HARD QUESTIONS IN UNEASY TIMES: THE PROSPECT OF ENFORCING FOREIGN AWARDS APPLYING SHARI'A LAW IN AUSTRALIA

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Abstract

*International arbitration under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] is the leading institution for the resolution of transnational disputes of a commercial character. Operating across interfaces between societies, polities, cultures, and as the vanguard mechanism of its kind, international arbitration must grapple not only with differences between legal systems, but also with divergent social values and cultural norms. Saudi Arabia's shift, over the past decade, towards becoming an arbitration-friendly jurisdiction, provides a timely opportunity to reflect. This paper raises, as a thought piece, the situation of enforcement of Saudi Arabia seated arbitral award in Australia, and the scope for resisting enforcement on public policy grounds. Saudi Arabia is an Islamic country with legal, political and social systems based on Shari'a law. The New York Convention permits a contracting State to refuse enforcement of an arbitral award where to grant enforcement would be contrary to public policy. This paper examines those aspects of Shari'a law which may be relevant to international commerce and dispute resolution and considers the likely impacts of Shari'a law on Saudi-seated arbitral awards. It then examines Australian judicial treatment of the public policy exception in order to distil the implications, if any, of Shari'a law on enforceability of Saudi-seated awards in Australia.*

I. Introduction

Edward Said, the great cultural scholar, in his seminal work 'Orientalism: Western Conceptions of the Orient', observed that the idea of the East, or the Orient, "*is an idea that has a history, tradition of thought, imagery, and vocabulary that have given it reality and presence in and for the West.*"[1] Said observed that the East had been home to some of Europe's oldest colonies, and a source of its languages and civilisations, but at the same time "*one of its deepest and most recurring images of the Other*", presenting itself as a contrast to its Western counterpart. In this approach, Said rests on the idea of the 'Other' as relevant to the definition of the West. The same way as there exists a relationship between the cultures of the East and the West, similarly, one must consider, unafraid, the nature and effect of Islamic law and its interaction with international commercial arbitration. It would be an error to proceed on the basis that the norms and approaches of one's own nation were to be granted a priori higher status as the repository of rectitude. In the context of international arbitration, such an approach would ignore the history of compromise that gave rise to the New York Convention, and subvert the destiny of international arbitration as the leading institution for the resolution of transnational disputes of a commercial character. Yet, a perplexing concern remains.

The concern attaches to the idea that certain practices or substantive laws may be of a character so problematic that the enforcing courts of another nation would find it morally reprehensible to

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1 EDWARD W. SAID, ORIENTALISM 5 (1995).

enforce an award that was the product, or enshrined the consequence, of such practices or laws. An extreme example illustrates the point. Assume that an arbitration in Alsatia, in accordance with its laws, was issued on the faith of testimony procured by bribery or torture. Few would contend that such awards should be enforced, given the apparent conflict with public policy.

Delicate issues arise when attention turns to legal systems that operate on ground norms that are different from one's own. In that regard, the engagement of the world with Islamic law will likely involve a number of complex and intricate issues. Indeed, an entire book has recently been written about this.[2] *Shari'a* law is applied in a number of countries. The application of those laws, in an international arbitration context, may, in certain circumstances, give rise to involute and intricate questions.

This paper, as a thought piece, seeks to raise for preliminary attention the situation of the enforcement of a Saudi Arabia seated arbitral award in Australia, and the scope for resisting enforcement on public policy grounds. Australia is chosen as the specimen enforcement jurisdiction for a number of reasons (besides the authors' familiarity with the jurisdiction), most significantly because it is a socially progressive and liberal society, but also a pro-enforcement jurisdiction for the purposes of international arbitration.[3]

The Kingdom of Saudi Arabia ["**Saudi Arabia**" or the "**Kingdom**"] is the second-largest oil producer in the world, and has the second-largest proven oil reserves of any nation.[4] In 2012, Saudi Arabia enacted a new arbitration law based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 ["**Model Law**"],[5] a significant step towards creating an arbitration-friendly jurisdiction and encouraging foreign investment in the Kingdom.

The new law strictly applies "*[…] without prejudice to the provisions of Islamic Shari'a.*"[6] As a result, it is possible that Saudi courts of enforcement will continue to look suspiciously upon foreign arbitral awards, due to concerns that *Shari'a* law was not adhered to in the arbitral proceedings.[7] Businesses dealing with Saudi companies may contract, by choice, necessity, or negotiation, for arbitration in Saudi seats; this may also be an attempt to shore up the prospect of enforcement in Saudi Arabia. The issue which then arises is whether the resulting arbitral awards, affected by the restrictions and impositions of *Shari'a* law, will be enforceable in jurisdictions outside Saudi Arabia.

This paper begins by considering some effects of the imposition of *Shari'a* law on arbitral awards produced by tribunals seated within Saudi Arabia. We then analyse the Australian approach to

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2 *See* MARIA BHATTI, ISLAMIC LAW AND INTERNATIONAL COMMERCIAL ARBITRATION (2019).

3 Nick Longley & Brian Long, *Australia: International Arbitration 2019*, ICLG (Aug. 22, 2019), *available at* https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/australia.

4 *What countries are the top producers and consumers of oil?,* US ENERGY INFORMATION ADMINISTRATION, *available at* https://www.eia.gov/tools/faqs/faq.php?id=709&t=6; *Oil Reserves by Country 2020*, WORLD POPULATION REVIEW (Feb. 26, 2020), *available at* http://worldpopulationreview.com/countries/oil-reserves-by-country.

5 Royal Decree No. M/34 (Approving the Law of Arbitration), 24/5/1433H, Apr. 16, 2012 (Saudi Arabia) [*hereinafter* "Royal Decree No. M/34"].

6 *Id.*

7 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 6, 1958, 330 U.N.T.S. 38 [*hereinafter* "New York Convention"]. Article V of the New York Convention lists, among the limited grounds upon which enforcement of an arbitral award can be refused, the ground that "[…] [t]he recognition or enforcement of the award would be contrary to the public policy of [the enforcing country]."

public policy as a ground for refusing enforcement of arbitral awards. From this, we draw conclusions about the circumstances in which the impact of mandatory laws of *Shari'a* on Saudi awards is likely to affect their enforceability in Australia.

II. Saudi Arabia's Arbitration Law

Saudi Arabia acceded to the New York Convention in 1994.[8] The Kingdom has a long history of arbitration. In the mid to late 20th century, a series of controversial awards, including the decision in *Saudi Arabia* v. *Arabian American Oil Co.*,[9] caused significant discontent with international arbitration within the region, rooted in general concern amongst Saudi Arabians that Saudi law would not be applied to international arbitrations concerning oil, its most important natural resource.[10] Dissatisfied with the outcome of the case, the government passed a resolution in 1963 that prevented government instrumentalities from participating in arbitrations,[11] a move which marked a strong retreat from international arbitration.

Although Saudi Arabia enacted its arbitration law in 1983, in anticipation of its accession to the New York Convention, the system these laws created was rigid and allowed high levels of court interference at various stages of the proceedings to ensure compliance with *Shari'a*.[12] As a result, Saudi Arabia was not considered an arbitration-friendly jurisdiction, and international corporations were reluctant to rely on international arbitration when doing business in Saudi Arabia.[13]

The enactment of a new arbitration law on April 16, 2012 marked a momentous change for arbitration in the Kingdom.[14] The new 'Royal Decree Number M/34' ["**Law of Arbitration**"][15] is based on the Model Law, and brings its legal framework up to international standards in many respects.[16] For example, the Law of Arbitration now recognises the competence-competence principle, allowing an arbitral tribunal to rule on its own jurisdiction,[17] and the Saudi Centre for Commercial Arbitration ["**SCCA**"] was established in Riyadh in 2016.[18] However, the Law of Arbitration explicitly makes its provisions subject to the laws of *Shari'a*.[19] Article 2 states that the law applies "*without prejudice to the provisions of Islamic Shari'a.*"[20] The influence of *Shari'a* is pervasive in the new law, and many aspects of the proceedings, which are generally under the control of the parties, are made subject to the provisions of *Shari'a*. These include agreements as to the

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8 *Countries, Contracting States*, NEW YORK ARBITRATION CONVENTION, *available at* http://www.newyorkconvention.org/countries.

9 Saudi Arabia v. Arabian Am. Oil Co., (1963) 27 ILR 117.

10 Saud Al-Ammari & Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, 30(2) ARB. INT'L 387, 388 (2014).

11 *Id.* at 389; Council of Ministers Resolution No. 58 (Restricting Right of Saudi Governmental Agency to Submit to Arbitration), 17/1/1383, June 25, 1963 (Saudi Arabia).

12 BHATTI, *supra* note 2, at 37; Al-Ammari & Martin, *supra* note 10, at 387, 389.

13 Kristin Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non-Domestic Arbitral Awards*, 18(3) FORDHAM INT'L L. J. 920, 952 (1994).

14 Jean-Pierre Harb & Alexander Leventhal, *The New Saudi Arbitration Law: Modernization to the Tune of Shari'a*, 30 J. INT'L ARB. 113 (2013).

15 Royal Decree No. M/34.

16 Khalid Alnowaiser, *The New Arbitration Law and its Impact on Investment in Saudi Arabia*, 29 J. INT'L ARB. 723 (2012).

17 Harb & Leventhal, s*upra* note 14, at 6, 118; Royal Decree No. M/34, art. 20.

18 Caroline Kehoe et al., *Saudi Arabia: Arbitrating in the Kingdom of Saudi Arabia*, HERBERT SMITH FREEHILLS (Nov. 1, 2018), *available at* https://hsfnotes.com/arbitration/2018/11/01/arbitrating-in-the-kingdom-of-saudi-arabia.

19 Harb & Leventhal, *supra* note 14, at 115.

20 Royal Decree No. M/34, art. 2.

procedures of the arbitral tribunal,[21] and the substantive law governing the relationship between the parties.[22] If an award violates the provisions of *Shari'a*, a nullification action may be brought, and a competent court must nullify the award.[23] Likewise, an order to execute an award will be refused where the award violates the provisions of *Shari'a*.[24] The primacy of *Shari'a* law has been cemented by the SCCA rules,[25] as well as a new enforcement law enacted in 2013,[26] and has not been detracted from by the implementing regulations.[27] However, it is worth noting that if the award is divisible, the part not containing a violation of the provisions of *Shari'a* or public policy may be executed.[28] The provisions of *Shari'a* are, therefore, mandatory law in Saudi Arabia.[29] As a result, it should be anticipated that both, the arbitral process and content of arbitral awards will comply with *Shari'a*. This leads to concerns about the enforceability of commercial contracts by arbitration in Saudi Arabia. Conversely, as discussed here, this leads to concerns about the enforceability of arbitral awards issued from Saudi Arabian seats elsewhere.

III. Aspects of *Shari'a* Law

Shari'a is a broad and pervasive code of conduct that informs all aspects of society and human behaviour in Islam.[30] *Shari'a* is derived from the *Quran*, the practice of Mohammad (the *Sunna*), points of scholarly consensus (*Ijmaa*) and analogical inferences (*Qiyas*).[31] *Shari'a* is not interpreted consistently across the Islamic world, or even within the Sunni branch of Islam followed in Saudi Arabia.[32] The dominant school of interpretation in Saudi Arabia is the *Hanbali* school, the most conservative of the four schools of Sunni Islam.[33] This school unquestioningly accepts both the *Quran* and *Sunna*.[34]

Some provisions of *Shari'a*, such as *Jahala* (a prohibition on unclear terms), *Ghabn* (a rule against deceit), and *Wa'ad Ta'aqud* (a rule against 'agreements to agree'),[35] represent only minor departures from international principles and should not ordinarily be a cause for concern. However, some other *Shari'a* provisions do have the potential to affect the making of arbitral awards in Saudi Arabian seats. For example, the prohibition of *Riba,* which prevents charging of interest is interpreted in Saudi Arabia as prohibiting interest of any kind, not just unfair or usurious interest.[36]

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21 Royal Decree No. M/34, art. 25.
22 Royal Decree No. M/34, art. 38.
23 Royal Decree No. M/34, art. 50(2).
24 Royal Decree No. M/34, art. 50(2)(v).
25 Saudi Center for Commercial Arbitration (SCCA) Rules, art. 31(1), May 2016.
26 Royal Decree No. M/53 (Enforcement Law), 13/8/1433H, July 2, 2012 (Saudi Arabia); Caroline Kehoe et al., *supra* note 18.
27 Council of Ministers Decision No. 541/1438 (Implementing Regulations to the 2012 Saudi Arbitration Law), May 22, 2017 (Saudi Arabia).
28 Royal Decree Number M/34, art. 55(2)(b). This may have implications for awards which, for example, provide for damages as well as interest, in which case it could be speculated that the damages part would be executed, but not the interest part.
29 Abdulkadir Guzeloglu, *The Role of Sharia Law on the Enforcement of Arbitral Awards in the Kingdom of Saudi Arabia*, GUZELOGLU, *available at* https://www.guzeloglu.legal/uploads/pdf/99-2/3423R21.pdf [*hereinafter* "Guzeloglu"].
30 Harb & Leventhal, *supra* note 14, at 115.
31 *Id.*
32 Arthur Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5(1) SANTA CLARA J. INT'L L. 169, 174-175 (2006).
33 *Id.* at 176.
34 *Id.*
35 Al-Ammari & Martin, *supra* note 10, at 406.
36 *Id.* at 406.

The rule has been relaxed in Saudi Arabia in some contexts (such as banking),[37] and in the words of one author, "*[t]he situation is truly vague and confusing to the extent that nobody is able to determine whether interest is legal or illegal.*"[38]

In light of this, where parties provide for arbitration in Saudi Arabia, they must take into account the likelihood that their contract will be unenforceable to the extent that it provides for interest. An arbitration award which grants interest is likely to be seen as equivalent to a contract containing interest and may be nullified by a Saudi court.[39]

The prohibition on *Gharar,* meaning gambling or speculation, prevents the enforcement of contracts where the subject matter is uncertain or does not yet exist.[40] This rule has the potential to prevent the enforcement of certain types of contracts, including insurance contracts and trade in futures, although the Saudi government has relaxed this rule as far as insurance contracts are concerned.[41] The rule is likely to restrict the types of damages available for breach of contract; for example, damages for future profits are unlikely to be permitted.[42] As with *Riba,* arbitral awards which enforce or contain *Gharar* will be subject to nullification.[43]

There is a further rule of *Shari'a,* that, by virtue of its emotive valency, attracts much attention, concerning the legal capacity of females to give evidence. This provision has caused significant concern in the arbitration community, with regard to the morality of participating in,[44] or condoning[45] *Shari'a* based arbitration, further raising questions as to whether *Shari'a*-influenced awards will be, or should be, enforced by the courts of the Western countries.[46]

The rule concerning female testimony derives from the *Quran*, the principal source of *Shari'a.* Verse 2:282 of the *Quran* provides that in establishing financial or commercial matters, the testimony of either two males, or one male and two females is required.[47] This often leads to the inference that the testimony of a female is to be given less weight than that of a male.[48] This rule is an artefact of a time when women did not normally engage in commercial matters in Islamic societies, nor indeed in many Western societies.[49] In this regard, the historical position in the West ought not to be forgotten — where, for instance, women could not attest documents in French civil courts under

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37 Guzeloglu, *supra* note 29.

38 ABDULRAHMAN YAHYA BAAMIR, *SHARI'A* LAW IN BANKING AND COMMERCIAL ARBITRATION: LAW AND PRACTICE IN SAUDI ARABIA 168 (2010).

39 Royal Decree No. M/34, art. 50(2).

40 Al-Ammari & Martin, *supra* note 10, at 406.

41 Roy, *supra* note 13, at 948.

42 Al-Ammari & Martin, *supra* note 10, at 406.

43 Royal Decree No. M/34 art. 50(2).

44 Albert D. Spalding & Katherine Kim Eun-Jung, *Should Western Corporations Ban the Use of Shari'a Arbitration Clauses in their Commercial Contracts?*, 132(3) J. BUS. ETHICS 613 (2015).

45 *See generally* Richard Halmo, *Shari'a Law in Western Traditions: Irreconcilable Differences or an Endeavour in Religious Autonomy?*, L. SCH. Student Scholarship 231 (2013).

46 Saad U. Rizwan, *Foreseeable Issues and Hard Questions: Implications of U.S. Courts Recognizing and Enforcing Foreign Arbitral Awards Applying Islamic Law under the New York Convention*, 98(2) CORNELL L. REV. 493 (2013).

47 Nehaluddin Ahmad, *Women's Testimony in Islamic Law and Misconceptions: A Critical Analysis*, 6 RELIGION & HUM. RTS. 13 (2011).

48 BHATTI, *supra* note 2, at 115; Spalding & Kim, *supra* note 44, at 613, 618.

49 BHATTI, *supra* note 2, at 115, 116; Torki Al-Shubaiki, *The Saudi Arabian arbitration law in the international business Community: a Saudi perspective*, LONDON SCH. OF ECONOMICS 196 (2003) [*hereinafter* "Al-Shubaiki"].

the Napoleonic code until 1897.[50] The *Shari'a* rule survives and reportedly continues to be applied in Saudi Arabia to this day,[51] although the extent to which it applies, in practice, to international commercial arbitration proceedings is unclear.[52] It will depend on the circumstances whether the application of the rule will make a difference. The confidentiality of arbitral proceedings, combined with the limited number of published enforcement decisions coming out of Saudi Arabia, means that it is difficult to tell whether female testimony is *in practice* given less weight by arbitral tribunals seated in Saudi Arabia.

In theory, the rules of *Shari'a* are absolute and inflexible.[53] Moreover, an analysis of the Law of Arbitration leads to the conclusion that failure to comply with the rule would render an award subject to nullification by the Saudi courts.

Article 25 of Law of Arbitration states as follows:

> "*The two parties to arbitration may agree on procedures to be followed by the arbitration tribunal in conducting the proceedings, including their right to subject such proceedings to effective rules of any organization, agency or arbitration center within the Kingdom or abroad, provided said rules are not in conflict with the provisions of Shari'a.*"[54]

This is likely to encompass the rules of evidence, and therefore, it is logical to conclude that failure to comply with the rule concerning female testimony would subject the award to nullification under Article 50(1)(e) or 50(2) of the Law of Arbitration.[55] There have also been calls for a return to Islamic principles throughout the Muslim world, and for international arbitration to be more inclusive, in the sense of accommodating *Shari'a* law.[56] It follows that there is a significant risk and real possibility that arbitral tribunals seated in Saudi Arabia will follow the rule, and not accord full weight to the testimony of women in commercial matters. This particular aspect of *Shari'a* will, therefore, be the focus of the remainder of this paper, and its implications for enforceability examined in close detail.

IV. ***Shari'a* Law and Arbitration: Concerns**

As already noted, concerns about the intermixing of *Shari'a* with arbitration are by no means novel. The problem was perceived, and steps were taken to counter it.

It was observed in the study 'Dealing in Virtue' that attempts were made to establish an Islamic Arbitration Centre in Cairo to offer an alternative approach to arbitration, but:

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50 Al-Shubaiki, *supra* note 49, at 196; CODE CIVIL [C. CIV.] [CIVIL CODE] art. 37 (Fr.).

51 U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. and Lab., Saudi Arabia 2015 Human Rights Report, 35 (2015), *available at* https://2009-2017.state.gov/documents/organization/253157.pdf; *Arbitrary Detention and Unfair Trials in the Deficient Criminal Justice System of Saudi Arabia, Precarious Justice*, HUM. RTS. WATCH, app. ¶ 3 (March, 2010), *available at* https://www.hrw.org/reports/2008/saudijustice0308/saudijustice0308web.pdf.

52 BHATTI, *supra* note 2 at 116.

53 Béligh Elbati, *The recognition of foreign judgments as a tool of economic integration: views from the Middle Eastern and Arab Gulf countries*, *in* CHINA'S ONE BELT ONE ROAD INITIATIVE AND PRIVATE INTERNATIONAL LAW (2018).

54 Royal Decree No. M/34, art. 25.

55 *Id.* arts. 50(1)(e) and 50(2).

56 Faisal Kutty, *The Sharia Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 619 (2006).

> "*[I]n order to build legitimacy in the international community, the proponents of the new centre now emphasize how Islamic law will really lead to no difference in outcomes. Islamic contract law is reportedly the same in practice as that found in the civil systems, and even the lex mercatoria can be applied in any arbitrations that may make their way to the Islamic centre. The unmistakable theme is that almost all the differences – except perhaps the prohibition of interest – can be eliminated to gain international acceptance.*"[57]

For instance, in an article published in 2013, Saad Rizwan questioned whether arbitral awards from *Shari'a* jurisdictions could, or should be enforceable in the United States of America ["**US**"],[58] considering that, among other things, the provisions regarding female testimony were contrary to the equal protection rights in the 14th Amendment to the Constitution of the US.[59] Rizwan dismissed the idea of a blanket non-enforcement approach, primarily because such an approach would involve the judicial arm of the government venturing into foreign policy issues in violation of the 'political question' doctrine.[60] The US 'political question' doctrine holds, in essence, that issues that are fundamentally political (as opposed to legal) are not justiciable.

Rizwan further observes that a "*due process and equal protection analysis*" could be carried out by the courts of enforcement in limited circumstances, namely, where the party seeking to resist enforcement objected on those grounds during the arbitral proceedings.[61] He argued that this could be done even if it were contrary to the New York Convention, since constitutional rights trump obligations under international treaties when the two conflict.[62]

By contrast, Australia's constitution does not expressly guarantee an extensive set of human rights, and contains very few provisions which amount to rights protections.[63] As a result, it is doubtful whether a particular provision of the Constitution, expressed or argued to be capable of promoting gender equality, could be invoked to resist enforcement of arbitral awards in Australia.

Other concerns have also been raised. For instance, in a 2014 article,[64] Albert Spalding and Eun-Jung Kim considered the issues posed by *Shari'a* based arbitration from a corporate policy perspective. They grappled with the question of whether Western corporations – corporations based in Western countries and espousing Western values – should avoid engaging in *Shari'a*-based arbitration on moral grounds. The article begins by reiterating some of the concerns commonly raised about *Shari'a* generally and *Shari'a*-based arbitration specifically: human rights concerns, concerns that the rights of women and non-Muslims are not adequately protected and, concerns that decisions may be arbitrary due to the absence of a requirement to adhere to precedent or established principles. They consider whether, despite considerable incompatibilities, it remains

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57 YVES DEZALAY & BRYANT G. GARTH, DEALING VIRTUE – INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 243 (1996).

58 Rizwan, *supra* note 46, at 493, 505.

59 *Id.* at 510.

60 *Id.* at 507.

61 *Id.* at 516.

62 *Id.* at 517, 518.

63 George Williams, *The Federal Parliament and the Protection of Human Rights*, PARLIAMENT OF AUST'L (May 11, 1999), *available at* https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp20.

64 Spalding & Kim, *supra* note 44, at 613.

justifiable for a Western corporation to engage with, or acquiesce to the determination of disputes in accordance with *Shari'a* law.

Spalding and Kim, controversially, consider arguments in favour of a corporate ban on *Shari'a* arbitration clauses, and in particular human rights arguments. They begin their discussion by noting that "*[a]dmittedly it does not fall to Western corporations to "fix" other cultures whenever there are differences that, when viewed through a Western cultural lens, appear to signify oppression of women, children, the poor, or other segments of the population.*"[65] Then, they assert that corporations do have a negative duty to refrain from participating in human rights violations. They acknowledge that the issues of gender inequality arising can be seen as "*irredeemably patriarchal, unassimilable to Western democracy and culture and, above all, a rejection of modernity when viewed through a Western lens,*" and that participation in *Shari'a* arbitration could, therefore, amount to a violation of the negative duty.[66]

They go on to posit that it might nevertheless be morally justifiable for a corporation to participate in *Shari'a*-based arbitration, drawing a comparison to the Catholic Church's continued practice of excluding women from the priesthood, and arguing that Catholics who disagree with this position can still participate in the Church without such participation being considered immoral.[67] Spalding and Kim apparently conclude that a corporation's primary duty is to uphold the interests of its stakeholders, not the interests of all persons who are affected by its actions, and that commercial contracts are not required to promote the human rights of all affected persons in equal measure.[68]

The matters raised by Spalding and Kim share a common thread with the concern of this paper in that both consider Western institutions directly or indirectly engaging with *Shari'a* legal systems and question whether that engagement is contrary to morality or unlawful.

Similarly, in 2013, Richard Halmo examined whether *Shari'a* law could exist within the constitutional frameworks of Western countries.[69] Halmo analysed the experiences of *Shari'a* integration in the United Kingdom ["**UK**"], Canada and US. His article is prefaced with a statement of the European Court of Human Rights that says "*Shari'a is incompatible with the fundamental principles of democracy.*"[70] Halmo proceeds to examine the validity of that statement.

Halmo claims that *Shari'a* law can exist within Western countries mostly "*through a laissez faire approach to religious arbitration law.*"[71] He argues that Muslims should have the religious autonomy to enter into arbitration agreements with *Shari'a* as the substantive law to be applied in cases where it would not affect the rights of others.[72] He acknowledges that "*the tension between Shari'a Law and [the] West stems not just from a politically ethno-centric fear of the Other, but also from a concern that Shari'a jurisprudence is, in many respects, at odds with Western approaches.*"[73]

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65 *Id.* at 613, 617.
66 *Id.* at 613, 618.
67 *Id.* at 613, 621.
68 *Id.* at 613, 621–622.
69 Halmo, *supra* note 45, at 3.
70 Case of Refah Partisi (The Welfare Party) v. Turk., 42 ILM 560 (2003).
71 Halmo, *supra* note 45, at 3.
72 *Id.* at 28–29.
73 *Id.* at 6.

A recurring theme in Halmo's analysis is consent and contractual autonomy. In examining the emergence of *Shari'a* courts in the UK, he argues that religious tribunals have existed in Britain for many years in the form of Jewish tribunals under the UK Arbitration Act, 1996. Halmo argues that the UK's Muslims should be given equal rights to engage in religious arbitration in equivalent tribunals, but saliently points to a central feature of those tribunals: that both sides must in every case *agree* to binding arbitration.[74]

Halmo examines religious arbitration panels in the USA, which find their legal basis in secular laws and general contractual principles.[75] These tribunals have come under attack, to the point where the State of Oklahoma in 2010 attempted to forbid the consideration of *Shari'a* principles by its courts, which would have made many *Shari'a* arbitration clauses unenforceable.[76] A constitutional challenge to those laws saw them struck down as violative of the First Amendment to the Constitution of the United States (which prevents the establishment of a state religion).[77] Thus, at least in the US, not only is arbitration in accordance with *Shari'a* principles generally permitted, but it is also, to an extent, a constitutionally protected right. Of course, there is a critical difference between protecting the enforceability of *Shari'a* arbitration clauses on one hand and enforcing *Shari'a* -based arbitral awards on the other.

There is one other matter to note. It has been suggested that some of the fundamental pillars of arbitration are themselves incompatible with *Shari'a*. This was refuted in a 2017 paper by Mutasim Alqudah,[78] who argued that the slow adoption of arbitration in Gulf countries had more to do with a general distrust for arbitration, and less to do with any fundamental inconsistency. The existence of conflicting schools of *Shari'a* law has been cited as a concern in the analogous context of enforcement of foreign judgments.[79] Even more intriguingly, there has been some debate about the contribution of Islam to the very creation of the institution of arbitration. A treatise published in 2013 by Jan Paulsson[80] records the various views, considering matters of apt translation, to conclude (correctly, with respect):

> "*The modern acceptance of arbitration in the Arab world is thus, in Mezghani's view, due more to increased confidence in successful nation-building than to a resurgence of forgotten traditions. For that matter, the purported traditions are little more than two vague legitimising observations: (i) arbitration is not proscribed by Islamic law and (ii) it is not a Western invention. Beyond this baseline – minimalist but nevertheless important – respect for accuracy demands that one recognizes that appeals to the past seek to establish 'une fausse continuté historique'. Furthermore, the classical sources of Islamic law do not treat arbitration as an important topic; those who assemble evidence of Islamic views of arbitration are thus exposed to the criticism that they have gathered scattered and inconclusive passages from texts having a quite different primary focus. Some classical authors were hostile to arbitration because it*

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74 *Id.* at 14.
75 *Id.* at 26.
76 *Id.* at 27.
77 Awad v. Ziriax, 966 F. Supp. 2d 1198 (W.D. Okla. 2013) (U.S.).
78 Mutasim Alqudah, *The Impact of Shari'a on the Acceptance of International Commercial Arbitration in the Countries of the Gulf Cooperative Council*, 20(1) J. OF LEGAL, ETHICAL & REG. ISSUES (2017).
79 Elbati, *supra* note 53, at 231.
80 JAN PAULSSON, THE IDEA OF ARBITRATION 12 (2013).

> *could lead to decisions by persons not adequately versed in the Shari'a, or because it detracted from the rule of sovereigns; others accepted it only with respect to geographic zones where there were no judges.*" (citation omitted)

The recent acceptance of arbitration in Islamic jurisdictions has been a lukewarm embrace. As George Khoukaz observes in a 2017 article,[81] "*the fact that Muslim countries have signed the New York Convention does not necessarily bring any certainty in terms of enforcement of a dispute.*"[82] For example, the public policy exemption is frequently invoked in Saudi Arabia and similar jurisdictions to avoid enforcement of foreign awards.[83] However, enforcement of foreign awards in *Shari'a* jurisdictions is not the concern of this paper.

The question of enforceability of *Shari'a*-based awards in Australia has yet to be tackled. Answering questions of enforceability of awards vesting or deploying *Shari'a* will require a close analysis of the public policy exception and its judicial treatment in Australia.

V. Australian Take on the Public Policy Exception

An important pillar of international arbitration is that courts are slow to refuse enforcement of an award which is valid on its face. This is reflected in the fact that Article V of the New York Convention sets out an exhaustive list of grounds for refusal.[84]Among those limited grounds, is the public policy exception: a court of enforcement may refuse to enforce an award where, doing so would be contrary to the 'public policy' of the said country.

In Australia, the public policy exception is implemented by Section 8 of the International Arbitration Act, 1974 ["**Act**"]:

> "*(7): In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:*
>
> *(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or*
>
> *(b) to enforce the award would be contrary to public policy.*
>
> *(7A): To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:*
>
> *(a) the making of the award was induced or affected by fraud or corruption; or*
>
> *(b) a breach of the rules of natural justice occurred in connection with the making of the award.*"

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81 George Khoukaz, *Sharia Law and International Commercial Arbitration: The Need for an Intra-Islamic Arbitral Institution*, 2017(1) J. OF DISP. RESOL. 181 (2017).

82 *Id.* at 188, 189.

83 *Id.* at 189.

84 New York Convention, art. V.

Despite the elaborations given in the Act, public policy eludes immediate and precise definition.[85] As a result, we must closely consider the nature of public policy in the context of international arbitration, and examine how the public policy exception has been applied by Australian courts when it comes to considering the intersection between public policy and *Shari'a*.

Public policy takes into account the morals and social values of society, as well as the principles that underlie its written laws.[86] It is the most frequently argued ground for refusing enforcement, and varied and inconsistent interpretation of the public policy exception by national courts has been a major problem in the development of the system of international arbitration.[87]

There are various conceptions of public policy. Domestic public policy comprises the "*most basic notions of morality and justice*" in the place of enforcement.[88] In contrast, international public policy refers to "*[…] those standards or rules of a given state's domestic public policy that will also be applied by that state in an international context.*"[89] A third proposed concept of public policy is transnational public policy, which would represent "*[…] the existence of an international consensus as to universal standards or accepted norms of conduct that must always apply and provide limitations to public as well as private international relationships and transactions.*"[90] Public policy, as a ground for refusal of enforcement, has been held by Australian courts to refer to international public policy,[91] although the argument has been made that it should be taken to refer to transnational public policy.[92]

Public policy can be divided into substantive and procedural public policy rules. Substantive public policy rules include prohibitions arising from national systems of competition law, tax law, consumer law, currency controls, and embargoes and boycotts.[93] As a convenient illustration, many of the provisions of *Shari'a*, including *Riba* and *Gharar*, are likely to form part of the substantive public policy of Islamic nations. Examples of substantive public policy in Australia include rules against fraud and double recovery. On the other hand, procedural public policy includes rules of natural justice.[94] The *Shari'a* rules concerning female testimony may form part of the procedural public policy of Islamic nations.

The most common public policy ground for resisting enforcement of arbitral awards in Australia is breach of natural justice. The leading authority is the Full Court of the Federal Court of Australia's decision in *TCL Air Conditioner (Zhongshan) Co. Ltd.* v. *Castel Electronics Pty Ltd.*

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85 Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19(2) ARB. INT'L 249, 252 (2003).

86 Abdulaziz Mohammed Bin Zaid, The recognition and enforcement of foreign commercial arbitral awards in Saudi Arabia: comparative study with Australia 276 (Mar. 2014) (University of Wollongong).

87 Inae Yang, *A comparative review on substantive public policy in international commercial arbitration*, 70(2) DISP. RESOL. J. 49, 51 (2015).

88 Mark Buchanan, *Public Policy and International Commercial Arbitration*, 28 AM. BUS. L. J. 511, 513 (1998) [*hereinafter* "Buchanan"]; Parsons v. Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 974 (1974) (U.S.).

89 Buchanan, *supra* note 88, at 514.

90 *Id.*

91 *Id.* at 516; Mayer & Sheppard, *supra* note 85, at 249, 251; Traxys Europe SA v. Balaji Coke Industry Pty Ltd. [No. 2] [2012] 276 FCA 104, 105 (Austl.).

92 Buchanan, *supra* note 88, at 518.

93 Mayer & Sheppard, *supra* note 85, at 249, 256.

94 *Id.*

["**TCL**"].[95] In this case, the appellant sought to resist enforcement on public policy grounds, alleging three breaches of natural justice in the making of the award. The appellant argued that the "*proper approach was to examine the facts of the case afresh and revisit in full the questions which were before the arbitrators in order to evaluate whether or not probative material supported the factual conclusion.*"

In *TCL*, the primary judge had held that "*[…] the review by the Court did not involve examining the case afresh and revisiting in full all questions before the arbitrator. Rather, the extent of the enquiry depended on the circumstances in question.*"[96] On the question of when a breach of natural justice would constitute grounds to set aside an award, a narrow view was adopted by the court. The court held that "*[…] the asserted breach of the rules of natural justice must be of a sufficiently serious character to offend fundamental notions of fairness and justice before the relevant discretion under either Art 34 or Art 36 [of the Model Law] would be exercised.*"[97]

The Full Court in *TCL* upheld the primary judge's decision. The court held that public policy should be limited to "*[…] the fundamental principles of justice and morality of the state*"[98] and must be given a narrow meaning.[99] The court took a narrow view of natural justice as a ground for refusing enforcement, contending that "*[…] if the rules of natural justice encompass requirements such as the requirement of probative evidence for the finding of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by judicial review."*[100] Thus, it was held that although it is an error of law to make a finding of fact without probative evidence,[101] it does not necessarily constitute a breach of natural justice.[102]

The judgment in *TCL* has been followed as authority for a narrow view of natural justice as a public policy ground for refusing enforcement. The Full Court in *TCL* considered that natural justice was not necessarily limited to the rule necessitating fair hearing and the rule against bias.[103] Rather, it was found that the determinative question is whether there is demonstrated "*[…] real unfairness or real practical injustice*" in the making of the award.[104]

In *William Hare UAE LLC* v. *Aircraft Support Industries Pty Ltd.* ["**William Hare**"],[105] the Supreme Court of New South Wales (Darke J.) held that only one breach of natural justice was made out, out of many pleaded, being an award of a claim that was no longer pressed by the relevant party.[106] His Honour held that the part of the award affected by the breach of natural justice should be severed, and the rest of the award was enforced, unaffected.[107] His Honour followed the Full Court

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95 TCL Air Conditioner (Zhongshan) Co. Ltd. v. Castel Electronics Pty Ltd. [2014] FCAFC 83 (Austl.) [*hereinafter* "TCL Air Conditioner"].
96 *Id.* ¶ 13.
97 *Id.*
98 *Id.* ¶ 76.
99 *Id.* ¶ 80.
100 *Id.* ¶ 54.
101 *Id.* ¶ 82.
102 *Id.* ¶ 83.
103 *Id.* ¶ 88.
104 *Id.* ¶ 55.
105 William Hare UAE LLC v. Aircraft Support Industries Pty Ltd. [2014] NSWSC 1403 (Austl.) [*hereinafter* "William Hare"].
106 *Id.* ¶ 104.
107 *Id.* ¶ 137.

decision in *TCL*, finding that public policy was limited to "*the fundamental principles of justice and morality*" of the State,[108] and adopted a narrow view of natural justice.[109] This decision was unanimously upheld by the Court of Appeal.[110]

By way of comparison, in *Mango Boulevard Pty Ltd.* v. *Mio Art Pty Ltd.*,[111] the Queensland Court of Appeal overturned the primary judge's refusal to enforce an award where the arbitrator had introduced his own valuation methodology, which had not been pleaded by either party. The Court of Appeal held that the appellant had ample opportunity to respond to the new material but chose not to, so there was no "*real unfairness or real practical prejudice*".[112]

In *Sauber Motorsport AG* v. *Giedo van der Garde BV*,[113] the issue was whether there had been a breach of natural justice stemming from a misapprehension by the arbitral tribunal of the parties to the agreement. The Victorian Court of Appeal followed *TCL* in holding that because there was no real practical injustice or real unfairness, there was no breach of natural justice. In particular, it was asserted that the court would not entertain "*[…] a complaint as to a legal or factual conclusion which is, to use the words of the Full Court of the Federal Court in TCL, 'dressed up as a complaint about natural justice'*."[114]

In *ALYK (HK) Ltd.* v. *Caprock Commodities Trading Pty Ltd.*,[115] the award debtor alleged various breaches of natural justice as grounds for refusal of enforcement, including bias, and errors of law and procedure. The New South Wales Supreme Court followed *TCL*, holding that there was no real practical injustice or real unfairness, and therefore, no breach of natural justice. Slattery J. made it clear that the court would not allow findings of fact to be challenged under the guise of a natural justice challenge.[116]

On the other hand, in *Hui* v. *Esposito Holdings Pty Ltd.*,[117] the Federal Court (Beach J.) set aside an award where the arbitrator had made final decisions on substantial questions during a preliminary hearing without giving parties an opportunity to be heard. It was held that despite subsequent opportunities for the parties to be heard, the arbitrator was affected by prejudgment equating to bias.[118]

In *Gutnick* v. *Indian Farmers Fertiliser Cooperative Ltd.*,[119] the Victorian Supreme Court (Croft J.) suggested that enforcement may be refused where an award provides for double recovery, but found that the award in question did not provide for double recovery. The trial judge's finding of fact was unanimously upheld by the Court of Appeal in refusing leave to appeal, so the question of law did not arise for consideration.[120]

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108 *Id.* ¶ 41.
109 *Id.* ¶ 41.
110 Aircraft Support Industries Pty Ltd. v. Hare UAE LLC [2015] NSWCA 229 (Austl.).
111 Mango Boulevard Pty Ltd. v. Mio Art Pty Ltd. [2018] QCA 39 (Austl.).
112 *Id.* ¶¶ 75-86.
113 Sauber Motorsport AG v. Giedo van der Garde BV [2015] VSCA 37 (Austl.).
114 *Id.* ¶ 17.
115 ALYK (HK) Ltd. v. Caprock Commodities Trading Pty Ltd. [2015] NSWSC 1006 (Austl.).
116 *Id.* ¶ 19.
117 Hui v. Esposito Holdings Pty Ltd. [2017] FCA 648 (Austl.).
118 *Id.* ¶¶ 240-247.
119 Gutnick v. Indian Farmers Fertiliser Cooperative Ltd. [2016] VSCA 5 (Austl.).
120 *Id.*

On a review of Australian case law, breach of natural justice is by far the most common public policy ground for refusing enforcement, but courts will only refuse enforcement where there is 'real unfairness or real practical injustice' in the making of the award. Courts will not entertain a re-examination of the case put to the arbitrators and are wary of appeals on points of law dressed as natural justice arguments.

VI. Thinking about Saudi Awards

The Australian courts' approach to the public policy exception shows that the substantive content of an arbitral award will not ordinarily be reviewed. What matters is fairness in the making of the award. As a result, the *Shari'a* rules concerning interest and speculation should not affect enforceability, if the choice of law was clear, and there was no countervailing mandatory law applicable in Australia. This is fundamentally a matter of individual autonomy and freedom of contract. If the parties to a contract agree to forgo interest on damages, whether expressly or by selecting a governing law which prohibits interest, that agreement should be enforceable. If the parties to a contract desire to subject themselves to punitive damages, they may choose the laws of the United States of America, and their agreement should likewise be enforceable.[121]

On the other hand, the rules concerning female testimony pose a real risk to enforceability, both, as a matter of natural justice and due to wider normative values, assessments and perceptions of fairness.

Natural justice is traditionally bisected into the rule against bias and the right to be heard. In *Kioa* v. *West*,[122] the Australian High Court held that "*[…] the rules of natural justice are flexible, requiring fairness in all the circumstances.*"[123] It seems strongly arguable that affording a woman's testimony less weight than that of a man falls short of "*fairness in all the circumstances.*" Preferring one witness' testimony over that of another on a basis as arbitrary as gender may, depending on the circumstances, give rise to an apprehension of bias.

However, the circumstances in which courts are likely to refuse enforcement are probably few in number. This is for a number of reasons.

First, in line with the decisions in *TCL*, *ALYK* and *William Hare*, enforcement will only be refused if it can be shown that the award was actually affected by the breach,[124] meaning that the reduced weight given to female testimony must, to some extent, have influenced the outcome of the award.

Second, if a party to an arbitration does not object to the application of *Shari'a* evidentiary law during the arbitral proceedings, it is quite possible that they will be taken to have waived any right to object at the enforcement stage. This view was propounded by Rizwan, although he raises, by way of counterargument, the notion that the enforcing state may have a prevailing interest in ensuring due process as a matter of public policy or (in the US example) constitutional law.[125] It is also supported by a large body of Australian authority to the effect that failure to raise bias-related

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121 Jessica Fei, *Awards of Punitive Damages*, 2 STOCKHOLM ARB. REP. 33 (2003).

122 Kioa v. West (1985) 159 CLR 550 (Austl.).

123 *Id.* at 563.

124 TCL Air Conditioner, [2014] FCAFC 55, 83, 111 (Austl.); ALYK (HK) Lt.d v. Caprock Commodities Trading Pty Ltd., [2015] NSWSC 1006, 34 (Austl.); William Hare [2014] NSWSC 1403, 63, 103 (Austl.).

125 Rizwan, *supra* note 46, at 493, 515.

objections at the earliest opportunity will usually amount to a waiver of the right to object,[126] the principle behind which has been extended, for example, to circumstances in which a husband's testimony appeared to be favoured over that of a wife.[127] It is also supported by the wider principle that issues not agitated at trial cannot be raised on appeal.[128]

Third, there will be obvious difficulties in tracing the outcome of an award to particular decisions around weight of testimony. In *TCL*, it was stated that failure to accord weight to particular submissions did not necessarily constitute a breach of natural justice,[129] so it may be necessary to show that witness assessment based on gender was the reason for the decision. A court will not ordinarily re-examine the evidence in order to determine whether evidence was given proper weight.[130] While there may be a need to avoid the requirements of natural justice being reduced to a charade,[131] the determinative question remains whether there was actual unfairness in the making of the decision.[132]

It seems to us that Australian courts are unlikely to refuse enforcement for breach of natural justice except in circumstances where a male's evidence is preferred without any other justification, and where the outcome of the award is evidently affected by that preference. That may not be a palatable conclusion.

It is possible that a broader approach may be adopted due to the exceptional and emotive nature of the issue in question. Gender equality before the law is a central principle of Australian public policy. Australia signed the UN Convention on the Elimination of All Forms of Discrimination against Women in 1983,[133] and implemented it principally through the Sex Discrimination Act, 1984. All Australian states followed by enacting their own laws against gender discrimination, one example being Western Australia's Equal Opportunity Act, 1984. Australia also acceded to the Convention on the Political Rights of Women and has ratified the International Covenant on Civil and Political Rights.

It is unclear whether human rights treaties and conventions should apply to voluntary arbitration,[134] but it is conceivable that Australian courts might take into account the broader public policy of upholding gender equality. To enforce an affected award would indirectly discriminate against women by lending support to a regime which directly discriminates against women. Such an argument is yet to be made, but the moment for its making has arrived. We will need to watch this space.

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126 *See* Vakauta v. Kelly (1989) 167 CLR 568, 572 (Brennan, Deane & Gaudron JJ.) (Austl.); Smits v. Roach (2006) 227 CLR 423, 443 (Gleeson CJ, Heydon & Crennan JJ.) (Austl.).

127 Garden v. Gavin [No. 2] (2010) 43 Fam LR 383, 68-74 (Austl.).

128 Suttor v. Gundowda (1950) 81 CLR 418 (Austl.).

129 TCL Air Conditioner, [2014] FCAFC 83, 107 (Austl.).

130 *Id.* at 113.

131 *Id.* at 107.

132 *Id.* at 111.

133 *The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, AUSTRALIAN HUMAN RIGHTS COMMISSION (Dec. 14, 2012), *available at* https://www.humanrights.gov.au/convention-elimination-all-forms-discrimination-against-women-cedaw-sex-discrimination-international.

134 BHATTI, *supra* note 2, at 97-98.

VII. Conclusion

In Australia, the courts have maintained a strong pro-enforcement bias, and the Commonwealth Parliament has demonstrated its intent to limit public policy grounds to a breach of natural justice, fraud, and corruption. Nevertheless, there is a real possibility that some *Shari'a* rules, such as those concerning female testimony in commercial matters, will affect the enforceability of awards. Systematic discounting of particular evidence based on gender can be seen as depriving a party of a proper opportunity to present their case, and may constitute a breach of the principles of natural justice. This could, in some cases, render enforcement contrary to Australian public policy. It is possible, though less likely, that a court may, at some stage, take into account broader public policy considerations of gender equality.

The task of those concerned with the operation of the New York Convention, and the vitality of international commercial arbitration, is to see a way through the noise and distraction to determine how we ought to engage with *Shari'a* law. That task is for reverent hands and the reverence should extend not only to conceptions of efficiency, equality and fairness, but to recognized traditions and faiths. The challenge will be in finding the appropriate balance. In that quest, it would be beneficial to remember that the difference between one and the Other can be mere matters of geography or history. We ought to take up the task with the Chinese proverb in mind: *better a diamond with a flaw than a pebble without one*.