SHARIAH AND THE INTERNATIONAL TREATIES ON COMMERCIAL DISPUTE SETTLEMENTS: AN APPRAISAL

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ABSTRACT

The International treaties on commercial dispute resolution have been very helpful to adjudicating complex commercial disputes with international elements. This paper aims to highlight some critical issues of the International Commercial Conventions and treaties on settlement of disputes related to commercial transactions in developing economies. The ratification of those conventions was not an easy task due to various concerns related to sovereignty and national interests of the participating nations. This paper looks into the popular New York Convention and CISD and their ratifications by developing countries, especially those that regarded Shariah as their primary source of law. A library-based research method has been used to obtain information from books, journal articles, and published and unpublished papers and analyze them accordingly. The paper highlights the fact that Shariah has no objection in accepting or ratifying a treaty, which is meant for the wellbeing of the society. This is however, should not contradict with the general principles of Shariah law. The findings reveal that despite the ratification of the above-mentioned conventions by developing nations, issues related to countries national laws and sovereignty are still not addressed in practical terms. The refusal of the arbitration penal in the case of Kingdom of Saudi Arabia V. Aramco Oil Company and its denial to accepting the Shariah law as the Governing law despite been stipulated, has raised many concerns of the perfection of international dispute settlement mechanisms involving Shariah law. Furthermore, the experience was similar in the case of Shamil Bank of Bahrain EC v Beximco Phamaceticals Ltd, where

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the Shariah law was sidelined even though it was the initial governing law of the contract.

Keywords: *international commercial conventions, developing countries, Shariah Law*

INTRODUCTION

The international commercial dispute settlement mechanisms have been in place to help the international business community settle the potential commercial disputes arising from international businesses and multinational contracts. However, these mechanisms have been deeply criticized as being essentially a western import. In addition to the couple of issues related to the interpretation of international business agreements and commercial activities, language disparities, culture, religious sanctions and laws tend to evoke conflicts and disagreements between international business partners. European countries embarked several conventions to harmonize the law of international commerce in the region, which were opened for the purpose of ratification in respect of any interested countries. Initially, such conventions were widely criticized by the European community within the European continent as well as other countries around the world. However, due to the remarkable progression in international trade disputes exceeding states borders of the world economies and the continuing interconnected globalized world, many countries were indirectly required to ratify the international conventions for the purposes of protecting their public interests and policies, however, this ratification has so much to do with various challenges.

People in the twentieth century have witnessed vibrant expansion of international trade and commercial activities across the globe. Various Economies and International experts have come to understand that while commercial relationships are expanding at the separate level to various businesses then government is obliged to provide rules and regulations as well as various platforms which would certainly inspire and nurture these vibrant international transactions. Similar to litigation, rigid arbitration may sometimes end business activities and commercial relationships. Therefore, traditionally there are various cultural means of private dispute resolution in many societies; this however executed through negotiation, conciliation and also mediation. Some jurisdictions have already provided a legal environment since then for dispute settlement, which includes commercial dispute as well. The emergence of the current internationally recognised contracts, financial papers, insurance, trade documentation and cross border trade relationship

has created a new paradigm of international jurisprudence, which made the form of trade dispute adjudicated based on right and power and becomes more feasible option across the globe.

The New York convention on the recognition and enforcement of foreign awards has transformed the enforcement of international arbitral awards to become more candid in many countries and becomes even better than many foreign or local judgments. Many companies might relate this to various issues including the preferences of arbitration for commercial disputes, which is actually favoured by many companies over litigation.

The significant responses of various government agencies and the stake holders for eminent consistency and reliable international business laws have very rigorous economic reasons. Today we are leaving in a hectic open global market's economy, investors and businesses across the globe need to be protected and make the available laws transparent so that business owners make proper resolutions and make choices that balance the risks against their business return and expansion. Therefore, the transparency and the certainty of the legal system that is governing the transaction is one of the most important factors pertaining to the business risk, profitability, safety and other related issues. Based on these observations, many questions have been raised on what form of dispute resolutions available for disputed transactions with international elements and whether the local courts enforce an arbitral award or foreign judgments. Therefore, a number of economies have passed laws introducing the UNCITRAL model law for commercial arbitration with foreign elements, and also the ICSID been adopted by many economies as well for settlement of investment disputes between states, and also the convention on international sale of goods which was also given attention by the international community in other to allow more certainty to the international contracts. This paper aims to look into the international commercial conventions and treaties used for the international commercial dispute's settlement including the execution of international arbitral awards and its significance in response to Shariah law, and the related issues concerning Islamic jurisdictions.

THE GCC STATE'S ADOPTION OF NEW YORK CONVENTION 1958

The New York Convention, adopted at diplomatic conference on the 10th of June 1958, organised by the United Nations earlier to the creation of United Nations Commission on International Trade Law (UNCITRAL) and its campaigning activities related to the convention is an integral part of the commission's plan. In addition to that, this important convention has been recognised as a frontier instrument for foreign arbitration and its provisions allowed the state courts

of the disputing parties to give effect to an agreement for arbitration and to also honour and enforce arbitration awards provided by other jurisdictions, subject to some particular limited exclusions. The central obligation of the parties is to recognise the award, that's been delivered within the scheme, make them binding and enforce them under the lex fori. The parties have the autonomy to determine the procedural apparatuses that may be followed since the Convention does not prescribe any requirement for that.[1]

The Convention entered into force on the 7th of June 1959. As of December 14, 2015, most countries have adopted the New York Convention 156 of the 193 United Nations Member States.[2] In 1993, the Kingdom of Saudi Arabia agreed to the New York Convention and appointed the *"Diwan Al Mazalim"* as eligible court for the execution of the award made out of Saudi Arabia (Hamid, E. A. A. & El-Ahdab, J., 2011: 567-568). Saudi government did not hold any reservations in regard to the nature of the disputes settled by the award and it has not required that it should be a commercial dispute. The country has stipulated the limitation of the implementation of the Convention, and among the procedure applicable to the *"Diwan Al Mazalim"* are two criteria, which must be fulfilled when the request for enforcement examined the reciprocity and compliance with the Shariah law (Hamid, E. A. A. & El-Ahdab, J., 2011: 568-569).

Kuwait is also a party to the New York Convention, the country acceded to the Convention subject to a reservation that the enforcement could only be applied to arbitration made in the premises of the contracting jurisdictions (Samir Saleh, 2006: 437-437). However, most of the legal systems under Syria, Libya, Bahrain, Lebanon, Egypt and Jordan have adopted either in their domestic statutes or by international conventions or bilateral treaties a system of external control over a foreign verdict (*Ibid*., 439-440). On the contrary, the ratification of the International Conventions in the United Arab Emirates has given legal priority over domestic laws. The UAE code of civil procedure of 1992 article 238 highlighted that the priority of international conventions over some particular articles set out in the United Arab Emirates law of civil procedure, it was also indicated in the article 22 of the United Arab Emirates civil code of 1985 which indicated that "the provisions of the forgoing Articles shall not apply in cases where there is a contrary provision in a special law or an International Convention in force in the state" (Briggs, R., 2003: 107-109).

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1 New York Convention 1958, accessed (2021)

2 Parties to the New York Convention, http://www.newyorkconvention.org/countries, accessed on 17 August 2019.

It is important to figure out that Bahrain's consent to the New York Convention was incorporated with two standard reservations adopted by most GCC countries: reciprocity and public order. However, in its implementing legislation, Bahrain affirmed that it would execute New York Convention awards "as far as possible." One can ask: what does that mean in legal terms? In less than a glowing support, the US Commerce Department recommends to business people that Bahrain's enforcement of foreign arbitration awards is "less challenging than in most other Gulf Cooperation Council states" (Arthur J Gemmel, 2006: 191).

The acceptance of the New York convention enhances reciprocity issues. The convention indicates that a jurisdiction may become a party to the convention and at the same time limits its application to awards made in other state parties. By given broad acceptance of the New York Convention, however, the reciprocity reservation is dropping its relevance. However, many Muslims states have treated international arbitral awards like judgments of other state's courts. Therefore, those awards were habitually subjected to the reciprocity requirements applicable to such judgments. Thus, for example, a Saudi court denied enforcement of an arbitral award delivered by the court in the United Kingdom, simply because the United Kingdom's courts do not enforce Saudi judicial decisions as well. The large collective consent to the New York Convention has prevented this concern, consequently allowing the enforcement of foreign arbitral awards in Saudi Arabia as well as other places in the world (W. Michael Reisman, 2002: 231-233).

Despite the massive signatories of Muslim nations to the New York convention for the enforcement of arbitral award, the enforcement of the arbitral award is still very challenging due to the indemnity related to public policy, this exemption might become a huddle for the enforcement of arbitration award in the Muslim member countries. The convention's exemption made it possible to the signatories to reject an enforcement of the award if the award violated their public interest. And every decision that might have conflicted with Shariah law is regarded as public interest and policy violation and therefore might not be enforced in such countries. One of the examples of the public policy reservation ware two countries who actually used most often, the Kingdom of Saudi Arabia and Iran are always raising the issue of which these countries refused to recognise various awards based on this particular reservation (Geoge Khookaz, 2017: 11-12). Lack of understanding of Shariah principles by the western world has courses a lot of different interpretation on what the public policy means in the Muslim nations. Therefore, it is obvious that the arbitral award made in the United Kingdom for instance might not be considering any public interest regarded by Shariah to be implemented in Saudi

Arabia or any other middle Eastern state or any other Muslim nation, this is due to the fact that the arbitrator doesn't have any exposure to the Shariah law and has no any experience what so ever in dealing with the Shariah principles. Likewise, the same arbitral award sent to the western countries by a Middle Eastern state might not be understood or recognised as a valid arbitral award based on western tradition and practices (Geoge Khookaz, 2017: 12-13). Therefore, the challenges are still there but the massive acceptance to the New York convention has facilitated a lot in avoiding many challenges related to this particular convention, but the challenges are still there to stay.

The failure of the New York convention to define the term "public policy" has causes a lot of controversies in the implementation of foreign arbitral awards in the Muslim world. This has resulted in a fact that many *Shariah* practicing nations where side-lined internationally and this has resulted in creating a gab and misconception in understanding and differentiating between the system based on Shariah and the International system. The aperture between the two systems has gone beyond the public policy issues, but reached to the issue of avoiding the Shariah law in totality and adopting the western laws instead. Most of the cases involved the Shariah countries in the middle of the twentieth century have avoided the application of Shariah law in the dispute. Three main cases are famous in the Muslim world, first the case of Petroleum development trucial coasts ltd. V. Sheikh of abu Dhabi, in this case the arbitrator accepts the applicability of the Shariah domestic law of Abu Dhabi in resolving the dispute, however, the arbitrator undermined its validity on the ground that, it will become laughable to advocate that this primitive region has any recognised law that is appropriate to the modern commercial disputes resolution (*Ibid*., 11-12).

Adoption of ICSID Convention 1965

The Convention on the Settlement of Investment Disputes Between States and Nationals of other States was established in March 1965, by the International Bank for Reconstruction and development which created the International Centre for Settlement and of Investment Disputes between states and nationals of other states ICISD. The Convention came into force on October 1965 and was ratified by twenty different counties at the time. But recently, the Convention has almost One Hundred and Sixty-three member States.[3] The

[3] International Convention on settlement of investment Dispute https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx, accessed on 14 March 2019.

primary purpose of ICSID is to provide facilities for reconciliation and arbitration of international investment disputes. Hence, the Convention sought to remove major obstructions to allow free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. ICSID was created by the Convention as an impartial international forum providing facilities for the resolution of legal disputes between eligible parties, through reconciliation or arbitration procedures. Recourse to the ICSID facilities is always subjected to the parties' consent. Today, ICSID is considered to be one of the leading International Arbitration Institutions dedicated to investor-state dispute settlement (*Ibid*).

The kingdom of Saudi Arabia ratified this Convention on 16 April 1980 and then later came into force in the country on the 7th June,1980 (Hamid, E. A. A. & El-Ahdab, J., 2011: 564-565). However, the country made two reservations at the time of ratification concerning matters that the country refused to refer to the arbitration at that moment. Those matters include: petroleum matters and any matter relating to national sovereignty. Some scholars argued that the absence of publication of the ratification of this convention in the official Gazette *"Umm Al Qura"* suspended the legal effect of the convention, because in some acts, it was stipulated that their provision will only come into force after publication in the official Gazette, but such provisions are not available during the ratification of this convention and that might be problematic and risk-averse for a Saudi party in the court of law during the process of litigation (*Ibid*).

The state of Egypt has also ratified to the convention that came into force on June 02, 1972 and the ratification was approved by the decree-law No. 90 of November 7th 1971 (off. Gaz. November 11,1971). The convention entered into force for Syria on February 24, 2006. The ICSID Convention entered into force for the United Arab Emirates on January 22, 1982 without any reservation. The Convention was also ratified by Pakistan on October 15, 1966. For Malaysia, it was on October 14, 1966. The Convention also entered into force for Nigeria on October 14, 1966. Decree No. 49 of 1967, International Centre for Settlement of Investment Disputes (Off. Gaz. Extr. 105, Vol. 54, No.30, 1967, p.A255).[4] In summary, the majority Muslim countries ratified to the convention.

[4] List of member states https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx, accessed on 17 July 2019.

MAIN REASONS BEHIND THE RATIFICATION OF COMMERCIAL CONVENTIONS BY MUSLIMS COUNTRIES

It may have been the realization of certain conclusions that motivated many Muslim countries to ratify to above conventions. Most of the Muslim countries are blessed with a large amount of wealth which needs to be uncovered for public benefit, but unfortunately most of those countries do not have the required technology or sophisticated processes that can help extract this wealth from their natural resources for utilization and revenue generation. Therefore, Muslim countries were initially in need to engage with some western and international partners in order to achieve exploration goals. A good example is petroleum exploration, it is a fact that many developing countries either lack indigenous expertise in petroleum exploration, or do not have enough risk capital, or both, and therefore must rely on foreign investors to exploit their petroleum resources. Specifically, it may well be the case that the limited scope of exploration is the direct result of various factors that serve to reduce the net returns to foreign capital that is otherwise willing to be invested in such activity (Broadman, H. G., 1991: 51).

After the commencement of exploration exercises a given country will have the need to sell the subject matter (business plan) in the global market, where differences in law, culture, religious injunctions, language and others will probably instigate disputes between the parties. Furthermore, many Muslims states emerged from colonialism almost completely dependent on the export of a single commodity, i.e., oil, but found themselves saddled with long-term concessions to foreign investor, which these states regarded as an unwelcome legacy.

During the same period, the West grew increasingly dependent on Middle Eastern oil, and the economic stability of the international community rested on the maintenance of "a huge and complex international legal infrastructure, for exploration, transportation and distribution of petroleum, and for resolving disputes concerning these activities" (W. Michael Reisman, 2002: 231-233). Many developing states felt that they could not abide by the international dispute settlement system, one whose genesis not come about with their participation and whose values were felt to be inconsistent with their own cultural and legal traditions. These states consequently began to challenge the existing international legal infrastructure. Naturally, developing states disliked, in particular, the international law of expropriation, which limited how states could deal with foreign-investor authority to their most vital natural resources (Brower, C. N., & Sharpe, J. K., 2003: 3). Furthermore, the Muslim domestic law had been rejected in many cases; therefore, there was no choice for a

Muslim country except to ratify the rules set out by the relevant convention so as to restore harmony with their partners.

The number of controversial disputes occurred in contractual obligations between Muslim developing states and European countries are huge in number; here is one of the most important cases in this matter, the *Kingdom of Saudi Arabia V. Aramco Oil Company:* The king of Saudi Arabia on the 29th of May, 1993 has entered into a contract with the Standard Oil Company of California (Socal) this contract was based on Oil exploration in the country and consequently this contract has awarded (Socal) a special concession agreement which was signed by the government of Saudi Arabia, the concession would last for the duration of sixty years in Saudi Arabian eastern region. The company organizes Cooperation California-Arabian Standard Oil Company (Casoc) for the purpose of enterprise and appointed to its rights and obligations under the concession agreement, which was approved by the Government of Saudi Arabia. Later the company modified its name to become Arabian American Company (Aramco). Based on the concession agreement, the company specified that during the drilling and survey exercises, the company would only be rewarded and enjoyed compensation when the oil was discovered in large amounts (Khaled Mohammed Al-Jumah, 2002: 221).

However, with an increased production of oil in Aramco and the overall amount paid by the company to the Saudi Arabian Government was witnessing a rapid rise, which caused the local oil market to slowdown. As a result, the company stated to put its oil in the international markets. The firm entered into another deal for the sale of crude oil and for the sale of refined products with Saudi Government, which included transportation abroad. However, the company did not own or charter tankers, preferring instead to conclude the appropriate contracts for carriage based on the most part of FOB[5] conditions (Khaled Mohammed Al-Jumah, 2002: 221).

The dispute occurred in 1954, when the firm comes to know that the Saudi Government signed a concession agreement with Onassis, granting a special right to the company and the company has given privilege to shipping and transporting oil products for a thirty year period in the kingdom, and also lowed to form a private company under the Saudi Arabia Maritime Tankers Company Ltd. (Satco). The contract contained that Satco should provide

[5] FOB means F*ree on Board: Is a* trade term requiring the seller to deliver goods on board a vessel designated by the buyer. The seller fulfils his obligations to deliver when the goods have passed over the ship's rail. When used in trade terms, the word "free" means the seller has an obligation to deliver goods to a named place for transfer to a carrier.

tankers with a minimum tonnage, and obliged to establish a maritime school in Jeddah and employ on its tankers the graduates of that school to transport free of charge fifty thousand tons of petrol from Saudi ports on the Arabian Golf to various other Saudi Arabian ports. Satco undertook to compensate the Saudi Government for each single ton transported overseas as well as all taxes fixed by the Saudi Port Authorities (Hamid, E. A. A. & El-Ahdab, J., 2011: 567-568).

When the Saudi Government requested Aramco Company to comply with the provisions of a Royal Decree under the Onassis Agreement which came into force with effect of law, the Company refused to comply, and stated that the concession which had been given to it since 1933 entitle it to choose unilaterally the necessary means of transport including foreign tankers. The Saudi Government then resorted to arbitration to solve the dispute. Aramco Company agreed to the option and arbitration agreement was entered on 23rd February, 1955 which provided in Article 4 that the Arbitral tribunal would settle the dispute in compliance with Saudi Law indicated in the agreement namely (the Shariah according to the *Hanbali* doctrine) if the disputed questions were of the jurisdiction of Saudi Arabia, and it would also be incompliance with any law if the disputed questions were not of such jurisdiction (*Ibid*., 559-570).

However, despite this agreement, Aramco challenged the Arbitral tribunal on the basis of what sort of Saudi law should be implemented in the award. The Company also argued that the 1933 concession agreement stipulates that the Law of the contracting parties should be implemented and the contract was an international agreement whereas and the Saudi law was a domestic law of the country. Therefore, Arbitral tribunal should only apply the general principle of law recognized by developed countries and defined in article 38 of the statutes of International Court of Justice (*Ibid*., 570-571). Saudi Government replied that in view of the international character of the contract it has no intention to modify its agreement with Aramco or to deprive Aramco of its rights recognized in such agreement and that the Royal Decree in question was only to regulate petroleum transport to other countries. And this regulation did comply with the concession contract signed in 1933, Shariah Law, i.e. the "General principles recognized in civilized countries and International law" (*Ibid*., 571-572).

The arbitral tribunal held that the applicable law is Saudi law but it was not sufficient and that it should be completed by other sources of law as follows: The Royal king who reserves the power to issue laws necessary for the protection of public interest, has provided the rules of a concession system and notably those of oil concession system, based on concessions contracts

and conceived in order not to violate the provisions of the Shariah law (*Ibid*., 572-574). The Arbitral tribunal held that the Aramco Company had acquired right in the concession contract and that the Saudi Government could not carry away these rights and grant them to a third party. The rights acquired was on the basic principle of international legal system and most civilized countries, the tribunal also added that the Saudi Government should not abolish acquired rights in a concession contract by granting them all or in a new concession contract (*Ibid.*, 572-574).

ANALYSIS OF COMMERCIAL DISPUTE INVOLVING SHARIAH LAW

In the modern-day legal system, Shariah law is used as a source of law in combination with the civil and common law traditions, this is according to jurisdiction. The Shariah concept in the Muslim world is quite broader than the Western view of law. This is because it is adopted in every day today life, it affected all the governing issues, family relations, hygiene, commercial activities as well as dispute resolutions, arbitration mechanisms and so on. Arbitration is a long-established religious way of dispute resolution across the Middle East and the Muslim world. Shariah uses the word *al-tahkim* to represent arbitration, which was derived from the word *Hakkama* which means to turn back from doing wrong. The appointment of an arbitrator required to be an upright person who is well known and an expert in dispute resolution. Once the arbitrator has agreed to arbitrate the parties should be obliged to provide security for compliance purposes. Arabs in the past don't have religion or laws to observe their day-to-day lives, but they used to have arbitrators to resolve dispute (Marria Bahtti, 2019: 53-55).

The earlier arbitration practices were adopted on conflicts related to blood, grazing or inheritance as Arabs used to appoint an arbitrator who carried the characters of morality, honesty, wisdom and sometimes old aged and experienced arbitrator. The concept of the contemporary arbitration is believed to have driven from the earlier practices such as the concept of instigating a kind of compromise between the conflicting parties other than going straight to a binding and enforceable decision. This has shown that the traditional justice has aimed at creating harmony among the parties and resolve disputes for the parties to continue with their normal paths of businesses (*Ibid*).

In Shariah law, the concept of foreign law or party is not based on the nationality, but it is based on religion, the Muslim community means the followers of Prophet Muhammad peace be upon him and those who obeyed him on what was revealed to him by the Almighty Allah. Therefore, an

international party to a contract is not a foreign national but a party who is not belongs to the society (Samir Saleh, 2006: 84-85). The classical jurists distinguished the Muslims community from others by identification of territories with "*Dar'al-Islam" and "Dar'al-Harb"*. Dar al-Islam means the Islamic territory which contains three different residents: (1) Muslims (2) Ahl-dhimma (3) Musta'mans. Muslims are the first class citizens of Dar al-Islam. The dhimmis have significant freedom in matters of religious practices and social tradition, they are under the protection of Muslims if they reside in *Dar'al-islam* and pay a specific compliment called *Jizya*, couple with the polite standpoint concerning the religion of Islam.

Musta'man means a non-Muslim who entered the Muslim territory based on the permission of the authorities or the permission of any Muslim adult (a business Partner). Shariah is the prevailing law within the *Dar al-Islam,* although there is no reported involvement of Shariah where it restricted the contracts of dhimmis or *Musta'mans* amongst them even if the contracts are against the Shariah principles, except if it is affecting the Muslim community then the public interest may require the constraint. *Dar al-harb* is regarded as a territory that is not secured for Muslims to live (Muḥammad Ra'fat 'Uthmān & Miṣbāḥ al-Mutawakkal Sayyid al-Ḥammād, 1987: 292-293). Or the country which has openly declared war on Muslim nations, the issue of whether the Shariah has jurisdiction in *Dar al-harb* or not is a disputed issue among the Islamic scholars, Imam Abu *Hanifah* holds the opinion that no legal action will be enforced in *Dar-Al-harb*, because the leader does not have any right to enforce Shariah in *Dar Al-harb.* But the majority of jurists allowed it (Maḥmūd 'Abd al-Fattāḥ Maḥmūd Yūsuf, 1994: 217-218).

However, there is an element of disparity among the Islamic jurists on the issues related to adopting Islamic personal statutes laws on foreign individuals. The schools of jurisprudence are of the opinion that it is better to for foreigners to bring their suits before an authority of their own sect, who will deal with their disputes in accordance with their own faith and by applying their own religious or whatever suitable laws for them (*Ibid*.). However, there is disagreement on whether a Muslim judge is allowed to attain to cases brought to him by a foreign litigant. Based on *Shafi'i* School and the established view of *Hanbali* School the expert is obliged to accept and proceed with the case even if it is requested by only one party involved in the litigation process. This opinion is based on the Qur'an verse: "*Judge between them in accordance with that God has revealed and do not follow their inclinations*".[6] Based on this verse, the two schools understand that if one of the contracting parties brought the case

[6] Al-Qur'an, 4-42.

to the *Shariah* judge then it is enough to be accepted and decided according to the Shariah (al-Shāfi'ī, Muḥammad bin Idrīs, 1978: 393).

However, the Maliki School reserved the opinion that if both parties request that their case should be decided by a Shariah judge, then the judge has the choice to accept or refuse the case. If his choice is positive, then he is obliged to decide the case based on Shariah law alone. If he does agree to accept it, he is then obliged to enforce Islamic law on those concerned.[7] However, if only one of the disputing parties requested a Shariah judgement but the other party refuses, then the Shariah judge should not entertain the case in a Shariah court. This juristic view has actually given a room for other alternative ways for resolving disputes in a case of conflict of laws involving Shariah. In commercial contracts however, Muslims are required to follow the rules of Shariah law wherever they are, i.e., it is identical if they found themselves *in Dar al-Islam* or *Dar al-Harb*. The question is whether a Muslim party can accept the law of Dar al-harb in order to settle dispute arising between him and *Harbi*. In general, any law other than the Shariah law will not be binding on Muslims except in a situation where there is a necessity. The concept of necessity in Islam has a general connotation which implies that everything that the Qur'an and Sunnah have prohibited becomes permissible in cases where a persistent inevitability exists.

This has been reiterated throughout the Qur'an. The Almighty Allah has said: "But whoever is forced by necessity neither desiring it nor transgressing (its limit): there is no sin upon him, indeed, Allah is forgiving and merciful."[8] It is generally accepted among the Islamic jurists that the necessity renders the forbidden permissible. Furthermore, the Islamic jurists have demonstrated the opinion that the change is wide and Islam is opened to the adoption of anything of value of whichever source so long as it does not violate the text of the Qur'anic text as well as the prophet traditions. The prophet (peace be upon him) said, as narrated in a hadith which is unanimously held to be authentic and highlights this principle clearly: "It is but for the perfecting of morals that I have been sent to you" (al-Bayḥaqī, 1989: 192-193) means not only affirming all virtues that had been practiced before him, but also including them as an inseparable part of his mission.

The Prophet peace be upon him also said: "The believer is always searching after wisdom, whenever he may find it; it is for him to get to it" (al-Tirmidhī,

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7 Mālik bin Ānas (1924). *al-Mudawwanah al-Kubrā*, vol. 4. Bayrūt: Dār al-Kutub al-'Ilmiyyah, narrated by Sahnun ibn Sa'id al-Tanukhi from Abdurrahman ibn Qasim, 161.

8 Al-Qur'an, 2-173.

1980: 31-33). There is issue of public interest (*Maslahah*), which is also discussed by Muslim scholars in this regard. It was demonstrated that the Shariah's objective is to achieve people's comfort which is described as public interest (*Maslahah*) Public interest in Islam is seen as seeking or promoting something which is good and beneficial, or removing something which is injurious or damaging. The objective of Shariah is to protect and promote public interest by confirming the protection of the five known items: *religion, life*, *intellect, lineage,* and *property*. Therefore, any law or treaty or provision which promote destruction and injuries to these five items of *maqasid*, then it is considered to be unsafe and unjust and not acceptable. Whereas, if a law or treaty or activity which endeavoured to protecting and preserving the above five items then it is permissible and allowed in Islam. Thus, Islamic business ethics evaluates all business decisions and activities based on the criteria of interest of the public. Therefore, according to this standpoint, it is permissible to admit that commercial related laws of other nations could be accepted by a Muslim country once they are aligned with the general principles of Shariah Law and aimed at preserving and protecting the five mentioned items. Furthermore, the prophet peace be upon him has also entered into many agreements and treaties with other nations in other to attain public interest and the wellbeing of the Muslim society in his time.

The general recognition and adoption of arbitration and foreign judgements in the middle East today could be traced to an old practice that exist in the region especially in countries such as the United Arab Emirates and Bahrain, it is a very long-term customary exercise in these countries to undertake and resolve dispute based on arbitration principles in the Islamic societies. However, the modern arbitration practices maintained a notable wobbly record in the Islamic societies, the current modus operandi of arbitration in the Middle East has so much differences from the arbitration practiced in the western societies, this is however the Middle Eastern arbitration was first understood through the religion of Islam from the early practices, as well as the notable impact of the religion in the region politically, legally and socially which plays a very important role in influencing the concept and the practices of arbitration in the Middle East. Therefore, understanding the arbitration practices in the Middle East will be a very promising concept to understanding the arbitration in other Muslim communities out of Middle East (Geoge Khookaz, 2017: 8-9).

The arbitration in the middle east has been effective and practiced for a very long time with the intention to preserve and protect the interest of the Muslim community, the tribes and the individual contracting and disputing parties. Therefore, the collective dispute which has much impact on the community is given more concern than a dispute which affect a tribe or family, then the

family and tribe dispute has more importance than the individual disputes. This practice aimed at preserving the community's peaceful coexistence and maintain the societal harmony before preserving individual cases. The history of dispute resolution in the west has so much to do with individual contracts, groups and nations, the dispute resolution structure geared towards a fast solution to the dispute for better economic development and public services. However, the history of instigating arbitration in the Middle East has to do with the principle of sulh, or mediation for conflict resolution, this has started with tribal conflict such as the conflict of placing the stone on ka'abah in which the prophet Muhammad was appointed as the mediator expert to mediate between all the tribes in conflict. The concept of *Sulh* mediation and *Tahkim* arbitration was later developed to include business related disputes and as a tool to the modern International commercial dispute settlement, therefore alternative dispute resolution instruments were developed for divers' purposes in the west as well as in the Middle East and other Muslim countries across the globe (*Ibid*., 9-10).

The Islamic conceptual understanding of *Sulh* is relatively similar to the western conception of mediation, where mostly the dispute ends between the two contracting parties without the necessary involvement of a third party in resolving the case. Therefore, the two concepts of the alternative dispute resolution could be adopted before reaching out to arbitration. Arbitration is a western concept which has similar connotation with the Islamic concept *Tahkim,* tahkim requires the third-party involvement and could be used to resolve disputes out of court. Most of the International commercial disputes are adjudicated based on arbitration in which the international conventions discussed detail implementations of its awards in another contracting jurisdiction. Tahkim could be considered as earlier Islamic concept which has been confirmed by the religion of Islam and supported by the Sunnah of Prophet Muhammad peace be upon him (*Ibid*., 9-10). However, in the Islamic looking into the idea of Tahkim in Islam, the issue of the award enforcement is relatively relied on the disputing parties to accept the enforcement of not to accept, the acceptance is generally relied on the integrity of the *hakam* or the arbitrator (*Ibid*., 12).

Muslims were encouraged to resort to *tahkim* or arbitration in their day to day activities and use it to resolve dissatisfactions and disagreements. Many *muhakkims* and arbitrators emerge within Muslim societies across the history. The prophet peace be upon was involved in various *tahkim* or arbitration, as well as *sulh* and other agreements out of court. One of the good examples was *al-hudaibiya* dispute settlement, during the settlement exercises, a treaty was written to dissolve the issues between the Prophet and his tribe *Quraish*.

The treaty requires the Prophet Muhammad to leave Makkah after coming to perform umrah, the treaty was represented by the *Suhail* bin amr from the *Quraish* side, while Aliyu may Allah be pleased with him was representing the prophet side and the provisions of the agreement was drafted by the two representatives in which the prophet accepted the treaties and went back to Madinah without performing the Umrah, and abide by the decision made by the two representatives (*Ibid*., 12).

During the *umawi* era of Islamic history, Muawiya was the first Muslim ruler to develop an innovative judicial system which considered the endorsement of the Shariah judge before the enforcement of the *Tahkim* resolution. This exercise has differentiated *Tahkim* from the practices of arbitration in the western world. Other differences were also realised between the western application of arbitration and the Islamic practices of *Tahkim*, for instance party's autonomy related to validity and enforcement of the arbitral award was maintained by Shariah, while the western experience doesn't regard this in the enforcement and validity of the arbitral award (*Ibid*., 11-12).

CONCLUSION

Once an International commercial dispute takes place parties normally run to save their manded using possible ways, laws, and jurisdictions to achieve their aims. The jurisdictional problem is one of the most crucial issues in an international trade dispute. Usually, the court of the plaintiff's jurisdiction may have difficulties to enforcing a foreign breaching party to abide by their verdict. Likewise, the courts of the breaching party are most likely to favour their nationals other than the foreign parties. Therefore, foreigners in other jurisdictions are most likely to be denied justice for their respective international trade related disputes based on nationality issues. In other to avoid such illegality, the International Trade partners joined the arbitration procedure where third party will be making a decision in other to achieve justice. This has helped in recognizing the importance of the international arbitration as a mechanism to facilitate settlement of the international commercial disputes. A good number of nations have agreed to come together and drafted the initial Convention on recognition and Enforcement of Foreign Awards with was known as New York convention in the year 1958.

This paper highlighted the importance of these commercial conventions and their role in the making of the harmonious system of laws that can help adjudicate and arbitrate disputes between international parties involving parties in the developing and developed nations, with mutual respect of

each domestic laws and regulations when it comes to the arbitration and the enforcement of international awards. The paper has explicitly encouraged developing economies to be part of the international treaties as one of the ways to eliminating disputes with international elements across the globe. The ratification of International Conventions may be one of the solutions, however, it is advised that the Shariah law should be given a precedence over other laws once the Shariah is selected by a given country or party to be chosen as the law to govern the international related disputes. It is important to underline the fact that the case of ARAMCO is not the only case where Shariah has been prostrated and side-lined in an international commercial dispute settlement. In *Shamil Bank of Bahrain EC v Beximco pharmaceuticals Ltd*[9] the court verdict showed that there was no possibility to allow Shariah law for the resolution of disputes arising from that particular international contract. It is therefore the conclusion of this paper that this trend is clearly against the spirit of the interest of developing nations and governments and their citizens across the world, justice and fairness is to be observed in international commercial dispute resolutions involving developing sovereign nations and their counterparts who are parties to the international treaties and conventions meant for amicable settlement of International Disputes across the globe.

International commercial transactions and the related dispute resolution mechanisms particularly the international arbitration and other non-litigation methods of dispute settlements have become gradually common and vital in today's commercial dispute resolution. International investors and business associates have to be comfortable in their international business and investment activities and have to be safe from the biased behaviours which are more likely to be under control due to the rapid accessions of the international commercial conventions and treaties by majority countries in the world. Couple with a notable reservation of territorial laws as well as honouring the awards issued by foreign arbitrators, this laudable development facilitates a very remarkable achievement in the international commercial and investment growth. However, the development has proved that the area of international trade and investment dispute resolution are areas that need further researches and should be given notable concern due to the complex issues and rapid cases involved.

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