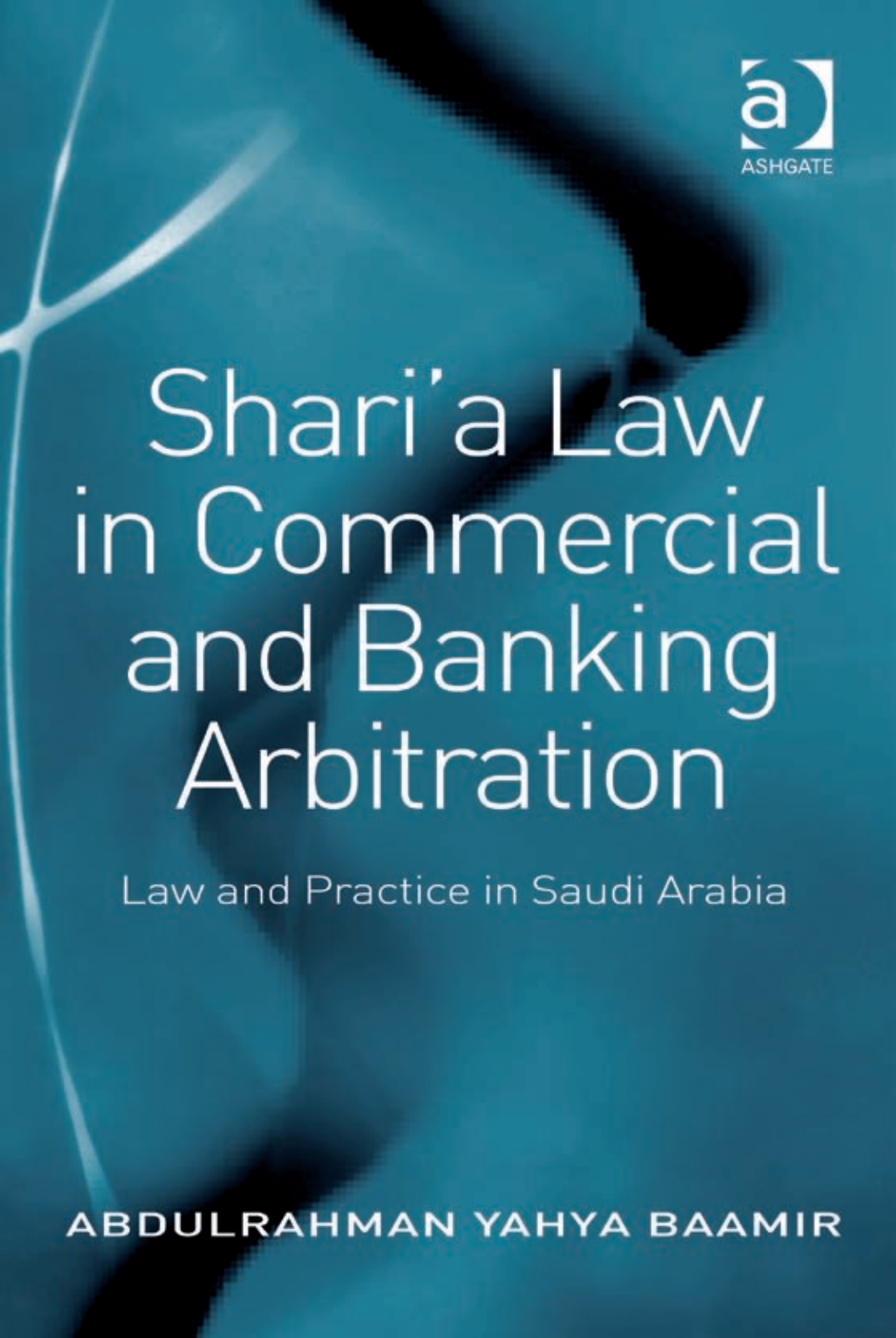
ASHGATE
Shari'a Law in Commercial and Banking Arbitration
Law and Practice in Saudi Arabia
ABDULRAHMAN YAHYA BAAMIR

SHARI′A LAW IN COMMERCIAL AND BANKING ARBITRATION

To my parents

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Law and Practice in Saudi Arabia

ABDULRAHMAN YAHYA BAAMIR
Jeddah, Saudi Arabia

ASHGATE

Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey, GU9 7PT
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington
VT 05401-4405
USA

www.ashgate.com

British Library Cataloguing in Publication Data
Baamir, Abdulrahman Yahya.
Shari′a law in commercial and banking arbitration : law and practice in Saudi Arabia.
1. Arbitration and award--Saudi Arabia. 2. Arbitration and award (Islamic law)--Saudi Arabia. 3. Banking law--Saudi Arabia. 4. Banking law (Islamic law)--Saudi Arabia. 5. Conflict of laws--Arbitration and award--Saudi Arabia.
I. Title
346.5'38082-dc22

Library of Congress Cataloging-in-Publication Data
Baamir, Abdulrahman Yahya.
Shari′a law in commercial and banking arbitration : law and practice in Saudi Arabia / by Abdulrahman Yahya Baamir.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-4094-0377-7 (hardback) -- ISBN 978-1-4094-0378-4 (ebook) 1. Arbitration and award--Saudi Arabia. 2. Arbitration and award (Islamic law). I. Title.
KMT1829.B33 2010
347.538"09--dc22

2010014662

ISBN 9781409403777 (hbk)
ISBN 9781409403784 (ebk)I

Printed and bound in Great Britain by
MPG Books Group, UK

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Acknowledgements

I am greatly indebted to the following people:

To my parents and family.

To my friends, Professor Ben Chigara and Judge Essam Abdulaziz Al-Alsheikh.

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List of Abbreviations

ADR	Alternative Dispute Resolution
Aramco	Arabian American Oil Company
BIT	Bilateral Investment Treaty
GCC	Gulf Cooperation Council
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IPO	Initial Public Offering
KSA	Kingdom of Saudi Arabia
OPEC	Organization of the Petroleum Exporting Countries
SAGIA	Saudi Arabian General Investment Authority
SAMA	Saudi Arabian Monetary Agency
UAE	United Arab Emirates
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

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Introduction

Prior to the establishment of meaningful judicial systems, use of force was the primary means of settling disputes.[1] This notwithstanding, there is nonetheless some evidence that humans knew and practised some form of arbitration even before the creation of identifiable legal systems and litigation. In the Middle East, over time, these practices developed to form a body of customs and traditions, referred to in Arabic as *urf*. As part of this process, people started to refer their disputes to selected third parties. The custom of the ancient Arabs laid down some general criteria for the choice of arbitrators, namely that they should be known for their impartiality, fairness and wisdom, as well as their social standing. For instance, monks could be appointed, because their religious influence could be beneficial in enforcing a judgment. The same logic applied to tribal chiefs, whose social position could help to determine a dispute and enforce a judgment.[2] As a result, arbitration became the tool of individuals seeking peaceful and fair dispute settlement via a third party. Following the creation and development of judicial bodies, arbitration continued to exist as an auxiliary dispute settlement mechanism, working under the supervision of the judicial authorities.[3]

Islamic law, known as *Shari'a*, introduced a comprehensive set of arbitration rules, giving arbitration similar weight to that of official litigation. Shari′a regulated all the steps of arbitral practice, from the initial arbitration agreement to the enforcement of the final award. In Saudi Arabia, the first attempt to codify the Shari′a arbitration rules came with the provisions of the Code of Commercial Courts of 1931; however, the code was not really good enough, because Shari′a courts failed, at that time, to recognize arbitration clauses and because the enforcement of arbitration awards was voluntary.[4] The wrong interpretation of the law by Shari′a courts with regard to the recognition of arbitration clauses and the voluntary execution of arbitral awards had a negative effect on arbitration in Saudi Arabia. As a result arbitration existed only in theory for many decades. The

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1 W. Ragib, 'Hal Altahkeem Nao′ min Alqada′?' ['Is Arbitration a type of Litigation?'] *University of Kuwait Law Journal*, 17/1 (1993), pp. 131–72.

2 See, in general, N. Albejad, *Arbitration in Saudi Arabia* (1st edn., Institute of Public Administration, 1999).

3 A. Saiyed, *Arbitration Rules: A Comparative Study between Shari'a, Kuwaiti and Egyptian Law* (1st edn., Aleman Publishers, 2000), pp. 5–8.

4 See the Code of Commercial Courts ratified by Royal Decree No. 32 dated 15/01/1350 H. (1931) published in *Umm Alqura Gazette*, issue No. 374–76 dated 22/03/1350 H. (1931).

second attempt came when Saudi Arabia enacted the Arbitration Code of 1983, which overcame many of the problems of the first code, but did not produce clear solutions to the crucial issue of banking arbitration.

In Saudi Arabia a major problem relating to conventional banking disputes developed, as the principles of conventional banking contradict the principles of Shari′a, especially when it comes to particularly sensitive issues such as interest. As a general rule, Saudi courts are not competent to settle disputes that arise out of banking activities as defined by the Banking Control Law of 1966. The competence is spread between different semi-judicial committees in addition to arbitration. The new amendment of the Law of Judiciary (‘*Nizam Alqada*', issued by Royal Decree No. M/78 dated 09/09/1428 H. 2007) reduced the number to one committee; however, even resorting to that committee does not guarantee the full enforcement of interest provisions in any agreement. This is because the Committee for the Settlement of Banking Disputes does not have full power to enforce its judgments if it provides for the payment of interest, and because the judgments of the Committee are not really binding, as will be seen later. It has been argued by many foreign researchers and practitioners that arbitration would be the best remedy for cases involving disputed subject matter under Shari′a. This argument does have some merit.

Even though arbitration can be a possible remedy for a banking dispute, there are many obstacles that make disputes related to conventional banking amenable to arbitration in theory only. The Saudi law of 1983 did not even give a clear answer to the question of arbitrability of disputes in general and of banking disputes in particular, referring the whole issue to the law on conciliation. The law on conciliation itself carries a great deal of ambiguity and conflict among the different schools of jurisprudence. In addition, there are no codified rules on conciliation in Saudi Arabia. In accordance with Shari′a teachings on conciliation, banking interest disputes are arbitrable. However, whether this applies in real life is debatable. Furthermore, the question of the arbitrability of banking disputes is of more importance in the aftermath of the recent global financial crisis, which, owing to tight governmental control, did not hit the Saudi banking system. The rest of the private sector was less fortunate, however, and suffered its impact in varying degrees. The case of the Saad Group and Al-Gosaibi Co. is the largest case of loan default in Saudi Arabia to date. It remains to be seen whether this case represents the peak of the crisis in the GCC region, or whether it is only the tip of the iceberg. There can be no quick conclusions here, particularly given the size of the case, the systemic risk associated with syndicated loans given to holding companies and the difficult global atmosphere. In this case, the central banks of Oman and the UAE have warned of the exposure of the two family groups to banks in their jurisdiction. There has also been a lot of speculation about the companies' ability to repay billions of US dollars and about whether the companies will go bankrupt or the banks will agree to reschedule the debts. In any event, arbitration may play a key role in settling such disputes.

This book examines various issues in arbitration law and practice in relation to Islamic Shari′a law and the law of Saudi Arabia in general, and to arbitration in conventional banking disputes in particular. The book also compares available remedies for the settlement of banking disputes in Saudi Arabia in order to identify those most appropriate. The work further provides a simplified reference to the principles of Shari′a law and its theories, as well as Saudi law and practice in general.

The book is divided into six chapters. Chapter 1 provides a very general background to Saudi law and its sources, in addition to examining some other related general legal issues such as Wahhabism, the role of the official Mufti and his influence on the legal system, the role of women in the legal system, foreign influence on Saudi law, and some of the recent economic developments. The chapter shows how Muslim scholars introduced the methodologies of *usul alfiqh* to allow Muslims to keep their laws updated, by regulating the reasoning process and putting restrictions on law transplantation within the Muslim state, and by using the concept of urf, or local custom, as one of the sources of legislation to protect the special identity of the society. The evolution of usul alfiqh, or the legal theories, as an independent science led to the creation of four main schools of thought, each of which adopted a different set of rules for reasoning and application, and different subordinate sources of law. The chapter also distinguishes between the three confusing concepts of Islamic law, Shari′a and Islamic jurisprudence on the one hand, and Saudi law on the other. Moreover, the chapter gives an overview of the related Saudi acts and regulations, as well as the role of Saudi Arabia as one of the major capital-exporting countries.

Chapter 2 provides historical background to arbitration in this very specific geographical area. The rules of arbitration discussed in this chapter, both Islamic and pre-Islamic, are the raw materials forming arbitration rules in the four schools of jurisprudence, which are themselves the basis of modern arbitration law in Saudi Arabia. The chapter begins with the law and practice of arbitration in the pre-Islamic period, which ended around the time of Prophet Muhammad (AD 570–632), and goes up to the time of the establishment of the four schools of jurisprudence. The chapter also shows how Islam upheld some pre-Islamic practices with regard to arbitration.

Chapter 3 discusses the next stage of the development of arbitration law in Saudi Arabia, examining the law of arbitration under fully developed Islamic jurisprudence, known as *fiqh*. The arbitration laws discussed in this chapter form the basis of the Arbitration Act of 1983 in Saudi Arabia. The chapter starts by outlining the difference between arbitration and litigation under Shari′a. This is followed by discussion of the definitions of arbitration. The chapter covers the arbitration rules of Shari′a, from the arbitration agreement to enforcement of the final arbitral award, making comparisons among the four Islamic schools and paying particular attention to the *Hanbali* school as the official school in Saudi Arabia.