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Arbitration in Islamic Shari'ah; A Comparative Study with International Law and English Law

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Declaration

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Abstract

Alternative dispute resolution (ADR) witnesses an increase in usage by disputing parties through the world. Arbitration comes on the top of the list of this means of dispute settlement. This thesis studies arbitration in Islamic Shari'ah principally, along with international law and the English legal system. In addition, it refers to the arbitration system in KSA. It covers most of important stages and issues of arbitration, such as scope of arbitration, terms of arbitration agreements, qualifications of arbitrators, roles of the arbitral tribunal and the court during arbitration proceedings, grounds for refusal of the enforcement of the award, major obstacles which face arbitration, and so on. Additionally, it gives a brief overview of the ancient history of arbitration and indicates how various civilizations have benefited from it.

The object of all these points of study is to find out mutual elements between the reviewed laws and also to highlight the differentials. The main goal is to discover to what extent Islamic Jurisprudence in arbitration is compatible with that in international law and English law.

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List of Abbreviations

| | |
|-----------------|--|
| KSA | Kingdom of Saudi Arabia |
| UK | United Kingdom |
| USA | United States of America |
| NYC | New York Convention |
| UNCITRAL | United Nations Commission on International Trade Law |
| ADR | Alternative Dispute Resolution |
| ICC | International Chamber of Commerce |
| ICSID | International Centre for Settlement of Investment Disputes |
| MAT | Muslim Arbitration Tribunal |
| ECJ | European Court of Justice |
| EU | European Union |
| AA 1996 | Arbitration Act 1996 |

Introduction

Preface

Nobody can deny the fact that many people nowadays complain about litigation and the unacceptable delays that often characterise its process. This negative aspect of litigation has pushed a number of people to abandon some of their rights, because that option is less expensive and less difficult than having recourse to litigation and initiating a long judicial process. Personally, I have faced this experience, as others do. I was compelled to forget my right rather than getting embroiled in time consuming litigation to enforce it. In fact, I had thought of this problem ever since I became a judge with the aim of proffering solutions for those issues and effective alternatives.¹ The most important of these alternatives is arbitration. But unfortunately, arbitration is addressed in Islamic jurisprudence only in basic terms and the old Islamic books give it narrow space. Arbitration is scantily discussed in this Islamic law literature. This seems understandable due to the fact that those books were written nearly 1000 years ago and also arbitration in those ages was not as popular and wide-spread as it is now. Moreover, financial transactions and international affairs were not so complicated as they are now. The scope for disputes is therefore greater in modern commerce.

All of these gave me a strong motivation to identify arbitration to be the topic of my current thesis. I also chose English law as one basis for comparison because the United Kingdom is one of the leaders of the world and has a very good reputation for its judicial system and legislation. In addition, London is famous for its Arbitration Centre where many disputing parties from various nationalities, including Saudi Arabia, prefer to arbitrate their controversies. The English judicial and legislative systems have possessed immense knowledge about the issues which face arbitration in our contemporary world and the

¹ I became a judge in Diwan Al-Madhalim (Board of Grievances) in 2005. The Court deals with administrative disputes along with commercial disputes. It is also the competent court to supervise on arbitration agreements and enforce any domestic or foreign arbitral awards. I resigned from the court in 2007 after working two years there.

appropriate solutions and procedures that address them much more than the developing countries, such as the Kingdom of Saudi Arabia.²

Furthermore, the sharp growth in the use of arbitration as an alternative means to settle disputes, especially commercial ones, has also increased my interest in the study of arbitration from an Islamic perspective hence, the decision to embark on this research. In a report published by the Guardian newspaper entitled "Fears over Non-Muslim's Use of Islamic Law to Resolve Disputes" it says that Muslim Arbitration Tribunal recorded 15% rise in non-Muslims employing Islamic law in commercial cases. The newspaper further states that Campaigners have voiced concerns over a growing number of non-Muslims using Islamic law to resolve legal disputes in Britain despite controversy over the role of shari'ah law. Also, the report relied on a press release from a spokesman for the Muslim Arbitration Tribunal (MAT), Fareed Chedie, who said that there had been a 15% rise in the number of non-Muslims using shari'ah arbitrations in commercial cases in the year (2010) through their network of tribunals which operate in London, Birmingham, Bradford, Manchester, Nuneaton and Luton.³ Also, the International Chamber of Commerce (ICC) has registered a noticeable increase in the number of cases that were brought before its court of arbitration in the latest years, and its statistics shows that 759 requests for arbitration were filed with the ICC Court in 2012.⁴ In addition, the number of new cases registered in the International Center for Settlement of Investment Disputes (ICSID) is at the highest level in 40 years.⁵ In 2011, ICSID registered 38 new cases, while in 2012, 50 new cases were registered.⁶

² Davidson, F., (2011), "The Arbitration (Scotland) Act 2010: The Way Forward or a Few Missteps?", The Journal of Business Law, 1, pp 43-63.

³ "Fears Over Non-Muslim's Use of Islamic Law to Resolve Disputes", The Guardian, Sunday 14 March 2010, available at: <http://www.theguardian.com/uk/2010/mar/14/non-muslims-sharia-law-uk>, accessed on 15/8/2013.

⁴ International Chamber of Commerce, available at: <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>, accessed on 15/8/2013.

⁵ Morek, R., (2012), "The World Map of Investment Arbitration in ICSID Statistics", available at: <http://www.disputeresolutionpoland.com/2012/08/31/the-world-map-of-investment-arbitration-in-icsid-statistics/>, accessed on 15/8/2013.

⁶ The ICSID Caseload – Statistics (Issue 2013-2), available at: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>, accessed on 28/10/2013.

Arbitration is considered one of the most important means of resolving disputes that arise between parties, particularly in commercial transactions. Historically, it is the oldest known instrument that was used to settle conflicts between persons or between States (See Chapter 1.1). There is no doubt that recognizing arbitration and supporting it by countries of the world, international institutions and committees has greatly encouraged and increased international commerce throughout the world. Countries look to make inward investment as attractive as possible through incentives and by removing obstacles. Foreign investors seek a stable economic environment in which to invest and a trustworthy legal framework which protects their investment. Arbitration is part of this trusted regime.

In order to maximize the benefits of inward foreign investment, a range of policies and procedures need to be put in place in a way that will attract and reassure investors while, at the same time, minimize all forms of hindrances. Among the most important of these policies is the one that builds a legal framework governing the investments and assets of foreign investors and affording them safeguards and guarantees. Like other countries, the Kingdom of Saudi Arabia does its best to attract foreign capital in order to foster growth in the national economy and increase its revenues. Responding to the need to attract inward investment, the Saudi government has introduced a number of rules and regulations that follow worldwide economic trends, such as Foreign Investment System (FIS) and System of Settlement Preventing Bankruptcy (SSPB). These rules and regulations reflect the reality of globalization and the needs of multinational companies that look for a secure and profitable environment when making investment decisions.

This thesis will address arbitration from the Islamic law perspective with a view to finding out the contemporary arbitration operational stages. Besides, this study will also be looking at the Saudi Arabian arbitration system since it is the native country of the researcher and also being a country that adopts the Islamic legal system. In addition, this thesis will compare the approach of Islamic law as regards arbitration with those of English law and international law. The purpose is to analyse the differences and similarities between these legal systems with a view to confirming the extent to which the Islamic arbitration system is compatible with the conventional international law.

At the time I commenced this study in January 2010, the existing law with regards to arbitration in Saudi Arabia was contained in the Arbitration System 1983. I started my thesis by analyzing the provisions of the 1983 Arbitration System, but, before the completion of this study, the Saudi Arabian government issued a new Arbitration System on April 16, 2012 which came into force in July 9, 2012. The new arbitration system addresses matters in more detail than the former system and benefits greatly from the UNCITRAL Model Law on International Commercial Arbitration, a law that was designed by the United Nations to assist States in reforming and modernizing their laws on arbitral procedures for the purpose of international commercial arbitration. It then became necessary for me to study the new arbitration system thoroughly to find out the changes that have been introduced into the arbitration system. Meanwhile, I must mention that up until the submission of my thesis in December 2013, the executing rules have not been issued.

Research Questions

This research studies arbitration in the Islamic Shari'ah along with the Saudi arbitration system and what is the relationship between arbitration in the Islamic law and the international law. It also analyzes areas of differences and compatibility between Islamic arbitration law and Arbitration Act 1996 in England. The main hypothesis to be examined in this study will be based on the question of whether International law and the English law of arbitration are in harmony with the concept of arbitration in Islamic law.

This research question raises some sub-questions regarding the concept of arbitration and its types; the terms and conditions of arbitration; the role of arbitration in Saudi Arabia; what is the framework that governs the relationship with international commercial arbitration. In addition, this research aims to answer some questions that concern the nature of the arbitration System in Islamic jurisprudence and the Kingdom of Saudi Arabia. What are the problems and the difficulties that face arbitration or enforcing awards in the reviewed laws?

Existing literature

With regard to existing literature in this field, there are several sources that have addressed some of aspects of arbitration. However, these sources have addressed arbitration from different perspectives. Moreover, the latest arbitration system in Saudi Arabia has just been issued which means that this thesis would be the first, or at least one of the first, works that studies and analyses in detail the concept of arbitration and its procedure in the Kingdom of Saudi Arabia in light of the new arbitration system.

However, some authors have made significant contributions towards some aspects of arbitration which I have listed below:

Nidal Al-Bloui⁷ discusses the arbitration rules in Islamic law along with arbitration system in the Kingdom of Saudi Arabia. However, his discussion does not include a comparative analysis of arbitration from Islamic law and international law perspectives. It is further observed that Nidal Al-Bloui wrote from the view point of the old system of arbitration in Saudi Arabia, as the book was published before the institution of the new system. The author has argued that the Saudi Arbitration System has been affected by Islamic law especially in arbitrators' conditions and criticized requesting the same conditions of judges in arbitrator although the difference of nature and scope between arbitration and litigation. He recommended that the Saudi Government should issue new system especially to regulate arbitration in international financial transactions.

The authors⁸ of 'International Commercial Arbitration: An Asia- Pacific Perspective' study international commercial arbitration generally but concentrate on Asia-Pacific national regulations. Also, they examine many of the arbitration cases that have been decided by courts in this region, such as India, China and Hong Kong. However, their analysis does not include other countries that are outside this region, such as the Kingdom of Saudi Arabia.

⁷ Al-Bloui, N., (2012), The Arbitration in Islamic Sharia, Amman, Dar Al-Thaqafah, 1st edn.

⁸ Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press.

In his book published in 2010,⁹ Baamir explains about commercial arbitration in Islamic law and refers to its system in the Kingdom of Saudi Arabia. Because this book was published in 2010, the author only studied the old system of arbitration in KSA and does not talk about the new one as my thesis does. Besides that it does not refer to International and English law and make a comparison with them.

Research Importance

The significance of this research is that it deals with the use of an alternative dispute resolution tool instead of referring disputes to the courts and thus reflects the importance of the courts themselves to people's lives and communities generally. In relation to companies particularly in this era when we have various multi-national companies springing up with huge financial budgets, there is the urgent need to preserve the companies' interests and not to disrupt the companies' main objectives as a result of going through long and expensive litigation in our courts.

Moreover, the significance of this can be seen from its general view and its study of different legislation. For example, the Islamic Shari'ah, which is one of the laws considered in this study has increasingly attracted attention of many countries in recent years due to the fact that it is one of the major legal systems in the world. It may also be correct to say that the Islamic law concept of arbitration has not been given adequate attention considering its contribution to international arbitration.

Furthermore, one of the examined systems in the research is regarded as a new system –Saudi Arbitration System - and it is in need of explanation and in- depth analysis. The research deals with a topic that has not had enough scholarly discussion, as it has not been explained in the required manner. This is evident by looking at previous research, especially that on the national system which is considered the pillar of research in this field.

⁹ Baamir, A., (2010), Shari'a Law in Commercial and Banking Arbitration, UK, Ashgate.

Eventually, this research will constitute an important reference source for all foreign companies that invest in the Kingdom of Saudi Arabia or companies that have the desire to invest in it, as well as the local parties. It is hoped it will be an important guide to legal professionals who are interested in this issue, such as legislators, judges, academics, lawyers, consultants and others.

Research Methodology

I intend to consider critically the provisions and texts of the laws that are relevant to this study directly and then analyse books and other materials that explain and interpret those provisions and texts. This approach aims at ensuring proper understanding of those provisions which at the end will most likely lead to correct findings.

The research methodology will be based on a traditional doctrinal legal analysis, which relies on information that already exists in some form, such as books, journal articles, case reports, legislations, statements and resolutions by the United Nations, the works of other international and inter-governmental bodies. I will give more attention to recent publications because they are most likely to be current in their analysis. I will also focus more on legislation and legal instruments governing arbitration within the Kingdom of Saudi Arabia; the English legal system; and the international community mainly to analyze their provisions and finally make comparison between them. In addition, there will be given some practical applications that increase the clarification of the topic such as cases and arbitral awards, in order to build a bigger picture regarding the issues under discussion.

Regarding the Islamic law aspect, I concentrate on the classical writings of great Muslim scholars in order properly to appreciate their views concerning the concept of arbitration in Islamic law, in addition to books written by modern Muslim commentators. That is because these classical works are regarded as being more reliable.

I have visited many countries and libraries in order to avail myself the benefit of their materials and resources for this study. One of the important libraries that I have visited was the Institute of Advanced Legal Studies in London. I found there new source materials and I benefited so much from its huge databases which are not available in other places.

At the end, I hope that this research will benefit all researchers, legal specialists and others interested in arbitration. Also, I hope that it will enhance a clear understanding of arbitration rules in Islamic law and its compatibility with International law and the English legal system, particularly, for the non-Muslim readers and the public at large.

Chapter One

Arbitration as a Dispute Settlement Mechanism

1.1 Definition of Arbitration

Tahkim is the translation of the word “arbitration” in Arabic. It is a verbal noun of the Arabic word “hakkama”¹⁰, which primarily signifies the turning of a man back from wrongdoing. Al-Zamakhshari defines the meaning of the word hakkama as making someone an arbitrator (hakam/muhakkam).¹¹ Literally, tahkim means to make someone an arbitrator (hakam) and to authorise him to pass judgement.¹² Ibn Abidin explains that tahkim literally is a means of making judgement in a case for someone by someone else.¹³ According to Al-Mawardi, tahkim is the appointment by two disputing parties of a member of the community to judge on a matter that both parties dispute.¹⁴

A wider definition is given by a current Muslim scholar, Al-Zuhayli, who defines it as an agreement by the parties to appoint a qualified person to settle their dispute by reference to Islamic Law.¹⁵ According to the Majallah al-Ahkam al-Adliyyah,¹⁶ tahkim signifies appointing a third party as hakam in agreement by the disputing parties to resolve their dispute.¹⁷

Although the jurists differ in definition, they are, however in agreement as to its meaning and scope, in that tahkim is an appointment, and together with it, authority, made by the disputing parties of a third party to resolve the disputes of the parties. The wording of this article suggests that the terminological definition of tahkim is close to its literal meaning.¹⁸

¹⁰ Ibn Maniur, M., (1990), Lisan al-'Arab, Beirut, Dar Sadir.

¹¹ Al-Zamakhshar, M., (1985), Asas Al-Balaghah, Egypt, al-Hai'ah al-Misriyyah al-'Ammah.

¹² Ibn Sayyidah, A., (n.d.), Al-Makhsas, Beirut, Dar al-Fikr.

¹³ Ibn 'Abidin, M., (1979), Hdshiyah Radd at-Muhtar 'ald Durr al-Mukhtar: sharh Tanwer al-Absar, Beirut, Dar al-Fikr, 2nd edn.

¹⁴ Zahraa, M. and Hak, N., (2006), "Tahkim (Arbitration) in Islamic Law Within the Context of Family Disputes", Arab Law Quartely, 20, pp 2-42.

¹⁵ Al-Zuhayli, W., (1989), Al-Fiqh Al-Islam wa 'Adillatuhu, Damascus, Dar al-Fikr.

¹⁶ It is the first civil codification of Muslim law. It represents an attempt to codify part of Hanafi fiqh on mu'amalat (transaction) in the Ottoman Empire.

¹⁷ Majallah al-Ahkam al- 'Adliyyah, article 1790.

¹⁸ Zahraa and Hak, Supra note (14).

As for the word “Arbitration” which is the English translation of the Arabic word 'tahkim', the Shorter Oxford English Dictionary defines it as “the settlement of a question at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision”.¹⁹

According to David, “arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons, the arbitrator or arbitrators, who derive their powers from a private agreement, not from the authorities of a state, who are to proceed and decide the case on the basis of such an agreement”.²⁰

Arbitration has also been defined in ‘Words and Phrases Legally Defined’ as “the reference of a dispute or difference between no less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction”.²¹ Halsbury’s Laws of England defines it as “the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law”.²²

Leon Sarpy in his definition sees arbitration as “a procedure whereby the interested parties submit their controversy to a disinterested person or persons who make a binding determination of the dispute”.²³ Domke defines arbitration as: ‘a process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on an evidence and arguments to be presented before the arbitration tribunal. The parties agree in advance that the arbitrator’s determination, the award, will be accepted as final and binding upon them”.²⁴

¹⁹ The Shorter Oxford English Dictionary, (3rd edn, 1969).

²⁰ Rone, D., (1985), Arbitration in International Trade, Kluwer Law and Taxation Publications, 5th edn.

²¹ Saunders (ed), Words and Phrases Legally Defined, (3rd edn, Butterworths 1988), p 105.

²² Halsbury’s Laws of England, (4th edn, Butterworths 1991).

²³ Sarpy, L., (1965), "Arbitration as a Means of Reducing Court Congestion", Notre Dame Lawyer, vol. 41, issue 2, pp 182-191.

²⁴ Domke, Arbitration, 1. Cited from: Lew, J., Mistelis, L. and Kroll, S., (2003), Comparative International Commercial Arbitration, Netherlands, Kluwer Law International.

As arbitration is a dynamic dispute resolution mechanism varying according to law and international practice, national laws and regulations do not attempt a final definition. For example, the Arbitration Act 1996 does not provide a definition of arbitration, but it sets out clear statements of principle of what was expected from arbitration. Section 1 provides:

“(a)The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

(b)The parties should be free to agree how their disputes are resolved. Subject only to such safeguards as are necessary in the public interest”.²⁵

In the same vein, the International Commercial Law Commission (UNCITRAL), in the model international commercial arbitration law published by it, leaves arbitration without any specific definition, and the same phenomenon is also a feature of former Saudi Arbitration system.²⁶ The present Saudi Arbitration system gives a definition of an arbitration agreement rather than arbitration itself. Article 1 of the system defines an arbitration agreement as an agreement between two parties or more to refer to arbitration all or some specific disputes that have arisen or may arise between them regard a legal relationship, contractual or not, whether the arbitration agreement is in form of an arbitral clause entered into a contract or in form of an independent submission agreement.²⁷

1.2 History of Arbitration

Before discussing arbitration and its terms in Shari'ah and comparing that with some international laws and western systems, we should give some account of the history of arbitration throughout the years. It is important to narrate arbitration procedures over time and know whether this means of dispute resolution was found in different stages of history as

²⁵ Lew, J., Mistelis, L. and Kröll, S., (2003), Comparative international commercial arbitration, The Netherlands, Kluwer Law International.

²⁶ UNCITRAL, 1985 - UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. See also: Borba, Igor M., (2009), International Arbitration: A comparative study of the AAA and ICC rules, USA, ProQuest LLC.

²⁷ Saudi Arbitration System 2012, article 1.

well as in various civilizations or not. In addition, we need to recognise how important and how old arbitration is; how was it utilized by different civilizations; and what benefit did humanity derive from it.

In fact, arbitration, otherwise known as ‘Tahkim’ in Islamic jurisprudence, has a very ancient history in many different civilisations. This means of resolving controversies is an ancient institution. It has been observed that no one knows exactly when and where the practice of arbitration was first seen in history;²⁸ or who was the first person to initiate the arbitral process of dispute resolution; and who was the first arbitrator. Wolaver says “the origin of arbitration is lost in obscurity”.²⁹ However, humans have been found to resort to arbitration in resolving their disputes much longer before the emergence of other means of adjudication and dispute resolution, such as judgment by courts. Arbitration has been in existence long time before the establishment of contemporary courts, a fact which is also attested to by Bell that “this amicable private tribunal is of an earlier date than the public courts.”³⁰

One of arbitration’s earliest recorded usages was found in Egypt, where in circa 2500 B.C., the grand chief of Nekheb gave an order that disputes between the priests would be submitted to fellow members of the college for resolution.³¹ A glimpse into various ancient civilizations at different ages, lends support to the primordial nature of arbitration. Some of these civilizations will now be considered one after the other.

1.2.1 Israel Children Kingdom Era

²⁸ Robert, V. and Massey, Jr., (n.d.), "History of Arbitration and Grievance Arbitration in the United States", West Virginia University Extension Service Institute for Labor Studies and Research, available at: <http://www.laborstudiesandresearch.ext.wvu.edu/r/download/32003>, accessed on 15/3/2010.

²⁹ Wolaver, Earl S., (1934), "The Historical Background of Commercial Arbitration", University of Pennsylvania Law Review and American Law Register, vol. 83, pp 132-140.

³⁰ Law of Arbitration, p. i. Cited from: Wolaver, Earl S., (1934), "The Historical Background of Commercial Arbitration", University of Pennsylvania Law Review and American Law Register, vol. 83, pp 132-140.

³¹ Sarpy, L., (1965), "Arbitration as a Means of Reducing Court Congestion", Notre Dame Lawyer, vol. 41, issue 2, pp182-191.

Our study will begin with the era which is said to have one of the oldest written cases of arbitration. That was in the era of the children of Israel and precisely during the reign of king and prophet Solomon, the son of David (peace be upon them), who was very famous for his gifted wisdom and intelligence.

According to Frank D. Emerson 'one of the earliest arbitrators was Solomon.'³² Elkouri and Elkouri in their book, 'How Arbitration Works' (2003), not only stated that Solomon was an arbitrator, but also noted that the procedure used by him was in many respects similar to that used by arbitrators today.³³ An account of one of Solomon's arbitrations is found in the Old Testament in I Kings, chapter 3, verses 16-28. This part of the Old Testament narrates the story of two women who brought a matter to the King for adjudication. One of them accused the other of stealing her living baby by substituting it with a dead one. The other woman in denying the allegation insisted that the living child was her own. When the King saw that both of them were laying claim to the living child, he requested for a sword and pretended that he was going to sever the living baby into two halves to be shared amongst the two contesting women. According to the Old Testament's account:

"Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, but divide it. Then the king answered and said, give her the living child, and in no wise slay it; she is the mother thereof and all Israel heard of the judgment which the king had judged; and they feared the king; for they saw that the wisdom of God was in him, to do judgment".³⁴

Prophet Muhammad (peace be upon him) also narrated a similar story to his companions thus: "There were two women, each of whom had a child with her. A wolf came and took away the child of one of them, whereupon the other said, 'It has taken your child.' The first said, 'But it has taken your child.' So they both carried the case before David who judged that the living

³² Emerson, F. D., (1970), "History of Arbitration Practice and Law", Cleveland State Law Review, vol. 19, pp 155-156.

³³ Elkouri, F. and Elkouri, E., (2003), How Arbitration Works, USA, Bna Books, 6th edn.

³⁴ The Old Testament, I Kings, chapter 3, verses 16-28. Also see: Emerson, supra note (32).

child be given to the elder lady. So both of them went to Solomon the son of David and informed him (of the case). He said, 'Bring me a knife so as to cut the child into two pieces and distribute it between them.' The younger lady said, 'May Allah be merciful to you! Don't do that, for it is her (i.e. the other lady's) child.' So he gave the child to the younger lady."³⁵

But in my own opinion, I do not think that this case can properly be used as a reference in establishing the pre-historic nature of arbitration, regardless of the fact that some writers have regarded it as such. The case of king Solomon narrated above, to my mind appears to be more in conformity with judgment than arbitration. The reason being that Solomon combined the authorities of a king; a prophet; and a judge. With this therefore, he had a full authority and power to award and enforce the verdict.

Monarchs in ancient times were known to adjudicate and resolve disputes amongst their subjects in addition to their ceremonial responsibilities. In the Shari'ah (Islamic law), judges are regarded as representatives and deputies of the caliphs and imams when they exercise judgement and receive their authorities. Moreover, imams and governors in Islam basically have the right to judge between people and resolve their disputes, and no one should be an Imam without possessing the qualities required of a judge - adl' (justice), Istiqaamah (uprightness) and Fiqh (jurisconsult).³⁶ Muhammad (peace be upon him) and his companions after his death all exercised judgment by themselves and at the same time sent many other judges to the far regions of the Islamic empire in order to judge between their people.³⁷

³⁵ Bukhari, M., Sahih Bukhari's, 4, (55:637), available at:

<http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/bukhari/055.sbt.html>.

= This is the Arabic text of the hadeeth:

روى الإمام البخاري في صحيحه عن أبي هريرة رضي الله عنه ، أن النبي صلى الله عليه وسلم قال : (كانت امرأتان معهما ابناهما ، جاء الذئب فذهب بابن إحداهما ، فقالت صاحبتها : إنما ذهب بابنك ، وقالت الأخرى : إنما ذهب بابنك ، فتحاكما إلى داود عليه السلام ، فقضى به للكبرى ، فخرجتا على سليمان بن داود عليه السلام ، فأخبرتا ، فقال : انتوني بالسكين أشقه بينهما ، فقالت الصغرى : لا تفعل يرحمك الله ، هو ابنها . فقضى به للصغرى) .

³⁶ Imams, governors and caliphs in the early period of Islam possessed these qualities. It however doubtful if leaders of Muslim countries today these amiable qualities. Under the Shari'ah, without possessing these qualities a person will not have the jurisdiction and competence to adjudicate over any disputes.

³⁷ Ibn-Qudamah, A., (1405/1985), Al-Mughnee, Dar Ehiaa Alturath Alarabi, 1st edn.

The Qur'an has also narrated another story indicating how a dispute was resolved by Solomon and his father (peace be upon them) in the following words:

(وداود وسليمان إذ يحكمان في الحرث إذ نفشت فيه غنم القوم وكنا لحكمهم شاهدين (78)
ففهمناها سليمان وكلا آتينا حكما وعلما)³⁸

According to this Quranic text, a conflict arose between two men because the sheep of one of them trampled over the crops of the other, then grazed and caused him such loss. The two men took their case to Prophet Dawood (David) and asked him to judge between them. The crops owner narrated his case and requested that he be compensated by the sheep owner. The shepherd was very poor and had nothing except the sheep. The damage done to the crops exceeded the price of the sheep. Prophet Dawood ordered the defaulter to give his sheep to the owner of the field as reparation. Sulaiman (Solomon) who was present listening to the judgement of his father, respectfully, spoke out: "Dear father, undoubtedly, your decision is correct but it will be more suitable if all the sheep are delivered to the plaintiff for the utilisation of their milk and wool only. The respondent should be directed to render services to the owner of the crops until the damaged field is restored to its normal position. When it is done, the sheep must be given back to the shepherd. Prophet Dawood appreciated this novel way of awarding justice and the Holy Qur'an speaks very highly of him.

But again and as I have maintained earlier, these cases may not serve as appropriate examples to establish the existence of arbitration in antiquity in view of the fact that the adjudicator in these instances had unquestionable authority coupled with the binding force of their verdict thereby leaving the disputants with no option.

However, in the Bible there is a case which appears much clearer in its relation to arbitration than the foregoing cases. In the book of Genesis, chapter 31, verses 36 and 37 a dispute between Jacob and Laban is described. The two of them resorted to arbitration as a means of resolving their conflict. Jacob says to Laban: "Now that you have ransacked all my things,

³⁸ The Holy Qura'an, (21:78,79), Translation: "And remember David and Solomon, when they gave judgment in the matter of the field into which the sheep of certain people had strayed by night: We did witness their judgment. To Solomon We inspired the (right) understanding of the matter: to each (of them) We gave Judgment and Knowledge". See: Islam101, The Prophet Sulaiman, available at: <http://www.islam101.com/history/people/prophets/sulaiman.htm>, accessed on 25/2/2010.

have you found a single object taken from your belongings? If so, produce it here before your kinsmen and mine, and let them decide between us two". This way, Jacob and Laban suggested that a third party should settle their argument, based on the idea of arbitration.³⁹

1.2.2 The Greek Era

The Greeks in ancient time, according to Niebuhr, "were accustomed to arbitration from an early period in their history."⁴⁰ "Arbitration was highly developed in Greece at this period."⁴¹ International arbitration was known to the Greeks, for several political conflicts seem to have been resolved in such a manner. For example, in an argument between Megara and Athens about the ownership of the island of Salamis, about 600 B.C., the issue was submitted to five Spartan judges who, by arbitration, gave the island to Athens. In 480 B.C. there was also a dispute about the ownership of Leucas between Corinth and Corcyra. The conflict this time was submitted to Themistocles who decided it as an arbitrator.⁴²

The Greeks also used arbitration as a mechanism of averting wars between their cities which either had arisen or were likely to arise in the future. In 445 BC there was a treaty between Athena and Sparta wherein it was agreed that should there arise any dispute between them, none of them shall resort to war. Instead, they should go to arbitration in order to resolve any potential dispute. After that and exactly in 432 BC Sparta accused Athena of several violations of the 445 BC treaty and that made Athena invite Sparta to submit the issue to arbitration as they had initially agreed to. Sparta on its part refused to honour the treaty by invading Athena. The defeat suffered by Sparta in that war was attributed to its violations of a solemn oath for which the Gods exacted a punishment. The war lasted for ten years and came to an end by the 'Peace of Nicias' in 421 BC, which emphasised that disputes must not in the

³⁹ Borba, I., (2009), International Arbitration: A comparative study of the AAA and ICC rules, USA, ProQuest LLC.

⁴⁰ Greek International Arbitration, Marcus Niebuhr Tod, Oxford, 1915, p 174. Cited in: Walsh, E. and Duggan, S., (1969), The History and Nature of International Relations, 2nd edn, p 49-51.

⁴¹ Rostovtseff, M. I., (1969), "International Relations in the Ancient World", p 29-66.

⁴² Soons, A. H. A., (ed), (1990). International Arbitration: Past and Prospects, Netherlands, Martiuns Nijhoff.

future be resolved by resorting to war but instead by submitting all disputes to arbitration and be willing to accept the arbitral awards.⁴³

However, history still repeated itself. A few years later Sparta complained about such violations in treaty 421 BC and requested Athena to submit to arbitration, and upon the refusal of Athena to so submit, Sparta was therefore compelled to take action against Athena by attacking it. This time, Athena was denied the assistance of the gods by losing the war.⁴⁴

Moreover, the father of Alexander the Great, Philip II, used arbitration as a way of settling territorial disputes arising from a peace treaty he had negotiated with the southern states of Greece as far back as 337 B.C.⁴⁵

Upon Mt. Ida in Greece, the royal shepherd, Paris, was also called upon to deliver an arbitration award. The dispute concerned the competing claims of Juno, Pallas Athene, and Venus for the prize of beauty. All other ways of resolution having failed, Paris, by agreement of the parties, determined the subject by arbitration.⁴⁶

In 117 B.C., a boundary line in controversy between the Genoese⁴⁷ and Viturians⁴⁸ was resolved by arbitration. The award having been written upon a bronze tablet, unearthed near Genoa. Civil arbitration was also flourished in Greece. In the Homeric period, chiefs and elders held more or less regular sittings, in places of assembly, to resolve the controversies of all persons. Besides, commercial arbitration was known and a common practice among Phoenician and the Greek traders. Furthermore, there are many instances which were

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Robert, V. and Massey, Jr., (n.d.), "History of Arbitration and Grievance Arbitration in the United States", West Virginia University Extension Service Institute for Labor Studies and Research, available at: <http://laborstudiesandresearch.ext.wvu.edu/r/download/32003>, accessed on 15/3/2010.

⁴⁶ Emerson, F. D., (1970), "History of Arbitration Practice and Law", Cleveland State Law Review, vol. 19, pp 155-156.

⁴⁷ The people live in Genoa. Genoa is a city of northwest Italy on the Gulf of Genoa. It enjoyed type of independence that time although it was bound to Rom only by treaty.

⁴⁸ The people live in Vituria. Vituria is a village near to Genoa and was governed by it.

submitted to arbitration throughout the Greek era. Some of them involved a third strong power to force other powers to have recourse to arbitration. Sometimes the arbitrator was an individual like Themistocles, or an institution such as the Areopagus at Athens, or a State such as Athens.⁴⁹

1.2.3 Roman Era

The Romanic empire which inherited the Greek civilization knew and practiced arbitration too. Wolaver says “It was common among the Romans to put an end to litigation by means of arbitration”.⁵⁰ In fact, the first attempt in history to define arbitration clearly was by the Roman law. It was written in a Code called ‘Digesto’ in the Roman law that a third party called an *arbiter* would settle any pending dispute. The arbitrator used to be an old person endowed with great wisdom and who commanded much respect in the society. It is significant to note that this arbitrator was not a state authority, and his or her award would be enforced nevertheless by the parties involved in the disagreement.⁵¹

Arbitration was used by Romans in civil matters on a limited basis and they contributed efficiently to the spread of its use throughout Europe during their conquest before the Middle Ages. One of cases which attested to the existence of arbitration in the Roman era is when Romans and Samnites⁵² were demanded by Tarentines⁵³ to desist from their war-like preparations and submit to them the resolution of their differences. The Romans did not pay attention to their request due to their scorn of them. As a “Vanissimagens”- the most

⁴⁹ Emerson, *supra* note (46).

⁵⁰ Wolaver, E., (1934), "The Historical Background of Commercial Arbitration", University of Pennsylvania Law Review and American Law Register , 83, pp 132-140.

⁵¹ Borba, I., (2009), International Arbitration: A comparative study of the AAA and ICC rules, USA, ProQuest LLC.

⁵² The Samnites were an Italic people living in Samnium in south-central Italy who fought several wars with the Roman Republic in the era before Christ.

⁵³ The people who live in city of Taranto which was founded in 706 BC by Dorian immigrants as the only Spartan colony and it sets in the south of Italy.

frivolous of peoples which, although unable to settle its own domestic revolutions and discords thinks its self competent to dictate to others conditions of war and peace.⁵⁴

But when the Roman Empire became more developed, arbitration began to lose its importance and position to court houses which became the standard method of settling disputes and conflicts in Rome. The same thing also happened later in other states which became more organised and established as their court houses became the most common way of settling conflicts. Nevertheless, arbitration continued to be used in solving disputes howbeit, in less proportion.⁵⁵

Generally, two rival trends have clamoured for supremacy in this field in the course of history, the supremacy of the courts and the supremacy of private tribunals. In Roman law, there was no struggle to establish the jurisdiction of the ordinary courts as against rival tribunals.⁵⁶

1.2.4 The Islamic Era

The system of resolving disputes through arbitration has been known to the Arabs prior to the emergence of Islam and was an indicator of the civilisation of the society. Tribal disputes and individual disputes were resolved through arbitration as there was no central power that could maintain order and protect the rights of individuals during this period. Tribal princes and people renowned for their superior wisdom, intelligence, impartiality and justice used to stand in as arbitrators.⁵⁷

⁵⁴ Walsh, E., (ed), (1969), The History and Nature of International Relations, USA, 2nd edn.

⁵⁵ Borba, I., (2009), International Arbitration: A Comparative Study of the AAA and ICC Rules, USA, ProQuest LLC.

⁵⁶ Law Commission of India, "Seventy: Sixth Report on Arbitration Act, 1940", (1978), available at: <http://lawcommissionofindia.nic.in/51-100/Report76.pdf>, accessed on 9/9/2010.

⁵⁷ Zahraa, M. and Hak, N., (2006), "Tahkim (Arbitration) In Islamic Law Within The Context Of Family Disputes ", Arab Law Quartely, 20, pp 2-42.

With the emergence of Islam some Arab customs were adopted while many others were proscribed. Arbitration happens to be one of such customs that was accepted and encouraged by Islam. The holy Quran mentions arbitration in several places. One of them is in Sura Al-Nisa (The Women) where Allah says:

(وان خفتم شقاق بينهما فابعثوا حكما من أهله وحكما من أهلها إن يريدا إصلاحا يوفق الله بينهما إن الله كان عليما خبيرا).⁵⁸

The phrase ‘And if you fear’ means when you become aware of, a breach, argument that may lead to divorcement, between the two, the married couple send forth, for them with their consent, an arbiter, a just man, from his folk (his kinsmen) and an arbiter from her folk: the husband delegates to his arbiter the [matter of] divorce or the acceptance of compensation in its place, while she delegates to her arbiter the [matter of] separation. The two arbiters are required to do their best and warn the one guilty of the injustice to desist, or in the alternative they may suggest separation if they see fit. Allah (God), exalted be He, says, if they, the two arbiters, desire to set things right, Allah (God) will grant them (the married couples) success, in determining for them what constitutes [an act of] obedience, be it reconciliation or separation. Surely Allah (God) is ever Knower, of everything, Aware, of what is hidden and what is manifested.⁵⁹

A famous case of arbitration during the Islamic era was in the year 37 A.H⁶⁰ (657 AD), when Ali ibn Abi Talib and Mu’awiyah ibn Abi Sufyan (may Allah be pleased with them) agreed to put an end to the battle of Siffeen, that happened between Muslims after the death of Uthman ibn Affan, the third Caliph (may Allah be pleased with him) after the demise of Prophet Muhammad by going to arbitration.⁶¹ Both sides agreed to go to arbitration and each team

⁵⁸ The holy Qura'an, 4/35, Translation: “If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things”.

⁵⁹ Almahalli, J. and As-sutee, J., (2007), *Tafsir Al-Jalalayn*, Dar Altaqwa.

⁶⁰ This signifies the period after Hijrah that is the period after the historic migration of the Holy Prophet Muhammad to Madina.

⁶¹ This war happened between Muslims because Uthman ibn Affan, the Head of the Islamic State may Allah be pleased with him was killed unfairly and aggressively by some Muslim protestants who came from far parts of country to the capital city of the Islamic State, Almadinah Almunwarah, to challenge his authority of leadership. Regardless of the illegality of their actions, Uthman ordered his army and other surviving companions of the Holy Prophet to remain indoors and should neither do anything to protect him nor fight against the insurgents. This he did because he did not want anybody to be killed because of him. After Uthman was killed, all Muslims

chose an arbitrator and then together wrote the arbitration agreement which took place at a place called Udhruh, now in southern Jordan. This is the text of their tahkim (arbitration) agreement:

The umpires, Abu Musa Al-Asha'ari and Amr ibn Al-'Aas, were required to give their decision in accordance with the injunctions of the Holy Quran. In the absence of any guidance from the Holy Quran, the traditions of the Holy Prophet were to be followed. The umpires were guaranteed the security of their life and property and of their families whatever the outcome of the arbitration might be. It was provided that the decision of the umpires was to be binding on all concerned. The umpires were required to give their decision within six months. It was written on the 13th in the month of Ramadan, 37 A.H.

After that, the two umpires Abu Musa Al-Asha'ari, and Amr ibn Al'Aas met at Dumatul Jandal, midway between Kufa and Damascus in January 658 A.D., each side sent a retinue of four hundred persons to witness the proceedings. The award issued by the arbitrators was that the Muslims should dissociate themselves from the two disputing leaders, Ali and Mu'awiyah by announcing their award in front of the people and thereafter leave the Muslims with the right to elect and choose whoever they wanted to be their Imam.⁶²

In addition to the eras mentioned above, arbitration was also practised in many other ancient civilizations. For example, the Chinese civilization has a record of having resorted to arbitration dating back to about 2100-166 BC.⁶³

especially the companions of the Prophet (these are people who have saw Prophet Muhammad peace be upon him and lived with him) were furious and demanded taking revenge under Islamic law by killing his murderers. They were all unanimous on bringing the murderers to book but then they disagreed on whether the murderers should be killed immediately or whether it should be deferred until after returning normalcy to the State. It was this disagreement that led to the first civil war in Islam.

⁶² Ibn-kather, E., (1424 AH/2003 AD), Albidaiah and Alnihaiah, Dara-alemAlktub. Also see: Al-Jubouri, I., (2004), History of Islamic Philosophy, Bright Pen. Also see: Choueiri, Y., (2005), A Companion to the History of the Middle East, Malden, Blackwell Publishing, 1st edn.

⁶³ Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York , Cambridge University Press.

1.2.5 The Middle Age Era

First and foremost, the Middle Age is a period in European history which spans between the 5th and the 16th centuries. It is commonly dated from the collapse of the Western Roman Empire, and contrasted with a later Early Modern Period. It is defined in Oxford Dictionary as “the period of European history from the fall of the Roman Empire in the West (5th century) to the fall of Constantinople (1453), or, more narrowly, from c.1000 to 1453.”⁶⁴ According to the Cambridge Dictionary, it is “a period in European history, between about 1000 AD and 1500 AD, when the power of kings, people of high rank and the Christian Church was strong.”⁶⁵

However, during this period, States were no longer so powerful, as such; arbitration became once again, a more popular method of resolving disagreements. There were often conflicts among the Catholic Church and landowners and that contributed importantly in creating a very good and attractive ground for arbitration. The church would play the role of arbitrator and the Pope was continually determining matters and also designating bishops to act as arbitrators.⁶⁶

At the beginning and during the twelfth century, the number of arbitration cases increased considerably especially among businessmen. In spite of the fact that the judicial system had improved its process and also got back its power, yet it was slow, arduous and jurisdiction was limited to its local community. There was a complex network of finance and trade throughout this period that spread from England across Western Europe which was dependent mainly on import and export of goods. This sort of international trade required a flexible and rapid method to settle commercial disputes which might arise between multinational merchants to guarantee the continuity of their business and save their reputation. Some of

⁶⁴ Compact Oxford English Dictionary, available at:

Dictiohttp://www.askoxford.com/concise_oed/middleages?view=uknary.

⁶⁵ Cambridge Advanced Learner's Dictionary, available at:

<http://dictionary.cambridge.org/define.asp?key=50376&dict=CALD&topic=middle-ages-medieval-period-501-1500>.

⁶⁶ Borba, I., (2009), International Arbitration: A comparative study of the AAA and ICC rules, USA, ProQuest LLC.

conflicts in this period were referable to experts in the trade than to arbitrators without that special knowledge.⁶⁷

An example of an arbitration case in this period is to be found in the rolls of the Mayor's Court of the City of London in 1424. The case involved a claim for medical negligence in the treating of a wound to the thumb. Eight medical experts of the City were designated to arbitrate the dispute according to the medical courses and rules which usually should be followed by doctors in similar cases. After hearing from both parties and making some investigations, it was determined that the course taken by doctors was surgically correct, and 'any defect, mutilation or disfigurement of the hand was due to the constellations aforesaid or some defect of the patient or the original nature of the wound'.⁶⁸

1.2.6 The Era of Modern History

The modern history of international arbitration could be generally and extensively dated from the so-called Jay Treaty which was signed by the United States of America and Great Britain in 1794. This Treaty of Friendship, Commerce and Navigation set up three joint commissions which consisted of equal numbers of the British and American members. Their duty was to resolve several outstanding controversies between the two parties which had not been possible to settle by negotiation. Though, it is true that members of these joint commissions were not independent and chosen from a third-party as the rules of usual arbitration require, they were entitled to function to some extent as arbitrators. The success recorded from this procedure in the settlement of the issues between the two countries had drawn more interest and attention to the process of arbitration. Therefore and during the nineteenth century, arbitration had been resorted to by many countries around the world. This is confirmed by Machado Neto (2005) when he asserts thus: "Since the end of the XIX century, arbitration became a part of the legal system of several countries". Since that century, most legal

⁶⁷ Ibid.

⁶⁸ Tweeddale, K. and Tweeddale, A., (1998), A Practical Approach to Arbitration Law, Britain, Blackstone Press Limited.

systems and judicial regulations around the world began to officially recognize arbitration as a valid dispute resolution method.⁶⁹

In 1872, The Alabama Claims arbitration between the United States of America and the United Kingdom marked another memorable stage in the modern history of international arbitration. Alabama claims were a series of claims made by the U.S. government against Great Britain for the damage inflicted on Northern merchant ships during the American Civil War by the Alabama and other Confederate cruisers that had been built, fitted out, and otherwise aided by British interests. Under the Treaty of Washington signed in 1871, both countries decided to submit to arbitration the United States' claims for supposed breaches of impartiality by the United Kingdom throughout the American Civil War. There were certain rules fixed by the two parties to govern the duties of unbiased governments that were to be practical by the tribunal, which they agreed should be composed of five members, to be selected respectively by the Heads of State of the United States, the United Kingdom, Brazil, Italy and Switzerland, the last three countries not being parties to the case. The arbitral tribunal's decision, which was in favour of the United States, demanded that the United Kingdom pays compensation and this was duly complied with. The procedures served as a demonstration of the usefulness of arbitration in the resolution of a major argument which led throughout the latter years of the nineteenth century to developments in various aspects of arbitration. International arbitration witnessed a huge and drastic increase in the numbers of provisions inserted in Conventions and Treaties which allow for means of submitting arguments between parties whether they are countries or normal individuals to arbitration. Consequently, more than two hundreds arbitration tribunals were established over this century.⁷⁰

In the end of nineteenth century in 1899, a remarkable shift was traced in the history of arbitration and its processes. That was because this year saw the birth of the Permanent Court of Arbitration (PCA) which is located in The Hague. This court was a result of The

⁶⁹ Borba, I., (2009), International Arbitration: A comparative study of the AAA and ICC rules, USA, Pro Quest LLC.

⁷⁰ International Court of Justice, The Court History, available at: <http://www.icjij.org/court/index.php?p1=1&p2=1>. See also: Borba, *ibid*.

Hague Peace Conference convened in the same year at the initiative of the Russian Czar Nicholas II. The smaller States of Europe, Mexico and some Asian States attended and participated in the conference and the principal purpose of it was to discuss peace and disarmament. The conference ended by adopting a Convention on the Pacific Settlement of International Disputes such as arbitration, good offices and mediation.⁷¹

The convention provided for creation of a permanent machinery in order to facilitate establishing arbitral tribunals in future and enable them to play their roles easily and in the preferred standard. The PCA composed of a team of jurists appointed by each of the countries that are signatories to the Convention, with the exception of a number of officers and clerks that were needed for the day to day running of the procedures of the Court. Each country has the right to select up to four jurists.⁷²

A few years later, in 1907, a second Hague Peace Conference took place and more countries were invited to it such as the States of Central and South America. The participants revised the 1899 Convention and improved the rules governing arbitral procedures by amending some of the old provisions and adding another new provisions.⁷³

There is no doubt that the Permanent Court of Arbitration has contributed positively and noticeably well to the development of international law. The Court has records of plethora of famous international disputes submitted to its machinery for resolution such as the *Carthage* and *Manouba* cases (1913) regarding the seizure of vessels, and of the *Timor Frontiers* (1914) and *Sovereignty over the Island of Palmas* (1928) cases. Moreover, it has recently sought to diversify the services that it can offer, along with those contemplated by the Conventions. The International Bureau of the Permanent Court has *inter alia* acted as Registry in several important international arbitrations, including that between the United Kingdom and Ireland under the 1992 Convention for the Protection of the Marine Environment of the North-East

⁷¹ Ibid.

⁷² Ibid.

⁷³ Rubino-Sammartano, M., (2001), International Arbitration Law and Practice, Netherlands, Kluwer Law International.

Atlantic (OSPAR) and that between Yemen and Eritrea on questions of territorial sovereignty and maritime delimitation (1998 and 1999) and disputes concerning the delimitation of the boundary between Ethiopia and Eritrea (2002). Moreover, in 1993, the Permanent Court of Arbitration adopted new “Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State” and, in 2001, “Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment”.⁷⁴

The year 1958 witnessed the largest and most significant shift in the whole history of international commercial arbitration. In this year, the United Nations invited member States to a conference on international commercial arbitration which took place in New York between the period of May 20 and June 10. All attendant countries and parties to the conference discussed together the difficulties and restrictions facing recognition and enforcement of arbitration awards in the world of international trade. The conference ended with the participants adopting a convention on the recognition and enforcement of foreign arbitral awards that later became known as the ‘New York Convention’.⁷⁵

The objective of this Convention as it is declared in its script is “to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards”. It therefore means by implication that foreign and non-domestic tribunal awards will not be discriminated against and it binds parties to ensure that such awards are treated in their jurisdiction in the same way as domestic awards whether regarding recognition or enforcement. An auxiliary aim of the Convention is to oblige the parties to provide arbitration clause in agreements with full effect to bind courts to reject the parties’ access to court when any provision of the agreement has been violated by referring the matter to an arbitral tribunal. Up until now, there are about 142 countries

⁷⁴ International Court Of Justice, The Court History, available at: <http://www.icj-cij.org/court/index.php?p1=1&p2=1>. Also see: Borba, I., (2009), International Arbitration: A comparative study of the AAA and ICC rules, USA, Pro Quest LLC.

⁷⁵ Ibid.

around the world that have acceded to the New York Convention which imparts its importance and mark of internationality.⁷⁶

In the year 1985, the United Nations through one of its commissions, the International Commercial Law Commission popularly referred to as 'UNCITRAL' published a model law for international commercial arbitration. The purpose of publishing the model law was to guide and assist countries and legislators in writing and formulating their local arbitration regulations and make sure that they are harmonised with international conventions and treaties which govern foreign affairs and international trade between nations and countries of the world. It is also the aim of the publication to ensure that there is no conflict between the domestic arbitration laws of respective member States and international Conventions and Treaties.⁷⁷

Finally, it can be concluded that arbitration has a very ancient history. Arbitration has existed in most civilizations. Moreover, most of features of arbitration which were found over the past still exist today and there is similarity in the general framework between arbitration's operation in the past and in the present.

1.3 Advantages of Arbitration

There is no doubt that settlement of disputes by arbitration has many advantages and benefits. The world today is witnessing a significant increase in the amount of cases subjected to arbitration. Several arbitral centres have approved this such as International Chamber of Commerce (ICC) which revealed that 759 requests for arbitration were filed with the ICC

⁷⁶ UNCITRAL, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), available at: http://www.uncitral.org/pdf/07-87406_Ebook_ALL.pdf. Also see: Borba, I., (2009), International Arbitration: A comparative study of the AAA and ICC rules, USA, Pro Quest LLC.

⁷⁷ UNCITRAL, 1985 - UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. Also see: Borba, I., (2009), International Arbitration: A comparative study of the AAA and ICC rules, USA, Pro Quest LLC.

Court in 2012.⁷⁸ Most developed countries have established their own arbitration centres and the remainder are well on their way to doing so.

One of the most important advantages of arbitration is that resolving disagreements between different parties by arbitration is usually speedier than the litigation route. According to a recent study by the Federal Mediation and Conciliation Services, the average time from filing to decision was about 475 days in an arbitrated case, whereas a similar case took from 18 months to three years in the courts to resolve.⁷⁹ Arbitration does not usually take as much time from start to finish as going to court does. Even a seemingly straightforward and logical matter may take many months to work through the system, due to the vast numbers of cases that come before the judges every day. Arbitrators have a much smaller workload and are therefore able to devote much more time to each individual case. For example, in Saudi Arabia there are less than a thousand judges available to deal with and service a population of more than twenty three million.⁸⁰ According to the Ministry of Justice in Saudi Arabia, in 1426 AH (2005 AD), the number of judges working in courts related to the Ministry was only 662 and the number of cases submitted to them over that year only was 715,885.⁸¹ Moreover, the many layers of bureaucracy that government workings are very famous for play a noticeable role in delaying the judicial processes.

Once the dispute is resolved by arbitration and the award paid quickly, the parties therefore can plan their commerce or personal affairs in a more intelligent manner, because they will be confident of the exact amount of funds that they can allocate for future investments, purchases, etc. Hence, the rapid resolution of the disagreement not only liberates money which would have been saved for protection against an adverse determination but also allows for more success in planning. Besides, arbitration is often more economical and less

⁷⁸ International Chamber of Commerce, available at: <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>, accessed on 15/8/2013.

⁷⁹ "Arbitration Pros and Cons", Nolo, available at: <http://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html>, accessed on 22/10/2013.

⁸⁰ Ministry of Economy and Planning Website, KSA, available at: <http://www.cdsi.gov.sa/socandpub/resd>, accessed on 19/11/2013.

⁸¹ Ministry of Justice in Saudi Arabia, available at: <http://www.moj.gov.sa/documentations/30/3dl-1.pdf>.

expensive than going to court and paying lawyers. However, there can be exceptions due to multiple parties, arbitrators, lawyers and litigation strategy.

Moreover, arbitration is flexible and often more satisfying for the disputing parties, because they have the right to submit their disputes to judges of their own choice and choose arbitrators who have expertise specific to the subject matter of the case. They are also free to choose the law they want their claims to be subjected to and make their own rules, which might be not available under common law. In addition, the operation of arbitration involves a limited level of discovery, and can provide all parties with a good deal of privacy. Litigation is subject to open justice and this fact has recently been reaffirmed by the Court of Appeal in UK which refused an opposed application for a private hearing of unfair prejudice application under s. 994 of the Companies Act 2006 and associated restrictions.⁸² Arbitration assists its parties in keeping their dispute secret and far away from media and the public, because the whole process is entirely controlled by what the parties have agreed upon with the arbitrator. Conversely, going to court makes it easy for others to discover details that might cause negative effects on either parties' social and economic life and situations. In other words, with arbitration, there is no public hearing and there is no public record of the proceedings. Confidentiality is required of the arbitrator and by agreement the whole dispute and the resolution of it can be subject to confidentiality, which includes all parties, their experts and attorneys taking part in the arbitration process.⁸³

Sometimes, minority groups within the population of a country, as well as religious groups can benefit from arbitration by subjecting their disputes to the laws they choose, while avoiding enforcing laws and regulations of the countries they live in which may be in conflict with their religious rules, their traditions and their beliefs. Also, in arbitration, exclusionary regulations of proof do not apply; everything can come into evidence so long as it is relevant and non-cumulative. Moreover, arbitration procedure is often less adversarial than litigation

⁸² *Global Torch Ltd v Apex Global Management* [2013] EWCA Civ 819.

⁸³ Jaconelli, J., (2002), Open Justice, Oxford University Press Inc., USA, p 215-220. Also see: Brown, H., (2003), Franchising: Realities and Remedies, New York, Law Journal Press. See also: Sanders, P., (1999), Quo Vadis Arbitration? Sixty Years of Arbitration Practice, Kluwer Law International.

which helps to maintain good business relationships between the parties. Thus arbitration is more informal than litigation.⁸⁴

Another advantage of arbitration lies in its circumvention of juries which, in some instances, may be biased, overly sympathetic or generally incompetent to determine the case. Furthermore, private arbitration, unlike public trials, costs the public and budgets of governments nothing. If parties arbitrate their disputes privately, the substantial expenses of a trial (e.g., bailiff, clerk and general courtroom charge) would be eliminated. Moreover, it contributes efficiently to decrease pressure on the public courts who therefore can concentrate more on other cases that come before them.⁸⁵

Finally, arbitration benefits from the finality of its award; normally there is no right of appeal to the courts to change the award.⁸⁶ In addition, foreign arbitration awards are easier in enforcement than verdicts made by foreign judgements due to many international conventions which may be imposed on the parties. Also, arbitration can be safer and more independent than seeking a court judgment. In certain instances, courts may be under pressure from governments and therefore sometimes suffers from political side effects. In most countries today, if not all, judges are exposed to many types of force and threat from their judicial presidents and their governments, to push them to judge against their own opinion and concepts, especially if the case under consideration poses a threat to those in power or a special importance for them.⁸⁷

⁸⁴ Arthur Mazirow, E., CRE (2008). "The Advantages and Disadvantages of Arbitration as Compared to Litigation", available at: http://www.cre.org/images/MY08/presentations/The_Advantages_And_Disadvantages_of_Arbitration_As_Compared_to_Litigation_2_Mazirow.pdf, accessed on 12/5/2010.

⁸⁵ Sarpy, L., (1965), "Arbitration as a Means of Reducing Court Congestion", Notre Dame Lawyer, vol. 41, issue 2, pp 182-191.

⁸⁶ Ibid. See also: Smit, H., (1986-1987), "The Future Of International Commercial Arbitration: A Single Transnational Institution?", Colum. J. Transnat'l L., 25, pp 9-34. See also: Lew, J., Mistelis, L. and Kröll, S., (2003), Comparative International Commercial Arbitration, The Netherlands, Kluwer Law International.

⁸⁷ Hoffman, S., (2008), The Law and Business of International Project Finance, Cambridge, Cambridge University Press.

On the other hand, there are few disadvantages may be found in arbitration occasionally. One of them is that arbitration sometimes costs much more than litigation. Especially when the matter in dispute is so complicated or the arbitral tribunal consists from more than one arbitrator. In addition, arbitration lacks standard judicial review and its award is final. That means if one of the disputing parties failed to represent its case and its argument typically before the tribunal, it would be no chance else to do that elsewhere. Moreover, which I think is the worst thing in an arbitration scenario, many arbitration cases end up before the courts, because the losing parties usually and naturally do not want to surrender easily. This makes arbitration a complete waste of time and money. Actually, this issue concerns so much the companies and investors who want to enter in a commercial transaction governed by arbitration rather by recourse to the judiciary, but at the end they have found themselves in front of what they tried hard to avoid (the court). One of the potential solutions to such an issue is to include a *Scott v Avery* clause which stipulates obtaining the final award before take any legal action in the court. This clause will be addressed in more detail in the next section 1.4.3 as well as Ch 4.4.⁸⁸

1.4 Legitimacy of Arbitration

This section questions whether or not arbitration is legitimate and lawful in Islamic law (Shari'ah), international law and under English law. Also considered in this section is an exploration of texts and legal articles which lead us to recognise undoubtedly, the position of arbitration generally in these different legal systems.

1.4.1 Legitimacy of Arbitration in Shari'ah

In Islam, generally, there is no argument between Islamic schools or Muslims thinkers about arbitration's legitimacy. All are agreed that it is legal and available to use as a dispute

⁸⁸ Di Jiang-Schuergert., (1999), "Perfect Arbitration = Arbitration + Litigation?", Harvard Negotiation Law Review, 4, pp 231-252.

resolution method. They rely on many evidences from the Holy Qura'an, Sunnah, Ijma' (consensus) and Qiyas (analogy).⁸⁹

Firstly, the Holy Qura'an says:

(وان خفتم شقاق بينهما فابعثوا حكما من أهله وحكما من أهلها إن يريدا إصلاحا يوفق الله بينهما إن الله كان عليما خبيرا).⁹⁰

This verse of the Holy Qura'an is very clear in its denotation of legitimizing arbitration. It is true that this verse initially covers family disputes, but it primarily denotes the legitimacy of arbitration generally.

Also, in another verse Allah says:

(ومن لم يحكم بما أنزل الله فأولئك هم الكافرون).⁹¹

Also, Allah says in another place of the Holy Qura'an:

(إن الله يأمركم أن تؤدوا الأمانات إلى أهلها وإذا حكمتم بين الناس أن تحكموا بالعدل).⁹²

Although the last two verses are not very clear in their denotation of legitimacy of arbitration but due to the fact that Allah is talking to all people, and not only judges and leaders, and commanding them to judge fairly, it can be extracted that arbitration is legitimate.

⁸⁹(The Holy Qura'an) is words of Allah which were revealed by him to his Prophet Mohammed (peace be on him) through arch angel Gabriel.

(Sunnah) means: whatever was reported that the Prophet Muhammad (peace and blessings be upon him) said, did, or permitted to do.

(Ijma') means: the agreement of all the scientists (mujtahids) of the Muslims existing at one particular period after the prophet's death about a particular ruling regarding a matter or event.

(Qiyas) means: establishing and obtaining a decision, a rule and judgment for a case due to a certain cause just because of the existence of the similar cause, rule and judgment in another particular case.

⁹⁰ The Holy Qura'an, Sura An-Nisa' (Women), 4/35, Translation: "If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things". Translation of meaning of The Holy Qura'an by Yusef Ali, available at: <http://www.islam101.com/quran/yusufAli/QURAN/4.htm>.

⁹¹ The Holy Qura'an, Sura Al-Ma'ida, 5/44, Translation: "If any do fail to judge by (the light of) what Allah hath revealed, they are (no better than) Unbelievers". Translation of meaning of The Holy Qura'an by Yusef Ali, available at: <http://www.islam101.com/quran/yusufAli/QURAN/5.htm>.

⁹² The Holy Qura'an, Sura An-Nisa' (Women), 4/58, Translation: "Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He Who heareth and seeth all things". Translation of meaning of The Holy Qura'an by Yusef Ali, available at: <http://www.islam101.com/quran/yusufAli/QURAN/4.htm>.

Secondly, from the Sunnah, Allah's Messenger, Muhammad (peace be upon him) agreed to appoint Sa'ad bin Mua'ad in the matter of Quraidhah children, the Jews, after he was appointed by the Jews themselves.⁹³ In addition, once Abu Shuraih Hanee bin Yazeed came with his tribe to Prophet Muhammad, he was named Abu al-hakam (referee) and the Prophet asked him: "Allah is Al-Hakam and to Him is judgement why are you called Abu Al-hakam?" He replied: "Because my tribe come to me when they have disagreement and I therefore determine the issue and always both of the disputing parties are happy and contented." The Prophet said: This is good, what is better than this! Who is the oldest of your sons? He said: Shuraih. Then Prophet said to him: you are Abu Shuraih.⁹⁴

Thirdly, from Ijma', (consensus), there have been several disagreements between Prophet's companions, such as the one that happened between Omar and Ka'ab regarding palms and both of them appointed Zaid as an arbitrator to settle the dispute, which were submitted to arbitration and there was no one among Prophet companions disapproved that.⁹⁵

Finally, from Qiyas (analogy), arbitration in Islam is very similar to litigation. Arbitrator acts as a judge and he is expected to apply the same rules and principles of the Shari'ah while discharging his duty. Also, arbitration aims to achieve the same goals which litigation does. The main difference between them is that the judge is designated by Imam and receives his authority from him whereas the arbitrator is appointed by the disputing parties themselves and receives his authority from them. Aside from that, the arbitration logically has the same legitimacy as litigation.⁹⁶

⁹³ Ibn Hajar, A., (1960), Fath Albari sharh Sahih Albukhari, Cairo, Almaktabah Alssalafiah.

⁹⁴ Alnnisa'ee, A., (1930), Sunan Alnnisa'ee, Dar Alfeker, Beirut, 1st edn.

⁹⁵ Alssarkhasi, M., (1986), Almabsoot, Dar Alma'arefah, Beirut. Also see: Ibn Qudamah, A., (1997), Almughni, Dar Aalm Alkutub, Riyadh, 3rd edn.

⁹⁶ Ibid.

As for KSA, arbitration is also legitimated in law. Saudi Arbitration System 1983 and Saudi Arbitration System 2012 both provide for legality of arbitration whether regard a dispute has arisen or may arise in the future.⁹⁷

1.4.2 Legitimacy of Arbitration in International Law

Arbitration is legitimate in international law. There are many international conventions and treaties which cover arbitration and arrange its processes as well as binding countries to submit disputes to arbitration. As world trade extended, the international community felt that it was vital to formulate new legislations and adopt more conventions that legitimate and facilitate arbitration and at the same time encourage different parties to refer to it once they have any disputes.⁹⁸

The early efforts to make legitimate, regulate and support arbitration in international law were in 1899. This year saw the birth of The Permanent Court of Arbitration (PCA). The PCA was established by the Convention for the Pacific Settlement of International Disputes concluded at The Hague during the first Hague Peace Conference. The most concrete achievement of the Conference was the support of international arbitration and puts obvious instruments for its procedures and the establishment of the PCA: the first global mechanism for the settlement of disputes between states which still exists and functions today. The 1899 Convention was revised at the second Hague Peace Conference in 1907.⁹⁹

Among many articles which refer to arbitration in that convention are Articles 15 and 16 which lay down clearly on legitimacy of arbitration and its being preferred way to settle differences between countries when diplomacy fails. The following are provisions of these Articles:

Article 15:

⁹⁷ Saudi Arbitration System 1983, article 1, Saudi Arbitration System 2012, article 9.

⁹⁸ Lew, J., Mistelis, L. and Kröll, S., (2003), Comparative International Commercial Arbitration, The Netherlands, Kluwer Law International.

⁹⁹ Ibid.

“International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law”.¹⁰⁰

Article 16:

“In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle”.¹⁰¹

After that, the efforts followed due to a rising importance of arbitration among international community. In 1923, a meeting of the assembly of the League of Nations in Geneva ended by adopting a Protocol on arbitration clauses commonly known as Geneva Protocol. About forty countries ratified this Protocol.

Article 1 of this Protocol provides that:

“Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject”.¹⁰²

Following that Protocol, another convention on the execution of foreign arbitral awards signed at Geneva in 1927 was also adopted. This convention lays down the legitimacy of foreign awards and binding enforcement in the territories of any contracting party to the convention. This appears from article 1 which says:

“In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to

¹⁰⁰ Convention For The Pacific Settlement Of The International Dispute (Hague I) 1899, article 15.

¹⁰¹ Convention For The Pacific Settlement Of The International Dispute (Hague I) 1899, article 16.

¹⁰² Geneva Protocol 1923, article 1.

existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties".¹⁰³

The New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), replaced two Geneva Conventions. This fact is reflected in Article VII.2 which says:

"The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention".¹⁰⁴

The New York Convention is the cornerstone of international commercial arbitration. The Convention established an international regime to be adopted in national laws which facilitate recognition and enforcement of both arbitration agreements and awards. More than 142 countries are party to the Convention. It is one of few private law Conventions that have achieved a wide international acceptance.¹⁰⁵ Article I of this Convention clarifies the main aim and indicates obviously that international arbitration is legitimate and favourable:

"This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards

¹⁰³ Geneva Convention 1927, article 1.

¹⁰⁴ New York Convention 1958, article VII (2).

¹⁰⁵ Lew, J., Mistelis, L. and Kröll, S., (2003), Comparative International Commercial Arbitration, The Netherlands, Kluwer Law International.

not considered as domestic awards in the State where their recognition and enforcement are sought”.¹⁰⁶

In 1976, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules came into being. These rules provide a comprehensive group of procedural rules upon which parties can agree for the conduct of arbitral proceedings steaming from their commercial relationship. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the conduct of arbitral proceedings and the appointment of arbitration and establishing rules in relation to the form, effect and interpretation of the award.¹⁰⁷

In 1985, UNCITRAL also issued a Model Law on International Commercial Arbitration. The Model Law is designed to help countries in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.¹⁰⁸

In addition to the former conventions, there are several other multilateral and bilateral conventions and treaties which support resolving disputes by arbitration but they generally less important and effective in the whole world than those mentioned above.

1.4.3 Legal Foundation of Arbitration in English Law

¹⁰⁶ New York Convention 1958, article I.

¹⁰⁷ UNICTRAL Website, UNICTRAL texts and status, available at:

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html.

¹⁰⁸ UNICTRAL Website, UNICTRAL texts and status, available at:

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

England was one of the earliest countries which included arbitration in its national laws and legitimated it in modern history. The earliest law dedicated to arbitration in England was in 1698 and was drafted by John Locke while that of France was 1806 and the United States 1925. The English courts have accepted the merits of arbitration for over four centuries. During those centuries, England has had several Arbitration Acts which legitimated arbitration and arranged the relationship between it and the courts.¹⁰⁹

Moreover, the common law has also taken a pro-arbitration approach. This is evident from many cases that were considered by the English courts in respect of arbitration during tens of years. One of the most important cases that shows this was *Scott v Avery*.¹¹⁰ In the middle of the 19th century, the approach of the court was not pro-arbitration and a stay of litigation to arbitration would only be granted where a judge considered it a fair course; besides there were no mandatory provisions imposed on it to order a stay. Consequently, many arbitration clauses were ignored by one of its parties or another who commenced court proceedings. The courts then frequently tended to engage in the dispute irrespective of arbitration clause on the basis that a party cannot by contract oust the jurisdiction of them. This approach was criticized sharply by Lord Campbell in *Scott v Avery*. Lord Campbell accused judges by doing so to push their own interests (by garnering fees through litigation) over the needs of justice and respect for contract. I think he put his finger on the point perfectly.¹¹¹

Scott v Avery involved a clause which was entered into to avoid the traditional objection to ousting the court's jurisdiction. However, in order to be effective, the clause needed to delay a cause of action arising until after the arbitrator's award was made. Because it could not do so by simply referring to arbitration. Lord Cranworth also in *Scott v Avery* determined that it was valid. In explaining the purpose of the condition precedent he concluded that there was: "no principle or policy of the law which prevents parties from entering into such a contract as

¹⁰⁹ Oldham, J. and Su Jin Kim., (2013), "Arbitration in America: The Early History", Law and History Review, vol. 31, issue 1, pp 241-266. Also see: Lew, J., Mistelis, L. and Kroll, S., (2003), Comparative International Commercial Arbitration, Netherlands, Kluwer Law International. Also see: Zekos, G., (2008), International Commercial and Marine Arbitration, Abingdon, Routledge-Cavendish.

¹¹⁰ [1843–1860] All E.R. Rep. 1 HL.

¹¹¹ Wolaver, Earl S., (1934), "The Historical Background of Commercial Arbitration", University of Pennsylvania Law Review and American Law Register, vol. 83, pp 132-140.

no breach shall occur until after a reference has been made to arbitration.” He reasoned that in an arbitration no cause of action accrues until the award has been issued since the right of a party to an action is a claim for the sum specified by the arbitral tribunal. Ever since then, this clause has been known a *Scott v Avery* clause.¹¹²

Nowadays, the Arbitration Act 1996 has also supported arbitration and arranged its processes. In fact, it adds significant developments to arbitration and gives it more autonomy and independence. Part I sets out some of the principles that the Act shall be construed accordingly:

- “a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
- (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
- (c) in matters governed by this Part the court should not intervene except as provided by this Part”.¹¹³

The Arbitration Act 1996 applies in England, Wales and to a large extent in Northern Ireland. It does not apply in Scotland (s. 108) but the Scots have largely replicated this legislation in the 2010 Act. Also, the Scottish Courts have determined that English case law applying to the Act in force there since 1996 can be used to interpret the Scottish Act.¹¹⁴

In conclusion, it appears obviously that there is a consensus between Islamic Law, International Law and English law on the legitimacy of arbitration. Moreover, all of them are agreed on recognizing arbitral awards and the binding nature of them.

¹¹² Tweeddale, A. and Tweeddale, K., (2011), "*Scott v Avery* Clauses: O'er Judges' Fingers, Who Straight Dream on Fees", available at: http://corbett.co.uk/wp_content/uploads/Arbitration-article-Scott-v-Avery.pdf, accessed on 10/11/2013.

¹¹³ Arbitration Act 1996, s. 1.

¹¹⁴ "Advantages of Scottish Arbitration", Scottish Arbitration Centre, available at: <http://www.scottisharbitrationcentre.org/index.php/arbitration/arbitration-in-scotland>, accessed on 21/10/2013. Also see: Davidson, F., (2011), "The Arbitration (Scotland) Act 2010: The Way Forward or a Few Missteps?", *The Journal of Business Law*, 1, pp 43-63.

1.5 Scope of Arbitration

The scope of arbitration or what is called in other words ‘Arbitrability’ can be explained as a classification of a subject matter whether it can or cannot be referred for arbitration. Nevertheless, in particular it is the most complex part of arbitration to decide, and is the major question under consideration in the International Commercial Arbitration. Various attempts were done to put a list containing the common factors which determine inarbitrability but all to no avail. Thus, the word has no specific definition in most of the instruments and laws.¹¹⁵

Meanwhile, this section is dedicated to research the three legal systems – Islamic, International, English Law with a view of finding out the scope of arbitration in each legal system.

1.5.1 Scope of Arbitration in Islamic Shari’ah

The scope of arbitration in Islamic Law is quite broad. As discussed earlier, there were many disputes in Islamic history that were resolved by arbitration. Some of them can be categorised as international, such as the case of Quraidhah children; some as political, such as the case of Ali and Mu’awiyah; and other as commercial and financial such as the case of Ka’ab and Omar. Beside these, there are other family disputes which the Holy Qura’an has encouraged to be resolved expressly by arbitration.¹¹⁶

Notwithstanding, there are few types of dispute which cannot be resolved by arbitration according to Islamic jurisprudence. However, there are divergent views amongst the various schools that constitute the Islamic jurisprudence.¹¹⁷

¹¹⁵ Rai, S., (2008-09), "How Do or Should Arbitrators Deal with Domestic Public Policy or Regulatory Issues. Does it Affect Arbitrability?", available at: <http://ssrn.com/abstract=1433799>.

¹¹⁶ See Ch 1, para 1.2.4 and 1.4.1.

¹¹⁷ There are four large schools in Islamic jurisprudence and all of them have very high respect amongst Muslims regardless of what they (Muslims) are specifically following. These four schools are as following:

Al-Hanafiyyah say that arbitration cannot be resorted to in hudud¹¹⁸ because it involves the right of Allah alone and as such, the responsibility for determination of punishment is that of the Imam. Also, Hanafiyyah add retribution (qisas) to cases which are not arbitrable, because arbitration likes conciliation and a human being does not own his blood, therefore he does not own to make him under conciliation, beside to diah¹¹⁹ due to the fact that its effects exceed disputing parties to other parties. In other words, diah has to be paid not only by the murderer but also by his relatives. They also exclude lee'aan¹²⁰ because it is an alternative of Al-haad (singular of hudud) so it takes its term. Furthermore, they add waqf¹²¹ also to hudud in its being not capable of settlement by arbitration. That is because waqf is owned by Allah Almighty and nobody has the right to accept conciliation or make waive of it.¹²²

Al-Malikiyyah opined that all cases are capable of settlement by arbitration except in thirteen cases namely: maturity and capacity and its opposite (Alrushd), will, waqf, determining the matter of an absent person, parentage, allegiance (walaa),¹²³ al-haad, qisas, orphan money, divorce, hoariness and lee'aan. Because they either rights of Allah or rights of others not of the arbitration parties. Ibn Arafah has made a very useful criteria for arbitrability by saying that: "arbitration is correct in all cases which parties of arbitration can waive their rights".¹²⁴

Hanafi: The Hanafi school was founded by Abu Hanifa an-Nu'man (699-767). It is followed by Muslims in Central Asia, and some Arab states such as Iraq, Egypt and others. It also was followed by Ottoman Empire.

Maliki: The Maliki school was founded by Malik ibn Anas (711-795). It is followed by Muslims in North Africa and West Africa.

Shafi'i: The Shafi'i school was founded by Muhammad ibn Idris ash-Shafi'i (767-820). It is followed by Muslims in Somalia, Jordan, Palestine, Indonesia, and is officially followed by the government of Malaysia.

Hanbali: The Hanbali school was founded by Ahmad ibn Hanbal (780-855). It is followed by Muslims in Saudi Arabia, Qatar and minority communities in Syria and Iraq.

¹¹⁸ Hudud is a category of crimes in the shari'ah which include murder, assault, adultery, drunkenness, theft and robbery.

¹¹⁹ Diah is money paid as a compensation to the murdered family when they chose it instead of qisas.

¹²⁰ Lee'aan is a shai'ah procedure whereby the married couple terminate their marital relationship upon one party accusing the other of adultery.

¹²¹ Waqf means the detention of specific thing in the ownership of Allah and the devoting of its profit or products in charity of poors or other good objects.

¹²² Al-Auine, M., (1981), Al-Binaiah Sharah Al-Hidaiah, Beirut, Dar Al-Fikr, 1st edn. Also see: Al-Kasane, A., (1982), Bda'ea Alsana'ee, Beirut, Dar Al-Kitab Al-Arabi, 2nd edn. Also see: Abdulwaheed, M., (n.d.), Sharh Fath Al-Qadeer, Beirut, Dar Ihia' Al-Turath Al-Arabi.

¹²³ Walaa means the right of inheriting a former slave by his master who gave him his freedom when there is no other relatives.

¹²⁴ Al-Dusoqi, M., (n.d.), Hashiat Al-Dusoqi, Beirut, Dar Al-Fikr.

Al-Shafi'iyah has contended that arbitration cannot resolve cases referred to as hudud, while others can be settled by it.¹²⁵

The Hanbali adopted two views: Firstly, they argued that arbitration can be resorted to in all litigious cases, meaning therefore, that there is no difference between hudud, finance, marriage and so on. They based their reason on the ground that arbitrator acts as the judge. Secondly, that only financial matters can be resolved by arbitration but others cannot because they are based on provision (ihtiaat), so they have to be taken and shown on judgement. The first opinion is the stronger in the Hanbali School.¹²⁶

In conclusion, there is a consensus between all Islamic schools on the fact that commercial disputes are capable of settlement by arbitration whereas they quite agree that hudud should be excluded from the sphere of arbitration. Moreover, the Hanbali School has shown that it has the most open-minded conception towards arbitration in this point among the other schools as well as western and international laws as it will appeared when we explore their conceptions later in this section.

As for the system in KSA, the former system of arbitration 1983 forbad arbitration in all cases where conciliation is not acceptable to resolve according of course to Islamic Shari'ah.¹²⁷ While the new system 2012 adds more restrictions and bans arbitration in all personal status disputes also.¹²⁸ In my view, I prefer the former text because it enlarges the scope of arbitration and also there is a clear verse in Islam that encourages recourse to arbitration in family conflicts, as it is found in sura 'Al-Nisa'.¹²⁹

1.5.2 Scope of Arbitration in International Law

¹²⁵ Al-Sherbini, M., (n.d), Mughni Al-Muhtaj, Beirut, Dar AL-Fikr.

¹²⁶ Ibn Qudamah, A., (1997), Al-Mughne, Dar Aalem Alkutub, Riyadh, 3rd edn. Also see: Ibn Qudamah, A., (1997), Al-Kafi, Huger, Egypt, 1st edn. Also see: Al-Bhoti, M., (1982), Kshshaf Al-Qina', Beirut, Dar Al-Fikr.

¹²⁷ Saudi Arbitration System 1983, article 2.

¹²⁸ Saudi Arbitration System 2012, article 2.

¹²⁹ The Holy Qur'an, 4/35.

It is generally agreed between the various legal systems that not all cases are capable of settlement by arbitration, yet they differ in method of categorising them. Some litigation attempts to identify those that are not capable of settlement by arbitration while other attempt to provide cases which are arbitrable. Most of international conventions cover commercial arbitration and are limited to cases that are classified as commercial in the national laws. Some of them leave to applicable law in the country in which arbitration takes place the determination of stating those disputes which are capable of settlement by arbitration and others which are not.

The Geneva Protocol 1923 provides for that each of the contracting states recognises the validity of an agreement to submit to arbitration all or any differences relating to commercial matters or any other matter capable of settlement by arbitration. It is noted that the Geneva Protocol widened the scope of arbitration in international conflicts and makes it includes any matter capable of settlement by arbitration instead of limiting it to commercial cases as many international convention did. Regardless of the fact that it gave its members the right to limit the obligation to only disputes considered as commercial under their national laws provided they notify the Secretary-General of the League of Nations in advance. In the other hand, this expression- capable of settlement by arbitration- is obscure, because the Protocol does not lay down or clarify who has the authority to determine whether the case is capable of settlement by arbitration or not.¹³⁰

However, this obscurity was tackled by the Geneva Convention 1927. It illustrated obviously that in order to recognise and enforce award made by arbitration it has to be based on a subject matter capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon. It adds another restriction on the scope of arbitration and enforcement of its awards. This term lays down on award being not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.¹³¹

¹³⁰ Geneva Protocol on Arbitration Clauses, article 1.

¹³¹ Geneva Convention on the Execution of Foreign Arbitral Awards, article 1(a), (b).

The New York Convention provides in a similar way that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- "(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country."¹³²

In addition, the New York Convention gives any contracting state the right when signing, ratifying or acceding to it, to limit applying the Convention only to differences arising out of legal relationships which are considered as commercial under its national law.¹³³ The UNCITRAL Model Law has also provided in article 34 (2) (b) that an arbitral award can be set aside by the court if the subject-matter of arbitration is not capable of settlement under the law of the state or it is in conflict with the public policy of the state.¹³⁴ Although, it has been proposed during the preparation of the UNCITRAL Model Law that “the provision 34 (2) (b) should be deleted since the term public policy was too vague.”¹³⁵

1.5.3 Scope of Arbitration in the English Legal System

Under English Law, arbitrability is defined so broadly. The Arbitration Act 1996 does not address the subject of non-arbitrable issues, and there is a little English precedent dealing with the topic. English Law does not indicate and provide specifically for the scope of arbitration. Arbitrability is not determined by a sole criterion applicable in all circumstances to determine the arbitrability of a dispute. There is no list in it for non-arbitrable disputes. Rather, it proceeds in accordance with its traditions on a case by case basis. The only general rule seems to prescribe non-arbitrability for disputes affecting “the public at large”, which includes in particular matters concerning persons who are not a party to the arbitration

¹³² New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, article V.

¹³³ New York Convention 1958, article I.

¹³⁴ UNCITRAL Model Law, article 34 (2) (b).

¹³⁵ Rai, S., (2008-09), "How Do or Should Arbitrators Deal with Domestic Public Policy or Regulatory Issues. Does it Affect Arbitrability?", available at: <http://ssrn.com/abstract=1433799>.

agreement, such as the annulment of a patent.¹³⁶ Arbitrators cannot, for example, settle on disputes relating to family rights or criminal law issues, or those which fall within the jurisdiction of admiralty, or concern insolvency or which are in any way contrary to public policy or arise from an illegal contract, i.e. a contract which breaks the law thus nullifying its arbitration clause.¹³⁷

According to section 81 of the Arbitration Act 1996, arbitrability is determined and governed by Common Law. In addition, it does not exclude the operation of arbitration of the refusal of recognition or enforcement of an arbitral award on grounds of public policy. Section 68 of the Act also provides that awards can be challenged on the ground of offending serious irregularity such as that the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy.¹³⁸

Moreover, section 103 emphasises that on recognition or enforcement of a New York Convention award, it shall not be refused except in some cases. One of them is when the award is in respect of matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.¹³⁹ However, after exploring the attitude of arbitration in England and some texts of Arbitration Act 1996, it can be sum up that there is no restrictions on the scope of arbitration at least theoretically except cases that are in resistance with public policy of a country.¹⁴⁰

In fact, all international conventions and national laws almost as we have already explored some of them limit the scope of arbitration by providing that it is not contrary to public policy. The issue is that this word is too broad and can be abused to destroy the whole arbitration

¹³⁶ Born, G., (2001), International Commercial Arbitration: Commentary and Materials, The Netherlands, Kluwer Law International, 2nd edn. Also see: Poudret, J. and Besson, S., (2007), Comparative Law of International Arbitration, London, Sweet & Maxwell Ltd.

¹³⁷ Sammartano, M., (2001), International Arbitration Law and Practice, The Hague, The Netherlands, Kluwer Law International.

¹³⁸ Arbitration Act 1996, s 81& 68, article 2(g).

¹³⁹ Arbitration Act 1996, s 103.

¹⁴⁰ Junita, F., (2012), "Public Policy Exception in International Commercial Arbitration-Promoting Uniform Model Norms", Contemporary Asia Arbitration Journal, vol. 5, 1, pp 45-82.

operation. Public policy or '*ordre public*' can be defined as the fundamental principle that binds together the social, moral and economic values of a modern civil society. The English House of Lords in 1853 in *Egerton v Brownlow*¹⁴¹ described public policy as "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against public good".¹⁴²

Many jurists have criticized the elastic expression of public policy. Ruth Bader Ginsburg J. argues that "Public policy has been called an unruly horse. All you have to do is open the door and you will have litigation in court, and then the court will decide what the arbitrator would otherwise decide". Also, Mr. Dipen Sabharwal says while giving it a global interpretation that "there is no use of entering into an arbitral agreement if the same would end, being goofed up by a bench of judges instead of arbitrators and the loser would escape pleading violation of public policy".¹⁴³

In Islamic law, there is no expression such as 'public policy' either in arbitration or in other parts of fiqh (jurisprudence). Although, there is what is known as 'public interest' which, may be regarded, in some way similar to public policy. Public interest is regarded in the Shari'ah and Muslim judges are required to put it into consideration when making their verdicts regarding any dispute brought before them. But at the same time, they are not allowed to use it when there is a definite or clear text or as a means of circumventing a definite text.

In conclusion, it can be observed that there is a similarity between all three different legal systems- Islamic, International, English Laws- in their concepts about scope of arbitration. They all are agreed that not all cases are capable of settlement by arbitration, except an opinion among the Hanbali School that says that all cases can be resolved by it. Moreover, all of them are agreed on the fact that commercial and financial disputes are arbitrable.

¹⁴¹ *Egerton -v- Brownlow* (1853) 4 HLC 1.

¹⁴² Rai, S., (2008-09), "How Do or Should Arbitrators Deal with Domestic Public Policy or Regulatory Issues. Does it Affect Arbitrability?", available at: <http://ssrn.com/abstract=1433799>, accessed on 12/11/2012.

¹⁴³ Ibid.

Furthermore, criminal conflicts especially serious ones and also any dispute which the rights and effects are not referred only to the disputing parties are not capable of settlement by arbitration under both Islamic and English law.

1.5.3.1 Arbitrability of Statutory Rights

There is a controversial question that has been raised recently especially in England regarding arbitrability of statutory rights. In other words, can an arbitration agreement be enforced where the dispute concerns one of the parties' statutory rights? In fact, this point of law is a complex and needs more studies and highlighting. English courts have showed different and conflicted conceptions regarding this question, a fact which indicates how deep and difficult is this matter.

In *Re Vocam Europe Ltd*,¹⁴⁴ two members of a company presented an unfair prejudice petition because they had been removed from the board. They sought an order that the respondent majority shareholders should purchase their shares. In contrast, the majority shareholders applied to stay the petition under section 9 of the Arbitration Act 1996 on the basis that the shareholders' agreement contains an arbitration clause which obliges all parties to refer all disputes between them to arbitration and they were granted it. Rimer J held that: "the claims made by the petitioners in the petition relate to matters of dispute arising under the [shareholders' agreement] and that VIP is entitled to the stay it seeks".¹⁴⁵

By comparison, in *Exeter City Association Football Club Ltd -v- Football Conference Ltd*,¹⁴⁶ the High Court ignored the earlier decision in *Vocam* and determined that the right to bring an unfair prejudice petition before the courts could not be removed by contract. In this case, Exeter City Association Football Club (the "Club") petitioned on the grounds of unfair prejudice as a member of Football Conference Limited ("FCL"), which ran the National Conference football league. The Club proposed to enter into a creditors' voluntary arrangement ("CVA"), which gave preference to "football creditors". It did so because the

¹⁴⁴ [1998] BCC 396.

¹⁴⁵ *Ibid*.

¹⁴⁶ [2004] 1 WLR 2910.

articles of FCL provided that a member entering into a CVA was liable to expulsion, subject to a discretion to allow the Club to retain membership, such discretion being exercised as a matter of policy if football creditors were to be paid in full. The Revenue then applied to revoke the CVA on the grounds that it had been prejudiced by the preferential treatment of football creditors, and the Club responded by presenting an unfair prejudice petition. FCL applied for a mandatory stay under section 9 of the Arbitration Act 1996 on the basis of the widely drawn arbitration clause in the FA Rules. Judge Weeks QC then held as the *ratio decidendi* of the case that: "The statutory rights conferred on shareholders to apply for relief at any stage are, in my judgment, inalienable and cannot be diminished or removed by contract or otherwise".¹⁴⁷

However, in most recent case brought before English high court, the court turned again to grant stay in favour of arbitration. In 2009 both Fulham Football Club (Fulham) and Tottenham Hotspur Football Club (Tottenham) were competing to sign footballer Peter Crouch from Portsmouth Football Club. Fulham alleged that the chairman of the Football Association Premier League Ltd (FAPL), Sir David Richards, interfered in the transfer negotiations to facilitate Crouch's move to Tottenham ahead of Fulham. All the clubs in the Premier League, of which Fulham is one, are governed by the FAPL Articles of Association and Rules. Fulham alleged that the interference of the FAPL chairman represented unfair prejudice against Fulham in favour of another member, Tottenham. As such, Fulham sought to bring the matter in front of the courts under s. 994 of Companies Act 2006 which gives the right for members of a company to apply to the court by petition for an order on the basis that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of some or all of its members, or that an actual or proposed act or omission of the company is or would be so prejudicial.¹⁴⁸

Fulham sought for an order to restrain Sir David Richards from participating in any future transfer negotiations as well as remove him from the position of chairman of the FAPL. Sir

¹⁴⁷ Ibid.

¹⁴⁸ Besson, S. and Poudret, J., (2007), Comparative Law of International Arbitration, England, Sweet & Maxwell. Also see: Redfern, A. and Hunter, M., (2009), Law and Practice of International Commercial Arbitration, London, Sweet & Maxwell, 5th edn. Also see: Lew, J., Mistelis, L. and Kroll, S., (2003), Comparative International Commercial Arbitration, The Netherlands, Kluwer Law International.

David Richards and the FAPL requested that the proceedings be stayed on the basis that the dispute was subject to an arbitration agreement and the Arbitration Act 1996 provides clearly that " A party to an arbitration agreement against whom legal proceedings are brought... in respect of a matter which under the agreement is to be referred to arbitration may...apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter".¹⁴⁹

The judge, Mr Justice Vos, after having weighed up the conflicting first instance decisions, followed the decision in *Vocam* and regarded that *Exeter* had been wrongly decided. As a result, he granted the stay deciding that the matters in the petition fell within the scope of the FAPL Rules arbitration agreement and the relief sought is not a type of relief that an arbitrator could not grant on the basis that it binds third parties or on public policy grounds. The decision confirms that unfair prejudice petitions may be arbitrated as well as reflects the established pro-arbitration stance of the English courts by recognising that parties should be free to agree how their disputes are resolved.¹⁵⁰ Fulham appealed the decision made by Vos J., but the Court of Appeal affirmed the decision of Vos J and dismissed the appeal on the ground that there is no express provision in either the Arbitration Act 1996 or the Companies Act 2006 which excludes arbitration as a possible means of determining disputes of this kind. The primacy of arbitration is thus reaffirmed.¹⁵¹

In my view, I think that Mr Justice Vos' decision and the confirmation of it by the Court of Appeal seem to be in more harmony with the regulations and laws which govern the dispute whether it is the Arbitration Act, Companies Act or internal regulations of FAPL. In addition, recourse to court in any dispute is a statutory right for all people but at the same time, recourse to arbitration is a statutory right too. As a result, once parties have agreed to waive their principle and first right of recourse to litigation and choose arbitration instead, then they and the court have to comply with the contract, otherwise, arbitration agreement would be useless and unbinding and any party can escape from its obligation under this excuse. Except, of

¹⁴⁹ Arbitration Act 1996, s 9 (1).

¹⁵⁰ *Fulham FC (1987) Ltd -v- Sir David Richards and The FA Premier League Limited* [2010] EWHC 3111 (Ch).

¹⁵¹ *Fulham Football Club (1987) Ltd v Richards & Anor* [2011] EWCA Civ 855.

course, when the dispute is beyond the scope of arbitration or was excluded obviously and expressly by legislator from being arbitrated such as consumer contracts that worth less than 5,000 pounds in England for example.

1.5.3.2 Arbitrability of Employment Disputes and Consumer Disputes

The legal regulations in some countries restrict or prohibit the arbitrability of certain disputes where the legal relationship involves a party deemed to be economically weak, such as in consumer contracts and employment contracts. In both of types of contract, usually, the consumer or the employee do not have an option to discuss and negotiate the contract which they will sign it. In international arbitration, these cantonal restrictions are not applicable and the arbitrability of employment law claims is recognized for pecuniary claims.¹⁵²

As for English Law, English courts recently have regarded arbitration clause an unenforceable with regard to employment rights. In the recent case of *Clyde & Co LLP -v- Krista Bates van Winkelhof*,¹⁵³ the English High Court rejected the application submitted by Clyde & Co LLP to force the defendant to arbitrate a dispute concerning her employment rights since Clyde & Co's Members' Agreement contained an arbitration clause providing for LCIA arbitration. The root of the dispute arose when the defendant Krista Bates had been dismissed from the Membership of Clyde & Co LLP in January 2011. Consequently, she brought a claim against Clyde & Co in the Employment Tribunal alleging that there was a discrimination on grounds of her sex and/or pregnancy behind her dismissal. She also brought a whistle blowing claim under the Employment Rights Act 1996 (ERA).¹⁵⁴

Clyde & Co then sought to enforce the arbitration clause, and effectively prevent the defendant from bringing her claim before the Employment Tribunal by seeking injunctive relief in the English High Court. The Court decided that, as regards the whistle blowing claim, the provision for binding arbitration was rendered void by virtue of section 203 ERA 1996

¹⁵² Besson, S. and Poudret, J., (2007), Comparative Law of International Arbitration, England, Sweet & Maxwell.

¹⁵³ [2011] EWHC 668 (QB).

¹⁵⁴ Ibid.

which lays down that any provision which precluded a person from bringing a claim before the Employment Tribunal would be void.¹⁵⁵ Therefore, Clyde & Co was not entitled to force Krista Bates to arbitrate her claim and discontinue procedures before the Tribunal. As for the discrimination claim, the Court found that section 144(1) of the Equality Act 2010, which provides that " a term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this act", rendered unenforceable an agreement to preclude or limit the continuation of sex discrimination proceedings before an Employment Tribunal unless reached in accordance with section 144(4).¹⁵⁶ Consequently, an agreement to submit the argument to arbitration was only enforceable if it satisfied the conditions of section 144(6), which it did not in this case. As such, Clyde & Co was not entitled to injunctive relief to compel the defendant to comply with the arbitration clause as regards her discrimination claim.¹⁵⁷

However, Clyde & Co appealed the decision of the High Court before the Court of Appeal which decided in September 2012 to dismiss the High Court's decision. It held that LLP members are not 'workers' for the purposes of s.230 (3) of the Employment Rights Act 1996 (ERA 1996), so cannot bring whistle blowing complaints in the Employment Tribunal under s.47B ERA 1996.¹⁵⁸ This case is apparently being appealed to the Supreme Court.

¹⁵⁵ Employment Rights Act 1996, s. 203.

¹⁵⁶ Equality Act 2010, s. 144.

¹⁵⁷ Besson, S. and Poudret, J., (2007), Comparative Law of International Arbitration, England, Sweet & Maxwell. Also see: Redfern, A. and Hunter, M., (2009), Law and Practice of International Commercial Arbitration, London, Sweet & Maxwell, 5th edn.

¹⁵⁸ *Clyde & Co LLP & Anor v Bates Van Winkelhof* [2012] EWCA Civ 1207 .

Chapter Two

Arbitration Agreement

2.1 Terms of the Arbitration Agreements

In fact, an arbitration agreement just like any other agreement requires terms and conditions to give it substance. In order for any arbitration agreement to be valid, it has to satisfy those terms and conditions. But first, a definition has to be given to an arbitration agreement. The UNCITRAL Model Law on International Commercial Arbitration 1985 defines an arbitration agreement as “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”.¹⁵⁹

For an arbitration agreement to be recognised legally, the following terms and conditions must be satisfied:

2.1.1 Satisfaction

It is a requirement that the satisfaction of all the parties to an agreement should be legal and valid. Satisfaction consists of offer and acceptance. The most important feature of a contract is that one party makes an offer that another then accepts. There must be the meeting of two minds in one and the same intention. An arbitration agreement must be based on acceptance from all parties related to it about having recourse to arbitration in a certain current conflict or when dispute arises in the future. This acceptance must be clear and it indicate undoubtedly mutual consent of the agreement's parties.¹⁶⁰

In Islamic Law, as well as in International Law and English Law, satisfaction and acceptance are basic elements in contracts and agreements, which mean that without them there is no agreement or contract. The legal basis of this term is found in the following Quranic verse:

¹⁵⁹ UNCITRAL Model Law on International Commercial Arbitration 1985, article 7 (1).

¹⁶⁰ Baamir, A., (2010), Shari'a Law in Commercial and Banking Arbitration, Ashgate, UK, p 68.

"يا أيها الذين آمنوا لا تأكلوا أموالكم بينكم بالباطل إلا أن تكون تجارة عن تراض منكم"¹⁶¹

Acceptance can be expressed by any word or action denoted on it obviously. Expressing acceptance may be by saying or writing, such as when a party sends a written offer to the other party and the latter replies in writing as well. Also, expression of acceptance can be inferred referentially. So, if someone replies an offer by expressive reference or one of the parties has no ability to speak, the contract is valid.¹⁶²

One of the recent issues related to arbitration, and specifically to the question of satisfaction, relates to mandatory arbitration clauses which it is very rare today to find a consumer contract or an employment contract does not include. Mandatory arbitration means clauses which require that all disputes will be submitted to arbitration and are usually found in standard form contracts, which are rarely read by consumers or employees, or, if read at all, most likely misunderstood. Even if the terms are read and comprehended before the contract is signed, few consumers or employees have adequate bargaining power to negotiate changes to them. According to the Unfair Terms in Consumer Contracts Regulations 1999 in England 'consumer' is defined as 'any natural person who is acting for purposes outside his trade, business or profession'.¹⁶³

This sort of contract has accordingly been dealt with scepticism by courts. It is looked at it as an instrument by which a stronger party exploits informational and resource imbalances to impose conditions which are positive to itself upon the weaker party, normally the consumer. Businesses, who as repeat players may decide the forum and the applicable law, can consequently gain control of the arbitration process to the disadvantage of 'one-shot' consumers. Oppression resulting from mandatory arbitration clause is linked to the prospect

¹⁶¹ "O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will", The Holy Qura'an, women 4/29, Translation of meaning of The Holy Qura'an by Yusef Ali, available at: <http://www.islam101.com/quran/yusufAli/QURAN/4.htm>.

¹⁶² Vogenauer, S. and Kleinheisterkamp, J., (eds), (2009), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), Oxford University Press Inc, New York, p 223. Also see: AL-Bijad, M., (1999), Arbitration in the Kingdom of Saudi Arabia, Riyadh, Administrative Researches and Studies Centre. Also see: Al-Moso'ah Al-Fighiah, (1993), Dar Al-Safwah, Egypt.

¹⁶³ Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), reg. 3(1).

for high costs of this procedure relative to litigation, as well as the absence of choice, for example if the term in question is standard across an industry. This represents a departure from the idea of freedom of contract and supplements common law principles such as unconscionably and duress.¹⁶⁴

Compulsory arbitration clauses do not in fact expel the authority of the courts; rather they provide that the courts do not have jurisdiction until the arbitration award has been rendered. Still, this does forbid early recourse to legal remedies. Refusal of access to litigation may accordingly be viewed as a denial of the right to a fair trial as enshrined in Article 6(1) of the European Convention on Human Rights, although courts have noted that individuals are free to waive this right by the use of an arbitration clause, as long as the waiver is informed and voluntary, conditions which lie at the root of judicial scrutiny of such clauses.¹⁶⁵

In English Law, mandatory arbitration clauses especially in consumer contracts, are regarded as a potential unfair term which is governed by the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) and most likely to be struck down by the court, with noticing that upholding of arbitration clauses for disputes worth less than £5,000 is prohibited under Arbitration Act 1996. This will exclude most day-to-day consumer transactions, including most of those conducted by standard form contracts. Schedule 2 in UTCCR provides an 'Indicative and Non-Exhaustive List of Terms Which May be Regarded as Unfair', raising the probability that if one of the mentioned terms exists, it is up to the party asserting the term to prove that it is not unfair. Sub-paragraph 1(q) of Schedule 2 deals specifically with arbitration clauses, referring to:

"terms which have the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy; particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on

¹⁶⁴ Vogenauer and Kleinheisterkamp, *supra* note (162).

¹⁶⁵ Collins, D., (2008), "Compulsory Arbitration Agreements in Domestic and International Consumer Contracts", *King's Law Journal*, vol. 19, no 2, pp 335-355.

him a burden of proof which, according to applicable law, should lie with another party to the contract".¹⁶⁶

Some legal commentators have suggested that the condition 'not covered by the legal provisions' is meant to narrow the category of unfair arbitration clauses to those in which the parties have clearly agreed to exclude the powers of the courts to control the arbitrator's decision. This interpretation cannot apply to domestic arbitrations, because the Arbitration Act 1996 disallows such agreements unless entered into during the arbitration proceedings.¹⁶⁷

Moreover, term (i) in the 'indicative list' also appears to be related to term (q). It covers clauses that bind the consumer to terms with which they had no real opportunity to become acquainted. Consequently, it would be crucial to establish the degree of notice that the consumer was given with regard to the clause of arbitration before the agreement was concluded in order for that clause to be binding. Or perhaps where consent was actually manifest, irrespective of the reasonableness of the notice, then the consumer should be bound by it.¹⁶⁸

Zealand v Laing Homes Ltd,¹⁶⁹ is a case on arbitration clauses brought before the court in England and decided under the UTCCR. The court held that the arbitration clause was inapplicable for the reason that the claimant consumer was faced with a significant imbalance under the UTCCR with respect to the defendant builder, in that the consumer would be required to instigate separate proceedings for the matters covered in the contract and some other matters falling outside of it, namely certain tortious claims, and that this would lead to 'injustice through lack of resources. This amounted to unfair financial hardship to the consumer, who already had inferior resources relative to his opponent.'¹⁷⁰

¹⁶⁶ Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), Schedule 2, 1(q).

¹⁶⁷ Arbitration Act 1996, s. 87. Also see: Collins, *supra* note (165).

¹⁶⁸ Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), Schedule 2, 1(i).

¹⁶⁹ *Zealand v Laing Homes Ltd* (2000) 2 TCLR 724 (TCC).

¹⁷⁰ *Ibid.*

As for International Law, there is no a direct reference to such issues like this, at least in principal international conventions and treaties which regulate and control arbitration such as Geneva and New York Conventions. Notwithstanding, there are few provisions in them that can be based generally on to protect consumers and weak parties from exploitation of traders and businesses. In addition, those Conventions have given national courts a lot of flexibility which in fact enable them to control arbitration operation and apply their local principles of laws upon it especially in the stage of enforcement of the award. For example, the New York Convention offers several additional safeguards that protect weaker parties such as consumers, irrespective of where the arbitration is conducted. First, national courts may refuse to enforce international arbitral awards where the parties were under some incapacity, or the agreement to arbitrate was not valid (under the law to which the parties subjected it, or, if no law was chosen, under the law where the award was made).¹⁷¹

2.1.2 Intention to Create a Legal Relationship

The intention of the parties to establish a legal agreement must be found to exist. It is an essential element to the formation of any contract including arbitration agreement, be it oral or written, that there has to be a joint consent or a "meeting of the minds" of the parties on all proposed conditions and necessary fundamentals of the agreement. There can be no agreement unless all the parties involved proposed to enter into one. The outward actions or actual words of the parties determine this intent, not just their internal intentions or desires. Consequently, mere negotiations to reach a mutual agreement or consent to a contract would not be considered an offer and acceptance, even though the parties agree on some of the terms which are being negotiated. Both parties must have intended to enter into the contract and one cannot have been misled by the other. That is why fraud or certain mistakes can make a contract voidable.¹⁷²

¹⁷¹ Collins, D., (2008), "Compulsory Arbitration Agreements in Domestic and International Consumer Contracts", *King's Law Journal*, vol. 19, no. 2, pp 335-355. Also see: the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083).

¹⁷² Vogenauer, S. and Kleinheisterkamp, J., (eds), (2009), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), Oxford University Press Inc, New York, p 225-228.

2.1.3 The Subject

The subject of an agreement can be defined as the thing which culminates into an agreement or the thing which an agreement is made for obtaining it or, in other words, the thing which the agreed parties undertake to do. The subject of any agreement must be capable of being contractual under the relative law, otherwise agreement will be invalid.¹⁷³

The subject of arbitration agreement is the settlement of a dispute between more than one party by a person or more designated by the disputing parties themselves to avoid recourse to a normal litigation. It is always legitimate due to legitimisation of arbitration in all laws including studied laws; Islamic Law, International Law and English Law. But this legitimisation is limited to the subject of the original conflict. So, if it is not capable of settlement by arbitration therefore, arbitration agreement is invalid and the parties of agreement cannot be enforced to execute it. Even if all parties of such agreement agreed to execute the arbitration, the award resulting from it will be void and the interested party can hold and demand avoidance of it.¹⁷⁴

2.1.4 The Object

The object is regarded as one of the principles of the agreement or the contract. The object must be legal and legitimate and not in conflict with public and common laws as well as morals. The object of arbitration agreement usually is desire of its parties in benefiting from many advantages which arbitration has, such as fast settlement and so on. This reason for this understanding and meaning is always legal and legitimate as we have explored before that all legislations and laws make arbitration legal.¹⁷⁵

¹⁷³ AL-Bijad, M., (1999), Arbitration in the Kingdom of Saudi Arabia, Riyadh, Administrative Researches and Studies Centre.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

But in spite of this, it connects very closely with the reason and object of the original agreement whose origin of dispute, especially in the event of agreement to submit to arbitration, is a clause included in the original contract. So, it is necessary to look at the reason and object of the original agreement to determine whether an arbitration agreement is valid and legal or not. If the object is illegal the arbitration agreement will be invalid, except where it is provided that the arbitration clause is independent from the original agreement. Therefore, it becomes separate from the original contract and arbitrators have authority to determine whether the agreement is void or not.¹⁷⁶

2.1.5 Capacity

Capacity means maturity and the attainment of the legal age. Besides, there must be no judicial decision imposing on any contracting party control of his belongings such as in the event of insolvency. Parties to a contract must have general legal capacity and be competent to enter to that contract. They must be of sound mind; they must be of full age; they must act freely and not under threats or duress. In addition, they must have power in relation to the subject-matter otherwise the contract or agreement is invalid. The position is no different if the contract in question happens to be an arbitration agreement. The general rule is that any natural or legal person who has the capacity to enter into a valid contract has the capacity to enter into an arbitration agreement. Accordingly, the parties to such agreements include individuals, as well as partnerships, corporations, states and state agencies.¹⁷⁷

If an arbitration agreement is entered into by a party who does not have the capacity to do so, the other party or any relative or interested party can ask a competent court to stop the arbitration if it is still at the beginning on the basis that the arbitration agreement is void. Similarly, he may refuse recognition and enforcement of the award at the end of the arbitral

¹⁷⁶ AL-Bijad, M., (1999), Arbitration in the Kingdom of Saudi Arabia, Riyadh, Administrative Researches and Studies Centre.

¹⁷⁷ Redfern, A. and Hunter, M., (2009), Law and Practice of International Commercial Arbitration, London, Sweet & Maxwell, 5th edn.

proceedings on the basis that one of the parties to arbitration agreement is under some incapacity.¹⁷⁸

In Islamic Law, the capacity of contracting parties is an essential part in any contract or agreement. Therefore, any contract that involves an incapable party will be null and invalid. Accordingly, this term has been provided for in the Saudi Arbitration System. For example, Article 2 of 1983 System provided that arbitration agreement is invalid if it is signed by anyone who does not have legal capacity.¹⁷⁹ Also, the 2012 System stipulates such term.¹⁸⁰

Likewise, the New York Convention has set out in Article V that recognition and enforcement of the award may be refused if any of the parties in the arbitration agreement is under some incapacity according to the law applicable to them.¹⁸¹ Article 2 of the Geneva Convention has provided that recognition and enforcement of the award shall be refused if the Court is satisfied that the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented.¹⁸²

However, under English Law, legal age is fixed at eighteen years and every one under that age is called an infant. Whereas in Islam the age of maturity for boy and girl is when they both become sexually matured and this is when the girl starts her menstrual period. However, the average age which these signals start to appear on both genders is usually fifteen years.¹⁸³

2.1.6 Writing

¹⁷⁸ Baamir, A., (2010), Shari'a Law in Commercial and Banking Arbitration, Ashgate, UK, p 62-64. Also see: Redfern, A. and Hunter, M., (2009), Law and Practice of International Commercial Arbitration, London, Sweet & Maxwell, 5th edn.

¹⁷⁹ Saudi Arbitration System 1983, article 2.

¹⁸⁰ Saudi Arbitration System 2012, article 10.

¹⁸¹ New York Convention 1958, article V (a).

¹⁸² Geneva Convention 1927, article 2(b).

¹⁸³ McKendrick, E., (2011), Contract Law, Basingstoke, Palgrave Macmillan, p 281. Also see: Andrews, N., (2011), Contract Law, USA, Cambridge University Press, 1st edn. Also see: Al-Moso'ah Al-Fighiah, (1993), Dar Al-Safwah, Egypt.

Various national laws differ with regards to the writing of arbitration agreement as a condition for it to be a valid and effective document. Some countries, such as Jordan, include in their local laws that an arbitration agreement must be in writing. Others require at least a written evidence of the agreement to arbitrate. Saudi Arabian system 1983 for instance, which is in accordance with Islamic Law, does not require a written arbitration agreement and not even written evidence in order to recognise arbitration agreement. Under Islamic Law, which is in operation in Saudi Arabia, an arbitration agreement is operative and binding even if it is not written as well as other contracts and agreements. It can be proved in the event of conflict by common proof instruments, such as by concession, through witnesses and by other evidence.¹⁸⁴

However, the Saudi Arbitration system 2012 has taken the modernist version of arbitration laws which requires the arbitration agreement to be in writing, otherwise would be regarded invalid.¹⁸⁵ Al-Zuhili sees that it is acceptable to require an arbitration agreement to be in writing otherwise it would be regarded as null. He argues that the society has changed and morals and principles which used to be prevent people from lying and other negative behaviour have decreased, therefore it is logical to ban witness and other similar forms of evidences to establish in the truth in large verbal transactions.¹⁸⁶

As for international law, the New York Convention, for example, considers the writing of arbitration agreement as a term and condition for the agreement to benefit from the Convention. This will allow for the proper enforcement of the arbitration agreement and its arbitral award in the territory of any member state of the Convention. This can be found in Article II which lays down clearly that:

“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship,

¹⁸⁴ Al-Moso'ah Al-Fighiah, (1993), Dar Al-Safwah, Egypt.

¹⁸⁵ Saudi Arbitration System 2012, article 9(2).

¹⁸⁶ Al-Zuhili, M., (1402/1982), Wsaeil Al-ethbat, Dar Al-Bian, Demusqes, 1st edn, p 232.

whether contractual or not, concerning a subject matter capable of settlement by arbitration”.¹⁸⁷

The same Article also explains the meaning of the term “agreement in writing” by emphasising that it includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.¹⁸⁸

The UNCITRAL Model Law takes the same trend in establishing and defining the writing of an arbitration agreement in a more modern way. Writing of arbitration agreement under the Model Law can be fulfilled if the contents of the agreement is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. It includes any recorded electronic communications such as electronic mail, telegram, telex and telecopy. It also includes an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. Furthermore, the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.¹⁸⁹

As for English Law, section 5 in Part I in the Arbitration Act 1996 also states that an arbitration agreement has to be in writing, and it limits the application of provisions of Part I to only where the arbitration agreement is in writing. The term “in writing” however, includes when it is being recorded by any means or the agreement is evidenced in writing.¹⁹⁰ However, it should be noted that although this section is clear in requiring an arbitration agreement to

¹⁸⁷ NYC, article II.

¹⁸⁸ Ibid.

¹⁸⁹ UNCITRAL Model Law on International Commercial Arbitration 1985, article 7(2). Also see: Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press, p 146-150.

¹⁹⁰ Arbitration Act 1996, s. 5.

be in writing in order to be valid and protected by the Act, oral arbitration agreements may still be valid and enforceable under the common law, subject to satisfactory proof.¹⁹¹

2.2 Types of Arbitration Agreement

There are basically two types of arbitration agreement or, in other words, two ways to agree to arbitration. The first of them is by including in a contract a clause stating that in the event of any dispute which may arise in the future, such dispute shall be resolved by reference to arbitration. This type of arbitration is what is known as 'arbitration clause'. The second type is a submission agreement which is drawn up after dispute has arisen and it is usually in a separate form. These two types of arbitration are discussed in detail below:

2.2.1 Arbitration Clause

An arbitration clause as we have mentioned before, is contained in a contract for either or both of the parties to have recourse to arbitration instead of a court to settle any dispute that may arise between them in relation to any rights or duties as stated in the contract. Usually, the arbitration clause is short and appears at the end of the contract. It is generally known as 'midnight clause' since it is the last of all the clauses to be considered in the contract. The fact of its being short and being put in the tail end of the contract seems to be logical due to its nature that covers something may happen in the future and may be not, therefore all necessary details related to this thing 'the dispute' such as description of the dispute, appointing arbitrators, choice of the applicable law and so on would be absent of parties mind that time. Indeed, they hope that there will be no need to invoke it.¹⁹²

An arbitration clause is legitimate and lawful in Islamic Law. Although there is no direct and express reference to it in Islamic jurisprudence but that conclusion can be extracted by looking at the general rules and principles of Islamic Shari'ah particularly those that govern

¹⁹¹ Mistelis, L., (ed), (2010), Concise International Arbitration, the Netherland, Kluwer Law International, p 844.

¹⁹² Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press, p 146. Also see: Baamir, A., (2010), Shari'a Law in Commercial and Banking Arbitration, Ashgate, UK, p 73-75.

fair and unfair terms of contracts. The major rule in this field according to Islamic law provides that all terms being included in any contract shall be respected and enforced by the parties except in the event of its being permitted a forbidden matter or prohibited a permissible matter. This rule is based on a hadith which says: "The believers have to abide by the conditions they have agreed on, except a condition that made a prohibition (haram) allowable (halal) and something allowed (halal) prohibited (haram)".¹⁹³

In addition, the other basic rule says: the key principle regarding customary behaviour is permissibility. That means everything is allowed in this regard, except if there is clear and authentic evidence restricting or prohibiting its allowance. Moreover, Allah has ordered believers to respect their promises and contracts in so many places in the Holy Qura'an:

(يَا أَيُّهَا الَّذِينَ ءَامَنُوا أَوْفُوا بِالْعُقُودِ)¹⁹⁴

Contracts and terms shall be regarded valid except when they include what is in conflict with the main objective of the contract itself, gharar (ambiguity), riba (interest) or public tort. Hanabilah School is the most open minded in this field also. They permit all terms requested by the contracting parties or by one of them except in two cases; first: if it is in conflict with the objective of the contract, second: if there is a specific text in the Qura'an or Hadith banning it. The Malikiah School agrees with Hanabilah on this point . Ibn Timiah¹⁹⁵ says:" the base is that contracts and terms are validable and permissible and should not forbid or null any one of them except those that there is a clear text or analogy do so".¹⁹⁶

Furthermore, an arbitration clause aims to give a warranty that any conflict that may arise about the contract would be resolved by arbitration. This has many advantages and benefits for the parties of the contract such as making them more confident and it supports them to

¹⁹³ Al-Ainee, M., (2001), Umdat Alqaree Sharah Saheeh Al-Bukhari, Beirut, Dar al-kutub Al-ilmiah, 1st edn.

¹⁹⁴ "O ye who believe! fulfill (all) your obligations", Sura Al-Ma'ida (The Table), no(5), verse(1), Translation by Yusuf Ali, available at: http://www.harunyahya.com/Quran_translation/Quran_translation_index.php.

¹⁹⁵ Ibn Timiah or Sheikh Al-Islam as many of people and books nominate him is one of the most popular jurists in Islam and enjoys very high reputation among all muslims from different schools due to his creative understandings of Islam and valuable additions which he added to Islamic jurisprudence. He primary follows Hanabilah School and he wrote a lot of well-known books in various topics. His name is Ahmad bin Abdualhalim and he lived in the 13-14th century.

¹⁹⁶ Al-Sanhori, A., (1997), Msadir Al-Haaq in Islamic Jurispurdence, Dar Iheaa Al-Turath, Beirut, 3: 90-130.

enter into the contract agreement and conclude it. This is because of the fact that they are not coerced into having recourse to litigation that usually takes too much time to resolve and in most cases the losing party will resort to blackmail that might lead the other party to waive some or all of its entire rights. However, Islam is always in favour of all matters and instruments that benefit the society or individuals provided that they are not in conflict with its pillars and principles which were particularly and mainly reserved for humanity.¹⁹⁷

As for International Law, many of conventions recognize the arbitration clause and enforce its award. For example, the New York Convention lays down clearly in article II:

“Each contracting state shall recognize an agreement in writing under which the parties undertake to submit to which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”.¹⁹⁸

The expression ' which may arise ' refers to arbitration clause. Also, the UNCITRAL Model Law on International Commercial Arbitration 1985 has emphasized on that in article 7(1):

“Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement”.¹⁹⁹

As for the English Law, arbitration clause is also recognized and upheld. That appears from section 6 (1) in Arbitration Act 1996 which defines arbitration agreement as "an agreement to submit to arbitration present or future disputes (whether they are contractual or not)".²⁰⁰ Also the Saudi Arbitration System, whether the former 1983 model or the new 2012 version, confirms the validity of this type of arbitration agreement.²⁰¹

¹⁹⁷ Ibid.

¹⁹⁸ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1985, article II.

¹⁹⁹ UNCITRAL Model law on International Commercial Arbitration 1985, article 7(1).

²⁰⁰ Arbitration Act 1996, s. 6(1).

²⁰¹ Saudi Arbitration System 1983, article 1. Also see: Saudi Arbitration System 2012, article 9.

2.2.2 Submission Agreement

The submission agreement is an agreement between more than party to have recourse to arbitration in order to resolve an existing dispute between them instead of going to the courts. So, it looks to the past, while an arbitration clause looks to the future. It is usually long and written in separate form. In addition, it consists of all necessary details which are needed in arbitration procedures such as description of the dispute and its reasons, grounds for appointing the arbitrators, choice the applicable law, place of arbitration and so on.²⁰²

However, a submission agreement is legitimate in all national (English law including) and international legislation including Islamic Law. All of the three legal systems recognize and uphold a submission agreement, as we have already explored in Chapter one.²⁰³ Actually, this type and way of agreement does not have such argument as much as arbitration clause due to the fact that submission agreement deals with present and specific conflict which means that the parties enter to a contract that is very clear and known to them whereas arbitration clause deals with an absent and unknown conflict.²⁰⁴

In Saudi Law, article 1 of the Saudi Arbitration System 1983 provides expressly that a submission agreement is legitimate as well as an arbitration clause. According to article 5 of the same system submission agreement has to include a description of the dispute subject, names of arbitrators with their acceptance, signatures and names of disputing parties or their agents.²⁰⁵ Otherwise it will be regarded an incomplete agreement and then it needs to satisfy all necessary requirements before it can be considered and acceptable before court. Also, the new system 2012 provides for the legality of a submission agreement.²⁰⁶

²⁰² Redfern, A. and Hunter, M., (2009), Law and Practice of International Commercial Arbitration, England, Sweet & Maxwell, 5th edn. Also see: Al-Bijad, M., (1999), Arbitration in the Kingdom of Saudi Arabia, Riyadh, Administrative Researches and Studies Centre.

²⁰³ See Section 4 'Legitimacy of Arbitration' of Chapter 1.

²⁰⁴ *Supra* note (202).

²⁰⁵ Saudi Arbitration System 1983, article 1.

²⁰⁶ Saudi Arbitration System 2012, article 9.

2.3 Characteristics of Arbitration Agreement

We have already seen that arbitration agreement sometimes could be in the form of an arbitral clause entered into in another contract as one item and therefore, becomes part of it. Sometimes also, it takes the form of a separate contract which is called a submission agreement. Arbitration agreement has special characteristics that distinguish it from other contracts. These characteristics are discussed below:

2.3.1 Arbitration is a Legal Contract

As we have already discussed under the heading of legitimacy of arbitration, arbitration is regarded as a legal contract. That means all different national and international laws recognize it and apply the obligations and responses that it includes. Consequently, courts have to reject to hear disputes brought before them in the event of their being covered by arbitration agreements.²⁰⁷

2.3.2 Arbitration is a Nominate Contract

A nominate contract means that the contract is defined by law. In other words, it is given a unique definition in law.²⁰⁸ Arbitration is given a specific definition by all different national legislations and usually is allotted with separate law that bears its name as the title of its law. Most of the countries, if not all, have devoted a separate and independent law for arbitration. They define it and explain all stages of arbitration operation and indicate all rules and steps which have to be taken in order to obtain an enforceable and recognizable contract and award. That reflects how important arbitration is for countries and business treatments in the world.²⁰⁹

²⁰⁷ Al-Bijad, M., (1999), Arbitration in the Kingdom of Saudi Arabia, Riyadh, Administrative Researches and Studies Centre.

²⁰⁸ Abo Sadah, M., (2010), "International Arbitration Contract Principles: Analysis of Middle East Perceptions", Journal of International Trade Law and Policy, 9, pp 148-174.

²⁰⁹ Al-Bijad, *ibid*.

The importance of arbitration being part of a group of named contracts consisting of the obligation to refer to its specific law when wanting to conclude an arbitration agreement or make any decision regarding arbitration proceedings or its award. In the absence of arbitration law regarding a specific matter that relates to arbitration, in that case, it can be referred to in the general rules and regulations that govern contracts generally.²¹⁰

2.3.3 Arbitration is a Consensual Contract

A consensual contract needs only the consent of its parties and the meeting of their minds by an offer and acceptance to be concluded thus becomes binding. Arbitration agreement is regarded as a consensual contract due to the fact that it only requires consent of all the parties to be concluded and operative. Some national regulations require that arbitration contract should be in writing, however, some of them stipulate a type of writing to recognize arbitration agreement, but not necessary in stage of concluding the contract.²¹¹

2.3.4 Arbitration is a Commutative Contract

A commutative contract is a contract that has mutual benefits and interests for all its parties. These benefits have to be legitimate, otherwise the contract will be regarded null and void. An arbitration agreement is regarded as a commutative contract because of the fact that it includes shared interests for its parties consisting of their desire to benefit from many advantages which arbitration grants such as fast settlement of the dispute by experts in its field and privacy and so on.²¹²

2.3.5 Arbitration is a Binding Contract

²¹⁰ Baamir, A., (2010), Shari'a Law in Commercial and Banking Arbitration, Ashgate, UK, p 70.

²¹¹ Al-Bijad, supra note (207).

²¹² Ibid.

An arbitration agreement is classified as a mandatory contract. A contract is said to be binding when it establishes obligations and responds to the need of each of the parties. In arbitration agreement, both parties are obliged to submit their dispute to arbitral tribunal in order to resolve it according to selected law and proceedings. They cannot have recourse to normal jurisdiction except they agreed to waive their right of arbitration.²¹³

2.3.6 Arbitration is a Separable Contract

An arbitration agreement is separable from the agreement to which it relates, such that it does not become invalid. The principle of separability recognises the arbitration clause in a main contract as a separate contract, independent and distinct from the main contract. The essence of the doctrine is that the validity of an arbitration clause is not bound to the fate of the main contract and vice versa. Therefore, the illegality or termination of the main contract does not affect the jurisdiction of an arbitration tribunal based on an arbitration clause contained in that contract. The obligation to resolve all disputes by arbitration continues even if the main obligation or indeed the contract expires or is vitiated. Separability protects the integrity of the agreement to arbitrate and plays an important role in ensuring that the intention of parties to submit disputes is not easily defeated. In this way it also protects the jurisdiction of the arbitration tribunal.²¹⁴

The separability doctrine under Arbitration Law in the UK is now laid down in section 7 of the Arbitration Act 1996 which provides that:

"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement".²¹⁵

²¹³ Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press.

²¹⁴ Lew, J., Mistelis, L. and Kroll, S., (2003), Comparative International Commercial Arbitration, Netherlands, Kluwer Law International.

²¹⁵ Arbitration Act 1996, s. 7.

We note that section 7 is not mandatory; therefore, the parties may agree to tie the validity of the arbitration clause to the validity of the contract of which it forms part of. The UNCITRAL Model Law on Arbitration as well as the modern codifications based on it expressly provide for the separability of arbitration agreement. Article 16 of UNCITRAL Model Law states that:

“The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause”.²¹⁶

As for Islamic law, there is no express reference to this doctrine which makes it difficult to raise an opinion and refer it to Islamic jurisprudence. But generally, it can be said that arbitration clause is part of the main contract and based on that it shall take the same attitude and decision of the other parts of the main contract. In other words, once the original contract is regarded null and void, arbitral clause as the same as other parts of the contract shall also be regarded null and void. The jurisprudential rule says: "if the contract is void, all terms included in are void".²¹⁷ Similarly, the Saudi Arbitration System 1983 has also left this point without any reference, yet the new system 2012 refers to it expressly and provides for sovereignty of arbitration clause from other terms of the main contract and thus being the contract void, annulled or terminated do not affect the arbitration clause if it is valid itself.²¹⁸

However, although the doctrine of separability has achieved a widespread recognition, it is still amorphous.²¹⁹ Separability of an arbitration agreement is a complicated issue and still there is a real ambiguity about the scope and limitation of this doctrine and of course in applying it in particular cases. Theoretically, there is no doubt about separability of

²¹⁶ UNCITRAL Model Law, article 16.

²¹⁷ Al-Bloui, N., (2012), *The Arbitration in Islamic Sharia*, Dar Al-Thaqafah, Amman, 1st edn, p 105.

²¹⁸ Saudi Arbitration System 2012, article 21.

²¹⁹ Sparka, F., (2010), *Jurisdiction and Arbitration Clauses in Maritime Transport Documents*, Germany, Springer.

arbitration agreement generally, except in Islamic jurisprudence as I mentioned earlier, and the fact that it is stated on in almost national laws; including Saudi Arbitration System 2012 and Arbitration Act 1996, and also international conventions and treaties that address arbitration. But the perplexing question is to what extent this doctrine can be applied in order for the arbitral tribunal to still have the jurisdiction to determine the dispute? In other words, when there is an allegation denying the existence of the main contract in principle and not only challenging its validity, who owns the jurisdiction; the tribunal or the court?²²⁰

To try to reach an answer for this question we should pave the way for it by identifying the possible situations that separability can arise in. Separability is an issue in three possible situations: (1) where the contract never came into existence because of circumstances including, but not limited to, forgery or lack of authority or failure to meet contractual formation requirements; (2) where the contract is void ab initio because of illegality; and (3) where the contract was avoided or cancelled at a later time. Having looked to these three situations separately, it can be said that separability enjoys a stable position as regard situations (2) and (3) and it is settled law that the arbitral tribunal can rule on the validity of the arbitration clause within the contract if the contract is or has come into existence. The issue is in the first situation which the existence of the underlying contract is being challenged.²²¹

If the contract does not exist (for example, because the signature of the person who signed it was procured under duress) it is difficult to see how such a document can give rise to valid arbitration agreement and thus to a valid arbitration. Whereas where there is a main contract which contains an arbitration clause, even if it is null or void, it still there is a juridical platform upon which the arbitral tribunal may stand, to determine the validity of the main body of the contract.²²²

²²⁰ Tweeddale, K. and Tweeddale, A., (1999), A Practical Approach to Arbitration Law, Britain, Blackstone Press Limited, p 73-76.

²²¹ Haining, K. and Zeller, B., (2010), "Can Separability Save Kompetenz-Kompetenz When There is a Challenge to the Existence of a Contract?", Arbitration, 76(3), pp 493-502.

²²² Ibid.

Most jurisdictions grant the authority of determination the courts only when the existence of the main contract is in issue, while others leave it to the tribunal its self to do so. In the United States the position is that separability to be considered before questions as to the *Kompetenz* of an arbitral tribunal. In *Pollux Marine Agencies Inc v Louis Dreyfus Corp*²²³ the court found that it is for the court to determine the existence of a contract and *prima facie* the arbitration agreement. The court held that an arbitration clause is not severable when the existence of the main contract is in dispute:

"Turning first to severability, it does seem to the Court that something can be severable only from something else that exists. How can the Court 'sever' an arbitration clause from a non-existent charter-party?"

In 2006, the USA Supreme Court held that although an arbitral tribunal could determine issues about validity, it could not give guidance about who determined issues about the existence of an underlying agreement²²⁴ : "The issue of the contract's validity is different from the issue of whether any agreement between the alleged obligor and obligee was ever concluded."²²⁵

In France, the situation is completely different. The Paris Court of Appeal emphasized the fact that " arbitration clause is completely separable from ... the main agreement, the non-existence or the nullity of which has no effect on it".²²⁶ More recently, the Court of Cassation dispelled any doubt and held that the validity of the arbitration agreement is not affected by the nullity or non-existence of the main contract.²²⁷ From above cases, it can be seen obviously that there is a clear conception of separability of arbitration agreement, regardless it is right or wrong, in the event of an alleged non-existent contract in the French litigation.²²⁸

²²³ *Pollux Marine Agencies Inc v Louis Dreyfus Corp*, 455 F. Supp. 211 (S.D.N.Y, 1978).

²²⁴ *Buckeye Check Cashing v Cardegna*, 546 U.S. 440 (2006), 3.

²²⁵ Joffet, D., (2007), "Extending the Severability Rule: Buckeye Check Cashing, Inc. v. Cardegna", *Harv. Negot. L. Rev.*, 12, pp 549-572.

²²⁶ *Ducler* (1990) *Rev. arb.* 675.

²²⁷ *Omenex v Hugon* (2006) *Rev. arb.* 103.

²²⁸ Haining, K. and Zeller, B., (2010), "Can Separability Save Kompetenz-Kompetenz When There is a Challenge to the Existence of a Contract?", *Arbitration*, 76(3), pp 493-502.

As for England, English courts used to consider separability before *kompetenze-kompetenze* and favoured the position that nothing can come from nothing. Therefore there is no jurisdiction for the tribunal in case of non-existence contract and such dispute shall be resolved by the court first not the arbitral tribunal.²²⁹

This was the case prior to enacting Arbitration Act 1996 which article 7 of the Act provides that an arbitration agreement contained in another agreement “shall not be regarded as invalid, non-existent or ineffective because that other agreement ... did not come into existence”. Although this article is quite obvious and enlivens arbitration agreement even if the underlying contract did not come into existence, the situation is still foggy and there are different understandings amongst English judges to the meaning of this article which have led necessarily to several conflict decisions made by English courts. Some English judges in recent cases have confirmed that the fate of an arbitration agreement remains inextricably linked to the initial existence of the main contract.²³⁰

For example, in *Azov Shipping Co v Baltic Shipping Co*²³¹, Colman J. concluded that the parties' failure to complete the principal contract led directly to the absence of arbitral jurisdiction.

On the other hand, in *Fiona Trust & Holding Corp v Yuri Privalov*²³² which involved an allegation that a contract containing an arbitration clause had been rescinded due to bribery, the House of Lords affirmed the decision of the Court of Appeal that the jurisdiction is still with the arbitral tribunal to decide the dispute although the main contract is alleged to be obtained by bribery. Lord Hoffmann stated that section 7 of the Arbitration Act 1996 means that the main agreement and the arbitration agreement “must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of

²²⁹ Ibid.

²³⁰ Haining, K. and Zeller, B., (2010), “Can Separability Save Kompetenz-Kompetenz When There is a Challenge to the Existence of a Contract?”, *Arbitration*, 76(3), pp 493-502.

²³¹ *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68 at 69.

²³² *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.

the main agreement". Also Gross J. in *UR Power GmbH v Kuok Oils and Grains Pte Ltd*²³³ stated:

“To my mind, the wording of s.7 of the Act makes it plain that even though the underlying contract never came into existence, the arbitration agreement may still be binding. In this regard, it is worth underlining the wording in s.7 ‘or was intended to form part of’ and ‘or did not come into existence’”.²³⁴

To sum up, it appears from exploring a number of cases and various jurisdictions around the world that this point of law is not clear completely and requires clarification and settlement whether at international level or local level for each country. Particularly in UK and KSA since both have recognized the doctrine of separability of arbitration agreement but have not demonstrated enough to what extent they do. UNCITRAL also may consider amending its Model Law to ensure that the allegation of a non-existent contract does not mean, as a result of the severability principle, the rescinding of *kompetenze-kompetenze* or it does.

To my view, I am attracted to the position taken by the USA courts which confines the tribunal's jurisdiction to contracts alleged to be void and not exist. This is more logical and is consistent with contract theory. Moreover, it should be borne in mind in Islamic law all times that arbitration is exception and litigation is origin, thus we ought not to expand on the interpretation of separability where there is no platform can be stand on and consequently deprives a person of his statutory right to recourse to the free and normal litigation. This is so- called 'istishab' (the presumption of continuity).²³⁵

²³³ *UR Power GmbH v Kuok Oils and Grains PTE Ltd* [2009] EWHC 1940 (Comm).

²³⁴ Shackleton, S., (2010), "The High Cost of London as an Arbitration Venue - the Court of Appeal Rejects Competence-Competence and Separability in *Midgulf International Ltd v Groupe Chimiche Tunisien*", *Int. A.L.R.*, 13(2), pp 50-72.

²³⁵ 'Istishab' means things or situations continue to exist until the contrary is proven.

2.4 Effects of Arbitration Agreement

An arbitration agreement is a contract in which the parties agree to submit their existing or future conflicts to an arbitrator and not to the court. As any contract which establishes obligations on its parties, an arbitration contract does the same. Whatever be the form of an arbitration agreement, it has effects on its parties once it is valid. Those effects pertain to the parties themselves and the competent authority to settle the dispute beside other parties. An arbitration agreement is an obligatory contract for its parties, which means that both parties must perform their exchange responses and obligations laid down in the contract. Once the contract is signed, both parties cannot neglect its terms and conditions nor change them, except if they both agreed by concluding a new contract to revoke the former or amend it.

As for an arbitration agreement, the main purpose of it is to settle a dispute by arbitration rather than by litigation. So, the principal effect of arbitration agreement consists of stopping its parties from having recourse to courts for resolving conflicts that may arise between them. Instead, they have to appoint an arbitrator or more depending on the arbitration agreement in order to settle the dispute as well as provide the basis for jurisdiction of the arbitral tribunal. This obligation is capable of specific performance.²³⁶

In case *Al-Muhemeed Firm v Al-Mshrari Al-Shamila Co*,²³⁷ the claimant -Al-Muhemeed Firm- alleged that it had a right to be paid 1,572,022 SAR for the works that it performed in a school in Riyadh for the respondent -Al-Mshari Al-Shamila Co-. The respondent raised the arbitral clause which was included in their main agreement. Therefore, the court (The Board of Grievances) in KSA refused to hear the dispute and referred the parties to arbitration. Also, in a case *No 1103/2/(ق)*,²³⁸ the court refused considering the dispute and held that it was not allowed to hear it because there had been an arbitral clause in the disputed agreement states on resolving any dispute arises out of it by arbitration. The dispute was between two companies and the claimant applied to the court to obtain the remaining cost of a structure

²³⁶ Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York , Cambridge University Press.

²³⁷ Case No 205/1/(ق) in 1430 H/2009 AD.

²³⁸ Case No 1103/2/(ق) in 1428 H/2007 AD.

contract with the respondent. The latter raised the arbitration agreement and asked the court to refer the dispute to the arbitration. The First Instance Court accepted his defence and referred the dispute to arbitration. The Court of Appeal reaffirmed the decision and dismissed the appeal. Moreover, the same was in case No 114/2/(ق).²³⁹

According to the general rules that govern contracts, primarily, the effects of arbitration agreement are limited to its parties and do not extend beyond them. Therefore, they are the only persons that can benefit from the arbitration agreement and also be negatively affected by it. In addition, the arbitration agreement also affects the successors of the parties in the event of death of one or all the principal parties. Consequently, they have to continue satisfying their predecessor's obligations and fulfil any arbitration agreement until the end and the award resulting from it is binding on them. That is because arbitration is a commutative contract. So, aside from the rights they inherit from their cousin, they also inherit their duties and are expected to achieve their obligations.²⁴⁰

In fact, party consent is a precondition for arbitration. Nonetheless, that does not exclude the possibility of an arbitration agreement concluded in appropriate form between two or more parties from binding other parties. This can be imagined in a variety of ways. Firstly, by operation of the 'group of companies' doctrine pursuant to which the benefits and duties arising from an arbitration contract may in certain circumstances be extended to other members of the same groups of companies. Secondly, by operation of the general rules of private law and this arises on assignment, agency and succession.²⁴¹

However, the 'group of companies' doctrine is not universally accepted. Some legal systems refuse to recognise it. In England, the court set aside an award rendered by an arbitral tribunal

²³⁹ Case No 114/2/(ق) in 1428 H/2007 AD.

²⁴⁰ AL-Bijad, M., (1999), Arbitration in the Kingdom of Saudi Arabia, Riyadh, Administrative Researches and Studies Centre.

²⁴¹ Pulle, A., (2008), "Enforcing Foreign Arbitral Awards Against Non-Signatories: A Plea for Strict Scrutiny", Asia Pacific Law Review, vol. 16 (2), pp177-196.

in London in which the "group of companies" doctrine was recognised, finding *inter alia* that the doctrine "forms no part in English Law".²⁴²

The court based its verdict on that under English Law, the substantive law of an agreement should be applied to identify the parties to an agreement not the procedural law. In Peterson Farms, the substantive law of the agreement was Arkansas law. Peterson Farms (the respondent in the arbitration) sought a declaration from the English court that certain findings in the award were made without jurisdiction, on the basis that some of the claimants in the arbitration were not signatories to the arbitration agreement. The tribunal decided that it had jurisdiction over all the parties by application of the group of companies doctrine. However, the court held that the tribunal was wrong not to have applied the substantive law of the dispute, Arkansas law, to identify the parties. The court applied Arkansas law and held that the group of companies doctrine did not form part of that law, and stated that this was also the position under English law.²⁴³

In more detail, the arbitration involved a claim for damages by the Respondent C &M as Claimant against Peterson as Respondent arising out of the sale by Peterson of live poultry. Both parties engaged in a sale agreement in 1996 which states that any dispute may arise in the future out of the contract shall be submitted to arbitration by International Chamber of Commerce, UK. C&M sought compensation for the losses that had been caused by Peterson to it and the other companies of its group. The latter defended that C &M had not mentioned a principal and agent relationship and that reliance on the group of companies doctrine was misplaced because identification of the parties to the Agreement was a matter of substantive law governed by Arkansas law.²⁴⁴

The arbitral tribunal rejected Peterson's arguments and awarded C &M damages in the sum of US\$ 6,747,217. The tribunal based its decision on the doctrine of separability and

²⁴² *Peterson Farms Inc v C & M Farming Ltd* [2004] EWHC 121 (Comm).

²⁴³ Bamforth, R., (2007), "Joining Non-Signatories to an Arbitration; Recent Developments", In- House Perspective, vol. 3, pp 17-24. Also see: Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press, pp164-169.

²⁴⁴ Ibid.

autonomy of arbitration agreement from the underlying contract. It stated that this doctrine has become a universal principle in the realm of international commercial arbitration. Therefore, the law applicable to the arbitration agreement may differ from the law applicable both to the substance of the contract underlying the dispute and to the arbitral proceedings themselves, and because of the absence of any choice of law made by the parties with regard to the arbitration agreement itself, the tribunal addressed this question in accordance with the common intent of the parties.²⁴⁵

Moreover, the Tribunal regarded that Peterson was aware of its being dealing with the C & M Group as it apparent from the negotiations, internal reports and correspondence that have taken place prior to signing the contract and at the time of it, which practically confirm the intend of Peterson to deal with C & M Group. Consequently, according to all these reasons the tribunal did not consider that it is legally excluded from taking into consideration C & M's damages claims to cover and embrace the damages of all C & M Group companies. The group of companies doctrine provides that an arbitration agreement signed by one company in a group of companies obligates affiliate non-signatory companies, if the circumstances surrounding negotiation, execution, and termination of the agreement show that the mutual intention of all the parties was to bind the non-signatories, which they are found in this case, because a group of companies constitute the same "economic reality".²⁴⁶

Peterson appealed to the court of England as it is the place of arbitration. The judge held that the identification of the parties shall be interpreted according to the applicable substantive law of the underlying contract which in this case is Arkansas law not the procedural. He added that "The autonomy" of the arbitration agreement is not in point. The question is whether it is governed by Arkansas law and the answer according to view of the judge is clearly yes. As a result, there was no basis for the arbitral tribunal to apply any other law whether theoretically derived from "the common intent of the parties" or not. The common intent was indeed demonstrated in the Agreement: that is both English and Arkansas law. The "law" the tribunal derived from its approach was neither the proper law of the Agreement nor

²⁴⁵ Ibid.

²⁴⁶ Pulle, A., (2008), "Enforcing Foreign Arbitral Awards Against Non-Signatories: A Plea for Strict Scrutiny", Asia Pacific Law Review, vol. 16 (2), pp 177-196.

even the law of the chosen place of the arbitration but, in effect, the group of companies' doctrine itself. In the context of the group of companies' doctrine the agreement was that Arkansas law was the same as English law. English law treats the issue as one subject to the chosen proper law of the Agreement and that excludes the doctrine which forms no part of English law. In conclusion, Peterson was entitled to have that part of the Award which awarded payment of losses by other C & M group entities set aside for want of jurisdiction.²⁴⁷

Also, another effect of an arbitration agreement is that the obligation to submit disputes covered by the arbitration agreement to arbitration prevails over jurisdictional privileges and immunity. Sometimes although the parties have agreed to settle a conflict which arise or has arisen by means of arbitration, a party may try to oppose commencing the arbitral tribunal proceedings especially once a dispute has arisen by relying on a jurisdictional privilege or immunity. However, in both cases, a party is regarded to have waived such rights by entering into the arbitration agreement. There is no doubt that parties to arbitration agreement will be taken to have waived their right by merely signing the arbitration agreement even if the waiver is not expressly set forth in the agreement. This waiver results from the incompatibility of the purpose of the arbitration agreement, which is mainly, to ensure that controversies are submitted to arbitration.²⁴⁸

Similarly, once a party enjoys immunity (such as state or state-owned entity) and enters into an arbitration agreement, he cannot rely on his immunity from litigation to escape from the obligations that come from the arbitration agreement which require it to commence arbitration proceedings. He has to attend the arbitration proceedings as well as the jurisdiction of courts handling litigation associated with arbitration. Therefore, arbitrators have jurisdiction to hear such controversies due to the fact that immunity from jurisdiction capable of being waived and the arbitration agreement is in direct contradiction with that immunity from jurisdiction, and must be therefore to be considered to be a waiver of that immunity by the state or public entity in question. It has also been shown that the issue of the immunity of a foreign state does not arise in arbitration. This is because the immunity is intended to

²⁴⁷ Ibid.

²⁴⁸ Gaillard, E. and Savages, J., (Eds.), (1999), Fouchard Gaillard Goldman on International Commercial Arbitration, Netherlands, Kluwer Law International.

protect its beneficiary from being subject to the jurisdiction of the courts of other countries. Furthermore discussion of this issue will be found in Ch 6, para 6.4.2.²⁴⁹

Furthermore, an arbitration agreement affects the authority of the courts by pulling out the jurisdiction of resolving the dispute covered by an arbitration agreement and giving it to arbitrators and an arbitral tribunal. Therefore, courts, according to the law, have to refuse to hear any cases brought before them if there is a previous contract between the parties agreeing to submit the dispute to arbitration. The role of the courts in this case, is restricted only to assisting and supporting arbitral tribunal proceedings and to ensure that they are going according to the law and terms of the arbitration agreement and to enforce the award resulted from arbitration operation.²⁵⁰

Article 7 of the Saudi Arbitration System 1983 has emphasised that: "Where parties agree to arbitration before the dispute arises, or where a decision has been issued sanctioning the arbitration instrument in a specific existing dispute, the subject matter of the dispute may only be heard in accordance with the provisions of this Law".²⁵¹

The New York Convention also provides for that in article II by confirming that the court of a contracting state, when seized of the facts of an action in respect of which the parties have made an arbitration agreement, shall refer the parties to arbitration.²⁵²

English law has for long considered that the effect of the arbitration agreement was to justify the grant of a stay of proceedings by the courts until the making of the arbitral award, rather than to exclude the jurisdiction of the court altogether. The Arbitration Act 1996 also takes this approach. Section 9 indicates that rather than asking a court to decline jurisdiction a party to an arbitration agreement can apply to the court in which the proceedings have been

²⁴⁹ Ibid.

²⁵⁰ Palacen, C., (2009), "Forms of Arbitration in International Trade", Law Annals Titu Maiorescu U, pp 117-128.

²⁵¹ Saudi Arbitration System 1983, article 7.

²⁵² Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), article II.

brought to stay the proceedings so far as they concern that matter. In this case, and on an application under this section "the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed".²⁵³

2.5 Expiry of Arbitration Agreement

There are several reasons which cause the expiry of an arbitration agreement, whether it is in form of an arbitration clause or a submission agreement. Those reasons are as follows:

2.5.1 The Making of a Final Award

The aim of an arbitration agreement is to resolve a dispute by designated arbitrators other than judges. When the arbitral tribunal makes an award covering all points in dispute, the submitted agreement on which the arbitration is based is extinguished and the arbitral proceedings come to an end. Reaching the final award regarding the dispute by arbitration agreement is the natural and final result of commencing the arbitral proceedings and it indicates that all the parties to the agreement have satisfied their responsibilities and obligations toward the arbitration agreement, therefore regarding it as extinguished.²⁵⁴

In contrast, whether or not the underlying contract has been performed or terminated, an arbitration clause could still be effective if a new dispute were to arise from the main contractual relationship between the parties.²⁵⁵

2.5.2 Consent of the Parties to Extinguish the Arbitration Agreement

²⁵³ Arbitration Act 1996, s. 9.

²⁵⁴ Gaillard, E. and Savages, J., (eds.), (1999), Fouchard Gaillard Goldman on International Commercial Arbitration, Netherlands, Kluwer Law International. Also see: AL-Bijad, M., (1999), Arbitration in the Kingdom of Saudi Arabia, Riyadh, Administrative Researches and Studies Centre.

²⁵⁵ Ibid.

Just as in other agreements, parties to an arbitration agreement have the right to terminate it whenever they like. An arbitration agreement can be terminated by the contracting parties themselves waiving it. The waiving of the agreement could be either before or after the dispute has arisen. It could also be waived after the commencement of arbitration procedures.²⁵⁶

This waiver could be done expressly by concluding an agreement in this meaning or by exchanging letters which indicate their joint desire to waive arbitration agreement and cancel it, and could be also expressed tacitly such as when parties recourse to litigation to settle a matter has been agreed to be resolved by arbitration or when a party goes to court to determine a dispute and the other party attends before the court and shows his defences, because that will be understood as the parties have waived their right to recourse to arbitration.²⁵⁷ In a case *No 29/(ت)/4*,²⁵⁸ the court in KSA decided that agreement of the disputing parties to have recourse to the court to settle their dispute and engage in the procedures before raising the arbitration agreement is regarded a tacit waiver of arbitration. Also in a case *No 72/(ت)/4*,²⁵⁹ the Court of First Instance refused to hear the dispute because of the existence of arbitration clause, but the Appeal Court dismissed the decision because the respondent raised the arbitration clause after engaging in the respond.²⁶⁰

2.5.3 Avoidance of Arbitration Agreement

An arbitration agreement also expires when the agreement itself is nullified. It does not matter whether the agreement is in the form of a submission or arbitration clause. There are

²⁵⁶ Gillies, P. and Dahdal, A., (2007), "Waiver of a Right to Arbitrate by Resort to Litigation, in the Context of International Commercial Arbitration", *Arbitration*, 73(4), pp 361-372.

²⁵⁷ Poudret, J. and Besson, S., (2007), *Comparative Law of International Law*, England, Sweet & Maxwell Ltd. Also see: AL-Bijad, M., (1999), *Arbitration in the Kingdom of Saudi Arabia*, Riyadh, Administrative Researches and Studies Centre. Also see: Gaillard, E. and Savages, J., (eds.). (1999), *Fouchard Gaillard Goldman on International Commercial Arbitration*, Netherlands, Kluwer Law International.

²⁵⁸ Case *No 29/(ت)/4* in 1413 H/1992 AD.

²⁵⁹ Case *No 72/(ت)/4* in 1411 H/1990 AD.

²⁶⁰ Poudret and Besson, supra note (257).

several reasons that make an arbitration agreement null and void, such as when it is signed by an incapable party or when the matter is not capable of settlement by arbitration.²⁶¹

2.5.4 Avoidance or Expiry of the Main Contract

In addition, an arbitration clause may be regarded as void when determining that the principal contract is void. However, there is an argument about avoidance of the arbitration clause based on the fact that the principal contract is void. In fact, an arbitration clause is not a typical contractual term. It provides for the establishment of the rights provided in the rest of the agreement and typically some beyond its scope. So, it is certainly not a creator of primary obligations. It does not even, strictly speaking, contain secondary duties. It contains the promises relating to both types of obligations and above all else their enforcement. We could call it a tertiary obligation.²⁶²

There is a relationship between the arbitration agreement and the underlying contract. The former will necessarily expire with the latter, as the sole purpose of the former is to provide a means to resolving disputes arising from the latter. However, the arbitration agreement will continue to exist even when the rights created by the main contract have been extinguished, precisely where that extinguishment or its consequences are in dispute. As a result of the principle of the autonomy, or separation of the arbitration agreement, a party cannot avoid the consciences of an arbitration agreement simply by alleging that the main contract has expired, because the arbitration agreement can only be extinguished by a cause which specifically applies to it.²⁶³

The fact that a dispute does not arise, and a party does not assert claims until after the parties' contract has terminated does not necessarily prevent the dispute from being arbitrated

²⁶¹ Ibid.

²⁶² Akhtar, Z., (2011), "Conflict of Laws, Sharia Rules and Dispute Resolution", International Arbitration Law Review, 14(2), N 8-10.

²⁶³ Samuel A., "Separability of Arbitration Clauses", available at: <http://www.adamsamuel.com/pdfs/separabi.pdf>, accessed on 12/10/2012.

pursuant to an arbitration clause in the underlying and expired contract. This idea was laid down in the Arbitration Act 1996, which states that:

“Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement”.²⁶⁴

Prior to the 1996 Act and in *Harbour Assurance Co v Kansa*²⁶⁵, the courts extended the doctrine of separability so that the arbitration clause also survives the invalidity of the principal contract. As a result, an attack on the validity of the contract, even if successful, will not by itself make null the authority of the arbitrator if the arbitration agreement is not thereby invalid. So, arbitrators can consider questions of legality and may find the main contract void for illegality without thereby removing their own jurisdiction so to find.²⁶⁶

In Islamic Law, there is no express reference to this point of argument, so it is difficult to ascribe an Islamic conception to this, because of the absence of previous studies and precedents cases which dealt with and examined this issue. Nevertheless, it can be said based on the general rules which govern contracts in Islam that an arbitration clause is a part of the main contract and shall take the same legality as other parts of it. Therefore, when it is determined that the main contract is void that means all parts of it shall be regarded void including arbitration clause. Or in other words, if the contract fails, the arbitral clause goes with it.²⁶⁷

Saudi legislators have also left the matter obscure in the arbitration system 1983 and they did not intentionally or unwittingly referred to it in arbitration system. They might want to leave

²⁶⁴ Arbitration Act 1996, s. 7.

²⁶⁵ [1993] 1 Lloyd's Rep 455.

²⁶⁶ Samuel A., "Separability of Arbitration Clauses", available at:

<http://www.adamsamuel.com/pdfs/separabi.pdf>, accessed on 12/10/2012.

²⁶⁷ Akhtar, Z., (2011), "Conflict of Laws, Sharia Rules and Dispute Resolution", *International Arbitration Law Review*, 14(2), N 8-10.

the decision freely to judges to deal with each case lonely and according to circumstances surrounding it as well as according to their understandings.²⁶⁸ But in the new system of 2012, the legislators have stated on the independent nature of the arbitral clause, thus deciding that the main contract is null, or grounds exist for terminating it, does not cause nullity of the arbitration clause.²⁶⁹

2.5.5 The Expiry of the Agreed Deadline for Making a Final Award

Most arbitration agreements especially, those in form of submission agreement contain a deadline for making the award. A time-limit for making the award may be laid down on either in an arbitration clause, whether directly or by reference to institutional arbitration rules, or by the law governing the arbitral procedures. If that time-limit has reached before an award has been made, the arbitral procedures come to an end. However, the parties stay bound by the arbitration clause, and they will therefore remain obliged to refer to arbitration or accept referral arbitration on the same controversy or other controversies arising out of the underlying agreement containing the clause.²⁷⁰

In the Saudi legal system, if the award was not made within the period provided for in the arbitration agreement or within nineteen days from the date of decision of approval arbitration agreement by the competent authority, in the event of absence of fixed date in the arbitration agreement, any party of the agreement has the right to bring the matter before the court to make a decision regarding it either resolving it by the court or expanding the time limit of making the award for a further period.²⁷¹ The picture is the same in the new arbitration system 2012 with small modifications as regard the period of making decision by

²⁶⁸ AL-Bijad, M., (1999), Arbitration in the Kingdom of Saudi Arabia, Riyadh, Administrative Researches and Studies Centre.

²⁶⁹ Saudi System 2012, article 21.

²⁷⁰ Gillies, P. and Dahdal, A., (2007), "Waiver of a Right to Arbitrate by Resort to Litigation, in the Context of International Commercial Arbitration", Arbitration, 73(4), pp 361-372.

²⁷¹ Saudi Arbitration System 1983, article 9.

the tribunal. It has been enlarged to 12 months capable of increase by 6 months more rather of 90 days that were set out by the former one.²⁷²

As for English Law, the Arbitration Act 1996 empowers the court to extend contractual time-limit for the rendering of the award, which allows the claimant to avoid the award from being set aside for failure to adhere to the time-limit. In particular, where the time for making an award is limited by or in pursuance of the arbitration agreement, the tribunal (upon notice to the parties) or any party to the proceedings (upon notice to the tribunal and the other parties) after exhausting any available arbitral process for obtaining an extension of time can apply to the court for an order to extend the time. If the court is satisfied that a substantial injustice would otherwise be done it shall make an order since an application from the tribunal or a party as it was mentioned and the court may extend the time for such period and on such terms as it thinks fit.²⁷³

In conclusion, it appears obvious from legal provisions and articles explored above that the contractual time-limit restricting the duration of the arbitrators' mission has no effect on the validity of the arbitration agreement or on the regularity of the arbitral award, neither in the Saudi system nor in English Law.

2.5.6 Death of a Party or a Party Being under an Incapacity

According to the Saudi arbitration system 1983, an arbitration agreement does not come to an end in the event of death of one of the parties or his being under some incapacity for any reason which causes that. None of the former events lead to the extinguishing of the arbitration agreement, otherwise it is still operative and in effect and it shall extend the time

²⁷² Saudi Arbitration System 2012, article 40.

²⁷³ Redfern, A. and Hunter, M., (2009), Law and Practice of International Commercial Arbitration, London, Sweet & Maxwell, 5th edn. Also see: Gaillard, E. and Savages, J., (1999), Fouchard Gaillard Goldman on International Commercial Arbitration, Netherlands, Kluwer Law International. Also see: Poudret, J. and Besson, S., (2007), Comparative Law of International Law, England, Sweet & Maxwell Ltd. Also see: English Arbitration Act 1996, s. 50.

of making the award by thirty days unless the arbitrators decide to extend for a longer period. The same text is found also in the new arbitration system 2012.²⁷⁴

Likewise, in emergency circumstances, an arbitration agreement does not expire by expiration of the agreed deadline for making award but it shall be extended, although that will not be found provided for in the Saudi model. This is in accordance with the general rules of Islamic Law which bear in mind such events and stops account of the period since the beginning of emergency event until it is finished. In addition, that can be done by arbitrators depending on article 15 of Saudi Arbitration System which provides the arbitrators with more authorities and flexibilities to extend the period fixed for the award. Article 15 states that: "Arbitrators may, by the same majority required for making the award and by a decision giving the grounds for so doing, extend the period fixed for an award due to circumstances pertaining to the subject matter of the dispute".²⁷⁵

In the same trend, the Arbitration Act 1996 goes in regarding that the arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party, unless otherwise agreed by the parties. Moreover, it states that "Unless otherwise agreed by the parties, the death of the person by whom an arbitrator was appointed does not revoke the arbitrator's authority".²⁷⁶

2.5.7 The Default of an Arbitrator

An arbitration agreement does not expire in the event of the death of an arbitrator or resignation or being dismissed or being under some incapacity. In practice, it is rare for arbitrators to be named in the arbitration clause and the question of the impact of their refusal to act, impediment or death will therefore hardly ever arise. In addition, even if the arbitration clause does name the arbitrators, it constitutes a general agreement providing for any controversy which might subsequently arise out of the underlying contract to be submitted to

²⁷⁴ Saudi Arbitration System 2012, article 41.

²⁷⁵ Saudi Arbitration System 1983, article 15.

²⁷⁶ Arbitration Act 1996, s. 26.

arbitration. The clause is thus not defeated by default of an arbitrator, as that arbitrator can simply be replaced if and when a controversy arises, either by means of a new agreement or by using the procedure provided for that purpose by the parties or by the applicable arbitration law. In an international arbitration, the results of the default of an arbitrator rely solely on the parties' contract.²⁷⁷ The parties are completely free to stipulate, directly or by reference to institutional arbitration regulations, how the defaulting arbitrator is to be replaced. The arbitral procedures shall continue, and that the arbitral tribunal will determine whether any previous procedural decisions should be reopened in the presence of the new arbitrator. Such rules are common in international practice, and they help to avoid manoeuvres such as the resignation of a biased arbitrator.²⁷⁸

Also, the Saudi Arbitration System has regarded that where one arbitrator or more refuses to work, or withdraws, or a contingency arises which prevents him from undertaking the arbitration or if he is dismissed, all those events do not extinguish arbitration agreement. Instead, the arbitrator shall be replaced by another appointed by the originally competent authority if there is no special stipulation by the parties, which in this case is Grievance Court (*diwan-almadhalim*). This step is taken upon the request of the party interested in expediting the arbitration along with extending the date fixed for the award by thirty days. The number of arbitrators appointed shall be equal or complementary to the number agreed upon among the parties and the court's decision in this respect shall be final.²⁷⁹

2.5.8 The Setting Aside of an Award

The setting aside of an award made on the basis of an arbitration clause, whether or not the clause has been followed by a submission agreement, will not extinguish the arbitration clause with regard to any different dispute covered by the arbitration clause. This is because it

²⁷⁷ Davidson, F., (1997), "The New Arbitration Act - A Model Law?", The Journal of Business Law, pp 101-129.

²⁷⁸ Redfern, A. and Hunter, M., (2009), Law and Practice of International Commercial Arbitration, London, Sweet & Maxwell, 5th edn. Also see: Gaillard, E. and Savages, J., (1999), Fouchard Gaillard Goldman on International Commercial Arbitration, Netherlands, Kluwer Law International. Also see: Poudret, J. and Besson, S., (2007), Comparative Law of International Law, England, Sweet & Maxwell Ltd.

²⁷⁹ Saudi Arbitration System 1983, article 10, 14.

is confined to the dispute previously submitted to the arbitral tribunal; that power to decide the merits of the dispute leaves the arbitration clause intact. The clause remains applicable to all other disputes which may subsequently arise and which are within its scope. Of course, the situation will be different where the award is set aside on the grounds that the arbitration agreement is void. In that case, the arbitration agreement is extinguished.²⁸⁰

²⁸⁰ Gillies, P. and Dahdal, A., (2007), "Waiver of a Right to Arbitrate by Resort to Litigation, in the Context of International Commercial Arbitration", Arbitration, 73(4), pp 361-372. Also see: Gaillard, E. and Savages, J., (1999), Fouchard Gaillard Goldman on International Commercial Arbitration, Netherlands, Kluwer Law International. Also see: Poudret, J. and Besson, S., (2007), Comparative Law of International Law, England, Sweet & Maxwell Ltd.

Chapter three

Arbitration Tribunal

3.1 Appointment of Arbitrators

Once a decision to have recourse to arbitration has been made, the most important next step is to appoint a suitable and reliable arbitrator or arbitrators, depending on the arbitration agreement, in order to resolve the dispute covered by the arbitration agreement. However, it is difficult to anticipate the right choice of arbitrator before the dispute arises, because disputes vary in the expertise and qualities demanded of the arbitrator. In most cases, the appointment of arbitrators, besides all other factors relevant to the arbitration procedure, are discussed by the parties and their legal counsellors after the conflict has arisen. Consequently, the most appropriate arbitrator will be selected in respect of that particular dispute and all circumstances around it.²⁸¹

Freedom of choice of the arbitrator is a right reserved to the disputing parties in Islamic Shari'ah, in International Law and in English Law. In principle, the parties should feel free to choose their own arbitrators whom they trust and are confident of their quality and sense of justice and as well as specify their numbers. Nevertheless, sometimes the freedom of choice will be restricted by an arbitration clause which already stipulates in advance the number of arbitrators, their names and their qualifications. The idea of being able to appoint an arbitrator thus provides the parties concerned with a feeling of confidence in the arbitral tribunal.²⁸²

However, in order to appoint an arbitrator correctly, the method and terms provided for in the arbitration agreement as well as national and international rules which are connected with the tribunal operation must be followed.²⁸³

3.1.1 Number of Arbitrators

²⁸¹ Hirsch, M., (1990), The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes, The Netherlands, Martinus Nijhoff Publishers.

²⁸² Lookofsky, J., (1992), Transnational Litigation and Commercial Arbitration, New York, Transnational Juris Publications.

²⁸³ Ibid.

Parties to an arbitration contract are free to fix the number of arbitrators they want for the settlement of their dispute. However, it is preferable that the chosen number of arbitrators be uneven, taking into account that they may differ into equal scales which will of course, require somebody to overbalance.²⁸⁴

The laws of some countries stipulate that the number of arbitrators must be uneven. Saudi Arabia for example, is one of the countries which took this view by providing in its Arbitration System 1983 that: "in case of multiple arbitrators, they shall be odd in number".²⁸⁵ The Saudi Arbitration System 2012 also says the same and adds a very extreme provision by deciding that in the event of not doing so, the arbitration shall be regarded null.²⁸⁶ In contrast, Islamic Law does not require that the number of arbitrators must be uneven, and the evidence for this appears in the so famous arbitration agreement that was signed between Ali and Mu'awiyah in order to put an end to the battle of Siffeen.²⁸⁷ That agreement appointed two arbitrators, each party was designated an arbitrator.²⁸⁸

However, in international law, and specifically under the UNCITRAL Model Law, there are no restrictions on the parties regarding the number of arbitrators they have to nominate as they are free to nominate them in even or uneven number. But in the absence of such stipulation in the arbitration agreement, the number of arbitrator must be odd, specifically three. In contrast, the ICC Rules of Arbitration limit the number of arbitrators to only one or three depending on the size of the dispute.²⁸⁹

As in the UNCITRAL Model Law, the Arbitration Act 1996 leaves to the parties to an arbitration agreement the choice of the number of arbitrators for the dispute settlement and

²⁸⁴ Newmark, C. and Hill, R., (2004), "The Appointment of Arbitrators in International Arbitration", *Int. A.L.R.*, 7(3), pp 73-80.

²⁸⁵ Saudi Arbitration System 1983, article 4.

²⁸⁶ Saudi Arbitration System 2012, article 13.

²⁸⁷ See Ch 1, para 1.2.4.

²⁸⁸ Zahraa, M. and Hak, N., (2006), "Tahkim (Arbitration) In Islamic Law Within The Context Of Family Disputes ", *Arab Law Quartely*, vol. 20, pp 2-45.

²⁸⁹ UNCITRAL Model Law on International Commercial Arbitration, article 10. Also see: International Chamber of Commerce Rules of Arbitration, article 8.

whether there is to be a chairman or umpire. But on the other hand, in the absence of an agreement to the number of arbitrators, the arbitral tribunal shall consist only of a sole arbitrator and not three as the UNCITRAL Model Law provides.²⁹⁰ Indeed, it says further that: "unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal".²⁹¹

The appointment of a sole arbitrator to settle a dispute has many advantages. It is much easier and faster to arrange a meeting or hearing by a sole arbitrator than doing that by an arbitral tribunal consisting of two or more arbitrators. In addition, it is economically viable for the disputing parties, because they will pay fees and expenses of only one arbitrator instead of two or more and that is definitely much cheaper. Moreover, the progress of arbitration procedures will be faster and go more smoothly due to the fact that a sole arbitrator will not need to spend much time in consultation with his colleagues regarding each step that arbitral process requires or struggling to arrive at an agreed or majority decision about matters in the controversy.²⁹²

On the other hand, when an arbitral tribunal consists of more than one arbitrator in the arbitration agreement, each party will be able to nominate at least one of the tribunal's members. Consequently, that will reflect positively on their impression toward the arbitral tribunal as well as contributing in giving them a feeling of confidence in it. Besides, it will help to reveal all evidence and documents they have and the arbitrator will make sure on behalf of his appointing party that the whole picture of the dispute according to his own appointing party's conception is delivered rightly to the arbitral tribunal. He also will assist to address any missing issues from the arbitral tribunal before they make their determination and render the ultimate award. This is quite significant in international commercial arbitration or any type of international arbitration, because there are usually differences of language, culture and tradition between the parties as well as the arbitral tribunal themselves.

²⁹⁰ Davidson, F., (1997), "The New Arbitration Act-A Model Law?", The Journal of Business Law, pp 101-129.

²⁹¹ Arbitration Act 1996, s. 15.

²⁹² Borba, Igor M., (2009), International Arbitration: A Comparative Study of the AAA and ICC Rules, USA, Pro Quest LLC, Marquette University.

Furthermore, the arbitral tribunal of two or three arbitrators is likely to prove more satisfactory to the parties; the quality of justice is expected to be less subject to the individual pre-dispositions and particular characteristics of a sole arbitrator. Therefore, the final award is more likely to be acceptable to the parties. Also single arbitrators may die or become incapable – having multiple arbitrators reduces this risk.²⁹³

However, it may appear to be difficult in practice for the arbitrator appointed by one party to combine between representing his appointing party and performing as an unbiased arbitrator, but in fact, it is possible for the arbitrator to play the role without stepping outside the bounds of impartiality and independence.²⁹⁴

3.1.2 Selection of Arbitrators

One of the most important advantages of arbitration is that the disputing parties have the right to submit their disputes to adjudicators of their own choice. Although, there are different ways of appointing arbitrators, the principal way is by an agreement between the disputing parties themselves and in the event of failure to do so, the competent authority whose duty it is to supervise arbitration process shall appoint them.²⁹⁵

3.1.2.1 Appointment of Arbitrators by the Parties

The common method of appointment of an arbitrator is by an agreement between the disputing parties. This primarily distinguishes arbitration from litigation and encourages many disputants around the world especially commercial corporations to select it and prefer it to courts system.

²⁹³ Newmark, C. and Hill, R., (2004), "The Appointment of Arbitrators in International Arbitration", Int. A.L.R., 7(3), pp 73-80.

²⁹⁴ Redfern, A. and Hunter, M., (2009), Law and Practice of International Commercial Arbitration, London, Sweet & Maxwell, 5th edn. Also see: Born, G., (2009), International Commercial Arbitration, The Netherlands, Kluwer Law International.

²⁹⁵ Ibid.

This way of appointing arbitrators requires two things: **First**, it involves the consent of both or all parties if they are more than two upon a specific person/persons or an institution to be nominated as an arbitrator. **Secondly**, it needs the consent of the nominated arbitrator upon this commission. In some of arbitration agreements, parties would have nominated their arbitrators in case there arise any dispute. In such a case, they have to submit their dispute to the arbitrators unless they make a new agreement on a different term.²⁹⁶

However, there is no guarantee that the nominated arbitrator will be willing to accept the mission of arbitration. In some cases, designated arbitrator/arbitrators may refuse to act as an arbitrator between the parties. He may also not be able to carry out the arbitral duty due to many reasons such as his being so busy, too ill, or even dead. In this event, the parties or the appointing party if the arbitral tribunal consists of multiple arbitrators and each party has the right to choose one, have to replace the former arbitrator with another one provided he satisfies the same terms and characteristics if there is any provided in the arbitration agreement.²⁹⁷

All national and international laws confirm this position. The Arbitration Act 1996 states in section 16 that: "The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire". In the event that there is no such agreement, according to English Law, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so if the tribunal is to consist of a sole arbitrator, whereas if the tribunal consists of two arbitrator, each party shall design one arbitrator not later than 14 days after service of a request in writing by either party to do so. In addition, where the tribunal consists of two arbitrators and an umpire, the two appointed arbitrators may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration. The same operation shall be followed if

²⁹⁶ Toobe, S., (1990), Mixed International Arbitration, UK, Cambridge, Grotius Publications Limited.

²⁹⁷ Reynolds, M., (1993), Arbitration, London, Lloyd's of London Press Ltd.

the tribunal consists of three arbitrators and the only difference is that the two so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal.²⁹⁸

Similarly, UNCITRAL Model Law also provides a policy on how to appoint the arbitrators by the disputing parties which is regarded similar to the one followed by Arbitration Act 1996 with a little difference in the period given to the parties to design their arbitrators. Most likely, the English legislation has benefited many ideas and rules from UNCITRAL Model Law.²⁹⁹

As for Islamic law (Shari'ah), there is no big difference; parties to an arbitration agreement are completely free to choose arbitrators who they like and agree on the procedure of appointing them which they prefer. There is no a specific method or time limit which may restrict the disputing parties in appointing their arbitrators except what they have agreed upon in the arbitration agreement. That does not mean that a party can delay the fulfilment of his obligation in appointing the arbitrator. In the event there is no such time limit for appointing the arbitrator(s) in the arbitration agreement, custom (urf) of the community will be regarded to indicate and limit the period which parties have to nominate the arbitrators, because of the jurisprudential rule that says "custom serves as the basis for adjudication" (al-'ada muhakkama).³⁰⁰

However, parties to an arbitration agreement can waive and grant their right of appointing the arbitrators to a third party, such as an arbitral institution, or include a provision in the arbitration agreement which allows an experienced institution to intervene and make the appointment in the event of failure of the parties to do so. Arbitral institutions always have

²⁹⁸ Arbitration Act 1996, s. 16.

²⁹⁹ UNCITRAL Model Law, article 11.

³⁰⁰ Urf is a secondary source for Islamic Law. It is a source of rulings where there aren't explicit primary texts of the Qur'an and Sunnah specifying the ruling. Urf refers to largely unwritten tribal or customary codes that govern social relations, so it differs from society to another and from time to time. However, there are some conditions that have to be satisfied for urf to be regarded. It must be common and recurrent. Urf must be in practice at the time of transaction, i.e., past Urf is no basis. Custom or Urf must not violate the *nass* or clear stipulation of the Quran and the Sunnah. Custom must not contravene the terms of a valid agreement (valid according to Shari'ah).

mechanisms for appointing arbitrators under their own rules of arbitration, and many of them are ready to offer their service as appointing authority, even where the arbitration is not to be conducted under their own rules.³⁰¹

3.1.2.2 Appointment of Arbitrators by Court

The second way of appointing the arbitrator is by the national courts. It is possible that the parties of an arbitration agreement fail to agree on the procedure of appointing arbitrators after a dispute arise or one of them does not fulfil and satisfy his obligation of appointing his own arbitrator. So, in this occasion and when the disputing parties of arbitration agreement failed to reach an agreement on how to appoint arbitrators or one of them refused to nominate his own arbitrator, competent court shall upon request by one of the parties exercise its power as granted by law to settle the matter and appoint an arbitrator based on its experience. In choosing arbitrators, the courts have to pay attention to any characteristics and qualities that may be provided in the arbitration agreement. However, it is noticeable that intervention of state courts in the appointment of arbitrators is more frequent in *ad hoc* arbitration than in the administrated once because in the later, the parties grant to the institutional body the authority to design the arbitrators.³⁰²

Most arbitration laws have included provisions which allow for appointment of arbitrators by the courts. The UNCITRAL Model Law has confirmed this and granted authority to the court to appoint arbitrators upon request by a party in the event that any party of arbitration fails "to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment". It also emphasized that the court "shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are

³⁰¹ Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press.

³⁰² Newmark, C. and Hill, R., (2004), "The Appointment of Arbitrators in International Arbitration", Int. A.L.R., 7(3), pp 73-80.

likely to secure the appointment of an independent and impartial arbitrator"³⁰³ when exercising this authority.³⁰⁴

Legislators in Saudi Arabia have also followed the same line and stated in their Arbitration System 1983 in Article 10 that: "the authority originally competent to hear the dispute shall appoint the arbitrator(s) as necessary, upon request of the party interested in expediting the arbitration".³⁰⁵ The same right is granted to the court also in the Arbitration System 2012.³⁰⁶

The Arbitration Act 1996 shows more flexibility and some creative solutions regarding failure of appointment arbitrators by the parties of arbitration. It gives the parties a chance to make a new agreement upon the procedure of appoint of the arbitrators once there is no such advanced agreement. In the event of failure to reach an agreement, then the interested party can apply to the court and seek to appoint an arbitrator. In addition, the Act gives the party who has satisfied his obligation and nominated his own arbitrator the right to appoint his appointing arbitrator as a sole arbitrator in the event of the another party failing or refusing to appoint his arbitrator within the time provided either by the agreement or by the Arbitration Act which is 14 days after a request to do so, unless the parties otherwise agree. Furthermore, it provides the court with many options and powers in the event of the dispute being brought before it due to failure of appointment of arbitrators and upon request of the interested party. Those powers are to give directions as to the making of any necessary appointments and reach a settlement by the use of a list procedure and any other means, to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made, to revoke any appointments already made, or to make any necessary appointments itself.³⁰⁷

³⁰³ UNCITRAL Model Law, article 11.

³⁰⁴ Ibid.

³⁰⁵ Saudi Arbitration System 1983, article 10.

³⁰⁶ Saudi Arbitration System 2012, article 15.

³⁰⁷ Arbitration Act 1996, s. 17, 18. Also see: Lew, J., Mistelis, L. and Kroll, S., (2003), Comparative International Commercial Arbitration, Netherlands, Kluwer Law International.

3.2 Qualifications of Arbitrators

There are some qualities and conditions which should be found in the person who is appointed as arbitrator. Those qualities aim to ensure that once the arbitrator submits to the settlement of dispute, he is competent to play this important role and is independent. Although it is difficult to forecast with precision the kind of arbitrator that may be required for arbitration in the future, the parties may desire to identify the experience or qualifications required by the arbitrator. Another option is to agree upon the qualifications or experience once the dispute has arisen. The latter option seems to be wiser and reasonable, because the qualifications and knowledge that arbitrator should have depend principally on the kind of dispute and this cannot be known before the dispute arises.³⁰⁸

In order to appoint the arbitrator(s) properly, this appointment must be in accordance with the method defined by the arbitration agreement or related arbitration regulations. Generally, it can be said that there are two types of conditions and qualities that must be found in any selected arbitrator. Among them are those imposed by international and national laws which are in relation to arbitration, and the others are imposed by the parties of arbitration agreement themselves.³⁰⁹

3.2.1 Conditions and Qualities Imposed by National and International Laws

Some of the national laws require some qualities and conditions in the person to be appointed as an arbitrator, while some do not. Noticeably, the number of countries that impose restrictions on the choice of an arbitrator is becoming smaller. Any natural person may be chosen to act as an arbitrator, the only general requirement being that the person chosen must have legal capacity. Some legal systems may not even insist upon legal capacity.

³⁰⁸ Klotz, J., (2008), International Sales Agreement: An Annotating Drafting and Negotiating Guide, The Netherlands, Kluwer Law International.

³⁰⁹ Jagusch, S., (2005), "Starting Out as an Arbitrator: How to Get Appointments and What to Do When you Receive them", Arbitration, 71(4), pp 329-338.

Nevertheless, the general rule is a sensible one and should be followed in the practice of international commercial arbitration.³¹⁰

In Islamic Shari'ah, there are a number of qualities that have to be found in a person to be appointed as an arbitrator otherwise, he is not competent to settle the dispute. Generally, it can be said that an arbitrator has to satisfy all conditions and experience that are required from a judge. However, there are divergent views among the famous four Muslim jurisprudential schools about those qualities. At times they agree on some of the qualities and in other occasion, they disagree.³¹¹

The majority of the Muslim jurists request that for a person to be appointed as an arbitrator, he must possess the following qualities which are found in the judges: **Firstly**, he must be a Muslim. Judges have to be Muslims because they will apply Islamic law and a non-Muslim judge is assumed not to be qualified and not capable to fully understand the culture. In addition, Muslim judges could exhibit the fear of Allah and as a result try harder to achieve justice.³¹² Moreover, the power to give judgement is very high position and very important one, and Islam does not encourage non-Muslims to be in a position such that over Muslims. However, Islamic jurisprudence allows a non-Muslim judge to settle disputes that arise between non-Muslim parties. Allah says:

(فان جاؤك فاحكم بينهم أو أعرض عنهم وان تعرض عنهم فلن يضروك شيئا وان حكمت فاحكم بينهم بالقسط ان الله يحب المقسطين)³¹³ , (وليحكم أهل الانجيل بما أنزل الله فيه ومن لم يحكم بما أنزل الله فأولئك هم الفاسقون).³¹⁴

³¹⁰ Redfern, A. and Hunter, M., (2009), Law and Practice of International Commercial Arbitration, London, Sweet & Maxwell, 5th edn.

³¹¹ Ibn Qudamah, A., (1997), Al-Kafi, Huger, Egypt, 1st edn.

³¹² Al-Moso'ah Al-Fighiah, (1993), Dar Al-Safwah, Egypt.

³¹³ Al- Ma'idah, 5/42. Translation: "So if they (Jews) come to you, [O Muhammad], judge between them or turn away from them. And if you turn away from them - never will they harm you at all. And if you judge, judge between them with justice. Indeed, Allah loves those who act justly."

³¹⁴ Al- Ma'idah, 5/47. Translation: "And let the People of the Gospel judge by what Allah has revealed therein. And whoever does not judge by what Allah has revealed - then it is those who are the defiantly disobedient."

Secondly, he must be a male, because women are not allowed to work as judges. Muslim jurists rely on many verses of the Qur'an and hadiths in formulating their conceptions about this matter. One of the pieces of evidence is the hadith related by Abu Bakr that when the news reached Prophet Muhammad that the Persians had made the daughter of Chosroe their ruler he observed: 'a nation can never prosper which has assigned its reign to a woman'.³¹⁵ Woman cannot be a nation's leader (khalifah), and as such she should not be allowed to be a judge which is part of the function of a khalifah. Also, in Sura an-Nisa' 4:34 the Qur'an states that:

"الرجال قوامون على النساء بما فضل الله بعضهم على بعض وبما أنفقوا من أموالهم"³¹⁶

Moreover, it is claimed that women are so emotional and so tend to make their decisions depend on it.³¹⁷

Thirdly, he must have attained adulthood. The judge is required to be mature in Islamic Law and anyone who is under the age of maturity is not allowed to judge between people and settle conflicts. That is because of the sensitive nature of judgment which requires an extremely perfect attitude. Of course, this affects his function and decisions made by him. In addition, immature people are not often competent to dispose their affairs in life, so they will not be able to dispose of other people's affairs. Maturity according to Shari'ah, as we have addressed before when we talked about terms of arbitration agreement and its parties,³¹⁸ is regarded since the person becomes sexually matured. Usually people reach this stage at the age of fifteen although environmental differences may occur. **Fourthly**, he must be sane. Thereby, it is not acceptable to appoint a person who is not in sound mind to work as a judge, because he will need somebody else to look after him. Consequently, judge and arbitrator must be sane and sound in all their faculties in order to be able to exercise good judgment. Fifthly, a judge has to have rectitude (Adalah). Thus, the one who settle disputes must be fair in terms of justice. Justice is a trait in a human being that restrains him from committing sins

³¹⁵ Al-Bukhari, M., (2005), *Aljame' Alsaheeh*, Dar Aljeel, Egypt, 1st edn, vol. 3, ch 34, hadith no. 320.

³¹⁶ Sura Al-Nisa, 4/34. The translation of the meaning of this verse is "men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means". Translation of meaning of The Holy Qura'an by Yusef Ali, available at: <http://www.islam101.com/quran/yusufAli/QURAN/4.htm>.

³¹⁷ Al-Zuhayli, W., (1989), *Al-Fiqh Al-Islami wa 'Adillatuhu*, Damascus, Dar al-Fikr.

³¹⁸ See Ch 2, para 2.1.5.

and keeps him away from minor sins as well as being chivalrous and relinquishing trivial drawbacks.³¹⁹

Sixthly, in the position of an adequate knowledge of the law, both in its fundamental principles and rules, as well as an ability to exercise legal reasoning through analogy (qiyas) and make the right and just decisions in accordance with the recognized sources of the Law. He must have sound knowledge of Islamic law and its sources. **Seventhly**, freedom is another requirement. In Islam, a judge must be free. **Finally**, he must be sound in the senses especially in sight and hearing. Though some jurists (Maliki in particular) make reservation about sight, others do not, as he might be assisted by someone who acts as an aide.³²⁰

These eight qualifications which are required of a judge in Shari'ah, and therefore the arbitrator, are the classical qualifications. There are some small differences about some of them amongst Muslim scholars. The first six of them; Muslim, male, adult, mature, rectitude and knowledge of the law are so stable and have a large degree agreement between the four schools of Islamic jurisprudence. Unlike the remaining two qualifications; free, sighted and hearing, about which there are strong arguments and that disagreement reflected in practice. For example, in KSA there are a number of judges who are blind.³²¹

However, there is no doubt arbitration is less highly esteemed than litigation and less important. Because the function of arbitration and arbitrator is to decide a specific dispute between limited parties, while judiciary is a general position and has a general authority to resolve matters. In addition, an arbitrator is chosen by the disputing parties themselves, whereas judges are imposed on the disputing parties. Hence, for these reasons, I think it is logical that qualifications requested an arbitrator should be less and lighter than those requested in a judge. Ibn Timiah sees that the tenth qualifications, that are requested in the judge (some books divide the eighth qualifications into three qualifications; non-blind, non-

³¹⁹ Al-Sherbini, M., (n.d.), *Mughni Al-Muhtaj*, Dar AL-Fiker.

³²⁰ Al-Nshmi, A., (2002), "International Arbitration in Islamic Shari'ah", A paper presented in European Council for Fatwa and Research, available at: www.e-cfr.org/ar/bo/8.doc.

³²¹ Ibid.

deaf, non-dumb), are not requested in arbitrator.³²² I see there is no justification to request the arbitrator to be Muslim even if the deputing parties are non- Muslim, or to request him to be male even if the disputing parties are women and the case is not related to crimes. These two qualifications, in my opinion, in these cases are discretionary preferences and not mandatory. The Hanafi School agrees with me and allows non-Muslim to arbitrate between non-Muslim parties.³²³ Also, they (Hanafiyyah) and the majority of Malikiyyah permit a woman to act as an arbitrator in commercial and personal status disputes.³²⁴ Moreover, the level of rectitude 'Adalah' and knowledge of the law that is required in an arbitrator can be less than that requested in judge, since the former is nominated and accepted by the disputing parties themselves freely.³²⁵

As for the Saudi arbitration regulation, it requires many of the qualities to be satisfied by arbitrator to be legally appointed. Article 4 specifically of Saudi Arbitration System 1983 along with article 3 of the Executive Regulation of the same system addresses this point of study and lays down many qualities as shown below:³²⁶

1- An arbitrator must be experienced

Usually, arbitrators are selected on the ground of their experience in the field of dispute. The Saudi arbitration system states that arbitrator must be experienced, but does not require any certifications or academic qualifications. That means any person who has worked in any field relating to the subject of dispute and knows how things work in that field can be regarded as an experienced person. This matter is also that which attracts the disputing parties to have recourse to arbitration rather than normal litigation. This is because an experienced arbitrator who has a perfect background and knows all details regarding an industry or a specific field would understand the dispute and all the circumstances surrounding it than a judge who usually is away from the industry and does not know what is happening. However, Article 4

³²² Al-Bhoti, M., (1982), Kashshaf Al-Qina', Birute, Dar Al-Fikr, 6/309.

³²³ Ibn 'Abidin, M., (2003), Hdshiyah Radd at-Muhtar 'ala Durr al-Mukhtar, Riyadh, Dar Aalm Alkutub. Also see: Al-Kasane, A., (1982), Bda'ea Alsana'eea, Dar Al-Kitab Al-Arabi, Beirut, 2nd edn.

³²⁴ Abdulwaheed, M., (n.d.), Sharh Fath Al-Qadeer, Dar Ihia' Al-turath Al-Arabi, Beirut. Also see: Al-Dusoqi, M., (n.d.), Hashiat Al-Dusoqi, Dar Al-Fikr.

³²⁵ Baamir, A., (2010), Shari'a Law in Commercial and Banking Arbitration, Ashgate, UK, p 78-81.

³²⁶ Saudi Arbitration System 1983, article 4. See also: the Executive Regulation, article 3.

which states that "An arbitrator is required to be experienced and be of good conduct and reputation and full legal capacity" has obscure in its meaning about experience. It does not provide for clear standard, criteria of what sort and degree of experience that is required? Does it mean experience in arbitration or in the industry and field of dispute? Anyway, this condition has been removed in Arbitration System 2012.³²⁷

2- The arbitrator must have a record of good behaviour and conduct

An arbitrator must be known for his good behaviour and conduct, because that arbitrator acts as a judge in terms of settling disputes and thus his reputation, actions, objectivity and impartiality must not be affected by any defects. The text of Article 4 of the executive regulation explains in more details the meaning of having good behaviour and conduct by providing that an arbitrator should not have been subject to a court ruling or reprehension with respect to any immoral offences or have been dismissed from any governmental position because of disciplinary reasons.³²⁸ Both systems of arbitration in KSA have required this condition in an arbitrator.³²⁹ Anyway, all people are assumed to be of good behaviour and conduct until the opposite is evidenced. However, if an arbitrator is proved to be otherwise he is no longer an arbitrator as he does not satisfy the main requirement. Moreover, if the arbitration document were approved it would be void and would have no effect unless it were to detail the appointment of another arbitrator who could satisfy the same requirements.

3- The arbitrator must be competent

Also, in order for the appointment of an arbitrator to be valid under Saudi system, he must be competent. Competency means maturity and the attainment of the legal age as well as being of sound mind. Besides, there is must not be any judicial verdict banning him from controlling his belongings such as in the event of insolvency. Thus, anyone who is immature or suffers from any mental default or being under a type of guardianship cannot be designated arbitrators. The reason behind that is so obvious, because they do not own the right to control and dispose their possessions and thus how can they be appointed to handle and settle other

³²⁷ Shawlak, A., (2007), A Critical Overview of the Problems In Commercial Arbitration and The Enforcement of Foreign Arbitral Awards in Saudi Arabia, Canterbury, University of Kent, p 27.

³²⁸ Ibid.

³²⁹ Saudi Arbitration System 1983, article 4, the Executive Regulation, article 3, 4. Also see: Saudi Arbitration System 2012, article 14.

disputes. The same ruling applies for a mentally challenged person, the insane or inattentive one. Also this condition is set out by both systems.³³⁰

4- The arbitrator must be a Muslim but can be a national or non-national

The Executive Regulation of the Saudi Arbitration System states that an arbitrator must be a Muslim. It does not differentiate between Muslim nationals and non nationals with respect to the settlement of disputes by appointing them as arbitrators.³³¹ The Saudi 1983 system has provided that due to the fact that arbitrator acts as a judge and settles a dispute between people, in this event he has to be Muslim because non-Muslims are not allowed to be appointed as judges or arbitrators in Muslim society. Even if the dispute is between non-Muslim parties, the arbitrator has to be Muslim as long as the arbitration operation takes place on the territories of Saudi Arabia and be subjected to its laws.³³² However, there is no reference to this condition in the new system 2012. This is a noticeable difference, but it should be known that this condition was not mentioned in Arbitration System 1983 itself, but it was put in the Executive Regulations which was made to implement the system. This means that there is still a chance to request this condition in the executive regulations which has not been issued yet on the new system and should be issued according to the article 56 of Arbitration System 2012.³³³ The legislative authorities in KSA have to refer to such condition and list it on the top of qualifications and conditions that are requested in arbitrator, because this is a fundamental matter. Otherwise, it would be regarded as a large breach to Shari'ah and the Basic System of the country.

5- The arbitrator must have no interest in the dispute

Arbitration is so similar to litigation, so it requests most of the qualities and terms required for anyone to work as a judge. One of the most important qualities of a judge as well as an arbitrator is that he must have no interest in the dispute. Because his involvement in the dispute is more likely to affect his impartiality and independence. Article 12 of Saudi Arbitration System 1983 equates between judges and arbitrators regarding reasons and grounds that they may be rejected and challenged based on them by an interested party, and

³³⁰ Saudi Arbitration System 1983, article 4, the Executive Regulation, article 4. Also see: Saudi Arbitration System 2012, article 14.

³³¹ The Executive Regulation of Arbitration System 1983, article 3.

³³² Al-Bijad, M., (1999), Arbitration in the Kingdom of Saudi Arabia, Riyadh, Administrative Researches and Studies Centre.

³³³ Saudi Arbitration System 2012, article 56.

one of them is having a personal interest in the dispute. It is true that article 4 of the Executive Regulation does not define specifically the nature of the interest nor draw its bounds, but that can be interpreted generally and regarding any type of interest over the due fees as a restriction bans the arbitrator from settling the dispute whether the interest is in form finance or relationships.³³⁴ Similarly, the Saudi Arbitration System 2012 bans any person who has an interest in the dispute from working as an arbitrator.³³⁵

6- The arbitrator must have knowledge of legal rules and economic systems

Also, in the event of appointing a multiple arbitral tribunal, the Executive Regulation of 1983 Arbitration System requires for the existence of this condition in the chairman of arbitration panel. On the contrary, if the dispute is going to be settled by one arbitrator there is no need for this condition based on the provision which does not address this case. The fact that this case is not addressed, means that it is not a prerequisite for the condition to be available in an arbitrator in case the dispute is to be settled by one arbitrator.³³⁶ However, this qualification which was requested by the Saudi Arbitration System 1983 was not linked with clear criteria to the satisfied level of the knowledge of legal rules and economic systems.³³⁷ By comparison, the new 2012 System clarifies this point much better and stipulates that the arbitrator has to have in minimum a bachelor degree in Islamic or legal studies. In the event that the arbitral tribunal consists of more than one, such condition has to be found in the chairman only. The new System does not refer to knowledge of economic systems at all.³³⁸

7- Profession of arbitrator

Parties to an arbitration choose arbitrators generally based upon their confidence in them and their experience in the subject of a particular dispute. However, with regard to the civil servant he is obliged to get the approval of the body where he works as this is a compulsory requirement for the validity of his position as an arbitrator. As a result, interested parties such as disputing parties and others may challenge the appointment of such an arbitrator or his resolution based on this issue. This is why the competent court has to, prior to the approval of

³³⁴ Shawlak, A., (2007), A Critical Overview of the Problems In Commercial Arbitration and The Enforcement of Foreign Arbitral Awards in Saudi Arabia, Canterbury, University of Kent, p 32.

³³⁵ Saudi Arbitration System 2012, article 16.

³³⁶ Al-Bijad, M., (1999), Arbitration in the Kingdom of Saudi Arabia, Riyadh, Administrative Researches and Studies Centre.

³³⁷ Saudi Arbitration System 1983, article 4, the Executive Regulation, article 3, 4.

³³⁸ Saudi Arbitration System 2012, article 14.

the arbitration document, make a decision whether the arbitrator designated is a civil servant or not. If he is a civil servant the competent court must make sure that he has the approval of the government body where he works as per a formal letter issued by this body permitting the employee to practice the profession of arbitration. This condition is not found in the new Arbitration System, but again it should be known that this condition was not mentioned in Arbitration System 1983 itself, but it was listed in the Executive Regulations which was made with regard to the system. This means that there is still a chance to request this condition in the Executive Regulations which has not been issued yet.³³⁹

With regard to international and English Law, they on the contrary do not impose any qualifications or terms on arbitrators. Therefore, anyone who enjoys, of course, general capacity can be chosen by the parties or courts or whoever is entitled to appoint an arbitrator to carry out as an arbitrator. There is no restriction at all on his religion, specialization, gender or nationality and so on. Article 11 of the UNCITRAL Model Law provides that "no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties".³⁴⁰

3.2.2 Qualities Imposed by the Parties of Arbitration Agreement

Parties to an arbitration agreement are free to impose and add additional qualifications they think are important to be found in the arbitrator who will resolve their dispute. They can either indicate qualities and terms of the arbitrator in an arbitral clause before a dispute arises between them or after it had arisen. This right is granted and reserved in all studied laws; Islamic law, international law and English law. It is said that it is preferable that they leave the decision of qualifications that should be possessed by an arbitrator to the time when the dispute has already arisen, because it is only that time they can know exactly the appropriate requirements and needs for the potential arbitrator. However, some of the parties may tend to

³³⁹ Saudi Arbitration System 2012.

³⁴⁰ UNCITRAL Model Law on International Commercial Arbitration, article 11. Also see: Arbitration Act 1996.

do that in the beginning of the contract because of the fear of not being able to reach consent on the required qualities later if any dispute has arisen due to many reasons.³⁴¹

Generally, parties usually tend to nominate an arbitrator who is related to their industry, because that kind of arbitrator will be better in his understanding of the interior environment of the industry and all factors and principles which govern it and relations between its members as well as tiny details that surround it. Consequently, he will be more likely to settle the dispute faster and acceptably than others who are not involved in the industry.³⁴²

Recently, an important question has arisen in English jurisdiction whether requiring an arbitrator to be a member of a specific religious group violates English anti-discrimination laws or public policy. Is the arbitrator an employee or not and therefore is it governed by the Human Rights Act 1998 and the Employment Equality Regulations 2003 (SI 2003/1660)? This question has arisen in *Jivraj v Hashwani*³⁴³ which was decided by the Supreme Court in the UK.³⁴⁴

The case concerned a joint venture agreement signed in 1981 between Jivraj and Hashwani. The agreement included an arbitration clause which states that, in the event of a dispute between them which they were unable to resolve, that dispute should be resolved by arbitration before three arbitrators, each of whom should be a respected member of the Ismaili community, of which they were both members. By late 1988 the partners had agreed to part company. In 2008, Hashwani, wrote to Jivraj asserting a claim for US\$1,412,494, together with interest. The letter gave notice that Hashwani had appointed Sir Anthony Colman as an arbitrator under article 8 of the JVA and that, if Jivraj failed to appoint an arbitrator within seven days, steps would be taken to appoint Sir Anthony as sole arbitrator. The letter added that Mr Hashwani did not regard himself as bound by the provision that the

³⁴¹ Jagusch, S., (2005), "Starting Out as an Arbitrator: How to Get Appointments and What to Do When you Receive them", *Arbitration*, 71(4), pp 329-338.

³⁴² Ibid.

³⁴³ *Jivraj v Hashwani* [2011] UKSC 40.

³⁴⁴ Ahmed, F. and Luk, S., (2011), "Religious Arbitration: A Study of Legal Safeguards", *Arbitration*, 77(3), 290-303. Also see: Rogers, J. and Jahn, I., (2011), "Commentary on the Case of *Jivraj v Hashwani*", *International Arbitration Law Review*, 14(3), N11-N13.

arbitrators should be members of the Ismaili community because such a requirement "would now amount to religious discrimination which would violate the Human Rights Act 1998 and therefore must be regarded as void". In contrast, Jivraj started proceedings in the Commercial Court seeking a declaration that the appointment of Sir Anthony was invalid because he was not a member of the Ismaili community. Hashwani subsequently issued an arbitration claim form seeking an order that Sir Anthony be appointed sole arbitrator pursuant to section 18(2) of the English Arbitration Act 1996.³⁴⁵

The judge in the High Court found in favour of Jivraj on the grounds that the term did not constitute unlawful discrimination on any of those bases and, specifically, that arbitrators were not "employed" within the meaning of the Regulations. He also added that if, even so, appointment of arbitrators fell within the scope of the Regulations, it was demonstrated that one of the more significant characteristics of the Ismaili sect was an enthusiasm for dispute resolution within the Ismaili community, that this was an "ethos based on religion" within the meaning of the Regulations and that the requirement for the arbitrators to be members of the Ismaili community constituted a genuine occupational requirement which it was an proportionate to apply within regulation 7(3).³⁴⁶

Before the Court of Appeal, the Court unanimously reached a different conclusion from the judge in the first instance. It held that the arbitrator satisfies the definition of "employment" in regulation 2(3) and consequently the restriction of eligibility for appointment as an arbitrator to members of the Ismaili community constituted unlawful discrimination on religious grounds. The Court of Appeal further held that being a member of the Ismaili community was not "a genuine occupational requirement for the job" within the meaning of the exception in regulation 7(3).³⁴⁷

³⁴⁵ Ahmed, F. and Luk, S., (2011), "Religious Arbitration: A Study of Legal Safeguards", *Arbitration*, 77(3), pp 290-303.

³⁴⁶ Altaras, D., (2009), "Selection Criteria: Jivari v Hashwani", *Arbitration*, 75(4), pp 574-577. Also see: Lambert, R., Panayides, A. and Sheppard, A., (2010), "Jivraj v Hashwani: Discriminatory Arbitration Agreements?", *International Arbitration Law Review*, 13(4), N29-31.

³⁴⁷ Smith, R., Welsh, A. and Aggarwal, M., (2011), "Jivraj v Hashwani - The UK Supreme Court Overturns a Controversial Court of Appeal Ruling on Arbitration Clauses", *International Arbitration Law Review*, 14(5),

However, the Supreme Court in contrast refused the decision made by the Court of Appeal and agreed with the conclusion reached by the judge in the first instance court. It emphasized that arbitrators are not employees and therefore fall outside of UK equality laws and the Regulations are not applicable to the selection, engagement or appointment of arbitrators. It also held that the requirement of an Ismaili arbitrator can be regarded as a genuine occupational requirement on the basis that it was not only genuine but both legitimate and justified. As a result, it decided that no part of clause 8 of the JVA is invalid by reason of the Regulations.³⁴⁸

Lord Clarke stated that:

“I do not agree with Mr Brindle that the requirement that arbitrators be Ismailis cannot be objectively justified. His submission that an English law dispute in London under English curial law does not require an Ismaili arbitrator takes a very narrow view of the function of arbitration proceedings. This characterisation reduces arbitration to no more than the application of a given national law to a dispute”.³⁴⁹

Anyway, the findings which can be derived from this case and the decision of the Supreme Court are very important to the arbitration position in England. The Supreme Court has therefore re-emphasized the freedom, autonomy and flexibility granted to parties who select to arbitrate in England. Arbitration is not a rigid, private version of state court litigation where knowledge of law is the only related requisite for an arbitrator, but can and should be a flexible procedure tailored to the needs and preferences of individual parties.³⁵⁰ There is no doubt that the decision is in favour of the internationally accepted conception of arbitration and contributes in strengthening the position of England as a favourable place and centre of arbitration. Appointment of Muslim arbitrators is acceptable and respect choice under English

N35-39. Also see: Rogers, J. and Jahn, I., (2011), "Commentary on the Case of *Jivraj v Hashwani*", International Arbitration Law Review, 14(3), N11-N13.

³⁴⁸ Rabinowitz, Laurence., (2011), "Arbitration and Equality: *Jivraj v Hashwani*", Business Law International, vol. 12. 1, pp 119-126.

³⁴⁹ Abdelhadi, H., (2011), "Islamic Law in Secular Courts (Again): Teachable Moments from the Journey", available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1835765 , accessed on 5/12/2011.

³⁵⁰ Capper, P., Cowan, P. and Yardley, J., (2011), "*Jivraj v. Hashwani* – England's Highest Court Supports Autonomy and Flexibility in Arbitration", available at: <http://www.whitecase.com/alerts-07272011/#.UdrZkflSiGU>, accessed on 8/7/2013.

system and does not conflict with employment and equality regulations as well as the public policy. It also clarifies that, in English arbitration, parties wishing to appoint arbitrators having specific religious beliefs or affiliations must demonstrate a *bona fide* need for the requirement.³⁵¹

Some critics have highlighted the decision of the Supreme Court and raised concerns that may result from it. They have suggested some changes and additions to be made on Arbitration Act 1996 in order to protect values and principles of English Law especially equality. One of them was Baroness Cox who proposed various amendments to the Arbitration Act. The most principal amendments proposed in her Bill are that the Act must insist on preventing the arbitrator from doing anything that constitutes discrimination, harassment or victimization on the grounds of sex. In addition, any term or part whether in arbitration agreement itself or the rules which the parties have agreed to be applied on their dispute shall be unenforceable in so far as they provide for treatment of discrimination prohibited on grounds of sex e.g. the evidence of a man is worth more than the evidence of a woman, the male children take more than female children in any division of heritage. Furthermore, she suggests creating a new criminal offence on arbitrating on a matter that is not capable to be arbitrated such as family law and criminal law disputes.³⁵² Her Bill was given second reading in the House of Lords in October, 19, 2012. After long debate between the Lords, Lord Gardiner of Kimble, speaking for the government stated that: "The Government are not convinced that introducing the measures proposed in this Bill...". This means that the government's conception remains that there is no need for a clarification or amendment of the Arbitration Act.³⁵³ However, the Bill was left with the Committee of the Whole House.³⁵⁴

³⁵¹ Dundas, H., (2011), "The Return of Normality: The UK Supreme Court Decides Jivraj", *Arbitration*, 77(4), pp 467-473. Also see: Abdelhadi, H., (2011), "Islamic Law in Secular Courts (Again): Teachable Moments from the Journey", available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1835765 , accessed on 5/12/2011.

³⁵² "UK: The Overshadowed Issues Arising from Jivraj v. Hashwani", (2012), available at: <http://www.mayerbrown.com/uk--the-overshadowed-issues-arising-from-jivraj-v-hashwani-11-30-2012/>, accessed on 8/7/2013.

³⁵³ The Spectator, "The Government Kicks the Sharia Debate into the Long Grass", 22 October 2012, available at: <http://blogs.spectator.co.uk/douglas-murray/2012/10/the-government-kicks-the-sharia-debate-into-the-long-grass/>, accessed on 23/10/2013.

³⁵⁴ The Parliament, available at: <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121019-0001.htm>, accessed on 23/10/2013.

However, there are, on the other hand, some scholars who do not think there is need of a new Arbitration Act amendment and they argue that it already contains adequate safeguards to protect against the kinds of abuse that were concerned by the Bill of Baroness Cox. The Act states on the objection of arbitration and determines that it is to obtain the fair resolution of disputes by an impartial tribunal. Besides, it emphasizes on the voluntary for both parties of arbitration to enter into an arbitration agreement and they should be free to agree how their controversies are to be resolved. They also argue that the Act includes several safeguards which are in the hands of the aggrieved party or in some cases the court itself to use when the arbitration go wrong or principles of justice are in threat, such as granting the aggrieved party the right to apply to the court for the removal of a biased arbitrator or to challenge an award on the ground of serious irregularity and one of these grounds, contrary to public policy, is very huge umbrella can address all breaks of law and dispel all fears and concerns about the possibility of abuses. Moreover, the jurisdiction of these religious bodies, when functioning as arbitral tribunals, is limited to matters and disputes that are capable of being determined by arbitration. Only civil disputes, such as claims in tort, intellectual property disputes, contractual disputes and certain statutory claims, are arbitrable. Criminal controversies and family law cannot be subjected legally to arbitration and thereby to these religious bodies.³⁵⁵

In my opinion, I think that adopting a version of Baroness Cox's Bill would lead to making arbitration a photocopy of the local and national litigation and this undermines the aim and nature of arbitration. It also reduces sharply the importance of arbitration as an alternative means to settle controversies which arise between individuals or corporations and therefore decreases recourse to it. Moreover, the Arbitration Act 1996 in its current form contains several possibilities that enable the English Courts to intervene through and applying their large principles whether in the time of arbitration procedures or after rendering the final award. Furthermore, it appears from the examples mentioned by the Bill that Cox's concerns focus on Shari'ah Law, and in this regard I can say honestly and definitely that Islam does not have any discrimination against woman or race. Quite the opposite, Islam has liberalized women and granted them many of rights and advantages which were never exist in other

³⁵⁵ Cranmer, F., (2012), "Sharia Law, the Arbitration Act 1996 and the Arbitration and Mediation Services (Equality) Bill", available at: <http://www.lawandreligionuk.com/2012/10/24/sharia-law-the-arbitration-act-1996-and-the-arbitration-and-mediation-services-equality-bill/>, accessed on 15/8/2013.

societies that time, and some of these rights still up to now found just in Islam such as dowry 'mahr', obligating male family's members to look after and spend on female members in the event of being them poor and so on.

As for specific terms that she included in her Bill as examples of discrimination in the Islamic system, the answer simply is that this claim is not true. Man and woman have different natures and attitudes and thus it is logical to have slight different job in this life. Consequently, they should have slight different in the terms that govern them due to the difference in their nature and jobs. Allah determines this fact and emphasizes on equality of both genders in the Holy Qura'an:

(ولهن مثل الذي عليهن بالمعروف وللرجال عليهن درجة)³⁵⁶

Finally, she ignored a very significant factor and forgotten the fact that arbitration is not mandatory agreement and it rather requests the consent of all its parties to enter into it in order to stand and be effective. Accordingly, I see there is no justification for somebody to raise concerns about what he or she sees unfair in some dispute resolution regimes, since the recourse to those regimes is subject to free choice.

3.3 Powers and Duties of an Arbitrator

An arbitrator has certain duties towards parties of the dispute from whom he derive his jurisdiction. These duties have to be satisfied and fulfilled by the arbitrator or the arbitral tribunal in order to render a valid and recognisable award in due course. At the same time, the arbitrator has powers and authorities which are granted to him by the parties of arbitration and international or national rules that regulate arbitration procedures. The aim of these powers given to the arbitrator is to enable him to control the arbitral operation as well as

³⁵⁶ Sura the Cow, 2/228, "and women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them", translation by Yusuf Ali, available at: <http://www.islam101.com/quran/yusufAli/QURAN/2.htm>.

reach all documents and evidence which are necessary to know the fact and achieve justice.³⁵⁷

This section will address the duties of arbitrator in Islamic shari'ah; international law; and English law and then will discuss the powers of arbitrator under each of these legal systems.

3.3.1 Duties of Arbitrator

Arbitration is an important role. Its purpose is to settle disputes that arise between individuals and companies in a friendly but fairly environment. It is so similar to litigation and takes the same importance of it. As a result, there are several duties and responsibilities on the person or institution who is appointed to exercise this very much position. Some of these duties are usually imposed by parties of the arbitration agreement themselves while others are provided for by the arbitration regulations.³⁵⁸

3.3.1.1 Duties Imposed by Parties in the Arbitration Agreement

Parties to the arbitration agreement can establish or add a duty on the arbitrator which they believe to be necessary and useful for them. They can, of course, exercise this right either prior to appointing the arbitrator by stating it in the arbitration agreement or exercise the right after appointing the arbitrator. But in the later case they are required to obtain the consent of the arbitrator.³⁵⁹

³⁵⁷ Calvo, M., (1999), "The Appointments, Duties and Rights of the ICC Arbitrators (Revisited under the New ICC Rules)", I.B.L.J., 3, pp 361-376.

³⁵⁸ Smit, H., (1986-1987), "The Future Of International Commercial Arbitration: A Single Transnational Institution?", Columbia Journal of Transnational Law, vol. 25, pp 9-34. Also see: Cordero Moss, M., (2010), "Revision of the UNCITRAL Arbitration Rules: Further Steps", International Arbitration Law Review, 13(3), pp 96-99.

³⁵⁹ Ibid.

3.3.1.2 Duties Imposed by Applicable Rules or Law

In addition to duties imposed by the parties of arbitration agreement, the applicable international, national and institutional rules or the arbitral laws of the country where the arbitration takes place also impose specific duties on the arbitral tribunal.

One of the most essential duties of arbitrator or arbitral tribunal is to remain impartial and independent. The impartiality and independence of an arbitrator are essential features that must be enjoyed by any arbitrator in arbitration as its function is so similar to that of the judge. The arbitrator must avoid communicating with one party without the knowledge of the other. Impartiality requires that an arbitrator neither favours one party nor be predisposed as to the question in dispute. Independence on the other hand, requires that there should be no such actual or past dependant relationship between the parties and the arbitrators which may affect, or appear to affect the arbitrators' freedom of judgment. This duty is found in the English Arbitration Act 1996, specifically in section 33 which states that: "The tribunal shall act fairly and impartially as between the parties".³⁶⁰

Also, the arbitrator has an obligation to disclose all relevant facts which are likely to raise question about his impartiality and independence. This duty must be fulfilled at the earliest opportunity, usually at the time of negotiation between the arbitrator and the disputing parties before appointing him formally and continue after the appointment and during the arbitral proceedings until the time of rendering the award. Once an arbitrator has satisfied his obligation of disclosure, a party cannot challenge the award on the ground of the fact disclosed as such party would be held to have waived his rights and submitted to the jurisdiction of the Arbitrator.³⁶¹

An arbitrator also has a duty to effectively resolve the dispute between the parties by rendering a valid award. The main duty and job of arbitrator is to settle the dispute which

³⁶⁰ Arbitration Act 1996, s. 33.

³⁶¹ Fagbohunlu, B., "The Duties of Arbitrators", available at: http://ciarbnigeria.org/Page_Builder_images/pages/The_Duties_of_Arbitrators%5B1%5D.pdf, accessed on 27/6/2011.

made the parties to appoint him. This purpose cannot be achieved without a valid award rendered by the arbitrator. Therefore, he should be sure first of all of his jurisdiction to resolve the dispute which depends on many factors such as the validity of an arbitration agreement, the dispute is capable of settlement by arbitration and so on. Moreover, he must apply all terms and conditions relating to the arbitral operation either included in the arbitration agreement itself or provided for in the national and international regulations which are relevant to the arbitration, otherwise, the court may set aside such an award.³⁶²

The arbitrator has a duty to be physically and mentally capable of conducting the proceedings as well as to adopt procedures suitable to the circumstances of the particular case. Arbitration Act 1996 has also stated in section 33 that one of general duties of the tribunal is to "adopt procedures suitable to the circumstances of the particular case".³⁶³

The arbitrator also has to treat the parties equally and fairly and make sure that each party is given full opportunity and reasonable time of presenting his case and respond to the case of the other party. Moreover, he must consider all material issues in the case before reaching a decision and rendering an award. At the same time, the arbitrator has to avoid undue delay or expense. Arbitration Act 1996 refers to this duty in section 33 by emphasizing that the arbitrator has to avoid unnecessary delay or expense, so as to provide a fair means for the resolution of the matters to be determined. The tribunal is also expected to keep the arbitration confidential and consider relevant circumstances when determining the language to be used at the arbitral proceedings as well as to take into account relevant consideration when fixing the arbitrators fees.³⁶⁴

Furthermore, the arbitrator has to communicate to the parties any expert report or evidentiary document upon which the arbitral tribunal may rely in making its decision and give them reasonable opportunity to comment on them. This duty is laid down in the Arbitration Act

³⁶² Ibid.

³⁶³ Arbitration Act 1996, s. 33.

³⁶⁴ Redfern, A. and Hunter, M., (2009), Law and Practice of International Commercial Arbitration, London, Sweet & Maxwell, 5th edn. Also see: Lew, J., Mistelis, L. and Kroll, S., (2003), Comparative International Commercial Arbitration, Netherlands, Kluwer Law International.

1996 which provides that the tribunal shall give each party a reasonable opportunity of putting his case and dealing with that of his opponent.³⁶⁵ Also, in section 37 which indicates the powers of arbitrator in appointing an expert, legal advisor or assessor provides that "the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person".³⁶⁶ Similarly, the Saudi Arbitration System requires the tribunal to comply with the principles of judgment and ensures that all parties from know the documents and evidence that may affect their decision. It also demands that enough time be given for reply to be filed and for parties to present their defence and proofs either orally or in writing.³⁶⁷

As for Islamic Law, it can be said that there is no difference between it and other legal systems on the above duties. An arbitrator in Islam acts as the judge, so, he has the same duties which the judge has. He shall act fairly and impartiality and give parties of the dispute enough time to present their cases and hear them. Also, he is required to stay away from any action or position that may raise doubts regarding his fairness and independence.³⁶⁸

3.3.2 Powers of Arbitrator

An arbitrator or arbitral tribunal enjoy several powers when they exercise the arbitral operation. The aim of these powers is to enable the arbitrator to efficiently control the arbitral process. Without such powers an arbitrator will be impelled to have recourse to court in every single issue and that will cause delay for all parties thereby making recourse to arbitration useless. The power of the arbitral tribunal is enjoyed out of its competence to rule on its jurisdiction (*kompetenz-kompetenz* principle). In other words, it means that the arbitral tribunal is allowed to make a decision on whether it has jurisdiction over an issue that needs to be settled and whether an arbitration agreement is valid. Article 16 of the UNCITRAL Model Law states that: "The arbitral tribunal may rule on its own jurisdiction, including any

³⁶⁵ Arbitration Act 1996, s. 33.

³⁶⁶ Arbitration Act 1996, s. 37.

³⁶⁷ The Executive Regulation of Saudi Arbitration System 1983, article 36.

³⁶⁸ Al-Nawawi, Y., (n.d), *al-Majmu' Sharh al-Muhadhdhab*, Beirut, Dar Al-Fikr.

objections with respect to the existence or validity of the arbitration agreement".³⁶⁹ Also, it has a power to conduct arbitral proceedings and render an award.³⁷⁰

In addition, the arbitral tribunal can order interim measures while engaged in consideration of the dispute. Interim measures can be ordered on the basis of maintaining or restoring the status quo pending determination of the dispute; taking action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself; providing a means of preserving assets out of which a subsequent award may be satisfied; or preserving evidence that may be relevant and material to the resolution of the dispute.³⁷¹ Also, they have a power to appoint experts or ask for assistance from legal advisers or assessors who they think are essential to determine technical matters or specific issues that need a professional specialist and may allow any such expert, legal adviser or assessor to attend the proceedings.³⁷²

Moreover, there are some general powers exercisable by the tribunal. The tribunal may order a claimant to provide security for the costs of the arbitration. It can give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceeding. This order could be for the purposes of inspection, preservation, custody or detention of the property by the tribunal, an expert or a party, or ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property. Besides, the tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation as well as give directions to a party for the preservation for the purposes of the proceedings of any evidence

³⁶⁹ UNCITRAL Model Law, article 16.

³⁷⁰ Runeland, P. and Blanke, G., (2007), "On Provisional Measures in English Arbitrations: A Brief Overview", Arbitration, 73(2), pp 189-198.

³⁷¹ UNCITRAL Model Law, article 17.

³⁷² Arbitration Act 1996, s. 37. Also see: Debattista, C., (2010), "Arbitrators' Powers to Order Interim Measures Including Anti-Suit Injunctions", Arbitration, 76(3), pp 421-426.

in his custody or control.³⁷³ Furthermore, there are more and other subsidiary powers that are granted to the arbitrator in order to exercise his role efficiently and apply justice.³⁷⁴

3.4 Challenge and Replacement of Arbitrators

People who are appointed as arbitrators have to satisfy the conditions and duties required either by applicable laws or the parties that appoint them. Also, they should observe those conditions during the course of the arbitration until the time of issuing an award. If an arbitrator breaks those qualifications and fails to comply with them, then he can be challenged by an interested party and replaced with someone else. In general, the parties to arbitration may challenge an arbitrator only where they have reasonable doubts as to his impartiality or independence. The UNCITRAL Rules provide that:

“Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence. A party may challenge the arbitrator appointed by him only if he becomes aware after the appointment has been made”.³⁷⁵

The Model Law contains similar provisions, as do most of the rules of the international constitutions as well as most of developed national arbitration laws. The Model Law adds to the grounds of challenge which the party may rely on if the arbitrator does not possess qualifications as agreed to by the parties.³⁷⁶ As for the English jurisdiction, the Arbitration Act 1996 seems to be more comprehensive. A party to an arbitration agreement can challenge an arbitrator on several grounds:

³⁷³ Arbitration Act 1996, s. 38. Also see: Debattista, Ibid.

³⁷⁴ Runeland, P. and Blanke, G., (2007), "On Provisional Measures in English Arbitrations: A Brief Overview", *Arbitration*, 73(2), pp 189-198. Also see: Tsang, A., (2011), "Transnational Rules on Interim Measures in International Courts and Arbitrations", *International Arbitration Law Review*, 14(2), pp 35-42. Also see: Fagbohunlu, B., "The Duties of Arbitrators", available at: http://ciarbnigeria.org/Page_Builder_images/pages/The_Duties_of_Arbitrators%5B1%5D.pdf.

³⁷⁵ The UNCITRAL Rules, article 12.

³⁷⁶ The UNCITRAL Model Law on International Commercial Arbitration, article 12 (2).

- "(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;
- (b) that he does not possess the qualifications required by the arbitration agreement;
- (c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;
- (d) that he has refused or failed—
- (i) properly to conduct the proceedings, or
- (ii) to use all reasonable dispatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant." ³⁷⁷

Anyway, the potential arbitrator should not accept the mission if there is any reason or factor that may likely push a party to feel that he is not capable of approaching the issues impartially or not independent in order to avoid an objection from that party after the appointment of the arbitrator or during arbitration procedures, because the position will be more difficult then. The arbitrator should also resign if both parties request him to or the objection made by a party regarding is impartiality or independence is or appeared to be well-founded, whether or not the parties agree. But in the event the objection seems to be without value the arbitrator should not resign, but should rather allow the matter to be dealt with by the relevant challenge procedure. This course will help to discourage unmeritorious disruptive tactics although it may create delay. However, if a party appoints a perfectly acceptable arbitrator and desires that the arbitrator remains, although an objection has been made, that arbitrator should, in principle, stay, unless the competent authority, whether it is a national court or another body, issues a ruling to the opposite. ³⁷⁸

³⁷⁷ Arbitration Act 1996, s. 24 (1).

³⁷⁸ Lowenfeld, A., (1996), International Litigation and the Quest for Reasonableness, New York, Clarendon Press Oxford. Also see: Greenberg, S., Kee, C. And Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press.

In Islamic Shari'ah, the arbitrator can be challenged by both of the parties to the arbitration or by one of them when a doubt has arisen about his independence, impartiality or any qualifications that have been requested by the parties in the beginning of arbitration. He is like the judge who can also be challenged in the event he possesses any negative factor which may affect justice such as a relative, a previous relationship or enemy between the judge or the arbitrator and one of the parties, or there is a vested interest in the case before them. In accordance with Islamic regulation, Saudi Arbitration System 1983 states that a request to disqualify the arbitrator may be made for the same reasons for which a judge may be disqualified.³⁷⁹ Also, the Saudi Arbitration System 2012 permits challenging the arbitrator in a case of circumstances appearing to raise doubts about his impartiality and independence or where he has failed to satisfy any condition requested by the parties or the law.³⁸⁰

3.4.1 Procedure for Challenge

The procedures for challenge of an arbitrator could be found either in the law of the country where the arbitration takes place, or in any rules of arbitration that have been agreed upon by the parties. Where a challenge reaches the court, the procedure and steps to be applied and followed are provided for in the applicable law. But in the event where the rules of an arbitral institution apply, the procedure is usually either that a complaint should be made in the first instance to the arbitral tribunal itself, with recourse to the courts, or that the complaint is submitted straight to the arbitral institution.³⁸¹

The majority of national laws provide for a challenge to an arbitrator during the course of the arbitration as well as on an application to set aside the award. Delays are often minimized by provisions that limit challenges to objections founded on information that has recently been

³⁷⁹ Saudi Arbitration System 1983, article 12. Also see: Al-Moso'ah Al-Fighiah, (1993), Dar Al-Safwah, Egypt.

³⁸⁰ Saudi Arbitration System 2012, article 16 (3).

³⁸¹ Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press.

known to the challenging party, prohibit any appeal from the initial ruling on the challenge, and allow the arbitration to proceed whereas the challenge is pending.³⁸²

Under the UNCITRAL rules, any challenge must be notified by the party who intends to challenge an arbitrator to the other party and to the members of the arbitral tribunal, including the challenged arbitrator. The notice shall be sent within 15 days after the challenging party has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence became known to that party. The notice of challenge shall include the reasons for the challenge and shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. All parties may agree to the challenge the arbitrator or the arbitrator may withdraw from his office, and that does not mean acceptance of the validity of the grounds for the challenge. In the event of disagreement between the parties on the challenge or the arbitrator does not withdraw from his office, it is required that within 15 days from the date of the notice of challenge, the challenging party may elect to pursue its challenge. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.³⁸³

The Model Law of arbitration is similar to the UNCITRAL Rules with regard to challenge procedures even in the time limit that the notice of challenge or recourse to the court shall take. The Model Law states expressly on giving the parties freedom to agree on a procedure for challenging an arbitrator and also the statement or the notice, which shall be sent by the challenging party to all parties including the arbitral tribunal, being written. Moreover, it provides that the arbitral tribunal shall decide on the challenge unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge.³⁸⁴

³⁸² Besson, S. and Poudret, J., (2007), Comparative Law of International Arbitration, England, Sweet & Maxwell. Also see: Calvo, M., (1999), "The Appointments, Duties and Rights of the ICC Arbitrators (Revisited under the New ICC Rules)", I.B.L.J., 3, pp 361-376.

³⁸³ The UNCITRAL Rules, article 13.

³⁸⁴ The UNCITRAL Model Law on International Commercial Arbitration, article 13.

In the English jurisdiction, procedures to challenge an arbitrator require that the party to arbitral proceedings who wants to make a challenge (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) has to apply to the court to remove an arbitrator. The challenged arbitrator can appear and be heard by the court before it reveals its decision. The court shall not exercise its power of removal if there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, unless satisfied that the applicant has first exhausted any available recourse to that institution or person. However, the application to the competent court does not stop the arbitral tribunal from continuing the arbitral proceedings and make an award while an application to the court is pending.³⁸⁵

As for Islamic jurisdiction, there is no specified procedure to challenge an arbitrator, but it can be said, depending on the general rules of judgment in Islam, that the interested party shall have recourse to the court as soon as he knew anything about the challenged arbitrator which is likely to affect his award negatively and make him arrive at a biased decision. The judge shall consider the challenge carefully and make the right decision after looking at the general conditions of arbitrator in Islam aside from any more qualification that have been requested and mentioned by the parties in their private agreement of arbitration. Although, there is no time-limit for the challenge to be applied to the court, it is to be submitted once the reason has arisen to avoid any suspicion by the court about the real cause of his challenge otherwise the delay may be understood as an acceptance from the party by the arbitrator.³⁸⁶

In contrast, the Saudi Arbitration System 1983 subjects the request for disqualification of an arbitrator to a time-limit. It shall be submitted to the competent authority to hear the argument within five days from the day a party is notified of the appointment of the arbitrator or from the day the reasons for disqualification appears or occurs. It also states that a ruling on the disqualification request shall be made at a hearing specially convened for this purpose to which the parties and the arbitrator whose disqualification is requested are summoned.³⁸⁷

³⁸⁵ Arbitration Act 1996, S. 24. Also see: Cato, M., (1997), Arbitration Practice and Procedure: Interlocutory and Hearing Problems, London, LLP, 2nd edn.

³⁸⁶ Al-Moso'ah Al-Fighiah, (1993), Dar Al-Safwah, Egypt.

³⁸⁷ Saudi Arbitration System 1983, article 12.

3.4.2 Replacement of Arbitrators

When an arbitrator has been challenged and the challenge was successful, whether by agreement of all parties to the challenge or the withdrawal of the arbitrator by himself or by the competent authority, he shall be replaced with another person that satisfies the qualifications and conditions that have already been agreed upon by all parties of arbitration. In general, the new appointment is made in the same way as the original appointment.³⁸⁸

However, if the arbitration is conducted under international or institutional rules or under a properly drawn up submission agreement, the procedure for replacing an arbitrator will be specified. Problems are likely to arise in replacing an arbitrator only in ad hoc arbitration because there will be no rules govern that operation. Therefore, in this case the parties themselves should attempt first to reach an agreement as to the method of replacing the arbitrator otherwise, they can make a request for the appointment of a replaced arbitrator to the court at the seat of arbitration.³⁸⁹

The UNCITRAL Rules provide that "a substitute arbitrator shall be appointed or chosen pursuant to the procedure that was applicable to the appointment or choice of the arbitrator being replaced".³⁹⁰ Similar provision is found in the Model Law.³⁹¹ When an arbitrator is replaced, the proceedings shall recommence from the step where the replacement arbitrator ceased to perform his functions, unless the arbitral tribunal decides otherwise.³⁹²

The Arbitration 1996 Act grants the parties to arbitration the freedom and right to select the suitable way for them to fill the vacancy to determine what extent the previous proceedings should stand. If there is no previous agreement or the parties are not able to reach an agreement on how a new arbitrator should be appointed, then the procedure for appointment

³⁸⁸ Tweeddale, K. and Tweeddale, A., (1999), A Practical Approach to Arbitration Law, Britain, Blackstone Press Limited.

³⁸⁹ Ibid.

³⁹⁰ The UNCITRAL Rules, article 14 (1).

³⁹¹ The UNCITRAL Model Law on International Commercial Arbitration, article 15.

³⁹² The UNCITRAL Rules, article 15.

of arbitrators in the beginning apply in relation to the filling of the vacancy as in relation to an original appointment. In addition, the English Arbitration Act differs from the UNCITRAL Rules in giving the reconstituted tribunal the authority to determine whether and if so to what extent the previous proceedings should stand.³⁹³

In the Saudi jurisdiction, where an arbitrator is appointed in place of a dismissed or a withdrawn arbitrator, the date fixed for the award shall be extended by thirty days.³⁹⁴ The new system of 2012 does not state on extending the date of the award in the event of replacing an arbitrator. However, article 19 of the system emphasises on following the same procedures, which have been followed in appointing the replaced arbitrator, in appointing the new one.³⁹⁵

³⁹³ Arbitration Act 1996, s. 27. Also see: Cato, M., (1997), Arbitration Practice and Procedure: Interlocutory and Hearing Problems, London, LLP, 2nd edn. Also see: Besson, S. and Poudret, J., (2007), Comparative Law of International Arbitration, England, Sweet & Maxwell.

³⁹⁴ Saudi Arbitration System 1983, article 14. Also see: Baamir, A., (2010), Shari'a Law in Commercial and Banking Arbitration, Ashgate, UK.

³⁹⁵ Saudi Arbitration System 2012, article 19.

Chapter Four

Arbitration Procedures

4.1 Commencement of Arbitration

The commencement of arbitration proceedings occupies a significant stage in every arbitration; this is because it evidences the existence of a dispute between the parties and the choice of one of them to refer it to arbitration in accordance with their agreement. Sometimes, one party may intend to begin the arbitration only as a tactic in ongoing negotiations between the parties where one of them desires to show its resolve and strength of feeling towards enforcing and protecting its rights. However, the real importance is the legal consequences which result from the commencement of the arbitration. Most significant is the fact that it stops the limitation periods from running which otherwise, if exceeded, would frustrate or prevent the exercise of rights.³⁹⁶

After appointing the arbitrators, the arbitral tribunal starts reviewing the dispute in order to resolve it legally. To commence the arbitration procedures, there are some steps that have to be followed. Those steps usually are agreed upon between most national and international laws, but there are still some differences between them as regard those steps which make it necessary to refer to some of them particularly in international law, English law and Islamic law since they are principally of relevance to this study.³⁹⁷

The Model Law gives the parties the freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Therefore, they are free to indicate what needs to be done; when and how the arbitration commences; and whether by notification of claim or by request of arbitration. In addition, they may choose to restrict the notification or the request by a time-limit which, to them, is suitable and justified. In the event of failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes power to determine the admissibility, relevance, materiality and weight of any evidence.³⁹⁸ The arbitral proceedings begin on the date which a request for a dispute to be referred to arbitration is

³⁹⁶ Al-Anizy, M., (2006), Nullity of the International Commercial Arbitration Award, Beirut, Munshorat Al-Halebi Al-Hquqiyah, p 270-279.

³⁹⁷ Kreindler, R., (2001), "An Overview of Key Rights and Duties at the Beginning Stage of an International Arbitration", *Int. A.L.R.*, 4(3), pp 77-83.

³⁹⁸ The UNCITRAL Model Law on International Commercial Arbitration, article 19.

received by the respondent, unless there is an agreement between the parties to the contrary.³⁹⁹

Similarly, the UNCITRAL Rules stipulate that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. The arbitral tribunal shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute. It shall also establish the provisional timetable of the arbitration as soon as practicable after its constitution and after inviting the parties to express their views.⁴⁰⁰

As for the statement of claim, the UNCITRAL Rules request the claimant to communicate its statement in writing to the respondent and to the arbitral tribunal within a period of time. Moreover, it provides that the statement of claim should include:

- "(a) The names and contact details of the parties;
- (b) A statement of the facts supporting the claim;
- (c) The points at issue;
- (d) The relief or remedy sought;
- (e) The legal grounds or arguments supporting the claim".⁴⁰¹

Besides the above requirements, all relevant documents which arise out of or in relation to the dispute should be attached.⁴⁰²

³⁹⁹ The UNCITRAL Model Law on International Commercial Arbitration, article 21.

⁴⁰⁰ The UNCITRAL Rules, article 17.

⁴⁰¹ The UNCITRAL Rules, article 20.

⁴⁰² Kreindler, R., (2001), "An Overview of Key Rights and Duties at the Beginning Stage of an International Arbitration", *Int. A.L.R.*, 4(3), pp 77-83.

In English law, the commencement of arbitral proceedings is a matter for the parties of arbitration themselves to agree and determine when arbitral proceedings are to be regarded as commenced. In the absence of such agreement, the arbitral proceedings are commenced when one party notifies the other party or when the parties in writing require that they submit their dispute to the arbitral tribunal. This is in the case where the arbitrator is named or designated in the arbitration agreement.⁴⁰³ But in the event where the arbitral tribunal has not been designated, the arbitral proceedings are commenced when one party calls upon the other party or parties in writing to appoint an arbitrator or to agree to the appointment of an arbitrator. However, if the arbitrators are to be nominated by a third party other than a party to the proceedings, the arbitral proceedings are then regarded as commenced when one party gives notice in writing to that party requesting him to make the appointment of arbitrators.⁴⁰⁴

In Islamic jurisprudence, it is difficult to find such details spelled out in respect of arbitration and how its proceedings should commence. However, such silence provides Muslim legislators and scholars with great freedom and flexibility to select the suitable proceedings and steps that they think will be ideal for the commencement of arbitration proceedings. Their selection should not be contrary to the general rules and principles of the Islamic law. Therefore, it can be said that parties of arbitration are free to agree on the proceedings of arbitration including the commencement and the time limit for each step to be taken in the proceedings.⁴⁰⁵

According to the Saudi legal system, parties to a dispute shall file the arbitration instrument with the court that has the original jurisdiction to hear the dispute (Board of Grievances). The said instrument shall be signed by the parties and the arbitrators, and it shall indicate all necessary details such as the subject matter of the dispute, the names of the parties, the names of the arbitrators and the consent of the parties to have the dispute submitted to arbitration. Also, copies of the relevant documents shall be attached. Thereafter, the competent court shall record applications of arbitration submitted to it and issue a decision approving the

⁴⁰³ Tweeddale, A., (2002), "Delay in Commencing an Arbitration", Arbitration, 68(3), pp 238-244.

⁴⁰⁴ Arbitration Act 1996, s. 14.

⁴⁰⁵ Ibn Qudamah, A., (1997), Al-Mughne, Dar Alem Alkutub, Riyadh, 3rd edn.

arbitration instrument.⁴⁰⁶ This was confirmed by case *No 150/(ت)/4*,⁴⁰⁷ which emphasized that the arbitration instrument shall be deposited at the competent court, and in the event that one of the disputed parties refused to comply with his obligations, the another party can perform it under supervision of the court itself, and then the court can issue an order approving it.⁴⁰⁸ As for the Arbitration System 2012, there is no requirement to file the arbitration instrument with the court before commencing arbitration procedures. This, in my view, is more logical and in harmony with international arbitration laws. It also decreases the intervention of the court in arbitration.⁴⁰⁹

4.1.1 Place of Arbitration

The need to specify the place of arbitration is very paramount to arbitration proceedings due to several important factors. Parties to arbitration, for instance, usually tend to select the city or country they live as the place of arbitration, because that is easier, faster and less expensive for them when they commence the arbitral tribunal than selecting somewhere else. Also, some people would choose the place to be in a developed country that has a very good reputation in respect of its jurisdiction as well as its arbitration centres, rather than their native countries. Perhaps, this explains why London is often chosen as a place for arbitration.⁴¹⁰

The place of arbitration constitutes the seat of the arbitration, and the law of that location governs the arbitral proceedings. It is sensible for the parties themselves to select a suitable place for arbitration, rather than leaving the selection to others. In doing so, they should bear in mind the realistic matters such as distance, availability of sufficient hearing rooms, back up services and so on. However, they should also pay attention to the laws that are applicable in the chosen place and make sure those regulations are adapted to the needs of international

⁴⁰⁶ Saudi Arbitration System 1983, article 5, 6.

⁴⁰⁷ *Case No 150/(ت)/4* in 1413 H/1992 AD.

⁴⁰⁸ Ibid.

⁴⁰⁹ Saudi Arbitration System 2012, article 26.

⁴¹⁰ Dundas, H., (2008), "Recent Arbitration Cases in the English Courts: Section 69 Appeals by Agreement, Commencement of Arbitration and Discontinuance of Arbitration Applications", *Arbitration*, 74(3), pp 324-329.

commercial arbitration and the state which the place of arbitration will be in is a party to the New York Convention.⁴¹¹

The place or seat of the arbitration is not just a matter of geographical location. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated. Hence, when the place of arbitration is determined by the parties or the arbitral tribunal or whoever is given the authority to do that according to the arbitration agreement, it does not refer to geographical location. It rather means that the arbitration is conducted within the framework of the law of arbitration of that place. The seat of arbitration is consequently intended to be its central point or its centre of gravity. Notwithstanding, some arbitration proceedings can take place out of the place of arbitration according to the needs and estimation of the arbitral tribunal. This does not mean that the seat of arbitration changes with each change in a country. The legal place of arbitration remains the same even if the physical place changes from time to time.⁴¹²

The UNCITRAL Rules in the same way as Model Law confirm the right of the parties of arbitration to agree on the place of arbitration. In the absence of a previous agreement or failing such agreement, the arbitral tribunal shall determine the place of arbitration having regard to the circumstances of the case, including the convenience of the parties. The arbitrators also, unless otherwise agreed by the parties, have the right to meet at any location it considers suitable for discussions or other purpose such as hearing of witnesses or experts and so on.⁴¹³

In Islam, there is no restriction on choosing the place of arbitration. The parties are free according to general rules of Islamic jurisdiction to decide the location of arbitration which hosts the arbitration proceedings and its various stages and requirements. Nevertheless, the parties should take into account that wherever the place of arbitration they have agreed upon,

⁴¹¹ Ibid.

⁴¹² Redfern, A. and Hunter, M., (2009), Law and Practice of International Commercial Arbitration, London, Sweet & Maxwell, 5th edn.

⁴¹³ The UNCITRAL Rules, article 18. Also see: The UNCITRAL Model Law on International Commercial Arbitration, article 20.

they are not allowed to apply another law other than Islamic law on their dispute even if the chosen place applies different legal system. Anyway, Islamic law is generally flexible and wide and can comply with many positive laws due to the uncountable mutual points between them. Saudi Arbitration System 2012 gives the parties the right to agree on the place of arbitration whether inside the country or outside it. It also provides for that in the event of absence of agreement, the right moves to the arbitral tribunal, and it should pay attention to circumstances that surround the dispute.⁴¹⁴

4.1.2 Language of Arbitration

Language of arbitration is another important factor that should be determined in the arbitration agreement due to the fact that the disputing parties, including the arbitral tribunal members may have come from different nations where different languages are spoken. It is, however, advisable, where parties speak the same language, that they choose their language to be the language of arbitration because that is easier for them to show their claims and defences directly to the arbitral tribunal without the need to engage the service of a translator. But in case the parties or arbitrators speak different languages, then it will be difficult to make a choice.⁴¹⁵

Under International law, the parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall decide the language or languages to be used in the proceedings. The language chosen, either by the disputing parties or the arbitral tribunal in the absence of such agreement, shall apply to any written statements by the parties, any hearing, any award, decision or other communication by the arbitral tribunal. Where the arbitral tribunal provides documentary evidence or any documents in different language, it can order those documents to be accompanied by a

⁴¹⁴ Saudi Arbitration System 2012, article 28.

⁴¹⁵ Tweeddale, A., (2002), "Delay in Commencing an Arbitration", *Arbitration*, 68(3), pp 238-244.

translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.⁴¹⁶

Similarly, Arbitration Act 1996 grants the right of deciding all procedural and evidential matters including the language or languages to be used in the proceedings to the tribunal, subject to the right of the parties to agree on any matter.⁴¹⁷ The Islamic model has also the same conception. There is no specific language that has to be used in the arbitration proceedings. The matter is left freely to the parties of arbitration to determine the language of proceedings either by themselves or granting the right to the tribunal.⁴¹⁸

Conversely, the Saudi Arbitration system 1983 stated that the language of arbitration shall be Arabic. Arabic language shall be the formal language to be used before the arbitral tribunal including statements, discussions and hearing. It is not acceptable under Saudi Arbitration System to use a different language other than Arabic. The foreigner who does not speak Arabic has to bring a reliable translator to help him with the interpretation of the statements and relevant documents. In addition, all documents submitted to the arbitral tribunal have to be combined with a reliable translation if they are in different language.⁴¹⁹ But the new system 2012 has followed the modern trend by allowing the parties or the arbitral tribunal to decide the language that they want to use in arbitration proceedings.⁴²⁰

4.2 The Applicable Law

Any contract needs to depend on a law from which it derives its nature, characteristics and obligation, otherwise it could be useless and inapplicable. An arbitration contract is a complex contract as regard the applicability of its law due to its unique nature and

⁴¹⁶ The UNCITRAL Rules, article 19. Also see: the UNCITRAL Model Law on International Commercial Arbitration, article 22.

⁴¹⁷ Arbitration Act 1996, s. 34.

⁴¹⁸ Mistelis, L., (ed), (2010), Concise International Arbitration, The Netherland, Kluwer Law International.

⁴¹⁹ Exclusive Regulation of Saudi Arbitration System 1983, article, 25. Also see: Baamir, A., (2012), "The New Saudi Arbitration Act: Evaluation of the Theory and Practice", Int. A.L.R., 15(6), pp 219-235.

⁴²⁰ Saudi Arbitration System 2012, article 29.

characteristics, especially when the contracting parties come from different countries and have different legal systems. Usually, arbitration agreements, particularly those that involve international transactions, are governed by various laws. For example, the suitability of a dispute for arbitration may rely on several laws, such as the procedural law, the national law of the parties and the law governing the merits and the *lex fori* (the law of the forum). In addition, the possibility of obtaining recognition of the award in another state may also depend on the suitability of the dispute for arbitration under the law of the requested state as it is generally the case according to the international conventions.⁴²¹

This section will address the substantive law and the procedural law that are applicable to arbitration as well as the law governing the arbitration agreement itself.

4.2.1 The Substantive Law

Determining the applicable substantive law that the arbitration dispute shall be governed by is a very important matter but yet, very complex.⁴²² The parties of arbitration should choose the substantive law which they desire to use for the resolution of their dispute according to its provisions. This is required because it may turn out to be a difficult issue for the arbitrators during the commencement of the arbitration procedures.⁴²³

Choosing the substantive law by the disputing parties is the main criterion in international arbitration. Once the parties have decided on the applicable law they have chosen with regards to the arbitration matter, the court or the arbitral tribunal cannot make a different choice. This is supported by the provisions of the UNCITRAL Model law which states that:

⁴²¹ Velden, J., (2012), "The 'Cautious 'lex fori' Approach to Foreign Judgments and Preclusion: Yukos Capital Sarl v OJSC Rosneft Oil Co", International & Comparative Law Quarterly, vol. 61, issue 2, pp 519-530.

⁴²² Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press, pp 96-97.

⁴²³ Sammartano, M., (2011), International Arbitration Law and Practice, The Netherlands, Kluwer Law International, 2nd edn.

“The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules”.⁴²⁴

Likewise, the UNCITRAL Arbitration Rules provides that the arbitrators shall apply the rules of law chosen by the parties as applicable to the substance of the dispute.⁴²⁵ English legal system and the new Arbitration System 2012 in KSA, in a similar manner, also grant the parties of arbitration the right to choose the applicable law that suits them to govern the substance of their dispute. The Saudi legal system restricts this right and choice to those which are not in contrary to Islamic Shari'ah or the public policy of the Kingdom of Saudi Arabia. Both systems state that for this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.⁴²⁶

The parties' independence to choose the applicable law is well settled by an English court in *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd*.⁴²⁷ Where Lord Reid stated: "in my view there is no doubt that they {the parties} are entitled to make such an agreement and I see no good reasons why, subject as it may be to some limitations, they should not be so entitled".⁴²⁸ However, it is important to note that if there is no link between the relationship from which the argument arises and the law chosen by the parties, that choice is not always acceptable, as it was reached in the English judgment in *Wagg*: "The court will not necessarily enforce a choice of law clause selecting a law with no connection with the transaction".⁴²⁹

⁴²⁴ UNCITRAL Model Law, article 28.

⁴²⁵ UNCITRAL Arbitration Rules, article 35.

⁴²⁶ Arbitration Act 1996, s. 46. Also see: Saudi Arbitration System 2012, article 38 (1) (a).

⁴²⁷ [1970] A.C. 583.

⁴²⁸ Ibid.

⁴²⁹ *Re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323.

Parties to an arbitration are encouraged to make their choice of the substantive law clear and express due to the fact that the express choice by the parties is consequently the main criterion for identifying the applicable law. Once the choice is clearly made, it does not accommodate any objection thereafter. In most cases, the parties usually select the national law of one of them to be the substantive applicable law. In the event where the substantive applicable law is not clearly selected, it will then be subject to the normal criteria for interpreting the intention of the parties.⁴³⁰

In the English jurisdiction, the proper law of the contract is that selected by the parties of the contract so long as the selection is not contrary to public policy.⁴³¹ If there is no express choice, efforts should be made towards recognising the intention of the parties. Intention of the parties may be inferred by the choice of jurisdiction or place of arbitration. The choice of the place of arbitration is an accurate indication of the choice of the applicable law. This approach is, in fact, a result of the English tendency to combine jurisdiction and the substantive applicable law with the consequence that when the English judge - and also the arbitrator- is called upon to decide, he may apply both his national substantive law and procedural law. If that does not achieve a result, then the applicable law should be the system of law of the country that is closely connected to the arbitration contract. To determine this issue, it is important that we consider some factors, such as the place of dispute resolution, the place of contract and the place of performance.⁴³²

Where the parties are unable to agree on the applicable substantive law, whether expressly or tacitly, the arbitrators are entitled to choose the applicable law instead. The UNCITRAL Arbitration Rules authorise the arbitral tribunal to apply the law which it deems to be appropriate in such circumstance.⁴³³ Similarly, the Model Law does the same and further states that the arbitrators shall take into account in all cases the usages of the trade applicable

⁴³⁰ Bentil, K., (1992), "Commercial Arbitrators Authorised not to Apply Strict Rules of Law and Judicial Review", *The Journal of Business Law*, pp 26-38.

⁴³¹ Arbitration Act 1996, s. 1.

⁴³² Swanson, P., (2004), "Arbitration Clauses: What Law Governs and Who Decides?", available at: <http://www.bernardpartners.com/images2005/pdfs/Harbour&ShippingArticleArbitrationClauses.pdf>, accessed on 15/11/2011.

⁴³³ UNCITRAL Arbitration Rules, article 35.

to the transaction as well as the terms of the contract.⁴³⁴ The English Arbitration Act, 1996 also grants the arbitral tribunal the power, if there is no such choice or agreement by the parties, to apply the law determined by the conflict of laws rules which it considers applicable.⁴³⁵ The Saudi legal 2012 system provides for that too.⁴³⁶

It should be noted that the Model Law and English law restrict the choice of the arbitral tribunal to the applicable law, in case where the parties are unable to agree, to the conflict of laws rules which they consider to be appropriate.⁴³⁷ While the UNCITRAL Arbitration Rules as revised in 2010 and the Saudi Arbitration System 2012 grant the arbitral tribunal the freedom completely to choose the law or rules of law which is directly preferable.⁴³⁸

However, there is another vital issue that calls for attention and that is whether the chosen substantive law can be amended after a dispute has arisen or not. There are two divergent conceptions in respect of that issue. One of them looks to the contractual nature of arbitration agreement and the fact that the freedom to contract allows the parties to amend their agreement freely at any time and therefore they can also change their choice of applicable law. The other approach, which is regarded more formal, prevents the parties from amending the applicable law which has already been chosen by them, since the first choice creates a legal situation and might have already produced effects.⁴³⁹

4.2.2 The Procedural Law

It is true that the parties to a contract make their own law and are free to set the terms and procedures which they prefer. Nevertheless, agreements that are intended to have a legal operation, create legal rights and duties, cannot exist in a vacuum. It is required that they

⁴³⁴ UNCITRAL Model Law, article 28.

⁴³⁵ Arbitration Act 1996, s. 46.

⁴³⁶ Saudi Arbitration System 2012, article 38 (1) (b).

⁴³⁷ The Model Law, article 28. See also: Arbitration Act 1996, s. 46.

⁴³⁸ The UNCITRAL Rules, article 35. See also: Saudi Arbitration System 2012, article 38 (1) (b).

⁴³⁹ Sammartano, M., (2011), International Arbitration Law and Practice, The Netherlands, Kluwer Law International, 2nd edn.

must have a place within a legal system for dealing with such questions as the application and interpretation of contracts, the validity of contracts and generally for supplementing their express provisions. Arbitration is like other contract, it does not exist in a legal vacuum. It is controlled and regulated, first by the rules of procedures that have been chosen and adopted by the parties and the arbitral tribunal, and secondly, it is regulated by the place of arbitration.⁴⁴⁰

Modern laws of arbitration leave parties and the arbitral tribunal free to decide upon their own particular and detailed rules of procedure as long as the parties are treated equally. Under these modern laws, the courts are very much reluctant to intervene in arbitration matters, if they intervene at all. Nonetheless, rules need the sanction of law if they are to be effective; and in this context, the relevant law is the law of place or seat of arbitration. This is occasionally referred to as the "curial law" but is much more commonly known as the "lex arbitri".⁴⁴¹

Most often, parties of arbitration who are from different countries tend to choose a neutral country to be the place of arbitration. This means, in practical terms, that the law of the country in whose territory the arbitration takes place will generally be different from the law that governs the substantive matters in dispute. For example, the arbitration may take place in France while the arbitral tribunal may be required to decide the substantive issues in the dispute according to the law of England or somewhere else. The arbitration and the way in which it is conducted will be governed (if only in outline) by the relevant French law on international arbitration. The difference between the lex arbitri (the law of the place or seat of arbitration) and the law governing the substance of the dispute is now firmly established in international commercial arbitration.⁴⁴²

⁴⁴⁰ Al-Anizy, M., (2006), Nullity of the International Commercial Arbitration Award, Beirut, Munshorat Al-Halebi Al-Hquqiyah, p 398-392. Also see: Sammartano, M., (2011), International Arbitration Law and Practice, The Netherlands, Kluwer Law International, 2nd edn.

⁴⁴¹ Bentil, K., (1992), "Commercial Arbitrators Authorised not to Apply Strict Rules of Law and Judicial Review", The Journal of Business Law, pp 26-38.

⁴⁴² Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press.

The Geneva Convention, 1923 states that: "the arbitral procedures, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place..."⁴⁴³ The Model Law gives the parties the freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Therefore, they are free to indicate what needs to be done and when and how the arbitration commences. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.⁴⁴⁴ The 2012 Arbitration System in KSA follows also the same trend and enables the parties to choose the procedural law which they prefer, provided that there is no conflict with Shari'ah.⁴⁴⁵

In some occasions, the arbitral tribunal is impelled to leave the place of arbitration and visit another country for collecting information and materials that can help them in their mission or hearing from witnesses and so on. It should take into account that it must, of course, respect the law of that country. For instance, if the aim of the visit is to take evidence from witnesses, the arbitrators should respect any provisions of the local law that regulate the taking of evidence.⁴⁴⁶

Although the *lex arbitri* (the law of place of arbitration) may deal in principle with procedural matters - such as the constitution of an arbitral tribunal where there is no relevant contractual provisions- but it also may determine that a given type of dispute is not capable of settlement by arbitration under the local law or an award may be set aside on the grounds that it is contrary to the public policy of the *lex arbitri*. It must be stated, however, that these are not matters of procedure.⁴⁴⁷

⁴⁴³ Geneva Convention (1923), article 2.

⁴⁴⁴ The UNCITRAL Model Law on International Commercial Arbitration, article 19.

⁴⁴⁵ Saudi Arbitration System 2012, article 25.

⁴⁴⁶ Bentil, *supra* note (441).

⁴⁴⁷ Salamah, A., (2004), International and National Commercial Arbitration Law, Dar Al-Nahza Al-Arabia, Cairo.

4.2.2.1 Choice of a Foreign Procedural Law

An important question also arises in this part of study which is whether it is acceptable or whether it is impossible for the arbitration to be placed in a country and subjected to procedural law of another country? For example, the parties chose London as the seat of arbitration and the procedural law of France as the applicable law. This means that the parties and the arbitral tribunal would need to have regard to two procedural laws, one as the chosen procedural law and the other as the procedural law of the chosen place of arbitration as some of its provisions are mandatory. Where the applicable procedural law is different from that of the place of arbitration, the mandatory provisions of the procedural law of the place of arbitration need to be taken into account.⁴⁴⁸

In a case that was brought before the English court where it was held that there is no reason in theory that bans the parties of arbitration to agree on a country to be the seat of arbitration while at the same time subject the dispute to the procedural law of a different country. In the *Peruvian Insurance* case,⁴⁴⁹ the English Court of Appeal considered a contract that had been held by the court of first instance to provide for an arbitration to be placed in Peru but subject to English procedural law. The Court of Appeal construed the contract as providing for arbitration to be in London under English law but noted that a situation involving a choice of foreign procedural law was theoretically possible. However, particular difficulties were foreseen that “at any rate under the principles of English law, an agreement to arbitrate in X subject to English procedural law would not empower our courts to exercise jurisdiction over the arbitration in X.”⁴⁵⁰

4.2.3 The Law Governing the Agreement of Arbitration

An agreement to arbitrate, as already discussed under the types of arbitration agreement in Chapter two, may take the shape of a separate agreement which is called submission agreement, and may be included in a contract as a term or clause which is called arbitration

⁴⁴⁸ Redfern, A. and Hunter, M., (2009), Law and Practice of International Commercial Arbitration, London, Sweet & Maxwell, 5th edn.

⁴⁴⁹ *Naviera Amazonia Peruma SA v Compania Internacional de Seguros de Peru* [1988] 1 Lloyd's Rep 116.

⁴⁵⁰ Ibid.

clause. The submission agreement, which is drawn up after the dispute has arisen, should address all matters and needs that are relative to the arbitration procedures such as choice of the arbitral tribunal and choice of the law which that tribunal is to apply.⁴⁵¹

But the question is that what if there is an argument about the submission agreement itself? If, for example, there is an issue concerning the scope or validity of the submission agreement, what is the applicable law which is assumed to govern that kind of issue and resolve it? It might be thought that the applicable law to the submission agreement is the same law which the disputing parties had chosen to govern the substantive issue in dispute. However, this may not necessarily be the correct conception, because the clause refers expressly to the substantive issue in the dispute only and does not refer to the disputes that might arise in relation to the submission agreement itself. It is advisable that when drafting the submission agreement that the parties indicate clearly the law which they prefer to apply to that agreement. If no express choice of law is made, the general principles as to the choice of law will apply and the law of the place of arbitration chosen by the parties will generally be regarded as the applicable law.⁴⁵²

As for the arbitration clause, which is set usually at the end of the contract and amongst many clauses and terms, it would seem justifiable that the law chosen by the parties to govern the underlying contract will also apply to the arbitration clause due to the fact that the arbitral clause is a part of the contract and should be governed by the law applicable to the contract exactly as the other parts and clauses of the contract. This approach was taken by the English court in *Sonatrach Petroleum Corporation (BVI) v Ferrell International Limited*⁴⁵³ that: "where the substantive contract contains an express choice of law, but the agreement contains no separate choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract".⁴⁵⁴

⁴⁵¹ Salamah, A., (2004), International and National Commercial Arbitration Law, Dar Al-Nahza Al-Arabia, Cairo.

⁴⁵² Redfern, *supra* note (448).

⁴⁵³ [2001] EWHC 481 (Comm).

⁴⁵⁴ *Ibid.*

Therefore, it can be said that there are two laws which are regarded as the closest law to be the applicable law for arbitration agreement, regardless to whether they are contained in an arbitration clause or a submission agreement. One of them is the law of place of arbitration and the other is the law applicable to the underlying contract. The New York Convention has mentioned the two laws in the articles relating to enforcement of the award. It provides that the agreement under which the award is made must be valid under the law to which the parties have subjected it or under the law of the country where the award was made (which will be the law of the place of arbitration) in the event of absence of a previous choice by the parties.⁴⁵⁵

In a case law which was held by the English court in 2000, the court recognised the application of a different law on the arbitration agreement rather than the law that governs the substantive rights and duties of the parties. A dispute arose between *XL Insurance Ltd v Owens Corning*⁴⁵⁶ regarding an insurance policy containing an arbitration clause that provides that any dispute as to the policy or its breach, termination or invalidity is to be determined in London and under the provisions of the Arbitration Act 1996. However, there was also another clause included in the contract which stipulates that the policy as a whole should be construed in accordance with the internal laws of the state of New York. When a dispute arose between the parties as to the interpretation of the insurance policy, Owens Corning brought the dispute before the USA court alleging that the arbitration agreement was not valid under US law. By contrast, XL Insurance Ltd sought an anti suit injunction against Owens Corning on the basis that there is a valid arbitration agreement and the controversy shall be resolved by arbitration in London. The English court stated that:

“ it is by now firmly established that more than one national system of law may bear upon an international arbitration ... there is the proper law which regulates the substantive rights and duties of the parties ... exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration”.⁴⁵⁷

⁴⁵⁵ Salamah, *supra* note (451).

⁴⁵⁶ [2000] 2 Lloyd's Rep. 500.

⁴⁵⁷ Ibid.

As for Islamic law, the concept of the conflict of laws under Shari'ah is different in comparison to modern Western laws. All four schools of jurisprudence (fiqh) insist on the compulsory application of procedural and substantive Shari'ah rules especially between Muslim parties. Islam grants non Muslim parties the right to have recourse to their religious laws in personal status. Allah says in the Holy Qur'an:

(ومن لم يحكم بما انزل الله فاولئك هم الكافرون)⁴⁵⁸

Shari'ah pays no attention to countries' borders, and other factors such as domicile and nationality. Only two main categories of legal subjects are recognized by Islamic law, Muslims and non-Muslims.⁴⁵⁹ However, Islamic law in many cases and parts of life tends usually to draw the general and wide lines to the Muslim society and leaves the secondary and executive details to be determined by it, according to the general principles and rules of Islam as well as the interest of the public and nation, which may change from one place to another and from one age to another. This approach of Islam grants Muslim scholars and legislators such flexibility and freedom which enable them to attend to our contemporary needs. Arbitration is one of those parts whose were mentioned in the Holy Qura'an and Sunna generally. According to the principle of freedom of contract under Islamic Sharia, parties are free to include any clause in their contract as long as such clause does not permit acts against the commandments of God. Indeed, Sharia is not static and rigid and it is only guided by the Qura'an, Sunna, Ijma' and Qiyas (analogy).⁴⁶⁰

Parties to an arbitration are not free wholly under Islamic legal system to choose the law which they desire to govern the substance of their dispute nor the procedural law. But it should be noted just as we have already mentioned that there is no complete system of jurisprudence called Islamic Arbitration Law. Of course, there are general principles and values that are shared between civilizations and modern laws in the world. The Islamic Shari'ah contains general principles, which are basic to any civilised system of laws, such as good faith in the performance of obligations and the observance of due process in the

⁴⁵⁸ "And whoever does not judge by what Allah has revealed - then it is those who are the disbelievers", The Qura'an 5/44.

⁴⁵⁹ Baamir, A., (2010), *Shari'a Law in Commercial and Banking Arbitration*, Ashgate, UK, p 77-78.

⁴⁶⁰ *Al-Moso'ah Al-Fighiah*, (1993), Dar Al-Safwah, Egypt.

settlement of disputes. Therefore, it is essential that we study some countries' judicial system so as to determine their compatibility with Islamic Shari'ah.⁴⁶¹

Consequently, it can be said that parties of arbitration in Islam have the choice of adopting any applicable law for the resolution of their disputes provided that such law does not run contrary to the provisions of Islamic law. In other words, having recourse to a non-Islamic legal system is valid as long as the rules to be applied on the contract do not violate express provisions of Qur'an and Sunna. On some occasions, parties select a foreign law to govern their controversy and make an exclusion to the provisions that are in conflict with provisions of the Holy Qur'an or Sunna which shall then prevail. This method, in my view, is acceptable since the arbitrator will be Muslim and the chosen law will not contradict Islamic law.⁴⁶²

In a case which was submitted to the English court, a financial transaction had been concluded in a manner that ensured that the transaction complied with traditional Islamic banking practice. There were provisions for any controversy to be resolved by arbitration in London under the ICC Rules of Arbitration and there was a choice of law clause which stipulated that any dispute to be "governed by the Law of England except to the extent it may conflict with Islamic Shari'ah, which shall prevail".⁴⁶³ A dispute arose regarding the transaction and the ICC designated Mr Samir Saleh, an experienced lawyer and expert on Shari'ah law, as sole arbitrator. The arbitrator's award was challenged by the losing party, but this challenge was refused by the English court which held that the award was a clear and full evaluation of the issues and had all the appearances of being right.⁴⁶⁴

As for the law governing the arbitration agreement itself, I think the Islamic conception would be in favour of applying the law of the underlying contract. This because duties and rights cannot exist in a legal vacuum. It is also likely to be the same even if the parties of

⁴⁶¹ Alqurashi, Z., "Arbitration under the Islamic Sharia", available at: <http://www.nigerianlawguru.com/articles/arbitration/ARBITRATION%20UNDER%20THE%20ISLAMIC%20SHARIA.pdf>, accessed on 16/11/2011.

⁴⁶² Ibid.

⁴⁶³ Sammartano, M., (2011), *International Arbitration Law and Practice*, The Netherlands, Kluwer Law International, 2nd edn.

⁴⁶⁴ Ibid.

agreement have designated a specific law, other than the law governing the main contract, to be the applicable law.

4.3 Jurisdiction of Arbitral Tribunal

The contracting parties have the right to set the terms of their business relationships freely. This is in accord with the contractual doctrine of party autonomy. In fact, by referring their dispute to arbitration, parties are in essence agreeing to be bound with the final award by the arbitral tribunal. This should not be understood to mean that courts do not have a role to play in arbitral proceedings. The courts often assist or interfere according to the national law and international conventions that govern their authority. The freedom of the parties to select the governing law and rules, otherwise known as 'the parties' autonomy', has become internationally recognized and most national laws and international conventions are in favour of it.⁴⁶⁵

However, it should be noted that there are few limitations on the rule of party autonomy which aims at preventing it from being abused or contrary to public policy. Certainly, jurisdiction is the lifeblood of all legal proceedings. Where an arbitral tribunal lacks jurisdiction, the entire proceedings would be a nullity and the final award stands the risk of being set aside or not recognized and enforced. An arbitral tribunal must therefore operate within the jurisdiction and powers given to it by the parties. An arbitrator(s) may only acceptably decide those controversies that the parties have agreed that should be decided. This rule is a predictable and suitable consequence of the voluntary nature of arbitration. In consensual arbitration, the agreement of the parties is the only source of the authority or competence of the arbitral tribunal and indeed there is no other source from which it can come. As a result, the arbitral tribunal must take care to stay within the terms of its mandate and must not exceed its jurisdiction.⁴⁶⁶

⁴⁶⁵ Chang, S., (2012), "Inherent Power of the Arbitral Tribunal to Investigate its Own Jurisdiction", *J. Int. Arb.*, 29(2), pp 171-182.

⁴⁶⁶ Osadare, B., "Jurisdiction and Powers of Arbitral Tribunals: Who Decides?", available at: www.dundee.ac.uk/cepmlp/gateway/files.php?, accessed on 20/11/2011.

It is often the case that one of the parties who had submitted to arbitration, often the respondent, would object to the jurisdiction of the arbitral tribunal. These objections may be based on several grounds. The respondent may allege that the arbitration agreement is void or even that there was never an agreement to arbitrate disputes. The arbitral tribunal, when faced with such objections should not withdraw from arbitral proceedings or even stay the proceedings until the competent court resolve the challenge. At least, this is a way of preventing the usefulness of arbitration as an alternative dispute resolution tool. In addition, it is widely recognized that an arbitral tribunal has jurisdiction to determine its own jurisdiction in the face of objections, whether partial or total.⁴⁶⁷

The jurisdiction of the arbitral tribunal is often challenged by the party that is likely to lose probably to avoid the effects of the enforcement of the award and decision made by the tribunal. The challenge made by a party to the jurisdiction of an arbitral tribunal may be partial or total. The partial challenge is the one that raises the question of whether certain (but not all) of the claims or counterclaims which have been submitted to the arbitral tribunal are within its jurisdiction. This type of challenge does not amount to a basic attack on the jurisdiction of the arbitral tribunal. Conversely, a total challenge questions the whole basis upon which the arbitral tribunal is acting or purporting to act. A partial challenge is usually dependent on whether the particular matters referred to arbitration fall within the scope of the arbitration agreement while a total challenge usually questions whether there is a valid arbitration agreement at all.⁴⁶⁸

If the arbitral tribunal exceeds its jurisdiction, its award will be imperilled and may be set aside or rejected recognition and enforcement in whole or in part by the competent court. The competent court in this respect means the courts of the country in which the arbitration is held; or the courts of the country or countries in which recognition and enforcement of the award is sought.⁴⁶⁹

⁴⁶⁷ Ibid.

⁴⁶⁸ Bentil, K., (1992), "Commercial Arbitrators Authorised not to Apply Strict Rules of Law and Judicial Review", *The Journal of Business Law*, pp 26-38.

⁴⁶⁹ Chang, S., (2012), "Inherent Power of the Arbitral Tribunal to Investigate its Own Jurisdiction", *J. Int. Arb.*, 29(2), pp 171-182.

There are several provisions in the national laws and international conventions that stress the importance of the jurisdiction of arbitral tribunals and the need for such tribunals not to exceed their jurisdiction. The New York Convention provides that recognition and enforcement of an award may be refused on proof that: "the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration."⁴⁷⁰

The total challenge to jurisdiction is likely to arise particularly where the authority (or supposed authority) of the arbitral tribunal is derived from an arbitration clause. The challenge could be based on the ground that the legal entity signing the agreement was a different and distinct legal person. Or the whole dispute in issue is outside the scope of the arbitration agreement or not arbitrable under the applicable law. Or again, it may be alleged by one of the parties that the arbitration agreement is not an agreement in writing and so on. The following questions may arise as to who may decide the challenge in the event of being a total challenge to the jurisdiction of the arbitral tribunal: Is it the arbitral tribunal or the national court? Whether a ruling on jurisdiction by the arbitral tribunal may submit to review by a national court and at what stage?⁴⁷¹

It is generally accepted that an arbitral tribunal has power to investigate its own jurisdiction. This is a power inherent in the appointment of the arbitral tribunal; indeed, it is an essential power if the arbitral tribunal is to carry out its task properly. An arbitral tribunal must be able to look at the arbitration agreement, the terms of its appointment and any relevant evidence in order to decide whether or not a particular claim or series of claims comes within its jurisdiction. The arbitral tribunal's decision on the issue may be overruled subsequently by a competent national court; but this does not prevent the tribunal from making the decision in the first place.⁴⁷²

⁴⁷⁰ New York Convention, article v.1(c).

⁴⁷¹ Rosen, J., (1993), "Arbitration under Private International Law: The Doctrines of Separability and Competence 'de la Competence'", Fordham International Law Journal, vol. 17, Issue 3, pp 599-666.

⁴⁷² Shine, P., (2008), "Establishing Jurisdiction in Commercial Disputes: Arbitral Autonomy and the Principle of Kompetenz-Kompetenz", Journal of Business Law, 3, pp 202-225.

However, the power that enables the arbitral tribunal to decide upon its jurisdiction under modern international and institutional rules of arbitration, is called competence to decide on upon its competence. Most modern national laws and institutional arbitration rules regulate international arbitration and provide for the power of an arbitral tribunal to rule on its own jurisdiction.⁴⁷³

The UNCITRAL Arbitration Rules, as well as the Model Law, grant arbitrators the authority and the competence to rule on its own jurisdiction, including any objections regarding the existence or validity of the arbitration agreement. It emphasises that an arbitration clause shall be treated as an agreement independent of the other clauses of the underlying contract. It also provides that revoking the underlying contract by the arbitral tribunal does not automatically invalidate the arbitration clause.⁴⁷⁴

The interested party who intends to make an objection that the arbitral tribunal does not have jurisdiction is required under the Rules to raise a plea not later than the submission of the statement of defence.⁴⁷⁵ Appointing the arbitrator or participating in the appointment does not preclude the party from raising such a plea. In the event that the arbitral tribunal is exceeding the scope of its authority or as it is thought by a party, a plea shall be raised as soon as the matter is alleged to be beyond the scope of the arbitral tribunal's authority. However, the arbitral tribunal may admit a later plea if it considers the delay to be reasonable. The arbitral tribunal may continue with the arbitration proceedings and make an award while the challenge made to its jurisdiction is still pending before the competent court.⁴⁷⁶

Most modern national laws and institutional arbitration rules provide for the power of an arbitral tribunal to rule on its own jurisdiction too. For example, in the Arbitration Act 1996, the competence for an arbitral tribunal to rule on its own jurisdiction is well established.

⁴⁷³ Ibid.

⁴⁷⁴ UNCITRAL Arbitration Rules, article 23(1). Also see: The UNCITRAL Model Law on International Commercial Arbitration, article 16(1).

⁴⁷⁵ The UNCITRAL Model Law on International Commercial Arbitration, article 16(2).

⁴⁷⁶ UNCITRAL Arbitration Rules, article 23. Also see: The UNCITRAL Model Law on International Commercial Arbitration, article 16.

According to Arbitration Act 1996, the arbitrator(s) can decide, unless otherwise agreed by the parties, whether there is a valid arbitration agreement or not, they also can determine whether the tribunal is properly constituted or not. Moreover, they are entitled to decide whether all issues have been submitted to arbitration in accordance with the arbitration agreement. Similar to the provisions of the UNCITRAL Rules and Model Law, the Arbitration Act 1996 also stipulates that the right of the parties of arbitration to challenge the jurisdiction of the arbitral tribunal as soon as the alleged matter to be beyond the scope of arbitration agreement and the authority of the arbitral tribunal has been raised. The arbitral tribunal must deal with the challenge made by a party either by ruling on the matter in an award as to jurisdiction, or dealing with the objection in its award on the merits. Alternatively, the tribunal may in any case stay arbitration proceedings whilst an application is made to the court.⁴⁷⁷

However, the court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.⁴⁷⁸ Anyway, the Act imposes several terms upon the court before it can consider the challenge. Those terms are stated as follows:

- "(a) it is made with the agreement in writing of all the other parties to the proceedings, or
- (b) it is made with the permission of the tribunal and the court is satisfied—
 - (i) that the determination of the question is likely to produce substantial savings in costs,
 - (ii) that the application was made without delay, and
 - (iii) that there is good reason why the matter should be decided by the court." ⁴⁷⁹

This may appear to show how the English legislators tend to support arbitration and respect its nature as a private settlement of dispute. In addition, it also indicates how the English legal system discourages the intervention of the national courts in the operation of the arbitration

⁴⁷⁷ Arbitration Act 1996, s. 30, 31.

⁴⁷⁸ Arbitration Act 1996, s. 32 (1).

⁴⁷⁹ Arbitration Act 1996, s. 32 (2).

system and this approach definitely complies with the international conventions and the modern conception of arbitration.⁴⁸⁰

The 2012 Arbitration System in KSA also agrees on the competence of the arbitral tribunal to decide on its own jurisdiction. This includes allegations of a non-existent agreement, nullity of the agreement and that the dispute is outside the agreement.⁴⁸¹

4.3.1 The Doctrine of *Kompetenz-Kompetenz*

The doctrine of *Kompetenz-Kompetenz*, which means that the arbitral tribunal can decide on its own jurisdiction, does not however prevent other investigations to the issue by national courts. In *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*,⁴⁸² the Supreme Court upheld the decisions of the Court of Appeal and High Court which refused to recognize and enforce a New York Convention award in favour of Dallah. The case raised questions as to the extent to which an English court will, at the enforcement stage, investigate whether the arbitral tribunal had jurisdiction over the parties.⁴⁸³

The root of the dispute goes back to 1996 when Dallah and the Awami Hajj Trust (a trust set up by ordinances of the Government of Pakistan) signed an agreement for the provision of housing to pilgrims. The agreement included an arbitration agreement, which referred any disputes to ICC arbitration in Paris, but which did not specify the applicable governing law. The ordinances establishing the Trust lapsed shortly after the agreement was signed, and the Trust ceased to exist as a legal entity. A dispute arose as to the scope of the project, and Dallah brought ICC arbitration proceedings in 1998 against the Government, claiming that the Government was a true party to the underlying agreement. The tribunal revealed an

⁴⁸⁰ Tweeddale, K. and Tweeddale, A., (1999), A Practical Approach to Arbitration Law, Britain, Blackstone Press Limited.

⁴⁸¹ Saudi Arbitration System, article 20 (1).

⁴⁸² [2010] UKSC 46.

⁴⁸³ Bermann, G., (2011), "The UK Supreme Court Speaks to International Arbitration: Learning from the Dallah Case", American Review of International Arbitration, vol. 22, no. 1.

award in 2006 upholding Dallah's claim and awarding it USD 20 million. Dallah then sought to enforce the award in England. The Government objected to enforce it under section 103(2)(b) of the Arbitration Act 1996, on the basis that "the arbitration agreement was not valid [...] under the law of the country where the award was made" because the Government was not a party to it.⁴⁸⁴

One of the central issues which the Supreme Court had to consider was the nature of the exercise which an enforcing court must undertake when deciding whether an arbitration agreement exists. Dallah's primary submission was that only a supervisory court (here, the French court) has standing to undertake a full examination of the tribunal's jurisdiction and that it does so on an application to set aside the award for lack of jurisdiction. It also submitted that a mere enforcing court must do no more than undertake a limited review of the tribunal's jurisdiction and the precedent question of whether there is a valid arbitration agreement which binds the relevant parties. Therefore, the court should refuse to become involved.⁴⁸⁵

The Supreme Court did not accept that anything less than a full investigation of the issue of the jurisdiction of the tribunal should be carried out in order for it to ascertain whether section 103(2)(b) of the 1996 Act has been made out by a party resisting enforcement on the grounds that the arbitration agreement was not valid (nor binding on the relevant parties). Lord Collins acknowledged that the New York Convention had introduced a "pro-enforcement" policy for the recognition and enforcement of awards. But he defended the decision to allow a full investigation of the issue of jurisdiction, in terms which in fact seek to give due weight to one of the cornerstones of arbitration – that is, its consensual nature. Lord Collins emphasized that such intervention by the court under section 103(2) was limited to those circumstances where the "fundamental structural integrity of the arbitration proceedings" was in issue, and it is never more in issue than where one party alleges that it was not a party to the purported arbitration proceedings.⁴⁸⁶

⁴⁸⁴ Ibid.

⁴⁸⁵ Dundas, H., (2009), "The Pro-Enforcement Assumption of the New York Convention: But... Enforcement of a Foreign Award Refused by English Court of Appeal: *Dallah v Pakistan*", *Arbitration*, 75(4), pp 555-564.

⁴⁸⁶ Ibid.

The court also found that there is nothing in the language of both section 103(2)(b) of the 1996 Act and Article V of the New York Convention which indicates only a limited review by the enforcing court, nor do they contain any signal that a person resisting recognition or enforcement in one country has an obligation first to seek to set aside the award in the country where it was made. The court said that the tribunal's own view has no legal or evidential value when the issue is whether it had legitimate authority in relation to a party. The arbitral tribunal may rule on its own jurisdiction but cannot be the final arbiter of jurisdiction. Moreover, the court referred to several cases which were decided by different jurisdictions such as in US, Germany and France and all of them confirmed that the doctrine of *kompetenz-kompetenz* is not applied to mean that the tribunal's word is the last word on its jurisdiction. The last word will lie with a court, either in a challenge brought before the courts of the arbitral seat, or in a challenge to recognition or enforcement abroad.⁴⁸⁷

Having decided that it had the authority fully to consider the question of whether the Government was a party to the arbitration agreement, the Supreme Court, in accordance with section 103(2)(b) of the 1996 Arbitration Act where the parties have not stipulated a governing law of the arbitration agreement, applied French law since it is the law of the country where the award was made. Thereafter, and after the court tested the relevant law it concluded that the Government was not a party to the arbitration agreement.⁴⁸⁸

Anyway, the decision of the court will have noticeable ramifications. The court highlighted how the doctrine of *kompetenz-kompetenz* does not ban the competent court either in the place of arbitration or where the award is sought to enforce from reviewing the award made by the tribunal, and both courts have same investigatory rights. The court relied, when making its decision, on section 103(2)(b) of the 1996 Act and article V(1)(a) of the New York Convention which both grant it the power to investigate the jurisdiction of the tribunal in the event of the arbitration agreement being not valid or alleged to be. It also confirms that

⁴⁸⁷ Dundas, H., (2011), "Competence-Competence and the Jurisdiction of the English Courts: the UK Supreme Court Decides - Dallah Real Estate & Tourism Holding Co v Pakistan", *Arbitration*, 77(1), pp 135-146.

⁴⁸⁸ Ibid.

the law of the seat of arbitration is the applicable law in the absence of specified law by the agreement, and the jurisdictional issue shall be addressed under it in such cases.⁴⁸⁹

4.4 The Role of Courts During the Proceedings

There is no doubt that the court's primary and traditional role is to provide a forum for adjudication of civil disputes. As another favourable option, arbitration plays the same role, but it does need the court to assist it in many various stages in order to achieve its goals. Arbitration cannot be completely independent from national courts because the arbitral tribunal does not own an executive power and instruments which enable it to enforce its orders in case a party refuses to comply with. The arbitral tribunal may need to make some interim orders, the enforcement of which can only be done with the assistance of courts. There may also be a need to order an interim measure which the arbitral tribunal cannot do especially where orders have to be made against a third party. Therefore, in those circumstances courts are the only option and the involvement of them in both the international or domestic arbitration process remains essential to its effectiveness. For this reason, all jurisdictions permit their courts to play a role in arbitral proceedings, albeit in varying degrees. The Model Law, which has been built upon by many countries provides that "in matters governed by this Law, no court shall intervene except where so provided in this Law"⁴⁹⁰ It then gives permission to national courts to interfere in a number of instances during an arbitral proceeding, including the appointment of arbitrators, the challenge of arbitrators, the determination of arbitral jurisdiction, and the issuance of interim measures.⁴⁹¹

However, some arbitrating parties may abuse such a role given to the court by law and request the intervention of the court as a tactic in order to lengthen the judicial process and thereby delay arbitration. Then, they can negotiate with the other party and force them to

⁴⁸⁹ Bamforth, R. and Aglionby, A., (2010), "Case Comment: Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46", available at: <http://uksblog.com/case-comment-dallah-real-estate-and-tourism-holding-company-v-the-ministry-of-religious-affairs-government-of-pakistan-2010-uksc-46>, accessed on 6\12\2011.

⁴⁹⁰ The Model Law, article 5.

⁴⁹¹ Muttath, R. and Hwang, M., (2002), "The Role of Courts in the Course of Arbitral Proceedings: Singapore and Other Asian Perspectives", *Arbitration*, 68(3), pp 223-237.

abandon some of their rights, otherwise they might have to wait for too much time until they can obtain their whole rights. Therefore, the question that arises here is whether there is a way to avoid such tactics and prevent such abuse? In other words, can the parties to the arbitration agree on excluding the powers and role of the court during the arbitration proceedings? The answer can be found in the so called *Scott v Avery* clause which previously was mentioned in Ch 1.4.3. This scenario refers to a clause in the arbitration agreement that prevents the parties from commencing any procedure in the court prior to rendering the final arbitral award.⁴⁹²

Recently, this issue came before Flaux J. in the Commercial Court in *B v S*.⁴⁹³ S sold to B under two contracts some consignments of sunflower seed oil. Both contracts were on the terms of FOSFA 54, which is one of the standard forms of the Federation of Oilseeds and Fats Associations. Later, disputes having arisen in respect of alleged default by S, B claimed his entitlement to nearly US\$3 million and commenced an arbitration under clause 29 of FOSFA 54. Clause 29 was a *Scott v Avery* provision. At the same time, B sought from the court a worldwide freezing order, under the Arbitration Act 1996 s.44, over the assets of S. This section permits the court to exercise its powers, which are given to it in relation to legal proceedings, also in support of arbitral proceedings, unless otherwise agreed by the parties. One of these powers, as it is provided for in the same section, permits "the granting of an interim injunction or the appointment of a receiver."⁴⁹⁴

On a without notice application, the court issued a worldwide freezing injunction in favour of B. In response, S applied to set aside the injunction on the ground that it was obtained in breach of the *Scott v Avery* clause. S argued that a *Scott v Avery* clause prevents recourse to the court until an award had been issued. As a result, the Arbitration Act 1996 s.44 does not apply as the parties have "agreed otherwise". At the beginning of his judgment Flaux J.

⁴⁹² Chang, S., (2012), "Inherent Power of the Arbitral Tribunal to Investigate its Own Jurisdiction", *J. Int. Arb.*, 29(2), pp 171-182.

⁴⁹³ [2011] EWHC 691 (Comm).

⁴⁹⁴ Arbitration Act 1996, s.44 (2) (a).

declared that as a matter of construction cl.29 of the FOSFA, it was wide enough to exclude all proceedings anywhere, whether substantive or ancillary.⁴⁹⁵

As part of his consideration of the case he referred to *Mantovani v Carapelli*,⁴⁹⁶ which concerned an arbitration clause identical in material terms to clause 29 in FOSFA 54. In that case Donaldson J had concluded that it did not prohibit an application to the court for security made under s. 12(6) of the 1950 Act (the equivalent of s.44 of the 1996 Act). However, Flaux J. concluded that the decision was based on the mandatory terms of s.12 (6) of the 1950 Act and not on the construction of the clause. The situation in 1996 Act is however different. It (AA 1996) rather emphasizes party autonomy as well as categorizing s.44 and other several provisions as non-mandatory. Therefore the effect of the *Scott v Avery* clause was now more far reaching, and it had to be construed as meaning that the parties had agreed otherwise. He added also that the situation applies to any application made under s.42 of the 1996 Act which grants the court the power to make an order requiring a party to comply with a peremptory order made by the tribunal.⁴⁹⁷

Flaux J. also reviewed Rix J.'s judgment in *Re Q's Estate*,⁴⁹⁸ It was the only case at that time to have considered injunctions granted under the Arbitration Act 1996 s.44. Even though in this case the arbitration clause was not of the *Scott v Avery*-type, Flaux J. found support in Rix J.'s obiter dicta which he took as saying that if it had been such a clause it would have precluded the court from exercising its jurisdiction under the Arbitration Act 1996 s.44. Having considered previous relevant cases, Flaux J gave his decision that the freezing injunction should be discharged and held that a *Scott v Avery* clause is effective to block ancillary as well as substantive proceedings.⁴⁹⁹

⁴⁹⁵ Fletcher, N., "Challenge to an Injunction on the Basis of a *Scott v Avery* Clause Preventing any Legal Proceedings until an Award has been Made", March 23/2011, available at: <http://www.blplaw.com/expert-legal-insights/articles/arbitration-challenge-to-an-injunction-on-the-basis-of-a-scott-v-avery-clause-preventing-any-legal-proceedings-until-an-award-has-been-issued/>, accessed on 10/11/2013.

⁴⁹⁶ [1978] Lloyd's Rep. 63 QBD (Comm).

⁴⁹⁷ Fletcher, *ibid*.

⁴⁹⁸ [1999] 1 All E.R. (Comm) 499.

⁴⁹⁹ Fletcher, *ibid*.

The conclusion that can be drawn from these cases is that the position in England prior to enacting the 1996 Act was to apply the clause to substantial proceedings and not to ancillary proceedings since it was a mandatory provision under the 1950 Act. However, the situation after 1996 Act has changed and the clause shall prohibit all legal actions before the court until making the final award. Equally, applications under s.45 (Determination of preliminary point of law), 50 (Extension of time for making award) and 77 (Powers of court in relation to service of documents) will be prevented as these are situations where the court cannot act if the parties “otherwise agree”. In contrast, the mandatory powers given to the courts under the Arbitration Act 1996 will not be affected by *S v B*.⁵⁰⁰ For instance, *Scott v Avery* clauses will not affect the court’s power to stay litigation under s.9, or to extend time for commencing an arbitration under s.12, or for securing the attendance of witnesses under s.43.⁵⁰¹

Returning to the main discussion the following are most important roles which national courts can play during the arbitral proceedings:

4.4.1 Role of Courts in Enforcement of Arbitration Agreements

Sometimes, one of the parties of arbitration, usually the one who expects to lose, commences court proceedings for tactical reasons contrary to the terms of the agreement. The court then has to enforce the arbitration agreement by refusing to assume jurisdiction of hearing the claim brought before it and instead refers the parties to arbitration or stays the proceedings before it.⁵⁰²

The New York Convention as well as the Model Law oblige the courts to enforce the arbitration agreements only by way of reference to arbitration. Hence, the courts are required, at a request of one of the parties (before taking any steps in the action), to stay the court

⁵⁰⁰ [2011] EWHC 691 (Comm).

⁵⁰¹ Tweeddale, A. and Tweeddale, K. (2011), "*Scott v Avery* Clauses: O’er Judges’ Fingers, Who Straight Dream on Fees", available at: <http://corbett.co.uk/wp-content/uploads/Arbitration-article-Scott-v-Avery.pdf>, accessed on 10/11/2013.

⁵⁰² Lurie, J., (2010), "Court Intervention in Arbitration: Support or Interference?", *Arbitration*, 76(3), pp 447-453.

proceedings in favour of arbitration unless the arbitration agreement in question is null and void, inoperative or incapable of being performed. The stay or reference is mandatory and the courts have no discretion.⁵⁰³ At the same time, applying to the court does not necessarily prevent the arbitral tribunal from commencing arbitral procedures or continuing them and an award may be made while the issue is being considered by the court.⁵⁰⁴

Similarly, the English legal system grants the court the power to order a stay of proceedings upon a request of a party to an arbitration agreement, unless the court is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.⁵⁰⁵ Also, Saudi Arbitration System 2012 requires a local court of competent jurisdiction to decline jurisdiction *ex officio* if the defendant requests referral of the case to arbitration prior to making any claim of defence. Meanwhile, the arbitral tribunal can continue with the arbitration procedures and issue the final award.⁵⁰⁶

4.4.2 Role of Courts in Establishment of an Arbitral Tribunal

One of the roles which the courts can play in arbitration operation is assisting in constituting the arbitral tribunal. They may be requested by the parties of arbitration or one of them to play a role in the appointment of an arbitrator, in deciding a challenge against arbitrators and in the removal of arbitrators. Under the Model Law, the courts have authority to designate arbitrators where there is no agreed procedure or where an agreed procedure fails.⁵⁰⁷ However, it is noticeable that courts' intervention in the designation of the arbitrators is more frequent in ad hoc arbitration than institutional one, due to the fact that the latter has its own regulations and rules that address the absence of appointment of arbitrators in arbitration agreement or failure to do that by the disputing parties.⁵⁰⁸

⁵⁰³ The Model Law, article 8(1). Also see: New York Convention, article II (3).

⁵⁰⁴ Lurie, *supra* note (502).

⁵⁰⁵ Arbitration Act 1996, s. 9.

⁵⁰⁶ Saudi Arbitration System 2012, article 11.

⁵⁰⁷ The Model Law, article 11(3).

⁵⁰⁸ Muttath, R. and Hwang, M., (2002), "The Role of Courts in the Course of Arbitral Proceedings: Singapore and Other Asian Perspectives", *Arbitration*, 68(3), pp 223-237.

The Arbitration Act 1996 goes in the same trend with the Model Law and it legitimates the court's intervention in the failure of the procedure for the appointment of the arbitral tribunal and the court shall pay attention and have due regard to any agreement of the parties as to the qualifications required of the arbitrators. It specifies the powers of the court in such cases as following:

- "(a) to give directions as to the making of any necessary appointments;
- (b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;
- (c) to revoke any appointments already made;
- (d) to make any necessary appointments itself." ⁵⁰⁹

The courts are also entitled in both international law and English law to make a decision on challenges against arbitrators on their independence, impartiality or qualifications, where there is no agreed procedure for such challenge or where the agreed procedure fails. The courts shall not intervene and exercise its power of removal before exhausting any available recourse to the arbitral tribunal by the applicant. However, a decision of a national court in any of the above matters related to the constitution of an arbitral tribunal is not subject to appeal. The Model Law as well as the Arbitration Act 1996 both allow the arbitrators to continue the arbitral proceedings and make an award, pending a challenge. Most probably, both these provisions are aimed to avoid potential delay and extra expenses. ⁵¹⁰

The Saudi Arbitration System also refers the same role to the court in the event of failure of the parties of arbitration to appoint the arbitrators or where the arbitrator refuses to work, or withdraws, or a contingency arises which prevents him from undertaking the arbitration, or if he is dismissed and there is no special stipulation by the parties. The court shall take into account when playing the role, the number of arbitrators agreed upon among the parties. ⁵¹¹

⁵⁰⁹ Arbitration Act 1996, s. 18, 19.

⁵¹⁰ The Model Law, article 13. Also see: Arbitration Act 1996, s. 24.

⁵¹¹ Saudi Arbitration System 1983, article 10. Also see: Saudi Arbitration System 2012, article 15.

Additionally, the court is empowered to intervene on the grounds of a request by a party to disqualify the arbitrator.⁵¹²

4.4.3 Role of Courts in Determining Jurisdiction of the Tribunal

One of the significant characters of arbitration is the doctrine of *kompetenz-kompetenz* that empowers the arbitral tribunal to rule on its own jurisdiction. This great power and right that the tribunal has is still subject to appeal to the relevant national court under the Model Law. As in former cases already mentioned, where the court is allowed to intervene in arbitration task, the arbitral tribunal is entitled to continue the arbitral proceedings and make an award, pending such an appeal.⁵¹³

Also, English law grants the court the authority to determine any question as to the substantive jurisdiction of the tribunal. Any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties, provided that the court is satisfied that the determination of the question is likely to save significant amount of costs, and there is no delay in submitting the application to the court by the interested party as well as there is good reason why the matter should be decided by the court.⁵¹⁴

Surprisingly, the Arbitration System 2012 in KSA does not refer to this role or right of the court to determine the jurisdiction of the arbitral tribunal. Quite the opposite, article 20 of the System empowers only the tribunal to do so. In the event that one of the disputing parties challenges its jurisdiction, it (the tribunal) should rule on it before ruling on merits, but it can join it to the merits to decide both together. "If it rules to dismiss a motion, such motion may not be invoked except through filing a claim for the annulment of the arbitration award

⁵¹² Saudi Arbitration System 1983, article 12.

⁵¹³ Al-Anizy, M., (2006), Nullity of the International Commercial Arbitration Award, Beirut, Munshorat Al-Halebi Al-Hquqiyah, p 274.

⁵¹⁴ Arbitration Act 1996, s. 32, 45.

adjudicating the dispute pursuant to Article 54 of this law".⁵¹⁵ This undoubtedly poses a remarkable shift in the arbitration system in KSA.

4.4.4 Role of Courts in Relation to Interim Measures

During the course of arbitration, it may be necessary for the arbitral tribunal or the national court to issue orders to protect assets or keep evidence. Those orders are commonly known as "interim measures". They are noticeably very imperative to an arbitral proceeding as they protect the legislative rights and interests of the parties before or during the arbitration and ensure the smooth execution of an arbitration award. However, the arbitral tribunal may not have the necessary powers that enable it to issue an interim measures for several reasons; as it has not been granted such powers by the arbitration agreement, it has not been established yet or the order in relation to a third party who is not covered by the agreement. Besides, the arbitral tribunal occasionally faces difficulties in enforcing its orders or the matter aimed by the order is urgent and need rapid action which the tribunal cannot comply with, because it needs an application and noticing the other party and that may push the other party to change the situation or make fast transactions. In these instances, there is no way to protect evidence or preserve properties and so on except recourse to the courts which are granted such powers in many national jurisdictions beside to international conventions and treaties. The Model Law, for example, confirms the right of a party to an arbitration agreement to seek interim measures of protection from the competent court and the later to grant such a measure.⁵¹⁶

Some jurisdictions impose significant restrictions on the authorities of national courts to order interim measures in relation to an arbitral proceeding. One of those jurisdictions is the English jurisdiction which allows the parties to exclude the powers of courts in this regard. It also provides that the courts must act only if, or to the extent that, the arbitral tribunal, and any arbitral or other institution or person having power to act in relation to the subject-matter, has no power or is unable to act effectively. Moreover, it requests a permission of the arbitral tribunal or an agreement in writing of the other parties in the event of the case being not one

⁵¹⁵ Saudi Arbitration System 2012, article 20.

⁵¹⁶ The Model Law, article 9.

of urgency before the court being able to order an interim measures. But if the case is one of urgency, the court may make such orders just on the application of a party or proposed party to the arbitral proceedings.⁵¹⁷

Under the English Act, the court's powers which are exercisable in support of arbitral proceedings apply even if the seat of arbitration is outside England or Wales or Northern Ireland, or no seat has been designated or determined.⁵¹⁸ The position is the same also in KSA. The new 2012 System, grants the court the right to order such interim measures to support arbitration procedures, provided that there is a request by one of the parties to the arbitration or by the tribunal itself.⁵¹⁹

4.4.5 Role of Courts in Taking of Evidence

Witnesses and documents in litigation and other alternative dispute resolution models are very important. Obviously, they assist decision makers in those contexts to reach factual findings and make right decisions. In arbitration, the arbitral tribunal authority is limited and depends on the agreement and consent of the disputing parties and of course, does not enjoy as much power as the courts do. Consequently, it indeed needs assistance from the courts in some cases such as enforcing an directing a witness to testify or to produce documents. This limitation becomes even more conspicuous when one of the parties uses it as a dilatory tactic. This is where assistance from national courts is essential. The Model Law recognises that the court may have a role in assisting in the taking of evidence. Article 27 of the Model Law states:

“The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court ... assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence”.⁵²⁰

⁵¹⁷ Mistelis, L., (ed), (2010), Concise International Arbitration, the Netherland, Kluwer Law International.

⁵¹⁸ Muttath, R. and Hwang, M., (2002), "The Role of Courts in the Course of Arbitral Proceedings: Singapore and Other Asian Perspectives", Arbitration, 68(3), pp 223-237.

⁵¹⁹ Saudi Arbitration System 2012, article 22.

⁵²⁰ The Model Law, article 27.

Similarly, the Arbitration Act 1996 allows the party of arbitration to "use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence" provided that the witness is in the United Kingdom, and the arbitral proceedings are being conducted in England and Wales or Northern Ireland.⁵²¹ Saudi Arbitration System 2012 also allows the tribunal to apply the court to assist it in obtaining evidence.⁵²²

4.4.6 Role of Courts in Ordering Security for Costs

The costs of arbitration can be very high especially international commercial arbitration. Consequently, it may be necessary for the courts or the arbitral tribunal to order security for costs in some situations because the losing party may refuse to bear its own costs or he is insolvent. Generally, both the arbitral tribunals (in jurisdictions where they have powers to grant interim measures) and national courts have the power to order security for costs in appropriate instances. However, the general trend (of both courts and arbitral tribunals) is to discourage orders for security for costs in modern international commercial arbitrations, against which there are policy arguments. The courts take a restrictive approach even in litigation. It has been repeatedly held that an order for security for costs is not automatic but a matter within the discretion of the court. The courts take into consideration all the relevant circumstances, including whether the respondent's impecuniosity is attributable to the claimant, whether the application is oppressive and intended to stifle a genuine claim, or is *bona fide* and has a reasonable prospect of success.⁵²³

An exception to this general rule is the English Act, which does not seem to allow an English court to order security for costs in an arbitral proceeding, although it grants the arbitral tribunal that.⁵²⁴ As for the Saudi system, it does not include any signal to this matter and it seems that it does not allow such order. Rather, it provides for authority of competent court to

⁵²¹ Arbitration Act 1996, s. 43.

⁵²² Saudi Arbitration System 2012, article 22 (3).

⁵²³ Muttath, R. and Hwang, M., (2002), "The Role of Courts in the Course of Arbitral Proceedings: Singapore and Other Asian Perspectives", *Arbitration*, 68(3), pp 223-237.

⁵²⁴ Arbitration Act 1996, s. 38 (3).

hear and decide the dispute that arises regarding arbitrators' fees if there is no prior agreement.⁵²⁵

4.4.7 Role of Courts in Granting Anti-Arbitration Injunctions

It is not rare for the parties to an arbitration agreement to make an application to restrain the arbitral proceedings due to various reasons. One of the reasons that push a party to do so is where one of the parties wants to delay or abort the arbitral proceedings simply because it does not have a good case. Another situation is where a party prefers to initiate court proceedings in its own country. An injunction restraining arbitration proceedings may be granted where they are wrongly brought or where one of the parties disputes the tribunal's substantive jurisdiction. The courts may take into account whether the applicant has taken any part in the arbitration, has delayed making the application and whether there is a pending action in a local or foreign court.⁵²⁶

Anti-arbitration injunctions have been criticized by continental scholars. It has been argued that such injunctions are sought especially in developing states in order to frustrate the international arbitral system by engaging in judicial protectionism of local companies and governmental entities. Some commentators have described anti-arbitration injunctions as well as anti-suit injunctions as an oddity of common law jurisdictions. Others noted that anti-arbitration injunctions violate conventional and customary international law and international public policy.⁵²⁷

As to the New York Convention, it leaves the door open and there is no provision in it prevents such an injunction. Quite opposite, art. II (3) of the Convention provides that a Contracting State should refer parties to arbitration unless the arbitration clause is null and void, inoperative or incapable of being performed.⁵²⁸

⁵²⁵ Saudi Arbitration System 1983, article 23. Also see: Saudi Arbitration System 2012, article 24.

⁵²⁶ Muttath, R. and Hwang, M., (2002), "The Role of Courts in the Course of Arbitral Proceedings: Singapore and Other Asian Perspectives", *Arbitration*, 68(3), pp 223-237.

⁵²⁷ Seriki, H., (2013), "Anti-Arbitration Injunctions and the English Courts: Judicial Interference or Judicial Protection?", *Int. A.L.R.*, 16(2), pp 43-55.

⁵²⁸ NYC, article, II (3).

In England, this tool is in common use regardless of the seat of arbitration, whether inside or outside the UK. Nevertheless, this power is exercised by the English court with great caution and it is not always that the court will grant such injunction. In *Elektrim S.A. v Vivendi Universal S.A.*,⁵²⁹ there had been a number of litigation and arbitration proceedings between Elektrim, Vivendi and others. In an attempt to settle their disputes, the parties entered into a Settlement Agreement which was not signed. Some of the parties declined to recognize the validity of the Settlement Agreement, as such Vivendi commenced an ICC arbitration in Geneva according to the Settlement Agreement. In the meantime, the London Court of International Arbitration (LCIA) proceedings continued. Elektrim sought several times to stay the LCIA proceedings on various grounds but all of them were refused by the LCIA tribunal. Thereafter, Elektrim applied to the court under s.37 of the Senior Courts Act 1981 (SCA) to restrain the LCIA arbitration on the grounds that the relief claimed by the defendants in the LCIA arbitration was inconsistent with the relief sought in the ICC arbitration.⁵³⁰

Although Aikens J. admitted that Elektrim could have established that one of its legal or equitable rights had been infringed or threatened by the continuation of the LCIA arbitration pending the outcome of the ICC arbitration or that the same proceedings were oppressive or unconscionable, he dismissed the application. He explained that by indicating that such injunction would be contrary to the agreement of the parties to refer their disputes to the LCIA. In addition, the LCIA tribunal had the authority to stay the arbitration, but it had decided on three occasions not to do so. Moreover, the court had no express power under the Act to review or overrule those procedural decisions prior to rendering an award by the LCIA tribunal.⁵³¹

The English courts exercise this power even if the seat of arbitration is outside the UK, but with more cautions as compared to the arbitration takes place inside it. This can be extracted from *Weissfisch v Anthony Julius*.⁵³² The two parties of this case agreed to appoint an arbitrator who had provided legal advice to both of them. In their agreement, they waived expressly any right of challenging his appointment. After arbitration commencement,

⁵²⁹ [2007] EWHC 571 (Comm).

⁵³⁰ Angenieux, P., (2007), "Anti-Arbitration Injunctions Restraining Arbitrations Subject to the Arbitration Act 1996", *Int. A.L.R.*, 10(4), pp 139-144.

⁵³¹ Ibid.

⁵³² [2006] EWCA Civ 218.

Weissfisch applied to the court in order to obtain an anti-arbitration injunction to halt the arbitral proceedings. The application was refused by the first instance court and also the appeal was dismissed. The Court of Appeal relied on the fact that the parties have submitted their arbitration to Swiss law and therefore determining the validity of the unusual provisions of the arbitration clause would fall to be resolved in Switzerland according to Swiss law. However, the court emphasized that in some exceptional circumstances, which are not found in this case, it is entitled to take such action.⁵³³

Also, in *Intermet FZCO v Ansol Ltd*,⁵³⁴ Ansol failed to obtain an interim injunction to restrain Internet and Vnesheexpert Service Consulting Company Ltd (VES) on the grounds that they commenced concurrent proceedings against Ansol, one by way of arbitration in Zurich and the other by way of court proceedings in the Commercial Court in London. Ansol argued that both proceedings embodied the very same claims, thus creating a major degree of overlap and duplication between the two sets of proceedings. The judge was not convinced because she did not consider that it would be oppressive, vexatious or severely prejudicial to the defendant for the arbitration to continue.⁵³⁵

However, In *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi TBK Ltd & anr*,⁵³⁶ the interim injunction was granted. Golden Ocean hired a vessel from Genuine but redelivered it in early time claiming that it was not capable to work anymore. Thereafter, Golden Ocean sought for repayment of overpaid hire under a charterparty. In contrast, Genuine, a subsidiary of the Humpuss Group sought for damages for early redelivery. The charterparty contains an arbitration clause designs London as the seat of arbitration. After the dispute had arisen, Golden Ocean and Genuine signed an addendum states on settling the dispute by arbitration in Singapore.

Nonetheless, Golden Ocean commenced an arbitration in London against HIT and the later refused to appear. In November 2012, the arbitrator issued his award holding that Golden Ocean had contracted with HIT and therefore he had jurisdiction to determine the dispute pursuant to the arbitration agreement contained in the charterparty. He awarded Golden

⁵³³ Seriki, H., (2013), "Anti-Arbitration Injunctions and the English Courts: Judicial Interference or Judicial Protection?", *Int. A.L.R.*, 16(2), pp 43-55.

⁵³⁴ [2007] EWHC 226 (Comm).

⁵³⁵ Seriki, *ibid*.

⁵³⁶ [2013] EWHC 1240.

Ocean its costs against HIT. In January 2013, Genuine commenced an arbitration in Singapore and sent a letter giving notice of doing so to Golden Ocean. Golden Ocean applied to the English court seeking an interim injunction restraining Genuine from pursuing the Singapore arbitration on the basis that the addendum was void because the charterparty was between itself and Humpuss Intermoda Transportasi TBK Ltd (HIT), the parent company of the Humpuss Group. In addition, Golden Ocean sought a declaration that the charterparty is between Golden Ocean and HIT and also a declaration that there is no arbitration agreement between Golden Ocean and Genuine.⁵³⁷

The task facing the English court was identifying the disponent owner (ie a person or company that commercially controls a vessel, but does not own it) of the vessel under the charterparty: HIT, the parent company of the Humpuss Group, or Genuine, its former subsidiary. Popplewell J stated that the test for whether the English court should respect the principle of *kompetenz-kompetenz* is the same for an application for an anti-arbitration injunction as for an application to stay proceedings under s.9. Popplewell J stressed on the significance of taking into consideration the circumstances of the case as comprehensively as possible when determining whether to decide the question of jurisdiction or defer it to the arbitrator. He set out the factors that likely make the court to decide the matter itself as following:

- if the decision would avoid the risk of inconsistent judgments,
- if the jurisdiction issue will probable fall to be decided by the court in any event, for example on enforcement, then the court is likely to decide to save costs and time.
- if the decision on jurisdiction will not involve deciding substantive matters.
- if the arbitration agreement is governed by English law.
- The court will also take into a count the factors provided for by the House of Lords in *Spiliada Maritime Corp v Cansulex*,⁵³⁸ such as the location of witnesses and evidence, to determine which is the most appropriate forum.
- the courts also will grant a stay if it is satisfied that the party resisting the stay will not suffer prejudice in referring the decision to the arbitrator.

⁵³⁷ Allen & Overy, "English Court Rules on Singapore Tribunal's Jurisdiction", available at: <http://www.allenoverly.com/publications/engb/Pages/ENGLISH-COURT-RULES-ON-SINGAPORE-TRIBUNAL%E2%80%99S%20JURISDICTION.aspx>, accessed on 24/11/2013.

⁵³⁸ [1987] AC 460.

Finally, Popplewell J held that these factors were found in the instant case and there is a risk of inconsistent awards in the London and Singapore arbitrations. Consequently, he granted the claimant an anti arbitration injunction and gave directions for a trial of the issues to decide the validity of the addendum to the charterparty, notwithstanding, that the investigation would be complex and costly. Permission to appeal was granted on 12 June 2013.⁵³⁹

Also, the anti-arbitration injunction can be granted where one party initiates arbitral proceedings so as to re-arbitrate disputes already decided against it. In *Injazat Technology v Najafi*,⁵⁴⁰ Flaux J. granted the anti-arbitration injunction on the ground that the new proceedings were vexatious, unconscionable, oppressive and an attempt to frustrate the enforcement of a valid arbitral award.⁵⁴¹

In conclusion, it is clear from the cases discussed above that the English courts will not for all time grant an anti-arbitration injunction, especially where the seat of arbitration is not in England and Wales. Such injunctions are granted with caution and only in exceptional circumstances. Secondly, the hard task which usually the English courts have to challenge with is balancing the principle of *kompetenz-kompetenz* on the one hand and the fact that arbitration is a consensual operation and only parties to an arbitration agreement should be made to arbitrate on the other. Thirdly, the jurisdiction to grant an anti-arbitration injunction is derived from the court's inherent jurisdiction under s.37 of the SCA. Lastly, it appears that the test for granting an anti-suit injunction also applies often to anti-arbitration injunctions.⁵⁴² However, it must be bore in mind that arbitration is a process that aims to obtain a fair resolution of disputes without unnecessary expense and delay. It would be no logical if a party that is not obviously a party to an arbitration agreement has to constantly incur costs to represent before a tribunal to challenge its jurisdiction over it when it never consented to its jurisdiction. The use of anti-arbitration injunctions helps to preserve the consensual character of arbitration and in the right circumstances can be a helpful instrument to hold back a party

⁵³⁹ Ibid.

⁵⁴⁰ [2012] EWHC 4171 (Comm).

⁵⁴¹ Ibid.

⁵⁴² Seriki, H., (2013), "Anti-Arbitration Injunctions and the English Courts: Judicial Interference or Judicial Protection?", *Int. A.L.R.*, 16(2), pp 43-55.

that tries to abuse the arbitral process. So, it should not necessarily be seen as totally incompatible with arbitration.⁵⁴³

Moreover, it should be remembered that an anti-arbitration injunction is a discretionary remedy, thereby; it must be sought rapidly without delay. The same rapidity applies to anti-suit injunctions. Failure to do so may cause dismissing the application for delay. Furthermore, it is worthwhile to say that in many cases the arbitral tribunal did not obey the decision of the courts to halt arbitration. They continue arbitration procedures and issued awards. They argue that they have a duty to protect and apply choice of the disputing parties and their agreement. Besides, they enjoy the power of deciding on their jurisdiction '*kompetenz-kompetenz*'.⁵⁴⁴

As for Islamic jurisprudence and Saudi legal regime, there is no reference or exercise to such injunction. As a result, the option which is available to the aggrieved party is doing nothing and waiting until the award is rendered and sought to be enforced then challenge it.⁵⁴⁵

4.4.8 Role of Courts in Granting Anti Suit Injunctions

An anti-suit injunction is an order mostly issued by courts in common law jurisdiction especially in United Kingdom and the United States. Some other countries, particularly in civil law jurisdictions, find the anti-suit injunctions offensive.⁵⁴⁶ In fact, it is viewed to be a controversial injunction because it constrains judicial proceedings in another country. An anti suit injunction is an order issued by a court or arbitral tribunal that prevents an opposing party from commencing or continuing a proceeding in another jurisdiction or forum. It is often used as a means to prevent forum shopping and to avoid conflict between different courts. The legal basis for anti-suit injunctions in current English law is in the Supreme Court Act 1981. It is universally acknowledged that parties to a dispute sometimes commence proceedings in foreign jurisdictions with a view to gaining time.⁵⁴⁷

⁵⁴³ Ibid.

⁵⁴⁴ Ibid.

⁵⁴⁵ Al-Nawawi, Y., (n.d), *al-Majmu' Sharh al-Muhadhdhab*, Beirut, Dar Al-Fikr.

⁵⁴⁶ Barcelo, J., "Anti-Foreign-Suit Injunctions to Enforce Arbitration Arbitrations", cited in: Rovine, A., (ed.), (2007), *Contemporary Issues in International Arbitration and Mediation*, The Netherlands, Martinus Nijhoff Publishers, p107.

⁵⁴⁷ Ibid.

A recent exercise by the court in England to this power has raised many and important questions about its consistent with the European Union rules and effects expected to be reflected on arbitration in Europe. The case is *West Tankers (Allianz)*.⁵⁴⁸ The High Court in England granted West Tankers an anti-suit injunction in order to prevent Allianz and Generali from continuing proceedings which they commenced against it before a court in Italy. Allianz appealed the judgment to the House of Lords in the UK and the later referred a question to European Court of Justice whether anti-suit injunction is harmonized with Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or not? The answer was no.⁵⁴⁹

The answer of the European Court of Justice (ECJ) was unexpected due to the fact that European Union law does not, in principle, deal with international arbitration and the main objective of Council Regulation (EC) No 44/2001 is creating an “area of freedom, security and justice.” Moreover, it is indicated expressly in the Regulation that the Regulation shall not apply to arbitration. Anyway, this section will highlight the outcomes of ECJ’s decision and predictable results beyond it as well as criticisms that have been raised against the idea of anti-suit injunction.⁵⁵⁰

The roots of the dispute between West Tankers and Allianz go back to August 2000 when a vessel owned by West Tankers and chartered by Erg Petroli SpA (‘Erg’), collided in Syracuse (Italy) with a jetty owned by Erg and caused substantial damage. The charter party was governed by English law and included a clause laying down an arbitration in London. Erg asked for compensation from its insurers Allianz and Generali up to the limit of its insurance cover and commenced arbitration procedures in London against West Tankers for damages in excess of the insurance policy limit. West Tankers rejected legal responsibility for the damage caused by the crash.⁵⁵¹

⁵⁴⁸ *Allianz & Anor v West Tankers Inc (Judgments Convention/Enforcement of judgments)* [2009] EUECJ C-185/07.

⁵⁴⁹ Cairns, D., (2009), "Introductory Note to European Court of Justice-Allianze Spa v West Tankers Inc", International Legal Materials, vol. 48, pp. 485-492. Also see: Case C-185/07.

⁵⁵⁰ Ibid.

⁵⁵¹ Zadkovich, J. and Roberts, N., (2012), "West Tankers 2012: Pro-Arbitration Through Enforcement of Declaratory Awards", International Arbitration Law Review, 15(2), 51-55.

On 30 July, 2003 and after paying Erg compensation under the insurance policies for the loss it had suffered, Allianz and Generali brought proceedings against West Tankers before the Tribunale di Siracusa (Italy) in order to recover the money they had paid to Erg. The action was based on their statutory right of subrogation to Erg's claims, in accordance with Article 1916 of the Italian Civil Code. West Tankers raised an objection of lack of jurisdiction on the ground of the existence of the arbitration agreement. Moreover, it brought proceedings on 10 September, 2004 before the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court), seeking a declaration that the argument between itself and Allianz and Generali was to be resolved by arbitration pursuant to the arbitration agreement beside an injunction 'the anti-suit injunction' preventing Allianz and Generali from commencing any proceedings other than arbitration and requiring them to discontinue the proceedings they have already commenced before the Tribunale di Siracusa.⁵⁵²

On 21st of March 2005, the Commercial Court of England gave its verdict by upholding West Tankers' claims and granting it the anti-suit injunction sought against Allianz and Generali. The court relied on the fact that the anti-suit injunction relates to arbitration and is therefore excluded from the Jurisdiction Regulation. The latter appealed against that judgment to the House of Lords arguing that the grant of such an injunction is contrary to Regulation No 44/2001. The House of Lords, in turn, referred the following question to the ECJ pursuant to Article 234 EC: "Is it consistent with Regulation No. 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?". The ECJ answer that came on 10th of February 2009 was surprising, holding that it was not.⁵⁵³

The ECJ found that under the arbitration agreement and under the Jurisdiction Regulation the Syracuse Court had exclusive jurisdiction to rule on the objection to its own jurisdiction. Consequently, the anti-suit injunction necessarily aimed to stripping that court of the power to determine on its own jurisdiction. The ECJ then turned to the principle of mutual trust,

⁵⁵² Ibid.

⁵⁵³ Ibid.

strongly relied on by the Advocate General, stating that the anti-suit injunction "runs counter to the trust which the Member States accord to one another's legal systems and juridical institutions and on which the system of jurisdiction under [the Jurisdiction Regulation] is based." ⁵⁵⁴

In addition, the general rule on *lis pendens* provides that where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, the court where the action was first instituted shall first establish whether it has jurisdiction over it or not. Once the court that was first seised of the matter refuses jurisdiction, then the second court second may proceed with the case. ⁵⁵⁵

4.4.8.1 Criticism of the Anti-Suit Injunction

There are many criticisms on several grounds that have been widely raised against anti-suit injunction by legalists and lawyers. One of the most important criticisms is that it is seen to be in conflict with the conception of international comity of nations. In public international law, comity involves reciprocal and mutual respect which is to prevail in the relations between different nations and their courts and legal systems. Principles of international comity revolve around equality and justice, therefore, working under the umbrella of International comity requires that all its members should trust each other's institutions and jurisdictions as well as work together in cooperation and harmony. The anti-suit injunction appears to be in breach to those doctrines which international comity is based on.

Anti-suit injunctions interfere with matters falling within the national dominion of other states, namely the administration of justice. In particular, the principle of mutual trust by virtue of which judgments given in other Member States are recognized and enforced all over

⁵⁵⁴ Cairns, D., (2009), "Introductory Note to European Court of Justice-Allianze Spa v West Tankers Inc", International Legal Materials, vol. 48, pp. 485-492. Also see: Pohjankoski, P., (2010), "Can International Arbitration Remain Unaffected by EU Law? – Anti Suit Injunction and the Scope of the Arbitration Exception", Helsinki Law Review, [PDF], available at: <http://www.edilex.fi/lakikirjasto/7115.pdf>. Also see: Case C-185/07.

⁵⁵⁵ Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, article 27,28.

the EU may be seen as an expression to respect the administration of justice in other Member States.⁵⁵⁶

In addition, the possibility to gain an anti-suit injunction may also be seen as inherently favouring litigants in those jurisdictions where the anti-suit injunction is available, as opposed to litigants in jurisdictions where such an order is unknown. Furthermore, the anti-suit injunction is seen as possibly breaching basic human rights as it may be seen as obstructing a party's access to court, particularly in the sense of Article 6 of the European Convention of Human Rights.⁵⁵⁷

4.4.8.2 Negative Effects of Rejecting the Anti-Suit Injunction

Generally, the ECJ judgments have been criticized sharply mainly by lawyers from common law jurisdictions. The ECJ judgments have been seen to create needless inflexibility by imposing rigid rules where the system would call for flexibility. In addition, the realistic implications of the ECJ case law are feared by many to prove disastrous. Until the *West Tankers* judgment, the ECJ case law remained thus unclear as to whether anti-suit injunctions could be granted in a situation where the subject-matter of the dispute would have to do with arbitration. Therefore, it is likely expected that the decision adopted by the ECJ regarding the case of *Allianz SpA and Generali v West Tankers Inc* will lead to negative effects on arbitration centres which have spread through Europe, especially in UK, and which enjoy very good reputations as well as granting an advantage to arbitration taking place outside of continent of Europe.⁵⁵⁸

It is also likely to encourage actions brought in bad faith before courts. The accessibility of such dilatory actions provides an undue incentive for forum shopping which aims to extend the period of resolving the dispute. In according prevalence to the idea of the mutual trust in

⁵⁵⁶ Pohjankoski, P., (2010), "Can International Arbitration Remain Unaffected by EU Law? – Anti Suit Injunction and the Scope of the Arbitration Exception", Helsinki Law Review, [PDF], available at: <http://www.edilex.fi/lakikirjasto/7115.pdf>. Also see: Case C-185/07.

⁵⁵⁷ Cairns, D., (2009), "Introductory Note to European Court of Justice-*Allianze Spa v West Tankers Inc*", International Legal Materials, vol. 48, pp. 485-492. Also see: Case C-185/07.

⁵⁵⁸ Ibid.

the interaction of the courts of the Member States on account of respecting the trust in private agreements conferring jurisdiction, the ECJ has arguably legitimised and facilitated the use of dilatory proceedings in the courts of other Member country. Debatably, also the fact that a clause conferring jurisdiction is seen as not conferring exclusive jurisdiction, in the sense that no other court could be seised by the parties, may wear away the confidence that economic operators have for the European legal system. In turn, this probably will lead to reduce attractiveness of European arbitral seats such as London and cause large-scale commercial court case being driven out of the European Union for interest of other major arbitration centres, such as New York or Singapore.⁵⁵⁹ Overall, the judgment of ECJ has raised arguments around Regulation No 44/2001 and has caused many demands to revise and reform it efficiently and realistically in order to protect the special nature of arbitration and keep Europe an attractive seat of arbitration.⁵⁶⁰

However, after three years the demands were heard. On 10 December 2012 the Council of EU Justice Ministers voted to adopt the revision of Regulation (EC) 44/2001. The new Regulation (No 1215/2012) has come into force 20 days after its publication in the Official Journal of the EU, but will not apply until the early 2015.⁵⁶¹ The adopted revised regulation has included a few good changes regards arbitration but no one of them affects directly the position of anti-suit injunction that was confirmed by the ECJ in *West Tankers*. It clarifies that there is an absolute exclusion of arbitration from the ambit of the Regulation. It also states on that a member state court can decide upon the validity of an arbitration agreement and does need to wait for the decision of another member state court, even if the question has been referred to that other court first. More importantly, it says that in the event of a conflicting arbitral award and a member state court judgment, a member state may enforce

⁵⁵⁹ Cairns, D., (2009), "Introductory Note to European Court of Justice-*Allianze Spa v West Tankers Inc*", *International Legal Materials*, vol. 48, pp. 485-492.

⁵⁶⁰ Pohjankoski, P., (2010), "Can International Arbitration Remain Unaffected by EU Law? – Anti Suit Injunction and the Scope of the Arbitration Exception", *Helsinki Law Review*, [PDF], available at: <http://www.edilex.fi/lakikirjasto/7115.pdf>.

⁵⁶¹ Cairns, *ibid*.

the arbitral award if considered valid under the New York Convention in preference to the court judgment.⁵⁶²

Some commentators may argue that there is no need to have an anti-suit injunction any more since the new changes lay stress on enforcing the arbitral award in preference to the court judgment in the event of conflicting decisions. So, the party who is interested in the arbitration can simply ignore the proceeding brought before a foreign court and wait until the arbitral tribunal issuing its award under the New York Convention which takes precedence over this Regulation. This is quite true, but it still there are some remaining issues. For example, in the event of arbitral operation is still in process while the foreign court has made its decision, in this case there is no arbitral award yet to fight the court's decision therefore the court in the place of arbitration would enforce it. Besides, if the award was sought to be enforced in the same country of the court that had made the decision.⁵⁶³

However, it should be noted that the *West Tankers* decision is applied only between EU countries and does not apply to proceedings brought in a non-Member State court. As a result, an anti-suit injunction can still be obtained by a party where the other party to an arbitration agreement or an exclusive jurisdiction agreement seeks to bring court proceedings in breach of the agreement in a non-Member State court. This was confirmed by the decision made in *Shashoua v Sharma*⁵⁶⁴. The English courts established that *West Tankers* did not apply in respect of proceedings brought in India.⁵⁶⁵

Further, a recent decision of the Supreme Court in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust -Kamenogorsk Hydropower Plant JSC*⁵⁶⁶ even confirmed that anti-suit injunctions may be granted under section 37 of the Senior Courts Act 1981 where there is no arbitration

⁵⁶² "The Revised Brussels Regulation: Are We Back to Where We Started?", Herbert Smith Freehills, 12 December 2012, available at: <http://hsf-arbitrationnotes.com/2012/12/12/the-revised-brussels-regulation-are-we-back-to-where-we-started/>, accessed on 25/10/2013.

⁵⁶³ Cairns, Supra note (559).

⁵⁶⁴ *Shashoua and ors v Sharma* [2009] EWHC 957 (Comm).

⁵⁶⁵ Ibid.

⁵⁶⁶ *Ust -Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35.

in prospect (in order to protect a party's right to arbitrate where there was an arbitration agreement in place and the other party had already sought to bring court proceedings in Kazakhstan in breach of that agreement). The issue in this case, as Lord Mance determined, is whether, if the other forum is a foreign jurisdiction outside the European regime of the Brussels Regulation (EC) No 44/2001 and the Lugano Convention, the English court has any and if so what power to declare that the claim can only properly be brought in arbitration and/or to injunct the continuation or commencement of the foreign proceedings.⁵⁶⁷

Burton J, the judge in the first instance court, granted the respondent, Aes Ust-Kamenogorsk Hydropower Plant LLP ("AESUK"), such a declaration together with an injunction in relation to the bringing of proceedings against it by the appellant, Ust-Kamenogorsk Hydropower Plant JSC ("JSC"). Thereafter, JSC appealed the decision to the Court of Appeal which upheld the decision and dismissed JSC's appeal against the judge's. JSC appealed again to the Supreme Court and again lost it. The Supreme Court decided that Burton J had jurisdiction under section 37 of the Senior Courts Act 1981 to make the order that he did, and that there was nothing wrong in principle with exercise of his power to do so. The Court of Appeal was right so to conclude, and the appeal should be dismissed.⁵⁶⁸

This decision is so important and contributes together with the *West Tankers'* case in illustrating the status of the power of English courts to grant anti-suit injunction and whether they have jurisdiction to restrain the continuation or commencement of foreign proceedings brought in breach of an arbitration agreement. It can be derived from these cases that anti-suit injunction cannot be granted against a member state of EU whereas it can be obtained against the countries outside EU. In addition, there is no need of arbitration to be commenced or proposed to grant such action.⁵⁶⁹

⁵⁶⁷ Frame, S., (2013), "Anti-Suit Injunctions in International Arbitration - Which Court Has Jurisdiction?", available at: <http://www.lexology.com/library/detail.aspx?g=49c03122-9c37-4b9b-98b0-e98487c238d9>, accessed on 3/10/2013.

⁵⁶⁸ Frame, S., (2013), "Court Powers to Grant Injunctions - Interaction of Arbitration Act 1996 & Senior Courts Act 1981", available at: <http://www.lexology.com/library/detail.aspx?g=37c477d2-a658-42fd-b788-b6c4f2de4234>, accessed on 3/10/2013.

⁵⁶⁹ Ibid.

There are no specific provisions for anti-suit injunctions in Islamic law. However, there are no texts either in the Qur'an or the Sunnah that make the issuance of such injunction unlawful. Invariably, that brings such injunction under the discretionary power of the court or the judge. In Islamic law, where there is no reference to a specific matter whether positively or negatively, the judge has the discretion to apply what is co-called 'istihsan' (Juristic Preference). Istihsan is one the juristic principles of 'Ijtihad' (independent reasoning).⁵⁷⁰

It may be useful to mention that several books of Islamic jurisprudence have recorded some circumstances where the judge can write to another judge in a different place asking the other judge to take certain action with regards to the case brought before him. For example, when a witness in a case is living far away from the place of the court and cannot attend court or he finds it difficult to attend court either due to illness or cost, the judge can request another judge that sits at a place near to the witness to take his evidence and then send it back to him.⁵⁷¹

As regards the Saudi Model, there are also no provisions for anti-suit injunction either in the Arbitration System 1983 or in the Arbitration System 2012. The law in Saudi does not give or provide for giving the Saudi courts the power to grant an anti-suit injunction to a party of arbitration in the event of breaching an arbitration agreement by one of its parties and recourse to a foreign court.⁵⁷²

In my own opinion, I think that the idea of anti-suit injunction is understandable and the purpose behind it is widely accepted. Undoubtedly, it supports arbitration and gives an advantage to the country which grants such power to its courts over others which do not. The order of anti-suit injunction is directed to the party who wants to breach the arbitration agreement by initiating judicial procedures in a foreign court, and it is not directed to the foreign court. Therefore, I see there is no exceeds in such action to the jurisdiction or authority of another state. Quite the opposite, it puts the party who intends to breach the

⁵⁷⁰ Ibn Qudamah, A., (1997), *Al-Mughni*, Riyadh, Dar Aalm Alktub, 3, vol. 14, p 73-85.

⁵⁷¹ Ibid.

⁵⁷² Saudi Arbitration system 1983 and 2012.

arbitration agreement in front of its responsibilities in the event of denying the order, and charges it the cost or losses that may the another party suffer from.

4.5 Termination of Arbitral Proceedings

Arbitration can be ended and terminated on various grounds, such as by the withdrawal of an application, by a settlement or by an order or injunction of the competent court. The applicable rules on arbitration and civil procedure have to determine whether or not such events terminate the arbitration and thereby also the suspension. This section will address the reasons and situations where the arbitral tribunal is empowered or obliged to issue an order termination the proceedings. The following are the principal situations that may lead to the termination of arbitral proceedings:

4.5.1 Rendering the Final Award

The normal and expected end of arbitral proceedings is the issuance an award by the arbitral tribunal which resolves the dispute. The Model Law states that: "The arbitral proceedings are terminated by the final award."⁵⁷³ The Saudi Arbitration System 2012 also provides that arbitration proceedings will automatically come an end when the final award is delivered.⁵⁷⁴ Also, the Arbitration Act 1996 obliges the tribunal to terminate the substantive proceedings unless otherwise agreed by the parties.⁵⁷⁵ This does not mean that the arbitral tribunal cannot re-open the proceedings at all after making an award. The rule that the arbitration is terminated and the mandate of the arbitral tribunal terminates when a final award is issued is modified to the extent that the arbitral tribunal can correct any mistake, for instance, in calculation etc. Arbitration proceedings can also be re-opened mainly to complete the award

⁵⁷³ UNCITRAL Model Law on International Commercial Arbitration, article 32.

⁵⁷⁴ Saudi Arbitration System 2012, article 41.

⁵⁷⁵ Arbitration Act 1996, s.51 (2).

by making an additional award as to the claims presented in the arbitral proceedings but omitted from the award, or give an interpretation of the award.⁵⁷⁶

4.5.2 Withdrawal of the Claim

Another ground that obliges the arbitral tribunal to issue an order for the termination of the arbitral proceedings is when the claimant withdraws his claim. In this case, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings unless the respondent objects to such action and the arbitral tribunal finds a legitimate interest for him in obtaining a final settlement of the dispute. It then shall continue the arbitral proceedings until the end and make an award regarding the dispute as contained in Article 32 of the Model law.⁵⁷⁷ A similar provision is also contained in Article 41 of the Saudi Arbitration System 2012.⁵⁷⁸ AA 1996 also empowers the tribunal to make an award dismissing the claim, in the event that there has been inordinate or inexcusable delay on the part of the claimant in pursuing his claim.⁵⁷⁹

4.5.3 Settlement of the Dispute

When the arbitral proceedings has been initiated by the parties of arbitration and the arbitral tribunal, it is possible for the disputing parties to reach an agreement and settlement of the dispute while the proceedings is on and before the arbitral tribunal issues the final award. In this event, the UNCITRAL Rules, the Model Law and Arbitration Act 1996 all request the tribunal to terminate the substantive proceedings "and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award".⁵⁸⁰ They also request the arbitral tribunal to state that the agreed award is an award of the tribunal and it shall have the same status and effect as any other award on the merits of the

⁵⁷⁶ Tweeddale, K. and Tweeddale, A., (1999), A Practical Approach to Arbitration Law. Britain, Blackstone Press Limited, p 168-169.

⁵⁷⁷ UNCITRAL Model Law on International Commercial Arbitration, article 32.

⁵⁷⁸ Saudi Arbitration System 2012, article 41.

⁵⁷⁹ Arbitration Act 1996, s. 41.

⁵⁸⁰ Ibid, s.51 (2).

case.⁵⁸¹ Also, the Saudi Arbitration System 2012 includes same provision and regards settlement of the dispute as an acceptable cause to terminate arbitration proceedings. It also grants the settlement power of an arbitral award in enforcement provided issuing it in form of an award.⁵⁸²

4.5.4 Agreement of Parties to Terminate Arbitral Proceedings

An arbitration contract is a voluntary and consensual contract due to the fact that it poses the desire of its parties to recourse to arbitration rather than litigation. Consequently, it will be logical to say that since they concluded it voluntarily, they should also have the liberty to terminate it when they so desire. The international law through the Model Law confirms such right and provides expressly for termination of the arbitral proceedings when the parties themselves agree to do so.⁵⁸³

As for the English system, although there is no direct reference to such situation, it is so obvious in my view that once the parties of arbitration desire to terminate the arbitral proceedings they can do. That is what harmonises with the general aspects and principles which govern contracts generally and shared by many jurisdictions and legislations in the world. Moreover, this is so close and similar to termination of the arbitral proceedings on the basis of settlement of the dispute by the parties themselves which is legitimated expressly by s. 51 of the English Arbitration Act 1996. Being so clear, this made English legislators not to refer to it when issuing the Act even though it is mentioned in the Model Law. The Saudi Arbitration System 2012 has also expressly referred to this situation and confirmed that arbitration procedures should be terminated in such case.⁵⁸⁴

4.5.5 Default of a Party

⁵⁸¹ UNCITRAL Arbitration Rules, article 36. Also see: UNCITRAL Model Law, article 30. Also see: Arbitration Act 1996, s. 51.

⁵⁸² Saudi Arbitration System 2012, article 45.

⁵⁸³ UNCITRAL Model Law on International Commercial Arbitration, article 32.

⁵⁸⁴ Saudi Arbitration System 2012, article 41.

Termination of arbitral proceedings can also be made by the arbitral tribunal on the basis of failure of the claimant to communicate his statement of claim according to the provisions of UNCITRAL Model Law. In contrast, the failure of the respondent to communicate his statement of defence shall not lead to the termination of proceedings nor being understood as an admission of the claimant's allegations according to the same law. In addition, failure of a party to appear at a hearing or to produce documentary evidence does not necessarily terminate the arbitral proceedings, but the arbitral tribunal may continue the proceedings and make the award on the evidence before it.⁵⁸⁵ In the Kingdom of Saudi Arabia, the failure of the claimant to deliver its statement of claim in writing and within the period agreed on by the parties or specified by the arbitral tribunal imposes on the later to terminate arbitration procedures unless the parties agree on something different.⁵⁸⁶

In England, the arbitral tribunal is allowed, according to s.41(3) of the Arbitration Act 1996, unless otherwise agreed by the parties, to make an award dismissing the claimant's claims if the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim. This authority however subject to two conditions, namely that the delay "gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim" or "has caused, or is likely to cause, serious prejudice to the respondent." If these conditions are not fulfilled, the arbitral tribunal has two options; either continuing the proceedings or rendering an award on the basis of the evidence before it.⁵⁸⁷

In *TAG Wealth Management v West*,⁵⁸⁸ the arbitrator exercised this power granted by s 41 and the court in England supported his award. TAG is a financial and investment advisor which engaged Mr West as an associate for several years in relation to the sale of both regulated and non-regulated financial products, the arranging of mortgages and the provision

⁵⁸⁵ UNCITRAL Model Law on International Commercial Arbitration, article 25.

⁵⁸⁶ Saudi Arbitration System 2012, article 34.

⁵⁸⁷ Poudret, J. and Besson, S., (2007), *Comparative Law of International Arbitration*, England, Sweet & Maxwell Ltd. Also see: Arbitration Act 1996, s. 41.

⁵⁸⁸ *TAG Wealth Management v West* [2008] EWHC 1466 (Comm). [2008] 2 Lloyd's Rep. 699 / 2008 WL 5458982.

of fee-based financial advice. Mr West's work included writing life insurance policies with a variety of life offices on behalf of TAG but in respect of individual clients.⁵⁸⁹

In 2000, disputes arose between TAG and Mr West and an arbitrator was appointed in January 2002 in order to resolve the dispute between the parties. The arbitrator started consideration of the dispute and issued an order that there would be mutual disclosure of relevant documents by both parties prior to the service of points of claim or defence. Various exchanges of correspondence between the parties ensued during the rest of 2002 and throughout 2003, each side accusing the other of delaying tactics. In January 2004, the arbitrator issued Order stating: "More generally TAG's delay in this case is not just a matter of the last few weeks, but extends over some eleven months by not responding properly to DLA Piper's letter of 18 February 2003".⁵⁹⁰

Further correspondence between the parties happened in 2004-2007. Inter alia, TAG stated in May 2007 that it was experiencing great difficulties since its relevant storage facilities had been flooded and documents most likely destroyed. Mr West applied to the arbitral tribunal for dismissing TAG's claim relying upon s. 41(3) of English Arbitration Act. The arbitrator subsequently held that Mr West's s. 41(3) application succeeded, and he therefore ordered that TAG's claim against Mr West be dismissed. The arbitrator gave full reasons for his decision, concluding that the delay in the case had been almost entirely the fault of TAG. He also concluded that this delay had been both inordinate and inexcusable and it was apparent that it was impossible to have a fair trial. TAG appealed under both s. 68(2)(a) and (d) and s. 69, the principal ground being that the arbitrator had failed to comply with s. 33, and/or that he had failed to have dealt with all the issues put to him.⁵⁹¹

The court after considering the dispute brought before it and the grounds on which the appeal was based on decided that none of TAG's complaints established serious irregularity that

⁵⁸⁹ Ibid.

⁵⁹⁰ Ibid.

⁵⁹¹ Dundas, H., (2008), "Case Comment: Dismissal of a Claim for Claimant's Inordinate and Inexcusable Delay: TAG Wealth Management v West", *Arbitration*, 74(4), pp 467-471.

affected either the arbitrator or the proceedings or the award. Aikens J. did not find any relevant irregularity at all, let alone any that either had caused or would cause substantial injustice to TAG. For that reason, he concluded that the s. 68 appeal must be dismissed. He also stated that there had been no error of law on the part of the arbitrator thus that s. 69 was not applicable at all in this case; the application for leave to appeal must be dismissed.⁵⁹²

However, what should an arbitrator do with the default of the claimant in the absence of a specific rule governing such position? The question actually has a close link to that of the effects of withdrawal of the claimant on the arbitral operation. Should such withdrawal be understood to just terminate the proceedings or also dispose of the merits of the claims? Personally, I am in favour the opinion that a withdrawal "without prejudice" is permissible before the respondent has officially represented his defence and answered the claims. This criterion enables the arbitral tribunal to finish the arbitral proceedings without addressing the dispute at a point when it is difficult to visualize sensibly that the claimant could be in default. But once the respondent has filed his defence, the arbitral tribunal should pursue the proceedings and make an award on the merits except when the respondent waives such actions, and then the only effect would be the termination of the arbitral proceedings "without prejudice" for the claimant's claims.

4.5.6 The Continuation of Proceedings Becoming Unnecessary or Impossible

The arbitral tribunal may find in some occasions and before the award is made that the continuation of the proceedings has become unnecessary or impossible for other reasons different from those mentioned before. In such case, the arbitral tribunal is entitled to issue an order terminating the proceedings provided that the tribunal informs the parties of arbitration in advance of its intention to issue such order and there are no remaining matters that may

⁵⁹² Ibid.

need to be decided and the arbitral tribunal considers it appropriate to do so.⁵⁹³ This is provided for in the Saudi Arbitration System 2012.⁵⁹⁴

In conclusion, it appears obviously that there are several situations where the arbitral tribunal is obliged to terminate the arbitral proceedings. Most of them are mutual between international, English law and Saudi model. Those provisions show how flexible and sufficient the arbitration operation generally as well as the powers and authorities that the arbitral tribunal enjoys during the arbitral proceedings which aims principally to make arbitration successful and beneficial means.⁵⁹⁵

⁵⁹³ UNCITRAL Arbitration Rules, article 36.

⁵⁹⁴ Saudi Arbitration System 2012, article 41.

⁵⁹⁵ Poudret, J. and Besson, S., (2007), Comparative Law of International Arbitration, England, Sweet & Maxwell Ltd.

Chapter Five

The Arbitral Award, and Ways of Challenging it

Arbitration is a process by which a dispute is referred to a private person or persons (the arbitrator or arbitrators) for their decision. The arbitrator or arbitrators are chosen by the parties to the dispute, and their decision is binding on the parties. Arbitration is a common method of resolving disputes, and it is often used in commercial and construction contracts.

5.1 Form of Award

The award is the final stage and the step that ends the arbitration process. It indicates the winner, the loser, who is responsible for legal fees and the other fees and expenses relating to the arbitration, etc. Before we address the form of the award, we will illustrate the different types of awards which may be issued by the arbitral tribunal during the course of arbitration or at the end of it.

5.1.1 Types of Awards

There are various kinds and types of awards that the arbitral tribunal is entitled to issue during the arbitration process. These types are discussed below.

5.1.1.1 Final Awards

Although all awards that may be made by the arbitrators during the course of arbitration are final in their nature, it is only the award which completes and ends the mission of the arbitral tribunal and resolves the whole dispute that carries the name of "final award". It can thus be said that the final award is the award that the arbitral tribunal makes at the end of arbitration proceedings and which is supposed to finish and settle the dispute. However, it should be noted that when the word 'award' comes to be mentioned in an arbitral document without any more description, it refers in principle to this kind of award: the 'final award'.⁵⁹⁶

5.1.1.2 Partial and Interim Awards

There is no doubt that arbitration is a favourable way to settle disputes especially among businessmen as it is smoother and provides more flexibility than litigation. One of the most important weapons in the hand of the arbitral tribunal which can be used to keep arbitration effective and flexible is the authority to issue an interim orders and a partial award. These

⁵⁹⁶ Hartwell, G., "The Reasoned Award in International Arbitration", available at: <http://www.hartwell.demon.co.uk/intaward.htm>, accessed on 25/2/2012. Also see: Menzies, I., (1999), "Award or Order?", *Arbitration*, 65(2), pp 107-109.

kinds of awards are specialised to settle important issues that may appear during the arbitral process and cannot wait to be settled at the end because of their determination contributes significantly to save considerable time and efforts as well as money for all parties including the arbitral tribunal itself. For example, issues related to jurisdiction of the tribunal or where there is an argument between the disputing parties about the laws applicable to the merits of the case are better determined in the interim.⁵⁹⁷

Also in this regard, the Arbitration Act 1996 grants the arbitral tribunal, unless the parties agreed otherwise, the power to award simple or compound interest from such dates, at such rates as it considers meets the justice. However, it is worth pointing out that this provision conflicts starkly with Islamic Shari'ah. Interest 'riba' in Islam is unacceptable at all. The Qura'an and Sunna, both are agreed on prohibiting it strongly. Allah says:

(يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنتُمْ مُؤْمِنِينَ. فَإِن لَّمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِّنَ اللَّهِ وَرَسُولِهِ وَأَنْ تَبِيتُمْ فَلِكُم رُؤُوسُ أَمْوَالِكُمْ لَا تَظْلُمُونَ وَلَا تُظْلَمُونَ)⁵⁹⁸

In Sunna Jabir reported: The Prophet cursed the receiver and the payer of interest, the one who records it (the contract) and the two witnesses to the transaction and said, "they are all alike (in guilt)."⁵⁹⁹ Also, there is a complete unanimity 'consensus' among all Islamic schools of thought regarding the prohibition of riba. Al-Nawawi⁶⁰⁰ says: "Muslims have made a consensus on prohibiting 'riba', and it was said that it was prohibited in all religions".⁶⁰¹

⁵⁹⁷ Ustah, O., (2007), The Judicial Supervision over awards of International Arbitration, Egypt, Sader, vol. 1, p 50-58.

⁵⁹⁸ Sura Al-Baqara (the cow), 2/278-279, "O ye who believe! Fear Allah, and give up what remains of your demand for usury, if ye are indeed believers. If ye do it not, Take notice of war from Allah and His Messenger. But if ye turn back, ye shall have your capital sums: Deal not unjustly, and ye shall not be dealt with unjustly". Translation of meaning of The Holy Qura'an by Yusef Ali, available at: <http://www.islam101.com/quran/yusufAli/QURAN/2.htm>, accessed on 15/11/2013.

⁵⁹⁹ Sahih Muslim, hadith no 1598, available at:

<http://hadith.alislam.com/Page.aspx?pageid=192&TOCID=717&BookID=25&PID=3067>, accessed on 15/11/2013.

⁶⁰⁰ Abu Zakaria Mohiuddin Yahya Ibn Sharaf al-Nawawi, popularly known as al-Nawawi, or Imam Nawawi. He was born in Nawa near Damascus, Syria in (631 A.H./1234 A.D). He was a famous Muslim author on Fiqh and hadith and wrote many important books, such as al-Majmu' sharh al-Muhadhdhab and Al Minhaj bi Sharh Sahih Muslim. His position on legal matters is considered the authoritative one in the Shafi'i Madhhab. He died in (676 A.H/1277 A.D).

⁶⁰¹ Al-Nawawi, Y., (n.d.), al-Majmu' sharh al-Muhadhdhab, Beirut, Dar Al-Fikr, 9/487.

5.1.1.3 Default Awards

A default award is the award rendered at the end of an arbitration operation in which one of its parties has failed or refused to take part in it. The refusal or failure may happen prior to the commencement of arbitral proceedings or during it as a kind of strategy and tactic or the party is not convinced that it is obliged by the agreement. In this case, the tribunal shall commence or continue arbitration with the active party and make an extra effort in testing the evidence and assertions submitted by the active party before rendering the award.⁶⁰²

5.1.1.4 Consent Awards

Sometimes, parties to an arbitration arrive at a settlement of the dispute while arbitral proceedings are on and before issuing the final award. Therefore, the arbitration would be regarded as finished, thus terminating the authority of the arbitral tribunal. However, in some cases, the parties may desire that the terms of settlement be included in a form of award. This because that gives their agreement power of award and therefore benefiting from international conventions and national laws that grant the award enforceability much easier than a simple agreement. This type of award is called a consent award and is recognised by many international treaties and national systems. The Model Law, for example, and the UNCITRAL Rules provide for such an agreed award.⁶⁰³ Also, Saudi Arbitration System 2012 and Arbitration Act 1996 do the same.⁶⁰⁴

5.1.2 Form and Contents of Award

The award shall deal with all matters referred to arbitration and is not to be ambiguous. It also must be dispositive and constitute an effective determination of the issues in dispute and

⁶⁰² Zekos,G., (2008), International Commercial and Marine Arbitration, Abingdon, Routledge-Cavendish, p 431-435.

⁶⁰³ The UNCITRAL Model Law on International Commercial Arbitration, article 30. Also see: The UNCITRAL Arbitration Rules, article 34.1.

⁶⁰⁴ Saudi Arbitration System 2012, article 45. Also see: Arbitration Act 1996, s. 51.

avoid a vague expression of opinion. Moreover, the arbitral tribunal should avoid including in its award any directions or orders which are outside the scope of its authority.⁶⁰⁵

In the event of the national systems of law and international conventions being silent as to the form of the award that shall be issued, the parties of arbitration can request a certain form of award to be delivered by the arbitral tribunal, i.e. a reasoned award or findings of fact and conclusions of law. If there is no relative national or international laws nor agreement between the parties requesting a certain type of award, the arbitral tribunal would only be responsible for issuing a general award.⁶⁰⁶

Essentially, the parties to an arbitration are entitled to an award of good quality which achieves its purpose. That means that it must be capable of giving effect to the arbitral decision in the jurisdictions in which it may have to be enforced. There is no requirement for the award to be issued in some particular form or style. While giving a useful advice to practising arbitrators, Lord Justice Donaldson (as he then was) observed that "No particular form of award is required all that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen, and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is."⁶⁰⁷

The arbitral tribunal in its way to issue an award regarding the dispute must satisfy itself that it has jurisdiction to decide the matters which it is called upon to determine and ensure that it covers all of these matters. It also needs to examine the requirements of relevant jurisdictions and convention in order to make an enforceable and recognisable award. On top of those rules and conventions, which the arbitrators should pay particular attention to prior to the making of an award, is the New York Convention as it has obtained ratification from most of countries around the world. Hence, the enforcement of that award stands the risk of being

⁶⁰⁵ Dundas, H., (2007), "The Finality of Arbitration Awards and the Jurisdiction of the Court of Appeal", *Arbitration*, 73(1), pp 127-137.

⁶⁰⁶ George, J., "Types of Arbitration Awards", available at: <http://joycejgeorge.com/blog/types-of-arbitration-awards/>, accessed on 25/2/2012.

⁶⁰⁷ Hartwell, G., "The Reasoned Award in International Arbitration", available at: <http://www.hartwell.demon.co.uk/intaward.htm>, accessed on 25/2/2012.

refused by a competent court on the ground of failure to comply with provisions of the law, particularly when the loser refuses to comply voluntarily with the award, then the only way to apply the award would be by having recourse to the court. For that reason, the award has to be clear on the legal standing of the documents, who are the parties, what they are required to do, what is the legal basis for that requirement and why that legal basis applies to the matter.⁶⁰⁸

Normally, arbitrators associated with the parties of arbitration tend to adopt a visual standard similar to that of the Court practice with which they are familiar. This style or standard usually contains a brief narrative illustrating a number of facts relating to the arbitration such as the creation of the arbitral tribunal and the preparation of the reference, the circumstances of the dispute, the choice of evidence, the decisions of the arbitral tribunal and finally, the arbitral tribunal's directions which give effect to the award. The arbitral tribunal should do its best to ensure that its award is not only correct, but also valid and enforceable. An arbitral tribunal should bear the possibilities of challenge and recourse in mind when drawing up its award.⁶⁰⁹

In general the requirements of form are dictated by: the arbitration agreement; and the law governing the arbitration (the *lex arbitri*). Therefore, the arbitrators should take into account the arbitration agreement when drawing up the award and check whether the arbitration agreement specifies any particular formalities for the award. In practice, this means examining any set of rules that the parties have adopted. Besides, they should look at the importance of the law governing arbitration and find out whether there are conditions or requirements that need to be satisfied in the award.⁶¹⁰

⁶⁰⁸ Ustah, O., (2009), The Judicial Supervision Over Awards of International Arbitration; Supervision before the Host State, Egypt, Sader, vol. 2, p 53.

⁶⁰⁹ Besson, S. and Poudret, J., (2007), Comparative Law of International Arbitration, England, Sweet & Maxwell, p 631-648. Also see: Hartwell, G., "The Reasoned Award in International Arbitration", available at: <http://www.hartwell.demon.co.uk/intaward.htm>, accessed on 25/2/2012.

⁶¹⁰ Zekos, G., (2008), International Commercial and Marine Arbitration, Abingdon, Routledge-Cavendish, p 413-435.

The requirements of form imposed by national systems of law vary from the comprehensive to the virtually non-existent. The UNCITRAL Model Law does not impose a specific form or type of award on the arbitral tribunal. According to its provisions, it just must be written and signed by all arbitrators or at least those have agreed on it in the event of its being rendered by majority not unanimously. Additionally, it shall be reasoned -unless the parties agree otherwise or the award is an award on agreed terms- and shall indicate its date and the place of arbitration. The Washington Convention differs with the Model Law in this point and calls for a reasoned award in all circumstances.⁶¹¹

The English jurisdiction adopts the same approach as the Model Law and grants the parties to arbitration freedom to agree on the form of the award. It does not indicate or request a specific form or standard of award. It rather specifies several requirements which the award shall satisfy in the absence of an agreement between the parties on the form of the award. In such case, the award shall be in writing and signed by all the arbitrators or all those assenting to the award. It also shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.⁶¹² Moreover, it shall state the place of the arbitration and the date when the award is made.⁶¹³

As for Islamic jurisprudence, arbitrators are not required to adopt a certain form nor give reasons for their decisions. The arbitrators may render a short award in one line showing the winner and loser and the obligations of each of them, although it is preferable to do so due to many advantages resulting from indicating the reasons and backgrounds of the award which it is based on such as confidentiality of the parties. However, when there is an advanced agreement between the parties requesting such action or it is requested by laws of the country, then it must be respected and applied even in Islamic law.⁶¹⁴

⁶¹¹ The Washington Convention, article 48.3.

⁶¹² Davidson, F., (1997), "The New Arbitration Act-A Model Law?", The Journal of Business Law, pp 101-129.

⁶¹³ Arbitration Act 1996, s. 52.

⁶¹⁴ Al-Moso'ah Al-Fighiah, (1993), Dar Al-Safwah, Egypt. Also see: Al-Bloui, N., (2012), The Arbitration in Islamic Sharia, Dar Al-Thaqafah, Amman, 1st edn.

The pattern is the same in the Saudi arbitration system. There is no certain form of award that must be issued by the arbitrators. The only requirement is to include the arbitration agreement in the award along with a summary of evidence and defences of the parties and the decision combined with its reasons. It also must include the names of the arbitrators and their signatures as well as the date of issuing the award and its place.⁶¹⁵ The Saudi Arbitration System, 2012 adds the costs of arbitrators and arbitration to those which have to be included in the award. Moreover, in the event that the award did not have unanimity, it shall be indicated in the award the reasons for minority to not signing the award.⁶¹⁶

Generally, it appears obviously that all four different systems of law- International law, English law, Islamic law and the Saudi system- do not impose a certain template of award on the arbitral tribunal when making the final award of arbitration which is supposed to finish the dispute. Additionally, all these systems except Islamic law are very similar in the requirements and matters that shall be included in the award. The slightly different between the three is that Saudi Arbitration System does ask for a reasoned award in all circumstances and without any exception as Washington Convention does, whereas the UNICTRAL Model Law and Arbitration Act 1996 give an option to the parties to dispense with reasons and moreover do not request such award in the case of being an agreed award.⁶¹⁷

Although issuing the final award represents the end in the arbitral operation, it does not mean the relationship between the arbitral tribunal and parties has finished. The parties may refer to the arbitral tribunal to correct any errors that were found in the award or to give an interpretation of a specific point or part of the award. In addition, they may refer to the arbitral tribunal in order to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. All these requests shall be made within thirty days of receipt of the award according to the Model law and twenty eight days according to English Arbitration Act 1996, unless another period of time has been agreed upon by the

⁶¹⁵ Saudi Arbitration System 1983, article 17. Also see: Executive Regulation of Saudi Arbitration System 1983, article 41, 42.

⁶¹⁶ Saudi Arbitration System 2012, article 42.

⁶¹⁷ Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press.

parties. The interpretation shall form part of the award.⁶¹⁸ The Saudi System 1983 is the same. It gives the arbitral tribunal the power to make any correction or interpretation but without stipulating a limited time of period.⁶¹⁹ However, the 2012 System limits the period of interpretation to thirty days starts from receiving the award. As for correction, the tribunal can perform it within fifteen days after rendering the award or receiving a request from one of the parties.⁶²⁰

5.1.3 Language of the Award

The award will be normally written in the language of the arbitration, although sometimes it may be made in the language which is most suitable for the parties. Any compulsory rule of law of the place of the arbitration concerning the language of the award must be followed and respected. It is a condition of recognition and enforcement under the New York Convention that a foreign arbitral award must be accompanied by an officially certified translation into the language of the place in which recognition and enforcement of the award is sought, when this is not the language of the award. It states that:

"If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator by a diplomatic or consular agent".⁶²¹

The Saudi arbitration system 1983 provided that Arabic language must be the only language used before the arbitral tribunal and in all documents, communications and discussions that relates to arbitration. Although, there is no direct reference to the language to be used for the arbitral of award, it may also be inferred from the former provision that the award shall be

⁶¹⁸ The UNCITRAL Model Law on International Commercial Arbitration, article 33. Also see: Arbitration Act 1996, s 57.

⁶¹⁹ Executive Regulation of Saudi Arbitration System 1983, article 42, 43.

⁶²⁰ Saudi Arbitration System 2012, article 46.

⁶²¹ The New York Convention, article II.2. Also see: Menzies, I., (1999), "Award or order?", *Arbitration*, 65(2), pp 107-109.

also made in Arabic.⁶²² The new 2012 System in contrast grants the parties and the tribunal the freedom to choose the language. In the absence of choice then the award shall be in Arabic.⁶²³

5.2 Challenges to the Award

No one likes to lose. So, it is often that the unsuccessful party to arbitration complains about the arbitral award and seeks recourse against it before the court. There are few grounds on which a party can rely on and seek to avoid an award in the event of his being dissatisfied with the award and unwilling to voluntarily accept its effect. Once an award has been rendered the losing party has three options. It can appeal against the award; if this is allowed under the applicable law or the arbitration rules, apply to challenge the award in the courts of the seat where the award was made or wait until the winning party starts enforcement proceedings before a court at which stage it can seek to resist the enforcement. This section is devoted to discuss the second option; challenging the award before the court of place of arbitration, while the third option; resisting recognition and enforcement of award before the enforcing court will be discussed in Chapter 6.⁶²⁴

Certain provisions for the challenge of awards are found in all national arbitration laws and international instruments regulating arbitration. In general, they provide for an action to set aside the award. However, parties who wish to challenge an award should first exhaust possibilities for review and reconsider the award before the arbitral tribunal which issued it or the institution within which the award was made. This includes seeking correction and interpretation of the award as appropriate. English law states that: "An application or appeal may not be brought if the applicant or appellant has not first exhausted any available arbitral process of appeal or review, and any available recourse under section 57 (correction of award or additional award)."⁶²⁵

⁶²² Executive Regulation of Saudi Arbitration System 1983, article 25.

⁶²³ Saudi Arbitration System 2012, article 29.

⁶²⁴ Born, G., (2009), International Commercial Arbitration, The Netherlands, Kluwer Law International.

⁶²⁵ Arbitration Act 1996, s. 70(2).

Challenges must be filed with the competent court which has jurisdiction to hear and look into the application. This is generally the court at the place of arbitration. This is the position adopted in the Model Law and the majority of arbitration laws.⁶²⁶ However, there are several grounds that can be relied on by the default party in seeking to set aside the tribunal's award. Some grounds may be raised only by the parties but others can be invoked by the court too.⁶²⁷ Following is illustration of these grounds in detail.

5.2.1 Grounds to be Raised by the Aggrieved Party

The normal way of challenging an arbitral award is to raise a challenge by the interested party before the competent court. There are several grounds and reasons that are available to the aggrieved party to depend upon in its seeking to avoid the award and challenge it under international and national regulations. These grounds are as follows:

5.2.1.1 Lack of Capacity or Agreement

The first ground upon which the tribunal's award may be challenged is the absence of legal capacity of one of the parties of arbitration or absence of the agreement to arbitration in principle. Capacity of parties to any contract is a principal term by which the contract is regarded to be correct and efficient. The same equally goes for contract of arbitration. We have already mentioned terms of arbitration agreement in chapter two and referred to capacity of parties as one of the arbitration agreement's terms. We would like to know whether a party of arbitration is under some incapacity or not, by looking at the personal legal status of that party. Some countries regard the law of the nationality of the party as the personal law of that party as it is followed in most of Arabic countries, whereas others consider the law of the place where a party resides as his /her personal law, such as the UK and the USA.⁶²⁸

⁶²⁶ Embiricos, E., (2010), "Appeals from Arbitration Awards", *Arbitration*, 76(3), pp 427-430. Also see: Seriki, H., (2005), "Serious Irregularity and the Arbitration Act 1996: Lesotho Highlands Development Authority v Impregilo SpA", *Journal of Business Law*, Nov, pp 745-751.

⁶²⁷ Hasen, Kh., (2010), *Nullity of Arbitration Award*, Cairo, Dar Al-Nhzah Al-Arabiah, p 234-240.

⁶²⁸ McIsaac, C., (2010), "Challenging the Rules of the Game: Certainty through Procedural Harmonisation of Challenges in International Commercial Arbitration", *International Arbitration Law Review*, 13(4), pp127-137.

In addition, the losing party can challenge the award by claiming that the agreement of arbitration is revoked or null. The Model Law, English Law and Saudi Arbitration System 2012 all list the lack of capacity or agreement on the top of all grounds upon which the arbitral tribunal's award could be challenged.⁶²⁹

5.2.1.2 Issues in the Proceedings

It is essential that the arbitral tribunal conduct the arbitral proceedings properly and correctly. That contributes to making the arbitral operation more confident for its parties, as it also guarantees fairness and neutrality. The tribunal is obliged to follow the terms of the arbitration agreement carefully and plays its role excellently without any excesses or errors.⁶³⁰

Some mistakes that occasionally happen during the arbitral proceedings may open the door to challenge the award which is usually made at the end of such proceeding. The Model Law, English Law and also the Saudi Arbitration System 2012 provide for challenging the award on the grounds of failure of the tribunal to notify the challenging party appropriately of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or the arbitral procedure was not in accordance with the agreement of the parties.⁶³¹ In addition, the Arbitration Act 1996 allows for challenging the arbitral award in the event of finding "any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award."⁶³²

Also see: Al-Zabi, M., (2011), The Legal Action for the Nullity of Arbitration Award in the International Commercial Disputes, Dar Al-Thaqafah, Amman, 1st edn.

⁶²⁹ The Model Law, article 34(2) (i). Also see: AA1996, s. 68 (2) (b). Also see: Saudi Arbitration System 2012, article 50 (1).

⁶³⁰ Seriki, H., (2005), "Serious irregularity and the Arbitration Act 1996: Lesotho Highlands Development Authority v Impregilo SpA", Journal of Business Law, Nov, pp 745-751.

⁶³¹ The Model Law, article 34(2) (ii,iv). Also see: Arbitration Act 1996, s. 68(a,b,c,d,e). Also see: Saudi Arbitration System 2012, article 50 (1).

⁶³² Seriki, *ibid*. Also see: English Arbitration Act 1996, s 68(i).

5.2.1.3 Failure by the Tribunal to Deal with all the Issues that Were Put to It

An arbitral tribunal is expected to deal with all issues raised by the disputing parties and address them according to justice rules and the terms of arbitration agreement. In the event of failure of the tribunal to comply with such duty, the aggrieved party may have recourse to litigation and tries to challenge the award. Such right of recourse and challenge is found in some national systems of law, although it is not set out in the New York Convention and the Model Law. For example, the English law regards failure by the tribunal to deal with all the issues that were put to it as a serious irregularity and therefore it is a reasonable ground to challenge the arbitral award.⁶³³ The Saudi Arbitration System 2012 follows the Model Law and does not refer to such a challenge. However, this does not mean that the tribunal shall look at all issues that were put to it even those which are insignificant or immaterial. It may exercise its discretion not to deal with such issues without being in need to explain in detail how its conclusion was reached.⁶³⁴

This doctrine was confirmed by a recent case was brought before the High Court in England in *Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd*.⁶³⁵ Kealey J. considered the particular meaning of s. 68(2)(d) and reinforced the interpretation of what is meant by the tribunal's failure to deal with "all the issues that were put to it" (i.e. the first limb of the test under s. 68(2)(d)). In his opinion, the interpretation of s.68(2)(d) was clear: that the section was designed to cover only those essential issues which were put to the tribunal and which was necessary for the tribunal to deal with for a fair decision on the claims or specific defences raised in the course of a reference, *World Trade Corp v Czarnikow Sugar Ltd*.⁶³⁶ This interpretation of the "essential issues" revealed by Kealey J. leads to the logical conclusion that an arbitral tribunal was not obliged to deal with all the issues raised by the parties one way or another as it may be possible that in dealing with some of the issues, other issues raised by the parties may simply fall away and may not, therefore, require final determination. Kealey J. further stated that:

⁶³³ Arbitration Act 1996, s. 68(d).

⁶³⁴ Hober, K., (2011), "International Arbitration in London: A View from Outside", *Arbitration*, 77(4), pp 428-434.

⁶³⁵ *Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm).

⁶³⁶ *World Trade Corp v Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm).

“it seems to me that the question whether or not the Tribunal failed to deal with an essential issue ... cannot be decided on the basis of whether or not the issue has any merit: the presence or absence of merit might be relevant to whether or not a substantial injustice might have been done to one or other of the parties but it cannot resolve the question whether or not the issue was dealt with in the first instance”.

*Buyuk Camlica Shipping*⁶³⁷ is a welcome reminder to academics and practitioners alike of the application of the sections of the Act concerned with challenging an award. It indicated clearly that the arbitral tribunal is not under an obligation to deal with all issues raised by the parties, but only those issues which are essential to the matter. However, this does not let the arbitral tribunal off the hook if it fails to deal with an issue which it may perceive as not having merit--such issues must at least be dealt with so that the parties and the courts are not left guessing whether the issue was covered in the reasons or the award. Kealey J.'s judgment is also to be welcomed as it clarifies reinforces the balance which must be struck when considering an application under s.68; in particular a balance between allowing a tribunal some flexibility when dealing with the essential issues which may mean that other issues fall away and therefore do not require full consideration and the need to provide parties and the courts with confirmation about what the tribunal has decided.⁶³⁸

Buyuk Camlica Shipping clarifies when s. 57(3)(a) will apply and also its relationship with s.68. Where there is an essential issue that a tribunal has not dealt with, s.57(3)(a) will have limited application and a party may proceed with making its application under s.68 without first having to exhaust recourse under s.57(3)(a). Kealey J.'s approach to s.57(3)(a) upholds the policy which underlies the Act and which Cook J. set out in *Torch Offshore LLC*⁶³⁹ thus: “The policy which underlies the Act is one of enabling the arbitral process to correct itself where possible, without the intervention of the Court.”⁶⁴⁰

⁶³⁷ Supra note (635).

⁶³⁸ Ustah, O., (2009), The Judicial Supervision Over Awards of International Arbitration; Supervision before the Host State, Egypt, Sader, vol. 2, p 199-208.

⁶³⁹ *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm).

⁶⁴⁰ Ahmed, M., (2010), "Case Comment: Challenges to an Award and Extension of Time: *Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd*", Arbitration, 76(3), pp 555-558.

5.2.1.4 Lack of Jurisdiction

There is no doubt that the arbitral tribunal receives its power and jurisdiction principally from arbitration agreement. This agreement sets out the scope under which the tribunal must exercise its role and should not exceed that ambit, otherwise its award can be challenged before the court on the basis of lack of jurisdiction. All international laws and national systems grant the losing party the right of challenging such an award. The Model Law refers to this reason as a ground of challenge in its provisions. Article 34 of the Model Law provides that an arbitral award may be set aside by the court if "the award deals with matters not contemplated by or not falling within the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement." The court in contrast shall set aside the award in whole or only in part in the event of the decisions on matters submitted to arbitration can be separated from those not so submitted.⁶⁴¹

Also, the Saudi Arbitration System 2012 permits challenging the award on ground of lack of jurisdiction or deciding on something outside the arbitration agreement.⁶⁴² In a case *No 33/(ت)/4*,⁶⁴³ there was an arbitration agreement to arbitrate the dispute that had arisen between the parties about compensation for a tort, that stemmed from delay in payment, but the arbitral tribunal exceeded that and decided upon demand of the cost of the performed works. The aggrieved party challenged the award before the court in KSA. The court set aside the award and held that the arbitral tribunal exceeded its jurisdiction and the scope of the arbitration agreement.⁶⁴⁴ However, this case was prior to the new system, and the 1983 System did not state specifically on this ground of challenge. The court might relied on the general terms and principles of contract under Shari'ah along with the article of the 1983 System that obliged the court to revoke the award that violates Islamic law.⁶⁴⁵

⁶⁴¹ New York Convention, article v (1) (c). Also see: The Model Law, article 34(2) (iii).

⁶⁴² Saudi Arbitration System 2012, article 50 (1).

⁶⁴³ *Case No 33/(ت)/4* in 1414 H/1993 AD.

⁶⁴⁴ Ibid.

⁶⁴⁵ Saudi Arbitration System 1983, article 20.

Similarly, the Arbitration Act 1996 refers to lack of jurisdiction as an acceptable ground for challenging the tribunal's award.⁶⁴⁶ S. 67 (1) of the Act provides that:

“A party to arbitral proceedings may... apply to the court—

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction;

or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction”.⁶⁴⁷

Also s.68 (2) (b) of the Act provides that it forms one of the serious irregularities for the arbitral tribunal to exceed its powers, which will eventually form a valid ground upon which an award can be challenged.⁶⁴⁸

However, it should be noted that the English courts apply restricted standards as to these grounds of challenge and do not intervene in the award unless the losing party can show the excess of the arbitral tribunal's authority and that it has caused substantial injustice. As Colman J. observed in *Vee Networks* :⁶⁴⁹

“The element of serious injustice in the context of s.68 does not in such a case depend on the arbitrator having come to the wrong conclusion as a matter of law or fact but whether he was caused by adopting inappropriate means to reach one conclusion whereas had he adopted appropriate means he might well have reached another conclusion favourable to the applicant”.⁶⁵⁰

In *B v A (Arbitration: Chosen Law)*,⁶⁵¹ there was a dispute that arose between the parties under an agreement governed by Spanish law which was referred to arbitration under the ICC Rules in London before three arbitrators. The arbitrators rendered the award in October 2009

⁶⁴⁶ Arbitration Act 1996, s. 67, 68(b,e).

⁶⁴⁷ Arbitration Act 1996, s. 67(1).

⁶⁴⁸ Arbitration Act 1996, s. 68(2) (b).

⁶⁴⁹ *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909; [2005] 1 Lloyd's Rep.192.

⁶⁵⁰ Seriki, H., (2005), “Serious Irregularity and the Arbitration Act 1996: Lesotho Highlands Development Authority v Impregilo SpA”, *Journal of Business Law*, Nov, pp 745-751.

⁶⁵¹ *B v A (Arbitration: Chosen Law)* [2010] EWHC 1626 (Comm); [2010] 2 Lloyd's Rep. 681 (QBD (Comm)).

and it was in favour of Party A but the decision was issued only by the majority. The third arbitrator gave a different opinion and criticised the award unusually alleging that the majority arbitrators had ignored Spanish law. Party B applied to the court in England challenging the arbitral award under ss.67 and 68 of the Act, alleging that the majority arbitrators had failed to apply Spanish law, which was the law chosen by the parties, contrary to s.46(1)(a) of the Arbitration Act 1996 which states that "The arbitral tribunal shall decide the dispute..in accordance with the law chosen by the parties as applicable to the substance of the dispute." This failure, as alleged by Party B, had resulted in the tribunal having exceeded its substantive jurisdiction and in a serious irregularity. The application was accompanied by expert evidence as to Spanish law.⁶⁵²

The court accepted a preliminary issue as to whether Party B's application had any realistic opportunity of success as a matter of law. The response of the court was negative and Tomlinson J. decided the preliminary issue in favour of Party A and confirmed the award. He rejected the challenge under s.67 on the basis that, "an error in the application of the chosen law does not involve a lack of substantive jurisdiction as it is defined in the Act." As regards the s.68 challenge, Tomlinson J. rejected the suggestion that, although arbitrators could make an error in the application of the chosen law without there being a breach of s.46 of the Act, a more serious error, which amounted to a departure from the chosen law, would provide grounds for a challenge under the Act.⁶⁵³

This landmark judgment will undoubtedly enhance London's status as one of the world's leading centres for international arbitration, and highlights the distinguished position of the English courts in dealing with challenges to arbitration awards. It reveals the fact that the English courts will not break the finality of award easily on the grounds that the arbitrators failed to apply a foreign law unless it is shown that the arbitrators had consciously disregarded that law which would in practice be very difficult to prove. This approach closes the door in front of many losing seeking parties to frustrate recognition and enforcement of

⁶⁵² Ibid.

⁶⁵³ Hew, R. and Dundas, H., (2010), "B v A: Alphabet Soup - Foreign Law and Dissenting Opinions in International Arbitration in London", *Arbitration*, 76(4), pp 757-763.

an arbitral award by bringing challenges whenever the dispute involves a foreign governing law alleging that the tribunal has failed or ignore the applicable law.⁶⁵⁴

5.2.1.5 Issues in the Form of the Award

Making the award is the end of the arbitral procedures and it includes the summary of the whole operation with the verdict of the tribunal regarding the dispute. As a result, it should be presented in good writing and high degree of clarity in order to fulfil its greatest aim in resolving the current dispute completely and finally, by not creating new arguments between the parties. Once the arbitral tribunal fails to comply with such criteria, it put its award at a risk of being challenged by the parties of arbitration. English law regards, that uncertainty or ambiguity as to the effect of the award; or failure to comply with the requirements as to the form of the award; or any irregularity in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award, as a serious irregularity which enable the party to apply to the court challenging an award on the ground of it.⁶⁵⁵ Similarly, the Saudi Arbitration System 2012 states that failure to adhere to the conditions and terms that have to be included in the arbitral award and which may affect the content of the award, constitutes an acceptable ground to challenge the award.⁶⁵⁶

5.2.2 Grounds which Can be Raised by the Court Directly

There are two grounds upon which an arbitral award can be challenged by the court without being necessarily instigated or initiated by one of the parties. This reflects the importance of these grounds and the special attention given to them by different legislations.

⁶⁵⁴ Clifford, P. and Browne, B., (2010), "B v A: Scope of Challenges Following an Alleged Error of Foreign Law", International Arbitration Law Review, 13(4), N31-33.

⁶⁵⁵ Gloster, E., (2007), " Attempts to Thwart the Arbitration Process: Current Examples of How the Court Makes Parties Stick to their Agreement to Arbitrate", Arbitration, 73(4), pp 407-412. Also see: English Arbitration Act 1996, s. 68(f,h,i).

⁶⁵⁶ Saudi Arbitration System 2012, article 50 (1).

5.2.2.1 Arbitrability

One of the most important grounds to challenge arbitral award is the incapability of settlement by arbitration. We have already discussed types of disputes which are categorized as incapable of settlement by arbitration under section five (Scope of Arbitration) in chapter one.⁶⁵⁷

The issue of arbitrability is given importance by all international and national legislations more than previous grounds and issues which the award can be challenged on. This appears in the court being not in need to a party to raise such challenge in order to be able to test the award and set it aside based on the issue of arbitrability. The Model Law provides for refusal and setting aside the award which covers an inarbitrable dispute.⁶⁵⁸ Also, article 50 (2) of Saudi Arbitration System 2012 stipulates that the court shall revoke the award if the dispute which was addressed by the award is not capable of settlement by arbitration according to arbitration system in KSA. The criteria of arbitrability are subjected to the law of the place where the award was made.⁶⁵⁹

5.2.2.2 Contrary to Public Policy

When the award passes all stages and satisfies all terms and conditions that it is required in order for it to be enforceable and recognizable, there is still a final test that must be made by the competent court before whom the challenge of the arbitral award is placed. This test is to ensure that the award does not contain decisions which can be regarded as contrary to the public policy of the country of the seat of arbitration. The Model Law as well as most of national laws grants the court the right to challenge and revoke the tribunal's award on the ground of it being a violation of the public policy. The court does not require a party to raise such challenge in before it can place the award on a test of public policy. It is a requirement of the law that this power must be exercised rightly by the court.⁶⁶⁰

⁶⁵⁷ Hasen, Kh., (2010), Nullity of Arbitration Award, Cairo, Dar Al-Nhzah Al-Arabiah, p 268.

⁶⁵⁸ The Model Law, article 34(2) (i).

⁶⁵⁹ Embiricos, E., (2010), "Appeals from Arbitration Awards", Arbitration, 76(3), pp 427-430.

⁶⁶⁰ Megens, P. and Finch, D., (2011), "Setting Aside an Award on Public Policy Grounds: AJT v AJU", Arbitration, 77(1), pp 155-157.

For example, the Arbitration Act 1996 provides that a challenge of an arbitral award on the ground of its incompatibility with public policy by a party constitutes a serious irregularity which therefore make the award is capable of being challenged based on. The Act specifically mentions the grounds upon which an arbitral award could be challenged when it says: "the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy."⁶⁶¹ It is worth mentioning that unlike the Model Law, the English system does not grant the court the right to raise such challenge *suo motu* (starts a legal process on its own) without an application from a party to arbitration. Therefore, the question which arises here is; when an award is challenged before the English courts on a ground other than violating the public policy and that ground was not approved, but from the case it was obvious to the court that the award is in contrary to public policy, in this situation can the court dismiss the award? It appears from the text of s. 68 that it cannot.

Public policy has been defined as that "principle of law which holds that no subject can lawfully do that which has a mischievous tendency to be injurious to the interest of the public, which is against the public good or public welfare."⁶⁶² In fact, it is the values which a country holds in high esteem and jealously protects from being violated. The fact is that the meaning given to public policy appears to be too broad and could be abused in a way that may destroy the whole arbitration system. No wonder, many jurists have criticized the elastic expression of 'public policy' and described it as "a very unruly horse, and when once you get astride it you never know where it will carry you."⁶⁶³

However, when the arbitral tribunal has been bribed or has acted fraudulently, it is likely its award will be refused by the court on basis of contrary to public policy. Its being a NYC award or not makes no difference. Also, when the award being is admitted to be based on an illegal act, it is likely to be refused as well. In *Soleimany v Soleimany*,⁶⁶⁴ the Court of Appeal

⁶⁶¹ The Model Law, article 34(2) (ii).

⁶⁶¹ Arbitration Act 1996, s. 68(g). Also see: Megens and Finch, *supra* note (660).

⁶⁶² Arun, K., (2002), *Mercantile Law*, New Delhi, Atlantic Publishers and Distributors, p 99.

⁶⁶³ Richardson v Mellish, (1824) 2 Bing. 229, 252. See also Rai,S., (2008-09), "How Do or Should Arbitrators Deal with Domestic Public Policy or Regulatory Issues. Does it Affect Arbitrability?", available at: <http://ssrn.com/abstract=1433799>.

⁶⁶⁴ [1998] EWCA Civ 285.

refused to enforce the award on the ground of public policy. The dispute was between father and son about profits of the sale of smuggled carpets from Iran. The tribunal awarded the son the half of the profits although it admitted clearly that the profits were a result of an illegal act. The court refused to enforce the award because the act was illegal in both the country of the act and the country of enforcement.⁶⁶⁵

In *Westacre Investments v Jugoimport-SDPR Holding Co. Ltd*,⁶⁶⁶ the Court of Appeal had to decide whether it would enforce an award which was legal under the proper law of the contract and under the *lex arbitri*, but illegal in the country of enforcement. The court held unanimously that such an award should be enforced. Waller LJ draw attention to the criteria that had been set out by Colman J in *Lemenda Trading Co. Ltd v African Middle East Petroleum Co. Ltd*⁶⁶⁷ such as the fact that illegality does not appear on the face of the award and the illegality is not in the highest level. Nonetheless, Waller LJ stated that there are some rules of public policy which the court will not tolerant with infringing them whatever their proper law and wherever their place of performance.⁶⁶⁸

As for Islamic Shari'ah, the Hanbali and Shaf'iah schools of law are of the view that the court shall not accept challenge of an arbitral award and revoke the award except in the same manner when it look into a matter has already been decided by another judge. The Maliki jurists opine that the judge will only be allowed to revoke an arbitral award where the arbitral award is tainted with obvious injustice.⁶⁶⁹ The Hanafi jurists, on the other hand, differ from the other schools by contending that the judge can revoke the award if it is against his opinion. Thus, Islamic law can be said to be quite similar to international law and English legal system with regards to the grounds upon which an arbitral award may be challenged either by a party to arbitration or a competent court. For example, under Islamic law, lack of capacity or agreement is a valid ground to challenge an arbitral award. Usually, capacity of parties to a contract forms a fundamental term in determining the correctness of that contract. Therefore,

⁶⁶⁵ Tweeddale, K. and Tweeddale, A., (1999), A Practical Approach to Arbitration Law, Britain, Blackstone Press Limited.

⁶⁶⁶ [1999] EWCA Civ 1401.

⁶⁶⁷ [1988] 1 QB 448.

⁶⁶⁸ Tweeddale and Tweeddale, *ibid*.

⁶⁶⁹ Ibn Qudamah, A., (1997), Al-Mughne, Riyadh, Dar Aalm Alktub, 3rd edn, vol. 14, p 92-93.

any absence of capacity will definitely constitute a genuine ground to challenge the contract.⁶⁷⁰

Also, it is a requirement in Islamic law that the standard of justice must never be breached. For instance, failure to give a party enough opportunity to present his case or show his evidence is valid ground that can be relied on to challenge an arbitral award. It was reported that Prophet Muhammad (peace be upon him) said that: “When two men come to you seeking judgment, do not judge for the first until you have heard the statement of the other. Soon you will know how to judge.”⁶⁷¹

Disputes are not all capable of settlement by arbitration in Islamic jurisprudence, according to the opinion of the majority of jurists, as earlier discussed in chapter one when we talked about scope of arbitration. Consequently, if a tribunal's award is made regarding a matter that cannot be submitted to arbitration, it will be set aside by the court. In Islamic law, there is no expression such as ‘public policy’ either in arbitration or in other parts of fiqh. There is what is known as ‘public interest’ which may be regarded, in some way, to be similar to public policy. Public interest is highly regarded in Shari’ah, and the Muslim judges are required to put it into consideration when making their verdicts regarding any dispute brought before them. But at the same time, they are not allowed to use it when there is a definite or clear text or as a means of circumventing a definite text in the Qur’an or the prophetic tradition.⁶⁷²

The 1983 Saudi Arbitration System did not refer to specific grounds of challenging the tribunal award. Rather, it left the door open to challenge the arbitral award before a competent court within five days from its issuance. Article 20 of the 1983 Saudi Arbitration System provided for the compulsory enforcement of the award when it becomes final by issuing an order from the competent authority. It also stated that the order of enforcing the

⁶⁷⁰ Al-Auine, M., (1981), Al-Binaiah Sharah Al-Hidaiah, Dar Al-Feker, 1st edn. Also see: Ibn Qudamah, A., (1997), Al-Mughne, Dar Aalem Alkutub, Riyadh, 3rd edn. Also see: Ibn Qudamah, A., (1997), Al-Kafi, Huger, Egypt, 1st edn. Also see: Al-Moso’ah Al-Fighiah, (1993), Dar Al-Safwah, Egypt.

⁶⁷¹ At-Tirmidhi, A., (2007), Jami’ at-Tirmidhi, USA, Dar-us-Salam, 1st edn, hadith no.1331.

⁶⁷² Al-Kasane, A., (1982), Bda’ea Alsana’ee, Dar Al-Kitab Al-Arabi, Beirut, 2nd edn. Also see: Al-Bloui, N., (2012), The Arbitration in Islamic Sharia, Dar Al-Thaqafah, Amman, 1st edn.

award shall be issued by the court upon request from one of the parties of arbitration after examining the award and making sure there is nothing in that restricts or bans the enforcement under Islamic law.⁶⁷³ Conversely, the new Saudi Arbitration System, 2012 lists several grounds upon which an arbitral award could be challenged included when an award is said to be in conflict with Islamic Shari'ah or public policy.⁶⁷⁴

In conclusion, there is an agreement between different systems of law whether these covered by this study or others about the finality of arbitral award and tendency to save it from being challenged or set aside. As a result, they narrow and limit the possibility of challenging the award as much as they can and put a lot of restrictions on such action. Nevertheless, they allow the challenge of an arbitral award on few grounds because of the desire of these systems to ensure that the award does run contrary to principles of justice and policies of their countries.

Moreover, it appears that there are no significant differences between international law and English jurisdiction as to the grounds of challenge of the arbitral award. However, it can be said that English jurisdiction seems wider than international law in this matter. The Arbitration Act 1996 contains more points and reasons which can be invoked to bring the award before the courts and challenge it. Some of them can be categorized as elastic points and have general expressions such as the ground that states that "any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award."⁶⁷⁵

In contrast, Islamic Law as well as Saudi Arbitration System 1983 does not set out certain reasons for challenge of the award as international and English laws do and also later Saudi Arbitration System 2012 does. Instead, they legitimate the challenge of the award before the

⁶⁷³ Saudi Arbitration System 1983, articles 18, 20.

⁶⁷⁴ Saudi Arbitration System 2012, articles 50 (2).

⁶⁷⁵ Arbitration Act 1996, s 68, 2 (i). Also see: Clifford, P. and Browne, B., (2010), "B v A: Scope of Challenges Following an Alleged Error of Foreign Law", *International Arbitration Law Review*, 13(4), N31-33.

court without specifying the grounds which can be acceptable to be depended upon by the parties in challenging the award or also by the court to review it. This means that the position is left to the general rules and restrictions that regulate arbitration and litigation and control the relationship between them. Meaning, therefore, that the judge shall treat the arbitral award as the same as decision made by another judge. He is required, according to Islamic jurisprudence (and therefore under the Saudi system), not to accept looking into the case except if it contains (whether in the award or in the procedures of arbitration) serious irregularity which Islamic Shari'ah does not tolerate. In other words, he cannot revoke the award simply because it differs from his opinion. In Islamic law, there is what is known as 'ijtihad' which means the independent or original interpretation of problems not precisely covered by the Qur'an, Hadith and Ijma (a scholarly consensus). In this area, the court cannot impose its own opinion and interpretation on the arbitral tribunal. Nevertheless, grounds that are set out in international and English laws are also regarded in Islamic Shari'ah since the Islamic jurisprudence maintains the same opinion that those grounds pose serious irregularity and as such, it is justifiable that an arbitral award be challenged on those grounds.⁶⁷⁶

5.3 Time Limits for Challenging the Award

Time is essential in relation to the challenge of awards. As a matter of justice, time limits begin to run from the date the award was deposited or notified to the aggrieved party who wishes to challenge the award. These time limits must be observed. Failure to observe the time limit is likely to block a challenge to the award. The majority of national laws require the application for challenge to be launched within weeks rather than months after the time limits have started to run. Otherwise, the party may lose the right to challenge if it delays doing so.⁶⁷⁷

⁶⁷⁶ Al-Zabi, M., (2011), The Legal Action for the Nullity of Arbitration Award in the International Commercial Disputes, Dar Al-Thaqafah, Amman, 1st edn. Also see: Sami, F., (1994), The International Commercial Arbitration, Dar Al-Thaqafah, Amman, 6th edn. Also see: Al-Bloui, N., (2012), The Arbitration in Islamic Sharia, Dar Al-Thaqafah, Amman, 1st edn. Also see: Lew, J., Mistelis, L. and Kroll, S., (2003), Comparative International Commercial Arbitration, Netherlands, Kluwer Law International.

⁶⁷⁷ Sornarajah, M., (2000), The Settlement of Foreign Investment Disputes, Boston, Kluwer Law International.

The New York Convention is silent on such time limits, whereas Article 34 (3) of the Model Law sets a time limit of three months starting from notification of the award to the party wishing to challenge it. It states thus:

“An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal”.⁶⁷⁸

The word "may" used in the above passage signifies that the court has a discretionary power to hear the case after the expiry of the time limit. The use of the word “may” in Article 34 can be said to be reasonable because an action for challenge is the only recourse the unsuccessful party has in the country where the award was made.⁶⁷⁹

In contrast, the English jurisdiction gives only 28 days to the party who is interested in challenging the award to present a claim and application to the competent court. Section 70 of Arbitration Act 1996 provides that: "Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process."⁶⁸⁰

Although the Arbitration Act 1996 provides for 28 days as a time limit in which a party is able to bring a challenge or an appeal under sections 67, 68 and 69 of the Act. The competent court still has discretion to extend the period for making such an application, but it will not be made lightly. Whilst each case will be considered depending on its facts, the court will also consider specific factors which were set out in *Kalmneft JSC v Glencore International AG and Another*.⁶⁸¹ However, in international arbitrations, it should be noted that the considerations will also be balanced against the general considerations which apply to international arbitrations.⁶⁸²

⁶⁷⁸ The Model Law, article 34(3).

⁶⁷⁹ Sornarajah, *supra* note (677).

⁶⁸⁰ Arbitration Act 1996, s. 70(3).

⁶⁸¹ *Kalmneft JSC v Glencore International AG* [2001] C.L.C. 1805, [2002] 1 Lloyd's Rep. 128.

⁶⁸² Ahmed, M., (2010), "Case Comment: Challenges to an Award and Extension of Time: *Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd*", *Arbitration*, 76(3), pp 555-558.

By the Arbitration Act 1996, s.70 (which applies to applications or appeals under ss.67, 68 and 69) states that:

“(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted--

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).

(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process”.⁶⁸³

This provision and others that control operation of challenging the award as sections 67, 68 and 69 reflect the legislators' objectives of achieving and guaranteeing the finality of the arbitral award by requiring the aggrieved party to exhaust the available arbitral resources prior to being able to challenge the award before the court, and limiting the intervention of the court. Section 70 of the English Arbitration Act requires the application for appeal and challenge to be submitted to the court within 28 days of the date of the award. The date of an award is the date on which it is signed by the arbitrators, as it is defined by s.54, in the absence of any such decision made by the tribunal or an agreement by the parties.⁶⁸⁴

However, a problem could arise if the tribunal, after having signed the award, rejects to release and deliver it to the parties until its fees and expenses have been paid in full as it is entitled to do under s.56. A party cannot likely be expected to initiate process of challenge or appeal before it sees the award and knows whether it has won or lost. In such circumstance, it is expected that the late delivery of an award will be a justified ground for extending time to challenge the award. But what would be the case if the challenging party himself was responsible to such delay because it had declined to pay his own portion of the fees and expenses. Would it make a difference if his refusal to pay was reasonable rather than

⁶⁸³ Arbitration Act 1996, s. 70.

⁶⁸⁴ Altaras, D., (2008), "Time Limits for Appealing Against or Challenging an Arbitral Award in England and Wales", *Arbitration*, 74(4), pp 360-368.

unreasonable in all the circumstances? It would be preferable that if the first leg of s.70 (3) was in the same pattern as the second leg of the same section, which states that time starts to run when the applicant or appellant is notified of the result of the internal appeal or review process, and provides for the running of time from the date when the applicant or appellant was notified of the award. This expression was adopted by the Civil Procedure Rules (CPR),⁶⁸⁵ which applies to pre-1996 arbitrations.⁶⁸⁶

An essential question also arises regarding the interpretation of s.57 and s.70. What is the position if the aggrieved party wants to challenge or appeal against the award on specific points in the court and at the same time wants to apply to the arbitral tribunal to correct an error or issue an additional award on quite separate point? Should the party delay its application of challenging the award in the court until the tribunal releases its verdict regarding the application of correcting the award or issuing an additional award? The answer to this question is found in the judgment of H.H. Judge Havelock-Allan Q.C. in *Al-Hadha Trading Co v Tradigrain SA*.⁶⁸⁷

There was arbitration under GAFTA Rules and the Board of Appeal of GAFTA issued an award. One of the arbitration parties demanded that the award be corrected based on s. 57(3)(b) and the Board duly issued a corrected award. Thereafter, the same party sought to set aside the award on a number of separate grounds of serious irregularity. Two of the grounds were the subject of the application to correct the award and of the corrected award but the third ground was out of the subject of that application. The court depended on s. 57(7) in its interpretation of time limits that states that “any correction of an award shall form part of the award.” He held that the word “award” in s. 70(3) should be construed as meaning the award as corrected. The judge further held that where two complaints were made about separate parts of an award, only one of which was made the subject of a reference to the

⁶⁸⁵ CPR, r 62. 15.

⁶⁸⁶ Dundas, H., (2007), "The Finality of Arbitration Awards and the Jurisdiction of the Court of Appeal", *Arbitration*, 73(1), pp 127-137.

⁶⁸⁷ *Al-Hadha Trading Co v Tradigrain SA* [2002] 2 Lloyd's Rep. 512.

tribunal under s.57, time would run from the date of the original award in respect of the other part complained of, if that part was properly severable.⁶⁸⁸

However, s.80 of the Arbitration Act 1996 permits the court to extend the time within which to challenge or appeal an award. It provides that:

“Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement”.⁶⁸⁹

Also, Rule 62.9(1) of CPR provides that the court may vary the time for complying with the 28-day limit. However, in deciding whether to extend the statutory time limit, the court should take into account that the Arbitration Act is based on principles of party autonomy and finality of awards. It is significant that any challenge or appeal against an award should be pursued without delay due to the fact that the court will require well-argued reasons for extending time.⁶⁹⁰

It thus appears that the court has the power to extend the time limits in some circumstances. The question is what are these circumstances and criteria that govern such power? Several criteria for extending the time limits by the court have been established by Colman J. in *Kalmneft v Glencore International AG*.⁶⁹¹ The judge sets out the following criteria which are:

(i) The length of the delay. This is an essential factor in determining whether to extend the time or not by the competent court. All legislation, whether international or national, emphasize the doctrine of finality of the arbitral award. Therefore, it is likely that the court

⁶⁸⁸ Altaras, D., (2008), "Time Limits for Appealing Against or Challenging an Arbitral Award in England and Wales", *Arbitration*, 74(4), pp 360-368.

⁶⁸⁹ Arbitration Act 1996, s. 80 (5)

⁶⁹⁰ Altaras, *ibid*.

⁶⁹¹ *Kalmneft JSC v Glencore International AG*, *supra* note (681).

will decline to extend time when the delay is considered too long in order to comply with such doctrine and put a limit to the dispute finally. This criterion should be tested firstly by the court when it considers an application for extending time. However, in *Kalmneft*, delays of 11 weeks and 14 weeks were described by Colman J. as very considerable periods of delay. In *Dulwich Estate v Baptiste*,⁶⁹² the deputy High Court judge held that a delay of 21 days was “not insignificant but nor [was] it inordinate.”

(ii) The reason for the delay. The court has to identify the party who is responsible for the delay and make sure that the delay is not the appellant's fault. In other words, a sensible explanation for the delay should be presented by the challenging party in order to be granted extension of time.

(iii) In addition, the court should test whether the respondent or the arbitral tribunal have caused or contributed to the delay. If they were found that they have done so, this will, undoubtedly, support the appellant's application for extending the time limits.

(iv) Whether the respondent to the application would by reason of the delay suffer irreparable prejudice, in addition to mere loss of time, if the application to extend time were granted. The possibility of prejudice to the innocent party is always a consideration. However, it does not follow from the absence of prejudice that the application should be granted.

(v) Whether the arbitration has continued during the period of delay and, if so, what impact there would be on its progress or the costs incurred, if the court were to extend the time limit.

(vi) The strength of the substantive application under s.67 or s.68 or of the appeal under s.69.

(vii) Whether in the broadest sense it would be unfair to the applicant to deny it the opportunity of having its substantive application or appeal heard. That consideration reflects the overriding objective of the CPR of enabling the court to deal with the case justly and the general principle of the Act to obtain the fair resolution of the dispute.⁶⁹³

In *Kalmneft JSC*, Mance L.J. identified factors (i) to (iii) as the “primary factors”. He thought that factor (iv) was not “an essential pre-condition” and that factor (v) was “a relatively minor factor”. In relation to factor (vi), he noted, without criticism, that the first instance judge did

⁶⁹² *Dulwich Estate v Baptiste* [2007] EWHC 410 (Ch) at [8].

⁶⁹³ *Supra* note (681).

not explicitly refer to the strength, or indeed the weakness of the claim. Akenhead J., having also reviewed these authorities and criteria in *L Brown & Sons Ltd v Crosby Homes (North West) Ltd*,⁶⁹⁴ and concluded that factors (i) to (iii), that is the length of delay, its causation and the reasonableness of the parties' conduct as identified by Colman J. in *Kalmneft* are the primary factors. He added that the weight to be given to factor (vi) (the strength of the section 68 application) is not a primary factor. However, an intrinsically weak case will count against the application for extension whilst a strong case would positively assist the application. An application which is neither strong nor weak will not add significant weight to the application for extension of time.”⁶⁹⁵

As for the Saudi system, it goes less than English law and decreases the period of challenging the award to only 15 days starting from notifying the parties of the award formally. However, this period appears to be too short and is not enough for the aggrieved party to make application to the court challenging the award. The parties should be provided with sufficient time in order to study the arbitral award carefully and analyze reasons and evidences which were relied upon by the arbitral tribunal when making its decision. Moreover, they need to consult their lawyers and determine whether they are going to make a challenge to the award or not and how much is the opportunity of success.⁶⁹⁶ This was in the former system of arbitration 1983, but the new system of 2012 has increased the period to 60 days and this is more appropriate.⁶⁹⁷

5.4 Effects of Challenging the Award

Any legal action taken by any parties of arbitration and presented before the court shall have effects and reaction regardless of the nature of that reaction which can be positive or also

⁶⁹⁴ *L Brown & Sons Ltd v Crosby Homes (North West) Ltd* [2008] EWHC 817 (TCC).

⁶⁹⁵ Altaras, D., (2008), "Time Limits for Appealing Against or Challenging an Arbitral Award in England and Wales", *Arbitration*, 74(4), pp 360-368.

⁶⁹⁶ Al-Zabi, M., (2011), *The Legal Action for the Nullity of Arbitration Award in the International Commercial Disputes*, Dar Al-Thaqafah, Amman, 1st edn. Also see: Sami, F., (1994), *The International Commercial Arbitration*, Dar Al-Thaqafah, Amman, 6th edn. Also see: Al-Bloui, N., (2012), *The Arbitration in Islamic Sharia*, Dar Al-Thaqafah, Amman, 1st edn.

⁶⁹⁷ Saudi Arbitration System 2012, article 51.

negative. Challenging the arbitral award by one of the parties involves more attention and carefulness from the court toward the matter. The court has a number of options available to it, following its hearing of the challenge. The effects of challenging the award before the court vary depending on the grounds of the challenge and the relevant law and the decision of the court. There are four options that the court may have recourse to after hearing a challenge on an arbitral award. These options are confirming the award; referring it back to the arbitral tribunal for reconsideration; varying it; and setting it aside in whole or in part.⁶⁹⁸

These four options have been given to the court according to the English jurisdiction. Nevertheless, the Arbitration Act 1996 emphasizes that "the court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration." It also grants the variation of the award that was made by the court the same effect as other parts of the tribunal's award. In the event of the award being remitted to the arbitral tribunal, in whole or in part, the arbitral tribunal shall reconsider the award in light of observations of the court within three months of the date of the order for remission or such longer or shorter period as the court may direct, and make a new award. While in the case that the award is set aside or declared to be of no effect, in whole or in part, "the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award."⁶⁹⁹

The Arbitration Act has shown more flexibility in this point than the Model Law. The Model law does not give the court multi options once it faces an application to challenge the arbitral award like what English jurisdiction does. The Model Law provides for setting aside as exclusive recourse against arbitral award. Therefore, the court, according to the Model Law, does not own to vary the award or to remit it back to the arbitral tribunal in order to give it a

⁶⁹⁸ Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press.

⁶⁹⁹ Arbitration Act 1996, s. 67, 68, 69, 70, 71. Also see: Al-Zabi, M., (2011), The Legal Action for the Nullity of Arbitration Award in the International Commercial Disputes, Dar Al-Thaqafah, Amman, 1st edn. Also see: Rubino-Sammartano, M., (2001), International Arbitration Law and Practice. The Hague, Netherlands. Kluwer Law International.

chance to modify its award and satisfy a specific request that was noticed by the court and hence avoiding its award to be set aside. However, the Model Law allows the court to “suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside.” This action is provided by its being appropriate in the court’s conception and also so requested by a party.⁷⁰⁰

These legal provisions allow the national courts to remit the award back to the arbitrators or suspend the setting aside of proceedings for a period of time in order to give the arbitral tribunal an opportunity to revise its award and vary it, reflect the tendency of these different systems to narrow as much as they can the intervention of the courts in the arbitration operation and reflect also their respect to the doctrine of finality of the award.⁷⁰¹

As for Islamic Shari'ah and the Saudi system, there are no such details about the options that are in front of the court regarding dealing with such application. Saudi Arbitration System speaks generally about this matter which means that the door and options are open to the court when it deals with an application of this type. According to the general rules and principles that shall be followed in the absence of specific provisions and texts as regard a matter whether in Islamic Law or Saudi jurisdiction, the judge can chose the most suitable and appropriate option and perform it in such case. In other words, he can vary the award, remit it back to the tribunal, confirm it or set it aside.⁷⁰²

⁷⁰⁰ The Model Law, article 34 (1, 4).

⁷⁰¹ Dundas, H., (2007), "The Finality of Arbitration Awards and the Jurisdiction of the Court of Appeal", Arbitration, 73(1), pp 127-137.

⁷⁰² Sami, F., (1994), The International Commercial Arbitration, Dar Al-Thaqafah, Amman, 6th edn. Also see: Al-Bloui, N., (2012), The Arbitration in Islamic Sharia, Dar Al-Thaqafah, Amman, 1st edn.

Chapter six

Recognition and Enforcement of Arbitral Award

6.1 The Differences between Recognition and Enforcement

The winning party expects the arbitral award to be enforced without delay. Unlike national courts, the arbitral tribunal does not have the power to enforce its decision. In fact, its role stops at rendering the award. The losing party often attempts to avoid the award that was rendered against him. There are various ways which the losing party can walk through in order to reach his target. He can use the award to negotiate with the successful party and force him to accept less than what he was granted by the award based on his refusal to carry out the award voluntarily, or applying to the court to challenge the award and issuing an order to set it aside. There are several grounds which the losing party can rely on in order to materialise these steps which have been extensively discussed in Chapter 5. Alternatively, he can do nothing and wait until the successful party seeks to obtain recognition and enforcement of the award before the competent jurisdiction, and then present his objection to the arbitral award. Anyway, this final option which is addressed by this chapter.⁷⁰³

Challenging the award is attacking it in the location of its origin with the hope of modifying or setting aside the award by the national court in whole or in part, while the application for recognition and enforcement of the award aims to give effect to it either in the country where it was made or in other countries where the subject and place of dispute or the assets are found in.⁷⁰⁴

6.1.1 The Differences Between Foreign and Domestic Awards

It is important to know that the arbitration divides into two types; domestic arbitration and foreign arbitration, and to know the differences between them. Domestic arbitration is usually governed by the local laws of the state while the foreign arbitration is regulated by multilateral and bilateral conventions between countries of the world.⁷⁰⁵

⁷⁰³ Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia-Pacific Perspective, New York, Cambridge University Press, p 429.

⁷⁰⁴ Ibid.

⁷⁰⁵ Cato, M., (1997), Arbitration Practice and Procedure: Interlocutory and Hearing Problems, London, LLP, 2nd edn, p 223.

The English Arbitration Act 1996 defines the domestic arbitration agreement by saying that it is the agreement which none of the parties is—

"(a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or

(b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom,

and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom." ⁷⁰⁶

Under the New York Convention, only foreign arbitral awards are governed by the Convention. The Convention defines the foreign arbitral award as an "award made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." ⁷⁰⁷ An award is in consequence assigned nationality under the Convention based on the country in which the arbitration took place. The nationality of the parties is not a relevant factor. The Convention also regards the arbitral awards which are not considered as domestic awards in the country where their recognition and enforcement are sought as a "foreign" for purposes of recognition and enforcement. ⁷⁰⁸ The Convention defines "domestic" award by omission, consequently all those awards which are not foreign under either of these two standards are domestic awards, which are governed by the municipal law of the enforcing state. ⁷⁰⁹

As for the Model Law, it is intended to govern only the conduct of an international commercial arbitration as expressly stated in Article 1 that: "[t]his Law applies to international commercial arbitration." ⁷¹⁰ The Model Law further gives three cases whereby an arbitration will be considered to be international if: (1) the parties have their places of business in different states; or (2) either the place of arbitration, or the place where a

⁷⁰⁶ Arbitration Act 1996, s. 85.

⁷⁰⁷ New York Convention, article I.

⁷⁰⁸ Ibid.

⁷⁰⁹ Ungar, Kenneth T., (1986-1987), "Enforcement of Arbitral Awards under UNCITRAL's Model Law on International Commercial Arbitration", *Colum. J. Transnat'l L.*, pp 717-755.

⁷¹⁰ The Model Law, article 1.

substantial portion of the obligations of the underlying commercial relationship is to be performed, is outside the state in which the parties have their places of business; or (3) the subject matter of the dispute is most closely connected with a state other than the one where the arbitration takes place.⁷¹¹ By comparison, the New York Convention is only concerned with the place where the award is made, not with the nature of the arbitration. Awards referred to as "domestic" in the legislative history of the Model Law are those awards issued in an international arbitration whose enforcement is sought in the same state. "Foreign" awards are simply those awards sought to be enforced in a country different from the place of arbitration.⁷¹²

In the Saudi Arbitration System 1983, there was no a reference expressly to these two types of the arbitral award. It talked about the award generally in all its provisions. Similarly, the classical books of Islamic jurisprudence do not refer specifically to this division between the domestic and foreign awards. These books frequently address arbitration in general without more details and that involves recourse to the principal rules which govern Islamic jurisprudence when we want or need to find out the Islamic perception about such matter or something else. The Saudi Arbitration System, 2012 has drastically changed this picture. In fact, it expressly defines international commercial arbitration along the same lines given in Article 1 (3) of the Model Law.⁷¹³

6.1.2 The Difference Between Recognition and Enforcement of Award

Recognition is a stage prior to the enforcement stage. The significance of recognition of award should not be underestimated. An enforcement action, for example cannot take place without recognition (often implicit) of the award by the enforcing court. Article III of the New York Convention requires that "each contracting state shall recognize arbitral awards as

⁷¹¹ The Model Law, article 1.

⁷¹² Ungar, Kenneth T., (1986-1987), "Enforcement of Arbitral Awards under UNCITRAL's Model Law on International Commercial Arbitration", *Colum. J. Transnat'l L.*, pp 717-755.

⁷¹³ Saudi Arbitration System 2012, article 3.

binding."⁷¹⁴ So, it must be clear that enforcing the arbitral award by the competent court cannot be imagined before recognising it by the same court as a valid and effective award.⁷¹⁵

But recognition of an award can be obtained lonely by the interested party. This happens when the losing party applies to the court seeking a resolution of a dispute, and the defendant (the winning party) defends by saying the dispute has already been resolved by an arbitration process and demands the court to recognise the award as a valid and binding award on the other party. Recognition of an award aims to block any attempt to raise a dispute about the same issues which the award have already dealt with, whereas enforcement of the award is asking the court to invoke its authority to force the losing party to carry it out and fulfil its obligations and responsibilities.⁷¹⁶

6.1.3 Place of Recognition and Enforcement

When obtaining the award, the winning party is expected to investigate the losing party's assets: where are they situated before applying to court for recognising and enforcing the award? In some cases, the assets and properties of the losing party may be found to be located in more than one country. In such a case, the winning party must carefully finds out which one among those countries has a suitable legal system that complies with the arbitral award and supports arbitration for the purpose of applying to its courts to enforce the award.⁷¹⁷

It may not be enough to test whether a country has been a member of the New York Convention when planning enforcement strategies. Other factors such as a country's implementation of the New York Convention or its administrative procedures should be taken

⁷¹⁴ New York Convention, article III.

⁷¹⁵ Bishop, R. and Martin, E., "Enforcement of Foreign Arbitral Awards", available at: <http://www.kslaw.com/library/pdf/bishop6.pdf>, acceded on 30/7/2012.

⁷¹⁶ Al-Zabi, M., (2011), The Legal Action for the Nullity of Arbitration Award in the International Commercial Disputes, Dar Al-Thaqafah, Amman, 1st edn, p 235-237.

⁷¹⁷ Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press, p 435.

into account and may prove enormously significant in assessing the prospects of enforcement.⁷¹⁸

6.1.4 Methods of Recognition and Enforcement

Internationally, recognition and enforcement of an award is much easier than recognition and enforcement of a foreign court judgement due to many international conventions and treaties that regulate such procedure.

The methods of recognition and enforcement of an award depend on the requirements and conditions that are indicated and provided for in both the place of arbitration and the place of enforcement of the award. For instance, if both countries where the award was made and where the enforcement is sought are members of the New York Convention, that will certainly make the recognition and enforcement of the award easier and faster because of the provisions that are found in the convention which control and regulate the operation and oblige the countries.⁷¹⁹

6.2 Recognition and Enforcement of Arbitral Award under International and National laws

6.2.1 Recognition and Enforcement under Saudi Law

Enforcement of foreign arbitral awards in Saudi Arabia is subject to **three** conditions and requirements. The first and most important one is that the foreign award must not run contrary to Islamic law. The seventh provision of the Basic System of Governance

⁷¹⁸ Ibid.

⁷¹⁹ Beaumont, J. and Al-Hashim, A., (2004), "Enforcing of Foreign Judgments and Foreign Arbitral Awards in Saudi Arabia", available at: http://update.legal500.com/index.php?option=com_content&task=view&id=470&Itemid=93, acceded on 25/7/2012.

in Saudi Arabia provides that the government derives its authority from Allah's book (the Holy Qur'an) and path of his messenger (hadith); they are the controller over all systems of the country.⁷²⁰ Also, this prohibition was also stated in the 1983 Saudi Arbitration System which stipulated that:

“The award of arbitrators shall be executed when it becomes final pursuant to an order by the authority having original jurisdiction to consider the dispute. This order shall be passed upon request by an interested party ensuring that it is not contrary to Islamic Shari'a principles”.⁷²¹

Consequently, the competent authority which has the power to recognise and enforce the foreign arbitral award, known as The Board of Grievances (Diwan Al-Madhalim), shall examine the award carefully and make sure that it is not in conflict with Islamic Sharia'ah. In practice, foreign awards that contain elements charging interest for example cannot be enforced in K.S.A. However, it is worthwhile noticing that the Islamic model is flexible and more practicable and can be separated between parts of the award that are inconsistent with its rules and those that are not. In other words, the foreign arbitral awards which consist of more than one parts and terms could be recognised and enforced in K.S.A partially as to those which do not contradict the principles of Islam notwithstanding they contain other parts and terms do.⁷²²

Examples can be drawn from two cases decided in Saudi Arabia, they are case *No 1903/1/9*,⁷²³ and case *No 1851/1/9*.⁷²⁴ Both cases entail awards, having one part conforming with Islamic Sharia and the other denoting usury. Thus an order was issued to execute the parts of the awards having nothing to do with usury and to put aside those parts containing

⁷²⁰ Basic System of Governance, article 7.

⁷²¹ Saudi Arbitration System 1983, article (20).

⁷²² Sami, F., (1994), *The International Commercial Arbitration*, Dar Al-Thaqafah, Amman, 6th edn, p 353-365.

⁷²³ *Case No 1903/1/9* in 1414 H/1994 AD.

⁷²⁴ *Case No 1851/1/9* in 1414 H/1994 AD.

usury. This makes it clear that foreign arbitral awards should not be contrary to the rules of Islamic Sharia if they are to be executed in the Kingdom of Saudi Arabia.⁷²⁵

The second requirement to obtain recognition and enforcement in K.S.A in the case of a foreign arbitral award is that it being issued in a country and jurisdiction that respects Saudi's judicial and arbitral awards rendered on its territory. This is called in diplomatic and legal affairs 'reciprocity'.⁷²⁶ This condition is widely practised by most countries that require it prior to the recognition and enforcement of foreign judicial or arbitral awards.⁷²⁷

The third and final requirement is the content of international conventions to which Saudi Arabia has agreed. In order to attract investors and foreign investments, Saudi Arabia has performed many steps to satisfy the global standards and comply with the new world especially in the field of laws and regulations. It has entered and ratified several conventions and treaties whether regional or international that facilitate recognition and enforcement of the foreign arbitral award such as the Washington Agreement, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, and The International Convention on the Settlement of Investment Disputes (ICSID). These conventions are important in organizing the enforcement of foreign arbitral awards in the Kingdom of Saudi Arabia. This is the entire set of rules put together by international conventions relating to arbitration which Saudi Arabia has joined. These rules are binding.⁷²⁸

As for Islamic jurisprudence, there is no reference to domestic or foreign awards as I have mentioned before. It addresses arbitration generally and does not deal with small details and terms that are relevant to arbitration operation as modern international and national systems

⁷²⁵ Shawlak, A., (2007), A Critical Overview of the Problems In Commercial Arbitration and The Enforcement of Foreign Arbitral Awards in Saudi Arabia, Canterbury, University of Kent.

⁷²⁶ This principle was stressed by Royal Decree in 29 January 1993 (Royal Decree N M/11 dated 16/7/1414H) when the Kingdom of Saudi Arabia joined the 1958 New York Convention. The Kingdom declared, according to the contents of paragraph (3) of the first article of the convention, that the basis of reciprocity will apply to what the convention regards as recognition and enforcement of arbitral awards in another contracting country.

⁷²⁷ Hampton, W., (2011); "Foreigners Beware?: Exploring the Tension Between Saudi Arabian and Western International Commercial Arbitration Practices", J. Disp. Resol., pp 431-446.

⁷²⁸ Shawlak, *ibid.*

do. Therefore, it can be said depends on the general rules and principles that govern Islamic conception as regard authentications and certifications that are requested in order the court to recognize and enforce the award, whether foreign or domestic, that Islamic system would ask for the award as the other systems do but with a notice that the award can be proved by showing the original copy of it or also any type of evidences that are effectual in Islamic law such witness and swear. In the event of disputing parties do not deny the award the court would enforce it even without written documents and this known in Islamic Law Al-Iqrar (admission/confession). Also, in the event that the award or any document being not in a language whom understood to the court, it is logic and expected that the judge would request reliable translation.⁷²⁹

6.2.2 Recognition and Enforcement under NYC

The aim of the New York Convention as it appears obviously from its title is facilitating the recognition and enforcement of foreign awards throughout the world. The Convention has achieved its aim and contributed enormously to make arbitration operation goes smoothly and put arbitration on the top of list of alternative disputes settlements, particularly when the dispute includes multinational parties. Article III of the New York Convention requires that "each contracting state shall recognize arbitral awards as binding."⁷³⁰ However, it may not be enough to test simply whether a country has joined the New York Convention or not when planning enforcement strategies. Other matters and factors such as a country's implementation of the New York Convention or its administrative procedures may prove enormously significant in assessing the prospects of enforcement.⁷³¹

The New York Convention does not refer to finality as an enforcement condition. Rather, the New York Convention refers to awards that are 'binding'....an arbitral tribunal's order may be enforceable at the seat of arbitration under domestic legislation as if the order had been made by a court. It should be noted that the New York Convention facilitates the enforcement of

⁷²⁹ Al-Bloui, N., (2012), The Arbitration in Islamic Sharia, Dar Al-Thaqafah, Amman, 1st edn.

⁷³⁰ The New York Convention, article III.

⁷³¹ Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press, p 435.

the arbitral awards, but it cannot be used to set aside an award. Only a competent court at the place of arbitration can do that and set aside an award. Furthermore, even if a court rejects enforcement according to the Convention, its decision affects only the enforceability of the arbitral award in that country and has no effect in the validity of the award itself. The decision of the validity should be left to the courts at the place of arbitration.⁷³²

Even accepting the relatively broad extent of the New York Convention, it does not include and address some types of decision such as procedural orders. These may include, for example, orders for document production, hearing of witnesses or other interim orders.⁷³³

However, the New York Convention allows its members to make **two** reservations while applying it. The **first** is to limit the Convention's scope by declaring that it will apply the Convention "to the recognition and enforcement of awards made only in the territory of another Contracting State."⁷³⁴ Making this reservation limits the application of the New York Convention to the arbitral awards that was issued in other countries which are members to that Convention. Anyway, this reservation does not pose or create a major obstacle anymore, due to the fact that the mass majority of states around the world has signed the convention and joined it.⁷³⁵ In comparison with the Model Law enforcement provision, the latter requires no reciprocity. Article 35 provides that:⁷³⁶

"An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36".⁷³⁷

The **second** reservation that is available to the members of the Convention is to limit the application of the Convention to "differences arising out of legal relationships, whether

⁷³² Greenberg, S., Kee, C. and Weeramantry, R., *supra* note (731), p 440.

⁷³³ *Ibid*, p 439.

⁷³⁴ New York Convention, article 1(3).

⁷³⁵ Greenberg, S., Kee, C. and Weeramantry, R., *supra* note (723), p 440- 441.

⁷³⁶ The Model Law, article 35.

⁷³⁷ Han, Ping., (2011), "Challenging Arbitral Awards: A Comparative Study of Chinese law, British Law and UNCITRAL Model Law", *Frontiers of Law in China*, vol. 6(3), pp 418-446.

contractual or not, which are considered as commercial under the national law of the State making such declaration."⁷³⁸ Fewer countries have made this reservation in comparison with those that have made a reciprocal reservation.⁷³⁹

This strange commercial dispute reservation has been subject to excessively restrictive interpretations. The participants in the New York Convention did not expect this provision to be the source of any difficulty. But in fact, it does. Experience has shown that the term "commercial" is susceptible to varying interpretations in different jurisdictions. If each Contracting State making this reservation defines "commercial" differently, then the scope of the Convention will vary from state to state. By removing certain subjects from the area of "commercial disputes," a country may obstruct the enforcement of awards made by foreign arbitral tribunals. Although certain types of disputes emerge to be unquestionably commercial in nature, domestic public policy might nevertheless mandate that they be resolved exclusively within a nation's courts. Fortunately, however, most national legal systems give broad meaning to the term.⁷⁴⁰

As for the documents required for enforcement, there is no doubt that the attractiveness of the New York Convention enforcement procedure lies in its simplicity. The role of national courts is reduced to an almost administrative function of ordering the award to be enforced. According to Article IV (1), only two items must be provided by the party seeking enforcement:

- "(a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof."⁷⁴¹

⁷³⁸ The New York Convention, article 1(3).

⁷³⁹ Sornarajah, M., (2000), The Settlement of Foreign Investment Disputes, Boston, Kluwer Law International, p 309-311.

⁷⁴⁰ Ungar, Kenneth T., (1986-1987), "Enforcement of Arbitral Awards under UNCITRAL's Model Law on International Commercial Arbitration", Colum. J. Transnat'l L., pp 717-755.

⁷⁴¹ The New York Convention, article IV (1).

Moreover, if the documents required in Article IV (1) are not in an official language of the state in which the enforcement application is made it is necessary that "the party seeking for recognition and enforcement of the award provides a translation of these documents into such language."⁷⁴² The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.⁷⁴³

6.2.3 Recognition and Enforcement under UNCITRAL's Model Law

The Model Law aims to regulate only the conduct of an "international" commercial arbitration.⁷⁴⁴ The New York Convention, on the other hand, is only concerned with the place of arbitration, not with the nature of the arbitration. Also, the Model Law unlike the New York Convention has covered and addressed interim measures in the stage of recognition and enforcement. It emphasizes that interim measures shall be recognized as binding and enforced upon application to the competent court, irrespective of the country in which it was issued.⁷⁴⁵ In addition, it sets forth the grounds for refusing recognition or enforcement of an interim measure which, in fact, is the same as the grounds set out for refusing recognition or enforcement of the final award itself.⁷⁴⁶

As for reservations that are permitted and provided for in the Model Law, it can be said that the Model Law does not limit recognition and enforcement of foreign award by reciprocity as the New York Convention does or at least gives their members the choice to do. Nonetheless, article 1(1), which provides that "This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States", can be used by the country to apply its reciprocity reservation which has already been made by it

⁷⁴² Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press, p 443-444.

⁷⁴³ The New York Convention, article IV (2).

⁷⁴⁴ The Model Law, article 1(3).

⁷⁴⁵ The Model Law, article 17H.

⁷⁴⁶ The Model Law, article 17I.

within ratifying the New York Convention on a foreign award and therefore limit applying the terms of the Model Law on the basis of reciprocity.⁷⁴⁷

However, although the Model Law does not stipulate, as the New York Convention does, that the state can make reservation and limit the application of the Law to disputes with regard to commercial only, the same result can be reached from article 1 which states that it applies only to international commercial arbitration. The interpretation of the word "commercial" is well illustrated in the footnote to Article 1 of the Model Law. The footnote includes a non-exhaustive list of relationships which are considered "commercial" under the Model Law. They are: Any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.⁷⁴⁸

Actually, it appears that the UNCITRAL intended to broaden the scope of the term "commercial" in the Model Law in order to reduce varying interpretations of that term and to encourage the aim of treating all arbitral awards equally, regardless of the subject matter of the dispute. Although the Model Law broadens the interpretation of "commercial", it at the same time leaves it (interpretation) under control of the state and subjects to its other law by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration.⁷⁴⁹

As for the documents required for enforcement, the Model Law went in the same trend as the New York Convention did as regards Authentication and Certification that are required to be supplied by the interested party in order to obtain recognition and enforcement of the award from the competent court. It actually cites the provision of the Convention in verbatim which

⁷⁴⁷ Ungar, Kenneth T., (1986-1987), "Enforcement of Arbitral Awards under UNCITRAL's Model Law on International Commercial Arbitration", *Colum. J. Transnat'l L.*, pp 717-755.

⁷⁴⁸ The Model Law, article 1(5).

⁷⁴⁹ Ibid.

requests supplying the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement... or a duly certified copy thereof. Also, it requests, in the event of the award or agreement being not made in an official language of the state where recognition and enforcement are sought, the party to supply a duly certified translation thereof into such language.⁷⁵⁰

The footnote to article 35(2) adds an important declaration which provides that these requirements are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retains even less onerous conditions.⁷⁵¹

6.2.4 Recognition and Enforcement under English Law

In England, the arbitral award shall be enforced in the same manner as a judgment or order of the court to the same effect.⁷⁵² When the losing party proves that the tribunal lacked substantive jurisdiction to make the award then the court shall not give leave to the other party.⁷⁵³ Also, as regard evidences and authentications that are requested by the court to recognize and enforce a foreign award, the Arbitration Act 1996 requests the same authentications and certifications that are set out by the New York Convention.⁷⁵⁴ The UK has ratified NYC, but has limited its acceptance of it on the basis of reciprocity as many countries did.⁷⁵⁵

⁷⁵⁰ The Model Law, article 35(2).

⁷⁵¹ Ibid.

⁷⁵² Dundas, H., (2007), "The Finality of Arbitration Awards and the Jurisdiction of the Court of Appeal", Arbitration, 73(1), pp 127-137.

⁷⁵³ Arbitration Act 1996, s. 66.

⁷⁵⁴ Arbitration Act 1996, s. 102.

⁷⁵⁵ Tweeddale, K. and Tweeddale, A., (1999), A Practical Approach to Arbitration Law, Britain, Blackstone Press Limited, p 293.

6.3 Enforcement Refusal Grounds

Many studies and statistics show that most arbitral awards are in fact carried out voluntarily, and there was little need to recourse to national courts to push parties of dispute to enforce it. Nonetheless, there are some awards which their parties do not comply with which compel the winning party to apply to the court where the losing party owns possessions in order to enforce the award against them. International and national laws grant the winning party such right and at the same time grant the losing party the right to resist enforcement before the same court on several grounds.⁷⁵⁶

There are several grounds that have been set out by international law and national laws which can be relied on by the courts or losing party to refuse recognition and enforcement of arbitral award. We have discussed ways of challenging arbitral awards in Chapter 5, and the difference between grounds for challenge and grounds of refusal. Any challenge of arbitral award is before the court in the country where the award is made, while refusal is before the court where recognition and enforcement of the award is sought, which is the country where the losing party possesses assets. This country could be the one where the award is made or somewhere else.⁷⁵⁷

The NYC and the Model Law set forth seven grounds on which the recognition and enforcement of a foreign arbitral award can be resisted. Five of the grounds can be raised by the interested party only while the remaining two grounds can be raised by the parties of dispute and the competent court. Six of these grounds have been set forth also as grounds for challenging the award by the Model Law. The NYC does not set out rules for challenging the award before the court of the place of arbitration. This is because it is made to facilitate the recognition and enforcement of the foreign arbitral awards inside other countries. We have discussed this in detail in Chapter 5, and there is no need to belabour this point here and I will

⁷⁵⁶ Dundas, H., (2009), "The Pro-Enforcement Assumption of the New York Convention: But... Enforcement of a Foreign Award Refused by English Court of Appeal: *Dallah v Pakistan*", *Arbitration*, 75(4), pp 555-564. Also see: Redfern, A. and Hunter, M., (2009), *Law and Practice of International Commercial Arbitration*, London, Sweet & Maxwell, 5th edn.

⁷⁵⁷ Ustah, O., (2010), *The Judicial Supervision over awards of International Arbitration*; Supervision before the Enforcing State, Egypt, Sader, vol. 3, p 39-59.

just refer to them briefly along with the seventh ground. The **five** refusal grounds that can be raised only by one of the disputing parties are:⁷⁵⁸

- "(a) The parties to the agreement were under some incapacity according to the law applicable to them, or the said agreement is not valid under the applicable law that governs it.
- (b) The losing party was not given proper notice of any important and effective proceedings such as the appointment of the arbitrator or was not otherwise given an appropriate opportunity to present his case; or
- (c) The award deals with a dispute or disagreement not included in the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.
- (d) The composition of the arbitral authority or the arbitral procedure was not as it is agreed upon in the agreement of the parties, or was not in accordance with the law of the country where the arbitration took place if there is no such agreement.
- (e) The arbitral award has not yet become binding on the parties, or has been annulled or suspended by a competent authority of the country in which, or under the law of which that award was made."⁷⁵⁹

The two grounds refusal that can be raised by the parties to the dispute and **the enforcing court** are as follows:

- "(f) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (g) The recognition or enforcement of the award would be contrary to the public policy of that country."⁷⁶⁰

However, it is worth noticing that Article V of the New York Convention, which sets out the grounds above, provides in the introductory paragraph that:

⁷⁵⁸ Al-Geghbier, I., (2009), Nullity of Arbitrator's Award, Amman, Dar Al-Thqafah, p 127-162.

⁷⁵⁹ New York Convention, article v.

⁷⁶⁰ New York Convention, article v.

“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that...”⁷⁶¹

That means that the enforcing court is not permitted to hear the application to set aside the award and its mission and authority is confined to enforcing or refusing the enforcement of an award only. In addition, the phrase 'only if' in the introductory paragraph to Article V indicates that the seventh grounds are exhaustive.⁷⁶² Moreover, another vital phrase in the Article V (1) introductory paragraph is 'may be refused'. The ordinary meaning of the word 'may' demonstrates that refusal is discretionary. Thus, even if one of the five refusal grounds is established, the court can still order enforcement. This comports with the pro-enforcement object and purpose of the Convention.⁷⁶³ Article 36 of the Model Law which indicates grounds for refusing recognition or enforcement bears the same meaning.⁷⁶⁴ Therefore, it can be said that the party resisting enforcement must establish a real risk of injustice and that its rights have been violated in a material way.⁷⁶⁵

As for English law, it provides for recognition of the New York awards as binding and for the enforcement of them in the same manner as a judgment or order of the court to the same effect. It also cites exactly the refusal of recognition and enforcement grounds, which can be relied on by the dissatisfied party in resisting recognition and enforcement of the award, and are set out in the Convention. This reflects the English legislators' desire to comply with the Convention and also reflects the professional language that was used in writing provisions of the Convention.⁷⁶⁶

The new Arbitration System in KSA also lists several grounds to refuse enforcement of an arbitral award. These grounds are similar to those set out by NYC. The only difference

⁷⁶¹ NYC, article v.

⁷⁶² Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press, p 447-448.

⁷⁶³ Ibid, p 448-449.

⁷⁶⁴ NYC, article vi. Also see: The Model Law, article 36.

⁷⁶⁵ Payton, M., (2010), "Security for and Enforcement of Arbitration Awards", Arbitration, 76(3), pp 431-439.

⁷⁶⁶ Arbitration Act 1996, s. 101, 103.

between them is that the Saudi arbitration legislation refers to Shari'ah along with public policy and stipulates that the award shall not be in contrary to both of them. Anyway, this does not pose a large difference, because if the code did not refer to Shari'ah expressly, it would still be effective and could not be avoided due to the fact that Shari'ah occupies the highest position in the public policy of Saudi Arabia.⁷⁶⁷ On the other hand, the Saudi Code does not include a reference to ground (e) which allows refusing the award in the event that it has not yet become binding, or has been annulled or suspended by the court in arbitration place.⁷⁶⁸

The Model Law and the NYC permit the court, where the recognition and enforcement of a foreign arbitral awards were sought, if it considers it proper, to adjourn the decision on the recognition or enforcement of the award where an application for the setting aside or suspension of the award has been made to such a competent authority. It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.⁷⁶⁹ This article guarantees the losing party's right to challenge the award in the awarding country before the enforcing country recognizes the award. It reflects the desire of the Model Law's drafters to allow the awarding state to make a full determination of the matter arbitrated within its boundaries. As reflected in the language, "may, if it considers it proper," the decision of the enforcing state's court to adjourn its decision is discretionary. While ensuring that the losing party has exhausted the appeals process, the court may also discourage it from engaging in dilatory tactics by requiring it to supply appropriate security before the court adjourns the proceedings. English law does the same and grants the court, where the recognition and enforcement of a foreign arbitral awards was sought before, the same right.⁷⁷⁰

⁷⁶⁷ Al- Hoshan, M., (2012), "The New Saudi Arbitration System", Journal of Global Arbitration, vol. 16, pp 83-92.

⁷⁶⁸ Saudi Arbitration System 2012, article 50.

⁷⁶⁹ The Model Law, article 36(2).

⁷⁷⁰ Al-Geghbier, I., (2009), Nullity of Arbitrator's Award, Amman, Dar Al-Thqafah, p 177-229. Also see: Ungar, Kenneth T., (1986-1987), "Enforcement of Arbitral Awards under UNCITRAL's Model Law on International Commercial Arbitration", Colum. J. Transnat'l L., pp 717-755.

6.4 Major Obstacles to the Enforcement of Arbitral Awards

There are some obstacles that can face arbitral awards in the stage of recognition and enforcement. The primary obstacles that can hinder enforcement of arbitral awards are as listed below:

6.4.1 Act of State Doctrine

One of issues that may arise in the stage of recognition and enforcement of the foreign arbitral award is what is called the act of state doctrine and issue of estoppel. These two issues have been brought before the English court in *Yukos Capital Sarl v OJSC Rosneft Oil Co.*⁷⁷¹ The act of state doctrine means that a nation is sovereign within its own borders, and its domestic actions may not be questioned in the courts of another nation.⁷⁷² As regards estoppel, it is, in its broadest sense, a legal term referring to a series of legal and equitable doctrines that "preclude a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth, either by the acts of judicial or legislative officers, or by his own deed, acts, or representations, either express or implied."⁷⁷³

There was a dispute between Rosneft Oil Co. ("Rosneft") and Yukos Capital SARL ("Yukos") about loans that were paid by the latter to the group. Yukos was a member of a Russian group of companies that works in oil production. The group was broken up and Rosneft, owned by the Russian government, acquired the majority of its assets. Yukos had recourse to arbitration according to the agreement between the parties which obliged them to resolve any dispute that may arise in the future by arbitration in Russia. Yukos obtained four awards of \$425 millions, but Rosneft applied to the Russian court in order to set aside the award on the ground that the loan agreements were part of an illegal scheme of tax which had been held to

⁷⁷¹ *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2012] EWCA CIV 85.

⁷⁷² "The Act of State Doctrine", USLEGAL, available at: <http://actsofstatelaws.uslegal.com/the-act-of-state-doctrine-article/> accessed on 21/7/2012.

⁷⁷³ "Estoppel Memory Aid", Philippine Law Reviewers, available at: <http://lawphilreviewer.wordpress.com/tag/estoppel-memory-aid/>, acceded on 28/7/2012.

be illegal and fraudulent by the Russian courts. The Russian court set the award aside. Nevertheless, Yukos enforced the award successfully in the Netherlands. The Amsterdam court of appeal held that the awards should be recognised for enforcement, while the Russian courts' decisions setting aside the awards should not be recognised because they resulted from partial and dependent judicial process.⁷⁷⁴

Thereafter, Yukos brought further enforcement proceedings in England demanding post-award interest of \$160 million. In contrast, Rosneft resisted enforcement, arguing that the awards had been set aside and that Y's allegations of a campaign of unlawful interference by the Russian state were not justiciable by virtue of the act of state doctrine. At first instance, Hamblen J held that the act of state doctrine applies only where a plaintiff was challenging the effectiveness or validity of a foreign act of state, but not where the act of state was alleged to be unlawful, wrongful or improper. The judge held, as preliminary issues, that R was estopped by the decision of the Amsterdam court of appeal from denying that the Russian decisions setting aside the awards were partial and dependent, and that the doctrines of act of state or non-justiciability did not apply. Yukos argued that the act of state doctrine was only engaged where the English court was requested to adjudicate upon the actions of the foreign state by deciding that they were invalid or by granting a remedy in respect of those actions.⁷⁷⁵

However, Rosneft appealed against this decision before the appeal court which reconsider the matter and reach a different decision. Rosneft submitted that it is unfair to be prevented from denying that the Russian court's decisions were resulted from a partial and dependent judicial process, because the consequence would be that the English court would, in effect, be bound not to recognize six decisions of a friendly sovereign country on the basis not of the English court's own analysis or consideration of the events that took place before that foreign court, but merely because the courts of a different foreign state had decided that it should not recognize those decisions. In addition, this is a case in which the most serious allegations are made against the government and judiciary of a friendly foreign sovereign state. No fewer than six decisions of the Russian courts, which decisions would at first sight themselves give

⁷⁷⁴ Lee, S., (2012), "Acts of State and Immunities", Singapore International Arbitration Blog, available at: <http://singaporeinternationalarbitration.com/2012/07/16/acts-of-state-and-immunities/>, acceded on 30/7/2012.

⁷⁷⁵ "Yukos Capital Sarl v OJSC Rosneft Oil Company", One Essex Court, available at: <http://www.oeclaw.co.uk/news/item/?n=15527>, accessed on 20/7/2012.

rise to issue estoppels against Yukos Capital, were sought to be impugned as tainted by bias and corruption.⁷⁷⁶

The Court of Appeal considered the defence of Rosneft and upheld the judgment on the question of act of state, but upheld Rosneft's appeal on the question of issue estoppel. It stated that the act of state doctrine did not prevent an examination of or adjudication upon the conduct of the judiciary of a foreign state. Whereas in a proper case comity required that the lawfulness of the legislative or executive acts of a foreign friendly state acting within its territory should not be the subject of adjudication in the English courts, comity only cautioned that the judicial acts of a foreign state acting within its territory should not be challenged without cogent evidence. Judicial acts were not acts of state for the purposes of the act of state doctrine. The act of state doctrine did not apply to allegations of impropriety against foreign court decisions, therefore, the act of state doctrine did not bar any part of Yukos's case. The Court of Appeal also emphasised that Rosneft was not estopped by the decision of the Dutch court from resisting the enforcement of the awards in England. The Amsterdam court of appeal determined that the annulment decisions were not to be recognised since that would be contrary to Dutch public policy. The issue in England was not the same: it was whether the decisions were not to be recognised as contrary to English public policy, which was or might be different from Dutch public policy.⁷⁷⁷

In conclusion, this case illustrates obviously that there is no rule, at least in England, against hearing allegations that decision by foreign courts to set aside award caused by lack of judicial independence. In addition, it indicates that the decision of a foreign court refusing to recognise another foreign court decisions annulling arbitration awards did not create an issue estoppel shutting out the appellant from objecting enforcement of the awards in England. Moreover and generally, this case and the decisions made regard whether those decisions rendered by the court in Russia, the Netherlands and finally in England show some

⁷⁷⁶ Velden, J., (2012), " The "cautious lex fori" Approach to Foreign Judgments and Preclusion: Yukos Capital Sarl v OJSC Rosneft Oil Co", *International & Comparative Law Quarterly*, vol. 61, issue 2, pp 519-530.

⁷⁷⁷ "Yukos v Rosneft: Russian Courts are not Independent", CIS Arbitration Forum, available at: <http://cisarbitration.com/2011/06/27/yukos-v-rosneft-russian-courts-are-not-independent/> accessed on 21/7/2012.

difficulties that sometimes face the operation of recognition and enforcement of the arbitral award especially the foreign one in the reality.⁷⁷⁸

6.4.2 The Doctrine of State Immunity

The doctrine of State Immunity means the protection which a state is given from being sued in the courts of other states. The rules relate to legal proceedings in the courts of another state, not in a state's own courts. The rules developed at a time when it was thought to be an infringement of a state's sovereignty to bring proceedings against it or its officials in a foreign country. It is also known as sovereign immunity. The principle may enable a state that is a party to an international arbitration to claim immunity from the enforcement powers of another state's courts.⁷⁷⁹

The NYC is silent about state immunity. The United Nations Convention on Jurisdictional Immunities of States and their Property, which is not yet in force, formulates the rules and the exceptions to them. It does not cover criminal proceedings, and it does not allow civil actions for human rights abuses against state agents where the abuse has occurred in another country. On the other hand, it does not allow invoking state immunity in proceedings related to commercial transactions and arbitration.⁷⁸⁰ It illustrates undoubtedly that if a state engages in a commercial transaction with a foreign natural or juridical person, the state cannot invoke immunity from the jurisdiction which is competent under the applicable law of the main agreement to hear issues arising out of that commercial transaction, unless the parties have already agreed otherwise. However, when a State enterprise or other entity established by a state which has an independent legal personality is involved in a proceeding which relates to a commercial transaction, the immunity from jurisdiction enjoyed by that State shall not be affected.⁷⁸¹ It also indicates that if a state enters into a written agreement with a foreign

⁷⁷⁸ Ibid.

⁷⁷⁹ Fox, H., (2006), " In Defence of State Immunity: Why the UN Convention on State Immunity is Important", International and comparative Law Quarterly, 55, pp 399-407.

⁷⁸⁰ Krishnan, A., (2011), "Obstacles to the Enforcement of Arbitral Awards against States- an International Perspective", available at: <http://www.criticaltwenties.in/lawthejudiciary/obstacles-to-the-enforcement-of-arbitral-awards-against-states-an-international-perspective>, accessed on 15/1/2013.

⁷⁸¹ United Nations Convention on Jurisdictional Immunities of States and Their Property, article 10.

natural or juridical person to submit to arbitration differences relating to a commercial transaction, that state will not enjoy immunity from jurisdiction before a competent foreign court as relate to arbitration unless the arbitration agreement otherwise provides.⁷⁸²

Nowadays, there is a trend in various countries towards considerable exceptions to the rule of immunity and allow a state to be sued when the dispute arises from a commercial transaction entered into by a state. A majority of countries have reduced the degree of sovereign immunity and moved from a system of absolute sovereign immunity to restrictive sovereign immunity particularly in commercial properties. However, there are differences between different regimes as the scope of sovereign immunity and definition of commercial property.⁷⁸³ Execution is possible against non-commercial property only if the State has waived its sovereign immunity. Such a waiver can be contained in the treaty itself. However, waivers of sovereign immunity at the dispute resolution stage or participation in an arbitration proceeding do not by themselves result in a waiver of sovereign immunity for the purpose of execution. Courts are known to adopt a very pro-sovereign immunity approach. This is perhaps because they expect similar reciprocation from other States.⁷⁸⁴

In a case that was brought before the English court known as *AIG Capital Partners Inc v Kazakhstan*,⁷⁸⁵ the judge decided that the property of a foreign state's Central Bank is immune from enforcement in English courts. He relied on section 14(4) of the United Kingdom State Immunity Act 1978 which in his view impinges on the rights of access of parties to the enforcement jurisdiction of the United Kingdom courts.⁷⁸⁶

This case concerns a claim for state immunity by the Republic of Kazakhstan and its Central Bank, the National Bank of Kazakhstan ("the NBK"). The Claimants had obtained an arbitration award from the International Centre for the Settlement of Investment Disputes ("ICSID") against the RoK. The Award required the RoK to pay to the Claimants a total of

⁷⁸² United Nations Convention on Jurisdictional Immunities of States and Their Property, article 17.

⁷⁸³ Seriki, H., (2006), "Amir Weissfisch v Anthony Julius, Rami Weissfisch, Philip Davis - the supervisory powers of English courts over foreign arbitrations", *Journal of Business Law*, Aug, pp 541-544.

⁷⁸⁴ Ibid.

⁷⁸⁵ *AIG Capital Partners Inc & Anor. v Kazakhstan* [2005] EWHC 2239 (Comm).

⁷⁸⁶ Ibid.

US\$ 9,951,709 plus continuing interest. The Claimants had already obtained Interim Orders and they say that the cash and the securities are assets of the RoK that can and should be the subject of Final Orders. The National Bank of Kazakhstan intervened in the proceedings and applied to discharge both orders on the ground that the cash and securities held by AAMGS constitute "*property*" of the NBK and are the subject of immunity from enforcement under sections 13(2)(b) and 14(4) of the State Immunity Act 1978. The Claimants say that those sections, properly construed and applied to the facts of this case, did not grant immunity, so that the Interim Orders should indeed be made Final.⁷⁸⁷

In addressing the dispute brought before him, the judge was shown some facts and regulations that were relevant to the case. It is true that United Kingdom is a party to the ICSID Convention which obliges Contracting State to recognise an arbitration award made pursuant to the ICSID Convention as if it were a final judgment of a court of that State. The same Convention also stipulates that "Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."⁷⁸⁸ However, Article 55 of the ICSID Convention states expressly that:

“Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution”.⁷⁸⁹

In addition, the European Convention on Human Rights and Fundamental Freedoms grants persons the right to enjoy his possessions peacefully and no one shall prevent his possessions except when they are contrary to the public interest and subject to the law and general principles of international law. It also demonstrates that its provisions shall not in any way limit power of states to enforce such laws when they consider it necessary to govern the benefit of property in accordance with the general interest.⁷⁹⁰

⁷⁸⁷ Ibid.

⁷⁸⁸ ICSID, article 54 (3).

⁷⁸⁹ ICSID, article 55.

⁷⁹⁰ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, article 1.

In his summary, the judge held that 'property' has a wide meaning including all real and personal property and can comprise any right or interest in possessions and assets that are held by or on behalf of a State or any "emanation of the State" or a central bank or other monetary authority that comes within sections 13 and 14 of the State Immunity Act. He agreed that the immunity established by section 14(4) does touch the rights of access to the court of a plaintiff who desires to execute an award legitimately registered as a judgment against the assets of a central bank ...as well as the right of a claimant to a civil right to have access to the courts, in accordance with Article 6(1) of the European Convention on Human Rights, yet at the same time, he adds, that right is not absolute. The immunity available to assets of central banks, as provided for in section 14(4), is both legal and consistent and is in accordance with the expectations of States. Therefore there was no infringement of the Claimants' rights under Article 6(1).⁷⁹¹

Finally, he emphasized that s 14 (4) does not divest the claimant of his possession, i.e. the ICSID award or the judgment that has been registered. The Award was always subject to the restrictions on enforcement that existed at the time it was made. Those restrictions are clear from Article 55 of the Washington Convention which set up the ICSID arbitration procedure. Therefore there was no infringement of Article 1 to the Protocol to the European Convention on Human Rights.⁷⁹²

However, in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafta*,⁷⁹³ the court in England rejected relying on state immunity to avoid enforcement of an arbitral award. The origin of this dispute was when the parties Svenska, Government of Lithuania (the State) and AB Geonafta entered into a joint venture agreement (JVA) in relation to the planned exploitation of various oil fields in Lithuania. The governing law of the contract was Danish. Svenska and Geonafta did not manage to agree terms for the development of the fields. Geonafta continued to develop the fields separately since it held the license to develop the field before the JVA. Svenska argued that it had the exclusive right to do so and later initiated arbitral proceedings in Copenhagen. The State challenged the

⁷⁹¹ *AIG Capital Partners Inc & Anor. v Kazakhstan* [2005] EWHC 2239 (Comm).

⁷⁹² *Ibid.*

⁷⁹³ [2006] EWCA Civ 1529.

jurisdiction of the tribunal on the basis that it (the state) was not a party to the JVA. The tribunal refused argument that and issued an interim award holding that the State was a party to the JVA. Thereafter, the state participated in the hearing procedures and did not challenge the interim award on jurisdiction. At the end of arbitration, the tribunal rendered the final award which obliges the State and Geonafta jointly to pay Svenska the sum of \$12,579,000. In April 2004, Svenska sought to enforce the final award in England, but the State defended this claiming that it was immune from the jurisdiction of the English court by virtue of s.1 of the State Immunity Act 1978. Svenska replied that sovereign immunity cannot be used in this dispute because of existence of three exceptions:

- (1) the State had expressly waived any entitlement to rely on sovereign immunity and had agreed to submit to the English court's jurisdiction, and this is a sufficient exception according to the s.2 of the State Immunity Act 1978;
- (2) the State was a party to a commercial transaction, thus it is not immune from proceedings that relate to such transaction, according to the s.3 of the 1978 Act; and
- (3) the State was a party to the arbitration agreement in the JVA, and this is a regarded exception according to the s.9 of the State Immunity Act.⁷⁹⁴

The court checked the three alleged exceptions respectively. It was not satisfied that the state had agreed to submit to the English court's jurisdiction and regarded art 35 of the JVA which states: "Government and EPG hereby irrevocably waives all rights to sovereign immunity" is general. It confirmed that s.2 of the State Immunity Act 1978 requires an express submission to the jurisdiction of the courts, and that a general waiver is not sufficient to allow the exception to be taken advantage of. As for s.3 exception, the State argued that its role was to regulate the licensing of the country's natural resources which is a purely governmental function and it was never a commercial party to the JVA. Gloster J. refused this argument on

⁷⁹⁴ Ibid

the ground that terms of the JVA clarify that the State did enter the JVA as a commercial party and therefore it had entered into a commercial transaction.⁷⁹⁵

As regard Section 9 which states that where the State has agreed in writing to arbitration, it may not claim immunity in respect to proceedings which relate to the arbitration.⁷⁹⁶ The State argued that these proceedings related to the enforcement of the arbitration award and not to the arbitration. The aim of this section, the state added, was to encourage the courts to support the arbitration process and not to allow the enforcement of awards that have no connection to England. The court dismissed this contention because it requires an unduly narrow construction of s.9. Rather, it held, relying on reviewing the Parliamentary proceedings which lead up to the enactment of the state Immunity Act 1978, that there is no requirement for any connection between the underlying arbitration and the English courts. Consequently, the court decided that the State could not raise a defence of sovereign immunity. The state applied to the Court of Appeal challenging the decision made by Gloster J. but the court dismissed it and affirmed the verdict taken by the High Court.⁷⁹⁷

The decision in *Svenska* has made it obvious that the English court can only assert jurisdiction over a state only where express jurisdiction is conferred upon it. So, it is advisable that the parties write the waiver of immunity in clear and express words and provide for an express submission to the jurisdiction of the courts. On the other hand, the decision has also established that where a state descends into the commercial arena it will not be able to avoid its contractual obligations by simply raising immunity. Overall, it has brought a comforting development for foreign investors and clarified some ambiguities in state immunity doctrine practice in Britain.⁷⁹⁸

⁷⁹⁵ Seriki, H. and Beeley, M., (2006), "State Immunity and Arbitration: Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafra", International Arbitration Law Review, 9(2), pp 37-39.

⁷⁹⁶ State Immunity Act 1978, s. 9 (1).

⁷⁹⁷ [2006] EWCA Civ 1529. Also see: Seriki, *ibid*.

⁷⁹⁸ *Ibid*.

As for Islamic jurisprudence and the Saudi legal regime, there is no case or specific rule that refers to or regulates such matters. Generally, Islam supports diplomatic rights and respects multilaterals conventions. It recognizes the special nature of diplomacies from the start of its date. One of the case which approves that is the case of the two emissaries sent to Prophet Muhammad (peace be upon him) by Musaylimah.⁷⁹⁹ Musaylimah sent them with a letter claiming in it that he is a prophet as the same as Prophet Muhammad and asking him to divide the lands and authority between them. After reading the content of Musaylimah's letter, the emissaries were asked by the Prophet: 'Do you also say what he (Musaylimah) has said'? They replied: 'We say exactly what he said' and confirmed their believe in the acclaimed prophethood of Musaylimah, the Prophet then said : 'By God, if it were not the tradition that envoys could not be killed, I would have severed your heads.'. However, these words which could be taken as a direct contempt of Prophet Muhammad never bothered him as they (the two emissaries) were considered as ordinary means of diplomatic communication, and more so, they possessed diplomatic immunity.⁸⁰⁰

Saudi Arabia does not have a statute that regulates state immunity specifically as the UK does. It ratified the Vienna Convention on Diplomatic Relations 1961. The Convention stresses that the diplomatic agent shall enjoy immunity from the jurisdiction of the receiving country, except in some cases such as a real action relating to private immovable property, unless he holds it on behalf of the sending State for the purposes of the mission and an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions. It also permits the sending state to waive such immunity. The waiver must always be express. Waiver of immunity from jurisdiction shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.⁸⁰¹

⁷⁹⁹ Musaylimah AL-Kaththab was a man from Hanifa tribe which used to live in place called Yamama. It is a wide region in the heart of Arab Island. He claimed to be another prophet in the age of Prophet Muhammad peace be upon him. He asked Prophet Muhammad to share the authority and lands of the Arab Island. He was killed by Muslim army after death of Prophet Muhammad peace be upon him.

⁸⁰⁰ Hanbal, A., (1993), Musnad Ahmad, Dar Ehia' Al-Turath Al-Arabi, hadith no 3634.

⁸⁰¹ Vienna Convention 1961, articles 31 (1), 32.

As a result, it can be said that due to the Vienna Convention the situation in KSA is similar to that which prevails in the UK. The state enjoys immunity unless it waives it expressly. In Islamic jurisprudence, if there is an international custom or conventions provides for such immunity they should be fulfilled and respected. If there is no existence for such things, then there is no obligation to give such immunity and the judges would deal with state as they deal with privates. In other words, if a state engaged in a contract or arbitration agreement with an ordinary person it shall fulfilled its obligation completely, and Islamic courts will not exclude it from any duties based on immunity.⁸⁰²

In conclusion, to overcome this problem that threatens recognition and enforcement of the arbitral awards, it is necessary that the party, who signs an arbitration agreement with a state directly or a company owned and incorporated by a state, make sure that the state is not immune from the enforcement or execution of an arbitral award. This can be performed by including an express waiver of a state's immunity in the arbitration agreement itself and include a clause expressly waiving immunity from execution either in the relevant contract or treaty with the state. There are model clauses recommended by many arbitration institutions over the world such as ICSID to achieve this goal. Moreover, even such clauses sometimes will not prevent courts from taking unexpected stances and invalidate state immunity against enforcement of award against state's assets. Another method would be to agree with the state that it will earmark property that can be used to satisfy sums due under an award issued against a state.⁸⁰³

6.4.3 The Public Policy Issue

One of the major obstacles that face the operation of arbitration, especially in the stage of enforcing the award is the public policy of the country where enforcement is sought. Nearly all contemporary systems along with international conventions and treaties that regulate arbitration give the courts the right to reject execution of an arbitral award on the ground of violation of the public policy. For example, article V (2) (b) of the NYC provides that

⁸⁰² Ibid.

⁸⁰³ Greenberg, S., Kee, C. and Weeramantry, R., (2011), International Commercial Arbitration: An Asia- Pacific Perspective, New York, Cambridge University Press, p 476.

recognition and enforcement of an arbitral award may be refused if the competent court finds that recognition of enforcement would be “contrary to the public policy of that country”.⁸⁰⁴ Similarly, the Model Law, AA 1996 and Arbitration System 2012 in KSA provide for that.⁸⁰⁵

It is true that there are other grounds that can be relied upon to resist enforcement of the award and those grounds are given by the same systems, but the public policy is different. This is due to the elastic nature of the expression 'public policy' as it has already been discussed in Chapter 5. In a nutshell, it can be said that public policy is an elastic word that can be abused by biased litigation to avoid recognizing and enforcing final and legal arbitral awards.⁸⁰⁶

The danger of the expression 'public policy' consists of the fact that it is not specific and may differ in interpretation from one judge to another. The Court of Appeal in the UK has held that considerations of public policy could not be exhaustively defined and should be approached with extreme caution.⁸⁰⁷ Also, this obstacle can be raised by the enforcing court by itself and does not need to one of the disputing parties to raise it as other enforcement refusal grounds that set out by laws. Many of scholars have criticized the elastic expression of 'public policy' and described it as an unruly horse. However, Islamic law is the only one which does not know this expression and does not regard it as an acceptable refusal ground of enforcement of the award.⁸⁰⁸

⁸⁰⁴ Megens, P. and Finch, D., (2011), "Setting Aside an Award on Public Policy Grounds: AJT v AJU", Arbitration, 77(1), 155-157.

⁸⁰⁵ The Model Law, article 36 (1) (ii). Also see: AA1996, s.103 (3). Also see: Saudi Arbitration System 2012, article 50 (2).

⁸⁰⁶ Ustah, O., (2010), The Judicial Supervision Over Awards of International Arbitration; Supervision before the Enforcing State, Egypt, Sader, vol. 3, p 92.

⁸⁰⁷ Mistelis, L., (ed), (2010), Concise International Arbitration, the Netherlands, Kluwer Law International, p 844.

⁸⁰⁸ Krishnan, A., (2011), "Obstacles to the Enforcement of Arbitral Awards against States- an International Perspective", available at: <http://www.criticaltwenties.in/lawthejudiciary/obstacles-to-the-enforcement-of-arbitral-awards-against-states-an-international-perspective>, accessed on 15/1/2013.

Fifi Junita⁸⁰⁹ has made a good recommendation to overcome this issue. She suggests that the international community ought to adopt uniform model norms of public policy by establishing transnational public policy which is different from national public policy. It should be a mix of values and principles that shared between countries of the world. In this context, the determination of the enforcement of arbitral awards on the basis of public policy would be based on efficiency instead of politics. This theory privileges the primacy of the individual (party autonomy principle) over state sovereignty. She argues that this would help to understand the level of permitted interference by the law and courts of the seat of arbitration as well as reduce the application of "irrelevant local mandatory laws and national parochialism". Moreover, it would mark a shift from the territoriality concept of public policy to a more universal concept based on neutrality and certainty. Without doing so, she adds, the finality of the awards cannot be achieved.⁸¹⁰

Anyway, this issue of enforcement is not specific to execution of an arbitral award against a State and may be applicable against individuals or corporations as well. The solution which is in our hands today to solve the "public policy" problem is to choose a jurisdiction for enforcement where "public policy" is interpreted narrowly. However, this again is not efficient at all times and relies on whether the defendant possesses assets in these jurisdictions.⁸¹¹

6.4.4 Islamic Shari'ah

It is very well known that nothing can be enforced in Islamic country if it is in conflict with Islamic Shari'ah. The Saudi Arbitration System 1983 stated expressly that the award shall be enforced when it becomes final by an order from the competent authority which is entitled principally to hear the dispute. This order shall be issued based on the request of an interested party after ensuring that there is nothing in the said award that negates the principles of

⁸⁰⁹ Lecturer of Business Law at the Faculty of Law, Airlangga University, Surabaya, Indonesia.

⁸¹⁰ Junita, F., (2012), "Public Policy Exception in International Commercial Arbitration-Promoting Uniform Model Norms", *Contemporary Asia Arbitration Journal*, vol. 5, 1, pp 45-82.

⁸¹¹ Rai, S., (2008-09), "How Do or Should Arbitrators Deal with Domestic Public Policy or Regulatory Issues. Does it Affect Arbitrability?", available at: <http://ssrn.com/abstract=1433799>.

Islamic law.⁸¹² This generally has caused no problems due to the fact that almost all countries and nations limit the enforcement of arbitral award on its territories to few conditions and set out few restrictions. However, some researchers still criticize the uncertain nature of Islamic jurisprudence particularly in some areas.⁸¹³

Some have argued that legislative authorities in Islamic countries including the Kingdom of Saudi Arabia should have the principles and terms of Islamic jurisprudence embodied in a codified form similar to modern laws rather than leaving the terms of Islamic jurisprudence scattered in old Islamic books. This will, in their opinion, narrow down the interpretation of Islamic Shari'ah and impose on judges the application of concepts and opinions emanating from more than one schools of Islamic jurisprudence. Thus, the vision will be obvious for individuals and companies that intend to enter into contractual relationships with these states or their citizens.⁸¹⁴

This is to some degree true. It is quite important to note that this idea (of having Islamic jurisprudence in a codified form) was practiced during the Ottoman empire under the name of 'Majlat Al Ahkam Al Adliyah' which received much acceptance amongst the Islamic scholars of that time and still commands much respect up till now. However, it should be known that Islamic Shari'ah is not a floating or an elastic code as some biased critics claim. Islamic law is so logical and practical and consists of pillars, rules, peremptory provisions and of course discretionary provisions. There are many terms and provisions inside Islamic jurisprudence that have consensus between all Muslim scholars and no one can break or touch these provisions such as the prohibition on charging interest. At the same time, there are other provisions and terms that do not enjoy such consensus and scholars have different opinions regarding them.⁸¹⁵

⁸¹² Saudi System 1983, article 20.

⁸¹³ Al- Hoshan, M., (2012), "The New Saudi Arbitration System", Journal of Global Arbitration, vol. 16, pp 83-92.

⁸¹⁴ Shawlak, A., (2007), A Critical Overview of the Problems In Commercial Arbitration and The Enforcement of Foreign Arbitral Awards in Saudi Arabia, Canterbury, University of Kent, Master's Theses.

⁸¹⁵ Al-Zuhayli, W., (1989), Al-Fiqh Al-Islami wa 'Adillatuhu, Damascus, Dar al-Fikr.

Perhaps, individual Muslim countries may have decided to adopt one preferred school out of the major schools of Islamic jurisprudence while attending to legal matters in their respective countries in order to avoid conflicting legal decisions which may take away the trust and confidence the people have in the litigation systems. For instance, the Kingdom of Saudi Arabia follows the Hanbali School of Law, while Egypt adopts the Hanafi School of Law. Moreover, there are some areas where Islamic Shari'ah is silent about and that means that the door is open for scholars to find out the term of Islamic jurisprudence on these areas by searching into general rules and principles of Islamic law. It is normal in this event that scholars may defer based on their individual understanding of the rules and texts which are relevant to the studied case. The fact that Islamic scholars expressed different views on legal matters is not unique to Islamic law, after all, there are divergent views also expressed by scholars in positive laws, although they are written in modern form. We have seen in this research several similar cases that were brought before English courts nevertheless they have been given different decisions.⁸¹⁶

The fact should be admitted that it is not that easy for any legal systems, whether Islamic or Western to address in detail all legal issues and disputes. It is almost certain that all the legal systems cannot encompass all issues, hence the areas that cannot be covered for judges to decide upon relying on their individual understanding and their consciences with provide them with general rules and criteria. The thing that proves this evidently in this context is the entering of the expression of 'public policy' in all international and national codes that are related to arbitration; including the NYC, the Model Law and Arbitration Act 1996. This matter is made beside to above in order to take precaution against any legal loophole in their systems may be exploited to enforce an award contains which affect the goals of the state and its basic principles.

For countries to be able to overcome these problems, it is my opinion that more attention should pay to the general understanding of the concept of fairness and justice while appointing judges in order to raise the level of justice in their respective jurisdictions. It should be paid more attention to instruments of choosing judges so and focus on those who

⁸¹⁶ Hampton, W., (2011), "Foreigners Beware?: Exploring the Tension Between Saudi Arabian and Western International Commercial Arbitration Practices", *J. Disp. Resol.*, pp 431-446.

have conscience and right understanding of the concept of justice in its broad form. In addition, the judges should be given constant and continuous training that is geared towards increasing their legal knowledge with the view to enhancing efficiency and sound judgements. Also, it should be noted that Islamic Shari'ah does not permit a judge to impose his view on another judge or an arbitrator and cannot revoke his decision or an award in the area of discretionary provisions.⁸¹⁷

Approving this, when the prophet, peace be upon him, said to a man who had asked him how to distinguish between right and wrong deeds: "Consult your heart. Righteousness is that about which the soul feels at ease and the heart feels tranquil. And wrongdoing is that which wavers in the soul and causes uneasiness in the breast, even though people have repeatedly given their legal opinion [in its favour]." This is, as I think, similar to the purpose of jury that participates in determining the case in western courts.⁸¹⁸

⁸¹⁷ Al-Bloui, N., (2012), The Arbitration in Islamic Sharia, Dar Al-Thaqafah, Amman, 1st edn.

⁸¹⁸ Al-Qarii, A., (1980), Majalat Al-Ahkam Al-Shar'eah, Tuhamah, KSA, 1st edn. Also see: Al-Sanhori, A., (1997), Msadir Al-Haaq in Islamic Jurispurdence, Dar Iheaa Al-Turath, Beirut.

Chapter seven

Conclusion

7.1 The Findings of this Study

This research was designed to explore the concept of arbitration in Islamic Shari'ah and compare it with both International law and English law. The study also focused on the Saudi system, since Saudi Arabia is the home country of the researcher and also it has such a special influence in the Islamic world. More so, its constitutional system relies on Islamic jurisprudence.⁸¹⁹ In this thesis there are some important findings that have been identified.

7.1.1 Research Question

First of all, and further to the research question, it can be seen that there is quite a great degree of harmony and similarity between the four legal systems that were put under analysis by this study in respect of arbitration. There are not many **fundamental** differences between them. But, there are several noteworthy differences between Western practices, Saudi Arabian Arbitration Laws, and Shari'a in general. These differences that appear most salient are with regard to interest 'riba', uncertainty 'gharar' and weight of female testimony. But we should take into account that these differences are not linked directly to arbitration, they govern commercial law and transactions generally. Arbitration therefore reflects the underlying law.

The question of separability of arbitration agreement and requiring the arbitrator to be Muslim are the obvious and principal disagreements, in my view between the various laws, which are linked to arbitration directly. However, it is noteworthy that there is a strong opinion amongst Islamic schools that allows non-Muslim parties to choose a non-Muslim arbitrator. Besides, the 2012 Arbitration System recognises the doctrine of separability and therefore now it agrees with international law and English system on this point, unlike Shari'ah which does not do so. All of systems agree on legitimacy of arbitration, arbitrability of commercial disputes, terms of arbitration agreement, right of the parties to appoint arbitrators, right of them to choose the applicable law of the dispute (subject to few restrictions such as being in not contrary to Islamic law or public policy as for English

⁸¹⁹ See: Basic System of Governance, article 7.

system), finality of the award, challenge and refusal grounds of the award...etc. Therefore the fundamentals of arbitration make it an ideal tool for dispute resolution in the modern world.

To my own view, the only provision of Arbitration Act 1996 which starkly contrasts with Islamic law is section 49 that legitimates rendering an interest award. However, this section is a non-mandatory provision, which means that the arbitrating parties can agree to ignore it.⁸²⁰ Moreover, there is no similar article either in NYC nor the Model Law that violates Shari'ah.

Secondly, going through the pages of history, we have come to the conclusion that arbitration was known in most of ancient civilizations and it is the oldest known means of resolving disputes throughout history, at least before the public courts. This fact reflects the importance of arbitration and the great role it has played in nations of the past and present.⁸²¹

7.1.2 Islamic Shari'ah

As for Islamic Shari'ah, another finding from this research is that arbitration in this contemporary age has two types or forms, and both of them, whether in the form of arbitration submission once the dispute has arisen or via an arbitral clause in the original contract, are legitimate in Islamic Shari'ah as well as the Saudi arbitration systems. There are many verses in Qur'an which confirm that, along with several cases that happened and resolved by arbitration in early period of Islam. In fact, Islamic Shari'ah has an open conception with regards to arbitration and it encourages this means of resolving disputes. Moreover, it has been shown that Islamic Shari'ah is more flexible than the Western laws in some areas that relate to arbitration, such as the scope of arbitration (arbitrability).⁸²² Islamic law, according to the Hanbali School of Law, allows the use of arbitration for the settlement of all kinds of disputes, be it criminal or family issue. Unlike international law and English legal system that limit the use of arbitration to those cases which are regarded commercial beside to some family issues in English law. Undoubtedly, this view reflects the

⁸²⁰ See Ch 5, para 5.1.1.2.

⁸²¹ See Ch 1, para 1.2.

⁸²² Arbitrability means a classification of a subject matter whether it can or cannot be referred for arbitration.

encouragement of Islam to the use of arbitration and gives Islamic law an advantage over other systems since the latter prohibit recourse to arbitration in those fields.⁸²³

On the negative side, there are some legal scholars and critics, whether within the Kingdom of Saudi Arabia or without, who maintain that the Saudi legislative authority should rewrite Islamic Shari'ah in the form of modern laws, which are well codified in the form of specific and clear provisions and articles, rather than leaving it scattered here and there in traditional Islamic books. They further maintained that unless Islamic law in relation to arbitration is quickly codified, it may be difficult for non-Muslims and even Muslims that are not knowledgeable in Islamic jurisprudence to understand Islamic Law and therefore, they will not be confident enough to have recourse to it. They also contend that this will increase fogginess and ambiguity in the jurisdiction and will facilitate corruption and eventually lead to judges issuing conflicting decisions. Some of these critics who make these demands have good and innocent intentions and some of them have not. The latter may intend and look forward to a split between Islam as religion and the system.

Anyway, regardless of their backgrounds, this is to some extent true. But it should be noted that Islamic jurisprudence, being in the old form is not as large a problem as they think. To provide evidence for that, we have seen through this research many conflicting decisions issued by foreign courts, such as the English courts in similar cases, although they have laws and acts formulated in modern style: see Ch 2.3. This proves that the problem –conflicting decisions- would continue to exist even after reformulating Islamic jurisprudence. In my opinion, there is no remedy to overcome such problem other than to pay more attention to the conscience and morals of those who are appointed as judges along with other classic skills.⁸²⁴

7.1.3 Saudi Legal System

⁸²³ See Ch 1, para 1.5.

⁸²⁴ See Ch 6, para 6.4.4.

When we analysed the Saudi Arbitration System 1983 we discovered that it was so basic and needed a lot of developments in regulating arbitration procedures in its various stages. For example, it required the parties of arbitration to register their arbitration agreement in the competent court before starting the arbitral procedures. Also, it did not set out specific and clear grounds of challenging the award. Anyway, this system has become part of the past by issuing of the Arbitration System 2012 as indicated in this study. The Saudi Arbitration System 2012 is more modern than the former one and has been influenced significantly by the Model Law. This appears clearly in several articles, such as article 50 which sets out enforcement refusal grounds. It has brought in more detailed rules and could now cover most of the important areas and questions that relate to arbitration. Moreover, it is more flexible and tolerant with conditions and standards of arbitration that are found in international arbitration. Furthermore, the Saudi Arbitration System 2012 shrank the scope of arbitration compared with Saudi Arbitration System 1983 and banned recourse to arbitration in personal status disputes. Although we note that there are texts in the Holy Qura'an encouraging disputing parties in family issues to appoint arbitrators to settle their disputes (see Ch 1.5).

7.1.4 Arbitration Act 1996

As for English law, particularly the Arbitration Act 1996, it is clear that it has many advantages and covers most sides of arbitration. It recognises the right of disputing parties to choose religious bodies to arbitrate a dispute or requires an arbitrator to be member of a religious group. This is lawful in UK under Arbitration Act 1996, and does not pose discrimination or breach of any principle of equality. This result was confirmed recently by the Supreme Court in *Jivraj v Hashwani*.⁸²⁵ The court refused to categorize the arbitrator as an employee, hence he is not governed by employment equality regulations. It added and indicated that requesting an arbitrator to be from a religious group is to designate a sort of professional skill requirement. This decision definitely supports London as a centre of arbitration and harmonises in practice with the Islamic conception which also allows non-Muslim parties to nominate a non-Muslim arbitrator and also allows them to recourse to their religious laws particularly those of personal status. In addition, it grants the minorities inside UK the opportunity to submit their controversies to their religious rules and thoughts.

⁸²⁵ *Jivraj v Hashwani* [2011] UKSC 40.

Also, the English court, unlike other national courts, enjoys a power of granting an anti suit injunction in favour of protecting the arbitration process, and this has undoubtedly supplied London as a centre for arbitration with an advantage. This type of injunction is granted to a party of an arbitration agreement in the event of other party breaching the agreement to arbitrate a dispute and brought or commenced court's proceedings in a foreign state. This power strengthens the position of London as a favourable centre of arbitration and gives it an advantage over other arbitration centres.

But this favourable situation no longer exists at least against a European country due to the decision made by the House of Lords in the case *West Tankers*,⁸²⁶ which confirmed that such power is in conflict with European Union rules. The court referred a question to the European Union (EU) Court of Justice whether such action is violating EU rules and the answer was surprisingly yes. Hence, such power cannot be exercised against a member state of EU because of the Brussels Regulation (EC) No 44/2001 and the Lugano Convention. However, in *Ust -Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* case,⁸²⁷ the Supreme Court confirmed that anti-suit injunction is still available to be granted against states that are located outside of the European Union regime.

Such power to grant anti suit injunctions is not found in Islamic jurisprudence, or the Saudi System or International Arbitration Conventions. It is thought widely that it violates international comity and independence of other jurisdictions. Anyway, this injunction is primarily directed at the party of arbitration who commenced a court's proceedings rather than the foreign court itself and puts the party at risk of having a fine in the event of ignoring it or refusing to enforce the decision of the foreign court.⁸²⁸

Moreover, the English court is empowered to order an anti-arbitration injunction. This kind of order aims to halt an illegal arbitration procedure whether it takes place inside UK or

⁸²⁶ *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)* [2007] UKHL 4; [2007] 1 All E.R. (Comm) 794 (HL).

⁸²⁷ *Ust -Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35.

⁸²⁸ See Ch 4, para 4.4.8.

outside it. Again, the international arbitration law and the Saudi legal law are silent about such injunction.⁸²⁹

However, the Arbitration Act 1996 does not provide guidance as to the disputes which can be arbitrable under it and those cannot. This differs from the Saudi Arbitration System and also international law, which both illustrate clearly such a point. I think it would be better if such clarification were mentioned in the Act itself rather than leaving the interested parties to guess or make a research in other codes to find it. Because arbitrability is critical and effective in arbitration. Even outside the Arbitration Act 1996, the picture is not enough clear.

7.1.5 Joint Efforts in Support Arbitration

One of the significant findings of this study is also that there are great efforts to support recourse to arbitration and facilitate its process. This appears in recognising the separability of the arbitration agreement. The international conventions, the UNCITRAL Model Law and many states around the world including KSA and UK recognise the separability of an arbitration agreement from the underlying contract which it poses as part of. But there is a significant issue about what extent do they apply it. This is not clear enough in all these laws and conventions, as indicated in Chapter 3, which has led to conflicting conceptions and decisions regarding it. Some jurisdictions, such as France, go so far in recognising the doctrine of separability even when the existence of the main contract is in dispute, whilst others limit applying it to situations where the underlying contract be void only not non-exist such as in USA. However, there are indeed other states where the picture is grey and needs deduction, such as in UK and KSA. We have seen division between the English judges with regard the extension of separability, despite the fact that section 7 of Arbitration Act 1996 includes a reference which to some degree is obvious to expand the extension of separability to contracts that are regarded as invalid, or did not come into existence or have become ineffective.⁸³⁰

⁸²⁹ See Ch 4, para 4.4.7.

⁸³⁰ See Ch 2, para 2.3.6.

However, Islamic Shari'ah and the former Saudi Arbitration System 1983, unlike the new 2012 Arbitration System, do not recognise the doctrine of separability, and they regard the arbitration agreement part from the main contract like other its parts and thus goes around with it and take the same of its attitude as the same as other parts do. In other words, an arbitration clause shall be regarded void or non-existence when the underlying contract is regarded so.

In addition, these joint efforts in support arbitration appear in granting the parties of arbitration the right to select both the substantive and procedural law that they want to apply on their dispute (so-called 'party autonomy'). Both International law, the Arbitration Act 1996 and the new 2012 Arbitration System, all agree on granting the arbitrated parties such a right. This means that they could choose law of a foreign state or institution to be the applicable law of their arbitration agreement. The Saudi Code restricts this choice by virtue of its being in no conflict with Shari'ah or public policy. A similar restriction is also found in the English legal system. It recognises the selection so long as it is not contrary to public policy. In the absence of such choice or failure to agree on such matter by the parties, then the arbitral tribunal can play the role instead. Also, the doctrine of *Kompetenz-Kompetenz* which means that the arbitrator (s) can decide on their own jurisdiction is recognised by the three systems under review; international law, English law and Saudi legal system. (see Ch 4.2).

7.1.6 Number of Arbitrators and Their Qualifications

Shari'ah, the Model Law and the Arbitration Act 1996 agree on freedom of the arbitrating parties to decide the number of arbitrators that they want. As a result, they choose one, two or more arbitrators and whether in even or uneven number. The Saudi legal system differs with them and requires the number to be odd, otherwise arbitration would be regarded as null. Actually, the Saudi legislators might want to avoid the possibility of disagreement that may happen between the arbitrators in the case of their being appointed in an even number. Although this is a strong possibility, but I think this term is so extreme and unsuitable. They could use 'should' in this context instead of 'shall', and address the possibility of disagreement by stating the right of arbitrators, and the court later if they failed, to choose another

additional arbitrator to break the impasse. Or follow the remedy supplied by the AA 1996. It (AA 1996) understands appointing arbitrators in even number as it requires the appointment of an additional arbitrator to be the chairman of the tribunal. This understanding is applied only in the absence of any opposite decision made by the arbitrating parties expressly.⁸³¹

The Model Law and the Arbitration Act 1996 do not refer to the qualifications that shall be found in any arbitrator. So, it can be said that the only condition is that the arbitrator has to enjoy a legal capacity. Islamic Shari'ah and Saudi Arbitration System in contrast require several qualifications. Both of systems agree on requiring an Islamic background, legal capacity, rectitude ('adalah'), having knowledge of the law and having no interest in the dispute in the arbitrator. Islamic jurisprudence only, however, requires more qualifications; the arbitrator should be male, be free, be sighted and have hearing. As a noticeable point, the Saudi Arbitration Systems (both 1983 and 2012) have not required masculine gender as a qualification that shall be satisfied by arbitrator in order to be appointed validly. It may in so doing rely on an opinion amongst Islamic schools (specifically Hanafi and Maliki) which permits woman to act as arbitrator. Both of schools allow woman to arbitrate disputes that are commercial.⁸³² More importantly, the new 2012 System also does not refer to Islam in its provisions. This is a noticeable difference, but it should be known that this condition was not mentioned in Arbitration System 1983 itself, rather it was put in the Executive Regulations which were later made for that system. This means that there is still a chance to require this condition in the Executive Regulations which has not been issued yet on the new system and should be issued according to the article 56 of Arbitration System 2012.⁸³³

7.1.7 Arbitration Agreement has to be Written

Moreover, one of the more significant findings to emerge from this study is that most of national laws and international treaties as well as the Model Law require the arbitration agreement to be in writing otherwise it would be regarded void and non-effective. These national laws include the Arbitration Act 1996 in England and the new arbitration legislation

⁸³¹ See Ch 3, para 3.1.

⁸³² See Ch 3, para 3.2.1.

⁸³³ Saudi Arbitration System 2012, article 56.

in Saudi Arabia. Islamic jurisprudence and the old arbitration system in Saudi Arabia do not require such thing. This means, it is acceptable under both codes to prove the arbitration agreement by other oral proofs instruments as such as other contracts.

However, an arbitration agreement which is not written may still be valid and enforceable in UK under the common law, if there are other satisfactory evidences to hand.⁸³⁴ This possibility is not found or at least clear in KSA particularly after issuing the new arbitration system, since there is no contract law or evidence act in it to cover the empty areas that are found in other legislations of the country and address them. consequently, the question which arises here is whether there is an exception to the article 9(2) of the Arbitration System 2012, which states on requesting an arbitration agreement to be in writing otherwise it would be void, as it is applied in other countries such as UK or not.⁸³⁵

In my opinion, I think this point is very important and it needs to be solved decisively and conclusively by the Saudi legislator way or the other, since I assume that it falls in the discretion region and there is no restriction in Islamic law preventing decisiveness in any direction. There is a good chance to do that in the coming executing rules which shall be issued on Arbitration System 2012 according to the System itself. There was no date given to the issuing of it. In addition, I think that Saudi legislators have copied this article as many of the articles of the new Arbitration System are taken from the Model Law, and they also may have look at some arbitration acts in some states which have long history and good reputation in their legislations and legal formulations such as UK and Egypt, but they did not recognise that these states have another acts that covered and applied arbitration in some areas. For example, Article 63 of the Evidence Act in Egypt provides for accepting witness in the matters that request written proof in two cases: when there is a physically or literary blocker that prevents access to written evidence e.g. marriage, relative relationship, service relations...; and the **second** is that if the creditor lost his written document for a reason out of his hand.⁸³⁶

⁸³⁴ Mistelis, L., (ed), (2010), Concise International Arbitration, the Netherland, Kluwer Law International.

⁸³⁵ See Ch 2, para 2.1.6.

⁸³⁶ Al-Sanhori, A., (2004), Al-Wasiit, Al-Maarif, Al-eskandriah, vol. 2, p 410-411.

7.1.8 Obstacles in the Way of Arbitration

On the other hand, arbitration is facing several obstacles which can decrease the effectiveness of it sharply. One of those largest obstacles is public policy. All national laws and international conventions allow national courts to refuse arbitral award on the ground of ventilating public policy. This opens the door widely to the governments and politicians to intervene in arbitration and abuse this right and this is an elastic expression. There is no specific definition for what is co-called 'public policy'. So, the question arises here how can the disputing parties or the arbitral tribunal know what it is? Hence, how can they avoid infringing it? Without resolving this issue, the whole arbitration operation and its parties would still be under the mercy of the court that looks into it and at a risk to be broken down due to some unexpected and unknown cause. It seems that governments intend to keep this elastic expression as a weapon in their hands and to keep the last word with their judicial system.

However, this particular obstacle does not existence in Islamic law since there is nothing called 'public policy' in it. As a result, parties to arbitration who would enforce their awards in a state applying Islamic law should feel reassurance on this issue. This surely gives arbitration another advantage in the Islamic legal system.⁸³⁷

Moreover, the doctrine of state immunity which renders states immune from submission to the jurisdiction of a foreign court may stay enforcement of the arbitral award in the event that it was rendered against a state. The English State Immunity Act 1978 as well as United Nations Convention on Jurisdictional Immunities of States and Their Property (not in force yet) do not permit the state to invoke such immunity in proceedings that is relate to commercial transaction or arbitration which the state has already engaged in. However, the party who intend to enter in a commercial transaction with a state or a company owned by it should include in their agreement an express waiver of immunity regarding arbitration and submission to a foreign court generally and also specifically regard enforcement of the arbitral award. In contrast, In Islamic jurisprudence, immunity of envoys while they are

⁸³⁷ See Ch 6, para 6.4.3.

performing their specific function is recognised, but there is no reference to state immunity as regards its properties. Consequently, if there is no convention obliges Islamic country to grant such immunity, the court is likely to deal with the matter as it deals with individuals.⁸³⁸

7.1.9 Summary

In conclusion, it can be extracted from this study that there are areas of compatibility between Islamic law, International law and English law as regards arbitration. However, we must admit that there are appear to be a few areas of tension between them, but they are not huge and can be overcome by joint research. In addition, Islamic Shari'ah is such a flexible and dynamic system and this is what makes it capable of surviving up to now, although its roots go back to more than 1400 years and this specifically appears in the greater harmonisation which is found between it and modern laws. Shari'a law is nothing close to the harsh and unforgiving creature it is often portrayed as. Rather, it has historically been quite humane, affording equality and protection in some areas of life that Western law did not. Moreover, the New York Convention represents a cornerstone in recognition and enforcement of international arbitral award and has contributed enormously to spread recourse to arbitration in international disputes and facilitate its procedures. Similarly, the Model Law of Arbitration is a useful model law and many countries around the world have followed most of its provisions in formulating their local arbitration laws. Parts of those countries are the Kingdom of Saudi Arabia and the United Kingdom.

7.2 Recommendations

At the end of this thesis there are some recommendations and steps which I think should be taken by legislators in the studied countries and the international institutions that care about arbitration, in order to increase the effectiveness of arbitration and encourage the disputing parties to have more confidence and trust in it with the hope of lightening the pressure on litigation.

⁸³⁸ See Ch 6, para 6.4.2.

First of all, international society and states are encouraged to make more efforts to define and shrink their expression of 'public policy' in order to increase transparency in their jurisdictions and in particular regulations that govern arbitration. Some scholars have suggested that international community should adopt uniform model norms of public policy by establishing transnational public policy, which is extracted from joint fundamental values and principles between countries of the world, instead of leaving each state make a decision on enforcement an award based on its narrow local public policy. I think this suggestion is rational and worthy of further study. Personally, I think that it is possible to dispense with this restriction completely if there is a real joint willingness in the international community to raise level of fairness and clarity in their models: see Chapter 6.4.

In addition, the Saudi government should act fast in issuing the executive regulations of the new arbitration system, as Article 56 of the system provides for. The executive regulation should contain interpretations and give more details to many ambiguous areas such as arbitrator's conditions and whether is he requested to be a Muslim as the old system says or not? They have to provide for that arbitrator shall be Muslim at least when both of disputing parties or one of them being Muslim as Islamic Shari'ah sets out. The legislative authorities in KSA have to refer to such a condition and list it on the top of qualifications and conditions that are requested in an arbitrator, because this is a fundamental matter. Otherwise, it would be regarded as a large breach to Shari'ah and the Basic System of the country. It also should give an interpretation as to what are personal status disputes, which according to the system are not capable of settlement by arbitration, since there is no law in KSA that covers and defines it.

Moreover, international committees such as the UNCITRAL and also national legislators should pay attention to the issue of separability of the arbitration agreement and determine unequivocally the situation in case of the main contract, which the arbitration clause was included in, is alleged to be not validly existing. This can be performed by amending the Model Law and local arbitration regulations and adding a clear expression ends the argument that surrounds the case either by confirming the application of the doctrine in such case or denying it. This is more necessary and demanded in UK since division and foggy amongst its

judges is sharper and more appearance than others. The same also should be done by the legislative authority in KSA.

Furthermore, Muslim scholars, either individually or through Islamic studies councils such as The Islamic Fiqh Council, are encouraged to address arbitration in its modern and detailed form and try to find out the vision of Islamic Jurisprudence about each important issue in this field such as separability, requesting the arbitration agreement to be in writing and ignorance the rest ways of evidence and approving that are respected in Islam etc. Finally, judicial authority in Saudi Arabia should take serious and rapid steps toward publishing their courts' decisions on arbitration matters and other matters as well regularly for the public as many countries do on public websites. This step would help to improve transparency and confidence in their system and enable the public to share in the scrutiny of the decisions rendered by the courts and make sure whether these decisions are in line with Islamic Law and other local regulations as they are supposed to be or not. Furthermore, it would raise the legal culture among the people as well as provide researchers and legalists with information and interpretations which they need in their works.

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