

Article

Will Parties Take to Tahkim?: The Use of Islamic Law and Arbitration in the United States

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Will Parties Take to Tahkim?: The Use of Islamic Law and Arbitration in the United States

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Introduction

For devout Muslims, law and religion intertwine, forming a comprehensive system that expects compliance from Islam's adherents. Islamic law first emerged in countries in the Middle East, which had either Islamic governments or a major Muslim population. In contrast to Islamic law, the common law system that developed in the United States provides for a clear separation of church and state. In recent times, private parties have sought to enforce contracts governed by Islamic law in U.S. courts. This article examines some recent cases on this issue and looks at how the Restatement (Second) of Conflict of Laws may provide guidance to courts and parties in future cases. It then considers whether the use of Islamic arbitration, *tahkim*, which already has a long and distinguished history within Islam, may provide another mechanism for parties to have their contracts and disputes governed by Islamic law within the United States. In this context, this article summarizes the positive development of another form of religious arbitration tribunals, the Jewish rabbinical arbitration courts, the *Beth din*. The *Beth din* may serve as a valuable example for how Islamic arbitration tribunals can develop in the United States.

Part I of this article provides an introduction to Islamic law from the time of the Prophet Mohammad until the end of the Ottoman Empire, describing important Islamic legal traditions and schools of thought. Part II of this article provides examples of cases in the United States where parties sought to use Islamic law. Part III examines the Restatement (Second) of Conflict of Laws and its application to Islamic law. Part IV proposes a solution to implementing Islamic law in American courts—Islamic arbitration tribunals.

I. Islamic Law: A Brief Introduction

The word "Islam" comes from the root word *salam*, which means peace.¹ Islam, pronounced *al-Islam* in Arabic, translates to “the act of submission to God.”² Muslims believe that God, through the archangel Gabriel, revealed the holy book of Islam, the *Qur’an*, to Prophet Mohammad.³ There are two main sources of Islamic law: the *Qur’an* and the *Sunnah*. The *Qur’an* contains legal principles, which form the primary source of Islamic law. These principles serve as a guide to Muslims on how to act in their daily lives, in terms of moral and legal duties.⁴

The *Sunnah*,⁵ in turn, constitutes the second main source of Islamic law and contains explanations of Prophet Mohammad’s acts, in which he applied legal principles to particular cases.⁶ The *Hadith*, meaning the Prophet’s traditions and sayings, “is the verbal report of the *Sunnah* of the Prophet, which is the second primary source of Islamic legislation.”⁷

Three different kinds of *Sunan* exist:⁸ *Sunnat al-Fi’li*, the actual actions of Prophet Mohammad;⁹ *Sunnat al-Qawli*, the “[t]raditions enjoined by words;”¹⁰ and *Sunnat al-Ima*, the actions of others approved *ex post facto*, or not disapproved of, by Prophet Mohammad.¹¹

There are also three different types of *ahadith*.¹² The first type is *hadith qudsi*, a term used for a “holy or divine *hadith*.”¹³ In a *hadith qudsi*,

¹ S. MOSTAFA MOHAGHEGH DAMAD, PROTECTION OF INDIVIDUALS IN TIMES OF ARMED CONFLICT UNDER INTERNATIONAL AND ISLAMIC LAWS 1 (2005) (noting that *salam* can be defined as “peace, safety, well-being and health”).

² *Id.* (stating that *Aslama*, the past tense of *salm*, means “he submitted”).

³ *Id.*

⁴ JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 11 (1964) (noting that Prophet Muhammad acted as a judge of Islamic law in his community, also known as *hakam*); *see also id.* at 11-12 (indicating that some moral and legal duties listed in the *Qur’an* are to “arbitrate with justice, not offer bribes, to give true evidence, and to give full weight and measure. Contracts are [also] safeguarded by commands to put them in writing, to call witnesses, to give securities . . . when there is no scribe available . . . or . . . to fulfill one’s contracts and, especially, to return a trust or deposit (*amana*) to its owner”); *see also Qur’an, sura ii.* 282 f. (cf. xxiv. 33) – ii. 177; iii. 76; iv. 58; v. I; viii. 27; ix. 4, 7; xvi. 91 f.; xvii. 34; xxiii. 8; lxx. 32.

⁵ DAMAD, *supra* note 1, at 26 (relaying that the plural of *Sunnah* is *Sunan*).

⁶ *Id.* at 24-25 (noting that the traditions of the Prophet are a divine source, just as is the *Qur’an*).

⁷ SCHACHT, *supra* note 4, at 298 glossary (stating that the plural of *hadith* is *ahadith*); *see also* DAMAD, *supra* note 1, at 25 (“[t]he reports of the words and deeds of the Holy Prophet are compiled in various books of *Hadith*, *Siyar*, and *Sunan*, from which the science of the *Sunnah* is derived).

⁸ *Id.* at 26.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² DAMAD, *supra* note 1, at 463 (listing the three different types of *ahadith* as *hadith qudsi*, *hadith sahih*, and *al-hadith al-maudu’ah*).

¹³ *Id.*

the speaker of the saying is *Allah* instead of Prophet Mohammad.¹⁴ The second type is *hadith sahih*, a term used for a trusted tradition.¹⁵ For *hadith sahih*, the origin of the *hadith* is not in question and does not contradict the *Qur'an*.¹⁶ The third type is *al-hadith al-maudu'ah*, a term used for a fabricated *hadith*.¹⁷ *Al-hadith al-maudu'ah* is considered forged and is incorrectly attributed to Prophet Mohammad.¹⁸

Finally, two other important sources of Islamic law are *ijma'*, meaning consensus, and *qiyas*, meaning analogy.¹⁹ *Ijma'* is an "agreement of the Jurists among the followers of Prophet Mohammad in a particular age on a question of law."²⁰ The methodological process of *ijma'* is murky and surrounded by disagreement. Some of these issues include the following: the exact procedure to form *ijma'*; the necessary number of jurists; whether the vote should be majority or unanimous; whether the reasoning should precede jurists' decisions; and whether the jurists should sit together when forming *ijma'*.²¹ Some jurists use the method of *qiyas*, which is defined as "pronouncing a new provision of law on the basis of analogical deduction from the *Qur'an*, the Traditions of the Prophet or some authentic report regarding the *ijma'* of the Companions of the Prophet on the provision of law."²² This source of law, too, is obscure and disputed as to its nature, character, and scope.²³

In addition, Islamic law has several secondary sources, including justice, equity, good conscience, judicial decisions, and *'urf*, which means custom.²⁴ Pre-Islamic era customs may be implemented within the Islamic legal system if they do not contradict the primary sources of Islamic law.²⁵ As for justice, equity, and good conscience, they underlie the foundations of religion and law.²⁶ Given Islam's wide acceptance of judicial decisions made by the consensus (*ijma'*) of *mufti(s)*,²⁷ such a decision might be considered a judicial precedent.²⁸

¹⁴ *Id.* (stating that a *hadith qudsi* usually refers to God, or has God speaking in the first person and the verses are inspired directly by God, not passed down through Archangel Gabriel).

¹⁵ *Id.*

¹⁶ *Id.* (indicating that a *hadith sahih*, also does not contradict "well-established text[s]" of Islam).

¹⁷ *Id.*

¹⁸ *Id.* at 463.

¹⁹ *Id.* at 29-31.

²⁰ *Id.* at 29.

²¹ *Id.* at 30.

²² *Id.* at 31.

²³ *Id.* at 31.

²⁴ *Id.* at 33-34.

²⁵ *See id.* at 33.

²⁶ *See id.* at 34.

²⁷ *Id.*

²⁸ *See id.*

Islamic law is also known as *Shari'ah* law.²⁹ *Shar'*, which means road, is the root of the word *Shari'ah*: the "road that men and women must follow in life."³⁰ Islamic law differs from other systems of jurisprudence because its principles include an inherent sense of morality. Islamic law guides its constituents by providing them with information on how to handle their daily lives.³¹ Additionally, the way Islamic law is formed makes it different from other jurisprudential systems. As stated previously, Islamic law is comprised of the *Qur'an* and *hadith* as well as *qiyas* and *ijma'*.³² Due to the many different components of Islamic law, there exist numerous schools of Islamic law and lines of legal reasoning; these independent schools of thought are also known as *ijtihad*.³³

Islamic law categorizes its laws into two groups based on individual acts: recommended and reprehensible.³⁴ Recommended actions, as the name suggests, are not required, but are considered morally good.³⁵ For instance, helping the poor represents a recommended action.³⁶ Reprehensible actions, in contrast, while not forbidden, are looked upon with distaste by *Allah*.³⁷ An example of such an act would be proposing to a woman who is engaged.³⁸

The aforementioned laws and customs developed as follows. The two main sources of Islamic law, the *Qur'an* and the *hadith*, date back to the time of Prophet Mohammed, 609-32 C.E.³⁹ They provide the basic rules and foundation for Islamic law.⁴⁰ After Mohammed died in 632 C.E., the Islamic world entered into the reign of the four Rightly Guided *Caliphs*.⁴¹ During this time period, *ijma'* and *qiyas* became two additional sources of Islamic law.⁴² Also, a new set of rules emerged and supplemented the body of Islamic law.⁴³ The first rule stated that the city of Medina, in an area now part of Saudi Arabia, would be modeled after the

²⁹ *Id.* at 2.

³⁰ *Id.* at 1 (relaying that *Shari'ah* is divided into *ibadat*, rules for worship, and *mu'amilat*, rules for transactions).

³¹ *See id.* at 3 (giving an example of how the *Qur'an* encourages people to fulfill contracts because it is their moral duty; an unfulfilled contract equates to disbelief in Islam).

³² *See id.* at 4.

³³ *See id.* (listing differences in *Ijtihad* between *Sunni* and *Shia* Muslims.)

³⁴ *Id.* at 5.

³⁵ *Id.*

³⁶ *Id.* at 5.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See id.* at 8-9.

⁴⁰ *Id.* at 9.

⁴¹ *See id.* at 9-10 (noting that this period lasted from 632-62 A.D., and during this time the *Caliphate* passed from Abu Bakr, to 'Umar, to Uthamn, and finally to Ali).

⁴² *See id.* at 10.

⁴³ *Id.*

Persian administrative system.⁴⁴ The second one asserted that temporary marriage would be abolished as well as a “certain type of pilgrimage to Mecca that had been permitted at the time of the Holy Prophet.”⁴⁵ *Sunnis* accepted this decree, but the minority *Shias* rejected it.⁴⁶

From 622-794 C.E., the Umayyad Dynasty held the *caliphate*.⁴⁷ During this period, the office of *qadi(s)* became the administration of justice and the “office of the clerk of the court” also known as the *sherif*.⁴⁸ Throughout this time, the Umayyads spread misrepresentations of the Prophet’s sayings as a way to gain their constituents’ support.⁴⁹ These falsehoods led Muslims to seek the help of Islamic legal scholars, who were recognized as independent and wise individuals.⁵⁰ These Islamic scholars are known as *mufii(s)*.⁵¹

The next significant period of Islamic legal development occurred during the Abbasid era, 745-1272 C.E.⁵² During this period, the Office of Chief Justice, or *Qadi-al-qudat*, was established.⁵³ The Chief Justice acted as legal advisor to the *caliph* with the sole right to appoint and dismiss judges.⁵⁴ A police force, or *shurtah*, was also created.⁵⁵ Furthermore, the Abbasids created a court of grievances, or *al-nazar fi al-mazalim*, which reviewed the jurists’ opinions and ensured their compliance with Islamic law and justice.⁵⁶ Abbasids also attempted to compile the traditions of the Holy Prophet.⁵⁷

Throughout history, scholars gathered the *hadith* into several different books, including the most famous ones: *Sahih-i-Bukhari*, *Sahih-i-Muslim*, *Sahih-i-Tirmadhi*, *Sahih-i-Nisayi*, *Sahih-i-sajastani*, and *Sahih-i-ibn majeh*.⁵⁸ *Shi’ite* scholars compiled their own books, such as *al-Kafi*, *Man-la-yahduruhul-al-faqih*, *Kitab al-Tahdhib*, and *Kitab al-Istirbsar*.⁵⁹

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See id.* at 10-11 (stating that Mu’awiyah was the first *Caliph* under the Umayyad Dynasty, which held great power for more than 80 years but ultimately crumbled after a civil war in 794 A.D.).

⁴⁸ *Id.* at 11 (noting that Mohammad acted as a judge during his lifetime; the *Caliphs* also acted as judges but additionally appointed other judges in major cities).

⁴⁹ *See id.* at 12.

⁵⁰ *See id.*

⁵¹ *Id.* at 13.

⁵² *See id.*

⁵³ *Id.* at 14.

⁵⁴ *Id.* at 14.

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *See id.* at 15.

⁵⁹ *Id.*

During 1283-1923 C.E., the Ottoman Empire established the office of *Grand Mufti* and codified the Islamic law.⁶⁰ Thereafter, the secular courts adjudicated commercial and trade disputes while the *Shari'ah* courts resolved all other issues.⁶¹ Ottoman *caliphs* codified Islamic law⁶² in an 1850 commercial code and an 1877 civil code.⁶³

After the fall of the Ottoman Empire, Islamic countries began a process of modernization in line with the European legal system.⁶⁴ However, they did not want to trade Islamic law for European law.⁶⁵ This modernization, though it did not affect religious rituals or personal status laws, modified some areas like commercial and tax law.⁶⁶ Certain countries still chose to follow “Traditional Islamic Law.”⁶⁷

Each school of Islamic law solves legal issues in a different manner.⁶⁸ The main schools of Islamic law among the *Sunnis* include *Hanafi*, *Maliki*, *Shafi'i*, and *Hanbali*. The *Shi'ite* and *Khawarij* also have several non-official schools of law.⁶⁹ The *Hanafi* school famously places more importance on *qiyas* to solve legal issues rather than on the traditions of the Prophet.⁷⁰ The *Maliki* school focuses on the traditions of the Prophet, along with “the rule of discretion (*Istislah*).”⁷¹ The *Maliki* school also relies on the practices of the people from Medina, dating back to the time of the Prophet and the school's founder, *Malik Ibn Anas*.⁷² The *Shafi'i* school supports the traditions of the Prophet, *qiyas*, and *istislah*, but opposes preference (*istihsan*).⁷³ The *Hanbali* school focuses first on the *Qur'an*, and then on the traditions of the Prophet.⁷⁴ Out of all the schools, the *Hanbali* school places the most importance on the traditions of the Prophet.⁷⁵

⁶⁰ *Id.* at 463.

⁶¹ *See id.* at 16.

⁶² *Id.* (relaying that this reformation is referred to as *Tanzimat*).

⁶³ *Id.* (indicating that the civil code was known as *Majallah-al-Ahkam-al-'Adliyah*).

⁶⁴ *See id.* at 17.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 18.

⁶⁸ *See id.* at 18.

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *See id.* at 19.

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *See id.* at 20.

⁷⁵ *See id.*

II. Islamic Law in American Courts

As seen above, Islam is not only a religion, but also a jurisprudential system dating back to the time of the Prophet Mohammed, 609-632 C.E. It is one of the most important legal regimes in the world today. The cases discussed below serve as examples of how Islamic law, as a choice of law in private contracts, has been handled in the United States legal system.

A. Awad v. Ziriax

In 2010, Oklahoma voters sought to amend their state constitution, and on November 2, 2010, State Question 755 was adopted.⁷⁶ State Question 755, also known as the “Save Our State Amendment,”⁷⁷ would amend Article 7, Section 1 of the Oklahoma State Constitution to include a provision stating:

The Courts provided for in subsection A of this section, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, the federal regulation promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include *Sharia* Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically the courts shall not consider international law or *Sharia* Law. The provisions of this subsection shall apply to all cases before the

⁷⁶ See Penny M. Venetis, *The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions Like it that Bar State Courts From Considering International Law*, 59 CLEV. ST. L. REV. 189, 189 (2011) (stating that on November 2, 2010, by a 70.08 percent majority, Oklahoma voters adopted State Question 755); see also *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1301 (W.D. Okla. 2012). [hereinafter *Awad I*] (“State Question No. 755, which was on Oklahoma’s November 2, 2010 ballot, provides: This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend article VII, section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using *Sharia* law. International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons. The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties. *Sharia* law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.”).

⁷⁷ See Okla. CONST. art. VII, § 1 (calling section C of the Oklahoma Constitution the “Save Our State Amendment”).

respective courts including, but not limited to, cases of first impression.⁷⁸

On November 4, 2010, a Muslim American, Muneer Awad filed a complaint in the United States District Court for the District of Oklahoma (the “District of Oklahoma”) seeking a temporary restraining order and preliminary injunction to prevent the results of the November 2, 2010 election from being certified and thereby taking effect.⁷⁹ Awad was the Executive Director of the Council on American Islamic Relations, Oklahoma Branch.⁸⁰ The defendant in the action was the Board of Elections for Oklahoma.⁸¹ Awad challenged the constitutionality of State Question 755, asserting that a prohibition from considering *Sharia* law violates the First Amendment’s Establishment and Free Exercise Clauses.⁸² The Establishment and Free Exercise Clauses of the First Amendment say that “[C]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of people to peaceably assemble, and to petition the Government for a redress of grievances.”⁸³ State Question 755 only mentions *Sharia* law, and no other religion or religious law.

⁷⁸ See Okla. CONST. art. VII, § 1; see also Complaint, *Awad I*, 754 F. Supp. 2d 1298 (W.D. Okla. 2012) (No. 5:10-CV-01186) (indicating that the Amendment’s text prohibits state courts from applying other state court laws, if these laws include *Sharia* law, and from considering *Sharia* law themselves); see also CHARLES LE GAI EATON, *ISLAM AND THE DESTINY OF MAN* 166 (1985) (defining the word *Sharia* as “‘road or highway[,]” referring to a road wild animals walk down to drink from—‘the road which leads to where the waters of life flow inexhaustibly.’”); *id.* at 167 (stating that the *Qur’anic* message and Prophet Mohammed’s example form *Sharia* law, a body of living law, which proscribes guidance for Muslims on how to live together, is not solely revealed law, but is made also from the sayings and actions of Mohammed, which form the hadiths); DAMAD, *supra* note 1, at 2 (defining *Sharia* as the “road men and women must follow in life” and *Sharia* law as divided into two sections, *‘ibadat* and *mu’amilat*. *‘Ibadat* concerns worship and *mu’amilat* concerns transactions, such as economic or social, or wills in the case of Awad).

⁷⁹ See *Awad I*, 754 F. Supp. 2d at 1305; see also Complaint, *Awad I*, 754 F. Supp. 2d 1298 (No. 5:10-CV-01186) (indicating the urgency with which the temporary restraining order and preliminary injunction were needed, because the State Board of Elections was scheduled to certify State Question 755’s results on November 9, 2010).

⁸⁰ See Complaint, *Awad I*, 754 F. Supp. 2d 1298 (No. 5:10-CV-01186) (listing information about plaintiff, including that he defends Muslims’ civil rights in his capacity as Executive Director of the Council on American Islamic Relations and relaying that State Question 755’s supporters have described it as a “preemptive strike” against morals that threaten “Oklahoma’s Judeo-Christian values”); see also Aziz Z. Huq, *Private Religious Discrimination, National Security, and the First Amendment*, 5 HARV. L. & POL’Y REV. 347, 369 (2011) (stating that under the proposed Oklahoma Amendment, a contract for *kosher* meat will be enforced, while a contract for *halal* meat will not).

⁸¹ See Complaint, *Awad I*, 754 F. Supp. 2d 1298 (No. 5:10-CV-01186) (listing defendants as the entire Board for Oklahoma’s State Board of Elections, and specifying Paul Ziriach, Agency Head for Oklahoma’s State Board of Elections, who has control over their operations, and Thomas Prince and Susan Turpen, board members with the legal authority to vote to certify an election).

⁸² See *Awad I*, 754 F. Supp. 2d at 1.

⁸³ See U.S. CONST. ART. I.

Awad argued that if the election results were certified, his First Amendment rights would be violated.⁸⁴ The violation would flow from condemnation of his religion by banning *Sharia* law,⁸⁵ because his last will and testament, which incorporates aspects of *Sharia* law, would be invalidated.⁸⁶ Awad's last will and testament contained instructions for charitable distribution of his assets, which is a principle drawn from a teaching of Mohammed.⁸⁷ Since State Question 755 would consider a teaching of Mohammed to be *Sharia* law, an Oklahoma court would have to consider *Sharia* law to distribute his assets.⁸⁸ Thus, State Question 755 would prohibit an Oklahoma court from probating Awad's last will and testament.

Awad contended that state courts would violate the First Amendment by becoming entangled with religion when trying to figure out what qualifies as *Sharia* law.⁸⁹ He presented testimony to show that *Sharia* law is a religious tradition and not actual law.⁹⁰ He argued that *Sharia* law imposes personal obligations based on faith, not legal obligations, and that the content of *Sharia* law differs by country.⁹¹ *Sharia* law, he further argued, directs Muslims to abide by the law of the land, so, for example, although in polygamy is permissible in Islam, it is not in the United States,

⁸⁴ See *Awad I*, 754 F. Supp. 2d at 1; See also, Complaint, *Awad I*, 754 F. Supp. 2d 1298 (noting that once Thomas Prince and Susan Turpen certify the results of the election, the results will have legal effect).

⁸⁵ See Complaint at 6, *Awad I*, 754 F. Supp. 2d 1298 (No. 5:10-CV-01186) (stating that certification of the election results will equal state disapproval of plaintiff's faith, the ban on *Sharia* law implies there is something "nefarious about the Koran" and Mohammed's teachings, the excessive entanglement with religion that certification of the results will lead to, is in violation of what the Establishment Clause of the First Amendment stands to protect); see also Domke on Commercial Arbitration, Part XVI. *Interaction of Arbitration with Specialized Fields in the law*, § 54:10. *Particular issues in the Abrahamic/Mosaic religions—Islam*, 2 DOMKE ON COM. ARB. § 54:10 (relaying that both Mohammed and Moses, considered great lawmakers, are depicted in a freeze within the United States Supreme Court, but this equality in depiction is not mirrored by equality in perception of the American public, where Jewish laws are generally cited positively, and Islamic laws are viewed as "primitive and unpredictable").

⁸⁶ Complaint at 7, *Awad I*, 754 F. Supp. 2d 1298 (No. 5:10-CV-01186) (indicating that plaintiff's validly executed last will and testament directs his affairs to be handled in accordance with *Sharia* law, and even goes so far as to direct the testator to *Qur'anic* verses containing instructions for the purposes of executing a last will and testament in accordance with Islamic tradition; plaintiff argues that this validly executed will can no longer be considered in Oklahoma because it implicates and would require a judge to "consider" *Sharia* law. Plaintiff's uncertainty about when he will die and what will happen to his estate when in probate creates an immediate injury. Lastly, for any will to be enforceable, it must eliminate any reference to his religion, which includes guidance for important matters such as inheritance and burial instructions.).

⁸⁷ *Awad I*, 754 F. Supp. 2d at 1304.

⁸⁸ *Id.*

⁸⁹ See *id.* at 1301-02 (describing plaintiff's religion, Islam, as relying on the *Qur'an* and Prophet Mohammed, and as providing the principles that guide plaintiff for every action he makes in his business or personal life).

⁹⁰ *Id.* at 1306.

⁹¹ *Id.*

and thus Muslims in the U.S. do not engage in polygamy.⁹² The District of Oklahoma found that *Sharia* law “lacks a legal character and, thus, plaintiff’s religious traditions and faith are the only non-legal content subject to the judicial exclusion set forth in the amendment.”⁹³ Thus, it found that State Question 755 inhibited plaintiff’s religion by disapproving of Islam.⁹⁴ Also, because the court found that *Sharia* law was, in fact, not law, it further held that State Question 755 would lead to excessive government entanglement with religion, in violation of the First Amendment, because Oklahoma courts would have to determine the content of *Sharia* law, meaning the content of plaintiff’s religion.⁹⁵

In sum, Awad argued that the amendment violated the Establishment Clause by singling out the Muslim faith, requiring state courts to become unnecessarily entangled in religion, and disapproving of his religion.⁹⁶ There is not a single text that all Muslims regard as making up *Sharia* law, and so the state courts would have to examine many different religious texts to determine what texts will count as *Sharia* law.⁹⁷ Awad further asserted that the Free Exercise Clause of the First Amendment had been violated because the amendment discriminates against his religion, and fails strict scrutiny because it has no “compelling interest and is not narrowly tailored.”⁹⁸

The court determined that Awad had standing to bring his action and that he made a “preliminary showing that he will suffer an injury in fact,”⁹⁹ and granted a temporary restraining order and enjoined the defendants from certifying the election results.¹⁰⁰

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 1306-1307

⁹⁶ *Id.* at 3 (“In support, plaintiff cites to one of the authors of State Question 755, Representative Rex Duncan’s statement that ‘America was founded on Judeo-Christian principles’ and the amendment’s purpose was to ensure that Oklahoma’s courts are not used to ‘undermine those founding principles,’ and Representative Duncan’s further statement that the purpose of the measure was to establish a legal impediment against the ‘looming threat’ of *Sharia* law in the United States.”)

⁹⁷ *Id.*; see also, DAMAD, *supra* note 1, at 1-2 (noting that the *Qur’an* has approximately 6000 verses, approximately 200 of which deal with law, approximately 80 of which deal with personal status laws. Personal status laws concern issues of family law, such as inheritance and marriage. These laws are interwoven throughout the *Qur’anic* chapters that were revealed to Mohammed in Medina, as opposed to those chapters revealed in Mecca); DAMAD, *supra* note 1, at 4 (listing the main sources of Islamic law as the *Qur’an*, the hadiths (traditions and sayings of the prophet), “reasoning by analogy (*qiyas*), and “the consensus of the Islamic jurists or *Ijma’*.” The *qiyas* and *Ijma’* answer legal issues through interpretation and the *Qur’an* and hadiths); *id.* at 19-21 (listing the schools of Islamic Law as the Hanafi School, Maliki School, Shafi’i School, Hanbali School, Shi’ite School, Zaidis, Imamiyah, and Ismal’iyah).

⁹⁸ *Awad 1*, 754 F. Supp. 2d at 1303.

⁹⁹ *Id.* at 2.

¹⁰⁰ *Id.* at 4.

Following the November 9, 2010 decision granting the temporary restraining order and enjoining the defendants from certifying the election results,¹⁰¹ the District Court in Oklahoma found, after reviewing the briefs and hearing arguments, that Awad would suffer an injury in fact—a violation of his First Amendment rights.¹⁰² The court even went on to say, with strong language, that “it would be incomprehensible if, as Plaintiff alleges, Oklahoma could condemn the religion of its Muslim citizens, yet one of those citizens could not defend himself in court against his government’s preferment of other religious views.”¹⁰³ The court also agreed with the plaintiff that because of the ban on considering *Sharia* law, Oklahoma courts would not be able to probate his will, which would make his will unenforceable.¹⁰⁴ It granted a preliminary injunction enjoining the Oklahoma State Board of Elections from certifying the election results until it could rule on the merits of Awad’s claims.¹⁰⁵

The Oklahoma State Board of Elections appealed the case to the United States Court of Appeals for the Tenth Circuit (the “Tenth Circuit”).¹⁰⁶ The Tenth Circuit reviewed whether the District Court of Oklahoma abused its discretion when granting the preliminary injunction.¹⁰⁷ It held that the lower court did not abuse its discretion in granting the preliminary injunction and noted that the Plaintiff made a “strong showing on the substantial likelihood and balance-of-harms factors as the heightened standard requires.”¹⁰⁸ As the case stands now, the Board of Elections for Oklahoma can file a petition to have the case reheard,¹⁰⁹ or the Solicitor General for Oklahoma can file for certiorari in the U.S. Supreme Court.¹¹⁰

Although the District Court in *Awad v. Ziriya* invalidated the ban on *Sharia* law, the ruling was based on constitutional issues and is not wholly

¹⁰¹ *Id.* at 4.

¹⁰² *See id.* at 1304.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1308.

¹⁰⁶ *See generally* *Awad v. Ziriya*, 670 F.3d 1111, 1116 (10th Cir.2012) [hereinafter *Awad 2*] (noting that the Board members asked for the case to be reviewed).

¹⁰⁷ *Id.* at 1116.

¹⁰⁸ *Id.* at 1132; *Awad 2*, 670 F.3d at 1129 (stating that under the Larson Test, which was applied to the Establishment Clause, “Appellants must show (1) a compelling government interest, and (2) that the amendment is “closely fitted” to that compelling interest” and the State of Oklahoma lacked a compelling state interest necessary to survive this test).

¹⁰⁹ *Awad 2*, 670 F.3d at 1116 (indicating that *Awad v. Ziriya* was heard before Judges O’Brien, McKay, and Matheson, not the entire panel of 10th circuit judges, so Wyrick, the Solicitor General for Oklahoma can file an appeal to have the case reheard en banc).

¹¹⁰ Ismael T. Salam, “*Save Our State*” Amendment: *Dead on Arrival*, 17 PUB. INT. L. REP. 35, 41 (2011) (relaying that as of the time of the writing of this article, the Tenth Circuit had not yet rendered an opinion, however, as of the time of the writing of this Paper, the Tenth Circuit has rendered an opinion, but there has been no further action on the case).

indicative of a favorable view of Islamic law as a choice of law in the United States. Similar proposals to the “Save Our State Amendment” have been considered in other states.¹¹¹ The South Carolina Legislature proposed a very similar bill, which also mentioned *Sharia* law specifically.¹¹² Arizona introduced a resolution prohibiting international law, which went so far as to declare that a judicial decision violating the ban on international law is grounds for impeachment and removal of the deciding judge.¹¹³

B. In re Marriage of Ahmad and Sherifa Shaban v. Sherifa Shaban

Marriage of Shaban v. Shaban involved a prenuptial agreement, which appeared to be governed by Islamic law. The Shabans married in Egypt and subsequently lived in the United States for 17 years before deciding to divorce.¹¹⁴ Prior to their marriage, a prenuptial agreement was executed.¹¹⁵ The agreement was written in Arabic and signed by Mr. Shaban and his father-in-law.¹¹⁶ There were three English translations of the document, but according to the California Fourth District Court of Appeal (“Court of Appeal”), only the dowry arrangement “set forth any substantive matter.”¹¹⁷ At trial, an expert witness was prepared to testify that the parties’ intended to have their marriage governed by Islamic law, including property division, based on the language of the document.¹¹⁸ Introducing the expert witness invoked the parol evidence rule.¹¹⁹ The agreement stated that the marriage is a “[l]egal marriage concluded in

¹¹¹ Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 320 (2011).

¹¹² *Id.* (“The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider *Sharia* law, international law, the constitutions, laws, rules, regulations, and decisions of courts or tribunals of other nations, or conventions, or treaties whether or not the United States is a party.”).

¹¹³ *Id.* (Text of Arizona resolution) (“[Arizona] ‘shall not use, implement, refer to or incorporate any case law or statute from another country or a foreign body or jurisdiction that is outside of the United States’ . . . [any judicial decision that violates this proscription is ‘null and void . . . and is grounds for impeachment and removal from office’ of the deciding judge.”).

¹¹⁴ *Marriage of Shaban v. Shaban*, 88 Cal. App. 4th 398, 400 (2001).

¹¹⁵ *Id.* at 400-401.

¹¹⁶ *Id.* at 401 (relaying that the bride’s father had signed the agreement on her behalf as her “representative”).

¹¹⁷ *Id.*; *see also id.* at 401, n.1 (text from the prenuptial agreement) (“[t]he above legal marriage has been concluded in accordance with his Almighty God’s Holy Book and the Rules of his Prophet to whom all God’s prayers and blessings be, by legal offer and acceptance from the two contracting parties. The foregoing was concluded after the two parties had taken cognizance of the legal implications and after ascertaining that there are no legal or formal impediments preventing their marriage, and that the bride does not receive any salary from the Government and does not possess any funds exceeding L.E. 200, and that the bride and the bridegroom are of age.”).

¹¹⁸ *Id.* at 401.

¹¹⁹ *Id.*

Accordance with God's Book and the precepts of His Prophet and with the mutual agreement of the husband and the wife's representative [and that the] two parties . . . [have] taken cognizance of the legal implications [of the agreement]."¹²⁰ Mr. Shaban asserted that this text referencing God indicates the parties' intention to have their marriage governed by "'Islamic law."¹²¹

California community property law provides that acquisitions of property during a marriage become community property and should be divided among the parties.¹²² Conversely, Islamic law provides that property accumulated during a marriage, including earnings, remain the property of the person who purchased or earned the property.¹²³ For the Shabans, the result of applying Islamic law would have meant that Mrs. Shaban would have no interest in Mr. Shaban's medical practice or retirement accounts, but their real property, jointly held in both of their names, would be equally divided.¹²⁴

The Islamic law expert was not allowed to testify because the trial court judge concluded that the alleged prenuptial agreement was in actuality a marriage certificate, and California community property law was applied.¹²⁵ Mr. Shaban appealed the trial court's ruling, arguing that the Islamic law expert should have been allowed to testify.¹²⁶ The Court of Appeal affirmed the trial court decision.¹²⁷ The court engaged in a lengthy discussion about the distinctions between the parol evidence rule and the Statute of Frauds,¹²⁸ concluding that "there [was] no reason the same requirement that the writing evidence[,] with reasonable certainty[,] . . . should not also apply to prenuptial agreements."¹²⁹ It reasoned that the policy considerations supporting the Statute of Frauds were of the utmost importance when dealing with prenuptial agreements, because of the emotional impact of divorce, the triggering of prenuptial agreements, and the temptation for "selective memory" in divorce cases.¹³⁰ The court stated that regardless of the parties' desire to be regulated under Islamic law,¹³¹

¹²⁰ *Id.* at 403.

¹²¹ *Id.* at 403-404.

¹²² *Id.* at 404.

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ *Id.* (stating that Mr. Shaban did note that if California law were found to govern, then the division of property as laid down by the trial court was correct).

¹²⁷ *Id.* at 411.

¹²⁸ *See id.* at 404-407.

¹²⁹ *Id.* at 406.

¹³⁰ *Id.*

¹³¹ *See id.* at 406-407 (stating that the evidence for this desire is found in the term of their contract saying "in Accordance with his Almighty God's Holy Book and the rules of this Prophet' and 'two parties [having] taken cognizance of the legal implications").

the contract terms indicating such a desire had too weak a relationship to a prenuptial agreement to satisfy the Statute of Frauds. It declined to rule on whether the alleged prenuptial agreement was against public policy, because the trial court did not err in excluding the parol evidence rule.¹³²

In the *Shaban* case, the Court of Appeal determined that applying Islamic law would be too abstract, and did not discuss whether the application of Islamic law in the Shabans' case would be contrary to public policy.¹³³ The court stated that it would be acceptable for a couple to choose a system of law to govern their prenuptial agreement, but found that choosing Islamic law would be equivalent to "[putting together a contract] without any agreement as to basic terms, [and agreeing] that a marriage will simply be governed by a given system of law and then hop[ing] that parol evidence will supply those basic terms."¹³⁴ The practical effect of the court's holding in this case is a suggestion that Islamic law is too vague to be applied in the courts.

C. El-Farra v. Sayyed

El-Farra v. Sayyed is an example of a case where the court declined to enforce an employment agreement governed by Islamic law. The Supreme Court of Arkansas reviewed whether the circuit court had subject matter jurisdiction to hear the claims of Monir El-Farra.¹³⁵ El-Farra was the Imam at the Islamic Center of Little Rock ("ICLR").¹³⁶ His employment contract stated that the ICLR could terminate his employment through a unanimous vote "on valid grounds according to Islamic Jurisdiction (Shari'a)."¹³⁷ El-Farra's sermons were found to be offensive to members of the congregation, and on May 15, 2003, the ICLR sent him a letter saying his actions created "'disunity and 'fitna',¹³⁸ among the community[.]'"¹³⁹ The letter further warned El-Farra that if he did not improve, he would be terminated.¹⁴⁰ On May 30, 2003, the ICLR sent El-

¹³² *Id.* at 403.

¹³³ *Id.* at 407.

¹³⁴ *See id.*

¹³⁵ *El-Farra v. Sayyed*, 365 Ark. 209, 210 (2006).

¹³⁶ *Id.* at 211.

¹³⁷ *Id.* (relaying that the Executive Committee and Board of Directions of the Islamic Center must have a unanimous vote to terminate his employment).

¹³⁸ ABOUT.COM, <http://islam.about.com/od/glossary/g/fitna.htm> (last visited Apr. 21, 2012) ("forces that cause controversy, fragmentation, scandal, chaos, or discord within the Muslim community, disturbing social peace and order.").

¹³⁹ *El-Farra*, 365 Ark. at 211.

¹⁴⁰ *Id.*

Farra another letter, stating his actions were in “contradict[ion] with Islamic law.”¹⁴¹ El-Farra was eventually terminated on July 17, 2003.¹⁴²

After his termination, El-Farra filed a complaint against the ICLR alleging defamation, tortious interference with a contract, and breach of a contract. The ICLR responded by arguing that under the First Amendment, the court could not hear the case and summary judgment should be granted.¹⁴³ The circuit court stated that it could not hear El-Farra’s claims because doing so would be akin to a civil court placing limitations on individuals that religious institutions can choose as their representatives, which would violate the First Amendment.¹⁴⁴ El-Farra claimed there was a breach of his contract,¹⁴⁵ and the terms of his contract provided that he could be terminated ““on valid grounds according to Islamic Jurisdiction (Shari’a).””¹⁴⁶ The court found that any determination of El-Farra’s claim would involve intertwining itself in ecclesiastical issues, which would violate the First Amendment, and therefore, El-Farra was left without any remedy because the court would not look at *Sharia* law.¹⁴⁷

El-Farra also asserted a claim for defamation, based on what the letters sent to him by the Islamic Center claimed.¹⁴⁸ To make a determination on whether the Islamic Center is guilty of defaming El-Farra,¹⁴⁹ the court would have to delve into Islamic law, which it claimed would be a violation of the First Amendment.¹⁵⁰ The Supreme Court of Arkansas affirmed the lower court’s ruling, which held that there was insufficient subject-matter jurisdiction to hear the case.¹⁵¹

The *El-Farra* case demonstrates a situation where the parties chose to have their contract governed by Islamic law, but the courts did not view Islamic law as a valid choice of law and therefore did not honor this choice.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 212.

¹⁴⁵ *Id.* at 211.

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* at 214-215 (“the First Amendment protects the act of decision rather than the motivation behind it; therefore, whether the termination of appellant was based on secular reasons or Islamic doctrine, this court will not involve itself in ICLR’s right to choose ministers without government interference.”).

¹⁴⁸ *Id.* at 211; *see also id.* at 215-216 (recounting that the letters sent by the Islamic Center to El-Farra accused him of “‘insubordination, disrespect, and lack of cooperation,’ of being ‘disruptive, to the community,’ of delivering khutbas (sermons) which showed ‘maleficence and deliberate interference in the operations of the EC,’ and of ‘creating disunity and ‘fitna’ among the community,’ . . . [and] of conduct which ‘contradicts the Islamic law,’ and of conduct which has ‘increasingly been unbecoming, insubordinate and disrespectful to the entire community.’”).

¹⁴⁹ *Id.* at 216 (indicating that to determine whether El-Farra has contradicted Islamic law, or is guilty of creating *fitna* in the community, the court will have to delve into interpret Islamic law).

¹⁵⁰ *See id.* at 216.

¹⁵¹ *See id.* at 214.

D. National Group for Communications & Computers v. Lucent Technologies International

In *Nat'l Grp. for Commc'ns & Computers v. Lucent Techs. Int'l*, National Group for Communications and Computers Ltd. ("NGC") sued Lucent Technologies International, Inc. ("Lucent") over a telecommunications construction subcontract.¹⁵² American Telephone and Telegraph Company ("AT&T"), the corporate predecessor of Lucent, had entered into a subcontract with the Saudi Arabian Ministry of Post Telephone and Telegraph.¹⁵³ The contract provided for a four-year relationship.¹⁵⁴ The project, however, never came to fruition and the subcontract was ultimately terminated.¹⁵⁵ The case concerned the proper award of damages under Saudi Arabian law for a breach of contract claim.¹⁵⁶ Both parties chose Saudi Arabian law to apply, using the following language: "This Subcontract is subject to the regulations in force in the Kingdom of Saudi Arabia. Interpretation and execution of the Subcontract and settlement of claims arising therefrom shall be subject to and in accordance with the said regulations."¹⁵⁷ Due to the choice-of-law provision, the New Jersey District Court had to determine the case under Saudi Arabian law.¹⁵⁸ The court had jurisdiction to do this pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, which provides that when deciding issues of foreign law, a court "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law."¹⁵⁹

¹⁵² *Nat'l Grp. for Commc'n & Computers v. Lucent Tech. Int'l*, 331 F. Supp. 2d 290, 292 (D. N.J. 2004).

¹⁵³ *Id.*

¹⁵⁴ *Id.* (stating that "[p]laintiff was to implement the Roadside Emergency Telephone and Wayside Facilities Project ("RET/WSF Projects") in Saudi Arabia by performing design and engineering services and installing emergency and pay telephones along Saudi Arabia's highways and nearby facilities.").

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (noting that the parties agreed and the Court "assume[d]" that the subcontract was breached, and so the findings of fact only concerned damages under Saudi Arabian law); *See also* Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 635 (2006) (noting that Saudi Arabia has adopted the classical, un-codified, Islamic law).

¹⁵⁷ *Lucent*, 331 F. Supp. 2d at 293.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 293-294 (explaining that in making the determination on foreign law, courts may conduct its own research, request additional information from the parties, use experts and foreign material, and may even consider evidence that would be inadmissible at trial).

The court then analyzed *Sharia* law nonetheless.¹⁶⁰ Saudi Arabia applies classic Islamic law, whereas other countries may only apply a few tenets of the faith and jurisprudential system.¹⁶¹ In applying Saudi Arabian law, the court examined various sources of the law; consulted Islamic law scholars; noted the infusion of Islam into the life of Saudi Arabian citizens; and acknowledged that Islamic law controls Saudi Arabia's legal system.¹⁶² The court then highlighted several ways in which the Saudi Arabian legal system differs from that of the United States.¹⁶³ Importantly, there is no judicial precedent to bind judges and the opinions are not published in Saudi Arabia.¹⁶⁴ In fact, judges in Saudi Arabia "must strive for the divine truth for each case that confronts him, without being bound by past opinions, even his own. Truth is the ultimate precedent, to which one must return once it is revealed."¹⁶⁵

Under Islamic law, it is difficult to conduct some business transactions because of the prohibition of *gharar*,¹⁶⁶ and as such, clients engaging in complex business transactions are often encouraged to exclude *Sharia* law as a choice of law.¹⁶⁷ Here, the court determined that the parties were sophisticated in business and Islamic law. Because they chose not to expressly exclude *Sharia* law in their contract, the court found it applied, noting "however uncompromising that application may be."¹⁶⁸ After finding *Sharia* law governed, the court then applied Saudi Arabian damages law to the case and determined that the damages plaintiff sought were contrary to Islamic law due to *gharar*.¹⁶⁹ The court ultimately decided that

¹⁶⁰ *Id.*

¹⁶¹ *See id.* at 295.

¹⁶² *Id.* at 294 (citing sections from the Basic Regulation of the Kingdom of Saudi Arabia quoted by the Court) ("Article 1: The religion [of Saudi Arabia] is Islam, its constitution is the Book of God Most High and the *Sunna* of His Prophet, may God bless him and give him peace. Article 7: Rule in the Kingdom of Saudi Arabia draws its authority from the Book of God Most High and the *Sunna* of His Prophet. These two are sovereign over this Regulation and all regulations of the state. Article 48: The courts shall apply in cases brought before them the rules of the Islamic *shari'a* in agreement with the indications in the Book and the *Sunna* and the regulations issued by the ruler that do not contradict the Book or the *Sunna*.").

¹⁶³ *Id.* at 295-297.

¹⁶⁴ *See id.* at 295.

¹⁶⁵ *See id.*; *see also* Trumbull, *supra* note 156, at 633-634 (stating that one of the reasons that Islamic law is harder to apply than Christian or Jewish law is because there is no authoritative text on Islamic law and expert witnesses cannot testify to a binding interpretation of Islamic law, unless an *ijma* has been reached, and since there are many schools of Islamic thought, adopting one over the other will likely prove unconstitutional).

¹⁶⁶ *See Lucent*, 331 F. Supp. 2d at 296 (indicating that *gharar*, meaning risk, is prohibited and repugnant in Islam and the practical result is that courts in Saudi Arabia will not enforce uncertain or unknown sales); *see also* Trumbull, *supra* note 156, at 633-634 (noting that this prohibition comes from the *hadith*).

¹⁶⁷ *See* Trumbull, *supra* note 156, at 633-634

¹⁶⁸ *Lucent*, 331 F. Supp. 2d at 297.

¹⁶⁹ *Id.* at 298.

when applying Saudi Arabian law, looking at Islamic law texts, considering expert testimony, and examining Islamic law, it could not award damages to the plaintiff.¹⁷⁰

The *Lucent* decision indicates that there are situations where U.S. courts can and will apply Islamic law.¹⁷¹ Thus, despite arguments that this jurisprudential system is overly vague, U.S. courts are capable of understanding and applying Islamic law.¹⁷² In *Lucent*, both parties contracted for Saudi Arabian law to apply.¹⁷³ As such, the court reasoned that it had to determine the case under this law, which required it to analyze Islamic law.¹⁷⁴ According to Saudi Arabian law, in a claim for breach of contract, a plaintiff can only recover for the “actual physical harm to the property caused by the breach as well as out-of-pocket losses, and can be obtained only for losses which are precise, accurate and certain.”¹⁷⁵

Although it has been suggested that the *Lucent* case violates the First Amendment, no appeal has been filed to date.¹⁷⁶ Some scholars argue that, to decide this case, the court had to make a determination of religious doctrine concerning *gharar*. But since Saudi Arabian law is not codified, it could not make this determination based on a secular footing.¹⁷⁷ The judge, some argue, played the role of *qadi* and rejected the plaintiff’s argument for lack of ““supporting religious authority.””¹⁷⁸

III. Restatement (Second) of Conflict of Laws

There are constitutional and public policy issues with respect to applying Islamic law in the United States. The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of people to peaceably assemble, and to petition the Government for a redress of grievances.”¹⁷⁹ Critics of Islamic law fear that if it were allowed as a choice of law in the U.S. judicial system, the courts would violate the Establishment Clause of the First Amendment.¹⁸⁰ Another concern is that if Islamic law were applied in the arbitration

¹⁷⁰ *Id.* at 301.

¹⁷¹ See Julio C. Colon, *Choice of Law and Islamic Finance*, 46 TEX. INT’L L.J. 441, 429 (2011).

¹⁷² See Symeonides, *supra* note 111, at 430.

¹⁷³ *Lucent*, 331 F. Supp. 2d at 293.

¹⁷⁴ See Colon, *supra* note 171, at 429.

¹⁷⁵ See *Lucent*, 331 F. Supp. 2d at 297 (indicating that under Saudi Arabian law, a party actually cannot assume the risk of *gharar*).

¹⁷⁶ See Symeonides, *supra* note 111, at 430; see also Trumbull, *supra* note 156, at 634.

¹⁷⁷ See Trumbull, *supra* note 156, at 636.

¹⁷⁸ See *id.*

¹⁷⁹ U.S. CONST. art. I.

¹⁸⁰ See Colon, *supra* note 171, at 427.

setting, the resulting arbitral awards may be vacated in court on public policy grounds.¹⁸¹ There are, however, some legal sources available to assist courts tasked with these complicated choice-of-law situations, including applying Islamic law, which should allay such fears. The Restatement (Second) of Conflict of Laws (“Restatement”) is the main source.¹⁸²

The Restatement recognizes in its first section that issues arise that may implicate the laws of two separate states, and that these states may have conflicting laws, which makes it necessary to have a way to organize both sets of laws and come to a resolution.¹⁸³ Section 6 of the Restatement provides guidelines for choice-of-law principles.¹⁸⁴ Specifically, Section 6 provides that, *inter alia*, when a state does not have its own statutory directive to follow on choice of law, the factors relevant to the choice of the applicable rule include: 1) international and interstate system needs; 2) relevant policies of the forum; 3) relevant policies and interests of other interested states in the determination of the particular issue; 4) protection of justified expectations; 5) basic policies underlying the particular field of law; 6) certainty, predictability and uniformity of result; and 7) ease in the determination and application of the law to be applied.¹⁸⁵ The comments to this section note that the protection of justified expectations is an important tenet of choice of law rules.¹⁸⁶ Where parties have chosen a particular type of law, such as Islamic law, and are expecting to be bound by that law, it is unfair to “hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.”¹⁸⁷ Of course this tenet does not apply when the individual has molded his conduct to conform to the laws of another state whereby such conduct is contrary to public policy. However, where the parties choose Islamic law and there is no public policy issue, there is no reason that Islamic law should not be applied, such as in a contract case.

Another important factor emphasized by Section 6 is the understanding of the basic policies behind a given law.¹⁸⁸ Some courts have argued that Islamic law is vague and unpredictable because of the different schools of legal thought.¹⁸⁹ Yet given the number of cases where

¹⁸¹ *See id.* (noting that there have been instances in arbitration of Islamic finance where a challenge of the award was attached on First Amendment grounds).

¹⁸² RESTATEMENT (SECOND) CONFLICT OF LAWS § 1 (1971).

¹⁸³ *See id.*

¹⁸⁴ *Id.* at § 6.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at § 6 cmt. g.

¹⁸⁷ Colon, *supra* note 171, at § 6 cmt. g.

¹⁸⁸ *Id.* at § 6 cmt. h.

¹⁸⁹ *See, e.g.,* Marriage of Shaban v. Shaban, 88 Cal. App. 4th 398, 400 (2001).

courts have successfully applied Islamic law,¹⁹⁰ it is clear that concerns of adequately understanding Islamic law should not be a bar in selecting it as a choice of law.

The Restatement also addresses which law is to govern in the absence of effective choice by the parties.¹⁹¹ This Section applies to Islamic law, where parties choose to apply Islamic law generally, but fail to indicate which school of thought they planned to follow. Section 188 holds that where the parties have not made an effective choice of law, the “contacts to be taken into account in applying principles of Section 6 to determine the law applicable to an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.”¹⁹² The effect of this section on the choice of law, including Islamic law, is that where parties intend to be bound by Islamic law but are silent on the school of thought of such law, courts can “fill in the gap” by using the above factors to determine which school of thought is to apply. Of course, applying Section 188 will not work in every case where Islamic law is said to govern, or when some contract terms are substantially unclear. Although, if courts at least attempted to apply Islamic law, it is likely that some parties contracting for Islamic law would be successful in having this choice of law provision upheld, rather than the case being dismissed.

Section 187 of the Restatement concerns the law of the state chosen by the parties.¹⁹³ Generally, it provides that if parties have chosen a particular law to apply, then courts should apply that law. Further, even if parties have not indicated what law they want to apply, but have inserted terms in their contract that lead the court to conclude that the parties intended a particular law to apply, the court can apply that particular law.¹⁹⁴ In regard to Islamic law, if the parties provide that Islamic law applies, but do not indicate whether they intended to be bound by the laws of a specific country governed by Islamic law, classical Islamic law, or a particular school of Islamic law, courts can examine the contract terms to find which area of Islamic law the parties intended to apply. In addition, this Section provides for a public policy exception.¹⁹⁵ Specifically, if application of the

¹⁹⁰ See *Nat'l Grp. Comm'n & Computers v. Lucent Tech. Int'l*, 331 F. Supp. 2d 290, 294-98 (D. N.J. 2004).

¹⁹¹ RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 (1971).

¹⁹² *Id.*

¹⁹³ *Id.* at § 187

¹⁹⁴ *Id.* at § 187 cmt. a.

¹⁹⁵ *Id.* at § 187 (2)(b).

chosen law violates the fundamental public policy of a state, which has a greater interest in the action, the law shall not apply.¹⁹⁶ There are indeed instances where application of Islamic law in American courts would lead to a result contrary to the fundamental public policy of the United States. Accordingly, this section exempts the application of Islamic law where it runs counter to the public policy of the United States.

IV. A Solution: Islamic Arbitration

Islamic law is currently one of the top three major legal systems in the world.¹⁹⁷ Its application in U.S. courts has been slow, at best, due to constitutional issues and instances of social and institutional prejudice.¹⁹⁸ Nonetheless there are still parties in the United States as well as internationally that seek to have their disputes adjudicated within the U.S. under *Sharia* law. A solution to this issue has slowly been developing under the umbrella of Islamic arbitration. Indeed, Islamic law has a long history of arbitration, or *tahkim*, which dates back to pre-Islamic time when tribal leaders conducted arbitration.¹⁹⁹ Religious arbitration tribunals already exist, such as the *Beth din*, the Jewish rabbinical arbitration court.²⁰⁰ Notwithstanding, some argue that enforcement of religious arbitration is a violation of the Establishment Clause of the First Amendment; although courts have held that enforcing an award rendered by the *Beth din* does not require entangling themselves in religion by addressing the underlying merits of the case.²⁰¹

Arbitration is a mode of resolving disputes, which allows parties to choose a particular law to apply, and to have their issues resolved privately, outside of the court system.²⁰² It is conducted by arbitration tribunals, which have jurisdiction once parties submit to their jurisdiction pursuant to a valid arbitration clause in their contract.²⁰³ Often, parties submit to

¹⁹⁶ *Id.*

¹⁹⁷ See Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 566 (2006).

¹⁹⁸ *Id.* at 568 (noting that there is a view in the United States that Islamic law is unsophisticated and inherently defective).

¹⁹⁹ *Id.* at 589.

²⁰⁰ See Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1243 (2011).

²⁰¹ See *id.* at 1244; see also *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 354 (D.C. Cir. 2005); *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1113 (D. Colo. 1999); *Elmora Hebrew Ctr., Inc. v. Fishman*, 593 A.2d 725, 731 (N.J. 1991).

²⁰² See, e.g., Kutty, *supra* note 197, at 569.

²⁰³ See *id.*

arbitration because it is faster and less expensive than the traditional litigation route and allows greater flexibility regarding choice of law.²⁰⁴

The process of establishing Islamic arbitration in the United States has already begun, and the Fiqh Council of North America is one such example.²⁰⁵ This organization provides determinations based on Islamic legal issues and is responsible for appointing arbitrators and confirming that the arbitrators' decisions comply with Islamic law.²⁰⁶ Moreover, the Council of Masajid of the United States resolved to establish Islamic arbitration tribunals in numerous large metropolitan areas in the United States, although none have been established to date.²⁰⁷

The development of Islamic arbitration will not lead to rulings contrary to public policy because courts have the mechanisms to vacate arbitration awards in such cases.²⁰⁸ The Supreme Court of the United States has even stated that “[t]he public’s interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements,” explaining that awards contrary to public policy are void.²⁰⁹ Therefore, vacatur can serve as a check on religious arbitration.

Religious arbitration tribunals have been successful in the Jewish community. If the Muslim community models arbitration tribunals after examples such as the *Beth din*, there is no reason to believe that Islamic arbitration tribunals will not be successful as well. The mold has already been set. In 1925, written arbitration agreements were made valid by the Federal Arbitration Act (“FAA”).²¹⁰

There are various grounds under which an arbitration award may be vacated, both under the FAA and state arbitration statutes. Two of these grounds are where a tribunal failed to follow due process and where an award violates public policy.²¹¹

²⁰⁴ See *id.* at 560-570.

²⁰⁵ Helfand, *supra* note 200, at 1250.

²⁰⁶ *Id.*

²⁰⁷ *Id.* (discussing the importance to Muslims of establishing Islamic arbitration tribunals and giving the example of a recent *fatwa* issued by the Fiqh Council stating that Muslims must try to resolve disputes according to Islamic law).

²⁰⁸ *Id.* at 1256.

²⁰⁹ *Id.*; but see *id.* (“the grounds on which a court can vacate or modify an arbitration award are generally limited by statute to cases where the court finds ‘that the rights of the party were prejudiced by corruption, fraud, or misconduct in procuring the award; partiality of an arbitrator; that the rights of the arbitrator exceeded his power or failed to make a final and definite award; or a procedural failure was not waived.’”).

²¹⁰ See Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J. L. & RELIGION 379, 388 (2009-2010) (FAA provision) (“valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

²¹¹ *Id.* at 390.

Regarding the due process ground, a court will want to confirm that the arbitration comports with the basic requirements of fairness and due process, and that the parties entered the arbitration knowingly and voluntarily.²¹² There are various procedural routes that arbitrators in Jewish tribunals will take and these different roads are set out in advance, so that the parties know what to expect.²¹³ Interestingly, a *beth din* may apply only Jewish law, or in the alternative, a combination of Jewish and secular law.²¹⁴ An example of where public policy and Jewish law conflict is in cases where the *beth din* have refused a party the right to a lawyer.²¹⁵ In such a case, American courts will vacate the award.²¹⁶ Jewish law discourages the use of lawyers because they are seen as pursuing their client's case only and not justice as a whole in the case.²¹⁷ Of course, this Jewish law is in direct conflict with the core of the American legal system, where representation by an attorney is almost a fundamental right.²¹⁸

Regarding the public policy ground, courts will vacate a *beth din* award if the award is contrary to public policy or "irrational."²¹⁹ In addition, courts have determined some issues as non-justiciable by *beth dins* because of public policy, such as wills, child support, and custody.²²⁰ However, if a *beth din* does make a ruling on a child custody case, and the court finds that it is in the best interest of the child, the order will not be vacated.²²¹

The *beth din* mold can be applied to Islamic arbitration tribunals.²²² If the Islamic tribunals structure themselves similarly to *beth dins*, where parties can voluntarily agree to bring their cases to the Islamic tribunals,²²³ where the tribunals set basic ground rules,²²⁴ where the ground rules are

²¹² *Id.* at 393.

²¹³ Bambach, *supra* note 210, at 393-394 ("arbitrations can take various procedural forms, including 'compromise or settlement related to Jewish law (*p'shara korva l'din*),' or a hearing 'either according to Jewish law as it is understood by the arbitrators (*din torah*) or compromise (*p'shara*) alone.'").

²¹⁴ *Id.* at 394.

²¹⁵ *Id.* at 395.

²¹⁶ *Id.*

²¹⁷ *Id.* (noting that under Jewish law, lawyers are "depicted in halachic sources as . . . pursuing only [their] client's cases, not pursuing justice itself, in conflict with the Biblical commandment 'tzedek tzedek tirdof' –meaning justice, justice, thou shalt pursue.")

²¹⁸ *See id.*

²¹⁹ *Id.* at 399.

²²⁰ *Id.* (noting that most states argue that states' *parens patriae* role cannot be assumed).

²²¹ *Id.* at 399-400.

²²² *Id.* at 403.

²²³ *Id.* at 406 (explaining that a voluntary agreement for arbitration is a requirement for civil courts to review the agreements and that the arbitration agreements should always be in writing and be clear about what is going to be arbitrated).

²²⁴ *Id.* at 408 (stating that there are many different schools of thought and interpretation of Islamic law, and the tribunals should set ground rules for how to deal with this inherent issue that will come up).

followed,²²⁵ and where awards are not against public policy or irrational, Muslims may be successful in having their claims adjudicated by an Islamic arbitral tribunal pursuant to Islamic law.²²⁶

Conclusion

It is possible that the use of Islamic law in U.S. courts has been slow to develop because Muslim immigration to the United States is relatively new, only occurring in large numbers as of the 1960s.²²⁷ As more Muslims come to the U.S., and the use of Islamic law and custom becomes more widespread, hopefully U.S. courts will become more accustomed to analyzing, applying, and enforcing Islamic law as a choice of law in private contracts.

Islamic arbitration tribunals are another mechanism through which parties can have their contracts and disputes resolved pursuant to Islamic law. In this context, Jewish arbitration tribunals serve as a useful example for future Islamic arbitration tribunals.²²⁸ As the use of Islamic arbitration, or *tahkim*, grows in the U.S., the hope is that parties will increase their use of such tribunals and U.S. courts will become accustomed to enforcing arbitral awards rendered by such tribunals.

²²⁵ *Id.* at 409 (noting that arbitrators should not be biased in their decisions, which can happen in a small community).

²²⁶ *Id.* at 410 (knowing that awards contrary to public policy or irrational will not be confirmed by the courts, the tribunals should avoid deciding cases this way).

²²⁷ *Id.* at 381.

²²⁸ *See id.* at 411.

