CONFLICTS OF INTEREST BETWEEN SHARIA AND INTERNATIONAL SALE OF GOODS: DOES *CISG* INTEREST FIT WITH ISLAMIC LAW?

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Obligations to pay interest are widely accepted in commerce. However, in Muslim-majority countries subject to sharia law, they are normally forbidden. The United Nations Convention on Contracts for the International Sale of Goods ('CISG') *art 78 imposes an interest obligation. Consequently, many have been reluctant to accede to the Convention. The CISG Advisory Council has partially addressed how the* CISG *interest obligation is affected by prohibitions on interest. What remains unresolved is whether this renders the* CISG *compatible with sharia law. To date, perceptions of their compatibility have relied on generalised views of both the Islamic prohibitions and* CISG *interest. This article seeks to truly determine whether sharia and the CISG are reconcilable on the question of interest. It examines the basis for Islamic prohibitions on riba and* gharar*, but importantly, considers differing approaches across individual Muslim-majority states. Likewise, interpretation of the* CISG *interest obligation is considered in detail. Given this richer contextual landscape, we analyse whether sharia 'fits' with the* CISG*. We conclude that the* CISG *and sharia are compatible if slight modifications to* Opinion No 14 *are adopted. This may encourage greater accession to the* CISG *by Muslim countries as part of their push to adopt laws that attract more international trade.*

I INTRODUCTION

The question of interest being payable within the uniform law pertaining to international sales is notoriously fraught. Interest obligations are widely accepted in much of the commercial world and thus are included within many transnational commercial laws. Awards of compound interest are becoming more frequent. However, in Muslim-majority countries subject to sharia law, obligations to pay interest are normally forbidden as riba.

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The *United Nations Convention on Contracts for the International Sale of Goods* ('*CISG*') art 78 imposes an obligation to pay interest.[1] Arguably, this is why many Muslim-majority states have not acceded to the Convention. The CISG Advisory Council's Opinion on *Interest under Article 78 CISG* ('*Opinion No 14*') has attempted to address the position under sharia within its interpretation of *CISG* art 78.[2] However, it does not fully resolve the issue.

This article provides the context necessary to truly determine whether sharia and the *CISG* can be reconciled on the question of interest. It examines Islamic prohibitions on riba and *gharar*, but importantly, considers the vast range of practical approaches to riba that exist across Muslim-majority states. The article interrogates the comprehensive range of interpretations open within both laws, delving into the implications of those interpretations upon enforceability of awards. This comprehensive contextual landscape enables the authors to resolve the extent to which views on interest within sharia 'fit' with the *CISG*, to define the contours of pragmatic compatibility between these two laws, and importantly, to enable the reader to distinguish perceived conflicts from those which are real.

Perceptions of conflicts between sharia and the *CISG* are also discussed in relation to interest.[3] The authors argue that adoption of a more textured, pragmatic approach to interpretation of both laws can reduce perceived conflicts, which may in turn encourage greater accession to the *CISG* by Muslim countries.

In Part II, we briefly review *CISG* accession amongst Muslim-majority states. Part III gives a brief legislative history of the *CISG* interest obligation, and examines the function of interest and its calculation in other international instruments; Part IV compares this with how the interest obligation is interpreted within the *CISG* context: whether it is an internal or external gap, its function and calculation, and the CISG Advisory Council view; Part V introduces the Islamic prohibitions on riba and *gharar* and permitted charges of '*gharamah*' and '*ta'widh*'. The basis for each is explained; moreover, reasons for relevant variations on the interpretation of each are highlighted. Most importantly, we then undertake a survey of approaches to riba and *ta'widh* in practice within a selection of Muslim-majority states. Part VI reviews scholarly views about compatibility or otherwise of sharia and the *CISG* and the comments of the Advisory Council relevant to jurisdictions which forbid interest, identifies gaps in the Advisory Council comments relevant to compatibility, and suggests slight adaptations to the latter's approach which render the two compatible. Part VII works through hypothetical scenarios to test how the Advisory Council approach, modified by the suggestions, would operate

1 *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) art 78 ('*CISG*').

2 See Yeşim M Atamer, Rapporteur, *Interest under Article 78 CISG* (CISG Advisory Council Opinion No 14, 21–22 October 2013) 13–14 [3.22], 21 [3.43], 21–2 [3.45] <https://cisgac.com/wp-content/uploads/2023/02/CISG_Advisory_Council_Opinion_No_14.pdf> ('*Opinion No 14*').

3 Other scholars have raised further potential conflicts between sharia and the *CISG* beyond interest obligations. Given limitations of space, and the likelihood that interest obligations are the primary point of conflict, interest obligations are the sole focus of this article. Other issues are briefly raised below in Part VI(A) and will form the basis of a future study.

in practice. Part VIII then contemplates effects on accession amongst Muslim-majority jurisdictions, while Part IX concludes.

II *CISG* ACCESSION AMONGST MUSLIM-MAJORITY COUNTRIES

To date, the following Muslim-majority countries[4] have acceded to the *CISG*: Egypt (1982), Syria (1982), Iraq (1990), Mauritania (1999), Lebanon (2008), Bahrain (2013), and the State of Palestine (2017).[5] Most have mixed legal systems in which sharia principles apply to varying degrees.[6] Other Muslim-majority countries with largely secular legal systems have also acceded to the *CISG*, such as Bosnia and Herzegovina (1994), Uzbekistan (1996), Kyrgyzstan (1999), Guinea (1991), Albania (2009), Turkmenistan (2022), Turkey (2010) and Azerbaijan (2016).[7]

However, the overwhelming number of Muslim-majority jurisdictions are yet to accede.[8] For jurisdictions where sharia applies to some degree, non-accession rates may be as high as 81%.[9]

4 For the purposes of this article, 'Muslim-majority countries' refers to countries where Muslims consist of more than 50% of the population: Forum on Religion & Public Life, Pew Research Center, *The Future of the Global Muslim Population: Projections for 2010–2030* (Report, January 2011) 155 <https://www.pewforum.org/2011/01/27/future-of-the-global-muslim-population-muslim-majority/>.

5 For dates of accession, see 'Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status> ('CISG Accession Status').

6 It is beyond the scope of this paper to discuss the role and degree of influence of Islamic law within Muslim-majority countries.

7 Aslihan Bulut (ed), 'Country Profiles', *Sharia Source at Harvard Law School* (Web Page) <https://beta.shariasource.com/projects/1>; 'CISG Accession Status' (n 5).

8 This includes the following 26 Muslim-majority countries where sharia applies within the legal system in varying degrees: Saudi Arabia, United Arab Emirates, Qatar, Malaysia, Indonesia, Pakistan, Bangladesh, Iran, Algeria, Sudan, Morocco, Afghanistan, Yemen, Mali, Senegal, Tunisia, Somalia, Jordan, Libya, Oman, Kuwait, Gambia, Djibouti, Comoros, Maldives, and Brunei. Additionally, the following six largely secular Muslim-majority countries have not acceded to the *CISG*: Niger, Kazakhstan, Burkina Faso, Chad, Tajikistan and Sierra Leone: Bulut (n 7); 'CISG Accession Status' (n 5). As this article went to print on 21 August 2023, Saudi Arabia announced that it would accede to the CISG: see UNCITRAL, 'Saudi Arabia Accedes to the United Nations Convention on Contracts for the International Sale of Goods' (Press Release UNIS/L/347, 21 August 2023) <http://unis.unvienna.org/unis/en/pressrels/2023/unisl347.html#:~:text=VIENNA%2C%2021%20August%20(UN%20Information,III%2C%20on%201%20September%202024.>. It will enter into force on 1 September 2024. Notably, the Kingdom has made a reservation that will prevent application of art 78 *CISG* pending the outcome of a study by the Minister of Commerce regarding art 78 and the prohibition of riba under Islamic law. See also 'Saudi Arabia's Accession to the CISG: Changes and Impact', *Dentons Newsletter* (online, 21 August 2023) <https://www.dentons.com/en/insights/alerts/2023/august/21/saudi-arabias-accession-to-the-cisg-changes-and-impact>. For the purposes of an article focussing on art 78, Saudi Arabia can therefore still be considered a non-contracting state.

9 See above n 8 and text accompanying n 5.

An official version of the *CISG* is published in Arabic.[10] Reasons for non-accession may extend beyond prohibitions on interest, but the above high rates of non-accession indicate that reconciling concerns and perceptions about interest obligations underscores the potential for further accessions amongst Islamic countries.

III FUNCTIONS OF INTEREST AND INTEREST CALCULATION IN *CISG* & OTHER CONVENTIONS

The concern of Muslim-majority nations over interest obligations is not unique to the *CISG*; indeed, the *CISG* drafters anticipated this problem.

A *Legislative History of* CISG *art 78*

Article 78 of the *CISG* states that '[i]f a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74'.

An obligation to pay interest arises also elsewhere in the *CISG*. Article 84(1) stipulates that '[i]f the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid'.

At the 1980 Vienna Diplomatic Conference, after some debate, 'it was decided that the rate of interest should not be stipulated'.[11] However, delegates anticipated the problem presented by the prohibition of riba within sharia-observant states, and many proposed solutions.

The Egyptian delegation acknowledged omission of the 'well-established practice' of interest obligations was unrealistic.[12] Instead, Mr Shafik of Egypt proposed a reservation to art 78 to encourage signatories amongst nations where interest was forbidden.[13] Canada's Professor Ziegel proposed that Arab countries should be able to omit interest obligations or make them optional,[14] whilst Mr Sami of Iraq argued that interest obligations should be omitted from the *CISG* altogether, or

10 Arabic is one of the six official languages of the United Nations Commission on International Trade Law ('UNCITRAL'). El-Saghir points to inaccuracies in arts 25 and 36 of the Arabic version: Hossam A El-Saghir, 'The CISG in Islamic Countries: The Case of Egypt' in Larry A DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press, 2014) 505, 511–12.

11 Maria Bhatti, *Islamic Law and International Commercial Arbitration* (Routledge, 2019) 190; Klaus Peter Berger, 'International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts' (1998) 46(1) *American Journal of Comparative Law* 129, 134.

12 *United Nations Conference on Contracts for the International Sale of Goods*, UN GAOR, 1st Comm, 34th mtg, Agenda Item 3, UN Doc A/CONF.97/C.1/SR.34 (3 April 1980) 416 [10] <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-conf-97-19-ocred-eng.pdf> ('*Diplomatic Conference*').

13 Ibid.

14 Ibid 418 [23].

alternatively, a reservation permitted.[15] Ultimately, the idea of a reservation never came to fruition.[16]

The Egyptian representative stated he was unaware of any refusal within Arab countries to charge interest on loans or credit in international relations, but that a more appropriate term might be used. Thus, he suggested that after 'interest' an additional phrase such as 'or any other corresponding fee' be added.[17] Had this been adopted, it perhaps would have more easily accommodated approaches within many Muslim countries regarding interest charges in international relations, as discussed below in Part V.

Professor Honnold of the USA argued omission of interest could be viewed as barring its recovery, and therefore an interest obligation was necessary.[18] Honnold later commented that art 78 entitles parties to interest even if domestic law makes no reference to interest.[19] This naturally affects adoption of the *CISG* by Muslim-majority countries due to prevailing views that the *CISG* is incompatible with sharia.[20] Consequently, the question of incompatibility is tested and challenged within this article.

B *Function and Calculation of Interest in Other Instruments*

Interest is widely viewed as compensatory in nature. Its purpose in the commercial context is to place the injured party 'in the same position as it would have been in if no breach had occurred', thus it is compensatory and restitutionary rather than 'punitive or usurious'.[21]

This was reflected in *Iran v United States of America* where the Tribunal defined interest as 'compensation for damages suffered due to delay in payment'.[22] Professor Gotanda notes that the ability to award pre- and post-judgment interest in International Centre for Settlement of Investment Disputes ('ICSID') disputes

15 Ibid 418 [20]. See also Bhatti, *Islamic Law and International Commercial Arbitration* (n 11) 190.

16 Bhatti, *Islamic Law and International Commercial Arbitration* (n 11) 190.

17 *Diplomatic Conference* (n 12) 417 [14].

18 John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer Law International, 4th ed, 2009) 602.

19 Ibid 602–3.

20 Bhatti, *Islamic Law and International Commercial Arbitration* (n 11) 189.

21 Chartered Institute of Arbitrators, *Drafting Arbitral Awards: Part II — Interest* (International Arbitration Practice Guideline, 8 June 2016) 5 <https://www.ciarb.org/media/4208/guideline-11-drafting-arbitral-awards-part-ii-interest-2016.pdf>.

22 *Iran v United States of America (Decision)* (Iran–United States Claims Tribunal, Case No A19, 30 September 1987) [12], quoting *Sylvania Technical Systems Inc v Iran (Award)* (Iran–United States Claims Tribunal, Case No 64, 27 June 1985) [81].

reflects full compensation for lost time value of money,[23] and prevents benefits being gained by delayed compliance with awards.[24]

However, many international instruments do not clearly stipulate methods of calculation. Calculation is not clearly stipulated in the *Convention on the Settlement of Investment Disputes* ('*ICSID Convention*'),[25] and is largely discretionary within the *World Intellectual Property Organisation Arbitration Rules* ('*WIPO Arbitration Rules*'),[26] the 2021 *International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)* ('*ICDR Arbitration Rules*'),[27] and the 2020 *London Court of International Arbitration Rules* ('*LCIA Arbitration Rules*').[28]

Indeed, the *ICSID Convention* fails to mention any right to interest altogether. However, case law shows contracting states are required to recognise awards of interest as pecuniary obligations.[29] ICSID tribunals have tended towards compound interest,[30] reasoning that the purpose of interest is to compensate for not having use of the money 'between the date when it ought to have been paid and the date of the payment'.[31] Nonetheless, rates applied by ICSID tribunals are

23 John Y Gotanda, 'A Study of Interest' (Working Paper No 83, Villanova University Charles Widger School of Law, 2007) 4–5 ('A Study of Interest'). See also Jack Coe Jr and Noah Rubins, 'Regulatory Expropriation and the *Tecmed* Case: Context and Contributions' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005) 597, 631.

24 Gotanda, 'A Study of Interest' (n 23) 4. See also Bhatti, *Islamic Law and International Commercial Arbitration* (n 11) 185–6.

25 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('*ICSID Convention*').

26 World Intellectual Property Organisation, *WIPO Arbitration Rules, Schedule of Fees and Costs* (Rules, July 2021) art 62 <https://www.wipo.int/amc/en/arbitration/rules/index.html> ('*WIPO Arbitration Rules*').

27 International Centre for Dispute Resolution, American Arbitration Association, *International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)* (Procedures, 1 March 2021) art 34(4) <https://www.adr.org/sites/default/files/ICDR_Rules_0.pdf> ('*ICDR Arbitration Rules*').

28 London Court of International Arbitration, *Arbitration Rules* (Rules, 1 October 2020) art 26.4 <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> ('*LCIA Arbitration Rules*'). See also Bhatti, *Islamic Law and International Commercial Arbitration* (n 11) 187.

29 See *ICSID Convention* (n 25) art 54(1).

30 James Dow, 'Pre-Award Interest' in John A Trenor (ed), *The Guide to Damages in International Arbitration* (Law Business Research, 4th ed, 2020) 229, 309.

31 Hrvatska Elektroprivreda dd v Slovenia (Award) (ICSID Arbitral Tribunal, Case No ARB/05/24, 17 December 2015) [547] ('Hrvatska Elektroprivreda dd'), quoting Southern Pacific Properties (Middle East) Ltd v Egypt (Award) (1995) 3 ICSID Rep 189, 241 [219] ('Southern Pacific Properties').

diverse, from lending rates,[32] to rates which could have been earned,[33] to commercially reasonable rates.[34]

Some arbitral rules provide discretion regarding methods of calculation. Article 34 of the *ICDR Arbitration Rules* provides discretion to award pre- and post-award interest, simple or compound, as the tribunal 'considers appropriate, taking into consideration the contract and applicable law(s)'.[35] Similarly, *WIPO Arbitration Rules* art 62(b) provides the tribunal is 'free to determine' the interest rate 'it considers to be appropriate' as well as the period for which it is due, and may order simple or compound interest.[36]

The *LCIA Arbitration Rules* also give discretion in interest calculation, including simple or compound, at any 'rates as the Arbitral Tribunal decides to be appropriate' over any period it determines appropriate up to the date of compliance with the award.[37] Despite this 'wide latitude', LCIA awards tend to apply the rate and method pursuant to the law applicable pursuant to the conflict rules of the seat.[38] However, Scherer notes that because statutory interest rates are 'usually linked to a particular currency … it may not be logical to apply that interest rate to different currencies'.[39] Importantly, Scherer warns that 'governing law is particularly important if one of the laws in question is inspired by … Shari'a law … Parties should be aware that … awards ordering a party to pay interest might be unenforceable in a country applying Islamic law'.[40]

In contrast, *UNIDROIT Principles of International Commercial Contracts 2016* ('*UNIDROIT Principles*') art 7.4.9(2) rather prescriptively stipulates that

> [t]he rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.[41]

32 Tenaris SA v Venezuela (Award) (ICSID Arbitral Tribunal, Case No ARB/11/26, 29 January 2016) where the forced loan approach was balanced by a '[c]ountry [r]isk approach': at [587].

33 Hrvatska Elektroprivreda dd (n 31) [547].

34 Railroad Development Corporation v Guatemala (Award) (ICSID Arbitral Tribunal, Case No ARB/07/23, 29 June 2012) [279].

35 *ICDR Arbitration Rules* (n 27) art 34(4).

36 *WIPO Arbitration Rules* (n 26) art 62(b).

37 *LCIA Arbitration Rules* (n 28) art 26.4.

38 Maxi Scherer, 'Awards and Correction of Awards' in Maxi Scherer, Lisa Richman and Rémy Gerbay (eds), Arbitrating under the 2020 LCIA Rules: A User's Guide (Kluwer Law International, 2021) 391, 405–6.

39 Ibid.

40 Ibid.

41 International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* (2016) art 7.4.9(2) <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/>.

Despite the absence of a uniform approach to calculation, it is well-accepted in international commercial and investment arbitration that tribunals are empowered to award interest either as damages or separately.[42] This is an important point to which we will return.

C *Simple and Compound Interest in Other Instruments*

Compound interest is defined as interest due on the total of the principal sum and any accrued amount of unpaid interest, calculated for each compounding period (eg annually).[43] Historically, tribunals and courts were hesitant to award compound interest or 'interest on interest', although it was more commonly awarded in arbitral cases that took many years to resolve.[44] Interestingly, compound interest often takes the form of damages.[45]

Prior to 2000, only two ICSID tribunals had awarded compound interest,[46] and non-allowance of compound interest was considered one of the 'better settled' rules of international law.[47] The Iran–US Claims Tribunal granted simple interest noting that compound interest was appropriate where there were 'special reasons for departing from international precedents which normally do not allow the

42 Andrea Giardina, 'Issues of Applicable Law and Uniform Law on Interest: Basic Distinctions in National and International Practice' in Filip De Ly and Laurent Lévy (eds), *Interests, Auxiliary and Alternative Remedies in International Arbitration* (International Chamber of Commerce, 2008) 131, 138.

43 Tomas Cipra, *Financial and Insurance Formulas* (Physica-Verlag, 2010) 11. See also Natasha Affolder, 'Awarding Compound Interest in International Arbitration' (2001) 12(1) *American Review of International Arbitration* 45, 49. See generally David J Branson and Richard E Wallace Jr, 'Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach' (1988) 28(4) *Virginia Journal of International Law* 919; Martin Hunter and Volker Triebel, 'Awarding Interest in International Arbitration: Some Observations Based on a Comparative Study of the Laws of England and Germany' (1989) 6(1) *Journal of International Arbitration* 7.

44 Charles N Brower and Jeremy K Sharpe, 'Awards of Compound Interest in International Arbitration: The *Aminoil* Non-Precedent' (2006) 3(5) *Transnational Dispute Management* 155, 156–9. See also Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) 1186–7.

45 Affolder (n 43) 91. Compare contractual compound interest on late payment of a debt to '[w]here interest is viewed as an item of damage'.

46 *Atlantic Triton Co v Guinea (Award)* (1995) 3 ICSID Rep 13, 33; *Southern Pacific Properties* (n 31) 243 [229]–[230]. See also Andrew Smolik, 'The Effect of Shari'a on the Dispute Resolution Process Set Forth in the Washington Convention' [2010] (1) *Journal of Dispute Resolution* 151, 172; Florian Grisel, 'The Sources of Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) 213, 226–7.

47 Marjorie M Whiteman, Damages in International Law (United States Government Printing Office, 1943) vol 3, 1997. See also RJ Reynolds Tobacco Co v Iran (Partial Award) (1986) 7 Iran–US CTR 181 ('RJ Reynolds Tobacco'); Final Award, International Chamber of Commerce, Case No 6230 of 1990 reported in (1992) 17 Yearbook — Commercial Arbitration 164; Final Award, International Chamber of Commerce, Case No 6162 of 1990 reported in (1992) 17 Yearbook — Commercial Arbitration 153. See generally Brower and Sharpe (n 44).

awarding of compound interest'.[48] Compound interest is also discouraged under the domestic law of civil law countries Switzerland, Germany and France, although arbitral awards of compound interest are enforceable.[49]

However, this trend is changing. Since 2000, international investment tribunals have generally awarded compound interest at market rates.[50] One ICSID Tribunal highlighted the significance of compound interest, acknowledging that 'while simple interest tends to be awarded more frequently than compound, compound interest certainly is not unknown or excluded in international law. … Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness'.[51]

Commentators favour the growing trend toward compound interest by international arbitral tribunals. Professor Gotanda argues that '[i]n many cases … interest at a market rate and on a compound basis' ensures full compensation.[52] Professor Mann advocates compound interest as damages absent 'special circumstances'.[53] Brower and Sharpe agree it 'has a rightful place'.[54] Sénéchal contends that it 'reflects the majority of commercial realities, in … the loss of the use of that value' and that failure to recognise this may result in a 'windfall to the respondent'.[55]

Under English law, tribunals can award either simple or compound interest.[56] The *ICDR Arbitration Rules*, *LCIA Arbitration Rules* and *WIPO Arbitration Rules*

48 RJ Reynolds Tobacco (n 47) 191.

49 Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) (Switzerland) 30 March 1911, SR 220, arts 105(3), 314(3) [tr Swiss Confederation, 'Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911', Fedlex (Web Page, 9 February 2023) <https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en>]; *Bürgerliches Gesetzbuch* [Civil Code] (Germany) § 248; *Code civil* [Civil Code] (France) art 1343-2 ('*French Civil Code*'). But see below n 254. See Inter Maritime Management SA v Russin & Vecchi (Bundesgericht [Federal Supreme Court of Switzerland], 9 January 1995) reported in (1997) 22 Yearbook — Commercial Arbitration 789, 798; Hunter and Triebel (n 43) 16–19.

50 Gotanda, 'A Study of Interest' (n 23) 19. See also Smolik (n 46) 172, discussing Southern Pacific Properties (n 31).

51 Compañía del Desarrollo de Santa Elena SA v Costa Rica (Award) (2002) 5 ICSID Rep 153, 177–8 [103].

52 Gotanda, 'A Study of Interest' (n 23) 3–4.

53 FA Mann, 'Compound Interest as an Item of Damage in International Law' (1988) 21(3) University of California Davis Law Review 577, 586.

54 Brower and Sharpe (n 44) 160.

55 Thierry J Sénéchal, 'Present-Day Valuation in International Arbitration: A Conceptual Framework for Awarding Interest' in Filip De Ly and Laurent Lévy (eds), *Interests, Auxiliary and Alternative Remedies in International Arbitration* (International Chamber of Commerce, 2008) 219, 230.

56 *Arbitration Act 1996* (UK) s 49.

enable tribunals to award compound interest.[57] Unless contractually agreed, tribunals may determine interest rates by applying the law of the contract or of the place of arbitration, or relevant Conventions or arbitral rules.[58] Born recommends the law of the arbitral seat regarding authority to award interest, but the law of the award currency for interest rates.[59]

The tendency to award compound interest in international investment disputes could be incompatible with sharia laws that forbid compound interest.[60] Different approaches of various Muslim-majority countries toward interest are discussed below.

IV INTEREST WITHIN THE *CISG*

The inclusion of the obligation to pay interest in art 78 of the *CISG* simply creates an entitlement to interest but leaves open questions as to (a) whether the question of interest rates amounts to an internal or external gap in the *CISG*, (b) the applicable default interest rate and calculation method and related questions concerning the function of interest, and (c) how interpretation of art 78 intersects with other relevant laws.

A *Type of Gap*

Absent party agreement on interest rates, the default rate falls to be determined. Article 78's silence on rates has led to debate over whether this is an 'external gap' in the *CISG*, to be determined by the law applicable through the forum's conflict rules,[61] or an 'internal gap' to be filled by interpretative means,[62] including general principles underlying the *CISG*.[63] The former has been the predominant view.[64] Advocates argue interest rates fall outside the scope of the *CISG*.[65] On the other

57 *ICDR Arbitration Rules* (n 27) art 34(4); *LCIA Arbitration Rules* (n 28) art 26.4; *WIPO Arbitration Rules* (n 26) art 62.

58 Giardina (n 42) 135.

59 Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 3rd ed, 2021) vol 1, 3363.

60 Bhatti, *Islamic Law and International Commercial Arbitration* (n 11) 187. See below Part V.

61 Anthony J McMahon, 'Differentiating between Internal and External Gaps in the UN Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed by" in the Context of Article 7(2)' (2006) 44(3) *Columbia Journal of Transnational Law* 992, 993–4.

62 *Opinion No 14* (n 2) 5–6 [3.1]–[3.2].

63 Hossam A El-Saghir, 'The Interpretation of the CISG in the Arab World' in André Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier European Law Publishers, 2009) 355, 356–7. El-Saghir argues that judges should also review decisions made globally as compiled in international databases such as CLOUT, the CISG database at Pace University School of Law's Institute of International Commercial Law, and UNILEX.

64 *Opinion No 14* (n 2) 16 [3.27].

65 Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods* (Oceana Publications, 1992) 312. See also Affolder (n 43) 66.

hand, Professor Ferrari argues interest rates were not stipulated not due to insufficiency of the *CISG's* scope, but due to inability to agree on a formula.[66] Likewise, the CISG Advisory Council surmises that its drafters did not intend '[t]o arrest the development of the *CISG* in the … 1970's' and that external gaps should be avoided whenever possible.[67] It concluded failure to add interest rates to art 4 'can be interpreted as a delegation of this issue to future adjudicators'.[68] Thus, the Council favours treatment as an 'internal gap' to avoid the uncertainty wrought by turning to domestic law for interest rates.[69] The same concern is evident in *Cold-Rolled Metal Sheets Case II* which preferred reliance on general principles for this purpose since

> immediate recourse to a particular domestic law may lead to results which are incompatible with the principle embodied in [a]rt 78 of the *CISG*, at least in the cases where the law in question expressly prohibits the payment of interest.[70]

Treatment as an internal gap appears the most sensible approach to art 78, but still leaves the open question of which interest rate.

B *Function and Calculation of Interest*

The viewpoint within other international instruments as to the primacy of the compensatory function of interest is echoed also in the context of art 78 of the *CISG*. The CISG Advisory Council confirms that the interest obligation reflects the time value of money,[71] and prevents benefit to the debtor from retaining money for longer than they are legally entitled.[72] Accordingly, within the *CISG*, interest functions primarily as compensation for delayed payment and secondarily to prevent unjust enrichment.[73]

But what of the rate of interest? Where parties expressly agree on contractual interest rates, arbitral tribunals will generally enforce them unless they violate public policy or domestic laws on arbitrability or validity.[74] However, default rates of interest and default methods of calculation are the main focus of attention.

66 Franco Ferrari, 'Uniform Application and Interest Rates under the 1980 Vienna Sales Convention' (1995) 24(3) *Georgia Journal of International and Comparative Law* 467, 473–8; See also Berger (n 11) 134.

67 *Opinion No 14* (n 2) 5–6 [3.2].

68 Ibid 6 [3.2].

69 Ibid 16 [3.29]. See also Honnold (n 18) 604–5 [421].

70 Award, Vienna International Arbitral Centre of the Austrian Federal Economic Chamber, Case No SCH-4366, 15 June 1994 [5.2.2] ['Fulltext', *UNILEX* (Web Page) [5.2.2] <https://www.unilex.info/cisg/case/55>].

71 *Opinion No 14* (n 2) 18 [3.35].

72 Ibid 6 [3.3].

73 Ibid. See also Bhatti, *Islamic Law and International Commercial Arbitration* (n 11) 185.

74 Final Award, International Chamber of Commerce, Case No 11849 of 2003 reported in (2006) 31 *Yearbook — Commercial Arbitration* 148, 169 [78]–[79]; Award, China International Economic and Trade Arbitration Commission, Case No CISG/2000/13, 6 December 2000 [tr

Uniformity requires a relatively predictable rule for determination of interest rates. Various rules have been proposed: interest rate of creditor's place of business, debtor's place of business, currency of the claim, international or regional rates,[75] or the rule in art 7.4.9(2) of the *UNIDROIT Principles* as a supplement to the *CISG*.[76] Worldwide, *CISG* cases have not produced a consistent approach.[77] Decisions have relied upon various approaches, including a benchmark of 'reasonableness',[78] domestic law as determined by the governing law of the contract determined by the conflict rules of the forum,[79] and the domestic law of the seller's place of business.[80] The Foreign Trade Court of Arbitration of the Serbian Chamber of Commerce, inspired by the *UNIDROIT Principles*, has tended to apply the average interest rate for short-term loans in the currency of payment

Meihua Xu and John Zhu, 'China December 6, 2000 [Translation Available]', *Institute of International Commercial Law* (Web Page, 7 November 2016) <https://iicl.law.pace.edu/cisg/case/china-december-6-2000-translation-available>].

75 *Opinion No 14* (n 2) 15 [3.26].

76 Berger (n 11) 135, discussing Award, International Chamber of Commerce, Case No 8128 of 1995; Klaus Bacher, 'Article 78 CISG: Obligation to Pay Interest' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 1349, 1360 [39].

77 Tom McNamara, 'UN Sale of Goods Convention: Finally Coming of Age?' (2003) 32(2) *Colorado Lawyer* 11, 19.

78 *Shantou Real Lingerie Manufacturing Co Ltd v Native Group International Ltd* (SD NY, No 14cv10246-FM, 23 August 2016) slip op 4. See *Chicago Prime Packers Inc v Northam Food Trading Co*, 320 F Supp 2d 702**,** 715–6 (ND Ill, 2004). For a comprehensive list of cases taking various approaches, see *Opinion No 14* (n 2) addendum <https://cisgac.com/wp-content/uploads/2023/02/CISG_AC_Opinion_14_Decision_Chart_Final.pdf>.

79 Landgericht Aachen [Aachen District Court], 42 O 68/93, 28 July 1993; Landgericht Aachen [Aachen District Court], 41 O 111/95, 20 July 1995 [tr Peter Feuerstein and Ruth M Janal, 'CISG-Online 169', *CISG-Online* (Web Document) <https://cisg-online.org/files/cases/6145/translationFile/169_63112903.pdf>]. See also *Opinion No 14* (n 2) [3.27].

80 Award, International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Case No 54/2006, 29 December 2006 [tr Andriy Kril, 'Russian Federation December 29, 2006 [Translation Available]', *Institute of International Commercial Law* (Web Page, 9 January 2020) [1.4] <https://iicl.law.pace.edu/cisg/case/russian-federation-december-29-2006-translation-available>]. See also Final Award, International Chamber of Commerce, Case No 16369 of 2011 reported in (2014) 39 *Yearbook — Commercial Arbitration* 169.

in the seller's country in *CISG* cases.[81] Sénéchal argues that to fully compensate, interest must reflect inflation and market risk premiums, compounded annually.[82]

As to how interest is to be calculated under art 78 *CISG*, because *CISG* cases have frequently applied the domestic law otherwise governing the contract to determine interest calculation methods, simple interest or statutory interest rates have often been awarded.[83] Whilst far from universal, [84] the trend under the *CISG* has been not to award compound interest.[85] This is in contrast with the general 'trend in [international] investment disputes … for tribunals to award interest at market rates … on a compound basis'.[86]

Nonetheless, it has been recognised that, in circumstances where the party can prove that a loss of interest was a consequential loss from the breach of contract,

81 Award, Spoljnotrgovinska arbitraža pri Privrednoj komori Srbije [Foreign Trade Court of Arbitration of the Chamber of Commerce and Industry of Serbia], Case No T-9/07, 23 January 2008, [7.3] [tr Jovana Stevovic, Vladimir Pavic and Milena Djordjevic, 'Serbia January 23, 2008 [Translation Available]', *Institute of International Commercial Law* (Web Page, 21 May 2020) <https://iicl.law.pace.edu/cisg/case/23-january-2008-foreign-trade-court-arbitration-attached-serbian-chamber-commerce>]; Award, Spoljnotrgovinska arbitraža pri Privrednoj komori Srbije [Foreign Trade Court of Arbitration of the Chamber of Commerce and Industry of Serbia], Case No T-23/08, 10 November 2009, [VI.1.3] [tr Marija Šcekic, Milena Djordjevic and Marko Jovanovic, 'Serbia November 10, 2009 [Translation Available]', *Institute of International Commercial Law* (Web Page, 21 May 2020) <https://iicl.law.pace.edu/cisg/case/10-november-2009-foreign-trade-court-arbitration-attached-serbian-chamber-commerce>]; Award, Spoljnotrgovinska arbitraža pri Privrednoj komori Srbije [Foreign Trade Court of Arbitration of the Chamber of Commerce and Industry of Serbia], Case No T-6/08, 19 October 2009, [VI.3.3] [tr Marija Šcekic, Milena Djordjevic and Marko Jovanovic, 'Serbia October 19, 2009 [Translation Available]', *Institute of International Commercial Law* (Web Page, 21 May 2020) <https://iicl.law.pace.edu/cisg/case/19-october-2009-foreign-trade-court-arbitration-attached-serbian-chamber-commerce>]; Award, Spoljnotrgovinska arbitraža pri Privrednoj komori Srbije [Foreign Trade Court of Arbitration of the Chamber of Commerce and Industry of Serbia], Case No T-5/09, 6 May 2010, [V.2] [tr Uroš Živković, Milena Djordjevic and Marko Jovanovic, 'Serbia May 6, 2010 [Translation Available]', *Institute of International Commercial Law* (Web Page, 21 May 2020) <https://iicl.law.pace.edu/cisg/case/6-may-2010-foreign-trade-court-arbitration-attached-serbian-chamber-commerce>].

82 Sénéchal (n 55) 219, 224–9.

83 Noting this trend generally in relation to all international commercial disputes: Gotanda, 'A Study of Interest' (n 23) 19.

84 Final Award, International Chamber of Commerce, Case No 8502 of 1996, November 1996 reported in (1999) 10(2) *ICC International Court of Arbitration Bulletin* 72, 74; Final Award, International Chamber of Commerce, Case No 8908 of 1998, December 1998 reported in (1999) 10(2) *ICC International Court of Arbitration Bulletin* 83, 87. '[U]nder the *CISG*, compound interest is not accorded automatically and the claimant … [must] prove that it is entitled to compound interest': Hof van Beroep Antwerpen [Antwerp Court of Appeal], 2002/AR/2087, 24 April 2006, [A.5.2] [tr Kristof Cox, 'Hof van Beroep [Court of Appeal] Antwerp: *GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Hozwerkstoffe v NV Fepco International*', *CISG-Online* (Web Document) 9 <https://cisg-online.org/files/cases/7181/translationFile/1258_24722246.pdf>].

85 *Opinion No 14* (n 2) 21–2 [3.45].

86 Bhatti, *Islamic Law and International Commercial Arbitration* (n 11) 187, citing Gotanda, 'A Study of Interest' (n 23) 19.

the latter is recoverable as damages under art 74.[87] Thus, art 74 may provide damages compensating interest costs expended for bank loans necessitated by the breach.[88] In considering how the *CISG* interacts with other relevant laws, this capacity for further compensation under art 74 is critical.

C *CISG Advisory Council Views on Interest*

The lack of uniformity amongst decided cases led to the CISG Advisory Council proposing a uniform approach to interest. In *Opinion No 14*, the Council considers the above questions, and to some degree, how interest obligations within the *CISG* interact with other relevant law.

The CISG Advisory Council's Rule 9 recommends a single uniform rule for default interest rates, being that which a 'court [in] the creditor's place of business would grant in a similar contract … not governed by the *CISG*'.[89] Rule 8 reiterates parties may contractually determine interest rates by agreement.[90]

The Council reasoned that art 78 fulfilled a compensatory function, and that this aligned most closely with the creditor's place of business as the place where funds would likely have been reinvested, thereby providing the closest approximation to loss suffered due to lost time value of money.[91] It rejected the debtor's place of business as more aligned to disgorgement,[92] whilst other proposed solutions created greater uncertainty by leading to many potential rates and/or lacked sufficient nexus to the compensatory function.[93] *Opinion No 14* sets out a simple, predictable rule that promotes uniformity and certainty by carefully avoiding reliance on unpredictable conflicts rules.[94]

The approach within *Opinion No 14* conforms with the main function of interest: to provide compensation for the time value of money to the creditor.[95] It still

87 Petra Butler, 'Damages Principles under the Convention on Contracts for the International Sale of Goods' in John A Trenor (ed), *Damages in International Arbitration Guide* (Law Business Research, 5th ed, 2022) 55, 94; *Opinion No 14* (n 2) 2, 23–4 [3.51]–[3.52]; Oberlandesgericht Hamburg [Hamburg Court of Appeal], 12 U 39/00, 25 January 2008 [tr Jan Henning Berg and Daniel Nagel, 'CISG-Online 1681', *CISG-Online* (Web Document) <https://cisg-online.org/files/cases/7600/translationFile/1681_96061344.pdf>] ('*Café Inventory Case*'), where a party showed they were 'entitled to claim an interest rate of 9% which they had to expend for a bank loan'.

88 *Café Inventory Case* (n 87) 12 [46].

89 *Opinion No 14* (n 2) 2.

90 Ibid.

91 Ibid 6–8 [3.3]–[3.7].

92 Ibid 16 [3.30].

93 Ibid 17–18 [3.31]–[3.34].

94 Ibid 18–19 [3.35]–[3.36].

95 Ibid 18 [3.35]. See above Part III(B).

ultimately refers to domestic laws to ascertain rates,[96] but creates a simplified rule reflecting the ultimate outcome observed in 38% of surveyed *CISG* cases.[97]

The Council also clarified that where the default interest rate failed to reflect market conditions, any residual under-compensation can be claimed in damages under art 74, due to the compensatory nature of *CISG* interest.[98] However, unlike art 78 where loss is presumed reflected by applicable rates, art 74 claims for actual loss must be proven.[99]

The Advisory Council made certain comments which must be interpreted as addressing the interaction between the *CISG* and sharia. We shall examine these in Part VI.

In the next section, we elucidate more clearly the nature of relevant prohibitions within sharia law, and the reasons for their differing interpretations. Importantly, we identify differences in their practical application amongst a sample of Muslim-majority nations.

V RELEVANT SHARIA PROHIBITIONS: INTERPRETATION AND PRACTICAL APPLICATION

It is important to understand that sharia is not a uniform body of law. Whether or not a conflict with the *CISG* exists depends not only on interpretation of the latter, but also on how Islamic law is interpreted and applied within (1) the place of the creditor's business and/or the applicable law, and (2) the place of the forum. Below we consider the key Islamic finance principles, bases for variances in their interpretation, and finally, differences in how they are applied in practice.

A *Prohibition against Interest/Usury (Riba) and Speculation (*Gharar*)*

The prohibition against riba arises from the sources of Islamic law, being verses of the Koran[100] and the Hadith.[101] These sources view riba as exploitative and an illicit profit contrary to Islamic principles of fairness.[102]

96 Ibid 19 [3.37].

97 Directly or indirectly via conflict rules: ibid. See also *Opinion No 14* (n 2) addendum <https://cisgac.com/wp-content/uploads/2023/02/CISG_AC_Opinion_14_Decision_Chart_Final.pdf>; Bhatti, *Islamic Law and International Commercial Arbitration* (n 11) 193.

98 *Opinion No 14* (n 2) 2, 21 [3.43].

99 Ibid 2, 21 [3.43], 24 [3.52].

100 *The Qur'an*, tr MAS Abdel Haleem (Oxford University Press, rev ed, 2005) 32 ('*The Qur'an*').

101 See generally 'Search Results — Riba', *Sunnah.com* (Web Page) <http://sunnah.com/search/?q=riba>. Although this specific Hadith collection is followed by Sunni Muslims, riba is also considered forbidden for Shia Muslims.

102 Abdullah Saeed, 'The Moral Context of the Prohibition of Riba in Islam Revisted' (1995) 12(4) *American Journal of Islamic Social Sciences* 496, 499–500.

Gharar is defined by Islamic scholars as speculation or excessive uncertainty,[103] and is thus prohibited under Islamic law, especially uncertainty in sales involving 'price, deliverability, dates of exchange or possession of goods'.[104]

On the other hand, a *murabaha,* or cost-plus sale, is viewed by most Muslim scholars as being sharia-compliant. A *murabaha* transaction consists of an Islamic financial institution selling a commodity to a purchaser at a cost-plus mark-up profit rate which is pre-determined, as opposed to interest.[105] To be sharia-compliant the profit must be agreed upon when the contract is entered, thus avoiding *gharar* (speculation).[106]

The prohibition against riba in particular attracts much debate amongst Islamic scholars. Under a strict interpretation of sharia both simple and compound interest are forbidden.[107] Thus, the Islamic Fiqh Academy in Jeddah notes that

> [i]f the buyer/debtor delays the payment of installments after the specified date, it is not permissible to charge any amount in addition to his principal liability, whether it is made a pre-condition in the contract or it is claimed without a previous agreement, because it is '[*r*]*iba*', hence prohibited in *Shari'a*.[108]

According to this 'strict interpretation' of riba, penalties may be included in financial contracts, but if the penalty relates to a debt, it is characterised as 'riba',[109] due to the Koranic verse: '[i]f the debtor is in difficulty, then delay things until matters become easier for him; still, if you were to write it off as an act of charity, that would be better for you, if only you knew'.[110] Similarly, Usmani contends that no material difference exists between interest and late payment fees charged as

103 Sudin Haron and Wan Nursofiza Wan Azmi, *Islamic Finance and Banking System: Philosophies, Principles & Practices* (McGraw-Hill, 2009) 424; Mahmoud A El-Gamal, 'An Economic Explication of the Prohibition of *Gharar* in Classical Islamic Jurisprudence' (2001) 8(2) *Islamic Economic Studies* 29, 33–4; Nayla Comair-Obeid, *The Law of Business Contracts in the Arab Middle East: A Theoretical and Practical Comparative Analysis (with Particular Reference to Modern Legislation)* (Kluwer Law International, 1996) 57, citing Nabil A Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking* (Graham & Trotman, 2nd ed, 1992) 62.

104 Bhatti, *Islamic Law and International Commercial Arbitration* (n 11) 143.

105 Maria Bhatti, 'Taxation Treatment of Islamic Finance Products in Australia' (2015) 20(2) *Deakin Law Review* 263, 274 ('Taxation Treatment of Islamic Finance Products'); Abdullah Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation* (EJ Brill, 1996) 77, citing Nabil A Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law* (Cambridge University Press, 1986) 94.

106 Additionally, the bank should have constructive possession of the goods before they are sold to the customer, the subject matter sold must not be forbidden under sharia, and legal title to the goods must be transferred to the customer: Bhatti, 'Taxation Treatment of Islamic Finance Products' (n 105) 277–8.

107 Bhatti, *Islamic Law and International Commercial Arbitration* (n 11) 170.

108 Islamic Fiqh Academy, *Resolutions and Recommendations of the Council of the Islamic Fiqh Academy 1985–2000* (Islamic Development Bank, 2000) 104.

109 Ibid 252.

110 *The Qur'an* (n 100) 32.

compensation.[111] He states that sharia prohibits claims for any additional amounts from debtors such that penalties may issue against defaulting parties but no compensation lies for lost opportunity to invest money owed.[112]

However, Arfazadeh argues that sharia law

> offers a broad range of alternative claims or remedies that could constitute valuable substitutes for a claim for interest …[in] the form of damages for late payment or late performance, claims for sharing or disgorging profits made by the defaulting party, as well as other forms of penalty as provided for by contract or custom.[113]

These possibilities warrant further elaboration.

B *Permitted Charges of 'Gharamah' and 'Ta'widh'*

Islamic scholars differ on the acceptability of financial penalties for late payment, known by the Arabic term *gharamah*.[114] Views range from acceptance as compliant, to compliant only if channelled to charities, to rejection as noncompliant.[115] However, *gharamah* must be distinguished from *ta'widh,* which describes compensation for losses incurred due to delayed payment.[116]

In practice, the Shariah Advisory Council of Bank Negara Malaysia ('SAC') considers compensation for late payment (*ta'widh*) as sharia-compliant[117] based on the saying of the Prophet Muhammad that '[p]rocrastination (delay) in repaying debts by a wealthy person is injustice'.[118] The SAC thus considers *ta'widh* to be 'compensation [for] actual loss' suffered'.[119] Banks may charge *ta'widh* and retain

111 Muhammad Taqi Usmani, *An Introduction to Islamic Finance* (Kluwer Law International, 2002) 57; Bhatti, *Islamic Law and International Commercial Arbitration* (n 11) 170.

112 Usmani (n 111) 57.

113 Homayoon Arfazadeh, 'A Practitioner's Approach to Interest Claims under Sharia Law in International Arbitration' in Filip De Ly and Laurent Lévy (eds), *Interests, Auxiliary and Alternative Remedies in International Arbitration* (International Chamber of Commerce, 2008) 211, 213.

114 Securities Commission Malaysia, *Resolutions of the Shariah Advisory Council of the Securities Commission Malaysia* (Resolutions, 31 December 2022) 5–6 <https://www.sc.com.my/api/documentms/download.ashx?id=eadeb8bb-4c43-418a-9777-1986bb8bf56c> ('*2022 Resolutions*').

115 It is beyond the scope of this article to examine these positions in detail. See generally Ezani Yaakub et al, 'A Revisit to the Practice of Late Payment Charges by Islamic Banks in Malaysia' (2014) 42 *Jurnal Pengurusan* 185, 187.

116 *2022 Resolutions* (n 114) 5–6.

117 Securities Commission Malaysia, *Resolutions of the Securities Commission Shariah Advisory Council* (2nd ed, 2006) 125–6 <https://www.sc.com.my/api/documentms/download.ashx?id=511180c4-b0f1-49e3-9f92-46efe55457bc>.

118 '43: Loans, Payment of Loans, Freezing of Property, Bankruptcy', *Sunnah.com* (Web Page) <http://sunnah.com/bukhari/43/16>.

119 *2022 Resolutions* (n 114) 5.

its proceeds in the context of financial transactions,[120] which must be calculated (for defaults after maturity date) at 'not … more than the prevailing daily overnight Islamic Interbank Money Market rate on the outstanding balance (outstanding principal and accrued profit)'.[121] In addition, *gharamah* may be charged provided the combined *ta'widh* and *gharamah* do not exceed 10% of the outstanding amount.[122]

The SAC also accepts the legitimacy of *ta'widh* upon arbitration or judgment debts, stipulating a court may impose a late payment charge from judgment date to the date judgment debt is settled 'at the rate provided by the court rules', provided however, that *ta'widh* and *gharamah* are observed.[123] *Ta'widh* for late payment of judgment debt 'shall be based on the daily overnight Islamic Interbank rate as stated in the website of Islamic Interbank Money Market … fixed on the date when … judgment was made and calculated monthly based on a daily rest basis'.[124] The judgment creditor is only entitled to receive *ta'widh*, thus if the late payment penalty imposed by the court is greater than *ta'widh*, any excess is *gharamah* and must be 'channelled to charitable bodies'.[125] Late payment charges must not exceed the outstanding principal, and must be calculated only on the outstanding principal before any pre-judgment late payment charges.[126]

It follows that the SAC accepts late payment penalty charges (*gharamah*) as a permissible method to disincentivise defaults,[127] because proceeds are 'channelled to [certain] charitable bodies'.[128] The rationale behind acceptance of this late payment charge is that Islamic banks would be adversely impacted by the absence of any deterrent to late payment and default by clients.[129] Nonetheless, the difficulty is in balancing this against the view that customers cannot be charged riba.[130] There are different approaches. Some Islamic scholars such as Abd Sattar Abu Ghuddah contend that while the financial penalty may be imposed, it must be channelled to a charity, based on the notion that a penalty distributed to charity is no longer considered riba.[131] Others such as Mustafa al-Zarqa and Muhammad

120 Ibid 6.

121 Ibid 5.

122 That is, 10% or 'as may be determined by the SAC from time to time': ibid 7.

123 Ibid 5.

124 Ibid.

125 Ibid.

126 Ibid 6.

127 Ibid.

128 Ibid 6.

129 Yaakub et al (n 115) 189.

130 Ibid.

131 Ibid.

Sadiq al-Dharir argue that *gharamah* is not riba at all, pointing to classical Islamic principles to argue that under Islamic law, the public must not delay payment.[132]

The internationally influential Shari'ah Board of the Accounting and Auditing Organization for Islamic Financial Institutions ('AAOIFI')[133] also accepts *gharamah*. The AAOIFI produces standards to promote harmonisation of sharia issues in finance which are often adopted by significant Islamic finance institutions.[134] AAOIFI Standard No 8 permits *gharamah* within *murabaha* contracts in the form of an obligation 'to pay an amount of money or a percentage of the debt, on the basis of undertaking to donate it in the event of a delay on his part in paying instalments on their due date'.[135] Likewise, the State Bank of Pakistan also allows *gharamah* through contractual stipulation of penalties to be paid to charitable institutions calculated on a percentage per day or per annum, and clarifies that banks may seek court orders of solatium for costs but not opportunity cost.[136]

Interestingly, some arbitration rules remain silent on issues of *gharamah* and *ta'widh*. The International Islamic Centre for Reconciliation and Commercial Arbitration ('IICRA') was founded in the United Arab Emirates ('UAE') in 2005.[137] It aspires to facilitate dispute resolution where parties select sharia to govern proceedings.[138] The *IICRA Arbitration & Reconciliation Rules* are silent on whether or not interest, compensation (*ta'widh*) or late payment charges (*gharamah*) may be awarded. However, they permit tribunals to apply (inter alia) Islamic Fiqh academies' or AAOIFI's standards absent party agreement on law applicable to the merits.[139] As mentioned earlier, the latter permit *gharamah*. While the Saudi Center for Commercial Arbitration's *SCCA Arbitration Rules* are also silent, their appendix notes arbitration fees deposits do not yield interest.[140]

132 Ibid. As mentioned earlier, other Islamic scholars reject *gharamah* altogether.

133 'Home', *Accounting and Auditing Organization for Islamic Financial Institutions* (Web Page) <http://aaoifi.com/?lang=en>.

134 Accounting and Auditing Organization for Islamic Financial Institutions, *Shari'ah Standards: Full Text of Shari'ah Standards for Islamic Financial Institutions as at Safar 1437 AH — December 2015 AD* (Dar AlMaiman for Publishing & Distributing, 2015) 10 ('*AAOIFI Standards*').

135 Ibid 214 [5/6].

136 State Bank of Pakistan, *Essentials of Islamic Modes of Financing* (Guidelines, 16 April 2004) 5 <www.sbp.org.pk/press/2004/Islamic_modes.pdf>.

137 Munawar Iqbal, 'International Islamic Financial Institutions' in M Kabir Hassan and Mervyn K Lewis (eds), *Handbook of Islamic Banking* (Edward Elgar, 2007) 361, 380.

138 Ibid 380–1; 'Legal Framework', *International Islamic Centre for Reconciliation and Arbitration* (Web Page) <https://www.iicra.com/about-iicra/#about-legal>.

139 International Islamic Centre for Reconciliation and Arbitration, *IICRA Arbitration & Reconciliation Rules* (Rules, 30 December 2020) art 35(2) <https://www.iicra.com/wp-content/uploads/2023/04/IICRA-Arbitration-and-Reconciliation-Rules-1.pdf> ('*IICRA Arbitration Rules*').

140 Saudi Center for Commercial Arbitration, *Arbitration Rules* (Rules, 31 July 2016) app art 8(1) <https://www.sadr.org/assets/uploads/download_file/Arbitration_and_Mediation_Rules_EN1.pdf>.

However, the Kuala Lumpur-based Asian International Arbitration Centre's 2021 *i-Arbitration Rules* ('*AIAC i-Arbitration Rules*') are more comprehensive.[141] Unless parties have agreed otherwise, r 13.5(o) expressly empowers tribunals to award on sums of money awarded 'a late payment charge in accordance with the principles of Ta'widh and Gharamah or such similar charges that the Arbitral Tribunal considers appropriate, for any period ending no later than the date of payment'.

It can be concluded that late payment charges in the nature of *gharamah* are widely accepted as sharia-compliant.[142] However, acceptance of *ta'widh* by the SAC and under the *AIAC i-Arbitration Rules* in Malaysia stands in contrast to the strict interpretation of Islamic scholars such as Usmani and the Islamic Fiqh Academy in Jeddah who, as discussed above, argue that compensation (*ta'widh*) is equivalent to interest.[143]

C *Calculation of Permissible Penalties*

From the divergence in approaches outlined above, it must be concluded that if a contract to which the *CISG* applies is found to contain riba or *gharar* then it might be considered invalid or void under strict interpretations of sharia such as the AAOIFI's standards or by the Islamic Fiqh Academy in Jeddah. However, this may not be true under Islamic rules on banking and arbitration such as those of the SAC or the *AIAC i-Arbitration Rules*. Moreover, simple interest may be permissible in some Muslim-majority countries, as discussed below in Part V(D)(1).

Of considerable influence on calculation of permissible charges are the views of Abd Al-Razzaq Ahmad Al-Sanhuri. This Egyptian scholar viewed the major prohibition as against compound interest (*riba al-jahiliyya)*,[144] being 'interest … upon interest which has accumulated',[145] whilst lesser prohibitions on interest (*riba al-nasi'a* and *riba al-fadl*) were merely designed to prevent *riba al-jahiliyya*.[146] Sanhuri's distinction between permissible simple and forbidden compound interest is reflected by the laws of many Muslim-majority nations.[147] Islamic scholars Tantawi and Wasil also argue simple interest is a form of profit-

141 Asian International Arbitration Centre, *i-Arbitration Rules* (Rules, 1 November 2021) <https://www.aiac.world/Arbitration-Arbitration> ('*AIAC i-Arbitration Rules*'). The prefix 'i' indicates sharia compliance.

142 *AAOIFI Standards* (n 134) 214 [5/6]; *2022 Resolutions* (n 114) 5; *AIAC i-Arbitration Rules* (n 141) r 13.5(o); *IICRA Arbitration Rules* (n 139) art 35(2) (arguably indirectly).

143 Taqi Usmani is chairman of the Shari'ah Board of AAOIFI: 'Shari'ah Board Members', *Accounting and Auditing Organization for Islamic Financial Institutions* (Web Page) <http://aaoifi.com/members-2/?lang=en>.

144 Emad H Khalil and Abdulkader Thomas, 'The Modern Debate over Riba in Egypt' in Abdulkader Thomas (ed), *Interest in Islamic Economics: Understanding Riba* (Routledge, 2006) 68, 72.

145 Ibid, quoting Abd Al-Razzaq Ahmad Al-Sanhuri, *Masadir Al-Haqq fil-Fiqh al-Islami* [Sources of Law in Islamic Jurisprudence] (Manshurat al-Halabi al-Huquqiyah, 1998) 44.

146 Khalil and Thomas (n 144) 72.

147 Ibid 71.

sharing on investments rather than riba.[148] Such views thus take permissibility a step beyond mere compensation (*ta'widh*) to allow simple interest.

We now survey the degree of variance between Muslim-majority jurisdictions in relation to interest and compensation for late payment.

D *Survey of Interest Approaches in Domestic Laws of Muslim-Majority Jurisdictions*

In the above discussion we highlighted differences in scholarly opinion (and certain banking and arbitration rules) on the permissibility of interest and compensation for late payment. It follows that the impact of sharia varies depending on which scholarly interpretation is preferred within the nation concerned. This section surveys a selection of Muslim-majority countries and discusses whether interest or compensation for time value of money can be awarded under their domestic laws.

Jurisdictions surveyed can, for convenience, be divided into three categories (with Kuwait appearing twice due to characteristics which overlap more than one category):

> **Group A:** Countries influenced by a liberal scholarly approach to riba, whereby awards of interest are permitted, such as Egypt,[149] Kuwait, [150] Syria,[151] Iraq,[152] and Libya.[153]
>
> **Group B:** Countries which permit interest in commercial matters but prohibit

148 Sina Ali Muscati, 'Late Payment in Islamic Finance' (2007) 6(1) *UCLA Journal of Islamic and Near Eastern Law* 47, 62.

149 See *Civil Code* (Egypt) <http://www.wipo.int/wipolex/en/details.jsp?id=8362> [tr Perrott, Fanner & Sims Marshall, *The Egyptian Civil Code: Promulgated by Law No 131 of 1948 in Force since the 15 October 1949* (Tipografia Dell'istituto Don Bosco, 1952)] ('*Egyptian Civil Code*').

150 See *Commercial Code* (Kuwait) [tr Hilmar Krüger, 'Kuwaiti Commercial Code, Act No. 68 of 1980' *Trans-lex* (Web Page) <https://www.trans-lex.org/602600/_/kuwaiti-commercial-code-act-no-68-of-1980>] ('*Kuwaiti Commercial Code*').

151 See Mohamed S Abdel Wahab, 'Construction Arbitration in the MENA Region' in Stavros Brekoulakis and David Brynmor Thomas (eds), *The Guide to Construction Arbitration* (Law Business Research, 4th ed, 2021) 356, citing *Civil Code* (Syria) art 227 ('*Syrian Civil Code*') and *Commercial Code* (Syria) art 108. See also Florentine Sonia Sneij and Ulrich Andreas Zanconato, 'The Role of Shari'a Law and Modern Arbitration Statutes in an Environment of Growing Multilateral Trade: Lessons from Lebanon and Syria' (2015) 12(2) *Transnational Dispute Management* 1875-4120:1–19, 11–18.

152 See *Civil Code* (Iraq) [Refworld, 'Iraq: Civil Code', *Refworld* (Web Page) <http://www.refworld.org/docid/55002ec24.html>] ('*Iraqi Civil Code*').

153 *Civil Code* (Libya) [tr Meredith O Ansell and Ibrahim Massaud al-Arif, *The Libyan Civil Code: An English Translation and a Comparison with the Egyptian Civil Code* (Oleander Press) 42–3] ('*Libyan Civil Code*').

or limit interest charges in civil matters,[154] including Algeria, Oman,[155] the UAE,[156] Bahrain,[157] Kuwait,[158] and Yemen.[159]

Group C: Countries that generally prohibit interest, but which permit compensation (*ta'widh*) for delayed payments, such as Saudi Arabia, Iran,[160] and Qatar.[161]

1 *Group A: Liberal Approach to Interest with Prohibition of Compound Interest*

Simple interest is permissible in Group A countries. The domestic laws of Egypt, Syria, Iraq, Kuwait, and Libya were influenced by the Egyptian scholar, Sanhuri, who, as discussed earlier,[162] distinguished between the major prohibition against *riba al-jahiliyya* (arguably compound interest)[163] and simple interest.

154 In countries discussed in this section, 'civil matters' refers to contractual and tortious claims between natural persons: see Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford University Press, 2007) 234–5.

155 *Ayman Abdel Fattah Rady v Muhammad Abdel Razzak Muhammad Khorshid*, Egyptian Court of Cassation, 65/121, 12 June 2007 [tr Jalal El Ahdab (ed), 'Ayman Abdel Fattah Rady v Muhammad Abdel Razzak Muhammad Khorshid, Egyptian Court of Cassation, Annulment, 65/121, 12 June 2007' (2009) 1(1) *International Journal of Arab Arbitration* 243]; 'Oman's Civil Code: It's Impact on Banking and Finance Transactions', *Dentons* (Web Page, 23 January 2014) <https://www.dentons.com/en/insights/alerts/2014/january/23/omans-civil-code-its-impact-on-banking-and-finance-transactions>.

156 See *Federal Law No 18 of 1993 concerning the Commercial Transactions Law* (United Arab Emirates) [tr Dawoud Sudqi El Alami, *The Law of Commercial Procedure of the United Arab Emirates* (Graham & Trotman, 1994)] ('*UAE Code of Commercial Practice*').

157 *Law of Commerce* (Bahrain) Legislative Decree No 7 of 1987, art 81 [tr Gulf Translations WLL, 'The Law of Commerce: No 7 of 1987', *Ministry of Industry and Commerce* (Web Document) <https://www.moic.gov.bh/en/RegulationsAndAgreements/Regulations/Regulation%20New/The%20Law%20of%20Commerce%20No.%207%20of%201987.pdf> ('*Bahrain Law of Commerce*').

158 Kuwaiti commercial and civil law was influenced by Sanhuri, thus it also falls within Category A: see Isa A Huneidi, 'Twenty-Five Years of Civil Law System in Kuwait' (1986) 1(2) *Arab Law Quarterly* 216, 216.

159 *Desert Line Projects LLC v Yemen (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/17, 6 February 2008) [294] ('*Desert Line (Award)*').

160 Iran and Saudi Arabia are examined in more detail below in Part V(D)(3).

161 Hani Al Naddaf, 'Interest on Loans under Qatari laws', *Al Tamimi & Co* (Web Page, October 2012) <https://www.tamimi.com/law-update-articles/interest-on-loans-under-qatari-laws/>.

162 See above nn 144–5 and accompanying text.

163 Khalil and Thomas (n 144) 72.

Sanhuri drafted the Egyptian *Civil Code*[164] and significantly influenced the civil codes of Syria,[165] Iraq,[166] Libya,[167] and the *Commercial Code* of Kuwait.[168] Thus art 226 of the Egyptian *Civil Code* permits damages inclusive of interest for delay in payment:

> When the object of an obligation is the payment of a sum of money of which the amount is known at the time when the claim is made, the debtor shall be bound, in case of delay in payment, to pay the creditor, as damages for the delay, interest at the rate of four percent in civil matters and five percent in commercial matters. Such interest shall run from the date of the claim in Court, unless the contract or commercial usage fixes another date.[169]

A 1985 challenge to art 226 argued that it violated sharia within art 2 of the *Egyptian Constitution*.[170] However, in reasoning criticised by scholars,[171] the Egyptian Supreme Constitutional Court held art 226 preceded the Constitution and therefore prevailed over sharia, and that the Constitution had no retroactive impact.

Article 227 of the Egyptian *Civil Code* permits parties to contractually agree to a maximum interest rate of 7% but characterises this as damages for delayed payment.[172]

However, art 232 prohibits compound interest and caps total interest:

> Subject to any commercial rules or practice to the contrary, interest does not run on outstanding interest and in no case shall the total interest that the creditor may collect exceed the amount of the capital.[173]

2 *Group B: Interest Permitted in Commercial but Not Civil Matters*

Group B countries of Oman, the UAE, Bahrain, Kuwait, Yemen, and Morocco allow interest to be charged in commercial, but not civil matters (in which interest

164 Ibid.

165 See Wahab (n 151) 356. See also Sneij and Zanconato (n 151) 11–18.

166 Articles 171 and 172 of the *Iraqi Civil Code* (n 152) are similar to arts 227 and 228 of the *Syrian Civil Code* (n 151), however the maximum interest rate is 7%.

167 Articles 229–31 are similar to the *Egyptian Civil Code* (n 149), except that the *Libyan Civil Code* (n 153) interest rate is stipulated at 10%: at art 230, as opposed to 7% in the *Egyptian Civil Code*.

168 See *Kuwaiti Commercial Code* (n 150) art 102.

169 *Egyptian Civil Code* (n 149) art 226.

170 *Rector of the Azhar University v President of the Republic* (Supreme Constitutional Court of Egypt, Case No 20 of Judicial Year No 1, 4 May 1985) [tr Saba Habachy, 'Supreme Constitutional Court (Egypt): Shari'a and Riba' (1985) 1(1) *Arab Law Quarterly* 100].

171 El-Saghir, 'The CISG in Islamic Countries: The Case of Egypt' (n 10) 513; Saleh Majid and Faris Majid, 'Application of Islamic Law in the Middle East: Interest and Islamic Banking' (2003) 20(1) *International Construction Law Review* 177, 190–1.

172 *Egyptian Civil Code* (n 149) art 227.

173 Ibid art 232.

is prohibited). Consequently, between individuals in the private sphere, interest is forbidden, but may be permitted in dealings involving businesses. Thus Kuwait, Bahrain,[174] Oman,[175] and Yemen[176] permit and regulate interest within their commercial laws.[177] Morocco permits interest in transactions involving corporations.[178]

Article 547 of the *Civil Code of Kuwait* prohibits interest on loans in civil matters;[179] however, arts 110–11 and 113 of the Kuwaiti *Commercial Code* permit interest in commercial matters, and interest, where not provided in the contract, is fixed for commercial loans at 7% by art 102 of the Kuwaiti *Commercial Code*.[180]

The constitutionality of Kuwaiti laws permitting interest in commercial matters was challenged in an appeal before the Kuwaiti Constitutional Court which argued that arts 110 and 113 of the Kuwaiti *Commercial Code* were unconstitutional, being in violation of the sharia.[181] The Court rejected this argument. It held that art 2 of the Constitution provided that sharia was a source of law, but the legislature was permitted to rely on other sources. Furthermore, sharia was a source of law only in the absence of express legislative provisions. It followed that the express provisions in arts 110 and 113 were constitutional.[182]

174 *Bahrain Law of Commerce* (n 157) art 81. See 'Law of Commerce', *Economic Development Board of Bahrain* (Web Page) <https://bahrainbusinesslaws.com/laws/Law-of-Commerce>.

175 Ahmed Al Barwani and Richard Baxter, Thomson Reuters, *Doing Business in Oman: Overview* (online at 9 July 2023) <https://uk.practicallaw.thomsonreuters.com/w-007-5872?transitionType=Default&contextData=(sc.Default)&firstPage=true>. In Case No 1/2007, the Arbitral Tribunal ordered payment of interest of 7% from 1 November 2007 to the date of the award. The award was upheld by the Court of Appeal: Court of Appeal (Muscat), 34/2009, 27 April 2009 [tr Jalal El Ahdab (ed), 'Not Indicated v Not Indicated, Court of Appeal, Commercial, 34/2009, 27 April 2009' (2009) 1(3) *International Journal of Arab Arbitration* 245].

176 *Desert Line (Award)* (n 159) where, in proceedings under the *ICSID Arbitration Rules*, the Tribunal rejected a compound interest claim and instead awarded simple interest at 5% since compound interest was prohibited under governing Yemeni law: at [292]–[298].

177 Interest is also permitted in banking and finance sectors.

178 See generally Mahat Chraibi, 'Morocco: Corporate — Withholding Taxes' (Web Page, 4 April 2023) PwC <http://taxsummaries.pwc.com/uk/taxsummaries/wwts.nsf/ID/Morocco-Corporate-Withholding-taxes>; Fatima Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?' (2001) 13(1) *Pace University School of Law International Law Review* 1, 55.

179 *Civil Code of Kuwait* (Kuwait) art 547 [tr Nicholas Karam, *The Civil Code of Kuwait: Decree Law No 67 of 1980* (Lexgulf Publishers, 2011) 126].

180 Bhatti, *Islamic Law and International Commercial Arbitration* (n 11) 177, discussing *Kuwaiti Commercial Code* (n 150) arts 110–11, 113.

181 Majid and Majid (n 171) 191–2, citing a 28 November 1992 decision of the Kuwait Constitutional Court.

182 Ibid; Hind Tamimi, 'Interest under the UAE Law and as Applied by the Courts in Abu Dhabi' (2002) 17(1) *Arab Law Quarterly* 50, 52, discussing Federal Supreme Court Abu Dhabi, No 245/20, 7 May 2000.

Sharia is also a primary source of law in the UAE. Yet, interest is provided for within the UAE's *Federal Law No 18 of 1993 concerning the Commercial Transactions Law* ('*UAE Code of Commercial Practice*'),[183] art 76 of which permits awards of interest, where not otherwise specified in the contract, at prevailing market rates capped[184] at 12%.[185] In a case decided under its predecessor, the *Civil Courts Procedures Law No 3 of 1970*, it was argued that interest and compound interest were prohibited by sharia.[186] The UAE Federal Supreme Court held that sharia only applied in the absence of express legislative provisions, and that pursuant to the express legislative provisions, parties could validly agree on interest rates, provided they did not agree to compound interest.[187]

Although holding that arbitral awards may be set aside for violation of sharia,[188] the Dubai Court of Cassation has noted that the *Federal Law No 3 of 1987 on Issuance of the Penal Code* art 409 public policy prohibition on usury is limited to transactions between natural persons.[189] This was confirmed in another Dubai Court of Cassation decision, which held that, where a corporation is involved, UAE courts have no jurisdiction to set aside foreign arbitral awards on the basis that interest is forbidden by sharia.[190]

183 *UAE Code of Commercial Practice* (n 156).

184 See Tamimi (n 182) 52.

185 See Award, International Chamber of Commerce, Case No 12580 of 2006, 30 May 2006 reported in (2010) 2(3) *International Journal of Arab Arbitration* 270, 292. This case, in which Emirati law was applicable, involved Emirati, Lebanese and Indian corporations. The claimant sought 12% interest per arts 76 and 88 of the *UAE Code of Commercial Practice* (n 156). The Tribunal rejected the argument that, because compromise was impermissible under art 203 of *Federal Law No 11 on the Civil Procedures Law* (United Arab Emirates) 24 February 1992, interest was not arbitrable. It held interest was permitted and usual in arbitral practice in Abu Dhabi and ordered simple interest of 5%.

186 Federal Supreme Court of the United Arab Emirates, No 14/9, 28 June 1981, discussed in Tamimi (n 182) 50.

187 Tamimi (n 182) 50.

188 *Federal Law No 5 on the Civil Transactions Law* (United Arab Emirates) 15 December 1985, arts 3, 27. The UAE acceded to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention*') in 2006, and in 2018 adopted the *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc A/61/17 (7 July 2006) annex I ('*UNCITRAL Model Law*').

189 Dubai Court of Cassation, Petition No 146 of 2008, 9 November 2008 reported in Hassan Arab, Lara Hammond and Graham Lovett (eds), *Summaries of UAE Courts' Decisions on Arbitration* (International Chamber of Commerce, 2013) 94, 96, quoting *Federal Law No 3 of 1987 on Issuance of the Penal Code* (United Arab Emirates) 8 December 1987, art 409 ('*UAE Federal Penal Code*'), which states: 'Any natural person who deals in usury with another natural person in any civil or commercial transaction shall be punished with imprisonment for no less than three months and with a fine of no less than 2,000 Dirhams.'

190 Dubai Court of Cassation, Petition No 132 of 2012, 22 February 2012 reported in Hassan Arab, Lara Hammond and Graham Lovett (eds), *Summaries of UAE Courts' Decisions on Arbitration* (International Chamber of Commerce, 2013) 123, 124. See Richard Price and Essam Al Tamimi, *United Arab Emirates Court of Cassation Judgments: 1998–2003*, ed Mark SW Hoyle (Brill, 2005) 205, discussing Dubai Court of Cassation, Judgment No 321/99, 19 December 1999. See also *UAE Federal Penal Code* (n 189) ['Federal Law No (3) of 1987 on Issuance of the Penal

From the above survey of Group A and B jurisdictions it is clear that simple interest is generally permitted in commercial transactions in many countries whose Constitutions refer to sharia. Nonetheless, some 1980s ICC decisions ostensibly defer to sharia in refusing awards of interest. Thus, in *Parker Drilling Co v Sonatrach*, arbitrators refused interest because parties had selected Algerian law.[191] The Tribunal determined that the Algerian *Code de procédure civile* [Code of Civil Procedure] ('*Algerian Civil Code*') prohibited interest on loans between individuals but permitted interest in business contracts.[192] Despite this, the Tribunal held that the overarching role of sharia in the *Algerian Civil Code* meant interest could not be awarded, regardless of the commercial context.[193] A similar approach was taken by the Tribunal in ICC Case No 5277 of 1987.[194] Since the 1980s, Algerian arbitration law has been reformed and no recent ICC cases applying Algerian law have refused to award interest.[195]

As the *CISG* only governs contracts between commercial parties, Group A and B jurisdictions are effectively equivalent for the purposes of assessing potential conflict between the *CISG* and sharia. Both permit simple interest in commercial transactions.

3 *Group C: Prohibition on Interest, Allowing Compensation for Late Payment*

Unlike Groups A and B which permit simple interest for commercial contracts, the Group C countries of Saudi Arabia and Qatar generally prohibit all interest but permit compensation for late payment.

In Qatar, Shafiey et al advise that default interest is prohibited, but that:

> Code', *Al Mubasheri Advocates & Legal Consultancy* (Web Document, July 2014) <http://mublegal.com/wp-content/uploads/2014/07/Federal-law-penal-code.pdf>].

191 (Award, International Chamber of Commerce, Case No 4606 of 1985), discussed in Branson and Wallace (n 43) 937–40. Cf *Grove-Skanska v Lockheed Aircraft International AG* (Award, International Chamber of Commerce, Case No 3903 of 1981), discussed in Branson and Wallace (n 43) 933–7.

192 *Code de procédure civile* [Code of Civil Procedure] (Algeria) Ordinance No 66-154, 8 June 1966 ('*Algerian Code of Civil Procedure*').

193 Branson and Wallace Jr (n 43) 939.

194 Second Interim Award, International Chamber of Commerce, Case No 5277 of 1987 reported in 13 (1988) *Yearbook — Commercial Arbitration* 80, where the Tribunal noted: 'It is not, however, possible in our view for the prohibition on interest to be circumvented by describing it as a claim for damages for loss of the use of the money. We accept the evidence of Dr A that a court in country X would not uphold a claim for interest even though it was dressed up in such a way': at 90 [25]. See also Omar MH Aljazy, 'Jurisdiction of Arbitral Tribunals in Islamic Law (Shari'a)' in MÁ Fernández-Ballesteros and David Arias (eds), *Liber Amicorum: Bernardo Cremades* (La Ley, 2010) 65, 79; Born (n 59) 3362–3.

195 In 2008, the *Code de procédure civile et administrative* [Code of Civil and Administrative Procedure] (Algeria), 25 February 2008, *Journal officiel de la Republique algerienne* (No 21, 23 April 2008) replaced the *Algerian Code of Civil Procedure* (n 192). See generally Nasr Eddine Lezzar, 'Algeria' in Lise Bosman (ed), *Arbitration in Africa: A Practitioner's Guide* (Kluwer Law International, 2013) 277.

> Generally, Qatari law applies the principle of full compensation for the damage suffered (including losses, lost profits and moral damages, but not indirect damages) (*Articles 263 and 264, Civil Code*). However, contractual liquidated damages are admitted (*Article 263, Civil Code*), and punitive damages do not exist under the Qatari legal system. Awarding interest is uncommon, but there is no express provision preventing the enforcement of an [arbitral] award on interest.[196]

Indeed, art 268 of Qatar's *Law No 22 of 2004 regarding Promulgating the Civil Code* permits the court to award compensation in the form of an indemnity for losses due to non-payment:

> Where the obligation is the payment of money and the obligor fails to make such payment after being notified to do so, and provided that the obligee proves he has incurred damages due to such non-payment, the court may order the obligor to pay indemnity, subject to the requirements of justice.[197]

As Tannous explains, Qatari courts are now not only more willing to enforce arbitral awards of interest, but are themselves prepared to compensate losses suffered due to late payment:

> The Qatar Court of Cassation has found that an arbitral award that included an award of interest was valid and not contrary to public policy in Qatar. The award was challenged on the basis that the award of interest was incompatible with Sharia law and therefore unenforceable. The Court's judgment, Court of Cassation number 24 of 2018 handed down on 27 February 2018, is noticeable because it marks a clear shift in the court's approach with respect to awards of interest. …
>
> The Qatari Courts have traditionally refused to award interest for two main reasons: the courts either found that payment of interest is prohibited under the principles of Sharia; or considered the claim for payment of interest as a claim for compensation flowing from either late payment or a failure of the obligor to uphold contractual obligations. Instead of awarding interest on late or defaulted payments, the Qatari Courts have directed the relevant obligor to pay the obligee a lump sum of compensation as determined by the Court. However, there has been a gradual shift in this approach. In recent judgments, the Court of Cassation upheld decisions of the Court of First Instance and the Court of Appeal stating that the interest awarded by an arbitral tribunal amounts to compensation for breach of contract and, as such, is not contrary to public policy in Qatar.[198]

196 Hasan El Shafiey et al, Thomson Reuters, *Arbitration Procedures and Practice in Qatar: Overview* (online at 1 October 2017) <https://uk.practicallaw.thomsonreuters.com/w-011-1052?transitionType=Default&contextData=(sc.Default)&firstPage=true>.

197 *Law No 22 of 2004 regarding Promulgating the Civil Code* (Qatar) ['Law No (22) of 2004 regarding Promulgating the Civil Code' *Al Meezan: Qatari Legal Portal* (Web Page, 30 June 2004) <https://www.almeezan.qa/LawArticles.aspx?LawTreeSectionID=8936&LawID=2559&language=en>].

198 Noelle Tannous, 'The Qatari Courts' Approach to Awarding Interest', *Al Tamimi & Co* (Web Page) <https://www.tamimi.com/law-update-articles/the-qatari-courts-approach-to-awarding-interest/>.

Although Qatar is still developing its approach, for present purposes, it can be observed that in practice Qatari law supports lump sum compensation for losses due to delayed payment.

The Saudi prohibition of interest has been inconsistent. In Saudi Arabia, profit is charged in the banking and finance sector, despite the absence of any express provision for interest in Saudi regulations due to the prohibition against riba. Regardless of the practice within the banking and finance sector, courts have discretion to annul the interest aspect of contracts if found to be 'riba' and therefore in violation of sharia.[199]

Non-Saudi courts applying Saudi law have also considered the issue. In *National Group for Communications and Computers Ltd v Lucent Technologies International Inc*, a United States District Court found expectation damages were noncompliant with Saudi law because they were uncertain and therefore breached the prohibition against *gharar*.[200] Similarly, an ad hoc tribunal applying Saudi law rejected the interest claim 'since this is charged on a basis … not sanctioned [by] public law … derived from the *Shari'a* Islamic Law'.[201]

In spite of the largely conservative approach outside Saudi Arabia itself, some non-Saudi adjudicators have awarded interest.[202] In ICC Case No 7063 of 1993, the issue was whether interest could be awarded on damages.[203] The Tribunal determined that

> anything in the nature of usury or unjust taking of interest, as well as compound interest, are barred by this doctrine under Shari'a law. But we do not accept that it also bars all awards of compensation for financial loss due to a party not having had the use of a sum of money to which it would have otherwise been entitled, eg as a result of late payment.[204]

The Tribunal noted that modern commercial life in Saudi Arabia reflects conventional standards, and that commercial banks charge interest for loans.[205]

199 Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate, 2010) 167.

200 331 F Supp 2d 290 (D NJ, 2004) 297.

201 Final Award, Mohammad Hassan Al-Jabr, Saudi MA Shawwaf and Abdullah Al-Munifi, 20 November 1987 reported in (1989) 14 *Yearbook — Commercial Arbitration* 47, 68 [68] (emphasis added).

202 In *Midland International Trade Services Ltd v Sudairy* (England and Wales High Court — Queen's Bench Division, Hobhouse J, 11 April 1990), English and Saudi parties had agreed the Saudi company would pay interest on sums advanced. After the Riyadh Committee for the Settlement of Negotiable Instruments Disputes refused to award interest, a successful claim was initiated before the English courts. However, in this case English law governed the contract: Baamir (n 199) 174.

203 Final Award, International Chamber of Commerce, Case No 7063 of 1993 reported in (1997) 22 *Yearbook — Commercial Arbitration* 87, 89.

204 Ibid [6].

205 Ibid.

However, in deference to sharia, the Tribunal only awarded compensation at the annual inflation rate being 5% per annum, as opposed to commercial interest rates, and referred to this as 'compensation' for financial loss suffered due to inflation.[206] The same approach was taken in ICC Case No 8677/FMS, where the Tribunal noted compensation was allowed under sharia and was not considered 'interest in the technical Islamic sense relating to a contract of loan'.[207]

Iran is also an interesting case study given that Islamic law was introduced in Iran after the 1979 Islamic Revolution.[208] The *Constitution of the Islamic Republic of Iran* art 43(5) prohibits 'usury, and other invalid and forbidden interactions' and art 49 stipulates that '[t]he government is responsible for confiscating illegitimate wealth resulting from usury'.[209] However, the Guardian Council issued a notice ('Guardian Council's Opinion') which allowed

> [r]eceiving interest and damages for delay in payment from foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited, is permitted under religious [Islamic] standards; therefore claiming [and] receiving such funds is not against the *Constitution* …[210]

Thus, pursuant to Iranian law, interest may be received by Iranian nationals in transactions with foreigners.[211] This view is consistent with Islamic scholars from the Jafari and Hanafi schools of thought, who argue Muslims may receive interest from non-Muslims, but Muslims cannot pay interest in any situation.[212]

In relation to this, Gotanda observes:

206 Ibid 90 [7].

207 Award, International Chamber of Commerce, Case No 8677/FMS, 26 September 1997 reported in (2009) 1(4) *International Journal of Arab Arbitration* 333, 352.

208 James D Fry, 'Islamic Law and the Iran–United States Claims Tribunal: The Primacy of International Law over Municipal Law' (2002) 18(2) *Arbitration International* 105, 118, citing *Constitution of the Islamic Republic of Iran* (Iran) 3 December 1979, Preamble, art 4 ('*Iranian Constitution*'). See generally Nima Nasrollahi Shahri and Amirhossein Tanhaei, 'An Introduction to Alternative Dispute Settlement in the Iranian Legal System: Reconciliation of Shari'a Law with Arbitration as a Modern Institution' (2015) 12(2) *Transnational Dispute Management* 1875-4120: 1–23.

209 *Constitution of the Islamic Republic of Iran* (Iran) 3 December 1979 arts 43(5), 49 [tr Firoozeh Papan-Matin, 'The Constitution of the Islamic Republic of Iran (1989 Edition)' (2014) 47(1) *Iranian Studies* 159, 173–4.

210 Muscati (n 148) 51, quoting Guardian Council, *Ruznamehi Rasmi Jumhuri Islami Iran* [The Official Gazette of the Islamic Republic of Iran] (Notice No 53018, 4 October 1987); Guardian Council, *Ruznamehi Rasmi Jumhuri Islami Iran* [The Official Gazette of the Islamic Republic of Iran] (Notice No 12515, 7 February 1988).

211 John Y Gotanda, 'Awarding Interest in International Arbitration' (1996) 90(1) *American Journal of International Law* 40, 49 ('Awarding Interest').

212 Muscati (n 148) 50. See generally SH Amin, 'Banking and Finance Based on Islamic Principles: Law and Practice in Modern Iran' (1989) 9(1) *Islamic and Comparative Law Quarterly* 1.

> It is unclear whether Iranian courts would limit the applicability of the Guardian Council's opinion to the situation specified by the Prime Minister (ie, where interest has been sought by Iranian parties and its payment has been provided for in, or may be inferred from, the contract), or whether they would give it broad application to allow for interest to be paid to, or received from, a foreigner when the foreign party's law does not consider the awarding of interest to be prohibited.[213]

In ICC Case No 7263, the Iranian buyer sought damages and compound interest from a US seller.[214] The US seller argued arts 43 and 49 of the *Iranian Constitution* did not permit payment of interest.[215] However, the Iranian buyer relied upon the Guardian Council's Opinion to argue receipt of interest from foreign companies whose laws allowed interest was permitted under Iranian law. The Tribunal decided the Guardian Council's Opinion was 'discriminatory towards non-Iranian citizens, as they cannot claim such interest against Iranians in Iranian courts'.[216] It also found the policy was not 'addressed to nor implementable by foreign and international arbitral organs and institutions, such as the present Arbitral Tribunal'.[217] It held that any application of discriminatory rules would contradict 'general principles of international public order which this Tribunal is bound to respect and implement'.[218] Thus, applying Iranian law, the Tribunal nonetheless denied an award of interest on the basis that the Guardian Council's articulation of sharia was inconsistent with international public policy.[219]

The Tribunal in ICC Case No 7373 took a different approach.[220] It ordered an Iranian company to pay interest on amounts due upon rightful termination by a British company despite the prohibition under arts 43 and 49 of the *Iranian Constitution*. It noted that

> care should be taken in the wording of the relevant claim so as to cover compensation for loss of use of money (and not interest) and to provide proof of costs (such as the costs of borrowing money), so as to establish that the borrowing was directly mandated by, and that the loss suffered was a direct result of, the contractors' failure to receive payments when due.[221]

213 Gotanda, 'Awarding Interest' (n 211) 49.

214 Final Award, International Chamber of Commerce, Case No 7263 reported in (2004) 15(1) *ICC International Court of Arbitration Bulletin* 71.

215 Ibid [119].

216 Ibid [122].

217 Ibid.

218 Ibid.

219 However, it is unclear to which 'general principles of international public order' the Tribunal was referring. Article 18 of the *UNCITRAL Model Law* (n 188) and art V(1)(b) of the *New York Convention* (n 188) embody concepts of procedural fairness, due process and equal treatment. Alternatively, the reference could be to transnational public policy principles.

220 Final Award, International Chamber of Commerce, Case No 7373 of 1997 reported in (2004) 15(1) *ICC International Court of Arbitration Bulletin* 72 ('ICC Case No 7373').

221 Ibid [345], quoting Nancy B Turck, 'Resolution of Disputes in Saudi Arabia' (1991) 6(1) *Arab Law Quarterly* 3, 30.

The decision was based on arts 221 and 228 of the *Civil Code of the Islamic Republic of Iran*, which permit compensation for losses.[222] The Tribunal ordered compensation for lost income that 'would have been earned … [calculated] from the date of the loss to the date of payment'[223] and held that interest rates reflect accurate compensation due to the impacts of inflation on capital value and rates of return on capital.[224] It observed that denial of interest would be unjust in international commercial relations, and that interest was commonly awarded by arbitral tribunals in Middle East oil concessions.[225] It relied on *McCollough & Co Inc v Ministry of Post, Telegraph and Telephone*,[226] in which the Iran–US Claims Tribunal applied Iranian law and awarded 10% interest per annum on the basis that this would compensate for delay at a reasonable rate in the circumstances.[227] A similar approach was taken in ICC Case No 5082 of 1989, where Iranian law applied. There, the Arbitral Tribunal found that whilst riba was prohibited, compensation was allowed and therefore a fixed rate of 9% per annum was awarded.[228]

E *Analysis*

We can conclude from the above survey that simple interest is permitted in many Muslim countries in commercial contexts, irrespective of constitutional reference to sharia. This underscores the pragmatic approach prevalent in most Muslim-majority countries, represented by Groups A and B above. In Group C countries, interest is usually impermissible. While Iranian law permits Iranian entities to receive interest, arbitral tribunals may refuse to apply this discriminatory rule. However, even in Group C countries such as Saudi Arabia, Qatar and Iran, compensation for delayed payment (*ta'widh*) is acceptable in commercial matters.

The above analysis confirms that it would be naive to simply conclude that the *CISG* is incompatible with sharia law without taking into account differences in interpretation and application of Islamic law in practice. A more nuanced approach is required. With this in mind, we next consider scholarly views on potential conflicts between the *CISG* and sharia.

222 *Civil Code of the Islamic Republic of Iran* (Iran) arts 221, 228 [tr MAR Taleghany, *The Civil Code of Iran* (Fred B Rothman, 1995) 32–3].

223 ICC Case No 7373 (n 220) [347].

224 Ibid.

225 Ibid.

226 (Award, Iran–United States Claims Tribunal, Award No 225-89-3, 22 April 1986) reported in (1988) 11 Iran–US CTR 3.

227 Ibid [98]–[99], [104], discussed in ICC Case No 7373 (n 220) [348].

228 Partial Award, International Chamber of Commerce, Case No 5082 of 1989 reported in (2004) 15(1) *ICC International Court of Arbitration Bulletin* 63.

VI *CISG* AND SHARIA: INEVITABLE CONFLICT OF INTERESTS?

In this section, the views of scholars on the question of compatibility of the *CISG* and sharia are considered. We also revisit *Opinion No 14* and propose an extension or adaptation that more fully reconciles the variety of practical applications of sharia with the *CISG*.

A *Scholarly Views on Compatibility*

A variety of views have previously been expressed about the *CISG* and Islamic law. El-Saghir and Akaddaf argue that the *CISG* is generally compatible with Islamic principles of good faith, sanctity of contract, specific performance and recognition of *lex mercatoria*.[229] Akaddaf interprets *CISG* 'good faith' as compatible with sharia, because it safeguards against 'speculation at seller's expense by requiring [the] buyer to mitigate losses or by limiting the right to specific performance', consistent with good faith, certainty and honesty under sharia.[230] Article 7(1) aside, Koneru points out that many *CISG* provisions reflect variants of good faith such as 'reasonableness' or 'fair dealing'.[231] Akaddaf observes that *CISG* art 40 concretises the good faith in a seller's duty to disclose non-conformities.[232]

On the other hand, Associate Professor Bell argues that the *CISG* is not compatible with sharia and that the *CISG* should be excluded if parties want their '*murabaha* contract to be valid under Islamic law'.[233] Bell points to the prohibitions of riba and *gharar*,[234] arguing that compliant *murabaha* contracts cannot permit interest or uncertainty of price or goods. [235] Contrary to El-Saghir, Akaddaf and Koneru,

229 El-Saghir, 'The CISG in Islamic Countries: The Case of Egypt' (n 10) 515–16; Akaddaf (n 178) 30–1, 35.

230 Akaddaf (n 178) 33, citing John Fitzgerald, 'CISG, Specific Performance, and the Civil Law of Louisiana and Quebec' (1997) 16(2) *Journal of Law and Commerce* 291, 296.

231 Phanesh Koneru, 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles' (1997) 6(1) *Minnesota Journal of Global Trade* 105, 140, discussed in Akaddaf (n 178) 32–3. Arguably this broad view contrasts with the prevailing scholarly view that contends the role of art 7(1) is confined to interpretation of the *CISG*: Pascal Hachem, 'Article 7 CISG: Interpretation of Convention and Gap-Filling' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Commentary on the UN Convention on the International Sale of Goods* (Oxford University Press, 5th ed, 2022) 135, 137 [6].

232 Akaddaf (n 178) 32–3.

233 Gary F Bell, 'New Challenges for the Uniformisation of Laws: How the CISG Is Challenged by "Asian Values" and Islamic Law' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Towards Uniformity*: *The 2nd Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing, 2011) 11, 28.

234 Ibid 23.

235 Ibid 26–8. Unfortunately, due to limitations of space, there is insufficient room in this article to discuss Associate Professor Bell's views on the compatibility of issues beyond interest obligations, which will be explored in a future study.

Bell also asserts that the sharia good faith concept is wider than that within the *CISG*.[236]

However, as we have seen, there are differing interpretations of sharia in practice. Compatibility between the *CISG* and sharia depends entirely on the style of sharia within relevant jurisdictions. As observed in *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd*[237] and *Islamic Investment Co of the Gulf (Bahamas) Ltd v Symphony Gems NV*,[238] jurisdictions which do not adopt classical sharia may enforce *murabaha*. As discussed in Part V(D), many jurisdictions (such as those in Groups A and B) take a pragmatic approach to interest, recognising its significance in modern commerce, thus removing any real conflict in practice between the *CISG* and sharia. A fine-grained, nuanced approach is necessary to determine the true extent of compatibility.

With this in mind, we argue below that Islamic law as implemented within Muslim-majority jurisdictions in practice may be compatible with the *CISG*. We begin by returning to *Opinion No 14*.

B *Advisory Council: Comments on Prohibitions*

As discussed earlier in Part IV(C), *Opinion No 14* favoured a single rule for interest rates under *CISG* art 78: that interest is to be determined in accordance with the creditor's place of business. Importantly for present purposes, *Opinion No 14* addresses two relevant situations pertaining to the single rule, these being where the creditor's law prohibits compound interest, and where it prohibits interest altogether.

Concerning compound interest, *Opinion No 14* states that if forbidden by the law of the creditor's place of business, compound interest should not be awarded under art 78 but potentially claimed as a loss under art 74.[239] Likewise, it states that where interest is prohibited by the law of the creditor's place of business 'the tribunal should not award any interest based on Article 78. In such cases, the losses of the creditor can only be compensated subject to the prerequisites of Article 74'.[240]

These statements attempt to reconcile the *CISG* and sharia to some extent. As discussed in Part V(D)(3), a form of compensation for losses due to late payment is acceptable in some sharia-observant jurisdictions. Reference to the potential alternative of compensation pursuant to art 74 in the face of prohibitions within the law of the creditor's place of business alludes to this possibility, but

236 Ibid 27. Bell also contends nonconformity may lead to rescission under sharia, since it would breach the prohibition of *gharar*, whereas nonconformity under the *CISG* will not permit avoidance unless it amounts to a fundamental breach: at 27–8, citing *CISG* (n 1) arts 25, 49(1)(a).

237 [2004] 1 WLR 1784, 1801 [54]–[55].

238 [2002] All ER (D) 171 (Feb).

239 *Opinion No 14* (n 2) 22 [3.45]. See also Bhatti, *Islamic Law and International Commercial Arbitration* (n 10) 193. Any contractual stipulation for compound interest would also be subject to validity concerns.

240 *Opinion No 14* (n 2) 21 [3.43].

understandably, *Opinion No 14* does not delve into a detailed analysis of the extent to which this is feasible.

Opinion No 14 also acknowledges that despite Rule 8,[241] contractual agreements on interest rates may 'violate applicable national law provisions on validity, especially usury (Art 4 *CISG*) or public policy'.[242] This nod to validity issues affecting express agreements on interest where the applicable law forbids riba further explains how the *CISG* and sharia might interact.

Whilst these clarifications are most welcome, their utility suffers from two limitations. It was not within the remit of *Opinion No 14* to deal with these issues, but any roadmap of the extent of conflict between the *CISG* and sharia requires they be taken into account.

The first limitation is absence of detail regarding the nature of relevant prohibitions on riba. As we have seen in Part V, it is far from inevitable that every sharia-observant jurisdiction prohibits interest in commercial matters.

The second limitation is one of scope. *Opinion No 14* only deals with interactions between the *CISG* and prohibitions within the law of the creditor's place of business or the applicable law. However, in our view, conflicts can arise between the application of the *CISG* and the mandatory domestic law of the forum, where the latter contains relevant prohibitions.

C *Types of Conflicts: Impact of the Forum*

Assuming *Opinion No 14*'s interpretation holds, it might be thought that awards of simple interest under *CISG* art 78 are sharia-compatible if simple interest is recognised in the creditor's jurisdiction (Group A and B countries). Where a relevant prohibition precludes this, pursuant to *Opinion No 14*, compensation in lieu of interest pursuant to art 74 may in any event be awarded if loss is proven. It might be therefore thought that this would be sharia-compliant if the creditor's jurisdiction accepts *ta'widh* (Group A, B or C countries).

However, the potential for conflict between sharia prohibitions and the *CISG* is not confined to prohibitions within the law of the creditor's place of business. A relevant prohibition may arise due to the mandatory law of the forum: where enforcement of a contract governed by the *CISG* is sought in a forum which applies or is bound by sharia law that holds such contracts invalid or void for riba or *gharar*.[243] Likewise, enforcement of an award or judgment applying the *CISG* may be refused within a jurisdiction that adopts sharia, on the basis of public policy.[244] It is therefore also necessary to consider fora in Muslim-majority jurisdictions in assessing the impact of the prohibitions.

241 Ibid 2.

242 Ibid 14 [3.22].

243 See generally *AAOIFI Standards* (n 134) 221–31.

244 Even under *New York Convention* (n 188) art V(2)(b).

It should be noted that the Advisory Council only suggests the compensatory approach under art 74 when the law of the creditor's country results in a zero interest rate, or where the rate in that country leads to under-compensation compared with actual loss.[245] Conversely, the *forum law* might forbid interest (or compound interest), whilst the law of the creditor's place of business permits it.[246]

On its face, *Opinion No 14* provides no resolution, since it does no more than create a 'uniform rule' that the creditor's rate is to be applied to calculate interest under art 78. Similarly, the alternative compensation under art 74 is available for additional losses only if the *creditor's law* forbids interest (or its rate leads to under-compensation).

Consequently, the potential for conflict between sharia and the *CISG* is not fully addressed by *Opinion No 14*.

D *Suggested Adaptations to Interpretation of the* CISG

In our view, the interpretation of the *CISG* within *Opinion No 14* can be extended so as to minimise potential conflicts due to the mandatory law of the forum. We suggest two interpretive solutions to address different gaps within *Opinion No 14*: an interpretive 'extension' of the rule within *Opinion No 14* to account for forum public policy, and a 'flexible' approach adapting the rule in light of the jurisdiction of enforcement.

1 *Extension of Alternative Compensation Availability: Forum Public Policy Grounds*

We suggest an extension to circumstances under which the 'alternative' of compensation for proven time value losses pursuant to *CISG* art 74 is permitted. As discussed earlier, *Opinion No 14* approves of art 74, but only where the uniform rule for art 78 interest leads to a rate within the creditor's place of business that is either zero or inadequate to compensate for actual loss.

In our view, a further circumstance should also open the door to art 74 compensation. Specifically, the art 74 alternative should be available to a forum where, due to prohibitions within its *own* jurisdiction, the forum is rendered incapable of ordering art 78 relief or is confined to simple interest under art 78 where proven loss exceeds that rate.

This one slight extension turns on an appreciation of the almost universal acceptance of *ta'widh* in countries surveyed in Part V. Given that the forum law will accept the validity of awards in the nature of *ta'widh*, then notwithstanding the fact the creditor's law would permit interest under the uniform rule, the *CISG* should be interpreted as allowing the alternative compensation path. In our view this adaptation merely extends *Opinion No 14*'s logic regarding the functions of

245 See above nn 239–40 and accompanying text.

246 Moreover, *Opinion No 14* (n 2) only refers to invalidity arising from domestic law in the context of express agreements to charge interest: see above n 242 and accompanying text.

interest as primarily compensatory in nature, and its reasoning regarding the interrelation between arts 74 and 78. The adaptation must, however, be confined to situations where the forum law's *ordre public* otherwise precludes operation of the single uniform rule for art 78.

Note that for Group A and B countries, simple interest is permitted, subject to specific caps. Where enforcement is envisaged in these countries, art 78 awards of compliant interest could be made, with resort to art 74 in addition where necessary.

This interpretation ensures greater compatibility by allowing art 74 compensation (*ta'widh*) as an *alternative* to art 78 interest, but only in limited circumstances where the forum's hands are tied by public policy forbidding riba yet permitting *ta'widh.* Admittedly, formal uniformity is reduced to a slight degree within relevant situations, but the interpretation has the distinct advantage of reducing opportunities for conflict between the *CISG* and sharia, facilitating *CISG* application within fora located in Muslim jurisdictions, and encouraging greater accession to the *CISG* in Islamic countries.

2 *Flexibility of Award Structure Given Enforcing Jurisdiction Public Policy*

A more awkward problem is where the awarding forum appreciates that enforcement of its award will likely be sought before a Muslim-majority state forum. This is not a problem unique to the *CISG*.

One solution would be an interpretation that permits adjudicators flexibility to fashion awards more likely upheld by the forum before which enforcement would likely to be sought, where the enforcing jurisdiction includes a relevant prohibition. As we have already seen, some arbitral tribunals already structure their awards with this in mind.[247] Were the enforcing jurisdiction a Group A or B country, the adjudicator might award simple interest under art 78 with additional compensation under art 74 for proven losses beyond that rate. Were it a Group C country, the adjudicator might opt to only award compensation under art 74.

This flexible approach admittedly stands on less conceptually solid ground than the earlier suggestion. It bends the uniformity of the single rule regarding interest rates further still. The adjudicator in these situations is not precluded from rendering an award pursuant to the *Opinion No 14* approach yet is permitted flexibility to follow the alternative compensatory course. On the other hand, it seeks to fulfil the compensatory function of interest in a manner less likely to fall foul of sharia in the enforcing jurisdiction.

We now explore how these suggestions might operate in practice.

247 See above Part V(D)(3) for a discussion of the cases.

VII PRACTICAL OPERATION OF SUGGESTED INTERPRETATIONS

In combination with the interpretation in *Opinion No 14*, the 'extension' and 'flexible' adaptations suggested above would help harmonise outcomes in the two situations not covered by the Advisory Council: that is, when a court located in a jurisdiction subject to Islamic law is seized of a case involving a contract governed by the *CISG* or enforcement of an award which includes interest under the *CISG.* We consider the effect of these interpretations within Group A, B and C countries below. However, it is important to first recall how the status of the forum jurisdiction as either a *CISG* or non-*CISG* contracting state affects outcomes.

A *Fora in* CISG *and Non-*CISG *Muslim-Majority States*

If the jurisdiction of the forum has not acceded to the *CISG,* the court retains discretion to deny enforcement due to *gharar* or riba. It may find the contract invalid or void or decline enforcement of a foreign arbitral award on public policy grounds including in jurisdictions which have acceded to the United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('*New York Convention*').[248] However, this discretion need not be exercised. Indeed, if it determines that no real conflict between the *CISG* and sharia exists, the forum may uphold the contract or award, despite not being bound to do so. Were the above suggestions adopted, a court subject to sharia could comfortably reach such a conclusion.

In contrast, a court in a Muslim-majority jurisdiction which has adopted the *CISG* must navigate the waters between sharia and the *CISG*. It cannot simply determine the matter on the basis of validity. Article 4 excises validity from the scope of the *CISG*, but only to the extent the *CISG* fails to address a matter, and art 78 clearly does just that. A court in a contracting state is bound to uphold it, including the interest obligation.[249]

This alone might explain reticence towards *CISG* accession amongst Muslim-majority states. However, in our view, this reticence is not entirely justified. In Part V, we demonstrated that the practical application of sharia provides approaches which can now be reconciled with the suggested *CISG* interpretation in Part VI. The following considers each category of jurisdiction in light of those recommendations.

248 *New York Convention* (n 188) art V(2)(b).

249 Interestingly, *Opinion No 14* (n 2) states that jurisdictions prohibiting interest (or compound interest) may refuse to enforce for invalidity an express agreement by parties on interest within Rule 8: see above n 242 and accompanying text. It does not specifically contemplate the position of a jurisdiction which both prohibits interest (or compound interest) and is a contracting state to the *CISG*.

B *Hypothetical Transaction*

Consider a sale between a French party and Muslim-majority state party, where parties have selected French law without agreeing to exclude the *CISG*.[250] Would a *CISG* interest obligation be imposed? And if so, how?

1 *Court Located in Group A or B Country*

Courts located in Group A or B countries *can* award interest under art 78. As discussed in Part V(D), the hallmark of the prohibition against *riba* in these countries is that it does not apply to commercial transactions.[251] It follows that in Egypt, Kuwait, Syria, Iraq, Libya, Oman, the UAE, Bahrain, Yemen, and Morocco, the *CISG* and sharia are compatible on the question as to *whether* or not interest may be awarded.

However, *Opinion No 14* demands courts apply the interest rate applicable in the creditor's place of business.[252] Where the creditor is from a Group A or B country, this does not create a problem, since the simple interest rate applicable in the creditor's home country will apply.

However, if the creditor is French, the single rule in *Opinion No 14* leads to the French rate,[253] which might be, for example, 5.3% compounded annually.[254] *Opinion No 14* leads to that compound interest becoming due,[255] although forbidden within Group A and B nations. *Opinion No 14* does not address this conflict between the *CISG* and sharia, because it permits art 74 compensation only where the creditor's interest rate is zero or inadequately compensates loss.

250 It might be suggested that parties could reduce the risks of falling foul of prohibitions against riba by modifying the *CISG* to remove the application of art 78 by agreement, or by opting out of the *CISG* altogether: see *CISG* (n 1) art 6. However, neither solution would preclude imposition of interest obligations from (non-*CISG*) domestic law, unless parties carefully select a domestic law which accords with their preferred articulation of sharia: see TS Twibell, 'Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) under Shari'a (Islamic Law): Will Article 78 of the CISG Be Enforced when the Forum Is in an Islamic State?' (1997) 9(1–2) *International Legal Perspectives* 25, 80–1.

251 See above Parts V(D)(1)–(2).

252 The interest rate is that which a court in the creditor's place of business would grant in a similar contract: *Opinion No 14* (n 2) 2.

253 The interest rate which a court in France would award in relation to a similar non-*CISG* contract is hereinafter referred to as 'the French rate' for convenience.

254 For the sake of argument, it has been assumed that a compounding rate would be awarded. However, while French courts can award compound interest, they may choose to award simple rates, which could be compatible in Group A and B countries but would be problematic in Group C countries: see *French Civil Code* (n 49) art 1343-2; *Code de commerce* [Commercial Code] (France) art L441-10; John Yukio Gotanda, 'Compound Interest in International Disputes' (2003) 34(2) *Law and Policy in International Business* 393, 404–5. See also Directorate of Legal and Administrative Information (Prime Minister), 'Calculation of Legal Interest', *République française* (Web Page, 1 January 2023) <https://www.service-public.fr/particuliers/vosdroits/F783?lang=en>.

255 *Opinion No 14* (n 2) 2.

The suggested 'extension' of *Opinion No 14* resolves the dilemma.[256] It accepts the forum law's prohibition on compound interest as justification for the Group A or B court to instead award limited art 78 simple interest up to any maximum rate within the forum's jurisdiction.[257] Awards of interest under art 78 have the advantage of compensating lost money value without proof of loss.[258] Where actual losses exceed art 78 simple interest, further compensation may lie under art 74,[259] in accordance with *Opinion No 14* and the concept of *ta'widh,* provided requirements of proof of loss, foreseeability, and mitigation are met.[260] This *CISG* interpretation is entirely compatible with the interpretation of sharia in Group A and B forum states.

Obviously the 'extension' interpretation empowers Group A or B courts in *CISG* states to easily navigate the *CISG* waters in a sharia-compliant manner. This is important because some have acceded to the *CISG*. Thus, Egyptian, Iraqi, and Bahraini courts are bound to apply its provisions.[261]

Yet, the same approach may be taken (albeit at their discretion) by courts in jurisdictions that have not adopted the *CISG*. Thus, a UAE court would not be bound to apply the *CISG* but it could, pursuant to its own conflict of law rules, uphold the choice of French law and apply the *CISG* in exactly the same manner as suggested above, completely in alignment with its own jurisdiction's interpretation of sharia. Thus, the suggested interpretative 'extension' of the *Opinion No 14* rule promotes greater certainty for contracting parties in international trade with the Muslim world.

2 *Debtor Located in Group A or B Country*

Let us now consider what would happen were the matter heard by a French court and an Iraqi party were the creditor. This presents no problem under *Opinion No 14*. The French court would award interest under *CISG* art 78 pursuant to the Iraqi simple interest rate.

However, if the Iraqi party were the debtor, a conflict quickly arises under the unmodified *Opinion No 14* rule. A French court would be bound to apply art 78,

256 See above Part VI(D)(1).

257 See above Part V(D).

258 *Opinion No 14* (n 2) 20 [3.20].

259 Ibid 2.

260 Ibid 24 [3.52]. See generally at 16 [3.30], 20 [3.40], [3.45]. The question arises whether a court located in a Group A or B country would permit a claim for the equivalent of compound interest as a loss pursuant to art 74 of the *CISG*. A party might seek to prove their losses included a compounding rate on a loan that was necessary in lieu of the missing payment. How a court in Egypt — a *CISG* state — deals with this dilemma will be of great interest.

261 El-Saghir observes Egypt has not applied the *CISG* in an autonomous way, but instead Egyptian law is applied in parallel with the *CISG* or the *CISG* is ignored altogether: El-Saghir, 'The CISG in Islamic Countries: The Case of Egypt' (n 10) 510–11.

as part of domestic French law,[262] and would order the Iraqi debtor to pay interest at the French rate, which might be a compounding rate.

Under the 'flexible' interpretation suggested above,[263] a French court, mindful that enforcement would be within Iraq,[264] might instead tailor orders to be sharia-compliant: that is, a simple interest rate pursuant to art 78 within the bounds of the Iraqi maximum rate of 7%,[265] with additional compensation under art 74 for proven further losses.[266] For example, it might award a lump sum reflecting inflation rates beyond the simple interest, which would be acceptable in Iraq as equivalent to *ta'widh*.

Whilst the suggested adaptations may slightly reduce uniformity in application of the *CISG* compared with an unmodified application of the rule in *Opinion No 14*, this must be weighed against the significant advantages which flow from their adoption. The extended and flexible interpretations result in the *CISG* being applied in an effectively uniform manner across *CISG* and non-*CISG* states, ensure its interpretation is compatible with sharia in all Group A and B countries, and provide a path for *CISG* accession in sharia-compliant jurisdictions (as discussed below in Part VIII).

3 *Debtor Located in Group C Country*

Let us once again place the matter before a French court, with the Muslim-majority party being from Saudi Arabia. Where the Saudi party is the creditor, *Opinion No 14* leads to a sharia-compatible outcome for Group C countries. The French court would not award any interest under art 78 since the Saudi rate is 0%. Nonetheless, compensation for proven losses could be awarded under art 74 consistent with *ta'widh* concepts considered valid within the enforcement jurisdiction.

If the Saudi party were the debtor, a French court following *Opinion No 14* without modification would apply the French interest rate.[267] This would be unacceptable within the enforcement jurisdiction of Saudi Arabia. However, if the French court adopted the suggested 'flexible' interpretation,[268] it would not apply art 78 in situations where enforcement is likely in a Group C country. Existence of public policy prohibitions in the enforcement jurisdiction would permit the court flexibility to instead order compensation for proven losses due to late payment

262 Lisa Spagnolo, '*Iura Novit Curia* and the CISG: Resolution of the Faux Procedural Black Hole' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing, 2011) 181, 195–6.

263 See above Part VI(D)(2).

264 It is beyond the scope of this article to comment upon the obvious difficulties of enforcement of foreign judgments.

265 See above n 166.

266 See above nn 259–60 and accompanying text.

267 The 'French rate' could in reality be a simple interest rate: see above n 254. However, this would still fall foul of the prohibition in Group C nations: see above Part V(D)(3).

268 See above Part VI(D)(2).

entirely within art 74. This ensures the compensatory function is still fulfilled by only awarding compensation in a manner which aligns with permitted *ta'widh* for Group C countries, such as a lump sum reflecting inflation rates.

A deeper understanding of the practical operation of sharia and a more sensitive interpretation of the *CISG* could thus bring about a compatible interpretation that maximises potential enforceability of awards.[269]

4 *Courts Located in Group C Country*

If the hypothetical dispute were brought before a Saudi court, it would not be bound to apply the *CISG,* because it is not located in a contracting state. Thus, Saudi courts have discretion not to apply the *CISG* if considered contrary to Saudi law.

If the creditor were Saudi, the interest rate would be 0%, and the alternative art 74 compensation path under *Opinion No 14* would open, allowing an award consistent with accepted concepts of *ta'widh*.[270] Even though the Saudi court is not bound to apply the *CISG*, it may do so in a sharia-compliant way.

If the creditor were French, it would be impossible for a Saudi court to apply *Opinion No 14* without modification. It would naturally decline to award French rates of interest pursuant to art 78 as a violation of sharia as interpreted in Saudi Arabia. *Opinion No 14* offers no viable options since the alternative art 74 compensation route only opens where the creditor's interest rate is zero or inadequate to compensate for loss; clearly, the French rate does not fulfil these criteria.[271]

However, a Saudi court could adopt the interpretive 'extension' suggested above to render a sharia-compliant award.[272] Due to the prohibition within the forum's law against awarding any interest whatsoever, the extension would merely open the door to art 74 compensation for the Saudi court. It could therefore order lump sum compensation for delayed payment under *CISG* art 74 in a manner aligned to local interpretation of *ta'widh,* such as a lump sum for proven losses due to inflation. This would accord with sharia as implemented in all Group C countries.[273]

The same position could be taken by Qatari and Iranian courts. Whilst an Iranian court might actually be willing to impose art 78 interest obligations upon a French debtor (as discussed in Part V(D)), the 'extension' of art 74 compensation as an

269 Which explains why such approaches have been adopted by some tribunals: see above Part V(D)(3).

270 See above Part V(D)(3) for discussions regarding issues with the clarity of Saudi law.

271 Of course, as a forum in a non-contracting state, the Saudi court need not first conclude, as was suggested by the Advisory Council, that a 0% interest rate would apply under the creditor's law before applying the alternative compensation approach: *Opinion No 14* (n 2) 21 [3.43].

272 See above Part VI(D)(1).

273 See above Part V(D)(3).

adaptation of *Opinion No 14* is still preferable as a less discriminatory pathway, thereby providing greater consistency between arbitral and court decisions.

In our view, even in the most challenging situation of a Group C non-*CISG* contracting state court, the sharia and *CISG* can be reconciled with only slight adaptations to *Opinion No 14*. At the time of writing, no Group C nation has acceded to the *CISG*. However, as we have shown, courts in these countries can still apply the *CISG* to award art 74 compensation in accordance with sharia in Group C countries.

Reconciliation of the sharia and *CISG* is desirable to promote fairness and importantly, commercial predictability. As discussed below, it could also encourage greater *CISG* accession to further enhance international trade.

5 *Arbitral Tribunals*

Arbitrators are not bound by the *CISG* or state private international law principles,[274] unless parties have agreed on the *CISG* or law of a contracting state as the governing law of the contract. Absent agreement between parties, tribunals may apply the *CISG* pursuant to conflict of laws, supported by art 28(2) of the *UNCITRAL Model Law on International Commercial Arbitration* ('*UNCITRAL Model Law*')[275] or similar provisions.[276]

Arbitral awards are more likely to be enforceable than court judgments within foreign jurisdictions, due to wide adoption of the *New York Convention*.[277] Ratifying and/or signatory countries include Algeria, Bahrain, Djibouti, Egypt, Iran, Jordan, Kuwait, Lebanon, Malaysia, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Syria, Tunisia and the UAE.[278] Yet as seen in Part V(D)(2), many tribunals have historically declined interest awards in deference to sharia.

The above interpretations adapt the *Opinion No 14* rule to render the *CISG* compatible with sharia. We suggest that arbitral tribunals adopt the 'flexible' interpretation,[279] so that awards are appropriately sensitive to sharia, thus avoiding enforcement issues.

274 Spagnolo (n 262) 199–200; André Janssen and Matthias Spilker, 'The CISG and International Arbitration' in Larry A DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press, 2014) 135, 140.

275 *UNCITRAL Model Law* (n 188) art 28(2).

276 See, eg, *LCIA Arbitration Rules* (n 28) art 22.3; International Chamber of Commerce, *Arbitration Rules* (Rules, 1 January 2021) art 21, which stipulate that if the parties have not agreed on the law governing the merits of the dispute, the arbitral tribunal may apply the laws or rules of law that it considers appropriate. See generally Spagnolo (n 262) 200–1; Janssen and Spilker (n 274) 140.

277 *New York Convention* (n 188).

278 'Contracting States', *New York Arbitration Convention* (Web Page) <www.newyorkconvention.org/countries> ('Contracting States').

279 See above Part VI(D)(2).

Thus, where the *CISG* is applicable but the party against whom enforcement will be sought is located within a Group A, B or C nation, the tribunal, whilst not bound to do so, would be wise to adopt the suggested flexible extension of the rule in *Opinion No 14*. Were enforcement likely within a Group A or B country, this would mean ordering interest at a simple interest rate pursuant to art 78 within the bounds of the maximum allowable rate within that country, with additional lump sum compensation under art 74 only for proven further losses in a manner aligned with acceptable *ta'widh* in that country. Were enforcement likely in a Group C country, the flexible interpretive extension of *Opinion No 14* would lead to the tribunal refraining from ordering any art 78 interest, and instead awarding compensation only for proven losses within art 74 to the extent permitted by *ta'widh* within that country.

VIII IMPLICATIONS FOR ACCESSION

A more realistic re-evaluation of the feasibility of accession to the *CISG* for sharia-observant nations is now possible. Rather than a generalised evaluation that assumes sharia and the *CISG* must always collide, or are compatible on a conceptual level alone, a more nuanced approach can consider viability of accession in light of (a) the practical implementation of sharia in particular jurisdictions, and (b) viable interpretations of the *CISG* that are compatible with sharia.

Could the above interpretations, which demonstrate compatibility between sharia and the *CISG*, lead more Muslim-majority countries to accede to the *CISG?* Can such jurisdictions accede without fear of violation of their own mandatory prohibitions on interest?

As we have seen, the main ramification of accession is that courts within the acceding jurisdiction would become bound to apply it whenever conditions for its application are met. Indeed, this is already true in some Group A and B countries, such as Egypt, Iraq, and Bahrain, which have already acceded. Courts in jurisdictions which have not acceded currently retain discretion to decline to award art 78 interest. Unlike the *UNCITRAL Model Law*, adopted by the new 2012 Saudi *Law of Arbitration* and by the UAE,[280] the *CISG* is a convention, with no reservation available to opt out of art 78.

The natural concern is conflict with the sharia. However, we have demonstrated that this need not be so. Compatibility with the *CISG* is possible. Indeed, in light of a detailed examination of how sharia is applied in practice, only slight adaptations to the approach in *Opinion No 14* are required to achieve this, and these are only required in instances where the single uniform rule leading to the application of the creditor's rate conflicts with the mandatory forum law.

280 The UAE acceded to the *New York Convention* (n 188) in 2006 and adopted the *UNCITRAL Model Law* (n 188) in 2018. The *UNCITRAL Model Law* was adopted as the *Law of Arbitration* (Saudi Arabia) Royal Decree No M/34, 16 April 2012 and Saudi Arabia acceded to the *New York Convention* in 1994 subject to a declaration restricting its applicability to awards made in contracting states: 'Contracting States' (n 278).

In Group A and B countries, compound interest is forbidden, but simple interest is permitted in commercial transactions. In Part VII(B)(1) we explained that an 'extension' of *Opinion No 14*'s interpretation could apply whenever the forum's law mandatorily prohibits compound interest, enabling the court to instead award simple interest under art 78, and additional compensation under art 74 where simple interest is insufficient to compensate for proven losses.

In Part VII(B)(4) we proposed that the same 'extension' to *Opinion No 14* would arise in Group C countries where any form of interest is mandatorily prohibited by the forum's law, and would allow a court to order art 74 compensation for proven losses due to late payment rather than art 78 interest.

These solutions render sharia and the *CISG* compatible in a way that encourages accession without fear of violation of sharia. If embraced, we contend that there is no reason to believe that countries in Group A, B or C could not comfortably reconcile their interpretations of sharia with accession to the *CISG* to facilitate legal frameworks that further support foreign trade and investment in their jurisdictions.

One further point regarding accession: at the time of drafting, Islamic views were not given sufficient weight. It is now more important than ever that more Muslim voices be counted in shaping the future of the *CISG*. By joining, Muslim-majority state courts will be amongst the global community whose decisions report on the *CISG*, sometimes called the '*jurisconsultorium*', to which all courts should refer when interpreting the Convention.[281]

Moreover, whether Group A, B or C nations accede or not, courts in non-Islamic *CISG* contracting state courts may continue to order businesses from Muslim-majority countries to pay interest (including compound interest) pursuant to art 78. Remaining outside the *CISG* will not alter this.[282] Conversely, addition of more Muslim voices within the *CISG* 'family' will bring to bear sharia-sensitive interpretations of the *CISG* such as those advanced above.

IX CONCLUSION

Lack of accession by 81%[283] of Muslim-majority states to the *CISG* is a cause for concern. The main obstacle to accession is the perceived incompatibility of the *CISG* and sharia in relation to interest. However, those perceptions are based on a generalised view of both the *CISG* and sharia, which does not necessarily ring true when a more detailed examination is undertaken.

281 Camilla Baasch Andersen, 'The Uniform International Sales Law and the Global Jurisconsultorium' (2005) 24(2) *Journal of Law and Commerce* 159.

282 In the hypothetical scenario referred to earlier in Part VII(B), a French court might apply the *CISG* (n 1) by virtue of art 1(1)(a) rather than art 1(1)(b) were Saudi Arabia to accede, but the outcome would be the same.

283 See above n 8 and text accompanying n 5.

True conflict between sharia and the *CISG* is far less likely than might be assumed. The survey of Muslim-majority states with legal systems which apply sharia law in this paper points to adoption of pragmatic solutions to Islamic prohibitions throughout jurisdictions across the Muslim world.

However, in recent years, Muslim-majority nations have increasingly embraced commercial law internationalisation and modernisation to attract and diversify international trade and investment. An important aspect of this has been increasing adoptions of United Nations Commission on International Trade Law ('UNCITRAL') uniform texts. These are attractive as they provide standardised modern global trading platforms. Recently there have been notable adoptions of the *UNCITRAL Model Law* and *New York Convention*,[284] and establishment of excellent international centres for dispute resolution, such as in the UAE, Malaysia and Qatar. The same reasoning should now prompt reconsideration of the possible adoption of the original UNCITRAL uniform text, the *CISG*, as a relatively modern sales law for international trade that is predictable, fair and uniform.

The suggestions in this paper are designed to promote a more flexible interpretation of the *CISG* that facilitates compatibility with sharia law. To achieve this, we have eschewed broad notions of prohibitions against riba to examine how sharia is actually implemented in practice within Muslim-majority states. It is this fine-grained analysis that enables sharia in its various forms to be reconciled with the *CISG*.

We have also recommended slight adaptations to the approach in *Opinion No 14* that would permit courts in jurisdictions with mandatory domestic prohibitions (either against imposition of interest or compound interest) options to award compensation under art 74, without first requiring that the law of the creditor lead to a zero interest rate for art 78, and would allow courts in jurisdictions which permit simple but not compound interest to fashion a combination of both simple interest and compliant compensation under art 74. This slight 'extension' fulfils the compensatory function of interest in a manner sensitive to sharia law. We have also suggested tribunals, courts in non-*CISG* states, and *CISG* state courts in non-Muslim-majority jurisdictions consider 'flexible' approaches when enforcement in sharia-observant jurisdictions is likely. The flexible adaptation of the approach in *Opinion No 14* would similarly lead to compensatory outcomes acceptable within sharia law in the enforcement nation.

We contend that it would be appropriate for courts and tribunals to adopt these more nuanced interpretations of the *CISG* in the circumstances indicated. The adaptations slightly deviate from formal uniform application of the *CISG* but do so in a manner which extends the logic of the Advisory Council's *Opinion No 14* to address gaps within it. They therefore retain the compensatory function of the

284 See above n 278. Legislation based on the *UNCITRAL Model Law* (n 188) has been adopted by the following Muslim-majority countries: Bahrain, Egypt, Iran, Malaysia, Oman, Qatar, Saudi Arabia, Tunisia, Turkey, United Arab Emirates: 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status?>.

interest obligation but adjust its operation to account for the practical interpretation of Islamic law within the Muslim-majority nations surveyed. The outcome achieved by the interpretative adaptations suggested is more predictable substantive uniformity in application of the *CISG* whenever it intersects with the Muslim world, as well as greater acceptability and enforcement of the *CISG* within it.

In turn, we argue that these approaches to *CISG* interpretation open a pathway to accession for more Muslim-majority states that might otherwise remain hesitant. Recognition that sharia and the *CISG* can be entirely compatible creates new opportunities for more Muslim contracting states, whose courts can then in turn influence future interpretations of the *CISG* throughout the world by contributing decisions through the shared international *jurisconsultorium*.[285]

285 Andersen (n 281).