supra* notes 110-12 and accompanying text (discussing member state's ability to void international arbitration awards under Article V(2)(b) of New York Convention).

284. *See supra* notes 32-39 and accompanying text (discussing purpose of New York Convention).

285. *See supra* notes 113-65 and accompanying text (indicating that several nations have given Article V defenses narrow readings in order to increase New York Convention's effectiveness); *see, e.g.*, Matlin, *supra* note 44, at 151 (indicating that U.S. courts enforce non-U.S. arbitral awards wherever possible).

have embraced the New York Convention,<sup>286</sup> subordinating their own rules of civil procedure to the New York Convention's policies.<sup>287</sup> In addition, U.S. courts have held that all New York Convention defenses should be given a narrow reading, to be effective only when award enforcement would violate the most fundamental notion of justice.<sup>288</sup> Saudi Arabia, with its need to gain the confidence of the international commercial community,<sup>289</sup> may choose to give the public policy defense set forth in Article V(2)(b) of the New York Convention a narrow reading.<sup>290</sup>

## 2. Amend the Convention's Public Policy Defense

Article V(2)(b) of the New York Convention could be amended to provide that a signatory, finding a foreign arbitral award contrary to its public policy, could seek nullification of the award by a third and neutral body such as the American Arbitration Association ("AAA").<sup>291</sup> Permitting a third party to make

286. New York Convention, *supra* note 1, 21 U.S.T. 2517, 330 U.N.T.S. 38; see *International Legal Framework*, *supra* note 1 (indicating dates that United States, Kuwait, and Syria acceded to New York Convention); see *supra* notes 110-65 and accompanying text (discussing United States, Kuwaiti, and Syrian acceptance and adherence to New York Convention).

287. *Haardt v. Binzagr*, No. CIV.A.H-83-5846, 1986 WL 14836, at \*1 (S.D. Tex. Dec. 19, 1986)

288. See *supra* notes 145-65 and accompanying text (discussing United States restrictions on New York Convention defenses).

289. See *supra* notes 15-26 and accompanying text (discussing international community's hesitation in contracting with Saudi Arabia).

290. New York Convention, *supra* note 1, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

291. See American Arbitration Association, *Questions & Answers*, 1. The American Arbitration Association is a U.S., non-profit organization which administers and develops arbitration rules and proceedings. *Id.*

Under its charter, the Association's functions are: to organize the knowledge of arbitration, to provide a basic literature, to promote instruction in the subject, to carry on the research necessary for this purpose and to create national, inter-American, and international systems of arbitration and to provide and maintain services and facilities therefor.

*Id.*; see also Lucius Root Eastman, Address at the Association's Labor-Management Dinner (Nov. 23, 1942), in AAA ARBITRATION BIBLIOGRAPHY forward (1954). Lucius Eastman, President of the American Arbitration Association from 1927-1933, and 1935-1937, states:

I think voluntary arbitration is to all of us less of a procedure than it is a symbol of the peace on earth and goodwill toward men which exists in the hearts of all Americans in this great struggle for freedom which now encompasses the world. Many of us believe that in arbitration we have a concept that stands out in opposition to war. We believe that a science of arbitration can be equally well organized and intelligently administered and that under the ban-

the determination as to the award's acceptability in the enforcing jurisdiction would provide Article V(2)(b) with its missing element of impartiality. Determination by a neutral third party would ensure that signatories would not use Article V(2)(b) as an excuse to refuse enforcement of non-domestic arbitral awards.

### 3. Remove the Convention's Public Policy Defense

Complete removal of New York Convention Article V(2)(b) would not leave a party opposing the enforcement of a foreign arbitral award without a remedy.<sup>292</sup> A party who believes that a non-domestic award is unjust may invoke the remaining provisions of New York Convention Article V to question the validity of the award.<sup>293</sup> Further, pursuant to the New York Convention, the party may move to have the award annulled or set aside in the country where it was rendered.<sup>294</sup> Absolute removal of Article V(2)(b) would eliminate an enforcing nation's arbitrary denial of foreign arbitral awards. This elimination would provide the international community with security that: (1) an arbitral award represents the end of the dispute resolution process; and (2) enforcement will be effectuated by all member nations.

## CONCLUSION

Time may reveal that Saudi Arabia will adhere to the terms of the New York Convention without utilizing Article V(2)(b) to circumvent the requirement that it recognize and enforce non-Saudi Arabian arbitral awards. Nonetheless, Saudi Arabia can ef-

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ner of arbitration the scattered forced of those who strive for peace can be united. But to be effective, the concept of voluntary arbitration must be vitalized. We must organize it scientifically. We must through education and actual performance bring its potential values home to every American and through him to the world of which he is becoming so large a part.

*Id.*

292. See Lamm, *supra* note 37, at 278 (discussing remedies available to parties opposing arbitral award enforcement).

293. New York Convention, *supra* note 1, art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 42; see *supra* note 28 and accompanying text (listing other Article V defenses to enforcement of non-domestic arbitration awards).

294. Lamm, *supra* note 37, at 278. "As opposed to simply opposing enforcement, the losing party to an arbitration can also take the initiative to have the award annulled or set aside in the country where it was rendered." *Id.* at 278.

fectively nullify the terms of the New York Convention by invoking Article V(2)(b). This scenario evidences that Article V(2)(b) needs to be either modified or removed from the New York Convention. Modification or removal of Article V(2)(b) will provide the international community with a set of rules requiring New York Convention signatories to enforce all foreign arbitral awards, which is the true purpose of the Convention.